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

By Steven Hayward[†]

HIGHLIGHTS:

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

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

Introduction

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

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

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

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

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

What Lawsuit Filings Data Tell Us

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

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

The highlights of the analysis of these cases include:

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

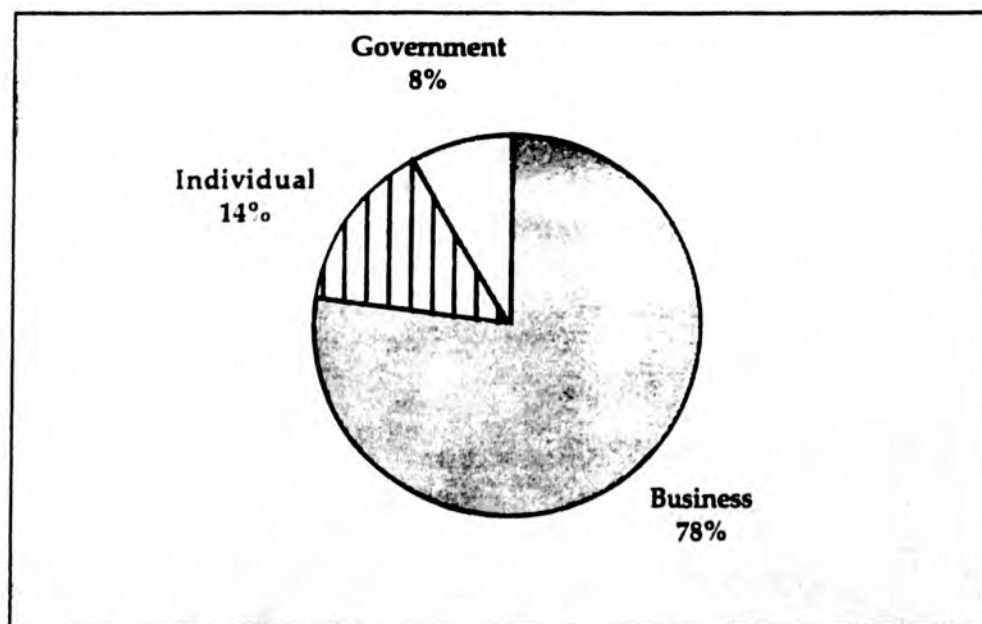
Of the 1,024 cases we examined, nine (9) cases were designated by the court as "sealed" and were unavailable for study. This left a pool of 1,015 lawsuits for study. 537 of these 1,015 cases, or 52.9 percent, were based on one of three principal causes of action where punitive damages are recoverable:

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

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

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

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



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

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

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

Government Agencies Frequently Targeted

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

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

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

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

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

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

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

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

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

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

Statutory Tort Cases				
	Primary Designated Defendant (Punitive Damage Claims in Parenthesis)			
	Individual	Business	Gov't Entity	Non-Profit
Totals	1 (0)	26 (19)	6 (4)	0 (0)
P.D.s as %	0%	73%	66%	0%
PDs for all statutory tort cases: 66% (23/33)				

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

Duration: Punitive Cases Take Longer to Resolve

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

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

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

Asking the Right Questions: The Dynamics of Lawsuit Settlement

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

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

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

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

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

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

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

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

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

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

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

⁷ D. Rosenberg & S. Shavell, "A Model in Which Suits Are Brought for Their Nuisance Value,"

5 *International Review of Law and Economics* (1983), p. 3.

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

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

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

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

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

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

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

¹¹ Katz, *op cit.*, p. 4, 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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



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To: Representative Joe Green and Lisa Kirsch
From: Jim Sourant 

February 20, 1997

Re: HB 58

Lisa:

Please note the following witnesses will appear on the following days in support of HB 58:

A. Friday, February 21:

*1. David McGuire, MD.

B. Monday, February 24

1. David Johnson, MD.

*2. Dick Cattanach

*3. Ardie Gray

4. Mike Lessmeier

5. Mike Barcott

*6. A.L. Tamagni Sr.

*7. Marianne K. Burke

8. Robert Valliant

*9. John Wheatley

*10. Colin Maynard

*11. Orin Seibert

*12. Glen Smith

13. Kevin Richie

*14. Steffani Galbraith-Moore

*15. Frank Dillon

16. Pam La Bolle

17. Neal McKinnon

~~*18. Steve Burrell~~ ~~Linda~~ ~~Hole?~~
cc: Brian Porter

* Arch. LTO

58 LIO
8/11

Fri

Save
a witness
list

RM18

2.20.97

Signed
up
Dick

- ① Dave McGuire - LIO Arch
- Medical issues in HBSF,
but not hospital ER.
- Collect benefit.

②

Mon

- ① Dr. Dave Johnson 225-144
- Stat. of Repose - Birth Trauma
- SL re Healthcare providers.

- ② Dick Cathanach 349-6666
- Genl? - Repose
- 5/phantom

- ③ Andie Gray (AOGA) 272-1481
- Judy's Shurt:
- Punitive cap
- Apportionment of fault.

Dick

- ④ Mike Lessmier ~~414~~ 586-5912
- Punitive
- Apportionment
- ~~Maybe loss of income from injury case~~
- Offer of Judgment

- ⑤ Mike Barcott 206-292-8008 ✓
- Under contract
- Maybe lose future full body
case issues

⑥ Al Tansri
- periodic pmt ✓
- why not white of some G.

Dick

⑦ Marlene Burk 2513
- No domestic writers ✓
- inter re marine Hays &
small acct
- indep. counsel of bus.?

✓

⑧ Bob Valliant 586-8438
- # hospital, offered.
- ~~Acct. of 2nd tier~~
- ER AM S
- prob of 2nd tier does.

Back to me

✓

⑨ John Whearty: The Alliance 563-6483
- 300+ members,
- Suppt KBTB

Dick

✓

⑩ Colin Maynard: AK Profile Design 274-2236
- STAT. of Repose.

Dick

✓

⑪ ORIN SEIBERT: Pen Air / AIR Cakes
- Probability to get insured
- Punishes
- Pen Air letter

Dick

✓

Call.
tell him
intent is
to do it
in family doc

Call

Call

- (12) ^{561-1725 Reg - FAX: 562-6595}
Glen Smith - Indy Broker / Aquosra
- Cap on punitive = #1
- Muni of Arch, Tesoro, Case 60th -
- Held hostage in small
cases by high defense costs
- No RSC fees when
they prevail? RSC

- (13) ^{Kevin Richie}
AK Muni League 586-1325 ✓
- They will move to Harris.
- 135 ~~are~~ Communities.
- all for HST

~~(14) Muni of Arch - Harry Sajberg~~
~~= Has to check at legal dept~~

- (14) ^{343 - 6333 Reg. FAX 343-4250}
Muni Atty: Steffan Gahrath - Moore ✓
- Shows reading materials.
- Frivolous suits
- Bar to recovery of community a felony.

- (15) Frank Dillon - AK Truckers
- 300 Cor at 20,000 each.
- Cap on punitive = Ryder Trucking.
907-276-1149

- ⑬. Am In Bush
 - 35 Chowder
 - 700 Bunsen (80% small)
 - 70,000 Alaskan

⑭ Neil MacKinnon

~~ATRT~~
 1-800-2872
 306
 12/29
 1x C/1x re

① St. of Repose
 ②

JUD HRA 2.24.97 HBS8

12pm
~~Week~~ Deadline this evening

① John Wheatley

- Deep: Alliance: 300 Business.
- Rec Devmt.
- Nonecon.
- Punitive: 3X future. Part to state.
- Collateral
- Apportionment -
- R95
- Felony
- Expert witnesses

② Judy Brady - AOGA: 19 Cor.
- Punitive: Clear/Convict. Capped

③ Stephen Galbreath - Arch. Muni.
- 30 in proply closes 2 yrs v. 6.
- Nonecon & punitive.
- Apportionment of fault.
- budget int.

④ Berk: #/times Arch Muni a pl?
A: unk

Berk: 2 govt.
A: larger \$ amt

Ken/Hi & W.

- Try to decide.
- FEN. Y10 / 120?
- ~~lawyers~~ still have 50%?
- Opposed. Will help us in -

Sue/Ross

- Read H358 legil. intent.
- v. TF pg 711 ...
- W2: Kessle insure -
- TF.

TF = excessively high Atty fees &
insur premiums

Corbin

Ross Mullins:

- P.W. Sound Canal Festival.
- 5% correct trial.
- CTD will show recovery over time due to inflation.

 FIXING chart of salmon survival.

Cardport
Wren Hopkins.

Arch
Dick CATTANACH.

- 600 civilian members
- 2 pts.

- 38: STAT. of Agoser

: not up to 6 yrs of subtl Cynical.

'Wren Talem': 5 yr s/c on atty
guarantees - fairly defend themselves.
: 8 yrs more than only.

- 3 punitives. not movable.

Chart: Asked about 5 yr s/c on atty.
A: Not a bar of intent,
fraudulent. Defense.

Q: Want some defense on atty?

Norm: Q: Designer of S/Ls.

: Mural of of plane + red color.

Bark: punitives ... \$220,000 claim.

Pl. chose \$200K + punitives.

Cost to defend 100K. Have to tell
insur co to settle w/ policy
limits.

Dick
Killed?
Don't

*
Dick to get this to court

Keth

~~David N. Johnson~~ - 27 yrs.

- State Med. Assoc - KBTJ OK -

- 35:

§ 56: S/L on children under 6.
- Most birth trauma left
at birth. Safeguards are

§ 58: None on damages.
- Fault on parent: arbitrary.
- Opposed to before but

§ 29-30. Expert W's.
- Part panel

Berk: § 35: civil liability of
hospitals.

- shifts burden to med. staff.
- ~~§ 30~~ Trade off prot'n.
- before Jackson v. Jowers &
created agency.

~~§ 35~~: Discy of childhood injuries.
Any which are not discov'd.
Not many. Any? Probably.

Ground damage at child birth
of seizure during med. notal,

i. of seizure later, & not reversible.
~~Not~~ Not children post when child
starts school.

Q: ~~mental~~ mental slowness: Not causally
related to trauma.

Beck: 50 (c) pg 4: Talk start. &
Repose until decay of foreign body.
— usually appears trouble
appears all along. Not a true
bomb that works for 20 years.

— best times too narrow —
something more/else other than
foreign object: A: if bad, appear
bad soon.

He 99.9% not work & later
noise ugly head.

Norm: ~~27~~ 27 yr, even see. A: no.

" 280k ceiling on noneconomic
A: it's the # in micro legit.

Young MDP
Berk: Moonlighting prevented prof working
in ER's? A: No interest in it
is not an issue.

Glen Smith - Scott Wetzels:

① ~~1500~~ = 1700 claims / yr

② 45 mo claim life

③ 1.19 : 1 closing ratio.

④ \$5K - \$10K claims = majority.

~~Effect~~ Effect small insurer Co
passed on to consumer.

Berk: How much insurer rate? A: 0. Need Natl tort reform.
But if punishment should be able to get
rates down.

Fit & Answer Profit: ~~What 3/4 bill leaving~~
rest on the coes.

§21: Offer of judgment.

Brian Q: If more companies competing
lower rates? A: Yes.

80% less cost than in 70s -

Kona:
Greg Holler - gone

FAXING Cardona

Sherry Shaw: 4 Fisherm AK:
Oppose H258.

Still think this bill would reverse EXXON.

NORM: ~~knows~~ ~~the~~ ~~effect~~
As EXXON they will try to use it.

And

Coleman MAYNARD - APOC

= 400 members w/ 5000 profs.

= Most cases settle to avoid

discovery costs & threat of punishment -

- (1) Spurr. of Repose - 8 yrs SL OK.

(a) ~~the~~ Cause = own problem.

(b) Claims made before.

(c)

(2) Dispute Resolution: AD Resolution.

Berk: Meteorite Stat

CRAFT: "Capricious" Juries AK?

- \$5M $\rightarrow$ \$350K after appeal.

Steve Burrell - Syntact

1000 members - small owners & users.

① fair comp for repairs, but cap.

② appropriate

③ felony bar

④ distrust/contempt for civil justice.

Berk & Abuse Power?

As B-BK

Berk & 'heavily' tort reform?

A: Small business not be

exposed to quarters.

Berk & Mediation

expedited discovery & ADR.

⑤

Fixed
testy
Al Tawani
§12, 13 & 14.

Periodic mtg: tax free

§12. - 95% injured parties not advised.

§13:

§14: before change.

Good
festivity

Vin Jordan - State Medice Review
BEKKA AMCA & NORCAL

- Q: what happen to notes if HS goes?
AE Experience in Calif is notes &
rel. to USA - Calif. now Reg AKS.

Frank Dillon

- 300 con. 15,000 resed.

- Since 1958.

- atty far too intrusive in our
society.

- looking way to ~~know~~ get justice.

Ex: (a) FOLKS
(b) Ryder.

Mike Evans - Keybank Ark. Pres.

- ON Gov's T.F.

↑ perception of a broken system
forces 75% settlement in place of punishment.

Chas Walls - Pres of Ark Village Coop.

Good intro.

- Amendment re Elec street lighting.

Lessons

- State farm rates set by AK experience.
- ~~Cost~~ MCA experience.
(~~Cost~~ + 160% ✓)
(AK + 1600%)

① Positive

- Study: Don't look at Thy verdicts.
 - 1. Positive take 1/3 more time.
 - 2.
 - 3. " Take role in settling.

② General Liability - Initiative...

- If Vol approved.

③ Offers of Judgment

- Good idea, Urge to make most offers early on?

④ \$48 & R95. If come to trial, you lose.

⑤ Under cost: 2 experiences, CHI CNSL.

- ① Int def cost } \$39 per hour.
- ② 500K " " }

Does current system result in better rules,
why not & of course

A: 5 years of cases in pipeline.

B: We not know which provisions
will be challenged: Most likely WYS
in Calif. state far give back &
other experience not as better.....

DON'T! Berk: No answer to w/c factors.
Punitive & settlement. What evidence?
1996 study?

Berk: Calif experience ~~legis~~

Craft & Bernier v. Wichman:

Noen: ① 1996 study.....

② Collier & Bengt

A: ~~Subrogation~~?

Mike

MS
Appointments
to

Mike Schneider

"Invisible Public Policy"

Public Trust

— Key bank: Mike Byrne

— Ap in the face to those who elected you
~~you're a doctor~~

Joe: Confine words & not attack.

Croft: Appointment?

A: (Not good job) -

berk: Rule 11?

How many frivolous...

He want to settle every case?

Bob Vallant = Ac Hosp & Nurse Home Assoc

Recreation in Rates: 1997: 3X higher

cvg - Chow 8 yrs ago at 1/2 cost. If improve bus. environment & in rates. The hospital is the low cost provider. In CT, it'll be competition to bring down prices.

33 member hosp/NA.

① ER. Bt 5...

② AK Supreme Ct: Jackson v. Lowers,
got expanded part ~~that~~ ER to
all healthcare providers - ^{ie.} does
called in a consultant or family physician.

His
US of
legisl
intent.

Ag 17: Anyone in hosp'l who
responds to ER w/ 500k is
OK.

~~§33 Notice of stay.~~

BRUN: # hosp's w/ 500k/loc:
At Arch area ~~hosp~~ (prov) not
require loc to have insur.

Prov. Columbia requires ER
loc to have insur, but not otherwise.

Mike Barcott

§39 §340

Beck:

ORIN

DATAIR - AK AIR carriers

- 130 members: AK AIR → smallest
 - 200 communities
 - Serious problems - lack of U/V capacity
 - 1994: Commuter accidents
 - Now no competition
- 3yr/yr premium?

more ~~exp~~ at real rates
to allow for recovery

~~Beck~~
No plan to tie punitive to
a % of net earnings
~~as~~ as cap on 3X compensatory

Niel McKinnon

Am label

700 bus members
35 chapters
70,000 AKMS

Brian

leave in or take
out 2nd tier
punitive

810(c)

① Dick -
- what ~~the~~ to Committee?
- Stough?
-

study
shook under
claims of Refuse.
Stout of Refuse.
Dunelle

② Glen Smith
- what ~~fixing~~ in? re. 80% bill to
help resolved cases. (RGP)

[2.27.97] HB58 / JCS / Avenir

File #12 Bank: lower rates 10%?

Brian: Problem 12:

- Cases in pipeline for years.
 - What port reform poured in other
 - Ans: 10 yrs of it challenge (Sak).
 - Cos can't vote policy decisions till then.
 - ~~Cost~~ because of inflow.
 - Cases experience.
 - Cost. Took 15 yrs.
 - Div. of ~~house~~ offered this is not a ~~dispute~~ ^{is not a dispute} ^{just a train of} ^{thought} ^{which} ^{could} ^{write}
- Here settled for buyers (not their cos) would have to sacrifice -

Call Charlie Miller of the M&L

#13 Craft: Need this for Exxon's of the world -

Brian: - OUT case: still be reduced -

$MAX = 25\%$ of future earnings -

- Exxon case = 4 B under this -

- PT = This removes the cap

OUT points & used not on Ford/Exxon but non/for.

CONN: ~~Exxon~~ Port (Exxon) want \$.

Brian:

0
Bread paintings have big effect on
starting ~~and~~ resulting in higher than
wanted settlement.

(14) Brains - OK

(15) OK

(15) Brain - If 2 found at fault, who
pay? Brain back ft. several
contributions of 50 to 100 hours.

Croft:

Brain: - If can't find reason,
take out - Prob is that it can't
be used to get to a deep
pocket.

Brains ~~is~~ consistent w/ (14).

AMENDMENT

(K)

OFFERED IN THE HOUSE
TO: SSHB 58

BY REPRESENTATIVE PORTER

- 1 Page 20, line 2, following "allocating":
- 2 Insert "fees and"

OK

(15)

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PORTER

TO: SSHB 58

1 Page 10, lines 1 - 4:

2 Delete "The trier of fact may assign a percentage of fault to [DETERMINE THAT]
3 two or more persons [ARE TO BE TREATED AS A SINGLE PARTY] if their conduct was
4 a cause of the damages claimed and the separate act or omission of each person cannot be
5 distinguished."

6 Insert "[THE TRIER OF FACT MAY DETERMINE THAT TWO OR MORE
7 PERSONS ARE TO BE TREATED AS A SINGLE PARTY IF THEIR CONDUCT WAS
8 A CAUSE OF THE DAMAGES CLAIMED AND THE SEPARATE ACT OR OMISSION
9 OF EACH PERSON CANNOT BE DISTINGUISHED.]"

(16)

AMENDMENT

OFFERED IN THE HOUSE
TO: SSHB 58

BY REPRESENTATIVE PORTER

- 1 Page 7, line 8:
- 2 Delete "[FUTURE]"
- 3 Insert "future"

- 4 Page 8, line 1:
- 5 Delete "[FUTURE]"
- 6 Insert "future"

OK

AMENDMENT

①

OFFERED IN THE HOUSE
TO: HB 58

BY REPRESENTATIVE GREEN

- 1 Page 16, following line 5:
2 Insert a new bill section to read:
3 **"* Sec. 35. AS 09.65 is amended by adding a new section to read:**
4 **Sec. 09.65.085. Civil liability of electric utility. (a) A utility offering**
5 **electrical service to the public for compensation under a certificate of public**
6 **convenience and necessity issued by the Alaska Public Utilities Commission under**
7 **AS 42.05.221 may not be held strictly liable for property damage, death, or personal**
8 **injury resulting from an act or omission of the utility, *relating to the production***
9 **(b) This section does not preclude liability for civil damages that are the result**
10 **of an intentional, reckless, or negligent act or omission."**
11 **Renumber the following bill sections accordingly.**

*OR
delivered of
electrical service.*

*for
K. Green*

AMENDMENT

To: SSHB 58

BY: Rep. Rokeberg

#2

Page 8, line 13

Delete: "Anchorage, all items index"

index

Insert: "U. S. City Average, all urban consumers, all items ~~indexes~~"

NO

AMENDMENT

BY REPRESENTATIVE CROFT/ #1

TO: ~~SSHB 58~~

complete or

Delete "is a hemiplegic, paraplegic, or quadriplegic and has permanent functional loss of one or more limbs resulting from injury to the spine or spinal cord"

Insert "suffers severe disfigurement or severe physical impairment"

PT = Give pls write room to
Ask for 500K cap v. 300K cap.

210

AMENDMENT

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 58

Page 5, line 17:

following "exceed",

delete "\$300,000", insert "\$500,000"

Page 5, line 19:

following "section",

delete "may not exceed \$500,000", insert "are not limited"

NO

AMENDMENT

BY REPRESENTATIVE CROFT / #2

OFFERED IN HOUSE JUDICIARY

TO: SSHB 58

Page 9, line 15 through page 10, line 16:

Delete all material

Renumber the following sections accordingly.

Page 20, line 11 through line 20:

Delete all material

Renumber the following sections accordingly.

Page 24, lines 13-17:

Delete all material

Renumber the following sections accordingly.

⑤
— completely guts
reportment of damages

— take out reduction in
warrior's comp. head for
else full.

— consistency change for ↑

NO

✓

AMENDMENT

6

BY REPRESENTATIVE CROFT/ #3

OFFERED IN HOUSE JUDICIARY

TO: SSHB 58

Page 3, line 11 through page 4, line 10:

Delete all material

*Delete of
State
Repose*

Renumber the following sections accordingly.

NO

AMENDMENT

⑦

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 58

Page 4, line 14:

following "provider",

delete "if the injured person is, on the date of the alleged negligent act
or omission, less than six years of age unless the action is
commenced before the person's eighth birthday",

insert "unless commenced within eight years of the date of the alleged
negligent act"

extends 5/1 but 2 yrs to 8?



AMENDMENT

EB-3

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 58

Page 6, line 11:

following "gain;"

delete "and", insert "or"

⑧
Kicks in 4X/600K
punitive anytime a
is motivated by a
full gain in
commercial
activity

NO

AMENDMENT

EB-4

⑨

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 58

Page 10, lines 30-31:

delete lines 30-31,

Page 11, line 1:

preceeding "trained", delete "(2)",

Page 11, line 2:

following "issue", delete "; and", insert "."

Page 11, lines 3-6:

delete lines 3-6

*expert witness
delete recent
profile be reviewed*

*make training and
experienced in
the same school
or discipline the
only recent*

delete cont'd by a Bd.

NO

AMENDMENT

EB-5

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 58

Page 7, lines 6-7:

following "of", delete "a party", insert "both parties"

Page 24, line 6:

following "by", delete "a party", insert "both parties"

(10)
Reverts pl to
agree to personal
sub.

NO

AMENDMENT

(u)

BY REPRESENTATIVE CROFT/ #5

OFFERED IN HOUSE JUDICIARY

TO: SSHB 58

puts community hospitals

Page 16, line 8 following "hospital" through page 16, line 31:

Delete all material

Insert "may not escape liability for the actions or inactions of emergency room physicians by contractual device, change in employment status, or purported notice to or waiver by emergency room patients. Nothing in this section is intended to modify the standard of care for emergency room physicians or apply to a physician that is independently hired and not associated with the hospital's provision of emergency services."

Renumber following sections accordingly.

*Croft
say this
enshrines
Jackson
case*

(u)

AMENDMENT

BY REPRESENTATIVE CROFT/ #6

OFFERED IN HOUSE JUDICIARY

TO: SSHB 58

Page 25, line 18 following "be affected":

Insert "*Sec. 64. This Act sunsets if, on July 1, 2000, the director of the Division of Insurance certifies to the lieutenant governor and the revisor of statutes that the liability insurance rates filed with the Division of Insurance have not been reduced by at least 10 percent from those filed on January 1, 1997. In this section, "liability insurance" means insurance described under AS 21.12.070(a)(2).

Renumber the following section accordingly.

Charlie
Nutter
AK Note

AMENDMENT

13

OFFERED IN THE HOUSE

BY REPRESENTATIVE CROFT / # 4

TO: SSHB 58

Page 6, lines 3 - 20:

Delete all material.

Insert new subsections to read:

"(b) Except as provided in (c) of this section, the court shall require deposit into the general fund of 50 percent of that portion of the punitive damages award that is equal to or less than the greater of three times the amount of compensatory damages or \$300,000.

(c) The court shall require deposit into the general fund of 50 percent of that portion of the punitive damages award that is equal to or less than the greater of four times the amount of compensatory damages awarded or \$600,000, if

(1) the wrongful conduct or omission arose in connection with a commercial activity motivated by financial gain; and

(2) the likelihood of death or serious bodily injury from the commercial activity was previously known by the person responsible for making policy decisions relating to the commercial activity and the knowledge was gained from previous instances of death or serious bodily injury arising from the same wrongful conduct or omission, regardless of where the previous wrongful conduct or omission occurred.

(d) If a court or jury awards punitive damages under (a) of this section, the court shall require that 100 percent of the punitive damages award that exceeds the maximum amounts described under (b) or (c) of this section, as applicable, be deposited into the general fund or the Alaska permanent fund under AS 37.13.010. The party paying the punitive damages shall elect which fund shall receive the money required to be paid under this subsection.

(e) The provisions of this section do not grant the state the right to file or join

1 a civil action to recover punitive damages."

2 Page 16, line 4:

3 Delete "due the state under AS 09.17.020(d)"

4 Insert "required to be deposited under AS 09.17.020"

5 Page 23, line 31, after "fund":

6 Insert "or the Alaska permanent fund"

delete request
of no CFB
all fees
full portion
going to state.

AK
perm
fund

Handwritten: Just working copy
Handwritten: page 10 201
Handwritten: before passed out of committee
Handwritten: H-TJD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 58

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PORTER, Cowdery

Introduced: 2/17/97

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil actions; relating to independent counsel provided under
 2 an insurance policy; relating to attorney fees; amending Rules 16.1, 41, 49, 58,
 3 68, 72.1, 82, and 95, Alaska Rules of Civil Procedure; amending Rule 702, Alaska
 4 Rules of Evidence; amending Rule 511, Alaska Rules of Appellate Procedure; and
 5 providing for an effective date."

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * **Section 1. LEGISLATIVE INTENT.** In enacting this bill, it is the intent of this
 8 legislature as a matter of public policy to

9 (1) encourage the efficiency of the civil justice system by discouraging
 10 frivolous litigation and by decreasing the amount, cost, and complexity of litigation without
 11 diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive,
 12 compensation for tortious injuries caused by others;

13 (2) provide for reasonable, but not excessive, punitive damage awards against

1 tortfeasors sufficient to deter conduct and practices that harm innocent Alaskans while not
2 hampering a positive business environment by allowing excessive penalties;

3 (3) encourage individual savings and economic growth by fostering an
4 environment likely to control the increase of liability insurance rates to individuals and
5 businesses resulting in a savings to the state, municipalities, and private businesses that are
6 self-insured;

7 (4) encourage the traditionally recognized Alaska values of self-reliance and
8 independence by underscoring the need for personal responsibility in making choices and
9 personal accountability for the consequences of those choices;

10 (5) alleviate the high cost of malpractice insurance premiums that discourage
11 physicians, architects, engineers, attorneys, and other professionals from rendering needed
12 services to the public;

13 (6) ensure that hospitals that comply with the disclosure requirements set out
14 in this Act are not liable for the negligence of independent contractors; to this extent, this Act
15 is intended to overrule Jackson v. Powers, 743 P.2d 1376 (Alaska 1987);

16 (7) ensure that one of several tortfeasors is not held responsible for the
17 negligence of an employer; to this extent, this Act is intended to overrule Lake v. Construction
18 Machinery, Inc., 787 P.2d 1027 (Alaska 1990);

19 (8) enact a statute of repose that meets the tests set out in Turner Construction
20 Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

21 (9) ensure that in actions involving the fault of more than one person, the fault
22 of each claimant, defendant, third-party defendant, person who has been released from
23 liability, or other person responsible for the damages be determined and awards be allocated
24 in accordance with the fault of each, thereby overruling Benner v. Wichman, 874 P.2d 949
25 (Alaska 1994); and

26 (10) reduce the amount of litigation proceeding to trial by modifying the
27 allocation of attorney fees and court costs based on the offer of judgment and the final court
28 award, thereby providing a financial incentive to both parties to settle the dispute.

29 * Sec. 2. AS 06.05.473(h) is amended to read:

30 (h) After the payment of all other claims, including interest at the rate of 10.5
31 percent a year [ESTABLISHED UNDER AS 09.30.070], the department shall pay

1 claims that are otherwise valid but that were not filed within the time prescribed.

2 * Sec. 3. AS 09.10.050 is repealed and reenacted to read:

3 **Sec. 09.10.050. Certain property actions to be brought in six years.** Unless
4 the action is commenced within six years, a person may not bring an action for waste
5 or trespass upon real property.

6 * Sec. 4. AS 09.10 is amended by adding a new section to read:

7 **Sec. 09.10.053. Contract actions to be brought in three years.** Unless the
8 action is commenced within three years, a person may not bring an action upon a
9 contract or liability, express or implied, except as provided in AS 09.10.040 or as
10 otherwise provided by law.

11 * Sec. 5. AS 09.10.055 is repealed and reenacted to read:

12 **Sec. 09.10.055. Statute of repose of eight years.** (a) Notwithstanding the
13 disability of minority described under AS 09.10.140(a), a person may not bring an
14 action for personal injury, death, or property damage unless commenced within eight
15 years of the earlier of the date of

16 (1) substantial completion of the construction alleged to have caused
17 the personal injury, death, or property damage; however, the limitation of this
18 paragraph does not apply to a claim resulting from an intentional or reckless disregard
19 of specific project design plans and specifications or building codes; in this paragraph,
20 "substantial completion" means the date when construction is sufficiently completed
21 to allow the owner or a person authorized by the owner to occupy the improvement
22 or to use the improvement in the manner for which it was intended; or

23 (2) the last act alleged to have caused the personal injury, death, or
24 property damage.

25 (b) This section does not apply if

26 (1) the personal injury, death, or property damage resulted from

27 (A) prolonged exposure to hazardous waste;

28 (B) an intentional act or gross negligence;

29 (C) fraud or fraudulent misrepresentation;

30 (D) breach of an express warranty or guarantee; or

31 (E) a defective product; in this subparagraph, "product" means

1 an object that has intrinsic value, is capable of delivery as an assembled whole
2 or as a component part, and is introduced into trade or commerce;

3 (2) the facts that would give notice of a potential cause of action are
4 intentionally concealed;

5 (3) a shorter period of time for bringing the action is imposed under
6 another provision of law.

7 (c) The limitation imposed under (a) of this section is tolled during any period
8 in which there exists the undiscovered presence of a foreign body that has no
9 therapeutic or diagnostic purpose or effect in the body of the injured person and the
10 action is based on the presence of the foreign body.

11 * Sec. 6. AS 09.10 is amended by adding a new section to read:

12 **Sec. 09.10.065. Limitation of actions against health care providers. (a)**

13 Notwithstanding the disability of minority described under AS 09.10.140(a), an action
14 based on professional negligence may not be brought against a health care provider if
15 the injured person is, on the date of the alleged negligent act or omission, less than six
16 years of age unless the action is commenced before the person's eighth birthday.

17 (b) The limitation imposed under (a) of this section is tolled during any period
18 in which there exists

19 (1) fraud, including fraud or collusion by a parent, guardian, insurer,
20 or health care provider, resulting in the failure to bring an action on behalf of an
21 injured minor;

22 (2) intentional concealment of facts that would give notice of a
23 potential action; or

24 (3) the undiscovered presence of a foreign object that has no
25 therapeutic or diagnostic purpose or effect in the body of the injured person and the
26 action is based on the presence of the foreign object.

27 (c) In this section,

28 (1) "health care provider" has the meaning given in AS 09.55.560;

29 (2) "professional negligence" has the meaning given in AS 09.55.560;

30 (3) "professional services" has the meaning given in AS 09.55.560.

31 * Sec. 7. AS 09.10.070(a) is amended to read:

1 (a) Except as otherwise provided by law, a [A] person may not bring an
2 action (1) for libel, slander, assault, battery, seduction, or false imprisonment, (2)
3 [OR] for personal [ANY] injury or death, [TO THE PERSON] or injury to the rights
4 of another not arising on contract and not specifically provided otherwise; (3) for
5 taking, detaining, or injuring personal property, including an action for its
6 specific recovery; (4) [(2)] upon a statute for a forfeiture or penalty to the state; or
7 (5) [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless
8 the action is commenced within two years of the accrual of the cause of action.

9 * Sec. 8. AS 09.17.010 is repealed and reenacted to read:

10 **Sec. 09.17.010. Noneconomic damages.** (a) In an action to recover damages
11 for personal injury or wrongful death, all damage claims for noneconomic losses shall
12 be limited to compensation for pain, suffering, inconvenience, physical impairment,
13 disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary
14 damage.

15 (b) Except as provided under (c) of this section, the damages awarded by a
16 court or a jury under (a) of this section for all claims, including a loss of consortium
17 claim, arising out of a single injury or death may not exceed \$300,000.

18 (c) In an action for personal injury, the damages awarded by a court or jury
19 that are described under (b) of this section may not exceed \$500,000 when the
20 claimant, as a result of the injury,

21 (1) is a hemiplegic, paraplegic, or quadriplegic and has permanent
22 functional loss of one or more limbs resulting from injury to the spine or spinal cord;
23 or

24 (2) has permanently impaired cognitive capacity and is incapable of
25 making independent, responsible decisions.

26 (d) Multiple injuries sustained by one person as a result of a single incident
27 shall be treated as a single injury for purposes of this section.

28 * Sec. 9. AS 09.17.020 is amended to read:

29 **Sec. 09.17.020. Punitive damages.** Punitive damages may not be awarded in
30 an action, whether in tort, contract, or otherwise, unless supported by clear and
31 convincing evidence of malice or conscious acts showing deliberate disregard of

another person by the person from whom the punitive damages are sought.

* Sec. 10. AS 09.17.020 is amended by adding new subsections to read:

(b) Except as provided under (c) of this section, the amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater.

(c) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed four times the amount of compensatory damages awarded or \$600,000, whichever amount is greater, if

(1) the wrongful conduct or omission arose in connection with a commercial activity motivated by financial gain; and

(2) the likelihood of death or serious bodily injury from the commercial activity was previously known by the person responsible for making policy decisions relating to the commercial activity and the knowledge was gained from previous instances of death or serious bodily injury arising from the same wrongful conduct or omission, regardless of where the previous wrongful conduct or omission occurred.

(d) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

* Sec. 11. AS 09.17.040(a) is amended to read:

(a) In every case where damages for personal injury or death are awarded by the court or jury,

(1) the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

(A) [(1)] past economic loss;

(B) [(2)] past noneconomic loss;

(C) [(3)] future economic loss;

(D) [(4)] future noneconomic loss; [AND]

(E) [(5)] punitive damages; and

(2) the amount of damages awarded shall be reduced by the

1 amount of federal and state income tax that would have been paid on damages
 2 contained in the verdict under tax rates in effect on the date of the injury or
 3 death; this paragraph does not apply to an award of damages if the damages are
 4 taxable under federal or state law.

5 * Sec. 12. AS 09.17.040(d) is amended to read:

6 (d) In an action to recover damages, the court shall, at the request of a [AN
 7 INJURED] party, enter judgment ordering that amounts awarded a judgment creditor
 8 for [FUTURE] damages that exceed \$100,000 be paid to the maximum extent feasible
 9 by periodic payments rather than by a lump-sum payment. If a portion of the
 10 judgment awarded is owed to an attorney under a contingent fee agreement, that
 11 portion of the judgment shall be reduced to present value, if necessary, and paid
 12 in a lump sum, and the remaining portion of the judgment shall be paid as
 13 provided under this subsection.

14 * Sec. 13. AS 09.17.040(e) is amended to read:

15 (e) Except as provided in this subsection, if a judgment is paid by
 16 structured settlement type periodic payments, the [THE] court shall [MAY] require
 17 security be posted in the form of United States government obligations [,] in order
 18 to ensure that funds are available as periodic payments become due. The court may
 19 not require security to be posted if the state, a self-insured municipality, or an
 20 authorized insurer, as defined in AS 21.90.900, acknowledges to the court its
 21 obligation to discharge the judgment, provided that an authorized insurer must be
 22 rated by two nationally recognized independent rating agencies to be in the two
 23 highest categories of quality and financial soundness. If a judgment is paid by
 24 annuity type period payments, the court shall require the annuity be purchased
 25 from an authorized insurer that is rated by two nationally recognized independent
 26 rating agencies to be in the two highest categories of quality and financial
 27 soundness. The injured party shall determine whether a structured settlement or
 28 an annuity is the source of the periodic payments. The injured party may not be
 29 required to accept a structured settlement or annuity from the defendant's or
 30 other party's insurer or from any affiliated companies of the insurer.

31 * Sec. 14. AS 09.17.040(f) is amended to read:

(f) A judgment ordering payment of [FUTURE] damages for personal injury or death by periodic payment shall specify the recipient, the dollar amount of the payments, including any increases in future payments for anticipated inflation, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will. In this subsection, "inflation" means the change in the consumer price index for Anchorage, all items index, compiled by the Bureau of Labor Statistics, United States Department of Labor.

* Sec. 15. AS 09.17.070 is repealed and reenacted to read:

Sec. 09.17.070. Collateral benefits. (a) A claimant in an action for personal injury or death may only recover damages that exceed amounts received by the claimant, or that with reasonable probability will be received in the future by the claimant, as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory, except when

(1) the collateral source is a federally funded program that by law must seek subrogation;

(2) the collateral source has a right of subrogation under federal law;

(3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent that does not result from insurance coverage;

(4) the benefit consists of death benefits paid under life insurance; or

(5) the benefit consists of workers' compensation benefits received under AS 23.30.

(b) A person defending a claim may introduce into evidence at trial an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under 42 U.S.C. 301 - 1397 (Social Security Act); a federal disability act; health;

1 sickness, disability, accident, or income-disability insurance; insurance that provides
2 health benefits or income-disability coverage; and a contract or agreement of a group,
3 organization, partnership, or corporation, or other collateral source, to provide, pay for,
4 or reimburse the cost of medical, hospital, dental, or other health care services,
5 disability, or lost wages. However, evidence of a collateral source described under
6 (a)(1) - (5) of this section may not be introduced into evidence at trial. If a person
7 defending a claim elects to introduce evidence described in this subsection, the
8 claimant may introduce evidence of the amount that the claimant has paid or
9 contributed to secure the claimant's right to the collateral benefit, including the cost
10 to the claimant resulting from depleted or exhausted coverage.

11 (c) A person who provides a collateral benefit admissible under (b) of this
12 section may not recover an amount against the claimant as reimbursement for those
13 benefits and may not be subrogated to the rights of a claimant against a person
14 defending a claim.

15 * Sec. 16. AS 09.17.080(a) is amended to read:

16 (a) In all actions involving fault of more than one person [PARTY TO THE
17 ACTION], including third-party defendants and persons who have been released
18 [UNDER AS 09.16.040], the court, unless otherwise agreed by all parties, shall instruct
19 the jury to answer special interrogatories or, if there is no jury, shall make findings,
20 indicating

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

23 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO
24 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,
25 [AND] person who has been released from liability, or other person responsible for
26 the damages to each claimant regardless of whether the other person, including
27 an employer, is or could have been named as a party to the action [UNDER
28 AS 09.16.040].

29 * Sec. 17. AS 09.17.080(b) is amended to read:

30 (b) In determining the percentages of fault, the trier of fact shall consider both
31 the nature of the conduct of each person [PARTY] at fault, and the extent of the

causal relation between the conduct and the damages claimed. ~~The trier of fact may assign a percentage of fault to [DETERMINE THAT] two or more persons [ARE TO BE TREATED AS A SINGLE PARTY] if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.~~

* Sec. 18. AS 09.17.080(c) is amended to read:

(c) The court shall determine the award of damages to each claimant in accordance with the findings [, SUBJECT TO A REDUCTION UNDER AS 09.16.040,] and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015(g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

* Sec. 19. AS 09.17.900 is amended to read:

Sec. 09.17.900. Definition. In this chapter, "fault" includes acts or omissions that are in any measure negligent, [OR] reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* Sec. 20. AS 09.20 is amended by adding a new section to read:

Sec. 09.20.185. Expert witness qualification. (a) In an action based on professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is

(1) a professional who is licensed in this state or in another state or country;

(2) trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

(3) certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue; however, this paragraph does not apply if a board does not exist that could certify the witness in the particular field or matter at issue.

* Sec. 21. AS 09.30.065 is amended to read:

Sec. 09.30.065. Offers of judgment. At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is at least five percent, less [NOT MORE] favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Alaska Rules of Civil Procedure and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made, [THE INTEREST AWARDED UNDER AS 09.30.070 AND ACCRUED UP TO THE DATE JUDGMENT IS ENTERED SHALL BE ADJUSTED] as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure the offeree shall pay 100 percent of the offeror's reasonable actual attorney fees [OFFEREE IS THE PARTY MAKING THE CLAIM, THE INTEREST RATE SHALL BE REDUCED BY FIVE PERCENT A YEAR];

(2) if the offer was served more than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure but more

1 than 90 days before the trial began, the offeree shall pay 75 percent of the
 2 offeror's reasonable actual attorney fees;

3 (3) if the offer was served 90 days or less but more than 10 days
 4 before the trial began, the offeree shall pay 50 percent of the offeror's reasonable
 5 actual attorney fees [OFFEREE IS THE PARTY DEFENDING AGAINST THE
 6 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A
 7 YEAR].

8 * Sec. 22. AS 09.30.065 is amended by adding new subsections to read:

9 (b) If an offeror receives costs and reasonable actual attorney fees under (a)
 10 of this section, that offeror shall be considered the prevailing party for purposes of an
 11 award of attorney fees under the Alaska Rules of Civil Procedure. Notwithstanding
 12 (a) of this section, if the amount awarded an offeror for attorney fees under the Alaska
 13 Rules of Civil Procedure is greater than a party would receive under (a) of this section,
 14 the offeree shall pay to the offeror attorney fees specified under the Alaska Rules of
 15 Civil Procedure and is not required to pay reasonable actual attorney fees under (a) of
 16 this section. A party who receives attorney fees under this section may not also
 17 receive attorney fees under the Alaska Rules of Civil Procedure.

18 (c) If an offeror makes more than one offer of judgment, the last offer served
 19 on the adverse party shall be considered to be a revocation of any prior offer of
 20 judgment.

21 * Sec. 23. AS 09.30.070(a) is amended to read:

22 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments
 23 and decrees for the payment of money, including prejudgment interest, is three
 24 percentage points above the 12th Federal Reserve District discount rate in effect
 25 on January 2 of the year in which the judgment or decree is entered [10.5
 26 PERCENT A YEAR], except that a judgment or decree founded on a contract in
 27 writing, providing for the payment of interest until paid at a specified rate not
 28 exceeding the legal rate of interest for that type of contract, bears interest at the rate
 29 specified in the contract if the interest rate is set out in the judgment or decree.

30 * Sec. 24. AS 09.30.070 is amended by adding a new subsection to read:

31 (c) Prejudgment interest may not be awarded for future economic damages,

1 future noneconomic damages, or punitive damages.

2 * **Sec. 25.** AS 09.50.280 is amended to read:

3 **Sec. 09.50.280. Judgment for plaintiff; punitive damages.** If judgment is
4 rendered for the plaintiff, it shall be for the legal amount found due from the state with
5 [LEGAL] interest as provided under AS 09.30.070 [FROM THE DATE IT BECAME
6 DUE] and without punitive damages.

7 * **Sec. 26.** AS 09.55.440(a) is amended to read:

8 (a) Upon the filing of the declaration of taking and the deposit with the court
9 of the amount of the estimated compensation stated in the declaration, title to the estate
10 as specified in the declaration vests in the plaintiff, and that property is condemned
11 and taken for the use of the plaintiff, and the right to just compensation for it vests in
12 the persons entitled to it. The compensation shall be ascertained and awarded in the
13 proceeding and established by judgment. The judgment must include interest at the
14 rate of 10.5 percent a year [SET OUT IN AS 09.30.070] on the amount finally
15 awarded that [WHICH] exceeds the amount paid into court under the declaration of
16 taking. The interest runs from the date title vests to the date of payment of the
17 judgment.

18 * **Sec. 27.** AS 09.55.535(k) is amended to read:

19 (k) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)
20 apply to arbitrations under this section if they do not conflict with the provisions of
21 this section; arbitrations under this section shall be conducted in accordance with
22 procedures established by any rules of court which may be adopted and according to
23 provisions of AS 09.55.540 - 09.55.547, 09.55.554 - 09.55.560 [AS 09.55.540 -
24 09.55.548 AND AS 09.55.554 - 09.55.560], and AS 09.65.090.

25 * **Sec. 28.** AS 09.55.536(a) is amended to read:

26 (a) In an action for damages due to personal injury or death based upon
27 the provision of professional services by a health care provider, including a person
28 providing services on behalf of a governmental entity, when the parties have not
29 agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within
30 20 days after filing of answer to a summons and complaint a three-person expert
31 advisory panel unless the court decides that an expert advisory opinion is not necessary

1 for a decision in the case. When the action is filed, the court shall, by order,
 2 determine the professions or specialties to be represented on the expert advisory panel,
 3 giving the parties the opportunity to object or make suggestions.

4 * Sec. 29. AS 09.55.536(c) is amended to read:

5 (c) Not more than 30 days after selection of the panel, the panel [IT] shall
 6 make a written report to the parties and to the court, answering the following questions
 7 and other questions submitted to the panel by the court in sufficient detail to explain
 8 the case and the reasons for the panel's answers:

9 (1) Why did the claimant seek [WHAT WAS THE DISORDER FOR
 10 WHICH THE PLAINTIFF CAME TO] medical care?

11 (2) Was a correct diagnosis made? If not, what was incorrect
 12 about the diagnosis [WHAT WOULD HAVE BEEN THE PROBABLE OUTCOME
 13 WITHOUT MEDICAL CARE]?

14 (3) Was the treatment or lack of treatment [SELECTED] appropriate?
 15 If not, what was inappropriate about the treatment or lack of treatment [FOR
 16 THE CASE]?

17 (4) Was the claimant injured during the course of evaluation or
 18 treatment or by failure to diagnose or treat [DID AN INJURY ARISE FROM THE
 19 MEDICAL CARE]?

20 (5) If the answer to question 4 is "yes," what [WHAT] is the nature
 21 and extent of the medical injury?

22 (6) What specifically caused the medical injury?

23 (7) Was the medical injury caused by unskillful care? Explain.

24 (8) If a medical injury had not occurred, what would have been the
 25 likely outcome of the medical case [HOW WOULD THE PLAINTIFF'S
 26 CONDITION DIFFER FROM THE PLAINTIFF'S PRESENT CONDITION]?

27 * Sec. 30. AS 09.55.536(f) is amended to read:

28 (f) Discovery may not be undertaken in a case until the report of the expert
 29 advisory panel is received or 60 days after selection of the panel, whichever occurs
 30 first. However, the court may relax this prohibition upon a showing of good cause by
 31 any party. If the panel has not completed its report within the 30-day period

1 prescribed in (c) of this section, the court may, upon application, grant the panel [IT]
2 an additional 30 days.

3 * **Sec. 31.** AS 09.55.536 is amended by adding a new subsection to read:

4 (i) This section applies regardless of whether a party in the action or the health
5 care provider whose professional services are the subject of the action is a
6 governmental entity or in the public or private sector.

7 * **Sec. 32.** AS 09.55.560(1) is amended to read:

8 (1) "health care provider" means an acupuncturist licensed under
9 AS 08.06; an audiologist licensed under AS 08.11; a chiropractor licensed under
10 AS 08.20; a dental hygienist licensed under AS 08.32; a dentist licensed under
11 AS 08.36; a nurse licensed under AS 08.68; a dispensing optician licensed under
12 AS 08.71; a naturopath licensed under AS 08.45; an optometrist licensed under
13 AS 08.72; a pharmacist licensed under AS 08.80; a physical therapist or occupational
14 therapist licensed under AS 08.84; a physician licensed under AS 08.64; a podiatrist;
15 a psychologist and a psychological associate licensed under AS 08.86; [AND] a
16 hospital as defined in AS 18.20.130, including a governmentally owned or operated
17 hospital; [AND] an employee of a health care provider acting within the course and
18 scope of employment; an ambulatory surgical facility and other organizations
19 whose primary purpose is the delivery of health care, including a health
20 maintenance organization, individual practice association, integrated delivery
21 system, preferred provider organization or arrangement, and a physical hospital
22 organization.

23 * **Sec. 33.** AS 09.55.560 is amended by adding new paragraphs to read:

24 (4) "professional negligence" means a negligent act or omission by a
25 health care provider in rendering professional services;

26 (5) "professional services" means service provided by a health care
27 provider that is within the scope of services for which the health care provider is
28 licensed and that is not prohibited under the health care provider's license or by a
29 facility in which the health care provider practices.

30 * **Sec. 34.** AS 09.60 is amended by adding a new section to read:

31 **Sec. 09.60.080. Contingent fee agreements.** If an attorney contracts for or

1 collects a contingency fee in connection with an action for personal injury, death, or
2 property damage and the damages awarded by a court or jury include an award of
3 punitive damages, the contingent fee due the attorney shall be calculated after that
4 portion of punitive damages due the state under AS 09.17.020(d) has been deducted
5 from the total award of damages.

6 * **Sec. 35.** AS 09.65 is amended by adding a new section to read:

7 **Sec. 09.65.096. Civil liability of hospitals for certain physicians.** (a) A
8 hospital is not liable for civil damages as a result of an act or omission by an
9 emergency room physician who is not an employee or actual agent of the hospital if
10 the hospital provides notice that the emergency room physician is an independent
11 contractor and the emergency room physician is insured as described under (c) of this
12 section. The hospital is responsible for exercising reasonable care in granting
13 privileges to practice in the hospital, for reviewing those privileges on a regular basis,
14 and for taking appropriate steps to revoke or restrict privileges in appropriate
15 circumstances. The hospital is not otherwise liable for the acts or omissions of an
16 emergency room physician who is an independent contractor. The notice required by
17 this subsection must be posted conspicuously in all admitting areas of the hospital,
18 published at least annually in a newspaper of general circulation in the area, and must
19 be in substantially the following form:

20 **Notice of Limited Liability**

21 The following emergency room physicians are independent
22 contractors and are not employees of the hospital:

23 (List specific emergency room physicians)

24 (b) This section does not preclude liability for civil damages that are the
25 proximate result of the hospital's negligence or intentional misconduct.

26 (c) A hospital is not immune from liability under (a) of this section for an act
27 or omission of an emergency room physician who is an independent contractor unless
28 the emergency room physician has liability insurance coverage in the amount of at
29 least \$500,000 for each incident and the coverage is in effect and applicable to those
30 health care services offered by the emergency room physician that the hospital is
31 required to provide by law or by accreditation requirements.

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(d) In this section,

(1) "emergency room physician" means a physician who provides health care services in a hospital emergency room; *is employed*

~~by or contracts with the hospital to provide care for patients in the emergency room.~~

(2) "hospital" has the meaning given in AS 18.20.130 and includes a

governmentally owned or operated hospital;

(3) "independent contractor" means an emergency room physician who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

* Sec. 36. AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. Damages resulting from commission of a felony or while under the influence of alcohol or drugs. A person who suffers personal injury or death or the person's personal representative under AS 09.55.570 or 09.55.580 may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to the personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony, a class A, or a class B felony for which the person was not convicted and the conduct

(A) substantially contributed to the personal injury or death; and

(B) is proven by the defendant in the civil trial by clear and convincing evidence;

(3) fleeing after the commission, by that person, of conduct that would constitute an unclassified felony, a class A felony, or a class B felony or being apprehended for conduct that would constitute an unclassified felony, a class A felony, or a class B felony if the conduct

(A) during the flight or apprehension substantially contributed to the injury or death; and

(B) is proven by the defendant in the civil trial by clear and convincing evidence;

(4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of nolo contendere, and the conduct substantially contributed to the personal injury or death; or

(5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the conduct substantially contributed to the personal injury or death and the conduct is proven by the defendant in the civil trial by clear and convincing evidence.

* Sec. 37. AS 09.68 is amended by adding a new section to read:

Sec. 09.68.130. Collection of settlement information. (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom the settlement was paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.

(b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.

(c) The requirements of (a) of this section do not apply to the following types of cases:

- (1) divorce and dissolution;
- (2) adoption, custody, support, visitation, and emancipation of children;
- (3) children-in-need-of-aid cases under AS 47.10 or delinquent minors cases under 47.12;
- (4) domestic violence protective orders under AS 18.66.100 - 18.66.180;
- (5) estate, guardianship, and trust cases filed under AS 13;
- (6) small claims under AS 22.15.040.

* Sec. 38. AS 21.06 is amended by adding a new section to read:

1 **Sec. 21.06.087. Insurance report.** (a) The director shall require reporting of
2 and shall compile information necessary to evaluate the effect of the measures enacted
3 in this Act on the availability and cost of insurance in the state.

4 (b) Information described in (a) of this section shall be provided by all insurers
5 doing business in this state in the format specified by the director and must include
6 factual information stating premiums, claims, losses, expenses, and solvency of the
7 company as a whole. Information shall be compiled by the division in a way that
8 protects the identity of individual insureds.

9 (c) The director shall adopt regulations to implement and interpret this section,
10 including requiring insurers doing business in the state to provide information
11 necessary for the division to carry out its responsibilities under (a) and (b) of this
12 section. If there are indications of market disruption, the director may waive all or
13 part of the reporting requirements in this section.

14 (d) Beginning June 1, 2000, the information compiled under (a) of this section
15 shall be reported annually to the governor and the judiciary committees of both houses
16 of the legislature.

17 (e) The division may consult with the Alaska Judicial Council when
18 determining what information to require to be reported under (a) - (c) of this section
19 and when implementing the compilation required under (a) of this section.

20 * **Sec. 39.** AS 21.89.100(d) is amended to read:

21 (d) If the insured selects independent counsel at the insurer's expense, the
22 insurer may require that the independent counsel have at least four years of experience
23 in civil litigation, including defense experience in the general subject area at issue in
24 the civil action, and malpractice insurance. Unless otherwise provided in the insurance
25 policy, the obligation of the insurer to pay the fee charged by the independent counsel
26 is limited to the rate that is actually paid by the insurer to an attorney in the ordinary
27 course of business in the defense of a similar civil action in the community in which
28 the claim arose or is being defended. In providing independent counsel, the insurer
29 is not responsible for the fees and costs of defending an allegation for which
30 coverage is properly denied and shall be responsible only for the fees and costs
31 to defend those allegations for which the insurer either reserves its position as to

fees are

✓ 1 coverage or accepts coverage. The independent counsel shall keep detailed
 2 records allocating costs accordingly. A dispute between the insurer and insured
 3 regarding attorney fees that is not resolved by the insurance policy or this section shall
 4 be resolved by arbitration under AS 09.43.

5 * Sec. 40. AS 21.89.100 is amended by adding a new subsection to read:

6 (h) When an insured is represented by independent counsel, the insurer may
 7 settle directly with the plaintiff if the settlement includes all claims based upon the
 8 allegations for which the insurer previously reserved its position as to coverage or
 9 accepted coverage, regardless of whether the settlement extinguishes all claims against
 10 the insured.

11 * Sec. 41. AS 23.30.015(g) is amended to read:

12 (g) If the employee or the employee's representative recovers damages from
 13 the third person, the employee or representative shall promptly pay to the employer the
 14 total amounts paid by the employer under (e)(1)(A) - (C) [(e)(1)(A), (B), AND (C)]
 15 of this section [,] insofar as the recovery is sufficient after deducting all litigation costs
 16 and expenses. Any excess recovery by the employee or representative shall be
 17 credited against any amount payable by the employer thereafter. If the employer is
 18 allocated a percentage of fault under AS 09.17.080, the amount due the employer
 19 under this subsection shall be reduced by an amount equal to the employer's
 20 equitable share of damages assessed under AS 09.17.080(c).

21 * Sec. 42. AS 44.77.015(a) is amended to read:

22 (a) For the purposes of filing claims for medical services provided under
 23 AS 47.07 or AS 47.25.120 - 47.25.300, "promptly," in AS 44.77.010(a), means (1)
 24 within six months after the date of service, or as provided in (b) of this section, if
 25 there is no third-party claim, or (2) within 12 months after the date of service if there
 26 is a third-party claim. Except as provided in (c) of this section, a claim may not be
 27 paid if it is not filed promptly; an inference to the contrary may not be drawn from
 28 AS 09.10.053 [AS 09.10.050], AS 09.50.250 - 09.50.300, or AS 37.25.010.

29 * Sec. 43. Rule 16.1(c), Alaska Rules of Civil Procedure, is amended to read:

30 (c) Motion to Set Trial and Certificate. Unless otherwise ordered by the
 31 court, a [A] motion to set trial may not be filed until after the meeting of parties

1 under (n) of this rule has occurred and the scheduling order under Rule 16(b) has
2 been issued [105 DAYS AFTER SERVICE OF THE SUMMONS AND
3 COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to
4 set trial together with a certificate, signed by counsel, stating:

- 5 (1) That the issues in the case have actually been joined;
- 6 (2) That all parties have completed discovery or have a reasonable
7 opportunity to do so within the next 60 days;
- 8 (3) That the procedure for listing witnesses and exhibits and providing
9 exhibit copies, as set forth in [PARAGRAPH] (d) of this rule has been completed;
- 10 (4) Whether trial by jury has been timely demanded;
- 11 (5) The estimated number of days for the trial, including estimates for
12 each party's case and for jury selection;
- 13 (6) The names, addresses and telephone numbers of all attorneys and
14 pro se parties who are responsible for the conduct of the litigation;
- 15 (7) Which, if any, statute or rule entitles the case to preference on the
16 trial calendar;
- 17 (8) That the parties have complied with [PARAGRAPH] (k) of this
18 rule.

19 * **Sec. 44.** Rule 16.1(n), Alaska Rules of Civil Procedure, is repealed and reenacted to read:

- 20 (n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as
21 soon as practicable after the exchange of initial disclosures required under Rule
22 26(a)(1) and in any event at least 14 days before a scheduling conference is held or
23 a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of
24 their claims and defenses and the possibilities for a prompt settlement of the case and
25 to develop a proposed discovery plan. The attorneys of record and all unrepresented
26 parties that have appeared in the case are jointly responsible for arranging and being
27 present or represented at the meeting, for attempting in good faith to agree on the
28 proposed discovery plan, and for submitting to the court within 10 days after the
29 meeting a written report outlining the proposed discovery plan. The proposed
30 discovery plan shall indicate the parties' views and proposals concerning
31 (1) what changes should be made in the timing or forms of subsequent

1 disclosures under the rules, including a statement as to when the disclosures required
2 under Rule 26(a) were made;

3 (2) the subjects on which discovery may be needed, when discovery
4 should be completed, and whether discovery should be conducted in phases or be
5 limited to or focused upon particular issues;

6 (3) what changes should be made in the limitations on discovery
7 imposed under these rules and what other limitations should be imposed;

8 (4) whether a scheduling conference is unnecessary;

9 (5) whether there will be dispositive or partially dispositive motions
10 filed in the case and whether other deadlines should be set aside pending resolution of
11 the dispositive or partially dispositive motions by the court; and

12 (6) any other orders that should be entered by the court under Civil
13 Rule 16(b) and (c).

14 * Sec. 45. Rule 41(a), Alaska Rules of Civil Procedure, is amended by adding a new
15 paragraph to read:

16 (3) **Settlement Information.** If a voluntary dismissal under this rule
17 is the result of compromise or other settlement of the parties, the parties shall submit
18 to the Alaska Judicial Council the information required under AS 09.68.130. A notice
19 of dismissal made under (1)[a] of this subsection must be accompanied by a
20 certification signed by or on behalf of the plaintiff that the information required under
21 AS 09.68.130 has been submitted to the Alaska Judicial Council. A stipulation of
22 dismissal made under (1)[b] of this subsection must be accompanied by a certification
23 signed by or on behalf of all parties who have appeared in the action. The
24 requirements of this paragraph do not apply to the types of cases listed in
25 AS 09.68.130(c).

26 * Sec. 46. Rule 72.1(g), Alaska Rules of Civil Procedure, is amended to read:

27 (g) **Discovery.** Except by leave of court, no discovery may be conducted until
28 the report of the Panel has been filed or until 60 [80] days **after selection of the Panel**
29 [HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first
30 to occur, unless discovery is further stayed for good cause by order of the court.

31 * Sec. 47. Rule 95(b), Alaska Rules of Civil Procedure, is amended to read:

1 (b) In addition to its authority under (a) of this rule and its power to punish
 2 for contempt, a court may, after reasonable notice and an opportunity to show cause
 3 to the contrary, and after hearing by the court, if requested, impose a fine not to
 4 exceed \$10,000.00 [\$1,000.00] against any attorney who practices before it for failure
 5 to comply with these rules or any rules promulgated by the supreme court.

6 * **Sec. 48.** Rule 95, Alaska Rules of Civil Procedure, is amended by adding a new
 7 subsection to read:

8 (c) If the trier of fact determines that a party to a civil action has intentionally
 9 made a false statement of a material fact in connection with the prosecution or defense
 10 of a civil action, the court shall enter judgment against the party making the false
 11 statement on the issue to which the false statement relates. If the civil action involves
 12 multiple claims and the false statement does not apply to all claims, the judgment
 13 required under this subsection shall apply only to those claims to which the false
 14 statement relates.

15 * **Sec. 49.** Rule 511, Alaska Rules of Appellate Procedure, is amended by adding a new
 16 subsection to read:

17 (e) **Settlement Information.** If a dismissal under (a) or (b) of this rule is the
 18 result of compromise or other settlement between the parties, the parties shall submit
 19 to the Alaska Judicial Council the information required under AS 09.68.130. A
 20 dismissal by agreement under (a) of this rule must be accompanied by a certification
 21 signed by the attorneys of record for all parties that the information required under
 22 AS 09.68.130 has been submitted to the Alaska Judicial Council. A dismissal by the
 23 appellant or petitioner made under (b) of this rule must be accompanied by a
 24 certification signed by the appellant's or petitioner's attorney of record. The
 25 requirements of this subsection do not apply to the types of cases listed in
 26 AS 09.68.130(c).

27 * **Sec. 50.** Rule 16.1(k)(4), Alaska Rules of Civil Procedure, is repealed.

28 * **Sec. 51.** AS 09.55.548 is repealed.

29 * **Sec. 52.** AS 09.17.020(d), as enacted by sec. 10 of this Act, has the effect of amending
 30 Rule 58, Alaska Rules of Civil Procedure, by requiring the court to require that a certain
 31 percentage of an award of punitive damages be deposited into the general fund.

1 * Sec. 53. AS 09.17.040(a), as amended by sec. 11 of this Act, has the effect of amending
2 Rule 58, Alaska Rules of Civil Procedure, by requiring the court to reduce an award of
3 damages by certain tax rates in effect on the date of injury or death if taxable.

4 * Sec. 54. AS 09.17.040(d), as amended by sec. 12 of this Act, has the effect of amending
5 Rule 58, Alaska Rules of Civil Procedure, by requiring that certain judgments be paid
6 periodically if requested by a party, with a lump sum payment for certain attorney fees.

7 * Sec. 55. AS 09.17.040(e), as amended by sec. 13 of this Act, has the effect of amending
8 Rule 58, Alaska Rules of Civil Procedure, by imposing certain requirements when a judgment
9 is paid by periodic payments.

10 * Sec. 56. AS 09.17.040(f), as amended by sec. 14 of this Act, has the effect of amending
11 Rule 58, Alaska Rules of Civil Procedure, by requiring that certain judgments include any
12 increases for future inflation.

13 * Sec. 57. AS 09.17.080(a), as amended by sec. 16 of this Act, has the effect of amending
14 Rule 49, Alaska Rules of Civil Procedure, by requiring the jury to answer the special
15 interrogatory listed in AS 09.17.080(a)(2) regarding the percentages of fault to be allocated
16 among the claimants, defendants, third-party defendants, persons who have been released from
17 liability, or other person who is responsible for the damages.

18 * Sec. 58. AS 09.20.185, enacted by sec. 20 of this Act, has the effect of amending
19 Rule 702, Alaska Rules of Evidence, by requiring certain qualifications from a person
20 testifying as an expert witness.

21 * Sec. 59. AS 09.30.065, as amended by secs. 21 and 22 of this Act, has the effect of
22 amending Rule 68, Alaska Rules of Civil Procedure, by requiring the offeree to pay costs and
23 reasonable actual attorney fees on a sliding scale of percentages in certain cases, by
24 eliminating provisions relating to interest and by providing that a subsequent offer revokes
25 prior offers.

26 * Sec. 60. AS 09.30.070(c), added by sec. 24 of this Act, has the effect of amending
27 Rule 58, Alaska Rules of Civil Procedure, by providing that prejudgment interest may not be
28 awarded for future economic or noneconomic damages.

29 * Sec. 61. ALTERNATIVE DISPUTE RESOLUTION. (a) It is the intent of this
30 legislation to create a pilot alternative dispute resolution procedure within the existing civil
31 litigation system in order to promote the timely, inexpensive, and efficient resolution of civil

1 disputes.

2 (b) The Alaska Judicial Council shall consult with the Alaska Dispute Settlement
3 Association, review court sanctioned alternative dispute resolution programs in other states and
4 in the federal court system, and make recommendations to assist the legislature and the Alaska
5 Court System in the establishment of a pilot program for alternative dispute resolution within
6 the Alaska Court System. The Alaska Judicial Council shall submit a written report to the
7 legislature and to the Alaska Supreme Court within six months after the effective date of this
8 Act. The report must include specific types of programs, specific types of cases within each
9 program that are amenable to alternative dispute resolution, the cost to the parties and to the
10 Alaska Court System under these programs, and the qualifications of the neutral parties,
11 including nonlawyers, who will provide dispute resolution services under the program.

12 (c) In this section, "alternative dispute resolution" is limited to arbitration, mediation,
13 and early neutral evaluation.

14 * Sec. 62. APPLICABILITY. This Act applies to all causes of action accruing on or after
15 the effective date of this Act.

16 * Sec. 63. SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the
17 application of a provision of this Act to any person or circumstance is held invalid, the
18 remainder of this Act and the application to other persons shall not be affected.

19 * Sec. 64. This Act takes effect July 1, 1997.

HOUSE JUDICIARY COMMITTEE MEETING 2/26/97

HB 58

REP. GREEN - "H-1 has to do with the civil liability of electrical utility companies. I would like to amend this amendment, on line 8, remove the (.) after utility and add the following words: relating to the production and delivery of electrical service.

1014

REP. PORTER - Move the amendment to the amendment

~~1030~~

REP. PORTER - there has not been a case in this state that has determined that a electrical utility is strictly liable for the incidence resulting from their delivery and production of electrical service, but there have been some in the states. It has been that finding seems to be contrary to our law. There is a case currently in the state that has not yet been decided. That this allegation is being made, this obviously would not affect that case but it is for that reason that the utilities thought it appropriate to think ahead instead of waiting for the ax to fall. The additional language relating to the production and delivery of electrical services is basically added so that we're sure that we're not exempting the utilities from other strict liability they may have in relation to some other activity that their utilities might find themselves involved in. I don't know what other strict liability they may have but obviously here we're only referring to the production & delivery of their electrical service not some leaky storage tank that for whatever other federal consideration might provide some other standard.

1122

REP. GREEN - It is actually a little bit of belt and suspenders. We do have the (b) section which would probably exclude any of those, but it's innocuous and it does make sure that we are talking about only those generating electricity.

1137

REP. BERKOWITZ - I don't.. It's been along time since I've played in the realm of strict liability. I seem to recall that if there was inherently dangerous

material that created a problem, and usually the case is dynamite that explodes somewhere then strict liability attaches.

1161

REP. PORTER- That is in many cases the truth. Having read the Hornbook recitation. That recitations thought is that in many instances they do not find strict liability in the providing of the service that is required and regulated. As opposed to handling something that is inherently dangerous because you choose too. Utility service is regulated and it is a requirement that it be provided.

GREEN - Substations would follow under the same category they're inherently dangerous

1210

REP. CROFT - That was part of my concern too, on strict liability that there are inherently dangerous activities and it's too late in the game for Rep. Porter to be doing the 'ahw shucks I'm not a lawyer but' (ha ha ha) it's obvious he's been studying Prosser at night. I guess we can limit this sort of by our discussion here today. We understand the intent to be that electricity, that providing electricity is a service rather than a product under the strict product liability rules and although I think we're jumping the gun a little seeing as there's no case that's determined otherwise and ah, this wouldn't affect the case that is, ah, it doesn't cause me much problem. I'd be more comfortable with language that talked about strict products liability rather than all the other portions liability, section (b) comes some ways towards that. But, not um gonna fight about this language with the understanding, that we're putting on the record that we're really talking about products liability and that we think of electricity as a service rather than a product.

GREEN - "That's right" Any other discussion? Rep. Berkowitz

1273

REP. BERKOWITZ - One other, and you can tell by the way I'm going to say this, that it's something that happens alot in the law. Is that in the amendment that Mr. Chair, you put forward, you talked about the production and delivery of electrical services. I'm always real leery of the conjunctive "and" instead of the disjunctive "or". And I, ... no hypothetical springs to mind but I'd much prefer "or" because what you do when you have "and" is that you impose two elements of proof on somebody instead of one.

1303

REP. GREEN - I would accept that as a friendly amendment. Any other discussion? Would there... are you offering that as an amendment?

BERKOWITZ - it's a friendly amendment

REP. GREEN - Is there objection to changing the conjunction "and" to "or"? Hearing none, we have modified that. What is the wish of the committee about this amendment?

REP. BUNDE - Has the amendment been moved? I thought the amendment was moved. Amendment #1

REP. GREEN - Is there objection? Hearing none that amendment is adopted. We go to amendment #2. It is entitled Rokeberg

**SCOTT WETZEL
SERVICES, INC.**

Risk Management Planning and Support

FAX TRANSMITTAL SHEETATTENTION Eric OlsonFAX NO. 465-3834DATE SENT 2-25-97 TIME SENT _____FROM Glen C. Smith
SCOTT WETZEL SERVICES, INC.

MESSAGE

Per your Request, Sorry for
confusion I meant to say
Rule #68

NUMBER OF PAGES (INCLUDING THIS SHEET) 2

0-LS0056VH

1 than 90 days before the trial began, the offeree shall pay 75 percent of the
2 offeror's reasonable actual attorney fees;

3 (3) if the offer was served 90 days or less but more than 10 days
4 before the trial began, the offeree shall pay 50 percent of the offeror's reasonable
5 actual attorney fees [OFFEREE IS THE PARTY DEFENDING AGAINST THE
6 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A
7 YEAR].

8 * Sec. 22. AS 09.30.065 is amended by adding new subsections to read:

9 (b) If an offeror receives costs and reasonable actual attorney fees under (a)
10 of this section, that offeror shall be considered the prevailing party for purposes of an
11 award of attorney fees under the Alaska Rules of Civil Procedure. Notwithstanding
12 (a) of this section, if the amount awarded an offeror for attorney fees under the Alaska
13 Rules of Civil Procedure is greater than a party would receive under (a) of this section,
14 the offeree shall pay to the offeror attorney fees specified under the Alaska Rules of
15 Civil Procedure and is not required to pay reasonable actual attorney fees under (a) of
16 this section. A party who receives attorney fees under this section may not also
17 receive attorney fees under the Alaska Rules of Civil Procedure.

18 (c) If an offeror makes more than one offer of judgment, the last offer served
19 on the adverse party shall be considered to be a revocation of any prior offer of
20 judgment.

21 * Sec. 23. AS 09.30.070(a) is amended to read:

22 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments
23 and decrees for the payment of money, including prejudgment interest, is three
24 percentage points above the 12th Federal Reserve District discount rate in effect
25 on January 2 of the year in which the judgment or decree is entered [10.5
26 PERCENT A YEAR], except that a judgment or decree founded on a contract in
27 writing, providing for the payment of interest until paid at a specified rate not
28 exceeding the legal rate of interest for that type of contract, bears interest at the rate
29 specified in the contract if the interest rate is set out in the judgment or decree.

30 * Sec. 24. AS 09.30.070 is amended by adding a new subsection to read:

31 (c) Prejudgment interest may not be awarded for future economic damages,

FX 343-4550

2.21.97

TEAR ~~Stefany~~ GALLAGHER - MOORE

- ① Happy W - Agreement of fault,
- limit on each garage,
- 2 yr s/l on personal property.
- Punitive use cap (exceeds)

② Concerns: Offer of Judgment:

- City gets sued in small cases
by people unable to pay R82
fees when assessed when
city wants. Majority of cases.

- ~~City~~ City will wind up negotiating
for atty fees rather than Court
of judgment.

(Re): Fallacy = The offer does
not include costs for atty fees?

But City says its experience
w/ civil Rts violations is that negot
are for 15K in fees when
only 500 in damages, because
Fed'l statute says Actual
atty fees.

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE GREEN

TO: HB 58

1 Page 16, following line 5:

2 Insert a new bill section to read:

3 **** Sec. 35. AS 09.65 is amended by adding a new section to read:**

4 **Sec. 09.65.085. Civil liability of electric utility.** (a) A utility offering
5 electrical service to the public for compensation under a certificate of public
6 convenience and necessity issued by the Alaska Public Utilities Commission under
7 AS 42.05.221 may not be held strictly liable for property damage, death, or personal
8 injury resulting from an act or omission of the utility.

9 (b) This section does not preclude liability for civil damages that are the result
10 of an intentional, reckless, or negligent act or omission."

11 Renumber the following bill sections accordingly.

*Don't hear
Hutchens
Protest
last year*

*463-3636
1/27
BP - Jax
Harry Markley
Thanks
H*

AMENDMENT TO TORT REFORM BILL

Proposed by Alaska Rural Electric Cooperative Association (ARECA)

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

AS 09.65 is amended by adding a new section to read:

AS 09.65.*** Civil liability of electric utilities

(a) A public utility providing electric service to consumers pursuant to a certificate of public convenience and necessity issued by the Alaska Public Utilities Commission shall not be strictly liable for any property damage, death, or personal injury suffered by any person as a result of the acts or omissions of the public utility.

(b) Nothing in this section shall be read to preclude the recovery of damages for the intentional, reckless or negligent acts or omissions of the electric utility.

*strict liability
NOT OK
because
electric
abst. &
products
& sue.*

Joe Green
Would you please
include this language in
the Tort Reform bill - makes
a lot of sense - requested by
the Utilities. Thanks -
(Markley) Gail

*Gail was - talked to
Hutchens about it
before he retired*

To: Mike Ford

From: Jim Sourant

Re: HB 58

February 24, 1997

Mike:

Could you please prepare an amendment to HB 58 in the form attached hereto regarding civil liability of electric utilities? We will need it by tomorrow afternoon. Should be no trouble, I hope.

Thanks for your help,



CEE BRIAN.

Jim
Sourant

LAW OFFICES OF
FRIEDMAN, RUBIN & WHITE

RECEIVED

NOV - 5 1996

Robertson, Monagle & Eastaugh

Anchorage
1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704
Telex: (907) 270-6449

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

November 1, 1996

Via Express Mail

Ted W. Green
Claims Representative
AIG Aviation Insurance Services
5700 Wilshire Blvd., Suite 456E
Los Angeles, CA 90036

Re: Estate of Willie Cork v. Peninsula Airways

Dear Ted:

This letter is in response to your request for economic information on Mr. Cork. In taking over this case from other lawyers, Larry Barry's name was in the file and I am sending him a copy of this letter as well.

Enclosed are William and Anne's tax returns for 1992-1995, a Wrongful Death Wage Loss Evaluation, and a declaration from a knowledgeable individual about Mr. Cork's projected career course. I couple the transmittal of this information with a settlement proposal. This letter is sent pursuant to Evidence Rule 408 and its contents and supporting documents are therefore not admissible for any purpose.

We have conducted an extensive investigation into the accident and the circumstances surrounding whether the flight should have departed on August 11, 1996. As you surely know, Alaska law provides for liability based upon *res ipsa loquitor* under circumstances such as in this case. Therefore, liability will not be an issue. The only issue that will need to be litigated is the amount of the loss to the estate and whether punitive damages will be available. You should be aware that my partner, Rick Friedman, who will try this case, has been extremely successful in obtaining punitive damages from juries in Alaska. In the past year he has obtained verdicts for punitive damages in the amounts of \$12,000,000 and \$16,500,000 (reduced by the court after verdict) and we have settled several cases in which the prospect of punitive damages led to settlement amounts vastly exceeding the economic loss.

Tom W. Brown, Claims Representative
AIG Aviation Insurance Services
November 1, 1996
Page 2

Willie Cork was an extraordinary young man. He was a devoted husband and father. He was a talented marine pilot with a bright future. See Mr. Soriano's declaration.

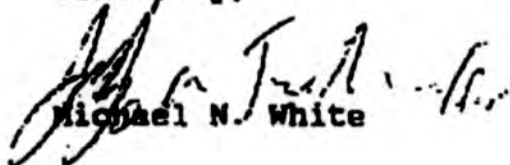
The plaintiffs would be willing to settle this case at this time for payment of the economic loss. This amount, \$2,695,728, should be attractive to AIG and Pan Air for several reasons. First, this figure does not take into account punitive damages or non-economic loss. For example, the Cork family is entitled to damages for the loss of its husband and father. I have enclosed within this letter a poem prepared by one of Mr. Cork's daughters, prior to his death, as an example of the love Mr. Cork's family has for him. This was written by his ten year old daughter. This and other evidence will be powerful before a jury.

You have indicated that there is only \$1,000,000 in insurance. If that is the case, I hope that someone discusses possible settlement with the defendant. We have done investigation into the assets of the defendant and are confident that a judgment above the limits will be collectable. Throughout the litigation we will be monitoring the defendant and will be prepared to act in the event of any transfers intended to defeat this claim.

Because Willie and Anne have two young daughters, we will be open to discussing a structure for some of the settlement amount. In sum, we can settle this now before your company spends hundreds of thousands in fees, and before we have to charge our full fees to the plaintiff, or we can litigate this. The end result will not be any more favorable for your client and may be greatly less favorable. This offer will remain open for a period of ten days from the date of this letter. If this offer is not accepted within this timeframe, a lawsuit will be promptly filed.

If you have any questions, please call me.

Sincerely,


Michael N. White

Enclosures as stated.

cc: Larry Berry, Esq. (w/ encls.)
Anne Cork (w/ encls.)



November 21, 1996

Rep Brian Porter
State Capitol
Juneau, Ak 99801-1182

Post-Net Fax Note 7571		Date 11/21/96	Pages 5
To Dick Catlarney	From	L. Nixon	
Co./Dept.	Co.		
Phone #	Phone #	258-8197	
Fax # 522-3464	Fax #	258-3510	

Dear Brian:

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

We lost a Goose near Dutch Harbor on Aug. 11. The one passenger was a highly compensated, licensed master mariner. 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.

PAGE TWO

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

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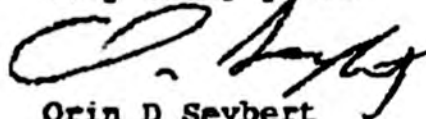
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Anyway, as I told you I am now highly motivated to help write the bill this session, and I intend to be there.

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



November 8, 1966

Capt. Stephan Moreno
Alaska Marine Pilots
2622 38th Ave S. W.
Seattle, 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 immediately 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. DBA PenAir

TOTAL P.05



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 Goose ~~passenger~~. The one passenger was a highly compensated, ~~executive~~. 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 computers, 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.

PAGE TWO

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

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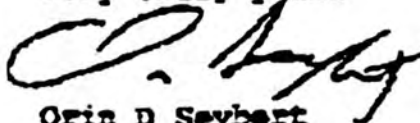
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Very truly yours



Orin D Seybert
President

CC: Gail Phillips
Rick Halford

A L A S K A



National Federation of Independent Business

Statement of Support for HB 58 - Tort Reform

February 22, 1997

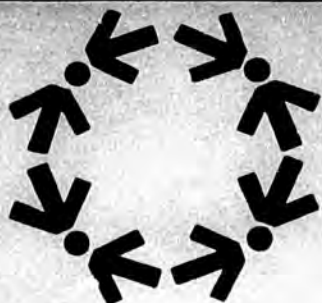
The Alaska Chapter of the National Federation of Independent Business has 4,400 members, making it the largest small-business advocacy group in the state. The typical NFIB/Alaska member is quite small, employing five workers and ringing up gross sales of about \$181,000 per year. Yet, in aggregate, the membership is a potent economic force, employing more than 43,000.

Each year NFIB/Alaska polls its entire membership on a variety of state legislative and regulatory issues. The federation uses the poll results to set its legislative agenda and promote those positions approved by majority vote. NFIB/Alaska ballot results have shown overwhelming support for a number of the provisions contained in HB 58.

NFIB supports putting reasonable limits on non-economic and punitive damages. When there are no limits on damages, the unpredictability of what a jury may award often forces insurance companies to settle out of court too soon for too much money. This drives up the cost of liability insurance.

The costs of personal injury cases and the unpredictability of unlimited damage awards has had a large impact on small business. NFIB/Alaska believes HB 58 will help to control these costs while assuring appropriate compensation for persons injured through no fault of their own. This legislation will help make the civil justice system more fair, more efficient and less costly.

NFIB/Alaska urges support for HB 58.



ALASKA PUBLIC INTEREST RESEARCH GROUP

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E-mail: akpirg@anc.ak.net

February 21, 1997

RECEIVED

FEB 25 1997

Representative Green
Representative Bunde
Representative James
Representative Porter
Representative Berkowitz
Representative Croft
Representative Dyson
Alaska House of Representatives
State Capitol
Juneau, AK 99801-1182

Dear Judiciary Committee Members:

We have reviewed HB 58, and oppose many of its provisions.

1. The Punitive damages provision can be amended to satisfy everyone's concerns.

AKPIRG proposes an effective compromise provision on punitive damages that will protect everyone's interests. There has been a fair amount of debate in this state about whether the law governing punitive damages should be amended. Generally, the consensus has been that the idea of behind punitive damages - to punish exceedingly callous conduct that threatens severe public and individual harm - is good policy. However, the perceived problem is that punitive damages might, in a particular case, cause a business to go bankrupt or to face an unfair amount of hardship.¹ An absolute punitive damages cap has been proposed by some in the past to prevent this occurrence. However, a flat cap would be devastating to small businesses, and absolutely ineffective against large corporate actors.

There is a very fair and very effective compromise position between those who feel a flat cap will provide an inadequate deterrent for the largest corporate actors, and those who feel a cap to protect smaller Alaskan businesses is necessary. Punitive damages can continue to properly deter and punish egregious conduct if they are capped, for the most egregious cases, at the defendant's 5-year average gross annual income. AKPIRG

¹ We have never seen any evidence that in this State that courts, after reviewing jury awards for constitutional soundness, are awarding too much in the way of punitive damages. However, if the Legislature determines that such evidence exists, then it should consider a fair and flexible cap proposal that reflects the reality that some defendants can and need to be punished and deterred more than others. A fair proposal should provide adequate deterrence and punishment, but should not threaten to put small Alaskan companies out of business.

supports this concept, as should all those on the various sides of this issue who wish for an effective compromise.

This cap would work as follows, and would protect small business much better than a flat dollar cap. A flat dollar cap of, for example, \$500,000, would threaten devastation for most local family businesses.

Punitive Damages Cap:

(a) Punitive damages awarded pursuant to existing law may not exceed the greater of: 1) the defendant's, or the defendant's owner's, gross income for the calendar year the plaintiff suffered injury; or 2) the defendant's insurance policy limits.

(b) In the case where a defendant company or corporation is owned by another, the gross income of the owner shall constitute the defendant's "Gross income". An "owner" under this section is a person or entity that holds a 95% or greater ownership interest in the defendant.

* * * *

Section (b) addresses an issue of accountability that is fought in every case. A corporation should not be able to hide its income for punitive damages purposes by creating "sub" corporations which have little in the way of assets or income on paper. This is a shell game that frequently gets played in the courts - but which courts that have addressed the subject have often said should not be played. The goal of punitive damages is to fairly punish the owner of the company. If a corporation is owned by Donald Trump, he should not avoid scrutiny by arguing that the corporation is owned by another corporation, which he in turn owns. See TXO Production Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 890 (W. Va. 1992), aff'd, 113 S. Ct. 2711 (1993); Mihara v. Dean Witter & Co., Inc., 619 F.2d 814, 824 (9th Cir. 1980); Riley v. Empire Airlines, Inc., 823 F. Supp. 1016, 1023 (N.D. N.Y. 1993); Dushaw v. Roadway Exp., Inc., 816 F.Supp. 1229, 1239 (N.D. Ohio 1992) (court takes judicial notice of parent's wealth is affirming punitive damage award).

2. Apportionment of Fault to Invisible Parties - A Shell Game.

HB 58 grants wrongdoers another weapon to use against innocent citizens. Currently, if a wrongdoer claims a third person is partially responsible for harming a citizen, it must make that party part of the suit. Damages will be split among all the responsible parties. A new provision allows defendants to play the game of never mentioning that a third party is responsible until it the time has passed to name the third party. It is unfair to allow a defendant, who has caused a plaintiff's injury, to deprive a plaintiff of compensation by strategically pointing at someone it knows cannot be named as a party. This is gamesmanship, not justice.

HB 58 then goes so far as to punish victims of malicious conduct and other wrongs. If a victim wins a case, s/he only gets partial attorneys fees, at best. Under HB 58, if a person proves s/he has been victimized by malicious or other wrong conduct, the wrongdoer may recover full attorneys fees against the victim. This will occur if a jury awards her/him one dollar less than what the wrongdoer offered to pay to prevent her/him from taking the case public to a jury. Given the provision's pre-judgment interest provision, this penalty will be imposed even where, adjusted for inflation/interest, a jury awards the plaintiff more than what is offered. Thus, someone who proves a \$50,000 claim of fraud may have to pay \$400,000 in attorney's fees for time billed at \$250/hour by a corporate defense firm. This is an injustice.

3. Statute of Repose

A few years ago in the North Slope Borough a house burned down, killing and injuring innocent children and family members. It burned down because the builder, 12 years earlier, built the home with sub-code wiring. Under HB 58's statute of repose, the survivors in this case would have no recourse.

The law today is not abusive. It is fair. It says that once a tort victim has reason to begin looking into his or her claim, s/he has two years to bring suit. The statute of repose punishes innocent victims who, like the fire victims in the North Slope Borough, do not know of the defendant's misconduct until after it has been committed.

Likewise, victims of many acts injurious to their health do not learn of misconduct until a disease, such as cancer, shows itself. This will normally be more than 8 years after the defendant's misconduct. This provision should be deleted.

4. Non-Economic Damages Cap.

One already exists. HB 58's cap insults the dignity of victims whose loved ones have died, capping the value of a person's life as if death were no more serious than a broken nose. The purpose of pain and suffering caps is to make sure people with minor injuries do not receive a windfall. A cap on non-serious injuries is appropriate. A cap on serious injuries is not appropriate. Courts have accordingly struck down caps similar caps as unconstitutional.

5. Damages reduced by taxes.

Currently injured people pay taxes on their recoveries, unless the recovery is to compensate for a physical injury. A wrongdoer then often deducts his liability on his taxes. Anything more than what exists is but a windfall to a wrongdoer. It also threatens to double tax victims, who will pay taxes to the person who injured them, and then again to the government.

6. Sending 50% of punitive Damages To The State Is reasonable.

It leaves victims with the financial incentive to punish society's worst actors. Anything more than 50% would be counterproductive.

7. Offers of Judgment/Pre-Judgment Interest

The existing rules should not be altered. They already favor rich people over average Alaskans. A person who has been victimized should never have to pay fees to a wrongdoer after s/he wins a case. Under these proposals, payments to wrongdoers, both indirectly and directly, would increase.

8. SLAP Suit Provision

It is our understanding that some legislators are considering a suit that imposes damages against anyone who brings a suit that is later found to be groundless. Big companies and Government use such provisions in the lower 48 to threaten publicly spirited citizens, conservative and liberal alike, from challenging their conduct. The right to free speech is too important to alter with a SLAPP suit provision.

Currently, people who bring frivolous lawsuits are on the hook to pay a defendants' FULL attorney's fees and costs. This is enough of a deterrent.

9. Promises of Lower Insurance Rates Have Never Been Honored, And Never Will be Honored.

On short notice, we have not had the time to review the remaining aspects of the Bill. However, we would remind the Legislature that this State has already enacted Tort Reform Statutes twice, in 1986 and 1988. We already have damage caps, and some of the most restrictive tort rules in the country. The promises have always been that insurance rates would go down after the laws were enacted. Insurance rates have never gone down as a result of Tort Reform, and never will. Insurance companies have proven that they keep extra profits - they do not share them with the community.

We oppose HB 58.

Sincerely,


Les Gara, Board Member
Steve Conn, Director

How About Some Politics?



by Daryl Nelson in collaboration with Bonnie Nelson on behalf of The Alaska Public Interest Research Group

The Alaska State Medical Association (ASMA) and Doctor David McGuire killed health care reform in Alaska because of their tort reform obsession. Affordable equitable health care as a right, rather than a privilege, would do more to get fair justice for all Alaskans than the current "civil justice" reform proposals being offered by ASMA. Having cradle to grave health care security would be a better alternative because it would reduce the litigation costs, the dollar amount of jury verdicts, the dollar amounts of settlements plus more people would have more incentive to get off welfare systems, go to work and pay taxes.

The problem is that the next legislature is going to pass a tort reform bill that is of the rich, by the rich, and for the rich. Gail Phillips, Speaker of the House, has said that their coalition has the numbers to get whatever they want. There will be no gridlock since they will be able to overturn a veto by the Governor. Poor people, disabled people, and the elderly will have no representation. Governor Tony Knowles has put together a Civil Justice Reform Task Force to help him write a bill to present to the legislature next session. But Gail Phillips said she would disregard the Task Force recommendations.

Tort means a civil wrong or injury resulting from a legal duty. The duty arises from society's expectations of interpersonal conduct rather than from a contract or other private relationship. Tort reform recommendations by ASMA were presented to the Governors Task Force on November 15, 1996. Doctors representing both the national and state medical association have repeatedly insisted that we

must have tort reform before health reform. Alaska Public Interest Research Group supports reform of Civil Justice, but not reforms that help wrongdoers at the expense of the blameless victims. The Alaska Public Interest Research Group refutes the following ASMA proposals, predicting that they will ignore the Task Force recommendations when their powerful lobbyists are in Juneau next session. Here are ASMA recommendations compared to the Alaska Public Interest Research Group (APIRG).

(1) ASMA recommends: Lower the current cap on non-economic damages such as pain and suffering to \$250,000, but leave the "no limit" on economic damages. ASMA says that "high unpredictable awards lead to more physicians going with out liability insurance because insurance premiums are based on jury verdicts."

APIRG recommends: The current \$500,000 statutory cap on non-economic damages should be repealed. The Constitution says that the jury should set damages, not the legislature. It actually would be fairer to cap economic damages because rich and poor should get the same compensation for the same kind of injury and negligence. Now they do not. If a child, an unemployed person, a disabled person, a retired person on Social Security or a person living a subsistence lifestyle becomes injured or further injured, they do not have as much economic value and their monetary award will be far less. Being disabled is a hardship regardless of one's status prior to becoming injured. Finally, most reports (such as the Rand Institute of Justice, Alaska Legislative Research, Alaska Division of Insurance, and the Alaska Judicial Council) are that insurance premiums are not based on litigation or settlement experience in Alaska, nor elsewhere. Instead, insurance premium rates are based on their investment success or failure in financial markets and also on predictable business cycles.

(2) ASMA recommends: The legislature should cap plaintiff attorney fees (if they are contingency). 40% of the first \$50,000

33 1/3% of the next \$50,000
25% of the next \$500,000
15% of any amount exceeding \$600,000

APIRG recommends: Capping only "contingency" fees discriminates against poor or middle class people because wealthy people pay attorneys at hourly rates or on retainer. Capping only plaintiff attorneys discriminates against injured persons who can pay them on an hourly basis or on retainer. Why not cap the hourly retainer rates that defense attorneys make so as to level the playing field. Or better yet the legislature should cap doctor and hospital fees (Health Reform Cost Containment) in exchange for a "no-fault" state health insurance for and by All Alaskans. And soon... before lower 48 multinational HMO's cap Alaska health care providers. Canadians are considering changing to a tow tiered health care system: one for the rich, and one for everyone else (like the United States). Instead of the U.S. becoming more humane like other countries, other countries now are becoming more mean-spirited like the U.S. Doctors and lawyers should make good money, but they should not be able to get rich off the injury and sickness of people.

(3) ASMA recommends: The jury should be allowed to know that the plaintiff received insurance, worker's compensation or other proceeds (collateral sources).

APIRG recommends: The current system requires that if there is money awarded for medical expenses which were paid by insurance or worker compensation, they this money must be paid back by the plaintiff (subrogation). There is no windfall to the plaintiff under the current system. To allow the jury to know collateral sources only lets negligent wrong doers pay less. Disclosing collateral sources to the jury hurts the plaintiff because reducing the potential amount of an award may result in the possibility of an attorney not taking a case or in settling unjustly.

(4) ASMA recommends: The legislature should allow either partly to require that an award be paid in installments (periodic payment of future damages).

... Continued on pg. 6...

Available Scholarship

Alaska Sea Services Scholarship Fund—
\$1000 awarded to a dependent child of a Regular or Reserve Navy, Marine Corps, or Coast Guard member on active duty, retired with pay, deceased, missing-in-action, or in a drilling reservist status who is/was a legal resident of Alaska. Applicants must be at an accredited college attending full-time pursuing a Bachelor of Arts or Science degree. Deadline to apply is April 30th.*

20 Days for \$20!

by Cree Bol

Looking for something to do over the winter break? Want to get outside, take advantage of the winter daylight, and have fun? The Outdoor Program is running a special deal on cross country ski rentals for APU I.D. holders only. You can rent a pair of skis, boots, and poles from December 16 to January 4 for only twenty dollars. There is a limited supply, so you may want to come by and reserve them NOW!

If you have never cross country skied before this is the perfect opportunity to teach yourself how. Students have been coming in all fall and checking out skis for the first time. With the APU trail system so close by, there are plenty of skiing opportunities within walking distance from your dorm room.

If you would rather have instruction, it's not too late to sign up for cross country lessons. The Ski Program is offering lessons to students for only \$15 dollars. Take a lesson and then spend the next 20 days improving your technique.

For more information call the Outdoor Program at 564-8314.*

...Politics, cont. from pg. 5...

APIRG recommends: If a plaintiff was required to get an award in periodic payments, then a seriously disabled person would not be eligible to get benefits from Medicaid, Social Security or Aid to the disabled, ect. This would be a windfall for the government at the expense of the victim.

(5) ASMA recommends: Allow doctors to contract with patients for mandatory arbitration of malpractice claims.

APIRG recommends: Arbitration or mediation should not be mandatory, but voluntary. People should be able to go to trial "as well as," not instead of. Alaskans have a fundamental right to a jury given to us with the founding of our country and our state. And our current system already allows for voluntary mediation. The legislature should not impose more costs and delays to litigants, but rather make the court process more efficient.

(6) ASMA recommends: Maintain the current statute of limitations for injury or death of persons over the age of six. For children under the age six, an action should be brought before age eight or within two years, whichever is longer. However, the clock would stop if there was fraud, intentional concealment of facts, or if there exists an undiscovered foreign object in the body.

(7) ASMA recommends: Prohibit suits after eight years measured from the date of the act that caused the injury of death (Statute of Repose).

APIRG recommends: The statute of limitation should remain as it is. Currently a minor has until age 18 plus two years. And there is no statute of repose. According to Bruce

YOU WANT ME TO JUMP OFF WHAT?!

by Heidi Witt

On November, 16th, while many APU residents were still snoozing, 14 ROTC students from Colony Junior High were on route to APU. What for you ask? They came to spend the day participating in the APU Challenge Program. These students spent the day crossing chocolate rivers, swinging from vines carrying buckets full of nitroglycerin, climbing blindfolded, and diving into crowds of people. Sounds like fun huh? Well you're right, it was. So much so, that the facilitators (Heidi Witt, Tonio Verzone, Josh Hedberg, and Jason Gleason) almost forgot we were getting paid! The Colony students spent the day doing all of these things and more. In fact, they had so much FUN some of them just darn near peed their pants from laughing so much! It was a great success for all. Now you might ask, "what the heck is going on here at APU and how can I join in the fun?!" Simple, it's the APU Challenge Program and heck yeah, you can get involved. Contact Heidi Witt (X8328) or Cree Bol (X8314) for further information. Woo Hoo!

Great Job Turkey Trotters

by Kim Brownsberger

A great time and prizes were had by all at the 1996 Annual Turkey Trot race. Paul Twardock (and buddy Roo), Marc Phillips, Jason Gleason, Rusty Myers, Nathan Meadows, Cree Bol, Karen Plentnikoff, Ulrica Olsson, and Charlie Fahl were the nine brave fleet-footed participants following the LARGE lunch we all had prior to the race. We look forward to even more participants in future races.*

Botelho, Attorney General, "The deletion of tolling for minors would violate due process if minors are deprived of their access to court. See, *Bush v. Reid*, 516 p. 2d 1215, 1219 (Alaska, 1979). A minor may not enforce legal rights in his or her own name or enter into a contract until the age of 18. AS 25.20.010. An additional concern is litigation by the former minor against the parent of guardian for failing to bring a personal injury action. This concern would especially impact the state acting as a child custodian. There may also be equal protection questions regarding different treatment of minors, who are incompetent to file suit by reason of minority and persons incompetent to file suit by reason of mental disability."

(8) ASMA recommends: Continue the medical review panel that has been in existence in Alaska since 1975, but change methods of choosing the three physicians, and change the questions asked.

APIRG recommends: The expert advisory panel should be eliminated because it is biased and it limits and injured person's legal rights to access justice by giving the doctors the power to decide if the case will go to a jury. This type of panel has been held unconstitutional in several other states. The Alaska Supreme Court upheld the validity of the medical review panel in *Keyes v. Humana Hosp. Alaska, Inc.* However, since it limited the scope of its holding to the facts of that particular case because she did not have enough statistics and factual evidence a future claim might differ. Keyes argued that Alaska Statutes section 09.55.536 violated her right to a jury trial, increased her burden of persuasion, deprived her of due process of law and violated separation of powers principles. She also claimed the panels were biased and bore no relation to their asserted goals (Alaska Law Review, Vol. 9:2, 1992).*