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DAVID A. McGUIRE, M.D., A.P.C.

Orthopedic Surgery
DIPLOMAT OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

4048 LAUREL STREET
SUITE 202
ANCHORAGE, ALASKA 99508

Telephone 907-562-4142
Telefax 907-563-8824

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ATTENTION OF: Brian Porter

ADDRESS:

PHONE NUMBER:

FAX NUMBER: 907-465-3834

FROM: David M°Guire M.D

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Regulations review committee up and running

The joint legislative committee assigned to review the status and administration of state regulations will play "a significantly more active role" than it has in recent years, chair Rep. Jeanette James says. The Fairbanks Republican is asking House and Senate members for their ideas "in focusing and setting priorities for a realistic agenda" for the session. Ideas already under consideration, according to a Jan.18 letter to colleagues, include "the possible creation of a one-stop central regulation/permitting mechanism; review regulations as they develop; and examine current regulations that the people of the state are concerned about." James has assigned Walt Wilcox as full time staff to the committee to develop a work agenda, but plans no more than three hearings this session. None were scheduled as of this week. Other members of the regulations committee are Reps. Alan Austerman and Eric Croft, Sens. Jerry Mackie, Gary Wilken and Georgianna Lincoln. *Regulation review is a tough issue for the Legislature since that body has no legal role in regulation review, after a 1970s Supreme Court decision held the Legislature's previously-exercised authority to annul administrative regulations was unconstitutional.*

Rep. James, a conservative, is prolific in proposing new legislation

As a freshman lawmaker in 1992 and a conservative Republican, James said her job was to "stop laws from being passed as well as enacting them," but she has since become a prolific sponsor with 20 personal bills introduced last year. This year she is prime sponsor of four bills, including an increase in tobacco taxes, and two resolutions and cosponsor of one resolution.

Fish forum: Some ideas rejected, others were accepted *(Cont.)*

Continued from preceding page

and reorganization of the raw fish tax system on a performance basis was also generally rejected. Ideas such as state grants or loans for small, high-value-addition processing plants located near fishing grounds found support among AYK representatives, and other districts. One message that was most clearly heard was the need to acknowledge and make the shift from a production-driven industry to market driven. The vision statement's charge to the industry is replete with the "M-word." Seafood's private sector must "focus on the consumer's needs." A report from the forum is expected to be published by March 1. Commerce Commissioner Willie Hensley said that document will be used to formulate legislative proposals from the Knowles administration.

The governor probably gained some political points with the industry just because of the attention he gave to the forum. Beside Ulmer and Hensley, Commissioners Frank Rue, Mike Irwin and more than a dozen special assistants, division heads and other senior officials led discussion groups and actively participated in the event.

Medical Liability Advisory Service

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...ing so-called gag clauses in contracts with the doctors, an HHS spokeswoman said. She noted it was the first time the department "directly and forcefully" informed the plans that gag clauses were forbidden.

Legislation proposed during the last session of Congress - but not approved - essentially stated the same policy for all HMOs that the HHS letter enunciated for Medicare patients. That legislation, endorsed by President Clinton, is expected to be reintroduced next year.

* * *

LIABILITY LIMITS - State courts may be upsetting the tort-reform applecart by overturning state laws limiting suits brought by injury victims. Citing state constitutional provisions that guarantee access to state courts to redress wrongs, the courts are refusing to uphold such limits.

In 26 states, court have issued more than 70 decisions striking down limits on lawsuits that have been enacted since the mid-1980s. The result of this trend has been that liability laws are becoming more uneven from state to state. Although tort reform is still alive in most states, more and more are striking down limits on lawsuits each year, experts say. Some predict 75 percent of state laws limiting suits will be dead by the year 2000.

Basically, state charters provide more explicit guarantees than the federal Constitution of a right to a trial by jury to settle civil disputes. In 37 states there are "open court" or "right to remedy" provisions in the state constitutions. The state judges and appeals court are applying liberal readings of due process and equal protection guarantees in their constitutions to further overturn limits on lawsuits, legal experts say.

Nine state courts have thrown out damage caps for pain and suffering; three have overturned laws requiring damage awards to be offset by compensation from other sources, such as insurance coverage; and four have eliminated bans on punitive damages or laws requiring that portions of the awards be turned over to the state.

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Wrong! Voted three court AK? TX Supreme Ct Judge.

Medical Liability Advisory Service

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SLANTS & TRENDS

WARNING TO HMOs - The federal government has notified health maintenance organizations (HMOs) that enroll Medicare beneficiaries that they cannot restrict what doctors may tell the patients about treatment options. The patients are entitled to full medical advice and counsel by doctors of all medically necessary treatment options.

In a letter last month to 300 HMOs and other managed-care plans with Medicare enrollees, the Department of Health and Human Services stated that physicians in these situations may not be limited by the HMO in counseling or advising the beneficiary. The letters told the health plans that an existing provision in the Medicare contracts with the plans henceforth would be interpreted as banning so-called gag clauses in contracts with the doctors, an HHS spokeswoman said. She noted it was the first time the department "directly and forcefully" informed the plans that gag clauses were forbidden.

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Fish Forum in Juneau — lots of ideas

One result of the Knowles administration's three-day "Salmon Industry Response Cabinet Forum" in Juneau Jan. 27, 28 and 29 will be a louder seafood industry voice in the deregulation debate. Whether the "industry" voice on that and more controversial issues is loud enough to be noticed after the three-day meeting in Juneau last week remains to be seen. Beside statements and proposals on more technical issues, like product quality, marketing and tax credits, the most controversial discussions centered on the critical need for the fishing and processing businesses to find a way to unite as an industry before they are wiped out.

Ulmer urges fish industry to "get its act together"

"For an industry not to be able to get its act together and speak with one voice really paralyzes, really weakens, your ability to do whatever it is you want to do," Lt. Gov. Fran Ulmer said with gentle bluntness. The new Alaska Seafood Council may, or may not, fulfill that role, but its organizers didn't jump to volunteer it, and some harvesters, particularly among various seine fleets, remain suspicious that it is a "processor group." John Sund, a former legislator now with NorQuest Seafoods, and a council founding board member, said the new trade group could fill that role in the future, but its immediate task is the defeat of Sen. Rick Halford's discrete stock management bill, SB-40, and a yet to be introduced salmon allocation bill.

Main product of forum — so far — is a "vision statement"

The immediate product of the session was a "vision statement" that sets out separate industry and government and joint responsibilities to modernize the state's largest private sector employer and second largest revenue producer. The statement was clearly not a call for rescue by government, and listed only two major responsibilities of the public sector: fisheries management with consideration of quality along with sustained yield and other existing criteria, and regulatory reform.

"No matter how tempted you are, do not go near the second floor up on that hill!" urged Rick Lauber, North Pacific Fisheries Management Council chair and executive director of the Pacific Seafood Processors Association. Lauber was addressing the debate over mandatory or voluntary quality or grading standards, but the message carried over to most other issues. His point was not to get concepts better done in regulation established in statute, because once there they will be difficult to undo. The tax credit and other financial incentive "concepts" listed in the Department of Commerce "strategy packet" for the forum were well discussed, but some were rejected. One panel found that tax credits would not be particularly applicable for new product development,

Continued on next page

Court Deems Social Work Group's Ethics Investigations Confidential

Healthcare organizations will need to become more concerned with oversight of social workers, as these professionals continue to play an increasingly important role in the organizations' provision of psychotherapy and other services. A recent ruling by a Massachusetts appeals court may offer some indication of the type of protection available to social workers and the organizations that employ them.

The Massachusetts Court of Appeals ruled last month that investigations by the National Association of Social Workers (NASW) into ethics complaints against member social workers are confidential and may not be introduced as evidence in lawsuits. In *Swatch v. Treat*, the court said documents from the NASW Massachusetts Chapter's investigation of a client complaint against a member social worker could not be used in the client's subsequent civil suit.

The Massachusetts case grew out of a client's complaint to NASW that a social worker treating her had violated standards of ethical practice, including improper termination of treatment. An investigation by the NASW state chapter's Committee on Inquiry established that the social worker had not met her ethical duties. The client then filed a civil suit for damages against the social worker, using the Committee on Inquiry report and recommendations as the basis for the suit.

NASW and its Massachusetts Chapter filed a motion to remove the document from the civil trial. A lower court rejected this claim, but the appeals court issued a decision in favor of the NASW. It determined that Committee on Inquiry proceedings are "peer review" processes under state law, which generally protects peer review documents and does not allow them to be introduced into private judicial proceedings.

"The objective of peer review is rigorous and candid evaluation of professional performance by the provider's peers," the court wrote. "The ability of peer review committees to speak with candor and the willingness of persons called before them to be equally forthright would be seriously hampered by public release of proceedings or reports of the peer review body."

The court also ruled that the social worker organization has the right to intervene in court cases where such documents are mistakenly used to request their removal, even if NASW is not a party to the original suit. The court also recognized the binding nature of the contract, signed by individuals who pursue an NASW ethics complaint, pledging confidentiality for all materials related to the proceedings.

Lab To Pay $182 Million To Settle Medical Fraud

Government efforts to put a stop to medical testing fraud has resulted in an agreement last month by the world's largest clinical laboratory company to pay a $182 million penalty for billing for unnecessary blood tests. The settlement is the largest yet in the federal government's crackdown on fraud in the medical laboratory industry.

The settlement involves the Burlington, N.C.-based Laboratory Corp. of America. The company agreed to the payment to settle accusations that the three laboratories that merged to form LabCorp had defrauded Medicare, Medicaid and insurance programs for military dependents and federal employees by billing for millions of tests that were not needed for diagnosis or treatment.

Federal officials indicated that, at the order of Attorney General Janet Reno, federal prosecutors have made medical fraud their second-highest priority - after violent crime. Additional federal prosecutors and FBI agents are being assigned to such cases. Results of the crackdown have included:

- An agreement in October by Damon Clinical Laboratories of Massachusetts to pay $119 million in criminal fines and civil payments.
- Corning Clinical Laboratories of New Jersey has paid about $62 million to settle civil claims on fraudulent billing.
- Published reports say that SmithKline Beecham Clinical Laboratories of Philadelphia is negotiating a medical fraud settlement that will be bigger than LabCorp's, although prosecutors have declined to confirm these reports.

The LabCorp case involved both state and federal officials in California, New Mexico, New York, North Carolina, Pennsylvania, Virginia, and the District of Columbia. The $182 million settlement money will be distributed to the Medicare fund and to state Medicaid funds, with a share going to "whistle-blowers" who provided inside information.

Leman sends out environmental audit bill

Acknowledging that he is playing "Russian roulette" with Alaska's control of its occupational health and safety monitoring program, Sen. Loren Leman moved his environmental, health and safety audits bill out of the Senate Labor and Commerce Committee, which he chairs. The substantially amended version of SB-41 faces more changes, which Leman will suggest in a transmittal letter to the Senate Judiciary Committee, which gets the bill next.The risk, in the current version, was noted in a January 27 letter from the Pacific Northwest director of the U.S. Department of Labor, who wrote that passage of SB-41 "may result in a recommendation" that approval and funding for Alaska's management of the program be ended.

Administration warns of "dual" federal, state OSHA inspections

Alaska Director of Labor Standards and Safety Al Dwyer said he does not believe federal funding for state operation of the program would be cut, but he warned of a worse fate: dual state and federal inspections. The bill is on dicey grounds from the federal perspective because it grants employers immunity from civil or administrative penalties for problems found by company audits. Amendment of the bill has reduced the sweeping privilege from disclosure the original bill gave to audit reports and associated documents, but the current version still grants privacy protections not provided in federal law. In cases where SB-41 reduced state inspectors' powers below those in federal law, an employer would be subject to both state and federal inspections, Dwyer said.

Leman sends suggestions for Judiciary committee "fixes" for bill

Among Leman's suggestions to the Judiciary Committee is addition of a section that withdraws immunity protection when it would conflict with federal requirements. The State Department of Law said this change would also have to cover the bill's legal privilege section to remove the federal takeover threat. "I'll resist the gun until we know that it's loaded," Leman said of the federal warning, using the Russian Roulette analogy. He said requirements that a state program be "as effective as" the federal program should apply to the law's bottom line of increasing worker and environmental protection, not merely to the respective laws' ability to punish offenders. The Department of Health and Social Services also noted concerns that the bill would make prevention of fraud in Medicaid funding more difficult to uncover. Leman said he would ask the Judiciary Committee to address that concern as well.

Rep. Mulder's HB-43, correcting an error in a bill passed last year on auto license tags, passed the House in "second reading" Jan. 31 on a 25-11 Majority-Minority split vote. The House failed on the two-thirds vote to move the measure to "third reading," (the Minority failed to go along with it) which simply delays the final vote for passage one day. The bill will pass when it is considered again.

Prosser and Keeton

on

THE LAW OF TORTS

benefit, as where water[72] or gas[73] pipes are maintained for his use, his willingness to encounter the risk is found by implication from his acceptance of the situation.

Privilege

There are certain conditions under which conduct which would otherwise result in strict liability may be privileged. The most obvious one is that of a sanction given by statutory authority, or by well defined local law.[74] Within the limitations of the constitution,[75] the legislature may authorize acts which involve a high degree of risk to others, and such authority amounts at least to a declaration that the acts are not antisocial, but desirable for the benefit of the community. In the absence of a provision expressly preserving the defendant's liability for any resulting damage,[76] the courts have on occasion interpreted the statute as condoning the consequences in advance, and have refused to hold the defendant liable for doing what was authorized. Thus where gas,[77] water,[78] or electric[79] conduits are laid in the street under legislative sanction, it has been held that there is no liability for the damage they may do, in the absence of some negligence.[80] Likewise a contractor, doing work involving blasting for the state, has been held not subject to strict liability.[81] The tendency in the later cases has been to avoid such a conclusion, by strict construction of the authorizing statute,[82] or by finding an implied condition that there shall be liability,[83] or that the manner of doing the work, or the resulting damage itself, are not authorized or necessary consequences of the sanctioned work.[84]

Even without a statutory exemption from strict liability, express or implied, the defendant may be regarded as so engaged in the rendition of such an essential public service as to justify an exception to the general rule of strict liability. It is generally held that the rules of strict liability do not apply if the activity is carried on in pursuance of a public duty.[85] The custodians of a public zo-

62 N.E. 94; Gomes v. Byrne, 1959, 51 Cal.2d 418, 333 P.2d 754; Brown v. Barber, 1943, 26 Tenn.App. 534, 174 S.W.2d 298.

72. Carstairs v. Taylor, 1871, L.R. 6 Ex. 217; Rickards v. Lothian, [1913] A.C. 263; Blake v. Woolf, [1898] 2 Q.B. 426.

73. Cf. Hess v. Greenway, Ont.1919, 48 Dom.L.Rep. 630; E. I. Du Pont de Nemours & Co. v. Cudd, 10th Cir. 1949, 176 F.2d 855 (plaintiff participating in activity).

74. See Linden, Strict Liability—Nuisance and Legislative Authorization, 1966, 4 Osgoode Hall L.Rev. 196. Also Madras R. Co. v. Zemindar of Carvatenagarum, 1874, L.R. 1 Ind.App. 364, 30 L.T. 770; Notes, 1960, 12 Stan.L.Rev. 691; 1938, 13 Notre Dame L. 229.

75. See generally Bacon v. City of Boston, 1891, 154 Mass. 100, 28 N.E. 9; Cohen v. Mayor of New York, 1889, 113 N.Y. 532, 21 N.E. 700; Rose v. State, 1942, 19 Cal.2d 713, 123 P.2d 505; Chick Springs Water, Inc. v. State Highway Department, 1931, 159 S.C. 481, 157 S.E. 842.

76. In such a case there is liability without negligence. Midwood & Co. v. Mayor of Manchester, [1905] 2 K.B. 597; Charing Cross Elec. Supply Co. v. Hydraulic Power Co., [1914] 3 K.B. 772.

77. Gould v. Winona Gas Co., 1907, 100 Minn. 258, 261, 111 N.W. 254, 255; Schmeer v. Gas Light Co., 1895, 147 N.Y. 529, 42 N.E. 202, 205; Price v. South Metropolitan Gas Co., 1895, 65 L.J.Q.B. 126.

78. Green v. Chelsea Waterworks Co., 1894, 70 L.T. 547.

79. National Tel. Co. v. Baker, [1893] 2 Ch. 186; Dumphy v. Montreal Light Co., [1907] A.C. 455. Compare the rule that a railway run under statutory authority is not liable for the escape of fire. Vaughan v. Taff Vale R. Co., 1860, 5 H. & N. 678, 157 Eng.Rep. 1351; Canadian Pac. R. Co. v. Roy, [1902] A.C. 220.

80. The statute does not relieve the defendant from liability for negligence. Northwestern Utilities v. London Guar. & Acc. Co., [1936] A.C. 105.

81. Pumphrey v. J. A. Jones Construction Co., 1959, 250 Iowa 559, 94 N.W.2d 737; Nelson v. McKenzie-Hague Co., 1934, 192 Minn. 180, 256 N.W. 96; V. N. Green & Co. v. Thomas, 1965, 205 Va. 903, 140 S.E.2d 635. Accord: Benner v. Atlantic Dredging Co., 1892, 134 N.Y. 156, 31 N.E. 328; Fitzgibbon v. Western Dredging Co., 1908, 141 Iowa 328, 117 N.W. 878. See Notes, 1934, 19 Minn.L.Rev. 129; 1966, 23 Wash. & Lee L.Rev. 118.

82. Cogswell v. New York, New Haven & Hartford Railroad Co., 1886, 103 N.Y. 10, 8 N.E. 537; Messer v. City of Dickinson, 1942, 71 N.D. 568, 3 N.W.2d 241, 245. Cf. McLane v. Northwest Natural Gas Co., 1969, 255 Or. 324, 467 P.2d 635.

83. Smith v. Aldridge, Mo.App.1962, 356 S.W.2d 532; Ferriter v. Herlihy, 1934, 287 Mass. 138, 191 N.E. 352, 354.

84. Whitney v. Ralph Myers Contracting Co., 1961, 146 W.Va. 130, 118 S.E.2d 622; Webster Co. v. Steelman, 1939, 172 Va. 342, 1 S.E.2d 305; Hakkila v. Old Colony Broken Stone & Concrete Co., 1928, 264 Mass. 447, 162 N.E. 895. Cf. Monroe v. Razor Construction Co., 1961, 252 Iowa 1249, 110 N.W.2d 250 (negligence).

85. Second Restatement of Torts, § 521. Boxes, Ltd. v. British Waterways Bd., 1970, 2 Lloyd's L.R. 434 (Q.B.).

ological garden are not subject to strict liability for harm done by the animals kept,[86] and a carrier which is required to accept dangerous animals,[87] or explosives[88] for transportation has been held liable only for negligence. The public utility that is engaged in generating and distributing electricity, no doubt an abnormally dangerous activity, is often intensively regulated as to rates and manner of rendition of the service. That being so, such an activity, authorized, sanctioned, and regulated in such a manner, may not be regarded as the kind that should be subjected to strict liability. This could depend in large part upon whether ratepayers for the service rendered should be required to absorb the costs of unavoidable accidents.

WESTLAW REFERENCES

synopsis,digest(damages /p limit! extend extent! /p strict! absolut! /s liab!)

Nature of Risk and Type of Harm Threatened

synopsis,digest(dog* cattle animal! livestock! horse* cow*) & strict! absolut! /s liab! & foresee! unforesee! reason! normal /s consequence! risk! harm*

28k70

Class of Persons Protected

synopsis,digest(dog* /p trespasser*)

28k68 /p trespasser* invitee* licensee*

wild vicious /s dog* animal* /p strict! absolut! /s liab!

Manner of Occurrence

siegler /5 kulhman

synopsis,digest(contributory /p strict! absolut! /s liab!) % topic(313a)

synopsis,digest(assumption assume* /s risk* /p strict! absolut! /s liab!) % topic(313a)

Privilege

zoo zoological /p strict! absolut! /s liab!

§ 80. Employers' Liability

The outstanding statutory application of the principle of strict liability is in the workers' compensation acts, which have very largely preempted the whole field of the liability of employers for injuries to their employees. Basically they do not rest upon any theory of tort liability, but upon one of social insurance.

The background of these statutes lay in the very limited tort liability of the master to his servant at common law. The extent of the employer's responsibility, although it was said to rest upon the understanding of the parties, undoubtedly was fixed by the courts upon the basis of old industrial conditions, and a social philosophy and an attitude toward labor, which are long since outmoded. The cornerstone of the common law edifice was the economic theory that there was complete mobility of labor, that the supply of work was unlimited, and that the worker was an entirely free agent, under no compulsion to enter into the employment. He was expected therefore to accept and take upon himself all of the usual risks of the trade, together with any unusual risks of which he had knowledge, and to relieve the employer of any duty to protect him. The economic compulsion which left him no choice except starvation, or equally dangerous employment elsewhere, was entirely disregarded. The employer's responsibili-

86. Jackson v. Baker, 1904, 24 App.D.C. 100; Guzzi v. New York Zoological Society, 1920, 192 App.Div. 263, 182 N.Y.S. 257, affirmed 1922, 233 N.Y. 511, 135 N.E. 897.

The city itself is not liable where it has legislative authority. McKinney v. City and County of San Francisco, 1952, 109 Cal.App.2d 844, 241 P.2d 1060; Hibbard v. City of Wichita, 1916, 98 Kan. 498, 159 P. 399. It is, however, strictly liable where it has no authority. City of Mangum v. Brownlee, 1938, 181 Okl. 515, 75 P.2d 174; Collentine v. City of New York, 1938, 279 N.Y. 119, 124, 17 N.E.2d 792, 795; Hyde v. City of Utica, 1940, 259 App.Div. 477, 20 N.Y.S.2d 335.

87. Malloy v. Starin, 1908, 191 N.Y. 21, 83 N.E. 588. The Restatement of Torts, § 517, takes the position that if the carrier is not required to accept the ... ment it may be strictly liable. But see, to the ... that it is sufficient that it is authorized to accept it ... carrier, Stamp v. Eighty-Sixth Street Amusement ... 1916, 95 Misc. 599, 159 N.Y.S. 683; cf. Pope v. Ed... M. Rude Carrier Corp., 1953, 138 W.Va. 218, 75 S.... 584 (dynamite).

88. Actiesselskabet Ingrid v. Central Railroad ... of New Jersey, 2d Cir. 1914, 216 F. 72, rehearing ... nied 216 F. 991, certiorari denied 238 U.S. 615, 35 ... 284, 59 L.Ed. 1490; Pope v. Edward M. Rude C... Corp., 1953, 138 W.Va. 218, 75 S.E.2d 584.

To: Brian

From: Jim

Re: Amendment to HB 58 re immunity of public electric utility companies from strict liability

Brian:

I attach pages 567 and 568 from the **Prossor and Keeton on Torts,** 5th Edition, which recognizes the correctness of granting immunity from strict liability to public electric utility companies. Although no cases are footnoted, Section 521 of the Second Restatement of Torts is footnoted.

It is interesting to note the language in **Prosser** also is aimed at extending immunity to zoos from strict liability. Alaska already has a statute on the books for zoos [AS 09.65.180], so the extension of immunity to electric utility companies by statute is consistent with what the 1990 legislature did for zoos.

Jim

Jim
Rep

A Primer on Punitive Damages

By Bert C. Cozart

A solid punitive damage claim is a powerful weapon for a plaintiff. Since the trier of fact does not precisely determine such damages at trial, the claim adds unpredictability to the case. Also, a punitive damage award is difficult to overturn on appeal (see *BMW of North America, Inc. v Gore* (1996) 116 S Ct 1589, and *Devlin v Kearny Mesa AMC/Jeep/Renault* (1984) 155 CA3d 381, for a discussion of specific standards). Indeed, "[c]ourts have affirmed punitive damage awards with a ratio [to the compensatory award] of as high as 2000 to 1." *Devlin,* 155 CA3d at 390. Thus, a deep-pocket defendant who has committed an egregious act is at high risk for a large punitive damage award, regardless of the actual damage caused. Such a defendant may prefer to settle the case for a known sum before trial rather than risk receiving a large punitive damage award after trial.

To make effective use of a punitive damage claim, attorneys must focus on building their case from day one, regardless of the actual damage amount sought. They must be armed with knowledge of the basics of pleading punitive damages and the special pretrial discovery techniques necessary to obtain the evidence to prove the claim at trial. The following discussion is aimed at providing this information so that attorneys can properly plead the claim and be prepared to present evidence at trial.

Where to File

Always file a case seeking punitive damages in superior rather than municipal court, regardless of the amount of actual damages sought. The municipal court cannot enter a judgment greater than $25,000, which virtually eliminates the leverage gained in settlement negotiations by the unpredictability of a large punitive damage award.

The amount of damages sought cannot be alleged in a complaint brought in superior court for personal injury or wrongful death. CCP §425.10(b). Thus, "[f]iling such actions in the superior court is probably enough by itself to establish the amount in controversy over $25,000." Weil and Brown, Cal Practice Guide: Civil Procedure Before Trial, ¶3:65, pp3–18 (Rutter 1996). In cases involving other claims, the complaint cannot allege the amount of punitive damages sought (CCP §3295(e)); therefore, an allegation that the total amount of damages (actual and punitive) is over the superior court's jurisdictional minimum will probably establish superior court jurisdiction. Weil and Brown, ¶3:67, pp3–18; *Gold v Los Angeles Democratic League* (1975) 49 CA3d 365, 375 n6 (court considered allegations of both actual and punitive damages in determining jurisdiction when pleading rules allowed amount of punitive damages sought to be alleged in complaint).

What Conduct Must Be Pleaded

Plaintiffs can recover punitive damages in tort actions "for the sake of example and by way of punishing the defendant" if they can prove "by clear and convincing

Bert C. Cozart, an associate with Troop Meisinger Steuber & Pasich in Los Angeles, litigates a wide variety of business disputes and specializes in representing policyholders in insurance coverage disputes.

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evidence that the defendant has been guilty of oppression, fraud, or malice." CC §3294(a).

"Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." CC §3294(c)(2). "Despicable conduct" is "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. Such conduct has been described as having the character of outrage frequently associated with crime." *Tomaselli v Transamerica Ins. Co.* (1994) 25 CA4th 1269, 1287. "Fraud" is defined as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." CC §3294(c)(3). "Malice" is defined as conduct "intended by the defendant to cause injury to the plaintiff" or "despicable conduct ... carried on by the defendant with a willful and conscious disregard of the rights or safety of others." CC §3294(c)(1). ("Despicable conduct" is defined above under "oppression.")

Thus, punitive damages are appropriate where a defendant intended to injure the plaintiff or acted in conscious disregard of whether the plaintiff would be injured.

How to Plead the Claim

Plaintiffs must plead both the circumstances of oppression, fraud, or malice and the facts to support those circumstances. *Grieves v Superior Court* (1984) 157 CA3d 159, 166. Conclusory allegations without any references to wrongful motive, intent, or purpose are subject to a motion to strike. *Cyrus v Haveson* (1976) 65 CA3d 306, 316-17.

Courts have liberally construed this pleading requirement by allowing the complaint as a whole to supply the facts supporting the circumstances of oppression, fraud, or malice. See *Monge v Superior Court (Crown Gibraltar)* (1986) 176 CA3d 503, 510; *Perkins v Superior Court (General Telephone)* (1981) 117 CA3d 1, 6-7. (Of course, as a cause of action, fraud must be specifically pleaded. *Stansfield v Starkey* (1990) 220 CA3d 59, 72-75.) However, it is not worth taking the chance that the court will consider the complaint as a whole if the defendant moves to strike. Although the motion to strike would probably be granted with leave to amend the complaint, there is always the possibility that the court will refuse to give leave to amend. Moreover, the filing of a motion to strike delays the important punitive damage discovery process: The court will probably not be receptive to a motion for an order allowing this discovery while a motion to strike is pending. Therefore, you should include all the facts you have at this early stage in your punitive damage allegations.

Finally, a punitive damage claim cannot state an amount sought. CC §3295(e). You should also know that there are special requirements for asserting such claims against an employer for an employee's wrongful acts (CC §3294(b)), a health care provider (CCP §425.13), or a religious corporation (CCP §425.14).

Getting Evidence of Defendants' Wealth

Punitive damages are meant to punish. Therefore it is necessary to determine what amount will impose the appropriate punitive effect. In determining this amount, the court *must* consider the defendant's financial condition. *Adams v Murakami* (1991) 54 C3d 105. The defendant's net worth is generally considered the best measure for the purpose of assessing punitive damages *(Downey Sav. & Loan Ass'n v Ohio Casualty Ins. Co.* (1987) 189 CA3d 1072, 1100), although the amount of profit gained from the tort has also been used (*Stevens v Owens-Corning Fiberglass Corp.*, 49 CA4th 1645, 1659-60).

The plaintiff bears the burden of presenting evidence of the defendant's financial condition at trial. *Adams*, 54 C3d at 119-23. Under Civil Code section 3295(c), the plaintiff can obtain this evidence either by subpoena requiring the production of the evidence at trial or by moving for an order allowing the plaintiff to conduct financial condition discovery. For some defendants (publicly held companies or insurance companies, for example) the information can be gathered more easily through investigation into public records such as filings they must make with state and federal governments regarding their financial condition. For most defendants, however, you must rely on section 3295(c).

Although section 3295(c) does not specifically provide that a subpoena may be served on third parties, it does provide that "the plaintiff may subpoena documents and witnesses," which presumably includes third parties as well as defendants. Obtaining financial evidence through discovery, however, is much more advantageous than serving subpoenas. The subpoena procedure requires that the subpoenaed party produce the documents and witnesses *at* trial, whereas the evidence can be gathered in discovery *before* trial, allowing plaintiffs counsel time to review the evidence and follow up with further discovery if questions remain unanswered.

In addition, the scope of information available to the plaintiff is much broader: A subpoena can demand only *admissible* evidence of financial condition, whereas in discovery the plaintiff can obtain information that is either "relevant to the subject matter" of the case (a standard that is broader than the standard of relevancy to the issues that determines admissibility at trial (*Laddon v Superior Court (Ross)* (1959) 167 CA2d 391, 396)) or "reasonably calculated to lead to the discovery of admissible evidence." CCP §2017(a). Moreover, on a practical note, evidence of the defendant's financial condition may influence your decision as to the importance of your case. You would want to learn that your defendant's pockets are not deep but shallow during discovery rather than at trial after you have put a lot of work into the case.

The motion to conduct financial condition discovery should be filed as soon as possible so that there will be time to conduct several rounds of discovery if necessary. If the court denies the motion, it will probably do so without prejudice, so nothing is lost by bringing the motion early. *Rowe v Superior Court (Church of Scientology of Orange County)* (1993) 15 CA4th 1711, 1735. Even a plaintiff who has not successfully pleaded a punitive damage

priate state's law.[67] Numerous commentators have unanimously concluded that the federal Atomic Energy Act left the issue of liability determinations to state law.[68]

Most private enterprisers who are engaged in the production, transportation, and handling of nuclear materials and energy are either operating under a license procured under the federal government and are often either public utilities or of a similar type and not the ordinary private enterprises operating in a competitive environment. This being so the question can be raised as to whether or not the enterpriser is the type upon which liability without fault should be visited.[69] This is briefly discussed hereafter. The Atomic Energy Act takes no position but it does limit liability for a nuclear disaster to 560 million dollars. The constitutionality of this limitation has been established.[70]

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rylands /5 fletcher

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restatement /5 torts /10 519 520

synopsis,digest(blast! /p strict! absolut! /5 liab!) 164k12

Recent Developments and Revisor's Comments

ultrahazardous extrahazardous abnormal! hazard! /p strict! absolut! /5 liab! & date(after 1971)

Aircraft, Rockets and Nuclear Energy

rocket* nuclear* /p ultrahazardous hazard! abnormal! /p strict! absolut! /5 liab!

title(silkwood & kerr-mcgee)

sh 667 f.2d 908

silkwood /10 kerr-mcgee

ic 667 f2d 908

67. Silkwood v. Kerr-McGee Corp., W.D.Okl.1979, 485 F.Supp. 566, affirmed in part, reversed in part, 10th Cir.1982, 667 F.2d 908.

68. See Moore, Radiation and Preconception Injuries: Some Interesting Problems in Tort Law, 1974, 28 Sw.L.J. 414, 427; Green, Nuclear Power: Risk, Liability, and Indemnity, 1973, 71 Mich.L.Rev. 479, 496.

69. See infra, § 79 under "Privilege."

70. Duke Power Co. v. Carolina Environmental Study Group, Inc., 1978, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595. See Note, The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act, 1974, 6 Rutgers-Camden L.J. 360.

42 /10 2210

§ 79. Extent of Liability

In dealing with the extent of strict liability, and the limitations upon it, it is convenient to group together all of the areas in which it is applied, since, with some occasional exceptions, reasonably consistent rules have developed which are common to all of them. It is clear, first of all, that unless a statute requires it, strict liability will never be found unless the defendant is aware of the abnormally dangerous condition or activity, and has voluntarily engaged in or permitted it.[1] Mere negligent failure to discover or prevent it is not enough, although it may, of course, be an independent basis of liability.

Once the responsibility is established, it frequently is stated, in cases of strict liability, that the defendant acts "at his peril," [2] and is an insurer against the consequences of his conduct. What is meant is that he is liable although (1) he did not intend an invasion on the basis of which liability could be imposed and (2) he was not negligent in proximately causing harm. But there are not lacking indications that the liability itself is thought to be an extensive one. Baron Bramwell[3] once carried this to the length of saying that if a person kept a tiger and lightning broke its chain, he might be liable for all the mischief the tiger might do.

But such extended responsibility may undoubtedly impose too heavy a burden upon the defendant. It is one thing to say that a

§ 79

1. Zampos v. United States Smelting, Refining & Mining Co., 10th Cir. 1953, 206 F.2d 171; The Nitroglycerine Case (Parrott v. Wells, Fargo & Co.), 1872, 82 U.S. (15 Wall.) 524, 21 L.Ed. 206; Hunt v. Hazen, 1953, 197 Or. 637, 254 P.2d 210; Dickson v. Graham-Jones Paper Co., Fla.1956, 84 So.2d 309.

2. Rylands v. Fletcher, 1868, L.R. 3 H.L. 330, 37 L.J.Ex. 161; Exner v. Sherman Power Construction Co., 2d Cir. 1931, 54 F.2d 510.

3. In Nichols v. Marsland, 1875, L.R. 10 Ex. 255.

dangerous enterprise must pay its way within reasonable limits, and quite another to say that it must bear responsibility for every extreme of harm that it may cause. The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of "proximate cause" in negligence cases,[4] demands here that some limit be set. It might be expected that this limit would be a narrower one where no initial departure from a social standard is to be found. In general, this has been true. Just as liability for negligence has tended to be restricted within narrower boundaries than when intentional misconduct is involved,[5] there is a visible tendency to restrict it still further when there is not even negligence. The intentional wrongdoer is commonly held liable for consequences extending beyond the scope of the foreseeable risk created,[6] and many courts have carried negligence liability beyond the risk to some extent.[7] But where there is neither intentional harm nor negligence, the line is generally drawn at the limits of the risk,[8] or even within it. This limitation has been expressed by saying that the defendant's duty to insure safety extends only to certain consequences.[9] More commonly, it is said that the defendant's conduct is not the "proximate cause" of the damage.[10] But ordinarily in such cases no question of causation is involved, and the limitation is one of the policy underlying liability.

Nature of Risk and Type of Harm Threatened

The nature of the risk and the type of damage threatened by the conduct which entails strict liability is well defined. The keeping of vicious animals involves the risk that human beings or other animals will be attacked; the risk of abnormally dangerous things and activities, such as high tension electricity or blasting, is sufficiently obvious. In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility.

Thus, the owner of trespassing animals has been held strictly liable for consequences of the trespass which were reasonably to be expected from an invasion by animals of the particular kind—including, of course, damage to crops, attacks upon other animals,[11] infecting them with disease,[12] or the misalliance of a scrub bull with a pedigreed heifer.[13] The same has been true of personal injuries suffered by the owner in an attempt to put the animal out, which has been regarded as foreseeable, reasonably likely to occur, and to provoke resistance.[14] On the other hand, there are several cases[15] denying recovery for injuries from quite un-

4. See supra, § 42; Carpenter, Proximate Cause, 1942, 15 So.Cal.L.Rev. 188, 195–198.

5. See supra, § 43.

6. Cf. Wyant v. Crouse, 1901, 127 Mich. 158, 86 N.W. 527; Isham v. Dow's Estate, 1898, 70 Vt. 588, 41 A. 585; Derosier v. New England Telephone & Telegraph Co., 1925, 81 N.H. 451, 130 A. 145.

7. See supra, § 43.

8. See Harper, Liability Without Fault and Proximate Cause, 1932, 30 Mich.L.Rev. 1001.

9. See Pollock, Duties of Insuring Safety: The Rule in Rylands v. Fletcher, 1886, 2 L.Q.Rev. 52.

10. See Harper, Liability Without Fault and Proximate Cause, 1932, 30 Mich.L.Rev. 1001.

11. Dolph v. Ferris, 1844, 7 Watts & S. 367 (bull); McKee v. Trisler, 1924, 311 Ill. 536, 143 N.E. 69 (bull); Morgan v. Hudnell, 1893, 52 Ohio St. 552, 40 N.E. 716 (horse); Ellis v. Loftus Iron Co., 1874, L.R. 10 C.P. 10 (horse); Hilton v. Overly, 1918, 69 Pa.Super. 348 (boar hog). Cf. Houska v. Hrabe, 1915, 35 S.D. 269, 151 N.W. 1021 (playful horse).

12. Anderton v. Buckton, 1718, 11 Mod. 304, 88 Eng.Rep. 1054; Theyer v. Purnell [1918] 2 K.B. 333; Lee v. Burk, 1884, 15 Ill.App. 651.

13. Crawford v. Williams, 1878, 48 Iowa 247; McLean v. Brett, 1919, 15 Alta.L.Rep. 43, 49 Dom.L.Rep. 162; Cousins v. Greaves, 1920, 13 Sask.L.Rep. 443, 54 Dom.L.Rep. 630. See, among the classics of legal humor on this subject, Kopplin v. Quade, 1911, 145 Wis. 454, 130 N.W. 511.

14. Troth v. Wills, 1897, 8 Pa.Super. 1; Nixon v. Harris, 1968, 15 Ohio St.2d 105, 238 N.E.2d 785; Walker v. Nickerson, 1935, 291 Mass. 522, 197 N.E. 451; Robinson v. Kerr, 1960, 144 Colo. 48, 355 P.2d 117; Harris Park Lakeshore, Inc. v. Church, 1963, 152 Colo. 278, 381 P.2d 459.

15. Leipske v. Guenther, 1959, 7 Wis.2d 86, 95 N.W.2d 774, rehearing denied 7 Wis.2d 86, 96 N.W.2d 821 (horse reached over high fence and bit schoolgirl in

benefit, as where water[72] or gas[73] pipes are maintained for his use, his willingness to encounter the risk is found by implication from his acceptance of the situation.

Privilege

There are certain conditions under which conduct which would otherwise result in strict liability may be privileged. The most obvious one is that of a sanction given by statutory authority, or by well defined local law.[74] Within the limitations of the constitution,[75] the legislature may authorize acts which involve a high degree of risk to others, and such authority amounts at least to a declaration that the acts are not antisocial, but desirable for the benefit of the community. In the absence of a provision expressly preserving the defendant's liability for any resulting damage,[76] the courts have on occasion interpreted the statute as condoning the consequences in advance, and have refused to hold the defendant liable for doing what was authorized. Thus where gas,[77] water,[78] or electric[79] conduits are laid in the street under legislative sanction, it has been held that there is no liability for the damage they may do, in the absence of some negligence.[80] Likewise a contractor, doing work involving blasting for the state, has been held not subject to strict liability.[81] The tendency in the later cases has been to avoid such a conclusion, by strict construction of the authorizing statute,[82] or by finding an implied condition that there shall be liability,[83] or that the manner of doing the work, or the resulting damage itself, are not authorized or necessary consequences of the sanctioned work.[84]

Even without a statutory exemption from strict liability, express or implied, the defendant may be regarded as so engaged in the rendition of such an essential public service as to justify an exception to the general rule of strict liability. It is generally held that the rules of strict liability do not apply if the activity is carried on in pursuance of a public duty.[85] The custodians of a public zo-

.62 N.E. 94; Gomes v. Byrne, 1959, 51 Cal.2d 418, 333 P.2d 754; Brown v. Barber, 1943, 26 Tenn.App. 534, 174 S.W.2d 298.

72. Carstairs v. Taylor, 1871, L.R. 6 Ex. 217; Rickards v. Lothian, [1913] A.C. 263; Blake v. Woolf, [1898] 2 Q.B. 426.

73. Cf. Hess v. Greenway, Ont.1919, 48 Dom.L.Rep. 630; E. I. Du Pont de Nemours & Co. v. Cudd, 10th Cir. 1949, 176 F.2d 855 (plaintiff participating in activity).

74. See Linden, Strict Liability—Nuisance and Legislative Authorization, 1966, 4 Osgoode Hall L.Rev. 196. Also Madras R. Co. v. Zemindar of Carvatenagarum, 1874, L.R. 1 Ind.App. 364, 30 L.T. 770; Notes, 1960, 12 Stan.L.Rev. 691; 1938, 13 Notre Dame L. 229.

75. See generally Bacon v. City of Boston, 1891, 154 Mass. 100, 28 N.E. 9; Cohen v. Mayor of New York, 1889, 113 N.Y. 532, 21 N.E. 700; Rose v. State, 1942, 19 Cal.2d 713, 123 P.2d 505; Chick Springs Water, Inc. v. State Highway Department, 1931, 159 S.C. 481, 157 S.E. 842.

76. In such a case there is liability without negligence. Midwood & Co. v. Mayor of Manchester, [1905] 2 K.B. 597; Charing Cross Elec. Supply Co. v. Hydraulic Power Co., [1914] 3 K.B. 772.

77. Gould v. Winona Gas Co., 1907, 100 Minn. 258, 261, 111 N.W. 254, 255; Schmeer v. Gas Light Co., 1895, 147 N.Y. 529, 42 N.E. 202, 205; Price v. South Metropolitan Gas Co., 1895, 65 L.J.Q.B. 126.

78. Green v. Chelsea Waterworks Co., 1894, 70 L.T. 547.

79. National Tel. Co. v. Baker, [1893] 2 Ch. 186; Dumphy v. Montreal Light Co., [1907] A.C. 455. Compare the rule that a railway run under statutory authority is not liable for the escape of fire. Vaughan v. Taff Vale R. Co., 1860, 5 H. & N. 678, 157 Eng.Rep. 1351; Canadian Pac. R. Co. v. Roy, [1902] A.C. 220.

80. The statute does not relieve the defendant from liability for negligence. Northwestern Utilities v. London Guar. & Acc. Co., [1936] A.C. 105.

81. Pumphrey v. J. A. Jones Construction Co., 1959, 250 Iowa 559, 94 N.W.2d 737; Nelson v. McKenzie-Hague Co., 1934, 192 Minn. 180, 256 N.W. 96; V. N. Green & Co. v. Thomas, 1965, 205 Va. 903, 140 S.E.2d 635. Accord: Benner v. Atlantic Dredging Co., 1892, 134 N.Y. 156, 31 N.E. 328; Fitzgibbon v. Western Dredging Co., 1908, 141 Iowa 328, 117 N.W. 878. See Notes, 1934, 19 Minn.L.Rev. 129; 1966, 23 Wash. & Lee L.Rev. 118.

82. Cogswell v. New York, New Haven & Hartford Railroad Co., 1886, 103 N.Y. 10, 8 N.E. 537; Messer v. City of Dickinson, 1942, 71 N.D. 568, 3 N.W.2d 241, 245. Cf. McLane v. Northwest Natural Gas Co., 1969, 255 Or. 324, 467 P.2d 635.

83. Smith v. Aldridge, Mo.App.1962, 356 S.W.2d 532; Ferriter v. Herlihy, 1934, 287 Mass. 138, 191 N.E. 352, 354.

84. Whitney v. Ralph Myers Contracting Co., 1961, 146 W.Va. 130, 118 S.E.2d 622; Webster Co. v. Steelman, 1939, 172 Va. 342, 1 S.E.2d 305; Hakkila v. Old Colony Broken Stone & Concrete Co., 1928, 264 Mass. 447, 162 N.E. 895. Cf. Monroe v. Razor Construction Co., 1961, 252 Iowa 1249, 110 N.W.2d 250 (negligence).

85. Second Restatement of Torts, § 521. Boxes, Ltd. v. British Waterways Bd., 1970, 2 Lloyd's L.R. 434 (Q.B.).

ological garden are not subject to strict liability for harm done by the animals kept,[86] and a carrier which is required to accept dangerous animals,[87] or explosives[88] for transportation has been held liable only for negligence. The public utility that is engaged in generating and distributing electricity, no doubt an abnormally dangerous activity, is often intensively regulated as to rates and manner of rendition of the service. That being so, such an activity, authorized, sanctioned, and regulated in such a manner, may not be regarded as the kind that should be subjected to strict liability. This could depend in large part upon whether ratepayers for the service rendered should be required to absorb the costs of unavoidable accidents.

WESTLAW REFERENCES

synopsis,digest(damages /p limit! extend extent! /p strict! absolut! /s liab!)

Nature of Risk and Type of Harm Threatened

synopsis,digest(dog* cattle animal! livestock! horse* cow*) & strict! absolut! /s liab! & foresee! unforesee! reason! normal /s consequence! risk! harm*

28k70

Class of Persons Protected

synopsis,digest(dog* /p trespasser*)

28k68 /p trespasser* invitee* licensee*

wild vicious /s dog* animal* /p strict! absolut! /s liab!

Manner of Occurrence

siegler /5 kulhman

synopsis,digest(contributory /p strict! absolut! /s liab!) % topic(313a)

synopsis,digest(assumption assume* /s risk* /p strict! absolut! /s liab!) % topic(313a)

Privilege

zoo zoological /p strict! absolut! /s liab!

§ 80. Employers' Liability

The outstanding statutory application of the principle of strict liability is in the workers' compensation acts, which have very largely preempted the whole field of the liability of employers for injuries to their employees. Basically they do not rest upon any theory of tort liability, but upon one of social insurance.

The background of these statutes lay in the very limited tort liability of the master to his servant at common law. The extent of the employer's responsibility, although it was said to rest upon the understanding of the parties, undoubtedly was fixed by the courts upon the basis of old industrial conditions, and a social philosophy and an attitude toward labor, which are long since outmoded. The cornerstone of the common law edifice was the economic theory that there was complete mobility of labor, that the supply of work was unlimited, and that the worker was an entirely free agent, under no compulsion to enter into the employment. He was expected therefore to accept and take upon himself all of the usual risks of the trade, together with any unusual risks of which he had knowledge, and to relieve the employer of any duty to protect him. The economic compulsion which left him no choice except starvation, or equally dangerous employment elsewhere, was entirely disregarded. The employer's responsibility

86. Jackson v. Baker, 1904, 24 App.D.C. 100; Guzzi v. New York Zoological Society, 1920, 192 App.Div. 263, 182 N.Y.S. 257, affirmed 1922, 233 N.Y. 511, 135 N.E. 897.

The city itself is not liable where it has legislative authority. McKinney v. City and County of San Francisco, 1952, 109 Cal.App.2d 844, 241 P.2d 1060; Hibbard v. City of Wichita, 1916, 98 Kan. 498, 159 P. 399. It is, however, strictly liable where it has no authority. City of Mangum v. Brownlee, 1938, 181 Okl. 515, 75 P.2d 174; Collentine v. City of New York, 1938, 279 N.Y. 119, 124, 17 N.E.2d 792, 795; Hyde v. City of Utica, 1940, 259 App.Div. 477, 20 N.Y.S.2d 335.

87. Malloy v. Starin, 1908, 191 N.Y. 21, 83 N.E. 588. The Restatement of Torts, § 517, takes the position that if the carrier is not required to accept the shipment it may be strictly liable. But see, to the effect that it is sufficient that it is authorized to accept it as a carrier, Stamp v. Eighty-Sixth Street Amusement Co., 1916, 95 Misc. 599, 159 N.Y.S. 683; cf. Pope v. Edward M. Rude Carrier Corp., 1953, 138 W.Va. 218, 75 S.E.2d 584 (dynamite).

88. Actiesselskabet Ingrid v. Central Railroad Co. of New Jersey, 2d Cir. 1914, 216 F. 72, rehearing denied 216 F. 991, certiorari denied 238 U.S. 615, 35 S.Ct. 284, 59 L.Ed. 1490; Pope v. Edward M. Rude Carrier Corp., 1953, 138 W.Va. 218, 75 S.E.2d 584.

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(206) 292-8008

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JUNEAU, ALASKA 99801
(907) 586-2210

ANCHORAGE OFFICE
550 W. 7TH AVENUE, SUITE 1000
ANCHORAGE, ALASKA 99501-3510
(907) 274-0666

February 5, 1997

via FAX (907)465-3834

Jim Sourant
c/o Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: SS for H.B. 58
File No. 1795.6377

Dear Jim:

As per our discussion, this language captures the concept, I think. I look forward to discussing this with you tomorrow.

(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability under AS 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action [AS 09.16.040]. In the event there is a finding of fault on the part of the employer, the payment and credit to the employer pursuant to AS 23.30.015(g) shall be reduced by the ~~amount~~ the claimant's award was reduced because of fault allocated to the employer under this subsection;

Very truly yours,

Michael A. Barcott

MAB:mb
cc: Roger Holmes
David Jones - ANIC, Anchorage

TOTAL P.02

Name of Lobbyist	Contract/Salaried	Subject	Name of Client/Employer	Termination Date
DILLON, Frank J. 3443 Minnesota Drive Anchorage, AK 99503 907-276-1149	Salaried Employee	Transportation	AK Trucking Assn., Inc.	
DOW, Thomas M. 2815 2nd Avenue #400 Seattle, WA 98121 9206-728-4202	Salaried Employee	Tourism	Princess Tours	
DOWDEN, William 7440 Woodland Drive Indianapolis, IN 46278 317-297-4123	Salaried Employee	Insurance	Golden Rule Insurance Co.	
DOYLE, Mila 211 4th Street #306 Juneau, AK 99801 907-586-2334	Salaried Employee	Labor	AK Public Employees Assn./AFT	
ETHERIDGE, Don Jr. 710 West 9th Street Juneau, AK 99801 907-586-3707	Salaried Employee	Labor	AK State District Council Laborers	
EVANS, Gordon E. 318 4th Street Juneau, AK 99801 907-586-3210	Contract Lobbyist Contract Lobbyist	Insurance Transportation	Health Insurance Association of America Totem Ocean Trailer Express	
EVANS, Robert A. PO Box 100384 Anchorage, AK 99510 907-586-6252	Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist Contract Lobbyist	Marine Pilots Local Government Local Boundaries Local Government Electric Utilities Transportation HydroElectic Power Telecommunications Railroad Issues	AK Marine Pilots Bristol Bay Borough Chugach Alaska Corporation City of Petersburg Copper Valley Electric Assn FAS Alaska Project Mgmt/Four Dam Pool Tel Alaska Montana Rail Link, Inc.	

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SENT TO: ALASKA STATE LEGISLATURE	**FAX NO:** (907)465-3834
ATTN: Jim Sourant	**PAGES:** 1 + COVER
FROM: Michael A. Barcott	**RE:** HB 58 **FILE NO:** 1795.6377

CONTENTS OF FAX: Letter to Jim Sourant

MESSAGE:

Name of Lobbyist	Contract/Salaried	Subject	Name of Client/Employer	Termination Date
GEORGE, John 3328 Fritz Cove Road Juneau, AK 99801 907-789-0172	Contract Lobbyist	Fisheries	United SE Alaska Gillnetters	
	Contract Lobbyist	Insurance	AFLAC	
	Contract Lobbyist	Insurance	American Council of Life Insurance	
GILLESPIE, Raymond A. 9478 Riverbend Court Juneau, AK 99801 907-463-3375	Contract Lobbyist	Construction	IAPMO	
	Contract Lobbyist	Fisheries	Assn. Regional Aquaculture Assns.	
	Contract Lobbyist	Local Government	Matanuska-Susitna Borough	
	Contract Lobbyist	Telecommunications	AT & T	
	Contract Lobbyist	Local Government	McNabbs	
	Contract Lobbyist	Oil/Gas	Delta Western	
GRAVEL, Mike 1600 North Oak St. #1412 Arlington, VA 22209 703-516-4056	Salaried Employee	Energy/Utilities	The Energy Group	
GRAVO, Mitchell D. 170 Botanical Circle Anchorage, AK 99515 907-244-2884	Contract Lobbyist	Tourism	AK Hotel Motel Association	
	Contract Lobbyist	Construction	AK State Homebuilders Association	
	Contract Lobbyist	Banking/Finance	AK Consumer Financial Services Assn.	
	Contract Lobbyist	Tourism	Anchorage Convention & Visitors Bureau	
	Contract Lobbyist	Economic Development	Anchorage Economic Development Corp.	
	Contract Lobbyist	Telecommunication	Anchorage Telephone Utility	
	Contract Lobbyist	Local Government	Municipality of Anchorage	
	Contract Lobbyist	Transportation	Northern Air Cargo	
	Contract Lobbyist	Information Services	RL Polk & Company	
	Contract Lobbyist	Recreation	Seibu AK - Alyeska Resort	
	Contract Lobbyist	Tobacco	UST Public Affairs Inc.	
	Contract Lobbyist	Education	AK Assn. of Private Career Educators	
	Contract Lobbyist	Telecommunications	MacTel Cellular Inc.	
GRAY, Leigh A. 121 W Fireweed #207 Anchorage, AK 99503 907-272-1481	Salaried Employee	Oil/Gas	AK Oil & Gas Association	

LAW OFFICES OF
FAULKNER, BANFIELD, DOOGAN & HOLMES
A PROFESSIONAL CORPORATION
FIRST INTERSTATE CENTER
999 THIRD AVE., SUITE 2600
SEATTLE, WASHINGTON 98104
FAX (206) 340-0289
(206) 292-8008

JUNEAU OFFICE
302 GOLD STREET
JUNEAU, ALASKA 99801
(907) 586-2210

ANCHORAGE OFFICE
550 W. 7TH AVENUE, SUITE 1000
ANCHORAGE, ALASKA 99501-3510
(907) 274-0666

February 4, 1997

via FAX (907)465-3834

Jim Sourant
c/o Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: SS for H.B. 58
File No. 1795.6377

Dear Jim:

Below is language which could be added to Sec. 16 of the Bill (AS 09.17.080(a)) to deal with the workers' compensation lien issue. After speaking with Roger I have put in shaded type our proposed addition to subsection (2).

> (2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability under AS 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action [AS 09.16.040]. In the event there is a finding of fault on the part of the employer, the payment and credit to the employer pursuant to AS 23.30.015(g) shall be reduced by the percentage of fault assessed against the employer pursuant to this subsection.

Please let me know if there is anything at all that I can do to assist.

Very truly yours,

Michael A. Barcott

MAB:mb
cc: Roger Holmes
David Jones - ANIC, Anchorage

TOTAL P.02

Ms. Sylvia C. Sullivan 835-3729

PO Box 2684

			Distribution	Affiliation	Reg Voter
Valdez	AK	99686	07	Alaskan	01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 14	Supports	

WE ADAMANTLY SUPPORT THIS BILL.

---

short title CORPORAL CORRECTON OF STUDENTS

Mr. Thomas W Reinbolt 688-5264

P O Box 670406

			Distribution	Affiliation	Reg Voter
Chugiak	AK	99567	60		01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
U	N		None	VETERANS

THE 36 VETERANS OF LAND LOTTERY 12 HAVE NEVER GOTTEN THE SAME DISCOUNT AS ALL OTHER VETERANS. DNR COMMISSIONER SHIVELY HAS AGREED WITH THE STATE OMBUDSMAN REPORT AO95-2803 TO FINALLY CORRECT THIS. PLEASE APPROPRIATE

FUNDS TO PAY THEM THEIR OVERPAYMENTS AND INTEREST ALSO. THE STATE HAS HAD THEIR MONEY FOR YEARS.

---

short title

Ms. Deborah Prewitt 479-2206

687 Blanket Blvd

			Distribution	Affiliation	Reg Voter
North Pole	AK	99705	60		01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

I THINK A LOT OF THESE PEOPLE ARE NOT LOCAL HIRE AND IT IS RIDICULOUS THAT THEY COME UP HERE AND TRY TO CHANGE OUR LAWS. IT IS ASININE.

---

short title VOLUNTARY FLEXIBLE WORK PLAN:

FAULKNER, BANFIELD, DOOGAN & HOLMES
999 Third Avenue, Suite 2600
Seattle, Washington 98104
(206) 292-8008
Fax: (206) 340-0289

FAX COVER SHEET

CONFIDENTIALITY NOTICE: The documents accompanying this facsimile message contain confidential communications which may be subject to protection under the attorney-client privilege or the attorney work-product doctrine. These documents are intended solely for the use of the proper addressee and should not be read or retained by anyone other than the intended recipient. If you have received this facsimile in error, please notify us immediately by collect telephone call at (206) 292-8008.

DATE: February 4,1997	**TIME:** 4:44pm
SENT TO: ALASKA STATE LEGISLATURE BISS HOLMES	**FAX NO:** (907)465-3834 (907)243-6695
ATTN: Jim Sourant Roger Holmes	**PAGES:** 1 + COVER
FROM: Michael A. Barcott	**RE:** HB 58 **FILE NO:** 1795.6377
CONTENTS OF FAX: February 4, 1997 letter	
MESSAGE:	

Mr. Matt MacKay 384-3132

16901 Meadow Creek Rd

#104 Distribution Affiliation Reg Voter

Eagle River AK 99577 60 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
U	N		None	VETERANS

PLEASE PAY BACK THE VETERANS OF LAND LOTTERY 12, ALL THEIR PAST DUE MONEYS PLUS THE INTEREST OWED THEM FOR THE MANY YEARS THE STATE HAS HAD THEIR MONEY.

---

short title

Mr. Charles F Cottrell 345-0450

PO Box 112304

Distribution Affiliation Reg Voter

Anchorage AK 99511 07 IBEW 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
Y	N	HB 68	Opposes	

THIS BILL - HB 68 WILL NOT PROTECT WOMEN OR PEOPLE WHICH HAVE MEDICAL PROBLEMS THAT STOP THEM FROM WORKING 12 HOURS A DAY. SINGLE MOTHERS CANNOT SPEND 12 HOURS A DAY WORKING AND RAISE A FAMILY. ALL THIS

BILL DOES IS SUPPORT THE GREED OF THE COMPANIES THAT WANT THIS BILL.

---

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Edgar J Smith 688-7110

22424 North Birchwood

Loop Rd #115 Distribution Affiliation Reg Voter

Chugiak AK 99567 40 01/2

Date POM Sent	Constituency	Bill Number	Response	Subject
U	N	HB 15	Supports	

I WANT YOU TO SUPPORT HB 15 AND HB 42.

---

short title MOVE LEGISLATURE TO ANCHORAGE

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Post-it® Fax Note 7671	Date 2/3	# of pages ▶ 2
To Jim	From M. Ford	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 3834	Fax # 2029	

TITLE 13

Obligation To Defend Action

(Added by Stats. 1987, ch. 1498.)

§ 2860. Provision of independent counsel to insured; Conflicts of interest; Selection of counsel; Waiver of right to counsel

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing

Thu, Jan 30, 1997 Jan 27-Feb 9 1997

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10:00 AM Kent Dawson 463-2533 re: Tort
11:00 AM Session
1:00 PM Judiciary Committee

Tuesday 28

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10:00 AM Press Conference
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3:45 PM Judy late lunch Dr. Longworth

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10:00 AM Joint Hess Committee in Butrovich Rm
10:30 AM Session.
11:00 AM Joint Session
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5:00 PM VFW Reception

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11:00 AM The Hotel/ Motel Assoc.
2:30 PM VFW - Waren Culver American Legion
3:00 PM HESS Committee
6:00 PM Tesoro Reception in the Treadwell Room, Baranof
7:00 PM Tesoro Dinner

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4:00 PM Jerry Reinwand & Jack McRae (Sr. VP Blue Cross WA &AK - Tort)
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6:00 PM Meeting w/ R & G

Sunday 9

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4, p. 35.
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aw No. 10, p. 20.
Conflicts of interest.
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unless, at the time the
does exist, the insured
counsel. An insurance
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does not exist as to al-
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superior court. Any
counsel is not a waiver
nt counsel by signing

the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.

Added Stats 1987 ch 1498 § 4. Amended Stats 1988 ch 1114 sec 1.

Amendments:

1988 Amendment: (1) amended subd (a) by substituting (a) "independent" for "such" before "counsel" the second and third time it appears in the first sentence; and (b) "that" for "such" before "counsel" in the second sentence; (2) amended subd (c) by substituting (a) "the" for "such" after "to pay fees to" in the second sentence; and (b) "This subdivision does" for "The provisions of this subdivision shall" at the beginning of the third sentence; and (3) substituted "that" for "such" after "the duty of" in the first sentence of subd (d).

Collateral References:

Witkin Summary (9th ed) Torts § 1139.

Miller & Starr, Cal Real Estate 2d §§ 7:102, 33:2.

Cal Trial Handbook 3d §§ 8:3, 13:39.

The Brown-Lockyer Civil Liability Reform Act of 1987 (comprehensive tort reform package in California). 9 CEB Civ Lit Rep No. 7 p. 257.

Rutter Cal Prac Guide, Personal Injury §§ 1:101.5 et seq.

Rutter Cal Prac Guide, Insurance Litigation §§ 7:771 et seq., 7:802 et seq.

Revisiting the "Cumis" rule: New legislation codifying the right to independent counsel creates a whole new set of problems. 11 Cal Law No. 5 p 55.

Cumis, conflicts and the Civil Code in California: Section 2860 changes little. 25 Cal Western LR 45.

Cumis counsel in California: Going, going, gone? 35 Dicta No. 3 p 20.

Review of selected 1987 legislation. 19 Pacific LJ 689.

The Other Side of the *Cumis* Coin: The Insurer's Ability to Select Associate Defense Counsel Under Civil Code Section 2860(f). 20 Western St LR 569.

The insurer's duty to provide independent counsel under California's new, "*Cumis* statute." 16 Western State LR 603.

NOTES OF DECISIONS

Civ. Code, § 2860, which requires an insurer to provide independent counsel to its insured when conflicts of interests arise, is not retroactive. There is no indication of legislative intent that § 2860 operate retroactively. Center Foundation v Chicago Ins. Co. (1991, 2nd Dist) 227 Cal App 3d 547, 278 Cal Rptr 132.

The trial court properly denied an insurer's petition to compel arbitration regarding a dispute over the insurer's duty to provide independent counsel for the defense of its insured. Although Civ. Code, § 2860, subd (c), provides for arbitration for fee disputes once independent counsel has been retained to represent an insured when a conflict of interest arises between an insured and an insurer, the statute does not require arbitration to resolve the duty to provide independent counsel. Arbitration is an efficient and favored method of dispute resolution, but without a statutory mandate or contractual provision requiring its use, a litigant cannot be deprived of its day in court. Truck Ins. Exchange v Dynamic Concepts, Inc. (1992, 4th Dist) 9 Cal App 4th 1147, 11 Cal Rptr 2d 873.

Civ. Code, § 2860, subd. (c) (arbitration of fees of insured's independent counsel when conflict of interest exists between insured and liability insurer), is only applicable to resolve disputes concerning the independent counsel. In the absence of a stipulation or unconditional agreement between the insurer and insured, unless and until there has been a judicial determination of an insurer's duty to defend and the existence of a conflict of interest, the provisions of Civ. Code, § 2860, are inapplicable. If the issues of the insurer's duty to defend or the existence of a conflict of interest are contested, these preliminary issues may not be decided in an arbitration ordered pursuant to Civ. Code, § 2860, but must be resolved by a trial court. Handy v First Interstate Bank (1993, 2nd Dist) 13 Cal App 4th 917, 16 Cal Rptr 2d 770.

The trial court did not abuse its discretion in denying a petition by an attorney to compel arbitra-

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February 5, 1997

via FAX (907)465-3834

Jim Sourant
c/o Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: SS for H.B. 58
File No. 1795.6377

Dear Jim:

As per our discussion, this language captures the concept, I think. I look forward to discussing this with you tomorrow.

(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability under AS 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action [AS 09.16.040]. In the event there is a finding of fault on the part of the employer, the payment and credit to the employer pursuant to AS 23.30.015(g) shall be reduced by the amount the claimant's award was reduced because of fault allocated to the employer.

Very truly yours,

Michael A. Barcott

MAB:mb
cc: Roger Holmes
David Jones - ANIC, Anchorage

DS MASTER

9-LS0328/6

MEMORANDUM

me: Look at Gov's AOR proves HB60 pg 6-7.

TO: Brian Porter

FROM: Roger F. Holmes

RE: Tort Reform Bill

DATE: December 26, 1996

We discussed submitting the same bill which came out of House Judiciary in the last session. I have the following comments on the proposed bill as well as some comments on the proposals which came out of the Governor's Task Force. Throughout this memorandum I use the term "committee" to refer to the bill which came out of House Judiciary and "commission" to describe the recommendations of the Governor's Commission.

1. The committee bill should be the basic framework except as noted below. The section references immediately below are to the committee bill.

   a. Sections 10 and 11. Attached are some suggested changes from Al Tamagni. The first change would make all future payments subject to periodic payments rather than the committee proposal of only those over $100,000. This is a policy issue, but might bog the courts down in small cases. The second requires periodic payments to be guaranteed and sets out that they may only be guaranteed by annuities or US obligations. I don't know if there are other ways to do appropriately guarantee this future stream of payments.

   b. Section 13 collateral benefits. You should use the version that was passed by the House rather than the committee version of this section. The committee version subjected worker's compensation benefits to non recovery. There was massive resistance to this and that category and parent paid medical bills for children were added to the version which passed the House. Mike Ford's 11/18/96 memo to you which you gave me, refers to the house bill and not the committee bill. His comments in Section 1 of that memo are well taken and should be incorporated.

   c. Section 14, allocation of fault. Mike's memo makes reference to a couple of changes in that provision which are not attached to his memo but are probably OK.

   d. Section 18. Al Tamagni had suggested tying the interest rates to the Internal Revenue Code based on Applicable

Federal Rates (AFR) Section 1274(d)(1)(a) Short Term Obligations (not exceeding three years). Attached is a rate sheet showing this rate was 5.79% last November. For a comparison of how this rate might differ from the committee bill (or the Governor's Commission recommendations) see 3(c) below.

e. Section 21, expert witnesses, Mike's suggestions make sense.

f. Section 35, applicability. You will recall that in the Initiative draft you wanted me to include the language "This Initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989." The committee bill, like the Initiative, only applies to causes of action which accrue after the effective date of the Act. Neither would apply to the Exxon Valdez case. However someone felt that having this language in the Initiative was important to insure that opponents could not misconstrue the bill.

2. Provisions to be added to the committee bill:

a. AS 09.55.560. Definitions. (1) "heath care provider" should include the following additional entities, none of which existed at the time the Malpractice Reform Act was passed in 1976. Many new medical entities which have been created to deal with the streamlined delivery of medical services are excluded from protection under the medical malpractice statutes.

i. An Ambulatory Surgical Facility.

ii. Organizations whose primary purpose is the delivery of health care including, but not limited to, Health Maintenance Organizations, Individual Practice Associations, Integrated Delivery Systems, Preferred Provider Organizations/Arrangements/ and Physician Hospital Organizations.

b. AS 18.23.070. Definitions. (5) (A) "review organization" should include the following additional entities, none of which existed at the time this legislation was originally passed in 1976. Many new medical entities which have been created to deal with the streamlined delivery of medical services are excluded from protection of the peer review statutes. This means that it will be nearly impossible to encourage these entities to engage in peer review with a resulting loss of protection to patients and health care providers.

i. "Review organization" means a governing body or a committee whose membership is limited to health care providers and administrative staff, except where otherwise provided for by state or federal law, and that is established by a hospital, by an ambulatory surgical facility, by a clinic, by one or more state or local associations of health care providers, by an organization of health care providers from a particular area or medical institution (including, but not limited to Health Maintenance Organizations, Individual Practice Associations, Integrated Delivery Systems, Preferred Provider Organizations/Arrangements/ and Physician Hospital Organizations), or by a professional standards review organization established under 42 U.S.C. 1320c-1, to gather and review information relating to the care and treatment of patients for the purposes of...

c. AS 21.100.89 should be amended to include the following additional provisions. This statute was passed in 1995 in response to an Alaska Supreme Court opinion entitled Chi of Alaska, Inc. V. Employer's Reinsurance Corp., which specified that under certain circumstances an insurer must appoint "independent counsel." The 1995 solution left two glaring loopholes. The first is that it does not specifically state that if certain issues are covered by insurance and certain issues are not covered by insurance, the insurance company need only pay for the covered claims. California has partially closed this loophole by decision in Horace Mann Insurance Company v. Barbara B, 846 P2d 792 (Cal 1993) by only requiring the insurer to pay for covered claims. The second loop hole is that if the insurance company tries to settle the covered claims with the plaintiff, it runs the risk that the insured will scream "bad faith" in an effort to force the insurance company to continue to provide a paid defense for both covered and uncovered claims. Alaska National, among other companies, has discovered that these two omissions have caused insurers untold problems.

i. AS 21.89.100 (d) If the insured selects independent counsel at the insurer's expense, the insurer may require that the independent counsel have at least four years of experience in civil litigation, including defense experience in the general subject area at issue in the civil action, and malpractice insurance. Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of

business in the defense of a similar civil action in the community in which the claim arose or is being defended. In providing independent counsel the insurer shall not be responsible for the fees and costs to defend any allegation for which coverage is properly denied, and shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage. The independent counsel shall keep detailed records allocating costs accordingly. A dispute between the insurer and insured regarding attorney fees that is not resolved by the insurance policy or this section shall be resolved by arbitration under AS 09.43.

ii. (h) When an insured is represented by independent counsel the insurer may settle directly with the plaintiff, provided the settlement includes all claims based upon allegations for which the insurer previously either reserved its position as to coverage or accepted coverage, regardless of whether or not the settlement extinguishes all claims against the insured.

3. The Governor's Commission recommendations. It is my understanding that although several of these provisions may be worth while, it was the decision not to preempt the governor by including them in this bill. I have the following comments on what we think will be the governor's bill.

a. Punitive damages. This proposal recommends a bifurcated trial such that there is a separate trial to award punitive damages if the first trial results in a finding of conduct deemed worthy of punishment. At first blush, this seems to favor defendants. However, it probably makes the provision subject to a 2/3 majority vote and may not be worth the trade off. Section G seems to remove the cap from punitive damages and is likely to be unacceptable to the majority of the coalition.

b. Cap on economic damages. This provision of the commission does little or nothing for the present problem of no cap for severe injuries and no definition of what is severe.

c. Interest rate. The committee bill is three percent above the 12th Federal Reserve Discount rate in effect at the first of the year when judgment is entered. The commission bill is 1.5% above the rate for five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H. 15 Statistical Release

figured monthly. According to Steve Williams, who was on the Governor's Commission, the rate for the 1st federal Reserve plus three percent on 12/19 was eight percent (he couldn't find the 12th) and for the U.S. Treasury note plus 1.5% was 7.56% or slightly lower for the commission recommendation.

d. Statute of limitations. This bill reduces property claims to two years (as does the committee bill.) It also reduces contract actions to three years. One of the ramifications of this is to reduce the legal malpractice statute of limitations to three years without really saying so. This provision is probably acceptable to the coalition and may gain some support for the bill from the legal community.

e. Alternative dispute resolution. This will probably bring a large fiscal note from the court system. I think there is a vocal group of people involved in alternative dispute resolution who are in favor of this provision. Its inclusion in any bill will likely bring support for the bill.

f. Improved Superior Court Fast-track procedures. This was asked for by the AG's office, Torts section. It does little in the tort reform arena and is probably a neutral provision in terms of the coalition.

g. Streamlined District Court Procedures. Both plaintiff's and defendants complained that the court system was too slow and too expensive. This provision will also likely bring howls of protest from the court system and a big fiscal note. It may ultimately help some self insured businesses like Carr Gottstein who have a lot of little slip and falls they would like to litigate but settle because the alternative is too expensive. Someone should ask Mark Williams, since he was on the commission, how he feels about this provision.

CALL Carr Gottstein

h. Offers of judgment. The committee version made the losing party pay actual attorney fees if the party rejected what turned out to be a reasonable offer of judgment. The commission version goes back to the interest rate penalty but makes the interest rate penalty greater the earlier in the process a party makes a reasonable offer. There is some merit to the commission approach.

i. Medical Advisory Panel improvements and access to the panels for malpractice claims against state health care providers. These changes are warranted and will be supported by the medical association.

j. Increased fines for frivolous behavior by lawyers. The committee (paragraph 26) included a provision which allowed the judge to fine lawyers up to $10,000. As I recall, Rep. Mackie wanted this provision in the bill. The commission placed this in Civil Rule 95 rather than in Civil Rule 11. Based upon testimony we heard in the Procedures subcommittee, the commission version is superior to the committee version.

k. Restriction on suits for injuries suffered during a felony. The commission version is a little more restrictive than the committee version. This can probably be worked out.

l. Clarifying liability for intentional acts. This is not included in the committee bill but is probably justified as a clarifying definition.

m. Settlement information. Some litigants may object to ~~providing~~ this confidential information. Since this is such a small state, taking the names off this information when processed by the judicial counsel will still result in most knowledgeable people knowing exactly who the parties were. This is a policy trade off. Since about 95% of all cases are settled, this information is now not available for any one to process and may produce relevant information should tort reform issue ever come back in front of the legislature.

n. Collection of more detailed insurance information. I passed this change along to Linda Hall at Ribelin Lowell and asked her to call you, me or Bruce Pozzi. I gave the information to George Sudduck and David Jones of Alaska National Insurance Company. They suggested a sunset provision for the information. They did not see that it would pose too many problems. They give much of this information to ISO every year. The insurance division began collecting information like this for workers comp several years ago and it has not caused many problems. (The Division doesn't really do anything with the information except collect it and put in a box. Without data from the past, the Division would have no basis for drawing any conclusions based upon future insurance data in any event.)

4. Contact with the state. Pursuant to our agreement I contacted Gail Voightlander, head of the Torts Section of the Anchorage Attorney General's Office. I asked her two questions.

   a. We discussed the package of tort reforms put forth by Brad Thompson to the Governor's Commission and rejected by the subcommittee. I asked her to discuss with Bruce

Botelho whether any of these provisions were a priority of the administration (as opposed to Brad). I asked her if Bruce would really like your bill to contain some of these provisions such that the administration could then agree to them as part of a compromise.

b. I also asked Gail to discuss with Bruce whether he would like to sit down with you and try to negotiate some type of compromise either now or early in the session.

c. I made this call to Gail the morning after our meeting last week. To date she has not called me back. When and if I hear anything, I will pass it on to you immediately.

cc: Bill Allen
Dave Bundy
Dick Cattanch
Jim Jordan
Bruce Pozzi
Al Tamagni

Structured Financial Associates, Inc.

SFA, Inc.
1205 E. Int'l Airport Rd.
Suite 205
Anchorage, AK 99518-1409

Phone: (907) 562-7421
Fax: (907) 562-1366

Facsimile

To: Roger Holmes
@Fax: ~~248-9013~~ 243-6695
From: A.L. Tamagni, Sr.
Date: 12/23/96
Re: Civil Liability Bill
Pages: ,2 including this

Roger:

1.

I have attached in regards to pre-judgement interest the Section of which we feel that interest should be based on Applicable Federal rates (AFRs) Section 1274(d)(1)(a) Short Term obligations (not exceeding 3 years) annual rate and begins to accrue at that rate from the date of accrual. Exclude future economic, non economic, punitive and Rule 82 fees and other costs.

2.

Section 09.17.040 (d) Change as follows: In an action to recover damages, the trier of fact at the request of any party electing to receive or pay future economic and or future non economic damages, enter judgment ordering that amounts awarded be paid to the maximum extent feasible by periodic payments in lieu of a lump sum.

Section 09.17.040 (e) If damages are to be paid on a periodic basis, the trier of fact shall require the defendant to purchase an annuity contract issued by a company licensed to do business as an authorized insurer in this state as defined under AS 21.90.900, or one or more obligations of the United States in order to assure the future payments of such periodic damage amounts for the discharge of its obligation. Such funding mechanisms shall not be purchased from defendants insurer or any ownership affiliates. (Roger, you may have to clean this last part up a little)

1274(D)(1)(A)

¶ 1117 Applicable Federal Rates

The IRS tables below show the Applicable one-month Federal Rates (AFRs). The tables provide short-term (obligations not exceeding three years), mid-term (over three years but not over nine years) and long-term (over nine years) rates (in percentages) based on annual, semiannual, quarterly and monthly compounding assumptions.[11]

Applicable Federal Rate	Annual	Semiannual	Quarterly	Monthly
November '95				
Short-Term				
AFR	5.79	5.71	5.67	5.64
110%	6.38	6.28	6.23	6.20
120%	6.97	6.86	6.79	6.75
Mid-Term				
AFR	6.11	6.02	5.98	5.95
110%	6.72	6.62	6.57	6.53
120%	7.36	7.22	7.16	7.11
150%	9.23	9.03	8.98	8.86
175%	10.82	10.54	10.40	10.32
Long-Term				
AFR	6.55	6.45	6.40	6.36
110%	7.23	7.10	7.04	7.00
120%	7.89	7.74	7.67	7.62
October '95				
Short-Term				
AFR	5.90	5.82	5.78	5.75
110%	6.50	6.40	6.35	6.32
120%	7.10	6.98	6.92	6.88
Mid-Term				
AFR	6.31	6.21	6.16	6.13
110%	6.95	6.83	6.77	6.73
120%	7.59	7.45	7.38	7.34
150%	9.54	9.32	9.21	9.14
175%	11.17	10.87	10.73	10.63
Long-Term				
AFR	6.77	6.66	6.61	6.57
110%	7.45	7.33	7.26	7.22
120%	8.15	7.99	7.91	7.86
September '95				
Short-Term				
AFR	5.91	5.83	5.79	5.76
110%	6.51	6.41	6.36	6.33
120%	7.12	7.00	6.94	6.90
Mid-Term				
AFR	6.33	6.23	6.20	6.20
110%	7.03	6.91	6.85	6.81
120%	7.68	7.54	7.47	7.42
150%	9.64	9.42	9.31	9.24
175%	11.29	10.99	10.84	10.75
Long-Term				
AFR	6.91	6.79	6.73	6.70
110%	7.61	7.47	7.40	7.36
120%	8.32	8.15	8.07	8.01

Applicable Federal Rate	Annual	Semiannual	Quarterly	Monthly
August '95				
Short-Term				
AFR	5.73	5.65	5.61	5.58
110%	6.32	6.22	6.17	6.14
120%	6.89	6.78	6.72	6.69
Mid-Term				
AFR	6.04	5.96	5.91	5.88
110%	6.66	6.55	6.50	6.46
120%	7.27	7.14	7.08	7.04
150%	9.13	8.93	8.83	8.77
175%	10.68	10.41	10.28	10.19
Long-Term				
AFR	6.56	6.46	6.41	6.37
110%	7.24	7.11	7.05	7.01
120%	7.90	7.75	7.68	7.63
July '95				
Short-Term				
AFR	5.97	5.88	5.84	5.81
110%	6.57	6.47	6.42	6.38
120%	7.18	7.06	7.00	6.96
Mid-Term				
AFR	6.28	6.18	6.13	6.10
110%	6.92	6.80	6.74	6.71
120%	7.56	7.42	7.36	7.31
150%	9.48	9.27	9.17	9.10
175%	11.11	10.82	10.68	10.58
Long-Term				
AFR	6.76	6.65	6.60	6.56
110%	7.45	7.32	7.25	7.21
120%	8.14	7.98	7.90	7.85
June '95				
Short-Term				
AFR	6.07	6.27	6.22	6.19
110%	7.02	6.90	6.84	6.80
120%	7.86	7.52	7.45	7.40
Mid-Term				
AFR	6.83	6.72	6.66	6.62
110%	7.55	7.39	7.32	7.28
120%	8.22	8.05	7.98	7.93
150%	10.39	10.08	9.96	9.87
175%	12.11	11.76	11.59	11.48
Long-Term				
AFR	7.31	7.18	7.12	7.07
110%	8.06	7.90	7.82	7.77
120%	8.81	8.62	8.53	8.47

11. ¶ J-4192; ¶s 12,714.01, 90,900; TD ¶ 16,826.

16a

FACSIMILE TRANSMISSION COVER SHEET

Office of the Attorney General

Dimond Courthouse, 123 Fourth Street, 4th Floor
P.O. Box 110300
Juneau, AK 99811-0300
PHONE: (907) 465-2133 FAX: (907) 465-2075

DATE: November 20, 1996

TO: MEMBERS - CIVIL JUSTICE REFORM TASK FORCE

Judge Thomas Stewart, Chair	463-5016
Marlene Johnson, Vice Chair	789-1896
Bill Allen	264-8130
Judy Brady	279-8114
David Bundy	258-2026
Mike Burns	563-1764
Charlie Cole	456-2523
Sen. Johnny Ellis	258-5571
Jeff Feldman	274-0819
Roger Holmes	243-6695
Julie Kitka	276-7989
Julian Mason	277-8235
Rep. Brian Porter	258-5510
Don Slone	561-4528
Steve Williams	276-2109
Mark Williams	564-2580
Dr. Rodman Wilson	563-7015

FROM: Chrystal Stillings Smith
Legal Administrator

Number of Pages:
Including this Sheet

RE: Attachments

Attached please find:

- Agenda for Task Force meetings, November 22-23

cc: J. Bush - 465-5442; B. Thompson - 465-3690
Botelho, Gordon, Voigtlander, Vandercook

IF YOU DO NOT RECEIVE THIS TRANSMISSION IN FULL, Call (907) 269-5073 Ask for Chrystal

Governor's Advisory Task Force on Civil Justice Reform

Friday, November 22 - Satuday, November 23, 1996
Exxon Valdez Oil Spill Trustees Council Conference Room
645 "G" Street, Anchorage, Alaska

RECEIVED
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ATTORNEYS AT LAW

Tentative Agenda

Friday, November 22

8:30 a.m. Call to order - Judge Thomas Stewart
Approve minutes
Approve agenda
Community forum report - Marcia Vandercook
Group discussions, public testimony, letters received

9:00 a.m. Committee meetings
Finalize recommendations to full task force

noon Lunch

1:30 p.m. Committee reports
Public testimony on committee changes

2:00 p.m. Discussion of voting procedures
Motions for reconsideration and rescission
Order of issues considered

2:30 p.m. Discussion and voting on issues

5:00 p.m. Recess
(ending time approximate)

Saturday, November 23

8:30 a.m. Continue discussion and voting on issues

noon Lunch

1:00 p.m. Continue discussion and voting on issues

4:45 p.m. Discuss format of report to Governor

5:00 p.m. Adjourn
(ending time approximate)

GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM

Friday, November 22 - Saturday, November 23, 1996
Task Force Meeting
Exxon Valdez Oil Spill Trustees Council Conference Room
645 "G" Street, Anchorage, Alaska

Minutes

Judge Thomas Stewart, Chair, called the meeting to order at 8:40 a.m. Present were Vice-chair Marlene Johnson and members Bill Allen, Attorney General Bruce Botelho, Judy Brady, David Bundy, Mike Burns, Jeff Bush, Charlie Cole, Senator Johnny Ellis, Jeff Feldman, Julie Kitka, Julian Mason, Don Slone, Brad Thompson, Mark Williams, Steve Williams, and Dr. Rodman Wilson. Roger Holmes was absent; Representative Brian Porter was excused. Also present were staff members Nancy Gordon, Chrystal Smith, Marcia Vandercook, Gail Voigtlander, and Ron Lorensen.

The task force approved the minutes of the meeting held October 30, 1996.

Judge Stewart reviewed the day's agenda. He said there were some potential conflicts for the December meeting (scheduled for December 9) and asked members to fill in a December calendar with dates they would not be available so that the meeting date could be confirmed.

Judge Stewart called on Marcia Vandercook to summarize the results of the community forums (held in Juneau, Bethel, Anchorage, and Fairbanks) and other public input. She referred members to the prepared summary of the call-in and forums. She mentioned that caps on noneconomic damages had been one of the most divisive issues across the state, as had punitive damages. People enjoyed the discussion of the hypothetical situations, although no one admitted having changed his or her mind. Dr. Rodman Wilson and Judge Stewart, who attended all the community forums, gave their impressions, which were generally favorable. Members received copies of letters from the public to the task force.

Jeff Feldman said that there was strong sentiment at the Anchorage meeting that the task force process had been too rushed and that people felt they had not been given an adequate opportunity to participate in the process. He said he saw this as a legitimate concern.

At 9:15, the meeting recessed so the committees could meet and complete their work.

The Task Force meeting was called back to order at 1:30 p.m.. Committee Chairs Julian Mason, Mike Burns, and Steve Williams (for Roger Holmes) reported on what their committees had done during their morning meetings. The work they did was incorporated into the proposals for consideration during the rest of the meeting.

Public Testimony: Steve Conn of AKPIRG said that 1) he thought the group exercises at the Anchorage community forum had been mischaracterized; 2) the public doesn't understand there is now a cap on noneconomic damages; 3) the public has indicated it doesn't want access to a jury limited; 4) he likes the idea of gathering insurance data but thinks consumer and employers need to be involved in an investigation of insurance in Alaska as both are being abused by the system; 5) he does not like the recommendations on punitive damages; 6) he is concerned about the effect passage of a statute of repose could have on litigation against tobacco companies; 7) he thinks that the task force should recommend additional investigation of the workers' comp system since the public is very unhappy with it.

Daryl Nelson said he does not favor any additional limits on noneconomic damages -- he says people want the cap taken away.

Bonnie Nelson said the legislature should postpone action on tort reform until the public can be more involved.

Jim Sykes focused his comments on the short timeline of the task force work and suggested that the task force request to continue its work and keep the subject open.

Discussion of recommendations:

Julian Mason proposed that a list of issues be adopted as a group, i.e., that a consent agenda be adopted and that items could be removed from the list if people wanted to debate them. Cole objected; Kitka said she wanted to hear the debate on items 14, 16, 17. Judge Stewart said he agreed that each issue should be taken up individually.

Proposition 1: Fast track pretrial procedures. Passed without objection.

Proposition 2: Offers of judgment.

Steve Williams discussed the committee's proposal, which is intended to equalize the incentives for settlement between plaintiffs and defendants, and to encourage early offers.

Proposition 2 passed without objection.

Proposition 4: Felons as plaintiffs.

Julian Mason explained the proposal. There was discussion of why this proposal was needed, whether allocation of fault would take care of the problem, and whether introducing the notion of trials of felonies by clear and convincing evidence within the civil statutes was a good idea.

Proposition 4 failed: 10-8. Voting in favor: Allen, Brady, Bundy, Burns, Bush, Mason, Slone, Thompson, M. Williams, Wilson; voting against: Botelho, Cole, Ellis, Feldman, Johnson, Kitka, S. Williams, Stewart.

Proposition 7: Medical advisory panels.

S. Williams discussed the proposition. Feldman said he could support it if the questions were reworded. It was agreed that the vote would be taken and that Feldman, Wilson, and S. Williams would be empowered to work on the questions the panels are supposed to answer.

Proposition 7 passed without objection.

Proposition 8: Extending medical panel access to state employees.

Feldman asked whether the proposal would extend coverage to state employees in occupations not covered by the current statute. He was informed it would not.

Proposition 8 passed without objection.

Proposition 9: Allowing for allocation of fault to intentional tortfeasors.

Proposition 9 passed without objection.

Proposition 12: Pre- and Post-judgment interest.

Mike Burns discussed the proposal to allow for a floating interest rate on pre- and post-judgment interest. Feldman emphasized that this was a compromise in the committee. He asked that the report of the task force reflect that the committee had considered a variety of ways to deal with issues of inequity related to accrual of pre- and postjudgment interest and decided that making the change to the floating rate would be the best way to handle perceived inequities.

Steve Williams said he would support recalculating the rate only one time a year, but that he thought the proposed rate (5-year constant maturity U.S. Treasury Note +100 basis points) was too low. Burns said he likes using this indicator but was not tied to the add-on.

The members discussed whether prejudgment interest should be related to the cost of borrowing or the return from investments.

Amendment proposed by Botelho to change the add-on to 200 basis points.

The question was raised whether the super majority rule (i.e., that 14 votes are needed to pass a proposition) applied in the case of amendments. Judge Stewart ruled that it did.

Amendment failed, 13-5. Voting in favor: Botelho, Burns, Bush, Cole, Ellis, Feldman, Johnson, Kitka, Mason, Slone, Thompson, S. Williams, Stewart. Voting against: Allen, Brady, Bundy, M. Williams, Wilson.

Motion to table failed. An at-ease was called.

Amendment #2 to change the add-on to 150 basis points. Passed without objection.

Proposition 12, as amended, passed without objection.

Proposition 14: Frivolous lawsuits. The proposal is to increase judges' discretionary authority to fine attorneys from $1,000 to $10,000.

Amendment by Cole to increase limit only to $5,000. Failed on voice vote.

Brady said the limit should be higher and that public reaction in favor of tort reform is because of "frivolous" suits. Amendment by Brady to increase limit to $100,000.

Discussion on need for better definition of "frivolous" and comments that "frivolity" is in the eye of the beholder (i.e., the defendant). The point was made that there are no limitations on bringing suit against attorneys for frivolous lawsuits and that this proposal deals with what is a "summary fine" in addition to ability to sue. Kitka asked for information about history of judges fining people.

Motion to table failed.

Brady amendment failed on voice vote.

Cole discussed effect of Federal Rule 11 on attorneys' willingness to work in "creative" areas that might expose them to fines for frivolous suits.

Proposition 14 passed, 14-2-2: voting in favor, Allen, Botelho, Bundy, Burns, Bush, Ellis, Feldman, Johnson, Mason, Slone, Thomson, S. Williams, M. Williams, Stewart; voting against, Cole, Wilson; abstaining, Brady, Kitka.

Proposition 15: Settlement data.

The issue of whether the Court System or the Judicial Council should be the agency to collect this information was discussed (the committee proposal called for the courts to do it). The court system already keeps other data confidential. Williams said that anyone

who wanted access to the data would have to apply to the court. Cole questioned the ability of the court to keep the data confidential. Bundy suggested that an effort be made to get settlement information from the federal courts as well and to consider a change in the local federal court rules. Bush suggested that the proposal be written so that if does not work within the court system it can be done by the judicial council. M. Williams suggested that "periodic" should be less frequent, perhaps annually, to help preserve confidentiality.

Proposition 15 passed without objection.

Proposition 16: Insurance data.

Points discussed included: need to work with Division of Insurance to determine what data are needed; the advisability/necessity of gathering investment data; the fact that no one from the insurance industry had seen this proposal; the importance of the Governor's charge to the Task Force to look at insurance issues; the claim of those who support tort reform that it will decrease the cost to business; the advisability of having this proposal in a separate bill. Allen said if it were included it would kill the tort reform bill.

An at-ease was called for the liabilities committee to discuss whether 1) the insurance data proposal should be in a separate bill and 2) it should include gathering data on investments. Mason reported back that the committee had decided it favored including the proposal within the main bill and including investment experience as a category of information to be collected. Thompson said it was important to discuss the Task Force's concerns with the Division of Insurance and to make it clear that the group is looking for better information on Alaska experience, including premiums, claims, and investment earnings. This is not meant to be onerous, but fairly readily accessible information.

Amendment to delete statement that issue should be covered in a separate bill passed on voice vote, with one No (Allen).

Proposition 16 passed, 17-1: voting against - Allen.

Proposition 17: Statute of limitations.

Issues discussed included: why there should be a difference between written and oral contracts and the fact that many times contracts are actually both; the tendency for people to enter into oral contracts more frequently in Bush Alaska.

Amendment to shorten oral contract statute of limitations to 2 years was made and withdrawn.

Amendment by Feldman to make statute of limitations 3 years for all contracts and to delete the adjustment for attorney malpractice. Since the Supreme Court has ruled that attorney services are governed by contract law, this would make attorney malpractice statute of limitations 3 years, not 2 years as for other professions.

Kitka said that trespass is a major problem in rural Alaska and for Native corporations and that she would not support shortening the statute of limitations for waste and trespass from 6 to 4 years. This period starts when the trespass is discovered, or should reasonably have been expected to be discovered, not when the trespass occurred/.

Bundy said that references to the statute of limitations on contracts occur many places in the statutes and that the UCC has a 4-year statute of limitations. Staff was directed to look into this.

Botelho moved to table, then withdrew the motion.

Feldman amendment passed – all contracts are at 3 years and there is no separate provision regarding attorney malpractice.

Amendment to omit the provision relating to the statute of limitation for waste and trespass passed.

Proposition 17, as amended, passed without objection.

At 5:45 p.m., the meeting recessed until 8:30 the next morning.

Saturday, November 23, 1996

Judge Stewart called the meeting back to order at 8:30 a.m. Members Brian Porter and Julie Kitka were excused; Roger Holmes was absent.

Task force members raised two issues: 1) that with respect to Proposition 2 it should be clear in draft statutory language that interest was to be only simple interest, not compounded; and 2) that the entire bill needs to be clear about which provisions apply only to events that occur after the effective date of the act and which apply to cases filed after the effective date of the act.

Proposition 3: District court jurisdiction.

S. Williams explained the proposal to change the jurisdiction of the district court to include cases up to $100,000. Cole said this was a big leap and that it made the district court the

court of general jurisdiction; he also questioned whether this would overload the district court. Cole also expressed concern about the potential for the parties extending discovery too much. After discussion, the measure was tabled and sent back to the committee.

Proposition 5: Punitive damages.

Mike Burns explained the committee's recommendation that "profit motivated" misconduct fall under the limits included in (g), which relate to annual income or profit made by the defendant.

Allen expressed his concerns about conduct of employees unknown by the management leading to damages against the corporation. Mark Williams said he did not believe that punitive damages altered the behavior of the offenders and that the corporation ends up paying for it. Cole said people need to remember that egregious conduct is mostly from large, powerful companies. Wilson said that the cap on punitives should be $300,000 and that for doctors other discipline, like losing one's license and criminal prosecution, are punishment enough. Several people cautioned that all business decisions, including decisions to hire and fire, could be considered to be motivated by profit considerations.

Mason said that an offending employee can always be named as a defendant and fault can be allocated to the employee. He suggested an amendment to exclude personnel actions from the definition of "profit motivated." Ellis asked whether Mason's proposal would preclude limits in, for instance, the Texaco discrimination case. Mason withdrew his amendment.

Feldman said that the Damages Committee worked long and hard on this proposal and it was a compromise they had agreed to. He said that (f) and (g) are trying to put some fences around unpredictability and risk that businesses complain about.

Brady said that liability should be limited to things that management knew about.

Cole said that the mechanism in (e) regarding separate proceedings to determine the amount of punitive damages would be difficult, since if there were separate fact finders the case regarding liability would essentially have to be tried a second time.

Task Force recessed for committee work.

Proposition 3 was brought up again.

Amendment by Cole to 1) decrease jurisdictional limit from $100,000 in committee proposal to $75,000 and 2) eliminate the ability of the parties to agree to extend discovery. Failed 6-13: voting in favor, Bush, Cole, Ellis, Johnson, Slone, Thompson; voting against,

Allen, Botelho, Brady, Bundy, Burns, Feldman, Mason, S. Williams, M. Williams, Wilson, Stewart.

Amendment by S. Williams to 1) delete provision in court rule amendment to allow parties to agree to extend the time in which a case should be set for trial and to add the words "in exceptional cases" with reference to the ability of the court to do so and 2) allow the parties to extend the discovery process only in "exceptional cases."

Amendment to the amendment by Cole to require approval of court to conduct additional discovery. Cole amendment failed, 4-13: voting in favor, Brady, Cole, Johnson, Wilson; voting against, Allen, Botelho, Bundy, Burns, Bush, Ellis, Feldman, Mason, Slone, Thompson, S. Williams, M. Williams, Stewart.

Williams amendment passed on a voice vote.

Proposition 3, as amended, passed without objection.

Proposition 6 - Alternative Dispute Resolution.

Cole offered an amendment to the committee proposal to 1) delete "and" in "early neutral evaluation and/or mediation" in 4; 2) delete "in all possible" in 4; 3) reduce the 50% figure to something lower; and 4) eliminate the use of ADR in the district court. Feldman said that the pilot project should require equal proportions of ENE and mediation and amended the measure to require 25% of each. Nancy Gordon reported that Susanne DiPietro of the Judicial Council said that no less than 25% of the total cases should be used, for statistical reliability. Bundy noted that the purpose of supporting ADR was not only to conduct a study, but also to speed things up.

Procedures Committee members said their intent was that the court system be allowed to design the system.

After more discussion, Botelho offered an alternative amendment that would apply the ADR requirement (to at least 50% of cases) at the Superior Court level only. Amendment adopted without objection.

Mason offered an amendment that would limit required mediation to 12 hours. Amendment adopted without objection.

Proposition 6, as amended, passed without objection.

Mason served notice that he would call for reconsideration of Proposition 4 later in the day.

Proposition 5 - Punitive Damages

The issue of whether any portion of punitive damages should go to the state was brought up. Burns said the Damages Committee had agreed that a portion should go to the state, but had not agreed on what percent. That recommendation was inadvertentlyleft out of the proposal before the body.

Members discussed the purpose of punitive damages (i.e., a social agenda issue, or to change the behavior of individuals), whether attorney fees would be covered prior to giving a share to the state, and whether the person who had pursued the suit and taken the risk of investing in witnesses, costs of discovery, etc. was entitled to the full award. It was suggested that if a share of punitive damages were to be allocated to the state the parties might settle the case out of court to keep the state from getting anything. Botelho said that the "state" should be seen as a surrogate for society, not just as government.

A straw vote was taken to how many would vote in favor of giving a portion of any punitive damages to the state and whether it was worth arriving at a number. The straw vote resulted in an 11-6 vote, and the idea was dropped for lack of adequate support. Voting in favor of sharing punitives with the state were Allen, Botelho, Brady, Bundy, Burns, Feldman, Johnson, Slone, Thompson, M. Williams, Wilson; voting against were Bush, Cole, Ellis, Mason, S. Williams, and Stewart.

A substitute motion to amend the original proposal was introduced. It included a provision that employment-related conduct subject to punitive damages would not be subject to the cap for "profit motivated" conduct unless it involved "multiple incidents" or "a pattern or practice of conduct."

Issues discussed included 1) changing the wording in (g) to "motivated by financial gain" instead of "profit motivated" and 2) what the term "multiple incidents" meant.

Meeting was recessed for lunch until 1:30 p.m.

When the meeting resumed, Steve Williams moved to amend (a) and (e) to make it clear that the same fact finder is to conduct both proceedings and to amend (e) to limit discovery relating to information about the financial condition of the defendant and the profitability of the defendant's misconduct until after the fact finder has determined that an award of punitive damages will be appropriate. Amendment passed without objection.

Amendment by Botelho to change "profit motivated" to "motivated by financial gain." Asked for unanimous consent.

Brady moved to amend the amendment by including language that tied the offending conduct to a management decision. Brady amendment failed, 10-7: voting in favor, Allen,

Botelho, Brady, Bundy, Burns, Bush, Feldman, Slone, Thompson, M. Williams; voting against, Cole, Ellis, Johnson, Mason, S. Williams, Wilson, Stewart.

Botelho amendment passed without objection.

Bundy amendment to (h) to omit reference to "multiple incidents." Language changed to "a pattern or practice affecting more than one person." Passed without objection.

Proposition 5, as amended, passed on a vote of 15-2. Voting in favor: Allen, Botelho, Bundy, Burns, Bush, Cole, Feldman, Johnson, Mason, Slone, Thompson, S. Williams, M. Williams, Wilson, Stewart; voting against, Brady, Ellis.

Proposition 4 (felons as plaintiffs) was brought up for reconsideration. Mason amendment to specify 1) affirmative defense not available if person was acquitted; 2) only unclassified, Class A, and Class B felonies would be included; 3) would not bar actions under Section 1983 of the Civil Rights Act. Discussion ensued about whether the applicable felonies should be only those under Alaska law or under federal law and those from other states. Amendment passed without objection.

Proposition 4, as amended, failed to pass on a vote of 12-4. Voting in favor, Botelho, Brady, Bundy, Burns, Bush, Ellis, Johnson, Mason, Slone, Thompson, M. Williams, Wilson; voting against, Cole, Feldman, S. Williams, Stewart. Allen was out of the room for the vote.

Recess was called.

Proposition 10: Hospital liability was pulled from the agenda at the request of the committee.

Proposition 11: Allocation of fault.

Julian Mason said that his committee had found this issue extremely complicated. It raises a number of issues including: 1) requiring the defendant to bring an additional party into the suit and then paying attorney fees if that person is found not liable; 2) the problem of parties who can't be sued but may be partially at fault (e.g., employers who are covered under workers' comp and therefore can't be sued). Bundy suggested that the proposition be redrafted to permit allocation of fault to those who are otherwise immune/not subject to suit.

A straw poll was taken to see whether there would be support for the proposition if it were redrafted. Vote was 8-9: voting in favor, Allen, Brady, Bundy, Burns, Slone, Thompson, M. Williams, Wilson; voting against, Botelho, Bush, Cole, Ellis, Feldman, Johnson, Mason, S. Williams, Stewart.

Proposition 11 failed to advance for further discussion.

Proposition 13: Front pay for wrongful discharge.

The proposal, which calls for future study in another context, was discussed briefly.

Proposition 13 passed without objection.

Proposition 18: Statutes of repose. The proposal would establish a 10-year statute of repose for all types of actions based on negligence. This is a reduction from 15 years currently in place for design and construction and a new limit for other types of actions. Bundy amendment to add actions for economic loss to those limited by the statute of repose. Amendment passed. Amendment to delete end of first sentence to simply say statute of repose applies to "actions for negligence" without specifying which. Amendment passed.

Feldman noted that the current statute of repose (15 years) for design and construction was a compromise enacted in 1994. Statutes of repose have been found to be unconstitutional by some courts.

Slone said Alaska's statute of repose is one of only 2 that are so long for building design and construction; most others are 10 years or less. He said that architects and engineers are involved at early stages and then turn buildings over to owners so liability should not last so long. 98 percent of all claims related to building failures are brought within 10 years.

Cole said that the statute of repose should be longer and that the public comment heard during the community forums supported this view, with many people talking about what the "normal" life of a building should be presumed to be.

Cole suggested some amendments to remove the exceptions in the original proposal that did not deal with "negligent" behavior.

The task force took a break.

Botelho explained the revised and rewritten committee proposal for Proposition 18. Cole proposed an amendment to raise the statute of repose from 10 to 15 years. Feldman said the whole thing was a bad idea. Wilson said there is a need to put issues to rest so people don't have to worry forever about potential liability. Amendment failed, 13-4: voting in favor, Botelho, Brady, Bundy, Burns, Bush, Cole, Ellis, Feldman, Johnson, Mason, Thompson, S. Williams, M. Williams, Stewart; voting against, Allen, Bundy, Slone, Wilson.

After further discussion, the amendment to raise the period of repose to 15 years was voted on again and passed, 16-1, with Mason voting No.

Proposition 18, as amended, failed to be adopted by a vote of 10-7. Voting in favor, Allen, Botelho, Brady, Bundy, Burns, Cole, Slone, Thompson, Wilson, Stewart; voting against, Bush, Ellis, Feldman, Johnson, Mason, S. Williams, M. Williams.

Proposition 19: Noneconomic damages.

Wilson said that the committee was a marginal improvement but not as much as he had hoped for.

Proposition 19 passed on a vote of 14-3. Voting in favor, Allen, Botelho, Brady, Bundy, Burns, Bush, Feldman, Johnson, Mason, Slone, Thompson, S. Williams, M. Williams, Wilson; voting against, Cole, Ellis, Stewart.

Proposition 4 (felons as plaintiffs), as amended, was brought up again and passed on a vote of 16-1. Voting against, S. Williams.

The Task Force discussed the issue of different effective dates for sections of the bill. For substantive rights it should apply for harm occurring on or after the effective date, and for procedural rights it should apply to claims filed on or after the effective date.

Botelho brought up a proposition that had not been reported out of committee, one dealing with **alcohol- and drug impaired plaintiffs**, i.e., persons who sue for damages that are caused, in part at least, by their own impairment. He asked for task force support to pass a proposition relating to this.

Feldman asked why this was an issue. It was pointed out that there was a tendency for juries to give damages to persons who sue the state or municipalities even if they were at fault because of impairment.

Since there was not a written proposal addressing Alaska law prepared, staff was asked to prepare materials for consideration at the December meeting of the Task Force, and to circulate the proposal prior to that meeting. The draft should also be circulated for public comment. Johnson and Feldman asked that as much data as possible be included with the proposal.

It was announced that the next, and final, meeting of the Task Force would be held on Monday, December 9, as originally planned.

Meeting was adjourned at 5:45 p.m.

Governor's Task Force on Civil Justice Reform

Minutes from Procedures Committee - 11/22/96

By: Gail T. Voigtlander
Assistant Attorney General

Date: November 25, 1996

All Good guys Absent!

Present: Steve Williams (acting Chair), Julie Kitka, Jeff Bush, Dr. Rodman Wilson, Don Slone

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Proposal re. Allocation of fault to intentional tortfeasor explained.

Offer of Judgment: want to revisit? No request to do so. Proposal passes to go to Task Force.

ADR pilot project: want to revisit? Comments from other task force members that five years is too long a period to run. Will take up later this meeting..

Williams discusses how matters will be addressed when goes to full task force.
Recap of steering committee mtg this a.m.

Medical Advisory Panel: Dr. Wilson gives overview of his proposed revision. Revision of 8 statutory questions (including "missed diagnosis" scenario). Dr. Wilson went over the revised questions with Mauri Long, J. Shortell, and the medical-legal committee of the Med Ass'n. Our Panel has not in the past, nor do they want to, deal w/ ultimate legal question "was there medical malpractice"? Q.7 : was the injury caused by unskillful care? If you want ultimate question - should have attorney on panel.

Have added to the statute language: "and amplifying answers as necessary to explain the case" to avoid reports that contain inadequate discussion..

Williams offers amendment: "and answering the questions in sufficient detail to explain the case and the reasons for the panels answers." Adopted.

Recommendation l re. finding doctors to serve/appointment of panel members: as established now Med Assn selects six, hears challenges on these, and gets to three. Alternate: have each side name a physician and then have the two get together and choose a third member. This gets rid of challenges problem. Court system's conflict of interest form is perhaps too rigorous. Best panels in the past have been mixed panels, i.e. orthopedic case, have 1 or 2 orthopedists but maybe an internist as third member of panel. Criticism of that system: it might be difficult for party to find a doctor to be a nominee. Offices of state med. Assn would still be involved and used - i.e. party may need Assn's help to suggest possible names. Dr. Brudenell thinks that there could still be a problem of participation. Approximately 1/3 of doctors are currently involved in panels. Problem now is that the paperwork is slow, getting doctors on line, filling out conflict of interest forms,

Alternate to this proposal for selection: have med ass'n recommend 6 names and then each party

select one doctor.

Maybe better to recommend that process be examined in terms of how to pull the panel together: joint effort of medical association, bar assn , and court to look at alternative method of selection. Would be very helpful to have Bar Ass'n involved. Changes to Civ. R. 72.1.

If panel report is not in the hands of the court w/in 60 days - it proceeds w/o panel report. One of the reasons that report is not timely done is that doctors are not compensated. Question is whether to relieve the stay of discovery and pretrial procedure?

GV to check on Supreme Court case re. Exp. Adv. Panel - after how long can discovery resume if no report? [Answer: the case held that after 80 days, the parties could go ahead with discovery].

If issue of bias - see p. 5 of handout: found fault in approx. 1/4 of the cases.

Adopting revised questions is approved.

Do we want to add sixty day proposal to lift discovery stay? Approved.

State proposal re. Expert Advisory Panel in Corrections cases: approved.

Collection of Settlement Information

Susanne DiPietro: need total settlement amount (one page form), description of claims (beyond case characterization -(same as used in tort summary).

Question: tort cases or all civil?
Exception for domestic cases, small claims, and probate..

Why? Jury verdicts don't necessarily represent what is happening in the real world.

Access to Judicial Council only: title 12 language for researchers if identifying data is deleted or if information is aggregated.

Recommend appellate dismissals be included as well.

DiPietro: include a satisfaction ratio? Rejected.

Alaska Judicial Council consult w/ any national folks (RAND) to see what need to include on form. (Same recommendation on ADR form) Could also ask whether ADR was used? How helpful was ADR in the specific case.

Minutes from Procedures meeting 11/22/96, p.3

Question: who would be opposed to this proposal? The aggregated information might become a benchmark.

Question: Ask the federal court to require where there are cases with state claims? Yes.

Question: why not require insurance companies to have to report to Division of Insurance?

If valuable to obtain insurance settlements that are not filed in court - take insurance data from companies. Is DiPietro interested - form?
Problem with this: a lot of data. Also a lot of cases in which insurance is not involved.

The other thing that you are not getting is the cost of defense or what the contingency fee agreement is in the case. It would be useful for transaction costs.

Also interesting to recap information where plaintiff is bankrupt.

Problem: this form reflects consensus of parties. Cure by independent reporting of this data. Separate form by each party to report the "sensitive data" .

Strengthening language re. confidentiality is approved. Not for litigation and under confidentiality agreement. Strip off identifying characteristics. AJC database is generally available.

[member Jeff Bush is excused - will return for later discussions]

[committee takes break]

Fast Track Proposal:

Voigtlander gives background of proposal.

Recommend study / evaluation of Fast Track system..

Public Comment: plaintiffs should have some threshold to review cases before complaint filed.

Committee recommends proposal. (Bush not present, nor voting)

State Proposals:

Intentional in definition of fault::

GV and Williams discuss the proposal.

Public comment: insurance regulation - allocation of fault to State for failing to regulate insurance

industry. Accessing guarantee fund.

[Jeff Bush returns to committee]

Committee adopts recommendation.

Claims against State employees converting to claims against the State:

Jeff Bush gives explanation of the proposal.

Issue: what happens if AG certifies case , and there is a demand for punitive damages, what happens to the punitive damage claim?

Course and scope of employment is this a term of art? Or subject to argument?

Recommendation to not go forward: consensus of committee. Unresolved what would happen if AG certifies claim which contains claim for punitive damages against an employee.

District Court Proposal

Williams gives brief summary. Incentive to get into more streamlined process, reduced litigation costs. Discovery pretrial is limited. Trial setting is expedited. Resolution more quickly, hopefully more efficiently and at less cost.

Chris Christiansen: most troublesome aspect might be increase to district court limit. Court system funded on the basis of certain number of cases (this also dictates the number of judges). If you encourage more people to get into court, need more resources available. This will be a net increase of number of folks into the system, and perhaps a larger number of jury trials.

Comment: what about rest of change without changing jurisdictional limit?

Comment: by enticing more cases into district court would there be a decrease in superior court caseload?

Comment: would expedite treatment of smaller cases.

Comment: what should top figure be?

Comment: do you want to have leverage over litigants if they chose the wrong forum?

Comment: can leave that to offer of judgment cure.

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Motion : adopt proposal w/ $100,000. Figure. Adopted by committee.

Christiansen: drive up number of cases that go to jury trial.

Comment: more access w/ less cost.

ADR Proposal

Question: is 5 yr period too long and 50% of cases too great?

Comment: stick with 5 yr and 50%. If had druthers would make it statewide. It will take at least 5 yrs (realistically even longer) to get valuable data. If Legislature or Court system says not working they can abandon and "undo" it.

Christiansen: litigants to pay unless unable to pay. Equal protection issues? 3rd judicial district plaintiff has to pay for mediation to be in court, vs. 2nd judicial district who does not have to pay for ADR. Recommend putting cap on how much to pay mediators.

Comment: how does this get implemented? Rules/ procedures?

Comment: up to court to work out procedures and details.

Comment: its pretty broad.

Comment: I'm comfortable w/ letting the Court come up w/ specifics.

Comment: respect the equal protection argument - ct system would feel compelled to identify in fiscal note cost for court to pay for mediation/ ENE.

Comment: court system set mediator/ENE rate only when court system must pay.

Proposal: moved as originally proposed. No amendments.

Adjournment to full Task Force

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM November 18, 1996

SUBJECT: Tort reform (Work Order No. 20-LS0056\A)

TO: Representative Brian Porter

FROM: Michael F. Ford
Legislative Counsel

Enclosed is the bill draft you requested. In reviewing the material once again there were a few issues I wanted to bring to your attention. These are mostly minor issues, but with some definite substantive effects as well.

1. Collateral benefits - Sec. 7 of the draft contains the material you requested concerning collateral benefits. In sec. 09.17.070(b), a person defending a claim is prohibited from introducing evidence of certain collateral sources. The prohibited evidence consists of the sources listed in subsection (a)(1), (2), (4), and (5), but (a)(3) is omitted. It would seem logical to include (a)(3) as well in subsection (b). If you agree let me know and I will make this correction.

2. Allocation of fault - I have made an additional change to AS 09.17.080(b), not contained in your material. If you look at sec. 9, you will see two changes to AS 09.17.080(b), that I believe are consistent with the other changes you requested in this section. If you disagree, let me know and I will make necessary changes.

3. Expert witness qualification - The expert witness qualification provision is contained in sec. 11. You may want to include an exception to the requirements of (a)(2) for those licensed professionals for which there are no board certifications in a particular field. The language in (b) does not help this situation, because (b) only applies if the person is not licensed.

If you have questions on these or other matters please contact me.

MFF:lmb
96-155.lmb

Enclosure

0-LS0056\A
Ford
11/18/96

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE PORTER

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Rules 49 and 68, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; and providing for an effective date."

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

*** Section 1.** AS 09.10.055 is repealed and reenacted to read:

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

(1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; however, the limitation of this paragraph does not apply to a claim resulting from an intentional or reckless disregard of specific project design plans and specifications or building codes; or

(2) the last act alleged to have caused the personal injury, death, or

property damage.

(b) This section does not apply if

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

(A) exposure to a hazardous substance; in this subparagraph, "hazardous substance" means an element or compound that, when it enters into the air or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to public or individual health and welfare;

(B) an intentional act or gross negligence;

(C) fraud or fraudulent misrepresentation;

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

(E) a defective product; in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce; "product" includes an element or compound that if ingested by humans or if humans are exposed to, or are in contact with the element compound or product, poses a threat to human health;

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

(3) a shorter period of time for bringing the action is imposed under another provision of law; or

(4) a longer period of time for bringing the action was provided under a contract.

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

(d) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

*** Sec. 2.** AS 09.10.070(a) is amended to read:

(a) **Except as otherwise provided by law, a** [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, **or** false imprisonment [, OR FOR ANY INJURY TO THE PERSON OR RIGHTS OF ANOTHER NOT ARISING ON CONTRACT AND NOT SPECIFICALLY PROVIDED OTHERWISE]; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

*** Sec. 3.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. Limitation on actions involving injury to person or property. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, property damage, or injury to the rights of another not arising on contract unless the action is brought within two years of the accrual of the action.

(b) This section does not apply if a shorter period of time for bringing the action is imposed under another provision of law.

*** Sec. 4.** AS 09.17.010 is repealed and reenacted to read:

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

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

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

(A) 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;

(B) has lost both arms or both legs or an arm and a leg;

(C) has permanently impaired cognitive capacity, is incapable of making independent, responsible decisions, and is permanently incapable of independently performing the activities of normal, daily living;

(D) is both deaf and blind; or

(E) has third degree burns over one-half or more of the claimant's body.

(d) The limit under (b) or (c) of this section does not apply to noneconomic damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

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

*** Sec. 5.** AS 09.17.020 is amended to read:

Sec. 09.17.020. Punitive damages. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence **of outrageous conduct, including acts done with malice or bad motives, or reckless indifference to the interest of another person**.

*** Sec. 6.** AS 09.17.020 is amended by adding new subsections to read:

(b) 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 limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person who, as proven by a preponderance of the evidence, was attempting to commit or committing a felony if the person bringing the action was a victim of that offense and the offense substantially contributed to the injury or death. In this subsection, "victim" has the meaning given in AS 12.55.185.

(d) If a person receives an award of punitive damages, the court shall require that 75 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. 7.** 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 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 state or federal disability act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, evidence of death benefits paid under life insurance, or evidence of workers' compensation benefits received under AS 23.30, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage.

(c) A person who provides a collateral benefit admissible under (b) of this

section may not recover an amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

*** Sec. 8.** AS 09.17.080(a) is amended to read:

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

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

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

*** Sec. 9.** AS 09.17.080(b) is amended to read:

(b) In determining the percentages of fault, the trier of fact shall consider both 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. 10.** 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. 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. 11.** AS 09.20 is amended by adding a new section to read:

Sec. 09.20.185. Expert witness qualification. (a) Except as provided under (b) of this section, 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 a professional who is licensed in this state or in another state or country and is

(1) 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

(2) certified by a board recognized by the state as having acknowledged expertise and training directly related to the particular field or matter at issue.

(b) The provisions of (a) of this section do not apply to a person who is testifying on the appropriate standard of care in a profession that is not licensed in this state, or another state or country, and who the court determines is qualified as an expert witness.

(c) In this section, "professional negligence" means a negligent act or omission in rendering professional services.

*** Sec. 12.** AS 09.30.070 is amended by adding a new subsection to read:

(c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages.

*** Sec. 13.** AS 09.55.535(k) is amended to read:

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

*** Sec. 14.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.096. Civil liability of hospitals for nonemployees. (a) A hospital is not liable for civil damages as a result of an act or omission by a health care provider who is not an employee or actual agent of the hospital if the hospital provides notice that the health care provider is an independent contractor. The notice required by this subsection must be posted conspicuously in all admitting areas of the hospital, published at least annually in a newspaper of general circulation in the area, and be in substantially the following form:

Notice of Limited Liability

The following health care providers are independent contractors and are not employees of the hospital:

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing those privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

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

(c) In this section,

(1) "health care provider" means a doctor of medicine, psychologist, osteopath, dentist, optometrist, chiropractor, optician, pharmacist, podiatrist, or certified registered nurse anesthetist, who is licensed in this state;

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmentally owned or operated hospital;

(3) "independent contractor" means a licensed health care provider who is a member of a hospital's medical staff or who has otherwise been granted specified privileges to render health care services directly or indirectly to patients at the hospital, but who is not an employee or actual agent of the hospital in connection with the rendition of the health care services.

*** Sec. 15.** AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. Damages resulting from commission of a felony. (a) A

person who suffers personal injury or property damage may not recover damages for the personal injury or property damage if the injury occurred while the person was attempting to commit or committing a felony, or fleeing from the commission of a felony, and the felony substantially contributed to the injury or property damage.

(b) The personal representative of a deceased person may not recover damages for the person's death if the court determines by clear and convincing evidence that the death occurred while the person was attempting to commit or committing a felony, or fleeing from the commission of a felony, and that the felony substantially contributed to the death.

*** Sec. 16.** AS 09.55.548 is repealed.

*** Sec. 17.** AS 09.17.080(a), as amended by sec. 8 of this Act, has the effect of amending Rule 49, Alaska Rules of Civil Procedure, by requiring the jury to answer the special interrogatory listed in AS 09.17.080(a)(2) regarding the percentages of fault to be allocated among the claimants, defendants, third-party defendants, persons who have been released from liability, or other person who is responsible for the damages.

*** Sec. 18.** AS 09.20.185, enacted by sec. 11 of this Act, has the effect of amending Rule 702, Alaska Rules of Evidence, by requiring certain qualifications from a person testifying as an expert witness.

*** Sec. 19.** AS 09.30.070(c), added by sec. 12 of this Act, has the effect of amending Rule 68, Alaska Rules of Civil Procedure, by providing that prejudgment interest may not be awarded for future economic or noneconomic damages.

*** Sec. 20.** APPLICABILITY. This Act applies to all causes of action accruing on or after the effective date of this Act, except that this Act does not apply to a cause of action resulting from the Exxon Valdez oil spill occurring on March 24, 1989.

*** Sec. 21.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*** Sec. 22.** This Act takes effect July 1, 1997.

January 15, 19[illegible]

The Honorable Brian Porter
House Of Representatives
State Capitol
Juneau, Alaska

Re: HB 158, Section 19

Dear Mr. Porter:

I am contacting you as a citizen of your district, and as a neighbor, having recently moved to 2927 Madison Way in the College Village subdivision of Anchorage.

I am an attorney practicing in the area of tort and insurance law. I have done so for nearly fourteen years. I represent insurance companies and the Alaska citizens they defend and protect from tort lawsuits. I have seen many well-founded lawsuits and just as many unfounded and unjustified suits. Accordingly, I favor well-reasoned efforts at tort reform. I have watched with interest as HB 158 has followed the path toward our statute books. I believe it is a good bill that could be made better by re-thinking Section 19: Civil Liability For False Claims And Improper Practice.

Alaska Rule of Civil Procedure 11 and the common law tort of malicious prosecution used to cover the same concerns now addressed by Section 19. Rule 11 provides that a person who signs a civil pleading must do so only after reasonable inquiry or investigation to determine whether the words contained in it are well grounded in fact and in law. We lawyers often refer to this as "the truth in pleading rule." A violation of the rule is supposed to result in a sanction against the person signing - typically a lawyer.

Federal Civil Rule 11 provides that the court must sanction one who violates the rule. The judge's only discretion involves what the sanction will be. In my experience, the rule tends to be effective in federal court, where I have seen it enforced.

Alaska's Civil Rule 11 was amended to conform to Federal Rule 11, but the amendment was later repealed in order to let the judge decide whether or not he or she will impose any sanction. My understanding is that this change was prompted by complaints from plaintiffs' attorneys that Rule 11 was unduly oppressive, chilling their "right" to push for new and creative theories of recovery.

Whatever the reason for the change to discretionary enforcement, the state version of Rule 11 has become largely unenforced, prompting the desire for some stronger rule against frivolous lawsuits.

Apparently to remedy this situation, Section 19 of HB 158 would resurrect Alaska's truth in pleading rule. But instead of putting it into the hands of the court to enforce, section 19 would create a new cause of action by which litigants could add a new claim against one another, and/or sue their opponents' attorney(s), when they feel the other side isn't playing fair.

I strongly urge you to rethink section 19. The goal of enforcing truth in pleading is a necessary and proper one. But the means adopted are antithetical to the key goals of limiting unnecessary or unreasonable litigation, and of limiting litigation costs.

Our Alaska Supreme Court has a history of expanding existing remedies, and creating new ones. This is part of the need for tort reform. But even that body knows better than to allow litigants to add claims against one another for malicious prosecution - the more limited equivalent of the new cause of action expressed in section 19.

It is inherent in civil litigation that most parties come into the court system with a feeling of animosity toward one another. They have been unable or unwilling to resolve their differences, and their suspicion of the motives of one another is extreme. Emotions run high, and the motives of the other party are impugned in the mind of each litigant. At minimum, they mistrust one another. All too often, they may even hate one another.

When the parties were able to add claims for taking "malicious" positions in the original litigation, they regularly did so, due to the passion and prejudice just mentioned. This escalated the cost and complexity of litigation, and used up valuable court resources, by tying the litigants and the court system to expensive discovery and delay in order to get at the suspected evil intentions of the other party.

Over time, American courts adopted a rule that, in order to make a case for "malicious prosecution", one must first prevail in the underlying claim(s) that brought the litigants to court in the first place. This rule had the effect of limiting the number of such emotionally-based claims. Alaska's courts now follow this rule, and to the best of my knowledge there has been no desire by the court system to re-open the floodgates as to such claims.

In existing practice, if one party or the other litigates "frivolously", "in bad faith", or "vexatiously", the court may award actual attorney's fees to the prevailing party under Civil Rule 82. This often has the effect of mooting out the need for a second lawsuit, for malicious prosecution, to recover actual litigation costs. This usually resolves the dispute, and the concern about suspected motives.

In Alaska there has been one noteable exception to this limitation. Until recently, it was unsettled whether plaintiffs, when suing insurance companies for denial of insurance coverage, could get damages for emotional distress and punitive damages even when the insurer had an objectively reasonable basis in the insurance policy for the denial of insurance coverage. The theory was referred to as "subjective bad faith." It allowed an insured to sue his insurance company for damages <u>even if the insurance company did not owe coverage under the contract</u>, on the theory or accusation that the real reason for denying insurance coverage (even if not owed under the contract) was some ill will toward the insured. This claim was merely an application of the old "malicious prosecution" theory, limited in other contexts. In effect, such "bad faith" claims were designed to require an insurer to cover losses they did not agree to insure, and to pay additional tort damages as well. This radically increased the cost and complexity of insurance coverage litigation. If you like, I can provide many examples of this from past lawsuits.

Finally, in <u>Hillman v. Nationwide Ins. Co.</u>, the Alaska Supreme Court ruled that an insurer is privileged to deny coverage if there exists an objectively reasonable basis for the insurance company's position. In other words, the insurance company was allowed to rely on the terms of the insurance contract when deciding whether insurance coverage exists. A copy of that decision is enclosed. The supreme court said that in the face of a good faith basis to deny coverage in the terms of the insurance contract, it simply did not matter whether the insurer allegedly had ill will toward its insured. This decision is fairly consistent with the common law rule of limiting malicious prosecution lawsuits, and has led to simplified litigation to decide insurance coverage, focusing on the terms of the insurance contract instead of conspiracy theories and the like.

Section 19 would tend to re-open, and expressly support, the theory of "subjective bad faith". I believe our courts would interpret it to overrule the <u>Hillman</u> case. This will, once again, radically raise the cost and complexity of insurance coverage litigation. This is especially problematic because the Ninth Circuit Court of Appeals has recently ruled that insurance companies may no longer

go to federal court to have their insurance coverage obligations decided. (The federal court approach to summary judgment tends to weed out meritless claims, while the state approach is to allow far more cases to go to jury trials.)

I have just explained the foreseeable impact of section 19 on insurance litigation. But the greatest impact may foreseeably occur in divorce litigation. In a divorce, the parties tend to be so emotionally distraught that they will readily add this claim against both their spouse and the spouse's lawyer, injecting the right to a jury trial in divorce proceedings, a place so far unfettered with this added expense and complexity.

The ability to sue opposing counsel is a nearly unprecedented step, with inherent opportunities to tactically derail fair and reasonable legal proceedings. A lawyer cannot properly function on behalf of his or her client when the lawyer knows a claim is to be brought against the lawyer. It injects an element of distraction and conflict between the interests of attorney and client.

I encourage you to seek an advisory opinion from the Alaska Bar Association about this issue. I believe Bar Counsel will foresee that when threatened with a lawsuit, the threatened lawyer may tend to compromise the legitimate interests of his client in order to defuse the delayed claim against the lawyer. This puts the attorney in a dilemma. To stay in is problematic, but to withdraw will foreseeably result in the same accusations against replacement counsel, unreasonably running up the client's litigation expenses.

The lawyer will be especially intimidated by such a claim because the lawyer will have no insurance protection from such claims. The insurer will foreseeably deny coverage on two grounds. First, it will be said that intentional and non-accidental conduct is not covered. There is generally such limiting language in all liability insurance policies. Second, it will be said by the lawyer's malpractice insurer that this is not a malpractice claim, because malpractice involves a suit by one's client, not by the client's opponent. I have seen this happen in actual cases, which I would be glad to share with you.

Section 19 would therefore create a new cause of action, closely resembling the old claim of malicious prosecution, but without the court-imposed limitations that once held back the floodgates of so dangerous a claim. Having created that cause of action, and actually increased the amount and the scope of unreasonable litigation instead of limiting it, we would find that there would not be insurance to protect the people sued under this new theory.

Accordingly, the application of section 19 will tend to undermine the real goals of tort reform.

The proviso in section 19 that the prevailing party on such a claim can collect actual damages is small help. The defendant in such a suit must still pay for litigation expenses in the meantime. Those expenses can be formidable, especially because plaintiff can by sharp tactics force the defendant to change counsel.

Most cases settle, and this class of claim lends itself to misuse in order to force an unreasonable settlement by a sort of blackmail. The threat goes something like this: "I'll sue you for taking an improper position, and your attorney, too. This will pressure him to withdraw as your lawyer. Then you'll have to pay for new counsel to learn this case. Then maybe I'll put that lawyer on notice that he'll be sued too, because he is continuing to assert the same position (and the lawyer after that, etc.). This will destroy you with expense to defend each time you change counsel. You'd better settle on my terms."

I have seen this tactic used for years in the insurance coverage field, under the old "subjective bad faith" theory of liability. The lawyer was made a witness to prove his client's "bad faith", or the lawyer was actually made a defendant. In effect, it forced an unreasonable settlement because the cost and comlexity was simply too great to go on. Again, I am willing to provide examples from past lawsuits in order to demonstrate how this is used in practice, if you wish.

For the foregoing reasons I encourage you to rethink the wisdom of Section 19. The goal is laudable, but I do not think this section will in fact serve that goal in practice. Rather, I believe it will tend to work against the larger purposes of tort reform, and be used by the enemies of tort reform to denounce future efforts at limiting the excesses of our tort system.

Thank you for your consideration of the foregoing. If you wish to discuss this matter further, I would like to do so. This area is a complex one, and I imagine it would be helpful to hear more from those who deal in the trenches of the tort system on an ongoing basis. If so, please feel free to contact me.

Very truly yours,

Jim Wright

James B. Wright

Phone: 276-3222 (office)
276-0546 (home)

John A. HILLMAN and Janet Hillman, individually and Janet Hillman as Personal Representative of the Estate of Julie G. Hillman, a deceased minor, Appellants,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Appellee.

No. S-4555.

Supreme Court of Alaska.

July 9, 1993.

Insureds brought action against uninsured motorist insurer for bad faith in handling uninsured motorist claim filed after the death of their daughter. The Superior Court, Third Judicial District, Peter A. Michalski, J., granted insurers motion to dismiss and designated insurer as prevailing party for purposes of awarding attorney's fees. Insureds appealed. The Supreme Court, Matthews, J., held that: (1) insurer's denial of coverage was not unreasonable; (2) insurer's arbitration demand was reasonable and not in bad faith; and (3) trial court erred in designating the insurer rather than the insured as prevailing party.

Affirmed in part, reversed in part, and remanded.

Compton, J., filed an opinion dissenting in part, in which Burke, J., joined.

1. Insurance ⇐602.5

The tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive, but it necessarily requires that insurance company's refusal to honor a claim be made without a reasonable basis.

2. Judgment ⇐185(2, 6)

If, when viewing evidence most favorably to opponent of motion for summary judgment, trial court finds that reasonable jury could only conclude that challenged conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered, although questions of reasonableness must often be resolved at trial.

3. Insurance ⇐602.12(2)

Where insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

4. Insurance ⇐602.5

Insurer did not act in bad faith in denying coverage under policy exclusion for injury suffered while occupying motor vehicle not insured for uninsured motorist coverage, where insureds did not present any evidence suggesting unreasonableness, trial court found that only reasonable interpretation of exclusion was that advanced by insurer, and two of the five members of the court had previously believed that the exclusion was valid, even though insurer did not follow its standard procedures in denying coverage, did not forward its attorney's letter to insureds as promised, and conditioned $50,000 offer on settling all of insureds' claims rather than just their uninsured motorist claim.

5. Insurance ⇐567.1

Insurer's demand for arbitration was reasonable and not in bad faith, where insurer could reasonably have concluded that uninsured motorist was only partially responsible for accident from initial police report, insurance policy only covered insureds to the extent that the uninsured motorist was liable, and in fact arbitrators determined that decedent was 66% at fault for the accident, and insureds were 85% at fault for their emotional distress.

6. Costs ⇐194.12

An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or manifestly unreasonable.

7. Costs ⇐194.14

Designation of prevailing party for purposes of awarding attorney's fees to prevailing party is committed to the broad

discretion of the trial court. Rules Civ. Proc., Rule 82(a).

8. Costs ⇐194.14

It is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party for purposes of attorney fee award. Rules Civ.Proc., Rule 82(a)(2).

9. Insurance ⇐675

Insureds prevailed against vigorous opposition on their claim of policy coverage and received $50,000 on that claim, and thus were prevailing parties entitled to award of attorney's fees, even though they did not receive compensatory and punitive damages on their claim of bad faith. Rules Civ.Proc., Rule 82(a).

Michael J. Schneider, Mestas & Schneider, P.C., Anchorage, for appellants.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

John and Janet Hillman sued their insurer, Nationwide Mutual Fire Insurance Company (Nationwide), for bad faith in the handling of their uninsured motorist claim filed after the death of their daughter. The superior court granted Nationwide's motion to dismiss the claim, concluding that the insurer's decisions to deny coverage and to demand arbitration were reasonable. The Hillmans appeal this decision along with the trial court's designation of Nationwide as the prevailing party for attorney's fee purposes. We affirm on the merits but reverse the award of attorney's fees.

I. FACTS AND PROCEEDINGS

On August 14, 1983, while driving an ATV owned by her father, eleven-year old Julie Hillman collided with an uninsured pickup truck driven by William Amis. Julie died six days later as a result of her injuries.

Nationwide had issued an automobile insurance policy to Julie's father, John Hillman, which provided uninsured motorist coverage up to $25,000 per person or $50,000 per occurrence. However, when on August 10, 1984, Janet Hillman, Julie's mother, contacted Nationwide to inquire about coverage and claim procedures, Maury Hafford, Nationwide's local adjustor, indicated that Nationwide had no liability. This denial was based on one of the "coverage exclusions" in the uninsured motorist section.[1] On February 7, 1985, after further inquiries by Mrs. Hillman, Hafford referred the claim to Nationwide's legal counsel in order to "clarify this issue of coverage for your understanding and satisfaction," as he wrote Mrs. Hillman. When, in late March 1985, Nationwide's attorney informed Hafford that "the question of coverage appears to be a roughly 50/50 proposition," Hafford wrote Hillman "seeking ... further details with regard to Julie's accident." However, he did not relay the attorney's opinion to Mrs. Hillman.

On April 1, 1985, the Hillmans filed a complaint against Nationwide for bad faith. The following month Nationwide offered the Hillmans $50,000 as a "compromise payment." The Hillmans rejected the offer, claiming that they were entitled to $150,000 under the insurance policy, plus medical benefits, incidental, consequential, and punitive damages.

The following April Judge Katz granted Nationwide's motion for summary judgment and dismissed the Hillmans' claims. The Hillmans appealed the decision.

1. The pertinent exclusion stated that
[t]his Uninsured Motorists insurance does not apply as follows:
....
4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for Uninsured Motorist coverage under this policy. It does not apply to bodily injury from being hit by any such vehicle. (Emphasis deleted.)

On July 1, 1988, this court held that the Hillmans were covered by the Nationwide policy. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (*Hillman I*). We agreed with Nationwide's interpretation of the contractual language. However, a majority of the court refused to give effect to the uninsured owned motor vehicle exclusion contained in the policy for statutory and public policy reasons. *Id.* at 1251–52.

Once coverage was established, Nationwide chose to pursue the arbitration procedure mandated by the policy for determining liability.[2] Arbitration was held on January 30, 1989. The arbitrators concluded that Amis was 33% at fault with regard to the claims related to Julie's estate. As for John and Janet's claims for negligent infliction of emotional distress, the panel agreed that Amis' negligence accounted for 15% of the harm. The arbitrators awarded $92,500 to the Hillmans. Two weeks later Nationwide paid the Hillmans $50,000, the maximum amount of the uninsured motorist coverage provided by the policy.[3]

Following arbitration, the Hillmans' bad faith litigation began anew. On June 21, 1990, Judge Michalski granted Nationwide's motion for partial summary judgment, dismissing the bad faith claims associated with Nationwide's denial of coverage and decision to arbitrate.

After several pre-trial motions, Judge Michalski reconsidered an earlier ruling and granted Nationwide's motion for summary judgment on the remaining bad faith claims.[4] Dismissal of the claims was based on Judge Michalski's belief that the Hillmans failed to demonstrate that they could show damages. After issuing the Final Judgment, the superior court identified Nationwide as the prevailing party and awarded costs and partial attorney's fees in the amount of $154,899.57.

This appeal followed.

II. DISCUSSION

A. Dismissal of the Hillmans' Bad Faith Claims

1. Denial of Coverage

In *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152 (Alaska 1989), we held that insurance companies could be liable for the tort of bad faith in so-called "first-party" cases—cases in which insureds seek compensation from their own insurers for losses which they have suffered. *Id.* at 1156.

We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in *Nicholson;* we have not done so in subsequent cases, *see e.g., State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); nor do we do so now. In recognizing the tort of bad faith in first-party cases, we aligned Alaska with those jurisdictions that have followed *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (Cal.1973), apparently the first case to apply bad faith as a tort in first-party cases.[5] *Gruenberg* articulated the tort in a manner that seemed to require unreasonable conduct and bad

2. In *Hillman I*, we rejected the Hillmans' argument that Nationwide had waived its right to arbitration. *Hillman I*, 758 P.2d at 1253. The trial court held that although "'Nationwide acted in bad faith in failing to disclose the availability of the arbitration procedure in four separate pieces of correspondence to Mrs. Hillman,' arbitration should proceed because the Hillmans were represented by counsel who 'simply made a calculated decision to attempt to obtain relief through the court system, knowing that the policy actually required dispute resolution through arbitration.'" *Id.* The court added that since "'none of the litigants herein has clean hands,' '[t]he balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process.'" *Id.* We found no error in the trial court's reasoning or conclusion.

3. On June 12, 1989, Judge Gonzalez granted Nationwide's motion for partial summary judgment and barred the Hillmans from recovering arbitration damages for emotional distress. The arbitration award was consequently reduced to $55,000.

4. What these claims consisted of is not brought into focus in the briefs before us.

5. The jurisdictions that have followed *Gruenberg* are listed in William M. Shernoff, et al., *Insurance Bad Faith Litigation*, § 5.01 at 5.3 n. 4 (1984 and Supp.1992).

faith: "Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg*, 510 P.2d at 1038.

A similar double requirement was imposed in *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981), another case on which we relied in *Nicholson*. The Arizona Supreme Court adopted the standard expressed by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (Wis.1978):

The *Anderson* Court states:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one....
>
> The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

271 N.W.2d at 376–77.

> Under the *Anderson* standard an insurance company may still challenge claims which are fairly debatable. The tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a reasonable basis for such action.

Noble, 624 P.2d at 868.

A leading text has this to say about the standard in first-party bad faith cases:

> In third party situations, an insurer can be liable for an excess judgment when it has failed to settle a third party action against its insured. However, courts have not agreed on the standard for imposing such liability. Some courts impose liability for a negligent failure to settle the third party action; others apply a "bad faith" test that, in practical terms, amounts to a negligence test; and a third group of courts applies a fairly strict requirement of subjective bad faith. A similar divergence of views concerning the level of wrongdoing necessary to impose tort liability on insurers for denial of benefits appears to exist among courts that have adopted the tort of first party bad faith.
>
> Although bad faith is not fully defined in some jurisdictions, courts have consistently held that a refusal to pay benefits based on a reasonable interpretation of the insurance contract is not bad faith.

Shernoff, *Insurance Bad Faith Litigation*, § 5.02[1] at 5–6 (1992) (footnotes omitted).

[1] The above authorities make it clear that while the tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive,[6] it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis.[7] Neither party takes issue with this proposition. Instead, the Hillmans argue that summary judgment should not have been granted because (a) reasonableness is always a question of fact for the jury and, alternatively, (b) under the facts and circumstances of this case there was a fact ques-

6. The Wisconsin Supreme Court may have modified the *Anderson* standard. In *Fehring v. Republic Insurance Co.*, 118 Wis.2d 299, 347 N.W.2d 595 (1984), the court held that proof that a reasonable insurer would not have acted as the defendant did under the circumstances establishes bad faith.

7. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622 (Alaska 1990), a case involving the somewhat analogous relationship between a surety and its obligee, we stated: "A surety may satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear." *Id.* at 628. In a footnote, we quoted an Arizona decision, *Dodge v. Fidelity and Deposit Co. of Maryland*, 161 Ariz. 344, 778 P.2d 1240 (1989), which uses language mirroring the rule of law employed in today's opinion: "So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability." *Loyal Order of Moose*, 797 P.2d at 627 n. 8.

tion as to whether Nationwide had a reasonable basis for denying the claim.

[2] The Hillmans' argument that reasonableness always presents a question of fact is without merit. Although questions of reasonableness often must be resolved at trial, we have not held that they are never an appropriate subject for summary judgment procedures. If, when viewing the evidence most favorably to the opponent of a motion for summary judgment, the trial court finds that a reasonable jury could only conclude that the challenged conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered. *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 623 (Alaska 1986).

The Hillmans also argue that the superior court tacitly accepted the standard of bad faith articulated in *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala.1982). In *Dutton*, the Alabama Supreme Court held that, except in extraordinary circumstances, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim ... the [bad faith] tort claim must fail and should not be submitted to the jury." *Id.* at 1362. In short, under the *Dutton* test, the plaintiff must prove that plaintiff is "entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law." *Id.*

[3] We need not address whether the superior court adopted the *Dutton* standard. *Dutton* does not state the Alaska rule of law. Our position is merely that where the insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

[4] The Hillmans' alternative argument—that they presented sufficient evidence to raise a fact question as to whether Nationwide's denial of coverage had a reasonable basis—requires more discussion. The Hillmans argue that they presented evidence showing that Nationwide denied coverage before making *any* investigation of the facts or the law and that Nationwide made subsequent, formal denials of coverage without having conducted significant investigation. They also argue that Nationwide's agents violated its guidelines and policies, which are intended to guarantee fair, honest and reasonable claims handling. Among others, this included violating the company policy requiring local adjustors to consult with higher echelons in the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policy holder; withholding from the file any explanation for why the policy holder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policy holder with a previously promised letter from Nationwide's attorney regarding coverage; lying to the policy holder about whether that letter was available; and "stonewalling" the claim for four years because of vindictiveness towards the Hillmans' attorneys.[8] Finally, the Hillmans argue that even after Nationwide had given its personnel the authority to concede coverage and settle the underlying case for the $50,000 policy limits, its Regional Claims Attorney unilaterally decided not to do so.

In our view none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis. The denial was based on an explicit exclusion in the policy. The question in this case is whether Nationwide was unreasonable in treating the exclusion as valid. As to this question, the Hillmans have directed us to no evidence suggesting unreasonableness. We have found that "the only reasonable interpretation" of this exclusion was that advanced by Nationwide. *Hillman I*, 758 P.2d at 1250. We also concluded in *Hillman I* that the exclusion was invalid on statutory and public policy grounds. Two of the five members

8. The Hillmans maintain that Nationwide's District Claims Manager and its Regional Claim Attorney concede that Nationwide failed to follow its own policies and procedures in all these respects.

of this court disagreed that the exclusion was invalid. *Id.* at 1255 (dissenting opinion of Justice Burke, joined by Justice Moore). *See also State Farm Mut. Auto. Ins. Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444, 445 (1973) (where appellate court was divided on interpretation of uninsured motorist statute, "insurer was legally justified in litigating the issue and cannot, as a matter of law, be liable for ... bad faith"). Further, as we acknowledged in *Hillman I*, a respectable minority of jurisdictions have reached the same conclusion as the dissent. *Hillman I*, 758 P.2d at 1251. The facts that Nationwide did not follow its standard procedures in denying coverage, that it did not forward its attorney's letter to the Hillmans, and that its $50,000 offer was conditioned on settling all of Hillmans' claims rather than their uninsured motorist claims, do not suffice to create a fact question as to whether Nationwide's decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point. We conclude, therefore, that there are no genuine issues of material fact as to whether Nationwide's denial of coverage was reasonable.[9]

2. Demand for Arbitration

[5] In the same order dismissing the bad faith claim related to coverage denial, Judge Michalski also dismissed the bad faith claim based on Nationwide's demand for arbitration. Judge Michalski found that the arbitration demand was not in bad faith because Nationwide "merely exercised its right." The court reiterated the decision in its March 7, 1991 order dismissing the Hillmans' remaining bad faith claims.

The Hillmans contend that Nationwide had no reasonable basis to demand arbitration. Instead, they argue, Nationwide's agents insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims and because of vindictiveness and aggravation with their attorneys.

However, the insurance policy covered the Hillmans "only to the extent the uninsured motorist was liable." Based on evidence from the initial police report, Nationwide could reasonably conclude that Amis was only partially responsible for the accident.[10] The subsequent findings of the arbitrators, that Julie was 66% at fault for the accident and her parents 85% at fault for their emotional distress, lend additional support to Nationwide's claim that its demand for arbitration was reasonable. *See Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848, 850 (1986) (a subsequent arbitrator's decision that a claimant was partially negligent was clear evidence that an insurer's denial of liability was not in bad faith). Consequently, Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith.

B. Award of Attorney's Fees

[6, 7] An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or "manifestly unreasonable." *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1138 (Alaska 1989). Designation of the prevailing party "is committed to the broad discretion of the trial court." *Apex Control Systems, Inc. v. Alaska Mechanical, Inc.*, 776 P.2d 310, 314 (Alaska 1989).

The determination will be affirmed on appeal "unless it is shown that the court abused its discretion by issuing a decision which is arbitrary, capricious, mani-

9. This conclusion is consistent with *State Farm Mutual Automobile Insurance Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444 (1973) and *Aetna Casualty & Surety Co. v. Superior Court*, 161 Ariz. 437, 778 P.2d 1333 (App.1989). In both cases, courts found that an insurer was not liable for bad faith when it denied coverage to an insured on the basis of an uninsured motorist exception which was later held invalid. *See also Hanson v. Prudential Insurance Co. of America*, 772 F.2d 580 (9th Cir.1985) (applying California law).

10. The report stated that Julie had "failed to yield when entering Long Lake Road from a side road." The Hillmans note that the information available to Nationwide when it insisted on arbitration was insufficient to prove that Amis was not *at all* at fault. This is true but irrelevant. Nationwide was entitled to arbitration if it could reasonably maintain that Amis was not *completely* at fault.

festly unreasonable, or improperly motivated."

Howard S. Lease Constr. Co. & Assoc. v. Holly, 725 P.2d 712, 720 (Alaska 1986) (quoting *City of Yakutat v. Ryman*, 654 P.2d 785, 793 (Alaska 1982)).

After the Final Judgment was issued, Judge Michalski awarded Nationwide approximately $155,000 in costs and partial attorney's fees.[11] The Hillmans argue that the trial court abused its discretion when it determined that Nationwide was the prevailing party. The Hillmans claim that since they prevailed on two of the three issues in the case, coverage and liability, but not on bad faith, they were the "prevailing party."

Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party.[12] "[T]he prevailing party is the one 'who has successfully prosecuted or defended against the action, the one who is successful on the "main issue" of the action and "in whose favor the decision or verdict is rendered and the judgment entered."'" *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989) (quoting *Adoption of V.M.C.*, 528 P.2d 788, 795 n. 14 (Alaska 1974)).

[8, 9] This court has recognized that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party." *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313–14 (Alaska 1972). We have been cited to two cases [13] where the party who obtained an affirmative recovery was held not to be the prevailing party by the trial court and this decision was affirmed on appeal. The cases are *Owen Jones* and *Hutchins v. Schwartz*, 724 P.2d 1194 (Alaska 1986). In *Hutchins*, the plaintiff sought $275,000 in compensatory damages. After a trial the jury returned a verdict in favor of the plaintiff, awarding some $1,900, which in turn had to be reduced by 40% because of the plaintiff's comparative negligence. *Id.* at 1204. Thus the plaintiff's affirmative award was only approximately $1,100. This recovery is so small in comparison with what was sought that it may properly be considered *de minimis*. The verdict essentially was a defense verdict.[14]

Owen Jones may not be so easily distinguished. There, Jones–Western, a contractor, sued its subcontractor, C.R. Lewis Co., to recover approximately $120,000 in progress payments that Jones–Western had paid C.R. Lewis in connection with construction of a building that was destroyed by an earthquake before it was completed. The subcontractor counterclaimed for services rendered and materials furnished before the collapse. The trial court held that Jones–Western was not entitled to recover progress payments and that the subcontractor had a claim in *quantum meruit* for the reasonable value of the services and materials supplied prior to the earthquake. The trial court fixed this sum at approximately $142,000. Thus, the subcontractor would have been entitled to an affirmative recovery of some $22,000 except for the fact that it salvaged some materials from the building after the earthquake on which the court placed a value of $30,000. Because of this, Jones–Western was left with a small affirmative recovery. We described this recovery in *Owen Jones* as merely "incidental": "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being consid-

11. The total consisted of $44,448.57 in costs and $110,451.00 in fees. The attorney's fees award was 40% of the total amount of attorney's fees Nationwide incurred after July 1988.

12. Alaska R.Civ.P. 82(a)(2) states:
> In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

13. *Buoy v. ERA Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989), is not a case in which the plaintiff received an affirmative recovery. The $141,676 jury verdict the plaintiff received in that case was reduced to nothing because of prior settlements which the plaintiff had made. *Id.* at 441.

14. In addition, in *Hutchins* the defendant had made an offer of judgment under Civil Rule 68 for $35,000 and therefore under that rule he was in any case entitled to attorney's fees incurred after the date of the offer. *Id.* at 1203.

ered a prevailing party." *Owen Jones*, 497 P.2d at 314, n. 5. We also noted that the "main issue" in the case below was whether the subcontractor had an obligation to refund the progress payments. The subcontractor prevailed on this issue. *Id.* at 314. Accordingly, we affirmed the trial court's holding that the subcontractor was the prevailing party. *Id.*

In reaching our conclusion in *Owen Jones*, we distinguished *Buza v. Columbia Lumber Co.*, 395 P.2d 511 (Alaska 1964). *Buza* was a suit brought for conversion of a quantity of logs. The plaintiff sought the return of the logs, worth some $8,000, plus compensatory and punitive damages of $31,000. After a trial the plaintiff was awarded the logs, but no damages. We held, nonetheless, that the plaintiff was the prevailing party, defining that term to mean the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." *Buza*, 395 P.2d at 514.

In *Owen Jones* we distinguished *Buza* as follows:

> The main issue in that case was the ownership of a quantity of logs, and the plaintiff proved his right to the logs although he was not able to obtain compensating or punitive damages.
>
> The instant case differs because the recovery of appellants was based only on an accounting for materials salvaged by the appellee. It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract....

Owen Jones, 497 P.2d at 314 (footnote omitted).

In our view the present case more closely resembles *Buza* than *Owen Jones*. Here, as in *Buza*, plaintiff prevailed on the basic liability question and received an affirmative recovery based on its successful litigation of that question, which was substantial in amount. *Owen Jones* is distinguishable because the plaintiff's affirmative recovery there was based on a minor accounting issue, not on the liability theory which plaintiff tried unsuccessfully before the court.

In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received $50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case. We conclude therefore that the trial court erred in refusing to designate the Hillmans as the prevailing party.[15] Accordingly the award of attorney's fees must be reversed and this case remanded so that an award of reasonable attorney's fees may be made in favor of the Hillmans.

III. CONCLUSION

We affirm the decision of the superior court granting Nationwide's motion for summary judgment on the Hillmans' bad faith claims. Nationwide's decisions to deny coverage and then to demand arbitration were reasonable. In light of our decision, there is no reason to consider the damages issue.[16]

The superior court's designation of Nationwide as the prevailing party was an abuse of discretion. Since the Hillmans prevailed on two of the three issues central to the case and won a substantial affirmative recovery based on these issues, they were the prevailing party. The trial court

15. The fact that Nationwide made an offer of settlement of $50,000 is irrelevant to the question of who the prevailing party is since this offer was not made under Civil Rule 68. *Myers v. Snow White Cleaners & Linen Supply, Inc.*, 770 P.2d 750, 753 (Alaska 1989) ("no offers not in compliance with Civil Rule 68 should be considered in determining questions of costs and attorney's fees").

16. In addition, we decline to address the Hillmans' claim that several of the superior court's evidentiary rulings were an abuse of discretion. Even if the superior court's rulings concerning the admissibility of evidence during trial were erroneous, such error was harmless where the case was never submitted to the jury.

should make a new award reflecting this determination.

The superior court's decision granting summary judgment on the bad faith claims is AFFIRMED. The award of attorney's fees is REVERSED and REMANDED.

COMPTON, Justice, with whom, BURKE, Justice, joins, dissenting in part.

While declining to comprehensively define the elements of the tort of bad faith, the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability regardless of any subjective bad faith. Because the court's analysis is contrary to law and not supported by policy, and because a reasonable jury could find that Nationwide acted with subjective bad faith, I dissent.

The court concludes that the tort of bad faith in the context of first party insurance claims necessarily includes a requirement that the insurer's refusal to honor the claim be made without a reasonable basis. It should be noted that the Hillmans do not accept this proposition, because contrary to the court's conclusion, the Hillmans do not accept that a reasonable basis can exist if actions are motivated by improper purposes. The Hillmans argue that because evidence was presented that shows Nationwide's denial was motivated by self serving, dishonest and improper purposes, summary judgment was inappropriate. "Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination." Thus the issue is properly before us.

Until today the covenant of good faith and fair dealing, which we have implied in every contract including insurance contracts, has imposed duties above and beyond express contractual duties. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979). The additional duties imposed by the covenant of good faith and fair dealing were not eliminated when this court accepted the argument that in insurance contracts, a breach of the covenant sounds in tort. "That responsibility is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 485, 510 P.2d 1032, 1037 (1973).

The covenant of good faith and fair dealing requires that the party act with both *subjective* good faith and *objective* fairness. *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1225 (Alaska 1992). It is objectively reasonable to rely on contractual rights. Contractual rights, therefore, provide a reasonable basis for a position. But this does not end our inquiry. The covenant of good faith and fair dealing requires that contractual rights be pursued with subjective good faith. In *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983), even though the employment at will contract allowed the firing of Mitford for no reason at all, "the circumstances surrounding Mitford's termination give rise to an inference that he was fired ... for the purpose of preventing him from sharing in future profits," thereby violating the duty of good faith and fair dealing. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622, 629 (Alaska 1990), we noted that while the surety had a contractual right to demand arbitration, "the demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

We have declined to hold that a breach of the covenant of good faith and fair dealing sounds in tort in the context of employment contracts. However, because of the special nature of insurance contracts, a breach of the covenant of good faith and fair dealing in first party insurance claims does sound in tort. *State Farm Fire & Cas. Co. v.*

Nicholson, 777 P.2d 1152, 1156–57 (Alaska 1989).

> The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Id., quoting Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L.Rev. 187, 200–01 (1982). The reason for holding that such claims sound in tort is because "an action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds." *Id.*, quoting *White v. Unigard Mutual Insurance Co.*, 112 Idaho 94, 730 P.2d 1014, 1017–18 (1986).

Nicholson is consistent with our policy that because of the special nature of insurance contracts, they are particularly susceptible to public policy considerations. *Hillman v. Nationwide Mutual Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (invalidating uninsured motor vehicle exclusion on the basis of public policy); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) (granting an insured the unilateral right to select independent counsel in cases where an insurer has reserved its rights, despite the insurer's express contractual right to select counsel); *Estes v. Alaska Ins. Guar. Ass'n*, 774 P.2d 1315 (Alaska 1989) (concluding that a time limitation on commencement of suit will only be enforced on a showing of prejudice); *Alaska Energy Authority v. Fairmont Insurance Co.*, 845 P.2d 420 (Alaska 1993) (concluding that the failure to file suit within the time limitation of the contract does not bar a claim without a showing of prejudice).

In spite of these cases, this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail regardless of any evidence of subjective bad faith. The court interprets our adoption of *Gruenberg* as "seem[ing]" to require proof of both objectively unfair conduct *and* subjective bad faith. *Gruenberg* was the first case to hold that a breach of the covenant of good faith and fair dealing sounds in tort, giving the plaintiff broader remedies than those in contract. While in *Gruenberg* there may have been evidence of both unfair conduct and bad faith, the court clearly articulated "the obligation, deemed to be imposed by the law, under which the insurer must act fairly *and* in good faith in discharging its contractual responsibilities." 510 P.2d at 1037 (emphasis added).

Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim.[1]

1. This court stated in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), that an insured may bring a bad faith claim "in tort as well as in contract." The duty of good faith and fair dealing implied in every contract requires the insurer to act with subjective good faith *and* objective fairness, unlike the tort of bad faith which, as now defined, permits the insurer to act with subjective bad faith. If *Weiford* is still a correct statement of the law, then the proper disposition of this case would be to remand it to the superior court for further proceedings. The Hillmans should be permitted to proceed on a claim based on a breach of the implied covenant of good faith and fair dealing arising out of the contractual relationship, distinct from a claim based on the tort of bad faith. They have set forth specific facts which, viewed in a light most favorable to them, raise genuine issues of material fact. Contractual damages based on a breach of the implied covenant of good faith and fair dealing may be narrower in scope than tort damages, yet some relief may be available to the Hill-

This is contrary to our previous holdings. For example, in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), we reaffirmed that "bad faith claims brought by insured persons against their insurance companies may be brought in tort as well as in contract." We vacated the award of punitive damages because "the $20,000 offer clearly was reasonable. While the suspect note to the file might be reflective of bad motive, since the offer in question was reasonable, the note cannot independently form the basis for a punitive damages award." *Id.* at 1268. However, we noted that "the crux of Weiford's bad faith case was the testimony of her expert, George Broatch. Broatch testified that no single act of State Farm amounted to bad faith, but that cumulatively State Farm's actions did: 'It—to me it was a matter of the company philosophy. I don't really have any quarrel with the day to day handling of the file particularly.'" *Id.* at 1267. We concluded "that there was sufficient evidence to support a jury finding that State Farm acted in bad faith." *Id.* at 1269. The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, *i.e. either* objectively unfairly *or* with subjective bad faith.

In reviewing a grant of summary judgment we view the facts in the light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans presented evidence that Nationwide denied coverage before making an investigation of the facts or law. Nationwide violated its internal guidelines and policies which guarantee fair, honest and reasonable claims handling. Specifically, Nationwide: (1) failed to follow internal procedures when local adjustors failed to consult with higher echelons in the company before denying the death claim; (2) failed to resolve all reasonable doubts about coverage in favor of the policy holder; (3) failed to explain why a nonwaiver agreement was required; (4) obtained a legal opinion in order to justify denying the claim; (5) failed to provide the Hillmans with previously promised information from its attorney; (6) lied about whether a letter from its attorney was available; (7) stonewalled for four years because of alleged vindictiveness toward the Hillmans' attorneys; and, (8) even after authority to concede coverage and settle the case was granted, the Regional Claims Attorney unilaterally decided not to settle.

Taking these assertions as true,[2] a reasonable jury could conclude that by failing to investigate, lying to the policy holder and stonewalling for four years, Nationwide acted with subjective bad faith. The grant of summary judgment was improper. Yet this court concludes that as long as Nationwide had a reasonable contractual basis for denying liability, evidence of bad faith and unfair dealings "have little or no relevance."

The court applies this same standard to the question of arbitration. Again, on summary judgment we view the facts in a light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans claim Nationwide insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims, and because of vindictiveness and aggravation with Hillmans' attorneys. Again, a reasonable jury could conclude that Nationwide acted with subjective bad faith. Yet because Nationwide's insurance policy contained an arbitration provision, "Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith." This conclusion ignores *Loyal Order of Moose*, 797 P.2d at 629, which specifically states that even though a surety *may have a right* to arbitration, "the demand for arbitration may not itself be

mans. However, the correctness of the statement in *Weiford* is now doubtful, despite this court's assertion that it is declining to "comprehensively" define the elements of the tort of bad faith.

2. While the Hillmans have not at this point presented convincing evidence of their assertions, they have set forth specific facts which, viewed in the light most favorable to the Hillmans, raise a genuine issue of fact.

made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim." The court's conclusion again effectively eliminates the covenant of good faith and fair dealing.

The Hillmans presented evidence from which a reasonable jury could conclude Nationwide acted with subjective bad faith. There are genuine issues of material fact which preclude summary judgment.

Debbie M. NIX, Appellant,

v.

Daniel L. NIX, Appellee.

No. S–4916.

Supreme Court of Alaska.

July 23, 1993.

Mother appealed from order of the Superior Court, Third Judicial District, Anchorage, Elaine M. Andrews, J., granting father's motion to vacate child support arrearage. The Supreme Court, Matthews, J., held that letter from mother partially waiving father's child support obligation was ineffective.

Reversed and remanded.

1. Parent and Child ⇐3.1(8)

Child support waiver is not valid and enforceable until court has reviewed and approved waiver's substantive adequacy. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

2. Divorce ⇐311.5

Where child support award has been established through initial dissolution proceeding, any subsequent proposed waiver must be presented to court for review under modification procedures provided for in applicable rule. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

3. Divorce ⇐311.5

Child support waiver presented after initial dissolution proceeding will be given only prospective effect from date of judicial approval. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

4. Divorce ⇐311.5

Letter from mother partially waiving father's child support obligation was ineffective, where mother revoked waiver as to any future child support before waiver was approved by superior court. Rules Civ. Proc., Rules 90.3, 90.3(h)(1, 2).

Maryann E. Foley, Anchorage, for appellant.

Allen M. Bailey, Law Offices of Allen M. Bailey, Anchorage, for appellee.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

Debbie and Daniel Nix were married in 1984 and have one child, born in 1986. Debbie and Daniel petitioned for dissolution of their marriage and the superior court entered a decree of dissolution in February 1990. The decree required Daniel to pay Debbie monthly child support in the amount of $936.

A letter written sometime after the hearing on their petition for dissolution,[1] signed only by Debbie, states her agreement to reduce the child support payments to $300 per month until such time that Debbie asks Daniel to increase the amount back to $936 per month. Daniel acknowledges that Debbie eventually exercised this right. He then increased the child support payment to the full $936 per month. After a period of time, the Child Support Enforcement

1. The letter is dated February 1, *1989*. Both parties agree, however, that the date "1989" was incorrect and that the letter was actually written and signed after the dissolution hearing, but before entry of the decree, in 1990.

Date: Jan 18, 1997

To: Brian

Fm: Jim

Subj: Additional legislative findings and purposes for HB58

1. Encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost and complexity of litigation, without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others.

2. Provide for reasonable, but not excessive, punitive damage awards against tortfeasors sufficient to deter conduct and practices which harm innocent Alaskans, while not hampering a positive business environment by allowing excessive windfall recoveries.

3. Encourage individual savings and economic growth by fostering a reduction in liability insurance rates to individuals and businesses alike.

4. Encourage the traditionally recognized Alaska values of individual self reliance and independence by underscoring the need for personal responsibility in making choices, and the personal accountability arising from those choices.

ak. Dispute Settlement assoc

~~The Arbitration & Mediation Group~~ Cathy Anderson

MEDIATORS, ARBITRATORS, FACILITATORS & TRAINERS

POST OFFICE BOX 240783
ANCHORAGE, ALASKA 99524-0783
TELEPHONE: (907) 345-3801
FAX: (907) 345-0006
E-MAIL: tamg@alaska.net

January 13, 1997

Brian:

Please excuse the informality of my transmitting letter. Subsequent to my volunteering to provide you with research and input on ADR and tort claims, I have reviewed, cover to cover, Rogers' and McEwen's *Mediation Law Policy & Practice*, (the most popular treatise on the subject), Court Connected Mediation Activities, published by the Society of Professionals in Dispute Resolution, and have gathered input and comment from several local and national colleagues, including persons whom I consider to have balanced opinions on the subject. Have invested considerable time and thought; the following are my recommendations.

I have included language drawn from the statutes of:

Arkansas	Kansas	Nebraska
Colorado	Maine	New Hampshire
Florida	Michigan	North Dakota
Illinois	Minnesota	Oregon
Indiana	Mississippi	Texas
		Utah

First, I firmly believe, after gathering all this data, that any project designed to determine whether mandated ADR will succeed in Alaska's court system will do so only to the extent that it is monitored by a balanced, independent body. As a result, I recommend the enactment of a balanced commission to oversee the pilot project's implement, and, perhaps to continue at the pleasure of the legislature for other ADR-related tasks.

The power of the balanced-membership commission will limit its oversight to pilot project results, establishing training standards for ADR providers, and make "further recommendations." In order to survive, the commission must include attorneys, nonattorneys, ADR providers, and business folk. Volunteer organizations must be taken into consideration as must be court administration.

I've tailored the language to place as much of the power as possible with the parties - the businesses and the individuals engaged in the dispute - and their legal advocates. If much is cut from the language, the balance will be lost

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To Brian	From [illegible]	
Co./Dept.	Co.	
Phone # 465 3854	Phone #	

between the need to insure that such a project could succeed and that the power is placed with and kept in the hands of the parties. Many have suggested in the past that we leave as much to the free market as possible. This does just that.

E.g., take a look at how cases are screened and referred. If too much power is given to court administration to screen and refer, another back-log will be created. If too much discretion is given the court to choose the process, attorney litigants may more successfully argue their clients' constitutional rights have been denied. If the case is referred too late in the discovery proces - most ADR processes will fail as research tells they work best early in the dispute.

To balance out the costs and "burdensomeness" of any pilot project, which could add costs and risk of failure, I've reduced the pilot project by screening out cases I believe from experience would meet the most opposition, e.g., domestic cases, cases where no answer is filed, and those in which a defendant asserts a statute of limitations defense. I believe that for the purposes of the pilot project only, they, in particular, should be adjudicated by the court. In addition, I've lowered the number of cases to be submitted to an ADR process, shortened the length of the project, but applied the pilot project to both the superior and district courts.

In order to protect the processes of mediation, arbitration and early neutral evaluation, as they are practiced in the market place and for which formal education exists, definitions are provided.

The court would retain ultimate jurisdiction over attorneys' fees so as to avoid conflicts with Rule 82, common law, and arguments raised by parties. The Alaska Judicial Council would, through the court system's budget, develop guidelines for pilot project analysis and statistics compilation.

Confidentiality, privilege and immunity are provided ADR service providers as it consistent with many other states' statutes and would be absolutely necessary, at a minimum, to increase litigation due to the introduction of new processes.

Interestingly, the Alaska Dispute Settlement Association is in the process of developing minimum qualifications for mediators and arbitrators. Discussions

thus far have focused on a minimum number of hours training in mediation or arbitration, adherence to a recognized, applicable code of ethics for same, and other elements. I cannot say what they will do with the data, but highly suspect it will be made available upon request. For address the issue of protection of the public, I have included a liability insurance section.

Thanks for this opportunity, Brian. If I may be of further service, please do not hesitate to contact me.

Best regards,

Purpose. The Legislature finds that the resolution of disputes through litigation can be costly and time-consuming and that alternative processes of dispute resolution have great potential to efficiently and fairly reduce the burden upon Alaska's court system. The Legislature intends to encourage, promote, and develop alternative processes in Alaska to resolve disputes brought in court for personal injury, death, and property damage by providing parties with less adversarial and equitable forums within which to resolve these disputes. These forums include, but are not limited to mediation, arbitration, and early neutral evaluation or fact finding. The legislature encourages all attorneys licensed in this state, when practicing in this state, to advise their clients about the dispute resolution process options available to them and to assist them in the selection of the technique or procedure appropriate for the client's dispute, case, or controversy.

(A) There is hereby created the Alaska Alternative Dispute Resolution Advisory Commission which shall consist of nine (9) members.

(1) Three (3) members shall be appointed by the Chief Justice of the Alaska Supreme Court, one (1) of which shall have been recommended to the court by the Alaska Bar Association. Two shall be attorneys and one (1) shall be a representative of court administration.

(2) Two (2) members shall be appointed by the Speaker of the House of Representatives, of which one shall be a nonattorney lay person.

(3) Two (2) members shall be appointed by the President of the Senate, of which one shall be a nonattorney lay person.

(4) Two (2) members shall be appointed by the Governor, one of which shall be a representative of voluntary or nonprofit alternative dispute resolution organizations in the State of Alaska. One of the members shall be a nonattorney lay person.

(B) All members of the commission shall be residents of the State of Alaska and shall demonstrate prior involvement in alternative dispute resolution.

(C) Commission members shall be appointed no later than _____ and shall serve for renewable three (3) year terms. If any member dies, resigns, or is otherwise unable to serve prior to the expiration of the term, the appointing

entity shall appoint a successor to serve the unexpired portion of the term. Upon expiration of a term of service, the appointing entity shall be responsible for filling the position for the next term.

(D) The members of the commission shall elect a chairman.

(E) The commission members shall be compensated in accordance with AS _____.

(F) The commission shall hold regular meetings no less than quarterly, on dates fixed by the commission, and shall hold special meetings as the commission finds necessary.

(G) Five members of the commission shall constitute a quorum.

Powers and duties of the commission.

The commission shall have the authority and responsibility to:

(A) Systematically promote the appropriate use of alternative dispute resolution;

(B) Establish standards for experience and alternative dispute resolution training requirements of persons who serve as mediators, arbitrators, or other alternative dispute resolution neutrals in and for the District and Superior Courts of the Third Judicial District for purposes of the pilot project. Nothing in this subsection or in the standards promulgated by the commission shall in any way limit the pursuits of alternative dispute resolution providers consistent with their training and code of ethics, nor shall this section or the standards established hereby apply to alternative dispute resolution services provided through a governmental agency. The requirements of this section, as well as the standards developed herein, may be satisfied by a nonprofit corporation on behalf of its service providers by providing a statement of training and retention requirements for its provider panels. Regardless, no individual may act as a mediator, arbitrator, or early neutral evaluator or fact finder under the pilot program discussed in this chapter without providing the individuals to the conflict with a written statement of qualifications which describe the person's experience and training in the applicable field; and

(C) Make recommendations to the legislature, the court system, the bar associations in the state of Alaska, and Alaska's public pertaining to the use of alternative dispute resolution processes. The commission shall issue annual reports to the legislature and the court system concerning its progress and activities.

Pilot Program for Alternative Dispute Resolution.

(A) There shall be a pilot program of no less than two years duration in which the court submits civil tort and property damage cases filed in the district and superior courts of the Third Judicial District to alternative dispute resolution processes.

(B) For purposes of the pilot project only, the following cases are exempted from submission to an alternative dispute resolution process:

(1) divorce, dissolution, child custody or visitation dissolutions or complaints, including motions to modify previous decrees;

(2) probate cases;

(3) cases where no answer is filed; and

(4) cases in which an answer raises dismissal based on filing outside the statute of limitations affirmative defense.

(C) All parties to selected, nonexempt cases, as defined by subsection (B) above, shall be ordered by the court, within 10 days of filing of the answer, to an alternative dispute resolution process of the parties' choice. The cases shall be selected on a random basis, after screening, the number of which shall be equal to forty percent (40%) of all exempt cases filed in a calendar year. The parties shall choose the process to which the case shall be submitted no later than 10 days of the court's order to a process and shall advise the court of its choice and scheduling.

(D) The parties shall choose an alternative dispute resolution service provider applicable to the process chosen by them no later than 30 days after the filing of the complaint. The parties may consult resources such as the Alaska Supreme Court Mediator's Directory, nonprofit alternative dispute resolution

corporation referral lists, or the free market. Alternative dispute resolution service organizations, as well as private providers, are encouraged to accept cases involving indigent parties.

(E) Parties who choose mediation shall attend at least one full session, which shall not include a scheduling, planning, premediation or orientation session. The parties are encouraged to negotiate in good faith and shall engage in the early and inexpensive exchange of discovery, case evaluation, and other data in furtherance of the process.

(F) Parties who choose or have been ordered to an alternative dispute resolution process shall engage in the process in good faith.

(G) Every partial or full settlement reached through mediation shall be submitted to the court for approval within ten (10) days of the submission and, if approved, shall be reflected in the judgment of the court.

(H) Cases not resolved in an alternative dispute resolution process within 140 days of ordering to an alternative process shall immediately, without exception, be scheduled by the court for a trial setting conference.

Pilot Program Evaluation and the Alaska Judicial Council.

The Alaska Judicial Council shall develop guidelines to evaluate the efficacy of the pilot program established pursuant to AS _____ at least annually. The evaluation shall, at a minimum, address factors such as the monetary value of cases resolved in the pilot program, the satisfaction of the parties to the case, the satisfaction of legal advocates to the parties, the nature and length of the alternative process used, and the costs of the alternative process used.

The Council shall annually evaluate data and concurrently report the results of its evaluation to the Commission, to the court, and to the legislature no later than March 15 of the year following the year of evaluation.

Confidentiality and Privilege.

The following shall apply to the pilot program as defined at AS _____:

(A) All information, whether verbal, written, or computer-controlled, transmitted between any party and a neutral person conducting the proceeding, or the staff of an alternative dispute resolution organization assisting the neutral person, and amendments thereto, shall be confidential communications. All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by an alternative dispute resolution provider or his or her staff shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any process in which the materials are generated. No person who serves as a mediator, arbitrator, early neutral evaluator or fact finder under this section may be subpoenaed or otherwise compelled to disclose matters discussed in the alternative dispute resolution process and no such person shall be subject to a process requiring the disclosure of any matter discussed during the pendency of the proceeding, absent a detailed written stipulation or consent to waiver entered into by the parties.

(B) Any party, including the neutral person or staff of an alternative dispute resolution organization, has a privilege in any action to refuse to disclose, or to prevent a witness from disclosing, any communication made during the pendency of the proceeding. The privilege may be claimed by the party or anyone the party authorizes to claim the privilege.

(C) The confidentiality and privilege requirements of this section shall not apply to:

(1) Information that is reasonably necessary to establish a defense for the neutral person or staff of an alternative dispute resolution organization administrating the proceeding in the case of an action against the neutral person or staff of an alternative dispute resolution organization that is filed by a party to the alternative dispute resolution process;

(2) Information that the neutral person is required to report under AS _____ (child abuse);

(3) Information that is reasonably necessary to stop the commission of an ongoing crime or fraud or to prevent the commission of a

crime or fraud in the future for which there was an expressed intent to commit such crime or fraud made or revealed during the process; or

(4) A report to the court only that the process used succeeded or failed to resolve all the issues in the dispute. Partial reports of success are specifically prohibited.

Immunity.

Persons who accept a case to mediate, arbitrate, or act as a early neutral evaluator or fact finder in issues in a dispute are immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist, facilitate or arbitrate a settlement, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

Professional liability insurance:

Persons who offer mediation, arbitration or early neutral evaluation or fact finding services and who accept a case under this chapter shall carry professional liability insurance specific to the provision of mediation, arbitration, or early neutral evaluation or fact finding services in an amount not less than $100,000.00.

Alternative Dispute Resolution provider fees.

(A) The parties shall equally share in the payment of an alternative dispute resolution service provider's fees or in a fashion stipulated between them prior to commencement of the process.

(B) Alternative dispute resolution service providers who provide services to the indigent may consider a fee sliding scale, reduced rate, or flat fee bases. Nothing herein limits a service provider from requiring that both parties symbolically vest in the alternative dispute resolution process through bartering or by other nonmonetary means.

Definitions.

As used in this chapter:

Alternative dispute resolution organization means a not-for-profit corporation which trains, certifies, and makes available to the public individuals who provide fact-finding, mediation, or binding arbitration services.

Alternative dispute resolution process means arbitration, mediation, or early neutral evaluation or fact finding.

Alternative dispute resolution provider means a person, other than a currently-seated judge, who holds himself out to the public as a qualified neutral and impartial person trained to function in the conflict-solving process addressed, using the techniques and procedures of mediation, arbitration or early neutral evaluation or fact finding.

Agreement to mediate means a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, sets forth applicable principles of confidentiality and privilege, provides for voluntary withdrawal from the mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other individuals who signed the agreement, is signed by the parties and the mediator, and is dated.

Arbitration means a forum to which parties voluntarily submit their dispute and in which a neutral third party considers all relevant evidence presented by the parties, rendering a binding decision, under either a collective bargaining agreement or pursuant to AS 9._____ (Alaska Uniform Arbitration Act).

Arbitrator means a person who is qualified by training and adherence to a recognized professional code of ethics to serve as a neutral third party in an arbitral proceeding.

Commission means the Alaska Alternative Dispute Resolution Commission.

Court means the district or superior court of the Third Judicial District of the state of Alaska.

Early neutral evaluator or fact finder means a private, neutral individual who offers alternative dispute resolution services in a forum designed to provide evaluative assistance to parties to a dispute prior to or shortly after the initiation of a lawsuit.

Early neutral evaluation or fact finding means a forum for case evaluation by a private, impartial third party who in investigating the issues to a dispute, may issue evaluative, advisory opinions regarding the liability or damages, or both, of the parties. Early neutral evaluation or fact finding occurs early in the dispute, either prior to the filing of a civil cause of action pertaining to the dispute, or shortly after.

Mediation means a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

Mediator means a person who is qualified by training and adherence to a recognized code of professional ethics who facilitates communication between parties in the mediation process, defines the issues in the dispute, and assists in exploring alternative solutions. The mediator remains neutral throughout and may not impose his own judgment on the issues for that of the parties.