

SCOMM

101A:5

Alaska State Medical Association

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

February 24, 1997

The Honorable Joseph Green
Chairman, House Judiciary Committee
House of Representatives
State Capital (MS 3100)
Juneau, AK 99801-1182

Subject: SSHB58 - Civil Justice Reform

Dear Representative Green:

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

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

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

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

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

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

2. Limits on Attorney Fees

A sliding attorney's contingency fee schedule is recommended as follows:

40% of the first \$50,000

33 1/3% of the next \$50,000

25% of the next \$500,000

15% of any amounts in excess of \$600,000

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

3. Collateral Source Evidence

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

4. Periodic Payment of Future Damages

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

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

5. Arbitration

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

6. Statute of Limitation

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

7. Statute of Repose

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

8. Panel System

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

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

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

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

The underlying purpose in the above is to provide some certainty where little certainty currently exists. Imposition of certainty provides for greater predictability and should result in reduced premium rates for professional liability coverage. Similar measures were adopted in California nearly 20 years ago with one result being that overall medical malpractice insurance premiums in California are half of what they are here in Alaska.

Lower rates should result in more physicians having professional liability insurance coverage with sufficiently high limits. This result should provide for added peace of mind to patients.

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

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Thank you again for opportunity to provide testimony.

Sincerely,



James J. Jordan
Executive Director

A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package. Study Shows

By Jeffrey Speicher

A

almost everyone agrees: The medical malpractice system in the United States serves no one well. Although a few multimillion dollar settlements draw public attention, most individuals who suffer real injury at the hands of their physician or hospital accept less than the full value of their claim—and endure long delays before receiving compensation. Those most

harmed—people left with lifelong medical needs or permanent loss of income—are most likely to be underpaid.

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

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

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

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

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

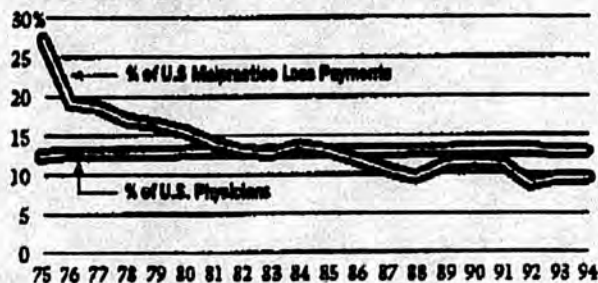
"Congress should adopt a comprehensive approach to tort reform by adopting a package of measures," says Jim Hurley, an actuary with Tillinghast/Towers Perrin and leader of the Academy group. "Our report provides a synthesis of measures that have been effective at the state level."

A Package Deal

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

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

FIGURE 1

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

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

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

Above all, the Academy report warns against piecemeal or faulty changes. Loss experience in New York shows that the individual tort reform measures adopted in that state over the past two decades did not improve costs relative to the U.S. total. "Poorly crafted malpractice reform—either

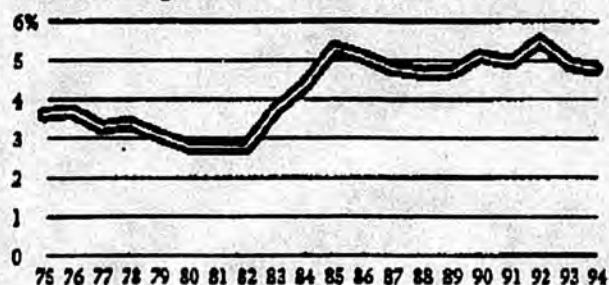
Above all, the Academy report warns against piecemeal or faulty changes. "Poorly crafted malpractice reform—either individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs."

individual measures that are too limited or broad transformations that are too far-reaching—can have unintended consequences that drive up costs," says Hurley.

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

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

FIGURE 2

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

eight or more. It's scary how many things can be compensated under the typical no-fault system."

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

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

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

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

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

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

An Offer You Can't Refuse

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

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

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

Medical malpractice is a nightmare of useless circularity.

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

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

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

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

However, Hurley notes, the periodic payment plan theoretically would have to remain in force for decades. Will claimants be out in the cold after the disability policy limits are reached, or will the insurer face unlimited exposure? Another concern: Like no-fault, the early-offer plan could give incentives for unmerited claims. Insurers may pay a doubtful claim rather than incur expensive litigation costs

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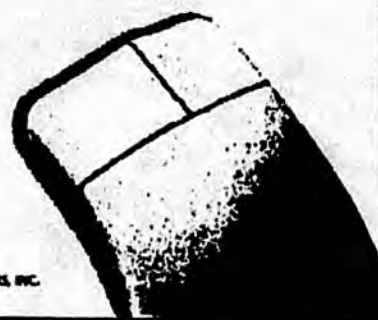
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and risk a large judgment award. In addition to increased costs, Hurley worries about a basic question: "Is it the right message to send to individuals who think doctors and insurers have deep pockets? The system may have practical advantages, but in terms of equity, it is hardly fair."

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

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

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

Answer to Brain Drain, page 13:

The house number is 76.

*Saves
"Rule 68"*

Analysis of Section 22, dealing with Offers of Judgment

WHERE PLAINTIFF SUES DEFENDANT FOR \$100,000:

1. If defendant gives an offer for \$90,000, and at trial plaintiff gets \$90,000:

Even though plaintiff prevailed on the merits, and could otherwise claim Rule 82 attorney fees, the plaintiff has to pay defendant's actual attorney fees under Rule 68. Plaintiff may not try to set off the Rule 82 fees he otherwise would be entitled to against defendant's Rule 68 attorney fees.

2. If defendant gives an offer for \$90,000, and at trial plaintiff gets only \$50,000:

Although it would be arguable which is the prevailing party under Rule 82, plaintiff has to pay all of defendant's actual attorney fees under Rule 68. Plaintiff may not set off the Rule 82 fees even if plaintiff were the prevailing party.

3. If defendant gives an offer for \$90,000, and at trial plaintiff gets only \$10,000:

Defendant probably is both the prevailing party under Rule 82 and entitled to actual attorney fees under Rule 68. Defendant gets only the Rule 68 fees.

4. If defendant gives an offer for \$90,000, and at trial plaintiff gets zeroed, the result is same as example 3 above.

=====

5. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets \$90,000:

Plaintiff is both a prevailing party under Rule 82 and entitled to actual attorney fees under Rule 68. Plaintiff gets only the Rule 68 fees.

6. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets only \$50,000:

Although it would be arguable which is the prevailing party under Rule 82, defendant is not liable for plaintiff's attorney fees under Rule 68. Defendant is liable for plaintiff's Rule 82 fees if plaintiff is adjudged the prevailing party.

7. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets only \$10,000:

Defendant probably is the prevailing party under Rule 82. Defendant is not liable for plaintiff's attorney fees under Rule 68. Plaintiff is probably liable to pay defendant Rule 82 attorney fees.

8. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets zeroed, the result is the same as example 7 above.

JAN 28 12:45 PM '96
FBI - SFA

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185 P02

Phone: (907) 562-7421
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Facsimile

To: Roger Holmes
@Fax: 248-8813
From: ~~248-8813~~ - 6655
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)

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COMP-PARE

1995 Life Insurance Company Rating Definitions

A. M. BEST RATINGS EXPLANATIONS

A++ and A+ (Superior)

Assigned to companies which, in our opinion, have demonstrated superior overall performance when compared to the standards established by the A. M. Best Company. A++ and A+ companies have a very strong ability to meet their obligations to policyholders over a long period of time.

A and A- (Excellent)

Assigned to companies which, in our opinion, have demonstrated excellent overall performance when compared to the standards established by the A. M. Best Company. A and A- companies have a strong ability to meet their obligations to policyholders over a long period of time.

B++ and B+ (Very Good)

Assigned to companies which, in our opinion, have demonstrated very good overall performance when compared to the standards established by the A. M. Best Company. B++ and B+ companies have a good ability to meet their obligations to policyholders over a long period of time.

B and B- (Adequate)

Assigned to companies which, in our opinion, have demonstrated adequate overall performance when compared to the standards established by the A. M. Best Company. B and B- companies generally have an adequate ability to meet their obligations to policyholders, but their financial strength may be vulnerable to unfavorable changes in underwriting or economic conditions.

C++ and C+ (Fair)

Assigned to companies which, in our opinion, have demonstrated fair overall performance when compared to the standards established by the A. M. Best Company. C++ and C+ companies generally have a current ability to meet their obligations to policyholders, but their financial strength is vulnerable to unfavorable changes in underwriting or economic conditions.

C and C- (Marginal)

Assigned to companies which, in our opinion, have demonstrated marginal overall performance when compared to the standards established by the A. M. Best Company. C and C- companies have a current ability to meet their obligations to policyholders, but their financial strength is very vulnerable to unfavorable changes in underwriting or economic conditions.

D (Very Vulnerable)

Assigned to companies which, in our opinion, have demonstrated poor overall performance when compared to the standards established by the A. M. Best Company. D companies have a current ability to meet their obligations to policyholders, but their financial strength is extremely

vulnerable to unfavorable changes in underwriting or economic conditions.

E (Under State Supervision)

Assigned to companies which are placed by a state insurance regulatory authority under any form of supervision, control or restraint, such as a conservatorship or rehabilitation, but does not include liquidation. May be assigned to a company under a cease and desist order issued by a regulator from a state other than its state of domicile.

F (In Liquidation)

Assigned to companies which have been placed under an order of liquidation by a court of law or whose owners have voluntarily agreed to liquidate. Note: Companies that voluntarily liquidate or dissolve their charters are generally not insolvent.

NA-1 (Limited Data Filing)

Assigned primarily to small companies exempt from filing the standard NAIC annual statement. These company reports are based on selected financial data obtained by the A. M. Best Company.

NA-2 (Less than Minimum Size)

Assigned to companies that file the standard NAIC annual statement but do not meet our minimum size requirement. To assure reasonable financial stability, we require a company to have a minimum policyholders' surplus of \$2.0 million for assignment of an initial letter rating. Exceptions include; a company that is virtually reinsured by a Best's rated affiliated company; is a member of a group participating in a business pooling arrangement; or is a company writing stable lines of business and has demonstrated a long history of above average performance when compared to Best's Rating standards. Companies assigned to the NA-2 rating category are eligible for assignment of Best's Financial Performance Rating (FPR).

NA-3 (Insufficient Operating Experience)

Assigned to companies which meet, or are anticipated will shortly meet, our minimum size requirement, but have not accumulated five consecutive years of representative operating experience. This requirement pertains to the age of the company's financial performance and not the actual experience of its management and includes consistency in both the types of coverages written and the relative volume of premium writings. Additional years of operating experience may be required if a company exhibits substantial premium growth or changes in product mix. NA-3 rated companies are eligible for assignment of Best's Financial Performance Rating (FPR).

NA-4 (Rating Procedure Inapplicable)

Assigned to companies whose business and/or operations are such that our normal rating procedure does not properly

apply. Examples are as follows: companies writing lines of business not common to the property/casualty or life/health fields; companies writing financial guaranty insurance; companies retaining only a small portion of their gross premiums written; companies which have discontinued writing new and renewal business and have a defined plan to run-off existing contractual obligations; companies that are effectively dormant or have no significant premium volume or in-force business; companies that are true captives; companies discounting loss reserves to the extent that the anticipated future investment income represents a significant part of their policyholders' surplus; and companies not soliciting business in the United States. This rating is also assigned to the life/health companies whose sole operation is the acceptance of business written directly by a parent, subsidiary or affiliated insurance company, or those writing predominantly property/casualty insurance under a dual charter.

NA-5 (Significant Change)

Assigned to previously letter-rated companies which experience a significant change in ownership, management or book of business, or other event which affects the nature of their operations and makes it impossible to render a rating opinion. Depending on the change, our rating procedure may require one to five years before the company is eligible for a rating.

NA-6 (Reinsured by Unrated Reinsurer)

Assigned to companies which have a substantial portion of their book of business reinsured by, or have reinsurance recoverables from, non-Best's rated reinsurers which represent a substantial portion of their policyholders' surplus. Exceptions are non-Best's rated foreign reinsurers that comply with our reporting requirements and satisfy our financial performance standards.

NA-7 (Below Minimum Standards)

Replaced by the Best's Rating of D.

NA-8 (Incomplete Financial Information)

Assigned to companies eligible for a ratings but which failed to submit complete financial information for the five-year period under review, including all domestic insurance subsidiaries in which the company's ownership exceeds 50%.

NA-9 (Company Request)

Assigned to companies eligible for ratings, but which request that the rating not be published because they disagree with our rating.

NA-10 (Under State Supervision)

Replaced by the Best's Rating of either E or F.

NA-11 (Rating Suspended)

Assigned to previously rated companies which have experienced sudden and significant events affecting their financial position and/or operating performance whose impact cannot be evaluated due to a lack of timely or adequate information.

STANDARD & POOR'S CLAIMS-PAYING ABILITY RATING DEFINITIONS

AAA

Insurers rates "AAA" offer superior financial security on both an absolute and relative basis. They possess the highest degree of safety and have an overwhelming capacity to meet policyholders obligations.

AA

Insurers rates "AA" offer excellent financial security, and their capacity to meet policyholder obligations differ only on a small degree from the insurers rates "AAA".

A

Insurers rates "A" offer a strong financial security, but their capacity to meet policyholder obligations is somewhat more susceptible to adverse changes in economic or underwriting conditions than more highly rated insurers.

BBB

Insurers rated "BBB" offer good financial security, but their capacity to meet policyholder obligations is considered more vulnerable to adverse economic or underwriting conditions than that of more highly rated insurers.

BB

Insurers rated "BB" offer adequate financial security for the "short-tail" or short-term policies, but their capacity to meet policyholder obligations is considered vulnerable to adverse economic conditions or underwriting conditions and may not be adequate for "long-tail" or long-term policies.

B

Insurers rated "B" are currently able to meet policyholder obligations, but their vulnerability to adverse economic or underwriting conditions is considered high.

CCC

Insurers rated "CCC" are vulnerable to adverse economic or underwriting conditions to the extent that their continued capacity to meet policyholder obligations is highly questionable unless a favorable environment prevails.

R (Regulatory Action)

As of the date indicated, the insurer is under supervision of insurance regulators following rehabilitation, receivership, liquidation, or any other action that reflects regulatory concern about the insurer's financial condition. Information on this status is provided by the National Association of Insurance Commissioners and other regulatory bodies. Although believed to be accurate, this information is not guaranteed. The R rating does not apply to insurers subject only to non-financial actions, such as market conduct violations.

"Quantitative" Ratings

A 'q' subscript indicates that the rating is based solely on quantitative analysis of publicly available data. In the case of claims-paying ability ratings, this is the statutory financial data filed with the National Association of Insurance Commissioners. These ratings are issued for each insurer on a standalone basis with out consideration for strength or weakness that might be added by a parent or affiliated companies. These new ratings which were effective July 31, 1995 replace Qualified Solvency Ratings, which are being discontinued.

**MOODY'S CLAIMS-PAYING
RATINGS DEFINITIONS**

Numeric modifiers are used to refer to the ranking within the groups below - one being the highest and three being the lowest. However, the financial strength of companies within a generic rating symbol is broadly the same.

Aaa

Highest quality.

Aa

High quality by all standards; long-term risks somewhat larger.

A

Upper medium grade; adequate security.

Baa

Medium grade; neither highly protected nor poorly secured.

Ba

Judged to have speculative elements.

B

Lack characteristics of the desirable investment.

Caa

May be in default or there may be present elements of danger with respect to principal or interest.

Ca

Speculative in a high degree; often in default.

C

Lowest rated class.

**DUFF & PHELPS CLAIMS-PAYING
ABILITY RATINGS DEFINITIONS**

AAA

Highest claims paying ability. Risk factors are negligible.

AA+, AA, AA-

Very high claims paying ability. Protection factors are strong. Risk is moderate, but may vary lightly over time due to economic and/or underwriting conditions.

A+, A, A-

High claims paying ability. Protection factors are average and there is an expectation of variability in risk over time due to economic and/or underwriting conditions.

BBB+, BBB, BBB-

Below average claims paying ability. Protection factors are average. However, there is considerable variability in risk over time due to economic and/or underwriting conditions.

BB+, BB, BB-

Uncertain claims paying ability and less than investment grade quality. However, the company is deemed likely to meet these obligations when due. Protection factors will vary widely with changes in economic and/or underwriting conditions.

B+, B, B-

Possessing risk that policyholder and contractholder obligations will not be paid when due. Protection factors will vary widely with changes in economic and/or underwriting conditions, or company fortunes.

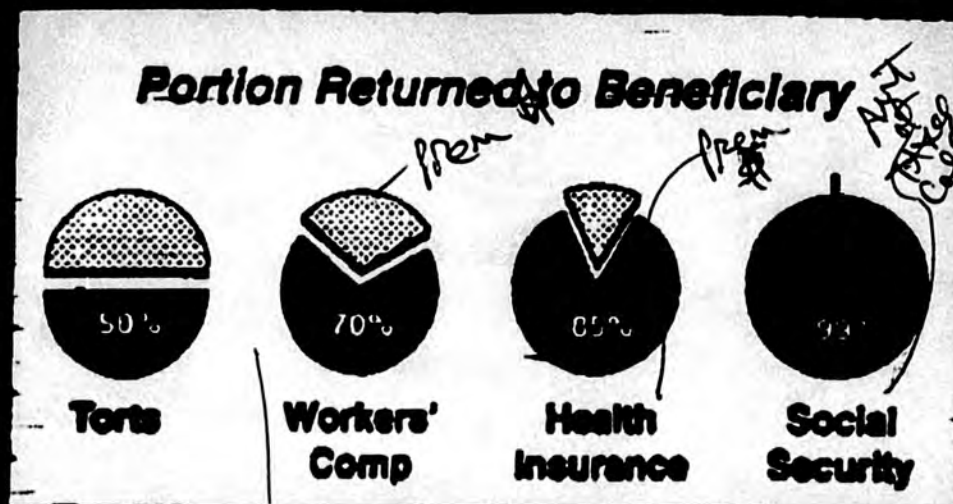
CCC

There is a substantial risk that policyholder and contractholder obligations will not be paid when due. Company has been or is likely to be placed in state insurance department supervision.

BRAN'S
file
#358

~~The Tort System~~ Does Not Effectively Serve Victims' Needs

Efficiency Comparisons



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

uncertainty removed
no litigation cost component
people ahead of time what they need

Source: The Tillinghast Report, Towers Perrin Company

11/11/11

ATTN: Jim

FROM: Dick

0 of pages 0
Tamara
2011-11-11

To: Jim Sourant
From: Dick Cattanach

Re: Draft of Speech for 24th

Let me know if you see any problems or modifications to this.

Thanks

His
speech
Great!

Testimony before the
ALASKA STATE LEGISLATURE
JUDICIARY COMMITTEE

SSHB 58

February 24, 1997

Mr. Chairman, members of the Judiciary Committee, my name is Richard Cattanach, Chairman of the Legislative Committee of the Associated General Contractors. I appreciate the opportunity to testify before you today. I realize that time constraints require that the testimony be limited to 3 minutes and therefore I would like to address two issues that are of paramount importance to the construction industry.

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

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

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

I don't believe that anyone would argue that the construction industry faces the same problems as the legal profession in defending itself from suits. Why then should the construction period have a longer period of time before they are free from litigation.

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

The second area is Section 10, Punitive Damages. In Alaska, more than 95% of the businesses are classified as small, "mom and pop" firms or companies that employ fewer than 20 employees. To them the issue of punitive damages is very serious because punitive damages are not covered by insurance. The Court System has issued statistics that indicate that the award of punitive damages is rare in Alaska and therefore not really a serious problem. What is overlooked is the fact that these statistics do not report on the suits that are settled prior to going to Court. Punitive damages are requested in almost 30 percent of the civil cases and seem to be used as a means of "extortion" to drive the defendant to settle prior to trial. Defendants realize that their insurance company will defend their acts for the original claim but exclude the defense or payment of any punitive damage awards. Companies are therefore forced to choose between the belief of their innocence or settling to avoid the crippling costs of defending the punitive damages suit should the case get that far. For the small business this is a Hobson's choice. Do you instruct your insurance company to settle even though you believe that you are innocent or do you risk your business and savings defending yourself should a trial for punitive damages be necessary. Many cannot afford the luxury of the gamble and avoid the risk of losing everything they worked for their entire life. Such a system is unfair and we should not tolerate a system that rewards the unscrupulous behavior of such plaintiffs attorneys'.

I thank you for your time and would be happy to answer any questions you might have.



UNIT COMPANY, 8101 OLD SEWARD HWY, ANCHORAGE, AK 99518

FAX

Date: February 24, 1997

Number of Pages: _____

Project: _____

To: Jim Sourant

Company: _____

Phone: _____

Fax: _____

From: _____

Company: UNIT COMPANY

Phone: (907) 349-6666

Fax: (907) 522-3484

Remarks:

Attached is the information that was requested from my testimony. On the surface, the information may be a little difficult to understand, but I believe that I can easily explain the meaning.

In any event, I believe that the information shows that 8 years provides plenty of protection for most claims.

Dick

COPY FAXED TO: _____

FILE: _____



March 16, 1983

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

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

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

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

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

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

July 21, 1989

Distribution Of Claims By Year As Compared To Project Substantial Completion

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

DISTRIBUTION OF CLAIMS BY YEAR WITHIN WHICH RECEIVED AFTER SUBSTANTIAL COMPLETION

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

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

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

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

DISTRIBUTION OF CLAIMS BY TYPE OF CLAIMANT

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

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



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

State Capital
Juneau, AK 99801-1142

Statute of Repose/Limitations by State, 1993

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

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

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

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

Document produced by Porters office; info from Leg. Research

APDC LEGISLATIVE LIAISON COMMITTEE
HOUSE JUDICIARY COMMITTEE TESTIMONY
FEBRUARY 24, 1997

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

Our legal system needs modification! Over 90% of civil suits never get to a court hearing. Most cases are settled, with little to no consideration to actual fault, to avoid the expenses of discovery, trials and the seemingly capricious decisions of juries. Suits are filed against all possible defendants, regardless of fault, to ensure there are plenty of pockets to chip into the settlement. Some people use the court system as a means of legal extortion by filing frivolous suits with the hope of a quick settlement. Millions of dollars are spent in the so called "discovery process" which almost always results in the defendants throwing in their insurance to stop the bleeding and make the case go away. Existing sanctions against frivolous suits are rarely used because they require that the plaintiff first lose at trial, a trial that rarely happens. Summary judgment is also very rare because appellate courts have almost always overturned such decisions, making trial judges wary of issuing such orders. HB58 includes two sections which will help the situation for design professionals:

The first reduces the Statute of Repose for construction related suits from fifteen years to eight years and expands it to cover all suits. Over 95 percent of the cases associated with construction are brought within eight years after substantial completion, over 98 percent within ten years. We believe that an eight year statute is more reasonable for four main reasons. First, almost all of the cases brought after eight years are related to maintenance problems, rather than design or construction problems. The owner of the building would still be available for suit, since his lack of maintenance is an on-going problem. Secondly, it is impossible to defend, or prosecute, a case fifteen years after substantial completion due to the lack of witnesses, fading memories, and lack of documentation. Most of us would have a hard time remembering what we did fifteen days or months ago, never mind fifteen years. Thirdly, we will not have to store fifteen years of files and can reduce the size, and rent, for our archive storage. Finally, it is also unreasonable to expect an engineer or architect to pay tens of thousands of dollars a year in insurance premiums for fifteen years after they retire. Errors & omissions insurance for design professionals is on a claims-made basis: that is, it covers you for claims made during that year. Therefore, the longer a period you have to cover, the higher the premium. The firm in which I am a principal had a premium of nearly twenty thousand dollars in our first year, with no "tail" to cover. If you add a fifteen year tail to that, you get a considerably higher premium. It is not unheard of to have a premium of over a hundred thousand dollars with a deductible of a hundred thousand dollars. If we can limit the "tail" for which we have to insure to eight years, we will make a considerable reduction in our insurance bills.

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

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

§12, 13 & 14

Facsimile

To: Representative Brian Porter
@Fax: 1-907-465-3834
From: A.L. Tamagni, Sr.
Date: 2/19/97
Re: SSHB 58
Pages: 3, including this

I wish to comment on the above proposed legislation which is very much needed in this state to reduce the costs of litigation to deserving injured parties, and innocent defendants. Accordingly the following is in order.

SECTION 4: 09.10.053: This section apparently includes General Contractors, such as Engineers, Architects, Attorneys and all other written contracts either written or oral. This is a reduction particularly for Attorneys who are facing increased Legal Mal-Pratice rates, from their Owner Company (ALPS). This section generally makes sense only if the statue of repose under **Section 5** is changes to reflect the Statue of Repose for Legal General Contractors to be the same as other contractors.

SECTION 8: 09.17.010: This section provides **A Schedule of Benefits** payable for Non-Economic Damages. This is the concept as proposed by the American Bar Association's, The American Law Institute's Reporters Study titled, "Enterprise Responsibility for Personal Injury". The schedule sets a schedule for Death and other criteria at \$300,000.00 and sets a higher schedule of \$500,000.00 for other criteria. This change should in most death cases (Section B) and (Section C) cases reduce the need for most litigation particularly in cases where there is clear fault. These then become scheduled payments and would seem to more Constitutionally acceptable as all parties within Certain Categories are treated equal and entitled to the same equal compensation based on the type of damage. This also eliminates discriminatory awards based on the Skill or Lack of such

page 2

from the representing Attorneys. Alaska has no specialty licensing criteria for Attorneys. Thus a person living in Nome having a Section (C)(1) claim would receive the same damage award as a person living in Juneau. This should reduce Attorney Fees Costs on the Defense Side and Plaintiff Side.

SECTION 11: 09.17.040(a) This section mirrors Section 104(a)(2) of the Internal Revenue Code which provides that injuries and damages that flow from a direct personal injury are generally exempt from inclusion of Gross Income. This action reflects that allowance.

SECTION 12: 09.17.040(d). This Language is very important as proposed. The reasons are as follows:

1. A defendant can make an offer of periodic payments and that offer can then be presented to the Jury, which currently cannot be done.
2. A plaintiff by allowing open presentation must be advised of his or her options to either receive a partial lump sum , future lump sums and future periodic payments on a tax exempt basis.
3. This eliminates the potential for dissipation of the award, insures a steady income stream on a tax exempt basis and eliminates dependency on Social Programs. These payments can be custom tailored to meet the different needs of any individual claimant.
4. Most importantly it allows a person to retain their pride and dignity for their lifestyles.
5. More importantly is mandates that the injured party is made aware of their choices. **Currently it is estimated that about 95% of Injured Parties are not advised or properly advised on this issue.** In most cases it could amount from Thousands to Millions of dollars in increased Tax Benefits. It would certainly eliminate potential Legal Mal-Pratice cases.

SECTION 13: 09.17.040(e): This section is excellent as it allows claimants to Choose between a Structured Settlement funded by United States Government Obligations or an Annuity from a Life Insurance Company or Combination of Both. Additionally it mandates diversification from affiliated companies, allowing potential for Independent payment choice.

SUGGESTION: WOULD RECOMMEND THAT **AND OR** BE INSERTED AS SOURCE TO ALLOW COMBINATION CHOICES. The Government Obligations Structured Settlement Trust pays up to a Maximum of 30 years, while an annuity can provide for a Life Time of Benefit.

page 3

The rating concept is an excellent Addition as most Instances Defense Carriers presently Insist on this Rating Criteria.

SECTION 14: 09.17.040(f): Would recommend the following change. "INFLATION MEANS THE CHANGE IN THE CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS FOR ALL ITEMS, AS PUBLISHED BY THE BUREAU OF LABOR STATISTICS OF THE UNITED STATES DEPT.. OF LABOR OR ANY SUCCESSOR AGENCY" This allows adjustments to be made on a United States Basis wherever and whenever living. Additionally it more closely meets the Internal Revenue Service Ruling dated June 7, 1994 which allows these increases to be exempt from Gross Income under Section 104(a)(2) of the code.

SECTION 21: 09.30.065: The language in this section is excellent as it forces both Parties to Realistically evaluate their case before trial. This should reduce the costs of litigation on both defense and plaintiff sides, and foster settlements in less time, thus providing **better service from the Court System to the Public**

SECTION 23: 09.30.070(a) This Language is excellent as it sets the yearly rate on a fixed date. More importantly is eliminates all unnecessary Attorney billings and arguments on how to calculate different periods and additionally as important a more realistic rate that is reflectively of Annual Market Conditions. If forces a focus on the merits of the case rather than trivia data.

SECTION 36: 09.65.210: This Section is needed particularly Section (4).

SECTION 44 through 61: These sections are excellent as the Availability of Legal Services for these cases under \$100,000.00 is virtually nonexistent and would provide a much needed enhancement and better Service to the Public. This is Patterned after a Pilot Program in New Hampshire, which was very successful as about 20 hours of time were on an average spent on both sides, Plaintiff and Defense .

This Bill is Sorely Needed by Alaska for all of it's people to provide uniform and more expeditious treatment for all parties, victims and innocent defendants. It will help forge the 3rd Branch of Government to Provide better service to the Public, which currently is lacking. **One only has to look at their average time to adjudicate an average Civil Trial. This figure is about 200% above the recommended time frames.**

BARTLETT REGIONAL HOSPITAL
3260 Hospital Drive, Juneau, Alaska 99801

Telephone: (907) 586-2611

Fax Number: (907) 463-4919

DATE:

2/19

TOTAL NUMBER OF PAGES 3

TO:

Guin

COMPANY:

FAX NUMBER:

FROM:

Robert Vaillant - 586-8438

COMMENTS:

Call Robert
re my 31

Mr. Chairman and Members of the Committee, my name is Robert Valliant, and I am representing the Alaska Hospital and Nursing Home Association. On behalf of the Association, we would like to go on record supporting the legislation before you. House Bill 58 contains two provisions that our 33 member Hospitals and Nursing Homes recognize as critical components in any Tort Reform legislation.

First is the provision for Relief from Civil Liability of hospitals for non-employees. The Hospitals and Nursing Homes take great care in credentialling both employees and non-employees to ensure certain standards of care are maintained. We believe that there is a duty by non-employees to maintain a certain level of responsibility for their own actions, and that Hospital and Nursing Homes should not be held liable for those negligent acts of non-employees over which it exercises little or no control.

The Second Provision also address the individual responsibility we feel the practitioner has to maintain a given level of liability insurance coverage. Hospitals and Nursing Homes become the deep pocket when uninsured or underinsured practitioners are sued; therefore, mandated minimum liability coverage for practitioners as a pre-requisite to immunity from Jackson vs Power for hospitals makes sense to us.

Finally, our gravest concern is that the Alaska Supreme Court Decision in the case of Jackson vs Power will be expanded to include institution liability for not just contracted practitioners but any practitioner that responds to a need for coverage at the Hospital or Nursing Home. We would like to prevent a Supreme Court ruling of this nature before it becomes a reality.

Once again, we strongly urge you to pass this bill out of your Committee.

John will call to get on witness list.

JOHN WHEATLEY
V.P. POLICY
THE SUPPORT INDUSTRY ALLIANCE

THANK YOU FOR THE OPPORTUNITY TO PROVIDE PUBLIC TESTIMONY ON AN ISSUE SO IMPORTANT TO THE PEOPLE OF THE STATE OF ALASKA.

MY NAME IS JOHN WHEATLEY AND I AM TESTIFYING TODAY AS VICE PRESIDENT, POLICY OF THE SUPPORT INDUSTRY ALLIANCE. THE ALLIANCE HAS OVER 300 MEMBER, COMPANIES AND INDIVIDUALS SUPPORTING PETROLEUM MINING AND RESOURCE DEVELOPMENT IN THE STATE OF ALASKA.

AS A STATE, WE ARE COMPETING FOR INVESTMENT DOLLARS ON A GLOBAL BASIS. WE MUST CONTINUE TO SEND THE MESSAGE THAT WE ARE "OPEN FOR BUSINESS". WE CAN DO THIS BY STABILIZING THE ECONOMIC CLIMATE THROUGH FISCAL RESTRAINT AND BY STABILIZING THE LEGAL CLIMATE THROUGH COMPREHENSIVE TORT REFORM.

THE COST OF LITIGATION AND LIABILITY INSURANCE HAS A DRAMATIC IMPACT ON BUSINESSES-LARGE AND SMALL. THE EVER-INCREASING PRODUCT LIABILITY, PERSONAL INJURY SUITS, AND UNPREDICTABILITY OF DAMAGE AWARDS HAS CAUSED COSTS TO SOAR. TORT REFORM LEGISLATION WILL HELP CONTROL THESE EXPENDITURES WHILE ASSURING APPROPRIATE COMPENSATION FOR PERSONS INJURED THROUGH THE FAULT OF OTHERS.

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

THE ALLIANCE BELIEVES TORT REFORM SHOULD:

- LIMIT NONECONOMIC DAMAGES.
- PROHIBIT PUNITIVE DAMAGES UNLESS MALICE OR CONSCIOUS ACTS SHOWING DELIBERATE DISREGARD FOR ANOTHER PERSON CAN BE SHOWN.
- LIMIT PUNITIVE DAMAGES.

- ALLOW JURIES TO BE INFORMED ABOUT AWARDS ALREADY COLLECTED BY CLAIMANTS FOR SAME INJURIES.
- ALLOW COURTS TO DECIDE EACH PARTY'S SHARE OF ~~OBLIGATION~~ ^{DAMAGES.}
- PROVIDE MONETARY SANCTIONS AGAINST ANY ATTORNEY IN CIVIL CASES FOR FILING FRIVOLOUS, UNNECESSARY, AND/OR LEGALLY DEFICIENT PLEADINGS.
- BAR DAMAGE SUITS IF INJURES WERE RECEIVED WHILE COMMITTING A FELONY.
- ESTABLISH GUIDELINES FOR THE ^{QUALIFICATION} ~~USE~~ OF EXPERT WITNESSES.

WE BELIEVE THE ABILITY TO RECOVER COSTS AND DAMAGES, TO BE MADE WHOLE, SHOULD BE PROTECTED. ~~PENALTIES FOR CRIMES ARE PRE SET IN CRIMINAL LAW.~~ PUNITIVE DAMAGES SHOULD BE ~~A PRE SET~~ ^{Added by} ~~AS WELL,~~ AND ASSESSED WHEN WILLFUL NEGLIGENCE OR MALICIOUS INTENT IS PROVEN. IF THE INTENT OF PUNITIVE DAMAGES IS TO PUNISH RATHER THAN REWARD, IT WOULD FOLLOW THAT A PORTION OF PUNITIVE DAMAGES COULD BE ALLOCATED TO THE STATE. ^{JDJ}

GOVERNMENT OFFICIALS MUST CONTINUE TO SEARCH FOR WAYS TO REDUCE THE COST OF DOING BUSINESS IN ALASKA, INCLUDING A COMPREHENSIVE REVIEW OF LIABILITY LAWS AFFECTING THE ECONOMICS OF BUSINESS.

THE ALLIANCE BELIEVES COMPREHENSIVE TORT REFORM IS A POSITIVE STEP TOWARD IMPROVING THE BUSINESS ENVIRONMENT IN ALASKA. WE SUPPORT H.B. 58.

Excellent!
Jim

WILLIS CORROON



Fax Transmission

From John Wheatley

Date 2/20/97

Willis Corroon Corporation of Anchorage

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Number of pages 3 (including this cover)

Subject/reference HB SB

Message

Jim -

attached is proposed testimony
hanks

Alaska Oil & Gas Association

121 W. Fireweed Lane, Suite 207

Anchorage, Alaska 99503

Judy Brady, Executive Director - Marilyn Crockett, Assistant Executive Director - Ardie Gray, Public Affairs Manager -
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Date:

2/19/97

Total # of pages including cover sheet:

2

To:

Company

Rep. Brian Portis Office
ATTN: Jim

From:

Ardie Gray

MESSAGE: _____

If problems occur during transmission call 907/272-1481

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**ALASKA OIL AND GAS ASSOCIATION
POSITION ON
TORT REFORM LEGISLATION
February, 1997**

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

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

- The Alaska civil justice system gives juries and judges discretion to impose unlimited punitive damages awards, without adequate guidelines or criteria necessary to insure the constitutional protection of due process.**
- Alaska's civil justice system discourages investment in the state. Firms assessing whether to invest or to conduct business in Alaska rather than in another state or country must take into account the legal risks that Alaskan law allows, and the substantial legal risks that can be incurred even in defending against frivolous civil actions.**

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

- Limitations on punitive damages. This reform would make it clear that awards beyond those necessary to compensate plaintiffs for real damages would need to be justified by clear and convincing evidence of outrageous conduct, and would be capped - as are sentences in criminal law - so that juries and judges could not impose financially ruinous or unlimited awards.**
- Judgments should be proportionate to fault. It is fundamentally unfair to require a defendant to pay a much larger share of damages than the defendant's share of fault.**

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

Adopted by the AOGA Board of Directors, February 10, 1997.

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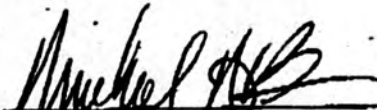
Jim Sourant
c/o Representative Brian S. Porter
Alaska State Legislature
District 20
State Capitol Building
Juneau, AK 99801-1182

Re: Sections 39 and 40
File No. 1795.6377

Dear Jim:

Attached are my proposed remarks to the Committee.

Very truly yours,


Michael A. Barcott

MAB:mb

Enclosure

BREACH OF WARRANTY	<u>4 years</u>
PRODUCT LIABILITY	<u>10 years</u> in all product liability actions
PROFESSIONAL LIABILITY	<u>10 years</u> statute of repose for design professionals

OHIO

PERSONAL INJURY	<u>2 years</u> for bodily injury; <u>1 year</u> for slander, libel, malicious prosecution, false imprisonment and medical malpractice (maximum <u>4 years</u> from occurrence); <u>4 years</u> for fraud.
WRONGFUL DEATH	<u>2 years</u>
PROPERTY DAMAGE	<u>2 years</u> ; <u>4 years</u> for recovery.

BREACH OF WARRANTY	<u>2 years</u> ; if contractual relationship; other - <u>2 years</u> .
PROFESSIONAL LIABILITY	<u>10 years</u> statute of repose for design professionals

OKLAHOMA

PERSONAL INJURY	<u>2 years</u> for injury to rights of another; <u>1 year</u> for assault, battery, libel, slander malicious prosecution, false imprisonment. <u>2 years</u> from discovery for medical malpractice.
WRONGFUL DEATH	<u>2 years</u>
PROPERTY DAMAGE	<u>2 years</u>
BREACH OF WARRANTY	<u>5 years</u>
PROFESSIONAL LIABILITY	<u>10 years</u> statute of repose for design professionals

OREGON

"STATUTE OF ULTIMATE REPOSE" Notwithstanding other longer statutory provisions as a result of tolling or delayed commencement or running of the statute of limitations, all actions for negligent injury to person or property must be brought within 10 years from the date of the act or omission complained of constitutionality upheld, Joseph v. Burns. Action accrues when injury manifests if injury not previously discoverable by exercise of due diligence, O'Gara v. Kaufman.

PERSONAL INJURY	<u>2 years</u> ; from discovery if fraud, deceit or medical malpractice (subject to 5 years max. unless fraud/deceit).
WRONGFUL DEATH	<u>3 years</u> from death-causing injury.
PROPERTY DAMAGE	<u>6 years</u>
BREACH OF WARRANTY	<u>4 years</u>
PRODUCT LIABILITY	<u>2 years</u> from date on which death, injury of damage occurs (from

SECTIONS 39 AND 40

Sections 39 and 40 of this Bill address significant problems which remain in the wake of the Supreme Court's decision in CHI of Alaska, Inc. v. Employers Reinsurance Corporation, the decision which gave a defendant the right to select its own independent counsel when an insurance company had issued a reservation of rights on coverage. Neither of these sections should be controversial.

The situation addressed by these sections arises when a claim for which there may be insurance coverage is joined with several for which there clearly is not insurance coverage. The example I will utilize is a lawsuit in which a plaintiff has sued a defendant in five separate counts. The First is for injury, which is alleged either to be negligent or intentional. The Second is for unpaid wages. The Third is for breach of contract. The Fourth is for slander and the Fifth is for discrimination. If the defendant is a typical business it has insurance for the injury claim, but that insurance will not cover the injury claim if it was intentionally caused. Thus, an insurer would typically issue a "reservation of rights" letter advising the defendant that it would be responsible for a negligently-caused bodily injury but would reserve its rights to deny coverage for an intentionally-caused bodily injury. The claims for unpaid wages, breach of contract, slander, and discrimination have no insurance coverage.

year for libel, slander, false imprisonment, malicious prosecution and 2 years from act for other professional malpractice.

WRONGFUL DEATH 2 years

PROPERTY DAMAGE 4 years

BREACH OF WARRANTY 4 years

PRODUCT LIABILITY 4 years, but within 10 years of injury or first sale, or 2 years from "being informed" if asbestos-related disease.

PROFESSIONAL LIABILITY 4 years statute of repose for design professionals in cases of patent defects, 10 years statute of repose in cases of latent defects.

NEVADA

PERSONAL INJURY 2 years except 3 years from discovery if fraud or mistake. Four years after injury or 2 years after discovery, whichever occurs first. Statute does not run if injury concealed. Minors: statute does not run until age 10 for brain damage or birth defects; if sterility alleged, statute runs 2 years after discovery.

WRONGFUL DEATH 2 years

PROPERTY DAMAGE 3 years

BREACH OF WARRANTY 4 years

PROFESSIONAL LIABILITY 6 years statute of repose for design professionals in cases of patent defects, 8 years statute of repose in cases of latent defects.

NEW HAMPSHIRE

PERSONAL INJURY 3 years for all personal actions including medical malpractice (from discovery of injury and causal relationship).

WRONGFUL DEATH 3 years

PROPERTY DAMAGE 3 years

BREACH OF WARRANTY Sales contract - 4 years

PRODUCT LIABILITY 3 years from injury, but not more than 12 years after product left control of manufacturer. 12 year statute of repose held unconstitutional, Heath v. Sears, Roebuck & Co. 464 A.2d 288 (N.H. 1983).

PROFESSIONAL LIABILITY 8 years statute of repose for design professionals

NEW JERSEY

PERSONAL INJURY 2 years for injury to person from wrongful act, neglect or default. Two years from accrual of claim (discovery).

WRONGFUL DEATH 2 years

PROPERTY DAMAGE 6 years

Because the insurer has issued a reservation of rights letter on the First Count, the defendant is entitled to select its own counsel and, under current practice in Alaska, that lawyer will defend Counts 1-5 and submit his/her entire bill for that defense to the insurance company. Because the insurance company has no control over the independent counsel it has been the experience of many of my clients that these bills are extraordinarily high.

Section 39 of this Bill provides that the insurance carrier in this situation need only pay for the costs of defending the First Count. Because that is the only count for which insurance coverage was ever purchased, the defendant is getting precisely what it bargained for when it bought insurance. This is a resolution which has been brought about judicially in California, upon which Alaska has modeled much of its judicial and statutory law in this area.

I would not expect the plaintiff's bar to have difficulty with this proposal. When a defendant is represented by independent counsel, that independent counsel frequently take a "scorched-earth" approach to litigation because of the lack of real financial constraints. In the case I have utilized here, it would be realistic to expect the independent counsel to defend Counts 2-5 with extensive discovery and motion tactics that run up the costs of litigation for the plaintiff who must respond to

PRODUCT LIABILITY

6 years

PROFESSIONAL LIABILITY

10 years statute of repose for design professionals

MARYLAND

PERSONAL INJURY

3 years for "all civil actions", except 1 year for assault, battery, libel, slander and 5 years from injury or 3 years from discovery for medical malpractice.

WRONGFUL DEATH

3 years

PROPERTY DAMAGE

3 years

BREACH OF WARRANTY

4 years

PRODUCT LIABILITY

3 years

PROFESSIONAL LIABILITY

10 years statute of repose for design professionals

MASSACHUSETTS

PERSONAL INJURY

3 years for torts, contract (personal injuries), replevin medical malpractice, assault, battery, libel, slander, false imprisonment.

WRONGFUL DEATH

3 years (death must occur within two years of death--causing injury).

PROPERTY DAMAGE

3 years

BREACH OF WARRANTY

4 years

PRODUCT LIABILITY

3 years

PROFESSIONAL LIABILITY

6 years statute of repose for design professionals

MICHIGAN

PERSONAL INJURY

2 years, except 1 year for slander or libel. Medical malpractice claims subject to 6 year statute of repose from date of occurrence. For minors injured before 8th birthday, medical liability claims must be brought within 6 years of event with exceptions of some claims brought after 10th birthday and injuries to reproductive system.

WRONGFUL DEATH

3 years (death must occur within two years of death--causing injury).

PROPERTY DAMAGE

3 years

BREACH OF WARRANT

3 years

PROFESSIONAL LIABILITY

10 years statute of repose for design professionals

MINNESOTA

PERSONAL INJURY

2 years - medical malpractice and torts resulting in personal injury.

these tactics. By requiring the defendant individually to shoulder the burden of expense for defending Counts 2-5, there is a realistic fiscal check on the activities of independent counsel.

Section 40 of this Bill provides a mechanism by which the insurance carrier can deal directly with the plaintiff in settling these types of cases. In the example we have utilized the only claim giving rise to the obligation for defense is Count 1. Section 40 makes it clear that the insurer can deal directly with the plaintiff to settle the injury claim. Once that case is settled, all that remain are claims for which there is no coverage and the obligation to provide independent counsel is eliminated. At present, there is a fear among insurance carriers that if they deal directly with the plaintiff, that they run the risk of a bad faith lawsuit by their insured. Once again the insurance carrier is providing all that it contracted to provide as it is settling the claim for which there is potentially coverage and eliminating a risk to the defendant. The plaintiff's bar should have no opposition to this as it allows plaintiffs to settle cases but obviously does not require them to do so. This is a section which is only implicated where both the plaintiff's counsel and the insurance carrier are in agreement on the settlement.

BREACH OF WARRANTY

4 years - Sales. 2 years - Personal injury or death.

PROFESSIONAL LIABILITY

6 years statute of repose for design professionals

ILLINOIS

PERSONAL INJURY

2 years; 1 year - slander or libel. Two years from injury. Foreign object: 1 year from discovery or 2 years from injury whichever is later. Idaho Supreme Court upheld constitutionality of this statute in Holmes v. IWASA, 657 P.2d 476 (1983).

WRONGFUL DEATH

2 years

PROPERTY DAMAGE

5 years

BREACH OF WARRANTY

4 years

PRODUCT LIABILITY

Amended 1995. Action is barred in all product liability actions after 12 years from first sale or 10 years from first sale to a user or consumer.

2 years from date of known injury of 8 years if unknown; in no case more than 12 years from date product leaves possession of manufacturer, or 10 years from date of first possession by initial owner, whichever period expires earlier; 12-year limitation not applicable to negligence actions, Dintelman v. Alliance Machine Co. constitutionality of statute of repose upheld, Thorton v. Mono Manufacturing Co.

PROFESSIONAL LIABILITY

4 years statute of repose for design professionals in cases of patent defects, 10 years statute of repose in cases of latent defects.

INDIANA

PERSONAL INJURY

2 years for injury to person, character or personal property. 6 years for fraud. Two years from discovery for medical malpractice.

WRONGFUL DEATH

2 years

PROPERTY DAMAGE

6 years - Realty 2 year - Personalty.

BREACH OF WARRANTY

4 years

PRODUCT LIABILITY

2 years after cause of action accrues or 10 years after delivery of the product to initial user, provided that if action accrues more than 8 but less than 10 years after initial delivery, it may be brought any time within 2 years of accrual.

PROFESSIONAL LIABILITY

10 years statute of repose for design professionals

IOWA

PERSONAL INJURY

2 years for injury to person or reputation, whether contract or tort; discovery accrual for medical malpractice.

WRONGFUL DEATH

2 years

PROPERTY DAMAGE

5 years