

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.02 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 564

Table A-6—Attorney Fee Limits,^a by State, 1993 (Continued)

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
WI: 33.33% of first \$1 million OR 25% of first \$1 million recovered if liability is stipulated within 180 days, and not later than 60 days before the first day of trial and 20% of any amount exceeding \$1 million			

^aNOTE: Most attorney fee limits are not direct limits on the amount attorneys can charge their clients. Rather, they are limits on the portion of the damage award that may go toward attorney fees.

O = Provision overturned.

R = Provision repealed.

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

Table A-7—Arbitration Provisions^a by State, 1993

Specific provision for medical malpractice claims	General arbitration provision ^b
AK	AL
CA	AR
CO*	AZ
FL*	CT
GA	DC
HI*	DE
IL	IA
LA*	ID
MI	IN
NJ*	KS
NY*	KY
OH*	MA
SD	MD
UT*	ME
VA	MN
	MO
	MS
	MT
	NC
	ND ^R
	NE*
	NH
	NM
	NV
	OK
	OR
	PA
	RI
	SC*
	TN
	TX*
	VT
	WA
	WI*
	WV
	WY

^aNOTE: Voluntary, binding arbitration provisions only, unless otherwise noted. This table does not indicate statutory provisions for court-annexed, nonbinding arbitration. Several States have provisions authorizing mandatory, nonbinding arbitration for civil suits where expected damages are below a certain threshold (most thresholds range from \$10,000 to \$50,000). However, because the vast majority of medical malpractice cases involve expected awards in excess of these thresholds, the provisions are rarely relevant to medical malpractice. One exception is the State of Hawaii, which requires court-ordered nonbinding arbitration for all civil tort actions having a probable jury award (exclusive of costs and interest) of \$150,000 or less (Hawaii Rev. Stats. Sec. 601-20 (Lexis 1992)). However, medical malpractice claimants may elect to bypass court-ordered arbitration if a decision has been rendered under the State's mandatory medical malpractice pretrial screening provision (Hawaii Rev. Stats. Sec. 671-16.5 (Lexis 1992)).

^bMany States have adopted the Uniform Arbitration Act (UAA) (Uniform Arbitration Act, Uniform Laws Annotated (Vol. 7) (St. Paul, MN: West Publishing Company, 1992)).

R = Provision repealed

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SOURCE: Office of Technology Assessment, 1993.



Cynthia Brooke, MD
A balance of treatment
and prevention.

Cynthia Brooke, M.D., F.A.C.O.G.

Diplomate of the American Board of Obstetrics and Gynecology

March 24, 1997

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

Dear Senator Pearce,

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

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

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

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

Senator Drue Pearce

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March 24, 1997

system in the United States of America which differs from any other tort system in the civilized world.

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

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

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

Legal experts who have interviewed juries coming out of these cases note that juries do not even think the case is about weighing the scientific evidence. They think that the case is about which lawyer they like the most, which is the most dramatic, which is the most convincing. They often think it is a moral question between the poor victim and the big corporation - never mind the facts.

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

Senator Drue Pearce

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March 24, 1997

understandably was reluctant to relinquish the data base to the attorneys. Also, as confidentiality of their research was threatened and doctors and patients pulled out of research studies, research, in general, was basically shut down at the Mayo Clinic, so the plaintiffs' attorneys got basically what they wanted: a moratorium on breast implant research. It was not worth it to the Mayo Clinic to risk all research. It was easier to give up doing breast implant research. Since the Mayo Clinic study was published in 1994, ten other peer-reviewed studies on breast implants have been conducted. None of these studies have found any link between breast implants and disease.

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

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

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

March 24, 1997

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

In Carl Sagan's recent book, which was a New York Times best seller for many weeks, called *The Demon-Haunted World: Science as a Candle in the Darkness*, he states how necessary science is in a healthy democracy. "The values of science and the values of democracy are concordant, in many cases indistinguishable. Science and democracy began in their civilized incarnations in the same time and place, Greece in the seventh and sixth centuries B.C. Science confers power on anyone who takes the trouble to learn it... Science thrives on, and indeed, requires the free exchange of ideas; its values are antithetical to secrecy. Science holds to no special vantage points or privileged positions. Both science and democracy encourage unconventional opinions and vigorous debate. Both demand adequate reason, coherent argument, rigorous standards of evidence and honesty. Science is a way to call the bluff of those who only pretend to knowledge."

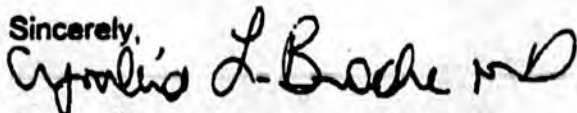
As a legislator, I ask that you make a vote for sanity and reason. Anyone, at this point, who argues that the current tort system is in the best interest of the community or the public at large has not looked at the facts. What is wrong with this system, they ask. Merrell-Dow is a big company - they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

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

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

Thank you very much for your consideration.

Sincerely,



Cynthia L. Brooke, MD

/plc

To: Legislative aides to:
Senator Drue Pearce
Senator Bert Sharp
Senate Finance Committee

Fm: Jim Sourant, legislative aide to:
Representative Brian Porter

Date: March 29, 1997
Re: HB 58 Tort reform

I bring to your attention a very important matter which has not been publicly disclosed during this session about the Governor' Task Force on Civil Justice Reform. At every stage through the House, the opponents of HB 58 have touted the recommendations of the task force as being the product of a blue ribbon bipartisan group which represents "the interests of large and small businesses, doctors...." This assertion has gone unchallenged to the present time. The fact of the matter is that nothing could be further from the truth.

The best evidence of misrepresentation is found in the attached letter from State Farm Insurance Company, which has over 200,000 automobile and homeowner insurance policies in effect in the state. The letter was written after the task force was created, but several months before the first meetings ever took place. The letter speaks for itself, but it is clear that State Farm was asking to be put on the task force. The "oversight" was not corrected, even though there was ample time to do so. Consequently, there were no representatives of the insurance industry on the task force.

Also conspicuously absent from the task force was the Division of Insurance. Had it been directly represented, there would have been evidence that over the past few years, ALL domestic insurance companies have withdrawn from high risk areas of coverage, such as the marine highway.

The task force then erroneously concluded that there was "no evidence of a crisis in insurance cost or availability, nor did it hear from the insurance industry in the course of its debate." Pages 2 and 7 of the task force report. First the insurance industry was arrogantly excluded from participation on the task force, then the task force cavalierly implied that the insurance industry was not interested in participating. Whatever the Division of Insurance could have contributed was not heard.

On those same pages of the task force report, the task force erroneously concluded that since insurance rates are not set by claims experience within Alaska, "the task force found no evidence that changes in Alaska law would affect Alaska insurance rates."! A look at the compendium of 25 letters

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(USAA Insurance Company's letter and Mike Lessmeier's letter for State Farm) previously furnished to your offices makes clear that just the opposite is true: insurance rates in Alaska are determined in part by claims experience in Alaska, and insurance rates and rebates will benefit from HB 58!

These egregious misrepresentations go a lot further than mere "spinmeistering"; they appear to be intentionally false and misleading. This is much more than "politics as usual" in my book.

It is also clear that the one physician on the task force did not represent the 500 physicians who belong to the Alaska State Medical Association. Also conspicuously absent from the composition of the task force were the 100 airlines represented by the Alaska Air Carriers Association; the 4500 Alaska small business members of the NFIB; the 700 businesses statewide represented by the Alaska State Chamber of Commerce; the 25 companies represented by the Alaska Trucker's Association; the 250 companies represented by the Alaska Forest Association; the 1000 members of the Alaska Miner's Association; the 135 municipalities represented by the Alaska Municipal League; 18 electric utility cooperatives statewide; the 33 hospitals and nursing homes represented by the Alaska State Hospital and Nursing Home Association; and the 550 general contractors represented by the Association of General Contractors.

These groups, and the tens of thousands of employees they represent, were not given a slot on the task force. The composition of the task force was skillfully skewed. Add to that a 2/3 majority required to pass meaningful tort reform measures, and it becomes apparent that the deck was carefully stacked to prevent a result not favored by the trial lawyers.

Don't be fooled. If someone starts touting the recommendations of the task force, just ask them if it is not true that the insurance industry wanted to be a part of it. If anyone denies it, show them the letter. If anyone admits it, ask them why the insurance industry was not allowed to participate. The answer will be interesting, especially since the trial lawyers were not only allowed to participate, but were allowed to dominate and write the report.

The point is that the recommendations of the task force are not credible. To date, the touting of the objectivity of the task force has gone unchallenged during this session. It is speculation on my part, but if the governor wants to veto this bill, he will do it under the political cover of the task force recommendations. Whether you or your bosses choose to preempt the governor's ability to shield himself is up to you. But record should be corrected sometime, and this is the only chance we'll have to do it.

cc: Portia Parker
cc: Annette Kreitzer

bcc: Tim Kelly

State Farm Insurance Companies

GARY L. METHNER
REGIONAL VICE PRESIDENT
PACIFIC NORTHWEST OFFICE

1000 WILMINGTON DRIVE
DUPONT, WASHINGTON 20027

4800 25TH AVENUE, NORTHEAST
SALEM, OREGON 97313

July 18, 1996

The Honorable Tony Knowles
Governor of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

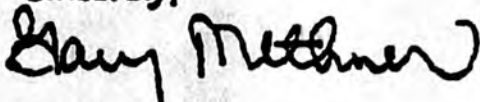
Dear Governor Knowles,

On behalf of Alaskans holding over 200,000 State Farm Insurance policies, I wish to express my disappointment at the composition of the Governor's Advisory Task Force on Civil Justice Reform (Advisory Task Force) that you created by means of Administrative Order Number 163.

In spite of the facts that insurance provides most of the money used to pay civil liability claims; that the Advisory Task Force is directed to assess the effects of insurance reforms on insurance rates in both Alaska and the Nation; and that State Farm and other insurers played a major role in the passage of HB 158, the Advisory Task Force has no direct representation from any member of the insurance industry. This omission is troubling and challenges the balance of the Advisory Task Force. None of the other members selected, business or otherwise, has the background, information, or concern to represent adequately the interests of policyholders and their insurers.

Failure to grant insurers seats on the Advisory Task Force has denied a voice to the hundreds of thousands of Alaskans whose premiums pay for the civil justice system that the Governor agrees needs reformation. Hopefully, you will recognize the gravity of this oversight and expand the Advisory Task Force to include as many of Alaska's major insurers as wish to participate. State Farm, for one, volunteers to sit on the Advisory Task Force should you choose to expand it. I await your response.

Sincerely,



Gary Methner

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Also conspicuously absent from the task force was the Division of Insurance. Had it been directly represented, there would have been evidence that over the past few years, ALL domestic insurance companies have withdrawn from high risk areas of coverage, such as the marine highway.

The task force then erroneously concluded that there was "no evidence of a crisis in insurance cost or availability, nor did it hear from the insurance industry in the course of its debate." Pages 2 and 7 of the task force report. First the insurance industry was arrogantly excluded from participation on the task force, then the task force cavalierly implied that the insurance industry was not interested in participating. Whatever the Division of Insurance could have contributed was not heard.

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It is also clear that the one physician on the task force did not represent the 500 physicians who belong to the Alaska State Medical Association. Also conspicuously absent from the composition of the task force were the 100 airlines represented by the Alaska Air Carriers Association; the 4500 Alaska small business members of the NFIB; the 700 businesses statewide represented by the Alaska State Chamber of Commerce; the 25 companies represented by the Alaska Trucker's Association; the 250 companies represented by the Alaska Forest Association; the 1000 members of the Alaska Miner's Association; the 135 municipalities represented by the Alaska Municipal League; 18 electric utility cooperatives statewide; the 33 hospitals and nursing homes represented by the Alaska State Hospital and Nursing Home Association; and the 550 general contractors represented by the Association of General Contractors.

These groups, and the tens of thousands of employees they represent, were not given a slot on the task force. The composition of the task force was skillfully skewed. Add to that a 2/3 majority required to pass meaningful tort reform measures, and it becomes apparent that the deck was carefully stacked to prevent a result not favored by the trial lawyers.

Don't be fooled. If someone starts touting the recommendations of the task force, just ask them if it is not true that the insurance industry wanted to be a part of it. If anyone denies it, show them the letter. If anyone admits it, ask them why the insurance industry was not allowed to participate. The answer will be interesting, especially since the trial lawyers were not only allowed to participate, but were allowed to dominate and write the report.

The point is that the recommendations of the task force are not credible. To date, the touting of the objectivity of the task force has gone unchallenged during this session. It is speculation on my part, but if the governor wants to veto this bill, he will do it under the political cover of the task force recommendations. Whether you or your bosses choose to preempt the governor's ability to shield himself is up to you. But record should be corrected sometime, and this is the only chance we'll have to do it.

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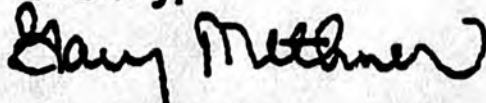
Dear Governor Knowles,

On behalf of Alaskans holding over 200,000 State Farm Insurance policies, I wish to express my disappointment at the composition of the Governor's Advisory Task Force on Civil Justice Reform (Advisory Task Force) that you created by means of Administrative Order Number 165.

In spite of the facts that insurance provides most of the money used to pay civil liability claims; that the Advisory Task Force is directed to assess the effects of insurance reforms on insurance rates in both Alaska and the Nation; and that State Farm and other insurers played a major role in the passage of HB 158, the Advisory Task Force has no direct representation from any member of the insurance industry. This omission is troubling and challenges the balance of the Advisory Task Force. None of the other members selected, business or otherwise, has the background, information, or concern to represent adequately the interests of policyholders and their insurers.

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Sincerely,



Gary Methner

GM:la

March 21, 1997

Re: HB 58 Tort reform bill

Dear Ms. Ross:

Thank you for your faxed letter of March 20. I respond to the questions in the order set out in your letter.

1. What led me to see a need for a comprehensive tort reform.

First, studies have shown that a piecemeal approach to tort reform does not work. What is necessary is a comprehensive package of tort reforms to do the job. HB 58 accomplishes this goal in its 25 pages containing 65 sections.

The lack of a cap on punitive damages and certain non economic damages ("disfigurement or severe physical impairment") has created among businesses of all sizes, as well of individuals, a perceived threat of unlimited liability. This threat causes 95% of tort cases to settle without going to trial, depriving Alaskans of their day in court before a jury of their peers. Few can afford to roll the dice when faced with virtually unlimited liability. This is often the case even when liability is in doubt.

The problem is made worse by the fact that after the attorney fees (commonly as high as 40%, but hardly ever less than 33.3%) and litigation costs are deducted, the injured person receives only about 50% of what he or she should have recovered. The current system is grossly inefficient compared to worker's compensation or health care insurance.

As a consequence of just these abuses, let alone many others too complicated to explain here, the liability insurance companies are forced to raise premiums based on their costly claims experience. In some economic sectors of this state, such as small an medium sized air carriers, liability insurance coverage now is only available in amounts inadequate to compensate an injured person. One medium sized airline now pays \$3 million a year in premiums for one tenth the insurance coverage it had a few years ago for a much smaller premium. It is for that reason refusing service to passengers who are highly compensated young individuals with dependents. Over the past few years, some insurance companies have ceased doing business in Alaska altogether, thereby causing rates to increase due to lack of competition. In some areas of risk in this state, such as marine highways, there is no insurance available at all.

The current civil justice system condones frivolous lawsuits, which not only makes life miserable and expensive for those being sued, but causes insurance premiums to go up more than they should. To ERA aviation, the costs of successfully defending a recent suit seeking \$13 million in punitive damages (for hearing loss claim allegedly caused by improper cabin pressure) was several hundred thousand dollars. When physicians are sued

in Alaska, in more than 80% of the cases going to trial, the physicians win defense verdicts, but only after the very significant expenditure of time and money. Something is terribly wrong with the system.

In all of this, there is a cost to the State of Alaska, in the form of more state employees (judges, clerks, guards and other staff). How much did the new courthouse in Anchorage cost?

The overall effect of the above is to create a significant disincentive for businesses, especially for small and medium sized businesses, to do business in Alaska. Without tort reform, creating an environment conducive to rational economic development, the creation of jobs, and a higher standard of living for all Alaskans is being undermined. Without a healthy and vibrant private sector, our economy cannot flourish.

2. What information weighed most heavily in my decision to vote for HB 58.

The tort reform bill does absolutely nothing to diminish the amount of worker's compensation or economic damages (past and future wages, past and future medical expenses, etc.) available to injured persons. The ability of injured persons to be made whole is not impaired for their economic losses.

What struck me was the wide and deep support of tort reform by just about every sector except the legal industry in this state: The 100 airlines and air taxi companies doing business in Alaska; the 4500 Alaskan small business members of the National Federation of Independent Businesses; the seven hundred businesses and their 70,000 employees statewide represented by the Alaska State Chamber of Commerce; 25 trucking companies operating in the state; the 250 companies in the timber industry; the 1000 miner members of the Alaska Miner's Association; the 135 municipalities which make up the Alaska Municipal League; everyone involved in the oil and gas industry; over 1400 licensed professional engineers, architects, surveyors, building code officials, and landscape architects; 18 electric utility cooperatives statewide; 33 community hospitals and nursing homes all over the state; the 500 physicians who are members of the Alaska State Medical Association; the 550 general contractors and their approximate 11,000 employees who do business in this state; and many others. What these people have to say is worth listening to, and I urge you to talk to them. The ones who have the most to lose by tort reform are the plaintiffs' lawyers.

Finally, the nuts and bolts contained in HB 58 have to be read, analyzed and understood to be appreciated. I commend it to your reading.

3. My constituents will benefit from passage of HB 58 for all the reasons stated above. Since we cannot all be government employees, it is the private sector which must be treated fairly if we expect to create jobs and a higher standard of living for all Alaskans. Unless the tort system is reformed, these beneficial goals will, over time, be at risk.

SUSAN ROSS
FAX: 262-8482 or 283-9007

RECEIVED
MAR 20 1997

March 20, 1997

Dear Representative:

I have attempted to contact you via phone on Wednesday and Thursday with a few questions regarding your vote on HB 58. I intended to use your comments in an upcoming article in The Peninsula Marketplace. Perhaps it would be easier for you to respond to my questions via fax; I would appreciate your response by Saturday, March 22.

- (1) What lead you to see a need for a comprehensive tort reform bill in Alaska?
- (2) What information / source of information weighed most heavily in your decision to vote for HB 58?
- (3) How will your constituents benefit from passage of HB 58?

THANK YOU FOR YOUR TIMELY RESPONSE TO THESE QUESTIONS.

Susan Ross

HB 58 DOES Allow Punitive Damages
for "reckless" conduct.

"Malice" = "reckless indifference"

Cummins v. Sea Lion Corp

924 P.2d 1011 (AK 1996).

To:

Fm: Jim

Re: POMs

1. There has been a lot of disinformation about the impact of HB 58 on the Exxon case. The truth of the matter is that the Exxon case is on appeal in a federal court from another federal court which applied federal laws, and not Alaska laws. The point is that no matter what Alaska law says about punitive damages, it has absolutely no bearing on the Exxon case. If Alaska punitive damage law was not applied at the trial level in the federal court, it can in no way be applied in the same federal court system on appeal.

Aside from the total inapplicability of Alaska law on the Exxon punitive damages issue, HB 58 does not apply retroactively. It applies only to cases arising 90 days after HB 58 becomes law.

Even assuming that Alaska law could somehow be applied in a future Exxon type of case, three or four times compensatory damages will be a huge number. Exxon paid out 287 million in claims to fishermen, but it also paid \$900 million into a trust for restoration. Attorneys involved in the case tell us that the \$900 million was compensatory. If so, that makes about \$1.2 billion right there. Times 3 is \$3.6 billion. Times 4 is \$4.8 billion. \$5 billion is the amount of punitives which were entered in the federal case, so what is the big to do about?

You have to ask yourself frankly if the opposition is being stirred up because the trial lawyers want to keep on extracting their exorbitant fees under the present system, with no caps on punitive damages and on certain types of noneconomic damage under Alaska state law. In the federal Exxon case, the plaintiffs' lawyers have recently asked the court to award them "only" 20 % of the amount of the judgment. That pencils out to over \$1 billion dollars. Ask yourself this question, and try to be objective. Who stands to gain the most from keeping things like they are? I bet you can give me the answer, and it has to be the tort legal industry. If we want a vibrant economy with real jobs, we cannot be chasing businesses of all sizes out of the state.

2. The attached letter is an example of the disinformation being put out by the Trial lawyers. They say HB 58 would prevent the award of punitive damages for reckless conduct. They should know better than to say that. HB 58 requires a showing of "malice" for punitives, but that word has always been defined by the Alaska Supreme Court to mean "reckless indifference". There is no change in existing law, and reckless conduct may serve as the basis for a punitive damages award. Why the information? Follow the money. Cummins v. Sea Lion Corp, 924 P.2d 1011 (1996)

KELLER ROHRBACK
LYNN LINCOLN SARNO
MICHAEL WOERNER
(800) 397-7455

DICKSTEIN SHAPIRO & MORIN
KEN ADAMS
CHARLES MILLER
(202) 785-9700

LIEFF CABRER & HEIMANN
WILLIAM HIRSCH
(415) 956-1000

ASHBURN & MASON
A. WILLIAM SAUPE
(907) 276-4331

JAMIN, EBELL, BOLGER & GENTRY
MATTHEW D. JAMIN
(907) 486-6024

DAVIS WRIGHT TREMAINE
DAVID W. ORSTING
(907) 276-4488

March 12, 1997

① "MALICE" = "reckless interference"
Cummings v. Sealion Corp.
924 P.2d 1011 (AK 1996)

Dear Claimant:

Re: Exxon Valdez Oil Spill Litigation

The Alaska Legislature is again considering passage of legislation that Exxon may use in its efforts to persuade the Ninth Circuit Court of Appeals or the United States Supreme Court to reduce or overturn the five billion dollar punitive damage award the Exxon Valdez Oil Spill plaintiffs obtained in September 1994. The current version of HB 58 (Sponsor Substitute for House Bill No. 58, entitled "An Act Relating to Civil Actions") would impose a low cap on punitive damages. Further, it would require half of the punitive damage award to be paid to the general fund of the State. Governor Knowles vetoed a similar bill last year, in part as a result of letters from Exxon claimants. In addition, the current bill contains a new provision that would prevent the award of punitive damages for reckless conduct. This, as you know, was the basis for the award of punitive damages against Exxon.

① WRONG!

HB 58 would be applicable to the Alaska State courts. Although the bill would not apply directly to the current Exxon litigation in the federal court system, Exxon has argued that the Exxon Valdez oil spill plaintiffs' punitive damage award was unjustified, excessive, and contrary to public policy. These arguments will be repeated as Exxon appeals the award to the Ninth Circuit Court of Appeals. HB 58 would give Exxon an argument that the Alaska Legislature, the voice of the people in Alaska, is against the five billion dollar punitive damage award as unjustified and excessive, that it is contrary to public policy, and that half of any punitive damage award should go to the State, not to individual plaintiffs. If enacted, this bill might have a compelling effect on the federal courts.

We believe that you should contact the Alaska Legislature immediately to express your opposition to this bill. You can phone in a personal opinion message, which will go to all legislators, simply by calling your local state Legislative Information Office (Anchorage: 258-8111, Cordova: 424-5461, Homer: 235-7878, Juneau: 465-4648, Kenai Peninsula: 283-2030, Kodiak: 486-8116, Seward: 224-5066, Valdez: 835-2111).

We also believe you should contact Governor Knowles to urge him to veto the bill. Telephone his office at (907) 465-3500 or fax him a letter at (907) 465-3532.

If you would like a copy of the full text of HB 58 or if you have any questions, please call any of us.

Time is of the essence. Please take action immediately.

② $3 \times 1.2B = 3.6B$
 $4 \times 1.2B = 4.8B$ } under HB 58.
EXXON PUNITIVES
WERE \$5.0B

② speculative: A trumped-up excuse to kill HB 58.

To: Portia Parker

Fm: Jim Sourant

March 10, 1997

Tort Reform: The highlights of HB 58

*CHNR
etc.*

1. HB 58 v. Governor's Task Force Recommendations.

a. Governor's Task Force was "stacked" with five trial lawyers and others opposed to true tort reform, so the **credibility and recommendations of the task force must be closely scrutinized.**

(1) What is noteworthy is who was **NOT** invited to participate as a member of the Task Force. Not invited were representatives of the State Chamber of Commerce, the National Federation of Independent Business, the construction industry, the aviation industry, the travel industry, the trucking industry, the mining industry, the insurance industry, the Alaska State Medical Association, and the Alaska State Hospital and Nursing Association. These organizations represent tens of thousands of Alaskan individuals and businesses which are the most affected by tort reform, and they were not invited and were not consulted.

2. What the Governor's Task Force opposed in its recommendations.

a. **Reasonable qualifications for expert witnesses in professional malpractice suits.** HB 58 proposes that if a doctor, lawyer, architect, or engineer is sued for malpractice, expert witnesses used by either side must be licensed in that profession in this state or in another state. The Governor's Task Force wants to leave existing law, which does not require an expert witness to have a particular license or academic degree to qualify as an expert. In other words, the Task Force does not object to "hired guns" possessing dubious qualifications to be allowed to make a charade of the judicial system.

b. **Allowing a jury to know of plaintiff's recoveries from collateral sources.** Under existing law, a jury is not allowed to learn that the plaintiff had an earlier recovery somewhere else for the same injuries. HB 58 allows the jury to become aware of such earlier recoveries before reaching a verdict on the amount of damages. The Governor's Task Force wants to leave existing law as it is.

An example of what has happened in the past is the **Justice v. Humana Hospital** case. There Mr. Justice was injured in an Anchorage bar fight one night. He was thoroughly examined at Humana Hospital and sent home. He moved to California, where he was examined with Cat-scans and MRI's with no findings noted. Later he presented signs of cerebral hemorrhage

from a congenital aneurysm. Mr. Justice sued the California health care providers in California, and received \$2.2 million of future payments (present value of \$579,000) over the next 42 years, which should have made him whole. He then returned to Alaska to sue the Alaska doctors and Humana Hospital for a second bite out of the apple. A sympathetic Alaska jury, ignorant of the earlier California action and \$2.2 million award, awarded \$1.9 million. The trial judge incorrectly further reduced the \$579,000 to present value before offsetting against it against the \$1.9 million Alaska award. However, the existing law does not let the jury know about the previous recoveries until after the verdict is in, with the result that the jury generally makes higher awards that it would have with full disclosure of the facts. The Governor's Task Force wants to continue keeping Alaskan juries in the dark about collateral benefit recoveries until after the jury becomes powerless to consider the true state of affairs.

c. **Allocating fault to people who are not parties to the action.** Under a voters' initiative in 1987, it was made clear that henceforth it was unfair to allow plaintiffs to go after "deep pocket" defendants for the entire amount of a person's damages, no matter how much or little the deep pocket was at fault. The people's wishes, however, were thwarted in an Alaska Supreme Court decision: **Benner v. Wichman**. HB 58 now attempts to restore the will of the people by making the statute absolutely clear that state courts shall determine each person's share of the fault, whether or not that person is a party to the suit. The Governor's Task Force wants to keep existing law allowing deep pocket defendants to be liable for more than their share of the fault.

3. What the Governor's Task Force made even worse.

a. **Caps on punitive damages.** Under existing law, there are no limits to the amount of punitive damages which may be assessed against a defendant. This state of the law has the effect of terrorizing defendants into very large settlements. HB 58 seeks to cap punitive damages at the greater of three times compensatory damages or \$300,000. In extreme cases, the cap is the greater of four times compensatory damages or \$600,000. If this were the law when the Exxon Valdez incident occurred, assuming \$1 billion in compensatory damages, a jury could have found another \$4 billion of punitive damages.

The Governor's Task Force proposed "cap" on punitive damages does little to put any kind of a "cap" on punitives. When carefully read, the Task Force recommendation places a company at risk of paying up to one year's "net annual income" as punitive damages, even for as little as two or more wrongful employment hirings, promotions, demotions or terminations! For one unnamed oil company doing business in Alaska, that could have been up to \$260 million. For one multi-national pharmaceutical company, the "cap" could have been between \$4.87 billion and \$3.17 billion, depending upon how the courts interpret "net annual income." Similar to the litigation interpreting the infamous Section 7(i) of the Alaska Native Claims

Settlement Act, determining the meaning of "net annual income" will likely require a costly, burdensome and time consuming effort. Add to that uncertainties generated by likely litigation over the efficacy of subsidiary corporation protection to the parent company, and it becomes more clear why companies wanting to do business in Alaska cannot make investment plans. How can Alaska project a business friendly face with that kind of law on the books? The Task Force's attempt to slip through such an outrageous provision completely undermines its credibility as well as whatever public confidence was once reposed in the Task Force. One must ask who benefits most from the Task Force version, and the answer must be the 1/3 contingent fee attorneys, courtesy of the five trial attorneys on the Task Force.

b. Caps on noneconomic damages, such as pain, suffering, physical impairment, loss of enjoyment of life. Under existing law, there is no cap on damages for disfigurement or severe physical impairment, although there is a cap of \$500,000 for other types of noneconomic losses. HB 58 seeks to cap noneconomic damages at \$300,000, except that a cap of \$500,000 will apply to certain enumerated serious situations. The Governor's Task Force wants to keep existing law in place, with no limit whatsoever for damages for "severe disfigurement or severe physical impairment."

4. What arose after the Governor's Task concluded its objective.

a. Independent counsel abuses. Under existing Alaska law, whenever an insured is sued, and the insurance company agrees that coverage exists for a part of the injured party's claim, but reserves its rights to deny coverage at a later date for another part of the claim, at that moment the insured has a right to an independent counsel. The fees of the independent counsel are paid by the insurance company. The abuses arise when the independent counsel runs up exorbitant fees defending against claims that are clearly not covered by the insurance policy. In two recent Alaska instances, independent counsel have run up fees in excess of \$700,000 and \$800,000 respectively.

HB 58 simply seeks to make the insurance company responsible only for the costs and attorney fees incurred by an independent counsel defending against claims for which the insurer has either accepted coverage or reserved its right to deny coverage.

Alaska State Legislature

Legislative Affairs Agency

Office of the Executive Director

130 Seward Street, Suite 313 Juneau, Alaska 99801-2197 Phone (907)465-3800

Fax (907)465-3234



March 5, 1997

Mr. Hugh Fleischer, President
Board of Directors of AKPIRG
1401 W. 11th Avenue
Anchorage, AK 99501

Dear Mr. Fleischer:

I am writing to make you aware of an incident that occurred in our legislative offices February 24, 1997. It is most distressing that a representative of AKPIRG, Mr. Stephen Conn, conducted himself in a harassing, disruptive and assaultive manner during a legislative teleconferenced committee meeting.

Here is a report of what happened:

"Frank Dillion made a comment across the table to another man. At that point Stephen Conn broke in and told Frank he was 'scum'. He didn't get much of a response from Frank, meaning Frank just looked at him and shrugged. Stephen then said something to the effect, 'do you want to take it outside?' Frank didn't respond and nothing more was said. Later in the meeting Stephen walked over and interrupted Mike Burns, who was giving testimony. Stephen said three or four words to him and slapped a book on the table next to him to look at. Stephen also called Al Tamangi a 'shithead'. At the end of the meeting Mr. Dillion walked over to Mr. Conn and asked 'do you want to take it outside?' At this point Mr. Conn struck Mr. Dillion's chin. Mr. Dillion responded by a slap on the shoulder. We were going to call the police but the assault did not escalate and Mr. Dillion left the room. Our LIO person walked over to talk to Mr. Conn, who at first was belligerent, saying 'none of this was his fault and everyone else had provoked it and they were scum.' Mr. Conn was asked to leave."

I would hope your organization takes note of this incident when you review Mr. Conn's performance. An anger management class or conflict resolution class should be taken by Mr. Conn. For your information, a conflict resolution class is offered May 16 in Anchorage. I have enclosed a copy.

If Mr. Conn does not adhere to our Legislative Information Office protocol in the future, he will be banned from the LIO.

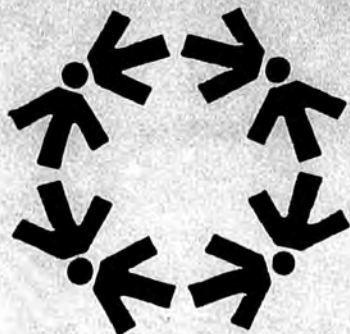
Sincerely,

A handwritten signature in cursive script that reads "Pamela A. Varni".

Pamela A. Varni
Executive Director

Enclosure

cc: Legislative Council Members
AKPIRG Board of Directors



AKPIRG

ALASKA PUBLIC INTEREST RESEARCH GROUP

Post Office Box 101093 / Anchorage, Alaska 99510-1093

(907) 278-3661 FAX (907) 278-9300

Ms. Lynn C. Morley
Manager
Legislative Affairs Agency
Information and Teleconferencing
130 Seward St., Suite 313
Juneau, Alaska 99801
March 3, 1997
Dear Ms. Morley:

*FYI - not
enclosed in letter
to Fleischer*

I am in receipt of your letter of February 26, 1997 regarding behavior in teleconferenced committee hearings. As I told your Anchorage staff, I agree entirely with you that my conduct and others must adhere to criteria that allow for mutual respect and a free exchange of ideas. To the extent that my own behavior deviated from that norm, I promise you as I promised your associates that it will never happen again.

As to your allusions to my behavior, I must clarify a point or two. When witness Mike Burns was asked about a point related to his participation on the Governor's Task Force on Civil Justice, he said that he had not brought a copy of the final report to the hearing for reference. Since I had a copy, I lent it to Burns. One of the other witnesses thought that I was interfering with Burns. To the contrary, I spent many days with Burns at meetings of the Task Force and enjoy a congenial relationship with him. He happens to be my banker. That same person slandered me after the hearing and apparently lied to the press about my encounter with Mr. Dillon. On the matter of physical contact with Dillon, Dillon approached me, asked if I wanted to go outside and hit me in the face after I reflexively touched his face with my finger.

I trust that the criteria you describe will be communicated to the persons who slandered and assaulted me and we can work together to insure the dignity of the legislative hearing process. I intend to fully abide by the protocols you have articulated.

Most respectfully,

Stephen Conn

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Conflicts are inevitable. Anger, grudges, hurt and blame are not.

Why can't work — and life — be easier?

They can. Fact is, most conflicts can be resolved fairly easily. Without shouting, competition or anger. Even better, you can solve conflicts in a way that actually benefits all concerned. This seminar will show you how.

In one day you'll learn a system of psychologically sound techniques proven to work in a variety of conflict situations. Even potentially destructive situations like temper tantrums ... tensions, anxiety and fear ... one-upmanship ... out-and-out lying ... and more.

The result? You'll be able to focus more on your work, instead of your anger. Your relationships with your team, boss and other business associates will improve dramatically. You'll feel less stressed. And your overall sense of well-being will be stronger, because you'll see that things really *can* be worked out.

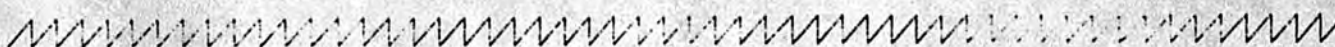
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2. The 2 primary reasons conflicts occur (and how understanding them leads to quicker resolution)
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5. Specific ways to create a more positive and cooperative climate for conflict resolution

- 
- 
6. What to say to get what you need: the 5 classic conflict resolution strategies, and how to use each
 7. The 5 rules that keep communication open
 8. When your conflict is very complicated or "too big" — how to narrow the focus and start making progress
 9. Separating the person from the problem: what it really means and how to do it
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 13. What to do when someone refuses to discuss the issue (and what *not* to do)
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 15. The least productive ways to deal with conflict (and how to respond if someone tries them on you)
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 18. Effective ways to resolve conflicts between teams and departments
 19. How to deal with contentious tactics, including ...
 - ... Manipulation: making you feel guilty through blaming, sarcasm, sulking, etc.
 - ... Back-stabbing, lying and sabotage
 - ... One-upmanship, like making you wait, interrupting you — anything to get you flustered
 - ... Ingratiation: making promises that sound too good to be true
 - ... Threats, both spoken and unspoken
 20. Mediation: knowing when a third party is useful, and how to recruit one (or be one)
 21. How to generate new options when both sides are stuck
 22. The best ways to resolve conflicts with your managers
 23. From conflict to problem solving: 4 steps that make it happen
 24. How to help others resolve their conflicts (essential for managers and parents)

Having conflict with one particular person?

Invite him or her along!

Perhaps it's a co-worker or teammate ... or even a family member or spouse.

Attend together and take a giant step toward resolution and peace. You'll discover the roots of your conflicts ... how each of you gets off track ... and how to find common ground.

This training will help you understand each other better, communicate more easily and develop a more satisfying relationship.

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Conflict management skills are considered *essential* for teamwork. This seminar is an easy, convenient way for your team to gain these skills.

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1-800-325-5854.

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“As an educator, I plan to use this information in the coming year. I have developed new skills in dealing with problems — skills I didn't realize existed.”

Carol Sanders, Teacher, River Road ISD

“I walk away feeling good and empowered, with tools and guidelines to put into action changes in my life.”

Constance M. Bessette, Patient Relations, Rand Eve Institute

“... highlighted the need to overcome our fears in dealing with conflict and confrontation, for a 'positive' outcome for all.”

H. Bokalo, Manager-Customer Service, Bell Canada

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Dana Yamada, Refugee Coordinator, Malton Neighborhood Services

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If you don't gain everything we promise — and all that you expected — from this program, we'll refund your tuition in full. Promptly and courteously, no quibbling whatsoever. And you have a full year to decide!

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Consider this: In one fast-paced day, you'll gain an advantage that will continue to pay off for years to come ... starting the very next day. If that's not incentive enough, here are five more reasons to sign up now:

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2. **In a single day you will gain proven peace-keeping skills that will serve you throughout your career.** This seminar is full of specific ideas you can put to use right away — you'll leave eager to try them and confident that they'll work.
3. **You'll learn skills that others will notice — and will want to copy themselves.** After all, "keeping your cool" is an enviable workplace trait. In no time at all, you'll see a marked improvement in how you handle yourself either as a participant or a mediator in conflicts.
4. **Your day will fly by.** When learning is fun, time goes fast and what you hear sticks. Your seminar leader is highly skilled at creating a lively and entertaining learning experience.
5. **We guarantee your satisfaction.** If for any reason you find this seminar isn't for you, feel free to leave at any time. Just let us know and we'll refund your tuition in full, no matter how long you stayed. You really have nothing to lose.

This seminar is a great opportunity for you to build your personal power and benefit your company or organization in the process. We hope you'll plan now to attend.



John Ball
Vice President of Marketing and Development



CareerTrack's name change signals a new era in training ...

CareerTrack has recently joined with ETC, the new training division of Telecommunications Inc.

ETC was formed to introduce the latest learning technology into workplaces, classrooms and homes worldwide. Through its vast telecommunication capabilities, ETC will be able to reach millions of people at home and at work every day. Couple that with CareerTrack's extensive line of seminars and instructional tapes, and the training possibilities become virtually limitless.

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Lunch: 11:45 am – 1:00 pm

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There is no fee for substituting or canceling. If you can't attend but can send a substitute, just phone us. If you need to cancel, phone us and we'll convert your tuition to a credit, good for a full year, that you can use for a future seminar or product purchase. Or, if you prefer, we'll send a refund.

PLEASE NOTE

- We will mail your Express Check-In ticket within 10 days after you register
- If you don't receive your ticket before the program, please phone us
- Walk-in registrations will be accepted as space allows
- Please, no audio or video recording
- Lunch and parking are not included
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- You will receive an attractive take-home Certificate of Attendance at the program

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Attn: Nurses, accountants and other professionally licensed personnel. By attending one of our programs, you may be eligible to receive six contact hours (.6 CEUs) or six CPE credits (Registered Sponsorship NASBA). To verify credits for your profession, simply phone us. Your certificate will arrive within four weeks after the program. CareerTrack is an authorized CEU sponsor member of the International Association for Continuing Education and Training (IACET).

MAILING ADDRESS INFORMATION

We strive to keep our mailing list as up-to-date and accurate as possible. If you are receiving duplicates or if the mailing label on this brochure is incorrect, please phone 1-800-837-4398. Or, note corrections on the labels and fax them to 1-800-788-5478, or mail them to us, attention: MS34-1. Please allow 15 weeks for processing. We occasionally make our mailing list available to other carefully screened companies. If you do not want to receive these offers, please notify us in writing and include a copy of your mailing label.

1997 PROGRAM LOCATIONS

The specific meeting room will be posted in the lobby on the day of the program.

Anchorage, AK – May 16 (#01048)

William A. Egan Convention Center
555 West Fifth Avenue

Fairbanks, AK – May 14 (#01049)

Westmark of Fairbanks • 813 Noble Street

Juneau, AK – May 12 (#01050)

Centennial Hall Convention Center
101 Egan Drive

Bloomington, IN – May 28 (#01068)

Convention Center
302 South College Avenue

Fort Wayne, IN – May 7 (#01069)

Holiday Inn Northwest
3330 West Coliseum Boulevard

Indianapolis, IN – May 5 (#01070)

Hyatt Regency Indianapolis
One South Capitol Avenue

Indianapolis, IN – May 30 (#01071)

Hyatt Regency Indianapolis
One South Capitol Avenue

Terre Haute, IN – May 29 (#01073)

Holiday Inn-Terre Haute
3300 U.S. 41 South

West Lafayette, IN – May 6 (#01072)

Holiday Inn Lafayette
5600 State Road 43 North

Eau Claire, WI – May 15 (#01091)

Best Western Midway Hotel
2251 Hendrickson Drive

Fond du Lac, WI – May 12 (#01098)

Holiday Inn • 625 Rolling Meadows Drive

Green Bay, WI – May 13 (#01092)

Regency Suites • 333 Main Street

La Crosse, WI – May 19 (#01093)

Midway Hotel Resort and
Convention Center
1835 Rose Street

Madison, WI – May 9 (#01094)

Radisson Inn Madison
517 Grand Canyon Drive

Madison, WI – May 20 (#01095)

Sheraton Madison Hotel
706 John Nolen Drive

Milwaukee, WI – May 8 (#01097)

Milwaukee Hilton
509 West Wisconsin Avenue

Pewaukee, WI – May 21 (#01096)

Country Inn Hotel and Conference Center
2819 Golf Road

Sheboygan, WI – May 7 (#01099)

Ramada Inn • 723 Center Avenue

Wausau, WI – May 14 (#01100)

Wausau Inn and Conference Center
2001 North Mountain Road

To register, phone 1-800-334-6780



PHONE

1-800-334-6780 or
(303) 447-2300

7 am to 7 pm weekdays and 8 am to 5 pm
Saturdays, except major U.S. holidays. Have your
address label and program number available.



FAX completed registration
form to 1-800-832-9489
or (303) 447-1696

24 hours a day, 7 days a week. We will mail,
not fax, your confirmation.



MAIL completed
registration form to

ETC w/CareerTrack MS2
3085 Center Green Drive
Boulder, CO 80301-5408



YES!

Please register me for the one-day, \$79 *Conflict Resolution and Confrontation Skills* seminar I've checked below.
(Tuition drops to \$69 each for groups of five or more.)

- ☐ Anchorage, AK - May 16 (#01048)
☐ Fairbanks, AK - May 14 (#01049)
☐ Juneau, AK - May 12 (#01050)

- ☐ Bloomington, IN - May 28 (#01068)
☐ Fort Wayne, IN - May 7 (#01069)
☐ Indianapolis, IN - May 5 (#01070)
☐ Indianapolis, IN - May 30 (#01071)

- ☐ Terre Haute, IN - May 29 (#01073)
☐ West Lafayette, IN - May 6 (#01072)

- ☐ Eau Claire, WI - May 15 (#01091)
☐ Fond du Lac, WI - May 12 (#01098)
☐ Green Bay, WI - May 13 (#01092)
☐ La Crosse, WI - May 19 (#01093)
☐ Madison, WI - May 9 (#01094)

- ☐ Madison, WI - May 20 (#01095)
☐ Milwaukee, WI - May 8 (#01097)
☐ Pewaukee, WI - May 21 (#01096)
☐ Sheboygan, WI - May 7 (#01099)
☐ Wausau, WI - May 14 (#01100)

IMPORTANT INFORMATION



Record the codes from your mailing label in the boxes below (even if this brochure was not addressed to you).

HR27

PRIORITY CODE

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CUSTOMER NUMBER

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ORGANIZATION SIZE



What is the total number of employees at your specific location?

- #1 ☐ 5 or fewer #2 ☐ 6-19 #3 ☐ 20-49 #4 ☐ 50-99 #5 ☐ 100-249 #6 ☐ 250-500 #7 ☐ Over 500

NAMES OF ATTENDEES (Please list additional names on a separate sheet.)



#1 ATTENDEE'S NAME

Mr.
Ms.
Mx.

JOB TITLE

PROGRAM NUMBER

#2 ATTENDEE'S NAME

Mr.
Ms.
Mx.

JOB TITLE

PROGRAM NUMBER

ORGANIZATION INFORMATION



APPROVING MANAGER'S NAME

TITLE

ORGANIZATION NAME

MAILING ADDRESS

☐ BUSINESS

☐ HOME

CITY

STATE

ZIP CODE

DAYTIME TELEPHONE NUMBER

()

FAX NUMBER

()

METHOD OF PAYMENT (Payment is due before the program.)



Please add applicable state and local tax to your payment for programs held in Hawaii, New Mexico and South Dakota. If you are tax-exempt,
enter your tax-exempt number here _____ and attach a copy of your tax-exempt certificate.

Total amount due: \$ _____

☐ Check # _____ (payable to ETC w/CareerTrack) is enclosed

☐ Bill my organization. Attn: _____

☐ Purchase order # _____ (Attach purchase order to completed registration form.)

☐ Charge to:

☐ MC ☐ VISA ☐ AMEX ☐ DISCOVER ☐ DINERS CLUB

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

DATE

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

DATE

Unashed refund checks and excess payments will be treated as a credit that is good for a full year.

To: Mary Gore and Portia Parker

Fm: Jim Sourant

February 26, 1997

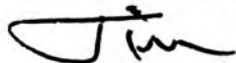
Dear Mary and Portia:

I appreciate how "swamped" both of you are. I know the feeling. Brian Porter informs me that his understanding with Senator Miller is that both of you are involved in tort reform on the Senate side.

Accordingly, I renew my offer to help in any way I can. I have previously provided your office with copies of SSHB 58, the Sponsor Statement, and the Sectional Analysis. Let me know what I can do.

Heads up, for today we hope to pass SSHB 58 out of the House Judiciary Committee. That should be helpful for you, since the documents people on the first floor should have SSHB 58 with all amendments already incorporated into it (at the judiciary committee level) by tomorrow, or at the latest, by Friday. This means that to keep up our momentum, you could call Mike Ford today or tomorrow, and get him alerted to recaptioning SSHB 58 to the Senate version during the upcoming break.

Thanks again for all your help. I'll look forward to working with you on this.



cc: Brian Porter

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

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



DISTRICT 20

SESSION:
STATE CAPITOL, ROOM 216
JUNEAU, ALASKA 99501-1182
PHONE: (907) 465-4930
FAX: (907) 465-3834

INTERIM:
716 W. 4TH AVE., SUITE 360
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

David Jones and George Suddock
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear David and George:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Please coordinate with Jim Sourant who will testify before the judiciary committee regarding Sections 31 and 32.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Brian".

Brian Porter

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
HOUSE JUDICIARY COMMITTEE
HOUSE RULES COMMITTEE
HEALTH, EDUC. & SOCIAL SERVICES COMMITTEE
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ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

Judy Brady
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear Judy:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Sincerely yours,

A handwritten signature in cursive script that reads "Brian".

Brian Porter

Post-it™ Fax Note	7671	Date	1/27	# of pages	23
To	Judy Brady	From	Jim Stewart		
Co./Dept.	NOGA	Co.	Rep Porter		
Phone #	272-1481	Phone #	258-8197		
Fax #	279-8114	Fax #	465-8434		

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

MEMBER
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HOUSE RULES COMMITTEE
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ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

David McGuire, M.D.
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear Dave:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Sincerely yours,

A handwritten signature in cursive script that reads "Brian".

Brian Porter

Post-It™ Fax Note	7671	Date	1/27	# of pages	23
To	David McGuire	From	Jim Saurant		
Co./Dept.		Co.	Rep Porter		
Phone #	562-4142	Phone #	258-8197		
Fax #	563-8824	Fax #			

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

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



DISTRICT 20

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716 W. 4TH AVE., SUITE 360
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

Bill Allen
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear Bill:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Sincerely yours,

A handwritten signature in cursive script that reads "Brian".

Brian Porter

Post-it™ Fax Note 7671		Date 1/27	# of pages 23
To Bill Allen	From Jim		
Co./Dept. Vero	Co. Rep Porter		
Phone # 277-5309	Phone # 258-8197		
Fax # 264-8130	Fax # 265-8434		

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

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



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INTERIM:
716 W. 4TH AVE., SUITE 360
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

Roger Holmes, Esquire
Anchorage, Alaska
January 27, 1997

Sent via Fax: 243-6695

Dear Roger:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Jim Sourant has questions for you about sections 7(b), 12, 13, 14, 19, 20, 28, 30, 31, 32 and 33. Please call him when you are ready to talk about those sections. Thanks!

Sincerely yours,

A handwritten signature in cursive script that reads "Brian".

Brian Porter

Post-It Fax Note		7671	Date	1/27	# of pages	23
To	Rogers	From	Jim Porter			
Co/Dept.		Co.	Rep Porter			
Phone #	248-8013	Phone #	465-4930			
Fax #	243-6695	Fax #	465-8434			

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

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



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FAX: (907) 465-3834

INTERIM:
716 W. 4TH AVE., SUITE 360
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

Dick Cattanch
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear Dick:

Here is our office draft of the Sponsor substitute for HB 58 (this year's HB 158). As you remember, we prefiled the initiative so as to get a bill going and have a lower number than the governor.

It basically contains a composite of:

1. HB 158 as it passed the House Judiciary Committee.
2. Refinements on some points developed since then.
3. Portions of the recommendations of the Governor's Task Force.

Please let me know, as soon as you can, if there are any items that create a problem, or any omissions.

Sincerely yours,

Brian
Brian Porter

Post-It™ Fax Note		7671	Date	1/27	# of pages	23
To	Dick Cattanch		From	Jim		
Co./Dept.			Co.	Rep Porter		
Phone #	349-6464		Phone #	258-8197		
Fax #	522-3464		Fax #	522-3464		

Alaska State Legislature

Representative Brian S. Porter

HOUSE MAJORITY LEADER

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



DISTRICT 20

SESSION:
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INTERIM:
716 W. 4TH AVE., SUITE 360
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

Post-It™ Fax Note	7671	Date	1/27	# of pages	3
To	Art Snowden				
Co./Dept.	AK Const				
Phone #	264-0547				
Fax #	264-2881				
From	Brian Porter				
Co.	AK Const				
Phone #	4930				
Fax #	5834				

Art Snowden
Anchorage, Alaska
January 27, 1997

Sent via Fax

Dear Art:

Here is the Alternative Dispute Resolution language we have drafted for inclusion in the Sponsor substitute for HB 58.

Please let me know, as soon as you can, if there are any items that create any problems, or any omissions.

Sincerely yours,

A handwritten signature in cursive script that reads "Brian".

Brian Porter

ADR:

WORKING COPY #1

Sec. 09.42.010 **Legislative intent.** It is the intent of this legislation to create a pilot alternative dispute resolution procedure within the existing civil litigation system in order to promote the timely, inexpensive and efficient resolution of civil disputes.

Sec. 09.42.020. Pilot program for alternative dispute resolution.

(a) The Alaska Judicial Council shall establish a pilot program under this chapter for the submission of no more than ___% of the tort and ___% of the contract cases filed after January 1, 1998 in the Superior Court for the Third Judicial District. The program shall operate for ___ years.

(b) In establishing the pilot program, the Alaska Judicial Council shall confer with the Alaska Supreme Court, the Alaska Court System, the Alaska Dispute Settlement Association, other states which have alternative dispute resolution programs, and whomever else may be appropriate to contribute to the successful establishment of the program.

(c) The Alaska Judicial Council shall develop the minimum qualifications for a person to be listed on the roster of persons determined to meet those qualifications, together with a schedule of fees to be charged. Nonlawyers shall, if they meet the minimum qualifications, be permitted to be listed on the roster.

(d) All persons who are listed on the roster in subsection (c) above have judicial immunity for conducting the alternative dispute resolution procedures to the same extent as judges have immunity in Alaska.

(e) The Alaska Judicial Council shall establish procedures for ensuring the confidentiality of all matters disclosed during alternative dispute resolution. Matters disclosed during alternative dispute resolution proceedings are not admissible in subsequent proceeding in the event of no resolution under this chapter, unless such matters are discoverable under the Alaska Rules of Civil Procedure.

(f) Fees and costs to conduct an alternative dispute resolution proceeding under this chapter shall be shared equally among the parties to the case, unless a party is determined to be an indigent by the trial court, in which case payment shall be made at public expense under procedures to be developed by the Alaska Judicial Council. Fees and costs borne at public expense under this subsection shall constitute a lien on any recovery by the indigent party. Reimbursement shall be paid first from the recovery.

(g) The procedures to be developed shall establish standards for the timely referral to alternate dispute resolution by the trial court. The alternative dispute resolution shall terminate no more than 100 days after the defendant's answer is served, unless the trial court grants a time extension in an exceptional case for good cause shown. The alternative dispute resolution proceeding shall be limited to no more than 12 hours, unless the parties mutually agree to a longer period.

(h) The Alaska Judicial Council shall evaluate the alternate dispute resolution procedure annually, and submit a written report to the Governor and to the judiciary committees of both houses of the Alaska Legislature. The evaluation shall measure the overall success of the project

in terms of its ability to quickly, inexpensively and efficiently resolve civil disputes. It shall also report on the satisfaction of the parties to the cases, and the expenditure of court resources, including amounts paid at public expense for the benefit of indigents and the recoupment under subsection (f) of this section.

Sec. 09.42.030. **Definitions.** In this chapter,

(a) "alternative dispute resolution" is limited to arbitration, mediation and early neutral evaluation.

*Sec. 34. AS 09.55.536(c) is amended to read:

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

(1) Why did the claimant come [WHAT WAS THE DISORDER FOR WHICH PLAINTIFF CAME] to medical care?

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

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

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

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

(6) What specifically caused the medical injury?

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

Explain.

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

*Sec. 35. AS 09.55.536(f) is amended to read:

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

*Sec. 36. AS 09.55.536 is amended by adding a new subsection to read:

**Municipality
of
Anchorage**



P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-1545

Rick Mystrom, Mayor

OFFICE OF THE MUNICIPAL ATTORNEY

March 12, 1997

The Honorable Gene Therrault
STATE CAPITAL, Room 511
Juneau, Alaska 99801-1182

Re: SSHB58 - Tort Reform Legislation

Dear Representative Therrault:

The Municipality of Anchorage is self insured for tort claims. As such, every dollar spent on the defense and resolution of tort claims is paid directly by the taxpayers. Despite earlier tort reform, the Municipality of Anchorage continues to be faced with frivolous lawsuits and in a climate of a back logged court system and increasing defense costs. In particular, there has been a significant increase in frivolous lawsuits against the Anchorage Police Department and individual officers. When the officers are pulled away from their important duties of investigating, fighting, and prosecuting crime to defend against these lawsuits, the safety of the people of this city and state is jeopardized.

For these reasons, the Municipality of Anchorage supports SSHB58, tort reform legislation, which would encourage the efficiency of the Alaska civil justice system by discouraging frivolous litigation while at the same time protecting injured Alaskans' rights to just compensation for injuries and damages caused by the negligent acts of others.

Anchorage supports the comprehensive changes set forth in SSHB58. In particular, those portions of the legislation that the Municipality would like to see implemented are as follows:

1. Section 7. AS 09.10.070(a) which would amend the statute of limitations for lawsuits arising out of damage to personal property to two years instead of the current six years. It is difficult if not impossible to defend against stale claims when memories have faded, personnel have changed, witnesses are gone, and evidence is lost. The Anchorage Police Department, in particular, has been faced with having to defend such claims due to the large amount of property handled by it in the course of a criminal investigation. The current six year statute actually encourages a delay in the bringing of such an action since the current prejudgment interest at 10.5% could potentially result in a windfall to the claimant.

Implants
Pro
Electric

- to join*
2. Section 8. AS 09.10.070 Non-economic damages. The changes proposed to this section are fair and would result in reasonable compensation to Alaskans who are injured by the negligent acts of others. The current law results in excessive damage claims that are typically unsupported by facts.
 3. Section 9. AS 09.17020 Punitive damages. The Alaska Supreme Court has ruled that municipalities are exempt from liability for punitive damages. In an effort to circumvent this law, plaintiffs' attorneys attempt to avoid Anchorage's immunity for punitive damages by suing employees individually and alleging punitive damages against them. There has been a significant increase in such claims in recent years. A legislative change which would streamline litigation by preventing meritless punitive damage claims is strongly supported by Anchorage.
 4. Section 18. AS 09.17.080(c) Anchorage supports changes to the current law that would allow any person responsible for damages to be assessed a percentage of fault regardless of whether the person is named in a lawsuit. Anchorage has often found itself in a position of acting as a third-party plaintiff to bring the appropriate parties into a lawsuit for a fair determination of fault. This is expensive and time consuming and the proposed legislation would obviate this need and would reduce the costs of defending litigation while at the same time ensuring a just result.
 5. Section 36. AS 09.65.210 Anchorage strongly supports repeal and reenactment of AS 09.65.210 to eliminate potential recovery of damages for personal injury or death if the injury or death occurred while the person was engaged in the commission of a felony. Further, since alcohol and other controlled substances have become an increasing problem in Alaska and across the country, Anchorage encourages the passage of both sections AS 09.65.210(4) and (5) which would reduce or eliminate the need to defend against claims brought by impaired persons who have substantially contributed or caused their own injuries.

Finally, Anchorage supports changes to the law that it would allow an offset for collateral benefits received by a party to avoid a double recovery, the proposed changes to prejudgment interest to avoid the windfall that currently exists regarding prejudgment interest, and more "teeth" in the present offer of judgment law to encourage early and prompt resolution of claims.

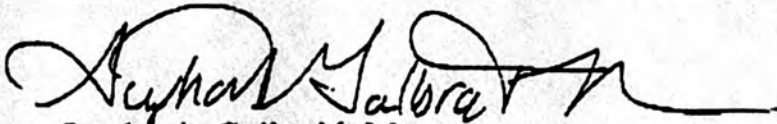
The Honorable Gene Therrault

March 12, 1997

Page 2 of 3

On behalf of the Municipality of Anchorage, the Law Department and the Risk Management Department encourage the passage of SSHB58. I would happy to discuss with you more detail how the proposed changes would impact litigation in this State, and in particular, would impact litigation faced by Anchorage on a day to day basis. Thank you for your attention to these matters.

Very truly yours,



Stephanie Galbraith Moore

Assistant Municipal Attorney

cc: Mary K. Hughes, Municipal Attorney
Harry Sjoberg, Risk Manager

SCOMM

101A:3

BRIEFING



755 Sansome Street, #450

San Francisco, CA 94111

Phone: (415) 989-0833

Fax: (415) 989-2411

E-Mail: PRIPP@aol.com

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

By Steven Hayward[†]

HIGHLIGHTS:

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

[†] Steven Hayward is vice president, research for the Pacific Research Institute. William S. Loughman, an attorney and senior fellow in legal studies for the Pacific Research Institute, conducted the research into lawsuit filings.

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

Introduction

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

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

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

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

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

What Lawsuit Filings Data Tell Us

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

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

The highlights of the analysis of these cases include:

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

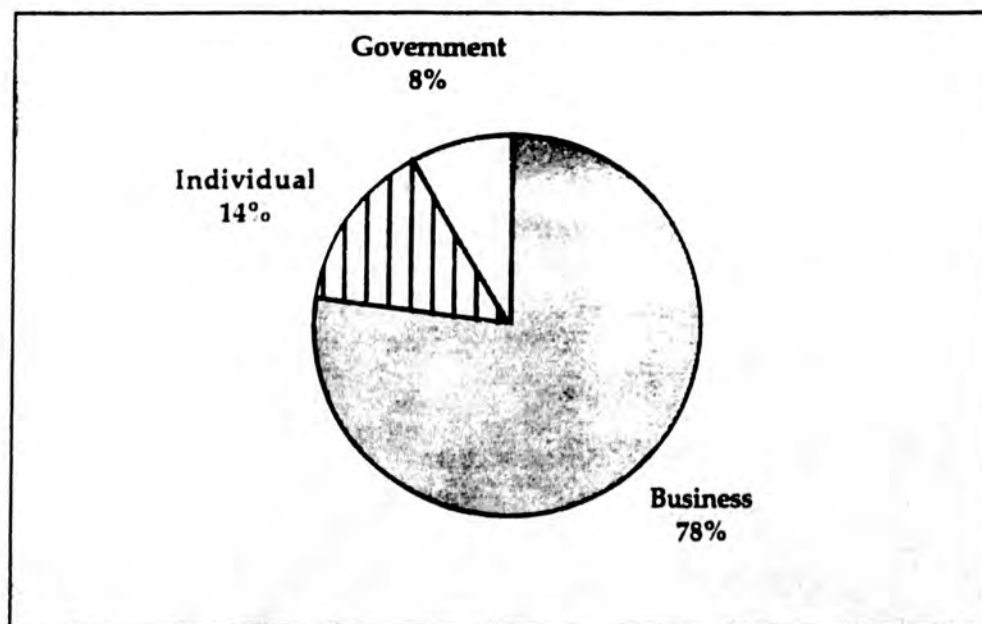
Of the 1,024 cases we examined, nine (9) cases were designated by the court as "sealed" and were unavailable for study. This left a pool of 1,015 lawsuits for study. 537 of these 1,015 cases, or 52.9 percent, were based on one of three principal causes of action where punitive damages are recoverable:

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

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

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

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



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

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

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

Government Agencies Frequently Targeted

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

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

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

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

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

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

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

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

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

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

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

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

Duration: Punitive Cases Take Longer to Resolve

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

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

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

Asking the Right Questions: The Dynamics of Lawsuit Settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ Katz, *op cit.*, p. 4, 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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



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

February 20, 1997

Re: HB 58

Lisa:

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

A. Friday, February 21:

*1. David McGuire, MD.

B. Monday, February 24

1. David Johnson, MD.

*2. Dick Cattanach

*3. Ardie Gray

4. Mike Lessmeier

5. Mike Barcott

*6. A.L. Tamagni Sr.

*7. Marianne K. Burke

8. Robert Valliant

*9. John Wheatley

*10. Colin Maynard

*11. Orin Seibert

*12. Glen Smith

13. Kevin Richie

*14. Steffani Galbraith-Moore

*15. Frank Dillon

16. Pam La Bolle

17. Neal McKinnon

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

* Arch. LTO

58 LIO
8/11

Fri

Save
a witness
list

RM18

2.20.97

Signed
up
Dick

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

②

Mon

- ① Dr. Dave Johnson 225144
- Int. of Repose - Birth Trauma
- SL re Healthcare providers.

- ② Dick Cathanach 349-6666
- Genl? - Repose
- 5/10
- Phantoms

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

Dick

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

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

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

Dick

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

✓

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

Back to me

✓

⑨ John Wheathy: The Alliance
- 300+ members,
- Suppt KBTB

Dick ✓

⑩ Colin Maynard: 274-2236
- STAT. of Repose.

Dick ✓

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

Dick ✓

Call. tell him intent is to do it. (family doc)

Call

Call

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

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

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

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

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

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

⑭ Neil MacKinnon

~~ATRT~~
 1-800-2872
 306 (x) Claire
 (any)

① St. of Repose
 ②

JUD HRA 2.24.97 HBS8

12pm
Avenue Deadline this evening

1 John Wheatley

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

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

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

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

Berk: 2 yr all.
A: larger \$ amt

Ken/Hi & W.

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

Suew Ross

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

TF = excessively high Atty fees &
insur premiums

Corbora

Ross Mullins:

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

 FIXING chart of salmon survival.

Cardport
Wren Hopkins.

Arch
Dick CATTANACH.

- 600 civilian members
- 2 pts.

- 38: STAT. of Agoser

: not up to 6 yrs of subalt. Conyda.

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

- 3 punitive. not movable.

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

Norm: Q: Designer of S/Ls.
: Minor OK of plane + red color.

Bark: 'punitive' ... \$220,000 claim.
Pl. chose \$2500K punitive.
Cost to defend 100K. Have to tell
insur co to settle with policy
limits.

Dick
Killed?
Don't

*
Dick to get atty to continue

Keth

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

- State Med. Assoc - KBTJ OK -

- 35:

§ 56: S/L on children under 6.
- Most Birth Trauma Dept
of birth. Safeguards are

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

§ 29-30. Expert W's.
- Part panel

Berk: § 35: civil liability of
hospitals.

- shifts burden to med. staff.
- ~~§ 30~~ Trade off protection.
- before Jackson v. Jones &
created agency.

~~§ 35~~: Disc. of childhood injuries.
Any which are not disc. of.
Not necessary. Any? Probably.

Ground damage of child birth
of seizure during med. not

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

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

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

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

75-99% Not work & later
noise ugly head.

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

" 280k ceiling on noneconomic
A: 1st to 4th in micro legend.

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

Glen Smith - Scott Weitzel:

① ~~1500~~ = 1700 claims / yr

② 45 mo claim life

③ 1.19 : 1 closing ratio.

④ \$5K - \$10K claims = majority.

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

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

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

§21: Offer of judgment.

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

80% less cost than in 70s -

Kona:
Greg Holler - Gave

(FAXING) Cardona

Sherry Shaw: 4 Fisherm AK:
Oppose H258.

Still think this bill would reverse EXXON.

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

And

Coleman MAYNARD - APOC

= 400 members w/ 5000 profs.

= Most cases settle to avoid

discovery costs & threat of punishment -

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

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

(b) Claims made bona.

(c)

(2) Dispute Resolv: AD Resolv.

Berk: Meteorite Stat C

CRAFT: "CAPRICIOUS" Juries All?

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

(I call
Colin)
EXXON

Steve Burrell - Syntact

1000 members - small owners & users.

① fair comp for repairs, but cap.

② appropriate

③ felony bar

④ distrust/contempt for civil justice.

Berk & Abuse Power?

As B-BK

Berk & 'heavily' tort reform?

A: Small business not be

exposed to quarters.

Berk & Mediation

expedited discovery & ADR.

⑤

Fixed
testy
Al Tawani
§12, 13 & 14.

Periodic mtg: tax free

§12. - 95% injured parties not advised.

§13:

§14: before change.

Good
festivity

Vin Jordan - State Medice Review
BEKKA AMCA & NORCAL

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

Frank Dillon

- 300 con. 15,000 resed.

- Since 1958.

- atty far too intrusive in our
society.

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

Ex: (a) FOLKS
(b) Ryder.

Mike Evans - Keybank Ark. Pres.

- ON Gov's T.F.

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

Chas Walls - Pres of Ark Village Coop.

Good intro.

- Amendment re Elec street lighting.

Lessons

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

① Positive

- Study: Don't look at Hwy verdicts.
 - 1. Punitive take 1/3 more time.
 - 2. "
 - 3. " Take role in settlement.

② General Liability - Initiative...

- 75 Vol approved.

③ Offers of Judgment

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

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

⑤ Uninsured cost: 2 experiences, CHI CNSL.

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

Is current system results in better rules,
why not of caps

A: years of cases in pipeline.

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

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

Berk: Calif experience ~~legis~~

Craft & Bernier v. Wichman:

Noen: ① 1996 study.....

② collateral benefits.

A: ~~subrogation~~?

Mike

MS
Appointments
to

Mike Schneider

"Invisible Public Policy"

Public Trust

— Key bank: Mike Byrne

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

Joe: Confine words & not attack.

Croft: Appointment?

A: (Not good job) -

berk: Rule III?

How many frivolous...

He want to settle every case?

Bob Vallant = Ac Hosp & Nurse Home Assoc

Recreation in Rates: 1997: 3X higher
cvg. than 8 yrs ago at 1/2 cost. 1st
if improve bus. env. get
in rates. His hosp is the
low cost provider. In CT, it'll
be competition to bring down prices.

33 member hosp/NA.

① ER. Bt 5...

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

His
US of
legisl
intent.

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

~~§ 33 Notice of Duty.~~

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

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

Mike Barcott

§ 39 § 40

Beck:

ORIN

DATAIR - AK AIR carriers

- 130 members: AK AIR → smallest
 - 200 communities
 - Serious problems - lack of U/V capacity
 - 1994: Commuter accidents
 - Now no competition
- \$30/yr premium!

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

~~Beck~~ me plan to tie punitive to
a % of net earnings
~~as~~ as cap on 3X compensatory

Niel McKinnon

Am label

700 bus members
35 chapters
70,000 AKMS

Brian

leave in or take
out ~~gutter~~ tier
punitive

810(c)

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

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

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

[2.27.97] HB58 / JCS / Avenir

File #12 Bank: lower rates 10%?

Brian: Problem 12:

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

Call Charlie Miller of the M&L

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

Brian: - OUT case: still be reduced -

MAX = 25% of future earnings -

- Exxon case = 4 B under this -

- PT = This remove the cap

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

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

Brian:

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

(14) Brins - OK

(15) OK

(15) Brin - if 2 found at fault, who
pay? Brins back ft several
contribution of 5 ft to 10 ft.

Croft:

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

Brins is consistent w/ (14).

AMENDMENT

(K)

OFFERED IN THE HOUSE

BY REPRESENTATIVE PORTER

TO: SSHB 58

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

OK

(15)

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PORTER

TO: SSHB 58

1 Page 10, lines 1 - 4:

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

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

(16)

AMENDMENT

OFFERED IN THE HOUSE
TO: SSHB 58

BY REPRESENTATIVE PORTER

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

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

OK

AMENDMENT

①

OFFERED IN THE HOUSE
TO: HB 58

BY REPRESENTATIVE GREEN

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

OR
delivered of
electrical service.

K. Green