

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.07 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 565

ALASKA STATE
HOSPITAL & NURSING HOME
ASSOCIATION

March 11, 1997

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

Dear Representative Therriault:

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

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

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

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

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

<u>SPECIALITY</u>	<u>CALIFORNIA</u>	<u>ALASKA</u>
Anesthesia	\$10,000	\$26,500
Family Practice	\$ 7,000	\$16,000
OB/GYN	\$31,500	\$64,500

March 11, 1997
Page 2

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

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

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

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

Sincerely,


Robert F. Valliant
Hospital Administrator

Alaska State Medical Association

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

March 13, 1997

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

Subject: SSHB58

Post-It® Fax Note	7871	Date	3.11.97	# of pages	▶
To	Brian Porter	From	Jim Jordan		
Co./Dept.		Co.	ASMA		
Phone #		Phone #	562-2662		
Fax #		Fax #			

Dear Representatives Hanley and Theriault:

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

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

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

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

1. Ceiling on Non-economic Damages

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

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

2. Limits on Attorney Fees

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

- 40% of the first \$50,000
- 33 1/3% of the next \$50,000
- 25% of the next \$500,000
- 15% of any amounts in excess of \$600,000

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

3. Collateral Source Evidence

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

4. Periodic Payment of Future Damages

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

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

5. Arbitration

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

6. Statute of Limitation

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

7. Statute of Repose

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

8. Panel System

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

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

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

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

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

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

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

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

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Thank you again for opportunity to provide testimony.

Sincerely,



James J. Jordan
Executive Director

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

A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package. Study Shows

By Jeffrey Speicher

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

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

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

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

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

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

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

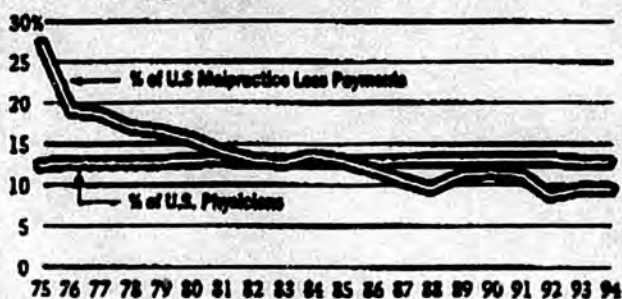
A Package Deal

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

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

FIGURE 1

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



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

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

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

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

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

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

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

FIGURE 2

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



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

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

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

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

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

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

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

An Offer You Can't Refuse

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

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

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

Medical malpractice is a nightmare of useless circularity.

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

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

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

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

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

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

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

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

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

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



ISSUE BRIEF

Medical Malpractice Tort Reform: Lessons from the States

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

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

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

Findings

Any federal medical malpractice tort reform effort should be based on a package of measures that have exhibited some success in stabilizing medical malpractice costs. The most effective elements of such a package are a cap on noneconomic damages and an

offset for collateral payments from other sources. These reforms would limit the financial exposure of health-care providers to lawsuits and would ensure that damages could not be collected through multiple suits. While there are significant limitations on data used to study specific tort reform, persuasive results can be observed by looking at medical malpractice costs in certain states over time and relating that experience to the timing of particular tort reform measures.

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

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

Members of the Work Group on Medical Malpractice Reform: James D. Hunt, FCAS, MAIA; William E. Rums, FCIS, MAIA; Linda A. Dombic, FCIS, MAIA; Allen C. Lytle, FCIS, MAIA; and Edward M. Whelan Jr., FCIS, MAIA.



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

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

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

California

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

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

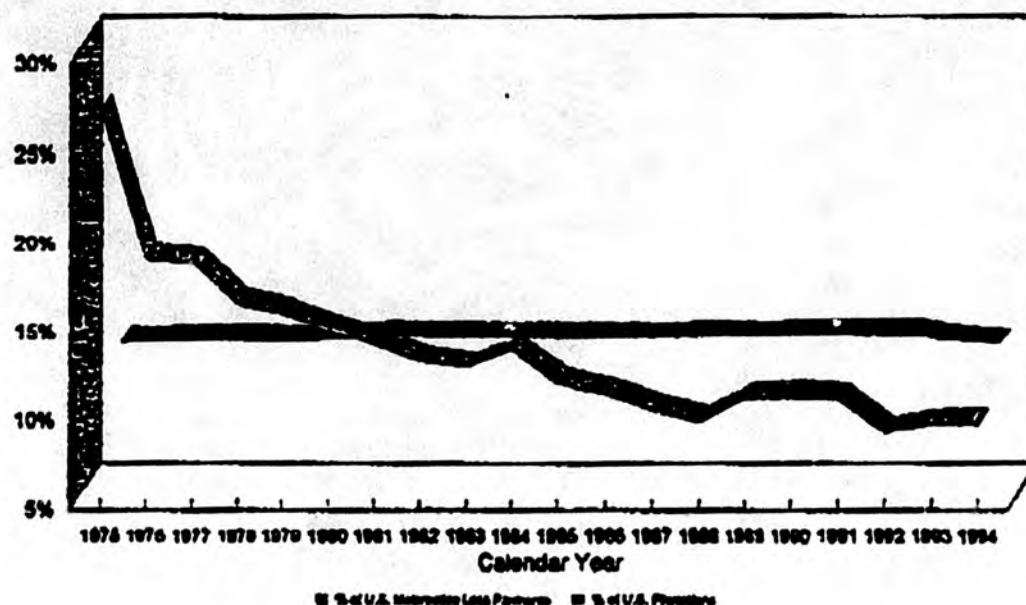
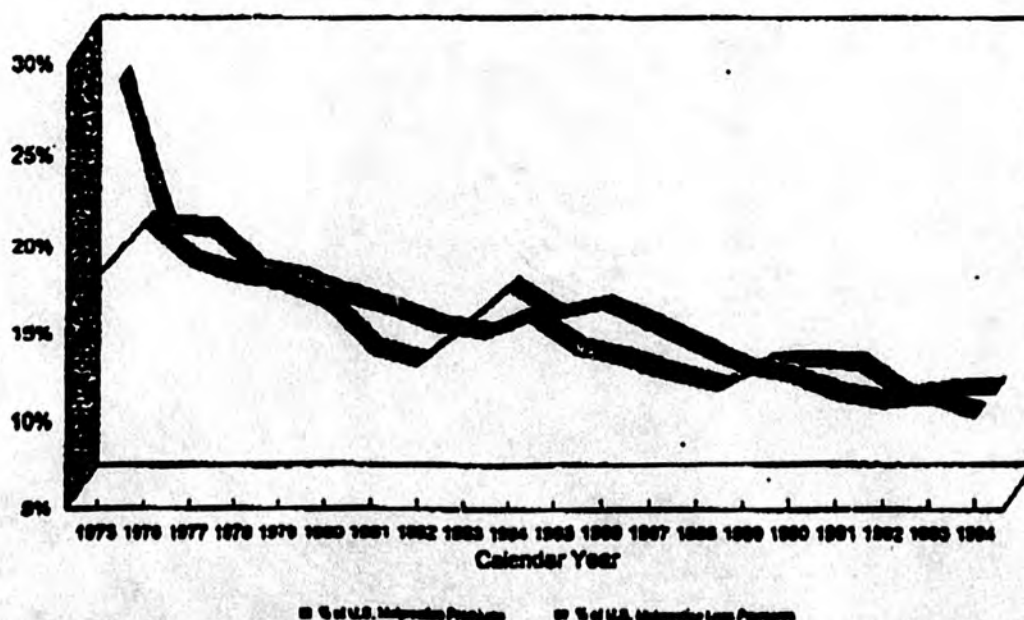


Exhibit 2
Malpractice Premiums and Malpractice Loss Payments in California as a Percentage of the U.S. Total,



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

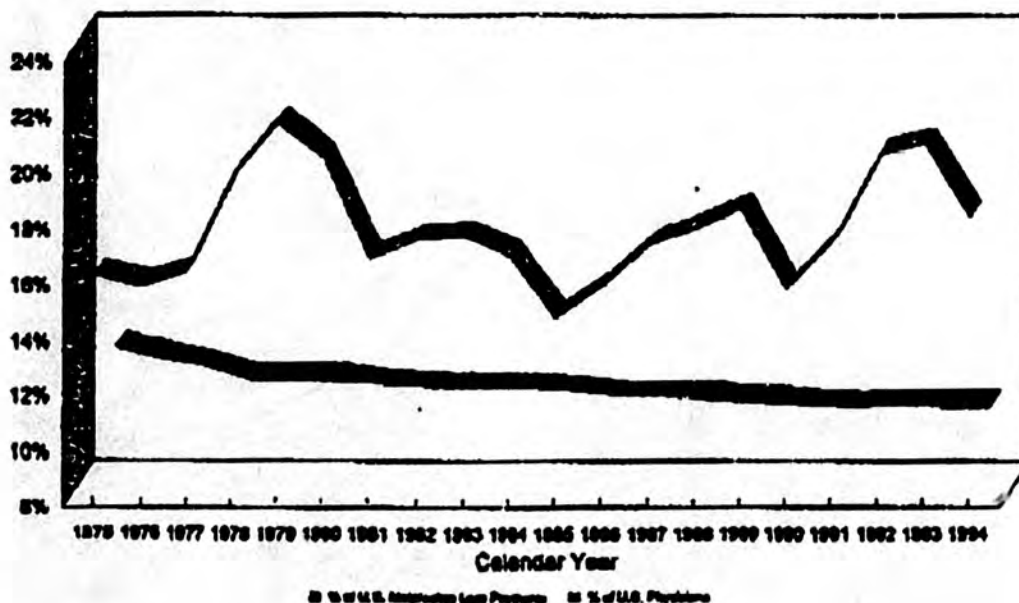
Many opponents of tort reform argue that insurance premiums do not drop after medical malpractice reform. Indeed, costs and premiums normally rise with inflation, and tort reform may only slow the increases. However, the California data show that premiums declined as losses declined. Exhibit 2 compares the paid loss data from Exhibit 1 with California premiums as a percentage of the total U.S.

medical malpractice premiums. Although year-to-year fluctuations do occur, premiums have fallen in proportion to the decline in losses. Competition tends to keep companies at an appropriate profit margin, and any extra profits are normally short-lived.

New York

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

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



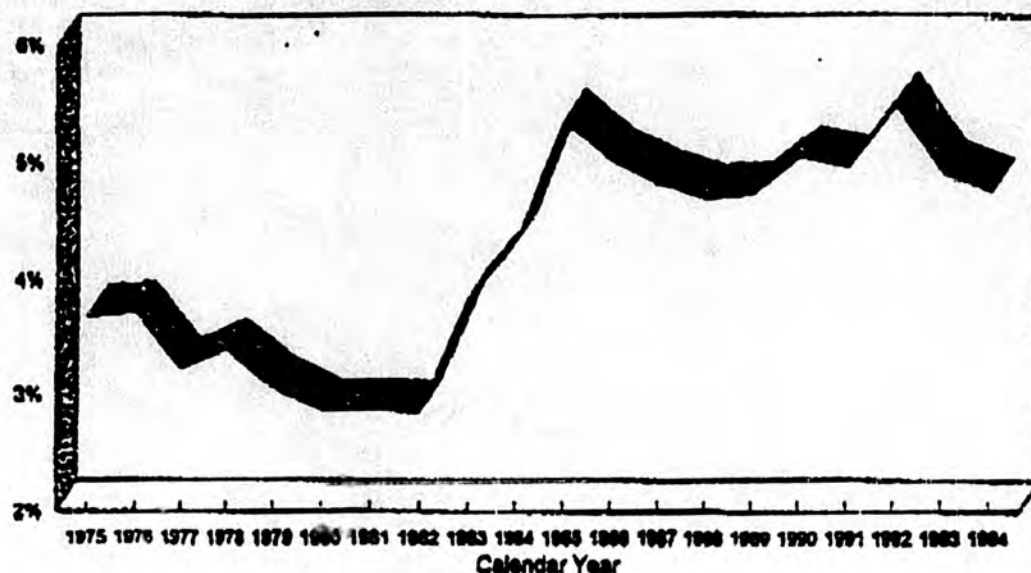
Ohio

The final example is Ohio, with data presented in Exhibit 4. The data show a gradual decline in costs following tort reform in 1975. The Ohio cap on damages came under court challenge in 1982, result-

ing in sharp increases that reached a peak in 1985 when the cap was finally overturned. Since 1985, costs in Ohio have remained high, with no signs of decreasing. Again, the data appear to support a tort reform package and the specific benefit of a cap on noneconomic damages.

Exhibit 4

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



Conclusions

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

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

For reform to be effective in reducing costs, the cap on noneconomic awards should be established on a

per-medical-injury basis at a level low enough to have an impact (e.g., \$250,000). In addition, a mandatory collateral-source offset rule is needed to ensure that double and triple damages cannot be collected through multiple suits. Under this rule, each suit would have to consider damages already paid from other sources.

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



March 10, 1997

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

Re: SSHB 58

Dear Representatives Hanley & Therriault:

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

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

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

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

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

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

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

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

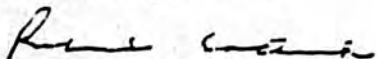
The second area of concern is Section 10, Punitive Damages. In Alaska, more than 95% of the businesses are classified as small, "mom and pop" firms or companies that employ fewer

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

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

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

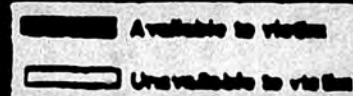
Sincerely, -



Richard Cattanach

In the Final Analysis, the Tort System Does Not Effectively Serve Victims' Needs

Efficiency Comparisons



Portion Returned to Beneficiary



Torts



**Workers'
Comp**



**Health
Insurance**



**Social
Security**

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

Source: The Tillinghast Report, Towers Perrin Company

Post-It™ brand fax transmittal memo 7671		Page 1 of 1	
To: <i>Danella Leper</i>	From: <i>Al Tamegna</i>		
Co:	Co:		
Dept:	Dept:		
Fax: <i>907-465-3834</i>	Fax: <i>907-542-1940</i>		

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THE WALL STREET JOURNAL

REVIEW & OUTLOOK

ABA v. Business

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

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

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

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

The ABA resolutions aren't just empty words. The ABA has a corps of paid lobbyists who are authorized to support the stances taken by its House of Delegates. And these lobbyists were active in opposing Republican efforts

to pass civil justice reform as part of the "Contract with America." Who can forget the ABA president describing the new GOP Congressional majority in 1995 as "reptilian bastards."

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

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

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

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



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

State Capital
Juneau, AK 99801-1182

Statute of Repose/Limitations by State, 1993

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

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

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

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



March 16, 1983

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

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

*Based on CNA's records, roughly 32.9% of these claims were brought prior to the date of substantial completion.

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

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

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

July 21, 1989

Distribution Of Claims By Year As Compared To Project Substantial Completion

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

DISTRIBUTION OF CLAIMS BY YEAR WITHIN WHICH RECEIVED AFTER SUBSTANTIAL COMPLETION

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

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

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

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

DISTRIBUTION OF CLAIMS BY TYPE OF CLAIMANT

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

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

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March 11, 1997

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

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

Dear Representative Therriault:

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

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

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

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

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

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

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

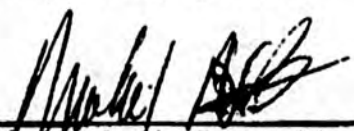
The Honorable Gene Therriault
March 11, 1997
Page 3

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

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

Thank you very much for considering these matters.

Very truly yours,



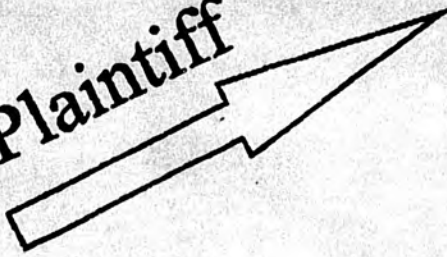
Michael A. Barcott

MAB:mb

Enclosure

cc: Representative Brian Porter

Plaintiff



Defendant

I.
Injury
Negligent

Covered

II.
Injury
Negligent/Intentional

*Reservation
of
Rights*

III.
Unpaid Wages

IV.
Breach of Contract

*Denial
of
Coverage*

V.
Discrimination

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February 21, 1997

VIA FACSIMILE - (907) 465-3422

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

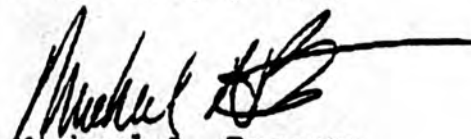
Dear Ms. Burke:

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

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

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

Very truly yours,


Michael A. Barcott

MAB/amf

\\FAC\MAIL\MAIL\BANKS.LTR

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February 18, 1997

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

FAXED & MAILED

Dear Representative Porter:

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

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

The City supports tort reform legislation that will:

- ▶ Relieve hospitals of liability for negligent acts of an emergency room contract physician if the doctor carries malpractice insurance.
- ▶ Decrease the statute of limitations from 6 to 3 years for contract disputes, attorney malpractice and damages to personal property.
- ▶ Set a "statute of repose" which is like a statute of limitations, at 8 years for damages caused by exposure to hazardous substances, defective products or fraud. The limit is currently 15 years.
- ▶ Establish a pilot program for alternative dispute resolution.
- ▶ Cap a punitive damage award by tying it to the compensatory award in the case, with limits.

REPRESENTATIVE PORTER

Tort Reform Legislation

Page 2

We should work together to provide services the public wants in the safest, most cost-efficient manner. High insurance premiums and claims interfere with local government's ability to do our part of the job. We all want to do more for our citizens, ' t must not be afraid to provide needed services like skate parks because of punitive legal actions.

Thanks for your help!

Sincerely,

City of Seward

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

Ronald A. Garzini,
City Manager

RAG:rg

cc: Governor Tony Knowles
Senator John Torgerson
Representative Gary Davis
Seward Mayor and Council Members
Alaska Municipal League
Alaska Municipal League Joint Insurance Association



Philip R. Hinderberger
Vice President and
General Counsel

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(415) 957-5600 FACSIMILE

March 11, 1997

Gene Therriault, Co-Chair
House Finance Committee
House of Representatives
State Capitol
Juneau, AK 99811

RE: SSHB 58 (JUD) Tort Reform Bill

Dear Representative Therriault:

NORCAL Mutual Insurance Company is a physician and health care provider-owned professional liability insurer with over 13,000 policyholders located in Alaska and the lower 48. In 1991, we assumed the medical malpractice business formerly written by Medical Insurance Company of Alaska (MICA). We are the only professional liability insurer with a full service office located in Alaska. Our nine person professional staff has served physicians and hospitals located throughout Alaska since 1975. Based on our extensive experience in Alaska and the lower 48, we support those portions of SSHB 58 in order to provide modest relief for physicians and hospitals from the worst abuses of the tort system. This bill will help move Alaska more in line with most other states that have adopted medical tort reform.

A number of studies have been done regarding the relative cost of medical malpractice insurance and the impact of tort reform on health care costs. Although we have been advised by actuaries that it is impossible to quantify precisely the impact of any particular tort reform, it is widely acknowledged that the package of reforms known as the Medical Injury Compensation Reform Act ("MICRA") has made medical malpractice insurance widely available and affordable in California as compared to Alaska. These savings arising from medical tort reform have been passed on to consumers in the form of lower medical costs (Exhibit 1).

Prior to the enactment of MICRA, California medical malpractice costs were out of control. During the period 1970 - 1975, medical malpractice costs increased over 400% in response to the dramatic increase in the number of lawsuits brought against doctors and hospitals. Since 1976 when MICRA was enacted, medical malpractice costs have only increased about 100% in California while nationwide costs excluding California have increased by over 563% (Exhibit 2). Had California medical malpractice premiums increased at the same rate as the rest of the United States, California physicians and hospitals would have paid an additional \$663 million during calendar year 1992 alone. Total savings to date exceed several billion dollars.

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March 11, 1997

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Comparing experience in California to other states graphically demonstrates that tort reform helps control medical malpractice insurance costs. Several states including Ohio enacted medical malpractice tort reforms similar to California and also saw a gradual reduction in malpractice costs compared to the rest of the United States. However, in 1982, Ohio's medical malpractice tort reforms were substantially weakened and its costs have risen dramatically (Exhibit 3).

Some states such as Alaska have not enacted medical tort reforms and their physicians and hospitals have over the years suffered severe increases in the cost of medical malpractice insurance resulting from swings in the severity and frequency of losses. Alaska has experienced the largest percentage increase in medical malpractice premiums in the nation with malpractice premiums skyrocketing from \$781,000 in 1976 to \$13,940,000 in 1994. This is a 1,684% increase in the cost of Alaska medical malpractice over 18 years for an average of 22% per year, which is almost three times the national average of 7.8% and more than eight times the average annual increase in California of 2.7% for the same period.

In 1975, California physicians' malpractice costs were the highest in the nation. To date, a comparison of premium costs for six medical specialties in California and Alaska clearly demonstrates that MICRA has kept California premiums significantly lower than in other states (Exhibit 4). California physicians not only pay less than their colleagues in other states, but they have seen a drop in their premiums when adjusted for the cost of living. The average California physician pays 60% less today than before MICRA (Exhibit 5).

Over the long term, Alaska physicians and hospitals should see similar reductions in the cost of malpractice insurance if SSHB 58 is enacted and upheld by the courts. California's medical tort reforms have worked in spite of strong pressure from the trial bar to overturn them in the courts. Real savings did not occur for many years until the California Supreme Court upheld MICRA in 1985. Because trial courts were reluctant to apply MICRA before the Supreme Court ruled on the constitutionality of MICRA, insurers were unable to report savings from tort reform and malpractice insurance costs actually increased during the early 1980s. The MICRA debate was finally put to rest in 1987 when the California Legislature refused to repeal or weaken MICRA. Since that time, California trial courts have recognized MICRA and policyholders have received substantial "MICRA" dividends amounting to several hundred million dollars. These MICRA dividends were paid by California's physician-owned insurers from loss reserve savings in the late 1980s. During the 1990s, California policyholders have had almost no rate increases and continue to receive substantial MICRA dividends.

The impact of legal reforms on health care costs has been the subject of several recent studies. The U.S. Congress, Office of Technology Assessment reported in 1993 that states which place reasonable limits on non-economic damages, require periodic payments and permit juries to hear evidence of collateral sources have seen a reduction in costs. Twenty-nine states place limits on non-economic damages, 30 states authorize periodic payments of large verdicts, 40 states have abolished the collateral

March 11, 1997

Page 3

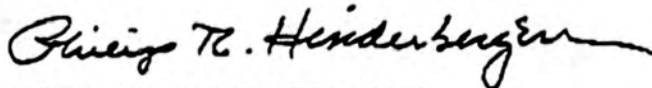
source rule, 50 states have statute of limits and 22 states control the amount of attorney contingency fees (Exhibit 6).

SSHB 58 offers a fair and balanced approach to reforming the civil justice system. SSHB 58 allows all Alaskans whether rich or poor to access the civil justice system and receive full compensation for their economic losses. SSHB 58 will eliminate the worst abuses by those who treat the civil justice system as a lawsuit lottery.

If the Alaska Legislature enacts SSHB 58, the rate of increase in the cost of medical malpractice insurance should, over time, be brought in line with other states that have enacted similar tort reform. SSHB 58 should also help eliminate the wild swings in the severity and frequency of losses which will foster a stable marketplace for medical malpractice insurance in Alaska and, ultimately, help control health care costs.

We urge your support of SSHB 58.

Very truly yours,



PHILIP R. HINDERBERGER

PRH/rl

Enclosures

cc: Representative Brian Porter

March 11, 1997

Page 4

bc: Richard Cattanach, Alaskans for Liability Reform
Steven S. Fountain, M.D., NORCAL Mutual Insurance Company
Roger Holmes, Biss & Holmes
Janet Johnston, NORCAL Mutual Insurance Company - Alaska
Jim Jordan, Alaska State Medical Association
Harlan Knudson, Alaska State Hospital and Nursing Association
Jay Michael, Californians Allied for Patient Protection
Ron Neupauer, Medical Insurance Exchange of California, San Francisco, CA
J. William Newton, NORCAL Mutual Insurance Company
Tim Shannon, California Association of Professional Liability Insurers
Larry Smart, Physician Insurers Association of America

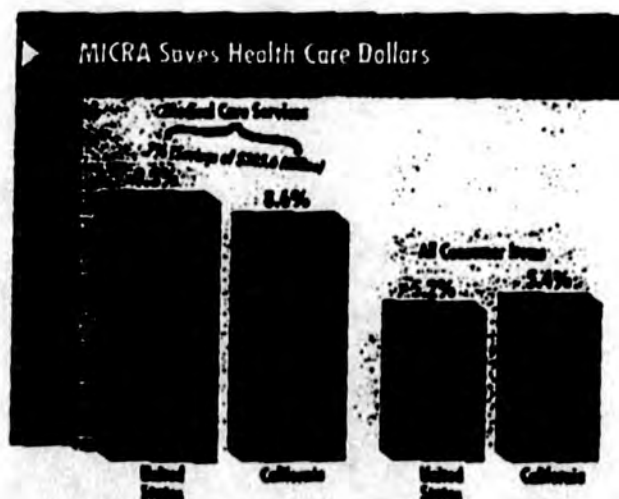
► After MICRA: Real Results

MICRA Helps Control Medical Costs in California — Without MICRA, Medical Costs Would Be Even Higher

By controlling the cost of liability insurance, MICRA has slowed the increase of health care costs in California. As illustrated in the first chart, a recent consumer study by "Families USA" shows that health care costs for the average New York family in 1991 were \$5,585 — compared to \$4,433 for the average California family.



Further, as seen in the second chart, although consumer costs in California generally were higher than the national average in 1991, the state's medical care services index was lower. In 1991, California's medical costs increased less than medical costs for the nation as a whole, saving Californians \$385.6 million.



SOURCE: 1. Families USA
2. SOURCE: Consumer Price Index for All Urban Consumers (CPI-U), 1982=100 (1991) from the Los Angeles and San Francisco Bay Area indexes

EXHIBIT

Charts

**Alaska Medical Malpractice Insurance Costs
Compared to U.S. and California
1976 - 1994**

Year	AK Premium Earned (Thous.)	% Change	U.S. Premium Earned (Millions)	% Change	CA Premium Earned (Millions)	% Change
1976	\$781		\$1,187		\$288	
1977	655	-16	1,266	+6.7	227	-21.2
1978	Not available		1,382	+9.2	249	+9.7
1979	2,233	+240.9	1,235	-10.6	239	-4.0
1980	1,798	-19.5	1,333	+7.9	230	-3.8
1981	2,125	+18.2	1,232	-7.6	204	-11.3
1982	2,276	+7.1	1,361	+10.5	211	+3.4
1983	2,609	+14.6	1,844	+35.5	287	+36.0
1984	3,483	+33.5	1,835	-.50	375	+30.7
1985	4,403	+26.4	2,261	+23.2	450	+20.0
1986	8,480	+92.6	3,435	+51.9	629	+39.8
1986	13,639	+60.8	4,450	+29.5	633	+0.6
1988	15,109	+10.8	5,080	+14.2	663	+4.7
1989	16,341	+8.2	5,120	+.80	633	-4.5
1990	14,983	-8.3	4,931	-3.7	605	-4.4
1991	13,371	-10.8	4,862	-1.4	529	-12.6
1992	13,439	+0.5	5,138	+5.7	526	-0.6
1993	14,723	+9.0	5,174	+1.0	563	+6.0
1994	13,940	-5.0	5,932	+15.0	577	+2.0

National Association of Insurance Commissioners' Report on Profitability by Line and by State 1976-1994.
This report is based on information obtained from insurance company Annual Statements.

Conclusions:

• **Alaska** medical malpractice premiums have increased from \$781,000 to \$13,940,000 for a total increase of \$13,159,000 or 1,684% overall at an average annual rate of 22%.

• **U.S.** medical malpractice premiums including Alaska have increased from \$1,187 billion to \$5,932 billion for a total increase of \$4,745 billion or 400% overall at an average annual increase of 7.8%.

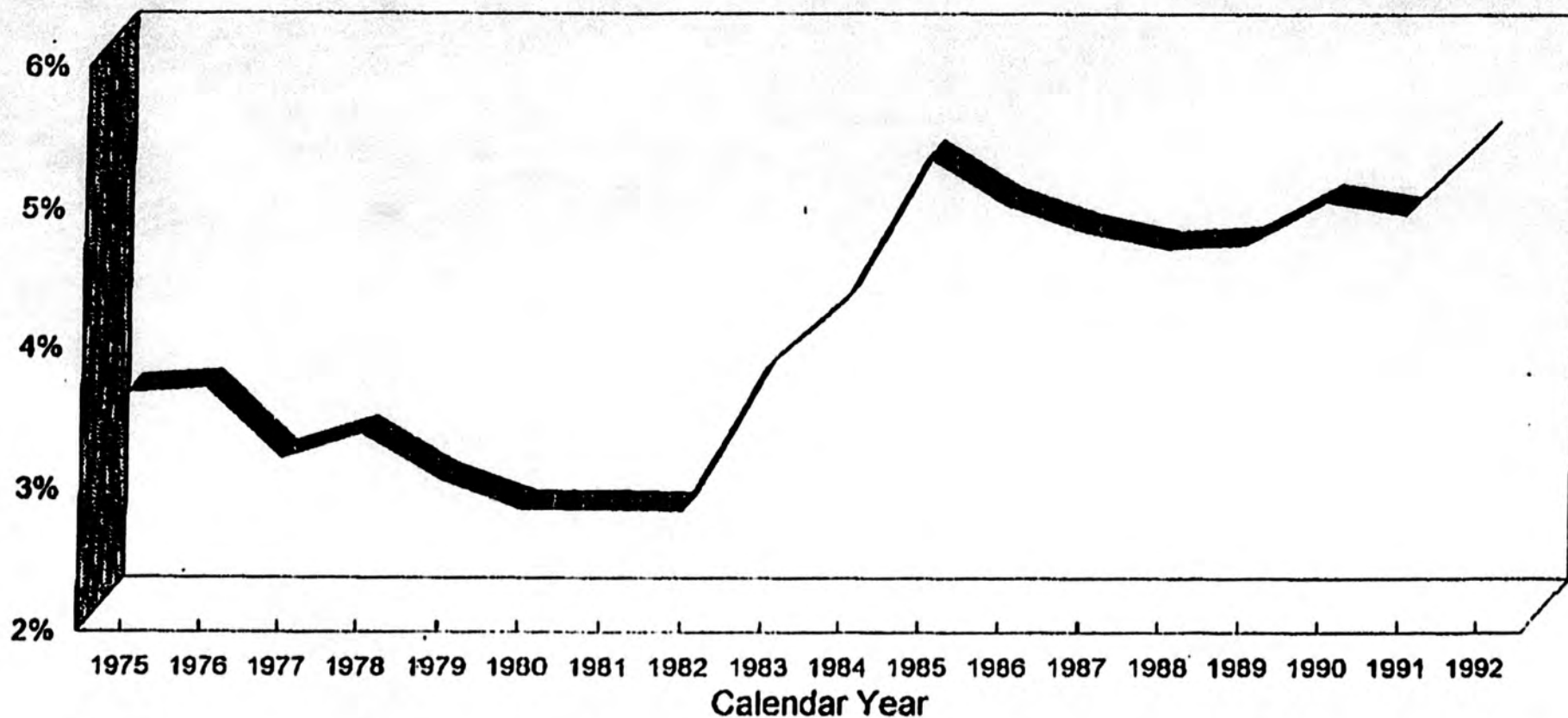
• **California** medical malpractice premiums have increased from \$288 million to \$577 million for a total increase of \$289 million or 100% overall at an annual average increase of 2.7%.

AMMIC-3/11/97

EXHIBIT 2

EXHIBIT 3

Ratio of Ohio Paid Loss and LAE to Countrywide



Medical Liability Insurance Costs**California v. Alaska**

	<u>California</u>	<u>Alaska</u>	<u>Difference</u>
Anesthesia	10,000	26,500	2 1/2x
Family Practice/ Minor Surgery	7,000	16,000	2x
Family Practice/ Major Surgery	19,000	26,500	1 1/2x
Neurosurgery	43,000	80,000	2x
Obstetrics/ Gynecology	31,500	64,500	2x
Orthopedic Surgery	26,000	80,000	3x

NOTE: NORCAL, Northern California and Alaska published premiums 1995.

EXHIBIT 4

Insurance Premiums Cut

MICRA Has Cut Medical Liability Insurance Premiums by 60%

Before MICRA took full effect, California physicians paid an average \$18,000 for liability insurance in 1976. By 1991, MICRA had reduced the average liability premium to \$7,000 — a 60% savings.

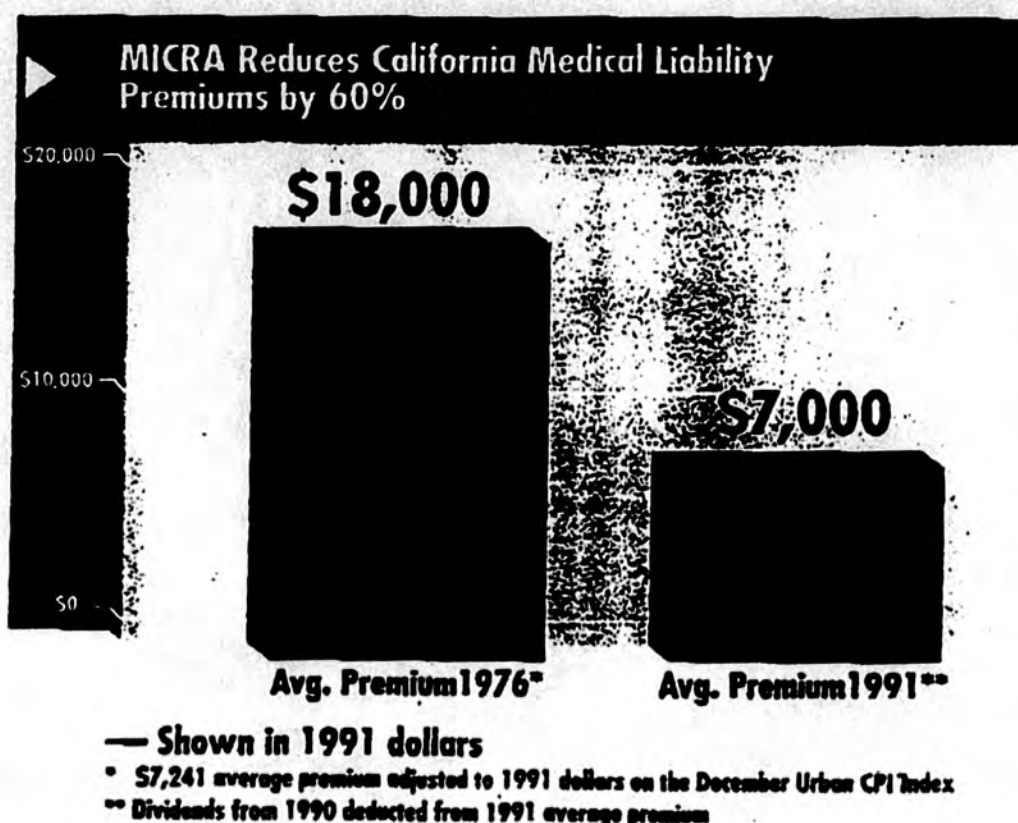


EXHIBIT 5

IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS

Background Paper
prepared by the

Health Program
Office of Technology Assessment

Clyde J. Behney, *Assistant Director, OTA*

Project Staff

Judith L. Wagner, *Project Director*
Defensive Medicine and the Use of Medical Technology

Jacqueline A. Corrigan, *Study Director*

David Klingman, *Senior Analyst*

Leah Wolfe, *Analyst*

Philip T. Polishuk, *Research Assistant*

September 1993

This paper was prepared for desk-top publishing by Carolyn Martin and Daniel B. Carson.

EXHIBIT 6

Appendix A
State Medical Malpractice Reforms

**EXPLANATION OF METHODS USED
BY OTA TO COMPILE DATA**

The tables, figures, and accompanying notes in appendix A were derived from a variety of sources and synthesized by OTA to reflect the most recent information available on selected State medical malpractice reforms.

The primary published sources were 1991 and 1993 editions of a compendium developed for the Federal Agency for Health Care Policy and Research (AHCPR),¹ selected State statutes, and judicial cases. Two additional sources were used to update, cross-check, and supplement the AHCPR compendia.²

After compiling information from these sources into summary tables, OTA sent draft copies of the information to the attorneys general in all 50 States on March 24, 1993, for confirmation or amendment. Information was changed to reflect respondents' comments. Where conflicts arose between

the attorney general response and information found elsewhere, the attorneys general's responses were favored. Unresolved questions were addressed through follow-up phone conversations with attorney general respondents and statutory research. The revised drafts were sent again to all 50 State attorneys general on June 25, 1993, for a final review and any corrections were incorporated.

For States that responded to the first survey only, information is current to March 1993. For States that responded to the second survey, information is current to June 1993. For the 10 States³ that did not respond to either review and the District of Columbia, information was cross-checked and supplemented through followup telephone calls and/or review of the relevant State codes where possible. Where confirmation was not possible, information in this appendix reflects that presented in the 1993 edition of the AHCPR compendium.

¹U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spornak, Center for Health Policy Research, The George Washington University (Rockville, MD: AHCPR, April 1993), AHCPR Pub. No. 93-0053; U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, "Compendium of State Systems for Resolution of Medical Injury Claims," prepared by S.M. Spornak and P.P. Budetti, Center for Health Policy Research, The George Washington University (Rockville, MD: DHHS, February 1991), DHHS Pub. No. (PHS)91-3474.

²These sources were: Fisk, M.C., "The Reform Juggernaut Slows Down," The National Law Journal 15(10):13-37, Nov. 9, 1992; American Nurses Association, "Report to ANA Board of Directors on Tort Reform, Part 3: Presentation of Selected Summary of State and Local Legislation Related to Tort Reform and Review of Insurance Company Practices and Policies Related to Nursing Negligence with Recommendations," December 1991.

³DE, FL, HI, KS, KY, MS, NJ, NM, TX, WV.

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Table A-1—Collateral Source Offset Provisions,^a by State, 1993

Mandatory	Discretionary	No provision
CO*	AK*	AR
CT	AL	DC
FL	AZ	GA ^O
IA	CA	HI
IL*	DE	LA
ID	IN	MO*
KSO*	KY	MS
MA*	MD*	NC
ME	NDO*	NE
MI	OR	NH ^O
MN*	SD	NV*
MT*		OK
NJ		PA ^O
NM		SC
NY		TX
OH*		VA
RI*		VT
TN		WA*
UT		WI
		WV
		WY

^aThe traditional collateral source rule forbade evidence of the plaintiff's collateral sources of income and reimbursement (e.g., medical insurance, disability payments) from being entered into evidence. States classified as "mandatory" or "discretionary" in this table have modified the traditional evidence rule to allow certain types of collateral sources to be admitted as evidence. Statutes which require that the plaintiff's award be offset by certain collateral sources are classified as mandatory. Statutes that leave the decision of whether to offset to the jury or judge are classified as discretionary. States with no provision have not modified their traditional collateral source rules. It is of note that a number of States reduce the malpractice award by the collateral source payments, but credit the plaintiff with any premiums he or she has paid or will pay to obtain the insurance (e.g., MN, MI, CT, RI, IL and NY).

^O = Provision overturned.

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Appendix A—State Medical Malpractice Reforms - 81

Table A-2—Caps on Damages^a and State Patient Compensation Funds, by State, 1993

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
AK: \$500,000*	AL: ^o Total recovery capped at \$1 million.*	AR	FL: Physicians may participate in fund by obtaining liability coverage of \$250,000 per claim and \$500,000 per occurrence. Fund will pay malpractice awards exceeding maximum physician liability of \$250,000 per claim, up to \$1 million per claim and \$3 million aggregate per policy.
CA: \$250,000		AZ	
FL: ^o \$350/250,000		CT	
HI: \$375,000		DC	
ID: ^o \$400,000*	CO: Total recovery capped at \$1 million. \$250,000 cap on noneconomic.*	DE	
KS: ^o \$250,000*		GA	
MD: \$350,000		IA	
MA: \$500,000		IL ^o	
MO: \$465,000*		KY	
OR: \$500,000		ME	
UT: \$250,000		MN ^R	IN: Provider not liable for that portion of any malpractice award which exceeds \$100,000. Any amount due the plaintiff which is in excess of the total liability of all health care providers, shall be paid from the PCF, with total payments from the PCF not to exceed \$750,000.
WV: \$1,000,000	IN: \$750,000	MS	
WI: \$1,000,000	LA: \$500,000*	MT	
	NE: \$1,250,000	NC	
	NM: \$500,000*	*ND ^o	
	SD: \$1,000,000*	NH ^o	
	VA: \$1,000,000	NJ	
		NV	
		NY	
		OH ^o	
		OK ^R	KS: Physicians must carry \$200,000 in malpractice insurance per claim (\$600,000 per annum) then can choose one of three options for excess coverage from PCF. For each option, the physician pays the initial \$200,000 in damages and then the fund will pay some portion of the remainder depending on how the physician chooses to distribute fund liability across potential claims: 1) fund liable for next \$100,000 per claim (\$300,000 aggregate per provider); 2) fund liable for next \$300,000 (\$900,000 aggregate per provider); and 3) fund liable for up to \$800,000 per claim.
		PA	
		RI	
		SC	
		TN	
		*TX ^o	
		VT	
		WA ^o	
		WY	

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Table A-2—Caps on Damages^a and State Patient Compensation Funds, by State, 1993 (Continued)

Noneconomic cap	Economic and noneconomic	No statutory limits	PCF (Patient Compensation Fund)
			LA: Provider liability limited to \$100,000 for injuries or death to plaintiff. Fund will pay total amount recoverable for all injuries or death of a plaintiff exclusive of future medical care and related benefits, up to \$400,000 for private providers. The State pays all damages up to \$500,000 for State health care providers.
			NE: The PCF shall cover liability exceeding \$200,000 up to \$1.25 million.
			NM: Health care provider liability is capped at \$100,000, with the remainder to be paid by the PCF. Total payment from PCF not to exceed \$500,000 per occurrence per year.
			PA: The fund shall pay any amount exceeding \$100,000 per occurrence, up to \$1 million per claim.
			SC: The fund will pay awards in excess of \$100,000 per claim (no upper limit).
			WI: Physicians must have \$400,000 of malpractice coverage per incident and \$1,000,000 in coverage per annum. The fund will pay for damages exceeding the physician's coverage. Each health care provider is also assessed an annual fee to help finance the fund.

^aNOTE: OTA's review did not include caps that apply only, or separately, to claims against State-employed or State-owned health care providers.

O = Provision overturned.

R = Provision repealed.

*See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Appendix A—State Medical Malpractice Reforms - 85

Table A-3—Periodic Payment of Awards,^a by State, 1993

Mandatory	Discretionary	No provision
AL > \$150,000*	AK*	DC
AZ	AR > \$100,000	GA
CA > \$50,000	CT > \$200,000*	HI
CO > \$150,000	DE	KS ^o
IL > \$250,000*	FL > \$250,000	KY
LA ≥ \$500,000*	IA	MA
ME ≥ \$250,000	ID > \$100,000	MS
MI	IN	NC
MO > \$100,000*	MD	NE
NM	MN > \$100,000	NH ^o
OH > \$200,000	MT > \$100,000	NJ
SD > \$200,000	ND*	NV
UT > \$100,000	NY > \$250,000*	OK
WA > \$100,000*	OR	PA
	RI > \$150,000*	TN
	SC > \$100,000	TX
		VA
		VT
		WI
		WV
		WY

^aPeriodic payment provisions are often not triggered unless the award reaches a threshold amount. The specific thresholds are noted parenthetically in the table. Periodic payment provisions apply only to future damages. The schedule of payments is either negotiated by the parties or determined by the court. Some statutes offer guidelines for determining the schedule. The mandatory category includes statutes in which periodic payment is mandatory upon reaching the threshold or upon unilateral request by defendant or plaintiff.

^o = Provision overturned. ———

* See additional notes on following page.

SOURCE: Office of Technology Assessment, 1993.

Appendix A--State Medical Malpractice Reforms - 87

Table A-4--Statutes of Limitations,^a by State, 1993

Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception ^{**}
AL: 2 years	6 months	4 years	.
AK: .	*2 years	.	.
AR: 2 years	.	.	1 year
AZ: .	2 years	.	.
CA: 3 years	1 year	3 years	1 year
CO: .	2 years	3 years	2 years
CT: .	2 years	3 years	.
DC: 3 years	.	.	.
DE: 2 years	3 years	.	.
FL: 2 years	2 years	4 years	.
GA: 2 years*	.	5 years	1 year
HI: .	2 years	6 years	.
ID: 2 years	.	.	1 year*
IN: .	2 years	.	.
IL: .	2 years	4 years	.
IA: .	2 years	6 years	2 years
KS: .	2 years	4 years	.
KY: .	1 year	5 years	.
LA: 1 year*	1 year	3 years	.
MA: 3 years	.	7 years	General Exception
ME: 3 years	.	3 years	Upon "reasonable discovery"
MD: 5 years	3 years	.	Exception for minors only
MI: 2 years*	6 months	6 years	6 months
MN: 2 years*	.	.	.
MS: .	2 years	.	.
MO: .	2 years	10 years	2 years after discovery
			10 years max.
MT: 3 years	3 years	5 years	.
NE: 2 years	1 year	10 years	.
NV: 4 years	2 years	.	.
NH: 3 years	3 years	.	.
NJ: .	2 years*	.	.
NM: 3 years*	.	.	.
NY: 2 years, 6 months	.	.	1 year
NC: 3 years	.	4 years	1 year after discovery, 10 year max
ND: .	2 years	6 years	.
OH: .	1 year	.	.
OK: .	2 years	3 years O*	.
OR: .	2 years	5 years	.
PA: 2 years	2 years	.	.
RI: 3 years	3 years	.	.
SC: 3 years	3 years	6 years	2 years
SD: 2 years	.	.	.
TN: .	1 year	3 years	1 year
TX: 2 years*	.	.	.
UT: .	2 years	4 years	1 year

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Table A-4—Statutes of Limitations,^a by State, 1993 (Continued)

Years within date of injury	Years within date of discovery	Maximum number of years	Foreign object exception**
VT: 3 years	2 years	7 years	2 years
VA: 2 years	-	10 years	1 year
WA: 3 years	1 year	8 years	1 year
WV: 2 years	2 years	10 years	-
WI: 3 years	1 year	5 years	1 year
WY: 2-2.5 years	2 years	-	-

Explanatory Notes for Table A-4

Column 1: Statutory time limit for bringing a suit is measured from the time the injury occurs or from the date of termination of the medical treatment that led to the claim.

Column 2: The statutory time limit for bringing suit is measured from the time at which the plaintiff could have reasonably discovered the injury. Often States allow the time limit to run from either the time of injury or the time of discovery, depending on the nature of the injury.

Column 3: The maximum period in which a claim can be brought, regardless of whether the limit is measured from the date of injury or act or the date of discovery. In most States, this maximum does not apply to the foreign body exception (see column 4).

Column 4: Because of the difficulty of discovering a foreign body (e.g., a surgical sponge) left inside a patient during invasive procedures, a number of States make special exceptions to the statute of limitations for these cases.

^aThis table does not cover special provisions for minors, disabled plaintiffs or cases involving fraud or concealment on the part of the healthcare provider.

O = Provision overturned.

* See additional notes on following page.

** Within year of discovery, maximum number of years do not apply unless stated.

SOURCE: Office of Technology Assessment, 1993.

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Table A-5--Pretrial Screening Panels, by State, 1993

Pretrial screening panels ^a			
Mandatory	Voluntary	No provision	
AK*	AR	AL	ND ^R
HI*	CT	AZ ^R	NJ ^R
ID*	DE*	CA	NY ^R
IN	KS*	CO*	OH
LA*	NH*	DC	OK
MA*	VA	FLO	OR
MD*		GA	PA ^O
ME		IA	RI ^O
MI		IL ^O	SC
MT		KY	SD
NE*		MN	TX
NM*		MO ^O	WA
NV		MS	WI ^R
TN		NC*	WV
UT			WYO
VT*			

^a"Mandatory" includes provisions that allow a waiver of the pretrial screening process upon the request of one or both parties.
 "Voluntary" refers to provisions that allow but do not require parties to submit their claim to pretrial screening panels.

^R = Provision repealed
^O = Provision overturned

* See additional notes on following pages.

SOURCE: Office of Technology Assessment, 1993.

Appendix A--State Medical Malpractice Reforms - 93

Table A-6--Attorney Fee Limits,^a by State, 1993

Sliding scale	Maximum %	Court-determined/ court approved	No statutory limits
CA: 40% of first \$50,000	IN-15%*	AZ	AK
33.33% of next \$50,000	MI-33.33%	HI	AL
25% of next \$50,000	OK-50%	IA	AR
15% damages that exceed \$600,000	TN-33.33%	KS	CO
	UT-33.33%	MD*	DC
CT: 33.33% of first \$300,000		NE	FL ^R
25% of next \$300,000		NH ^O *	GA
20% of next \$300,000		WA	ID
15% of next \$300,000			KY
10% damages that exceed \$1.2 million			LA
DE: 35% of first \$100,000			MN
25% of next \$100,000			MO
10% of damages that exceed \$200,000			MS
			MT
IL: *33.33% of first \$150,000			NC
25% of next \$850,000			ND
20% of damages exceeding \$1 million			NM
			NV
MA: 40% of first \$150,000			OH
33.33% of next \$150,000			OR ^R
30% of next \$200,000			PA ^O
25% of damages that exceed \$500,000*			RI
			SC
ME: 33.33% of first \$100,000			SD
25% of next \$100,000			TX
20% of damages that exceed \$200,000			VA
			VT
			WV
			WY
NJ: 33.33% of first \$250,000			
25% of next \$250,000			
20% of next \$500,000			
Amount shall not exceed 25% for a minor or an incompetent plaintiff			
NY: 30% of first \$250,000			
25% of next \$250,000			
20% of next \$500,000			
15% of next \$250,000			
10% of damages exceeding \$1.25 million			

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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.

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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

O = Provision overturned

^{*} See additional notes on following pages.

SOURCE: Council of Technology Assessment, 1993.

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February 23, 1997

Representative Brian S. Porter
Alaska State Legislature
House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Re: House Bill 58 (Sponsor substitute)

Dear Representative Porter:

This will confirm my conversation with Jim Sourant of your office concerning the Statute of Repose. I mentioned to Jim that all professionals in the State of Alaska are now covered by "claims made" professional liability insurance. This means that the claim must arise and be made during the policy period. When a professional retires the custom is to buy "tail insurance." This insurance covers the professional for claims made during the policy period but which do not arise until after the professional has retired and no longer carries insurance.

At the present time, most professional "tail" endorsements only cover three years into the future. In certain limited situations a five year "tail" endorsement is possible. You do not need much insurance savvy to figure out that without a statute of repose, all professionals who spend their lives practicing in Alaska have a substantial uninsurable risk in their retirement years.¹

Most professionals carry insurance to protect their clients (patients) as well as to protect themselves and their families. An uninsured loss over five years after retirement without adequate resources to combat the suit or income potential to recoup the loss is a devastating situation for the retired professional. Such a claim could result in the professional and his/her family requiring substantial state aid in their declining years.

¹The alternative if for the retired professional to continue to purchase "claims made" insurance for the remainder of his/her retirement years. For most professionals this is prohibitively expensive without income from the practice of their profession. For instance, some many physicians pay in excess of \$50,000 a year for "claims made" insurance.

Representative Brian S. Porter
February 23, 1997

Very truly yours,

BISS & HOLMES

A handwritten signature in dark ink, appearing to read "Roger F. Holmes", with a stylized flourish at the end.

Roger F. Holmes
/RFH

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Diane L. Liljegren, MD, FAAFP
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11 March 1997

Honorable Gene Therriault
Finance Committee
Alaska House of Representatives
Juneau, Alaska

Dear Representative Therriault:

I am writing on behalf of the Alaska State Medical Association Board of Trustees in support of House Bill 58. I would particularly like to address Section 6 regarding the statute of limitations, Section 8 regarding noneconomic damages, and Sections 29 and 30 regarding the expert advisory panels.

We support a statute of limitations of two years, except for infants. Waiting until two years after the incident or age eight, whichever is later, provides time for parents to watch their children through most of their developmental milestones. Contact with the school system comes within a few weeks of the child's sixth birthday at the latest, and that provides a societal back-up to the parents' observations. Early injuries do not have quiet interludes before expression: brain injury is not a discontinuous event.

Unpredictability of noneconomic damages is the single most expensive aspect of insuring against liability, and the unpredictability in unlimited damages makes it possible to justify almost any insurance premium a company might want. With medical expenses and lost economic value paid, a limitation on the lottery aspect of noneconomic damages makes the system more predictable and thus less expensive for everyone.

Steps to more sharply focus and to define timelines more clearly will strengthen the expert advisory panel system. As currently constituted the panel system is being distorted by preemptory challenges by counsel from its intended role as advisory to the court. We believe that the expert advisory panel system has been a useful tool for sorting through the complexities of medical liability cases, and that the system should be preserved.

Thank you for the opportunity to present our ideas on House Bill 58. I would be happy to address both any aspect of what I have presented here and any other questions regarding this important piece of legislation.

The Alaska State Medical Association supports House Bill 58.

Yours truly,


David E. Johnson, MD, FAAP

BRIEFING



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

By Steven Hayward[†]

HIGHLIGHTS:

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

[†] 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.**

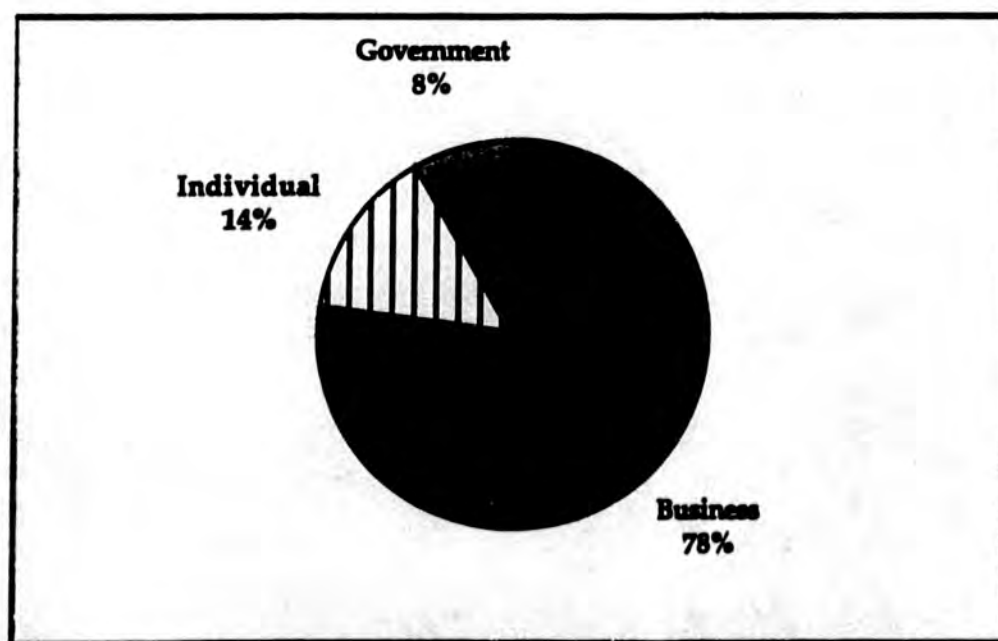
Of the 1,024 cases we examined, nine (9) cases were designated by the court as "sealed" and were unavailable for study. This left a pool of 1,015 lawsuits for study. 537 of these 1,015 cases, or 52.9 percent, were based on one of three principal causes of action where punitive damages are recoverable:

- 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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March 11, 1997

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
State Capital
Juneau, Alaska 99801

Re: HB 58

Dear Representative :

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm Mutual presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has approximately 43 percent of the homeowners' market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 25 years. It is from this perspective that we offer our comments regarding the bill presently before you.

State Farm Mutual is a mutual company, which means it is owned by its policy holders. The premiums it charges its Alaska policy holders are determined primarily by its loss experience in Alaska. When State Farm's loss experience in Alaska has been better than expected, State Farm has returned premiums to its policy holders. In November of 1987 State Farm Mutual returned 3.3 million dollars to its Alaska policy holders. In November of 1988, State Farm Mutual returned 3.1 million dollars to its Alaska policy holders. Since then, State Farm's loss experience in Alaska has worsened. Over the years 1992-96 State Farm Mutual experienced a pure underwriting loss of approximately 1.8 million dollars. Over the same years, State Farm Fire and Casualty experienced a pure underwriting loss of approximately 23 million dollars. Although there are signs that this trend is changing, these losses have been disturbing.

We offer this information because there has been testimony that insurance rates in Alaska are set on a national level and that nothing done in Alaska will affect the price of insurance in Alaska. We strongly disagree with this proposition. As set forth above, our rates in Alaska are determined primarily by our loss experience in Alaska. The fact that we have returned significant amounts of money to our Alaska policy holders is irrefutable evidence of this. Other mutual companies have also returned money to their Alaska policy holders.

LESSMEIER & WINTERS
ATTORNEYS AT LAW

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
March 12, 1997
Page 2

We believe this legislation will improve our loss experience in Alaska. Improvement in our loss experience will be reflected in the premiums we must charge for our products. We believe this to be true for many other companies as well.

There are several provisions of this legislation we wish to comment specifically on. One of the sections we feel strongly about is Section 10, which is the limit on punitive damages. We see punitive damage claims frequently. Without exception these claims are time consuming and expensive to defend. Although these cases are most often successfully defended, they nonetheless impose a tremendous burden. The limitation contained in this bill, which we fully support, would lessen this burden.

In prior hearings there has been much argument to the effect there are not documented instances of adverse jury verdicts indicating there is a problem with punitive damages. We have enclosed a copy of a study by Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence From Lawsuit Filings. This paper provides empirical support for what we have been saying all along: the issue is not necessarily the number of adverse verdicts, but the number of claims which are made. Each such claim has to be defended. Each has the potential of effecting the value of the underlying claim for compensatory damages. Each imposes a cost. It is no surprise to us that this study found that punitive damages claims on average take one-third longer to resolve and play a significant role in the settlement process. This reality is ignored by those who choose to focus only on actual verdicts.

The second issue we feel strongly about is the several liability provision contained in Sections 16-18. In 1988, the voters in Alaska adopted pure several liability through the initiative process. The ballot told the voters that the "initiative would make each party liable only for damages equal to his or her share of fault". This initiative was approved by approximately 75% of the voters. Five years later the Supreme Court ruled that fault could be apportioned only to those who were formally named as parties to the action. Thus instead of a party being liable only for damages he or she caused, a party can now be held liable for damages caused by the fault of another. We believe this to be contrary what the voters were told in 1988.

We have heard the argument that if these changes are adopted, a defendant may try to blame a non-party for a loss and that a plaintiff will be forced to defend an "empty chair" from claims that are for the first time made at trial. We believe this is a specious argument. The basis for any such claim would have to be disclosed at the very outset by Rule 26 of the Rules of Civil Procedure. The usual discovery would also require disclosure of such a claim. There is simply no basis for the argument that such claims could be raised for the first time at trial.

LESSMEIER & WINTERS
ATTORNEYS AT LAW

Representative Gene Therriault
Co-Chair, House Finance Committee
Alaska House of Representatives
March 12, 1997
Page 3

The essence of several liability is that each party should be held liable only for his or her share of fault and no more. Although it is difficult to argue with the fairness of such a fundamental proposition, the overwhelming approval the voters gave to the 1988 initiative shows the public's agreement with this proposition. Any mechanism which serves to reallocate fault so that one party ends up bearing the consequences of someone else's conduct is unfair and contrary to the expressed intent of the voters. Sections 16 and 17 will simply insure that the intent of the voters is implemented and accordingly is a provision we fully support.

Section 21 of this bill will dramatically change the law on offers of judgment so there is a significant incentive to evaluate one's position early and in a responsible way. This section simply provides that if a party betters by more than 5% an offer of judgment entered within 60 days of initial disclosures, that party may recover reasonable actual attorney fees. There is no such present incentive in the law.

The final section we wish to comment on is Section 48, which provides a certain deterrent for those that come to court and intentionally make false statements of material fact. We do not believe this provision to be controversial and again believe it is hard to argue with the logic of such a concept.

There are other portions of this legislation that are important in that they remove windfalls which are currently in the system. Examples of this include Section 23, which provides for a floating rate of prejudgment interest, Section 24, which provides that prejudgment interest may not be awarded on future damages and Section 11, which reduces future wage loss claims by the amount one would have to pay for income taxes. Each of these provisions is fair. Each will reduce a windfall currently present in the system. Each will help to further the goals this legislation seeks to accomplish.

We thank you for the opportunity to comment on this legislation. If you have questions, please let us know as we will be happy to respond.

Sincerely,
LESSMEIER & WINTERS

By: 
Michael L. Lessmeier

cc: Rep. Brian Porter

A L A S K A



March 11, 1997

Representative Mark Hanley, Co-chairman
Representative Gene Therriault, Co-chairman
House Finance Committee
State Capitol
Juneau, AK 99801-1182

Dear Representative Hanley and Representative Therriault,

HB 58, making important changes in Alaska's tort law, will be before the Finance Committee this week. This is a priority issue for the National Federation of Independent Business. With 4,400 Alaska members, NFIB/Alaska is the states largest small-business advocacy organization. NFIB represents the entire spectrum of independent businesses, from one person "cottage" operations to quite substantial enterprises.

NFIB is interested in changing Alaska's tort laws to make the civil justice system more fair, more efficient and less costly. That is the purpose of HB 58. This bill allows for appropriate compensation for persons injured through the fault of others. There is no limit on economic damages such as medical costs and lost wages. It does put a reasonable cap on additional awards for damages such as pain and suffering. It prohibits punitive damages unless deliberate disregard for another person is shown. It also puts sensible limits on punitive damage awards.

NFIB/Alaska strongly supports putting reasonable limits on non-economic and punitive damages. When there are no limits on damages, any business may be just one lawsuit away from being put out of business. The unpredictability of what a jury may award often forces insurance companies to settle out of court too soon for too much money. This drives up the cost of liability insurance.

NFIB/Alaska believes HB 58 will help control the costs of personal injury cases while assuring appropriate compensation for persons injured through no fault of their own. NFIB/Alaska urges support for HB 58.

Sincerely,

Thyes J. Shaub
on behalf of NFIB/Alaska

DAVID A. McGUIRE, M.D.

Orthopedic Surgery

DIPLOMAT OF THE AMERICAN BOARD
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PHONE 907-562-4142

March 10, 1997

Mr. Gene Therriault
Co-Chairman, House Finances
State Capitol, Room 517/15
Juneau, AK 99801-1182

Dear Representative Therriault:

I'm writing this letter to encourage your support of tort reform. I appreciate the efforts that you expend on our behalf. As you may know, I was instrumental in founding the original tort reform effort in Alaska, called the Citizens' Coalition for Tort Reform. We got some tort reform established in 1986, and were successful in getting the initiative on the ballot in 1988. Clearly not enough was done. The bill introduced by Senator Miller, and its running mate, Representative Porter's SSHB58, will certainly go a long way towards solving the problems that present us.

While it may be true that in 1976 only doctors and other small groups were affected, it is now the case that absolutely everyone in Society is affected. I most recently had a conversation with Oren Seybert of Peninsula Air. They had the unfortunate occurrence of an airplane disappearing with its passenger on board. The passenger's economic value is computed to be more than one million dollars. Unfortunately, Oren is in the unenviable position of being completely unable to obtain more than one million dollars in insurance. It is not only the cost interests of insurance, but the availability, that often affects decisions of businesses and professions in the State of Alaska.

Mr. Jim Jordon, of the Alaska State Medical Association, has been kind enough to forward two articles which I would like to bring to your attention. They are written by the American Academy of Actuaries. Once in my life I wanted to be an actuary, until I found out how little contact actuaries have with their fellow human beings. Having said that, they are very excellent at analyzing numbers in a dispassionate way. This analysis would appear to confirm what many of us have been thinking and saying for a long time. MICRA Reform in California has been demonstrably effective. California doctors now pay less for the same level of malpractice insurance than Alaska Doctors pay. No one, I think, would believe that Californians are less litigious than Alaskans. It simply shows the effectiveness of the Tort Reform legislation passed in 1975. The article also points out that tort reforms are ineffective when passed piece-meal. We have heard numerous arguments over the years that tort reform should be incremental, that we should do a little bit at a time. I for one have resisted those arguments because every time a small piece of

legislation has passed, everyone says tort reform is done, and since it's a controversial subject, they don't want to touch it again for the next four, five, or ten years. Meanwhile it's like having a bucket with ten holes in it, and one hole is plugged; the bucket still leaks at a very rapid rate.

A cap on non-economic damages, the prohibition of recovering from collateral sources and mandated structured periodic payments, are key elements to this tort reform. The MICRA Legislation included limitations on contingent fees. The pro-active way of making that statement is that in effect, more money is left for the truly injured client. The point is made in these articles, however, that that contingent fee is usually a fixed sum of money, regardless of risk involved in the case. A truly contingent fee would take less money from a case that was an open and shut case, as opposed to those in which there was considerable doubt. I can assure you that the standard practice in the Alaskan Legal Community is to take a fixed percentage of the case, regardless of risk. Those trial attorneys who are fortunate enough to be in the position of having the "Oh my God" case come through the door, are virtually assured of being millionaires as the result of the outcome of a single case. That seems a little unbalanced.

I'm enclosing, for your perusal, an analysis of a case that occurred in Alaska in 1987. Essentially Mr. Justice was involved in a bar fight, presented himself to the Emergency Room at Alaska Regional Hospital, which subsequently has become Columbia Hospital. He was thoroughly examined and sent home. He returned almost exactly 24 hours later, in the early morning hours, and was again examined and no material findings were produced. He then left to go to California. He was extensively evaluated in California, including CAT-scans and MRI's, for persistent headaches, and was admitted twice in California with no findings noted. On the third admission, he presented with symptoms of a cerebral hemorrhage, and was subsequently discovered to have a Berry aneurysm, which is a congenital malformation that he had prior to his altercation in the bar. It is noteworthy that he left Alaska neurologically intact, with the appropriate measures having been taken.

He elected to sue in California, which by then had enacted the MICRA Reform mentioned in the previous part of this letter. As a result of that, there was a cap on non-economic damages. He had mandated periodic payments for his economic damages. There were limitation on the amount of money that the attorney could recover, and he had no collateral source at that time from which to recover.

After having received the benefit of this life-time benefit in California, he returned to the State of Alaska. He sued the doctors and Alaska Regional Hospital, and shortly before trial, dropped the doctors. The jury was never permitted to know that he had received full compensation under the California Micra Act. The jury returned a verdict of "guilty", and assessed damages. We have enclosed an analysis of these damages, with those paid by California on the left, and those paid by Alaska on the right. You can see clearly that the

Page 3 - Gene Therriault

cost to settle the same case in California was one-third of that in Alaska. Another way of stating it is, that Alaska health care consumers pay three times as much to injured victims as California health care consumers do. In the end, all the money comes from the patients or their payors. This is a clear and egregious example of why collateral sources need to be limited. You will hear time and time again that "Tort Reformers" are trying to rig the Jury system. Nothing could be further from the truth. We'd simply like the Jury to know the whole truth and nothing but the truth, and if that were the case, we believe that they would come to a sensible verdict.

I appreciate the opportunity to present you with this information, and I would be most happy to discuss any part of it. (I have read the Justice file, including the examinations in the E.R. myself, and therefore I can promise you that it did happen as indicated.)

Sincerely,

A handwritten signature in black ink, appearing to read "David", with a long horizontal stroke extending to the left.

David A. McGuire, M.D.

DAM:li

cc: Brian Porter

In November of 1987, MICA went to trial on the Justice v. Humana Hospital Case. MICA insured each of the three defendants including the hospital on a "tail" policy purchased when Humana brought Community Hospital. The two physician defendants were dropped the day before trial by the plaintiff's attorneys and the hospital became a single defendant.

CASE FACTS:

Justice was seen in the emergency room on two occasions in May of 1982 for injuries received from a fall in an Anchorage bar. The visits were both in the middle of the night and 25 hours apart. 48 hours later the patient presented himself to Los Angeles County Hospital where he was admitted and discharged the next day. He was admitted yet again five days later, discharged and finally readmitted twelve days later comatose with a right sided hemiplegia.

LEGAL ACTION:

Separate suits were filed in California and later in Alaska. L.A. County made a settlement with an agreement that if the plaintiff was successful in Alaska, L.A. County could recover 1/3 of the Alaska award to a maximum of \$300,000.

TRIAL RESULTS:

MICA tried to join L.A. County Hospital in a joint defense. Certainly they were responsible for the last and longest treatment. Our court would not allow this and further would not allow any negligence by L.A. County to be a defense. The outcome was a verdict with the plaintiff 10% negligent and Humana 90% negligent. The verdict was an award totaling \$1,304,244 with add-ons for prejudgement interest and Rule 82 increasing the award to in excess of \$2,000,000.

TORT REFORM EFFECTS:

The cost to Alaska to pay for the plaintiff who had already received retribution in California is substantial. Tort Reform legislation would have had an absolute impact on the results of this case. Under Tort Reform legislation-

- the extent of L.A. County's negligence would have to be considered;
- the percentage of fault for Humana would be affected under joint and several liability;
- collateral source from the L.A. settlement would have to be offset and;
- a cap on non-economic losses would have impacted the judgement.

MICA feels this is an excellent representation of the positive effects of California tort reform. Because of the positive effects of California tort reform. Because of our own laws, Alaskans paid in the extreme for a plaintiff that had been compensated elsewhere. Our analysis of the Justice case leads us to the irrevocable conclusion that tort reform legislation will decrease costs to Alaska and its citizens.

COMPARISON OF RESULTS IN JUSTICE With Mandated Structured Settlements

California (WITH Tort Reform)		Alaska (WITHOUT Tort Reform)	
(\$1,344,000) \$32,000 paid per year for life expectancy of 42 years		Total jury verdict	\$ 1,449,160
\$305,619		Less plaintiffs 10% comparative negligence	(144,916)
			\$ 1,304,244
\$75,000 payment on July 1, 1995.	28,113	Present value of L. A. Hospital settlement as of July 1, 1985.	(210,201)
\$200,000 payment on July 1, 2005.	28,101		\$ 1,094,043
\$400,000 payment on July 1, 2015.	22,125	Collateral benefits pursuant to AS 09.55.548(b)	(89,378)
Present value of future payment of total jury verdict of \$2,019,000 as of July 1, 1985.	\$ 383,958	Subtotal	\$ 1,004,665
Plus cash payment on July 1, 1985.	50,000	Prejudement interest @ 10.5% per annum from May 30, 1982 (date of injury) through March 16, 1988.	683,534
Plus attorney fees present values as of July 1, 1985.	130,000	Rule 82(a) attorney fees	171,319
Plus costs	15,000		
Subtotal	\$ 578,958	Subtotal	\$ 1,859,518
Defense cost	unk	Insurance, Defense fees	501,605
Total	\$ 578,958	Total	\$ 2,361,123

DOES TORT REFORM WORK?

The effect of mandated structured settlements:

In California, the plaintiff received \$2,214,000 from a structured settlement for a present cost of \$578,958.

In Alaska, the plaintiff received \$1,859,518 with a present cost of \$1,859,518.

The present cost to health care consumers in Alaska is 3.2 times the amount in California.

DAVID A. McGUIRE, M.D.

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PHONE 907-562-4142

March 10, 1997

Brian Porter, Majority Leader
State Capitol, Room 216
Juneau, AK 99801-1182

Dear Brian:

Thanks again for your efforts in Tort Reform. I'm enclosing two articles that Jim Jordon of ASMA sent over to me. They are produced by the Actuarial Society. They leave very little doubt that tort reform is effective. They show clear evidence that a package of tort reform is what's required, and not individual piece-meal segments. The experience in Ohio shows that when enacted, they were effective, and when repealed, the costs rose. These State examples, I would think, would be abundant information for someone who truly wanted to understand the system.

Once again, I appreciate your help, and let me know if there is anything that I can do to help.

Sincerely,

A handwritten signature in black ink, appearing to read 'David McGuire', with a stylized flourish at the end.

David A. McGuire, M.D.

DAM:li



A Surgical Fix for Medical Malpractice

Reforms Work Best as a Package, Study Shows

By Jeffrey Speicher

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

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

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

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

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

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

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

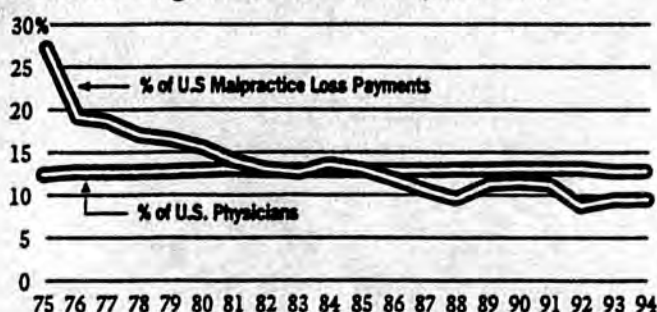
A Package Deal

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

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

FIGURE 1

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



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

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

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

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

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

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

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

FIGURE 2

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



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

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

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

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

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

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

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

An Offer You Can't Refuse

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

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

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

Medical malpractice is a nightmare of useless circularity.

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

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

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

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

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

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

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

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

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

Answer to Brain Drain, page 13:
The house number is 76.

TECHNOLOGY INSIGHTS

Rx: radical lawyerectomy

BY PETER HUBER



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HOW DO YOU TRIM \$20 billion a year from Medicare? That's about what it will take to stave off bankruptcy. The easiest way: amputate lawyers.

It can be done. In 1995 Congress immunized community health care centers from malpractice suits. The federal government now covers the claims incurred by these federally subsidized clinics—claims are heard by a judge, not a jury, and there are no punitive awards. The clinics save an estimated \$40 million in malpractice insurance. That funds treatment for an additional half-million indigent patients.

Why stop there? The country spends about \$8 billion a year treating elderly heart-disease patients. Cap awards, abolish punitive damages, implement a few other direct, financial limits on medical malpractice suits, and you reduce hospital expenditures on cardiac patients by 5% to 9%.

If limits like these had been written into federal law, nationwide spending on cardiac disease in the late 1980s would have been \$600 million a year lower. Extrapolate these results to medical spending generally—a debatable but reasonable enough basis for estimation—and you find that tort reform would save the country as a whole well over \$50 billion a year.

But how much more negligent medicine would that encourage? How many more cardiac patients would die? How many more would get inferior treatment and suffer a second heart attack as a result? The best estimate: None at all. Nor would any true victims of negligence go uncompensated. The reforms we're talking about here don't eliminate liability, they just place sensible limits on windfalls and double-dipping. They are in fact already part of the law in many states.

The numbers I cite come from a very important paper, "Do Doctors Practice Defensive Medicine?" written by Daniel Kessler and Mark McClellan, both of Stanford University. The paper appeared in the May 1996 *Quarterly Journal of Economics*.

The authors analyze data on all elderly Medicare beneficiaries hospitalized for seri-

ous heart disease in 1984, 1987 and 1990. The study correlates spending for medical care with state tort laws. About three patients in five were treated in states that placed no direct limits on rights to sue. But two in five were hospitalized in states that did. Direct liability limits have clear, strong effects on medical spending, the study concludes.

But that's just the first half of the story. Previous studies—most notably one conducted by Harvard Medical School in 1990—asked panels of doctors to review patient files and attach subjective judgments about adverse outcomes and deficient treatment. Much of the "negligence" identified in this way had no significant impact on the ostensible victim. Studies like this didn't reveal much about the consequences of malpractice litigation because they didn't pin down the consequences of malpractice itself.

With elderly cardiac patients there are objective standards for assessing ineffective care: Patients die, or they end up back in a cardiac ward not long after discharge.

Medical tort reform would save the country \$50 billion a year.

Analyzing the record on these solid criteria, Kessler and McClellan reach a second, clear conclusion: None of the liability reforms studied "led to any consequential differences in mortality or the occurrence of serious complications."

If liability doesn't force doctors to provide better treatment, why does it boost the cost of medicine so sharply? Unlimited liability gets you more medicine, not better. Lawyer-shy doctors administer tests willy-nilly, and hand off patients to specialists with great alacrity. They know that the surest way to avoid liability is to dispatch your problem patient to someone else—a lab technician or another doctor. This can go on indefinitely. It's very expensive. And medically useless.

Congress has generally left medical malpractice reform to the states. But when Medicare and Medicaid patients sneeze, it's the federal Treasury that catches cold. No principle of federalism requires federal taxpayers in Montana to pay for Mississippi medicine ordered up by the lawyers there, not the doctors or patients.

The best place for Congress to balance the Medicare budget is on the backs of trial lawyers. These lawyers are not old, not poor and not needed.

Alan Jordan
Tom
Kevin
TJ