

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.32 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997

September	644	600	566
October	574	736	706
November	746	784	784
December	549	850	1156
Totals	4977	5170	5769

ALLSTATE INSURANCE COMPANIES

<u>Month</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
January	32	43	42
February	33	41	57
March	36	51	42
April	31	37	61
May	38	39	48
June	39	36	41
July	22	45	52
August	38	37	39
September	27	37	42
October	37	64	51
November	51	48	64
December	44	43	59
Totals	428	521	598
GRAND TOTAL	5501	5823	6500

5.8% increase 1995 over 1994

11.8% increase 1996 over 1995

THE UTAH PROGRAM IS NOT WORKING!

| **This - 213** | **Analysis** |

Proposition 213: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to the Civil Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Title

This measure shall be known and may be cited as "The Personal Responsibility Act of 1996."

SECTION 2. Findings and Declaration of Purpose

(a) Insurance costs have skyrocketed for those Californians who have taken responsibility for their actions. Uninsured motorists, drunk drivers, and criminal felons are law breakers, and should not be rewarded for their irresponsibility and law breaking. However, under current laws, uninsured motorists and drunk drivers are able to recover unreasonable damages from law-abiding citizens as a result of drunk driving and other accidents, and criminals have been able to recover damages from law-abiding citizens for injuries suffered during the commission of their crimes.

(b) Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens.

(c) Therefore, the People of the State of California do hereby enact this measure to restore balance to our justice system by limiting the right to sue of criminals, drunk drivers, and uninsured motorists.

SECTION 3. Civil Justice Reform

Section 3333.3 is added to the Civil Code, to read:

3333.3. In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.

Section 3333.4 is added to the Civil Code, to read:

3333.4. (a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:

(1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.

(2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.

(3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state.

(b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).

(c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages.

SECTION 4. Effective Date

This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997.

SECTION 5. Severability

If any provision of this measure, or the application to any person or circumstances is held invalid or void, such invalidity or voidness shall not affect other provisions or applications that can be given effect without the invalid or void provision or application, and to this end, all of the provisions of this measure are declared to be severable.

SECTION 6. Conflicting Measures

In the event another measure to be voted on by the voters at the same election as this measure, and which constitutes a comprehensive regulatory scheme, receives more affirmative votes than this measure, the electors intend that any provision or provisions of this measure not in direct and apparent conflict with any provision or provisions of that other measure shall not be deemed to be in conflict therewith, and shall be severed from any other provision or provisions of this measure that are in direct and apparent conflict with the provision or provisions of the other measure. In that event, the provision or provisions not deemed in conflict shall be severed according to Section 5 of this measure upon application to any court of competent jurisdiction.

| This - 213 | Analysis |



USAA®
STATE LEGISLATIVE AFFAIRS

915 "L" Street, Suite 1100
Sacramento, CA 95814

FAX

Date: 03/05/97 9:25 AM

Number of pages to follow: 8

To:

Jim Sourrant
Rep. Porter

Phone:

Fax: **907/465-3834**

CC:

From:

James R. Jinks, AVP
Senior Legislative
Counsel

Phone: **916/552-6715**

Fax: **916/442-1328**

REMARKS: ☐ Urgent ☐ FYI/Review ☒ As Discussed ☐ Please comment

Per our conversation, the "no-pay, no-play" tort reform for auto insurance.

CONFIDENTIALITY NOTICE

The information contained in this facsimile transmission is a CONFIDENTIAL COMMUNICATION. It is intended solely for the use of the recipient identified above. If you are not the intended recipient, you are hereby notified that reading, copying, or distributing this transmission is STRICTLY PROHIBITED. The sender has not waived any applicable privilege by sending the accompanying transmission. If you have received this transmission in error, please notify the sender immediately by phone.



USAA
STATE LEGISLATIVE AFFAIRS

915 "L" Street, Suite 1100
Sacramento, CA 95814

FAX

Date: **02/12/97 12:59 PM**

Number of pages to follow: **13**

To:

Rep. Brian Porter

Attn: Judy

Phone:

Fax: **907/465-3834**

CC:

From:

James R. Jinks, AVP

**Senior Legislative
Counsel**

Phone: **916/552-6715**

Fax: **916/442-6715**

REMARKS: ☐ Urgent ☐ FYI/Review ☒ As Discussed ☐ Please comment

Judy: Attached please find the materials we discussed in our earlier conversation. Please call me at work or at my home (916/863-0858) if you have any questions or if I can provide any additional information.

CONFIDENTIALITY NOTICE

The information contained in this facsimile transmission is a CONFIDENTIAL COMMUNICATION. It is intended solely for the use of the recipient identified above. If you are not the intended recipient, you are hereby notified that reading, copying, or distributing this transmission is STRICTLY PROHIBITED. The sender has not waived any applicable privilege by sending the accompanying transmission. If you have received this transmission in error, please notify the sender immediately by phone.

government healthcare providers to the expert medical advisory panel. The clarification is sought because some trial judges do not refer such cases, usually stemming from healthcare extended to prisoners in correctional facilities, to the expert advisory panel.

Section 31. **Collateral benefits.** This section was repealed because it is no longer necessary in view of AS 09.17.070, which operates to adjust damages in all tort cases, including medical malpractice cases.

Section 32. **Definitions; health care provider.** This section amends the existing definition of health care providers to include various entities recently formed, and which will be formed, to provide health care services in the wake of the health care reforms which are taking place.

Section 33. **Definitions; professional negligence and professional services.** This section adds new subsections to define professional negligence and professional services in the health care area.

Section 34. **Attorney contingent fee agreements.** This section adds a new section AS 09.60.080 which clarifies that the 50% of punitive damage awards which are payable to the State of Alaska under AS 09.17.020(d) shall pass free and clear of any contingent fees which would otherwise would have been deducted under the terms of a contingent fee agreement between the attorney and the client. This section is also intended to protect the client from paying for contingent attorney fees calculated from the State's share of the punitive damages recovery

Section 35. **Civil liability of hospitals for nonemployees.** This section adds a new section designated AS 09.65.096. This statute grants immunity to hospitals from liability for the acts or omissions of emergency room physicians who are independent contractors. Current law allows a claimant to sue only the hospital rather than the independent contractor who may have less ability to satisfy a judgment. This section will provide immunity to the hospital if it posts a notice of limited liability in all admission areas, and publishes a notice annually in a local newspaper. This section is intended to overrule the case of Jackson v. Powers, 743 P.2d 1376 (Alaska 1987).

Subsection (c) imposes, however, an additional condition of immunity to the hospital by requiring the emergency room physician to carry liability insurance in the amount of at least \$500,000 per incident.

Section 36. **Damages resulting from commission of a felony, or while under the influence of alcohol or drugs.** With one exception, the Governor's Task Force report recommends that a person who sustains personal injuries or death during the commission, or attempted commission of a felony, should be barred from recovering damages for those injuries.

This section goes further than the Governor's Task Force report, and extends the bar to recovery to those instances where the injured

| This - 213 | Analysis |

Proposition 213: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to the Civil Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Title

This measure shall be known and may be cited as "The Personal Responsibility Act of 1996."

SECTION 2. Findings and Declaration of Purpose

(a) Insurance costs have skyrocketed for those Californians who have taken responsibility for their actions. Uninsured motorists, drunk drivers, and criminal felons are law breakers, and should not be rewarded for their irresponsibility and law breaking. However, under current laws, uninsured motorists and drunk drivers are able to recover unreasonable damages from law-abiding citizens as a result of drunk driving and other accidents, and criminals have been able to recover damages from law-abiding citizens for injuries suffered during the commission of their crimes.

(b) Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens.

(c) Therefore, the People of the State of California do hereby enact this measure to restore balance to our justice system by limiting the right to sue of criminals, drunk drivers, and uninsured motorists.

SECTION 3. Civil Justice Reform

Section 3333.3 is added to the Civil Code, to read:

3333.3. In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.

Section 3333.4 is added to the Civil Code, to read:

3333.4. (a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:

(1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.

(2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.

(3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state.

(b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).

(c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages.

Section 23. Prejudgment interest. This new section is intended to preclude prejudgment interest from being awarded for future economic and future noneconomic damages, as well as for punitive damage awards. It is consistent with existing Alaska case law. McConkey v. Hart, Alaska Supreme Court Opinion No. 4441, November 29, 1996; Anderson v. Edwards, 625 P.2d 282, 289 (Alaska 19--).

Section 24. Alternative Dispute Resolution. This section requires the Alaska Judicial Council to see what alternative dispute resolution programs have been used in other states and the federal courts in order to efficiently and economically structure such a program in the Alaska Court System. The report shall be ready in time for the second term of this 20th legislature.

While the Governor's Task Force report proposes a pilot program, it seems prudent to see what the experience has been in other jurisdictions before putting into place any program.

Section 25. Motion to set trial and certificate. This section is taken verbatim from the report of the Governor's Task Force. It is intended to improve Superior Court fast-track procedures.

Section 26. Voluntary arbitration. This section modifies subsection (k) of the statute to make a consistency change regarding the repeal of AS 09.55.548. That statute was repealed for the reason that it is no longer necessary in view of AS 09.17.070, which operates to adjust damages in all tort cases, including medical malpractice cases.

Section 27. Medical advisory panels. This section is taken verbatim from the report of the Governor's Task Force. This provision amends AS 09.55.536(a) by making expert advisory panels available to state health care providers.

Section 28. Expert advisory panel; panel questions. This section is taken verbatim from the report of the Governor's Task Force. The proposed changes are intended to clarify that omissions as well as commissions are within the purview of the questions to be answered by the medical advisory panel.

Section 29. Expert advisory panel; discovery. This section is taken verbatim from the report of the Governor's Task Force. The change appears to allow discovery to proceed within 60 days after the selection of a panel, irrespective of whether the panel has rendered its report. The reason given in the Governor's Task Force report is to expedite reporting of answers to improve the usefulness of the medical advisory panel system.

Section 30. Expert advisory panel; public sector provider. This section is taken verbatim from the Governor's Task Force report. It should be read in tandem with AS 09.55.536(a), in that this provision makes clear the access of

SECTION 4. Effective Date

This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997.

SECTION 5. Severability

If any provision of this measure, or the application to any person or circumstances is held invalid or void, such invalidity or voidness shall not affect other provisions or applications that can be given effect without the invalid or void provision or application, and to this end, all of the provisions of this measure are declared to be severable.

SECTION 6. Conflicting Measures

In the event another measure to be voted on by the voters at the same election as this measure, and which constitutes a comprehensive regulatory scheme, receives more affirmative votes than this measure, the electors intend that any provision or provisions of this measure not in direct and apparent conflict with any provision or provisions of that other measure shall not be deemed to be in conflict therewith, and shall be severed from any other provision or provisions of this measure that are in direct and apparent conflict with the provision or provisions of the other measure. In that event, the provision or provisions not deemed in conflict shall be severed according to Section 5 of this measure upon application to any court of competent jurisdiction.

| This - 213 | Analysis |

persons if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

Section 18. Apportionment of damages. This section eliminates a reference to AS 09.16.040 because that statute was repealed by the 1987 Initiative Proposal.

Section 19. Definition; intentional torts. This section is taken verbatim from the Report of the Governor's Task Force. This section amends AS 09.17.900 to clarify its application to intentional acts.

Section 20. Expert witness qualification. This section requires that certain minimal standards be met by persons who testify in professional malpractice cases, including medical malpractice cases.

Section 21. Offers of judgment. This section builds upon the approach taken from the Governor's Task Force report to encourage early settlements. This section places significantly more pressure on the parties to settle a case within 60 days after the Rule 26(a)(1) discovery disclosures have been made.

The approach taken in this section is to assess reasonable actual attorney fees against the offeree which are incurred after the date the offer is tendered, if the judgment finally entered is not at least 5% more favorable than the offer, whether the offer is tendered by the party making the claim, or the party defending against the claim. The phrase "reasonable actual attorney fees" is intended to mean the actual attorney's time expended, as evidenced by time sheets and billing statements. That phrase is not intended to mean Rule 82 fees.

The encouragement to settle early is furnished by the sliding scale percentages of reasonable actual attorney fees expended, based on the time the offer is made. The maximum amount of settlement pressure will occur within 60 days after the Rule 26(a)(1) disclosures are made, since 100% of the reasonable actual attorney fees should provide a heavy inducement to settle, particularly against frivolous suits.

Section 22. Interest on judgments; prejudgment interest. This section provides for a floating interest rate on judgments and prejudgment interest by making it three hundred basis points above the discount rate at the 12th Federal Reserve District as of January 2 of the year in which the judgment or decree is entered. Once set by this section, the interest rate does not change until satisfaction of the judgment or decree. Using the discount rate of the 12th Federal Reserve District is consistent with the way interest rates are determined under the usury statute, AS 45.45.010(b).

The Governor's Task Force report recommends a floating interest rate on judgments and prejudgment interest. This section should satisfy those concerns.

| Text of Proposed Law | This - 213 | Argument in Favor |

Analysis of Proposition 213

by the Legislative Analyst

PROPOSAL

This measure would limit the ability of certain people to sue to recover losses suffered in accidents.

Limits on Uninsured Motorists and Drunk Drivers

Under existing law, someone who has suffered an injury in a car accident may sue the person, business, or government at fault for the injury in order to recover related losses. These losses can include both *economic* losses (such as lost wages, medical expenses, and property damage) and *noneconomic* losses (such as pain and suffering).

This measure would prohibit the recovery of *noneconomic* losses in certain car accidents. Specifically, an uninsured driver or a driver subsequently convicted of driving under the influence of alcohol or drugs ("drunk drivers") at the time of an accident could not sue someone at fault for the accident for noneconomic losses. (These drivers could still sue for economic losses.) If, however, an uninsured motorist is injured by a drunk driver in an accident, the uninsured motorist could still sue to recover noneconomic losses from the drunk driver.

Limits on Convicted Felons

Currently, in certain cases a person who is injured while breaking the law may sue on the basis of another person's negligence to recover any losses resulting from the injury. For example, a person convicted of a robbery who was injured because he or she slipped and fell while fleeing the scene of the crime can sue to recover losses resulting from the injury.

This measure prohibits a person convicted of a felony from suing to recover any losses suffered while committing the crime or fleeing from the crime scene *if* these losses resulted from another person's negligence. Convicted felons, however, would still be able to sue to recover losses for some injuries suffered while committing or fleeing a crime--for instance those resulting from the use of "excessive force" during an arrest.

FISCAL EFFECT

Restricting the ability of people to sue for injury losses in the above situations would reduce the number of lawsuits handled by the courts. This would reduce annual court-related costs to state and local governments by an unknown but probably minor amount. These restrictions would also result in fewer lawsuits filed against state and local governments. Thus, there would be an unknown savings to state and local governments as a result of avoiding these lawsuits.

In addition, the restrictions placed on uninsured motorists and drunk drivers could result in somewhat lower costs, or "premiums," for auto insurance. Under current law, insurance companies doing business in California pay a tax of 2.35 percent of "gross premiums." This tax is called the gross premiums tax and its revenues are deposited in the state's General Fund. Any reduction in insurance premiums would also reduce gross premiums tax revenue to the state. We estimate that any revenue loss would probably be less than \$5 million annually.

by authorized insurers of the same quality as those which offer structured settlement type of periodic payments.

Section 14. Award of damages; periodic payments. This section clarifies that damage awards for personal injury or death are controlled by this statute.

This section also requires that either type of periodic payments provide for increases in future payments to compensate for inflation. It uses the Consumer Price Index for Anchorage as the standard for measuring increases in the rate of inflation.

Section 15. Collateral benefits. This section repeals and reenacts the collateral source statute, AS 09.17.070, which prevents double recovery by plaintiffs. In general, the award realized by an injured person is reduced by the amount of money the injured person has already received, or will likely receive in the future, from collateral sources.

Under the provisions of the repealed collateral benefits statute, no evidence could be offered at the trial that the plaintiff was receiving, or would in the future receive, funds from various collateral sources. It was only after the verdict was in that the defense could offer evidence to show how much the plaintiff had received, or would receive in the future, from collateral sources.

This section now allows the defendant at trial to introduce evidence that the plaintiff has received, or will likely receive in the future, the types of collateral benefits appearing in subsection (b) of this section. However, the defendant is still precluded from offering at trial evidence of worker's compensation benefits received, life insurance death benefits received, and various federally funded collateral sources which by law must seek subrogation from the plaintiff's recovery under subsection (a).

The new subsection (c) prevents persons who pay the collateral benefits enumerated in subsection (b) from seeking reimbursement from the injured party, either directly or through subrogation rights.

The repealed statute specifically excepted the collateral benefit statute from medical malpractice actions under AS 09.55. The new statute does not make that exclusion.

Section 16. Apportionment of damages.

By substituting the word "person" for the phrase "party to the action", this section extends apportionment of fault to nonparties to the action, thereby overruling Benner v. Wichman, 874 P.2d 949, 957 (Alaska 1994). Thus, this section requires state courts in the future to determine each person's share of the fault, whether or not that person is a party to the suit.

The elimination of two references to AS 09.16.040 is done because that statute was repealed by the 1987 Initiative Proposal.

Section 17. Apportionment of damages. This section amends AS 09.17.080(b) by allowing the trier of fact to assign a percentage of fault to two or more

| [Analysis](#) | [This - 213](#) | [Rebuttal to Argument in Favor](#) |

Argument in Favor of Proposition 213

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

PROPOSITION 213 WILL FIX A SYSTEM THAT REWARDS PEOPLE WHO BREAK THE LAW.

It's **AGAINST THE LAW TO DRIVE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS** in California. In most cases it's also against the law to drive without insurance. Unfortunately, thousands of people *ignore these laws and get rewarded for it*. Drunk drivers and uninsured motorists can sue law-abiding citizens for huge monetary awards in addition to being compensated for medical and other expenses.

These huge awards cost Californians who play by the rules and obey the law \$327 million every year! That's not fair!

Proposition 213 will prevent drunk drivers, convicted felons and uninsured motorists from collecting these huge monetary awards, while still protecting their right to be compensated for medical and out-of-pocket expenses. That is fair.

Further, if Proposition 213 becomes law, convicted felons would be prohibited from collecting any damages if they're accidentally injured while fleeing from their crime.

PROPOSITION 213 SAYS PEOPLE WHO BREAK THE LAW SHOULD NOT BE REWARDED, WHILE LAW ABIDING CITIZENS PICK UP THE TAB.

Law-abiding citizens already pay higher insurance premiums to cover uninsured motorists. Law-abiding citizens should *not* be punished for living responsibly! *The system needs to be fixed. Illegal behavior shouldn't be rewarded. People who break the law must be held accountable for their actions.*

PROPOSITION 213 SAYS DRUNK DRIVERS WHO INJURE AND EVEN KILL PEOPLE SHOULD NOT BE REWARDED.

Drunk drivers in California cost all of us in terms of lost lives, serious injuries to family members and friends and higher insurance premiums.

- ☐ In 1994, 1,488 people were killed in crashes caused by drunk drivers.
- ☐ 39,437 people were injured in collisions involving drunk drivers during 1994.
- ☐ These victims and their families shouldn't be forced to suffer a second time through huge lawsuits.
- ☐ Proposition 213 will stop drunk drivers from being rewarded for breaking the law.

PROPOSITION 213 SAYS CONVICTED FELONS SHOULD NOT BE ALLOWED TO PROFIT FROM THEIR CRIMES.

Proposition 213 takes the "profit" out of crime by closing a legal loophole that allows convicted felons to sue law-abiding citizens, businesses and governments to pay for "accidental injuries" incurred while running from their crime.

PROPOSITION 213 SAYS NO TO UNINSURED DRIVERS BY SAYING NO TO HUGE MONETARY AWARDS FOR "PAIN AND SUFFERING!"

Subsection (c) carves out an exception to subsection (b) in cases where the wrongful conduct arose in connection with commercial activities motivated by financial gain, and the likelihood of injury was previously known by the persons who made the subsequent policy decisions and they nonetheless went forward with selling the product, or otherwise engaged in the commercial activities that resulted in serious personal injuries or death. Under these circumstances, the cap on punitive damages would be four times compensatory damages, or \$600,000, whichever is greater.

Subsection (d) requires that one half of any punitive damage award be paid into the general fund of the State of Alaska.

Section 11. Award of damages; periodic payments. This section clarifies that an award for personal injuries is intended to include damages for death.

This section also includes in a new subsection (2) which requires that the amount of any judgment awarded shall be reduced by the amount of federal and state income taxes which would have been paid on the judgment under tax rates in effect on the date of the injury or death. Should the current federal income tax laws change in the future, with the result that the current tax treatment of personal injury awards (now not includible in gross income) changes, the reduction of judgment effect of this subsection automatically terminates without having to amend the statute.

Section 12. Award of damages; periodic payments. This section clarifies that cases involving judgments in excess of \$100,000 may be paid in periodic payments rather than in a lump sum payment if either party to the action requests payment by periodic payments.

This subsection also provides that if part of the judgment is owed to an attorney under a contingent fee agreement, those fees shall be reduced to present value, if necessary, and paid to the attorney in a lump sum, leaving the rest of the judgment to be paid to the client in periodic payments.

Section 13. Award of damages; periodic payments. This section requires that if a structured settlement type of periodic payment is selected by the injured party, the court must require security be posted in the form of U.S. government obligations to ensure that the funds are available when they become due. Excepted from the posting of security requirement are the State of Alaska, self-insured municipalities, and insurance companies authorized to do business in the state if their financial strength is in the highest two categories as measured by any two nationally recognized independent rating services.

This section also clarifies that annuities are also a recognized method of making periodic payments, and that it is the injured party who decides whether to take a structured settlement or annuity type of periodic payment. However, an annuity type of periodic payment can only be issued

On average, nearly 30% of all drivers on the road in California are uninsured. In some parts of California, the percent of uninsured drivers is as high as 93%.

Proposition 213 will stop uninsured motorists from being rewarded for breaking the law, while still covering medical and out-of-pocket expenses.

JOIN THE CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN, DORIS TATE CRIME VICTIMS BUREAU, THE CALIFORNIA PEACE OFFICERS' ASSOCIATION, PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA, CALIFORNIA POLICE CHIEFS' ASSOCIATION, THE ASSOCIATION FOR CALIFORNIA TORT REFORM, AND MANY OTHERS WHO SUPPORT THE PERSONAL RESPONSIBILITY ACT OF 1996.

- ☐ **STOP LAWBREAKERS FROM PROFITING FROM THEIR CRIMES.**
- ☐ **VOTE YES FOR PERSONAL RESPONSIBILITY.**
- ☐ **VOTE YES ON PROPOSITION 213.**

LINDA OXENREIDER

*California President, Mothers Against
Drunk Driving (MADD)*

CHUCK QUACKENBUSH

California Insurance Commissioner

D. O. "SPIKE" HELMICK

California Highway Patrol Commissioner

[| Analysis |](#) [This - 213 |](#) [Rebuttal to Argument in Favor |](#)

brought before the child's eighth birthday, including actions brought against obstetricians and gynecologists. This statute is tolled in cases where fraud or collusion, or intentional concealment of facts can be shown. It is also tolled until the actual discovery of a foreign object in the body of the injured person.

Section 6. Actions for torts, for certain statutory liabilities, and against peace officers and coroners to be brought in two years. This section amends AS 09.10.070(a) by including in the two year statute of limitations actions for recovery of, or damages to, personal property. Such actions previously were limited to a six year statute of limitations under AS 09.10.050. The report of the Governor's Task Force recommended this reduction.

This section also eliminates the conflict between existing subsections AS09.10.070(a)(2) - (3) with AS 09.10.090, to make clear the shorter statute of limitations of AS 09.10.090 controls.

Language is added indicating that ordinary negligence and other non-intentional actions is covered by the two year statute of limitations.

Section 7. Limitation of actions involving injury to person or property. Subsection (c) of the statute is a consistency change with respect to the one year statute of limitations set forth in AS 09.10.080, relating to actions against peace officers for the escape of prisoners, and in AS 09.10.090, relating to actions for statutory penalties.

Section 8. Noneconomic damages. This new section replaces an earlier version of this statute pertaining to noneconomic damages. This section generally places more stringent limits on the amounts which may be awarded for noneconomic damages. It also specifically adds loss of consortium to the list of items for which noneconomic damages may be sought.

This section lowers the recovery cap from \$500,000 to \$300,000 for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage, unless the personal injuries are so severe that the claimant is a hemiplegic, paraplegic, quadriplegic, or has other specified disabilities, in which case the cap remains at \$500,000.

Section 9. Punitive damages. This new section replaces an earlier version of this statute, which defines the circumstances in which punitive damages may be awarded. This section incorporates the language used by the Alaska Supreme Court to require malice or conscious acts showing a deliberate disregard of another person from whom the punitive damages are sought.

Section 10. Punitive damages. This section relates to new subsections which are added to the preceding Section 9 in order to clarify and cap the amount of punitive damages which may be awarded.

Subsection (b) generally limits punitive damages to the greater of three times compensatory damages, or \$300,000.

| Rebuttal to Argument in Favor | This - 213 | Rebuttal to Argument Against |

Argument Against Proposition 213

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

SAY "NO" TO NO-FAULT FOR RECKLESS DRIVERS ... VOTE "NO" ON PROPOSITION 213

In March, 2/3 of California's voters said "NO" to Proposition 200--No-Fault auto insurance. We don't want a law that allows reckless drivers to avoid responsibility for their actions.

But Proposition 213 says that if a reckless driver who can afford insurance hits an innocent person who cannot ... the reckless driver gets off without paying for all the injuries and damage they've done.

That's wrong.

The high cost of insurance makes it impossible for many poor and working people to buy insurance. If insurance companies won't sell affordable insurance, it is completely unfair to deny people full compensation for a car accident that is not even their fault.

YOU CAN SAY "NO" TO FELONS AND STILL ... VOTE "NO" ON PROPOSITION 213

Courts won't allow convicted felons to get damages for injuries they cause. So why are "felons" included in the title of Proposition 213?

The insurance companies pushing No-Fault want to divert your attention from their real agenda: boosting their profits to excessive levels.

Insurance companies make money anytime a reckless driver they insure is not held at fault.

The insurance companies couldn't get us to swallow No-Fault in one big gulp, so they're trying to feed it to us in little bites.

YOU CAN SAY "NO" TO DRUNK DRIVERS AND STILL ... VOTE "NO" ON PROPOSITION 213

California laws already say drunk drivers can't recover damages if they cause an accident. So why are they included in the title of Proposition 213?

The insurance companies have failed twice to get No-Fault insurance started in California. In Proposition 213 they are hiding the No-Fault idea behind wild talk about felons and drunk drivers.

NO MONEY-BACK GUARANTEE ... VOTE "NO" ON PROPOSITION 213

The No-Faulters argue that Proposition 213 will save Californians \$323 million per year.

We've heard that line before.

There is nothing in Proposition 213 that says Californians will see their insurance rates go down. In No-Fault states, auto insurance premiums have increased an average of 40% in recent years. No insurance rate reductions. No savings for consumers. The only people who benefit from this No-Fault scheme are reckless drivers ... and the insurance companies who paid to put it on the ballot.

Sectional Summary

of

SSHB 58 (JUD)

An Act Relating to Civil Actions

Section 1. Legislative intent. This section generally sets forth the legislative intent of this Act.

Section 2. Certain property actions to be brought in six years. This section is taken verbatim from the report of the Governor's Task Force on Civil Justice Reform ("Governor's Task Force"). It removes the six year statute of limitations for recovery of, or damages to, personal property. See Section 6.

Section 3. Contract actions to be brought in three years. This section is taken verbatim from the Governor's Task Force report. It adds a new section which imposes a three year statute of limitations on contract actions.

Section 4. Statute of repose of eight years. This section adds a new section which generally imposes an eight year statute of repose.

In this section, the statute of repose begins to run on the earlier of the date of substantial completion of a construction project or of the last act alleged to have caused the personal injury, death or property damage.

This section does not apply if the cause of action resulted from:

- (a) intentional or reckless disregard of plans and specifications or building codes in the design-construction area;
- (b) hazardous waste exposure;
- (c) intentional act or gross negligence;
- (d) fraud or fraudulent misrepresentation;
- (e) breach of express warranty or guarantee;
- (f) a defective product;
- (g) intentional concealment of facts,
- (h) where a shorter statute of limitations applies.

In medical malpractice cases the statute of repose is tolled until the actual discovery of a foreign object in the body of the injured person.

Section 5. Limitation of actions against health care providers. This section amends AS 09.10 by adding a new section which generally requires that actions for medical malpractice involving children under the age of six be

Insurance companies win, you lose.

SAY "NO" TO RECKLESS DRIVER NO-FAULT ...
VOTE "NO" ON PROPOSITION 213.

HARVEY ROSENFELD

Proposition 103 Enforcement Project

KEN McELDOWNEY

Executive Director, Consumer Action

INA DeLONG

Executive Director, United Policyholders

| [Rebuttal to Argument in Favor](#) | [This - 213](#) | [Rebuttal to Argument Against](#) |

1 * **Sec. 54.** AS 28.33.130(c) is amended to read:

2 (c) A person who is ordered out of service

3 (1) may not operate a commercial motor vehicle or be on-duty for 24
4 hours following issuance of the out of service order; and

5 (2) shall report that fact, in writing,

6 (A) within 24 hours to the person's employer; and

7 (B) within 30 days to the department [DIVISION OF
8 MOTOR VEHICLES] if the person possesses a commercial motor vehicle
9 license.

10 * **Sec. 55.** AS 28.35.024(c) is amended to read:

11 (c) Every person renting a motor vehicle shall keep a record of the
12 registration number of the vehicle rented, the name, address and license number of the
13 person to whom the vehicle is rented, and the date and place when and where the
14 license of the intended driver was issued. The record shall be open to inspection by
15 a peace officer or employee of the Department of Public Safety [DEPARTMENT]
16 acting in an official capacity.

17 * **Sec. 56.** AS 28.35.036(e) is amended to read:

18 (e) If not released under AS 28.35.037, a motor vehicle forfeited under this
19 section may be disposed of at the discretion of the Department of Public Safety
20 [DEPARTMENT].

21 * **Sec. 57.** AS 28.35.080(b) is amended to read:

22 (b) The driver of a vehicle involved in an accident resulting in bodily injury
23 to or death of a person or total property damage to an apparent extent of \$2,000 or
24 more shall, within 10 days after the accident, forward a written report of the accident
25 to the Department of Administration [PUBLIC SAFETY] and to the local police
26 department if the accident occurs within a municipality. A report is not required
27 under this subsection if the accident is investigated by a peace officer.

28 * **Sec. 58.** AS 28.35.080(d) is amended to read:

29 (d) The Department of Administration [PUBLIC SAFETY] may require the
30 driver of a vehicle involved in an accident of which a report must be made to file
31 supplemental reports whenever the original report is insufficient in the opinion of that

| [Argument Against](#) | [This - 213](#) | [Next Proposition \(214\)](#) |

Rebuttal to Argument Against Proposition 213

Arguments on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

PROPOSITION 213 STOPS REWARDING DANGEROUS FELONS

California law allows felons convicted of resisting a peace officer *and causing serious injury or death to the peace officer to sue* a city, county or anyone else who gets in their way and accidentally injures the felon fleeing from that crime. The same goes for crimes such as carjacking, "drive-by" shooting resulting in murder, multiple hate crimes and many others. *Proposition 213 stops rewarding criminal behavior.*

PROPOSITION 213 REFORMS AN UNFAIR SYSTEM THAT REWARDS LAWBREAKERS AND PUNISHES THOSE WHO PLAY BY THE RULES

Under Proposition 213, every driver involved in an accident could recover their medical and out-of-pocket expenses. Proposition 213 says "NO" to additional big money awards that drunk drivers, uninsured motorists and their attorneys go after when these lawbreakers are in an accident with an insured driver--even if they also cause the accident!

PROPOSITION 213 TAKES AWAY TRIAL LAWYERS' INCENTIVE TO SUE FOR OUTRAGEOUS AWARDS TO LINE THEIR OWN POCKETS

One-third of every dollar awarded for "pain and suffering" goes to attorneys, and they want to ensure the most lucrative of all injury awards isn't taken from them.

PROPOSITION 213 BENEFITS CONSUMERS BY MAKING INSURANCE MORE AFFORDABLE FOR EVERYONE

Law-abiding drivers pay additional premiums to protect themselves from uninsured drivers. Eliminating huge monetary awards for irresponsible drivers will save \$327 million each year!

- ☐ **VOTE YES FOR PERSONAL RESPONSIBILITY.**
- ☐ **VOTE YES FOR CRITICAL REFORMS.**
- ☐ **VOTE YES FOR PROPOSITION 213.**

RONALD E. LOWENBERG
President, California Police Chiefs' Association

JAN MILLER
Chairman, Doris Tate Crime Victims Bureau

STEVEN H. CRAIG
*President, Peace Officers Research Association
of California*

| [Argument Against](#) | [This - 213](#) | [Next Proposition \(214\)](#) |

1 a citation under AS 12.25.180 - 12.25.230 to a person who violates a regulation
2 adopted under AS 28.05.011(a)(2) [AS 28.05.011(2)]. An employee of the
3 Department of Public Safety [DEPARTMENT] who is authorized by the
4 commissioner of public safety to enforce both hazardous materials and commercial
5 vehicle safety regulations may not take a person into custody under AS 12.25.180(b).

6 * Sec. 50. AS 28.32.040(c) is amended to read:

7 (c) If a certificate is revoked or suspended under (b) of this section the
8 division shall give a commercial motor vehicle inspector a hearing within 10 days
9 after the receipt of a written request filed with the commissioner of public safety
10 within 30 days after revocation or suspension.

11 * Sec. 51. AS 28.33.010(b) is amended to read:

12 (b) Evidence of security required under (a) of this section shall be filed with
13 the Department of Public Safety [DEPARTMENT] and must be

14 (1) a policy or certificate of insurance issued by an insurer acceptable
15 to that [THE] department;

16 (2) a bond of a surety company licensed to write surety bonds in the
17 state;

18 (3) evidence accepted by that [THE] department, showing ability to
19 self-insure; or

20 (4) other security approved by that [THE] department.

21 * Sec. 52. AS 28.33.010(c) is amended to read:

22 (c) The Department of Public Safety [DEPARTMENT] may authorize
23 [DEPARTMENT] personnel of that department to enforce this section and may
24 adopt procedural regulations necessary to implement this section.

25 * Sec. 53. AS 28.33.010(d) is amended to read:

26 (d) A policy of insurance, surety bond, or other form of security may not be
27 cancelled on less than 30 days' written notice to the Department of Public Safety
28 [DEPARTMENT]. This requirement must be clearly stated in the policy or
29 endorsement for an insurance policy submitted as proof of financial responsibility
30 under (b)(1) of this section. The 30-day notice period is measured from the date on
31 which the Department of Public Safety [DEPARTMENT] receives notice.

CHART 2

AB 432

**Impact of Disallowing Uninsured Motorists from
Collecting Pain & Suffering Payments on Auto
Liability Policy in the 10 Largest Cities
in California**

City	Average Premium (all Liability) ¹	AB 432 % Savings ²	AB 432 \$ Savings ³
Anaheim	841	7.25%	46
Fresno	501	6.54%	33
Long Beach	701	6.45%	45
Los Angeles	1010	8.32%	84
Oakland	624	6.92%	43
Sacramento	511	3.18%	16
San Diego	495	4.72%	23
San Francisco	664	8.34%	55
San Jose	489	4.73%	23
Santa Anna	670	7.82%	52
California	549	6.86%	38

- ¹ This is an average premium for Bodily Injury, Property Damage, Medical Payment, and Uninsured Motorist Coverages per vehicle insured. Source: Auto Liability Data Base.
- ² This figure reflects percent savings on the combined liability claims (BI, PD, UM, and med Pay).
- ³ Actual savings to individual policyholders may vary depending on the risk characteristics, policy limits, rating area, and company's rate making formula.

1 terrain, ice, or snow and that has been declared by its owner at the time of registration
2 and determined by the Department of Public Safety [DEPARTMENT] to be
3 unsuitable for general highway use, although the vehicle may make incidental use of
4 a highway as provided in this title, but not including implements of husbandry or
5 special mobile equipment, such as construction machinery or earthmoving equipment.

6 * Sec. 46. AS 28.15.131 is amended to read:

7 **Sec. 28.15.131. License to be carried and exhibited on demand.** A licensee
8 shall have the licensee's driver's license in immediate possession at all times when
9 driving a motor vehicle, and shall present the license for inspection upon the demand
10 of a peace officer or other authorized representative of the Department of Public
11 Safety [DEPARTMENT] identified as such to the licensee by the officer or
12 representative. However, a person charged with violating this section may not be
13 convicted if the person produces in court or in the office of the arresting or citing
14 officer, a driver's license previously issued to the person that was valid at the time
15 of the person's arrest or citation.

16 * Sec. 47. AS 28.17.041(a) is amended to read:

17 (a) The commissioner of administration [PUBLIC SAFETY] shall adopt
18 regulations necessary to carry out the provisions of this chapter, and may call upon
19 the commissioner of education for assistance in formulating these regulations.

20 * Sec. 48. AS 28.20.560(a) is amended to read:

21 (a) A person whose license or registration is suspended under any provision
22 of this chapter, or whose policy of insurance or bond, when required under this
23 chapter, is canceled or terminated, shall immediately return the person's license or
24 registration to the department. If a person fails to return the license or registration to
25 the department, the department, through the commissioner of public safety, shall
26 immediately direct a peace officer to obtain possession of it and to return it to the
27 department.

28 * Sec. 49. AS 28.32.010(b) is amended to read:

29 (b) A peace officer, or an employee of the Department of Public Safety
30 [DEPARTMENT] who is authorized by the commissioner of that department to
31 enforce both hazardous materials and commercial vehicle safety regulations, may issue

AB 432

Impact of Disallowing Uninsured Motorists from collecting Pain & Suffering Payments on Auto Liability Policy in CALIFORNIA

(1) Uninsured Vehicles:	0.28
(2) Insured Vehicles:	0.72
(3) Probability of a claim involves Insured and Uninsured vehicle :	0.4032
(4) 1992 Incurred Losses for Bodily Injury:	2,614,046,463
(5) Pain & Suffering (31% of Bodily Injury):	810,354,404
(6) Estimated Pain & Suffering Claimed by Uninsured Motorist:	326,734,886
(7) Savings on Bodily Injury Coverage* :	12.50%
(8) 1992 Incurred Losses for All Liability Coverages:	4,759,792,277
(9) Savings on Losses of all Liability Coverages** :	6.86%

* While this figure may indicate savings on Bodily Injury Coverage losses, companies do not sell this coverage alone.

** We estimate that 85% of the insured vehicles are covered with all liability coverages. Therefore the 6.86% may be considered an estimate of the savings which an average auto liability policyholder may realize on their annual premium. Actual savings to individual policyholder may vary depending on the risk characteristics, policy limits, garaging area, and company rate making formula.

(1) & (2): DOI estimates of Uninsured Vehicles.

(3) is (1) X (2) X2

(4) is from 1992 Annual Statements & Auto Liability Data Base

(5) is (4) X 0.31. See "Automobile Claims, A Study of Closed Claims Patterns In California."
by Al-Faris, Boushehri, and Gillespie.

(6) is (3) X (5)

(7) is (6)/(4)

(8) is from 1992 Annual Statement, page 14, Line 19.2

(9) is (6)/(8)

1 may an owner knowingly permit to be driven or moved, on a highway or vehicular
2 way or area, a vehicle required to be registered under this chapter unless valid
3 registration plates, decals, or permits for the current registration period are attached
4 to and displayed on the vehicle in the manner required by this chapter, and unless a
5 valid certificate of registration for the current registration period is carried, as required
6 by this chapter, in the vehicle and is available for inspection by a peace officer or an
7 authorized representative of the Department of Public Safety [DEPARTMENT].

8 * Sec. 43. AS 28.10.502(b) is amended to read:

9 (b) A lien under this section is limited to towing and storage charges. Storage
10 charges cease to be part of the lien after 60 days unless the registered owner or
11 primary lienholder, if any, has been given actual notice of the possessory lien within
12 that time or unless a certified letter has been mailed within that time to the owner and
13 primary lienholder, if any, at their addresses of record with the department
14 [DEPARTMENT OF PUBLIC SAFETY] or the corresponding office in another
15 jurisdiction in which the title to the motor vehicle and the lien on it are recorded.

16 * Sec. 44. AS 28.10.502(d) is amended to read:

17 (d) The money realized from a sale made under this section shall be applied
18 first to the payment of costs and expenses of the sale and secondly to the lawful
19 charges of the person having a lien on the motor vehicle under this section.
20 Remaining proceeds from the sale shall be retained by the department
21 [DEPARTMENT OF PUBLIC SAFETY] to be distributed to the registered and legal
22 owner or lienholder entitled to the remaining proceeds. A purchaser in good faith of
23 a titled motor vehicle sold under this section takes the motor vehicle free of any rights
24 of prior lien.

25 * Sec. 45. AS 28.11.025(c) is amended to read:

26 (c) In this section, "vehicle" means a

27 (1) passenger car, motor home, bus, truck, truck-tractor, motorcycle,
28 motorbike, or similar motor vehicle that is designed for use primarily to transport a
29 person or to transport or draw property on a highway or vehicular way; and

30 (2) snowmobile, three-wheeler, four-wheeler, or a similar off-highway
31 motor vehicle designed or adapted for cross-country operation over unimproved

*Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

First Regular Session

Sixty-first General Assembly

LLS NO. 97-0222.01 EBD HOUSE BILL 97-1197

STATE OF COLORADO

BY REPRESENTATIVES Swenson, Agler, Allen, Dean, Dyer, June, May, Owen,
Pfiffner, Schauer, and Schwarz;

also SENATOR Coffman.

TRANSPORTATION & ENERGY

A BILL FOR AN ACT

CONCERNING LIMITATIONS ON RECOVERY OF DAMAGES ARISING OUT OF
A MOTOR VEHICLE ACCIDENT, AND, IN CONNECTION THEREWITH,
LIMITING RECOVERY OF NONECONOMIC DAMAGES BY CONVICTED
FELONS, UNINSURED MOTORISTS, OWNERS OF MOTOR VEHICLES THAT
ARE NOT INSURED, PERSONS CONVICTED OF DRIVING WHILE UNDER THE
INFLUENCE AT THE TIME OF AN ACCIDENT, AND PERSONS DRIVING WITH
A LICENSE THAT IS UNDER RESTRAINT.

Bill Summary

*(Note: This summary applies to this bill as introduced and does not necessarily reflect
any amendments which may be subsequently adopted.)*

In actions arising out of the operation or use of a motor vehicle bars recovery of
noneconomic damages by persons committing or fleeing from the scene of a felony,
convicted of driving while under the influence during an accident, uninsured motorists,
owners of motor vehicles that are not insured, and persons driving with a license that is
under restraint. Specifies that insurers are not liable to the above persons for
noneconomic damages. Continues to allow recovery by uninsured motorists who are
injured by a person convicted of driving under the influence or injured by a person
engaged in the commission of, or flight from, a felony.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 7 of article 4 of title 10, Colorado Revised Statutes, 1994 Repl. Vol.,
as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

**10-4-712.5. Limitation of recovery to convicted felons, uninsured motorists, persons
convicted of driving under the influence, and persons driving with a license under**

1 (2) the department determines that a registered vehicle is mechanically
2 unsafe to be driven or moved on a highway, vehicular way or area, or other public
3 property in this state and the vehicle has been seized or impounded under
4 AS 28.05.091;

5 (3) a registered vehicle has been scrapped, dismantled, or destroyed
6 beyond repair;

7 (4) the department determines that a required fee or tax has not been
8 paid and the fee or tax is not paid upon reasonable notice and demand;

9 (5) a registration plate, permit, or certificate is knowingly displayed
10 upon a vehicle other than the vehicle for which issued;

11 (6) the department determines that the owner of a vehicle has
12 committed an offense under this chapter involving the registration or the certificate,
13 plate, or permit to be suspended or revoked;

14 (7) the vehicle has been reported to the department as stolen or
15 unlawfully converted;

16 (8) the department is otherwise required to do so under the laws of this
17 state;

18 (9) the department determines that the vehicle owner has violated the
19 requirements of AS 28.10.146 or 28.10.147;

20 (10) the department determines that a repair to a commercial motor
21 vehicle, ordered by the Department of Public Safety [DEPARTMENT] under
22 regulations adopted under AS 28.05.011, was not completed after the owner or
23 operator represented to the Department of Public Safety or the Department of
24 Administration [DEPARTMENT] that the repair had been completed; or

25 (11) the owner or operator of a commercial motor vehicle has placed
26 a commercial motor vehicle back in service after it has been placed out of service by
27 the Department of Public Safety [DEPARTMENT] without having it reinspected as
28 required under regulations adopted under AS 28.05.011.

29 * Sec. 42. AS 28.10.461 is amended to read:

30 **Sec. 28.10.461. Driving vehicle without evidence of registration.** Except
31 as otherwise expressly permitted in this chapter, a person may not drive or move, nor

restraint. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) IN 1973 THE GENERAL ASSEMBLY ADOPTED A SYSTEM OF COMPULSORY AUTOMOBILE INSURANCE CONSISTING OF LIABILITY INSURANCE AND A COMPREHENSIVE PACKAGE OF PERSONAL INJURY PROTECTION BENEFITS PAID ON A NO-FAULT BASIS.

(b) COLORADO LAW PREVENTS INSURED MOTORISTS FROM COLLECTING IN TORT ANY ECONOMIC DAMAGES UNDER THE COLORADO AUTOMOBILE ACCIDENT REPARATIONS ACT, SUCH AS MEDICAL EXPENSES OR LOST WAGES, BECAUSE SUCH DAMAGES ARE PAID UNDER A COMPLYING POLICY AND IF A MOTORIST IS UNINSURED, SUCH MOTORIST IS, IN EFFECT, SELF-INSURED AND THEREFORE PREVENTED FROM COLLECTING IN TORT SUCH ECONOMIC DAMAGES.

(c) THE GENERAL ASSEMBLY RECOGNIZES THAT A SIGNIFICANT NUMBER OF MOTORISTS BREAK THE LAW BY DRIVING UNINSURED, COMMITTING OR FLEEING FROM A FELONY, DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, OR DRIVING UNDER A REVOKED OR SUSPENDED LICENSE AND YET ARE PERMITTED TO RECOVER NONECONOMIC DAMAGES, SUCH AS PAIN AND SUFFERING, UNDER LIABILITY INSURANCE POLICIES.

(d) BY ENACTMENT OF THIS STATUTE, THE GENERAL ASSEMBLY INTENDS TO STATE THAT THE PUBLIC POLICY OF COLORADO IS TO NO LONGER TOLERATE THE ABUSE OF THE PRESENT LIABILITY INSURANCE SYSTEM BY THOSE WHO FAIL TO HAVE IN EFFECT A COMPLYING POLICY AS REQUIRED UNDER SECTION 10-4-705 OR 10-4-706 OR BY THOSE WHO BREAK THE LAW AS DESCRIBED IN PARAGRAPH (c) OF THIS SUBSECTION (1).

(e) THE GENERAL ASSEMBLY, BY PASSING THIS SECTION, DOES NOT ALTER THE RIGHT OF ANY PERSON TO RECOVER ECONOMIC LOSSES IN A TORT ACTION AS CURRENTLY ALLOWED BY LAW.

(2) EXCEPT AS SPECIFIED IN SUBSECTION (3) OF THIS SECTION, IN ANY ACTION, BASED ON NEGLIGENCE, TO RECOVER DAMAGES RELATED TO THE OPERATION OR USE OF A MOTOR VEHICLE, AN INJURED PERSON SHALL NOT RECOVER NONECONOMIC DAMAGES TO COMPENSATE FOR PAIN, SUFFERING, INCONVENIENCE, PHYSICAL IMPAIRMENT, DISMEMBERMENT, DISABILITY, DISFIGUREMENT, OR OTHER NONPECUNIARY DAMAGES IF ANY OF THE FOLLOWING APPLIES:

(a) SUCH INJURED PERSON'S INJURIES WERE IN ANY WAY PROXIMATELY CAUSED BY THE INJURED PERSON'S COMMISSION OF ANY FELONY, OR IMMEDIATE FLIGHT THEREFROM, AND THE INJURED PERSON HAS BEEN CONVICTED OF, OR PLEAD GUILTY OR NO CONTEST TO, THAT FELONY.

(b) SUCH INJURED PERSON WAS CONVICTED OF, OR PLEAD GUILTY OR NO CONTEST TO, OPERATING SUCH MOTOR VEHICLE WHILE DRIVING UNDER

1 of Administration [DEPARTMENT] nearest to the residence of the person involved
 2 in the hearing unless the appropriate department and the person agree that the
 3 hearing is to be held elsewhere. The appropriate department shall grant a hearing
 4 delay if the person presents good cause for the delay. If a person fails to attend or
 5 appear for the hearing at the time and place stated by the appropriate department and
 6 if a hearing delay has not been granted, the person's failure to attend or appear is
 7 considered a waiver of the hearing and the appropriate department may take
 8 appropriate action with respect to the person.

9 (c) If at a [THE] hearing conducted by the Department of Administration
 10 under (a) of this section it appears that the record of the person sustains suspension,
 11 revocation, limitation, denial, or other remedial action, the hearing officer shall so
 12 order and the Department of Administration [DEPARTMENT] may suspend,
 13 revoke, limit, deny, or take other remedial action against that person's license,
 14 registration, or title and, if appropriate, the department shall adjust the person's point
 15 total accumulated under AS 28.15.231.

16 (d) A person aggrieved by the decision of the hearing officer may, within 30
 17 days after a decision is mailed or delivered to the person, file an appeal in superior
 18 court for judicial review of the hearing officer's decision. The judicial review shall
 19 be on the record. The court may reverse the [DEPARTMENT'S] determination of the
 20 Department of Public Safety or of the Department of Administration if the court
 21 finds that the department making the determination misinterpreted the law, acted in
 22 an arbitrary and capricious manner, or made a determination unsupported by the
 23 evidence in the record. The respective department's decision [OF THE
 24 DEPARTMENT] suspending, revoking, canceling, limiting, restricting, or denying a
 25 license, registration, title, permit, or privilege is stayed and does not take effect during
 26 the pendency of an appeal.

27 * Sec. 41. AS 28.10.051(a) is amended to read:

28 (a) The department may suspend or revoke the registration of a vehicle, the
 29 certificate of registration or registration plates for a vehicle, or a special permit when

30 (1) the department determines that the registration or certificate, plate,
 31 or permit was fraudulently procured or erroneously issued;

THE INFLUENCE AT THE TIME OF THE ACCIDENT IN VIOLATION OF SECTION 42-4-1301, C.R.S.;

(c) SUCH INJURED PERSON WAS THE OPERATOR OF, OR A PASSENGER IN, AND WAS THE OWNER OF A MOTOR VEHICLE INVOLVED IN THE ACCIDENT AND SUCH MOTOR VEHICLE WAS NOT INSURED AS REQUIRED BY SECTION 10-4-705 OR 10-4-716;

(d) SUCH INJURED PERSON WAS A NONOWNER OPERATOR OF A MOTOR VEHICLE INVOLVED IN THE ACCIDENT AND CANNOT ESTABLISH HIS OR HER FINANCIAL RESPONSIBILITY AS REQUIRED PURSUANT TO SECTION 10-4-705 OR 10-4-716; OR

(e) SUCH INJURED PERSON WAS OPERATING A MOTOR VEHICLE WHILE SUCH PERSON'S LICENSE WAS UNDER RESTRAINT IN VIOLATION OF SECTION 42-2-138, C.R.S.

(3) EXCEPT AS PROVIDED IN SUBSECTION (4) OF THIS SECTION, AN INSURER SHALL NOT BE LIABLE, DIRECTLY OR INDIRECTLY, UNDER A POLICY OF LIABILITY OR UNINSURED OR UNDERINSURED MOTORIST INSURANCE TO INDEMNIFY FOR NONECONOMIC DAMAGES OF A PERSON INJURED AS DESCRIBED IN SUBSECTION (2) OF THIS SECTION.

(4) SUBSECTION (2) OF THIS SECTION SHALL NOT APPLY IN THE EVENT A PERSON DESCRIBED IN PARAGRAPH (c) OR (d) OF SUBSECTION (2) OF THIS SECTION SUSTAINED INJURIES CAUSED BY A PERSON WHO, AT THE TIME OF THE ACCIDENT, WAS OPERATING HIS OR HER MOTOR VEHICLE WHILE UNDER THE INFLUENCE IN VIOLATION OF SECTION 42-4-1301, C.R.S., AND WAS CONVICTED OF THAT OFFENSE, OR IF THE INJURIES WERE IN ANY WAY CAUSED BY A MOTOR VEHICLE ACCIDENT IN WHICH THE NEGLIGENT DRIVER WAS ENGAGED IN THE COMMISSION OF, OR FLIGHT FROM, A FELONY.

SECTION 2. Effective date - applicability. (1) This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution; except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

(2) The provisions of this act shall apply to causes of action filed, and insurance policies issued or renewed, on or after the effective date of this act.

1 title is suspended, revoked, cancelled, limited, restricted, or denied or a vehicle is
2 impounded by that [THE] department. If action is required under this section and
3 prior opportunity for a hearing cannot be afforded, the appropriate department shall
4 promptly give notice of the opportunity for a hearing as soon after the action as
5 possible to the parties concerned.

6 (b) The notice under this section must state the reasons for the
7 [DEPARTMENT'S] proposed action of the Department of Public Safety or of the
8 Department of Administration, and must provide for a reasonable attendance date
9 of not less than 10 days after service of the notice. If there is no request for a hearing
10 by the attendance date specified in the notice, the hearing is considered to have been
11 waived.

12 * Sec. 40. AS 28.05.141 is amended to read:

13 Sec. 28.05.141. **Hearings and appeals.** (a) Unless otherwise specifically
14 provided, all hearings required under this title or regulations adopted under this title
15 shall be conducted by the Department of Public Safety or the Department of
16 Administration, as appropriate, [DEPARTMENT] under regulations adopted by the
17 appropriate commissioner governing practice and procedure and consistent with due
18 process of law. Hearings must be informal, and technical rules of evidence do not
19 apply. A person who requests a hearing may retain an attorney. The hearing officer
20 shall be appointed by the appropriate commissioner and may be appointed from the
21 department conducting the hearing. A hearing officer need not be an attorney, but
22 must be impartial and may not have participated in the decision that is under review.
23 The hearing officer does not have to file a full opinion or make formal findings of
24 fact or conclusions of law, but the hearing officer must state the reasons for the
25 determination and indicate the evidence relied upon. The proceedings at the hearing
26 shall be recorded.

27 (b) A hearing ordered under (a) of this section must be held by telephone
28 unless the hearing officer finds that a telephonic hearing would substantially prejudice
29 the rights of the person involved in the hearing or that an in-person hearing is
30 necessary to decide the issues to be presented in the hearing. An in-person hearing
31 must be held at the office of the Department of Public Safety or of the Department

Finally, we calculated relative savings under the proposition as the percentage difference between the break-even premium under the current system and the one under the proposition.

We focused on the effects of the proposed plan on auto insurers' compensation costs, including both the amounts they pay out in compensation and the transaction costs they incur in providing that compensation. We neglected the many other factors (e.g., insurers' overhead, profit margins, and investment income) that also affect insurance premiums.

We focused on the relative costs of the two insurance systems. Because any factors that proportionately affect costs under both the current system and the proposed plan net out in the comparison, the results are insensitive to changes in such factors over time.

References

Abrahamse, Allan F., and Stephen J. Carroll, *The Effects of a Choice Auto Insurance Plan on Insurance Costs*, Santa Monica, Calif.: RAND, MR-540-ICJ, 1995.

Carroll, Stephen, Allan Abrahamse, and Mary Vaiana, *The Costs of Excess Medical Claims for Automobile Personal Injuries*, Santa Monica, Calif.: RAND, DB-139-ICJ, 1995.

Carroll, Stephen, et al., *No-Fault Approaches to Compensating People Injured in Automobile Accidents*, Santa Monica, Calif.: RAND, R-4019-ICJ, 1991.

Insurance Research Council, *Auto Injuries: Claiming Behavior and Its Impact on Insurance Costs*, Oak Brook, Ill., September 1994.

National Association of Insurance Commissioners, *State Average Expenditures & Premiums for Personal Automobile Insurance in 1994*, Kansas City, Mo., January 1996.

[1] *Economic losses* include an accident victim's medical costs, lost wages, burial expenses, replacement service losses, and other pecuniary expenditures. *Non-economic losses* include physical and emotional pain, physical impairment, mental anguish, disfigurement, loss of enjoyment, and other nonpecuniary losses.

[2] Felons would be allowed to collect damages for intentional acts of harm against them.

[3] The data were collected by the Insurance Research Council (1994) from 61 insurance companies that together accounted for about 77 percent of California's private-passenger automobile insurance (by premium volume) in 1992.

[4] See Carroll, Abrahamse, and Vaiana (1995).

[5] Insurance Research Council (1994) provides a detailed description of the data.

[6] Carroll et al. (1991), Appendix D, describe the data and methods used to estimate insurers' transaction costs.

[7] We do not include claimants' legal costs, the value of claimants' time, or the costs the courts incur in handling litigated claims. Those costs do not affect insurers' costs and, hence, do not affect auto-insurance premiums.

The mission of the Institute for Civil Justice is to help make the civil justice system more efficient and more equitable by supplying policymakers and the public with the results of objective, empirically based, analytic research. ICJ research is supported by pooled grants from corporations, trade and

professional associations, and individuals; by government grants and contracts; and by private foundations. The Institute disseminates its work widely to the legal, business, and research communities, and to the general public.

For additional information about the Institute for Civil Justice, call Deborah Hensler at (310) 393-0411, x6916, or write to: 1700 Main St., P.O. Box 2138, Santa Monica, CA 90407-2138. Internet (Deborah_Hensler@rand.org).

A profile of the ICJ, abstracts of its publications, and ordering information can be found on RAND's home page on the World Wide Web (<http://www.rand.org/centers/icj>).

RAND issue papers explore topics of interest to the policymaking community. Although issue papers are formally reviewed, authors have substantial latitude to express provocative views without doing full justice to other perspectives. The views and conclusions expressed in issue papers are those of the authors and do not necessarily represent those of RAND's research sponsors.

RAND is a nonprofit institution that helps improve public policy through research and analysis.

Results of specific studies are documented in other RAND publications and in professional journal articles and books.

IP-157

Copyright © 1996 RAND

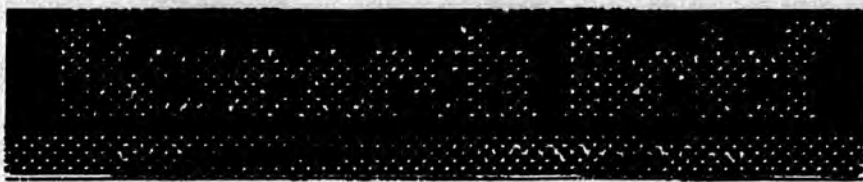
All rights reserved. Permission is given to duplicate this on-line document for personal use only, as long as it is unaltered and complete. Copies may not be duplicated for commercial purposes.

RAND is a nonprofit institution that helps improve public policy through research and analysis. RAND's publications do not necessarily reflect the opinions or policies of its research sponsors.

Published 1996 by RAND

This Issue Paper is also available in hard copy.

RAND's Home Page



Choosing an Alternative to Tort

Escalating auto insurance premiums have been a major public policy issue at the state level for the last three decades. *No-fault* auto insurance, spawned in the 1970s, was one response, offering cost savings to motorists and speedier compensation to auto accident victims. But because it required claimants to give up rights to seek compensation through the courts unless their losses exceeded a specified threshold, many states found it an unappealing alternative.

Choice auto insurance was proposed to address this concern. Under a choice auto insurance system, drivers may choose either a traditional auto insurance plan (tort) or a no-fault plan. Those who choose tort retain traditional tort rights and liabilities. Those who choose no-fault neither recover, nor are liable to others for, noneconomic losses (typically, pain and suffering) for less-serious injuries incurred in auto accidents.

Giving motorists a choice of coverage has strong appeal. But how does the choice alternative affect the premiums motorists pay? In a series of analyses, Stephen Carroll and Allan Abrahamse estimated how a choice auto insurance plan would affect insurance premiums in each state. Their basic finding: Overall, choice auto insurance could reduce the price tag for auto insurance by about 30 percent.

Approach

To understand the cost effects of choice auto insurance, the researchers estimated how a plan that offers a choice between tort and no-fault would affect the costs of auto insurance in each state that now relies on the traditional tort system. The plan they analyzed is *absolute no-fault*, the most extreme version of choice: Motorists may never sue, or be sued, for noneconomic loss. Thus, these estimates suggest the upper bound on the savings that can be accomplished in each tort state via the choice approach.

The researchers also estimated the cost effects of a choice plan in each state that already has some form of no-fault auto insurance. These estimates suggest the upper bound on the savings that can be accomplished in current no-fault states by extending the no-fault concept to its limit.

Results for Each State

In the tort states, the costs of compensating accident victims on behalf of drivers who elect no-fault would be at least 60 percent less than they would have been if those drivers had been insured under the traditional tort system. These savings include both the compensation paid to accident victims and the transactions costs incurred in providing that compensation.

If these savings are passed on to consumers, drivers in tort states who select choice could buy personal injury coverages for about 60 percent less than they pay for those coverages under the tort system. Because coverages for personal injury and property damage each account for roughly half of total auto insurance compensation costs, this 60 percent reduction translates roughly into a 30 percent reduction in a driver's total auto insurance premium. Premiums are unchanged for motorists who choose to remain in the traditional tort system.

In most no-fault states, a choice plan would have a similar effect on the costs of compensating accident victims and, again assuming that insurer savings are passed on to consumers, would result in similarly lower insurance premiums. And in most no-fault states, drivers who preferred to retain their current

no-fault plan would pay no more for personal injury coverage than under the current system.

The savings an individual driver will realize from a choice system do not depend on the proportion of uninsured drivers in a state's current system, the proportion of previously insured who switch to absolute no-fault, or the proportion of the previously uninsured who switch to absolute no-fault. The effects of the plan on the total costs of auto insurance do depend on how many drivers choose to switch to the absolute no-fault option.

Nationwide, the reductions in personal injury premiums resulting from choice could be enormous. For example, if every currently insured driver in the country were to choose absolute no-fault, total auto insurance premiums in 1993--the last year for which data are available--would have been \$26 billion lower. The table shows the relative savings for motorists in each state.

In addition to the savings in premiums, choice has another important cost effect. Because the no-fault premium is much lower than the premium for mandatory coverage under a tort system, some motorists who chose to drive without insurance under tort will choose no-fault. These uninsured drivers who switch to no-fault could contribute \$1 billion to \$4 billion to the compensation system nationwide.

Automobile Insurance Savings in Each State Under Choice¹

State	% Premium Savings for All Motorists (assumes 50% of insured motorists choose absolute no-fault)	% Premium Savings for Low-Income Motorists (assumes 50% of insured motorists choose absolute no-fault)	Total savings, \$ millions (assumes all insured motorists choose absolute no-fault)
Alabama	18	38	178
Alaska	18	29	33
Arizona	37	53	533
Arkansas	28	47	436
California	35	53	5622
Colorado	31	47	282
Connecticut	41	57	678
Delaware	41	57	48
Florida	32	44	1388
Georgia	24	37	387
Hawaii	45	55	229
Idaho	24	48	76
Illinois	23	43	772
Indiana	28	45	488
Iowa	27	48	187
Kansas	18	34	68
Kentucky	14	21	40
Louisiana	48	64	588
Maine	31	51	114
Maryland	34	58	491
Massachusetts*	41	57	1154
Michigan	18	38	287
Minnesota	32	48	483
Mississippi	28	44	347
Missouri	28	44	425
Montana	23	37	74
Nebraska	25	45	113
Nevada	28	38	184
New Hampshire	28	42	92
New Jersey	28	39	148
New Mexico	33	52	173
New York	38	64	1244
North Carolina	22	47	688
North Dakota	37	57	37
Ohio	29	47	646
Oklahoma	24	48	278
Oregon	29	43	272
Rhode Island	24	37	104
South Carolina	23	41	103
South Dakota	28	52	282
Tennessee	24	58	61
Texas	28	48	281
Utah	28	54	188
Vermont	21	38	31
Virginia	24	38	24
Washington	37	53	821
West Virginia	27	48	382
Wisconsin	31	53	443
Wyoming	41	64	41
All states	31	48	28100

¹ The choice plan examined here is described in J. O'Connell, S. J. Carroll, M. Horowitz, and A. Abrahamson, "Consumer Choice in the Auto Insurance Market," *Mayland Law Review*, Vol. 32, 1993. Reprinted as RAND RP-254, 1994.

* Insurance system changed since January 1, 1988.

The mission of the Institute for Civil Justice is to help make the civil justice system more efficient and more equitable by supplying policymakers and the public with the results of objective, empirically based, analytic research. ICJ research is supported by pooled grants from corporations, trade and professional associations, and individuals; by government grants and contracts; and by private foundations. The Institute disseminates its work widely to the legal, business, and research communities, and to the general public.

For additional information about the Institute for Civil Justice, call Deborah Hensler at (310) 393-0411, x7803, or write to: 1700 Main St., P.O. Box 2138, Santa Monica, CA 90407-2138. Internet: Deborah_Hensler@rand.org.

A profile of the ICJ, abstracts of its publications, and ordering information can also be found on RAND's

home page on the World Wide Web (<http://www.rand.org/centers/icj>) and on RAND's gopher server (info.rand.org).

RAND research briefs summarize research that has been more fully documented elsewhere. This research brief describes work done in the Institute for Civil Justice and published as follows: S. J. Carroll, J. S. Kakalik, N. M. Pace, and J. L. Adams, *No-Fault Approaches to Compensating People Injured in Automobile Accidents*, R-4019-ICJ; S. J. Carroll and J. S. Kakalik, "No-Fault Approaches to Compensating Auto Accident Victims," *The Journal of Risk and Insurance*, Vol. 60, No. 2, 1993, reprinted as RP-229; J. O'Connell, S. J. Carroll, M. Horowitz, and A. Abrahamse, "Consumer Choice in the Auto Insurance Market," *Maryland Law Review*, vol. 52, 1993, reprinted as RP-254; A. Abrahamse and S. J. Carroll, *The Effects of a Choice Auto Insurance Plan on Insurance Costs*, MR-540-ICJ; J. O'Connell, S. J. Carroll, M. Horowitz, A. Abrahamse, and D. Kaiser, "The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance," *Maryland Law Review*, Vol. 54, No. 2, 1995; J. O'Connell, S. Carroll, M. Horowitz, A. Abrahamse, and P. Jamieson, "The Comparative Costs of Consumer Choice for Auto Insurance in All Fifty States," *Maryland Law Review*, forthcoming.

RAND's Home Page

Issue Paper

September 1996

The Effects of Proposition 213 on the Costs of Auto Insurance in California

Stephen J. Carroll and Allan F. Abrahamse

What Is Proposition 213?

The cost of automobile insurance has been a major public policy issue in California, as in many other states, for more than a decade. A variety of public and private organizations and individuals have proposed alternative, purportedly less expensive, automobile insurance plans. But, to obtain the savings from such plans, the state would have to limit the compensation traditionally provided to people injured in auto accidents. To date, policymakers confronted with this trade-off have not been willing to limit accident victims' compensation rights.

Proposition 213, the Personal Responsibility Act of 1996, has qualified for the November 1996 California ballot. The proposition differs from previous proposals in that it would limit the compensation rights of only those people who were breaking certain laws when they were injured. If approved, the proposition would bar drunk drivers and uninsured motorists from compensation for any non-economic losses^[1] resulting from auto accident injuries. It would also bar compensation for any loss incurred by felons who were involved in auto accidents while committing crimes or fleeing from them.^[2]

We estimated the likely effects of the proposition's provisions regarding uninsured or drunk drivers on the costs of private-passenger auto insurance. Because of data limitations, we did not consider the provisions' effects regarding felons or its effects on the costs of commercial auto insurance.

Key Findings

Our analyses suggest that the proposition would reduce auto insurance costs. If current claiming, negotiating, and insurance-purchase patterns persist, the proposition would reduce auto insurers' compensation costs for personal injuries by about 10 percent relative to the costs under California's current auto insurance rules. Given the past relationship between compensation costs and auto insurance premiums in California, this difference would translate into a reduction of about 5 percent in the average California driver's auto insurance premiums.

To put this estimate in perspective, we estimated what auto insurance premiums would have been in 1994, the most recent year for which we have data on total auto insurance premiums, if the proposition had been in force then. Statewide, California drivers' auto insurance premiums would have been about \$550 million lower if the proposition had been in force in 1994, a reduction of roughly \$40 to the average California insured driver.

Our results address relative costs; they show the difference between what will happen if the current system is retained and what would occur if the proposal is adopted. We do not suggest that auto

insurance costs will necessarily fall if California adopts the proposal. Proposition 213 may not reverse the long-term trend toward higher auto insurance costs. Rather, we suggest that Proposition 213 will slow the rate of growth in premiums so that future premiums would be roughly 5 percent less, on average, than they would be if the current system is not modified.

Our results address the effects of the proposition on the average California driver. Both the expected costs of insuring a driver under the current auto insurance system and the likely effects of the proposition vary from one part of the state to another. For example, the uninsured-motorist rate is much higher in urban areas than in rural areas. Consequently, the savings that would result from limiting compensation to uninsured drivers injured in auto accidents would be greater in urban areas.

Because approval of the proposition could engender changes in behavior, we recalculated our estimates under different sets of assumptions incorporating such changes. We also explored the sensitivity of these results to sampling error. Although the precise estimates vary from one set of behavioral assumptions to another, the results generally suggest that the proposition would cut the costs of compensating auto accident victims by 10 to 13 percent. Thus, our basic conclusion--that Proposition 213 would result in savings of about 5 percent on the average driver's auto insurance premiums--holds for all the alternatives we considered.

The Probable Effects of Proposition 213: Detailed Discussion

The traditional rules of the tort system govern recovery for auto accident injuries in California. An accident victim may seek compensation for all economic and non-economic losses from the driver who caused the accident. However, the victim is entitled to compensation only to the degree that the other driver is responsible for the accident.

Proposition 213 would eliminate compensation for non-economic losses to uninsured motorists and to drunk drivers injured in auto accidents. The proposition would not affect the rights of these drivers to compensation for economic losses. Nor would it affect the compensation rights of any other person injured in an auto accident--insured, sober drivers; passengers; pedestrians; bicyclists; etc.--including passengers injured while riding in cars operated by uninsured or drunk drivers.

In sum, the only accident victims that would be affected by the proposition are

- uninsured or drunk drivers injured by an insured driver
- drunk drivers covered by uninsured-motorist insurance injured by a negligent, uninsured motorist.

The savings achieved by the proposition would be the amount of compensation for non-economic loss that would be paid to these victims under the current law, plus the transaction costs--claims handling and defense costs--that insurers would have incurred in providing that compensation.

To estimate the effects of Proposition 213, we used data derived from a representative sample of California auto-accident injury claims closed with payment during 1992.^[3] For purposes of the analysis, we assume that the distributions of accidents, losses, and claimants reported in those data are representative of the corresponding future distributions. We also assume that, in the future, 30 percent of California drivers will be uninsured and that 90 percent of insured drivers will purchase uninsured-motorist coverage.

Given these assumptions, we estimate that about 11 percent of future California auto accident victims will be uninsured drivers injured by an insured driver. Another 2 percent of future victims will be insured drunk drivers who are either injured by another insured driver or are injured by an uninsured motorist and have uninsured-motorist coverage. In all, the proposition would bar compensation for non-economic loss to about 13 percent of auto accident victims. If the costs of compensating uninsured or drunk drivers hurt in auto accidents are reduced by the average compensation for non-economic loss paid California drivers hurt in auto accidents, plus the associated transaction costs, the total costs of

compensating auto accident victims would fall about 10 percent.

Personal-injury coverages account for about half of auto-injury premiums; property-damage coverages account for the other half. Thus, a 10 percent reduction in the costs of compensating auto accident victims translates into a 5 percent reduction in total auto insurance premiums. In 1994, total auto insurance premiums in California added up to more than \$11 billion. Accordingly, if Proposition 213 had been in force then, the costs of auto insurance in 1994 would have been about \$550 million lower:

- Drivers denied compensation for non-economic losses because they were drunk or uninsured when they were injured would have lost about \$360 million. (Because some accident victims are represented by attorneys paid on a contingency fee basis, a cut of \$360 million in accident victims' gross compensation would be divided between the victims--in the form of lower net compensation--and attorneys--in the form of lower fees.)
- Because insurance companies would have faced smaller claims from drunk and insured drivers injured in accidents, they would have had to pay about \$70 million less in claims handling and defense costs.
- Finally, if insurance companies' other costs (overhead expenses, selling expenses, taxes, and license fees) vary in proportion to premiums, the companies would be able to cut premiums \$118 million and still earn the same rate of profit.

Possible Behavioral Responses to Proposition 213

The estimates described above assume that past behaviors persist. But it is possible that people will change their behavior if Proposition 213 is adopted. We speculated about what some of these possible behavioral changes might be, modified our model to reflect alternative behavioral assumptions, and re-estimated the proposition's effects. We emphasize that we have no evidence that any of these behavioral changes *will* occur if the proposition is approved. Our purpose is to identify the extent to which our estimates are sensitive to the behavioral assumptions that underlie the calculations.

It is possible that the claiming behavior of uninsured or drunk drivers might change if they could no longer obtain compensation for non-economic loss. We have found evidence of extensive excess claiming for medical costs in auto personal-injury cases across the United States, and particularly in California.^[4] California's current system encourages excess claiming as a means for leveraging greater compensation for non-economic loss; by eliminating that incentive to affected drivers, Proposition 213 would discourage fraudulent or excessive claims. At the same time, many accident victims rely on compensation for non-economic loss for the funds needed to pay their attorney; eliminating this source of funds to affected drivers may reduce their ability to obtain an attorney and, consequently, may discourage some legitimate claims.

The civil justice policy implications of reducing the frequency of excessive claims are very different from the policy implications of reducing the frequency of legitimate claims. But from a cost perspective, the two look the same: Fewer claims imply lower costs.

To estimate how reducing the frequency of claims--excessive claims, legitimate claims, or some combination--would affect costs, we assumed that adoption of Proposition 213 would result in either a 25 percent or a 50 percent reduction in the frequency of claims by drunk and uninsured drivers, and estimated what the savings would be in each case.

The negotiating behavior of accident victims, of their attorneys, or of claims adjusters might change if the proposition is adopted. In many cases, objective measures of an accident victim's non-economic losses or of the insured's negligence or both are not available and are determined in the course of negotiations. Our data reflect the results of those negotiations as they are conducted in the context of California's current insurance system. It is possible that under the proposition those involved in resolving a claim by an uninsured or drunk driver will agree on a compensation figure that is less than

what would have been paid under the current system, but not by the full amount that our data suggest is being paid for non-economic loss.

To estimate how a partial, rather than full, elimination of compensation for non-economic loss to uninsured or drunk drivers would affect our estimates, we assumed that, despite the formal provisions of Proposition 213, uninsured or drunk drivers injured in auto accidents would be compensated for either 25 percent or 50 percent of their non-economic loss and estimated what the savings would be in each case.

Adoption of the proposition could also change some drivers' insurance-purchase behavior. The potential costs of going uninsured would be increased--uninsured drivers would not only be in violation of the law, they would not have access to compensation for non-economic loss if they were injured in an auto accident. At the same time, the proposition would reduce the costs of purchasing auto insurance relative to the current system. It is possible that some drivers who would go uninsured under the current system will choose to purchase insurance under the proposition.

To estimate how an increase in the fraction of drivers who purchase insurance would affect our estimates, we assumed that either 25 percent or 50 percent of the uninsured-motorist population chooses to purchase insurance and estimated what the savings would be in each case.

Our estimates are based on data obtained in a sample of claims; they are subject to sampling error. Some of these claims were high-dollar claims, and it is possible that these high-dollar claims had an undue influence on our results. However, high-dollar claims are a fact of life, and although they are relatively rare, they might indeed have a real influence on savings under the proposition.

To examine the possible effect of sampling error on our results, we estimated the proposition's cost effects under three very different assumptions about the sample: (1) We used all the cases in our sample. (2) We dropped the 10 percent of all cases with the greatest economic loss. (3) We doubled the economic loss of cases in the top 10 percent of all cases. It is unlikely that the effect of sampling error in a file of 6,000 cases would be as great as the effect of discarding or doubling the top 10 percent of the sample.

In sum, we considered the sensitivity of our results to three alternative assumptions about the values of each of four factors: claim frequency, the fraction of non-economic loss compensated, the percentage of uninsured drivers induced to purchase insurance, and the frequency of very large claims. We calculated relative savings under Proposition 213 under all 81 combinations of the four factors over the three levels discussed above.

Table 1 shows the results of these calculations.

Table 1
Relative Proposition 213 Savings (%) Under Alternative Assumptions

Claiming Rate	Proportion of Non-Economic Loss Compensated	Percentage of Uninsured Drivers Getting Insurance	Cost Savings Estimates		
			Nominal	Drop Top 10%	Double Top 10%
No claiming reduction	No non-economic loss	0%	10.0	9.0	10.8
		25%	11.2	10.4	12.2

		50%	12.4	11.9	13.6
	25% of non-economic loss	0%	7.5	6.7	8.1
		25%	9.2	8.7	10.1
		50%	11.0	10.7	12.1
	50% of non-economic loss	0%	4.9	4.5	5.3
		25%	7.3	6.9	7.9
		50%	9.6	9.4	10.5
25% claiming reduction	No non-economic loss	0%	11.4	10.5	12.2
		25%	12.3	11.7	13.3
		50%	13.2	12.8	14.4
	25% of non-economic loss	0%	9.5	8.8	10.1
		25%	10.8	10.3	11.7
		50%	12.2	11.9	13.3
	50% of non-economic loss	0%	7.6	7.1	8.1
		25%	9.4	9.0	10.1
		50%	11.1	10.9	12.1
50% claiming reduction	No non-economic loss	0%	12.8	12.0	13.6
		25%	13.4	12.9	14.4
		50%	14.1	13.7	15.2
	25% of non-economic loss	0%	11.5	10.9	12.2
		25%	12.4	12.0	13.3
		50%	13.3	13.1	14.5
	50% of non-economic loss	0%	10.3	9.8	10.9
		25%	11.4	11.1	12.3
		50%	12.6	12.4	13.7
Maximum			14.1	13.7	15.2
Top quartile			12.4	12.0	13.5

Data and Methods

We obtained data from closed-claim surveys conducted by the Insurance Research Council.[5] These surveys obtained detailed information on a random sample of about 6,000 California auto-accident injury claims closed with payment during 1992 under the principal auto-injury coverages. The data describe each victim's accident, resulting injuries and losses, and the compensation obtained from auto insurance. We combined data from several sources to estimate insurers' transaction costs,[6] including both allocated loss-adjustment expenses--costs, primarily legal fees and related expenses, incurred on behalf of and directly attributed to a specific claim--and unallocated, or general claim-processing costs, for each line of private-passenger auto insurance.[7]

We estimated the effects of Proposition 213 on insurance costs by comparing the costs of compensating the accident victims in the sample under the current insurance system with the costs of compensating the same victims, for the same injuries and losses, under Proposition 213. We included all accident victims--insured and uninsured drivers, passengers, pedestrians, bicyclists, people injured in single-car accidents, etc.--in these calculations.

We assumed that the proportion of drivers who will purchase each available type of auto insurance personal-injury coverage and, by implication, the proportion of drivers who will go uninsured under California's current system will be about the same as those today. Given these assumptions, we computed the probability that an accident victim will have access to compensation under each coverage, multiplied by the average compensation paid California accident victims under that coverage, and summed over all coverages to estimate insurers' expected compensation costs under the current system. We then estimated a *break-even premium* for the current system--the amount insurers would have to charge the average insured driver to just recover what they paid out in compensating victims and the transaction costs they incurred in providing that compensation.

We assumed that drivers would make the same insurance-purchase decisions under the proposition and, by implication, that the same proportion of drivers would go uninsured. We computed insurers' expected compensation costs under these assumptions, and estimated the break-even premium under the proposition--the amount insurers would have to charge insured drivers to just recover compensation costs.



U S A A

STATE LEGISLATIVE AFFAIRS

915 "L" Street, Suite 1100

Sacramento, CA 95814

Phone: 916/552-6715

FAX: 916/442-1328

MESSAGE FOR:

LOCATION:

PHONE:

Jim Scurrant
Rep Brian Porter's Office

FROM:

James R. Jinks, Legislative Counsel

DATE:

OPERATOR:

Diana J. Newman

PAGES TO FOLLOW:

12

CONFIDENTIALITY NOTICE

The information contained in this facsimile transmission is a **CONFIDENTIAL COMMUNICATION**. It is intended solely for the use of the recipient identified above. If you are not the intended recipient, you are hereby notified that reading, copying, or distributing this transmission is **STRICTLY PROHIBITED**. The sender has not waived any applicable privilege by sending the accompanying transmission. If you have received this transmission in error, please notify the sender immediately by phone.

COMMENT:

*Thought These might be of
some interest,*

SCOMM

101A:32

Protected Classes. What are the protected classes? They are identified by federal statutes, state statutes, and local ordinances. Under Title VII of the Civil Rights Act of 1964 [correct?], it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, or sex.* [Make sure this quote is correct.] Under the Age Discrimination in the Employment Act of.... [is this a different act? If so, name, date...], *employees between the ages of 40 and 70* [quote valid?] are designated as a protected class. The American with Disabilities Act [is this a different act? If so, name, date...] protects *people with handicaps or disabilities (including HIV+ status) who can perform the essential functions of the job with reasonable accommodation.* [quote valid?] Some state statutes and local ordinances include sexual orientation and marital status as protected classes. The laws against employment discrimination do not protect only minorities. For example, Caucasians receive the same protection from Title VII as racial minorities, and, absent a legitimate affirmative action program, they may sue if race was a motivating factor in an employment decision. In summary, managers should be alert that they do not make employment decisions based on a person's...

- Race
- Color
- Religion
- National Origin
- Sex
- Age
- Handicap or Disability (in certain instances)

Jurisdictional Limits. The federal anti-discrimination laws do not apply to small employers. Under Title VII and in the Americans with Disabilities Act, an employer must have **at least fifteen employees** for the statutes to apply. Under the Age Discrimination in Employment Act, the employer must have **twenty** employees. State versions of the federal anti-discrimination laws have their own jurisdictional limits but most are similar to the federal thresholds. [true??]

Damages. Prior to legislative amendments in 1991, the only remedies that a successful, aggrieved party ("plaintiff") could obtain for a proven violation of Title VII were equitable in nature. For examples, the plaintiff might receive back pay, reinstatement to a lost position, front pay if reinstatement was not available or appropriate, and the payment of reasonable attorney's fees and costs. In addition, the ADEA [what do these letters stand for????] provided for liquidated damages [definition?] if the employer's violation was found by a jury to be "willful." It was (and is) also possible for a court to impose other types of injunctive relief, such as requiring a company to instruct all managers or employees in non-discriminatory employment practices.

In 1991, our elected Congress amended the anti-discrimination statutes to authorize a broader range of remedies. Today successful plaintiffs are entitled to all the remedies identified above, plus the full range of compensatory damages previously available in personal injury litigation. This means that juries and courts [??] may require employers to pay for lost future earning capacity, emotional distress and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Plaintiffs may also request punitive damages when the conduct of the defendant is sufficiently egregious to warrant them. Unlike compensatory damages, which are intended to compensate the plaintiff for any emotional or pecuniary loss, the purpose of punitive damages is to punish the defendant and to make the defendant serve as an example for others. Under the federal employment discrimination laws, the total of compensatory and punitive damages are limited as follows:

<u>Number of Employees</u>	<u>Damage Limit</u>
15-100	\$50,000
100-200	\$100,000
200-500	\$200,000
500+	\$300,000

The state and local versions of Title VII provide similar rights and remedies.

Individual Liability. It is common for plaintiffs to name owners, managers, and supervisors as separate defendants in employment discrimination cases. Most--but not all--federal courts that have addressed the issue have ruled that only the corporation/employing entity is subject to suit for employment discrimination. The state counterparts of the federal legislation may authorize individual liability, depending on the language of the statute and the interpretation of that language by the state courts. Needless to say, the stress of a lawsuit is compounded when managers and supervisors have to worry about their individual assets being at risk.

In summary on the law of the land, and repeating the point made at the start of this chapter, it is difficult to every really "win" a suit involving employment discrimination. Far better to prevent it.

Types of Employment Discrimination Claims

Disparate Treatment. The most common claim made against businesses is for dissimilar ("disparate") treatment. An employee or potential employee claims that an employer treated her or him unfavorably or less favorably because of her or his membership in a protected class. For example, a male employee might allege that his employer promoted others over him because of his religion. Disparate treatment claims can be made by individuals, groups of people, or via a class action in which one person or a small group presumes to speak for a larger group as a whole. [is this description of class action O.K.??]

In a disparate treatment case, the ultimate question is whether the person making the claim's membership in a protected class was a factor in the adverse employment decision. Under federal law, the question that would be put to the jury is whether or not the person's membership in a protected class was a "determining factor" in the adverse decision. Some states use a lower standard than the federal law. Such states say an employer is liable if the person's membership in a protected class was a "substantial factor" (rather than a determining factor). In these kinds of cases, an employer must make its case by demonstrating a legitimate, *non-discriminatory* reason for the adverse decision, e.g. why the person was fired, or not hired, or demoted, or not promoted. **Solid documentation regarding substandard performance** [or qualifications????] is the best way to demonstrate non-discriminatory reasons for adverse decisions.

Ch. 8

29 § 216

who acquired them : written assurance from were produced in com of this chapter, and value without notice o be deemed unlawful;

(2) to violate any of or section 207 of this of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods. (June 25, 1938, c. 676, § 15, 52 Stat. 1068; Oct. 26, 1949, c. 736, § 13, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1949 Amendment

Amendment of section by Act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see note set out under § 202 of this title.

Transfer of Functions

All functions of all other officers of the Department of Labor and functions of all agencies and employees of such Department were, with the exception of the functions vested by the Administrative Procedure Act (§ 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by such Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg. Plan No. 6, §§ 1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in note under § 611 of Title 5, Executive Departments and Government Officers and Employees.

Post-it® Fax Note	7671	Date	# of pages 4
To	Jim	From	Mike Ford
Co./Dept.		Co.	
Phone #		Phone #	
Fax #	3834	Fax #	2029

'mination Against

Stat. 791, provided political subdivision agency and which : an employee with terms or conditions vary 19, 1985, the

anyone who violates section 7 of the Fair Labor Standards Act of 1938 (section 207 of this title) shall be held to have violated section 15(a)(3) of such Act (subsec. (a)(3) of this section). The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act (subsec. (a)(3) of this title)."

FEDERAL PRACTICE AND PROCEDURE

Attempt of Congress to withdraw jurisdiction from courts, see Wright, Miller & Cooper: Jurisdiction 2d Pleading claim for relief, see Wright & Miller § 1239.

WEST'S FEDERAL FORMS

Complaint to enjoin violations, see § 1663.

WEST'S FEDERAL PRACTICE MANUAL

Federal Wage and Hour Law, see § 1451 et seq. Information in criminal action, see § 1451.87.

CODE OF FEDERAL REGULATION

Written assurances, statement of policy, see 29 et seq.

LIBRARY REFERENCES

Offenses and prosecutions under wage and hour regulations, see Labor Relations § 1641 et seq. Offenses and prosecutions under wage and hour regulations, see C.J.S. Labor Relations § 1943 et seq.

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer

Complete Annotation Materials, see Title 29, U.S.C.A.

29 § 216

LABOR

Ch. 8

who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid

minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after Aug. 8, 1966, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed \$10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

Complete Annotation Materials, see Title 29, U.S.C.A.

(1) Stat
(2) Sec
whic
by t
(3) a vi
repe
this
Any a
the an
be fin
notice
with t
that t
occur
penalt
after
tion 5
by the
for vic
as per
towar
violati
in acc
title.
212 of
of the
(June
52, §
919; 1
1263;
Pub.L.
87-30,
Title
§ 6(c)
95-15;
§ 9, 1
§ 310

Refer
Eff
ferred
note
Effec
Am
sectio
sectio
Effect
An
sectio
sectio

To: Steve Brandt

Fm: Jim Sourant

April 2, 1997

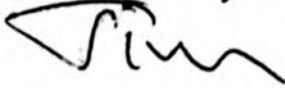
Dear Steve,

I need your help. Please have Romney Brain fax us at 907-465-3834 the federal employment statute (or the citation to it) referred to on pages 2-3.

We are informed by the legislative research people that under federal statutes, there can be no punitive or noneconomic damages for pain and suffering, emotional distress, etc. in the context of wrongful employment practices. Experience has taught me that I cannot always rely on their opinions. I need to know who is right pretty pronto.

If anyone needs to call me, please do so at 907-465-4930, since this is official business. I appreciate whatever you can do to assist. If you cannot get me a citation by this afternoon, please disregard this note.

Thanks for all your help,



Post-It® Fax Note 7671		Date: 4.2.97	# of pages: 1
To: Steve BRANDT	From: Jim Sourant		
Co./Dept.	Co. Rep. Porter		
Phone #	Phone #		
Fax # 360-378-6651	Fax # 907-465-3834		

To: Steve Brandt

Fm: Jim Sourant

April 2, 1997

Dear Steve,

Thank you for the materials that we received yesterday. Your efforts underscore even further for the need of tort reform.

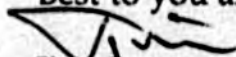
The 1991 federal anti-discrimination statutes have opened a pandora's box for the job-creating private sector. The "self-snagging" (original thought, but you can use it if you want) effect of such laws on American industry is putting us at a global competitive disadvantage. Don't let me get started on this.....

I fax herewith an important from the March 31 op-ed page of The Wall Street Journal, which you will no doubt find useful in supplementing your message.

I also pass along an editorial from the same newspaper in case you missed it. It is about the American Bar Association's unsurprising opposition to tort reform. Wrongful employment practices are the wave of the future for American tort lawyers, so your book is very timely. One ray of hope is that today only 36% of practicing lawyers in this country belong to the ABA, down from a much higher number from 20 years ago.

Steve, we are really under the gun here from now to May 15th, so I will not be of much help to you. Using my name certainly won't do much to help market your book, but feel free to use my name as a "tort reform activist and retired (recovering?) lawyer." You can attribute the thought that "this book is a life ring to businesses of all sizes faced with the self-snagging effects of current employment discrimination law..." Please massage the thought any way you want, and send me a bill for your time.

Best to you and your clan,



Jim Sourant

Harassment 101: How to Handle Complaints

Sexual harassment law demands that executives not only avoid inappropriate words and actions, but also take seriously complaints of harassment by their colleagues, even their superiors. A case in point: Earlier this month CNA Financial Corp. announced the resignation of its top life-insurance executive, Jack Kettler, and his deputy, Robert Teske. Mr. Kettler was accused of making "offensive comments" to two female employees; Mr.

Manager's Journal

By James B. Mintz

Teske, of failing to act on the women's complaints.

Equal Employment Opportunity Commission guidelines require employers to investigate complaints of sexual harassment "promptly and thoroughly." Based on a review of relevant court cases and on my investigative work for corporate counsel over the past two decades, here are some practical suggestions for minimizing the legal, internal and public-relations fallout from sexual harassment charges:

• *Move quickly to begin an investigation.* It's tempting to wait until the dust settles, but companies can help protect themselves from liability by starting an investigation immediately—preferably within 24 hours of a complaint. In the case of *Nash v. Electrospace System Inc.*, a federal district judge praised the accused company for

wrapping up its investigation quickly. "The investigation and transfer were accomplished within one week of [the plaintiff's] first complaints," the court noted. "Surely this [promptness] reflected a prudent response to an unpleasant situation." An appeals court, upholding the district court's ruling in favor of Electrospace, called the company's response "prompt and sensitive."

• *Interview potential witnesses, as well as people who may be aware of a pattern of harassment.* Such testimony is critical, especially when the alleged harasser denies the charge. And co-workers can provide important corroborating or exculpatory details, such as each individual's demeanor at the time of the alleged act, whether the harasser had the opportunity to commit it and whether there existed a broader pattern of behavior. If the accuser is a young female secretary, for example, an investigator should consider interviewing her young female predecessors.

• *Carefully regulate the alleged harasser's contact with accusers and potential witnesses.* Soon after a female employee of Astra USA filed a sexual harassment complaint against the unit's chief executive, he reportedly called her and asked if she felt her job was "in jeopardy" and if she "felt pressured." Later, the CEO reportedly summoned a female employee to his hotel room, told her he was going to fire another complainant, then directed her to sign an affidavit stating that he had not harassed her. Such overtures are clearly inappropriate, but even routine contact should be

minimized or prevented until the situation is resolved. If it's practical, remove both accuser and accused from the workplace, making clear to their colleagues that the separation does not imply any prejudgment but is simply a way to minimize pressure on everyone concerned.

• *Choose the sequence of interviews carefully.* The first investigative step is interviewing the accuser to learn about specific alleged acts, dates and other details. If the alleged harasser is likely to cooperate with the investigation or admit the harassment, interviewing him next could lead to a quick, informal resolution of the situation. But if the alleged harasser is considered hostile and the accuser says there is a pattern of behavior, it's probably best to interview other witnesses first.

• *Conduct interviews far from prying eyes.* While an investigation is in progress, employee interest in who is under suspicion, who is assisting the investigation and what they're saying is always intense. Even an interview's duration may be fodder for office gossip. To limit speculation and preserve confidentiality, conduct all interviews in a private area, preferably off site. Ask all employees, whether interviewed or not, to refrain from rumor and speculation, which can only hurt morale, productivity and the company's public image.

• *Ask for documents and other hard evidence.* In one case I worked on, a series of inappropriate messages in birthday cards from a boss to an employee were an important break in the investigation. Ask the complainant, alleged harasser and wit-

nesses for any documents—notes, hotel receipts and the like—that might corroborate or refute an accuser's claims. Voice and e-mail messages can also provide concrete evidence that harassment has occurred.

• *Reveal details about the allegation to interview subjects only when absolutely necessary.* A company risks a defamation charge if "raw," unconfirmed information obtained during a sexual harassment investigation leaks.

• *Investigate thoroughly, but don't let investigations drag on.* A major law firm, Baker & McKenzie, challenged the veracity of a secretary who complained about a partner's alleged groping—only to find later that a number of similar complaints had been made against the same partner. In 1994 a jury ordered the firm to pay its former employee several million dollars. In press interviews after the verdict, one juror cited the firm's failure to follow up on the prior complaints. Yet an overlong, overzealous investigation can do as much damage as a perfunctory one. If victims believe that a company's internal resolution process has failed because the investigation drags on, they may go outside the organization to seek satisfaction. That can escalate the seriousness of a situation that could have been resolved had the investigation been completed in a timely manner.

A badly managed sexual harassment investigation can seriously damage any organization—internally, in the courts and in the public eye. But a prompt, thorough, professional investigation can help preserve, even enhance, the credibility of its leadership, the morale of its workers and the value of its stock.

Mr. Mintz runs a corporate investigation company based in New York and Washington.

TWST 3.31.97

STANFORD UNIVERSITY
GRADUATE SCHOOL OF BUSINESS

P.O. Box 884
Friday Harbor, WA. 98250
360-378-3494
FAX: 360-378-6651
email:brandtsc@gmex.com

STEVEN C. BRANDT, Ph.D.
Senior Lecturer in Management Emeritus

March 27, 1997 ~~VIA FAX~~

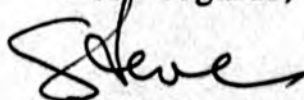
Dear Jim,

I think I have mentioned our new book, ***STAY OUT OF COURT & IN BUSINESS: Every Manager's Guide to Minimizing Legal Troubles.*** I am working with a Seattle law firm on this important material; we feel it fills a significant, unmet need. As I recall you seemed to respond to the concept with interest. I am wondering if you would be willing to take a look at a few of the finished chapters with an eye to providing a testimonial that we might include on the cover or in other promotional materials? On the chance that you will say, Yes!, I am enclosing two chapters. (Maybe Porter would be interested too.)

The book (table of contents also enclosed) is aimed at managers of going-concerns, in general. And I personally think every corporate director should inhale the chapters. I have been on three public boards, and I didn't really know this legal, operating material. So, like everyone else, I was dependent on an attorney. And often, he/she wasn't a business person.

If your time doesn't permit, no sweat. (I wanted to fax you first for an o.k., but Joey said "no fax.")

Best regards,


Steve

SAMPLE TESTIMONIALS FOR: *Stay Out of Court & In Business* by *STAFFORD FREY COOPER & Steven C. Brandt*

FAX
360
378
6651

Circle one or more you find comfortable; make any modifications you wish. Or compose a custom testimonial of your own in the space at the bottom.

1. The first practical book I have seen on this vital, even strategic, subject. Terrific. *HIGHLY* recommended.
 2. At last, a realistic approach to dealing with legal threats. This book is a must for anyone in business, starting with corporate directors.
 3. Crisply covers the main areas in which problems arise. Gave me the right questions to ask, for a change. Refreshing.
 4. Excellent coverage of a touchy subject. Easy to read, even interesting.
 5. This book would have saved me a lot of time and trouble. I wish it had been published two years ago.
 6. Managing a growth company is complicated enough without legal problems. This book is a wonderful primer for busy people.
 7. Told me exactly what I needed to know on very important subjects for my company. I am giving a book to every one of my managers.
 8. A valuable combination of basic legal knowledge and business understanding. This is an important book.
 9. Great read. I never thought I would enjoy getting up to speed on legal issues that affect our company. This book is going to be money in the bank.
 10. The material here will add to our competitive advantage. I hope my competitors don't pick up the book!
 11. I am amazed at what I didn't know. This book is solid gold.
 12. Building a company? Better read this.
 13. Legal issues covered in English. What a relief. I believe this book ought to be mandatory reading for every MBA and entrepreneur in the Country.
 14. This small book speaks volumes. I think it will save us hundreds of thousands of dollars over the years ahead.
 15. The contents cover what business people need to know. We have to live with the law of the land. This books tells how to do it.
 16. Great preventive medicine. This book is going to make a difference.
 17. Business people like myself need to stop fighting the law and use it to enhance their company's competitive advantages. This book points the way.
 18. A lot of business people complaint about attorneys. This book has practical steps for reducing the time spent with them!
 19. Comprehensive and readable. I am recommending this book to all my clients. (Lawyer or CPA)
 20. Litigation has gotten out of hand. This book will help redress the balance. I found it of immense value and will use it throughout my company.
 21. A practical, very readable book on an essential subject that effects every business in the land every day.
 22. This is an outstanding book for every company director....and busy manager.
 23. Custom quote: _____
-

Stay
Out of Court
and
In Business

*Every Manager's Guide to Minimizing Legal
Troubles*

by
STAFFORD FREY COOPER
&
Steven C. Brandt



P.O. Box 1249, Friday Harbor WA 98250 • 800-360-6166

DRAFT

ABOUT THE AUTHORS

STAFFORD FREY COOPER is a law firm based in Seattle, Washington. The firm was established in 1905 and today it serves a diverse client base made up of manufacturers, retailers, wholesalers, and individuals. The members of the firm who served as the primary authors of this book have extensive experience in all phases of legal practice in a cross-section of industries ranging from software to clothing. They have prepared *Stay Out of Court & In Business* to provide practical guidance to people who are busy building companies. The attorneys are:

J. William Ashbaugh
Mikhael C. Bolasina
Romney R. Brain
Meredith Dorrance
A. Richard Dykstra
Michaelanne Ehrenberg
Thomas M. Fitzpatrick
Kenneth Hobbs
Larry E. McMullen
William L. Neal
James T. Yand

1-206-
623-9900

Steven C. Brandt assisted in the preparation of the book. He is an experienced entrepreneur, company president, author, company director, and faculty veteran of 21 years at the Stanford University Graduate School of Business in the heart of Silicon Valley. At Stanford he taught New Enterprises, Business Strategy, and Small Business Management to over 4,000 executives and MBAs during the '70s, '80s, and '90s. Brandt has BSME, MBA, and PhD degrees and he has written three popular business books—*Entrepreneurship in Established Companies*, *Entrepreneurship: The Ten Commandments for Building a Growth Company*, and, most recently, *Focus Your Business: Strategic Planning in Emerging Companies*. He also has a video series entitled, *Managing the Emerging Company*.

TABLE OF CONTENTS

DRAFT

Preface - by Steven C. ^{Brandt} Brain	6
Introduction - by Romney R. Brain	7

CHAPTERS

*A Manager's Guide To Minimizing Legal Troubles
related to:*

1. Employment Discrimination.....	13
2. Workplace Sexual Harassment.....	33
3. Employee Handbooks	57
④ 4. Intellectual Property & Proprietary Rights.....	79
⑤ 5. Risk Management	93
6. Product Liabilities.....	
7. Contracts	
8. Unfair Business & Trade Practices	
9. Litigation	
10. Choosing & Using Attorneys	

Also
Available

References:

I. Employee Handbook	
II. Legal Audit	
III. XYZ Case	
IV. Legal Citations.....	

DRAFT

Chapter 1

EMPLOYMENT DISCRIMINATION

Overview

It is virtually impossible for an employer to ever actually "win" an employment discrimination lawsuit when all the costs involved are considered. Such suits are usually disruptive to the ongoing life of a business, expensive to defend, and generally an unpleasant experience for everyone involved--from employees to supervisors to managers and executives. The only practical way to win in the area of employment discrimination is to conduct your business in a way that makes claims obviously frivolous in the first place.

Many people in management do not acquire a working knowledge of the law governing employment discrimination until a charge is filed with the EEOC (Equal Employment Opportunity Commission) or their company (and sometimes they, themselves) are sued. The horse is out of the corral at this point. The key to minimizing legal troubles on discrimination is a pervasive knowledge of the law, a steady, even compliance across an organization and over time, and thorough documentation. This can be accomplished by knowing the law, following the law, and committing your personnel-related activities to paper to create an evidence trail of your knowledge of and adherence to the law. There are two other chapters in this book that relate to employment discrimination: Chapter 2 on Workplace Sexual Harassment and Chapter 3 on Employee Handbooks.

The Law of the Land

The law pertaining to employment discrimination is complex. It differs from one federal circuit (geographic area) to another, from state to state, and from city to city. Therefore, There are potentially at least three overlapping laws (federal, state, and city) that may apply to any given employer in a particular circumstance. This chapter will provide you with a general overview of the law with a special emphasis on federal law because it is the senior law of the land [true?] and it applies to most businesses across the country.

At-Will Employment. The general rule in the United States is that employees who do not have written employment contracts are considered "at-will" employees. With at-will employees, an employer can terminate, demote, promote, or change the terms and conditions of the employment, with or without notice, and with or without cause. **The laws prohibiting employment discrimination constitute a major exception to the doctrine of at-will employment.** Under laws enacted by Congress and virtually every state in the United States, *it is unlawful for an employer to take adverse action against an applicant or employee that is motivated by the applicant's or employee's status as a member of a protected class.* Examples of adverse action can include termination of an [a longtime?] employee, refusal to hire an applicant, and less favorable treatment an employee with regard to pay, bonuses, promotions, or other terms and conditions of employment.

Protected Classes. What are the protected classes? They are identified by federal statutes, state statutes, and local ordinances. Under Title VII of the Civil Rights Act of 1964 [correct?], it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, or sex.* [Make sure this quote is correct.] Under the Age Discrimination in the Employment Act of.... [is this a different act? If so, name, date...], *employees between the ages of 40 and 70* [quote valid?] are designated as a protected class. The American with Disabilities Act [is this a different act? If so, name, date...] protects *people with handicaps or disabilities (including HIV+ status) who can perform the essential functions of the job with reasonable accommodation.* [quote valid?] Some state statutes and local ordinances include sexual orientation and marital status as protected classes. The laws against employment discrimination do not protect only minorities. For example, Caucasians receive the same protection from Title VII as racial minorities, and, absent a legitimate affirmative action program, they may sue if race was a motivating factor in an employment decision. In summary, managers should be alert that they do not make employment decisions based on a person's...

- Race
- Color
- Religion
- National Origin
- Sex
- Age
- Handicap or Disability (in certain instances)

Jurisdictional Limits. The federal anti-discrimination laws do not apply to small employers. Under Title VII and in the Americans with Disabilities Act, an employer must have **at least fifteen employees** for the statutes to apply. Under the Age Discrimination in Employment Act, the employer must have **twenty** employees. State versions of the federal anti-discrimination laws have their own jurisdictional limits but most are similar to the federal thresholds. [true??]

Damages. Prior to legislative amendments in 1991, the only remedies that a successful, aggrieved party ("plaintiff") could obtain for a proven violation of Title VII were equitable in nature. For examples, the plaintiff might receive back pay, reinstatement to a lost position, front pay if reinstatement was not available or appropriate, and the payment of reasonable attorney's fees and costs. In addition, the ADEA [what do these letters stand for????] provided for liquidated damages [definition?] if the employer's violation was found by a jury to be "willful." It was (and is) also possible for a court to impose other types of injunctive relief, such as requiring a company to instruct all managers or employees in non-discriminatory employment practices.

In 1991, our elected Congress amended the anti-discrimination statutes to authorize a broader range of remedies. Today successful plaintiffs are entitled to all the remedies identified above, plus the full range of compensatory damages previously available in personal injury litigation. This means that juries and courts [??] may require employers to pay for lost future earning capacity, emotional distress and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Plaintiffs may also request punitive damages when the conduct of the defendant is sufficiently egregious to warrant them. Unlike compensatory damages, which are intended to compensate the plaintiff for any emotional or pecuniary loss, the purpose of punitive damages is to punish the defendant and to make the defendant serve as an example for others. Under the federal employment discrimination laws, the total of compensatory and punitive damages are limited as follows:

<u>Number of Employees</u>	<u>Damage Limit</u>
15-100	\$50,000
100-200	\$100,000
200-500	\$200,000
500+	\$300,000

The state and local versions of Title VII provide similar rights and remedies.

Individual Liability. It is common for plaintiffs to name owners, managers, and supervisors as separate defendants in employment discrimination cases. Most--but not all--federal courts that have addressed the issue have ruled that only the corporation/employing entity is subject to suit for employment discrimination. The state counterparts of the federal legislation may authorize individual liability, depending on the language of the statute and the interpretation of that language by the state courts. Needless to say, the stress of a lawsuit is compounded when managers and supervisors have to worry about their individual assets being at risk.

In summary on the law of the land, and repeating the point made at the start of this chapter, it is difficult to every really "win" a suit involving employment discrimination. Far better to prevent it.

Types of Employment Discrimination Claims

Disparate Treatment. The most common claim made against businesses is for dissimilar ("disparate") treatment. An employee or potential employee claims that an employer treated her or him unfavorably or less favorably because of her or his membership in a protected class. For example, a male employee might allege that his employer promoted others over him because of his religion. Disparate treatment claims can be made by individuals, groups of people, or via a class action in which one person or a small group presumes to speak for a larger group as a whole. [is this description of class action O.K.??]

In a disparate treatment case, the ultimate question is whether the person making the claim's membership in a protected class was a factor in the adverse employment decision. Under federal law, the question that would be put to the jury is whether or not the person's membership in a protected class was a "determining factor" in the adverse decision. Some states use a lower standard than the federal law. Such states say an employer is liable if the person's membership in a protected class was a "substantial factor" (rather than a determining factor). In these kinds of cases, an employer must make its case by demonstrating a legitimate, *non-discriminatory* reason for the adverse decision, e.g. why the person was fired, or not hired, or demoted, or not promoted. **Solid documentation regarding substandard performance** [or qualifications????] is the best way to demonstrate non-discriminatory reasons for adverse decisions.

Disparate Impact. In a disparate impact case, a person challenges a presumably neutral policy or requirement by alleging that the effect of the policy or requirement has an adverse impact on a protected class and that the policy or requirement is **unnecessary for effective performance** of the job. For example, the employment requirement of a minimum height for firefighters was challenged [199X?] to the effect that the policy excludes a disproportionate number of women because they tend to be shorter than men. Further, the challenge included material to show that the height requirement was and is not necessary for effective performance of the job. [footnote citation here?] Although the height policy or requirement appeared neutral on its face, the requirement was deemed unlawful by the courts because its effect was discriminatory against a protected class. As a practical matter, disparate impact claims are quite rare in recent years.

Reasonable Accommodation. Employers have a legal obligation to show some flexibility with regard to a person's religious beliefs or disabilities. If an employee or potential employee can perform the "essential functions" of a job with "reasonable accommodation," then it is unlawful to discriminate against the person because of these factors. Determining what is an essential function and what constitutes reasonable accommodation are job-specific inquiries. For example.... [Could we have two examples here??? One which an employer won; one which an employee or potential employee won.] [Also, what is the situation today regarding mental handicap issues? Is this an emerging area of activity? Recent case?]

Retaliation. Federal law and most state laws prohibit an employer from retaliating against an employee who complains about discriminatory employment practices. Forms of retaliation include.....?????. For example, the courts in XYZ found that...???? Also, it is important to note that a person can still seek (and win?) recovery for retaliation even if it is found that the person's original complaint (that precipitated the retaliation) was without merit.

In summary on the types of claims, disparate impact is the most common claim made against businesses. However, although the basis of a particular claim may be employment discrimination, aggrieved, at-will employees also regularly include other issues such as breach of oral contract, breach of promise, breach of inferred promise ("promissory estoppel") [Mike: Is this O.K.?.], wrongful discharge, violation of public policy, and intentional or negligent infliction of emotional distress. These subjects are usually governed by state law.

The EEOC (Equal Employment Opportunity Commission)

In order to pursue a claim based upon the federal anti-discrimination statutes, the initiating party must first file a formal charge with the EEOC. The deadline for filing a charge is 180 days after the last occurrence of alleged discrimination. The deadline date is relatively easy to calculate in the case of a job termination or the non-issuance of a job offer; it is more difficult to calculate when it involves a continuing violation of some kind. Once a charge is filed, the EEOC may or may not investigate. Sometimes it will; other times it will wait 180 days and issue a right-to-sue letter to the initiating party. That party cannot file a lawsuit alleging a violation of a federal anti-discrimination law until after it has filed a timely charge with the EEOC and

received a notice of her or his right to sue. If the person suing goes to court without having received such a notice, there is grounds for a dismissal of the claim by the court.

If the EEOC decides to investigate, the intensity of its investigation will vary dramatically depending on the assigned investigator's workload and the publicity appeal of the claim. **It is difficult to predict what the EEOC will do.** Normally an employer will be given the opportunity to respond in writing to a specific charge and provide documentation in support of its position on the matter at hand. The EEOC may then contact witnesses and subpoena documents.

Should an employer use a lawyer or a human resource professional during the time a charge is pending before the EEOC? It depends. An employer needs *someone* knowledgeable about employment discrimination law to draft a response to the charge and otherwise cooperate with the EEOC's investigation if there is one. The key is to work with the EEOC in such a way as to ensure that you do not prejudice any subsequent litigation or otherwise limit your range of solutions to the charges.

Individual states may have their own agencies which have their own requirements. Such agencies, if they exist, will often work in conjunction with the EEOC to process and investigate claims.

How To Minimize Your Legal Troubles

The intent of the law is to make people who employ other people base their decisions about employees and potential employees on performance considerations, not membership in a class of people. Separating on-the-job performance--potential or actual--from other human factors (e.g. effort, interest, appearance, compatibility, etc.) is not an easy task in many, if not most, business situations. Informed, vigilant managers are required. And documentation.

1. Stick to Job-Related Inquiries When Evaluating Applicants.

Make sure both your application forms and interviewers avoid asking questions or inviting answers that have the effect of identifying applicants who are members of a protected class. For example, a question that leads to the disclosure of the club(s) to which an applicant belongs can lead to a later claim. The general test should be: **Is the information requested necessary to judge an applicant's competence or job qualifications?** Here are the basic guidelines about what can and cannot be pursued during an interview or on an application:

- Do not seek information on an applicant's marital or family status, including family planning decisions, child care arrangements, or people to contact in event of an emergency. You can ask if the applicant was ever known by another name (so you can do reference checks), or whether the applicant has a relative who is employed by the company (if you have an anti-nepotism policy). You can ask how long the applicant plans to stay on the job and about his or her attendance record in past jobs.

- Do not pursue information regarding religion, religious holidays or practices, national origin, parents' national origin, appearance, foreign language proficiency (unless it is necessary for the position), any disability, or any handicap. A spirited debate on religion might be very stimulating, but it is definitely forbidden territory in an employment interview setting.

- You can describe the requirements of a subject job (days, hours, duties), and inquire generally whether the applicant can perform the job "with or without

reasonable accommodation." [where is the quote from? The law???] The EEOC recommends that the issue of accommodation not be addressed until after you have decided to offer the applicant a position. At that point the EEOC suggests that you make an offer conditional on the candidate's ability to perform the essential functions of the job.

In essence, to minimize legal troubles connected with hiring, you are well advised to stick to an applicant's ability to perform the duties of the job in question.

2. Establish and Use A Probationary Period for All New Employees.

While the laws against employment discrimination protect employees during a probationary period, such a period provides an opportunity for managers to systematically evaluate actual performance in the workplace. Appropriate action can then be taken early in the employment relationship with employees who do not meet the standards for the position. Moreover, an employee who is terminated during a probationary period is less likely to file a claim than one who has been employed for an extended time. When you have a probationary period, it is important that *all* new employees be subject to it and that a record be kept of each person's progress and evaluations while on probation.

3. Maintain and Use a Comprehensive Employee Handbook.

Experience indicates that both employees *and juries* respond positively to the presence of manuals that spell out key processes affecting employees. For example, when managers and supervisors follow a system of progressive discipline that is in writing for everyone to see, it is more likely an employee can correct minor problems before they boil over into major ones and termination. A proper employee handbook should set forth expectations regarding job performance and provide for recourse when those expectations are not met. A handbook should also set forth a procedure by which complaints of discrimination can be investigated and handled internally in a fair and impartial manner. **Because some states will enforce as written the terms of an employee handbook, the particular language used should be chosen with great care.** Employee handbooks are discussed in detail in Chapter 3.

4. Conduct and Document Regular Performance Reviews.

To minimize your legal troubles, your company should have a formal process of employee evaluation. It should *require* supervisors, managers, and executives to honestly and objectively appraise each of their people in terms of job-related strengths and weaknesses. The process should also help evaluators identify ways in which individuals can improve their performances. This is simply good business, and many organizations do conduct periodic assessments. Where many companies fall down, however, is in documentation, particularly documentation about poor performers.

The importance of putting performance problems down on paper can not be over-emphasized. For example, suppose a company must lay off employees in a reduction in force. When this happens, the door is opened to mass litigation against the company because those selected for layoff will often believe (or, at least, claim) they have been singled out for reasons unrelated to their performance, e.g., age. If you have documentation that shows that the people who were selected for layoff were the less stellar performers in the company, you will have a positive case to present to the EEOC (and perhaps, later, to a jury). You will have evidence that

your employment decisions were based on performance and merit, rather than on membership in a protected class.

Here is another example. Suppose you terminate a member of a protected class and he or she seeks help from an attorney. It has been known to happen. The first thing most plaintiff's attorneys will do is ask to see their potential client's personnel file. They will often do this before agreeing to take a discrimination case. If there is no file, the attorney knows her or his odds of winning the case are improved. If there is a file and it contains only positive performance evaluations, she or he will know that you may well have a difficult time persuading either the EEOC [true??] or a jury that the terminated employee deserved to be terminated. On the other hand, if there is a file and it identifies weak performance and/or other work-related problems over time, the attorney may well decline to take the case.

Start documenting a performance problem as soon as it arises.

5. Use Severance Agreements Selectively. [Romney and Mike: I have changed the tone from your draft here to make this item more proactive...rather than just responding to a possible threat. See what you think. scb]

Sometimes it becomes necessary to terminate an employee who is a member of a protected class and who is a borderline or gray-area case in terms of adequate performance. You recognize that the employee has the potential to make a troublesome claim--they may even have threatened, either expressly or implicitly, to file suit. In this case, you should consider negotiating a severance agreement with the employee that will offer him or her "consideration" (see Chapter 7 on Contracts) in exchange for a release agreement. In a typical release agreement, the employee agrees not to pursue any claims of discrimination against you. While you may blanch at the thought of paying severance to a borderline performer, you may wish to at least look at the economics. The cost of defending a claim in this circumstance may well be much greater than the cost of obtaining a release agreement at the time of the termination.

In this regard, employees between the ages of 40 and 70 have special rights when it comes to severance agreements. Under the Age Discrimination in Employment Act, any release agreement must include an express reference to the Act, a 21-day period in which to review the agreement before signing it, and a 7-day period to revoke the agreement after signing it.

6. Consider Insurance to Cover Your Employment Practices.

Some insurance companies now sell policies that cover the costs involved in claims and lawsuits alleging employment discrimination. This type of insurance is relatively new, and, if available, it is a way for you to pass off some of your risk of being in business to a third party, the insurer. Since insurance companies deal with many claims from a variety of sources, they should have broader experience with employment claims than any specific operating company. Their potential participation with you may justify the cost of the premium involved. In some cases you may have or be able to obtain employment practices coverage under your Comprehensive General Liability, Errors and Omissions, Umbrella, or Homeowner's policies. As suggested in Chapter 5 on Risk Management, it is important to know what your existing policies do and do not do for you.

7. Check Your Employee Headcount.

Whenever an employment discrimination claim is filed or threatened, you should determine whether you have the minimum number of employees required in the statutes that are alleged to have been violated. The earlier this defense is raised, the quicker and easier the claim may disappear.

Conclusion

There is no ironclad way to ensure that your company--and perhaps, you-- will not be sued for employment discrimination. There are steps you can take, however, to reduce the chances it will happen. Under the law of our land, employers retain the discretion to hire or fire "at-will" employees for any reason or no reason at all. The EEOC and juries do not accept that employers will use that discretion capriciously, however. Policies and practices such as those outlined above will help you prevent or defuse employment discrimination and claims thereof.

END 25000

DRAFT

Chapter 2

WORKPLACE SEXUAL HARASSMENT

Overview

Sexual harassment litigation has exploded in recent years. The explosion is due primarily to the passage of the Civil Rights Act of 1991 and an increased and increasing public awareness of sexual harassment in the workplace. The 1991 Civil Rights Act allows people who claim they are victims of sexual harassment (plaintiffs) to request jury trials. The Act also allows the plaintiffs to seek both compensatory and punitive damages from the defendants which in most cases are companies. Publicity, jury trials, and the widening array of damages being handed down in the courts in recent years may be encouraging employees with sexual harassment claims to pursue them by initiating litigation. In earlier times such employees might have chosen to remain silent or to pursue less litigious avenues of relief or satisfaction.

Many employers are responding to the challenge. In general, such employers adopt anti-harassment policies and provide training designed to eliminate sexual harassment incidents in the workplace. In spite of such policies and training, the litigation boom continues to grow. **Recent state and federal court decisions make clear that it is insufficient for employers simply to draft anti-harassment policies and investigate internal complaints.** Rather, to protect their companies from liability, employers must aggressively enforce stringent anti-harassment policies and take prompt remedial actions for transgressions. Even after instituting an anti-harassment policy, employers must demonstrate an **executive and managerial attitude of zero tolerance** for violations as a show of their commitment to the company policy. The actions outlined below are means of instituting and effecting anti-sexual harassment policies.

The Law of the Land

Title VII of the Civil Rights Act of 1964 says that it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex* Sexual harassment is classified today as one form of discrimination, and the definition of what actually constitutes sexual harassment continues to evolve in our legal system. As litigation on the matter increases in volume across the country, courts are identifying behaviors that fall within the legal definition of sexual harassment. The courts are also identifying behaviors that are not considered sexual harassment, i.e., behaviors that withstand scrutiny under a reasonableness standard. As an increasing number of types of workplace behavior

are found to fall within the sexual harassment boundary, employers are generally well served by being aggressive in an attempt to both prevent and correct sexual harassment incidents. The more vigorous the programs, the better the chances of avoiding liability.

Types of Sexual Harassment Claims

General Harassment. Traditionally, Title VII litigation required that sexual harassment claims rest upon sex and sexual conduct. Recent judicial decisions, however, have enlarged the range of incidents which can be used as the basis for a harassment claim. For example, an allegation of gender-based animosity will now sustain a sexual harassment claim. This means that harassing, abusive, and crude remarks may constitute sexual harassment even though a manager or supervisor directs the comments to all of his or her employees, both male and female. **Where a manager's or supervisor's conduct is so severe and pervasive that it alters the conditions of employment and creates a hostile, abusive work environment, a court may sustain the claims of a sexual harassment plaintiff.** ¹ In addition, the law recognizes that male employees may suffer sexual harassment at the hands of female co-workers or managers. Male plaintiffs have successfully sued their employers for sexual harassment by their female supervisors. ²

Same-Sex Harassment. With respect to same-sex harassment, the courts differ about whether Title VII prohibits same-sex harassment. One federal court held that a male supervisor's harassment of a subordinate male employee was not actionable, despite its sexual overtones. ³ The court reasoned that Title VII seeks to eradicate an atmosphere of oppression by a dominant gender, not by the same gender. Other federal courts, however, hold that Title VII is not limited to heterosexual harassment and that same-sex harassment is actionable under Title VII. ⁴ Individuals may regard sexual advances as unwelcome regardless of the offender's gender. Further, state courts have permitted plaintiffs to pursue same-sex harassment under state law. ⁵

Harassment based upon sexual orientation, however, is not actionable under Title VII. Courts reason that Title VII prohibits harassment on the basis of gender, not sexuality. Harassment of homosexuals and lesbians is potentially offensive toward men and women in equal measures. Therefore, harassment of lesbians and homosexuals because of their sexual orientation does not qualify as gender discrimination actionable under Title VII. ⁶

Quid Pro Quo Harassment. The law recognizes two forms of sexual harassment for which an employer may be liable. The first is quid pro quo (one thing in return for another) harassment. This type of harassment occurs when either (1) unwelcome sexual favors are a condition of one's employment; or (2) unwelcome sexual favors are sought by threatening or actually causing a tangible detriment to one's job. Employees generally assert quid pro quo claims against managers or supervisors when they find themselves forced to choose between submitting to a manager's or supervisors' personal demands and the loss of job benefits, promotions,

or employment. Most courts that have dealt with quid pro quo sexual harassment claims **have held the employers involved to be strictly liable on public policy grounds.** In general, when management people are found to have abused their authority, employers are declared liable because they were the best suited to prevent such abuse.

Until recent years, courts required quid pro quo harassment plaintiffs to demonstrate that they suffered tangible economic detriment as a result of their manager's or supervisors' unwelcome sexual advances. Recent court decisions, however, indicate an erosion of the "economic harm" element. One federal court held that a quid pro quo plaintiff need only show a "threat" of economic harm, rather than actual economic harm. ⁷ Another court found that a supervisor's threat to make life difficult for the plaintiff if she did not resume a relationship with him constituted a detriment to the plaintiff's terms or conditions of employment. Because the supervisor linked non-hostile working conditions to acceptance of his sexual advances, he was harassing her in a quid pro quo manner even though she did not suffer actual economic loss. ⁸ The disintegration of the economic harm element has reduced the burden of proof (?) on the plaintiffs in quid pro quo harassment suits.

CASE A: Patricia Apple was employed as a waitress at Hungry Hanks Bar & Grill. Hank's was owned and operated by Big Joe Enterprises and managed by Donald Spam. While working at Hanks, Apple was subjected to continuous sexual harassment. The harassment consisted of unwelcome sexual comments and physical contact from Spam. At one point Spam offered Apple two hundred dollars of his own money to have sex with him. Some time after she refused Apple noticed that her hours of work were decreased. Another time Spam suggested to Apple that she could become an assistant manager at Hanks. The offer, however, was linked to Apple's acquiescence to Spam's personal proposals. Apple refused again; she did not receive the promotion. Soon thereafter she did not receive an anticipated salary increase. Spam indicated that she did not receive the raise because she refused to have sex with him. Apple filed suit against Spam and Big Joe. The court held that Big Joe was strictly liable for the quid pro quo harassment perpetrated by Spam and awarded monetary damages to Apple.

In CASE A the court held the corporation strictly liable for the sexual harassment by its manager, Donald Spam. The decision was justified because the manager relied upon the actual or apparent authority inherent in his supervisory position within the company to extort sexual favors. Because the employer vested actual or apparent authority in the manager, the employer was held to be strictly liable for the misuse of that authority.

Hostile Work Environment Harassment. The second form of harassment for which employers may be liable has to do with the general work environment. To establish a sexual harassment claim in this area an employee must demonstrate three things: (1) That a supervisor or co-worker made sexual advances, requested sexual favors, or engaged in physical conduct of a sexual nature. (2) That the conduct

was unwelcome. (3) That the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. In addition, in assessing whether a workplace environment qualifies as hostile, courts usually look at factors such as the frequency of the discriminatory conduct, the severity of the discrimination, whether the offender physically threatened the complainant or uttered offensive statements, and whether the conduct unreasonably interfered with an employee's work performance. Incidents that are relatively trivial or isolated will typically not lead to a finding of employer liability for a hostile work environment.

CASE B: A male employee at a manufacturing plant frequently used sexually explicitly language around a female co-worker and frequently touched and fondled the female co-worker. The female employee lodged complaints with the plant supervisor. The supervisor took no action for several months and the harassing conduct continued. Finally, the male worker was transferred to a different shift. Other male employees, however, continued his course of intimidation. The woman finally resigned from her position and filed suit against the employer.

In this case the court found that the female had established the requisite elements of hostile work environment harassment and awarded monetary damages. The harassment was unwelcome; the employee was singled out and suffered the harassment as a result of her gender and the harassment was sufficiently severe and pervasive as to alter the conditions of employment and create an abusive working environment. The court held the employer responsible because the employer knew about the harassment, but failed to take reasonably prompt and adequate corrective action.

While most hostile work environment lawsuits are aimed at unwelcome conduct that occurs within the confines of the workplace, some lawsuits have to do with conduct between employees outside the workplace. For example, recent cases have included incidents which occurred at out-of-town business conventions and at after-hours social gatherings. An employer's liability for situations involving off-premises conduct is not automatic. The law remains unsettled as to when and if a hostile work environment can include events outside the normal work place. While intuitively it might seem that off-premise conduct lies outside the realm of employer responsibility, off-premise work may be inextricably entwined with job-related responsibilities. To guard against liability for any such harassment, employers should make sure their written policies cover off-premises work. Then, employers should treat complaints involving off-premise incidents with the same seriousness given to other complaints of sexual harassment.

To summarize on hostile work environment claims, when an owner, manager, partner, or corporate officer is found to have personally participated in the harassment, courts automatically impute the harassment to the employer. On the other hand, when an employee's co-worker perpetrates the harassment, an employer

will be liable only if the complainant demonstrates that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective measures. Courts hold that employers had actual or constructive knowledge of the harassment if the complainant either registered a complaint at the managerial level or the harassment was so pervasive that the employer should have known about it. An employer will be liable for such harassment if it fails to take remedial action reasonably calculated to end the harassment.

How To Minimize Your Legal Troubles

The intent of the law as it is being interpreted in the courts over time is to reduce to zero the incidents of sexual harassment people encounter in the course of their employment. To comply with the law, employers need to proactively seek to eliminate sexual harassment within their organizations. Following are six basic actions business leaders can take to stay in compliance with both the spirit and letter of the law of the land.

1. Set Expectations. Write and Maintain a Written Anti-Sexual Harassment Policy.

The creation of a written anti-sexual harassment policy is big step toward setting the stage for desired behavior. The written policy should explicitly define and prohibit sexual harassment, explain the procedures for filing a complaint with an independent representative of the employer, and encourage the prompt reporting of all complaints. The policy should contain assurances that all complaints will receive thorough, impartial investigation and resolution; that investigations will remain confidential to the extent consistent with an employer's obligation to investigate; and that all personnel, including executives, managers and supervisors, are equally subject to the policy.

2. Broadcast Expectations. Let Every Employee Know What is Expected.

An anti-sexual harassment policy loses its effectiveness quickly if the only copy of the policy is buried in the personnel manager's desk! Employers need to ensure the wide dissemination of the policy—first to existing members of the organization, and then to new people coming aboard. Experience shows that compliance with policy provisions and the effective utilization of incident reporting procedures depend upon employees' familiarity with the policy. Copies of the policy should be included in personnel manuals (see Chapter 4); copies can also be posted on employee bulletin boards. Some progressive firms include mention of the policy in their in-house newsletters.

3. Establish Crisp Reporting Procedures.

An effective reporting system will enable employees to present their complaints and concerns to their employer quickly and without fear of retaliation. **Trust is an essential factor in implementing an effective reporting procedure.** Employees will not report claims if they believe they will face ridicule, inaction, or retaliation. Fostering trust requires leadership that includes an open, sympathetic ear for

employees with harassment claims. More specifically, experience across a cross-section of companies indicates that it is best to identify more than one individual to whom employees can report complaints. In addition, it seems to be productive if there are several channels for complaints such as in person, after hours, via suggestion box or interoffice mail, or at staff meetings. For cases in which the designated individual or an immediate supervisor is the offender, the company needs to institute a procedure for bypassing those individuals. Some companies appoint an outside individual, such as a director or the firm's outside legal counsel, to serve as an alternative vehicle for registering harassment concerns. An employer should treat verbal and written complaints with equal seriousness.

4. Investigate Complaints.

Upon receiving a complaint, a designated and properly-qualified individual should promptly investigate the situation. The investigator should guard against conducting the investigation as an inquisition. Rather, the investigation should proceed as a fair and impartial fact-finding process that leads to an objective decision. The employer should consider using two interviewers during the investigation: one to interview the complainant, alleged offender, and any other necessary witnesses, and one to note the facts as they emerge during the interviews. The interviewers should not presume the guilt or innocence of either party until they have concluded the investigation. Throughout any investigation all parties and witnesses should feel confident that they will not face retaliation for participating. The interviewers (and employer) should seek a fair and impartial investigation and resolution. What is done should appear fair and impartial to outside observers. Employees who receive square treatment are less likely to later file a lawsuit.

If the investigation is inconclusive, the investigators might wish to inform the accused employee that appropriate disciplinary action will follow the discovery of additional information. The accused employee should be aware that retaliation against the complainant will result in disciplinary action. The employer or investigator should periodically check with the complainant to ensure that the harassing conduct has ceased and that the employee does not perceive that he or she has been the victim of retaliation.

Prior to issuing a disciplinary decision, the employer should provide the accused employee an opportunity to be heard and to present rebuttal evidence. By providing all the parties with minimum "due process" safeguards, employees are more likely to feel that they have been treated fairly. If the investigation reveals that offensive conduct did occur, the employer should take prompt remedial action designed to stop future harassment. The discipline of the offender should match the severity of the conduct. Depending upon the nature of the harassment the remedial measures could range from a verbal warning to counseling, suspension, transfer, demotion, or termination.

5. Conduct Anti-Sexual Harassment Training.

Anti-sexual harassment training is an essential supplement to a written policy. A written policy alone may prove ineffective in defining harassment. A portion of the people in almost any business organization usually require concrete examples of appropriate and inappropriate conduct. Proper training provides an opportunity to demonstrate and discuss the propriety, or impropriety, of specific workplace behavior. For example, some employees might be unaware that certain conduct, such as sexually-explicit language, touching, and off-color jokes, is offensive to particular co-workers. Discussions, which can be a part of the training sessions, allow employees to voice their discomfort with particular behavior. Training sessions give the trainer a chance to explain the law and encourage employees' cooperation and understanding. For example, new or untrained employees might be unaware that their conduct violates the law of the land. One other important benefit of training is that employees' questions may expose potential problems. Then an employer can take corrective action before little problems grow into big ones.

A final word on training: Periodic repeat sessions reacquaint employees and managers with the issue of workplace sexual harassment. By the issue out in the open, employees are less likely to engage in prohibited conduct and employers are less likely to face lawsuits and liability. Such training sessions also reaffirm an employers' commitment to the anti-harassment policy and to the employees' welfare in general.

6. Stay Current.

The definition, nature of, and liabilities for sexual harassment conduct is evolving over time as complaints, claims, and lawsuits wind their way through our judicial system. People building businesses are wise to take steps to remain abreast of developments in both state and federal courts.

Conclusion

Reducing the risk of lawsuits and liability is just good business.

Employers need to be vigilant in their attempts to eliminate sexual harassment incidents across their organizations. Leadership backed up by written policies and training are the best tools for achieving this end. Sexual harassment—or claims thereof—are embarrassing to everyone involved. And they are disruptive. Morale, productivity, and self-esteem all take hits.

A growing body of federal case law confirms that employers may avoid liability for the acts of individuals by taking action to eliminate harassment. In addition to publicizing and disseminating a strongly-worded, anti-sexual harassment policy, employers need to institute effective reporting and resolution procedures. Then they must act resolutely on complaints. Employers may successfully insulate themselves from liability by promptly investigating claims and responding with remedial measures designed to deter future incidents of sexual harassment.

21000



BUILD
YOUR
BUSINESS
GUIDES

RESOURCES FOR BUSINESS PROFESSIONALS.

FOCUS YOUR BUSINESS



STRATEGIC PLANNING IN EMERGING COMPANIES

STEVEN C. BRANDT

A COMPREHENSIVE AND
PRACTICAL GUIDE TO
MANAGING GROWTH AND
COMPLEXITY.

224 pages. ISBN 1-888925-03-5 \$14.95

Success breeds complexity that can strangle an emerging company.

Managing growth requires discipline.

How can you avoid the growth trap?

The answer:

Focus Your Business.

Everyone agrees that a growing company can't successfully be all things to all people. This book shows you how to be some things to some people. Author **Steven C. Brandt** in this, his fourth book, draws again on his experience as a veteran business builder and award winning management educator to give you straightforward, usable guidance that will help you guide your company to continuing success.

What Professionals say...

"A welcome change from all the single-theme management books."

- William P. Rutledge, CEO,
Allegheny Teledyne, Inc.

"...a very usable prescription for dealing with these times."

- Roger Salquist, CEO, Calgene

"The best I've seen on the complex subject of managing a growth company."

- W. Keith Kennedy, CEO,
Watkins-Johnson Co.

"A splendid blend of analytics and common sense."

- James M. Osterhoff, CFO, US West

PROVEN GUIDANCE FOR BUILDING A COMPANY.

Focus Your Business:

Strategic Planning in Emerging Companies.

by Steven C. Brandt

FLAME OUT! It is not unusual to read about companies fading away after they enjoyed dramatic success stories. It takes a lot of discipline to fix things before they break. This new book by noted Stanford University business professor and management educator Steven C. Brandt is about discipline. It is a roll-up-your-sleeves guide to managing growth and complexity. *Focus Your Business* will show you how to refine your expectations and prune your business in order to keep on succeeding. This book provides details on proven strategic planning techniques, including many short case examples and illustrations.

This comprehensive 224 page book will show you:

- How to excel at one thing as you build your business.
- How to set expectations for your entire organization.
- How to prune your business for growth.
- How to take the pulse of your organization.
- How to get maximum mileage out of finite resources.
- The trick to getting bigger without getting fatter.
- How to build for the long haul.

What others are saying...

"Clearly written. Great examples. Easy to read. A terrific guide for people busy building a company."

- Donn Viola, EVP, Mack Trucks

"A timely antidote to complexity."

- Dr. Ken Melmon, Imulogic

"This is the right book for serious builders of businesses."

-J. Frederick Merz, Jr., CEO,
Scott Specialty Gases

"Excellent. Covers the whole range of positioning issues faced by management teams."

-Stuart R. Foster, retired CEO,
US Bank of California

About the Author

Steven C. Brandt is an author, experienced entrepreneur, and faculty veteran of 21 years at the Stanford Graduate School of Business. There he taught New Enterprises and Business Strategy to over 4000 executives and MBA's. He has been a director of three public companies, co-founder/CEO of four growth companies, and a direct participant in the development of over twenty new businesses. A sought-after speaker and consultant to companies of all sizes, he has helped thousands of people build their businesses.

Publisher Information

Title: *Focus Your Business: Strategic Planning in Emerging Companies.*
Publisher: Archipelago Publishing
Author: Steven C. Brandt
Edition: 1st
Number in print: 5000
ISBN: 1-888925-03-5
Pages: 224, 5.5 X 8.5, softcover
Price: \$14.95
Season: Spring
Publication Date: March 1997
Distributor: IPG
Wholesaler: Baker & Taylor

PLEASE TAKE A MOMENT AND RETURN THIS FORM TO US!



Send this form or FAX IT to:

Archipelago Publishing
Build Your Business Guides
P.O. Box 1249
Friday Harbor, WA 98250
FAX#360-378-7097
email: Info@gmex.com
<http://www.gmex.com>

Order by phone 24 hr.

800-360-6166

Visa MC Accepted

Quantity Discounts Available
Satisfaction 100% Guaranteed

☐ **YES!** Please rush me _____ copies of *FOCUS YOUR BUSINESS: Strategic Planning in Emerging Companies!* (at \$14.95 each)

I am enclosing \$_____ plus \$3.00 for shipping & handling.
(All orders shipped Priority Mail unless otherwise requested. WA addresses please add 7.7% sales tax)

☐ Please send a **FREE COPY** of the Build Your Business Newsletter.

SHIP TO:

NAME: _____

ADDRESS: _____

CITY: _____ ST: _____ ZIP: _____

DAYTIME PHONE: () _____

EMAIL: _____

Credit Card Orders:

Card# _____ ex date: ____/____

Signature: _____

Print Your Name: _____

Every business will find this book useful. May we send one to a friend or associate?



BUILD
YOUR
BUSINESS
GUIDES

RESOURCES FOR BUSINESS PROFESSIONALS.

IDEAS + METHOD = SUCCESS!

"Remarkably helpful. High tech, low tech, or no tech, a must read."
- Forbes Powell, President, Luxel, Inc.

ENTREPRENEURING



COMMANDMENTS
for

BUILDING A GROWTH COMPANY

THIRD EDITION

STEVEN C. BRANDT

**PRACTICAL & ESSENTIAL
GUIDANCE FOR ANY BUSINESS.
THIS BOOK IS WRITTEN
TO BE USED.**

208 pages. ISBN 1-888925-02-7 \$14.95

Entrepreneurs are sprouting everywhere. We are in an age of opportunity. Everyone has at least one business idea in them, but few people have a method for getting started and building to prosperity. In order to succeed, they need the knowledge and guidance proven effective by those that have gone before them. Stanford University professor, veteran entrepreneur, and author **Steven C. Brandt**, provides

THE METHOD:

**TEN PROVEN OPERATING
FUNDAMENTALS FOR
BUILDING A GROWTH
COMPANY.**

OVER 100,000 COPIES SOLD!

What Professionals say...

"Sophisticated ideas made readable and usable."

- Robert K. Jaedicke
Former Dean, Stanford Graduate
School of Business

"I wish I had read this book years ago. It would have saved me a lot of trouble."

- Bob Hannah, Retired Founder &
CEO, R.S. Hannah Co.

"Vintage Brandt: Clear, concise, and written with experience."

- Henry B. Wilder,
Venture Capitalist

"High tech, low tech, or no tech, a must read."

- Forbes Powell,
President, Luxel, Inc.

IF YOU WANT TO BUILD A BUSINESS. HERE IS YOUR HANDBOOK.

Entrepreneurship: The Ten Commandments for Building a Growth Company, 3rd Edition.

By Steven C. Brandt

This fresh, updated edition persuasively presents ten operating fundamentals that have stood the test of time in Silicon Valley and around the globe. Over 100,000 first-edition copies have been sold since the first edition was introduced in the early 80s. In this book, veteran entrepreneur and Stanford professor, Steven C. Brandt covers key start-up issues including a guide to preparing a usable business plan. It contains 26 short case examples that breathe life into crucial matters such as cash flow and hiring people. This book was written to be used—a professional's road map to building a business.

This comprehensive 208 page book will show you:

- How to set objectives for yourself and the business.
- How to select the right partners, investors, employees.
- How to define your product or service and market.
- What to put in your business plan.
- How to monitor and conserve cash and credit.
- How to expand methodically.
- How to avoid stress.

About the Author

Steven C. Brandt is an author, experienced entrepreneur, and faculty veteran of 21 years at the Stanford Graduate School of Business. There he taught New Enterprises and Business Strategy to over 4000 executives and MBA's. He has been a director of three public companies, co-founder/CEO of four growth companies, and a direct participant in the development of over twenty new businesses. A sought-after speaker and consultant to companies of all sizes, he has helped thousands of people build their businesses.

What others are saying...

"An important road map for starting a business."

- Robert Tufts,
Corp. Attorney

"Succinct, practical, excellent cases. A valuable combination of real world experience, academic discipline, and humor."

- Freeman Ford, CEO,
FAFCO

"Comprehensive and to the point. I recommend it to anyone who comes to me for help in building a business."

- Mike Irvin, CPA

"The most valuable condensation of two years of business school I've ever read."

- Woody Howse,
Cable & Howse Ventures

Publisher Information

Title: *Entrepreneurship: The Ten Commandments for Building a Growth Company*
Publisher: Archipelago Publishing
Author: Steven C. Brandt
Edition: Third, revised
Number in print: 5000
ISBN: 1-888925-02-7
Pages: 208, 5.5 X 8.5, softcover
Price: \$14.95
Season: Spring
Publication Date: January 1997
Distributor: IPG
Wholesaler: Baker & Taylor

PLEASE TAKE A MOMENT AND RETURN THIS FORM TO US!



Send this form or FAX IT to:

Archipelago Publishing
Build Your Business Guides
P.O. Box 1249
Friday Harbor, WA 98250
FAX#360 378-7097
email: info@gmex.com
Website: http://www.gmex.com

Order by phone 24 hrs!

800-360-6166

Visa/MC Accepted

Quantity Discounts Available
Satisfaction 100% Guaranteed

☐ **YES!** Please rush me _____ copies of *Entrepreneurship: The Ten Commandments for Building a Growth Company* (at \$14.95 each)

I am enclosing \$_____ plus \$3.00 for shipping & handling.
(All orders shipped Priority Mail unless otherwise requested. WA addresses please add 7.7% sales tax)

☐ Please send a **FREE COPY** of the Build Your Business Newsletter.

SHIP TO:

NAME: _____

ADDRESS: _____

CITY: _____ ST: _____ ZIP: _____

DAYTIME PHONE: () _____

EMAIL: _____

Credit Card Orders:

Card# _____ ex date: ____/____

Signature: _____

Print Your Name: _____

Every business can use this book. May we send one to a friend or associate?

matters on file in this case, and after careful consideration of relevant principles of law, the Court grants the motion of the California State Board of Accountancy to dismiss with prejudice; and, additionally, on its own motion, dismisses the plaintiff's First Amended Complaint with prejudice against the other named defendants, to wit, the Department of the Treasury of the United States of America and John J. Corcoran, County Clerk and Clerk of the Superior Court of California, County of Los Angeles, for the following reasons:

(1) Plaintiff's First Amended Complaint fails to state a claim upon which relief could be granted against the defendant Department of the Treasury because (1) the decision of the Department of the Treasury to disbar the plaintiff from practice before the Internal Revenue Service is clearly supported by substantial evidence in that plaintiff was convicted of a crime involving moral turpitude; and (2) the Administrative Procedure Act is not violative of the fourteenth amendment.

(2) Plaintiff's First Amended Complaint fails to state a claim upon which relief could be granted against defendants John J. Corcoran and the California State Board of Accountancy because plaintiff's challenge to his state court criminal conviction, which forms the basis of his first amended complaint, has already been litigated and decided adversely to the plaintiff in a federal habeas corpus action and principles of res judicata bar him from relitigating the same issue in this court.

LET JUDGMENT BE ENTERED ACCORDINGLY.



**Mildred KENNEDY and Lillian
Ross, Plaintiffs,**

v.

**MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Defendants.**

Civ. A. No. 77-K-974.

United States District Court,
D. Colorado.

May 10, 1978.

Action was brought under Age Discrimination in Employment Act, with pendent state law tort and contract claims also asserted. Employer moved to dismiss the amended complaint. The District Court, Kane, J., held that: (1) punitive damages are recoverable under the Act; (2) there is a right of jury trial in proceeding under the Act, and (3) court would decline to exercise jurisdiction over the pendent state claims.

Motion granted in part and denied in part.

1. Labor Relations ⇌ 20.15

Punitive damages are recoverable in a suit under Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7, 7(c), 29 U.S.C.A. §§ 621 et seq., 626, 626(c).

2. Federal Courts ⇌ 15

Issue of whether to accept jurisdiction of state contract and tort claims in a federal question suit is discretionary with the district court.

3. Federal Courts ⇌ 15

Federal court, in Age Discrimination in Employment Act suit, declined to accept jurisdiction of state contract and tort claims since damages were recoverable under the tort claim for intentional infliction of emotional distress, were punitive in nature and award of punitive damages could be had under the ADEA. The breach of contract claims lacked sufficient relationship to the federal cause of action and its inclusion

w
te
pl
C.
4.
ur
A
A
\$\$
pl
fe
MI
mo
file
ph
ber
to
tior
plo
wer
occ
suf
pen
tiff
def
thir
cau
tort
the
plain
est
for
not
Pl
Disc
[AD
that
beca
to th
cemt
dem
natic

would cloud the issues and complicate matters of proof. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Federal Civil Procedure — 2069

Right of jury trial exists in actions under Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7, 7(c), 29 U.S.C.A. §§ 621 et seq., 626, 626(c).

Howard A. Roitman, Denver, Colo., for plaintiffs.

Rodney L. Smith, Denver, Colo., for defendants.

MEMORANDUM OPINION AND ORDER

KANE, District Judge.

THIS MATTER is before the court on a motion to dismiss the amended complaint filed by defendant Mountain States Telephone and Telegraph Company on November 21, 1977. Defendant moves as follows: to dismiss all claims for non-willful violations of the Age Discrimination and Employment Act of 1967 because such claims were not filed within two years of their occurrence; to dismiss claims for pain and suffering because such claims are not compensable under the Act; and to deny plaintiffs' request for a jury trial. Further, defendant moves to dismiss the second and third claims for relief which set forth state causes of action for breach of contract and tortious infliction of emotional distress. In the alternative, defendant moves to dismiss plaintiff's claims for attorney's fees, interest and costs for the second and third claims for relief because such fees and costs are not properly awardable in this type of case.

Plaintiffs filed this action under the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 621, et seq., alleging that they were demoted on May 5, 1975 because of their ages and were not returned to their positions in management until December 28, 1975. It is alleged that the demotions were the result of age discrimination by defendant which resulted in a loss

of compensation in the amount of approximately \$5,000 each; loss of participation in the management savings program; reduction in pension rights; and denial of other fringe benefits. Plaintiffs also alleged that they suffered physical pain and undue mental suffering as a result of defendant's actions. Plaintiffs submit that the actions complained of constitute willful violations of 26 U.S.C. § 623(a).

STATUTE OF LIMITATIONS

Defendant has moved the court to dismiss claims for all non-willful violations of the ADEA because such claims were not filed with this court within two years of their occurrences as required by 29 U.S.C. § 626(e). This section incorporates the statute of limitations set forth in the Portal-to-Portal Pay Act, 29 U.S.C. § 255(a). Although defendant has accurately cited the two year limitation period for non-willful violations, the amended complaint alleges that defendant's actions were *willful* violations of the ADEA. 29 U.S.C. § 255(a) provides that "a cause of action arising out of a willful violation may be commenced within *three* years after the cause of action accrued." (emphasis added.) Plaintiff's action was filed well within the three year period. Accordingly, defendant's motion to dismiss on this ground is denied.

CLAIM FOR PUNITIVE DAMAGES

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The protection afforded by this chapter is limited to "individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631. The enforcement provisions of the ADEA state, in part, as follows:

In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief* as may be appropriate to effectuate the pur-

poses of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626 (emphasis added.) Subsection (c) permits "[a]ny person aggrieved [to] bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter" 29 U.S.C. § 626(c) (emphasis added.)

Most courts have analogized age discrimination cases brought under the ADEA with the provisions and case law governing Title VII of the Civil Rights Act of 1964. Although it has been recognized that the two statutes are not identical and that decisions construing Title VII are not totally dispositive of the issues raised under the ADEA, most courts have determined that a comparison is profitable. See *Murphy v. American Motors Sales Corp.*, 410 F.Supp. 1403 (N.D.Ga.1976).

A review of the decisions in other United States courts and their efforts to determine congressional intent regarding the availability of punitive damages under the ADEA reveals a sharp divergence. Punitive damages were allowed in *Walker v. Pettit Construction Co.*, 437 F.Supp. 730 (D.S.C.1977); *Coates v. National Cash Register Co.*, 433 F.Supp. 655 (W.D.Va.1977); *Bertrand v. Orkin Exterminating Company*, 432 F.Supp. 952 (N.D.Ill.1977); *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841 (W.D.Okl.1976); *Murphy v. American Motors Sales Corporation*, 410 F.Supp. 1403 (N.D.Ga.1976). Other courts have denied recovery of punitive damages under the Age Act, *Dean v. American Security Insurance Company*, 559 F.2d 1036 (5th Cir. 1977), cert. denied, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (2/21/78); *Rogers v. Exxon Research and Engineering Company*, 550 F.2d 834 (3rd Cir. 1977), cert. denied, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 770 (1978); *Fellows v. Medford Corporation*, 431 F.Supp. 199 (D.Or.1977); *Looney v. Commercial Union Assurance Companies*, 428 F.Supp. 533

(E.D.Mich.1977); *Hannon v. Continental National Bank*, 427 F.Supp. 215 (D.Colo. 1977); *Platt v. Burroughs Corporation*, 424 F.Supp. 1329 (E.D.Pa.1976); *Sant v. Mack Trucks, Inc.*, 424 F.Supp. 621 (N.D.Cal. 1976).

The essential difference in the enforcement provisions of Title VII and the ADEA is that relief under Title VII is limited to equitable remedies whereas the Age Act provides for both equitable and legal relief. All United States courts recognize that punitive damages are not recoverable under Title VII due to this statutory limitation to equitable relief. 42 U.S.C. § 2000e-5(g). 29 U.S.C. § 626(b) and (c) make it clear that the Age Act is not so limited.

Further, most courts that have refused to make punitive damages available under the ADEA have also refused parties in a private suit under the ADEA to have trial by jury. The rationale in support of this latter position is based on the non-availability of a jury trial in Title VII cases. Such was recently rejected, however, by the United States Supreme Court in *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). In determining that the plaintiff was entitled to a jury trial under the ADEA, the court emphasized that 29 U.S.C. § 626(b) empowers a court to grant "legal or equitable relief." Recognizing that Congress knew the significance of the phrase "legal relief" when the statute was drafted, the court distinguished Title VII:

Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.

Further, citing *Standard Oil v. United States*, 221 U.S. 1, 59, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911), the court stated:

The word "legal" is a term of art . . . "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."

[1] been er ti West (10th appar inclus tablis that priva dama the p Pons, tion t nined.

[2, 3 jurisdi claims Unite 715, 8 We d these recover tional punitiv ruled t under mental withou

The cient r action jurisdic table cc concom conclusi tion to

[4] 1 tiffs' re Lorillan 866, 55

Accor IT IS motion t denied; and thir

[1] The award of punitive damages has been recognized and treated as a legal rather than equitable remedy. *Pearson v. Western Electric Company*, 542 F.2d 1150 (10th Cir. 1976). Taking into account the apparent congressional intent behind the inclusion of "legal" relief and the "long-established meaning [and] significance" of that term persuades this court that in a private action under the ADEA punitive damages will be available where sought by the plaintiff. See generally *Lorillard v. Pons*, *supra*. Accordingly, defendant's motion to dismiss this claim for relief is denied.

PENDENT STATE CLAIMS

[2,3] The issue of whether to accept jurisdiction of the state contract and tort claims is discretionary with the court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1136, 16 L.Ed.2d 218 (1966). We decline to exercise jurisdiction over these claims in this case. The damages recoverable under a tort claim for intentional infliction of emotional distress are punitive in nature. Since we have already ruled that punitive damages are recoverable under the ADEA, the plaintiffs' claims of mental distress can be remedied thereunder without resort to the state cause of action.

The breach of contract claim lacks sufficient relationship to the federal cause of action to convince this court that pendent jurisdiction should be exercised. The inevitable complications in matters of proof and concomitant clouding of issues supports this conclusion. Accordingly, defendant's motion to dismiss the state claims is granted.

JURY TRIAL

[4] Defendant's motion to dismiss plaintiffs' request for a jury trial is denied. *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

Accordingly,

IT IS ORDERED that the defendant's motion to dismiss the first claim for relief is denied; the motion to dismiss the second and third claims for relief is granted. De-

fendant is directed to respond to the plaintiffs' first claim for relief as set forth in its amended complaint on or before ten (10) days from the date hereof.



Hilda Cortes GONZALEZ, Plaintiff,

v.

Isaac BERAHA, Defendant.

No. CV 77-0420-B.

United States District Court,
D. Canal Zone,
Balboa Division.

May 12, 1978.

Plaintiff former wife brought action to modify a Panama court's divorce decree so as to increase the amount of child support from defendant former husband. The District Court, Charles R. Scott, Senior District Judge, Middle District of Florida, held that: (1) final divorce decree of a Panama court in 1965 would be recognized; (2) Court would not abstain and defer to the courts of Panama in action brought by former wife, a resident of United States but a citizen of Panama, notwithstanding that both parties were citizens of Panama who were divorced in Panama and that defendant former husband was a resident of Panama as well, and (3) evidence failed to justify increase in child support, since approximately one quarter of defendant former husband's annual income was already obligated for child support payments by the 1965 Panamanian divorce decree.

Order accordingly.

1. Divorce $\Rightarrow$ 403(7)

United States District Court of Canal Zone had jurisdiction over action of former wife, a resident of California, for modification of a Panama court's divorce decree to

Tony CARVALHO, Plaintiff,

v.

MacARTHUR
CORPORATION, Defendant.

No. 83-8280-Civ-JCP.

United States District Court,
S.D. Florida.

May 24, 1985.

Defendant in Age Discrimination in Employment Act action filed motion for summary judgment. The District Court, Paine, J., held that: (1) plaintiff was not entitled to either compensatory or punitive damages under Act, and (2) plaintiff's untenable damage claims, his unorthodox opposition to defendant's motion for summary judgment, and filings which were required thereof, warranted awarding of costs to defendant.

So ordered.

1. Civil Rights §46(18)

Plaintiff in Age Discrimination in Employment Act [29 U.S.C.A. § 621 et seq.] case was not entitled to either compensatory or punitive damages under Act. Age Discrimination in Employment Act of 1962, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Federal Civil Procedure §661

Plaintiff's legally untenable claims to compensatory and punitive damages under Age Discrimination in Employment Act [29 U.S.C.A. § 621 et seq.], his unorthodox opposition to defendant's motion for summary judgment, and filings which were required by virtue thereof, warranted awarding of costs to defendant under Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A. requiring that pleadings be filed in good faith. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

Evan I. Fetterman, Law Offices of Fetterman & Assoc., North Palm Beach, Fla., for plaintiff.

Paul C. Heidmann, Herbert Mintz, Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., Miami, Fla., David Bradford, Niles, Ill., for MacArthur Corp.

ORDER

PAINE, District Judge.

THIS CAUSE is before the Court on a motion for summary judgment, filed on behalf of the defendant, MacArthur Corporation [D.E. 16]. That motion claims that the plaintiff, whose action was brought under the Age Discrimination in Employment Act [hereafter ADEA], Title 29 U.S.C. § 621 et seq., is not entitled to either compensatory or punitive damages under the Act. Therefore, defendant argues, that portion of plaintiff's Count II, whereby he sought damages for "... extreme embarrassment and humiliation, and irreparable injury to his employment record ..." and Count III of the complaint, which sought punitive damages, should be adjudged summarily in defendant's favor.

This seemingly straightforward motion has spawned a heated and protracted series of pleadings:

D.E. 19—Memo in opposition to motion for summary judgment [filed by plaintiff];

D.E. 20—Motion to strike opposition memo [filed by defendant]

D.E. 21—Supplementary motion to strike and reply memo to opposition memo [filed by defendant]

D.E. 22—Memo in opposition to motion to strike [filed by plaintiff]

D.E. 24—Reply memo in support of motion to strike opposition mem [filed by defendant]

This Court has considered each of these filings, not because such a plethora of memos is in the least appropriate to such a motion, but in its desire to, fairly and finally, put the matter to rest.

[1] The legal issue is quite clear to this Court. Under the holding of *Dean v. American Security Insurance Co.*, 559

F.2d 1036 (5th Cir.1977), *cert. denied* 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978), which is binding upon this Court under the holding of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the plaintiff is not entitled to either compensatory or punitive damages under the ADEA. Plaintiff's untimely proffer of legal authority to the contrary (*Brenimer v. Great Western Sugar Co.*, 567 F.Supp. 218 (D.Colo.1983); *Wise v. Olan Mills, Inc., of Texas*, 485 F.Supp. 542 (D.Colo.1980); and *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F.Supp. 1008 (D.Colo.1978)) is wholly without even academic merit, much less persuasive or binding effect on this Court, in light of the decision rendered in *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir.1984). Therefore, this court finds that, as a matter of law, the defendant is entitled to partial summary judgment on plaintiff's claim in Count II for compensatory damages and in Count III for punitive damages.

[2] The other issue, which seems to have overshadowed the substantive legal issue presented by the motion, is whether the plaintiff's legally untenable damages claims, his unorthodox opposition to the defendant's motion for summary judgment, and the filings which defendant feels were unnecessarily required by virtue thereof, warrant the awarding of costs to the defendant. This Court feels they do warrant an award of costs which the defendant has incurred in connection with the filings listed at the beginning of this order.

The defendant's motion to strike and reply memorandum in support thereof [D.E. 20 & 24] offer a straightforward recitation of the grounds which justify the imposition of costs on the plaintiff. Of these, this Court is most concerned with the plaintiff's transparent attempt to avoid addressing the legal issue of damages under the ADEA by arguing that one of the counts was not brought under the ADEA, but was a pendent claim for conspiracy. This, the Court finds specious, in the face of a complaint which expressly states that it is brought under the ADEA, whose only jur-

isdictional bases pertain to federal civil rights claims and the ADEA, and which is wholly devoid of any reference to Florida law or conspiracy. Moreover, when the defendant first raised the impropriety of the compensatory and punitive damages sought by affirmative defense, and plaintiff responded to the affirmative defenses, plaintiff did not argue that Count III was intended to state a pendent state claim. To add insult to injury, five months after the motion to strike was filed by the defendant, the plaintiff changed its tack and attempted to offer District Court cases from Colorado, to argue that punitive and compensatory damages were permitted under the ADEA. This untimely, unpersuasive, and borderline unethical act of the plaintiff simply underscores the inappropriateness of the matter. This the Court will not condone. This is not vigorous advocacy on behalf of one's client, but legal folly. It has cost each client money, has delayed the progress of the case and, no doubt, has eroded working relations between counsel for the parties concerned.

As to the pleadings here concerned, this Court finds that they were not well-grounded in fact or warranted by existing law. Indeed, they could not even be said to constitute a good faith argument for the modification or reversal of existing law. As such, they are in violation of Rule 11, Fed.R.Civ.P. and subject to sanction.

It is hereby

ORDERED and ADJUDGED that the motion for partial summary judgment of the defendant, MacARTHUR CORPORATION, is granted, and this Court will not consider compensatory or punitive damages under plaintiff's claims;

FURTHER ORDERED and ADJUDGED that, as a sanction under Rule 11, FED.R. CIV.P., plaintiff's counsel shall pay the defendant the amount of the reasonable expenses incurred because of the filings necessitated, as well as a reasonable attorney's fee. Defendant is directed to file with the Court within twenty days of the date of this order an affidavit as to attorney's fees and a bill of costs on the appro-

tz, Mul-
Casey,
ni, Fla.,
cArthur

rt on a
filed on
r Corpo-
ms that
ght un-
loyment
U.S.C.
ier com-
der the
es, that
reby he
embar-
parable
." and
sought
ed sum-

motion
d series

motion
y plain-

position

to strike
a memo

motion

t of mo-
filed by

of these
hora of
such a
nd final-

r to this
Jean v.
Co., 559