

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.33 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997

ed States v. Springfield, 829 F.2d 860 (9th Cir.1987) (applying categorical "nature of the offense" test in determining that involuntary manslaughter is a crime of violence).

Thus, this court must examine the crime of extortion under color of official right in its generic form. The particular facts of this case are irrelevant to the analysis. In looking at the crime in its generic form, the court finds that it is not a crime of violence. In the usual scenario, a public official uses his *power as an official* to extort property from another. See *United States v. Williams*, 621 F.2d 123, 124 (5th Cir.1980) ("The coercive element is supplied by the existence of the public office itself."), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). No force or violence is involved, and there is almost no risk that force or violence will occur. A public official gets what he wants merely because he is a public official; he has no need for force. Thus, extortion under color of official right is not a "crime that usually involves a risk of harm," *United States v. Gonzalez-Lopez*, 911 F.2d at 547, and, consequently, "by its nature," it is not a crime of violence.⁵

The court hereby finds that defendant Calvin Clark is NOT GUILTY of a violation of 18 U.S.C. § 924(c). Extortion under color of official right is not a crime of violence as a matter of law.

and the jury charges to see if the elements of the generic definition are present. If these elements are present in the indictment or jury charges, then the conviction was for a violent felony. However, if all of the elements of generic burglary are not present in either of these documents, then the conviction is not for a violent felony. The court cannot examine the particular circumstances of the case in making its determination. *Taylor*, 495 U.S. at —, 110 S.Ct. at 2160, 109 L.Ed.2d at 629.

Since the determinations of a "crime of violence" and a "violent felony" are analogous, *Taylor* is additional precedent showing that a court must not look at the particular facts of a crime when performing a "crime of violence" analysis.

5. The government cites *United States v. O'Connor*, 910 F.2d 1466 (7th Cir.1990), *cert. de-*

Accordingly, let judgment of ACQUITTAL be entered for defendant as to Count Two.

SO ORDERED.



Ennis GRIMES, Sr., Plaintiff,

v.

CITY OF FORT VALLEY,
et al., Defendants.

Civ. A. No. 89-43-4-MAC(Df).

United States District Court,
M.D. Georgia,
Macon Division.

Oct. 2, 1991.

Black male over the age of 40 brought age discrimination action when he was denied position of building inspector with city. Plaintiff moved for instatement to position. The District Court, Fitzpatrick, J., held that plaintiff was not entitled to instatement where job he was denied paid less than one he presently held and granting instatement would force city to discharge current building inspector who was unquestionably qualified for position.

Motion denied.

nied, — U.S. —, 111 S.Ct. 953, 112 L.Ed.2d 1041 (1991), to support its argument that the generic form of the crime of extortion under color of official right *does* involve the use of actual or threatened force. In *O'Connor*, the Seventh Circuit stated that "a system of payment in exchange for official acts can itself demonstrate inducement: there is an implied threat of unpleasant consequences for nonpayment, whenever payment is a way of life." *Id.* at 1468 (emphasis in original).

The court disagrees with the government's interpretation that an "implied threat of unpleasant consequences for nonpayment" is equivalent to a "substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 924(c)(3)(B). Furthermore, there is no case law that supports the government's interpretation.

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CORRECTION

**THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION**



Central Microfilm Services
Department of Education & Early Development
State of Alaska

See 29 USC AS 626,
pg 161

Calo. { 449 F. Supp. 1008
~~427 F Supp 205~~
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ed States v. Springfield, 829 F.2d 860 (9th Cir.1987) (applying categorical "nature of the offense" test in determining that involuntary manslaughter is a crime of violence).

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1. Civil Rights §407

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied position of city building inspector was not entitled to recover back pay where job he was denied paid less than one he presently held.

2. Civil Rights §407

Black male over age of 40, who was discriminated against on basis of age when he applied for and was denied position of city building inspector and who was not entitled to back pay because job he was denied paid less than one he presently held, was not entitled to front pay without award of back pay; under these circumstances, such an award would be speculative at best.

3. Civil Rights §407

Compensatory and punitive damages are not recoverable under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Civil Rights §406

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied position of city building inspector was not entitled to be instated in the job; job offered less pay and fewer benefits than job male currently held and might be eliminated due to possible merger of governments and surrounding county and granting request would force city to discharge current building inspector who was unquestionably qualified for position.

5. Civil Rights §407, 411

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied job as building inspector for city was entitled to nominal damages and attorney fees under Age Discrimination in Employment Act (ADEA); awarding nominal damages and attorney fees was consistent with purposes of Act in this unusual case in which job plaintiff was denied paid less than one he presently held. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

6. Civil Rights §406

District court has broad discretion in selecting remedies as long as relief granted is consistent with purposes of Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

7. Civil Rights §406

General rules of reinstatement should apply to issue of instatement under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

8. Civil Rights §406

Determination of whether reinstatement is appropriate remedy in particular age discrimination case lies solely within sound discretion of trial court. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

9. Civil Rights §406

Jury verdict for plaintiff in age discrimination action does not automatically mandate reinstatement of employment to plaintiff. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

10. Civil Rights §269

Rule that merely proving liability is not enough to recover but that plaintiff must also show how defendant's acts have damaged him and in what amount applies to discrimination cases just as it does to other civil cases.

Christopher Coates, Milledgeville, Ga., for plaintiff.

Charles R. Adams, Jr., Adams & Adams, Fort Valley, Ga., Mary Mendel Katz, Thomas F. Richardson, Chambless, Higdon & Carson, Macon, Ga., for defendants.

FITZPATRICK, District Judge.

Pending before the court is Plaintiff Ennis Grimes' motion for instatement to the position of Building Inspector of the City of Fort Valley, Georgia.

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The Plaintiff, a black male over forty years of age, presently works as the Building Maintenance Supervisor for Fort Valley State College, where he currently earns \$25,694.00 per year.¹ He applied for the position of Building Inspector with the City, which presently pays \$23,076.56 per year, but was turned down. He then filed this lawsuit claiming that he was denied the job because of his race and age. On October 11, 1990, a jury returned a verdict in favor of the Plaintiff on his age discrimination claim, but against him on his claim of racial bias.

[1-3] There is no question that the Plaintiff has been the victim of discrimination; the problem lies in determining his relief. (All are agreed that this decision is to be made by the court.) He is not entitled to back pay, since the job he was denied pays less than the one he presently holds. Likewise, no authority has been found which would entitle him to front pay without an award of back pay and under these circumstances such an award would be speculative at best. *See, Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1332-33 (7th Cir.1987). Compensatory and punitive damages are not recoverable under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* *Carvalho v. MacArthur Corp.*, 615 F.Supp. 164, 164-65 (S.D.Fla.1985).

[4] The Plaintiff has therefore made a most unusual request. He has asked this court to instate him in the job of Building Inspector, which offers less pay and fewer benefits than the one he presently holds and which may well be eliminated due to a possible merger of the governments of the City of Fort Valley and the surrounding county. Granting this request would force the City to discharge Mrs. Barbara Hamrick, its current Building Inspector, who is unquestionably qualified for that position. The parties have negotiated extensively but have failed to reach a settlement.

1. If the Plaintiff got his annual raise on July 1 of this year, his present salary would approach

[5, 6] The court will not grant the motion for instatement, but will instead award the Plaintiff nominal damages and attorney's fees as required by the ADEA. Although certainly less than what the Plaintiff sought, this result is in accord with the purpose of the ADEA. A "district court has broad discretion in selecting remedies as long as the relief granted is consistent with the purposes of the ADEA." *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1052 (11th Cir.1989). "The purpose of the ADEA, insofar as the individual plaintiff is concerned, is to make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer." *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir.1988).

[7-9] It must be remembered that this is a motion for *instatement* rather than *reinstatement*. There is little precedent on the question of instatement, but the general rules of reinstatement should apply to this issue as well. "Reinstatement is the preferred remedy under the ADEA, and should be ordered whenever it is appropriate." *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 638 (10th Cir.1988). However, "[t]he determination of whether reinstatement is appropriate in a particular case lies solely within the sound discretion of the trial court. Furthermore, a jury verdict for [a] plaintiff in an age discrimination action does not automatically mandate reinstatement of employment to [the] plaintiff." *Kiel v. Goodyear Tire & Rubber Co.*, 575 F.Supp. 847, 848 (N.D. Ohio 1983), *aff'd*, 762 F.2d 1008 (6th Cir.1985).

Since the Plaintiff is, by analogy, not automatically entitled to instatement, even if that remedy could be considered the preferred one in a case like this, the court can fashion a plan of relief within its discretion as long as it is in accord with the purposes of the ADEA. Awarding nominal damages and attorney's fees is consistent with the purposes of the ADEA in this unusual

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case. Granti by contrast, ends of justice made whole, being placed than he is : Hamrick, an her job and tl Defendants (her. *See, We* F.2d 1135, 11

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2. The Defendants did not request th the question of no

case. Granting the motion for instatement, by contrast, would in no way serve the ends of justice. The Plaintiff would not be made whole, but in fact would suffer by being placed in a worse economic position than he is at present. Moreover, Mrs. Hamrick, an innocent person, would lose her job and there appears to be no way the Defendants could minimize the harm to her. See, *Walters v. City of Atlanta*, 803 F.2d 1135, 1150 (11th Cir.1986).

[10] As an alternative reason for denying the motion, the court must point out that while there is no doubt that the Plaintiff has suffered harm, he has failed to show any resulting damage. It is axiomatic in civil trials that merely proving liability is not enough to recover; a plaintiff must also show how the defendant's acts have damaged him and in what amount. The court sees no reason why this general rule should not apply to discrimination cases just as it does to other civil cases such as commercial disputes. In this case, the Defendants' acts of discrimination actually benefitted the Plaintiff (within the scope of types of relief allowed under the ADEA). The Plaintiff has shown neither the existence nor amount of any damages recoverable under the ADEA.

The Supreme Court has applied this same rule in the context of constitutional violations. In *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Court held that damages awards in cases arising under 42 U.S.C. § 1983 for violations of the fourteenth amendment should be governed by the principle of compensation. 435 U.S. at 254-58, 98 S.Ct. at 1047-49. In *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986), a case involving the first and fourteenth amendments, the Court reaffirmed that damages are intended as compensation, and specifically held that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common

law of torts." 477 U.S. at 305-06, 106 S.Ct. at 2542.

The principle to be derived from these cases is that when there has been no compensable injury, there can be no damages. If this is true in the context of the violation of constitutional rights, then it certainly applies when a statutory right, e.g. the right to be free of age discrimination as given in the ADEA, has been violated. In this case, the Plaintiff has suffered no compensable injury, and the relief he requests would harm both him and another person. The only way to make him whole is to leave him where he is.

Accordingly, the Plaintiff's motion for instatement is DENIED, although the court will award him \$100.00 in nominal damages and attorney's fees.² Plaintiff's counsel is directed to file his motion for attorney's fees and supporting documentation within fifteen (15) days of the receipt of this order.

SO ORDERED.



**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, Plaintiff,**

v.

J.H. STANLEY, Individually and as Temporary Administrator of the Estate of Mary Ann Stanley, Deceased, Betty B. Blocker, Merriam Kenneth Blocker, and Spencer Youngblood, Defendants.

No. CV 489-254.

United States District Court,
S.D. Georgia,
Savannah Division.

March 18, 1991.

Automobile insurer sought declaration as to its liability arising out of automobile

2. The Defendants have noted that the Plaintiff did not request that the court charge the jury on the question of nominal damages. Nonetheless,

the court believes it has the inherent power to make such an award under the authority of *Verbraeken*, 881 F.2d 1041.

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considered in determining whether settlement are (1) strength, in merits measured against terms, complexity, length and expense of on, (3) degree of opposition to, essence of collusion in gaining, nion of competent counsel as to settlement, and (6) stage of pro-out of discovery completed. *Wright Co. (1991, ND Ind) 755 F 1551.*

vidence of ADEA plaintiff's re-lion fraud is applicable to deter-plaintiff is precluded from seeking; However, to safeguard against misrepresentation, or omission, must be directly related to em-ployment, and must have been employer in making decision. *Life Ins. Co. (1993, WD Pa) 3 CCH EPD ¶ 42899, vacated, 3 A3 Pa. 31 F3d 1221; 65 BNA*

1 by ADEA plaintiff in settle-iscrimination claim is taxable as proceeds from settlement are monal injuries. *Drase v United (1) 65 BNA FEP Cas 1116; 94-2 TNT 173-7.*

"provision in 29 USCS § 626(b) wholesale incorporation of 29 her, provision requires selective LSA's limited remedies into cal 350, Plumbers & Pipefitters F Supp 417, 63 BNA FEP Cas

ve history, intent and purposes readth of discretion courts have l and equitable relief as they e to achieve those purposes, against labor organizations vio-pacity of labor organizations is ble relief. EEOC Policy Stato-1/11/90.

: discriminated against because t be instated in job that he was led since such job offered less ts than one he presently holds, n merger of local governments, tionably qualified person who fired; rather, plaintiff will be mages of \$100 and attorney's Valley (1991, MD Ga) 773 F FEP Cas 30.

l does not preclude ADEA suit, y not recover double damages. *Tree Expert Co. (1988, CA10 45 BNA FEP Cas 1386, 45 24 Fed Rules Evid Serv 875, (among conflicting authorities iton Corp. (CA7 Wis) 869 F2d 1P Cas 395, 49 CCH EPD xoding (RD Wis) 728 F Supp 2 Cas 1778, 53 CCH EPD g conflicting authorities noted tter Reynolds, Inc. (CA5 Tex) 4 FEP Cas 529, 54 CCH EPD CA5) 1990 US App LEXIS JS) 114 L Ed 2d 456, 111 S Cr P Cas 1232, 56 CCH EPD l, remanded (CA5) 1991 US*

AGE DISCRIMINATION

App LEXIS 17278) and (disagreed with by Branson v Price River Coal Co. (CA10 Utah) 853 F2d 768, 46 BNA FEP Cas 1003, 46 CCH EPD ¶ 37958 (among conflicting authorities noted in Waller v Consolidated Freightways Corp. (DC Kan) 1991 US Dist LEXIS 10413)) as stated in Whitten v Farmland Industries, Inc. (DC Kan) 759 F Supp 1522.

In reviewing monetary award in ADEA case, ap-peals court may reduce amount of award only if it exceeds any rational estimate of damages, or if trial court lacked authority to make certain award. *Linn v Andover Newton Theological School, Inc. (1989, CA1, Mass) 874 F2d 1, 49 BNA FEP Cas 1176, 50 CCH EPD ¶ 38969.*

In ADEA action wherein district court found that employer willfully violated ADEA because it denied profit sharing, contributions and forfeiture allocations and pension plan credits to employees over age of 65, district court properly awarded previously retired appellees present value of future pension losses rather than ordering employer to adjust their pension payments on monthly basis. *American Assn. of Retired Persons v Farmers Group, Inc. (1991, CA9 Cal) 943 F2d 996, 91 CDOS 6607, 91 Daily Journal DAR 10177, 14 EBC 1120, 56 BNA FEP Cas 1183, 57 CCH EPD ¶ 40951.*

Since jury was instructed on damages count by count and returned award on each count separately, damages awarded on each count should have been examined separately, rather than as lump sum, to determine whether damages award was excessive, duplicative or contrary to evidence. *Riggins v Hazen Paper Co. (1992, CA1 Mass) 57 BNA FEP Cas 1160.*

Since unions are liable for monetary damages under Fair Labor Standards Act when acting as employer, unions are liable for such damages in action brought under ADEA. *LaPointe v United Autoworkers Local 600 (1993, CA6 Mich) 8 F3d 376, 63 BNA FEP Cas 262, 63 CCH EPD ¶ 42641, reh. en banc den (CA6) 1993 US App LEXIS 32559.*

Although it is unlawful for labor organization to discriminate against any individual because of his age or to cause or attempt to cause employer to discriminate against individual, remedial scheme of ADEA does not permit actions to recover monetary damages, including backpay, against labor organization. *Nicolaisen v Chicago & Northwestern Transp. Co. (1991, DC Kan) 57 BNA FEP Cas 468, 138 BNA LRRM 2863.*

Regardless of whether plaintiff in ADEA case suffered economic harm as result of her employer's employment decision, employer may be subject to liability for employment discrimination even if she incurred only nominal damage. *Brockhouse v Southwestern Bell Tel. Co. (1991, WD Mo) 1991 US Dist LEXIS 171.*

Under ADEA, party can only recover damages in form of lost earnings. *Harter v GAF Corp. (1993, DC NJ) 150 FRD 502.*

Compensatory damages are within remedial structure of ADEA; however, punitive damages are not recoverable. *Egleston v South Bend Commu-nity Sch. Corp. (1994, ND Ind) 64 BNA FEP Cas 999.*

Spouse of ADEA plaintiff cannot assert deriva-tive state law claim for loss of consortium premised solely on defendant's alleged violation of ADEA vis-a-vis plaintiff. *Godby v Electroflux Corp. (1994, ND Ga) 65 BNA FEP Cas 211.*

29 USCS § 626, n 101

Mere fact that government agency (EEOC) serves as plaintiff in ADEA case brought against union, is not, in and of itself, sufficient reason to find mon-etary liability against union. *EEOC v Local 350, Plumbers & Pipefitters (1994, DC Nev) 842 F Supp 417, 63 BNA FEP Cas 1170.*

ADEA plaintiff's claim was dismissed for failure to show actual damages, where it was undisputed that plaintiff did not lose her position with em-ployer, and plaintiff did not present any evidence of lost wages. *Monica v New York City Off-Track Betting Corp. (1995, SD NY) 67 BNA FEP Cas 704.*

All damages received in ADEA lawsuit are for tax-ation purposes, excludable from gross income, since ADEA compensation scheme evidences tort-like conception of injury and remedy. *Downey v Commissioner (1993, TC) 62 BNA FEP Cas 361, 93 TNT 138-14.*

Individual middle-level former employees who had authority and discretion over plaintiff's age-discriminatory discharge can be subject to personal liability for monetary damages under ADEA. *House v Cannon Mills Co. (1988, MD NC) 713 F Supp 159, 49 BNA FEP Cas 1746, 51 CCH EPD ¶ 39320.*

When EEOC finds reasonable cause that labor organization has violated ADEA, it will seek full range of equitable and legal remedies, including monetary damages, as appropriate under facts of case. EEOC Policy Statement No. 915.053, 5/11/90.

Plaintiff who was discriminated against because of his age would not be instated in job that he was discriminatorily denied since such job offered less pay and fewer benefits than one he presently holds, may be eliminated in merger of local governments, and is held by unquestionably qualified person who would have to be fired; rather, plaintiff will be granted nominal damages of \$100 and attorney's fees. *Grimes v Ft. Valley (1991, MD Ga) 773 F Supp 1536, 57 BNA FEP Cas 30.*

Compensatory and punitive damages are not re-coverable under Age Discrimination in Em-ployment Act. *Grimes v Ft. Valley (1991, MD Ga) 773 F Supp 1536, 57 BNA FEP Cas 30.*

ADEA, as amended by Civil Rights Act of 1991, permits recoupment of compensatory and punitive damages; however, such damages are not applicable in cases which arose prior to 11/21/91 (effective date of 1991 Act). *Bender v Salvation Army (1993, MD Fla) 830 F Supp 1454, 7 FLW Fed.D 389.*

Damages awarded to ADEA plaintiff as result of suit brought against former employer under ADEA are excludable from gross income under 26 USCS § 104(a)(2). *Fite v Commissioner (1993) 63 BNA FEP Cas 910, TC Memo 1993-594, RIA TC Memo ¶ 93594, 66 CCH TCM 1588, 93 TNT 256-16.*

Former employee is entitled to exclude from his gross income payments that he received in settle-ment of his suit for age discrimination under ADEA. *Cassino v Commissioner (1994) 66 BNA FEP Cas 1337, TC Memo 1994-65, RIA TC Memo ¶ 94065, 67 CCH TCM 2193, 94 TNT 36-8.*

101. Back pay

If defendant in ADEA case is found to have acted willfully, court does not have discretion to reduce liquidated damages award; backpay award must be doubled. *Spanier v Morrison's Manage-ment Services, Inc. (1987, CA11 Ala) 822 F2d 975, 44 BNA FEP Cas 626, 44 CCH EPD ¶ 37319.*

Ch. 14

AGE DISCRIMINATION

29 § 626

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

(Pub.L. 90-202, § 6, Dec. 15, 1967, 81 Stat. 604.)

HISTORICAL AND STATUTORY NOTES

Transfer of Functions

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in Appendix 1 to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

Legislative History

For legislative history and purpose of Pub.L. 90-202, see 1987 U.S. Code Cong. and Adm. News, p. 2213.

FEDERAL PRACTICE AND PROCEDURE

Class actions maintainable, see Wright & Miller: Civil § 1772 et seq.

WEST'S FEDERAL PRACTICE MANUAL

Former enforcement procedures, see § 15394.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of

this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 216 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. 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 purposes 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. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 90 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as

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

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Regulations review committee up and running

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

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

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

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

Continued from preceding page

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

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

Medical Liability Advisory Service

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

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

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

In 26 states, court have issued more than 70 decisions striking down limits on lawsuits that

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

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

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

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SLANTS & TRENDS

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

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

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Fish Forum in Juneau — lots of ideas

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

Ulmer urges fish industry to "get its act together"

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

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

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

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

Continued on next page

Court Deems Social Work Group's Ethics Investigations Confidential

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

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

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

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

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

The court also ruled that the social worker organization has the right to intervene in court cases where such documents are mistakenly used to re-

quest their removal, even if NASW is not a party to the original suit. The court also recognized the binding nature of the contract, signed by individuals who pursue an NASW ethics complaint, pledging confidentiality for all materials related to the proceedings.

Lab To Pay \$182 Million To Settle Medical Fraud

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

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

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

- An agreement in October by Damon Clinical Laboratories of Massachusetts to pay \$119 million in criminal fines and civil payments.

- Corning Clinical Laboratories of New Jersey has paid about \$62 million to settle civil claims on fraudulent billing.

- Published reports say that SmithKline Beecham Clinical Laboratories of Philadelphia is negotiating a medical fraud settlement that will be bigger than LabCorp's, although prosecutors have declined to confirm these reports.

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

Leman sends out environmental audit bill

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

Administration warns of "dual" federal, state OSHA inspections

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

Leman sends suggestions for Judiciary committee "fixes" for bill

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

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

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benefit, as where water⁷² or gas⁷³ pipes are maintained for his use, his willingness to encounter the risk is found by implication from his acceptance of the situation.

Privilege

There are certain conditions under which conduct which would otherwise result in strict liability may be privileged. The most obvious one is that of a sanction given by statutory authority, or by well defined local law.⁷⁴ Within the limitations of the constitution,⁷⁵ the legislature may authorize acts which involve a high degree of risk to others, and such authority amounts at least to a declaration that the acts are not antisocial, but desirable for the benefit of the community. In the absence of a provision expressly preserving the defendant's liability for any resulting damage,⁷⁶ the courts have on occasion interpreted the statute as condoning the consequences in advance, and have refused to hold the defendant liable for doing what was authorized. Thus where

gas,⁷⁷ water,⁷⁸ or electric⁷⁹ conduits are laid in the street under legislative sanction, it has been held that there is no liability for the damage they may do, in the absence of some negligence.⁸⁰ Likewise a contractor, doing work involving blasting for the state, has been held not subject to strict liability.⁸¹ The tendency in the later cases has been to avoid such a conclusion, by strict construction of the authorizing statute,⁸² or by finding an implied condition that there shall be liability,⁸³ or that the manner of doing the work, or the resulting damage itself, are not authorized or necessary consequences of the sanctioned work.⁸⁴

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

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

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

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

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

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

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

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

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

79. *National Tel. Co. v. Baker*, [1893] 2 Ch. 186; *Dumphy v. Montreal Light Co.*, [1907] A.C. 455. Com-

pare the rule that a railway run under statutory authority is not liable for the escape of fire. *Vaughan v. Taff Vale R. Co.*, 1860, 5 H. & N. 678, 157 Eng.Rep. 1351; *Canadian Pac. R. Co. v. Roy*, [1902] A.C. 220.

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

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

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

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

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

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

See ASOP. 65. 180: Civil Liability of Zoos.

ological garden are not subject to strict liability for harm done by the animals kept.⁸⁶ and a carrier which is required to accept dangerous animals,⁸⁷ or explosives⁸⁸ for transportation has been held liable only for negligence. The public utility that is engaged in generating and distributing electricity, no doubt an abnormally dangerous activity, is often intensively regulated as to rates and manner of rendition of the service. That being so, such an activity, authorized, sanctioned, and regulated in such a manner, may not be regarded as the kind that should be subjected to strict liability. This could depend in large part upon whether ratepayers for the service rendered should be required to absorb the costs of unavoidable accidents.



WESTLAW REFERENCES

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

Nature of Risk and Type of Harm Threatened
synopsis.digest(dog* cattle animal! livestock! horse* cow*)
& strict! absolut! /s liab! & foresee! unforesee!
reason! normal /s consequence! risk! harm*
28k70

Class of Persons Protected

synopsis.digest(dog* /p trespasser*)
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Manner of Occurrence

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

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

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

87. Malloy v. Starin, 1908, 191 N.Y. 21, 83 N.E. 588. The Restatement of Torts, § 517, takes the position

Privilege

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

§ 80. Employers' Liability

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

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

that if the carrier is not required to accept the risk it may be strictly liable. But see, to the effect that it is sufficient that it is authorized to accept it, Stamp v. Eighty-Sixth Street Amusement Co., 1916, 95 Misc. 599, 159 N.Y.S. 683; cf. Pope v. Edward M. Rude Carrier Corp., 1953, 138 W.Va. 218, 75 S.E.2d 584 (dynamite).

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

Prosser & Keeton on Torts, 5th Edition

To: Brian

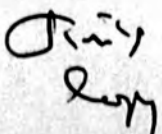
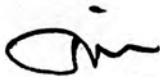
From: Jim

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

Brian:

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

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



A Primer on Punitive Damages

By Bert C. Cozart

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

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

Where to File

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

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

What Conduct Must Be Plead

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

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

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

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

How to Plead the Claim

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

Courts have liberally construed this pleading requirement by allowing the complaint as a whole to supply the facts supporting the circumstances of oppression, fraud, or malice. See *Monge v Superior Court (Crown Gibraltar)* (1986) 176 CA3d 503, 510; *Perkins v Superior Court (General Telephone)* (1981) 117 CA3d 1, 6-7. (Of course, as a cause of action, fraud must be specifically

pleaded. *Stansfield v Starkey* (1990) 220 CA3d 59, 72-75.) However, it is not worth taking the chance that the court will consider the complaint as a whole if the defendant moves to strike. Although the motion to strike would probably be granted with leave to amend the complaint, there is always the possibility that the court will refuse to give leave to amend. Moreover, the filing of a motion to strike delays the important punitive damage discovery process: The court will probably not be receptive to a motion for an order allowing this discovery while a motion to strike is pending. Therefore, you should include all the facts you have at this early stage in your punitive damage allegations.

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

Getting Evidence of Defendants' Wealth

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

The plaintiff bears the burden of presenting evidence of the defendant's financial condition at trial. *Adams*, 54 C3d at 119-23. Under Civil Code section 3295(c), the plaintiff can obtain this evidence either by subpoena requiring the production of the evidence at trial or by moving for an order allowing the plaintiff to conduct financial condition discovery. For some defendants (publicly held companies or

insurance companies, for example) the information can be gathered more easily through investigation into public records such as filings they must make with state and federal governments regarding their financial condition. For most defendants, however, you must rely on section 3295(c).

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

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

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

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

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



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

Recent Developments and Revisor's Comments

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

Aircraft, Rockets and Nuclear Energy

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

title(silkwood & kerr-mcgee)

sh 667 f.2d 908

silkwood /10 kerr-mcgee

ic 667 f2d 908

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

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

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

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

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§ 79. Extent of Liability

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

Once the responsibility is established, it frequently is stated, in cases of strict liability, that the defendant acts "at his peril,"² and is an insurer against the consequences of his conduct. What is meant is that he is liable although (1) he did not intend an invasion on the basis of which liability could be imposed and (2) he was not negligent in proximately causing harm. But there are not lacking indications that the liability itself is thought to be an extensive one. Baron Bramwell³ once carried this to the length of saying that if a person kept a tiger and lightning broke its chain, he might be liable for all the mischief the tiger might do.

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

§ 79

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

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

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

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

tion of causation is involved, and the limitation is one of the policy underlying liability.

Nature of Risk and Type of Harm Threatened

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

Thus, the owner of trespassing animals has been held strictly liable for consequences of the trespass which were reasonably to be expected from an invasion by animals of the particular kind—including, of course, damage to crops, attacks upon other animals,¹¹ infecting them with disease,¹² or the misalliance of a scrub bull with a pedigreed heifer.¹³ The same has been true of personal injuries suffered by the owner in an attempt to put the animal out, which has been regarded as foreseeable, reasonably likely to occur, and to provoke resistance.¹⁴ On the other hand, there are several cases¹⁵ denying recovery for injuries from quite un-

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

5. See *supra*, § 43.

6. Cf. *Wyant v. Crouse*, 1901, 127 Mich. 158, 86 N.W. 527; *Isham v. Dow's Estate*, 1898, 70 Vt. 588, 41 A. 585; *Derosier v. New England Telephone & Telegraph Co.*, 1925, 81 N.H. 451, 130 A. 115.

7. See *supra*, § 43.

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

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

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

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

hog). Cf. *Houska v. Hrabec*, 1915, 35 S.D. 269, 151 N.W. 1021 (playful horse).

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

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

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

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

benefit, as where water⁷² or gas⁷³ pipes are maintained for his use, his willingness to encounter the risk is found by implication from his acceptance of the situation.

Privilege

There are certain conditions under which conduct which would otherwise result in strict liability may be privileged. The most obvious one is that of a sanction given by statutory authority, or by well defined local law.⁷⁴ Within the limitations of the constitution,⁷⁵ the legislature may authorize acts which involve a high degree of risk to others, and such authority amounts at least to a declaration that the acts are not anti-social, but desirable for the benefit of the community. In the absence of a provision expressly preserving the defendant's liability for any resulting damage,⁷⁶ the courts have on occasion interpreted the statute as condoning the consequences in advance, and have refused to hold the defendant liable for doing what was authorized. Thus where

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

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

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

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

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

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

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

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

79. *National Tel. Co. v. Baker*, [1893] 2 Ch. 186; *Dumphy v. Montreal Light Co.*, [1907] A.C. 455. Com-

gas,⁷⁷ water,⁷⁸ or electric⁷⁹ conduits are laid in the street under legislative sanction, it has been held that there is no liability for the damage they may do, in the absence of some negligence.⁸⁰ Likewise a contractor, doing work involving blasting for the state, has been held not subject to strict liability.⁸¹ The tendency in the later cases has been to avoid such a conclusion, by strict construction of the authorizing statute,⁸² or by finding an implied condition that there shall be liability,⁸³ or that the manner of doing the work, or the resulting damage itself, are not authorized or necessary consequences of the sanctioned work.⁸⁴

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

pare the rule that a railway run under statutory authority is not liable for the escape of fire. *Vaughan v. Taff Vale R. Co.*, 1860, 5 H. & N. 678, 157 Eng.Rep. 1351; *Canadian Pac. R. Co. v. Roy*, [1902] A.C. 220.

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

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

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

83. *Smith v. Aldridge*, Mo App.1962, 356 S.W.2d 532; *Ferriter v. Herlihy*, 1934, 37 Mass. 138, 191 N.E. 352, 354.

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

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

ological garden are not subject to strict liability for harm done by the animals kept,⁸⁶ and a carrier which is required to accept dangerous animals,⁸⁷ or explosives⁸⁸ for transportation has been held liable only for negligence. The public utility that is engaged in generating and distributing electricity, no doubt an abnormally dangerous activity, is often intensively regulated as to rates and manner of rendition of the service. That being so, such an activity, authorized, sanctioned, and regulated in such a manner, may not be regarded as the kind that should be subjected to strict liability. This could depend in large part upon whether ratepayers for the service rendered should be required to absorb the costs of unavoidable accidents.



WESTLAW REFERENCES

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

Nature of Risk and Type of Harm Threatened

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

28k70

Class of Persons Protected

synopsis,digest(dog* /p trespasser*)
28k68 /p trespasser* invitee* licensee*
wild vicious /s dog* animal* /p strict! absolut! /s
liab!

Manner of Occurrence

siegler /5 kuhlman
synopsis,digest(contributory /p strict! absolut! /s liab!)
% topic(313a)
synopsis,digest(assumption assume* /s risk* /p strict!
absolut! /s liab!) % topic(313a)

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

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

87. Malloy v. Starin, 1908, 191 N.Y. 21, 83 N.E. 588. The Restatement of Torts, § 517, takes the position

Privilege

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

§ 80. Employers' Liability

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

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

that if the carrier is not required to accept the shipment it may be strictly liable. But see, to the effect that it is sufficient that it is authorized to accept it as a carrier, Stamp v. Eighty-Sixth Street Amusement Co., 1916, 95 Misc. 599, 159 N.Y.S. 683; cf. Pope v. Edward M. Rude Carrier Corp., 1953, 138 W.Va. 218, 75 S.E.2d 584 (dynamite).

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

LAW OFFICES OF
FAULKNER, BANFIELD, DOOGAN & HOLMES
A PROFESSIONAL CORPORATION
FIRST INTERSTATE CENTER
999 THIRD AVE., SUITE 2600
SEATTLE, WASHINGTON 98104
FAX (206) 340-0269
(206) 292-8008

JUNEAU OFFICE
302 GOLD STREET
JUNEAU, ALASKA 99801
(907) 596-2210

ANCHORAGE OFFICE
550 W. 7TH AVENUE, SUITE 1000
ANCHORAGE, ALASKA 99501-3610
(907) 274-0666

February 5, 1997

via FAX (907) 465-3834

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

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

Dear Jim:

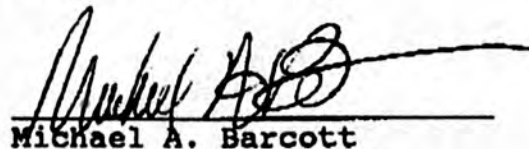
As per our discussion, this language captures the concept, I think. I look forward to discussing this with you tomorrow.

(2) the percentage of the total fault [OF ALL OF THE PARTIES TO EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant, [AND] person who has been released from liability under AS 09.17.091, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action [AS 09.16.040]. In the event there is a finding of fault on the part of the employer, the payment and credit to the employer pursuant to AS 23.10.015(g) shall be reduced by the amount the claimant's award was reduced because of fault allocated to the employer under this subsection.

u *1.15*

Indigent in the party 3rd party XW.

Very truly yours,


Michael A. Barcott

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

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

FAULKNER, BANFIELD, DOOGAN & HOLMES

999 Third Avenue, Suite 2600

Seattle, Washington 98104

(206) 292-8008

Fax: (206) 340-0289

FAX COVER SHEET

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

DATE: February 5, 1997**TIME:** 5:46pm**SENT TO:** ALASKA STATE
LEGISLATURE**FAX NO:** (907) 465-3834**ATTN:** Jim Sourant**PAGES:** 1 + COVER**FROM:** Michael A. Barcott**RE:** HB 58
FILE NO: 1795.6377**CONTENTS OF FAX:** Letter to Jim Sourant**MESSAGE:**

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

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FAULKNER, BANFIELD, DOOGAN & HOLMES
A PROFESSIONAL CORPORATION
FIRST INTERSTATE CENTER
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SEATTLE, WASHINGTON 98104
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JUNEAU, ALASKA 99801
(907) 586-2210

ANCHORAGE OFFICE
550 W. 7TH AVENUE, SUITE 1000
ANCHORAGE, ALASKA 99501-3510
(907) 274-0686

February 4, 1997

via FAX (907)465-3834

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

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

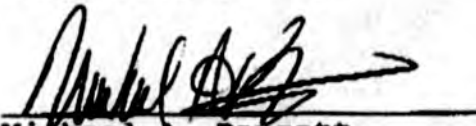
Dear Jim:

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

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

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

Very truly yours,



Michael A. Barcott

MAB:mb

cc: Roger Holmes
David Jones - ANIC, Anchorage

Ms. Sylvia
PO Box 2684

C. Sullivan

835-3729

Valdez AK 99686

Distribution Affiliation Reg Voter
07 Alaskan 01/2

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

Subject

WE ADAMANTLY SUPPORT THIS BILL.

short title CORPORAL CORRECTON OF STUDENTS

Mr. Thomas
P O Box 670406

W Reinbolt

688-5264

Chugiak AK 99567

Distribution Affiliation Reg Voter
60 01/2

Date POM Sent Constituency Bill Number Response
U N None

Subject
VETERANS

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

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

short title

Ms. Deborah
687 Blanket Blvd

Prewitt

479-2206

North Pole AK 99705

Distribution Affiliation Reg Voter
60 01/2

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

Subject

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

short title VOLUNTARY FLEXIBLE WORK PLAN:

FAULKNER, BANFIELD, DOOGAN & HOLMES

999 Third Avenue, Suite 2600
 Seattle, Washington 98104
 (206) 292-8008
 Fax: (206) 340-0289

FAX COVER SHEET

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DATE: February 4, 1997**TIME:** 4:44pm

SENT TO: ALASKA STATE
 LEGISLATURE
 BISS HOLMES

FAX NO: (907) 465-3834
 (907) 243-6695

ATTN: Jim Sourant
 Roger Holmes

PAGES: 1 + COVER**FROM:** Michael A. Barcott

RE: HB 58
FILE NO: 1795.6377

CONTENTS OF FAX: February 4, 1997 letter**MESSAGE:**

Mr. Matt MacKay 384-3132

16901 Meadow Creek Rd
#104

Eagle River AK 99577

Distribution Affiliation Reg Voter
60 01/2

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

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

short title

Mr. Charles F Cottrell 345-0450

PO Box 112304

Anchorage AK 99511

Distribution Affiliation Reg Voter
07 IBEW 01/2

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

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

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

short title VOLUNTARY FLEXIBLE WORK PLAN:

Mr. Edgar J Smith 688-7110

22424 North Birchwood

Loop Rd #115

Chugiak AK 99567

Distribution Affiliation Reg Voter
40 01/2

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

I WANT YOU TO SUPPORT HB 15 AND HB 42.

short title MOVE LEGISLATURE TO ANCHORAGE

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
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Post-it® Fax Note	7671	Date	2/3	Pages	2
To	Jim	From	M. Ford		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #	3834	Fax #	2029		

CIVIL CODE

§ 2860. (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

§ 2860. (b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

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

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

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

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

Monday 27 10:00 AM Kent Dawson 463-2533 re: Tort 11:00 AM Session 1:00 PM Judiciary Committee	Thursday 30 10:30 AM Governor Press Cnfrn on Youth & Justice 11:45 AM Meeting w/Senator Miller in his office 2:30 PM Sam Kito - tort recreational liability 3:00 PM HESS Committee 5:00 PM Leg. Council - Burtovich Rm
Tuesday 28 8:30 AM Mock Press Conference 10:00 AM Press Conference 11:30 AM Tony's Press Conference 2:45 PM Paul Flynn w/ Close Up re: Tobaccy Tax 3:00 PM HESS Committee 5:00 PM Juneau Empire, Pennisula Clarion Rcptn 5 to 7	Friday 31 10:00 AM Session 1:00 PM Judiciary Committee 3:45 PM Judy late lunch Dr. Longworth
Wednesday 29 9:45 AM Majority Caucus 10:00 AM Session 1:00 PM Judiciary Committee 3:00 PM Kemplen Rm 112, HB 47 3:00 PM Rules Committee 3:30 PM Jim & Tom Wright meet in Judiciary 5:00 PM Leg Council in Butrovich Rm	Saturday 1 Sunday 2

Monday 3 10:00 AM Murkowski Reception in the Fahrenkamp Rm 10:00 AM Joint Hess Committee in Butrovich Rm 10:30 AM Session. 11:00 AM Joint Session 12:00 PM Joint Leadership Lunch w/ Murkowski @ the Baranof 12 - 2 1:00 PM Judiciary Committee 5:00 PM VFW Reception	Thursday 6 7:00 AM ACCFT breakfast Baranof 7 - 8:30 2:30 PM Mark Higgins - Salmon for Ak's Future a Cmmrci Fshrmn Orgnztn 3:00 PM HESS Committee 7:00 PM ACCFT Dinner Capitol Cafe
Tuesday 4 11:00 AM The Hotel/ Motel Assoc. 2:30 PM VFW - Waren Culver American Legion 3:00 PM HESS Committee 6:00 PM Tesoro Reception in the Treadwell Room, Baranof 7:00 PM Tesoro Dinner	Friday 7 10:00 AM Session 1:00 PM Judiciary Committee 3:30 PM Mark Begich 1997 Legislative Programs 5:00 PM Fritz Pettijohn Show re: Safe Neighborhoods
Wednesday 5 10:00 AM Session 1:00 PM Judiciary Committee 4:00 PM Jerry Reinwand & Jack McRae (Sr. VP Blue Cross WA & AK - Tort) 5:00 PM Ak Hotel, Rstrnt & Rtirs Legislative Dinner in AJ Rm @ Baranof 5:30 PM Tesoro's Reception for Staff in Gastineau rm	Saturday 8 6:00 PM Meeting w/ R & G Sunday 9

CIVIL CODE

lative Bulletin, No. 4, p. 35; and
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aw No. 10, p. 20.

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Conflicts of interest

duty to defend upon an
duty on the part of the
insured; the insurer shall
unless, at the time the
does exist, the insured
counsel. An insurance
method of selecting that

does not exist as to insurer denies coverage, issue and the outcome retained by the insurer exist. No conflict of punitive damages or be an amount in excess of

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CIVIL CODE

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

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

Amendments:

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

Collateral References:

Wilkin Summary (9th ed) Torts § 1139.
 Miller & Starr: Cal Real Estate 2d §§ 7:102, 33:2.
 Cal Trial Handbook: 3d §§ 8:3-13:39.
 The Brown-Loocker Civil Liability Reform Act of 1987 (comprehensive tort reform package in California).
 9-CBR Civ Lit Rep No: 7/p. 257.
 Rutter Cal Prac Guide, Personal Injury §§ 1:101.5 et seq.
 Rutter Cal Prac Guide, Insurance Litigation §§ 7:771 et seq., 7:802 et seq.
 Revisiting the "Cumis" rule: New legislation codifying the right to independent counsel creates a whole new set of problems. 11 Cal Law No. 5 p. 55.
 Cumis, conflicts and the Civil Code in California: Section 2860 changes little. 25 Cal Western LR 45.
 Cumis counsel in California: Going, going, gone? 35 Dicta No: 3 p. 20.
 Review of selected 1987 legislation. 19 Pacific LJ 689.
 The Other Side of the Cumis Coin: The Insurer's Ability to Select Associate Defense Counsel Under Civil Code Section 2860(f). 20 Western St LR 569.
 The insurer's duty to provide independent counsel under California's new "Cumis statute". 16 Western State LR 603.

NOTES OF DECISIONS

Civ. Code, § 2860, which requires an insurer to provide independent counsel to its insured when conflicts of interests arise, is not retroactive. There is no indication of legislative intent that § 2860 operate retroactively. Center Foundation v Chicago Ins. Co. (1991, 2nd Dist.) 227 Cal.App.3d 547, 278 Cal.Rptr. 132, 60 Cal.Rptr.2d 370, 577 A.2d 1087.

The trial court properly denied an insurer's petition to compel arbitration regarding a dispute over the insurer's duty to provide independent counsel for the defense of its insured. Although Civ. Code § 2860.01(b)(3), provides for arbitration for few disputes, once independent counsel has been retained to represent an insured, when a conflict of interest arises between an insured and an insurer, the statute does not require arbitration to resolve the duty to provide independent counsel. Arbitration is an efficient and favored method of dispute resolution; but without a statutory mandate or contractual provision requiring its use, a litigant cannot be deprived of its day in court. Truck Ins.

Exchange v. Dynamic Concepts, Inc. (1992, 4th Dist.) 9 Cal App 4th 1147, 11 Cal Rptr 2d 873, 22 Cal Code Ann 252860 (subd. (c) (arbitration of fees of

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

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

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

Monday 27 10:00 AM Kent Dawson 463-2533 re: Tort 11:00 AM Session 1:00 PM Judiciary Committee	Thursday 30 10:30 AM Governor Press Cnfrn on Youth & Justice 11:45 AM Meeting w/Senator Miller in his office 2:30 PM Sam Kito - tort recreational liability 3:00 PM HESS Committee 5:00 PM Leg. Council - Burtovich Rm
Tuesday 28 8:30 AM Mock Press Conference 10:00 AM Press Conference 11:30 AM Tony's Press Conference 2:45 PM Paul Flynn w/ Close Up re: Tobaccy Tax 3:00 PM HESS Committee 5:00 PM Juneau Empire, Pennisula Clarion Rcptn 5 to 7	Friday 31 10:00 AM Session 1:00 PM Judiciary Committee 3:45 PM Judy late lunch Dr. Longworth
Wednesday 29 9:45 AM Majority Caucus 10:00 AM Session 1:00 PM Judiciary Committee 3:00 PM Kemplen Rm 112, HB 47 3:00 PM Rules Committee 3:30 PM Jim & Tom Wright meet in Judiciary 5:00 PM Leg Council in Butrovich Rm	Saturday 1 Sunday 2
Monday 3 10:00 AM Murkowski Reception in the Fahrenkamp Rm 10:00 AM Joint Hess Committee in Butrovich Rm 10:30 AM Session. 11:00 AM Joint Session 12:00 PM Joint Leadership Lunch w/ Murkowski @ the Baranof 12 - 2 1:00 PM Judiciary Committee 5:00 PM VFW Reception	Thursday 6 7:00 AM ACCFT breakfast Baranof 7 - 8:30 2:30 PM Mark Higgins - Salmon for Ak's Future a Cmmrci Fshrmn Orgnztn 3:00 PM HESS Committee 7:00 PM ACCFT Dinner Capitol Cafe
Tuesday 4 11:00 AM The Hotel/ Motel Assoc. 2:30 PM VFW - Waren Culver American Legion 3:00 PM HESS Committee 6:00 PM Tesoro Reception in the Treadwell Room, Baranof 7:00 PM Tesoro Dinner	Friday 7 10:00 AM Session 1:00 PM Judiciary Committee 3:30 PM Mark Begich 1997 Legislative Programs 5:00 PM Fritz PetiJohn Show re: Safe Neighborhoods
Wednesday 5 10:00 AM Session 1:00 PM Judiciary Committee 4:00 PM Jerry Reinwand & Jack McRae (Sr. VP Blue Cross WA & AK - Tort) 5:00 PM Ak Hotel, Rstrnt & Rtirs Legislative Dinner in AJ Rm @ Baranof 5:30 PM Tesoro's Reception for Staff in Gastineau rm	Saturday 8 6:00 PM Meeting w/ R & G Sunday 9

LAW OFFICES OF
FAULKNER, BANFIELD, DOOGAN & HOLMES

A PROFESSIONAL CORPORATION
FIRST INTERSTATE CENTER
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ANCHORAGE, ALASKA 99501-3510
(907) 274-0666

February 5, 1997

via FAX (907)465-3834

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

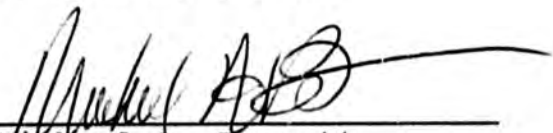
Re: SS for H.B. 58
File No. 1795.6377

Dear Jim:

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

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

Very truly yours,


Michael A. Barcott

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

JDs MATTER

MEMORANDUM

9-115 0328/6

*me: look at Gov's
ADR provisions Feb 60
pg 6-7.*

TO: Brian Porter
FROM: Roger F. Holmes
RE: Tort Reform Bill
DATE: December 26, 1996

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

1. The committee bill should be the basic framework except as noted below. The section references immediately below are to the committee bill.
 - a. Sections 10 and 11. Attached are some suggested changes from Al Tamagni. The first change would make all future payments subject to periodic payments rather than the committee proposal of only those over \$100,000. This is a policy issue, but might bog the courts down in small cases. The second requires periodic payments to be guaranteed and sets out that they may only be guaranteed by annuities or US obligations. I don't know if there are other ways to do appropriately guarantee this future stream of payments.
 - b. Section 13 collateral benefits. You should use the version that was passed by the House rather than the committee version of this section. The committee version subjected worker's compensation benefits to non recovery. There was massive resistance to this and that category and parent paid medical bills for children were added to the version which passed the House. Mike Ford's 11/18/96 memo to you which you gave me, refers to the house bill and not the committee bill. His comments in Section 1 of that memo are well taken and should be incorporated.
 - c. Section 14, allocation of fault. Mike's memo makes reference to a couple of changes in that provision which are not attached to his memo but are probably OK.
 - d. Section 18. Al Tamagni had suggested tying the interest rates to the Internal Revenue Code based on Applicable

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

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

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

2. Provisions to be added to the committee bill:

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

i. An Ambulatory Surgical Facility.

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

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

- i. "Review organization" means a governing body or a committee whose membership is limited to health care providers and administrative staff, except where otherwise provided for by state or federal law, and that is established by a hospital, by an ambulatory surgical facility, by a clinic, by one or more state or local associations of health care providers, by an organization of health care providers from a particular area or medical institution (including, but not limited to Health Maintenance Organizations, Individual Practice Associations, Integrated Delivery Systems, Preferred Provider Organizations/Arrangements/ and Physician Hospital Organizations), or by a professional standards review organization established under 42 U.S.C. 1320c-1, to gather and review information relating to the care and treatment of patients for the purposes of...
- c. AS 21.100.89 should be amended to include the following additional provisions. This statute was passed in 1995 in response to an Alaska Supreme Court opinion entitled Chi of Alaska, Inc. V. Employer's Reinsurance Corp., which specified that under certain circumstances an insurer must appoint "independent counsel." The 1995 solution left two glaring loopholes. The first is that it does not specifically state that if certain issues are covered by insurance and certain issues are not covered by insurance, the insurance company need only pay for the covered claims. California has partially closed this loophole by decision in Horace Mann Insurance Company v. Barbara B., 846 P2d 792 (Cal 1993) by only requiring the insurer to pay for covered claims. The second loop hole is that if the insurance company tries to settle the covered claims with the plaintiff, it runs the risk that the insured will scream "bad faith" in an effort to force the insurance company to continue to provide a paid defense for both covered and uncovered claims. Alaska National, among other companies, has discovered that these two omissions have caused insurers untold problems.
- i. AS 21.89.100 (d) If the insured selects independent counsel at the insurer's expense, the insurer may require that the independent counsel have at least four years of experience in civil litigation, including defense experience in the general subject area at issue in the civil action, and malpractice insurance. Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of

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

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

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

- a. Punitive damages. This proposal recommends a bifurcated trial such that there is a separate trial to award punitive damages if the first trial results in a finding of conduct deemed worthy of punishment. At first blush, this seems to favor defendants. However, it probably makes the provision subject to a 2/3 majority vote and may not be worth the trade off. Section G seems to remove the cap from punitive damages and is likely to be unacceptable to the majority of the coalition.
- b. Cap on economic damages. This provision of the commission does little or nothing for the present problem of no cap for severe injuries and no definition of what is severe.
- c. Interest rate. The committee bill is three percent above the 12th Federal Reserve Discount rate in effect at the first of the year when judgment is entered. The commission bill is 1.5% above the rate for five year constant maturity U.S. Treasury note published in the applicable Federal Reserve H. 15 Statistical Release

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

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

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

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

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

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

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

J.

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

K.

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

L.

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

M.

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

N.

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

4. Contact with the state. Pursuant to our agreement I contacted Gail Voightlander, head of the Torts Section of the Anchorage Attorney General's Office. I asked her two questions.
- a. We discussed the package of tort reforms put forth by Brad Thompson to the Governor's Commission and rejected by the subcommittee. I asked her to discuss with Bruce

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

- b. I also asked Gail to discuss with Bruce whether he would like to sit down with you and try to negotiate some type of compromise either now or early in the session.
- c. I made this call to Gail the morning after our meeting last week. To date she has not called me back. When and if I hear anything, I will pass it on to you immediately.

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

Structured Financial Associates, Inc.

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

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

Facsimile

To: Roger Holmes
@Fax: 248-8013-
From: A.L. Tamagni, Sr.
Date: 12/23/96
Re: Civil Liability Bill
Pages: 2 including this

Roger:

1.

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

2.

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

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

*Amth is if pl
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it all. if pl
also at 20
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know co get
APSO, A.T.
more lots
Also looks
like
Special
interest*

Monthly?

*why not
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*with A
rating
LAA is better in
A.G. Best?*

1274 CD(C)(A)

GENERAL TAX HANDBOOK

Chapter 1 / Tax Rates

1117 Applicable Federal Rates

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

Applicable Federal Rate	Annual	Semiannual	Quarterly	Monthly	Applicable Federal Rate	Annual	Semiannual	Quarterly	Monthly
November '96					August '96				
Short-Term					Short-Term				
AFR	5.79	5.71	5.67	5.64	AFR	5.73	5.65	5.61	5.58
110%	6.38	6.28	6.23	6.20	110%	6.32	6.22	6.17	6.14
120%	6.97	6.85	6.79	6.75	120%	6.89	6.78	6.72	6.69
Mid-Term					Mid-Term				
AFR	6.11	6.02	5.98	5.95	AFR	6.04	5.95	5.91	5.88
110%	6.72	6.62	6.57	6.53	110%	6.66	6.55	6.50	6.46
120%	7.26	7.12	7.06	7.01	120%	7.27	7.14	7.08	7.04
150%	9.23	9.03	8.98	8.93	150%	9.19	8.99	8.93	8.87
175%	10.82	10.54	10.40	10.32	175%	10.68	10.41	10.28	10.19
Long-Term					Long-Term				
AFR	6.55	6.45	6.40	6.36	AFR	6.56	6.46	6.41	6.37
110%	7.33	7.10	7.04	7.00	110%	7.24	7.11	7.05	7.01
120%	7.89	7.74	7.67	7.62	120%	7.90	7.75	7.68	7.63
October '96					July '96				
Short-Term					Short-Term				
AFR	5.90	5.82	5.78	5.75	AFR	5.97	5.88	5.84	5.81
110%	6.50	6.40	6.35	6.32	110%	6.57	6.47	6.42	6.38
120%	7.10	6.98	6.92	6.88	120%	7.18	7.06	7.00	6.96
Mid-Term					Mid-Term				
AFR	6.31	6.21	6.16	6.13	AFR	6.28	6.18	6.13	6.10
110%	6.95	6.83	6.77	6.73	110%	6.92	6.80	6.74	6.71
120%	7.59	7.45	7.38	7.34	120%	7.56	7.42	7.35	7.31
150%	9.54	9.32	9.21	9.14	150%	9.48	9.27	9.17	9.10
175%	11.17	10.87	10.73	10.63	175%	11.11	10.82	10.68	10.58
Long-Term					Long-Term				
AFR	6.77	6.66	6.61	6.57	AFR	6.76	6.65	6.60	6.56
110%	7.45	7.23	7.26	7.22	110%	7.45	7.32	7.25	7.21
120%	8.15	7.99	7.91	7.86	120%	8.14	7.98	7.90	7.85
September '96					June '96				
Short-Term					Short-Term				
AFR	5.91	5.83	5.79	5.76	AFR	6.37	6.27	6.22	6.18
110%	6.51	6.41	6.36	6.33	110%	7.02	6.90	6.84	6.80
120%	7.12	7.00	6.94	6.90	120%	7.66	7.52	7.45	7.40
Mid-Term					Mid-Term				
AFR	6.38	6.28	6.23	6.20	AFR	6.83	6.72	6.66	6.63
110%	7.03	6.91	6.85	6.81	110%	7.53	7.39	7.32	7.28
120%	7.68	7.54	7.47	7.42	120%	8.22	8.06	7.98	7.93
150%	9.84	9.62	9.51	9.44	150%	10.33	10.08	9.98	9.91
175%	11.29	10.99	10.84	10.75	175%	12.11	11.78	11.60	11.53
Long-Term					Long-Term				
AFR	6.91	6.79	6.73	6.70	AFR	7.31	7.18	7.12	7.07
110%	7.61	7.47	7.40	7.36	110%	8.08	7.90	7.82	7.77
120%	8.32	8.15	8.07	8.01	120%	8.81	8.62	8.55	8.47

11. 9J-4192; 96-12, 714, 81, 80, 900; TD 916, 826.

or 4.4% of selling

r 4.4% of selling price

40 lbs.

in excess of 70 lbs.

. in excess of 90 lbs.

pecified items; 3% for
tor and sonar devices;
limited to \$30.

The tax is:

\$1,000
1,300
1,700
2,100
2,600
3,000
3,700
4,500
5,400
6,400
7,700

rates for diesel fuel used

**FACSIMILE TRANSMISSION
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Office of the Attorney General
Dimond Courthouse, 123 Fourth Street, 4th Floor
P.O. Box 110300
Juneau, AK 99811-0300
PHONE: (907) 465-2133 FAX: (907) 465-2075

DATE: November 20, 1996

TO: MEMBERS - CIVIL JUSTICE REFORM TASK FORCE

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

FROM: Chrystal Stillings Smith
Legal Administrator

Number of Pages:
Including this Sheet

RE: Attachments

Attached please find:

- Agenda for Task Force meetings, November 22-23

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

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

Governor's Advisory Task Force on Civil Justice Reform

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

RECEIVED
NOV 21 1996

BISS & HOLMES
ATTORNEYS AT LAW

Tentative Agenda

Friday, November 22

- 8:30 a.m. Call to order - Judge Thomas Stewart
Approve minutes
Approve agenda
Community forum report - Marcia Vandercook
Group discussions, public testimony, letters received
- 9:00 a.m. Committee meetings
Finalize recommendations to full task force
- noon Lunch
- 1:30 p.m. Committee reports
Public testimony on committee changes
- 2:00 p.m. Discussion of voting procedures
Motions for reconsideration and rescission
Order of issues considered
- 2:30 p.m. Discussion and voting on issues
- 5:00 p.m. Recess
(ending time approximate)

Saturday, November 23

- 8:30 a.m. Continue discussion and voting on issues
- noon Lunch
- 1:00 p.m. Continue discussion and voting on issues
- 4:45 p.m. Discuss format of report to Governor
- 5:00 p.m. Adjourn
(ending time approximate)

GOVERNOR'S ADVISORY TASK FORCE ON CIVIL JUSTICE REFORM

Friday, November 22 - Saturday, November 23, 1996

Task Force Meeting

Exxon Valdez Oil Spill Trustees Council Conference Room
645 "G" Street, Anchorage, Alaska

Minutes

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

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

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

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

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

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

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

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

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

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

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

Discussion of recommendations:

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

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

Proposition 2: Offers of judgment.

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

Proposition 2 passed without objection.

Proposition 4: Felons as plaintiffs.

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

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

Proposition 7: Medical advisory panels.

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

Proposition 7 passed without objection.

Proposition 8: Extending medical panel access to state employees.

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

Proposition 8 passed without objection.

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

Proposition 9 passed without objection.

Proposition 12: Pre- and Post-judgment Interest.

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

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

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

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

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

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

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

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

Proposition 12, as amended, passed without objection.

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

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

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

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

Motion to table failed.

Brady amendment failed on voice vote.

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

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

Proposition 15: Settlement data.

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

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

Proposition 15 passed without objection.

Proposition 16: Insurance data.

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

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

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

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

Proposition 17: Statute of limitations.

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

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

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

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

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

Botelho moved to table, then withdrew the motion.

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

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

Proposition 17, as amended, passed without objection.

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

Saturday, November 23, 1996

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

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

Proposition 3: District court jurisdiction.

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

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

Proposition 5: Punitive damages.

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

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

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

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

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

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

Task Force recessed for committee work.

Proposition 3 was brought up again.

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

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

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

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

Williams amendment passed on a voice vote.

Proposition 3, as amended, passed without objection.

Proposition 6 - Alternative Dispute Resolution.

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

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

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

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

Proposition 6, as amended, passed without objection.

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

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Proposition 5 - Punitive Damages

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

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

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

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

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

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

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

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

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

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

Botelho amendment passed without objection.

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

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

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

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

Recess was called.

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

Proposition 11: Allocation of fault.

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

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

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Proposition 11 failed to advance for further discussion.

Proposition 13: Front pay for wrongful discharge. ?

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

Proposition 13 passed without objection.

7/19/97 out
Proposition 18: Statutes of repose. The proposal would establish a 10-year statute of repose for all types of actions based on negligence. This is a reduction from 15 years currently in place for design and construction and a new limit for other types of actions. Bundy amendment to add actions for economic loss to those limited by the statute of repose. Amendment passed. Amendment to delete end of first sentence to simply say statute of repose applies to "actions for negligence" without specifying which. Amendment passed.

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

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

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

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

The task force took a break.

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

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

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

Proposition 19: Noneconomic damages.

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

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

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

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

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

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

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

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

Meeting was adjourned at 5:45 p.m.

Governor's Task Force on Civil Justice Reform**Minutes from Procedures Committee - 11/22/96**

By: Gail T. Voigtlander
Assistant Attorney General

Date: November 25, 1996

All Good
guys Assent!

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

Proposal re. Allocation of fault to intentional tortfeasor explained.

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

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

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

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

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

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

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

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

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select one doctor.

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

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

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

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

Adopting revised questions is approved.

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

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

Collection of Settlement Information

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

Question: tort cases or all civil?

Exception for domestic cases, small claims, and probate..

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

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

Recommend appellate dismissals be included as well.

DiPietro: include a satisfaction ratio? Rejected.

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

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

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

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

If valuable to obtain insurance settlements that are not filed in court - take insurance data from companies. Is DiPietro interested - form?

Problem with this: a lot of data. Also a lot of cases in which insurance is not involved.

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

Also interesting to recap information where plaintiff is bankrupt.

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

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

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

[committee takes break]

Fast Track Proposal:

Voigtlander gives background of proposal.

Recommend study / evaluation of Fast Track system..

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

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

State Proposals:

Intentional in definition of fault::

GV and Williams discuss the proposal.

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

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industry. Accessing guarantee fund.

[Jeff Bush returns to committee]

Committee adopts recommendation.

Claims against State employees converting to claims against the State:

Jeff Bush gives explanation of the proposal.

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

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

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

District Court Proposal

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

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

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

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

Comment: would expedite treatment of smaller cases.

Comment: what should top figure be?

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

Comment: can leave that to offer of judgment cure.

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

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

Comment: more access w/ less cost.

ADR Proposal

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

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

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

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

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

Comment: its pretty broad.

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

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

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

Proposal: moved as originally proposed. No amendments.

Adjournment to full Task Force

DDS Master
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MEMORANDUM

November 18, 1996

SUBJECT: Tort reform (Work Order No. 20-LS0056\A)
TO: Representative Brian Porter
FROM: Michael F. Ford *MFF*
Legislative Counsel

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

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

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

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

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

MFF:lmb
96-155.lmb

Enclosure

HOUSE BILL NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****TWENTIETH LEGISLATURE - FIRST SESSION****BY REPRESENTATIVE PORTER**

Introduced:

Referred:

A BILL**FOR AN ACT ENTITLED**

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

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

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

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

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

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

1 property damage.

2 (b) This section does not apply if

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

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

8 (B) an intentional act or gross negligence;

9 (C) fraud or fraudulent misrepresentation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (A) is a hemiplegic, paraplegic, or quadriplegic and has
29 permanent functional loss of one or more limbs resulting from injury to the
30 spine or spinal cord;

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

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

(D) is both deaf and blind; or

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

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

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

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

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

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

(b) The amount of punitive damages awarded by a court or jury under (a) of this section may not exceed three times the amount of compensatory damages awarded or \$300,000, whichever amount is greater.

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

(d) If a person receives an award of punitive damages, the court shall require that 75 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover

1 punitive damages.

2 * **Sec. 7.** AS 09.17.070 is repealed and reenacted to read:

3 **Sec. 09.17.070. Collateral benefits.** (a) A claimant in an action for personal
4 injury or death may only recover damages that exceed amounts received by the
5 claimant, or that with reasonable probability will be received in the future by the
6 claimant, as compensation for the injuries from collateral sources, whether private,
7 group, or governmental, and whether contributory or noncontributory, except when

8 (1) the collateral source is a federally funded program that by law must
9 seek subrogation;

10 (2) the collateral source has a right of subrogation under federal law;

11 (3) the collateral source is the payment of a dependent child's medical
12 bills by the injured child's parent that does not result from insurance coverage;

13 (4) the benefit consists of death benefits paid under life insurance; or

14 (5) the benefit consists of workers' compensation benefits received
15 under AS 23.30.

16 (b) A person defending a claim may introduce into evidence an amount paid
17 or payable as a benefit to the claimant as a result of the personal injury or death under
18 42 U.S.C. 301 - 1397 (Social Security Act); a state or federal disability act; health,
19 sickness, disability, accident, or income-disability insurance; insurance that provides
20 health benefits or income-disability coverage; and a contract or agreement of a group,
21 organization, partnership, or corporation, or other collateral source, to provide, pay for,
22 or reimburse the cost of medical, hospital, dental, or other health care services,
23 disability, or lost wages. However, evidence of a collateral source that is a federally
24 funded program that by law must seek subrogation or that has a right of subrogation
25 under federal law, evidence of death benefits paid under life insurance, or evidence of
26 workers' compensation benefits received under AS 23.30, may not be introduced under
27 this subsection. If a person defending a claim elects to introduce evidence described
28 in this subsection, the claimant may introduce evidence of the amount that the claimant
29 has paid or contributed to secure the claimant's right to the collateral benefit, including
30 the cost to the claimant resulting from depleted or exhausted coverage.

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

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

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

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

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

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

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

19 (b) In determining the percentages of fault, the trier of fact shall consider both
20 the nature of the conduct of each person [PARTY] at fault, and the extent of the
21 causal relation between the conduct and the damages claimed. The trier of fact may
22 assign a percentage of fault to [DETERMINE THAT] two or more persons [ARE TO
23 BE TREATED AS A SINGLE PARTY] if their conduct was a cause of the damages
24 claimed and the separate act or omission of each person cannot be distinguished.

25 * Sec. 10. AS 09.17.080(c) is amended to read:

26 (c) The court shall determine the award of damages to each claimant in
27 accordance with the findings [, SUBJECT TO A REDUCTION UNDER
28 AS 09.16.040,] and enter judgment against each party liable. The court also shall
29 determine and state in the judgment each party's equitable share of the obligation to
30 each claimant in accordance with the respective percentages of fault as determined
31 under (a) of this section. An assessment of a percentage of fault against a person

who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

* Sec. 11. AS 09.20 is amended by adding a new section to read:

Sec. 09.20.185. Expert witness qualification. (a) Except as provided under (b) of this section, in an action based on professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is a professional who is licensed in this state or in another state or country and is

(1) trained and experienced in the same discipline or school of practice as the defendant or in an area directly related to a matter at issue; and

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

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

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

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

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

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

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

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

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

8 **Notice of Limited Liability**

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

11 (List specific health care providers)

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

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

19 (c) In this section,

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

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

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

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

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

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

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

10 * Sec. 16. AS 09.55.548 is repealed.

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

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

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

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

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

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

January 15, 199

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

Re: HB 158, Section 19

Dear Mr. Porter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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