

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.38 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997

AN ACT

1 Relating to civil actions.

2

3 * **Section 1. PURPOSE.** It is the purpose of this Act to

4 (1) enact further reforms that create a more equitable distribution of the cost
5 and risk of injury;

6 (2) reduce costs associated with the civil justice system, while ensuring that
7 adequate and appropriate compensation for persons injured through the fault of others is
8 available;

9 (3) help match losses with compensation by helping to

10 (A) ensure that money paid to an injured person is available when
11 anticipated expenses or losses occur;

12 (B) ensure that a claimant with substantial injury requiring long-term
13 treatment will have money available for future medical care;

14 (C) reduce reparation system costs by eliminating those portions of
15 awards that are not needed to compensate the claimant;

- 1 (D) eliminate duplicate recoveries;
2 (E) reduce the costs of litigation;
3 (F) establish appropriate thresholds for a damage award in order to
4 allow predictability of liability exposure; and
5 (G) reduce the ultimate costs to the state and to local governments of
6 providing medical services to those who cannot otherwise afford those services;
7 (4) reduce the amount of litigation proceeding to trial by modifying the
8 allocation of attorney fees and court costs based on the offer of judgment and the final court
9 award thereby providing a financial incentive to both parties to settle the dispute;
10 (5) enact a statute of repose that meets the tests set out in Turner Construction
11 Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);
12 (6) clarify the circumstances in which hospitals are held directly liable for the
13 actions of emergency room physicians who are not employees of the hospital;
14 (7) encourage health care providers to provide quality medical care in all areas
15 of this state at a cost that is affordable;
16 (8) stabilize the rapidly escalating costs of health care by curtailing the rapid
17 escalation in malpractice premiums and thereby make broader based health care available to
18 more residents of the state;
19 (9) require that 75 percent of punitive damages awarded by a court be
20 deposited into the general fund for the benefit of the public welfare and to deter future harm
21 to the public.

22 * Sec. 2. AS 05 is amended by adding a new chapter to read:

23 **CHAPTER 50. CIVIL LIABILITY FOR COMMERCIAL**
24 **RECREATIONAL ACTIVITIES.**

25 **Sec. 05.50.010. ACCEPTANCE OF INHERENT RISKS.** Participation in
26 a commercial recreational activity constitutes acceptance of the inherent risks of the
27 commercial recreational activity that are or should be apparent to an ordinarily prudent
28 person.

29 **Sec. 05.50.020. REDUCTION FOR NEGLIGENCE.** A person who accepts
30 an inherent risk of a commercial recreational activity as described in AS 05.50.010 is
31 negligent to the extent that the inherent risk causes injury, death, or property damage.

1 In an action seeking to recover damages for injury or death to a person or harm to
2 property resulting from an inherent risk of a commercial recreational activity,
3 compensatory damages shall be reduced by the injured person's negligence as provided
4 under AS 09.17.060.

5 Sec. 05.50.030. RESPONSIBILITIES OF PARTICIPANTS. A participant in
6 a commercial recreational activity has the responsibility to

- 7 (1) learn about and expressly accept the risks of the activities;
- 8 (2) act within the limits of the person's abilities;
- 9 (3) heed all warnings regarding participation in the commercial
10 recreational activity;
- 11 (4) maintain control of the participant's person, the participant's
12 children, and any equipment, devices, or animals the participant is using;
- 13 (5) refrain from acting in a manner that may cause or contribute to
14 injury of the participant or another person.

15 Sec. 05.50.040. RESPONSIBILITIES OF OPERATORS OF COMMERCIAL
16 RECREATIONAL ACTIVITIES. A person who operates a business that offers a
17 commercial recreational activity shall

- 18 (1) explain to a participant the
 - 19 (A) fundamental inherent risks of the commercial recreational
20 activity; and
 - 21 (B) skills or equipment required to participate in the commercial
22 recreational activity that are not apparent to an inexperienced participant;
- 23 (2) require that employees who are responsible for assisting participants
24 in the actual performance of a commercial recreational activity have training in basic
25 first aid and cardiopulmonary resuscitation and explain to those employees how to use
26 emergency medical services available in the area;
- 27 (3) maintain recreational equipment and facilities in good repair;
- 28 (4) provide trained and competent personnel; and
- 29 (5) act in a reasonably safe and competent manner.

30 Sec. 05.50.050. INTERACTION WITH OTHER LAWS. This chapter does
31 not affect the immunity of an owner of unimproved land under AS 09.65.200 or of a

1 ski area operator under AS 05.45.

2 Sec. 05.50.100. DEFINITIONS. In this chapter,

3 (1) "children" means persons under 18 years of age;

4 (2) "commercial recreational activity" means a recreational activity for
5 which the participants pay compensation;

6 (3) "recreational activity" means an outdoor activity undertaken for the
7 purpose of exercise, education, relaxation, pleasure, sport, or as a hobby.

8 * Sec. 3. AS 09.10.055 is repealed and reenacted to read:

9 Sec. 09.10.055. STATUTE OF REPOSE OF 10 YEARS. (a) A person may
10 not bring an action for personal injury, death, or property damage unless commenced
11 within 10 years of the earlier of the date of

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

16 (2) the last act alleged to have caused the personal injury, death, or
17 property damage.

18 (b) This section does not apply if

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

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

24 (B) an intentional act or gross negligence;

25 (C) fraud or fraudulent misrepresentation;

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

27 (E) a defective product; in this subparagraph, "product" means
28 an object that has intrinsic value, is capable of delivery as an assembled whole
29 or as a component part, and is introduced into trade or commerce; "product"
30 includes an element or compound that if ingested by humans or if humans are
31 exposed to, or are in contact with the element compound or product, poses a

1 threat to human health;

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

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

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

8 (c) The limitation imposed under (a) of this section is tolled

9 (1) as provided under AS 09.10.140(a)(1); and

10 (2) during any period in which there exists the undiscovered presence
11 of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body
12 of the injured person and the action is based on the presence of the foreign body.

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

17 * Sec. 4. AS 09.10.070 is amended to read:

18 Sec. 09.10.070. ACTIONS FOR CERTAIN TORTS AND CERTAIN
19 STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. Except as
20 otherwise provided by law, a [A] person may not bring an action (1) for libel,
21 slander, assault, battery, seduction, or false imprisonment [, OR FOR ANY INJURY
22 TO THE PERSON OR RIGHTS OF ANOTHER NOT ARISING ON CONTRACT
23 AND NOT SPECIFICALLY PROVIDED OTHERWISE]; (2) upon a statute for a
24 forfeiture or penalty to the state; or (3) upon a liability created by statute, other than
25 a penalty or forfeiture; unless the action is commenced within two years from the
26 accrual of the action.

27 * Sec. 5. AS 09.10 is amended by adding a new section to read:

28 Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO
29 PERSON OR PROPERTY. (a) A person may not bring an action for personal injury,
30 death, property damage, or injury to the rights of another not arising on contract,
31 unless the action is brought within two years of the accrual of the action.

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

3 * Sec. 6. AS 09.17.020 is amended to read:

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

8 * Sec. 7. AS 09.17.020 is amended by adding new subsections to read:

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

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

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

21 * Sec. 8. AS 09.17.040(e) is amended to read:

22 (e) If a judgment is paid by periodic payments, the [THE] court shall
23 [MAY] require security be posted [,] in order to ensure that funds are available as
24 periodic payments become due. The court may waive this requirement if the person
25 in whose favor judgment is entered agrees to waive the posting of security or the
26 court determines that waiver is prudent in the action [NOT REQUIRE SECURITY
27 TO BE POSTED IF AN AUTHORIZED INSURER, AS DEFINED IN AS 21.90.900,
28 ACKNOWLEDGES TO THE COURT ITS OBLIGATION TO DISCHARGE THE
29 JUDGMENT].

30 * Sec. 9. AS 09.17.040(f) is amended to read:

31 (f) A judgment ordering payment of future damages for personal injury or

1 death by periodic payment shall specify the recipient, the dollar amount of the
2 payments, including any increases in future payments for anticipated inflation or
3 the formula for the increases, the interval between payments, and the number of
4 payments or the period of time over which payments shall be made. Payments may
5 be modified only in the event of the death of the judgment creditor, in which case
6 payments may not be reduced or terminated, but shall be paid to persons to whom the
7 judgment creditor owed a duty of support, as provided by law, immediately before
8 death. In the event the judgment creditor owed no duty of support to dependents at
9 the time of the judgment creditor's death, the money remaining shall be distributed in
10 accordance with a will of the deceased judgment creditor accepted into probate or
11 under the intestate laws of the state if the deceased had no will.

12 * Sec. 10. AS 09.17.080(a) is amended to read:

13 (a) In all actions involving fault of more than one person [PARTY TO THE
14 ACTION], including third-party defendants and persons who have been released under
15 AS 09.17.091 [AS 09.16.040], the court, unless otherwise agreed by all parties, shall
16 instruct the jury to answer special interrogatories or, if there is no jury, shall make
17 findings, indicating

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

20 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO
21 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,
22 [AND] person who has been released from liability under AS 09.17.091, or other
23 person responsible for the damages to each claimant regardless of whether the
24 other person, including an employer, is or could have been named as a party to
25 the action [AS 09.16.040].

26 * Sec. 11. AS 09.17.080(c) is amended to read:

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

1 under (a) of this section. An assessment of a percentage of fault against a person
2 who is not a party may only be used as a measure for accurately determining the
3 percentages of fault of a named party. Assessment of a percentage of fault
4 against a person who is not a party does not subject that person to civil liability
5 in that action and may not be used as evidence of civil liability in another action.

6 * Sec. 12. AS 09.17 is amended by adding a new section to read:

7 Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to
8 sue or not to enforce judgment is given in good faith to one of two or more persons
9 civilly liable for the same injury or the same wrongful death it does not discharge any
10 of the other persons from liability for the injury or wrongful death unless its terms so
11 provide.

12 * Sec. 13. AS 09.30.065 is repealed and reenacted to read:

13 Sec. 09.30.065. OFFERS OF JUDGMENT. (a) At any time more than 10
14 days before the trial begins either the party making a claim or the party defending
15 against a claim may serve upon the adverse party an offer to allow judgment to be
16 entered in complete satisfaction of the claim for the money or property or to the effect
17 specified in the offer, with costs then accrued. If within 10 days after the service of
18 the offer the adverse party serves written notice that the offer is accepted, either party
19 may then file the offer and notice of acceptance together with proof of service, and the
20 clerk shall enter judgment. An offer not accepted within 10 days is considered
21 withdrawn and evidence of that offer is not admissible except in a proceeding to
22 determine the form of judgment after verdict.

23 (b) If the judgment finally entered on the claim as to which an offer has been
24 made under this section is at least five percent less favorable to the offeree than the
25 offer, the offeree shall pay costs as allowed under the Alaska Rules of Civil Procedure
26 and all reasonable attorney fees incurred by the offeror from the date the offer was
27 made. In comparing the offer to judgment finally entered, the court may not consider
28 prejudgment interest payable under the judgment during the period between when
29 payment would have been made under the offer and the date of entry of judgment.

30 * Sec. 14. AS 09.30.070(a) is amended to read:

31 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments

1 and decrees for the payment of money, including prejudgment interest, is three
2 percent above the interest rate set by the United States Bureau of the Public Debt
3 for five-year treasury notes in effect on the day on which the judgment or decree
4 is entered [10.5 PERCENT A YEAR], except that a judgment or decree founded on
5 a contract in writing, providing for the payment of interest until paid at a specified rate
6 not exceeding the legal rate of interest for that type of contract, bears interest at the
7 rate specified in the contract if the interest rate is set out in the judgment or decree.

8 * Sec. 15. AS 09.55 is amended by adding a new section to read:

9 Sec. 09.55.551. EXPERT WITNESS QUALIFICATION. (a) Except as
10 provided under (b) of this section, in an action based upon professional negligence, a
11 person may not testify as an expert witness on the issue of the appropriate standard of
12 care unless the witness is a professional who is licensed in this state or is licensed in
13 another state or country and

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

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

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

23 * Sec. 16. AS 09.55.560 is amended by adding a new paragraph to read:

24 (4) "professional negligence" means a negligent act or omission in
25 rendering professional services.

26 * Sec. 17. AS 09.55 is amended by adding a new section to read:

27 ARTICLE 8. MANDATORY ARBITRATION.

28 Sec. 09.55.700. MANDATORY ARBITRATION. (a) A person who files a
29 civil action for personal injury, death, or property damage shall also submit the claim
30 to the court for arbitration unless the action is excluded under (b) of this section. The
31 costs of arbitration shall be paid in equal shares by the parties.

- 1 (b) A civil action is not required to be arbitrated as provided under (a) of this
2 section if the
- 3 (1) amount claimed by a party, excluding interest, costs, and attorney
4 fees, exceeds \$50,000;
- 5 (2) parties have, under a written agreement made before or after the
6 accrual of the action, agreed to submit the claim to arbitration; or
- 7 (3) action
- 8 (A) is a class action;
- 9 (B) seeks equitable or declaratory relief;
- 10 (C) concerns the title to real property;
- 11 (D) is a probate action;
- 12 (E) is an appeal from a court of limited jurisdiction;
- 13 (F) involves divorce or domestic relations;
- 14 (G) is an appeal from action by an administrative agency;
- 15 (H) is a small claims action.
- 16 (c) When a claim is submitted as required by (a) of this section, the court shall
17 appoint an arbitrator to review the claim. An arbitrator appointed under this section
18 must be a member of the state bar association who has been admitted to the bar for
19 a minimum of five years or a member of the state bar association who is a retired
20 judge. The arbitrator appointed to review the claim shall interview the parties and
21 examine all records or materials relating to the claim and may compel the attendance
22 of witnesses, interview the parties, or consult with medical specialists.
- 23 (d) An arbitrator appointed under this section shall conduct a prehearing
24 settlement conference within 30 days after the appointment. The arbitrator shall
25 establish a period for discovery and a date for a hearing. The hearing date may not
26 be more than 120 days after the settlement conference.
- 27 (e) An arbitrator shall render a decision within 30 days after hearing a claim
28 under (d) of this section. The decision must contain findings of fact and conclusions
29 of law. The decision of the arbitrator may be rejected by a party.
- 30 (f) If the decision of the arbitrator is rejected by a party, the action may
31 proceed in the appropriate court. If an offer of judgment has not been entered by a

1 party, costs or actual reasonable attorney fees shall be assessed against a party who
2 requests a trial after arbitration, and who fails to improve that party's position in the
3 trial de novo.

4 (g) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)
5 apply to an arbitration under this section to the extent the provisions do not conflict
6 with the provisions of this section.

7 (h) Attorney fees and costs shall be included in the arbitrator's award only if
8 a party is found not liable or is awarded more than the party would have been awarded
9 under an offer of judgment entered under AS 09.30.065. If attorney fees and costs are
10 awarded, attorney fees and costs shall be calculated under the Alaska Rules of Civil
11 Procedure or AS 09.30.065, whichever applies.

12 * Sec. 18. AS 09.65 is amended by adding a new section to read:

13 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR CERTAIN
14 NONEMPLOYEES. (a) A hospital is not liable for civil damages as a result of an
15 act or omission by an emergency room physician who is not an employee or actual
16 agent of the hospital if the hospital provides notice that the emergency room physician
17 is an independent contractor and the emergency room physician is insured as described
18 under (c) of this section. The notice required by this subsection must be posted
19 conspicuously in all admitting areas of the hospital, published at least annually in a
20 newspaper of general circulation in the area, and must be in substantially the following
21 form:

22 Notice of Limited Liability

23 The following emergency room physicians are independent
24 contractors and are not employees of the hospital:

25 (List specific emergency room physicians)

26 The hospital is responsible for exercising reasonable care in granting privileges to
27 practice in the hospital, for reviewing those privileges on a regular basis, and for
28 taking appropriate steps to revoke or restrict privileges in appropriate circumstances.
29 The hospital is not otherwise liable for the acts or omissions of an emergency room
30 physician who is an independent contractor.

31 (b) This section does not preclude liability for civil damages that are the

1 proximate result of the hospital's own negligence or intentional misconduct.

2 (c) A hospital is not immune from liability under (a) of this section for an act
3 or omission of an emergency room physician who is an independent contractor unless
4 the emergency room physician has liability insurance coverage in the amount of at
5 least \$500,000 per incident and the coverage is in effect and applicable to those health
6 care services offered by the emergency room physician that the hospital is required to
7 provide by law or by accreditation requirements.

8 (d) In this section,

9 (1) "emergency room physician" means a physician who provides health
10 care services in a hospital emergency room;

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

13 (3) "independent contractor" means a licensed health care provider who
14 has been granted specified privileges to render health care services directly or
15 indirectly to patients at the hospital, but who is not an employee or actual agent of the
16 hospital in connection with the rendition of the health care services.

17 * Sec. 19. AS 09.65 is amended by adding a new section to read:

18 Sec. 09.65.190. CIVIL LIABILITY FOR FALSE CLAIMS AND IMPROPER
19 PRACTICE. (a) A person may not

20 (1) knowingly or recklessly file, or cause to be filed, a civil complaint,
21 answer, or other civil pleading that contains false allegations or material misstatements
22 of fact;

23 (2) sign a civil pleading before making reasonable inquiry and
24 determining that, to the best of the signer's knowledge, information, and belief, each
25 claim, defense, and allegation contained in the pleading is well grounded in fact and
26 is warranted by existing law or a good faith argument for the extension, modification,
27 or reversal of existing law; or

28 (3) interpose, in a civil action, a claim, defense, or allegation for an
29 improper purpose, including to harass or to cause unnecessary delay or needless
30 increase in the cost of litigation.

31 (b) If the trier of fact determines that a party to a civil action has intentionally

1 made a false statement of a material fact in connection with the prosecution or defense
2 of a civil action, the court shall enter judgment against the party making the false
3 statement on the issue to which the false statement relates. If the civil action involves
4 multiple claims and the false statement does not apply to all claims, the judgment
5 required under this section shall apply only to those claims to which the false
6 statement relates.

7 (c) A person who is injured by a violation of (a) of this section may bring an
8 action for compensatory and punitive damages. However, if the injury is the result of
9 an act or omission of a

10 (1) party, then the action shall be asserted in the same action in which
11 the injury arose; and

12 (2) party attorney, then the action shall be asserted in a separate action
13 commenced after entry of final judgment in the action in which the injury arose.

14 (d) A person who, on the person's own behalf or as a party's attorney, takes
15 part in the initiation, defense, continuation, or procurement of a civil action against
16 another is subject to civil liability for compensatory and punitive damages if the person
17 acts

18 (1) without probable cause on a claim or defense; or

19 (2) primarily for a purpose other than that of securing the proper
20 adjudication of a claim or defense involved in the civil action.

21 (e) In an action to recover damages under (c) of this section, a person is not
22 required to be the prevailing party in the civil action in which the violation of (a) of
23 this section occurred.

24 (f) A person may not bring a civil action to recover damages under (d) of this
25 section unless final judgment has been entered in the civil action described in (d) of
26 this section. For purposes of this subsection, a person is not required to be the
27 prevailing party in the civil action in which the violation of (d) of this section
28 occurred.

29 (g) If a person brings an action under (c) or (d) of this section, the court shall
30 award actual reasonable attorney fees to the prevailing party, regardless of whether the
31 prevailing party is the plaintiff or defendant.

1 (h) Neither the state, nor an agent or employee of the state acting within the
2 scope of that agency or employment, is subject to liability under this section.

3 * Sec. 20. AS 09.65.210 is repealed and reenacted to read:

4 Sec. 09.65.210. DAMAGES RESULTING FROM COMMISSION OF A
5 FELONY. (a) A person who suffers personal injury or property damage may not
6 recover damages for the personal injury or property damage if the injury occurred
7 while the person was committing or attempting to commit a felony, or fleeing from the
8 commission of a felony, and the felony substantially contributed to the injury or
9 property damage.

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

15 * Sec. 21. AS 09.68 is amended by adding a new section to read:

16 Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER
17 PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party
18 represented by an attorney shall be signed by at least one attorney of record in the
19 attorney's individual name, whose address shall be stated. A party who is not
20 represented by an attorney shall sign the party's pleading, motion, or other paper and
21 state the party's address. Except when otherwise specifically provided by the Alaska
22 Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by
23 affidavit. The signature of an attorney or party constitutes a certificate by the signer
24 that the signer has read the pleading, motion, or other paper; that to the best of the
25 signer's knowledge, information, and belief formed after reasonable inquiry it is well
26 grounded in fact and is warranted by existing law or a good faith argument of the
27 extension, modification, or reversal of existing law; and that it is not interposed for any
28 improper purpose, including to harass or to cause unnecessary delay or needless
29 increase in the cost of litigation. If a pleading, motion, or other paper is not signed,
30 it shall be stricken unless it is signed promptly after the omission is called to the
31 attention of the pleader or movant. If it is alleged or appears that a pleading, motion,

1 or other paper is signed in violation of this section, the court, upon motion or upon its
2 own initiative, may set the matter for hearing. If the court determines that a pleading,
3 motion, or other paper is signed in violation of this section, the court shall impose
4 upon the person who signed it, a represented party, or both, an appropriate sanction
5 that may include an order to pay to the other party the amount of the reasonable
6 expenses incurred because of the filing of the pleading, motion, or other paper,
7 including costs and attorney fees, and monetary sanctions not to exceed \$10,000.

8 * **Sec. 22. REPORT.** The director of the division of insurance shall determine the effects
9 of this Act on the liability insurance rates in this state and shall present a report of the
10 director's findings to the legislature by January 1, 1998. In this section, "liability insurance"
11 has the meaning given in AS 21.12.070(a)(2).

12 * **Sec. 23. SEVERABILITY.** Under AS 01.10.030, if any provision of this Act, or the
13 application of a provision of this Act to any person or circumstance is held invalid, the
14 remainder of this Act and the application to other persons shall not be affected.

15 * **Sec. 24. APPLICABILITY.** Sections 6 and 7 of this Act apply to a civil action that has
16 accrued on, after, or before the effective date of this Act, if judgment has not been entered in
17 the civil action before the effective date of this Act. Except for secs. 6 and 7 of this Act, this
18 Act applies to all causes of action accruing on or after the effective date of this Act.

AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled bill, SCS CSHB 158(RLS) am S(ct rls fld S), consisting of 15 pages, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the House May 4, 1996


Gail Phillips, Speaker of the House

ATTEST:


Suzi Lowell, Chief Clerk of the House

Passed by the Senate May 2, 1996

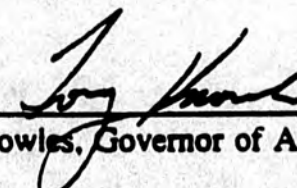

Drue Pearce, President of the Senate

ATTEST:


Nancy Quinto, Secretary of the Senate

ACTION BY GOVERNOR


Approved by the Governor June 14 19 96


Tony Knowles, Governor of Alaska

DEPT. OF COMMERCE

ANALYSIS OF SCS CSHB 158 (RIs) am S (ct rls fld s) -TORT REFORM

Throughout the Legislative process, the consistent Administration position has been that tort reform legislation should do three things: 1) make the civil justice system more efficient and reduce frivolous litigation; 2) still allow for fair and just compensation for injured parties, and not create major constitutional problems through unfair treatment of those who have been injured; and 3) lower liability insurance rates. The corollary to these precepts is that tort reform legislation should *not* 1) increase the cost, complexity, and amount of litigation; or 2) cut off the rights of injured Alaskans to recover reasonable compensation for injuries sustained by another party's negligent acts. Although some of the provisions included in this bill arguably comply with these basic tenets, when viewed as a whole this bill fails to meet most, if not all, of these tests.

The bill will increase the amount, cost, and complexity of litigation.

The Department of Law has prepared a detailed analysis outlining the numerous legal issues raised by this bill. It is worthwhile to briefly list the principal issues identified by Law, since each would likely lead to additional litigation.

1. *Commercial Recreational Activities (sec. 2).* This section of the bill was added very late in the legislative process, without adequate time for public comment or legal review. No other state has similar statutes. Law has now identified several ambiguities in the section, which will likely lead to extensive clarifying litigation. Also, the section probably violates constitutional equal protection guarantees.
2. *Statute of Repose (sec. 3).* This provision would prevent a suit from being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time.¹ The Alaska Supreme Court has already indicated that such a statute may be unconstitutional.
3. *Retroactivity of Punitive Damages Limitations (sec. 24).* By far the most disturbing section of the bill is the clause providing a retroactive effective date for the bill's punitive damages limits. This provision is probably unconstitutional as a violation of due process, and might also constitute an unlawful taking, especially because the section appears to be designed to benefit specific private parties to existing lawsuits. Furthermore, an argument can, and most certainly would, be made that the section applies to the punitive damages award in the *Exxon Valdez* litigation.
4. *Allocation of Fault (secs. 10-11).* The proposed changes would allow the fact finder in a trial (the jury, or the judge in a case tried without a jury) to apportion responsibility for the accident not only among the parties in court, but to any parties responsible for the injuries, even if one or more of those responsible are immune from liability. It creates the classic "empty chair" situation, where all those potentially liable to plaintiff argue that the majority of fault lies with those not in court.² Also, because the bill section was not coordinated with worker's compensation statutes, the injured

person could be required to give back some of his recovery to his employer, even though he could not receive compensation for the employer's fault in causing the accident.

5. *Offers of Judgment (sec. 13).* Without getting into the complexities of the legal analysis, the practical effect of the changes proposed could be to *reduce*, rather than increase, the incentives for early settlement of cases.

6. *Admissibility of Expert Testimony (sec. 15).* The restrictions on expert witnesses are at best confusing, and if interpreted by a court expressly as written, would likely be unconstitutional.

7. *New Civil Causes of Action for Frivolous Practice (sec. 19).* This section would create extensive additional litigation, providing an avenue for litigious litigants to bring many new claims and new lawsuits, adding to the cost and complexity of litigation.³

The bill will cut off the rights of injured Alaskans to reasonable and just compensation for injuries.

1. *Statute of Repose (sec. 3).* As noted above, operation of the statute of repose would cut off a person's right to recover, even if the accident had not yet occurred.⁴

2. *Hospital Non-Liability (sec. 18).* The bill would allow a hospital to exempt itself from liability for damages caused by the negligence of its emergency room doctors, if those doctors carry at least \$500,000 in insurance. That amount of insurance is probably inadequate to compensate for most serious emergency room injuries.

3. *Commercial Recreational Activities (sec. 2).* Although the tort reform advocates claim that this section merely codifies current law, the extensive lobbying efforts of the visitor industry clearly demonstrate that industry believes this section will reduce their liability to injured customers.

4. *Mandatory Arbitration (sec. 17).* In general the concept of alternative dispute resolution procedures such as arbitration and mediation can, in some cases, reduce the overall costs of litigation. However, the provisions in this bill could have the additional effect of foreclosing legitimate damage claims. The arbitration procedures set out in the bill have been made applicable only to relatively small cases where the amount claimed is less than \$50,000; by requiring the parties to pay all costs associated with the arbitration, the bill might effectively cut off a smaller claimant's ability to bring suit in the first place.

5. *Offers of Judgment (sec. 13).* The provisions relating to offers of judgment place an almost impossible burden on a plaintiff in a case involving multiple defendants, because the plaintiff will be required not only to reasonably predict how much he or she will recover in the case, but also the relative percentage of responsibility for each defendant; if the predictions for any single defendant are wrong, the plaintiff risks being held liable for all costs and attorney fees of the defendant who made the offer. Many injured plaintiffs cannot afford to take such risks and will be forced to accept unreasonably low settlement offers.

The Legislature totally failed to utilize a public, consensual process in crafting this bill.

Although this legislation went through several committees and had numerous hearings, the Legislature chose to ignore the results of that process and instead adopt a new version of the bill in the final hours without any public process. This session, several hearings were held on HB 158 in the Senate Judiciary and Finance Committees, in which many of the suggestions raised by the Administration and others were incorporated into the bill.

However, the Finance Committee version of the bill was essentially and a totally new version adopted by the Senate Rules Committee, apparently with the assistance and input of the strongest tort reform advocates. Included in this final version for the first time were the provisions relating to commercial recreational activities, a new arbitration procedure, and the retroactive limitations on punitive damages. The only public hearing on the final bill was a 15 minute Rules Committee hearing, held minutes after the bill was made available to the public for the first time.

The Legislature was unwilling to work to adopt acceptable, reasonable tort reform. For example, the tort reform advocates argued that tort reform would help reduce liability insurance rates. However, the Legislature refused to require a 10 percent reduction in rates as a precondition for the bill's taking effect, because the advocates argued that it would take a few years of the bill being in place before any results would be realized.

In response to this argument, Senator Phillips offered an amendment on the Senate floor to sunset the bill in five years if rates did not come down, thereby giving the bill's provisions a chance to have an impact before the rate reduction would be required; this amendment was also rejected.

Conclusion

Last year, Alaskans were charged with 28,370 misdemeanors, 2,778 felonies, came to court 68,761 times for traffic offenses, filed 8,692 domestic relations cases (including 3,984 for divorce or dissolution), and filed 9,717 small claims cases. There were 21,378 cases filed in Superior Court. However, there were only 993 personal injury cases filed —4.6 percent of the total. Only 43 civil jury trials were held last year in the state, and these included not only tort claims, but debt collection, review of administrative orders, and contract disputes. Thus, contrary to the claims of tort reform advocates, there is no explosion of tort litigation in Alaska.

Nonetheless, there are several features of this bill that could improve our civil justice system and form the basis for effective, responsible tort reform. Placing a reasonable limit on the amount of punitive damages that may be awarded in future cases (sec. 7) may be worthy of consideration, and a requirement that some percentage of such awards be turned over to the state (sec. 7) can maintain the benefits of the punitive damage process without giving plaintiffs an unreasonable windfall recovery. Tying interest rates on judgments to a variable market rate makes sense (sec. 14). Allowing hospitals to avoid liability for negligence of their emergency room doctors (sec. 18) may be a laudable goal, provided the doctors are required to carry sufficient insurance to protect patients. Prohibiting a person who is injured while committing a felony from recovering for such injuries

(sec. 20) does not offend most people's sense of justice. And enhancing the penalties under Civil Rule 11 against attorneys who file frivolous pleadings (sec. 21) could help reduce litigation and ensure better judicial practice. Other related concepts that warrant consideration, discussed at various times during the hearing process on this bill, include some method to ensure insurance rate reductions, and mandatory mediation similar to that proposed in CSHB 414 (Jud).

In short, there are many aspects of tort reform that could help reduce the costs and complexity of litigation, and presumably the cost of liability insurance in Alaska, without at the same time cutting off our citizens' right to recover reasonable compensation for injuries caused by the fault of others. Unfortunately, in passing HB 158, the Legislature chose a less humanistic approach: it elected to simply grant unwarranted benefits to insurance companies by cutting off injured parties' rights.

Alaska Department of Commerce and Economic Development, 6/13/96

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

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June 10, 1996

Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: SCS CSHB 158(RLS) am S(ct rls
fld S) -- (Tort Reform)
Our file: 883-96-0096

Dear Governor Knowles:

At the request of legislative director, Pat Pourchot, the Department of Law has reviewed SCS CSHB 158(RLS) am S(ct rls fld S) (hereafter "HB 158"), commonly known as the "tort reform" bill. If enacted, this bill would materially change substantive and procedural law governing tort actions, and would peripherally affect other types of actions. This review discusses some of the significant legal problems the bill would create.

HB 158 would primarily impact civil actions for personal injury, death, or damage to property.¹ The bill would have much less impact on economic torts such as interference with contract. See Fairbanks North Star Borough v. Roen Design Associates, Inc., 727 P.2d 758, 760 (Alaska 1986) (similar language did not cover damages to intangible property). Accordingly, use of the term "tort" in this review includes only actions for personal injury, death, or property damage, unless otherwise indicated.

CIVIL LIABILITY FOR COMMERCIAL RECREATIONAL ACTIVITIES

Section 2 of the bill limits the liability of those who operate outdoor recreational activities for paying participants. Participants would be deemed comparatively negligent to the extent

¹ Several sections of the bill would impact a broader category of actions. These are secs. 8, 9, 13, 14, 19, and 21 of the bill, which address interest, periodic payment, offers of judgment, and frivolous or improper action.

that an "inherent risk" of the activity contributed to an injury, and any award would be correspondingly reduced.

Current Law

Standard common law currently governs the liability of operators of commercial recreational activities, except for ski areas. The conduct of both the operator and the participant is compared with the conduct of a hypothetical ordinary person in the same circumstances who has similar training and skills and is reasonably prudent. Alaska Pattern Civil Jury Instruction 3.03A; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 32 at 185 (5th ed. 1984). Those circumstances include the risks of injury inherent in a given activity. Fickes v. Petrolane-Alaska Gas Service, Inc., 628 P.2d 908, 912-13 (Alaska 1981). If an operator or participant violates a duty created by statute, that person may be presumed negligent under the doctrine of negligence per se. Alaska Pattern Civil Jury Instruction at 3.04A.

Ski area liability is governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. The fourteen sections of the Alaska Ski Safety Act of 1994 precisely define the duties and responsibilities of skiers and operators. If a ski area fulfills all its responsibilities, it is immune from liability for any accident in which a contributing factor was an inherent risk of skiing or the skier's failure to follow the enumerated skier duties.

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Section 2 of the bill would change the manner of allocating comparative fault in personal injury or property damage lawsuits arising from "commercial recreational activities" other than ski areas. An "inherent risk" of the activity that partly causes an injury would be deemed negligence by the injured person and become part of that person's percentage of fault for calculating damages under AS 09.17.060. The section also would assign certain responsibilities to clients and operators. For example, the participant would be responsible for maintaining control of any equipment or animals the participant used, and all operators would be required to train employees in basic first aid and cardiopulmonary resuscitation (CPR).

Section 2 of the bill would apply to a broad range of activities inside and outside the commercial tourist industry, including outdoor sports leagues that charge a fee, summer camps for children, outdoor educational and sport activities conducted by private schools, and guided tourism, fishing, and hunting.

This section was added to the bill late in the session, in the Senate Rules Committee.² It would present interpretation problems and a constitutional issue.

Analysis

The concept of sec. 2 of the bill is similar to the Alaska Ski Safety Act of 1994, but in contrast to that Act's carefully-crafted, detailed provisions, sec. 2 of the bill covers a far broader range of activities with vague, ambiguous language. Added to the bill when public comment was no longer feasible, the section lacks the precision that results from open discussion and thorough analysis. Foreseeable problems with sec. 2 of the bill include ambiguity about the types of activities to which it applies, the unreasonable nature of the duties it imposes upon participants, a higher imposition of liability on volunteer operators than on paid operators, and elevated rights for nonpaying participants.

A. AMBIGUITY OF "OUTDOOR" RECREATIONAL ACTIVITY

Section 2 of the bill would apply to any "recreational activity" for which the participants pay compensation. "Recreational activity" means an "outdoor activity undertaken for the purpose of exercise, education, relaxation, pleasure, sport, or hobby." Because "outdoor" is not defined, the coverage of sec. 2 of the bill would be uncertain and would not become clear until a selection of claims are litigated over a period of years. For example, the bill is ambiguous as to whether air travel is "outdoor" recreation. Whether sec. 2 of the bill applies when the

² The section has some similarity to HB 300, which the House passed in 1994. Wisconsin's "Participation in Recreational Activities" statute, Wis. Stat. § 895.525 (1995) appears to be the source of some of the language used in sec. 2 of the bill and HB 300 (1994). The Wisconsin statute has a different effect, however. It addresses only the premises liability of landowners and lessees, and by express statement of the legislature is intended to impose no greater duties on recreational participants than they have under common law. Rockweit v. Senecal, 522 N.W.2d 742, 746 (Wis. 1995). Moreover, the Wisconsin law does not distinguish between "outdoor" and other recreational activities, or between activities conducted for compensation and those offered free of charge. No other state has a statute similar to sec. 2 of the bill.

operator of a guided hunting, fishing, climbing, or other outdoor service flies clients to activity locations is unclear.¹

Similarly, while sec. 2 of the bill presumably would cover guided tourism or fishing from the deck of a boat, its application is uncertain if the client spends part or all of the trip in the boat's cabin. Similar activities might be treated differently depending upon whether the boat used was a zodiac, cabin cruiser, coastal tour boat, cruise ship, or ferry.

Further, the coverage of "outdoor activity" may or may not apply when a client is injured in a camp tent, in a rustic cabin provided by the operator, or in a lodge.

The ambiguity extends to traditional sports activities as well. Although sec. 2 of the bill seems to cover a fee-based outdoor hockey or basketball program while exempting the same programs using indoor rinks or courts, it may or may not cover outdoor programs for injuries in the locker room or injuries caused by accidents while transporting participants to games.

B. RESPONSIBILITY FOR CONTROLLING EQUIPMENT AND ANIMALS

Section 2 of the bill unequivocally gives the paying participant responsibility to maintain control of any equipment the participant is using. The broad language covers all types of equipment and all ages of participants. Existing laws, industry standards, and custom often assign control responsibility to someone other than the participant. A skipper is commonly thought to be responsible for maintaining control of a sport fishing boat; a pilot is thought to be responsible for maintaining control of a flightseeing aircraft; and an amusement ride operator is thought to be responsible for maintaining control of a ferris wheel ride. If interpreted as written, sec. 2 of the bill would transfer these responsibilities to the party paying for the service. While a court interpreting the provision would seek to avoid an absurd result, the overbroad language leaves the provision's ultimate effect to the chance of litigation.

Section 2 of the bill also would transfer to the paying participant responsibility for controlling animals the participant

¹ Limited legislative history on the bill suggests that some legislators considered air travel to be an outdoor activity. Legislators apparently did not discuss travel on commercial airliners for recreational or educational purposes in conjunction with HB 158.

is using, such as the dogs provided by a commercial mushing operation or the ponies that children ride on a pony wheel at a fair. Thus, if a child attending summer camp is seriously injured when the camp counselor turns on loud music and causes the horse to shy and throw the child, the child's statutory responsibility for maintaining control of the horse would reduce the camp's liability. Section 2 of the bill would further reduce the camp's liability to the extent that the inherent risks of riding a horse (e.g., the risks associated with sitting high above the ground on an animal capable of being startled unexpectedly) were a contributing factor to the injury. Section 2 of the bill would alter current law so that the injured person would be deemed comparatively negligent and would recover less than full damages.

D. CREATION OF NEW DUTIES

Section 2 of the bill would impose new duties on a participant in a commercial recreational activity, including the obligations to learn about the risks of the activity and act within the limits of the person's ability. The operator also would have new duties, such as to "explain to a participant the fundamental inherent risks" of the activity. This new statutory duty might expand liability under a negligence per se theory if an operator failed to disclose an inherent risk that seemed too obvious for explanation.

E. LACK OF PHASE-IN PERIOD

Section 2 of the bill would take effect in 90 days, during the current outdoor recreation season. Operators of sports and outdoor education programs and recreational businesses in remote areas would have difficulty complying with the new first aid and CPR training requirements prior to the effective date. This would increase their exposure to liability, as failure to comply would constitute negligence per se in the event of an injury.

F. EQUAL PROTECTION

Section 2 of the bill would draw a distinction between compensated and uncompensated outdoor activities. People who operate outdoor activities without compensation would have substantially greater liability than those who are paid. Thus, a person could not raise the defenses under the section if the person voluntarily ran a neighborhood soccer league, but the defenses would be available to a person operating a league for paying participants. Likewise, if a child sustained an injury on

a school playground⁴ and the school were found negligent, the amount of liability would depend on whether the school is public or private; public schools would have greater exposure. The Alaska Supreme Court has struck down a statute discriminating among defendants "based on their occupation or the nature of the work they perform," rather than on distinction in conduct. Turner Construction Co. v. Scales, 752 P.2d 467, 470-71 (Alaska 1988). The distinction that sec. 2 of the bill makes is similar and may be unconstitutional as well.

Section 2 of the bill also would discriminate among plaintiffs in ways that a reviewing court might find capricious. For example, paying attendees at a summer camp apparently would be treated less favorably than campers on full scholarship. Because scholarship campers do not "pay compensation," they are probably outside the scope of sec. 2 of the bill. A scholarship and a paying camper could be injured in the same canoeing accident and the paying camper would have substantially fewer legal rights than would the paying camper's canoe mate.

TIME LIMITATIONS ON ACTIONS

The bill would affect the time period in which a plaintiff can file suit in three ways. Section 3 of the bill broadens the existing statute of repose, which limits a plaintiff's right of action for delayed injuries, to encompass torts outside the construction context, and shortens the time limit from 15 to 10 years. Section 4 of the bill reduces the statute of limitations for damage to tangible property.

A. STATUTE OF REPOSE

A statute of repose prevents a plaintiff from filing suit after a set period of time, even though the statute of limitations has not expired. While the period during which suit may be brought under a statute of limitations ordinarily begins on the date of injury, a statute of repose runs from the date of the defendant's act. This distinction is important when the injury occurs much later than the negligent act -- such as the collapse of a school or warehouse after a heavy snowfall due to defective design or construction years after the defective work was performed. The statute of limitations would not bar an action until two years

⁴ Under sec. 2 of the bill, activities on a playground at school for the purpose of "exercise," "education," or "pleasure" would be "recreational activities." They are within the scope of sec. 2 of the bill if "participants pay compensation."

after the collapse, but a statute of repose could bar a cause of action after the set number of years from the construction even if that period expired before the collapse.

Current Law

Since 1967, Alaska has had a statute of repose aimed at defects in design and construction of real property improvements. In 1988, the Alaska Supreme Court invalidated the 1967 law on equal protection grounds because the statute discriminated between different kinds of defendants "based on their occupation or the nature of the work they perform." Turner Construction, 752 P.2d at 470.

In 1994, the legislature passed a substitute statute of repose, the presently effective AS 09.10.055, which eliminated some of the distinctions among classes of defendants that the Alaska Supreme Court had criticized. The current statute of repose establishes a limit of 15 years for tort actions based on a design or construction defect in real estate improvements.

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The purpose of sec. 3 of the bill is to enact a statute of repose that meets the standards of Turner Construction. Section 3 of the bill would broaden the statute of repose to encompass torts outside the construction context, to all "last acts" by a defendant, and would shorten the bar on action from 15 to 10 years. Exceptions would be granted for damages caused by intentional acts or gross negligence and exposure to a hazardous substance, a defective product, or an undiscovered foreign object in a person's body. The statute of repose would not apply if the facts that would give notice of a potential cause of action were intentionally concealed.

Analysis

Section 3 of the bill may be unconstitutional under the Alaska Constitution's equal protection and due process clauses. In Turner Construction, the Alaska Supreme Court found the statute of repose's discrimination among defendants unconstitutional as an equal protection violation. The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution. Section 3 of the bill would be vulnerable to challenge on these grounds. State courts have split on the question of whether statutes of repose are constitutional. See Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 827-28 and n.12 (describing split and listing cases finding

such laws unconstitutional) (Mo. 1991). The Alaska Supreme Court has commented that "[i]t is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has had a reasonable opportunity to do so." Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143, 147 (Alaska 1984). This observation suggests that the court would find discrimination among classes of plaintiffs to violate the state constitution.

The state, as the owner of facilities, would be impacted by the broadened statute of repose. In particular, where the state had assumed ownership of facilities constructed by the Bureau of Indian Affairs (BIA) or other federal agencies, the state would lose its potential recourse against the United States for shoddy construction. Under the Federal Tort Claims Act, the federal government is liable only to the same extent as a private individual in like circumstances. 28 U.S.C. 2674 (1994).

The bill's changes to the statute of repose would cause an additional problem. Under sec. 24, the bill would apply retroactively if the defendant's "last act" occurred before the bill's effective date and more than ten years before the accrual date (generally the date of injury). Prospectively, parties could contractually protect themselves from the broadened statute of repose, but they would not have foreseen the retroactive application of a change when preparing earlier contracts. When the legislature amended the current statute of repose in 1994, it addressed this problem by making the bill effective only as to prospective defects in construction. Section 4, ch. 28 SLA 1994. For the reasons discussed below under part (2) of "Punitive Damages," this retroactive application creates additional constitutional concerns.

B. STATUTE OF LIMITATIONS

Current Law

Current law provides that a person has two years from the date a cause of action accrues to file suit for personal injury or other personal torts. AS 09.10.070. A cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all of the elements of a cause of action. Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991). This doctrine is known as the "discovery rule."

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Section 4 of the bill would reduce the statute of limitations for a claim for damages to tangible property from six years, under AS 09.10.050, to two years. Section 5 of the bill would create a separate statute of limitations addressing only a certain category of torts, and would accommodate the shorter limits established by the statute of repose. Both secs. 4 and 5 of the bill refer to the statute of limitations running "from the accrual of the action."

Analysis

The addition of the language in secs. 4 and 5 of the bill referring to the "accrual of the action" would not be a substantive change. This language incorporates the discovery rule under Cameron. The sponsor's sectional summary demonstrates that these provisions were not intended to change the discovery rule.

LIMITS ON DAMAGES

A. PUNITIVE DAMAGES

Current Law

The purpose of punitive damages is to punish the wrongdoer and deter the wrongdoer and others from repeating the wrong. Providence Washington Ins. v. Valdez, 684 P.2d 861 (Alaska 1984). Punitive damages are not easily obtained; a plaintiff must prove by clear and convincing evidence that the wrongdoer's act was outrageous, such as an act done with malice, bad motive, or a reckless indifference to the interests of another. Bridges v. Alaska Housing Auth., 375 P.2d 696, 702 (Alaska 1962) (citing Restatement of Torts § 908 (1939) and W. Prosser, Handbook on the Law of Torts, § 2 (2d ed. 1955)).

Federal courts look to state law on punitive damages in certain federal cases. Generally, state law governs to the extent that there is a state law basis for the punitive damage award:

In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S.Ct. 2909, 2921-22 (1989). Federal courts also look to state law to fill gaps in federal law. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 366 (9th Cir. 1992); U. S. for Use of Bldg. Rentals Corp. v. Western Cas. & Sur. Co., 498 F.2d 335 (9th Cir. 1974).

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Section 6 of the bill would codify the existing Alaska standard of proof to obtain an award of punitive damages. Section 7 would place a limit on punitive damages in all civil actions. An award could not exceed the greater of three times the compensatory damages or \$300,000. The cap would not apply if the wrongdoer caused the harm in the course of committing a felony. Seventy-five percent of the award, if collected, would be deposited into the state's general fund.

Analysis

A mathematical cap on punitive damages does not appear to pose either state or federal constitutional problems. See, e.g., Wackenhut Applied Technologies Ctr., Inc. v. Symetron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992); Bagley v. Shortt, 410 S.E.2d 738 (Ga. 1991); contra, Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993). However, both the United States Supreme Court and the Alaska Supreme Court have noted practical problems with arbitrary mathematical formulas. The United States Supreme Court stated recently:

[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every

case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus."

BMW of North America v. Gore, 640 U.S.L.W. 4335, 4342 (U.S. May 20, 1996) (citations and footnote omitted). The Alaska Supreme Court has declined on several occasions to judicially adopt a fixed ratio between punitive and compensatory damages:

This court has refused to prescribe a definite ratio between compensatory and punitive damages. . . . Though comparing punitive and actual damage awards is one way to determine if punitive damages are excessive, other factors, such as the magnitude and flagrancy of the offense, the importance of the policy violated, and the defendant's wealth, are equally important to the determination.

Cameron v. Beard, 864 P.2d 538, 551 (Alaska 1993) (citations omitted).

An allocation to the state of 75 percent of the punitive damage award also does not appear to violate state or federal constitutional provisions. See Gordon v. State, 585 So.2d 1033, 1035-1038 (Fla. App.1991), aff'd, 608 So.2d 800 (Fla.1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 637-639 (Ga.1993); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 619 (Iowa 1991). The allocation causes practical problems, however, that could in turn raise constitutionality questions.

1. Attorney Fee Liability: Punitive Damage Share.

Section 7(d) of the bill provides that "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." The original bill contained a provision specifying that contingent attorney fees must be calculated after the state's percentage of the punitive damage award was deducted (see section 20, CSHB 158(Fin)), which was dropped from the final bill, leaving the issue unaddressed in HB 158. This oversight creates significant risk that a plaintiff would recover less from an award including punitive damages for outrageous wrongdoing than from an award with no punitive damages.

The following example demonstrates how HB 158 could operate to financially penalize plaintiffs who are awarded punitive damages. If a plaintiff agrees to pay an attorney a 40 percent

contingent fee, which is not uncommon, and the contingent fees were calculated before deduction of the state's 75 percent portion of a punitive damage award, the plaintiff would recover no portion of the punitive award, and would actually be penalized 9 percent on each dollar of punitive damages awarded:

Comp. Damages	\$100,000	\$100,000	\$100,000
Prejudgment Int. ⁵	20,000	20,000	20,000
Punitive Damages	0	10,000	100,000
Civil Rule 82	<u>14,500</u>	<u>15,500</u>	<u>24,500</u>
Gross Award	134,500	145,500	244,500
40% Cont. Fees	<53,800>	< 58,200>	< 97,800>
State's Share of Punitive Damages	< <u>0</u> >	< <u>7,500</u> >	< <u>75,000</u> >
NET RECOVERY ⁶	\$80,700	\$79,800	\$71,700

Substantive due process requires that any bill granting the state a share of punitive damages contain language to protect plaintiffs from liability for contingent attorney fees calculated from the state's share of the recovery.

2. General Retroactivity of Punitive Damages Limitation

Section 24 of the bill would apply the punitive damages limits in sec. 7 of the bill to civil actions that accrued before the effective date of the bill if the court had not yet entered judgment in the civil action. This provision probably would constitute a taking without compensation and a violation of due process.⁷

⁵ The \$20,000 interest figure in this example represents approximately two years of interest on the compensatory award under the current rate of 10.5 percent per year. Prejudgment interest is not awarded on punitive damages. See Matanuska Electric Association, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986).

⁶ This illustration does not take into consideration litigation costs, which would vary from case to case, but which in every case would reduce the plaintiff's net recovery further.

⁷ The retroactivity language was added in the Senate Rules Committee and was never subjected to routine public hearings.

A newly imposed limitation on the remedy in an existing cause of action may constitute a taking of vested property rights or a violation of due process. An unlitigated claim is considered a property interest. Patrick v. Lynden Transp., Inc., 765 P.2d 1375, 1378 (Alaska 1988). State Superior Court Judge Larry Weeks has held that "once a lawsuit is filed by an individual to enforce a then existing legal right, that right cannot be extinguished by later legislative action directed at that individual's claim." Edwards v. Alaska Pulp Corp., 1JU94-1825 CI (September 22, 1994). Judge Weeks extended this principle to any statutory change that "reduces the value of Plaintiff's property." Id. This rationale would be even more compelling if the plaintiff had expended significant litigation costs in reliance on the existing law of punitive damages.

The Legislative Affairs Agency similarly has concluded that "[a]n actionable right that is canceled . . . would be considered a property right that is protected by the due process clause." Memo from Legislative Counsel Theresa Bannister to Rep. Navarre, March 7, 1994. In that matter, the legislative counsel considered a draft bill that would cancel certain private nuisance actionable rights even if the right had already accrued and was being litigated short of final judgment. The memo notes that even when the legislature eliminates a remedy, the action is unconstitutional if the change is so abrupt as to leave no reasonable time to exercise the remedy. The memo also concludes that retroactivity may constitute an inverse condemnation taking under art. I, sec. 18 of the Alaska Constitution. Both the due process and inverse condemnation aspects of the legislative counsel's analysis are applicable to HB 158.

The inverse condemnation concern is particularly applicable because the state would take 75 percent of a remedy that the plaintiff had spent money to obtain. Prospectively, a plaintiff would consider that outcome in determining what resources to devote to a punitive damages claim.

On the other hand, the Alaska Supreme Court could find that a claim for punitive damages does not constitute a property interest. Punitive damages are a creature of statute and do not exist independently of statutory authorization. Hazen v. Anchorage, 718 P.2d 456, 465 (Alaska 1986). Further, punitive damages can be viewed as a windfall to the plaintiff rather than as a right, because the payment does not compensate the plaintiff for actual damages. Some states' courts have held that the legislature may retroactively modify punitive damage provisions. See Shepherd Components, 473 N.W.2d at 619; Vaughan v. Taft

Broadcasting Co., 708 S.W.2d 656, 660 (Mo. 1986); but see Reeves v. Ille Elec. Co., 551 P.2d 647, 652 (Mont. 1976).

This section would raise an additional constitutional problem if it were established, as was suggested in House floor debate, that the legislative purpose of retroactivity was to affect the legal rights of individuals in specific litigation, rather than to promote a broad public purpose. See Yukon-Kuskokwim Health Corp. v. Trust Ins. Plan for S.W. Alaska, 884 F.Supp. 1360, 1366-67 (D. Alaska 1994). Judge Weeks also identified this deficiency in the statute he addressed in his Alaska Pulp Corp. decision. Because he found the legislation to be intended to extinguish rights in particular litigation, Judge Weeks held that it had a private purpose and therefore had insufficient public purpose to withstand due process scrutiny. A private purpose would not meet the constitutional test of bearing a reasonable relation to a legitimate public purpose. See Pan-Alaska Const. v. Dep't of Admin., 892 P.2d 159, 162 (Alaska 1995); Gates v. Tenakee Springs, 822 P.2d 455, 462 (Alaska 1991); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 351 (Alaska 1988).

Retroactive application of the allocation provision also would cause practical problems. The retroactivity provision would affect cases in which the jury had returned a verdict, but in which post-trial motions were pending. A final judgment "represents the completion of all steps in the adjudication of [a] claim by the court, short of any steps by way of execution or enforcement." Restatement (Second) Judgments § 13 comment b (1982); Catlin v. United States, 324 U.S. 229, 233 (1945). Even cases remanded on appeal may no longer have "final" judgments. Retroactive application would subject litigants in many pending cases to an additional stage of turmoil and unpredictability.

3. Impact on Exxon Valdez Litigation

You have asked about the impact of sec. 24 of the bill on the Exxon Valdez oil spill punitive damages award. The risk that sec. 24 of the bill would impact the \$5 billion punitive damage award in In re the Exxon Valdez, A89-095-CV (HRH) is significant. The court will not issue a final judgment in this case until the final phase of the litigation is completed. Whether sec. 24 of the bill impacts the verdict depends on how the federal appellate courts evaluate several hotly contested issues the trial court decided in the Exxon Valdez case. The federal appellate courts that will decide these issues are entirely outside the control of the state's executive, legislative, and judicial branches of government.

Counsel for the Exxon Valdez plaintiffs have indicated that the punitive damage award applies to the claims of approximately 30,000 victims of the oil spill, mostly Alaskan residents. The amount of the punitive damages award and the number of claimants affected render the award the most significant ever made in this state, and one of the most significant ever made in the United States. The plaintiffs' case took five years to proceed to trial. The federal trial court considered and decided scores of legal issues in motions filed before, during, and after the trial. Given the magnitude of the case, the enactment of sec. 24 of the bill almost certainly would provide an basis for additional post-trial motions, which would further delay final resolution and entry of judgment. Section 24 of the bill also would create substantial uncertainty about the appellate consideration of the punitive damages verdict.

Although the punitive damage award was made in federal court, state law governs if the punitive damage award is based on a state law claim. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. at 278. The plaintiffs in the Exxon Valdez case made claims under state statutes and state common law and sought punitive damages under those state law claims. The State joined the private plaintiffs in arguing that federal maritime law did not preempt applicable state law. The federal district court decided that federal maritime law applied and preempted all of the plaintiffs' state law claims. In re Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991).

Exxon then argued to the federal district court that the state "clear and convincing evidence" legal standard for punitive damages should apply in the Exxon Valdez trial. In its brief to the court on that issue, Exxon stated:

There is no question that a federal court can and should look to prevailing principles of land-based law, to the extent consistent with the policies and purposes of admiralty, when fashioning federal maritime common law rules.

Consistent with the ruling that federal maritime law preempted all state law causes of action, Judge Holland ruled that federal law governs the issue of punitive damages. (Order No. 171). Exxon unsuccessfully repeated its argument in its subsequent motion for a new trial on the plaintiff's punitive damages claims, and likely will continue to argue on appeal that applicable state law should limit punitive damages.

The court's decision that federal maritime law preempts state law is subject to challenge both on motion for reconsideration and on appeal, and may not survive. Another preliminary decision of the federal trial court on a different issue was appealed to and reversed by the Ninth Circuit prior to trial. Evak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir.), cert. denied, 115 S. Ct. 351 (1994) (reversing in part denial of motions to remand). In addition to the considerable authority the state cited in its briefs supporting the application of state law, several subsequently reported decisions by other federal courts hold that the plaintiffs' state law claims are not preempted by federal maritime law in similar circumstances. See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (holding that federal maritime law does not preempt oil spill-related claims under Rhode Island's Environmental Injury Compensation Act); In re Nautilus Motor Tanker Co., 900 F. Supp. 697 (D.N.J. 1995) (federal maritime law did not preempt oil spill-related claims under N.J. common law); Slaven v. BP America, Inc., 786 F. Supp. 853 (C.D.Cal. 1992) (holding California statutory and common law claims for damages arising from oil spill not preempted). Judge Shortell, who presided over the state court Exxon Valdez litigation, also reached a result contrary to that of the federal trial court, in pretrial orders 15 and 16, September 26, 1990. Whether the Ninth Circuit and the United States Supreme Court would agree with the trial court's decision on the preemption question in the Exxon Valdez case is an open question.

Even if the punitive damages cap and allocation provision do not apply directly to the Exxon Valdez award, HB 158 could have a more subtle effect. In its recent decision in BMW, the United States Supreme Court considered the limitations that state punitive damages laws impose in determining whether the Alabama award violated the due process clause. This type of reasoning would create a further basis for Exxon to argue that the jury's verdict is excessive. Exxon would present the bill's limitations on punitive damages as a standard by which to gauge reasonableness, and argue that the punitive damages awarded are grossly excessive compared to the caps the legislature has deemed appropriate.

Given the federal trial court's prior rulings on punitive damages issues, it is unlikely to determine that sec. 24 of the bill affects the punitive damages verdict in the Exxon Valdez case. The question is unsettled, however; Exxon is likely to argue the issue in a post-trial motion and more significantly, on appeal. Thus, sec. 24 of the bill injects considerable uncertainty and potential delay into the status of the punitive damages verdict.

B. PERIODIC PAYMENT

Current Law

Currently, a plaintiff may request that an award for future damages be paid by periodic payments rather than in a lump sum under Civil Rule 58(d). Periodic payments for future economic damages are permitted for all kinds of tort actions and contract cases. The court also has discretion to require that a defendant post security to ensure that funds are available as periodic payments become due. Civil Rule 58(e).

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Section 8 of the bill would provide the courts further guidance in deciding whether to require security for periodic payments. Section 9 of the bill would amend the provision providing the mechanism for payment of periodic damages, and would require a judgment for periodic damages to specify any future increases for inflation. Section 9 of the bill also limits the periodic payment mechanism to damages arising from personal injury or death.

Analysis

Because these provisions change matters of court procedure, but did not pass the legislature by a two-thirds margin, they probably are invalid as violative of the Alaska Constitution. The Alaska Supreme Court has power to make and promulgate rules governing the practice and procedure in civil and criminal cases in all courts. Alaska Constitution, art. VI, sec. 15. The legislature has no authority to make procedural rules, and can change existing rules only by a two-thirds majority of the members of each house. *Id.*; Linstad v. Sitka School District, 863 P.2d 838, 843 (Alaska 1993); Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 575, 576 (Alaska 1969).

To determine where the court's power ends and the legislature's begins, the court distinguishes between substantive and procedural law. Substantive law creates, defines, and regulates a right, while procedural law prescribes the method of enforcing the right. Ware v. City of Anchorage, 439 P.2d 793, 794 (Alaska 1968). In order for a statute to be invalidated as infringing on the court's authority to govern court procedure, it must be found that the statute conflicts with a rule promulgated by the court, Matanuska Maid, Inc. v. State, 620 P.2d 182, 188 (Alaska 1980), that the main subject of the statute is not substantive with only an incidental effect on procedure, Winegardner v. Greater

ALLOCATION OF FAULT

Current Law

The current law governing the allocation of fault in a tort action derives from the "Tort Reform Ballot Initiative" approved by Alaskan voters on November 8, 1988. The express purpose of the initiative was to eliminate "joint and several" liability -- the common law doctrine by which multiple defendants are held both jointly and individually liable for the entire amount of damages awarded to a plaintiff irrespective of each defendant's percentage of fault. In pertinent part, the initiative repealed AS 09.16.010, which provided for a right to contribution among co-tortfeasors, and amended AS 09.17.080(d) to read, "[T]he court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault."

In Benner v. Wichman, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes in AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. Thus, under current law defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

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Sections 10 and 11 of the bill would change current law by amending AS 09.17.080 to allow fault to be allocated to all persons responsible for a claimant's damages "regardless of whether the other person, including an employer, is or could have been named as a party to the action." The proposed changes would eliminate the need for a defendant to file a third-party complaint against a negligent but judgment-proof person (whom the plaintiff had elected not to sue) in order to have fault allocated to that person. Moreover, fault could be allocated to persons who are immune from tort liability in a particular case, for example, employers, who are immune from tort liability to injured employees, and the state, which is immune from tort liability for discretionary acts.

In addition, sec. 11 of the bill provides that the assessment of fault against a non-party does not subject the person to liability and may not be used as evidence of liability in another action.

Section 12 of the bill contains new language, added in the Senate Rules Committee, codifying existing Alaska law providing that an agreement not to sue or enforce judgment given to one

Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975); Channel Flying, Inc., 451 P.2d at 576, and that legislature has not changed the rule with the stated intention of doing so, Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963); Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1040 (Alaska 1981).

Applying this standard, the changes in mechanism for payment of periodic damages may violate the Alaska Constitution. The mechanism by which periodic damage payments are provided is inherently procedural. Further, the provision in HB 158 changes an existing rule without any statement that the legislature had this intent. In contrast, the legislature passed the original provision in 1986 by amending Alaska Civil Rule 58 by a two-thirds majority to contain periodic payment provisions.

C. INTEREST

Current Law

Under AS 09.30.070(a), the interest rates on judgments, both pre- and post-judgment, is 10.5 percent. The state pays interest on judgments against it under AS 09.50.280, which provides that judgments against the state will draw "legal interest." The Alaska Supreme Court has interpreted this phrase to mean that the state pays the rate set in AS 45.45.010, which sets the legal rate of interest in Alaska generally, rather than the rate set in AS 09.30.070. State v. Phillips, 470 P.2d 266, 272 (Alaska 1970)

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Except when a judgment involves a contract specifying the interest rate, sec. 14 of the bill would change both postjudgment and prejudgment interest to a variable rate, three percent above the rate for five-year treasury notes in effect on the date of judgment. This method of calculating an interest rate would be similar to the practice in federal courts, although the rates applicable to state judgments would be different.

Analysis

A variable interest rate provides more appropriate compensation to a plaintiff for the loss of the use of the money before payment is made. The new interest rate might not apply to judgments against the state, however, absent an amendment to AS 09.50.280 to cross-reference the new rate in proposed AS 09.30.070(a), rather than the rate specified in AS 45.45.010. This would subject the state to a different, presently higher, interest rate on judgments than private parties would pay. The legislative history does not indicate that this result was intended.

person does not discharge another person also civilly liable for the same injury or death. Young v. State, 455 P.2d 889, 893 (Alaska 1969).

Analysis

Sections 10 and 11 of the bill would implement pure "several liability," so that named parties are held accountable only for their own percentage of fault. The plaintiff could not collect damages from nonparties merely because fault is allocated to those persons, however. If the plaintiff chooses to sue unnamed persons in a separate action, the court or jury's allocation of fault in the first action would not be binding or permitted as evidence in the separate action. The bill would allow the court or jury to allocate fault to entities that the plaintiff cannot sue, such as an employer for a work-related injury, or those immune from liability, such as persons protected by the statute of repose or good Samaritan law. The plaintiff would remain uncompensated for that proportion of fault.

This provision creates a problem that HB 158 does not resolve. The bill does not amend workers' compensation law to account for the impact that sec. 10 of the bill would have on a worker injured due to the combined negligence of the employer and a third party. Under current law, a worker injured due to fault on the part of both the employer and a third party is entitled to workers' compensation from the employer and 100 percent tort damages from the third party. Lake v. Construction Machinery, Inc. 787 P.2d 1027 (Alaska 1990). The employee then must reimburse the employer for the workers' compensation benefits (less the employer's proportionate share of litigation costs and attorney fees) from the tort damages recovery. AS 23.30.015. Because HB 158 allows fault to be allocated to non-party employers in a suit against the negligent third party, the employee's tort recovery would be reduced by the employer's percentage of fault.⁸ HB 158 does not amend AS 23.30.015, however, so the employee still would have to reimburse the employer for the full workers' compensation benefits from the partial award from the third party.

⁸ AS 23.30.055 provides that workers' compensation is the exclusive remedy against an employer .

OFFERS OF JUDGMENT

Current Law

Several offer of judgment provisions currently exist to encourage settlement. These provisions generally reward parties who make reasonable offers before trial and penalize parties who reject them. A plaintiff or defendant can make an offer of judgment to the adverse party in a civil case. If the other party rejects the offer and then obtains a judgment more favorable than the offer, the offer will have no effect. If the other party rejects the offer and the ultimate judgment is equal to or less favorable than the offer, however, the prejudgment interest rate is adjusted. It is reduced from 10.5 percent to 5.5 percent simple interest if the offeree with a less favorable judgment than the offer is a plaintiff, and is increased from 10.5 percent to 15.5 percent if the offeree with a less favorable judgment than the offer is a defendant. This mechanism is set forth in AS 09.30.065 and Civil Rule 68.

In addition, Civil Rule 68 provides a further penalty against a plaintiff who obtains a less favorable judgment than the rejected offer. The plaintiff must pay the defendant's costs and attorney fees under Civil Rule 79 or 82 for the period after the date of the offer, as if the defendant had been the prevailing party. Such costs and fees awards are typically 30 percent of a party's actual expenses.

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Section 13 of the bill would change existing offer of judgment law in four ways. First, it would eliminate all adjustment of prejudgment interest rates. Offers of judgment would no longer be connected to the rate of interest assessed on judgments. Second, it would override the Civil Rule 68 provision regarding attorney fees so that the offeror would get full reasonable fees from the date of the offer, not just a percentage of fees. Third, the right to full reasonable fees would apply equally to plaintiffs and defendants, in contrast to current Civil Rule 68's provision for cost and fee awards only against plaintiffs. Fourth, the proposed provision introduces a five percent margin of error to the offer of judgment mechanism; costs and fees would be shifted only if the offeree obtains a judgment at least five percent less favorable than the one offered.

Analysis

As stated, the changes would not pose legal problems. However, some of the changes may be invalid because they amend court rules without the mandatory two-thirds majority vote, and the remaining provisions then would have an effect directly contrary to their intended impact.

Civil Rule 68 provides that the interest rate shall be adjusted "by the amount specified in AS 09.30.065," and sec. 13 of the bill would eliminate that statute's adjustments of prejudgment interest rates. Section 13's award of full reasonable attorney fees, intended to override Civil rule 68, may be invalid as an amendment of court rules in violation of art. IV, sec. 15 of the Alaska Constitution. Thus, the primary financial penalty for failing to accept a reasonable offer would disappear, but the replacement for that penalty would be ineffective and sec. 13 of the bill would have a net impact of reducing rather than increasing the incentives for early settlement of cases.

Finally, the interrelationship between Civil Rules 68 and 82 would cause a result presumably unintended by the legislature. Under Civil Rule 82, the plaintiff is entitled to recover 10 percent of the recovery as attorney fees, while under the proposed amendment to Civil Rule 68(b), the plaintiff also would be entitled to receive full attorney fees incurred from the date of the offer of judgment. Section 13 of the bill provides no mechanism for balancing these overlapping fee provisions.

MALPRACTICE

A. ADMISSIBILITY OF EXPERT TESTIMONY

Current Law

Current law generally restricts a jury from considering any evidence other than testimony of expert witnesses in determining whether a professional breached the standard of care in a malpractice case. Kendall v. State, Div. of Corrections, 692 P.2d 953, 955 (Alaska 1984). The court determines under Evidence Rule 702(a) whether a witness has sufficient expertise to testify as an expert. The witness must qualify by "knowledge, skill, experience, training, or education" to assist the jury "to understand the evidence or to determine a fact in issue." A witness need not possess a particular license or academic degree in order to qualify as an expert. Handley v. State, 615 P.2d 627, 630 (Alaska 1980).

HB 158

Under secs. 15 and 16 of the bill, neither the plaintiff nor the defendant in a professional malpractice action could present an expert to testify at trial who was not both licensed by a state or country and certified by a state-recognized board as having expertise directly related to the particular field or matter at issue. The only exception would be for professions not licensed in any state or country.

Analysis

If a profession is not licensed in Alaska, but is licensed in any other state or country, then no Alaskan professional could testify as an expert. The licensed professional also would have to be board-certified to be qualified to testify, even though most professions (including general practice physicians) do not have boards that certify expertise. For example, if the plumbing profession were licensed only in New Jersey, only a New Jersey plumber could testify in Alaska about the standard of care that Alaskan plumbers should use in Alaska plumbing construction. If the plumber were not board-certified because a board to certify plumbers did not exist, even a New Jersey plumber could not testify. To the extent that these limitations are impossible to meet or unduly limit a party's ability to present evidence at a civil trial, they probably violate due process. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14, (1950). The federal district court and the Tennessee Supreme Court upheld the constitutionality of a Tennessee statute that limited expert testimony in a medical malpractice case to physicians licensed in the state or contiguous states, because the statute included a waiver provision if appropriate witnesses were unavailable. Ralph v. Nagy, 749 F. Supp. 169, 175 (M.D. Tenn. 1990) quoting Stulphin v. Platt, 720 S.W.2d 455, 458 (Tenn. 1986). Absent such a waiver provision, the Alaska Supreme Court probably would find this provision unconstitutional because it lacks a reasonable relation to a legitimate public purpose. See Pan-Alaska Const., 892 P.2d at 162; Gates, 822 P.2d at 462; Keves, 750 P.2d at 351.

No other state has adopted similar restrictions on the admissibility of expert testimony. Some states require a medical malpractice expert to have knowledge related to the particular medical field. See, e.g., Colo. Rev. Stat. Ann. §13-64-401 (West 1989); Kan. Stat. Ann. § (1995); R.I. Gen. Laws § 9-19-41 (1995). Michigan law requires that if a health professional subject to the malpractice action is a specialist, the expert also must have that specialty, and if the health professional is a board-certified

specialist, then the expert also must be board-certified. Mich. Comp. Laws § 600.2169 (1) (1995). North Carolina has an evidence rule requiring an expert to have the same or a similar specialty as the health care provider subject to the malpractice claims. Evidence Rule 702(b), N.C. Gen. Stat. § 8C-1 (1996). The court can waive this requirement if it finds extraordinary circumstances that warrant permitting the witness to testify to serve the ends of justice. Id. at 702 (e).

Further, HB 158 may be ineffective to change the rules for admission of expert testimony because the bill did not expressly provide for an amendment to court rules and the bill did not pass by the required two-thirds majority. See Alaska Constitution, art. IV, sec. 15. The version of the bill presented on the House floor contained a section expressly amending Evidence Rule 701, but the section failed to pass by the required two-thirds majority. The Senate did not replace the section and therefore did not vote on it.

B. NON-LIABILITY OF HOSPITALS

Current Law

Generally, a hospital is not liable for the act of a physician or other health care provider who is an independent contractor, unless the hospital itself is negligent. The hospital has an independent duty to use reasonable care in granting staff privileges to practice in the hospital and to supervise the medical treatment provided. Jackson v. Power, 743 P.2d 1376, 1378 n.2 (Alaska 1987). This general liability exemption does not apply when the hospital contracts a service that it is required by law to provide, for example, emergency services, and the contractor is negligent. 743 P.2d at 1382-85 (Alaska 1987). This doctrine of "nondelegable duties" applies also in other areas of endeavor based on "the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." 743 P.2d at 1384 (quoting Prosser and Keeton on the Law of Torts § 71 at 511-12). Currently, hospitals may guard against vicarious liability for an emergency room physician by joining the negligent physician as a co-defendant to any suit and by requiring its emergency room physicians to carry adequate malpractice insurance.

HB 158

Section 18 of the bill limits liability of hospitals for civil damages caused by an emergency room physician if the hospital posts and publishes notice that the physician is an independent

contractor and if the physician holds liability insurance coverage for at least \$500,000 per incident. The bill codifies the hospital's independent duty to exercise reasonable care in granting and reviewing staff privileges. Whether the bill is intended to supersede a hospital's existing duty to supervise the medical treatment provided by an emergency room physician is unclear.

Analysis

This section does not appear to have any legal or constitutional problems.

ARBITRATION

HB 158

Section 17 of the bill would establish a requirement for nonbinding arbitration in tort cases with damage claims of less than \$50,000 that are not in small claims court. In such cases, the court would appoint an attorney arbitrator, whom the parties must pay "in equal shares." After an expedited period of discovery and a hearing, the arbitrator would render a decision. A party could reject the decision and receive a court trial, but attorney fees would be awarded against a party who chose this route but failed to improve on the arbitrator's decision. Section 17 of the bill does not state the manner of collecting arbitrators' fees and the appropriate division of arbitration costs in cases with multiple plaintiffs or defendants.

Analysis

Section 17 of the bill would provide for the first mandatory alternative dispute resolution in Alaska beyond the mediation that the court may order under Civil Rule 100. It would have narrow applicability, generally to property damage tort cases in district court. Because the parties with smaller claims would bear arbitration costs that parties in larger actions would avoid, the section may raise equal protection problems.

Further, sec. 17 of the bill may be invalid under art. IV, sec. 15, of the Alaska Constitution because it creates a court procedure without changing substantive rights, as discussed above.

FRIVOLOUS OR IMPROPER PRACTICE

A. NEW CIVIL CAUSES OF ACTION

Section 19 of the bill would allow parties to litigation to file new claims or spinoff lawsuits against other parties and their attorneys for "improper practice," and to seek punitive damages.

Current Law

At present, a person may bring a cause of action, under the common law action for abuse of process, against an opposing party for conduct during other litigation. Prosser and Keeton on the Law of Torts §§ 120-21 cited with approval in J & L Diversified Enter., Inc. v. Anchorage, 736 P.2d 349, 351 n. 3 (Alaska 1987). These causes of action ordinarily must be brought after prevailing in the underlying litigation. Id. at 892. The Alaska Supreme Court has set out the elements of the cause of action:

[A]buse of process consists of two essential elements, "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." . . . The second element "contemplates some overt act done in addition to the initiating of the suit. . . . '[T]he mere filing or maintenance of a lawsuit -- even for an improper purpose -- is not a proper basis for an abuse of process action.'"

DeNardo v. Michalski, 811 P.2d 315, 317 (Alaska 1991) (citations omitted).

Parties, counsel, witnesses, judges, and juries have absolute immunity against a defamation action for statements made in litigation and pertinent to some issue in the litigation. Prosser and Keeton on the Law of Torts § 114 at 816-17; cf. Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974). Of course, perjury would be subject to criminal liability under AS 11.56.200 or 11.56.230.

HB 158

Section 19 of the bill contains language added in the Senate Rules Committee and taken from HB 316. It would create a new cause of action under subsection (d) which is similar to the common law action for abuse of process, except that the new cause of action requires only a showing of either lack of probable cause

or ulterior motive, rather than both. Prosser and Keeton on the Law of Torts at 893-95. Section 19 of the bill also creates a new cause of action under subsec. (a) for various conduct including conduct that violates Civil Rule 11 (see discussion below), or conduct similar to abuse of process. The section creates liability for "reckless" false allegations or material misstatements of fact in the complaint or answer. The causes of action created under both subsections (a) and (d) may be asserted against the party or the party's attorney regardless of the outcome of the underlying litigation that gave rise to the claim. Under both provisions, the prevailing party may seek punitive damages and is entitled to an award of actual reasonable attorney fees.

Section 19 of the bill would dictate two methods for bringing the causes of action. For violations of subsec. (a) allegedly committed by the opposing party, the action would have to be maintained as a compulsory claim or counterclaim in the underlying lawsuit. For the violations of subsec. (a) allegedly committed by the opposing party's attorney, and for violations of (d) allegedly committed by either an opposing party or the party's attorney, the action would have to be brought after the conclusion of the underlying action.⁹

Additionally, subsec. (b) would require a court to enter judgment against a party on the party's claim or defense if the party intentionally made a material false statement in connection with the claim or defense.

Under sec. 19(h) of the bill, "[n]either the state, nor an agent or employee of the state acting within the scope of that agency or employment, is subject to liability under this section." This immunity parallels existing state immunity against claims for abuse of process set out in AS 09.50.250(3).

⁹ The precise demarcation between the causes of action under subsecs. (a) and (d) is unclear. Under (a)(2) and (c)(1), a party may have a compulsory counterclaim against the opposing party for failing to determine that each allegation in a pleading the opposing party signed was well grounded in fact. The same conduct may require that the action be brought after final judgment in the underlying action under (d)(1) and (f) because it could also be characterized as initiating an action without probable cause. Similarly, both (a)(3) and (d)(2) create liability for an ulterior motive.

Analysis

The creation of new causes of action for alleged false claims and improper conduct in litigation would increase the cost and complexity of litigation, particularly litigation against a judgment-proof opponent who could use the new causes of action to disrupt the adversary's case without fear of effective retaliation. The new causes of action could be characterized as more of a "sword" than a "shield."

To the extent that sec. 19 of the bill seeks to create a new category of compulsory counterclaim, based on conduct separate from that giving rise to the original lawsuit, it conflicts with Alaska Civil Rule 13. This aspect of sec. 19 of the bill would probably be invalid under art. IV, sec. 15, of the Alaska Constitution. If it were valid, this section could lead to a cycle of claims and counterclaims, as one party counterclaims that a claim was reckless or contained misstatements, the other party asserts that counterclaim was similarly deficient, and so on. The compulsory counterclaim provisions would create complexities in litigating the underlying case. For example, if a party made a misrepresentation that is corrected during the trial, a portion of the trial might be devoted to the question of whether the initial misrepresentation was reckless.

Additionally, a compulsory counterclaim requirement would often lead to a conflict between the client and attorney that would require the client to obtain new counsel. For example, if a client asserted reliance on the attorney for advice about the legal merits of an action, the original attorney would become a witness as to attorney-client communications and legal theory and might be precluded from continuing as the client's advocate in the underlying action. In some cases, the client may be forced to reveal attorney-client communications that otherwise would be privileged. Tactical use of such counterclaims could adversely impact both plaintiffs and defendants.

The requirement that all defenses be asserted based on "probable cause" may be difficult for defendants to meet. "Probable cause" means "having more evidence for than against." Black's Law Dictionary (5th Ed.). Typically, defense counsel must prepare the answer with very incomplete information and little or no evidence about the case. Current practice is to assert all defenses that conceivably might apply, in order to avoid waiving those defenses. Defenses that prove unfounded can later be dropped. Section 19 of the bill could make an attorney liable to the plaintiff for asserting such defenses in an answer, with the

alternative of being liable to the client for failing to timely assert a defense.

In some cases, a business's current liability insurance may not cover the derivative litigation arising from an underlying suit that otherwise would be covered by the insurance. While comprehensive general liability insurance policies appear to cover much of the litigation that could be generated by this section, some businesses carry more limited coverage that may not encompass the libel and slander claims authorized by sec. 19 of the bill. In such cases, insurance companies would be expected to decline to provide a defense to the spinoff claims, or to indemnify any adverse judgments.

B. SANCTIONS FOR PLEADINGS

Current Law

Under Civil Rule 11, attorneys or parties must sign their pleadings, and their signatures certify that the pleadings are well grounded in fact and law to the extent of their knowledge and belief after reasonable inquiry, and that the pleadings have not been filed for harassment or other improper purposes. Violations of this rule and any other civil rule may be sanctioned under Civil Rule 95. The court may require the offending party or attorney to pay the opposing party "costs or attorney fees as the circumstances of the case and discouragement of like conduct in the future may require." The court may impose an additional fine on an attorney of up to \$1000.

HB 158

Section 21 of the bill amend Civil Rule 95 for violations of Civil Rule 11 only. The bill would mandate sanctions for violations of Civil Rule 11 in an amount left to the court's discretion. An award to the opposing party is limited to those costs or fees "incurred because of" the violation. The bill increases the possible fine payable to the court to \$10,000 and applies the fine to parties as well as attorneys.

Analysis

The first five sentences of sec. 21 of the bill are substantively identical to existing Alaska Civil Rule 11. The remainder of sec. 21 of the bill is intended to amend Alaska Civil Rule 95. This rule change failed to receive the two-thirds majority vote necessary to be effective under article IV, section 15 of the Alaska Constitution.

FELON PLAINTIFFS

Current Law

AS 09.65.210 was enacted in 1986 to preclude recovery by a person who suffers personal injury or death if three elements are present: (1) the injury or death occurred while the person was engaged in the commission of a felony, (2) the person has been convicted of the felony (including a plea of nolo contendere), and (3) the felony substantially contributed to the injury or death. The current law maintains the felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act.

HB 158

Section 20 of the bill expands the liability limitation under AS 09.65.210 to apply when the claimant was attempting to commit a felony or fleeing from the commission of a felony, not merely "engaged in the commission of a felony." It also removes the requirement that the person be convicted. A felon's right of action under 42 U.S.C. 1983, the federal Civil Rights Act, would be no longer exempted from the prohibition on claims.

Analysis

Subsection (a) of sec. 20 of the bill does not state the standard of proof for proving the plaintiff was committing or attempting to commit a felony. In sec. 7 of the bill, the legislature specified the "preponderance of evidence" standard for establishing that the person was committing or attempting to commit a felony. The lack of a standard of proof is troublesome in light of the "clear and convincing evidence" standard set in subsec. (b) of sec. 20 of the bill for a wrongful death action. This section does not appear to have any other legal problems. A prisoner would be prohibited under this section only from maintaining a federal civil rights action in state court, not in federal court, so that all such claims against state officials would be decided by federal courts.

REPORT

Under sec. 22 of the bill, the director of the division of insurance would be directed to report to the legislature by January 1, 1998 on any impact the bill may have had on liability insurance rates.

Hon. Tony Knowles, Governor
Our file: 883-96-0096

June 10, 1996
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SEVERABILITY

Section 23 of the bill repeats AS 01.10.030 and does not vary the general rules on severability noted in State v. Kenaitze Indian Tribe, 894 P.2d 632, 639 (Alaska 1995).

APPLICABILITY

If enacted, the bill would be applicable to all civil actions accruing on or after the effective date, except the punitive damages provisions would apply retroactively to a cause of action if judgment had not yet been entered. Additionally, as discussed above under Statute of Repose, sec. 3 of the bill would have a retroactive effect to bar actions if the "final act" took place more than ten years before the injury occurring after the effective date.

CONCLUSION

The bill raises substantial constitutional and other legal concerns that warrant your serious consideration.

Sincerely,



Bruce M. Botelho
Attorney General

BMB:TEW:CMK:jem

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May 16, 1996

VIA FAX (907) 465-3532

Governor Tony Knowles
P.O. Box 110001
Juneau, Alaska 99811

Dear Governor Knowles:

We write to you as former Attorneys General for the State of Alaska who care deeply about our state and its justice system. Since statehood, we have served both Democratic and Republican administrations. As lawyers and policymakers, we have differed on many issues over the years. Now, however, we agree on one point: we all are firmly convinced that the civil liability reform measure recently passed by the Alaska legislature is bad for the people of Alaska, and we strongly urge that you exercise your constitutional authority and veto HB 158.

We do not oppose HB 158 because we specialize or have a vested interest in litigating personal injury cases. We oppose HB 158 because it is fundamentally unfair and bad legislation. The bill effectively locks the court house doors to many innocent victims. The bill makes it difficult and in some instances impossible for victims to recover fair compensation for their injuries. It also creates immunity for many wrongdoers, thereby reducing accountability and jeopardizing the safety of all Alaskans, and it gives special and unfair protection to some negligent professionals. Stated simply, HB 158 is primarily special interest legislation that serves to insure that many Alaskans will be denied justice. Among those that will be hurt by the bill is the State of Alaska, itself, which is the largest purchaser of goods and services and which, like other Alaskans, will be unable to seek relief in court for the damages it sustains as a result of another's negligence or misconduct. Moreover, the State will be liable for providing care and support of Alaskans who are foreclosed under the bill from obtaining relief from the person or company responsible for their injuries or losses.

The bill offers nothing for Alaskan consumers. The stated purpose of HB 158 is to reduce the cost of insurance, yet as passed it contains no provision requiring insurance companies to reduce their rates. Such a provision was included in an earlier version of the bill, but, inexplicably, it was deleted at the end of the legislative session. As a result, the bill unfairly inflicts a cruel hoax on Alaskans by taking away their rights to civil justice and giving them nothing in return. The arbitration provision in the bill is ineffective and needlessly

Governor Tony Knowles
May 16, 1996
Page 2

burdensome in that it only applies to small cases and imposes an additional layer of costs and delay on the parties. It makes an already onerous legal process nearly intolerable for the Alaskan with a modest-sized, but meritorious legal claim.

The bill is further troubling in that it strips Alaskan juries of their constitutional right to decide cases. During our many years of service as Attorneys General for Alaska, and as lawyers representing a both plaintiffs and defendants, we litigated or supervised more jury trials than anyone. As a result of that experience, we have the greatest respect and confidence in Alaska juries. Contrary to arguments frequently advanced by the proponents of HB 158, there is no history of excessive compensatory or punitive damages verdicts in this state. When challenged to identify such a pattern, the bill's supporters have stood oddly silent. The Alaska courts have carefully and conservatively supervised the awarding of damages in civil actions. In all the years since Statehood, the Alaska Supreme Court has never approved a punitive damages award in excess of \$700,000, and the average approved punitive damages award is under \$200,000. HB 158 artificially caps punitive damages at a level too low to serve in many cases as any meaningful deterrent to wilful misconduct..

Finally, many portions of the bill are unconstitutional, a fact that proponents of the bill were advised of in 1994 by the Hickel administration. For reasons unknown to us, the legislature ignored the serious constitutional problems with the bill. As a result, HB 158 invites avoidable and wasteful litigation of these constitutional issues, needlessly burdening litigants and the courts for years to come.

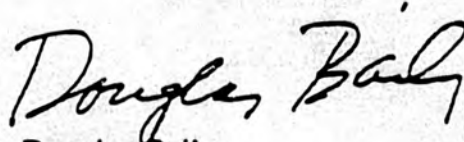
This is not a Republican or Democratic issue. All Alaskans have an interest in preserving an effective system of justice. It is undeniable that there are many areas in which our system of civil justice can be strengthened and improved. Access to justice should be easier. Costs should be reduced. The time needed to obtain a resolution should be shortened. Nothing in HB 158 will accomplish any of these laudable goals, however. Instead, the bill confers unwarranted special privileges, immunities, and benefits on negligent manufacturers, professionals, and insurers, and severely erodes the rights of innocently and seriously injured Alaskans.

On behalf of the people of Alaska, we strongly urge you to veto HB 158.

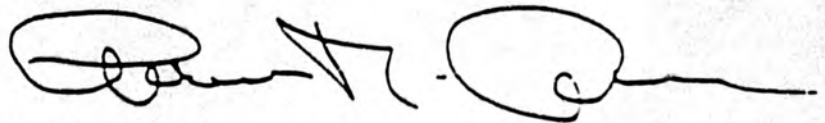
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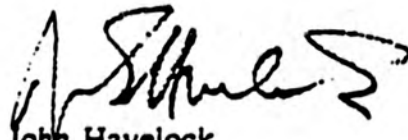
Charles E. Cole
(Attorney General of Alaska 1990-1993)



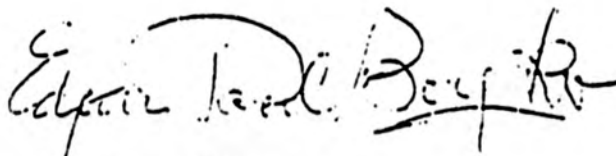
Douglas Baily
(Attorney General of Alaska 1988-1990)



Avrum Gross
(Attorney General of Alaska 1974-1980)



John Havelock
(Attorney General of Alaska 1970-1973)



Edgar Paul Boyko
(Attorney General of Alaska 1967-1968)

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State of Alaska
Office of the Governor

TONY KNOWLES
Governor
P.O. Box 110001
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NEWS RELEASE



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FOR IMMEDIATE RELEASE: June 14, 1996

96-154

KNOWLES VETOES FLAWED "TORT REFORM" MEASURE AS POOR POLICY
Creates Task Force to Develop Responsible Reform Bill

Gov. Tony Knowles today vetoed a so-called "tort reform" bill (HB 158) passed this year by the Legislature, saying it was the product of a flawed public process, it dictates poor public policy and it contains serious legal defects and constitutional problems.

To produce meaningful tort reform, the governor said he will appoint a task force of affected Alaskans to develop a new bill through an open public process that meets the goals of fairness, efficiency and reduction of insurance rates. Knowles has successfully adopted a similar approach of bringing affected Alaskans together on issues such as teacher tenure and welfare reform after the Legislature failed to pass reasonable bills.

"I agree with many Alaskans that meaningful reform of Alaska's civil justice system is necessary," the governor said in a veto message to legislative leaders. "The system should be more efficient yet just, and we should reduce frivolous litigation while preserving the ability of innocent victims to be compensated for injuries caused by others. Alaska businesses are faced with the risk of excessive lawsuit awards, high liability insurance rates and the threat of settlement or costly litigation."

"Few of those ideas survived in this bill. Instead, the current version was hastily rewritten in the dead of night and subject to little public review," Knowles said. "As a result, this bill fails far short of the mark of meaningful and responsible tort reform. It is extreme, seriously flawed and fails to implement these positive aspects of tort reform in a reasonable way. In fact, in some cases, this bill makes problems worse by increasing litigation expenses, lengthening the litigation process and clouding the rights of thousands of Alaskan families."

HB158 was passed by narrow margins in the final days of the session. The governor noted this year's legislative debate included some good concepts for reforming Alaska's civil justice system, such as reasonable limits on punitive damages, cutting back on frivolous lawsuits, insurance rate reductions and mediation to encourage early settlements.

-more-

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Tort Reform Veto

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June 14, 1996

But few of those ideas survived in this bill. Instead, the current version was hastily rewritten by the Senate Rules Committee with virtually no public review and lawmakers had little time to even read the bill. The governor said he vetoed it for three primary reasons:

- **Flawed public process** - One result of that process, which supporters of the bill claim is unintentional, is a dangerous and likely unconstitutional approach to limiting punitive damages. This bill would retroactively preclude certain punitive damage awards even after a jury has issued a verdict.

"In a case familiar to all Alaskans, I am advised this provision could jeopardize the rights of 30,000 Alaskans affected by the Exxon Valdez oil spill," Knowles said. "No responsible public official can or should take that risk."

- **Poor public policy** - The bill is littered with poor public policy provisions which complicate instead of streamline the civil justice system, which increase the amount, cost and complexity of litigation and which limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others. There also is no guarantee of reduced insurance rates resulting from this bill.
- **Legal defects and constitutional problems** - The bill contains contradictions, legal defects and provisions which are likely unconstitutional. For example, the "statute of repose" provision would prevent a suit being filed against a wrongdoer after 10 years, even if the injury did not occur until after this period of time. The Alaska Supreme Court has already indicated this provision may be unconstitutional.

To develop a meaningful and reasonable tort reform bill, the governor said he will appoint an advisory task force charged with developing recommendations for accomplishing the following goals before the next legislative session:

- Make the civil justice system more efficient and reduce frivolous litigation;
- Provide for fair and just but not excessive compensation for those injured by wrongdoing;
- Lower liability insurance rates; and,
- Provide for reasonable punitive damage awards sufficient to deter conduct and practices that harm innocent Alaskans, without hampering a positive business environment or allowing excessive windfall recoveries.

Thousands of Alaskans urged the governor to veto the bill, including the Kenai and Kodiak boroughs, the city of Cordova and Fairbanks Mayor Jim Hayes; a dozen fishing groups ranging from the Alaska Sportfishing Association to United Fishermen of Alaska; Native corporations and non-profits including the Association of Village Council Presidents, which represents 60 western Alaska villages, Bristol Bay Native Corp. and Chenega Corp.; women's health groups; labor organizations including the Anchorage Police Department Employees Assn.; and many others.

Of more than 21,000 cases filed last year in Alaska Superior Courts, only 4.6 percent were personal injury cases. Tort reform advocates claim there is an explosion of tort litigation in Alaska, but the evidence proves otherwise.

*A Report
on the Impact of House Bill 158
on Injured Alaskans*

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INTRODUCTION

In Alaska, certain groups recognize that they would profit if our jury system of damages for civil wrongs (torts) were significantly limited. Their solution is two pronged. Keep victims out of court, by locking the courtroom doors or by making claims too risky. Handcuff the jury so that it cannot award full compensation. Naturally, it is necessary to justify this solution in noble sounding policy goals.

House Bill 158 begins with a statement of high sounding goals, and then slashes away at the jury system. Every section takes from the victim, and gives to the wrongdoer. In this sense, House Bill 158 could be termed the "Wrongdoer's Relief Act of 1995".

This report will briefly examine the erroneous premises behind the legislative findings and goals in Section One of the bill. Then, each infringement on our jury system will be analyzed in plain English, so that the proposed transfer of rights, power, and money from the victims to the wrongdoers can be more clearly seen for what it is.

SECTION 1 LEGISLATIVE FINDINGS

A. THE JURY SYSTEM AND VICTIMS NEED STILL MORE OF THE LEGISLATIVE LASH, FOR THE GOOD OF SOCIETY.

Implicit throughout this "findings and purposes section" is the premise that the transfer of power from victims to those accused of wrongdoing which has occurred in Alaska over the past twenty five years does not go far enough. What follows is a synopsis of tort reform already on the books.

1. Doctors accused of medical malpractice are entitled to an immediate stay of discovery against them. They proceed to a hearing before their professional colleagues. The opinion of these colleagues is admissible in evidence at trial. A.S. 09.55.536. There is no requirement of impartiality; members of the panel may be rabidly opposed to injury claims. Indeed, one panel recently refused to find an orthopedic surgeon guilty of medical malpractice for performing a surgery on his patient's wrong knee.

2. In medical malpractice litigation, the court may order periodic payment of the judgment. A.S. 09.55.548.

3. Lawsuits may not be brought for injury, death, or property damage caused by construction defects more than fifteen years old. A.S. 09.10.055.

4. Punitive damages may only be awarded upon proof by clear and convincing evidence, a higher than normal standard. 09.17.020.

5. Wrongdoers in Alaska are not jointly liable. A.S. 09.17.080. This is a very significant change in the law which puts Alaska in a distinct minority of American jurisdictions. This law ended what is popularly known as "deep pocket" liability, and puts the risk of insolvency by one of several wrongdoers on the victim alone.

6. Non-economic damages are limited to \$500,000, except in cases of disfigurement or severe physical impairment. A.S. 09.17.010.

7. Damage awards are reduced by collateral benefits not subject to subrogation (payback to the victim's insurer). A.S. 09.17.010.

8. Municipalities are not liable for negligent failure in conducting safety inspections. A.S. 09.65.070.
9. Social hosts are never liable for furnishing liquor to other adults. A.S. 04.21.020.
10. Bar and liquor store owners are not liable for sales to minors made in good faith reliance on identification; criminal negligence must be shown. A.S. 04.21.020, 052.
11. Bars and liquor stores are not liable for selling to drunks or allowing them to remain on premises, unless criminal negligence is proven. A.S. 04.16.030.
12. Ski operators are not liable for ski accidents caused by the inherent risks of skiing. A.S. 05.45.010.
13. The State is not liable for its oil spill response absent gross negligence. A.S. 46.08.160.
14. Oil spill contractors are not liable for property damage absent gross negligence. A.S. 46.03.825.
15. No damages can be awarded to a person injured while in the commission of a felony. A.S. 09.65.210.
16. An owner is not liable for death or injury occurring on unimproved land. 09.65.200.
17. Real estate agents are not liable for mistaken information they innocently pass on to buyers. A.S. 09.65.230.
18. Members of non-profit boards are immune for their torts. A.S. 09.65.170.
19. A person rendering emergency aid cannot be sued. A.S. 09.65.90.

Unsatisfied with these special protections for negligent actors, the drafters of House Bill 158 seek further erosion of our jury system.

B. THE SKY IS FALLING: INSURANCE.

Also implicit in the legislative findings is the notion that society faces an intolerable insurance crisis. Insurance is now generally available and well priced. (Deborah Ballen, Vice President, American Insurance Association, testimony before U.S. Senate Subcommittee, April 5, 1990.) The real cause of the "insurance crisis" of the 1980's was the insurance industry's reliance on flawed investment strategies based on the high interest rates of the late 1970's.

See "The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It On You", Consumer Reports (August 1986). Notably, the State of Alaska joined nineteen other states in an antitrust case against various insurance companies for manipulating the market to artificially restrict coverage in select areas.

The major insurance problem facing Alaskans is the high price of insurance coverage for obstetrical practitioners in rural communities. This problem can only be solved by addressing it head on. It cannot be solved by tinkering with the tort system in general, and hoping that the effects will eventually trickle down to bush doctors who deliver babies. To date, the medical community and the legislature have shown no interest in specific solutions proposed by either consumer groups or trial lawyers.

C. THE SKY IS FALLING: MEDICAL MALPRACTICE

Also implicit in the legislative findings is the belief that society's health care concerns can be resolved by restricting medical malpractice lawsuits. Patients have rights that politicians should not restrict. If the legislature truly had the interests of patients and doctors at heart, it would work to reduce medical injuries through well proven risk management principles, rather than reducing compensation.

Every year, medical negligence injures hundreds of thousands of Americans. A recent Harvard University study found that in New York alone, medical negligence causes from seven thousand to twenty nine thousand deaths annually. New England Journal of Medicine, Vol. 325, No. 4, July 25, 1991. A Rand Corporation study found that between twelve to twenty seven per cent of patient deaths could have been prevented absent sub-standard medical care. Annals of Internal Medicine, Vol. 109, No. 7, October 1, 1988.

Notwithstanding this public health epidemic, few malpractice victims sue, and fewer still recover. The Harvard study concluded that fewer than two per cent of medical malpractice victims file suit. Most of those claimants do not succeed. A comprehensive 1994 study of medical malpractice jury verdicts reveals that patients win fewer than one third of the cases which go to trial. USA Today, citing Jury Verdict Research Study, 4/4/94. The rate of medical

malpractice claims has "steadily declined" since 1985. Consumer Reports, July 1992. "The price of medical malpractice and professional liability [insurance] coverage for health care organizations remains stable and capacity is plentiful". Business Insurance, 3/28/94.

Incredibly, Alaska does not require that doctors be insured. Providence Hospital in Anchorage is one of the few major hospitals in the United States which permit physicians to practice without insurance.

In Alaska, juries are extraordinarily solicitous of physicians. If the case is not so overpowering that it settles out of court, it will almost certainly be lost before the jury. Alaskan juries have found for the claimant and against a doctor fewer than a dozen times in the thirty five years since statehood.

A recent Duke University study of 2,000 medical malpractice cases in North Carolina reveals a median award of only \$36,500. The Atlanta Constitution, 2/1/93. A study by the American College of Physicians found that unjustified malpractice awards are "uncommon". Annals of Internal Medicine, Vol. 117, No. 9, 1992.

The total elimination of all medical malpractice claims would save Americans less than one per cent of health care costs. Department of Health and Human Services, Office of the Actuary. On average, per-physician premiums are less than four per cent of practice receipts. Median Economics, November 4, 1991. The average cost per malpractice claim "for most health care organizations" has decreased in recent years. Business Insurance, 3/28/94. When Alaskan physicians sold MICA, their own insurance company, several years ago, each member received a substantial payment based on MICA's surplus.

In 1994 the Congressional Office of Technology Assessment released a study of "defensive medicine". It revealed that a small percentage of procedures are ordered solely due to physician concern for malpractice exposure. The study concluded that "most malpractice reforms are unlikely to have much effect on defensive medicine". OTA Study, 7/21/94.

Caps on damage awards have no discernible effect on health care costs or doctor's

insurance premiums. Indiana's \$750,000 cap on damages, or California's \$250,000 cap on non-economic damages, have not reduced health care costs in those states. Indiana's health care cost ranking has remained identical before and after the cap; California's has gotten worse. Families USA Foundation, 1990. In twelve years following California's enactment of the cap, medical malpractice premiums in that state rose 191%.

State medical associations are notoriously lax in policing their own profession to sanction or remove repetitively negligent physicians. Because of the tort system, Alaskans receive better medical care. "It is sad but true that many physicians practice more carefully than they did in the past because they have an eye on the potential litigant...If the courts and insurance companies and the fear of malpractice become the most important disciplinary weapon in medicine—distasteful as the idea may be to physicians—so be it". Derbyshire, "Malpractice, Medical Discipline and the Public", 19 Hospital Practice 109, 116 (1984). See also Schwartz and Komesar, "Doctors, Damages and Deterrence: An Economic View of Medical Malpractice", 298 New England Journal of Medicine 1282 (1978).

LOCKING THE COURTHOUSE DOORS

SECTIONS 2-5

HOUSE BILL 158

House Bill 158 locks the courthouse door to many innocent victims of wrongful conduct, before they ever have a chance to file a claim. For example, if a homeowner builds a deck without a railing, and a child falls off more than eight years later, the child cannot sue. If the roof of Anchorage's Performing Arts Center collapsed during a performance, the age of that building would immunize all architects and contractors. A high voltage line installed contrary to standards; abandoned blasting caps or dynamite at a mine; a will negligently drafted by a lawyer; such negligence will go unpunished if it escapes discovery or does not cause harm within eight years. A lottery would control the rights of Alaskans; the losers would be locked out of the courtroom. The Alaska Supreme Court says, "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so". Hanebuth v. Bell Helicopter International, 694 P.2d 143, 147 (Ak. 1984). During the Hickel

administration, the Office of the Attorney General studied the predecessor to House Bill 158, and concluded, "The Alaska Supreme Court would probably find the proposed statute of repose invalid under several alternative provisions of the Alaska Constitution...we believe that the proposed statute of repose establishes distinctions between classes of people in a way that is not justifiable under the equal protection clause."

Section 5 of the bill locks children out of the courthouse. Now, the statute of limitations does not commence until children turn eighteen. House Bill 158 eliminates that protection. Section 3 provides special discriminatory treatment of babies and toddlers, if a doctor is at fault.

HANDCUFFING THE JURY: DAMAGE CAPS

SECTION 6

Juries are the conscience of our community. The typical jury includes engineers, accountants, teachers, business people, housewives, government employees, and workers. Juries tend to be quite conservative, and to hold victims to a high standard of proof. A prominent defense lawyer who advises the "tort reform" group privately says that the defense lawyer who waives jury trial is a fool. Insurance defense lawyers always insist on a jury trial. The notion that Alaskan juries are incompetent and unreliable is nonsense.

Large verdicts are not routine. A Rand Corporation study proves that in the past quarter century, jury verdicts have only kept pace with inflation. The U.S. General Accounting Office has determined that large verdicts are not arbitrarily awarded, but rather reflect the severity of injury and the high cost of medical care.

Ignoring all this, the bill slaps Alaskan juries in the face, decreeing they can't be trusted to render fair verdicts. It does this by arbitrarily "capping" the amounts juries can award. With few exceptions, verdicts for pain, suffering, and lost enjoyment of life are limited to \$300,000. Paralyzed and severely brain injured victims are limited to \$500,000.

A quadriplegic can't move his body below his neck, has lost all bowel and bladder control, all sexual response, and requires round the clock attendant care. If his nose itches, he can't scratch. He can't parent his kids, work, travel, play sports, turn a page, or hunt. Suicidal

thoughts are common. Damages for these "non-economic" injuries to him and his family are limited to \$500,000.

Note that the victim only gets a portion of this money, perhaps half, because it must be shared with others in the family who have claims for loss of consortium. The actual quadriplegic's award for pain and suffering, spread out over his lifetime, could easily amount to only \$5,000 for each year spent in a wretched condition.

This cap only targets those who are so seriously injured they have pain and suffering claims beyond \$300,000. Persons suffering mild to moderate injuries are allowed full compensation. It is Alaskans with amputated limbs, gruesome burns, blindness, paralysis, and debilitating brain damage who will be affected by this harsh rule.

The cap will not lower insurance rates. Caps affect a tiny percentage of total insurance payout. Most cases settle for less than \$25,000. Cases with pain and suffering damages exceeding \$300,000 are extremely rare. Legislation which affects only a few innocent, catastrophically injured Alaskans per year will bring down the rates of most people a few pennies a year, at most. What's happening here is truly shameful; the neediest victims are sacrificed, without any corresponding benefit to Alaskans as a whole.

HANDCUFFING THE JURY: PUNITIVE DAMAGES **SECTIONS 7-8, 23**

Occasionally the conduct of a defendant is so repugnant that a jury assesses punitive damages. Under existing law, the conduct must be outrageous, and it must be proven by clear and convincing evidence. Punitive damages are rarely awarded.

When juries speak, corporate America listens. That's why defectively designed cribs no longer strangle infants. Trucks have back-up alarms. Once harmful medical devices have been redesigned. Auto fuel systems have been strengthened. Cancer causing asbestos no longer poisons homes, schools and workplaces. Farm machinery has safety guards.

Punitive damage cases are very uncommon. A comprehensive study of punitive damages in products liability cases found only 355 punitive awards between 1965 and 1990. One

quarter were asbestos cases. Eighty per cent of the time, the manufacturer enacted a safety measure after the verdict. In the much maligned MacDonald's coffee spill case, two things happened. The judge lowered the punitive damage award to \$450,000; and MacDonald's finally turned down the temperature of its coffee, something that 750 prior accidents and complaints had not been able to accomplish. The bill lets criminals off the hook. Now, a driver who is high on drugs and kills meets the "outrageous" test, due to his reckless indifference to safety. The bill would require proof of "conscious acts" by a drunk driver, who will claim he did not know what he was doing.

The bill insults jury intelligence by capping the punitive award at the greater of \$300,000 or three times compensatory damages. Some corporations profit from systematic small thefts over many thousands of transactions. Limiting punitive damages to an arbitrary level undercuts their deterrent value, since reckless or malicious defendants might find it more cost effective to continue their bad behavior. This is precisely the decision making employed by the Ford Motor Company regarding its Pinto automobile. The company determined that it would be cheaper to sell the defectively designed car, and risk paying damage awards to injured consumers, than it would be to make the car significantly safer at a cost of \$11 per car.

The conservative United States Supreme Court recently upheld a substantial punitive award, in the millions, where the compensatory damages were \$19,000 but heavy deterrence was needed. Few other states limit punitive damages. Why should Alaskan juries faced with overwhelming evidence of outrageous conduct be handcuffed?

The bill allocates one half of the punitive damage award to the state, with no fee thereon to the lawyer. This creates a disincentive to the plaintiff and the lawyer to pursue such a case, particularly when the compensatory damages are modest. If an insurance company swindles its insured out of \$20,000, the most the client could recover in punitive damages would be \$150,000. That is simply not enough to justify the risk and expense the lawyer and client must bear to pursue such a case over the course of several years.

Why would the legislature want to limit the power of the jury to correct the conduct of corporations which are proven guilty by clear and convincing evidence of intentionally malicious behavior? At a time when the legislature is raising criminal penalties to hold individuals accountable for their behavior, why is reducing penalties for the malicious conduct of foreign corporations a high priority?

INCOME TAXES SECTION 9

This section commands that we take the income taxes which a victim would have paid in the future if uninjured, and credit them to the wrongdoer. Congress gives injury victims a break by not taxing their recoveries. The bill strips victims of this tax break, and hands it over to wrongdoers.

Most states do not deduct taxes from future lost income awarded by a jury. Figuring out future taxes is highly speculative. The tax code changes, as does the victim's tax status. Will he or she marry? When? How many children? Own a home? Have an IRA? All these unknowns affect tax liability. The jury is in effect asked to fill out twenty or thirty future tax returns by gazing in a crystal ball.

At a time when everyone is concerned with the expense and delay of lawsuits, does it make sense to add more complexity, court time, and jury aggravation?

AN ADMINISTRATIVE NIGHTMARE: PERIODIC PAYMENTS SECTIONS 10-12

Once a lawsuit is over, it's over. The judgment is paid in a lump sum. Future lost wages have been adjusted downward to reflect their early payment. In order to preserve the value of his lost income award, the victim must immediately invest this money, so interest will augment it and permit regular withdrawal to match what his salary would have been. Similarly, the jury has decided on the correct amount to pay the victim for future pain and suffering. The case is closed.

Rather than this straightforward system, House Bill 158 would allow the wrongdoer to pay the victim's future losses on the installment plan. Victim and wrongdoer would be joined for life by ongoing payment obligations. Such payments will be expensive to administer, and they won't accomplish anything beyond enriching outside insurance companies.

To set the payment level, the judge will guess the average inflation over the remaining life of the victim. If the judge guesses low, the victim will lose, because the wrongdoer will eventually be able to pay the victim in cheap dollars. A wrong guess could never be fixed, and could wipe a victim out.

The flexibility and discretion a victim currently possesses is eliminated. If the victim has an expensive medical crisis, the timing and amount of payments can't be adjusted. The bill mechanistically assumes the victim's needs are the same at age twelve and age seventy.

Insurance companies are not required to post security for their future payments. Insurance companies become insolvent each year. As of 1987, Executive Life had assets in the billions and the highest possible rating. Now it's bankrupt, with a trail of broken dreams behind it. One hurricane through New Orleans, one California earthquake, could devastate an insurance company. Why leave an Alaskan accident victim dependent for life on the solvency of one company?

Who is the big winner here? Out of state insurance companies get to control the victim's money. They get to invest it any way they want. It's like an interest free loan.

COLLATERAL BENEFITS SECTION 14

Collateral benefits are automatic payments to an injured person from sources such as medical insurance, state medicaid, or workers' compensation benefits. When an injured person sues, he or she makes claim for medical bills or lost wages which might have already been partially paid by insurers. If the jury awards these damages, the insurers or the state of Alaska get paid back, so there is no double recovery by the victim. This is called subrogation. Subrogation rights are included in virtually all health insurance policies. Reimbursements of

workers' compensation and medicaid payments are required by Alaska statutes. The state hires an accounting firm to monitor its medicaid liens.

The bill would cancel these repayments to insurers and the state, and instead reduce the damages payable by wrongdoers. To provide a benefit to proven wrongdoers, the bill penalizes every health and workers' compensation insurance carrier doing business in Alaska, plus raids the state treasury.

This section tells the jury about the victim's insurance, but not the wrongdoer's. It will increase the cost of health and worker's compensation insurance. It is a misguided, flagrantly unfair imposition on the innocent in favor of the guilty.

TURNING A TRIAL INTO A CIRCUS **SECTIONS 14-15**

The boring, technical language of these sections conceals a revolution in how jury trials will work. Under current rules, the parties to a lawsuit each have a lawyer. The jury listens to everyone, and assigns percentages of fault to the plaintiffs and the defendants. This legislation totally changes that, by permitting the jury to assign fault to "empty chairs", persons who have not been sued, have not defended, and are not present in the courtroom. The empty chairs pay nothing, but their fault decreases the award to the victim.

This rule change degrades the fairness of our jury trials. For example:

Victim is heavily burned in a LP-gas explosion caused by Defendant. She would have survived, except she is a drinker and a smoker. With weakened liver, heart and lungs, she doesn't have a chance. Victim's husband and kids sue Defendant. Defendant has a smart lawyer, who consumes two months of court time presenting evidence against the tobacco and liquor industries for failure to warn victim of health hazards. Those empty chairs of course do not fight back. Although such cases have never prevailed in the United States when defended, the jury buys the argument. End result: Defendant 40%; Marlboro 30%; Johnnie Walker 30%. Only Defendant pays; scotch and cigarette don't, because they were never sued. Victim loses 60% of her damages.

The bill gives defendants every incentive to accuse peripherally involved people. Reputations will be smeared in court by defendants, with no chance for the person behind the empty chair to respond. The average duration of jury trials will increase, as the truth finding quality of those trials degrades.

Alaskan workers will be especially disadvantaged by this change. Now, the workers' compensation law gives employers immunity from civil suit, and no fault can be allocated to them. The bill maintains employer immunity, but burdens the worker with the employer's fault. In every case where a worker is hurt, the defense will criticize the employer in absentia, alleging inadequate safety rules, insufficient procedural manuals, lack of inspection and supervision, failure to buy modern equipment, to train employees, and the like. The employer will have no reason to defend its conduct since the employer is immune and is not obligated to pay its share of the fault. Yet, every bit of fault the jury ascribes to the absent and unrepresented employer will directly diminish the injured worker's verdict.

These provisions are the real sleepers of the bill. Wrapped in dry, technical prose is a radical transformation of jury trials, so that much of the trial is about people and companies who are not present in the courtroom. Not only victims will be hurt; taxpayers will pay for longer trials. Individuals and companies will be publicly pilloried and defamed without a chance to respond. Much of the fairness built into our system as we have known it since statehood will be abandoned.

A REWARD FOR STALLING SECTION 16

Section 16 deals with a partial settlement of a case between a victim and one of several wrongdoers. It is poorly drafted. If it is interpreted to mean that a partial settlement is deducted from the jury award, and that the remaining defendant's percentage of fault is then applied to that reduced number, it becomes mathematically impossible for the plaintiff to fully recover, unless the jury finds the remaining defendant 100% at fault.

Under current law, a defendant who goes to trial pays his percentage of the fault as

found by the jury. It may be that the muddled drafting of this section seeks to change that by crediting to such a defendant any overpayment by a settling defendant. Such a provision allocates to victims all of the risks, and none of the benefits, of pretrial settlements. A victim can only break even or lose by a partial pretrial settlement. A defendant can only break even or win by failing to settle. Settlement is discouraged, and stalling is encouraged. This proposal will increase the cost of litigation by discouraging pretrial settlement.

CONFISCATION OF THE HOMES AND SAVINGS OF VICTIMS SECTION 17

The current "Offer of Judgment" rule is a procedural device to encourage pretrial settlement by giving a moderate reward to one who makes an offer, and after rejection does better at trial. House Bill 158 raises the stakes exponentially, by increasing the price of misjudgment to an intolerable level: full costs and attorney fees to the person making the offer.

This provision is breathtaking in its scope and ferocity. Not only will the victim who loses at trial pay the defendant's entire attorney fee and all costs. Also, the victim who wins at trial, but guesses wrong about the size of the verdict, will pay just as if he had lost. The victim pays if he loses; the victim pays if he wins.

Suppose an accident victim suffers a broken back, is in the hospital a long time, and has one hundred thousand dollars in medical bills. His lawyer researches other jury verdicts, and concludes the case is worth two hundred fifty thousand dollars. The defendant made an early offer of judgment of \$125,000, only twenty five thousand above the medical bills. The jury awards \$120,000. Now the victim must pay attorney fees and costs, which could easily wipe out the entire judgment. The defendant, proven guilty before a jury, goes scott free. The accident victim is stuck with \$100,000 in medical bills he can't pay. Doctors, hospitals and the State of Alaska will therefore have to subsidize this benefit to the wrongdoer.

This example is a simple one. A case may have multiple defendants, each making an offer of judgment. If the plaintiff guesses wrong on any of the offers, he can be wiped out, even if he wins the case. Or the defendants may suddenly accuse a non-party of fault, and

invalidate the assumptions on which a plaintiff earlier rejected an offer of judgment.

Such a system would further erode personal responsibility in Alaska, because it would force injured citizens to back down from holding wrongdoers fully accountable. Victims would choose between accepting a low offer and the risk of financial ruin. Winning a trial is never guaranteed, much less recovering a particular sum from a particular defendant out of many defendants and non-party players. This section gives excessive leverage to insurance companies to undercompensate injured Alaskans. The result: middle class plaintiffs will be forced to accept an insurance company's lowball offer. Who among us would risk his home and life savings betting on a lawyer's prescience regarding the exact size of a jury award from each defendant and each empty chair? This is one of the most anti-victim sections of House Bill 158.

MORE REWARD FOR STALLING SECTIONS 18-19

Currently a wrongdoer pays 10.5% annual interest from the time he receives notice of suit, until the jury decides the case. This is fair, because the wrongdoer has held money due the victim for several years, and has been able to invest it.

The bill would eliminate most of this duty to pay interest. First, it would exempt most of the judgment, the future part, from any interest at all. Secondly, it would cut the remaining interest to the federal discount rate plus 3%. Insurance companies are businesses who play hardball. If they can make money by delaying settlement, they will do so. This section gives them every incentive to delay.

The State of Alaska charges tax deadbeats a minimum of 11%. When the prejudgment interest rate is eliminated for some damages and lowered for other damages, insurance companies are in effect given a low interest loan for as long as they can stall the proceedings. It shouldn't be allowed.

MORE SPECIAL RULES FOR DOCTORS

SECTION 21

The Rules of Evidence adopted by the Alaska Supreme Court govern the qualifications of experts testifying before juries in Alaska. Once again, the medical profession is seeking special rules to make medical malpractice actions more difficult for the plaintiff.

First, this section complicates the victim's life by requiring an exact match; it takes an orthopedist to testify against an orthopedist. Why shouldn't an experienced family practitioner who is qualified to do so, be permitted to testify?

Secondly, the section can be read to require board certification. In medicine, this is akin to an advanced degree. Orthopedic surgeons practicing in Anchorage are not necessarily board certified. Why should an interest group like the State Medical Board be given the power to control who testifies as an expert, rather than our courts? No other profession has this privilege.

Thirdly, the section eliminates all retired physicians as expert witness by establishing an irrebuttable presumption of incompetence one year post retirement. Alaskan victims already struggle with a conspiracy of silence under which Alaskan doctors will not testify against their colleagues. Victims must undergo the added expense of locating expert witnesses out of state. This section would further reduce the expert witness pool by eliminating retired doctors, who are less subject to peer pressure. C. Everett Koop, the retired Surgeon General of the United States, could not testify in Alaska. These special interest rules for doctors are transparently unfair.

WHAT IS A HOSPITAL?

SECTION 24

Should hospitals be allowed to contract out vital patient services they are required by law to provide, to uninsured medical corporations, and wash their hands of the consequences?

For example:

An infant loses both kidneys because of incompetent nursing care in a hospital. He will require weekly blood cleansing (dialysis) for the rest of his life. The hospital denies any responsibility for the substandard care, because it hired Rent-A-Nurse to supply contract nursing services. Rent-A-Nurse was low bidder for the contract because it doesn't bother with insurance. Infant loses, and state medicaid gets stuck for millions.

People go to a hospital because it is an organized, coherent institution, rather than a boarding house for private care providers. If the hospital is immunized for the negligence of routine services contractors, it has no incentive to supervise its emergency room, its radiologists, its anesthesiologists, or its lab. This is poor public policy. The Alaska Supreme Court has ruled that hospitals should be hospitals, and should stand behind the medical care they provide the public, without resort to legal gimmickry. This sensible decision should not be overturned.

AFTERWORD

The drafters of House Bill 158 are nothing if not relentless. Time after time, they seek to disadvantage the innocent victim in favor of the proven wrongdoer. They want to handcuff our discretion when we sit on juries. They want to lock the courthouse doors to victims, based on random occurrences beyond anyone's control. They want to break the backs of middle class victims who have the courage to seek full compensation, but who guess wrong about the amount of the verdict or the complicated fault allocation. They want to coddle corporations proven by clear evidence to have acted maliciously. They want more special treatment for the medical profession. They want tax breaks, interest free loans, installment plans, insurance benefits, fortuitous immunities—all for the bad actor, the certified wrongdoer. They want every injured worker to be punished for his or her employer's negligence.

Who are these victims, and why are they deserving of harsh treatment? They are you and I, and our children, and our children's children. They are those among us who will one day suffer tragedy. They are tomorrow's Ted Stevens or Arliss Sturgulewski, politicians who lost spouses because of negligence and became claimants. They are rich and poor, young and old. They are our most productive workers in our most hazardous jobs. They are the roustabouts and the roughnecks. They are us. The rights we treat cavalierly are our rights.

Alaskan legislators have already implemented drastic changes in favor of defendants. Alaskan cities breathe easier, because "deep pocket" liability is no more. The insurance industry is not in crisis. We now know from experience that measures limiting victims' rights do not reduce premiums.

What we are left with in Alaska is a small group of extremist "tort reformers" who advocate this legislation based on their deep animosity to lawyers and lawsuits, period. These special interests have no fidelity to our constitutional jury system, but would destroy it with the death of a thousand cuts.

Since their bill is technical and complex, legislators may not grasp how drastically it

affects the families in their districts.

If this happens, Alaska will have passed the most radical anti-victim legislation in the United States. Alaskans will have fewer and lower quality civil rights than other Americans. And we will have done it to ourselves; not for any good reason, but merely to make Alaska a more profitable if minuscule niche in the national insurance market. What a shame.

House Bill 158 is harsh legislation which kicks innocent Alaskans when they are down and out. It grants Alaskans no commensurate benefit, such as a mandatory 20% reduction in auto and liability insurance premiums. Let us hope that our legislators find the courage to stand up for individual Alaskans against those who would rob us of our rights.

**THE FOLLOWING HAVE SPOKEN IN OPPOSITION TO
THIS ANTI-VICTIM LEGISLATION OR ITS
PREDECESSOR LAST SESSION**

**ALASKA NETWORK ON DOMESTIC VIOLENCE
AND SEXUAL ASSAULT**

ALASKA POLICE DEPARTMENT EMPLOYEES ASSOCIATION

TRUSTEES FOR ALASKA

AMERICAN ASSOCIATION OF RETIRED PERSONS, ALASKA

ALASKA STATE AFL-CIO

ALASKA ENVIRONMENTAL LOBBY

ALASKA WOMEN'S LOBBY

NEA-ALASKA

ALASKA HEALTH PROJECT

DES ACTION

ALASKA PUBLIC INTEREST RESEARCH GROUP

April 4, 1995

Governor Tony Knowles and Members of the Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 158 - The So-Called "Tort Reform" Bill.

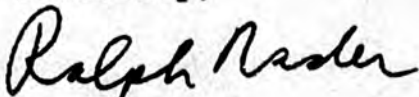
Dear Governor Knowles, and Members of the Legislature:

I have reviewed House Bill 158 at the request of the Alaska Public Interest Research Group. The provisions of this bill are nothing short of radical. Their effect will be to unjustifiably punish ordinary citizens. The bill's provisions, whatever their intentions, in fact are harmful to citizens who have been victims of injustice. That is, the bill punishes people who file just and valid lawsuits; it punishes people who have played by the rules, and who have pursued only legitimate grievances. At the same time, it benefits wrongdoers, insurance companies who do not wish to pay valid claims, and the attorneys who represent these special and usually wealthy interests. For example, the punitive damages provision subsidizes and protects wrongdoers who not only cause injury, but who do so "maliciously". This bill is ill-advised. By subsidizing wrongdoers at the expense of the innocent public, HB 158 will ensure that citizens live in a less just, less safe, and less desirable society.

The playing field in this nation's state and federal courts is already tilted in favor of wealthy defendants. HB 158, if enacted, will only make the process for those who seek justice, but are of average and low incomes, more hazardous and difficult than it already is. Alaska has a proud tradition of protecting its citizens. It has passed comprehensive hazardous substance laws, and has enacted laudable civil rights laws. HB 158 departs from this tradition. I have reviewed this bill in detail, and summarize some, but not all, of my concerns in the attached memorandum.

I urge that you oppose passage of this bill. I would ask that you work instead on measures that: 1) provide for equal access to the courts for Alaskans of average and low incomes, and, 2) protect the public's health and safety. HB 158 undermines both of those goals.

Sincerely,



Ralph Nader
P.O. Box 19312
Washington, DC 20036
202-387-8034

MEMORANDUM

To: Governor Knowles and Members of the Alaska State Senate and House of Representatives.

From: Ralph Nader

Re: Summary of Concerns About HB 158.

Date: April 4, 1995.

I have reviewed HB 158, and highlighted some of my concerns about this bill below.

1. **IMMUNITY FROM SUIT AFTER EIGHT YEARS:** Section 2 of HB 158 would lock the courthouse doors to innocent citizens who have been hurt by the carelessness of others. It does so by preventing them from seeking justice by a date in advance of the time they suffer injury, or should have learned that they have suffered injury. Section 2 proposes an eight-year "statute of repose." The statute would allow some wrongdoers full immunity from suit provided that their misconduct and errors do not cause discoverable injuries within the first eight years of their conduct. Thus, children rendered sterile by a physician's malpractice; movie-goers injured by a negligently-designed roof that collapses eight years and one month after the theater was constructed; and families forced to litigate against aggressive outsiders because a lawyer negligently drafted a will ten years previously would have absolutely no recourse against the people that were paid good money for their bad work in prior years. Examples of injuries that are not discovered, or which do not develop within eight years of a defendant's misconduct include cancers, birth defects, and other serious maladies.

HB 158's radical eight-year cutoff puts all Alaskans at risk that they will be seriously injured and have no rights to seek compensation from those whose misconduct caused their plight by letting wrongdoers off the hook after eight years. The law currently provides a deterrent effect that causes people to act responsibly, and with the interest of public safety in mind. Section 2 will encourage wrongdoers, by immunizing them for their misconduct, to increasingly act without regard to the public interest, and the public's health and safety.

2. **RENDERING THOSE WITH THE MOST POWER IMMUNE FROM PUNISHMENT:** Sections 6 and 7 would limit punitive damages to \$300,000 or three times compensatory damages. Currently punitive damages are allowed only to punish people found, by "clear and convincing" evidence, to have engaged in outrageous or malicious conduct, either intentionally or recklessly. Such people and businesses are not deserving of a state subsidy. It is outrageous that the Legislature would pass a law to protect these people.

The arbitrary cap on punitive damages effectively renders the wealthiest individual and corporate actors immune from meaningful punishment. Under the proposed law, any entity that

can afford to occasionally pay (when and if it gets caught) \$300,000 or three times compensatory damages, can afford to behave recklessly toward or to intentionally hurt Alaskans. This section, like others, immunizes those least deserving of protection for their gross misconduct, and invites them to increasingly act without regard to the public interest, and the public's health and safety.

3. SHUTTING THE COURTHOUSE DOORS TO ALL BUT THE WEALTHIEST ALASKANS: Section 14 of HB 158 makes a small, but significant change to an existing rule that would make filing suit too financially risky for any but the most affluent Alaskans. The current "Offer of Judgment" rule allows a person who makes a reasonable settlement offer a moderate award if he or she does better at trial than the amount of his or her offer. Section 14 would allow the person offering settlement their **full costs and attorney fees** if they managed at trial to beat, even by one dollar, their offer. Given that corporate attorneys charge in the range of \$160 - \$225 per hour for their work, this provision will result in attorney fee awards of hundreds of thousands of dollars to wrongdoers.

The proposed change would turn litigation, already expensive and risky, into a game of "Russian Roulette." Most litigation lasts well over one year; often two or three years elapse between the filing of the complaint and trial. An Alaskan of moderate income cannot afford to pay an insurance company's lawyer or lawyers for three years of litigation bills if his or her lawyer guesses wrong about what the jury will do with the damages portion of the case.

For example, consider a person whose back is badly injured by a toxic and defective product, or in a car wreck that was not his fault. Prior to the injury, the person had started a new job as a maintenance mechanic and had worked there for two weeks. He has three children and equity in a home. He files suit against the person who caused his injury. The ~~same~~ insurance company makes an offer of judgment of \$30,000, which, by rule, is open for 10 days. The injured worker does not yet know how long he will be off work or if his new job will be waiting for him when the doctor releases him to work. He does not know what his medical bills will be or what his long-term prognosis will be. He is afraid that \$30,000 will not cover his damages. However, his lawyer tells him that if he goes to trial and gets one penny less than \$30,000, he will now be liable to pay an attorney's fee that could well exceed \$100,000. If he is of ordinary means, he cannot afford to expose his family to the risk of that kind of liability. He is forced to accept the insurance company's offer.

It is the rule rather than the exception that damages cannot be fixed with certainty. Given this, Section 14 will in the broad run of cases force people to settle for pennies on the dollar for their injuries. This will in almost all cases ensure that citizens recover much less than full compensation for their injuries. It will, again, eradicate the current deterrent effect of the law such that wrongdoers will see it in their financial interest to cut corners, and act irresponsibly.

4. NO GRACE PERIOD FOR CHILDREN: Currently, Alaska law protects children from having to file a lawsuit until after they reach the age of 18. Section 4 of HB 158 would require children to become litigants within two years of suffering an injury, or be forever barred

from bringing suit. Section 4 would expose already injured children to the rigors of cross-examination and trial. It would put the parents or guardians of these children under enormous pressure to avoid asserting their child's rights to avoid further traumatizing their child.

5. ARBITRARY LIMITS FOR THE MOST SERIOUSLY INJURED: Section 5 of HB 158 would cap damages for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and loss of consortium to \$300,000. The cap would be raised to \$500,000 for quadriplegics, or those suffering permanent loss of a limb or permanent loss of cognitive ability.

This bill hurts the most gravely injured Alaskans. It hits hard at those who need the right to seek justice the most. This section damages only the most seriously injured - and only the people who have suffered the most injustice. Again, it acts as a subsidy to wrongdoers, and encourages conduct that places the public's health and safety at risk. An example illustrates the inequities of this section. Consider a teenage girl who suffers a broken leg in a bad car accident. She will likely receive full and fair compensation for her minor pain and suffering, loss of time from sports and school, etc. However, her friend and fellow passenger suffers a mutilated face, a crushed pelvis (rendering her an unlikely candidate for childbirth), and severely impaired and lacerated hands in the same accident. This friend, whose entire life has been horribly altered, is arbitrarily limited to \$300,000 in damages (minus court deposition costs, witness costs, exhibit costs, and attorney's fees) for pain and suffering, physical impairment and loss of enjoyment of life that will last throughout her lifetime.

Limiting loss of consortium to \$300,000 is grossly unfair to the survivors of deceased family members who worked inside the home or who lived a rural subsistence lifestyle. The two children of a doctor who is killed in an accident will be handsomely compensated for a large lost stream of income. The six children of a stay-at-home mom or a subsistence provider will be limited by an arbitrary, and often inadequate cap on damages, as these deceased parents, under HB 158, were producing no "traditional" monetary income.

CONCLUSION: The changes proposed by HB 158 arbitrarily benefit the wealthiest entities at the expense of smaller Alaskan businesses and hard-working citizens. This memorandum highlights some of the more drastic of these proposals: the one that protects those who maliciously, intentionally or recklessly hurt Alaskans; the one that caps recovery for the most severely injured Alaskans; the one that offers immunity to those wrongdoers lucky enough to have their errors go undetected for eight years; the one that requires Alaskan children to become litigants; and the one that would force any Alaskan of average or above-average means to accept early low-ball settlement offers from insurance companies to avoid the risk of bankruptcy.

HB 158 cloaks dangerous, harmful policies with misleading rhetoric. The real goals of tort reform, are not fairness, predictability, and equal access to the court system. Instead the civil justice system in Alaska could be seriously damaged by the cruel measures proposed in HB 158 by the defendants' lobby. I urge you to help expose these dangers in HB 158 and to work to defeat it.

FILE COPY

**FINAL REPORT OF THE
HOUSE LIABILITY TASK FORCE
(First Revised)**

**JUNEAU
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"OUR TASK IS NOT TO FIX THE BLAME FOR THE PAST,
BUT TO FIX THE COURSE FOR THE FUTURE."

John F. Kennedy

HOUSE LIABILITY TASK FORCE

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Representative Red Boucher
Representative Virginia Collins
Representative Dave Donley
Representative Johnny Ellis
Representative Peter Goll
Representative Max Gruenberg
Representative Ron Larson
Representative Loren Leman
Representative Mike Navarre

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Gary Fye
Vincent Haneman
Russ Huffman, M.D.
Jeffrey Jefferson, Esquire
Nancy Lord
Ames Luce, Esquire
David McGuire, M.D.
Al Parrish
Mary Pierce
Jim Witt

Alternates for Public Members:

William Brock for Mary Pierce
Dan Hensely for Ames Luce
Richard Ritter for Vincent Haneman

Special Counsel to Task Force:

David E. Rogers, Esquire