

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2431.40 SCOMM 101A: CIVIL JUSTICE/TORT REFORM - HB 58, 1997 6052

1 before the trial begins either the party making a claim or the party defending against
2 a claim may serve upon the adverse party an offer to allow judgment to be entered in
3 complete satisfaction of the claim for the money or property or to the effect specified
4 in the offer, with costs then accrued. If within 10 days after the service of the offer
5 the adverse party serves written notice that the offer is accepted, either party may then
6 file the offer and notice of acceptance together with proof of service, and the clerk
7 shall enter judgment. An offer not accepted within 10 days is considered withdrawn
8 and evidence of that offer is not admissible except in a proceeding to determine the
9 form of judgment after verdict. If the judgment finally entered on the claim as to
10 which an offer has been made under this section is at least five percent less [NOT
11 MORE] favorable to the offeree than the offer, the offeree shall pay costs as allowed
12 under the Alaska Rules of Civil Procedure and all reasonable attorney fees
13 incurred by the offeror from the date the offer was made [THE INTEREST
14 AWARDED UNDER AS 09.30.070 AND ACCRUED UP TO THE DATE
15 JUDGMENT IS ENTERED SHALL BE ADJUSTED AS FOLLOWS:

16 (1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE
17 INTEREST RATE SHALL BE REDUCED BY FIVE PERCENT A YEAR;

18 (2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE
19 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A
20 YEAR].

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

22 (a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments
23 and decrees for the payment of money, including prejudgment interest, is three
24 percent above the 12th Federal Reserve District discount rate in effect on
25 January 2 of the year in which the judgment or decree is entered [10.5 PERCENT
26 A YEAR], except that a judgment or decree founded on a contract in writing,
27 providing for the payment of interest until paid at a specified rate not exceeding the
28 legal rate of interest for that type of contract, bears interest at the rate specified in the
29 contract if the interest rate is set out in the judgment or decree.

30 * Sec. 15. AS 09.30.070 is amended by adding a new subsection to read:

31 (c) Prejudgment interest may not be awarded for future economic damages,

1 future noneconomic damages, or for punitive damages.

2 * Sec. 16. AS 09.55.535(k) is amended to read:

3 (k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180,
4 apply to arbitrations under this section if they do not conflict with the provisions of
5 this section; arbitrations under this section shall be conducted in accordance with
6 procedures established by any rules of court which may be adopted and according to
7 provisions of AS 09.55.540 - 09.55.547 [AS 09.55.540 - 09.55.548] and AS 09.55.554
8 - 09.55.560, and AS 09.65.090.

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

10 Sec. 09.55.551. MEDICAL EXPERT WITNESS QUALIFICATION. In an
11 action based upon professional negligence brought against a health care provider, a
12 person may not testify as an expert witness on the issue of the appropriate medical
13 standard of care unless the witness is a health care provider or is licensed as a health
14 care provider in another state or country and

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

17 (2) is certified by a board recognized by the State Medical Board as
18 having acknowledged expertise and training directly related to the particular health care
19 or matter at issue.

20 * Sec. 18. AS 09.55.560 is amended by adding new paragraphs to read:

21 (4) "professional negligence" means a negligent act or omission by a
22 health care provider in rendering professional services;

23 (5) "professional services" means services provided by a health care
24 provider.

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

26 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

27 (a) A hospital is not liable for civil damages as a result of an act or omission by a
28 health care provider who is not an employee or actual agent of the hospital if the
29 hospital provides notice that the health care provider is an independent contractor. The
30 notice required by this subsection must be posted conspicuously in all admitting areas
31 of the hospital, published at least annually in a newspaper of general circulation in the

1 area, and must be in substantially the following form:

2 **No ice of Limited Liability**

3 **The following health care providers are independent contractors**
4 **and are not employees of the hospital:**

5 **(List specific health care providers)**

6 **The hospital is responsible for exercising reasonable care in granting staff privileges**
7 **to practice in the hospital, for reviewing those privileges on a regular basis, and for**
8 **taking appropriate steps to revoke or restrict privileges in appropriate circumstances.**
9 **The hospital is not otherwise liable for the acts or omissions of a health care provider**
10 **who is an independent contractor.**

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

13 **(c) In this section,**

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

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

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

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

25 **Sec. 09.65.210. DAMAGES RESULTING FROM COMMISSION OF A**
26 **FELONY. (a) A person who suffers personal injury or property damage may not**
27 **recover damages for the personal injury or property damage if the injury occurred**
28 **while the person was committing or attempting to commit a felony, or fleeing from the**
29 **commission of a felony and the person has been convicted of the felony, including**
30 **conviction based on a guilty plea or plea of nolo contendere, and the felony**
31 **substantially contributed to the injury or property damage.**

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

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

7 Sec. 09.68.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER
8 PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party
9 represented by an attorney shall be signed by at least one attorney of record in the
10 attorney's individual name, whose address shall be stated. A party who is not
11 represented by an attorney shall sign the party's pleading, motion, or other paper and
12 state the party's address. Except when otherwise specifically provided by the Alaska
13 Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by
14 affidavit. The signature of an attorney or party constitutes a certificate by the signer
15 that the signer has read the pleading, motion, or other paper; that to the best of the
16 signer's knowledge, information, and belief formed after reasonable inquiry it is well
17 grounded in fact and is warranted by existing law or a good faith argument of the
18 extension, modification, or reversal of existing law; and that it is not interposed for any
19 improper purpose, including to harass or to cause unnecessary delay or needless
20 increase in the cost of litigation. If a pleading, motion, or other paper is not signed,
21 it shall be stricken unless it is signed promptly after the omission is called to the
22 attention of the pleader or movant. If it is alleged or appears that a pleading, motion,
23 or other paper is signed in violation of this section, the court, upon motion or upon its
24 own initiative, may set the matter for hearing. If the court determines that a pleading,
25 motion, or other paper is signed in violation of this section, the court shall impose
26 upon the person who signed it, a represented party, or both, an appropriate sanction
27 that may include an order to pay to the other party the amount of the reasonable
28 expenses incurred because of the filing of the pleading, motion, or other paper,
29 including costs and attorney fees, and monetary sanctions not to exceed \$10,000.

30 * Sec. 22. AS09.55.548 is repealed.

31 * Sec. 23. AS 09.68.125, as enacted in sec. 21 of this Act, has the effect of amending

1 Alaska Rule of Civil Procedure 95, by requiring imposition of sanctions for certain failures
2 to sign pleadings, motions, or other papers.

3 * Sec. 24. SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the
4 application of a provision of this Act to any person or circumstance is held invalid, the
5 remainder of this Act and the application to other persons shall not be affected.

6 * Sec. 25. APPLICABILITY. This Act applies to all causes of action accruing on or after
7 the effective date of this Act.

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November 19, 1996

Governor's Committee on Tort Reform

Re: Comments on Draft Proposals

To the honorable committee:

We briefly reviewed draft materials sent out on November 6 concerning the work of the governor's tort-reform committee. Having apparently conceded that there is no liability crisis in Alaska the committees nonetheless continue to urge the increasing restrictions on injured individuals rights to recover damages from wrongdoers. One can only conclude that the business representatives know something that the public at large does not, that it makes more economic sense to maim and kill then operate safely if you can keep people from suing you, or, if you can shift the blame for your misconduct to the other guy. Frankly speaking to the extent a certain member of this committee recently political ran ads as a victim's rights advocate, the recommendations of the liability subcommittee on which he sat are remarkably inconsistent with that position.

Turning to the work of the subcommittees as contained in the packet we received, we offer the following comments:

1. Allocation of fault: The committee apparently fundamentally misunderstands the role of courts in America and in the State of Alaska. Courts adjudicate disputes between parties. They are supremely incapable of resolving disputes or claims involving persons not parties. This is because our courts are based on an adversary model. That model anticipates that the parties will be before the court, that they will have a stake in the litigation, and will have the opportunity to vigorously pursue and defend claims against themselves.

The committee's recommendation that fault be able to be allocated to non-parties violates these most basic tenets of common law jurisprudence and judicial decision making, the court is adjudicating the responsibility on an individual not before it, that individual has no stake in the outcome of the litigation, and has neither the opportunity or reason

to pursue claims or defend themselves. The Alaska Supreme Court has expressed concerns when nominal parties are permitted to remain in a lawsuit. Breitkreutz v. Baker, 514 P.2d 17, 29 n.29 (Alaska 1973). The sub-committee's recommendation for fault allocation to non-parties significantly increases the hazards of an unjust result presented when litigation includes those who have no stake in the outcome.

If a defendant truly believes that some other individual is at fault in whole or in part for a plaintiff's injuries they should be required to sue that third-party. It is far too easy to name a non-party as the cause of an injury when you know they won't be in court defending themselves and proving the error of the assertion. Moreover, the ability to name non-parties for fault allocation purposes unfairly places the burden on the plaintiff to not only prove their own claim but then to disprove a negative, prove that the non-party tortfeasor was not at fault. This is fundamentally unfair and raises grave due process concerns.

There is another significant hazard, the allocation of fault to non-parties would have the effect of overruling the Alaska Supreme Court's decision in Lake v. Construction Machinery, Inc., 787 P.2d 1027 (Alaska 1990).

In Lake, the court recognized based on the immunity provisions of the worker's compensation act that it would be fundamentally unfair to permit a defendant in a third party suit to allocate a portion of fault to the employer. The subcommittee's recommendation would overrule Lake. The effect would be that a defendant without naming the employer as a party could place a portion of the blame on the the employer. To the extent any judgment was awarded against the defendant, the employer under the worker's compensation laws has a lien. The worker's recovery is then reduced by that lien. The effect of this is to encourage collusion between employer's and defendants so that the employer who cannot be sued and who is not under an obligation to fully compensate the injured worker, accepts responsibility, reducing the defendant's liability and turns around and takes money through the lien from the injured worker. If your going to recommend that a defendant be permitted to shift blame to an employer, I would submit at the same time you need to deal with the worker's compensation issues including 1) eliminating employer immunity and 2) providing for elimination or reduction of any lien asserted by an employer when it is found to be at fault. To do anything else is fundamentally unfair to injured workers and will

result in them being undercompensated rather than properly compensated.

The sub-committee's failure to address the issues of later use of findings and statute of limitations emphasizes the lack of serious thought which has gone into this proposal. Given the nature of the legal system it is clear that a jury's determination of fault of a non-party could not later be used against that party. There is not a court in America that would bind a non-related non-party to the results of litigation. Statute of limitations defenses in the equitable apportionment area are already resulting in plaintiff's being forced to eat the liability of third party defendants who were brought in after the statute of limitations has run. If the committee wanted to do something useful in the allocation area it would simply make the following recommendation:

The filing of a third party complaint for equitable apportionment tolls the statute of limitations for the commencement of an action or pursuit of a claim under ARCP 14(c) against all parties who may be assessed any percentage of fault.

See Iowa Code § 668.8.

The effect of this provision would be to ensure that plaintiff's claim under 14(c) are not considered time barred if the the third-party complaint is timely filed. Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985). No evidence suggests that in changing from joint and several liability to several liability the legislature or voters of Alaska intended a plaintiff to be under compensated. The change was simply to ensure that no defendant paid more than their fair share. One benefit of this proposal would be to end the temptation to name third-party defendants who have no incentive to defend because of statutes of limitation restrictions on plaintiff which do not exist as to defendants. Thus, any party timely named in a timely filed third-party complaint which sought to apportion fault would be held liable, assuring plaintiffs full recovery and that no defendant pays more, or less, than their allocated amount.

2. Felons as plaintiffs: We are unaware of any evidence that the courts are being overrun by felons filing civil damages lawsuits. The proposed defense would immunize tortfeasors from claims by those who have been found legally

not guilty of any crime or whose criminality was never adjudicated. On what constitutional basis do we impose the burden of conviction on those who are legally innocent? The recommendation is both unnecessary and constitutionally suspect. As to the response to the issue of immunizing police officers from excessive force claims, the history of criminal prosecutions of police officers in this state does not suggest that either prosecutors or licensing authorities would vigorously pursue an officer for excessive force. I know of only one case where the state charged an officer with excessive force. At trial he was acquitted. Given the agenda of cutting government espoused by the legislative majority, it is ludicrous to suppose that understaffed and overworked prosecutors will actively and aggressively prosecute excessive force claims. Moreover, the only liability from suit conferred would be for state law damage claims, federal claim under 42 U.S.C. § 1983 could still be pursued. These claims may be pursued in state courts.

3. Hospital liability: Has the committee been presented evidence that lawsuits against emergency room physicians has a substantial effect on hospital costs? I doubt it. Repeated studies have shown that medical malpractice claims are an almost insignificant part of the cost of health care.

4. Sovereign immunity: It is always refreshing to see the government so strongly endorse basic incidents of democracy such as the right to jury trial. Perhaps we should reinstitute the monarchical regime of the king can do no wrong. As to immunity for social workers, probation and parole officers, what the state should be urging is fuller funding for the programs these individuals work under so that they can do their jobs properly. If the legislative decision is to underfund programs so that they are negligently performed, no reason exists that the innocents who are injured should be left to bear the cost alone. When state probation and parole officers put an unsupervised and known violent felon into an unprotected community, the state should bear the financial risk. When the probation officers negligently place a repeat drunk driver with repeated problems with non-compliance with court orders and escapes into a half-way house which he walks away from, drinks, drives, and kills an innocent woman and child, the state should bear financial responsibility. It is the state's conduct at issue. If the state does not want Neakok liability, it should do its job right.

5. Insurance rates:- What the committee should be recommending is strengthening the regulatory environment so

that there is more enforcement, and more severe penalties for insurers who violate the law. Evidence in bad faith cases repeatedly reveal patterns and practice of insurer misconduct ranging from deliberate decisions to misrepresent policy benefits and terms to corporate decisions to cheat insureds out of the true value of their claim by taking a "get tough" policy.

The committee's comments that Alaska presents too small a market to make a rate roll back effective is further evidence that nothing the Alaska legislature does will effect insurance rates in the state in favor of either consumers or small business. This further militates against further restrictions of plaintiffs ability to recover full compensation for injuries.

6. Statutes of limitation: Our recommendation is to leave all current statutes of limitation alone. No evidence suggests that plaintiffs are unduly sitting on claims until the last possible minute. Indeed under several trial court's views with respect to equitable apportionment, it would be hazardous to do so since if the third party/14(c) claim is not brought within the statute of limitations the plaintiff may be barred from recovering. Accordingly, to the extent any change in statutes of limitation are recommended the recommendation stated in § 1 supra should be implemented.

7. Statute of repose: No comment.

8. Wrongful discharge: No evidence suggests that juries are giving windfalls to terminated employees. The existence of a written contract is certainly one fact that a jury can consider. Making this fact determinative fails to recognize the diverse and shifting relationships in employment which occur. The likely outcome of this kind of limitation will be to force wrongful discharge claimants into extra-contractual remedies such as for fraud.

In addition, since few Alaskan's have written employment contracts, this provision creates a license for employers to treat employees unfairly despite the employees objectively reasonable expectations. In sum, such a provision would eliminate the covenant of good faith and fair dealing inherent in all contracts, including especially employment contracts.

9. Alcohol impaired plaintiffs: Alaska adopted comparative negligence principles many years ago now. Alaska has also long followed the substantial factor test

for liability. Nothing in the judicial experience since that time as reported in the case law suggests that juries are incapable of evaluating the role of intoxication in assessing fault. Under the proposal a slight difference in fault would make a dramatic difference in recovery. For example if someone's intoxication were 50% of the cause they would collect half the damage award, but if the intoxication were 51% of the fault they would get nothing. The proposal would also reintroduce the discredited doctrine of contributory negligence and would eliminate the substantial factor test for determining liability. Given the hazard that intoxication presents, a far more sensible proposal would be to bar intoxicated defendants and those unlawfully contributing to the intoxication of another defendant from apportioning fault to other parties.

10. Cap on wrongful termination damages: No evidence suggests that wrongful damage claims should be treated from other claims. Juries are not incapable of evaluating the evidence in these cases and determining what damages should be assessed.

11. Cap on non-economic damages: There was never evidence supporting capping non-economic damages in the first place. There is no evidence that a cap on non-economic damages resulted in holding down insurance premiums. The committee should recommend that the damage cap simply be eliminated. Moreover, the committee should recognize that death is severe physical impairment so as to eliminate the argument that the cap applies in wrongful death cases.

12. Punitive damages: Subsection (d) of the proposal bifurcates both trial and discovery of financial information related to punitive damages. Bifurcated discovery will often result in substantial delays between the first jury verdict and the second. In many situations, an economist will be used to explain the average net income or the profit derived from the wrongful conduct. It may take a few days to analyze the materials, and more time for the opposing party to depose the expert. While bifurcation of trial may be appropriate, and is and has been within the court's discretion, bifurcation of discovery will lead to delays which are counter-productive to the stated goals of tort-reformers.

Subsection (f) of the proposal says the section does not apply to claims against the state. How will punitive damages be calculated against the state in situations where

it has waived its immunity to these types of damages? See the Whistleblower Act. This section could simply read:

In no case shall punitive damages be assessed against any party or entity that is immune from awards of punitive damages by law.

13. Mandatory alternative dispute resolution: The experience with mediation suggests it only works when the parties want it to work. Requiring plaintiffs who are proceeding on a contingent fee basis to take part in a proceeding in which they may not have an interest, and requiring them to pay for it, only increases the cost of litigation without significant benefit. If parties currently want mediation it can be ordered pursuant to Civil Rule 100. Before implementing a five year program forcing unwilling parties to pay for mediators they do not want to use, a study of cases in which Civil Rule 100 mediation was invoked should be conducted to determine if mandatory mediation is effective. I should note that we are of mixed views with respect to this provision. We recognize that there are many cases in which mediation can be very useful. Perhaps what is needed is an opt out provision.

In conclusion, our view of the proposals is that they are remarkably unbalanced and short-sighted. The evidence does not establish a liability or damages crisis.

The various provisions of the tort reform package, to the extent they limit the ability to seek compensation from those who are actually at fault will likely result in a large "fiscal note." If you deny people the right to recover compensation for their injuries from the party that caused the damage, they will look elsewhere for the money they need to survive. The most likely source of that money will be the welfare rolls.

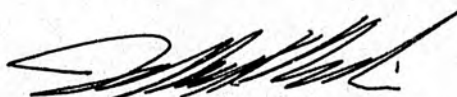
Effective liability reform would seek to strengthen individual safety and consumer protection through vigorous enforcement of regulatory schemes with penalty provisions increased. Through effective safety enforcement and consumer protection, individual lawsuits that supposedly "plague" business would be decreased. The fact is, though, that by underfunding enforcement and limiting liability, the legislative tort reform proponents and their constituency seek to escape their own responsibility and enhance their bottom lines at a cost incalculable in human misery. To the extent the committee adopts recommendations which further

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limit liability of tortfeasors in this state, it contributes to the parade of victims for whom there is no recourse or incomplete recourse.

The state legislature is largely considered the most irresponsible branch of government and held in the greatest disrepute. The proposals of the committee, particularly with respect to fault allocation to non-parties, will help ensure that the public comes to regard the courts in as low a fashion.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jeffrey K. Rubin', with a stylized, flowing script.

Jeffrey K. Rubin

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

Sec. 2. AS 09.10.070 is repealed and reenacted to read:

Sec. 09.10.070. ACTIONS FOR CERTAIN TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

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

Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY. (a) Notwithstanding the disability of minority described under AS 09.10.140(a), a person may not bring an action for personal injury, death, property damage, or injury to the rights of another not arising on contract, unless the action is brought within two years of the accrual of the action.

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

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

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

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

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

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

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

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

(D) is both deaf and blind; or

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

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

(e) Multiple injuries sustained as a result of a single incident shall be treated as a single injury for purposes of this section. 17

Sec. 5. AS 09.17.020 is repealed and reenacted to read:

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

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

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

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

Sec. 6. AS 09.17.070 is repealed and reenacted to read:

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

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

Present Value?

- (2) the collateral source has a right of subrogation under federal law;
- (3) the collateral source is the payment of a dependent child's medical bills by the injured child's parent which does not result from insurance coverage;
- (4) the benefit consists of death benefits paid under life insurance; or
- (5) the benefit consists of workers' compensation benefits received under AS 23.30.

(b) A person defending a claim may introduce into evidence an amount paid or payable as a benefit to the claimant as a result of the personal injury or death under Title 42 Chapter 7 of the United States Code (Social Security Act); a state or federal disability act; health, sickness, disability, accident, or income-disability insurance; insurance that provides health benefits or income-disability coverage; and a contract or agreement of a group, organization, partnership, or corporation, or other collateral source, to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services, disability, or lost wages. However, evidence of a collateral source that is a federally funded program that by law must seek subrogation or that has a right of subrogation under federal law, or evidence of death benefits paid under life insurance, or evidence of workers' compensation benefits received under AS 23.30, may not be introduced under this subsection. If a person defending a claim elects to introduce evidence described in this subsection, the claimant may introduce evidence of the amount that the claimant has paid or contributed to secure the claimant's right to the collateral benefit, including the cost to the claimant resulting from depleted or exhausted coverage. 7

(c) A person who provides a collateral benefit admissible under (b) of this section may not recover any amount against the claimant as reimbursement for those benefits and may not be subrogated to the rights of a claimant against a person defending a claim.

Sec. 7. AS 09.17.080 is repealed and reenacted to read:

Sec. 09.17.080. ALLOCATION OF DAMAGES. (a) In all actions involving the fault of more than one person, including third-party defendants and persons who have been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is not jury, shall make findings, indicating 7

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

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages to each claimant regardless of whether the other person, including an employer, is or could have been named as a party to the action. 7

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot

be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that or another action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.

Sec. 8. AS 09.30.070 is amended by adding a new subsection to read:

Sec. 09.30.070(c) **PREJUDGMENT INTEREST.** Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or for punitive damages.

Sec. 9. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

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

Notice of Limited Liability

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

(List specific health care providers)

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

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

(c) In this section,

(1) "health care provider" means a doctor of medicine, psychologist, osteopath, dentist, optometrist, chiropractor, optician, pharmacist, podiatrist, or certified registered nurse anesthetist, who

INITIATIVE

September 30, 1996

is licensed in this state:

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

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

Sec. 10. AS 09.65.210 is repealed and reenacted to read:

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

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

Sec. 11. AS 09.17 is amended to add a new section to read

Sec. 09.17.090 EXPERT WITNESS QUALIFICATION. (a) Except as provided under (b) of this section, in an action based upon professional negligence, a person may not testify as an expert witness on the issue of the appropriate standard of care unless the witness is a professional who is licensed in this state, or is licensed in another state or country and

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

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

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

(c) "Professional negligence" means a negligent act or omission in rendering professional services.

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Sec. 12. AS 09.55.548 is repealed.

Sec. 13. SEVERABILITY. If any provision of this Initiative, or the application of a provision of this Initiative to any person or circumstance is held invalid, the remainder of this Initiative and the application to other persons or circumstances shall not be affected.

Sec. 14. APPLICABILITY. This Initiative applies to all causes of action accruing on or after the effective date of this Act. This Initiative does not apply to any action or recovery arising out of the "Exxon Valdez" oil spill of March 1989.

Sec. 15. EFFECTIVE DATE OF THIS INITIATIVE. This Initiative takes effect ninety days after its certification by the lieutenant governor.

① Award Actual Atty Fees ?

A BRIEF HISTORY OF TORT REFORM EFFORTS IN ALASKA

Most of the current tort statutes were enacted in 1962. They operate in conjunction with principles of common law. The reforms commenced in 1967.

For injuries related to the design, planning, or construction of improvements to real estate, a statute of repose was enacted in 1967 as an exception to the general two-year statute of limitations. Under the 1967 statute of repose, a claim was barred unless brought within six years of the date of substantial completion of construction. An exception was made if the injury occurred in the sixth year -- the claimant would have two years to file for that injury.¹

In 1967, provisions specific to medical malpractice were added as Article 6 of AS 09.55. The new provisions listed the elements that needed to be proved to establish malpractice. A physician's standard of care was established as that of physicians with that expertise practicing in that or a similar locality.

In 1970, the legislature passed the Uniform Contribution Among Joint Tortfeasors Act, AS 09.16.010 - 09.16.060, that provided for contribution so that each joint tortfeasor was liable for an equal share of the damages despite the percentage of fault.² Previously, each joint tortfeasor could be liable for all of a claimant's damages, without a right of contribution. In 1975, the supreme court also changed the existing rule that a claimant could not recover any damages if the claimant was contributorily negligent. Under the new rule, the claimant's damages were reduced proportionally by the amount of the claimant's negligence (termed "comparative negligence.") Kaatz v. State, 540 P.2d 1037 (Alaska 1975) *appeal after remand* 572 P.2d 775 (1977)

The next flurry of activity took place during the 1975-76 legislative session. In 1975, after Governor Hammond vetoed a medical insurance bill, he created the Governor's Medical

¹ 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 Co. v. Scales, 752 P.2d 467, 470 (Alaska 1988). The court mentioned but did not reach two additional issues: discrimination among classes of plaintiffs and due process issues under the Alaska Constitution.

In 1994, the legislature passed a bill amending the statute of repose, AS 09.10.055. The bill contained findings of legislative purpose to justify the distinctions that the Alaska Supreme Court had criticized among classes of defendants. The bill extended the statute of repose to fifteen years. The current AS 09.10.055 has not been evaluated by the state supreme court.

² In 1979, the supreme court invited the legislature to amend the law to provide for proportionate liability. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979).

Malpractice Commission. The following year, a comprehensive bill was enacted. The Medical Indemnity Corporation of Alaska (MICA) was established as a public corporation. As a condition of licensure, physicians were required to obtain insurance from MICA; various other medical professions were also required to obtain insurance, but only from MICA if other insurance was found to be unavailable.³ The burden of proof for malpractice was amended to remove the "locality" restriction on standard of care; AS 09.55.535 provided for voluntary arbitration; and AS 09.55.556 required informed consent. Expert advisory panels were established with subpoena powers. A panel reports to the superior court its findings on medical malpractice cases, that the report is admissible as evidence, and the panel maintains a record of its proceedings. The bill required hospital peer review systems with attendant confidentiality and immunity for reviewers. Additionally, the new law provided for payment of future damages by periodic payment and allowed evidence of compensation from collateral sources to be considered by the court after the jury reached a verdict.

During the 1979-80 legislative session, the three tort-related bills that were filed all passed. AS 09.65.200 provides that a landowner of unimproved land is not responsible for injuries to a person who is not compensating the owner for use of the land and who is injured as a result of the natural condition of the land.⁴ Under another bill, skiers were assumed to assume the inherent risks of skiing if the ski resort posted prominent signs warning of the inherent risks that are enumerated in the statute.⁵ Additionally, a bill was passed that tolled the running of the statute of limitations for persons who were incompetent as a result of mental illness.

Major tort reform occurred during 1986. The bill that passed was one of five "omnibus" bills filed that session. The most significant change was a cap on noneconomic damages of \$500,000, except damages related to disfigurement or severe physical impairment. The bill provided for jury itemization of damages between past and present, and among economic, noneconomic, and punitive; modified joint and several liability; precluded damages for injuries during a claimant's commission of a felony; limited liability of nonprofit directors and officers; allowed reduction of a verdict by collateral source payments; limited awards of attorney fees to prevailing parties in certain contested cases, and provided for periodic payments of damage awards. The bill also amended provisions on offers of judgment; costs and attorney fees; and interest on

³ Under ch. 177, SLA 1978, the mandatory insurance provisions were later made voluntary. MICA was abolished in 1991. Ch. 14, SLA 1991.

⁴ The statute was amended by ch. 168, SLA 1988 to expand the definition of unimproved land to allow certain improvements, to preclude liability to a person who uses the land for free recreational use, and to exclude from immunity gross negligence or intentional conduct.

⁵ Ski area liability is now governed by the Alaska Ski Safety Act of 1994, AS 05.45.010 - 05.45.210. (Ch. 63, SLA 1994) The fourteen sections of the act 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.

judgments, including a new section on prejudgment interest. The bill codified the standard of proof for punitive damage awards of "clear and convincing evidence" set by the state supreme court in 1962 and the court's ruling on contributory fault set in 1975.

During the 1987-88 session, Governor Cowper introduced a bill to make further tort reform. The significant differences between the House and Senate version could not be resolved. Two other "omnibus" bills died in committee.

In November, 1988, the voters approved an initiative 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. 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."⁶ A provision in the initiative limiting attorney contingency fees was not placed on the ballot after it was disallowed by the Lieutenant Governor. (See Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991)).

In 1989, the House of Representatives created the "Liability Insurance Task Force" for the purpose of reviewing controversies concerning tort reform and to "determine how the state may more effectively regulate insurance and provide civil justice." The task force's final report was made in March, 1990, containing findings but no recommendations. That report is provided is the last document under tab 6, "Alaska Tort Reforms," in volume I of your packet for this meeting. An "omnibus" bill filed in both the house and senate died in committee that year.

In 1993, the state supreme court adopted a civil rule allowing the court to order mediation at the request of a party or on its own motion. Alaska R. Civ. P. 100. Mediation is not available in certain matters involving domestic abuse.

Another "omnibus" tort bill - HB292 - was filed in 1993. After extensive hearings by the House Labor and Commerce committee, it was not reported out of the House Finance committee. The most recent "omnibus" tort bill - HB158 - was filed in 1995. Extensive materials on that bill are located under tab 6, "Alaska Tort Reforms," in volume I of the packet for this meeting.

⁶ In Benner v. Wichman, 874 P.2d 949 (Alaska 1994), the Alaska Supreme Court analyzed the changes to AS 09.17.080 and held that fault could only be allocated among parties who had been joined to the action. (See tab 13, volume II in the packet for this meeting.) Thus, defendants may still be held liable for the fault of any tortfeasors who have not been joined in an action.

CHRONOLOGY - BY LEGISLATIVE SESSION¹

5TH LEGISLATIVE SESSION - 1967-68

ENACTED

Ch. 61, SLA 1967 - Statute of repose for construction- AS 09.10.055

Ch. 49, SLA 1967 - Medical malpractice burden of proof-- AS 09.55.530 - 09.55.550

6TH LEGISLATIVE SESSION - 1969-70

ENACTED

Ch. 80, SLA 1979 - Uniform Contribution Among Joint Tortfeasors Act - AS 09.16.010 - 09.16.060²

9TH LEGISLATIVE SESSION - 1975-76

ENACTED

Ch. 102, SLA 1976 - Medical malpractice - amendments to Title 8, additions to AS 09.55.530 - 09.55.560, new AS 13.23 and AS 21.88

OTHER BILLS FILED:

BILL	SPONSOR	BRIEF DESCRIPTION	FINAL STATUS
HB98	Smith	Medical malpractice - limit on damages	(H) Jud
HB176	Cowper	Comparative negligence	(S) Jud
HB476 SB549	Beirne	Med malpractice - limit on contingency fees	(H) Jud (S) Jud
HB575 SB523	Gov	Med Malpractice adjudication board / appeals	(H) Jud (S) Comm
HB636 SB566	Bierne	Med malpractice: admin adjudication; clear and convincing evidence; limits on damages; limit on informed consent liability; required insurance	(H) Jud (S) Comm
SB550	Kerttula	Limit on awards against physician or dentist	(S) Jud

¹ Bills filed and not enacted before the 9th Legislative Session are not shown. No search mechanism exists for those bills.

² Repealed by 1988 Initiative.

10TH LEGISLATIVE SESSION - 1977-78

ENACTED

Ch. 177, SLA 1978 - mandatory medical malpractice insurance made voluntary - Title 8

OTHER BILLS FILED:

HB124 SB308	Cowper Rodey	Comparative fault	(H) Jud (S) Jud
HB292 SB170	Beirne	Med malpractice - atty fees	(H) Comm (S) Jud
HB280 SB171	Bierne	Med malpractice - limit on awards	(H) Comm (S) Hess
HB309	Beirne	Med malpractice - requirement of notice of claim	(H) Comm
HB310	Beirne	Med malpractice - statute of limitations	(H) Comm
HB311	Beirne	Med malpractice - limit on pain and suffering damages	(H) Comm

11TH LEGISLATIVE SESSION 1979-80

ENACTED

Ch. 46, SLA 1979 - limitations of actions / exemption for mentally ill - AS 09.10.140

Ch. 80, SLA 1980 - inherent risks of skiing - AS 09.10.300 (replaced by AS 05.45.010 - 05.45.210)

Ch. 138, SLA 1980 - injuries on unimproved land - AS 09.65.200

12TH LEGISLATIVE SESSION - 1981-82

BILLS FILED:

HB562 SB537	Clocksini (S) Judiciary	Repeal statute of repose on construction	(H) Jud (S) Jud
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13TH LEGISLATIVE SESSION - 1983-84

BILLS FILED:

HB126	Hurlbert	Liability for aircraft guest	exp. 1st sess.
HB407	Bettisworth	State reimbursement - expenses	(H) Jud

14TH LEGISLATIVE SESSION - 1985-86

ENACTED

Ch. 139, SLA 1986 - "Omnibus" bill - added AS 09.17 and 09.65.120, amended AS 09.30.065, 09.30.070, and AS 09.60.010

OTHER BILLS FILED:

HB97	Duncan	State liability for hazardous recreation	(H) Jud
HB368	Gruenberg	Uniform Comparative Fault Act	(H) Jud
HB481	Reiger	"Omnibus" bill: punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; contributory fault; apportionment of damages; effect of release	(H) Jud
HB490	Szmanski	Periodic payment by state / munis	(H) L&C
HB532	Cotten	"Omnibus" bill: cap on noneconomic damages (\$250,000); punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; collateral benefits; contributory fault; apportionment of damages; effect of release; ~~limits on contingent fees; mandatory arbitration; offers of judgment; wrongful death; attorney fees~~	(H) Jud
HB660	Binkley	Recreational use of land	(H) Res
SB382	Kerttula	"Omnibus" bill: cap on noneconomic damages (\$750,000); periodic payments; apportionment of damages; limits on contingent fees	(S) L&C
SB392	Josephson	Periodic payment	(S) L&C
SB444	V. Fischer	"Omnibus" bill: cap on noneconomic damages (\$500,000); periodic payments; itemized verdict; limits on contingent fees	(S) L&C
SB451	Halford	Apportionment of damages	(S) L&C

15TH LEGISLATIVE SESSION - 1987-88

ENACTED

Ch. 168, SLA 1988 - injuries on unimproved land - amendments to AS 09.65.200

Initiative Proposal No. 2 - abolished joint and several liability - repealed AS 09.16 and replaced with AS 09.17.080(d)

BILLS FILED:

HB85	Gov	"Omnibus" bill: cap on noneconomic damages (\$250,000); periodic payment; collateral benefits, costs; commission of crime; liability of zoos, liability of hospitals for contractors, liability for hazardous substances, reports on insurance rates and litigation	await conc/reced
HB198	Hoffman	Recreational use of land	(S) Rules
HB250	Larson	"Omnibus" bill: cap on noneconomic damages (\$100,000); periodic payment; collateral benefits, commission of crime; costs	(H) L&C
HB515	Zawaki	Changes to statute of limitations; statute of repose for manufacturing equipment	(H) L&C
HB517	Ulmer	Liability of certain volunteers	(H) Jud
SB211	Faiks	"Omnibus" bill: commission of crime; partial immunity for nonprofit / gov't; joint and several liability; report on insurance rates	(H) Jud
SB447	Duncan	State liability for hazardous recreation	(S) Jud
SB461	Jones	Liability of hospitals for contractors	(H) L&C

16TH LEGISLATIVE SESSION - 1989-90

BILLS FILED:

HB115 SB228	Ulmer	Liability of certain volunteers	(H) L&C (S) Jud
HB166	Cotten, et al	"Omnibus" bill: statute of repose for product liability, construction, and physicians; commission of crime, periodic payments, partial immunity for nonprofit / gov't / peace officers; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	w/drawn
HB334	L&C	Require insurance after judgment entered against licensed health professional	(H) Jud
HB345 SB323	Gov	Creation of Health Claims Board; no fault claims for set amounts as exclusive remedy	(H) L&C (S) Jud
HB494	Menard	Recreational land use	(H) Jud
HB597 SB451	L&C Jud	"Omnibus" bill: statute of repose for product liability and construction (6 year); commission of crime, periodic payments, partial immunity for nonprofit / gov't; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates	(H) Jud (S) Jud
SB229	Duncan	State liability for hazardous recreation	(S) Jud
SB495	Rodey	Statute of repose for product liability and construction (5 year)	(S) Jud

17TH LEGISLATIVE SESSION - 1991-92

BILLS FILED:

HB178	Jud	Offers of judgment / costs and fees	(H) Jud
HB302	Jud	Require insurance after judgment entered against licensed health professional	(H) Fin
SB109	Halford	Statute of repose for construction (7 years)	(H) L&C
SB285	Halford	Liability of hospitals for contractors	(H) L&C
SB462	HES	Statute of repose for physicians	(S) Jud

18TH LEGISLATIVE SESSION - 1993-94

ENACTED

Ch. 12, SLA 1993 - good faith disclosure of job performance information - AS 09.65.160

Ch. 17, SLA 1994 - limitation on private nuisance action for pollution - AS 09.45.230

Ch. 28, SLA 1994 - statute of repose for construction - amendments to AS 09.10.055

Ch. 63, SLA 1994 - Alaska Ski Safety Act of 1994 - AS 05.45

OTHER BILLS FILED:

HB274 SB204	HES HES	"Omnibus" bill: limits on statute of limitations for health care; mandatory arbitration for health care; collateral source for health care; cap on noneconomic damages (\$250,000); contributory fault; allocation of damages; effect of release; interest; liability of hospitals for contractors	(H) HES (S) HES
HB292 SB254	L&C Pearce	"Omnibus" bill: general statute of repose (6 years); limits on statute of limitations for health care; expansion of cap on noneconomic damages cap on punitive damages; commission of crime; reduction by equivalent of taxes; wrongful death; collateral benefits; contributory fault; allocation of damages; effect of release; offers of judgment; liability of hospitals for contractors	(H) Fin (S) Jud
HB300	L&C	Liability for comm'l rec activities	(S) Jud
HB360	Bunde	Liability for air / watercraft guest passenger	(S) Comm
HB414 SB270	Gov Gov	Mandatory arbitration for health care claims	(H) Comm (S) HES
HB492	HES	Limits on liability to insurance coverage and mandatory arbitration for health care claims	(H) HES
HB493	HES	Required insurance for health care providers	(H) HES
SB123	HES	Medical malpractice: limits on statute of limitations; judgment interest rates; mandatory arbitration	(S) HES
SB184	Frank	Imm: nonprofit corp volunteers and employees	(S) Jud
SB367	HES	Mandatory arbitration for health care claims	(S) Rules

19TH LEGISLATIVE SESSION - 1995-96

ENACTED

Ch. 79, SLA 1995 - Prisoner litigation against state - AS 09.19, etc.

OTHER BILLS FILED:

HB19	Therriault	Def of "fault" to include intentional misconduct	(S) Jud
HB145	Ogan	Proof beyond reasonable doubt: punitive damages	(H) Jud
HB158	Porter	"Omnibus" bill: statute of repose; cap on punitive damages; 75% of punitive damages to state; allocation of fault; comm'l recreation activities; hospital liability for contractors; liability for frivolous or improper practice; offers of judgment; expert witnesses in malpractice; mandatory arbitration; periodic payment; effects of release; interest; commission of felony; sanctions; reports on insurance rates	Vetoed
HB161	Bunde	Liability for aircraft/ watercraft guest passenger	(H) Jud
HB252	Sanders	Cap on punitive damages	(H) Sta
HB316	Mulder	Liability for frivolous lawsuits	(S) Jud
HB414	Green	Mandatory conciliation panels for design professionals	(S) Jud
SB72	Frank	imm: nonprofit corp volunteers and employees	(S) Sta
SB324	Jud	mandatory arbitration; caps on punitive damages for unlawful employment practices	(H) Sta

TORT REFORM PROPOSALS BY TOPIC

CONSTRUCTION

1967-68

Ch. 61, SLA 1967 - Statute of repose

1981-82

HB562 / SB537 - Repeal statute of repose

1991-92

SB109 - Amend statute of repose

1993-94

Ch. 28, SLA 1994 - Amend statute of repose

1995-96

HB414 - Mandatory conciliation panels for design professionals

DAMAGES

1969-70

Ch. 80, SLA 1970 Uniform Contribution Among Tortfeasors Act

1975-76

HB 176 - Comparative negligence

1977-78

HB124 / SB308 - Comparative fault

1985-86

HB368 - Uniform Comparative Fault Act

SB392 - Periodic payment

SB451 - Apportionment of damages

1987-88

Initiative - abolished joint and several liability

1995-96

HB145 - Proof beyond reasonable doubt:
punitive damages

HB252 - Cap on punitive damages

LAND / RECREATION

1979-80

Ch. 80, SLA 1980 - inherent risks of skiing

Ch. 168, SLA 1980 - Non compensated use of unimproved land

1983-84

HB126 - Aircraft guest

1985-86

HB97 - State liability - hazardous recreation

HB660 - Non-compensated recreational use of land

1987-88

Ch. 168, SLA 1988 - Injuries on unimproved land

HB198 - Recreational use of land

SB477 - State liability for hazardous recreation

1989-90

HB494 - Recreational use of land

SB229 - State liability for hazardous recreation

1993-94

Ch. 63, SLA 1994 - Alaska Ski Safety Act

HB300 - Liability for comm'l recreation activities

HB360 - Liability for air / watercraft guest passengers

1995-96

HB161 - Liability for air / watercraft guest passengers

MEDICAL MALPRACTICE

1967-68

Ch. 49, SLA 1967 Burden of proof

1975-76

Ch. 102, SLA 1976 - Omnibus bill

HB 98 - Limits on damages

HB 476 / SB549 - Limit on contingency fees

HB575 / SB 523 - Admin adjudication /
appeals

HB636 - Administrative adjudication; clear and
convincing evidence; limits on damages;
limit on informed consent; required
insurance

SB550 - Limit on awards against physicians
and dentists

1977-78

Ch. 177 SLA 1978

HB252 / SB 170 - Attorney fees

HB280 / SB171 - Limit on awards

HB309 - Required notice of med mal claim

HB310 - Statute of limitations

HB311 - Limit on pain and suffering damages

HB 485 / SB325 - Revolving loan fund

1987-88

HB85 / SB461 - Hospitals for contractors

MISCELLANEOUS OTHER

1979-80

Ch. 46 SLA 1979 - Statute of limitations /
mentally ill

1987-88

HB515 - Manufacturing equipment

HB517 - Liability of certain volunteers

1989-90

HB115 / SB228 Liability of certain volunteers

1989-90

HB166 - Statute of repose for physicians; limit of
hospital liability for contractors

HB334 - Required insurance

HB345 / SB323 - No fault claims exclusive
remedy

HB597 - limit of hospital liability for contractors

1991-92

HB302 - Required insurance

SB285 - Hospitals for contractors

SB462 - Statute of repose for physicians

1993-94

HB274 / SB204 - Statute of limitations /
mandatory arbitration / collateral source

HB292 - statute of limitations / limit of hospital
liability for contractors

HB414 / SB270 - Mandatory arbitration

HB492 - Limits on liability to insurance coverage
/ mandatory arbitration

HB493 - Required insurance

SB123 - Statute of limitations / prejudgment
interest / mandatory arbitration

SB367 - Mandatory arbitration

1993-94

Ch. 12, SLA 1993 - good faith disclosure of
job performance information

Ch. 17, SLA 1994 - limitation on private
nuisance action for pollution

SB184 - Imm: nonprofit corp volunteers and
employees

1995-96

HB19 - Definition of "fault" to include
intentional conduct

SB72 - Imm: nonprofit corp volunteers and
employees

HB316 - Liability for frivolous lawsuits

"OMNIBUS" BILLS

1985-86

Ch. 139, SLA 1986 - Cap on noneconomic damages (\$500,000); itemized verdicts; modified joint and several liability; allocation for contributory fault; commission of a felony; limited liability of nonprofit directors and officers; collateral source evidence; periodic payments; offers of judgment; costs and attorney fees; interest

HB481 - Punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; contributory fault; apportionment of damages; effect of release

HB532 - "Omnibus" bill: cap on noneconomic damages (\$250,000); punitive damages to state; itemized verdicts; periodic payments; frivolous litigation; collateral benefits; contributory fault; apportionment of damages; effect of release; limits on contingent fees; mandatory arbitration; offers of judgment; wrongful death; attorney fees

SB382 - cap on noneconomic damages (\$750,000); periodic payments; apportionment of damages; limits on contingent fees

SB444 - cap on noneconomic damages (\$500,000); periodic payments; itemized verdict; limits on contingent fees

1987-88

HB85 - cap on noneconomic damages (\$250,000); periodic payment; collateral benefits, costs; commission of crime; liability of zoos, liability of hospitals for contractors, liability for hazardous substances, reports on insurance rates and litigation

HB250 - cap on noneconomic damages (\$100,000); periodic payment; collateral benefits, commission of crime; costs

SB211 - commission of crime; partial immunity for nonprofit / gov't; joint and several liability; report on insurance rates

1989-90

HB166 - statute of repose for product liability, construction, and physicians; commission of crime, periodic payments, partial immunity for nonprofit / gov't / peace officers; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates

HB597 / SB451 - statute of repose for product liability and construction (6 year); commission of crime, periodic payments, partial immunity for nonprofit / gov't; collateral benefits; interest; limit on nonpecuniary damages; costs; liability of hospitals for contractors; report on insurance rates

1993-94

HB274 / SB204 - cap on noneconomic damages (\$250,000); contributory fault; allocation of damages; effect of release; interest; liability of hospitals for contractors

HB292 / SB254 - general statute of repose (6 years); limits on statute of limitations for health care; expansion of cap on noneconomic damages cap on punitive damages; commission of crime; reduction by equivalent of taxes; wrongful death; collateral benefits; contributory fault; allocation of damages; effect of release; offers of judgment; liability of hospitals for contractors

1995-96

HB 158 - statute of repose; cap on punitive damages; 75% of punitive damages to state; allocation of fault; comm'l recreation activities; hospital liability for contractors; liability for frivolous or improper practice; offers of judgment; expert witnesses in malpractice; mandatory arbitration; periodic payment; effects of release; interest; commission of felony; sanctions; reports on insurance rates

SB324 - mandatory arbitration; caps on punitive damages for unlawful employment practices

PROCEDURE**1991-92**

HB178 - Offers of judgment / costs and fees

SB495 - Statute of repose for product liability and construction (5 year)

STATE AS PARTY**1983-84**

HB407 - State pays all fees and costs

1985-86

HB490 - Periodic payment of judgments against state or political subdivisions

1995-96

Ch. 79, SLA 1995 - Prisoner litigation against state

**LEGISLATOR E-Z CHECK-OFF FOR TORT REFORM BILL
(USING HISTORIC EXAMPLES)**

✓	Admin. adjudication	✓	Medical
	Allocation of fault / apportionment of damages		Definition of "fault" Include unnamed as well as named parties State effects of release
	Arbitration		Mandatory - medical - general
	Attorney fees and costs		Contingency fees - cap of _____ - prohibit in _____ types of cases Prevailing party - increase payments - eliminate payments
	Cap on noneconomic damages (e.g. physical impairment, pain and suffering, disfigurement, loss of enjoyment of life)		\$ _____ (10,000 - 750,000) Expand applicability
	Collateral benefits (e.g. claimant's insurance)		Evidence to jury Increase reduction of award Prohibit subrogation rights
	Conciliation panel		Mandatory non-binding determination of design professional negligence, but not damages, by panel; not admissible in court
	Crime - no damages to perpetrator		Include attempts and fleeing from commission of felony Expand to include misdemeanors as well as felonies Remove conviction requirement
	Damages		Limits on awards against certain professions: ____ physicians ____ limit to insurance coverage ____ dentists ____ health care
	Frivolous lawsuits		Increases sanctions New cause of action
	Immunity		Nonprofit employees and volunteers Volunteers State employees within scope of employment
	Informed consent		Reduce requirement for medical malpractice Create requirement for hazardous recreation activities

✓	Insurance rates	✓	Reduce by ____ % Report on changes
	Interest		Change rate / floating rate of ____ Preclude prejudgment interest on future damages
	Malpractice		Limits on expert witnesses: licensed and board-certified
	Medical		Any other reform, for medical only: ____ Hospitals -- nonliability for contractors
	No-fault / exclusive remedy		Workers' comp - type remedy for medical claims
	Offers of judgment		Increase incentives Reduce incentives
	Periodic payment of damage awards		Apply only to personal injury Allow for inflation
	Punitive damages		Cap of ____ Cap on certain types of action, e.g. unlawful employment practices ____ % to state Increase burden of proof
	Recreation		Compensated Non-compensated Parameters of state liability
	Required insurance		For ____ health profession(s) For health professional who has malpractice judgment
	Sanctions		Increase Allow fines against parties as well as attorneys
	Standard of proof		Increase for medical malpractice claims
	Statute of limitations		Modify tolling for minors in medical malpractice cases
	Statute of repose		Reduce # of years to ____ Expand to: product liability, manufacturing equip., physicians, all Repeal
	Taxes		Reduce judgment by estimated taxes
	Wrongful death		Apply (specified) personal injury reforms: ____

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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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.³

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

³ 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	14,500	15,500	24,500
Gross Award	134,500	145,500	244,500
40% Cont. Fees	<53,800>	< 58,200>	< 97,800>
State's Share of Punitive Damages	< 0>	< 7,500>	<75,000>
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 Barnister 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

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.

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

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.* 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.

* 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).

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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; Keyes, 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.

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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

8 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.

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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.

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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

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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,



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Reply to: JUNEAU

March 11, 1994

Representative Brian Porter
Alaska State Legislature
State Capital
Juneau, Alaska 99801-1182

Re: House Bill 292

Dear Representative Porter:

On behalf of State Farm, I have previously written to the House Labor and Commerce Committee regarding HB 292, and I have also testified before your committee. I have just seen a copy of the March 8, 1994 letter from the attorney general and I felt compelled to comment.

Section 3: Statute of Repose. You will recall from our previous correspondence that we took no position on the statute of repose other than to say that reasonable limitations obviously would have a positive impact on the goals this legislation seeks to further. In that light, we would simply make the following observations about the attorney general's letter of March 8, 1994.

The letter seems to be saying that regardless of what kind of statute of repose the legislature seeks to adopt, it will be held on unconstitutional by the Alaska Supreme Court. With this we disagree. We believe the legislature clearly has the power to enact a statute of repose. It has enacted numerous limitations on civil claims, such as statute of limitations, changes in the law relating to the medical malpractice area, and the tort reform of 1986. To our knowledge, the court has never indicated it would strike down all statutes of repose, and indeed, it would

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not have gone through the analysis it went through in Turner Construction Company, Inc. v. Scales, 752 P.2d, 467 (Alaska 1988) if that were its position. Contrary to what the attorney general apparently believes, we believe it is clearly within the legislature's power and authority to enact a statute of repose.

We also feel that it is very difficult to predict the action of the Alaska Supreme Court on any particular piece of legislation. The court has historically reversed approximately half of the rulings that are appealed to it. The possibility that it might find this statute unconstitutional in our view is not something that should deter the legislature from acting in this area if it feels that a statute of repose as a matter of policy is a positive thing for the people in Alaska.

There are several other comments we have regarding the analysis of the attorney general regarding the statute of repose. First, the attorney general indicates that insurance premiums tend to be governed by factors such as the insurance companies' return on their investments and other money management practices. I suspect the Division of Insurance would take great issue with this statement, as it is not an approved underwriting practice to set rates based on investment return, rather rates are set by loss experience. For State Farm, our rates in Alaska are determined by our loss experience in Alaska. I suspect this is true also of the medical malpractice carriers who do business in this state.

The second statement we take issue with is the statement that states that have adopted statutes of repose or other tort reform measures have not seen corresponding drops in malpractice insurance rates. This ignores the testimony that was presented by the general counsel of Norcal. As I recall that testimony, their general counsel said that since the enactment of tort reform in the medical malpractice area in 1975, medical malpractice premiums in the state of California have increased by 85 percent, whereas nationwide they have increased by 400 percent and in the state of Alaska by 1,600 percent. This also ignores testimony presented by the director of Risk Management, who testified he thought this legislation would have a positive impact.

The third concern we have about the attorney general's March 8, 1994 letter, is the statement that "automobile insurance rates have increased at approximately the same rate as malpractice insurance rates during the last 15 or 20 years." I can tell you that automobile insurance premiums in Alaska have not increased by 1600 percent since 1975, as have medical malpractice premiums. I have been following the cost of automobile insurance

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closely in Alaska since 1983 and the rates have been remarkably stable. Those increases which have occurred have been primarily linked to increases in medical costs and the increased cost of buying and repairing automobiles, which have lead to increases in claims severity, coupled with an increased in the frequency of claims. Even so, these increases are far less than the 1,600 percent increase in medical malpractice premiums.

The fourth concern we have about the attorney general's letter is that it implies that Alaska insurance premiums are set on a national basis. Again, as set forth above, this is not so, certainly for homeowner's insurance and automobile insurance. We also suspect it is not so for malpractice insurance.

In considering the constitutionality arguments raised by the attorney general in his letter of March 8, 1994, you should also consider that this provision, as well as the statute of limitations provisions, are but one part of a comprehensive bill, the overall purposes of which are clearly defined in the bill. These purposes have been recognized as being legitimate in Beck v. Department of Transportation and Public Facilities, 837 P.2d, 105, 117 (Alaska 1992). It is very difficult to separate one part of this legislation and focus on the role that part alone will play in accomplishing the goals which the legislation seeks to further.

The final concern we have is that the attorney general has ignored the measures this bill contains to study the effectiveness of the legislation and thus, if the legislation does not have its intended effect, appropriate changes can be made. This would in effect provide the overall documentation to support the changes it proposes, the lack of which is the primary basis for the criticisms of the attorney general.

Sections 7, 8, and 9. It does not appear the attorney general sees legal difficulties with section 7, 8, 9 or 10 although the attorney general notes the Alaska Supreme Court's refusal to apply a ratio test in reviewing punitive damage award raises some doubts as to how this cap would fair in a court challenge. Again, we believe this is an area where the legislature clearly has the authority to act. To our knowledge, a punitive damage cap does not pose any kind of constitutional challenge, and we know of no other basis for the court to over turn it.

Section 11: Damage Awards for Loss Earnings to be Reduce for Taxes. This section of the proposed legislation is one we are strongly in favor of. Certainly the attorney general is correct that the Alaska Supreme Court has refused to reduce awards for damages for impairment of future wage earning capacity

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by the amount that would have been paid for income taxes on the basis that a court cannot predict with sufficient certainty what amounts a plaintiff would be obliged to pay. Frankly, there are many areas that are much more difficult to predict than issues of future income tax consequences, such as future impairment, future pain and suffering, future wage loss itself, and future medical expenses. Indeed, the federal courts, including the United States Supreme Court, have long ruled that future damage awards must be reduced by the amount one would pay for income taxes Norfolk and Western Railroad Company v. Liepelt, 44 U.S. 490 rehearing denied 445 U.S. 972 (1980). Federal income taxes have been with us for many many years, and we have seen no predictions from anyone that federal income taxes will cease. Unless there is some evidence that federal income taxes will cease, there is simply no good, sound logical reason not to remove this windfall from our current system.

Sections 12, 13 and 14. There does not appear to be significant debate about the logic of periodic payments, rather the debate seems to center around the mechanism for implementing a periodic payment provision. We do not believe this will be as difficult or time consuming as the attorney general seems to feel it is. As practical matter, this issue will be decided by agreement of the parties or expert testimony and presents issues no more difficult or time consuming than courts deal with every day.

Section 15: Collateral Benefits. We believe a better collateral benefits provision is that reflected in the present law regarding medical malpractice claims as contained in AS 9.55.548. We suspect that if the only time this section will be applicable is when there is by contract no right of subrogation, it will seldom, if ever be applicable. AS 9.55.548 (or a predecessor version) has been in effect for a number of years and we think it is a very effective provision.

Sections 16, 17 and 18: Apportionment of Fault. These provisions simply implement the intent of the voters with respect to the several liability initiative and the attorney general evidently has no problem with these provisions, except for Section 18 regarding the effect of a release. To respond to the concerns raised by the attorney general, we would suggest you substitute the words "amount of the jury's verdict" for the words "claim against the others" in subsection 1.

Section 26: Rule 82 Fee Awards. We continue to support the abolition of Rule 82, as prevailing party attorney fees are paid as a matter course in virtually every claim now. Under the concept envisioned by section 19 and section 26, this would no longer be the case, but rather attorney fees would be awarded

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HUGHES THORSNESS GANTZ POWELL & BRUNDIN
ATTORNEYS AT LAW

only when one party or the other beats their own offer of judgment. We frankly feel this is a much more equitable way of awarding attorney fees, and we also feel it creates far greater incentive for parties to voluntarily come to the bargaining table.

Thank you again for opportunity to comment on this legislation.

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier
Michael L. Lessmeier

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Anchorage newspaper
editorial on
Brian's TORT Bill

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

The Anchorage Times Commentary in this segment of the Anchorage Daily News does not represent the views of the Daily News. It is written and published under an agreement with former owners of The Times, in the interests of preserving a diversity of viewpoints in the community.

Porter's progress

A JOURNEY of a thousand miles, according to Lao-tzu, must begin with a single step. The ancient Chinese philosopher neglected to mention, though, the length of time that might be involved.

For Rep. Brian Porter, his journey of a thousand miles has taken four years — so far, at any rate. He won't know for a few more days or weeks whether he's reached his destination — it all depends on Gov. Tony Knowles.

Porter's long-sought objective is to revise Alaska's liability laws to place reasonable limits on the size of damage awards handed out by judges and juries, and to discourage frivolous lawsuits that tie up the state court system and waste a lot of time and money.

Legislation sponsored by the Anchorage Republican to accomplish this is headed to the governor's desk. If the governor approves, Porter will have achieved what some have called a mission impossible. Over the years, others have tried and failed to get tort reform through the Legislature.

The GOP lawmaker from House District 20 picked up the tort reform torch as soon as he arrived in Juneau four years ago. It was an issue, he said, in which he believed strongly. Many small businesses and individual Alaskans were being hurt by excessive legal costs resulting from existing state liability laws. Porter intended to change that.

He began with the support of a long list of individuals, businesses, associations and civic organizations. Statewide opinion surveys showed four out five Alaskans endorsed the concept. Still, all that support was no match for the well organized opponents — trial lawyers who pack a lot of clout in Juneau.

The first year, Porter's tort reform bill got no further than a House committee. The second year, it made it to the Senate — only to die there. The third year, the first session of the 19th Legislature, his bill again cleared the House — but once again bogged down in a Senate committee. With help from Senate President Drue Pearce and the Republican majority, Porter's bill eventually moved through the Senate committee process, cleared the Senate floor and returned to the House for one final vote of approval.

If it's signed into law, the bill will make a number of significant changes to Alaska law — all geared toward creating a more equitable distribution of the cost and risk of injury, and reducing the costs associated with the liability system. At the same time, it will ensure that people injured through the fault of others receive adequate and appropriate compensation.

On the day his bill cleared its final legislative hurdle, Porter sounded as euphoric and relieved as someone who just completed a walk of a thousand miles.

We trust the governor will allow him the final step.

The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

The Anchorage Times Commentary in this segment of the Anchorage Daily News does not represent the views of the Daily News. It is written and published under an agreement with former owners of The Times, in the interests of preserving a diversity of viewpoints in the community.

The big lie

THE TRIAL LAWYERS are in a panic. After years of being able to dip into the cookie jar and extract goodies worth millions of dollars, they tremble at the prospect of losing bonanza payoffs from outrageous punitive damage suits.

Their ride on the gravy train will end if Gov. Tony Knowles displays the courage to face them down in what is becoming a major shootout over House Bill 158. That measure, passed by the 1996 Legislature during the course of its regular session, is known as the tort reform bill.

The reform that it promises, if Gov. Knowles does not veto the bill, will hit the pocketbooks of trial lawyers — the attorneys who have raised to a fine art the practice of suing anybody and everybody, claiming that individuals and businesses, large and small, need to suffer stupendous punishment in liability suits, over and beyond any actual damages that may have occurred.

The fishermen awaiting huge damage awards from the Exxon Valdez oil spill have become the latest tools in the trial lawyers' bag of tricks. But they need not worry. This measure will not affect the Exxon Valdez case, which is in federal — not state — court.

In an advertisement in the newspaper yesterday, an "open letter" to the governor made the outrageous claim on behalf of fishermen that the tort reform bill "increases the chances of future oil spills (the emphasis is in the wordage of the ad) by radically reducing the deterrent effect of Alaska's tort laws."

The ad tells the governor: "If you sign it, this legislation will send a clear message to polluters that Alaska is a safe place for them to operate and that reckless or malicious conduct will go unpunished."

Hogwash.

The implication is that the oil industry — relieved of excessive punitive damages — will see approval of this bill as an open invitation to run rampant over Alaska's environmental laws.

It's the big lie technique at work. The claim is absurd. Enactment of this bill in *no way* (the emphasis is ours) will send any kind of a message that Alaska is a safe place for polluters. To suggest that reckless and malicious conduct will go unpunished is ridiculous to the extreme.

But emotions are the goal here — an attempt to frighten good people and stampede them into telling the governor he should not take action that will shut down the punitive damage claim mill that has made a relative small number of lawyers very, very rich.

This "open letter" ad was signed by organizations representing commercial fishermen operating in Cordova, Bristol Bay, Kodiak, Cook Inlet, Kenai, Prince William Sound and other coastal regions of Alaska. But did these fishermen really write this so-called letter?

Yeah, sure. How about a trial lawyer, instead?

ice of The Times



Urge Gov. Knowles to sign tort reform legislation

THE ALASKA Legislature has passed a measure, House Bill 158, that takes a giant step toward making our civil court system more fair.

This important legislation, now awaiting Gov. Tony Knowles' signature, puts a cap on what have become increasingly outrageous punitive damage awards handed out in lawsuits — awards that can destroy companies large or small. The threat of seeking such awards is used as a threat to force unfair, undeserved settlements.

The bill also aims to put an end to the frivolous lawsuits that choke our courts and drive up costs for everyone who pays for health, auto or other insurance.

Trial lawyers, the very people who have turned our civil legal system into a giant slot machine, are trying their best to persuade Gov. Knowles not to sign the legislation. They want things to stay the way they are now. And you cannot blame them. The system is a gold mine for lawyers.

But for the rest of us ordinary people, it's something else. It's evolving into something that daily threatens companies, jobs and our pocketbooks. A single outrageous award can put people out of work and at the same time increase what the rest of us pay for products and insurance. For us, the current system is not a good deal.

We urge that you let Gov. Knowles know that ordinary people want the system reformed; that while it now is

good for lawyers, it's lousy for the rest of us. We don't want any more outrageous jury awards for hot coffee or bad paint jobs.

Tell him that we believe in fairness; that a person should be compensated for a loss, but not be given the keys to the store on a jury's whim.

Gov. Knowles needs to hear from you as quickly as possible on this important issue. He needs to know that ordinary people who depend on companies small and large for jobs want the law changed.

You can telephone his office in Juneau at (907) 465-3500.

You can send him a fax at (907) 465-3532.

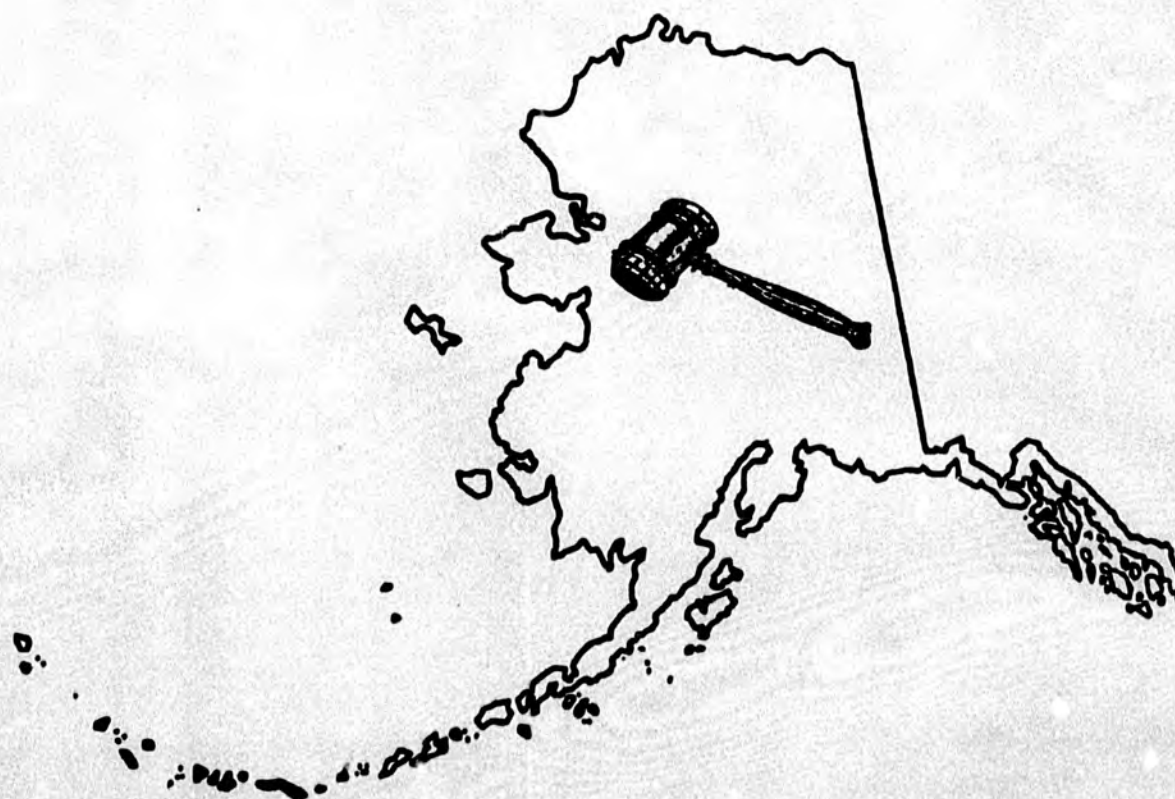
Or you can send a letter to P.O. Box 110001, Juneau AK 99811-0001.

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REPORT
OF THE
GOVERNOR'S
ADVISORY TASK FORCE
ON CIVIL JUSTICE REFORM



December 1996

REPORT
OF THE
GOVERNOR'S
ADVISORY TASK FORCE
ON CIVIL JUSTICE REFORM

December 1996

Office of The Governor
Box 110001
Juneau, Alaska 99811-0001

Governor's Advisory Task Force on Civil Justice Reform

TASK FORCE MEMBERS

Chair Judge Thomas B. Stewart, Retired Superior Court Judge
Vice Chair Marlene A. Johnson, Huna Totem Heritage Foundation

- Bill J. Allen, VECO
- Judith M. Brady, Alaska Oil and Gas Association
- David H. Bundy, Bundy & Christianson
- Michael J. Burns, Key Bank
- Charlie Cole, former Attorney General
- Jeffrey M. Feldman, Young & Feldman
- Roger F. Holmes, Biss & Holmes
- Julie Kitka, Alaska Federation of Natives
- Julian L. Mason, Ashburn & Mason
- Don Slone, P.E., Livingston Slone, Inc
- Stephan H. Williams - Law Office of Stephan H. Williams
- Mark R. Williams, Carr Gottstein Foods Co.
- Rodman Wilson, M.D. - Procedures Committee

EX OFFICIO

- Bruce M. Botelho, Attorney General
- Jeffrey W. Bush, Department of Commerce & Economic
 Development
- Senator Johnny Ellis
- Representative Brian Porter
- Brad Thompson, Division of Risk Management

Procedures Committee: Roger F. Holmes, Chair; Jeffrey W. Bush, Julie Kitka,
Don Slone, Stephan H. Williams, Rodman Wilson

Liability Committee: Julian L. Mason, Chair; Bill J. Allen, Judith M. Brady,
Charlie Cole, Representative Brian Porter,
Brad Thompson

Damages Committee: Michael J. Burns, Chair; David H. Bundy,
Senator Johnny Ellis, Jeffrey W. Feldman,
Mark R. Williams

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- an alternative dispute resolution project, to resolve cases without the expense of trial
- streamlined district court procedures, to increase access by hearing smaller cases faster and less expensively
- changes in superior court procedures, to encourage active judicial management of cases and thus decrease overall litigation expense
- a floating rate of interest on judgments that more accurately reflects current conditions, to promote prompt settlement of cases and payment of damages
- changes in court procedures for offers of judgment, to encourage early settlement offers by both plaintiffs and defendants
- shorter statutes of limitation in contract cases, to decrease risk and increase predictability in the modern business environment
- improvements in the expert advisory panel for medical malpractice cases, so doctors can provide quicker and more useful advice to the courts
- collection of information on cases that are settled, to obtain a full picture of the impact of civil liability laws
- collection of information on insurance premiums, claims paid, and investments, to allow a more accurate assessment of insurance rates and the effects of civil justice reforms on those rates

The task force also reviewed and rejected a number of ideas from previous tort reform efforts. It found that some of these ideas did not address real problems in Alaska's civil justice system, while others were unfair or created more problems than they solved. The task force considered but did not recommend:

- a shorter statute of repose for the negligence of architects and construction contractors, limiting the right of Alaskans to sue for injuries when a building more than 10 years but less than 15 years old collapses
- a statute of repose for other kinds of negligence, limiting the right to sue for injuries that are not immediately apparent, particularly for injured children
- allowing fault to be allocated to people who are not joined in the lawsuit, increasing the number of persons added to cases and reducing the likelihood of full compensation for innocent victims
- allowing hospitals to avoid responsibility for the negligence of doctors working in the hospital emergency room
- creating new, complex grounds for claiming that a lawsuit is frivolous, which would complicate and increase the costs of litigation and might also discourage valid claims

- allowing defendants found liable for damages to delay payment of the full judgment once a plaintiff is awarded the money, unless the plaintiff agrees to accept periodic installment payments
- changing the way benefits or payments from other sources, such as the individual's health care benefits, are considered at trial
- restrictions on contingency fees that might limit access to the courts for injured people with difficult or risky cases
- further restrictions on the qualifications of expert witnesses, resulting in parties having to retain more expensive and possibly non-Alaskan experts

The task force labored to create workable solutions to problems with the civil liability system, while sorting out recurring ideas that will not improve the process. It worked by consensus whenever possible, requiring a two-thirds majority to adopt any proposal, to make sure that its recommendations were responsive to the broad range of mainstream concerns. It presents its work as a balanced set of proposals designed to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, promote the predictability of outcomes, improve information available to decision-makers, and increase access to justice for all Alaskans.

Chapter 1

Task Force Process

The Governor's Advisory Task Force on Civil Justice Reform was created to provide Governor Knowles with proposals for a fair and legally sound tort reform bill to submit to the Alaska legislature. During the 1995-96 legislature, tort reform issues received a great deal of attention. The legislature passed a bill (referred to in this report as HB 158)¹ that included provisions on civil liability for commercial recreational activities, a ten-year statute of repose, a cap on punitive damages, a lower cap on noneconomic damages, allocation of fault to nonparties, mandatory arbitration of personal injury actions, a new cause of action for false claims and improper legal practice, limits on damages resulting from commission of a felony, and changes affecting offers of judgment, expert witness qualifications, hospital liability, and periodic payments. The legislature passed the final version of HB 158 by narrow margins in the final days of the session.

Governor Knowles vetoed the legislation, finding that it was the product of a flawed public process, dictated poor public policy, and contained serious legal defects and constitutional problems. He found that its provisions would complicate instead of streamline the civil justice system and would limit the rights of innocent Alaskans to reasonable and just compensation for injuries caused by others. He considered that the statute of repose and retroactive limitations on punitive damage awards would probably be unconstitutional.

To produce meaningful tort reform, the Governor appointed the task force to develop a new bill through an open public process that would meet the goals of fairness, efficiency, and reduction of insurance rates. The Governor appointed 16 public members and 5 ex officio members to represent the interests of large and small businesses, doctors and architects, plaintiff and defense lawyers, Alaska Natives, the Alaska legislature, and state departments responsible for law,

¹ The version adopted by the legislature was SCS CSHB 158(RLS) amS (ct rls fld S).