

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986

3423 HJUD SB 377/HB 532 (FILE 3: BILLS, FISCAL NOTES & AMENDMENTS)

1 to sue, or similar agreement.

2 Sec. 09.17.900. DEFINITION. In this chapter "fault" includes
3 acts or omissions that are in any measure negligent or reckless toward
4 the person or property of the actor or others, or that subject a
5 person to strict tort liability; the term also includes breach of
6 warranty, unreasonable assumption of risk not constituting an enforce-
7 able express consent, misuse of a product for which the defendant
8 otherwise would be liable, and unreasonable failure to avoid an injury
9 or to mitigate damages; legal requirements of causal relation apply
10 both to fault as the basis for liability and to contributory fault.

11 * Sec. 2. AS 09.10 is amended by adding a new section to read:

12 Sec. 09.10.075. ACTIONS THAT MUST BE ARBITRATED. A person may
13 not bring an action for damages based on injury to person or property
14 when the amount in controversy is less than \$75,000, exclusive of
15 costs, interest and attorney fees, unless the controversy is first
16 arbitrated under AS 09.43.

17 * Sec. 3. AS 09.30.065 is amended to read:

18 Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10
19 days before the trial begins [ON OR BEFORE THE 60TH DAY FOLLOWING THE
20 FILING OF AN ANSWER IN A CIVIL ACTION, AND ON THE FIFTH DAY FOLLOWING
21 THE DAY DISCOVERY CLOSES AS ORDERED BY THE COURT], either the party
22 making a claim or the party defending against a claim may serve upon
23 the adverse party an offer to allow judgment to be entered in complete
24 satisfaction of the claim for the money or property or to the effect
25 specified in the offer, with cost then accrued. If within 10 days
26 after the service of the offer the adverse party serves written notice
27 that the offer is accepted, either party may then file the offer and
28 notice of acceptance together with proof of service, and the clerk
29 shall enter judgment. An offer not accepted within 10 days is

1 considered withdrawn and evidence of that offer is not admissible
2 except proceeding to determine the form of judgment after ver-
3 dict. If the judgment finally entered on the claim as to which an
4 offer has been made under this section is not more favorable to the
5 offeree than the offer, the interest awarded under AS 45.45.010(a) and
6 accrued up to the date judgment is entered shall be adjusted as fol-
7 lows:

8 (1) if the offeree is the party making the claim, the
9 interest rate shall be reduced by five [TWO] percent a year;

10 (2) if the offeree is the party defending against the
11 claim, the interest rate shall be increased by five [TWO] percent a
12 year.

13 * Sec. 4. AS 09.30.070 is amended by adding a new subsection to read:

14 (b) Except when the court finds that the parties have agreed
15 otherwise, prejudgment interest accrues from the day the cause of
16 action accrues.

17 * Sec. 5. AS 09.43.110 is amended to read:

18 Sec. 09.43.110. CONFIRMATION OF AN AWARD. Upon application of
19 a party, the court shall confirm an award unless

20 (1) within the time limits imposed by AS 09.43.120 and
21 09.43.130 grounds are urged for vacating or modifying or correcting
22 the award, in which case the court shall proceed as provided in
23 AS 09.43.120 and 09.43.130; or

24 (2) an appeal is taken under AS 09.43.160(c).

25 * Sec. 6. AS 09.43.160 is amended by adding a new subsection to read:

26 (c) An award made as a result of arbitration required by AS 09.-
27 03.075 may be appealed to the proper court. The appeal shall be filed
28 within 60 days after notice of an award is made under AS 09.43.080.

29 The court shall grant a trial de novo if an appeal is filed under this

1 subsection.

2 * Sec. 7. AS 09.55.548 is repealed and reenacted to read:

3 Sec. 09.55.548. AWARDS. Damages shall be awarded in accordance
4 with principles of the common law. The fact finder in a malpractice
5 action shall render any award for damages in accordance with AS 09.17.

6 * Sec. 8. AS 09.60 is amended by adding a new section to read:

7 Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION
8 APPEAL. If a party appeals an award made as a result of arbitration
9 required by AS 09.10.075, and the appellate court increases or de-
10 creases the award by more than 10 percent, the prevailing party on
11 appeal shall also be awarded actual costs and attorney fees incurred
12 as a result of the appeal.

13 * Sec. 9. AS 22.10.020(d) is amended to read:

14 (d) The superior court has jurisdiction in all matters appealed
15 to it (1) from a subordinate court; (2) by a party to an arbitration
16 award under AS 09.43.160(c); [,] or (3) an administrative agency when
17 appeal is provided by law. The hearings on appeal from a final order
18 or judgment of a subordinate court or administrative agency shall be
19 on the record unless the superior court, in its discretion, grants a
20 trial de novo, in whole or in part.

21 * Sec. 10. AS 22.15.030(a) is amended to read:

22 (a) The district court has jurisdiction of civil cases and
23 proceedings as follows:

24 (1) for the recovery of money or damages when the amount
25 claimed exclusive of costs, interest and attorney fees does not exceed
26 \$25,000;

27 (2) for the recovery of specific personal property, when
28 the value of the property claimed and the damages for the detention do
29 not exceed \$25,000.

Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY. (a) The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action.

(b) The court may, upon petition by a party to a civil action, determine the reasonableness of that party's attorney fee agreement. The court shall take into consideration

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the attorney or attorneys performing the services;

(8) whether the fee is fixed or contingent;

(9) whether the fixed or contingent fee agreement was in writing and whether the client was aware of the right to petition the court under this section.

* Sec. 9. AS 09.60 is amended by adding a new section to read:

Sec. 09.60.035. COSTS AND ATTORNEY FEES ALLOWED FOR ARBITRATION APPEAL. If a party appeals an award made as a result of arbitration required by AS 09.10.075, and the appellate court increases or decreases the award by more than 10 percent, the prevailing party on appeal shall also be awarded actual costs and attorney fees incurred as a result of the appeal.

* Sec. 10. AS 22.10.020(d) is amended to read:

(d) The superior court has jurisdiction in all matters appealed to it (1) from a subordinate court; (2) by a party to an arbitration award under AS 09.43.160(c); [,] or (3) an administrative agency when appeal is provided by law. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part.

* Sec. 11. AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases and proceedings as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest and attorney fees does not exceed \$25,000;

(2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed \$25,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding \$25,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death of any person in the

manner prescribed in AS 09.55.020 - 09.55.060;

(6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 - 09.45.160 when the value of the property or of the arrears and damage to the property does not exceed \$25,000;

(7) for the foreclosure of a lien when the amount in controversy does not exceed \$25,000;

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest and attorney fees does not exceed \$25,000;

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020;

(11) over an appeal by a party to an arbitration award under AS 09.43.160(c) when the amount claimed exclusive of costs, interest, and attorney fees does not exceed \$25,000.

* Sec. 12. AS 09.16 is repealed.

* Sec. 13. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatories listed in AS 09.17.060 regarding the amount of damages and the percentages of fault to be allocated among the parties and to itemize the verdict regarding economic and noneconomic loss as specified in AS 09.17.030.

* Sec. 14. AS 09.17.060 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 52 by requiring the court to make specific findings regarding the amount of damages and the percentages of fault to be allocated among the parties.

* Sec. 15. AS 09.17.030 and 09.17.060 enacted in sec. 1 of this Act have the effect of amending Alaska Rule of Civil Procedure 58 by requiring the court to include a specific item in its judgment.

* Sec. 16. AS 09.17.040 enacted in sec. 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 11 by requiring verification of claims answers, counterclaims, and cross-claims.

* Sec. 17. AS 09.30.065 as amended by sec. 3 of this Act has the effect of amending Alaska Rule of Civil Procedure 68 by providing that prejudgment interest accrues from the day the cause of action accrues.

* Sec. 18. AS 09.60.010 as amended by sec. 8 of this Act has the effect of amending Alaska Rule of Civil Procedure 82 by prohibiting the award of attorney fees, unless allowed by statute or by agreement of the parties.

* Sec. 19. APPLICABILITY. Sections 1 - 12 of this Act apply to all causes of action accruing on or after the effective date of this Act.

* Sec. 20. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Table 2

MANDATORY COURT-ANNEXED ARBITRATION PROGRAMS

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
<u>State Courts</u>				
Alaska	Arbitration of Small Claims	State Law--A.S. §09 43.190	1972	Never implemented; jurisdiction limit too low to allow program (1984)
Arizona	Arbitration of Claims	State Law--A.R.S. §12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law--C.C.P. §1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law--Conn. Statutes §52-549H	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(C)	1984	Program began statewide in mid-1984
Michigan	Mediation	Supreme Court Rule (except Wayne County Court); General Court Rule 316	1980	Program under revision; 29 counties expected to implement new program in March 1985
Minnesota	Judicial Arbitration	State Law--Minn. Statutes §480.73	1984	Program to commence in February 1985 in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law--N.R.S. §38.215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damages cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law--Laws of N.J. Ch. 358	1983	Being implemented statewide
New Mexico		Supreme Court Rule	1984	Program to commence in 2 counties in July '85 (Albuquerque and Santa Fe)
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City

Table 2 (cont.)

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
Ohio	Varies by county	Local Judicial Rules-- Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law--Ch. 670 Oregon Laws	1983	Operational in 5 counties and expanding statewide by 12/31/84
Pennsylvania	Compulsory Arbitration	State Law--Pa. Gen. Stat. Ann. Title 42 §7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law--R.C.W. Ch. 7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
<u>Federal District Courts</u>				
California-- Northern Dist.	Court-annexed Arbitration	Local Rule--Rule 500	1978	Ongoing program
Connecticut	Court-annexed Arbitration	Local Rule	1978	Disbanded after experimental period concluded
Florida-- Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence January 1985
Michigan-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Missouri-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
New Jersey	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
North Carolina-- Middle Dist.	Court-annexed Arbitration	Local Rule--Part VI Rules of Practice and Procedure	1984	Program to commence January 1985
Oklahoma-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Pennsylvania-- Eastern Dist.	Court-annexed Arbitration	Local Rule--Civil Procedure B	1978	Ongoing program
Texas-- Southern Dist. Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985

Article 2. Arbitration of Small Claims.

Section	Section
190. Arbitration under court rules	210. Practice and procedure
200. Appointment and compensation of arbitrator	220. Judgments and appeal

Cross references. — For small claims actions in district courts, see AS 22.13.040; for district court rules providing for practice and procedure in small claims actions, see DCR 6-22.

Editor's notes. — To date, the supreme court has not adopted rules under this article.

Sec. 09.43.190. Arbitration under court rules. The supreme court may provide by rule for compulsory arbitration of a cause of action filed in a superior or district court, demanding only a money judgment, when it appears that the demand on the cause of action is for \$3,000 or less, exclusive of costs, or when it appears to the trial court as a result of a pretrial conference that the amount which will be recovered on the cause is not likely to exceed \$3,000. (§ 2 ch 94 SLA 1972)

Sec. 09.43.200. Appointment and compensation of arbitrator. Arbitration of actions shall be by either a member of the Alaska Bar Association or a magistrate appointed and compensated by the court as provided by its rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.210. Practice and procedure. The practice and procedure for conducting arbitration, the powers of the arbitrators and the assessment of costs shall be prescribed by the court rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.220. Judgments and appeals. Unless an appeal is taken from the award to the court which ordered arbitration as provided by the court rules, the court shall enter and enforce judgment in accordance with the award of the arbitrator. Any party aggrieved by the award may appeal. All appeals shall be determined in the manner permitted by the rules. (§ 2 ch 94 SLA 1972)

Chapter 45. Actions Relating to Real Property.

Article

1. Adverse Claims and Boundary Disputes (§§ 09.45.010 — 09.45.050)
2. Forcible Entry and Detainer (§§ 09.45.060 — 09.45.160)
3. Foreclosure of Liens (§§ 09.45.170 — 09.45.220)
4. Nuisances (§§ 09.45.230 — 09.45.250)
5. Partition (§§ 09.45.260 — 09.45.620)
6. Recovery of Possession (§§ 09.45.630 — 09.45.720)
7. Trespass (§ 09.45.730)



Alaska State Legislature House of Representatives

REPRESENTATIVE STEVE RIEGER
DISTRICT 3, SEAT B

MEMBER
FINANCE COMMITTEE

MEMORANDUM

TO: Representative Mike Navarre

FROM: Representative Steve Rieger

DATE: March 19, 1986

RE: Non-subrogated collateral sources

I understand that in your discussion of CSSSHB 532 (Labor and Commerce) this morning, Susan Burke asked whether there are any collateral sources which do not have subrogation rights. She suggested that if there are no collateral benefits which do not have subrogation rights, then there is no double recovery problem, and therefore no need for the collateral benefits section of the bill.

I was advised that you decided to withdraw the collateral benefits section of the bill pending a response to the question that was raised. I understand your concern on this issue, so I asked my staff to look into the matter. We discovered that there are a number of non-subrogated collateral sources aside from gratuitous benefits provided by family and friends.

According to Mike Lesmegan of Hughes, Thorsness, the largest insurance defense law firm in the State, State Farm Insurance Company's health insurance policies do not contain a subrogation clause. Similarly, the medical payment portion of Allstate's policies do not provide for a right of subrogation. Mr. Lesmegan also suggested that certain group health insurance policies purchased by employers for the benefit of their employees do not permit subrogation.

A broker with Shattuck & Grummett, one of the oldest insurance firms in Juneau, advised us that he is aware of individual accident and disability policies where there is no right of recovery against the insured by the insurer. He also mentioned a form of non-excess coverage where there is no right of subrogation.

Page Two

We double-checked the above information with Don Koch of the Division of Insurance and again were informed that there are indeed various kinds of insurance policies which do not have rights of subrogation, particularly in the disability area.

Finally, we checked some articles that have been written on the subject. According to a Washburn Law Review article sick leave and disability leave are two more examples of collateral sources which do not have subrogation rights attached to them.

In view of the above information, I hope you will reconsider your tentative decision to delete the collateral benefits section of the bill. If I can provide any additional information on this issue, I'd be happy to do whatever I can.

Pass on
w/ b. 11

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March 21, 1986

Hon. Mike Navarre
State Representative
State Capitol Building
Juneau, Alaska
99801

TO: HLC numbers
RE: caps on non
econ. awards

Re: SSHB 532

Dear Rep. Navarre:

Since I don't seem to be able to connect with the committee to testify, I thought I should submit some comments on what is apparently an overlooked matter. Please feel free to distribute this letter if you desire.

The section on **Noneconomic Damages** has been discussed in terms of pain and suffering and the like. Whatever the policy on a cap should be, I'm not aware that the sponsors intend to cap economic loss that is nonpecuniary.

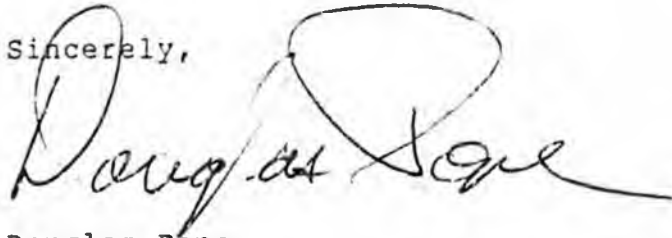
In Alaska, at least two types of economic loss are nonpecuniary, the household services a wife or husband provides to the family or to the spouse, and the subsistence support that is supplied to families in rural areas. Our courts have concluded that an economic value can be attributed to this type of support, even if it is not pecuniary in nature. For example, a typical situation involves a housewife who provides all of the household services to her husband and family, and then is seriously injured or killed by the negligence of a third party. The other typical example is a father in a rural village who supports his family by hunting, fishing and other subsistence activities, and then is seriously injured or killed. In both instances the family and spouse experience just as real a loss of support as if a wage earner were injured or killed. If the market value of those services is equivalent to \$20,000.00 per year, the courts and juries use that figure in quantifying loss. It is incumbent on the plaintiff to demonstrate the market value. This is typically done through expert testimony.

The effect of the current approach is to bring parity to the economic value of various forms of support, pecuniary or

nonpecuniary. The sponsor substitute, by defining non-economic loss as "nonpecuniary," is effectively capping the economic loss of household services, subsistence support, and the like.

If the committee wishes to correct this, I suggest that the language and other nonpecuniary damage be deleted from the bill, and be replaced with AND OTHER DAMAGES WHICH DO NOT HAVE AN ECONOMIC VALUE. If you have any questions, please don't hesitate to call me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Douglas Pope". The signature is written in dark ink and is positioned below the word "Sincerely,".

Douglas Pope

cc. Rep. Sam Cotten

Rule 11. Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

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performed under pertinent terms of contract each pertinent item pleaded as separate exhibit, (b) that defendant had received payment for specific portion of the work performed, (c) that plaintiff's claim for payment of the balance had been rejected. *Stock & Grove, Inc. v. City of Juneau*, Op. No. 292, 403 P2d 171 (Alaska 1965).

Civil Rule 11

Collateral References

Same as Fed. R. Civ. P. 11

2A Moore, Federal Practice 11.01 - 11.05 (2d ed. 1979)

5 Wright and Miller, Federal Practice and Procedure §§ 1331 - 1335 (1969)

Cases

Sanctions for failure to sign a pleading are a matter in the discretion of the trial court. *Sanuita v. Common Laborer's and Hod Carriers Union*, Op. No. 290, 402 P2d 199 (Alaska 1965).

Where appellants did not draw the trial court's attention to the failure of counsel to sign the complaint and made no motion to strike under this rule, and it was not contended that counsel's failure to sign was anything other than an oversight, the trial court had no opportunity to pass on the matter and failure to comply with this rule was not considered the first time on appeal. *Sanuita v. Common Laborer's and Hod Carriers Union*, Op. No. 290, 402 P2d 199 (Alaska 1965).

The purpose of this rule requiring signature of counsel as plainly set out in its present wording has been to insure the good faith of counsel by holding them strictly accountable for all the allegations contained in the complaint. *Sanuita v. Common Laborer's*

and Hod Carriers Union, Op. No. 290, 402 P2d 199 (Alaska 1965).

Civil Rule 12

Collateral References

Generally

2A Moore, Federal Practice 12.01 - 12.04 (2d ed. 1979)

5 Wright and Miller, Federal Practice and Procedure §§ 1344 (1969)

Rule 49. Special Verdicts and Interrogatories.

(a) **Returning a Verdict—Polling a Jury—Filing and Entering Verdict.** When the jury, or such a majority of it as may be required by the law or stipulation of the parties, have agreed upon a verdict, they shall be conducted into court, their names called, and the verdict shall be given by the foreman. The verdict shall be in writing and signed by the foreman. Upon stipulation of counsel, the court may permit the foreman of the jury to date, sign and seal in an envelope a verdict reached after the usual business hours. The jury may then separate, but all must be in the jury box to deliver the verdict when the court next convenes or as instructed by the court. Any party may require the jury to be polled as to any verdict, which is done by asking each juror if it is his verdict. If upon such polling it appears that a verdict has not been agreed upon, the jury shall be sent out for further deliberation. After a verdict has been agreed upon, the jury shall be discharged from the case. The verdict shall be filed and an entry thereof made in the minutes of the court. The word "verdict" shall include, where applicable, answers to questions or interrogatories.

(b) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so,

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aintiff did not waive her peremp-
tory challenge to a second alternate juror
by not challenging the first alternate
interviewed. *Grimes v. Haslett*, Op. No.
2476, 641 P2d 813 (Alaska 1982).

A stockholder's interest in an
ANCSA - created village corporation can
be the basis of a challenge for cause un-
der this rule when the corporation is
involved in the litigation. *Noey v.
Ukpeagvik Inupiat Corp.*, Op. No. 2836,
683 P2d 260 (Alaska 1984).

Civil Rule 48

Collateral References

- (b) 88 C.J.S. Trial §§ 323-378 (1955); 89 C.J.S. Trial § 468 (1955)
- 75 Am. Jur. 2d Trial §§ 600-640, 1040 (1974)
- (c) 88 C.J.S. Trial § 47 (1955)
- 75 Am. Jur. 2d Trial §§ 72-86 (1974)
- (d) 89 C.J.S. Trial §§ 453-454 (1955)
- 75 Am. Jur. 2d Trial §§ 945-948, 961, 974-976 (1974)
- (e) 50 C.J.S. Juries § 123 (1947)
- 47 Am. Jur. 2d Jury §§ 133-135 (1969)
- (f) 89 C.J.S. Trial §§ 451, 457, 462 (1955)
- 75 Am. Jur. 2d Trial §§ 940-944, 999-1002, 1005, 1009 (1974)
- (g) 89 C.J.S. Trial §§ 465, 469 (1955)
- 75 Am. Jur. 2d Trial §§ 1025-1040 (1974)

- (h) 89 C.J.S. Trial § 482 (1955)
- 76 Am. Jur. 2d Trial § 1072 (1975)
- (i) 89 C.J.S. Trial § 482 (1955)

Civil Rule 49

Collateral References

General

- 5A Moore, Federal Practice 49.01, 49.05-49.07 (2d ed. 1980)
- 9 Wright and Miller, Federal Practice and Procedure §§ 2501-2503 (1971)
- (a) 89 C.J.S. Trial §§ 486-490, 520 (1955)
- 76 Am. Jur. 2d Trial §§ 1117, 1119-1132 (1975)
- (b) Same as Fed. R. Civ. P. 49(a)
- 5A Moore, Federal Practice 49.02-49.03 (2d ed. 1980)
- 9 Wright and Miller, Federal Practice and Procedure §§ 2505-2510 (1971)
- (c) Same as Fed. R. Civ. P. 49(b)
- 5A Moore, Federal Practice 49.04 (2d ed. 1980)
- 9 Wright and Miller, Federal Practice and Procedure §§ 2511-2513 (1971)

Cases

It is incumbent on a party requesting a special verdict to see that the court gives the instruction required by Rule 49(b), and failure of a jury to answer special interrogatories is not error where no instruction or explanation was requested and none given. *Gregory v. Padilla*, Op. No. 139, 379 P2d 951 (Alaska 1963).

Uncontradicted testimony of two witnesses sustained jury's finding in answer to written interrogatories that area was overcut and supported verdict and judgment entered below. *United Geophysical Corporation v. Culver*, Op. No. 230, 394 P2d 393 (Alaska 1964).

Number and form of interrogatories rested in the sound discretion of the trial judge which was not abused where issue was fairly presented to the jury by the interrogatories he elected to submit. *Patterson v. Cushman*, Op. No. 233, 394 P2d 657 (Alaska 1964).

Where counsel for the defendant is given an opportunity prior to discharge of the jury to object to plaintiff's verdict and the defense counsel expresses his satisfaction with the verdict, the right to challenge the consistency of answers to jury interrogatories and the verdict is waived. *City of Homer v. Land's End Marine*, Op. No. 583, 459 P2d 475 (Alaska 1969).

An error in submitting compound interrogatories to a jury does not necessarily constitute plain error. *Holiday Inns of America, Inc. v. Peck*, Op. No. 1024, 520 P2d 87 (Alaska 1974).

Although one interrogatory of the special verdict was erroneous, other interrogatories plainly instructed the jury to do that which the erroneous one did not, and so rendered the error harmless. *Loof v. Sanders*, Op. No. 2859, 686 P2d 1205 (Alaska 1984).

Civil Rule 50

Collateral References

Generally

5A Moore, Federal Practice 50.01 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2521-2532 (1971)

Annos CR 56

(a) Same as Fed. R. Civ. P. 50(a)

5A Moore, Federal Practice 50.02-50.06 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2533-2536 (1971)

(b) Same as Fed. R. Civ. P. 50(b)

5A Moore, Federal Practice 50.07-50.12 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2537-2539 (1971)

(c) Same as Fed. R. Civ. P. 50(c)

5A Moore, Federal Practice 50.13-50.14 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2539 (1971)

(d) Same as Fed. R. Civ. P. 50(d)

5A Moore, Federal Practice 50.15 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2540 (1971)

Cases

I. Standard of Review

A. In General

B. Tests

II. Motion for Directed Verdict

III. Motion for Judgment

Notwithstanding the Verdict

IV. Motion for a New Trial

I. Standard of Review

A. In General

Granting motion for judgment notwithstanding the verdict did not mean automatic denial of an alternative motion for a new trial based on grounds which were not appropriate for consideration on motion for judgment n.o.v. *Alaska Brick Co. v. McCoy*, Op.

Alaska R of C Supp. No. 45 11-84

Rule 52. Findings by the Court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) **Amendment.** Upon motion of a party made not later than 10 days after the date shown in the clerk's certificate of distribution on the judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) **Preparation and Submission.** The preparation and submission of findings of fact and conclusions of law shall be governed by Rule 78. (Amended by Supreme Court Order 258 effective November 15, 1976; and by Supreme Court Order 554 effective April 4, 1983)

(a) CROSS REFERENCE: Civ. Form 84

negligence, the court's failure to charge the jury in an appropriate manner was not excused by the technical defects in the request to charge. *Pepsi Cola Bottling Co. v. Superior Burner Service Co., Inc.*, Op. No. 411, 427 P2d 833 (Alaska 1967).

Rejection of proposed instruction was not error where the substance of the requested instruction was adequately covered by the instructions which were given by the court. *City of Fairbanks v. Nesbett*, Op. No. 439, 432 P2d 607 (Alaska 1967).

It was not error for the court to give requested instructions defining the duty of one in a sudden emergency where the circumstances of the sudden emergency were covered by instructions defining negligence generally. *Ferrell v. Baxter*, Op. No. 688, 484 P2d 250 (Alaska 1971).

Splitting jury instructions concerning loss of consortium into one instruction defining consortium damages and another informing the jury how to evaluate such damages is error. *Grasle Electric Co. v. Clark*, Op. No. 1074, 525 P2d 1081 (Alaska 1974).

In "slip and fall" tort case, jury need not be instructed as to how a reasonable person performs the activity of walking. *Hatfield v. Universal Services, Inc.*, Op. No. 2288, 622 P2d 984 (Alaska 1981).

Civil Rule 52

Collateral References

Generally

5A Moore, Federal Practice 52.01 -52.02, 52.13 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2571 - 2573 (1971)

(a) Same as Fed. R. Civ. P. 52(a)

5A Moore, Federal Practice 52.03 -52.10, 52.12 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2574 - 2581 (1971)

(b) Same as Fed. R. Civ. P. 52(b)

5A Moore, Federal Practice 52.11 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure § 2582 (1971)

Cases

- I. In General
- II. Support for Findings
 - A. Replevements
 - B. Contribution
- III. Clearly Erroneous Rule

I. In General

Finding which has the indirect effect of finding that proceedings of a tax sale up to and including the issuance of the tax deed were not erroneous, illegal or void, was set aside where this was not an issue in the case. *Wells v. Noey*, Op. No. 142, 380 P2d 876 (Alask. 1962).

Civil Rule 52(a) was disregarded by trial judge's failure to direct entry of judgment in the civil docket in the manner provided by Civil Rule 74. *Lowe v. Senior*, Op. No. 168, 385 P2d 942 (Alaska 1963).

Objections to the findings of fact, conclusions of law or judgment below are not a prerequisite to challenge the insufficiency of evidence on appeal. *Isaacs v. Hickey*, Op. No. 210, 391 P2d 449 (Alaska 1964).

This rule which requires findings of fact was not applicable to appellate review by the superior court on an administrative agency's decision where the

52(a)
Practice 52.03

Practical Practice
52.11 (1971)

52(b)
Practice 52.11

Practical Practice

Direct effect
of a tax sale
when illegal or
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error, Op. No.
1972.

Reversed by
entry of
set in the
Rule 74,
385 P2d

Findings of fact,
present below
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on appeal,
391 P2d

Findings of
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superior court did not conduct a trial de novo and was not the finder of fact. *Employers' Liability Assurance Corp. v. Bradshaw*, Op. No. 360, 417 P2d 600 (Alaska 1966).

In disposing of motions for summary judgment it is unnecessary for the trial court to make findings of fact. *Palzer v. Serv-U-Meat Company*, Op. No. 367, 419 P2d 201 (Alaska 1966); *Alaska State Housing Authority v. Contento*, Op. No. 435, 432 P2d 117 (Alaska 1967).

Judging the credibility of witnesses and weighing conflicting evidence was the trial court's function. *Associated Engineers & Contractors, Inc. v. H. & W. Const. Co., Inc.*, Op. No. 462, 438 P2d 224 (Alaska 1968).

It is not the intent of Rule 78, requiring counsel for the successful party to prepare findings of fact, to delegate to counsel the trial judge's primary duty of personally finding the facts under this rule. *Fairbanks Builders, Inc. v. Morton DeLima, Inc.*, Op. No. 582, 483 P2d 194 (Alaska 1971).

An appellate court in reviewing a decision, must take the view of the evidence most favorable to the prevailing party in the lower court. *Graham v. Rockman*, Op. No. 854, 504 P2d 1351 (Alaska 1972).

Where there is a variance between the court's oral ruling on a motion for summary judgment and the written findings prepared by the prevailing party, the oral ruling controls. *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, Op. No. 1093, 527 P2d 447 (Alaska 1974).

Credibility choices are for the trier of facts to make and his selection will generally be accepted by a reviewing court. *B.B. & S. Construction Co., Inc. v. Stone*, Op. No. 1143, 535 P2d 271 (Alaska 1975).

Failure to object to finding of fact in action tried by court without jury does not waive any objection to such finding on appeal. *Casperon v. Meech*, Op. No. 1700, 583 P2d 218 (Alaska 1978).

In reviewing superior court's assumed conclusion that petitioner's activity was abnormally dangerous, leading to imposition of absolute liability, the supreme court was free to reach an independent conclusion based on the same nontestimonial record of undisputed facts presented below. *Yukon Equipment v. Fireman's Fund Ins. Co.*, Op. No. 1754, 585 P2d 1206 (Alaska 1978).

In contract action where extrinsic evidence was in dispute, the trial court's factual findings based upon the extrinsic evidence could not be reversed unless clearly erroneous. *Jackson v. Nangle*, Op. No. 2773, 677 P2d 242 (Alaska 1984).

In guardianship proceeding, incorporation of probate master's report in superior court's order appointing guardian was proper. *Matter of O.S.D.*, Op. No. 2744, 672 P2d 1304 (Alaska 1983).

II. Support for Findings

A. Requirements

The trial court cannot make a temporary restraining order into a preliminary injunction unless it sets forth the findings of fact and conclusions of law in support of its action. *Miller v. Atkinson*, Op. No. 49, 365 P2d 550, 552 (Alaska 1961).

It is the duty of a trial court to deal adequately with and state with clarity what it finds as facts and what it holds as conclusions of law. The findings and conclusions should be so clear and explicit as to give the supreme court a clear understanding of the basis for the decision made. *Dikerson v. Geiermann*,

Op. No. 60, 368 P2d 217 (Alaska 1962).

Rule 52(a) is mandatory and must be complied with. *Merrill v. Merrill*, Op. No. 62, 368 P2d 546 (Alaska 1962).

The purposes of Rule 52(a) are threefold: as an aid in the trial judge's process of adjudication; for the purposes of res adjudicata and estoppel by judgment; and as an aid to the appellate court on review. *Merrill v. Merrill*, Op. No. 62, 368 P2d 546 (Alaska 1962).

Under Rule 52(a) it is the duty of the trial court, by sufficiently detailed and explicit findings "to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the grounds on which the trial court reached its decision", *Merrill v. Merrill*, Op. No. 62, 368 P2d 546 (Alaska 1962).

Findings need only be sufficient to indicate the factual basis for the ultimate conclusion. *Spensard Plumbing & Heating v. Wright*, Op. No. 81, 370 P2d 519 (Alaska 1962).

Where the trial court, as trier of the facts, with every opportunity to judge the credibility of all the witnesses, found the existence of an oral contract and the terms of that contract the supreme court is bound by those findings unless they are clearly erroneous. *Nordin v. Zimmer*, Op. No. 96, 373 P2d 738 (Alaska 1962).

Trial court committed no error in failing to make findings of fact and conclusions of law where it granted defendant's motion for summary judgment. *Lowe v. Bogess*, Op. No. 110, 375 P2d 99 (Alaska 1962).

The supreme court's scope of review in judge-tried cases is limited to the determination of whether the court's findings are clearly erroneous. *State v.*

Phillips, Op. No. 619, 470 P2d 266 (Alaska 1970).

The findings of a trial court sitting in admiralty will not be disturbed unless they are clearly erroneous. *State v. Stanley*, Op. No. 865, 506 P2d 1284 (Alaska 1973).

The supreme court in reviewing a criminal conviction in which there is a challenge to the sufficiency of the evidence cannot add to a finding of fact but will take notice of facts appearing in evidence which are undisputed. *Hughes v. State*, Op. No. 926, 513 P2d 1115 (Alaska 1973).

In reviewing findings of fact of a trial judge sitting without a jury the supreme court is bound by the "clearly erroneous" standard. *Larman v. Kodiak Electric Association*, Op. No. 950, 514 P2d 1275 (Alaska 1973).

This rule does not require that findings and conclusions be properly labeled or even that express findings be made on all questions, so long as the record clearly indicates that the court considered the matter and resolved each critical and actual dispute. *Urban Development Co. v. Dekreon*, Op. No. 1083, 526 P2d 325 (Alaska 1974).

It is the trial court's duty under this rule to make findings sufficient to give a clear understanding of the basis of its decision in order to enable an intelligent review on appeal. *State v. P'Anson*, Op. No. 1102, 529 P2d 188 (Alaska 1974).

It is the duty of a trial court by sufficiently detailed and explicit findings to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which the trial court breached its decision. *Wigger v. Olkon*, Op. No. 1125, 533 P2d 6 (Alaska 1975).

In making a written statement of reasons for denying a motion to appeal at public expense, a judge should take care to state with particularity and in detail preliminary and basic facts upon which he relied. Only if the judge makes such findings will the supreme court be able to have a clear understanding of the basis for the judge's decision. *Johnson v. Johnson*, Op. No. 1229, 544 P2d 1028 (Alaska 1976).

As a general rule, findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue. *State v. Kaatz*, Op. No. 1536, 572 P2d 775 (Alaska 1977).

Court's decision to increase child support payments pursuant to a motion to modify original divorce decree was deficient because it contained no findings of fact. *Headlough v. Headlough*, Op. No. 2463, 639 P2d 1010 (Alaska 1982).

Findings are sufficient if they provide the reviewing court with a clear understanding of the basis for the trial court's decision. *Uchitel v. Telephone Co.*, Op. No. 2519, 646 P2d 229 (Alaska 1982).

When the trial court dismisses a complaint on the ground that the plaintiff has shown no right to relief, it must enter findings of fact and conclusions of law. *Winn v. Mannhalter*, Op. No. 2988, 708 P2d 444 (Alaska 1985).

B. Construction

In an action involving an attorney's claim for legal services rendered, the trial court ought to have determined whether an attorney-client relationship was created by contract, express or implied, and should have made findings of fact and conclusions of law to disclose the basis for its decision. *Dickerson v. Geiermann*, Op. No. 60, 368 P2d 217 (Alaska 1962).

If one of the questions presented at trial is controlled by equitable principles which underlie the common law action in assumpsit for money had and received, the superior court ought to have decided whether the evidence disclosed a state of facts which, measured by equitable standards, would have entitled appellant to the recovery which she sought. *Dickerson v. Geiermann*, Op. No. 60, 368 P2d 217 (Alaska 1962).

Evidence held sufficient to support finding of adequate consideration in action to set aside land contract. *Hitz v. Property Investments, Inc.*, Op. No. 65, 368 P2d 929 (Alaska 1962).

Finding of trial court that enforceable oral contract was formed held justified. *Elliot et al. v. Sandal*, Op. No. 74, 369 P2d 890 (Alaska 1962).

Finding of trial court that an agency by estoppel existed was supported by adequate evidence. *Elliot et al. v. Sandal*, Op. No. 74, 369 P2d 890 (Alaska 1962).

Finding that a third person was a party to an agreement entered into between the parties, and therefore not an indispensable party, was amply supported by the evidence. *Nordin v. Zimmer*, Op. No. 96, 373 P2d 738 (Alaska 1962).

Evidence supported finding of gross or wanton negligence where defendant left a truck parked on a bush airfield causing plaintiff's airplane to collide with it. *McLemore v. Harris*, Op. No. 102, 374 P2d 410 (Alaska 1962).

Evidence supported finding that testator was competent to execute will. *Kraft v. Kraft*, Op. No. 103, 374 P2d 413 (Alaska 1962).

Evidence supported finding that changes made by a lessee in leased premises were alterations instead of redecorations. *Anderson v. Jacobs*, Op. No. 105, 374 P2d 489 (Alaska 1962).

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Findings that fire department was negligent were not clearly erroneous and would not be set aside. *Fairbanks & Lathrop Co. v. Schaible*, Op. No. 97, 375 P2d 201 (Alaska 1962).

Evidence supported finding that a fire was caused by loose fuel fittings. *George v. Willman*, Op. No. 134, 379 P2d 103 (Alaska 1962).

Evidence supported findings that plaintiff was negligent. *Van Reenan v. Golden Valley Electric*, Op. No. 127, 379 P2d 958 (Alaska 1962).

Trial court was correct in finding that defendant had failed to prove the allegations of their counterclaim. *Wells v. Nooy*, Op. No. 142, 380 P2d 876 (Alaska 1962).

In a case heavy with demeanor evidence and tried without a jury, it was the task of the trial court to resolve apparent conflict between the evidence of the plaintiff and of the defendant. *Monsma v. Williams*, Op. No. 161, 385 P2d 107 (Alaska 1963).

In action for damages for an alleged assault which was tried without a jury, trial court committed no error in finding defendant's plea of guilty in prior criminal action arising out of the same events persuasive but not conclusive against the defendant. *Monsma v. Williams*, Op. No. 161, 385 P2d 107 (Alaska 1963).

Oral decision of trial judge indicated a sufficient factual basis for entry of a formal judgment by a successor judge. *Hale v. City of Anchorage*, Op. No. 189, 389 P2d 434 (Alaska 1964).

For setting aside findings of fact of the trial court as "clearly erroneous," there must exist a stronger basis than a mere difference in personal judgment. *Isaacs v. Hickey*, Op. No. 210, 391 P2d 449 (Alaska 1964).

Findings of trial court approving a receiver's report and failing to find him guilty of negligence or bad faith could not be set aside under Civil Rule 52(a) although the supreme court may have viewed the facts differently as initial trier of fact, where no clear error and no failure to make a sound survey of or to accord the proper effect to cogent facts appeared from the examination of the records. *First National Bank of Fairbanks v. Dual*, Op. No. 223, 392 P2d 463 (Alaska 1964).

The trial court's specific finding that defendant had orally promised to be solely responsible for the payment of a promissory note, sufficiently received the contention that plaintiff who was co-signer of the note was entitled at the most to sue for contribution and it was not necessary for the trial court to make findings asserting the negative of the issue presented. *Herning v. Wigger*, Op. No. 284, 398 P2d 1002 (Alaska 1965).

Where the trial judge had a rational basis for concluding that the mother was a fit person to have custody of the child such finding shall not be disturbed on appeal. *Wilson v. Mitchell*, Op. No. 301, 406 P2d 4 (Alaska 1965).

Findings of trial court which under the record were supported by substantial evidence could not be disturbed on appeal because of some inconsistencies in the testimony. *Kenai Power Corporation v. Stranberg*, Op. No. 350, 415 P2d 659 (Alaska 1965).

The rule that a trial judge has the duty to make sufficiently detailed and explicit findings of fact in order to afford the reviewing court a clear understanding of the basis for his decision applies to mechanics' and materialmen's foreclosure actions. *Moore v. Alaska Metal Buildings, Inc.*, Op. No. 515, 446 P2d 581 (Alaska 1968).

Strict compliance with provisions of this rule requiring findings of fact and conclusions of law and setting out reasons for the issuance of a preliminary injunction is required particularly in circumstances where the trial court is enjoining enforcement of an administrative regulation or statute. *Department of Fish & Game v. Pinneil*, Op. No. 586, 461 P2d 429 (Alaska 1969).

Where an order of final judgment incorporates language of an earlier interlocutory order which is supported with necessary findings of fact and

conclusions of law, no prejudice results from a lack of findings and conclusions to support the entry of partial judgment. *Moran v. Kenai Towing and Salvage, Inc.*, Op. No. 1056, 523 P2d 1237 (Alaska 1974).

Finding of oral contract for sale of homestead would not be reversed because not clearly erroneous. *Jackson v. White*, Op. No. 1334, 556 P2d 530 (Alaska 1976).

Findings of fact and conclusions of law were sufficiently detailed to meet the requirements of paragraph (a) of this rule. *City of Kenai v. Filler*, Op. No. 1463, 566 P2d 670 (Alaska 1977).

The court's findings of fact concerning its apportionment of percentages in a comparative negligence case were adequate to meet the requirements of this rule. *State v. Kaatz*, Op. No. 1536, 572 P2d 775 (Alaska 1977).

The determination of whether the doctrine of quasi-estoppel is applicable is essentially a factual one and, as such, will not be disturbed on appeal unless the findings on which it is based are clearly erroneous. *Jamison v. Consolidated Utilities, Inc.*, Op. No. 1576, 576 P2d 97 (Alaska 1978).

In an action on an open account, trial court's implicit factual finding that certain insurance payments were paid was not clearly erroneous. *Eagle Air v. Corroon, Etc.*, Op. No. 2538, 648 P2d 1000 (Alaska 1982).

Where court held that a purported lease agreement created a security interest by giving the lessee the option of owning the property for a nominal consideration, the nominality of the option price was a factual determination which could not be set aside unless clearly erroneous. *Western Enterprises v. Artic Office Machines*, Op. No. 2707, 667 P2d 1232 (Alaska 1983).

III. Unsupported Findings – Clearly Erroneous Rule

The findings of the trial court were not supported by the evidence and were "clearly erroneous" as to whether there had been a mistake in payment of partnership salaries. *Durkee v. Busk*, Op. No. 17, 355 P2d 588, 593 (Alaska 1960).

While regard must be given to the opportunity of the trial court to judge the credibility of witnesses, the findings of that court are not conclusive when the entire evidence convinces the reviewing court that a mistake has been committed. *Mink v. Patrick*, Op. No. 52, 367 P2d 157, 159 (Alaska 1961).

Where the trial court has failed to comply with Civil Rule 52(a), the normal practice is for the appellate court to remand the case for appropriate findings of fact and conclusions of law, but where the judgment itself cannot be understood, the court may vacate the judgment and return the case to the superior court for a new trial. *Dickerson v. Geiermann*, Op. No. 60, 368 P2d 217, 219 (Alaska 1962).

Where the basis for the trial court's decision cannot be determined from the finding of facts, the Supreme Court will remand the cause to the superior court for the purpose of making appropriate findings of fact, and if this cannot be done, the superior court shall, in lieu of making further findings of fact, grant a new trial. *Merrill v. Merrill*, Op. No. 62, 368 P2d 546, 548 (Alaska 1962).

Evidence held insufficient to support finding that real estate broker had failed to produce a purchaser who was ready, willing and able to purchase in accordance with terms of the earnest money receipt and agreement. *Pasley v. Barber*, Op. No. 64, 368 P2d 549 (Alaska 1962).

Where defendant's automobile skidded out of its lane of traffic on an icy street and struck plaintiff, trial court's finding that defendant was not negligent was not supported by the evidence, as the burden of proving excuse or justification for violation fell on defendant and he failed to discharge this burden. *Rogers v. Dubiel*, Op. No. 94, 373 P2d 295 (Alaska 1962).

Where findings of the trial court were not sufficiently detailed and explicit to give the appellate court a clear understanding of the basis of the decision, case was remanded for the purpose of making sufficient findings of fact. *Hamilton v. Lotto*, Op. No. 211, 391 P2d 948 (Alaska 1964).

Findings of fact were not adequate to determine with certainty what facts were found by the court, and as a result the conclusions of law served no helpful purpose. *Stock & Grove, Inc. v. City of Juneau*, Op. No. 292, 403 P2d 171 (Alaska 1965).

Medical malpractice case tried without a jury was remanded for the purpose of making more specific and detailed findings in regard to past and future damages for physical impairment and past and future damage by loss of time and impairment of earning capacity. *Patrick v. Sedwick*, Op. No. 338, 413 P2d 169 (Alaska 1966).

Where in a case arising under a mechanic's lien statute the findings of fact did not indicate whether a determination of "knowledge" of construction by the owner as required under the applicable statute for the creation of such lien was made by the court, and the conclusions of law were insufficiently articulate as to the rules of law relied on by the court, the case was remanded and the trial judge was empowered, if he so determines, to hear additional evidence or order a new trial. *Vaara v. Ketchikan Spruce Mills*, Op. No. 441, 432 P2d 618 (Alaska 1967).

Where an action by a prisoner against the state for injuries allegedly sustained while being transported in a truck after a hip operation is dismissed on the merits without any findings of fact being made, the case will be remanded for purposes of making adequate findings of fact and conclusions of law, including findings as to the court's judgment of credibility of the plaintiff and his witnesses. *Bohm v. State*, Op. No. 543, 453 P2d 410 (Alaska 1969).

Clear error will not be found unless the reviewing court is convinced on the whole record that a mistake has been committed. *Paskvan v. Mesich*, Op. No. 557, 455 P2d 229 (Alaska 1969).

A preliminary injunction which is granted without setting forth the reasons for the issuance of the injunction and without findings of fact and conclusions of law which articulate grounds for the issuance of the preliminary injunction as required by this rule is procedurally defective and will be vacated. *Department of Fish & Game v. Pinnell*, Op. No. 586, 461 P2d 429 (Alaska 1969).

The supreme court will vacate rather than remand where a preliminary injunction is procedurally defective and where a hearing has been held on a motion for permanent injunction and where a decision on the merits of the permanent injunction is anticipated in the near future. *Department of Fish & Game v. Pinnell*, Op. No. 586, 461 P2d 429 (Alaska 1969).

A finding is not clearly erroneous, unless, from a review of the entire record, the supreme court is left with definite and firm conviction that a mistake has been made. *State v. Phillips*, Op. No. 619, 470 P2d 266 (Alaska 1970).

The clearly erroneous standard of review applies to all factual findings, including findings in cases tried entirely on

the basis of written depositions, documentary evidence and statements of undisputed facts, as well as cases involving demeanor evidence. *Alaska Foods, Inc. v. American Mfr.'s Mut. Ins. Co.*, Op. No. 678, 482 P2d 842 (Alaska 1971).

The clearly erroneous standard of review of findings of fact means something more than merely showing that it is more probable than not that the trial judge was mistaken. The reviewing court must be convinced, in a definite and firm way, that a mistake has been committed and must be well persuaded by the party seeking to have the trial judge's findings set aside. *Alaska Foods, Inc. v. American Mfr.'s Mut. Ins. Co.*, Op. No. 678, 482 P2d 842 (Alaska 1971).

A finding is "clearly erroneous" when, although there may be evidence to support it, the reviewing court is left with the definite and firm conviction on the entire record that a mistake has been committed. *State v. Abbott*, Op. No. 804, 498 P2d 712 (Alaska 1972).

Before the supreme court will reverse a finding of fact as clearly erroneous, the court must be convinced, in a definite firm way, that a mistake has been committed. *Moran v. Holman*, Op. No. 945, 514 P2d 817 (Alaska 1973).

A finding is clearly erroneous and may be set aside on review when, although there may be evidence to support it, the court is left with the definite and firm conviction on the entire record that a mistake has been made. *Peters v. Juneau-Douglas Girl Scout Council*, Op. No. 1018, 519 P2d 826 (Alaska 1974).

A "clearly erroneous" finding which may be set aside in review, is one which leaves the supreme court with a definite and firm conviction in the entire record that a mistake has been made, although there may be evidence to support the

finding. *Frontier Saloon, Inc. v. Short*, Op. No. 1345, 557 P2d 779 (Alaska 1976).

A finding of fact by a judge in a trial without a jury will be disturbed by a reviewing court only if clearly erroneous; a finding is clearly erroneous only when the court is left with the definite and firm conviction on the entire record that a mistake has been committed. *Hausam v. Wodrich*, Op. No. 1558, 574 P2d 805 (Alaska 1978).

Finding by trial court that the Alaska Gay Coalition was deleted from City's Blue Book on municipal services because of its political focus was clearly erroneous where it was apparent that the deletion occurred because the coalition was a homosexual organization. *Alaska Gay Coalition v. Sullivan*, Op. No. 1616, 578 P2d 951 (Alaska 1978).

It was clearly erroneous for trial court to conclude that certain facts were so generally known that judicial notice could be taken of them while at the same time deciding that a company, whose work routinely involved those same facts, was not chargeable with at least the same degree of knowledge. *Lewis v. Anchorage Asphalt Pav. Co.*, Op. No. 1639, 579 P2d 532 (Alaska 1978).

The supreme court will only disturb trial court findings when it is convinced that they are clearly erroneous, that is, when it is left with a definite and firm conviction on the entire record that a mistake has been made, even though there may be evidence to support the finding. *Martens v. Metzgar*, Op. No. 1806, 591 P2d 541 (Alaska 1979).

Under the "clearly erroneous" standard of appellate review, the amount of deference that must be given to factual determinations of the sentencing

court will vary, depending upon the extent to which the sentencing court relied upon testimony in which the demeanor and credibility of witnesses played an important role. *Juneby v. State*, Op. No. 72, 641 P2d 523 (Alaska App. 1982).

The "clearly erroneous" standard is still to be applied when the trial court's findings are adopted from those submitted by the prevailing party. *Stack v. Miller*, Op. No. 2508, 645 P2d 184 (Alaska App. 1982).

Although breach of contract claim was dismissed by summary judgment, review of trial court's finding that the contract partially integrated would be based upon the "clearly erroneous" standard, since during subsequent trial on reformation of the contract, the court reviewed and reaffirmed its summary judgment findings on the integration issue. *Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.*, Op. No. 2689, 666 P2d 33 (Alaska 1983).

Although a reviewing court will exercise its independent judgment in reviewing a trial court's interpretation of a written contract when such findings are based exclusively upon documentary evidence, a "clearly erroneous" standard should be applied where extrinsic testimonial evidence has been presented and relied upon by the trial court in formulating its findings. *Kennedy Associates, Inc. v. Fischer*, Op. No. 2700, 667 P2d 174 (Alaska 1983).

Where trial court heard and relied upon extensive oral testimony in interpreting inspection clause in a disputed real estate loan commitment agreement, application of clearly erroneous standard was appropriate in reviewing the court's resolution of the dispute. *Kennedy Associates, Inc. v. Fischer*, Op. No. 2700, 667 P2d 174 (Alaska 1983).

Since arbitrator's exclusion of witness did not lead to the complete omission of critical evidence, party was afforded his right to a fair hearing; at most, one form of argument was closed off by the arbitrator, the argument itself was not; accordingly, trial court's conclusion that it was gross error for the arbitrator to exclude the witness was clearly erroneous. *City of Fairbanks Mun. Util. System v. Lees*, Op. No. 2977, 705 P2d 457 (Alaska 1985).

Findings of fact by trial court will not be overturned unless clearly erroneous. *Weason v. Harville*, Op. No. 2980, 706 P2d 206 (Alaska 1985).

Whether the parties to an informal agreement became bound prior to the drafting and execution of contemplated formal writings was a question of intent reviewable under the clearly erroneous standard. *Juliano v. Angelini*, Op. No. 2994, 708 P2d 1289 (Alaska 1985).

Civil Rule 53

Collateral References

Generally

5A Moore, Federal Practice 53.01 - 53.02 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2601 - 2606 (1971)

(a) Similar to Fed. R. Civ. P. 53(a)

5A Moore, Federal Practice 53.03 - 53.04 (2d ed. 1980)

9 Wright and Miller, Federal Practice and Procedure §§ 2607 - 2608 (1971)

(b) Same as Fed. R. Civ. P. 53(c)

5A Moore, Federal Practice 53.06 (2d ed. 1980)

Rule 58. Entry of Judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court or the clerk, upon direction of the court, shall forthwith enter the judgment; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly enter judgment. Every judgment shall be set forth on a separate document. The entry of the judgment shall not be delayed for the taxing of costs, but a blank space may be left in the form of judgment for insertion of costs by the clerk after they have been taxed. (Amended by Supreme Court Order 258 effective November 15, 1976; and by Supreme Court Order 554 effective April 4, 1983)

CROSS REFERENCES: AS 09.30.010; AS 09.30.020; Civ. Forms 113, 114

Rule 58.1. Judgments and Orders—Effective Dates and Commencement of Time for Appeal, Review and Reconsideration.

(a) **Effective Dates of Orders and Judgments.** Orders and judgments become effective the date they are entered.

(1) *Oral Orders* The date of entry of an oral order is the date the order is put on the official electronic record by the judge unless otherwise specified by the judge. At the time the judge announces an oral order, the judge shall also announce on the record whether the order shall be reduced to writing. If the oral order is reduced to writing, the effective date shall be included in the written order.

(2) *Written Orders Not Preceded by Oral Orders.* The date of entry of a written order not preceded by an oral order is the date the written order is signed unless otherwise specified in the order.

(3) *Judgments.* The date of entry of a civil judgment is the date it is signed unless otherwise specified in the judgment. All judgments shall be reduced to writing.

(b) **Commencement of Time for Appeal, Review and Reconsideration.** The time within which a notice of appeal may

be filed and reconsideration or review of orders and judgments may be requested begins running on the date of notice as defined below.

(c) Date of Notice.

(1) *Oral Orders.*

(i) As to the parties present when an oral order is announced, the date of notice is the date the judge announces the order on the official electronic record, unless at that time the judge announces his intention of having the order reduced to writing in which case the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(ii) As to parties not present at the announcement of an oral order, the date of notice is the date shown in the clerk's certificate of distribution of notice of the order. If, however, at the time the judge announces the oral order he announces his intention of having the order reduced to writing, the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(2) *Written Orders.* The date of notice of a written order is the date shown in the clerk's certificate of distribution on the written order.

(3) *Judgments.* All judgments must be reduced to writing. The date of notice of a judgment is the date shown in the clerk's certificate of distribution on the written judgment.

(4) *Other Service Requirements.* The notice provisions apply to the notice of orders and judgments under Rule 73(d) and do not affect the service requirements of any other rule of civil procedure.

(d) *Clerk's Certificate of Distribution.* Every written notice of an oral order and every written order and judgment shall include a clerk's certificate of distribution showing the date copies of the notice, order or judgment were distributed, to whom they were distributed, and the name or initials of the clerk who distributed them. (Added by Supreme Court Order 554 effective April 4, 1983)

CROSS REFERENCE: App. R. 204

relief for the defendants where defendant had not prayed for any relief whatsoever. Where upon the merits of the controversy the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action. *American Building & Loan v. State*, Op. No. 112, 376 P2d 370 (Alaska 1962).

A payment document which was filed by the defendant in a personal injury case in the superior court stating in substance that the full policy amount plus \$1,000 as "costs to date" were paid into the registry of the court and requesting that the court notify the plaintiff of such tender and relieve the defendant of liability for costs and attorney's fees, was not a confession of judgment in the meaning of this rule. *Albritton v. Estate of Larson*, Op. No. 413 428 P2d 379 (Alaska 1967).

The general rules of pleading and of civil procedure apply to actions of declaratory relief. *Jefferson v. Asplund*, Op. No. 579, 458 P2d 995 (Alaska 1969).

All that is required of a complaint seeking declaratory relief is a simple statement of the facts demonstrating that the superior court had jurisdiction and that an actual justiciable case or controversy is presented. *Jefferson v. Asplund*, Op. No. 579, 458 P2d 995 (Alaska 1969).

Statutory language giving a declaratory judgment the force of a final judgment and making it reviewable as such does not change the effect of this rule's provision that when multiple claims for relief are involved in an action, partial summary judgment may be entered as to one or more, but fewer than all, of the claims or parties only upon the express determination that there is no just reason for delay, and upon express direction by the court for the entry of judgment.

Alaska Airlines, Inc. v. Red Dodge Aviation, Inc., Op. No. 640, 475 P2d 229 (Alaska 1970).

Civil Rule 58

Collateral References

Similar to Fed. R. Civ. P. 58

6A Moore, Federal Practice 58.01 - 58.09 (2d ed. 1979)

11 Wright and Miller, Federal Practice and Procedure §§ 2781 - 2787 (1973)

Cases

In determining the time within which an appeal may be taken the term "entry of judgment," as it applies to trials by jury is set forth in Civ. R. 58. *Vogt v. Winbauer*, Op. No. 117, 376 P2d 1007 (Alaska 1962).

The 30-day period within which notice of appeal had to be given by the appellant commenced to run on the date upon which judgment was noted by the clerk in the civil docket. *Vogt v. Winbauer*, Op. No. 117, 376 P2d 1007 (Alaska 1962).

Where the court directs that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the directions. *Patrick v. Sedwick*, Op. No. 154, 387 P2d 294 (Alaska 1963).

It is contrary to the letter and purpose of Rule 58 to postpone entry of judgment until after a formal written judgment has been signed by the judge and filed. *McCoy v. Alaska Brick Co.*, Op. No. 192, 389 P2d 1009 (Alaska 1964).

Where on February 1st, the jury returned a general verdict accompanied by answers to interrogatories, but the court waited until February 8 to direct the entry of a formal judgment, the ten-day period for service and filing of a cost bill commenced at the latter date. *Patterson v. Cushman*, Op. No. 233, 394 P2d 657 (Alaska 1964).

Where the parties had stipulated that their agreement for settlement of a dispute constituted a final disposition of the litigation and a docket entry was made on January 12, clearly indicating the final settlement and dismissal by the court of the claim and counterclaim by M.O. and on April 6 following a transcript of the proceedings was filed in accordance with the settlement and dismissal and a docket entry of the same date clearly so stated, a final judgment dismissing the complaint and counterclaim with prejudice was entered either on January 12 or at the latest on April 6, and an erroneous docket entry by the clerk dated July 28 of "judgment of dismissal of complaint and counterclaim" which did not correctly reflect what occurred on that date, was not the entry

of a judgment from which an appeal could be taken. *Gravel v. Alaskan Village, Inc.*, Op. No. 321, 409 P2d 983 (Alaska 1966).

The Supreme Court will not indulge in literalism in reading the rule that the notation of a judgment in the civil docket as provided by Civil R. 74 constitutes the entry of the judgment where the parties with concurrence of the court below had clearly stipulated that a transcript of proceedings wherein they had agreed to a dismissal with prejudice of their respective complaint and counterclaim constituted a final and complete settlement of their dispute and the docket entries without stating in so many words that a "judgment was entered," nevertheless clearly expressed the intent of the parties and the concurrence of the court. *Gravel v. Alaskan Village, Inc.*, Op. No. 321, 409 P2d 983 (Alaska 1966).

Prejudgment interest is in the nature of damages and is necessary to compensate the plaintiff, not only for the amount by which he has suffered damage in the usual sense but also for the loss of use of the money to which he is entitled. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Civil Rule 59

Collateral References

Generally

6A Moore, Federal Practice 59.01
- 59.04 (2d ed. 1979)

11 Wright and Miller, Federal Practice and Procedure §§ 2801 - 2804 (1973)

(a) Similar to Fed. R. Civ. P. 59(a)

6A Moore, Federal Practice 59.05
- 59.08 (2d ed. 1979)

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CROSS REFERENCES: Civ. Forms 128, 129, 130

Civil Rule 68

Collateral References

Same as Fed. R. Civ. P. 68

7 Pt. 2 Moore, Federal Practice 68.01-68.06 (2d ed. 1979)

12 Wright and Miller, Federal Practice and Procedure §§ 3001-3005 (1973)

Cases

- I. In General
- II. Payment of Costs
 - A. Construction
 - B. Prejudgment Interest

I. In General

A payment document which, in itself, did not have the criterion of an offer of judgment and could, at most, be considered as a deposit in the superior court, made under the provisions of Civil Rule 67(a), was by virtue of a stipulation of the parties as reasonably construed converted into an offer of judgment which plaintiff's accepted under the stipulation. *Albritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

An offer of judgment and acceptance thereof is a contract and the amount of the offer of judgment must be definite so that it is clear there is a meeting of the minds on an essential term of the contract. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

This rule does not apply to eminent domain proceedings. *Anchorage v. Schavenius*, Op. No. 1183, 539 P2d 1169 (Alaska 1975).

The purpose of this rule is to encourage settlement and to avoid protracted litigation. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Offer of judgment that paralleled Form 128, Forms for Rules of Civil Procedure, differing only in that it supplied defendant's identity and filled in blank spaces, was valid compliance with Civil Rule 68. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 266 (Alaska 1979).

This rule applies not only when the offeree obtains judgment in his favor but also when the offeree does not prevail at all. *Wright v. Vickarsous*, Op. No. 2075, 611 P2d 20 (Alaska 1980).

A contract for an entry of judgment is not formed if the written notice of acceptance of an offer under this rule is not served within the ten day limit. *Gumear v. Interior Credit Bureau*, Op. No. 2339, 627 P2d 647 (Alaska 1981).

A defendant is not bound under this rule to make an offer of judgment commensurate with any degree of compensation. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment under this rule must be in writing to be valid. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment made pursuant to this rule is irrevocable for 10 days after it is served on the adverse party. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Where written offer of judgment by defendant was silent as to an offset for sums which had been advanced to plaintiff for medical treatment, defendant was required to pay the full amount of the offer without the offset. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Joint offers are excluded from the penal cost provisions of this rule. *Brinkerhoff v. Swearingen Aviation Corp.*, Op. No. 2666, 663 P2d 937 (Alaska 1983).

II. Payment of Costs

A. Construction

The provision of this rule that a party who made an offer of judgment which was not accepted, is not responsible for costs incurred after the making of the offer, did not apply to a case where judgment finally obtained was more favorable than the offer and where the offeror was an insurance company which had offered the insurance policy limit, and was not a party to the main cause, but had appealed from a garnishment proceeding. *Liberty National Insurance Company v. Eberhart*, Op. No. 281, 398 P2d 997 (Alaska 1965).

Even if it may be assumed that appellants were "prevailing party" within the meaning of Civil Rules 54(d) and 82(a) (1), the trial court's determination as to denial of attorney's costs where the action was settled pursuant to Civil Rule 68 was not disturbed on appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. *Albritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

Where in a personal injury action the defendant had filed a payment document which, in itself, could be considered at best a deposit in court under Civil Rule 67(a) but by stipulation between the parties was converted into an offer of judgment, and by virtue of such stipulation and the court's order appended thereto, plaintiff's causes of action were dismissed with prejudice, the action had been settled pursuant to Civil Rule 68 and under the "with costs

then accrued" portion of said rule the trial court was vested with wide discretion in determining award of attorney's fees. *Albritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

If the judgment recovered at trial is less than an offer of judgment, the offeror is liable for the costs incurred by the offeror subsequent to the time the offer was made. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

For purposes of this rule, an offer of judgment that specifies only a total sum must be construed as including the defendant's assessment of all the damages that the plaintiff is entitled to, including that occasioned by the loss of the use of the money. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

An offer of judgment will be construed as including the defendant's assessment of all the damages that plaintiff is entitled to, including costs and attorney's fees. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

An award of costs and attorney's fees to both the plaintiff and the defendant are properly computed as of the date the offer of judgment is made and not at a later time when accepted. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

Where radically different standards of partial compensation are applied in awarding attorney's fees to the parties, the award will be considered an abuse of discretion unless there are findings or an explanation by the trial court supporting such disparate treatment. *Irving v. Bullock*, Op. No. 1261, 549 P2d 1184 (Alaska 1976).

This rule does not require that costs incurred prior to an offer of judgment be awarded; such awards are within the trial court's discretion. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

An award of \$5,000.00 for attorney's fees to defendant, a "limited prevailing party" under Civil Rule 68, was not manifestly unreasonable when actual attorney's fees were \$14,053.12, considering that Rule 68 is designed to encourage reasonable settlement after a lawsuit is filed. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

An award of attorney's fees under Civil Rule 68 is designed to "partially" compensate the prevailing party. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

Court should make factual determination of offeror's actual expenses incurred after offer of judgment, then take into account the partial recovery principles of Civil Rule 82 in awarding offeror reasonable partial attorney's fees and costs based on such factual determination. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. *Truckweld Equipment Co. v. Swenson Trucking*, Op. No. 2545, 649 P2d 234 (Alaska 1982).

B. Prejudgment Interest

The phrase "judgment finally obtained by the offeree" within this rule includes the amount assessed as prejudgment interest but does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in the "judgment finally obtained by the offeree" and to compare that total to the amount of the offer of judgment in order to determine whether the offeree should pay the costs. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offeree interest on a judgment from the date of the offer through date of judgment when offeree ultimately recovers less than amount offered. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 555 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees—including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. *Farnsworth v. Steiner*, Op. No. 2454, 638 P2d 181 (Alaska 1981).

Civil Rule 69

Collateral References

Generally

33 C.J.S. Executions § 1 (1942)

30 Am. Jur. 2d Executions § 1 (1967)

(a) Similar to Fed. R. Civ. P. 69(a)

7 Pt. 2 Moore, Federal Practice 69.01-69.05 (2d ed. 1979)

12 Wright and Miller, Federal Practice and Procedure §§ 3011-3014 (1973)

(b)(1) 33 C.J.S. Executions §§ 361, 366, 373, 378 (1942)

30 Am. Jur. 2d Executions §§ 786, 823-824, 826 (1967)

(b)(2) 33 C.J.S. Executions §§ 376, 380, 383 (1942)

30 Am. Jur. 2d Executions §§ 828, 838 (1967)

(c) 33 C.J.S. Executions §§ 370, 398 (1942)

30 Am. Jur. 2d Executions §§ 835, 840, 844 (1967)

(d)(1) 33 C.J.S. Executions § 266 (1942)

30 Am. Jur. 2d Executions §§ 43-44 (1967)

(e)(1) 33 C.J.S. Executions § 266 (1942)

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30 Am. Jur. 2d Executions § 388-391 (1967)

(e)(2) 33 C.J.S. Executions § 266 (1942)

30 Am. Jur. 2d Executions § 390 (1967)

(e)(3) 33 C.J.S. Executions §§ 244, 251 (1942)

30 Am. Jur. 2d Executions §§ 510, 514-516 (1967)

Cases

Offset bid of \$2000 on a judgment of \$368.13 was a substantial irregularity having a natural tendency to deter the right to redeem and was therefore a proper consideration in trial judge's decision to set aside execution sale. *Law Offices of Murphy L. Clark v. Altman*, Op. No. 2811, 680 P2d 1125 (Alaska 1984).

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Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

	<i>Contested</i>	<i>Without Trial</i>	<i>Non-Contested</i>
First \$2,000	25%	20%	15%
Next \$3,000	20%	15%	12.5%
Next \$5,000	15%	12.5%	10%
Over \$10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

(4) Attorney's fees upon entry of judgment by default shall be determined by the clerk. In all other matters the court shall determine attorney's fees. Awards not pursuant to the schedule set forth in subparagraph (1) of this Rule shall be made only upon motion.

(b) Allowance in Mental Cases. In proceedings under the Mental Health Act, the attorney appointed to represent the patient shall be allowed and paid a fee of \$25.00, unless the judge, in his discretion, orders otherwise. A lay advisor appointed in such proceedings shall be allowed and paid a fee of \$10.00, unless the judge, in his discretion, orders otherwise. (Amended by Supreme Court Order 497 effective January 18, 1982)

The Collateral Source Rule — The American Medical Association and Tort Reform

Banks McDowell*

I. INTRODUCTION

The Collateral Source Rule is a common law rule created by the courts in the 19th century. It has been defined by the reporters of the *Restatement (Second) of Torts* as follows:

~~Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability although they cover all or a part of the harm for which the tortfeasor is liable.¹~~

This may be merely a rule of evidence preventing admission of proof of collateral benefits, or it may be viewed as a rule of substantive law specifying that collateral benefits are not to be deducted as an element under the appropriate damage formula.

Scholarly analysis over the last two decades has generally concluded that the rule should be abolished.² This common law rule could be abrogated by the courts who created it if they felt that the reasons justifying the rule no longer existed. It has, however, been adopted for so long a period and relied on to such an extent that courts should feel reluctant to reverse the precedents. It is more appropriate to seek repeal by statute.³ Eighteen states have passed statutes eliminating the operation of the Collateral Source Rule in medical malpractice actions.⁴ Colorado has abolished the Rule as to first-party insurance ben-

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The author acknowledges with gratitude the help of his research assistant, Thomas Sheehan, second year law student at Washburn.

1. *RESTATEMENT (SECOND) OF TORTS* § 920A, at 513 (1979).

2. Articles critical of the Collateral Source Rule include: Bell, *Complete Abrogation of the Collateral Source Rule—A Partial Answer to Criticism of the Present Injury Reparations System*, 14 *N.H.B.L.* 20 (1972); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 *CALIF. L. REV.* 1478 (1966); Peckinpah, *An Analysis of the Collateral Source Rule*, 32 *IND. CONTR.* 1-32 (1965); Schwartz, *The Collateral Source Rule*, 40 *B.U.L. REV.* 338 (1964). Note, *Uncertainty in the Law of Damages—The Collateral Source Rule*, 77 *HARV. L. REV.* 741 (1964). Articles defending the rule are: Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 *MICH. L. REV.* 669 (1962); Misceri & Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 *CONZ. L. REV.* 310 (1972).

3. This is the position of the reporters of the *Restatement (Second) of Torts*, stated in § 920A comment d. "The collateral-source rule is of common law origin and can be changed by statute. Changes made are sometimes in statutes providing a different method of compensation such as the first-party insurance involved in certain motor vehicle reparations acts."

4. *ALASKA STAT.* § 09-55-048 (1983); *ARRIZ. REV. STAT. ANN.* § 12-505 (1982); *CON. CIV. CODE* § 3333T (1976); *DEL. CODE ANN. TIT. 10, § 6002* (1974); *FLA. STAT. ANN.* § 768.50 (Supp. 1983); *LOUIS. CIVIL CODE* § 39-4210 (1977); *ILL. ANN. STAT.* § 110, 2-1205 (Smith-Hurd 1983); *IND. CIVIL CODE ANN.* § 147-116 (1972); *IOWA STAT. ANN.* § 00-471 (1983); *N.H. REV. STAT.* § 44:3819 (1978); *N.H. REV. STAT. ANN.* § 507-C:7(1) (1983); *N.Y. CIV. PRACT. LAW* § 4010 (McKinney 1975 & Supp. 1981); *N.D. CENT. CODE* § 26-40.1-08 (1977, repealed in 1983); *OHIO REV. CODE ANN.*

efits payable under its automobile accidents no-fault scheme.⁸ A more general statute abolishing the Collateral Source Rule in all tort actions has been introduced in the Kansas legislature.⁹

This article will consider a number of problems: (1) Why a rule developed under 19th century fault concepts of tort law may not work well under 20th century compensatory concepts? (2) What is the impact of the lobbying efforts by the medical profession to repeal the rule in malpractice actions? (3) Is it advisable as a matter of legislative policy to generalize this reform to all tort litigation?¹⁰ (4) If the Collateral Source Rule is abolished by statute, what form should the statutes take in order to minimize the problems and achieve the purposes of such reform?

II. OPERATION OF THE RULE

The scope of the Collateral Source Rule is described in comment c to *Restatement (Second) of Torts* section 920A:

c. The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits.

(1) **Insurance policies**, whether maintained by the plaintiff or a third party. Sometimes, as in fire insurance or collision automobile insurance, the insurance company is subrogated to the rights of the third party. This additional reason for keeping the tortfeasor's liability alive is not necessary, however, as the rule applies to insurance not involving subrogation, such as life or health policies.

(2) **Employment benefits**. These may be gratuitous, as in the

§ 2308 27 (Page 1971), K.I. GEN. LAWS § 9-19-34 (Supp. 1984), S.D. CODIFIED LAWS, ASSA § 21-12 (1976), TENN. CODE ANN. § 29-26-119 (1984), WASH. REV. CODE ANN. § 7.70160 (1975-76), 5 COLO. REV. STAT. § 10-4-713 (1973).

See *Kan. S.B. 758*, by the Committee on Judiciary, Feb. 20, 1984, which provides:

1. (a) In any action for damages for personal injury, including bodily harm, sickness, disease or death, or for property damage the court shall admit into evidence the total amount of all compensation or benefits received or entitled to be received by the claimant from any collateral source.

(b) If a party elects to introduce evidence of compensation or benefits from any collateral source, the court shall admit evidence of any amount which the party has paid or contributed to secure the party's right to any compensation or benefits concerning which evidence of collateral source compensation or benefits has been admitted.

11.

7. The collateral benefits problem is not confined to tort litigation. It may be an issue in contract recovery. See *Billener v. Posell*, 94 Cal. App. 2d 838, 211 P.2d 624 (1949), where an employer being sued to recover damages for wrongful dismissal was not allowed to set off unemployment compensation benefits against the wages owed. The purpose of expectation damages in contract is to place the plaintiff in as good a position as he would have been if the contract had been performed at the least cost to defendant, so there is little need to award plaintiff more than his net economic loss after collateral benefits have been subtracted. *Warren Co. v. Harman*, 17 Ariz. 252, 150 P. 238 (1915); *Anderson v. Reynolds*, 130 Kan. 503, 406 P.2d 131 (1965); *Oregon Power Co. v. Nade*, 137 Ky. 197, 125 S.W. 291 (1916). It may even become an issue in criminal law if some procedure is provided whereby a victim is authorized to recover a stipulation for his losses from the criminal. In Maine, the statutory right to restitution does not exist to the extent that the victim has been compensated from a collateral source. *ME. REV. STAT. ANN. tit. 17-A, § 1324(2)(C)* (1983). In Texas, where victims of crimes may recover from a state compensation fund, the state is subrogated to the insurance benefits of the victim to the amount awarded under the Crime Victim's Compensation Act. *TEX. CIV. STAT. ANN. § 83091* (19th Am. Supp. 1984).

case in which the employer, although not legally required to do so, continues to pay the employee's wages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising by statute, as in worker's compensation acts or the Federal Employers' Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than subrogation.

(3) **Gratuitous**. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.

(4) **Social legislation benefits**. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.⁸

While the scope and form of the Collateral Source Rule has not changed in the past eighty years, the context in which it most commonly operates has changed markedly. This can be illustrated by comparing the kind of fact situation and the type of collateral source which was first before the courts with a more modern context and modern sources of benefits.

An example of a typical early collateral source problem faced by 19th century courts is the following.⁹ The plaintiff, an elderly woman of modest means, was injured by the clear negligence of defendant's servant. It is probable that the defendant did not carry liability insurance, although that would not be known.¹⁰ The plaintiff needed medical and nursing care as a result of her injuries, so her two sons came from out of state to care for her. Their services were performed gratuitously. At the trial, the tortfeasor asked the court to not allow the jury to award the plaintiff "reasonable compensation for nurse hire and attendance" since she had received these services free from her sons. The court refused this request.

In deciding whether to credit the defendant with the value of gratuitous benefits received by plaintiff, the court had to select between two important principles, each of which covers the case and each of which clashes with the other. The first principle is the underlying fault

8. *RESTATEMENT (SECOND) OF TORTS* § 920A comment c, at 514-15 (1977).

9. The fact situation is patterned after *Lewark v. Parkerson*, 71 Kan. 523, 87 P. 601 (1906). Similar cases are *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N.E. 874 (1885); *Varadhan v. City of Council Bluffs*, 52 Iowa 698, 3 N.W. 792 (1879); *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Minn. 37, 142 N.W. 706 (1913). Reaching a contrary result by not allowing plaintiff to recover the reasonable value of gratuitous services as items of damage are *Morris v. Grand Ave. Ry. Co.*, 144 So. 260, 36 S.W. 130 (1898); *Goodhart v. Pennsylvania Ry. Co.*, 177 Pa. 1, 37 A. 191 (1890).

10. Of course, the result should be clear because the clear rule in most states is that it is precluded to defendants to object in the trial the fact that defendant had liability insurance. *Cott v. M. Emme*, 309 F.2d 117 (7th Cir. 1962); *Robins Engineering, Inc. v. Cockrell*, 354 So. 2d 1 (Ala. 1977); *Caylor v. Nicholson, I. & S. Ry. Co.*, 189 Kan. 210, 368 P.2d 281 (1962); *Miles v. Seple*, 511 P.2d 866 (Okla. Ct. App. 1977). My assumption in the text is based on the likelihood of a small businessman, a heavy stable operator, carrying liability insurance in the period before 1900.

concept in tort which says that a defendant should be responsible for all damages flowing naturally and probably from his wrongful act. Such damages would include the reasonable cost of all medical and nursing care the plaintiff needed, whether she could afford to purchase them prior to judgment or not. The second principle is that while plaintiff is entitled to full compensation for her injuries, she is not entitled to double up her recovery or to receive a windfall. When gratuitous benefits have been conferred on the plaintiff, one or the other of the consequences which these principles are designed to avoid must occur. Either the party at fault must pay less than the damages he caused, or the plaintiff receives a windfall; the amount assessed for services which she received gratuitously. The choice is an easy one. One party is injured, the other at fault. When one must suffer a disadvantageous consequence and the other receive a benefit, the benefit should go to the innocent party and the penalty be suffered by the wrongdoer. The Collateral Source Rule reaches that result.¹¹

The modern context in which the Collateral Source Rule operates is very different. Once again, an illustrative example will be used.¹² The plaintiff owned a building in which he operated a business. The business used natural gas. Due to the negligence of the gas company, there was a gas leakage causing an explosion. There was substantial damage to the building and substantial personal injuries to the plaintiff. The plaintiff carried fire insurance and paid the premiums as a business expense. The fire insurer settled plaintiff's property damage claim for \$15,000, which was the appraised value of the loss, (\$16,100, less a \$300 deductible). The plaintiff, a veteran, was hospitalized for three days in a veteran's hospital and was treated by the state there. His

medical expenses, if obtained in a private hospital, would have cost \$612. When he returned home, his wife nursed him for two weeks. If those services had been performed by a professional nurse, they would have cost \$420. While at home he was also treated by his brother-in-law, a physician. His brother-in-law sent him no bill, but his normal charges for these services would have been \$428. Plaintiff then sued the gas company for negligence and sought damages of \$68,990, consisting of property damage of \$16,100, medical expenses of \$1,076, nursing expense of \$420, loss of earnings of \$1,400 and pain and suffering of \$50,000. At the trial, the defendant gas company offered evidence of the plaintiff's settlement from his property insurer and the value of the medical and nursing services. The Collateral Source Rule compelled the judge to reject this evidence and to permit the plaintiff to recover his full damages. The equities produced by this result are very different in the tort system of the 1980's, when compared with the way the rule operated at the turn of the century.

In discussing this modern context, I assume that the real defendant in interest was not the gas company, but a liability insurer who defended the action and who must pay the judgment rendered against the gas company.¹³ Another real party in interest, although not appearing on the record, was plaintiff's fire insurer, the subrogee of plaintiff's claim to the extent that it has paid the loss.¹⁴

To analyze the impact of the Collateral Source Rule in this modern context and to contrast that with the consequences of abolishing the Rule, it is necessary to separate the damages sought by plaintiff into three categories: (a) those for which no collateral source benefits have been received, i.e. the claim for pain and suffering, the claim for loss of earnings, and the claim for the \$300 deductible under the fire insurance policy; (b) those for which collateral benefits were obtained, but where there is no right of subrogation in the provider of those services—in this case, the reasonable fee for the services of his brother-in-law as doctor and the reasonable value of the nursing services of his wife; and (c) those collateral benefits furnished by a party who is entitled under the doctrine of subrogation to recover the value of those benefits from

11. This is a more detailed analysis of the justification behind the Collateral Source Rule than is usually given. A typical articulation of the justification appears in *Reston v. Kansas Power & Light Co.*, 192 Kan. 349, 354, 98 P.2d 812, 841 (1961), where the court said:

It is well settled that the damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrongdoer did not contribute. This rule is not affected by the fact that the insurer is entitled to be subrogated to the rights of the insured, as against the tortfeasor, or to recover back from him the amount he recovers. The question of the right to the proceeds of the recovery is a matter between the insurer and the insured. It constitutes no defense to the action for damages caused by the wrong which must be brought in the name of the insured, although it might be for the use of the insurer. The reasons generally given for the rule are that the contract of insurance and the subsequent conduct of the insurer and the insured in relation thereto are matters with which the wrongdoer has no concern and which do not affect the measure of his liability.

12. This is an elaboration of the fact situations in *Reston v. Kansas Power & Light Co.*, 192 Kan. 343, 348 P.2d 832 (1961) and *Dalrymple v. Kansas Electric Power Co.*, 15 Kan. 97, 19 P.2d 809 (1941). Some other modern cases where the provider of the collateral benefits is not doing so gratuitously and where the real defendant is probably a compensated liability insurer or a subrogee who can pass the cost of judgment on to consumers are: *Overson v. United States*, 619 F.2d 1279 (5th Cir. 1969), *Avellan v. Hayak*, 511 P.2d 131 (Alaska 1973), *Taylor v. Johnson*, 345 S.W.2d 902 (Ky. 1960), *Benjamin v. Holden*, 341 S.W.2d 510 (Mo. 1960).

13. The gas company might choose to be a self-insurer. What this means is that it administers an insurance plan by charging its customers a small fee to build a fund from which tort losses are to be paid. Thus it would be the innocent consumers that must bear the punitive impact of the Collateral Source Rule rather than the wrongdoing company or its agent.

14. The right of the fire insurer to be subrogated to the claim of the insured where he or it has paid is well established. *Flow-Hampshire Ins. Co. v. Kansas Power & Light Co.*, 212 Kan. 466, 519 P.2d 1191 (1974); *Hume v. McGinnis*, 186 Kan. 300, 131 P.2d 162 (1943). If the action is brought in the name of the insured who has been partially paid by his own insurer, he is liable for part of the recovery received from the tortfeasor for which he has been paid by his insurer on trust for the insured. *Dwight v. Reichart*, 198 Kan. 242, 404 P.2d 174 (1965). If the insured has been fully compensated for his loss, then the insured is not the real party in interest and the action must be prosecuted by and in the name of the subrogated insurer. *Hill v. Fechtler*, 168 Kan. 88, 211 P.2d 433 (1949).

the defendant tortfeasor—here, the fire insurance settlement and the medical care from the veteran's hospital.¹⁵

In the first category, where there has been no collateral contribution of any kind toward these items of damages, it is clear that the presence or absence of the Collateral Source Rule will have no impact. The plaintiff is entitled to those damages from the defendant (or his liability insurance carrier) in order to be fully compensated.

The abolition of the Collateral Source Rule would change the outcomes in classes (b) and (c). I would like to analyze first the equities involved in class (c), the situation where the collateral benefit has been furnished by an insurer entitled to subrogation. Here the previous analysis made about the appropriateness of the Collateral Source Rule in the typical earlier case does not fit at all. The party who must pay the damages to a plaintiff already compensated by collateral benefits is not a wrongdoing tortfeasor, but his liability insurer. This additional cost must be borne by all insureds of this class. The additional liability under the Collateral Source Rule would increase the defendant's insurance premium only very slightly, but also would increase at the same rate the premiums of this entire class of insureds, whether they be careful or careless. The element of wrongdoing which justifies leaving this cost on the defendant's side is not nearly so clear once liability insurance is introduced. On the plaintiff's side, we are not dealing with what could be described as a windfall, but more accurately as double recovery. Here, plaintiff purchased the right to indemnification from his fire insurer and, in addition, has the right to full compensation given him by the law of torts. Both these rights cover the same injury. The doctrine of subrogation solves the double recovery problem. The plaintiff only gets to keep one recovery, the amount paid by his insurer. That portion of the tort judgment meant to compensate for the property damage belongs to his insurer. In summary, we are not penalizing a wrongdoing defendant, but defendant's compensated liability insurer, and not leaving a benefit with an innocent and poor plaintiff, but with plaintiff's compensated fire insurer.¹⁶ The problem is to determine

which insurance is primary. The Collateral Source Rule makes the liability insurance primary; its abolition would make the first party fire insurance primary.

Tort litigation to establish defendant's fault is an expensive and clumsy way to answer the question of whether the first party insurer is entitled to transfer its loss payment to a liability insurer. If we assume a case where the only item of plaintiff's damage was one for which he had been fully compensated by settlement with his insurer, then the only function of the tort action would be to charge defendant's insurer with that amount. In this limited case, the Collateral Source Rule encourages litigation and the attendant legal costs, such as attorney's fees, use of court resources, and time of witnesses, litigants and jurors. That is necessary because the issue of which insurer is primary turns on the determination of fault and this can only be finally answered by litigation. The abolition of the Collateral Source Rule would eliminate this litigation since the first party insurer would not be able to transfer its liability to pay the loss.

In category (b), where the provider of collateral benefits is not entitled to subrogation either because the benefits were furnished gratuitously or because subrogation is not a right extended to this provider, the equities are closer to the original collateral source context. The Collateral Source Rule permits the plaintiff to be overcompensated for his loss, since he would recover a full tort judgment for all his injuries and could retain the value of the collateral benefits as well. Abolition of the rule would save the liability insurer costs which ought to be passed on in the form of reduced premiums to the wrongdoing defendants as well as to prudent actors carrying liability insurance.¹⁷ The choice between these two consequences is more evenly balanced than the choice in the original collateral source context. Which choice is preferable turns on how far our tort system has moved away from being a fault system designed to punish wrongdoing and has become a compensatory system intended to provide victims with full compensation for their losses.¹⁸ If our main purpose is to guarantee compensa-

15. *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954). While not entitled to subrogation before 1962, the Veterans' Administration had a practice of taking express assignments from veterans admitted to free treatment in a veteran's hospital who may have a cause of action against a tortfeasor. See 38 C.F.R. § 17.48(d)(3) (1983). If the state has a policy permitting assignments of personal tort claims, this may have the same effect as subrogation. Since 1962, federal law has provided a right of subrogation in the United States for the reasonable fee value of any medical care which the United States is required or authorized to provide. 42 U.S.C.A. § 2651 (1973).

16. Whether there is in fact any windfall to the plaintiff's insurer depends on whether premiums charged to plaintiff and like insureds are discounted by the amount of subrogation recovery. If there is no serious benefit or windfall to the first party insurer." See W. Yonino, *DOUBLE RECOVERY CASES*, 80 MICHIGAN L.J. 312-41 (1971) where the editor says:

Insurance subrogation would have more impact than it does if it could be shown that recoveries enter into premium rate calculations in an equitable way. A survey in the early 60's revealed that a number of insurers do not record their subrogation exper-

ence by class of insurance. Rating bureaus, it was found, had no information on the volume of subrogation recoveries.

Professor Patterson wrote: "Subrogation is a windfall to the insurer—it plays no part in rate schedules (or only a minor one), and no reduction is made in insuring interest, such as that of the secured creditor, where the subrogation right will obviously be worth something. Hence, in such a case no reason appears for extending it."

17.

18. The degree to which our tort system has moved from fault-based ends to compensatory ones is evidenced by the adoption of no-fault concepts in automobile injury reparations. See *Kan. Stat. Automobile Injury Reparations Act*, KAN. STAT. ANN. §§ 90-101 to 90-121 (1981). In *Manzanarez v. E. B. 214 Kan. 589, 522 P.2d 1291 (1974)*, where there was a challenge to the constitutionality of this approach, the Kansas Supreme Court quoted with approval several studies of the operation of fault-based tort approaches to compensation and concluded:

tion for tortious injuries, that end is fully accomplished without the Collateral Source Rule.

A large majority of the scholarly writing about the Collateral Source Rule in the last two decades has been critical.¹⁷ The most thorough and scholarly analysis was made by John Fleming,¹⁸ who, after surveying the operation of the rule in England, the Commonwealth countries, and the United States, concluded that the Rule should be abolished. As he states in the conclusion:

In increasing measure, a person who has met with an accident may nowadays look for compensation not only to the law of torts but to other collateral sources. The coexistence of several such regimes of compensation in any individual case calls for important decisions as to their relation one to another. Three solutions are open: first, to let the accident victim cumulate the various benefits; second, to shift the ultimate burden of the accident loss to the tortfeasor, relieving as far as possible other compensation funds; third, to credit the tortfeasor with any benefits received from another source.

The first alternative associated with the "collateral source rule", condones multiple recovery to avoid giving the tortfeasor a "windfall" . . . in contrast to most other countries which are categorically committed to the compensatory and opposed to the punitive theory of tort damages, American courts continue to entertain an ambiguous and uneasy tolerance of double recovery . . .

Turning from double recovery to a consideration of other alternatives, we note that these differ from the former in posing a decision as to which of two sources of compensation to treat as the primary and which as the secondary. In contrast to cumulation of benefits, they force a confrontation with the basic policy orientation whether accident losses generally, or any particular accident loss, should be absorbed by the tortfeasor or by a collateral source, whether in accordance with the regime of tort law or the regime of private or social insurance . . .

[The] primarily moralistic postulates [underlying the collateral source rule] are gradually yielding in their appeal to an economic value system which places in the forefront the high collection costs of shifting the loss from a collateral source to the tortfeasor, the attendant wastefulness of multiple insurance and—most important of all perhaps, an awareness that in these days, when tort liability qualifies as a significant source of compensation only in case of defendants who can pass on the loss through liability insurance or pricing of their goods or services, the question is not so much whether a wrongdoer deserves to be relieved as which of several competing "risk com-

All studies concluded that the risk of tort liability based upon negligence is not a significant factor in inducing vehicle operators to drive more carefully, that the tort system of reparations based on fault is exceedingly expensive and inefficient as a means of compensating automobile crash victims, that compensation distribution to accident victims is under the tort system is inequitable in that it commonly results in overpayment of minor injuries, gross underpayment for those more seriously injured, and long delays in receipt of compensation.

17 See 301

18 See *supra* note 2.

19 Fleming, *supra* note 2.

penalties" should bear the loss²⁰

Once the fault justification for the Collateral Source Rule has been abandoned, the only modern justification advanced for the rule is that it helps prevent undercompensation for the victim.²¹ The plaintiff will usually receive only one-half to two-thirds of the amount awarded by the jury as full compensation.²² The fee for his attorney and other legal costs must be paid out of the proceeds. Since most plaintiffs' attorneys work on a contingency basis and the usual fee for litigating a case averages one-third of the judgment, but may go as high as one-half,²³ the plaintiff's actual recovery will be diminished by that amount. To the extent that collateral benefits received by plaintiff approach one-third to one-half of the verdict, they would seem to compensate plaintiff for his legal costs and thus correct that unfortunate principle adopted in the American common law that each party must bear the full cost of his own legal expenses, however free of fault he is compared to the other.

The operation of the Collateral Source Rule does not improve the position of the plaintiff. First, it should be clear that only those collateral benefits for which there is no right of subrogation could improve the plaintiff's position. All other collateral benefits for which a corresponding sum was included in the general verdict belong to the subrogee, not the plaintiff.²⁴ Beyond this, the Collateral Source Rule actually worsens the position of the plaintiff because the base on which the contingency fee is figured is the verdict and this is larger under the Collateral Source Rule than it would be if the rule were abolished.

This result can be illustrated by considering the fact situation discussed above under the modern context for operation of the Collateral Source Rule.²⁵ There I posited a case where the plaintiff sued to recover damages of \$63,990 for personal injuries and property damage which were caused by the negligence of the gas company. Included in this were items for which plaintiff had received collateral benefits of

20 Fleming, *supra* note 2, at 1534-47.

21 See *Micceri & Meynart, supra* note 2, at 311-12 (1972). See also the often cited passage from *Hudson v. Lazarus*, 217 F.2d 334, at 346 (D.C. Cir. 1953), where the court said:

Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover, the injured person seldom gets the compensation he "receives" for a substantial attorney's fee out of it. There is a limit to what a negligent wrongdoer can fairly, or consistently with the balance of the individual and social interest, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral source.

22

22 While we are required by the legal theory of fact finding to recognize the general verdict of the jury as the authoritative determination of what constitutes full compensation for plaintiff, that amount may be manipulated away from the jury's best estimate of true compensation by their conceivably for what they assume plaintiff will lose from having to pay attorney's fees or recoup from having insurance. See *infra* notes 23 & 24 and accompanying text.

23 E. M. Kintner, *Contingent Fees for Lost Services*, ch. 9 (1964).

24 See *supra* note 14.

25 See *supra* notes 12-14 and accompanying text.

\$17,290. Of this amount, \$16,442 was supplied by a collateral source entitled to subrogation. Now I would like to assume that the jury determines that the full amount prayed for is what plaintiff is entitled to as first compensation and awards judgment for that amount. Secondly, I assume that the plaintiff's attorney has a contingency contract under which he receives as his fee one-third of any recovery. Based on these assumptions, it is possible to compare the operation of the Collateral Source Rule and of its abolition:

	Collateral Source Rule	For Collateral Source Rule	(16,290 less collateral benefits of \$17,290)
Verdict	\$68,790	\$51,760	
Less attorney's fees of 33% of recovery	\$22,996	\$17,233	
	\$45,794	\$34,527	
Less subrogated benefits	\$16,442	642,26	
Plaintiff actually receives	\$29,352	\$33,875	

Abolition of the Collateral Source Rule would permit plaintiff to recover \$4,273 more. At the same time, his attorney would recover \$5,763 less. Thus, the Collateral Source Rule favors not only first party insurers over third party insurers, but plaintiffs' attorneys over plaintiffs.

This is not to suggest that there is anything improper about the contingency fee concept. It has always been a guarantee that those persons unable to hire a lawyer will have the benefit of counsel when pressing civil claims for injury.²⁷ But there is nothing in that salutary option that demands it be measured on anything more than the ~~losses~~ suffered by the plaintiff, that is, the sum which is owed by the defendant after collateral benefits have been credited.

One further point should be made about the operation of the Collateral Source Rule. It is one of a series of legal rules designed to keep the decision of jurors untainted by intrusion of the issue of insurance. Other rules aimed at this result are: (1) that a plaintiff only partly compensated from collateral sources is the real party in interest so that his first party insurer subrogated to a part of that tort recovery need not appear as the plaintiff of record,²⁸ and (2) the introduction of the fact that defendant has liability insurance is as prejudicial to the interests of

the defendant that he would normally be entitled to a new trial.²⁹ Abolition of the Collateral Source Rule would not conflict with this basic policy because no insurer appears as a party to be affected by the jury's verdict, either as claimant or as the party who must ultimately pay the judgment. ~~All the jury will learn is that some insurance money has already been paid.~~ A question ought, however, to be raised about the underlying policy. When these rules were first developed, insurance was not common, so it was safe to assume that the average juror would suspect there were no insurers behind either the plaintiff or the defendant unless insurance were in the open. ~~Only all persons of means carry insurance and are moderately sophisticated about the general facts of insurance.~~ Any automobile driver knows about automobile insurance, which he or she is required to carry. Almost every homeowner carries homeowner's comprehensive insurance. Most adults are covered by some form of medical and health insurance. ~~Juries may well speculate about the availability of insurance and such speculation could influence their decision one way or another. The completely insured person may be damaged by the operation of rules designed to protect an insured person and insurers as a class, because the jury might assume the presence of typical insurance protections when they do not in fact exist.~~ The abolition of the Collateral Source Rule which would permit evidence to be admitted on actual insurance protection owned by plaintiff lets the jury have reliable evidence on matters where otherwise they are likely to be speculating and doing so inaccurately.

III. THE AMERICAN MEDICAL ASSOCIATION AND THE COLLATERAL SOURCE RULE

Rarely does scholarly analysis about a legal problem and the need for reform lead directly to change. Some politically active group who stands to gain by the reform has the responsibility of turning a dispassionate analysis into a new and effective legislative program. That impetus came from the perceived crisis in medical costs when medical malpractice litigation mushroomed in the past two decades. Defendant doctors and, behind them, their liability insurers were particularly outraged when asked to pay in malpractice judgments not only very large sums for pain and suffering and for economic losses, but also to pay for the doctor's own services, corrective services and additional health care for which the patient had been fully compensated by health insurance programs of one sort or another.

In the 1970's the American Medical Association organized a nationwide campaign to achieve major reforms in the tort system which

26. This assumes that the abolition of the Collateral Source Rule carries with it explicitly or by implication the denial of the right of subrogation to the suppliers of the collateral benefits as far as it is in the power of the state legislature to do so. See *supra* note 20. The subrogation right of the United States for the medical services furnished by the veteran's hospital under 42 U.S.C. A. § 2651 would still exist.

27. For a historical discussion of the contingent fee arrangement and a defense of its utility in protecting the poor who are injured, see J. Aronson, *Contingent Fees* 143-50 (1966).

28. *Dener v. Reinhart*, 195 Kan. 232, 401 P.2d 174; *Times v. Ryan*, 272 P.2d 596 (1954). Some courts have decided that real party in interest statutes, such as *Public Health Code*, require that a subrogated insurer be named as a party plaintiff even if it has paid only a part of the plaintiff insured's claim. See *Public Serv. Comm'n. of Oklahoma v. Black & Veatch*, 667 P.2d 1143 (10th Cir. 1972).

29. See case cited *supra* note 9.

they hoped would limit the explosion in malpractice judgments and the cost of malpractice insurance. Among the reforms were the introduction of ~~separating panels to weed out unmeritorious claims~~,³⁰ the provision for ~~arbitration agreements to be executed between patients and health care providers~~,³¹ the grant of power to courts to review attorneys' fees ~~to ensure that they were reasonable~~,³² the ~~abolition of the Collateral Source Rule and the fixing of a maximum dollar limit on recovery in malpractice actions~~.³³ Having achieved limited success in persuading state legislatures to adopt these reforms, the American Medical Association has turned its attention³⁴ to supporting a no-fault compensation scheme for malpractice in the federal Congress.³⁵

The reform in the ~~Collateral Source Rule is the least radical change in the existing tort system and thus was the most widely adopted~~.³⁶ ~~These statutes are in no sense uniform although they all contain two common elements: (1) they apply only to medical malpractice actions, and (2) they permit the defendant health care provider(s) to introduce evidence of some collateral benefits received by the plaintiff. One of the most liberal and complete is the Arizona statute, which provides:~~

A. In any medical malpractice action against a licensed health care provider, the defendant may introduce evidence of any amount or other benefit which is or will be payable as a benefit to the plaintiff as a result of the injury or death pursuant to the ~~United States Social Security Act, any state or federal workmen's compensation act, any disability, health, sickness, life, income disability or accident insurance that provides health benefits or income disability coverage and any other contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of income disability or medical, hospital, dental or other health care services to establish that any cost, expense, or loss claimed by the plaintiff as a result of injury or death is subject to reimbursement or indemnification from such collateral source(s).~~ Where the defendant ~~elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any such benefits or that recovery from the defend-~~

30. E.g., ARIZ. REV. STAT. § 12-567 (1982); KAN. STAT. ANN. §§ 65-901 to -908 (1980).
 31. E.g., ILL. AGEN. STAT. §§ 110-201-204 (Smith-Hurd 1983).
 32. E.g., ARIZ. REV. STAT. § 21-568 (1975); TENN. CODE ANN. § 29-26-120 (1981); WASH. REV. CODE ANN. § 7-70-070 (1975-76).
 33. E.g., CAL. CIV. CODE § 3333.2 (1976) (limits recovery for noneconomic losses to \$250,000); CALIF. REV. CODE ANN. § 401.3 (Supp. 1971) (limits recovery for general damages to \$250,000); N.D. CENT. CODE § 26-1-11-11 (Supp. 1983) (limits recovery to amounts provided by malpractice insurance fund and the maximum recovery is \$500,000 for each claim and one million dollars for each policy period); S.D. CONSTIT. LAWS ANN. § 21-3-11 (1978) (total general damages limited to \$500,000, but there is no limit on amounts of special damages which are recoverable).
 34. See Statement of the American Medical Association presented by President James S. T. III, M.D., to the Subcommittee on Health of the Ways and Means Committee of the United States House of Representatives, June 26, 1984.
 35. See H. B. 5409, introduced in the 98th Cong., 2 Sess. (1984).
 36. See statutes listed *supra* note 4.

ant is subject to a lien or that a provider of such collateral benefits has a statutory right of recovery against the plaintiff as reimbursement for such benefits or that the provider of such benefits has a right of subrogation to the rights of the plaintiff in the medical malpractice action.

B. Evidence introduced pursuant to this section shall be admissible for the purpose of considering the damages claimed by the plaintiff and shall be accorded such weight as the trier of the facts chooses to give it.

C. Unless otherwise expressly permitted to do so by statute, no provider of collateral benefits, as described in subsection A, shall recover any amount against the plaintiff as reimbursement for such benefits, nor shall such provider be subrogated to the rights of the plaintiff.

The major issues on which the various statutes differ is: (1) whether it lies in the discretion of the jury to make the deduction, or whether the court must make the deduction as a matter of law;³⁷ (2) whether the statute specifically denies the right of subrogation to the provider(s) of collateral benefits,³⁸ or whether this is left to implication,³⁹ and (3) whether the evidence which may be introduced covers all benefits received by the plaintiff,⁴⁰ whether such benefits as life and accident insurance are excluded from admissibility,⁴¹ or whether benefits purchased by the plaintiff or his employer are excluded from admissibility.⁴²

These medical malpractice statutes abolishing the Collateral Source Rule have been subjected to vigorous constitutional attack.⁴³ The grounds argued to establish unconstitutionality are varied. It has been contended that the limited abolition of the Collateral Source Rule violates the requirements of due process and equal protection under the

37. ARIZ. REV. STAT. ANN. § 12-565 (1982).
 38. E.g., ARIZ. REV. STAT. ANN. § 12-565(B) (1982); WASH. REV. CODE ANN. § 7-70-070 (1975-76).
 39. E.g., FLA. STAT. ANN. § 768.50; N.Y. CIV. PRAC. LAW § 4010 (McKinney 1975 & Supp. 1981).
 40. E.g., ARIZ. REV. STAT. ANN. § 12-565(C) (1982); CAL. CIV. CODE § 3333.1(b) (1976).
 41. The abolition of the Collateral Source Rule would result in an *implied* loss by the right of subrogation in the collateral source provider. Otherwise, the plaintiff would receive less than full compensation because there would be a double deduction from his total damages, or else the impact of abolishing the Collateral Source Rule is evaded because the provider in a separate subrogation action would recover from the defendant tortfeasor the amount that was deducted from plaintiff's judgment upon introducing the evidence of the collateral benefit. The courts could avoid this implication only by holding that the evidence of collateral benefits is admissible only if the provider has no right of subrogation. This would mean the abolition would apply only to the category of damages in class (b), but not to class (c) where the equities more strongly justify abolition. See discussion *supra* notes 15-18 and accompanying text.
 42. E.g., ILL. CODE ANN. tit. 18, § 6862 (1974); IOWA CODE § 29-4-210 (1969).
 43. E.g., FLA. STAT. ANN. § 768.50, 2(d)(2) (Supp. 1981); N.Y. CIV. PRAC. LAW § 4010 (McKinney 1975 & Supp. 1981).
 44. S.D. CONSTIT. LAWS ANN. § 21-3-12 (1978); TENN. CODE ANN. § 29-26-119 (1981); WASH. REV. CODE ANN. § 7-70-070 (1975-76).
 45. An extended discussion of the constitutional issues may be found in Note, *Collateral Source Compensation Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 824 (1979).

federal Constitution⁴⁶. It has also been argued that state constitutional guarantees of equal protection of the process are violated by such statutes.⁴⁷ In addition, challengers have relied on special provisions of state constitutions, such as a prohibition against special legislation,⁴⁸ a prohibition against limiting damages⁴⁹ or a provision guaranteeing open courts and remedies for all wrongs.⁵⁰

The highest courts of two states, New Hampshire⁵¹ and North Dakota,⁵² have held unconstitutional that part of their medical malpractice act which abolished the Collateral Source Rule. In doing so, each court relied primarily on state constitutional provisions and their local views of appropriate constitutional principles. Both courts used a stricter rule of legislative scrutiny—the so-called “substantial relationship” test, requiring a close correspondence between the stated legislative ends and the classifications and means selected by the legislature to achieve those goals. Applying this stricter standard, the Supreme Court of North Dakota was persuaded that the crisis in medical malpractice was not great and this reform was not essential. The Supreme Court of New Hampshire felt that the means selected by the legislature were not the most effective or were not constitutionally permissible ways to achieve the goals.⁵³

46. See *Eaton v. Bromfield*, 116 Am. St. Rep. 237 (1977); *Phillips v. Cedar of Lebanon Hosp. Corp.*, 403 So. 2d 365 (La. 1981); *Caron v. Blanton*, 120 N.H. 925, 421 A.2d 871 (1980); *Atkinson v. Oliver*, 230 N.W.2d 125 (N.D. 1975).

47. See *Phillips v. Cedar of Lebanon Hosp. Corp.*, 403 So. 2d 365 (La. 1981); *Caron v. Blanton*, 120 N.H. 925, 421 A.2d 871 (1980); *Atkinson v. Oliver*, 230 N.W.2d 125 (N.D. 1975).

48. See *Eaton v. Bromfield*, 116 Am. St. Rep. 237 (1977); *Atkinson v. Oliver*, 230 N.W.2d 125 (N.D. 1975).

49. See *Eaton v. Bromfield*, 116 Am. St. Rep. 237 (1977).

50. See *Prendergast v. Nelson*, 199 Pa. 92, 26 N.W.2d 657 (1957).

51. *Caron v. Blanton*, 120 N.H. 925, 421 A.2d 871 (1980).

52. *Atkinson v. Oliver*, 230 N.W.2d 125 (N.D. 1975).

53. The Kansas statute was declared unconstitutional by a federal district court in *Doran v. Phillips*, 534 F. Supp. 30 (D. Kan. 1981), on both federal and state constitutional grounds. The judge found that the distinctions between plaintiff's collateral benefits which were admissible and collateral benefits paid for by the plaintiff or his employer which were inadmissible created a discriminatory classification. He also found that abolishing the Collateral Source Rule for any class of tort defendants, i.e. health providers, was an unfair classification. He felt that these distinctions violated the right to equal protection under the fourteenth amendment to the United States Constitution and also violated sections 1 and 2 of the Bill of Rights of the Kansas Constitution, which are the state equal protection provisions. The court also found the statute violated Article 2, section 17 of the Kansas Constitution in that it was not a law of general nature but in a uniform operation across the state. Whether the constitutional analysis is correct and it would be upheld by higher federal courts and by the Kansas court is open to serious doubt. The constitutional analysis made by Judge Rogers in the case of *Human v. The Messenger Found.*, 79-40-96, D. Kan. 1982 seems sounder and a better prediction of the judgment that higher federal courts and the Kansas Supreme Court would come to than the decision in *Doran v. Phillips*. Judge Rogers also noted that the validity of *Eaton v. Oliver* is open to question under equal protection analysis, turning on which test is used, the “rational basis” test or a stricter “substantial relationship” test. Three decisions which have held such statutes unconstitutional are *Wong v. City of Pittsburg*, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 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new the legislative discretion should be exercised. The reasons for modifying or abolishing the Collateral Source Rule apply to all tort actions, not just to medical malpractice. Similar crises or potential crises exist in other parts of our torts-compensation system. The cost and administrative delays in automobile compensation led to a variety of attempts to control costs, the most prominent of which has been no-fault legislation. ~~The cost of products liability litigation and compensation is another tort area approaching crisis dimensions.~~ As Jeffrey O'Connell, one of the leading proponents of no-fault approaches to tort liability, has written:

The main intellectual, rather than political, challenge currently posed by no-fault insurance is the application of the no-fault principle to accidents other than those involving autos, principally to claims arising from medical mis-treatment and malfunctioning products. Indeed, the success of no-fault auto insurance has meant that medical malpractice and product liability claims comprise a much greater portion of personal injury claims generally than before the advent of such no-fault laws.

Furthermore, the undesirable characteristics of the present tort liability system are even more evident in medical malpractice and products liability claims than in claims arising out of auto accidents. In medical malpractice and products liability suits, many more victims are left uncompensated. Payment, even when made, is much more delayed. Finally, much more of the premium dollar is spent on legal fees.⁵⁷

If automobile accidents, medical malpractice and injuries from defective products all represent areas of serious cost and administrative problems for our tort system, can there be any justification for abolishing the Collateral Source Rule in one case, but not in the others? And if we decide that these three problem areas require similar treatment by abolishing the Collateral Source Rule, is this not one of those cases where the exceptions would swallow up the rule, because the overwhelming bulk of tort litigation occurs in one of these three areas? Deciding that there ought to be uniform treatment, however, does not determine which way to generalize—whether to retain the rule or to abolish it.

The reasons behind the Collateral Source Rule no longer exist. The widespread and increasing use of liability insurance has virtually eliminated the fault aspects and deterrent operation of the law of tort. Anyone with sufficient assets to pay a tort judgment will almost invariably carry liability insurance. If there is no liability insurer, there is in all probability a judgment-proof tortfeasor. The penalties exacted by the Collateral Source Rule are thus hardly ever paid by wrongdoing

⁵⁷ O'Connell, *Options That Can't Be Retained: A Critique of Personal Injury Claims by Defendants' Prompt Payers of Claimants' Necessitous Losses*, 11 NW U.L. REV. 589, 595-96 (1981).

tortfeasors, but rather by the entire class of insureds under liability policies. Thus, liability insurance becomes a compensatory scheme for accident victims, no different in quality from other compensation schemes, such as health insurance, accident insurance, disability insurance, wage continuation plans, etc. Once the fault orientation to tort liability has been abandoned, the purpose of the tort system is to ensure that accident victims are fully compensated. That end is adequately and fully achieved if the liability insurer behind the defendant is required to pay only the true loss of the plaintiff, which is that amount not covered by the variety of collateral support plans now available to plaintiffs who have been injured.

~~No ultimate issue is which system of compensation is primary; liability insurance, or the sources of collateral benefits?~~ To the extent that these collateral benefits have not been provided gratuitously by friends and relatives, they have already been funded, either by tax money, by private insurance premiums or as fringe benefits in exchange for the employee's services. Their coverage is almost always broader than just for those accidental injuries where causal fault of a third party can be proved. The allocated cost of these benefits is usually figured free of the ability of the provider to transfer a portion of those costs to a defendant and his insurance carrier through subrogation or assignment. To the extent that there would be a savings occurring from subrogating first party providers of collateral benefits to the third party liability insurer, this savings is often wiped out by the costs of obtaining such transfers. If subrogation or transfer costs exceed recoupment from subrogation, there is an added burden on the total injury compensation system.

V. SPECIAL PROBLEMS IN THE DRAFTING OF A REFORM STATUTE

The conclusion that the Collateral Source Rule should be abolished leaves several subsidiary problems unsolved: (a) ~~Should the statute be evidentiary only,~~ so that the deduction of collateral benefits is ~~left to the discretion of the jury or should the judge be required to deduct the collateral receipts as a matter of law?~~ (b) ~~Should the reform apply to all collateral benefits, or only to some?~~ (c) ~~Should the plaintiff recover in the tort action the premiums and other consideration paid to the provider for the collateral benefits?~~ (d) ~~Should the providers' right of subrogation be abolished as well?~~ The medical malpractice statutes which have abolished the Collateral Source Rule⁵⁸ often do not cover one or more of these problems and, to the extent they do, the problems are resolved in very diverse ways.

⁵⁸ See *supra* note 4.

A. Issue of Fact for the Jury or Matter of Law for the Judge

Whether the judge or the jury should have the power to decide on the impact of collateral benefits is not an issue where there is a clear answer, but ~~there are reasons for leaving the matter to the discretion of the jury. First, there may be fact disputes to be resolved, such as whether the plaintiff actually received the benefits, and what they were worth in dollars.~~ Gratuitously rendered benefits, particularly the delivery of services or goods, often pose such issues. In order to leave the ultimate decision to the judge, it would be possible to set up a two tier procedure, whereby the jury in a special verdict would make the necessary fact determinations, quantifying the benefit, and then the judge would deduct the liquidated amount from the general verdict.⁶⁰ This procedure would not be frequently used because unliquidated and gratuitous goods or services are not the most common or important collateral benefits today. Insurance payments, such as property damage settlements, health insurance refunds, or disability payments under private or governmental plans, as well as salary paid under wage continuation plans, are easy to prove and are liquidated.

A more general reason for leaving the deduction to the discretion of the jury arises from the very nature of the general verdict. In arriving at a single final sum as the full compensation for plaintiff's losses, the jury probably balances a number of factors, such as the strength of the liability issue as against the seriousness of the injury, the nature and persuasiveness of the proof on the various items of damage, and the relative fault of the plaintiff as compared with the fault of the defendant. Letting the jury know of and be able to balance the amount of collateral benefits received only adds another factor to be used in arriving at a single just award. Not permitting the jury to know about or to balance these items, but instead requiring the judge to deduct it after the verdict is awarded, gives the element of collateral benefits much greater weight than the other factors because it has been removed from the scales.

Furthermore, the solution to this issue should be related to the answer to the next problem, the types of collateral sources which may reduce the defendant's liability. If the judge is required to deduct them as a matter of law, the collateral benefits should be only those which are clearly liquidated. If the question is one for the jury, a broader range of benefits, including gratuities, could be admissible.

Of those legislatures abolishing the Collateral Source Rule in medical malpractice actions, nine of them chose to leave the issue to the

⁶⁰ Illinois seems the closest to having adopted such a procedure. See Ill. Ann. Stat. § 110-2.12(b) (Smith-Hurd 1983).

discretion of the jury,⁶¹ and five made it a matter of law for the judge.⁶² In addition, New York originally left the matter to the jury, but in 1981 amended its statute to make the issue one of law for the judge.⁶³

B. Types of Collateral Benefits Which Should be Admissible

This is the problem on which the medical malpractice statutes show the greatest divergence. The broadest classification is to cover all collateral benefits of every type and from every source.⁶⁴ Another approach is to list quite specifically the collateral benefits for which evidence would be admissible.⁶⁵ A good example appears in the Arizona statute quoted above. A third approach is to specify that all collateral benefits are admissible with specific named exceptions—the most common exceptions are death benefits under life insurance policies and insurance purchased with assets of the claimant or members of the claimant's immediate family or paid for by claimant's employer.⁶⁶ Another common provision is to limit the collateral benefits to those which are clearly liquidated special damages, particularly payments or reimbursements for medical care, rehabilitative care, and custodial care, as well as for lost earnings.⁶⁷

This welter of approaches to identifying collateral benefits admissible under a statute abolishing the common law Collateral Source Rule raises two important problems: first, whether unliquidated gratuitous assistance given a claimant by friends or relatives should be a collateral benefit reducing a tort judgment, and, secondly, whether life insurance and nonmedical accident insurance should be excluded from admissibility.

There are policy and administrative grounds why the gratuitous unliquidated services should not be used to reduce a tortfeasor's judgment. The administrative reason is the difficulty in proving the receipt, the extent and the value of such services. The policy reason is that we want to reinforce a dwindling tradition in our society, the willingness of family and friends to help someone in need. If the amount of the help could be used to diminish the recovery of the victim in his legal action,

⁶⁰ See the statutes of Arizona, California, Delaware, Kansas, New Hampshire, Rhode Island, South Dakota, Tennessee, and Washington cited *supra* note 4.

⁶¹ See the statutes of Alaska, Florida, Illinois, Nevada and North Dakota cited *supra* note 4.

⁶² N.Y. Civ. Prac. Law § 4010, first adopted in 1975, then amended in 1981.

⁶³ See *Levano* Com. § 90-4210 (1977).

⁶⁴ See the statutes from Arizona, California and Rhode Island cited *supra* note 4.

⁶⁵ See the statutes from Alaska, Florida and New York cited *supra* note 4.

⁶⁶ See the statutes from Iowa, Kansas, Ohio, South Dakota, Tennessee, and Washington cited *supra* note 4.

⁶⁷ See the statutes from Illinois, New Hampshire, New York, Ohio and South Dakota cited *supra* note 4.

this will certainly have a chilling effect on the willingness of such people to make contributions.

Life insurance and accident insurance, except for medical payments, pose much the same issue. A potential victim may in planning for himself or beneficiaries in the event of a serious accident or death choose to provide for certain intangible losses not contemplated by any compensatory scheme. If a planner decides he wants to leave his beneficiaries in a better economic position than would be provided by a wrongful death action, should he not have the freedom to purchase such further protection through private insurance? If he wishes himself to be cared for in the event of a disabling accident more generously than either a tort judgment or other compensatory schemes are likely to provide, should he not also have the power to purchase additional accident insurance? If the purchased protection would be used to reduce the judgment he would receive from a wrongdoer, that would be a disincentive to the exercise of this freedom or power.

The analysis of these two problems suggests that the admissible collateral benefits should be those covering the items of special damage in tort, the medical expenses and loss of earnings. If the impact of the Collateral Source Rule or its abolition is primarily to select which of several compensatory schemes would have primary responsibility for indemnifying the victim, the compensatory schemes which are in competition with the tort system are directed to cover clear economic loss of the victim. The three main types are medical insurance, (either governmental or private), wage continuance plans and private or governmental disability payments. If admissibility is limited to these types, not many collateral benefits of real value will be left out.

C. Credit for Premiums Paid

One argument made against abolishing the Collateral Source Rule was that it would discourage victims from purchasing insurance protection.⁶⁵ This led some Medical Malpractice Acts to exclude all benefits from insurance purchased by the claimant or by his employer.⁶⁶ There would still be strong incentives to continue to purchase insurance because the potential victim never knows whether the loss can be transferred to a wrongdoer. Genuine accidents do occur. To go to the other extreme and permit all collateral benefits to be introduced in diminution of the tort liability of a tortfeasor would work an unfairness. It would give the defendant a windfall, the benefit of the victim's foresight in providing insurance protection without the wrongdoer having to pay for that insurance. A widely-adopted compromise is to

65. We quote from Chief Justice Sandberg, *supra* note 56 and accompanying text.

66. See the statutes from Kansas, Tennessee and Washington, cited *supra* note 4.

provide that if the defendant elects to introduce evidence of collateral benefits, the plaintiff is entitled to introduce evidence of the cost of those benefits.⁷⁰ The clear import of this is that the jury should diminish the plaintiff's award by the difference between the two. This difference represents the real economic gain which the plaintiff has received from the alternative compensatory schemes and is all the credit the defendant is entitled to.

D. Abolishing the Provider's Right of Subrogation

The Collateral Source Rule and the right of subrogation are closely linked. One cannot be altered without requiring changes in the other. This has been recognized by those Medical Malpractice Acts which define the admissible collateral benefits as those for which the provider does not have a right of subrogation.⁷¹ This lets the law of subrogation control the content of the Collateral Source Rule. This is not necessary because state legislatures have the power to abolish the right of subrogation in providers' of collateral benefits except where those benefits are provided by federal governmental programs and federal legislation gives to the provider the right of subrogation.⁷²

The state cannot effect the reforms called for by abolishing the Collateral Source Rule, if it leaves the right of subrogation in place. Some of the Medical Malpractice Acts have specifically abolished the right of subrogation in the providers.⁷³ A powerful argument can be made that unless the admissible collateral benefits are defined in such a way as to retain the rights of subrogation in those providers who have them, a statute revoking the Collateral Source Rule carries with it by implication the abolition of the right of subrogation in the provider.⁷⁴ This matter is too important to be left to implication or construction by the courts. The statute should forthrightly address the question and if the decision is made to abolish the Collateral Source Rule, the statute should clearly abolish the right of subrogation as widely as it is in the power of the state to do so. The analysis of this article would call strongly for Congress to abolish the right of subrogation in favor of federal programs of accident or injury compensation.

70. See the statutes from Arizona, California, Florida, Kansas and New Hampshire cited *supra* note 4. The statute in New York limits the credit to two years premiums and that of North Dakota to five years premiums.

71. See the statute from South Dakota cited *supra* note 4. The Alaska statute excludes from the definition of benefits those payments from federal programs which "by law must seek subrogation."

72. An example is 42 U.S.C.A. § 2651 (1973), creating in the United States the right of subrogation against any third person having a tort liability for the reasonable value of the medical care and treatment furnished any victim where the United States is authorized or required by law to furnish such treatment.

73. See the statutes from Arizona, California, Florida and Ohio, cited *supra* note 4.

74. See discussion *supra* note 10.

VI. CONCLUSION

The Collateral Source Rule is an anachronism based on 19th century fault concepts. This rule has survived into a 20th century legal system where the primary goal is to guarantee that accident victims will be adequately compensated for their losses. The rule was an acceptable anachronism until the rapidly inflating costs of automobile accidents, malpractice actions and products liability claims led to closer scrutiny of our torts system in order to find ways to administer it more efficiently. The Collateral Source Rule creates substantial transfer costs in shifting the duty to pay from one compensatory scheme to another without any corresponding benefit to the victim. If anything, it costs victims something in larger legal fees and costs. The reform which decreases cost with the least harm to our current tort system is to abolish this anachronism.

A carefully drawn statute negating the operation of the Collateral Source Rule in all tort actions should be adopted. Such a statute should leave the question of how much to deduct to the discretion of the jury, should limit the admissibility of collateral benefits to those which are clearly liquidated and cover the items of special damage in torts, should insist that the plaintiff receive credit for all premiums or other consideration paid to the providers of the collateral benefits, and should abolish the right of subrogation in the providers of such collateral benefits to the fullest extent possible.¹

Thirty Years After *Brown*: Looking Ahead

David Hall*
and George Henderson**

I. INTRODUCTION

*Brown v. Topeka Board of Education*¹ is one of the most famous cases in American judicial history. Its landmark status is beyond dispute and its social significance is overwhelming. Some scholars note that in spite of criticism, *Brown* has been accepted in the political processes at large as a fundamental aspect of constitutional law.² Most legal scholars consider *Brown* a landmark decision because it sounded the end of legal racial segregation within the United States of America. Indeed, *Brown* has been hailed as the positive turning point in Black-White attitudes within the country and the defeat of institutional racist policies. From this perspective, *Brown* is a "bright day" in American racial jurisprudence and is often cited as an example of the integrity of the American legal system.

Unfortunately, many of the attributes and accolades accorded *Brown* are misplaced. This article will attempt to show that the real contributions to American jurisprudence made by *Brown* are seldom recognized. While a significant factor in public school education, *Brown* did not bring about the equity sought by the plaintiffs and the class of people whom they represented. Furthermore, it is our contention that *Brown* was incorrectly decided and, consequently, created an educational nightmare from which this country has not totally awakened.

It is very difficult to adequately and accurately judge a significant human event such as *Brown* at the time it occurs. Often, immediate circumstances and needs shape and color society's vision of the event. Therefore, time becomes a necessary condition for an objective and realistic analysis. A historical evaluation of an event frequently proves to be the best judgment of its worth. Ergo the saying emerged: Hindsight is better than foresight.

Because of its great significance to Black Americans, it has been heresy for lawyers and scholars to place the *Brown* mandate in anything other than a sacrosanct category. The authors of this article are among those who have generally questioned the *Brown* mandate and its

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¹ 347 U.S. 483 (1954).

² E. Fourn, *American Constitutional Law* 52 (1978).

A RAND NOTE

COURT-ANNEXED ARBITRATION:
THE NATIONAL PICTURE

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LAW

PREFACE

This Note reports the results of a national survey to determine how many state and federal court jurisdictions have authorized court-annexed arbitration for civil cases in their general jurisdiction trial courts. For those jurisdictions that have adopted mandatory arbitration, we present an outline of their program's features. In the jurisdictions where no program yet exists but alternative dispute resolution programs are being considered, we identify the options officials are exploring.

This research was supported by the National Institute for Dispute Resolution.

Other Institute for Civil Justice publications related to the current effort include:

Introducing Court-Annexed Arbitration. A Policymaker's Guide.
E. Rolph, R-3167-ICJ, 1984.

Simple Justice. How Litigants Fare in the Pittsburgh Court Arbitration Program. J. W. Adler, D. R. Hensler, and C. E. Nelson, R-3071-ICJ, 1983.

Judicial Arbitration in California. The First Year. D. R. Hensler, A. J. Lipson, and E. S. Rolph, R-2733-ICJ, 1981.

Court Efforts To Reduce Pretrial Delay. A National Inventory.
P. A. Ebener with the assistance of J. Wilson-Adler, M. Selvin, and M. S. Yesley, R-2732-ICJ, 1981.

SUMMARY

This Note reports the findings of a national survey to determine the current status of court-annexed arbitration among state and federal trial courts. It provides an update of a similar Institute for Civil Justice survey conducted in 1980. At that time we found ten states and three federal courts had authorized court-annexed arbitration. Since then the number of jurisdictions around the country where court-annexed arbitration is authorized has doubled. Currently sixteen states have authorized arbitration programs and all but two of those have active programs underway in one or more major courts. On the federal side recent funding has resulted in an expansion of court-annexed arbitration to eight additional districts bringing to ten the number of active programs in the federal district courts.

Program features show considerable variation. For example, while most programs provide some upper limit on the value of cases eligible for the program, the range is from a low of \$3,000 in Alaska (where for this reason the program has not been implemented) to \$150,000 in a number of the federal district courts. Other design features such as the disincentive to appeal arbitrator awards, the number of arbitrators and their rate of compensation also vary from jurisdiction to jurisdiction.

We also found that eight states are considering court-annexed arbitration programs as part of ongoing investigations of alternative dispute resolution options. Some states plan to propose legislation in 1985, while others are conducting much broader inquiries that may not result in actual program proposals in the near future. In other jurisdictions where arbitration is voluntary or little used efforts are underway to expand its scope. Recent interest in arbitration has rekindled among the federal courts where nearly twenty percent of the districts applied for funds to introduce new court-annexed arbitration programs. While the federal funding currently can support only ten programs further expansion may occur over the next few years.

Finally, court officials in 26 states reported that the current demand on judicial resources did not warrant the use of alternative dispute resolution programs. About half of this group felt that arbitration might be attractive in the future, while the balance indicated that adding more judges would be a more likely option for their courts if civil delay became a pressing concern.

ACKNOWLEDGMENTS

We would like to thank the many court officials and representatives of bar associations, special government task forces, study groups, and other organizations who contributed so generously of their time and expertise during our telephone interviews. We would also like to express our appreciation to the National Institute for Dispute Resolution which provided the funding for this research. In addition we are grateful to Deborah Hensler for reviewing the manuscript and to Stephen Carroll and Elizabeth Rolph for their helpful suggestions that assisted in guiding the research.

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INTRODUCTION

During the past few years, courts, bar associations, and legislatures around the country have been examining problems of excessive delay and costs of civil litigation in state and federal trial courts. Much attention has been paid to alternative dispute resolution, especially, court-annexed arbitration, as a tool for diverting substantial portions of civil court caseloads to a less expensive, more efficient forum for disposition. Chief Justice Burger has endorsed court-annexed arbitration and called for extending its use around the country.¹ Although it was not declared a panacea for problems of court delay and congestion, the American Bar Association concluded in a 1984 report on arbitration that "court-annexed arbitration programs have met with a great deal of acceptance and support from the courts, attorneys, and the actual parties assigned to arbitration.... Most studies of the arbitration programs have also found widespread satisfaction from all of those involved in the programs."² In addition, the U.S. Senate directed attention to court-annexed arbitration by including a session on arbitration in a recent series of hearings on court delay convened by the Judiciary Committee Subcommittee on the Courts.

But what has been the effect around the country of the largely positive evaluation of arbitration at the national level? In 1980 the ICJ conducted a survey to determine how many states had authorized court-annexed arbitration for civil cases in the general jurisdiction trial courts, but since that time no systematic update had been done.³ To obtain a more current picture, we conducted a similar survey of the status of court-annexed arbitration as of November 1984. This Note describes our results.

¹Warren E. Burger. *1983 Year-end Report on the Judiciary*, January 1984, p. 16.

²*Report on Court-Annexed Arbitration*, American Bar Association, Litigation Section, Committee on Arbitration, Committee on Federal Procedure, Committee on Litigation Management and Economics, Committee on Corporate Counsel, Committee on Liaison with the Judiciary, 1984, p. 3.

³P. A. Eberhart, with the assistance of J. Wilson-Adler, M. Selvin, and M. S. Yesley, *Court Efforts to Reduce Pretrial Delay. A National Inventory*, The Rand Corporation, R-2732-ICJ, July 1981.

We telephoned officials in state court administration in every state where arbitration had not been authorized as of 1980. In several states we also talked with bar association officials. We determined the current status of court-annexed arbitration in the federal district courts but did not conduct interviews in each district. We not only catalogued the jurisdictions where arbitration has been authorized but also inquired about current proposals and investigations that could result in future adoption of a court-annexed arbitration program.

Other ICJ work has evaluated individual arbitration programs,⁴ and a recently published handbook provides a guide for policymakers in designing arbitration programs.⁵ These topics are beyond the scope of this survey, whose resources limited us to an investigation of court-annexed arbitration at the state and federal district court level. We did not systematically interview local court officials and have only limited information about the extent to which arbitration has been implemented in local courts within the states and federal jurisdictions where it is currently authorized. Some individual trial courts may have adopted their own arbitration programs, but we have included information about local court programs only to the extent that we learned of them from state level interviews.

Table 1 summarizes the survey results. As of January, 1985, 16 states and 11 federal district courts had authorized court-annexed arbitration. The number of jurisdictions has increased by 60 percent at the state court level and almost tripled at the federal level since our 1980 survey, when ten states and three federal courts had authorized arbitration. In January 1985 eight new programs were approved for the federal district courts. Among the state courts, three new programs were added in 1983 and three more in 1984. Although the Connecticut

⁴J. W. Adler, D. R. Hensler, C. E. Nelson with the assistance of G. J. Rest, *Simple Justice. How Litigants Fare in the Pittsburgh Court Arbitration Program*, The Rand Corporation, R-3071-ICJ, 1983; and D. R. Hensler, A. J. Lipson, and E. S. Rolph, *Judicial Arbitration in California. The First Year*, The Rand Corporation, R-2733-ICJ, April 1981.

⁵E. Rolph, *Introducing Court-Annexed Arbitration: A Policymaker's Guide*, The Rand Corporation, R-3167-ICJ, January 1984.

Table 1

COURT-ANNEXED ARBITRATION:
THE NATIONAL PICTURE AS OF JANUARY 1985

AUTHORIZED PROGRAMS:

State Courts

Alaska
Arizona
California
Connecticut
Delaware
Michigan
Minnesota
Nevada
New Hampshire
New Jersey
New Mexico
New York
Ohio
Oregon
Pennsylvania
Washington

Federal Courts

California--Northern District
Connecticut
Florida--Middle District
Michigan--Western District
Missouri--Western District
New Jersey
North Carolina--Middle District
Oklahoma--Western District
Pennsylvania--Eastern District
Texas--Southern District
--Western District

INVESTIGATION OF PROGRAMS UNDER WAY:

State Courts

Florida
Georgia
Hawaii
Illinois
Maryland

Federal Courts**

North Carolina
Texas
Wisconsin
District of Columbia

NO CURRENT AUTHORIZATION OR INVESTIGATION:

State Courts

Alabama
Arkansas
Colorado
Idaho
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Massachusetts
Mississippi
Missouri
Montana
Nebraska
North Dakota
Oklahoma
Rhode Island
South Carolina
South Dakota
Tennessee
Utah
Vermont
Virginia
West Virginia
Wyoming

**We did not individually contact each federal court district. The large number of districts that applied for the funds made available to add eight new program in 1985 suggest that further expansion would occur if additional appropriations are made.

federal program is the only one that has been repealed, implementation never took place in Alaska and in Nevada the program has never been actively implemented. Table 2 and accompanying text briefly describe the extent of implementation within the jurisdictions where programs have been authorized. Eight states and the District of Columbia are considering arbitration either singly or as part of a broad investigation of alternative dispute resolution. The federal district court for Northern Illinois recently rejected an arbitration program proposal, while at least 17 federal districts applied for funds to begin new programs in 1985. Current investigations range from recently formed study committees still formulating agendas to final reports and draft proposals under review by the final decisionmaking organization. In the 26 states that have no program in place and none formally under consideration, our survey respondents generally felt that their courts were not severely delayed or in need of alternative means of case disposition.

COURT-ANNEXED ARBITRATION--PATTERN OF ADOPTION NATIONWIDE

Sixteen states and 11 of the 94 federal district courts have authorized compulsory court-annexed arbitration for civil damages cases. These programs all provide for involuntary assignment of cases within specific eligibility criteria to a hearing by arbitrators. Although assignment to arbitration is not voluntary, the arbitrators' award is nonbinding; any party may appeal and request a trial *de novo*. These programs must be distinguished from traditional labor and contract dispute arbitration, which is usually private, voluntary, and binding upon the parties.

Table 2 shows the date each jurisdiction first authorized its program and the scope of implementation within each jurisdiction as of November 1984. In the six years between 1978 and 1984, the number of jurisdictions with arbitration programs more than tripled. No federal courts and only six states had authorized court-annexed arbitration in their general jurisdiction courts before 1978. New York and Pennsylvania were the only states among the six that had extensively

MANDATORY COURT-ANNEXED ARBITRATION PROGRAMS

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
<u>State Courts</u>				
Alaska	Arbitration of Small Claims	State Law--A.S. §09 43.190	1972	Never implemented; jurisdictional limit too low to make program useful
Arizona	Arbitration of Claims	State Law--A.R.S. §12-133	1974	Operational in at least 2 counties including Phoenix and Tucson
California	Judicial Arbitration	State Law--C.C.P. §1141.10-32	1978	Operational in 15 counties with 10 or more judges and slowly being adopted in smaller courts
Connecticut	Fact Finding and Arbitration	State Law--Conn. Statutes §52-549H	1983	Statewide implementation but far more cases processed by fact-finding than by arbitration
Delaware	Compulsory Pretrial Arbitration	Superior Court Rule 16(C)	1984	Program began statewide in mid-1984
Michigan	Mediation	Supreme Court Rule (except Wayne County Court); General Court Rule 316	1980	Program under revision; 29 counties expected to implement new program in March 1985
Minnesota	Judicial Arbitration	State Law--Minn. Statutes §484.73	1984	Program to commence in February 1985 in Hennepin County (Minneapolis)
Nevada	Motor Vehicle Damage Actions Arbitration	State Law--N.R.S. §38.215-245	1971	Very little application, but efforts are underway to launch an expanded voluntary arbitration program for all civil damages cases
New Hampshire	Compulsory Arbitration	Supreme Court Rule, Temporary Rules of Compulsory Arbitration	1978	2 counties (Merrimack, Rockingham)
New Jersey	Judicial Arbitration	State Law--Laws of N.J. Ch. 358	1983	Being implemented statewide
New Mexico		Supreme Court Rule	1984	Program to commence in 2 counties in July '85 (Albuquerque and Santa Fe)
New York	Alternative Dispute Resolution by Arbitration	State Law 22 N.Y.C.R.R. Part 28	1970	Operational in 31 counties, including New York City

Table 2 (cont.)

Jurisdiction	Program Title	Authorization	Earliest Date Authorized	Current Scope (As of Nov. 1984)
Ohio	Varies by county	Local Judicial Rules-- Hamilton County Rule 24 Stark County Rule 16 Cuyahoga County Rule 29	1970	Operational in approximately 15 counties including Cleveland and Cincinnati
Oregon	Arbitration Program	State Law--Ch.670 Oregon Laws	1983	Operational in 5 counties and expanding statewide by 12/31/84
Pennsylvania	Compulsory Arbitration	State Law--Pa. Con. Stat. Ann. Title 42 §7101	1952	Operational in 53 counties, including Philadelphia and Pittsburgh
Washington	Mandatory Arbitration of Civil Actions	State Law--R.C.M. Ch.7.06	1979	Operational in at least 3 counties (King, Pierce, Yakima)
<u>Federal District Courts</u>				
California-- Northern Dist.	Court-annexed Arbitration	Local Rule--Rule 500	1978	Ongoing program
Connecticut	Court-annexed Arbitration	Local Rule	1978	Disbanded after experimental period concluded
Florida-- Middle Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence January 1985
Michigan-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Missouri-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
New Jersey	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
North Carolina-- Middle Dist.	Court-annexed Arbitration	Local Rule--Part VI Rules of Practice and Procedure	1984	Program to commence January 1985
Oklahoma-- Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985
Pennsylvania-- Eastern Dist.	Court-annexed Arbitration	Local Rule--Civil Procedure 8	1978	Ongoing program
Texas-- Southern Dist. Western Dist.	Court-annexed Arbitration	Local Rule	1985	Program to commence by September 1985

implemented programs at that time. Between 1978 and 1980 three U.S. District Courts began experimenting with arbitration; and four more states authorized programs, including California where the legislature ordered that all counties with ten or more judges must adopt arbitration. Since 1980, California, Michigan, Ohio, and Washington have had considerable increases in the number of counties adopting arbitration; as far as we know, only the federal district for Connecticut has discontinued its program. Since 1982, six more states have authorized court-annexed arbitration. Congress appropriated \$400,000 to expand federal court arbitration to eight additional districts. Two of these, the Middle District Court of Florida and the Middle District of North Carolina began in early 1985, while the additional six districts are expected to have launched their programs by September 1985. Four of the most recently authorized state programs (Connecticut, Delaware, New Jersey, and Oregon) were adopted statewide, and the other two (Minnesota and New Mexico) are getting underway only in the large metropolitan courts in each state.

Eleven of the 16 state programs were authorized by state legislation, and the remainder and the federal programs were established by court rule. Often the legislative or court authority specified only broad design criteria and allowed individual courts to decide whether to adopt the program and to specify their own rules for implementation. Individual programs vary considerably within states as a result of this pattern of authorization.

FEATURES OF COURT-ANNEXED ARBITRATION AROUND THE COUNTRY

Types of Disputes and Jurisdictional Limits

Most courts have authorized court-annexed arbitration for civil cases where the claimant seeks only money damages. Contract, debt, and personal injury litigation make up the bulk of cases subject to arbitration. Two jurisdictions currently limit their program only to automobile litigation, and others exclude such categories as malpractice cases.

Over the past several years, jurisdictional limits on the programs have increased. The lowest ceiling among the most recently introduced programs is \$15,000 (Connecticut, New Jersey, New Mexico, and Oregon). The Delaware program has a \$30,000 limit and Minnesota has \$50,000. The federal program in North Carolina has a limit of \$150,000. In addition, several state and federal programs in place for longer periods have recently raised their dollar ceilings. For example, the federal court in Northern California has increased its limit from \$50,000 to \$100,000; in the Eastern District of Pennsylvania the new ceiling effective January 1985 will be \$75,000. Arizona, California and Pennsylvania state courts have also had legislative action to expand arbitration by increasing the ceiling and thus capturing a larger percentage of the courts' civil caseloads. Table 3 shows the types of disputes eligible and the jurisdictional limit for each jurisdiction that has authorized a program.

The system for valuing cases to determine their eligibility for arbitration is an important feature of local programs and varies considerably around the country. Elizabeth Rolph's guide for arbitration policymakers provides a useful discussion of the issues and tradeoffs involved in designing this component of an arbitration program.⁶

Arbitrators and Their Compensation

Most programs provide that the parties in a case assigned to arbitration can choose a mutually agreeable arbitrator or accept an arbitrator chosen at random by the program's administrative process. Programs vary considerably in how they assign arbitrators to cases and how hearings are scheduled. Most programs use attorneys from the local bar membership as arbitrators and set certain qualifications for them. The number of arbitrators and their rate of compensation is shown on Table 3. Compensation of arbitrators and program support personnel are the main costs for arbitration programs.⁷

⁶Rolph, *Introducing Court-Annexed Arbitration*, pp. 21-28.

⁷Rolph includes a discussion of funding arbitration programs on pp. 13-14.

FEATURES OF COURT-ANNEXED ARBITRATION PROGRAMS IN THE UNITED STATES

Jurisdiction	Types of Disputes	Jurisdictional Limit	Number of Arbitrators	Arbitrator Compensation	Appeal Disincentive
<u>State Courts</u>					
Alaska	Money damage suits	\$3,000	To be provided by rule	To be provided by rule	To be provided by rule
Arizona	Money damage suits	\$15,000	1 unless parties stipulate to 3(a)	\$50/day	Arbitrator fee
California	All civil actions except: class actions, equitable matters, small claims, unlawful detainer and family law Act proceedings	\$15,000; 25,000 (\$25,000 in Los Angeles and San Bernardino Cos., Santa Barbara and Ventura) other counties have been given authority to raise limit to \$25,000	1(a,b)	\$150/day	Arbitration and trial costs plus other party's trial costs (if trial results are not more favorable to party requesting trial)
Connecticut	Money damage suits	\$15,000	Determined by chief court administrator	\$100/day plus \$25 for each decision filed with the court	None
Delaware	Money damage suits	\$30,000	1	\$250/case	Arbitrator fee and costs of arbitration (including but not limited to expert witness fees, costs for issuing subpoenas and sheriff's mileage)
Michigan	All civil actions except child custody	None	3	Each party must pay \$75 to attorneys on panel	If trial verdict does not better the appellant's position by at least 10%, must pay other party's actual costs and attorney fee as determined by the trial judge
Minnesota	Most civil actions except family, juvenile, mental health	\$50,000	1 or 3 depending on experience of arbitrator	\$150/day	None
Nevada	Motor vehicle cases	\$3,000	1 or more as stipulated by parties or appointed by the court	As provided by award	Appellant must pay all costs of arbitration
New Hampshire	Money damage except malpractice suits	\$50,000	1 or 3(b)	None	None

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Table 3 (cont.)

Jurisdiction	Types of Disputes	Jurisdictional Limit	Number of Arbitrators	Arbitrator Compensation	Appeal Disincentive
New Jersey	Money damage suits related to motor vehicle use	\$15,000	Stipulated by mutual consent of all parties	Set by rules of Supreme Court	Arbitrator fees; in addition, court costs or other reasonable costs of other party assessed if appellant does not better his position
New Mexico(d)	Money damage suits	\$15,000	3	\$100-150/day	\$300 flat fee
New York	Money damage suits	\$6,000	1 or 3(b)	\$35/case \$45/chairman	Arbitration fee plus costs subsequent to award(c)
Ohio	All civil actions except equitable matters and actions relating to title of realty	\$10,000-15,000	1 or 3 subject to local rule	Subject to local rule	Appellant must bear all costs and attorney fees incurred after appeal if position not improved
Oregon	Money damage suits	\$15,000	1	\$150-300/case (depending on local rule)	Appellant pays \$150 plus other party's costs if position not improved
Pennsylvania	All civil matters except actions relating to title of realty	\$10,000-20,000(e)	3	\$200/day	Arbitrators' fee(c)
Washington	Money damage suits	\$15,000	1	Same rate as judges pro tem of the Superior Court	Trial and attorney costs if appellant does not better position
Federal District Courts(g)					
California-- Northern Dist.	Money damage suits	\$100,000	3 unless parties stipulate to 1	\$75/day as member of panel \$150/day as single arbitrator	Appellant may be assessed costs if position not improved
Connecticut	Money damage suits	\$50,000	(f)	(f)	(f)
North Carolina-- Middle Dist.	Money damage suits	\$150,000	3 unless parties stipulate to 1	\$250/day	Arbitration fees and costs if appellant does not improve position
Pennsylvania-- Eastern Dist.	Money damage suits	\$75,000	3 unless parties stipulate to 1	\$75/case	Arbitration fees if appellant does not improve position

(a) Parties may stipulate to their own arbitrator.

(b) Court may substitute retired judges.

Appeal Disincentives

All court-annexed arbitration programs preserve the parties' right to trial by allowing appeal of the arbitration award and trial *de novo* of the case. However, the objective is to make a final disposition of as many cases as possible at the arbitration hearing. Therefore, most programs include disincentives to appeal. These usually involve payment by the appealing party of the arbitrators' fees and costs of arbitration. In some cases the appealing party must pay the subsequent court costs for trial. Often the disincentives are aimed at those who appeal only to delay the disposition of the case, because the penalty is refundable if the appellant considerably better his or her position as a result of trial. Rolph describes some of the problems associated with imposing the appeal disincentive and providing a mechanism for its administration.³ Table 3 briefly describes the component for limiting appeals in each jurisdiction that has authorized court-annexed arbitration.

JURISDICTIONS CONSIDERING ADOPTION OF COURT-ANNEXED ARBITRATION

State Courts

From our telephone interviews with state court officials where court-annexed arbitration is not currently authorized, we learned that several states are examining options for diverting portions of their civil caseload to alternative forums for disposition. In some states the planning is specifically aimed at judicial arbitration; in others, broader examination of a range of alternative dispute resolution options is under way. We found that the status of investigations in most states was still at a stage where recommendations had not yet been formulated. In some places report preparation is under way, and in others the agenda for topics to consider is still under consideration. Some local courts around the country are no doubt also interested in the feasibility of court-annexed arbitration, but our inquiry did not systematically extend to the local court level. We also did not investigate current plans to extend arbitration to additional courts in the states where programs

³ Ibid., pp. 43-47.

appeal does not improve position

Parties may stipulate to their own arbitrator.
(b) Court may substitute retired judges.
(c) Not recoverable.

have already been authorized, although expansion of this nature appears to be fairly steady in several of those states.

A proposal to adopt judicial arbitration in Illinois is currently under review by the Executive Committee of the Illinois Judicial Council. A committee headed by the chief justice of the Illinois supreme court has completed an investigation of arbitration programs around the country and has recommended for Illinois circuit courts a program patterned after the system that has been in place for many years in the Philadelphia, Pennsylvania Court of Common Pleas. The current Illinois proposal calls for compulsory arbitration of all civil cases under \$15,000 in the law division of the circuit courts. Like many already established programs, the Illinois plan calls for a panel of three arbitrators who would enter nonbinding awards after a hearing of the dispute.

The Florida state court system has instituted a study commission on alternative dispute resolution that "was created to examine the feasibility of trial court administered means of dispute resolution."⁹ At the time of our survey this commission had met only a couple of times and had not yet decided on what recommendations it would make to the supreme court and the Florida legislature. The commission has scheduled public hearings on the issues and plans to submit a report on its findings by March 1985. This report is expected to include drafts of legislation and court rules, but we do not know whether judicial arbitration will be among the commission's proposals.

In Georgia, a commission appointed by the governor and headed by the chief justice is exploring a wide range of proposals for improvement of the judicial process statewide. This commission plans to explore the feasibility of judicial arbitration as part of its efforts, but it is still a long way from deciding on recommendations for new legislation for the courts in Georgia. We do not know what priority judicial arbitration will attain. However, in Atlanta a proposal to introduce mandatory arbitration for civil cases is pending before the Fulton County Superior Court.¹⁰ A program may be approved and in place in that

⁹State Court Administrator Memorandum from Chairman of the Study Commission on Alternative Dispute Resolution, October 30, 1984.

¹⁰See Appendix A for a copy of the draft rules for Fulton County. An index may be found on the first page of this appendix.

court by July 1985. The proposed rules call for compulsory nonbinding arbitration for all civil cases seeking exclusive money damages of \$20,000 or less. In addition, a party may request arbitration and a judge may order a case to arbitration at his or her discretion. Should the proposed program be approved, cases would be arbitrated by a panel of three attorneys who meet program qualifications. Compensation of arbitrators is proposed at \$200 per day. The proposal requires that a written award be entered by the arbitrators but does not require written findings of fact or conclusions of law. The draft rules state that either party may file notice of appeal of the award and obtain a trial *de novo*. It is left to the trial judge's discretion to assign the arbitrators' fees against an appealing party that does not substantially improve its position at trial.

In Hawaii, where no judicial arbitration program is currently in place, the court has adopted a unique approach to planning for future programs to divert civil cases from the trial list. The court has submitted a proposal for funding to establish a two-year program for experimenting with many dispute resolution alternatives, including judicial arbitration.

The Chairman of the Maryland Bar Association Joint Committee on Alternative Dispute Resolution informed us that the committee is looking at all areas of alternative dispute resolution, including judicial arbitration, but the committee's report has not yet been drafted.

In North Carolina, where the federal court Middle District is planning to initiate a judicial arbitration program early in 1985,¹¹ there is also a bar association task force examining methods for alternative resolution of civil cases for the state courts. A state bar association representative on this task force informed us that the group plans to complete its work and submit a report to the governor, the legislature, the state bar, and the court by summer 1985.

In Texas and Wisconsin, the state court administrative offices reported that proposals for statutes for upcoming legislative sessions are currently under discussion. In Texas, that legislation will probably propose a mandatory arbitration program for civil cases involving amounts under \$15,000. In Wisconsin, a pilot program to

¹¹See Appendix B for program rules.

Appendix A

ARBITRATION STATUTES AND RULES:
STATE AND LOCAL COURTS

This appendix includes statutes and court rules for those states where an arbitration program is in place, as well as rules for selected counties within some states. Also included are draft local rules and reports for several states.

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ALASKA

Article 2. Arbitration of Small Claims.

Section	Section
190. Arbitration under court rules	210. Practice and procedure
200. Appointment and compensation of arbitrator.	220. Judgments and appeals

Sec. 09.43.190. Arbitration under court rules. The supreme court may provide by rule for compulsory arbitration of a cause of action filed in a superior or district court, demanding only a money judgment, when it appears that the demand on the cause of action is for \$3,000 or less, exclusive of costs, or when it appears to the trial court as a result of a pretrial conference that the amount which will be recovered on the cause is not likely to exceed \$3,000. (§ 2 ch 94 SLA 1972)

Sec. 09.43.200. Appointment and compensation of arbitrator. Arbitration of actions shall be by either a member of the Alaska Bar Association or a magistrate appointed and compensated by the court as provided by its rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.210. Practice and procedure. The practice and procedure for conducting arbitration, the powers of the arbitrators and the assessment of costs shall be prescribed by the court rules. (§ 2 ch 94 SLA 1972)

Sec. 09.43.220. Judgments and appeals. Unless an appeal is taken from the award to the court which ordered arbitration as provided by the court rules, the court shall enter and enforce judgment in accordance with the award of the arbitrator. Any party aggrieved by the award may appeal. All appeals shall be determined in the manner permitted by the rules. (§ 2 ch 94 SLA 1972)

explore several alternative dispute resolution options, including judicial arbitration, might be proposed.

In the District of Columbia, which has operated a voluntary court-sponsored arbitration program since 1982, a committee of the bar association is currently considering the pros and cons of expanding that program by making arbitration compulsory for certain civil cases. The committee plans to report to the bar association in the near future.

Federal Courts

Until recently only the U.S. District Courts for the Eastern District of Pennsylvania¹² and the Northern District of California had ongoing court-annexed arbitration programs. One other district had abandoned use of arbitration since an experimental program conducted several years ago was completed. However, the U.S. District Courts for the Northern District of Illinois and the Middle District of North Carolina have proposed their own court-annexed arbitration programs. The Illinois program has recently been rejected by the court, but in North Carolina the court has adopted rules and the program will become effective January 1, 1985.¹³

Elsewhere in the federal courts, recent appropriations have been made to fund court-annexed arbitration demonstration programs in several additional district courts. The Administrative Office of the Courts recently selected eight districts from among 17 or 18 applicants for program funding. The demonstration programs which will bring the number of active federal programs up to ten districts are expected to get under way during 1985.

COURT-ANNEXED ARBITRATION NOT UNDER INVESTIGATION

In our interviews with state court administrators, we learned that 26 states have no court annexed-arbitration program in place and do not expect to have such a program in the near future.¹⁴ Table 4 lists the states where court-annexed arbitration has not been authorized and is not currently under consideration. In most of these states, backlog and

¹²See Appendix B for program rules.

¹³See Appendix B for a copy of the arbitration rules.

¹⁴We did not contact local courts in these states, but some state court administrators mentioned that individual courts had initiated

Table 4

STATES NOT USING OR CONSIDERING COURT-ANNEXED
ARBITRATION AS OF NOVEMBER 1984

Alabama	Maine	South Carolina
Arkansas	Massachusetts	South Dakota
Colorado	Mississippi	Tennessee
Idaho	Missouri	Utah
Indiana	Montana	Vermont
Iowa	Nebraska	Virginia
Kansas	North Dakota	West Virginia
Kentucky	Oklahoma	Wyoming
Louisiana	Rhode Island	

delay of civil cases is not a problem facing the majority of courts; several court officials stated that cases are tried promptly in their jurisdictions. One court official suggested that too many, rather than too few, judges was a problem in his courts.

We asked officials in these states whether they would consider adoption of arbitration in the future if court delay becomes a serious problem. Some court administrators indicated that arbitration might become a useful tool in the future should an alternative form of disposition for civil cases be needed. One court official said there was sufficient interest in arbitration that it was among a list of topics that the court might pursue in the next year or so. In South Carolina, an arbitration program is in place in the appellate courts. Familiarity with arbitration among the bench and bar there might lead to consideration of arbitration as an option for the trial courts at some point in the future. Similarly, in Virginia the Circuit Court in Fairfax County has an investigation of arbitration underway which could stimulate new interest around that state. Other administrative offices indicated that they are monitoring the programs in place in other jurisdictions.

their own investigations of arbitration and other alternative dispute resolution options. These efforts, while beyond the scope of our

Court officials in several states told us about alternative dispute resolution programs for small claims, divorce, and other cases. In Maine and Oklahoma, recent legislation has provided for courts to establish more economical and accessible alternatives for resolution of disputes. Some courts in Colorado have experimental voluntary mediation programs for various types of cases. Our 1980 survey of court efforts to expedite litigation identified other states and local courts with mediation and settlement programs.¹⁵

Other court officials indicated that they would look at different options, such as adding judges and improving case management, rather than arbitration, to solve future court delay problems. Two state court administrators commented that they didn't believe the programs they knew about were completely successful in reducing costs and time to disposition, and others felt their judges were philosophically opposed to arbitration or threatened by the prospect of an alternative form of disposition. In North Dakota, a supreme court advisory committee found little interest in arbitration.

CONCLUSION

Our survey results show that court-annexed arbitration continues to be adopted and implemented around the country as an alternative means of dispute resolution intended to reduce court delay and provide a less expensive forum for civil case disposition. Among the 16 states and 11 federal districts that have authorized arbitration, most have viable programs under way and have continued to expand the scope of their programs. Only two states have never implemented a program after authorization and only the Connecticut federal court has repealed its authorization. Program evaluations conducted in several jurisdictions consistently report favorably on the operation of court-annexed arbitration. In Washington the Seattle program was generally approved of by 90 percent of the lawyers and *pro se* litigants who responded to an evaluation survey. More than 80 percent of the respondents felt the

survey, may stimulate new interest at the state level in the near future.

¹⁵Ebener et al., *Court Efforts to Reduce Pretrial Delay*.

program produced faster case dispositions, was less expensive, and produced fair outcomes.¹⁶ In Pittsburgh, where a program has been in place for many years, an ICJ study found that most litigants interviewed about their arbitration experience were quite satisfied with the program.¹⁷

We found few jurisdictions seriously opposed to court-annexed arbitration, although many respondents indicated that in their courts they would be able to add judges if delay became a problem and would prefer that option. In the jurisdictions considering adoption of arbitration we learned that supporters expect the most serious opposition to come from trial lawyers, whose efforts in some jurisdictions have contributed to defeat of proposals to authorize programs. This opposition has centered in the past on the issue of whether programs like arbitration restrict litigants' access to the courts.

In the future, more jurisdictions that attempt to reduce the time and expense of disposing of small civil cases are likely to adopt court-annexed arbitration programs. We found enthusiastic supporters of arbitration in the eight states and the District of Columbia where alternative dispute resolution options are under consideration. In addition, the renewed federal interest in arbitration may result in additional funding for further expansion among the district courts. Finally, within states where programs are already authorized, we believe the generally positive evaluations by current users will influence other courts to implement their own programs.

¹⁶Greg Walters, Wayne Blair, and Carole Greene, "Mandatory Arbitration: Is It Working?" *Seattle-King County Bar Bulletin*, April 1983. See Appendix A.

¹⁷Adler, Kensler, and Nelson, *Simple Justice*.

(c) The case shall be submitted to arbitration at an earlier time upon the written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration § 6.1.
C.J.S. Arbitration §§ 17, 22.

§ 1141.17 Tolling limitations on dismissal for lack of prosecution

Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 563 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Limitation of Actions § 131.
C.J.S. Limitations of Actions § 296.

§ 1141.18 Arbitrators; qualifications; compensation; selection; disqualification

(a) Arbitrators shall be retired judges or members of the State Bar, and shall sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators upon the stipulation of all parties.

(b) The Judicial Council rules shall provide for the compensation, if any, of arbitrators, except that no compensation shall be paid prior to the filing of the award by the arbitrator, or prior to the settlement of the case by the parties. Compensation for arbitrators shall, unless waived in whole or in part, be one hundred fifty dollars (\$150) per day, except that the board of supervisors of a county or a city and county may set a higher level of compensation for that county or city and county.

(c) The board of governors of the State Bar shall provide by rule for the method of selection of arbitrators after consulting with administrative committees established pursuant to Rule 1603 of the Judicial Arbitration Rules for Civil Cases and with county bar associations in counties where there are no administrative committees. These rules shall provide for specialized panels and shall become operative upon approval of the Judicial Council.

(d) Any party may request the disqualification of the arbitrator selected for his case on the grounds and by the procedures specified in Section 170 or Section 170.6 within five days of the naming of the arbitrator.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Derivation: Former § 1141.20, added by Stats.1973, c. 1006, p. 2364, § 1.

Library References
Arbitration § 25, 27.
C.J.S. Arbitration §§ 60 to 65.

§ 1141.19 Arbitrators; powers

Arbitrators approved pursuant to this chapter shall have the powers necessary to perform duties pursuant to this chapter as prescribed by the Judicial Council.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration § 29.
C.J.S. Arbitration §§ 68, 69, 107, 109.

§ 1141.20 Finality of award; de novo trial; request; limitation; calendar

An arbitration award shall be final if a request for a de novo trial is not filed within 20 days after the date the arbitrator files the award with the court. Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the

§ 1141.20 CODE OF CIVIL PROCEDURE

same place on the active list as it had prior to arbitration, or shall receive civil priority on the next settling calendar.
(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

For § 1141.20 operative until July 1, 1979, see Chapter 2.5, ante.

Library References
Arbitration $\text{C}24$
C.J.S. Arbitration §§ 123 to 125.

§ 1141.21 Judgment upon trial de novo less favorable for party electing payment of nonrefundable costs and fees

(a) If the judgment upon the trial de novo is not more favorable to either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

(i) To the county, the compensation actually paid to the arbitrator.

(ii) To the other party or parties, all costs including, but not limited to, those specified in Sections 1032.5, 1032.6, 1032a, and 1032b, and the party electing the trial de novo shall not recover his costs.

(iii) To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case.

Such costs and fees, other than the compensation of the arbitrator, shall include only those incurred from the time of election of the trial de novo.

(b) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under paragraphs (ii) and (iii) of subdivision (a) shall be imposed only as an offset against any damages awarded in favor of that party.

(c) If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs under paragraph (i) of subdivision (a) shall be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under subdivision (b) has been deducted from the judgment.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Costs $\text{C}151$
C.J.S. Costs § 182.

§ 1141.22 Grounds for correction, modification or vacation of award

The Judicial Council rules shall specify the grounds upon which the arbitrator or the court, or both, may correct, modify or vacate an award.

(Added by Stats.1978, c. 743, p. —, § 2, operative July 1, 1979.)

Operative July 1, 1979

Library References
Arbitration $\text{C}76$
C.J.S. Arbitration §§ 149, 157, 159, 166,
167, 177.

§ 1141.23 Award; writing, signature and filing; entry in judgment book; force and effect

The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and