ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8072

3508 HLAB HB 469 - HB 481

384

RECORDS CERTIFICATION

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James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)


HB
469

Offered: 2/28/86
Referred: Labor & Commerce and Finance

Original sponsor: Health, Education and Social Services Committee

IN THE HOUSE BY THE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

CS FOR HOUSE BILL NO. 634 (HESS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Board of Nursing Home Administrators; and providing for an effective date."

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

* Section 1. AS 08.03.010(c)(9) is amended to read:

(9) Board of Nursing Home Administrators (AS 08.70.010) -- June 30, 1990 [1986].

* Sec. 2. AS 08.70.020(a) is amended to read:

(a) The board consists of three [FIVE] members: one [TWO] nursing home administrator [ADMINISTRATORS] licensed under this chapter and practicing in the state, a registered nurse licensed in the state and having no direct financial interest in any nursing home, and one person [TWO PERSONS] from the general public.

* Sec. 3. AS 08.70.155 is amended to read:

Sec. 08.70.155. GROUNDS FOR IMPOSITION OF DISCIPLINARY SANCTIONS. After a hearing the board may impose disciplinary sanctions when it finds that a licensee

(1) secured a license through deceit, fraud, or intentional misrepresentation;

(2) engaged in deceit, fraud, or intentional misrepresentation in the course of providing professional services or engaging in professional activities;

(3) advertised professional services in a false or misleading manner;

(4) intentionally or negligently engaged in or permitted

the performance of patient care by persons under the licensee's supervision which does not conform to minimum professional standards regardless of whether actual injury to the patient occurred;

(5) failed to comply with this chapter, with a regulation adopted under this chapter, or with an order of the board;

(6) continued to practice after becoming unfit due to

[(A)] professional incompetence, [;

(B)] addiction or severe dependency on alcohol or other drugs which impairs the licensee's ability to practice safely, or [;

(C)] physical or mental disability and the licensee has not been rehabilitated to the satisfaction of the board;

(7) sold or furnished a license to another;

(8) practiced as a nursing home administrator or used a designation tending to imply that the licensee is a nursing home administrator without a license issued under this chapter unless exempted from licensure requirements under AS 08.70.080.

* Sec. 4. TRANSITION. Notwithstanding the provisions of AS 08.70.020(a) as amended by sec. 2 of this Act, the members of the Board of Nursing Home Administrators on the effective date of this Act shall remain on the board until their terms expire or the positions otherwise become vacant.

* Sec. 5. This Act takes effect immediately in accordance with AS 01.10.070(c).

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: CSHB 634 (HESS)
Title: An Act relatin', to the Board of Nursing Home Administrators

Sponsor: House HESS
Requester: _____
Date of Request: _____

FISCAL DETAIL

Agency Affected: Commerce & Economic Dev.
BRU: Occupational Licensing

Components: _____

EXPENDITURES / REVENUES: (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		-0-	-0-	-0-	-0-	-0-
TRAVEL		-0-	-0-	-0-	[.5]	[.5]
CONTRACTUAL		-0-	-0-	-0-	-0-	-0-
SUPPLIES		-0-	-0-	-0-	-0-	-0-
EQUIPMENT		-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	[.5]	[.5]
CAPITAL						
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of dollars)

GENERAL FUND		-0-	-0-	-0-	[.5]	[.5]
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	[.5]	[.5]

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

This bill provides for continuation of the Board of Nursing Home Administrators and reduces the number of board members from five to three by attrition. One Anchorage member would attend only one meeting in FY 87, therefore, per diem cost of $80 would be eliminated for FY 88-91. This cost is not reflected as it is under $100 annually.

(see attached for continuation)

Prepared by: Jennifer Strickler, Management Analyst — Phone: 465-2144
Division: Occupational Licensing — Date: 3-17-86

Approved by Commissioner: _____ — Date: 3/17/86
Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 134 (HESS)

The reduction in cost shown for FY 90 and FY 91 reflects the elimination of one Juneau member whose term expires October 1, 1988. This member would attend the face to face meeting in FY 89 but travel and per diem cost of $512 in FY 90 and FY 91 would be eliminated.

Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION
AND SOCIAL SERVICES

OFFICIAL BUSINESS

POUCH V
JUNEAU, AK 9981
465-3759

February 24, 1986

Representative Ben Grussendorf
Speaker of the House
P.O Box V
Juneau, Alaska 99811

Dear Mr. Speaker:

The House Committee on Health, Education and Social Services has considered the Sunset Review of the Board of Nursing Home Administrators, and recommends that the board be continued. The Committee has introduced HB 634 to fulfill the findings of the Committee.

As required by AS 44.60.050 (c), the Committee submits the following findings:

(1) the extent to which the board, commission or program has operated in the public interest.

The Division of Legislative Audit found that the board served no public purpose and should be eliminated, however, the Committee finds that the existence of the board is required by federal Medicaid law and should therefore be maintained so that Alaskan nursing home residents may continue to qualify for Medicaid funds.

(2) the extent to which the operation of the board, commission or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.

Federal law requires the existence of this board as a criterion for qualification for Medicaid funding.

(3) the extent to which the board, commission or agency has recommended statutory changes which are generally of benefit to the public interest.

The statutes were amended to require biennial rather than annual licensing and to revoke licenses of those persons who do not uphold the board's standards.

(4) the extent to which the board, commission or agency has encouraged interested persons to report to it concerning the effect of its regulations

and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

There have been four board meetings since 1982. For two meetings, there was insufficient hearing notice between time of publication and the meetings, and for a third meeting there was no notice.

(5) the extent to which the board, commission or agency has encouraged public participation in the making of its regulations and decisions.

The board announces proposed changes to regulations in the newspaper according to the Administrative Procedures Act.

(6) the efficiency with which public inquiries or complaints regarding the activities of the board, commission or agency filed with it, with the department to which the board or commission is administratively assigned, or with the office of the ombudsman have been processed or resolved.

Only one complaint has been filed with the Division of Occupational Licensing in the past several years, and that complaint was dismissed as lacking merit. No complaints have been filed with the Office of the Ombudsman or the Attorney General's office.

(7) the extent to which the board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.

50 persons are licensed as nursing home administrators in the state, with no evidence that unqualified practitioners have been licensed.

(8) the extent to which state personnel practices, including affirmative action practices, have been complied with by the board, commission or agency to its own activities and the area of activity or interest.

No complaints have been filed with the Office of Equal Employment Opportunity regarding the Board of Nursing Home Administrators

(9) the extent to which statutory, regulatory, budgeting or other changes are necessary to enable the agency, board or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

The Committee determined that the board should be reduced to three members to reduce the cost of operation. This change is reflected in HB 634, which the Committee introduced to continue the board.

As required by AS 44.60.050 (d), the Committee submits the following findings:

(1) an identification of the problems or the needs that the programs and activities of the board, commission or agency are intended to address.

The board needs to assure adequate notice of board meetings. The board wishes to investigate a preceptorship program and continuing

education requirements. The Committee determined that the board has the statutory authority to pursue these goals.

(2) a statement, to the extent practicable, of the objectives of the program of the board, commission, or agency program, and its anticipated accomplishments.

The purpose of the board is to license qualified nursing home administrators to protect the public and assure that Alaska receives Medicaid funding. The board is fulfilling this function.

(3) an identification of any other programs having similar, conflicting or duplicate objectives.

There are no other programs having a duplicate function.

(4) an assessment of alternative methods of achieving the purposes of the program.

Because the Medicaid regulations require licensure by a board composed of members of different medical professions, the Committee determined that there are no alternatives other than this board for licensing nursing home administrators.

(5) an assessment of the consequences of eliminating the board, commission or program and consolidating its activities with another program, or of funding it at a lower level.

Elimination of the board would make the state of Alaska liable for federal Medicaid sanctions. Since institutional facilities account for over half of the Medicaid budget, this would not be in the state's best interest. In order to save money, the Committee has reduced the number of members on the board to three from five.

(6) a justification for the recommended continuation or extension of the board, commission or program, and an explanation of the manner in which it avoids duplication of or conflict with other efforts.

Since Alaska has no combined medical licensing boards which would meet federal regulations, the board must be continued.

(7) any other information which, in the opinion of the committee, would improve the performance of the board, commission or agency with respect to its representation of and responsiveness to the public interest.

The Committee recommended that reduction of the board be accomplished by attrition. The Division of Occupational Licensing recommended that the meetings be reduced to one per year, but the Committee felt that teleconferenced meetings can and should be held so that the board can fulfill the mandate of AS 08.70.040 at little cost to the state. Such meetings will also allow the board to develop its proposed preceptorship program.

The Committee also recommends that licensing fees for the board be raised in order to produce income necessary to cover the operating

expenses of the board.

_____

Representative Max F. Gruenberg, Jr., Co-Chair
House Health, Education and Social Services Committee

_____

Representative Niilo Koponen, Co-Chair
House Health, Education and Social Services Committee

requirement. (1) The State's payment of premiums, deductibles, cost sharing, or similar charges under part B does not obligate it to provide the full range of part B services to recipients not covered by Medicare.

(2) The State plan must specify this exception if it applies.

(c) *Federal financial participation.* (1) No FFP is available in State expenditures for Medicare part B premiums for Medicaid recipients who receive no money payments under title I, IV-A, X, XIV, XVI (AABD), or XVI (SSI) of the Act. However, FFP is available in these expenditures for—

(i) AFDC families required to be covered under §§ 435.112 and 436.116 of this subchapter, those eligible for continued Medicaid coverage despite increased income from employment;

(ii) Recipients required to be covered under §§ 435.114, 435.134, and 436.112 of this subchapter, those eligible for continued Medicaid coverage despite increased income from monthly insurance benefits under title II of the Act, and

(iii) Recipients required to be covered under § 435.135 of this subchapter, those eligible for continued Medicaid coverage despite increased income from cost-of-living increases under title II of the Act.

(2) No FFP is available in State Medicaid expenditures that could have been paid for under Medicare part B but were not because the person was not enrolled in part B. This limit applies to all recipients eligible for enrollment under part B, whether individually or through an agreement under section 1843(a) of the Act. However, FFP is available in expenditures required by §§ 435.914 and 436.901 of this subchapter for retroactive coverage of recipients.

[45 FR 45188, Sept. 30, 1979, as amended at 47 FR 17035, Mar. 23, 1979]

§ 431.630 Coordination of Medicaid with Professional Standards Review Organizations.

(a) The State plan may provide that the review of Medicaid services by a PSRO designated under Part B of Title XI of the Act. Medicaid requirements for medical and utilization review shall be deemed to be met for those services or providers subject to such contracted review.

(b) The State plan must specify how the contract with the PSRO satisfies the requirements that:

(1) The provisions of paragraphs (a), (b), (c), (g), (h), (i), (m), and (n) of § 431.503 of this subchapter are met;

(2) A monitoring and evaluation plan is in effect by which the State will assure satisfactory performance by the PSRO;

(3) The services and providers subject to PSRO review are identified; and

(4) The review activities performed by the PSRO are not inconsistent with those activities performed for the review of Title XVIII services, including a description of whether and to what extent PSRO determinations will be considered conclusive for payment purposes.

[46 FR 48565, Oct. 1, 1981; 46 FR 54744, Nov. 4, 1981]

EDITORIAL NOTE: Section 431.630 was revised at 46 FR 48565, Oct. 1, 1982. The recording and/or recordkeeping requirement in § 431.60 is not required until OMB approval has been obtained. HCFA will publish a document in the Federal Register when OMB approves or disapproves these requirements.

Subpart N—State Programs for Licensing Nursing Home Administrators

§ 431.700 Basis and purpose.

This subpart implements sections 1903(a)(29) and 1908 of the Act which require that the State plan include a State program for licensing nursing home administrators.

§ 431.701 Definitions.

Unless otherwise indicated, the following definitions apply for purposes of this subpart:

"Agency" means the State agency responsible for licensing individual practitioners under the State's healing arts licensing act.

"Board" means an appointed State board established to carry out a State program for licensing administrators of nursing homes, in a State that does not have a healing arts licensing act or an agency as defined in this section.

"Licensed" means certified by a State agency or board as meeting all of the requirements for a licensed nursing home administrator specified in this subpart.

"Nursing home" means any institution, facility, or distinct part of a hospital that is licensed or formally recognized as meeting nursing home standards established under State law, or that is determined under § 431.704 to be included under the requirements of this subpart. The term does not include—

(a) A Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass.; or

(b) A distinct part of a hospital, if the hospital meets the definition in § 440.10 or § 440.140 of this subchapter, and the distinct part is not licensed separately or formally approved as a nursing home by the State even though it is designated or certified as a skilled nursing facility.

"Nursing home administrator" means any person who is in charge of the general administration of a nursing home whether or not the person—

(a) Has an ownership interest in the home; or

(b) Shares his functions and duties with one or more other persons.

§ 431.702 State plan requirement.

A State plan must provide that the State has a program for licensing administrators of nursing homes that meets the requirements of §§ 431.703 through 431.713 of this subpart.

§ 431.703 Licensing requirement.

The State licensing program must provide that only nursing homes supervised by an administrator licensed in accordance with the requirements of this subpart may operate in the State.

§ 431.704 Nursing homes designated by other terms.

If a State licensing law does not use the term "nursing home," the HCFA Administrator will determine the term or terms equivalent to "nursing home" for purposes of applying the requirements of this subpart. To obtain this determination, the Medicaid agency must submit to the Regional Medicaid Director copies of current State laws that define institutional health care facilities for licensing purposes.

§ 431.705 Licensing authority.

(a) The State licensing program must provide for licensing of nursing home administrators by—

(1) The agency designated under the healing arts act of the State; or

(2) A State licensing board.

(b) The State agency or board must perform the functions and duties specified in §§ 431.707 through 431.713 and the board must meet the membership requirements specified in § 431.706 of this subpart.

§ 431.706 Composition of licensing board.

(a) The board must be composed of persons representing professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients. However—

(1) A majority of the board members may not be representative of a single profession or category of institution, and

(2) Members not representative of institutions may not have a direct financial interest in any nursing home.

(b) For purposes of this section, nursing home administrators are considered representatives of institutions.

§ 431.707 Standards.

(a) The agency or board must develop, impose, and enforce standards that must be met by individuals in order to be licensed as a nursing home administrator.

(b) The standards must be designed to insure that nursing home administrators are—

(1) Of good character;

(2) Otherwise suitable; and

(3) Qualified to serve because of training or experience in institutional administration.

§ 431.708 Procedures for applying standards.

The agency or board must develop and apply appropriate procedures and techniques, including examinations

Hess

A PERFORMANCE REPORT ON THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT BOARD OF NURSING HOME ADMINISTRATORS

September 30, 1985

Audit Control Number

08-1222-86-R

Commissioner, Department of Commerce and Economic Development	Loren H. Lounsbury
Deputy Commissioners, Department of Commerce and Economic Development	Greg Baker Terry Elder

Members of the
Board of Nursing Home Administrators

Acting Chairperson	Ruth Roth, RN
Member	Jane Sabes, NHA
Member	Thomas E. Boling, NHA
Member	Raymond A. Davidson
Member	Eloise E. Deater

STATE OF ALASKA

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

September 30, 1985

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Titles 24 and 44 of the Alaska Statutes (sunset legislation), the attached report is submitted for your review.

A PERFORMANCE REPORT ON THE
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
BOARD OF NURSING HOME ADMINISTRATORS

September 30, 1985

Audit Control Number

08-1222-86-R

Gerald L. Wilkerson

Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

TABLE OF CONTENTS

PURPOSE OF THE REPORT

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Board of Nursing Home Administrators for the past four fiscal years to determine if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during legislative oversight hearings to determine whether the Board of Nursing Home Administrators should be reestablished. The law now specifies that the Board will terminate June 30, 1986, and have one year from that date to conclude its affairs.

The major areas of our examination were the licensing, examination, administration, complaint, and affirmative action functions of the Board. We reviewed and performed the following:

1. Applicable statutes and regulations.

2. Tests of files and documents of licensees.

3. Interviews with the licensing examiners.

4. Complaints filed with the Division of Occupational Licensing, Equal Employment Opportunity Office, and the Ombudsman's Office.

5. Discussions with Board members.

6. Minutes of Board meetings and Division correspondence files.

7. Attorney General's Opinions applicable to professional boards.

ORGANIZATION AND FUNCTION

Federal law [U.S. Code, Title 42, Sect. 1396a(29)] requires a state to license nursing home administrators in order for that state to receive Medicaid assistance from the Federal government. Thus, to receive Medicaid funding, a nursing home must be administered by a licensed nursing home administrator.

In response to this requirement, the Board of Nursing Home Administrators was created by the Alaska Legislature in 1975. The Board is comprised of five members; two nursing home administrators, one registered nurse, and two public members. The purpose of the Board is to ensure that nursing home administrators have the knowledge and experience necessary to be competent administrators.

The major duties of the Board are to issue initial licenses to qualified applicants and to monitor the renewal of licenses. The Board is assisted in these duties by the Department of Commerce and Economic Development, Division of Occupational Licensing (OL). OL processes applications, maintains licensing files, answers correspondence dealing with the Board, and provides other administrative support as needed by the Board. In addition, OL investigates any complaints involving nursing home administrators.

Qualifications for licensure include work experience and educational requirements. Additionally, a passing score of 75% or better must be obtained on the exam given by the National Association of Boards of Nursing Home Administrators.

License renewal is required biennially. Renewal requires the licensee to complete a license renewal application, an affidavit of good moral character, and to submit a 50 dollar license fee.

There are currently 21 facilities in the State which are required to have licensed administrators.

REPORT CONCLUSION

Policy Issues

This report contains policy issues raised as a result of our evaluation of Board practices. The final policy decisions affecting these practices are not within the scope of this report but require legislative consideration. In debating these issues, the oversight committees should take into consideration the findings and recommendations presented in this report so the potential impact of policy changes can be evaluated.

Report Conclusion

We found no evidence the continuation of the Board of Nursing Home Administrators (BNHA) will benefit the public's safety or welfare. However, the Board needs to be reestablished in order to comply with Federal law governing the licensing of nursing home administrators. These laws require nursing homes to be administered by licensed administrators if the nursing homes are to be eligible to receive Federal Medicaid financial assistance. Therefore, we are recommending that BNHA pursue ways to reduce the cost of regulating nursing home administrators without jeopardizing the State's eligibility to receive Federal Medicaid funding (see Recommendation No. 1).

FINDING AND RECOMMENDATION

Recommendation No. 1

The Board of Nursing Home Administrators (BNHA) should consider, evaluate, and pursue ways to reduce the cost of regulating nursing home administrators without jeopardizing the State's eligibility to receive Federal Medicaid funding.

The existence of BNHA is not required to ensure the public's welfare. Public protection is provided through State and Federal nursing home license and certification reviews. With the exception of the five State-operated Pioneers' Homes, all of the 21 facilities in Alaska that are required to have licensed administrators are subject to these reviews.

The primary justification for continuing BNHA is to maintain the State's eligibility to receive Federal Medicaid funding. U.S. Code, Title 42, requires the State to have either a licensing board or an agency of the State responsible for licensing under the Healing Arts Act of the State. Since Alaska does not have a Healing Arts Act, the State is required to have a licensing board in order to be eligible for Medicaid funding.

Alaska Statutes 08.70.020-.040 require a five member board to meet twice annually. BNHA is relatively inactive. Board activity is largely limited to the approval of applicants for licensure, of which there are only 50 active licensees in the State. The number of board members and meetings required by the statutes is greater than is warranted by the Board's workload.

From FY 82 through September 30, 1985, only four formal meetings had been held. Due to a lack of business, two of the more recent meetings lasted less than two and one-half hours each. Additionally, during the last five years, unfilled board member vacancies caused the Board to operate at less than full membership.

For these reasons BNHA should determine and support a less expensive method of licensing administrators. In June 1985, the U.S. Department of Health and Human Services indicated that they would possibly approve a scheme by which licensing of administrators could be done by the Medical Board. This would allow the elimination of the BNHA without jeopardizing the State's eligibility for Federal Medicaid funding. We believe the Medical Board could accomplish the limited duties of the BNHA in the course of its regular activities and meetings with little or no increase in its workload. To best serve the public, we recommend that the BNHA study and support implementation of a cost-effective alternative to the current Board that will preserve the State's eligibility for Medicaid funding.

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses indicate both positive and negative factors as they relate to the public need as defined in the "sunset" law. These analyses are not intended to be comprehensive, but to address those areas we were able to cover during our review.

I. The extent to which the board, commission, or program has operated in the public interest.

A. We have determined that no public need for the Board has been demonstrated. The Board was created to comply with Federal law (see Recommendation No. 1).

B. The Board has initiated statutory changes which have benefited the public (see criteria III).

II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.

A. Federal law requires the State to have either a Board of Nursing Home Administrators or an agency of the State responsible for licensing under the Healing Arts Act of the State. Since Alaska does not have a Healing Arts Act, the State is mandated to have a licensing board.

III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.

A. The statutes were amended to replace annual licensing renewal requirements with biennial requirements.

B. Statutes were established by which licenses can be revoked from persons who do not uphold the standards established by the Board.

IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Finding and Recommendation.

APPENDIXES

APPENDIX A

BOARD OF NURSING HOME ADMINISTRATORS
REVENUES COMPARED WITH EXPENDITURES
For Fiscal Year 1985
(UNAUDITED)
(Note 1)

Average Revenues (Note 2)	$ 1,818
Expenditures (Note 3)	3,022
Excess of Expenditures over Revenues	$(1,204)

Schedule 1
Types of Revenues

Revenues	Amount	Collection Time
Examination Fee	$25	With application form
Reexamination Fee	25	With application form
Investigation Fee	25	With application form
Biennial License Fee	50	Prior to initial license issuance and biennially
Late Fee Fine	10	With late payment
Bad Check Charge	10	With valid payment

Note 1

This revenue/expenditure comparison was prepared from available records and discussions with Occupational Licensing personnel. The records were not audited by us and, accordingly, we do not express an opinion on the Board's Revenues Compared with Expenditures.

Note 2

The majority of the revenues collected are composed of license renewal fees. These fees are collected by most boards once every two or four years and cause revenues in one year to be much greater than the revenues collected in the next year. Therefore, we calculated and reported an average for the revenues collected in Fiscal Years 1984 and 1985 in order to obtain a more accurate representation of collected revenues.

APPENDIX B

BOARD OF NURSING HOME ADMINISTRATORS
EXAMINATION STATISTICS

Number of Examinations Given in Fiscal Years 1983-85

Fiscal Year	Passes	Fails	Total
1983	4	0	4
1984	2	1	3
1985	7	2	9

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

POUCH D
JUNEAU, ALASKA 99811
PHONE: (907) 465-2534

December 23, 1985

Mr. Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, AK 99811

Dear Mr. Wilkerson:

Thank you for the opportunity to comment on your preliminary audit report for the Board of Nursing Home Administrators.

We concur with your findings and recommendations and agree that a less expensive metnod to administer licensing should be sought while preserving the State's eligibility to obtain Medicaid funding.

Thank you once again for the opportunity to comment on your audit.

Sincerely,

Loren H. Lounsbury
Commissioner

LHL/me1282M
122385b

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)


HB
479

Utermohle
1/29/86

Original sponsor: Duncan

IN THE HOUSE

BY THE LABOR AND COMMERCE COMMITTEE

CS FOR HOUSE BILL NO. 479 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to biomass fuel systems."

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

* Section 1. AS 45.88.500(a) is amended to read:

(a) In this chapter, "alternative energy system"

(1) means a source of thermal, mechanical, or electrical energy which is not dependent on oil or gas or a nuclear fuel for the supply of energy for space heating and cooling, refrigeration and cold storage, electrical power, mechanical power, or the heating of water;

(2) includes

(A) an alternative energy property as defined by 26 U.S.C. 48 (l)(3)(A), (Sec. 301, P.L. 95-618, Internal Revenue Code);

(B) a method of architectural design and construction which provides for the collection, storage, and use of direct radiation from the sun;

(C) a woodstove with a catalytic converter, [OR] a catalytic converter for a wood stove, or a catalytic fireplace insert; [AND]

(D) a steam, hot water, or ducted hot air central heating system that uses wood or coal for fuel; and

(E) a stove or furnace that uses biomass fuel produced from any organic matter that is available on a renewable basis, including agricultural crops and agricultural waste and residue, wood waste residue, animal waste, municipal waste, and aquatic

plants;

(3) does not include, unless described in (2)(C) of this subsection,

(A) a stove that uses only firewood [WOOD], coal, or oil for fuel; or

(B) a fireplace or fireplace insert.

Introduced: 1/16/86
Referred: Labor & Commerce, House
Special Committee on State Loans and
Finance

IN THE HOUSE BY DUNCAN

HOUSE BILL NO. 479

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to biomass fuel systems."

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

* Section 1. AS 45.88.500(a) is amended to read:

(a) In this chapter, "alternative energy system"

(1) means a source of thermal, mechanical, or electrical energy which is not dependent on oil or gas or a nuclear fuel for the supply of energy for space heating and cooling, refrigeration and cold storage, electrical power, mechanical power, or the heating of water;

(2) includes

(A) an alternative energy property as defined by 26 U.S.C. 48 (1)(3)(A), (Sec. 301, P.L. 95-618, Internal Revenue Code);

(B) a method of architectural design and construction which provides for the collection, storage, and use of direct radiation from the sun;

(C) a woodstove with a catalytic converter or a catalytic converter for a wood stove; [AND]

(D) a steam, hot water, or ducted hot air central heating system that uses wood or coal for fuel; and

(E) a stove or furnace that uses biomass fuel produced from any organic matter that is available on a renewable basis, including agricultural crops and agricultural waste and residue, wood waste residue, animal waste, municipal waste, and aquatic plants;

F

(3) does not include

(A) a stove, other than one described in (2)(E) of this sub-section, that uses only wood, coal, or oil for fuel; or

(B) a fireplace or fireplace insert.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : 01/28/86

REQUEST

Bill Resolution No. : HB 479
Title : An Act Relating to Biomass Fuel Systems

Sponsor : Representative Duncan
Requestor : House Labor & Commerce
Date of Request :

FISCAL DETAIL

Agency Affected : Commerce & Economic Dev.
BRU : Investments

Components : Economic Development

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

It is anticipated that any new loan demand created as a result of HB 479 will be absorbed within the existing funding available under the Alternative Energy Loan Program. New loan application processing will also be absorbed by existing staff within the division.

Prepared by : Paul B. Arnoldt, Director
Phone : 465-2510
Division : Investments
Date : 1/28/86

Approved by Commissioner : for Loren H. Lounsbury
Date : 1/24/86
Agency : Commerce & Economic Development

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and P
Impacted Agency(ies)

10 25 85

THE COMPANY

Traeger Industries is a family owned corporation based in Mt. Angel, Oregon. During the last two decades, Traegers have developed and marketed over 22 different models of solid fueled appliances and have thousands of satisfied customers who rely on them for affordable heating equipment.

Traegers have been keeping families warm for over 25 years. Old-fashioned care and craftsmanship goes into every product they build. The Traeger name means top quality, tested performance, and first rate customer service.

TRAEGER

TRAEGER INDUSTRIES/P.O. BOX 829/MT. ANGEL, OREGON 97362

Pellet Fuel is Available Locally At:

ALASKA PELLET HEATING
1832 Crest St. – Tel. 789-1332
Juneau, Alaska 99801
Next To Perseverance Glass

★★★★★★★★★★★★

Traeger Pellet Fired Equipment is Available Locally At:

ALASKA PELLET HEATING
1832 Crest St. – Tel. 789-1332
Juneau, Alaska 99801
Next To Perseverance Glass

★★★★★★★★★★★★

JOIN THE REVOLUTION!

AN AMERICAN REVOLUTION

WHY PELLETS?

"I told my husband that either the wood stove goes or he does. I was fed up with the dirt, dust and smoke in my living room. Then we saw Traeger's new pellet heaters. We can't believe how clean they burn. No more mess in the living room. No more worrying about chimney fires. Safe and clean."

"When you live on a fixed income, high utility bills can sure put the pinch on. I'm not getting any younger and I don't need back breaking wood chores. These new pellets sure have take the work out of woodburning. Just load the hopper and forget about it. What a relief!"

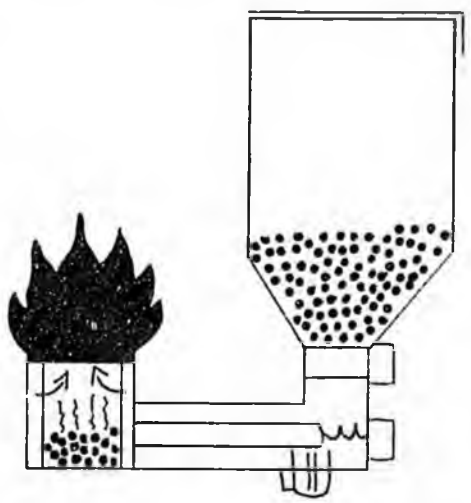
"I spent a good deal of my youth cutting, splitting, hauling, stacking, loading and babysitting wood stove. So when I built a house of my own I said 'never again'. But that was before oil, gas, and electric prices skyrocketed. Thank goodness for these new pellet heaters. Now I can have both convenience and low fuel bills!"

"Today's utility prices are almost enough to make a guy sick. But I have better things to do with my time than make wood. Then I found out about Traeger's new pellet stoves, furnaces and boilers. Talk about low utility bills! As far as I'm concerned these pellet burners are the greatest thing since sliced bread!"

OPERATION

Pellets are stored in the attached hopper. When the room thermostat calls for heat, the burner is activated. Pellets are metered and dropped down to the auger assembly. The auger delivers the pellets into the firepot. Extremely high temperatures in the fire pot cause the pellets to give off combustible gases. As fresh air is mixed with these combustible gases, they ignite in a flame similar to that of an oil or gas power burner. Combustion by-products are then routed through a heat exchanger where the blower forces return air over the exchanger, warms it, and delivers it to the room. All burners feature pilot fire maintenance, and a unique flame protection system designed to prevent overfires, mis-fires, and hopper burn back.

PATENT PENDING



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Juneau, Alaska 99801
Next To Perseverance Glass

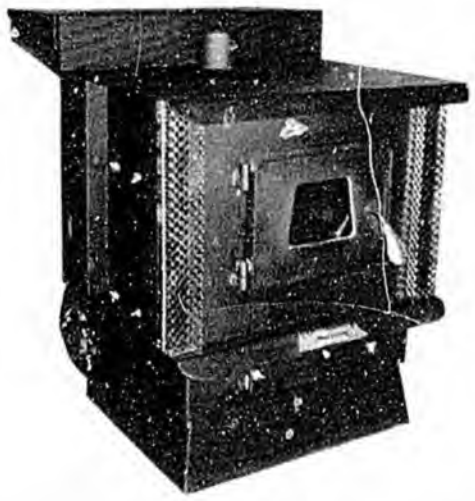
★★★★★★★★★★★★

JOIN THE REVOLUTION!

AN AMERICAN REVOLUTION

THE 070 MINUTEMAN

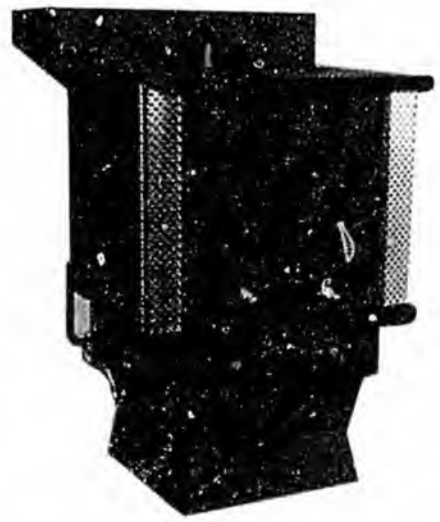
MPW070



The MINUTEMAN 070 is Traeger's largest biomass pellet burning top breach free standing stove. Thermostatically controlled and fully automatic. The MINUTEMAN 070 is designed for installation directly on carpeting, tile, wood, or linoleum flooring with minimal floor and no wall protection. The MINUTEMAN 070 does not require the expensive class A all fuel chimney, and instead is approved for use with class L chimney. The MINUTEMAN 070 features glass door with air wash, brass cloverleaf trim, automatic blower, remote thermostat, flame protection, pilot maintenance, 14 ga. 409 stainless steel firebox, and a 5 year heat exchanger warranty.

THE 040T MINUTEMAN

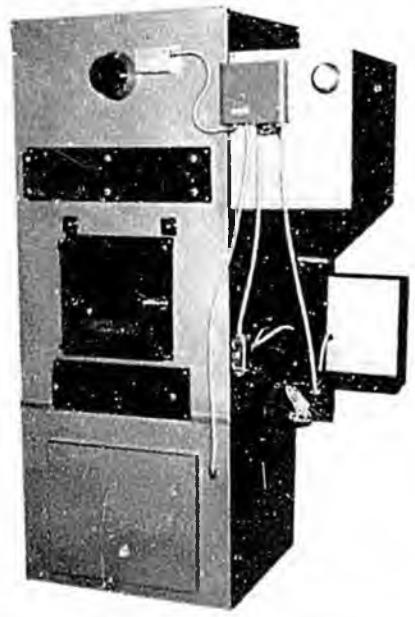
MPW040T



The MINUTEMAN 040T is Traeger's biomass pellet burning top breach free standing stove. Thermostatically controlled and fully automatic. The MINUTEMAN 040T is designed for installation directly on carpeting, tile, wood, or linoleum flooring with minimal floor and no wall protection. The MINUTEMAN 040T does not require the expensive class A all fuel chimney. The MINUTEMAN 040T features glass door with air wash, brass cloverleaf trim, automatic blower, remote thermostat, 14 ga. 409 stainless steel firebox, flame protection, pilot maintenance, and a 5 year heat exchanger warranty.

THE GENERAL

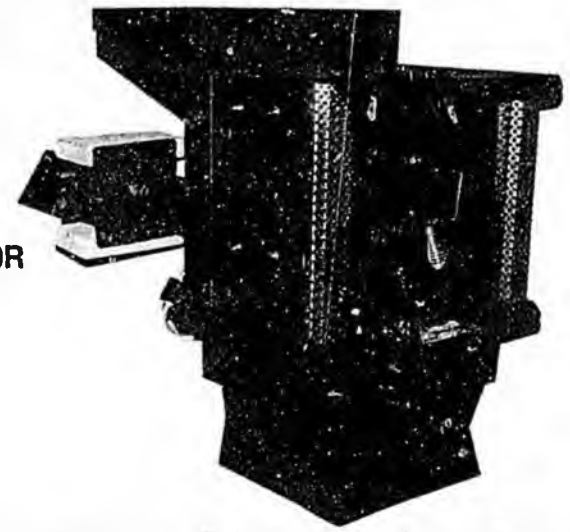
GBU130



The GENERAL is Traeger's biomass pellet combination gas, oil, or electric forced air furnace for central heating systems. Thermostatically controlled and fully automatic. Designed in a component system, the GENERAL can be set up as an upflow, down flow or lowboy configuration. The GENERAL features large hopper, flame protection, pilot maintenance, 14 ga. 409 stainless steel firebox, 1/4 hp or 1/2 hp blowers, domestic water heating, and a 5 year heat exchanger warranty.

THE 040R MINUTEMAN

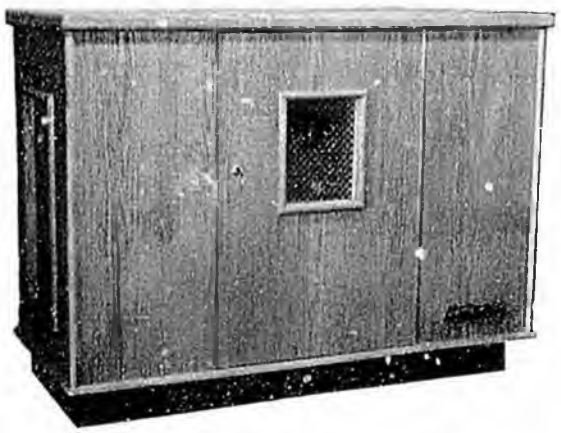
MPW040R



The MINUTEMAN 040R is Traeger's biomass pellet burning rear breach free standing stove. Thermostatically controlled, and fully automatic. The MINUTEMAN 040R is also designed for installation directly on carpeting, tile, wood or linoleum flooring with minimal floor and no wall protection. The MINUTEMAN 040R does not require a chimney, instead, the 040R comes with a rear breach kit for penetrating homes exterior walls. (Much like a dryer vent.) The MINUTEMAN 040R features include: glass door with airwash, brass cloverleaf trim, automatic blower, remote thermostat, 14 ga. 409 stainless steel firebox, rear breach kit with outside air, flame protection, pilot maintenance, and a 5 year heat exchanger warranty.

THE PATRIOT

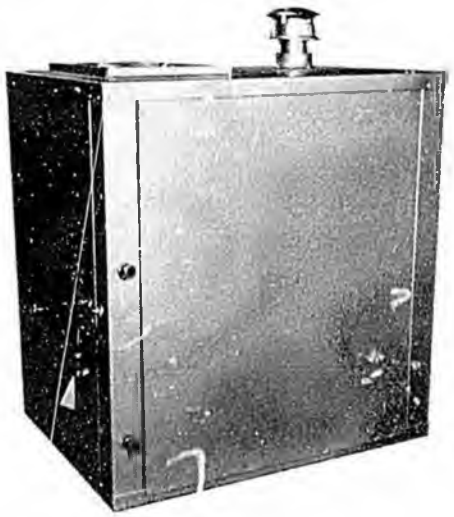
PCH040



The PATRIOT is Traeger's biomass pellet fired console heater. Thermostatically controlled and fully automatic. Its beautiful oak cabinet is a far cry from the traditional black box stove design, plus the PATRIOT is far safer. The PATRIOT requires no floor or wall protection, and utilizes a rear breach wall venting system. The PATRIOT features include: oak cabinet, glass door with air wash, brass cloverleaf panels, automatic blower, remote thermostat, 14 ga. 409 stainless steel firebox, rear breach kit with outside air, flame protection, pilot maintenance, and a 5 year heat exchanger warranty. Can also be used for fireplaces.

THE DELAWARE

DOD130



The DELAWARE is Traeger's biomass pellet fired hot water boiler. Thermostatically controlled and fully automatic. The DELAWARE operates at low pressure, low temperature (110°-190°) and is suitable for radiant water systems, or water to air exchange systems. Features include 250 lb. hopper, pump, expansion tank w/purge, thermometers, triple aquastat, and a variety of accessories.

CITY AND BOROUGH OF JUNEAU, ALASKA
CERTIFIED WOODSTOVES WHICH WOULD MEET THE
PROPOSED WOODSMOKE REGULATIONS
Revised January 17, 1986

Model	Type	Average Smoke (grams/hr.)	Average Overall Efficiency	Output Heat (BTU/hr.)	Burn Time Between Refueling (hours) Low - High	
Blaze King "King"	Catalytic	1.6	76.9	9,510 to 35,200	16.2	4.4
Fisher Tech IV	Fireplace Insert (Catalytic)	2.5	79.1	18,033 to 31,794	5.6	2.8
Timber Eze 477	Catalytic	2.0	75.8	8,660 to 21,860	11.4	3.4
Vista 640	Non-Catalytic	5.4	61.8	20,839 to 60,104	1.8	0.6
Earth Stove 1000-C	Catalytic	3.5	74.9	10,873 to 24,418	7.3	3.0
Arrow ATS II	Catalytic	2.5	75.6	9,055 to 31,838	6.5	1.8
Turbo 10	Catalytic	3.1	76.0	12,662 to 35,427	6.5	2.2
*Pellefier FS-1	Non-Catalytic	0.7	79.4	9,455 to 29,630	NA	NA
*Whitfield	Non-Catalytic	0.9	79.4	9,499 to 26,638	NA	NA
*Collins Hopper	Add-on Device	2.6	73.4	6,932 to 56,196	NA	NA
Earthstove 1002-0 (This model with the air supply stop is the only model that has been approved)	Non-Catalytic	5.6	68.7			
Sweethome Stove Works Catalytic Fir AK-18	Catalytic	2.0	76.2			
ORLEY'S Leopard U246 Free Standing Model	Catalytic	2.5	73.0			
ORLEY'S Panther F246 Hearth Model	Catalytic	2.5	73.0			
**Jotul 3C	Catalytic	3.9	73.0			
**Jotul 8C	Catalytic	6.0	75.0			

*Burns Pellet Fuel
**Only certified for the rear vent application

HB 475, cont'd

Introduced Jan. 15, and referred to the State Affairs and Finance Committee.

Insurance Rate Hike (notice)

HOUSE BILL 476, by Rep. M.M. Miller by request. Requires an insurer who increases premium or adds a surcharge to an auto insurance policy because of an accident in which the insured or a person covered by the policy was at fault to give written notice of the increase or surcharge at least 15 days before it takes effect, stating the reason for the change and the right of appeal.

Introduced Jan. 15, and referred to the Community and Regional Affairs and Judiciary Committees.

Energy Funding

HOUSE BILL NO. 477, by the Rules Committee by request of the Governor. See SENATE BILL 347, page 14, identical.

Introduced Jan. 15, and referred to the House Special Loans and Finance Committees.

Moose Hunting (stamp)

HOUSE BILL NO. 478, by Martin. Requires the Dept. of Revenue to establish a moose habitat conservation stamp program similar to the one established for waterfowl, and to set aside receipts in the fish and game fund to be used for enhancement and maintenance of moose habitat in the state.

Introduced Jan. 15 and referred to the Resources and Finance Committees.

Energy Loans

HOUSE BILL NO. 479, by Rep. Duncan. Adds to those alternative energy and heating systems which are eligible for alternative energy loans systems which use biomass fuel produced from any organic matter that is available on a renewable basis, such as agricultural crops, waste and residue, animal waste, municipal waste and acquatic plants.

Introduced Jan. 16 and referred to the Labor and Commerce, Loans and Finance Committees.

Corporal Punishment (prohibited)

HOUSE BILL NO. 480, by Reps. Koponen and Davis. Prohibits anyone employed by a private or public school from inflicting corporal punishment or bodily pain on a student; permits the use of reasonable and necessary restraint on a student to protect the student or others from physical harm, to obtain possession of a dangerous weapon or object, or to protect property from serious harm.

Introduced Jan. 16, and referred to Health, Education & Social Services and State Affairs Committees.

not know it. It's real easy
d with blasting caps," he

caps are small metalic
few inches in length, usu-
d to a length of electrical
red is suggesting Juneau
ep an eye open for such
heir homes. If a blasting
d, Windred recommends
police to remove it.
led police to several
sting caps and containers
dynamite stored in the
Windred. Other explo-

sive material was found following a search of a suspect's bedroom, he said.

According to Windred, the stolen blasting caps may be linked to a series of unexplained explosions in recent months. On Dec. 29, a door at Floyd Dryden Middle School was blown open with blasting caps. Several area mail boxes may also have been blown up with the stolen material, he said.

Police are investigating possible violations of laws regulating storage of explosives at the suspect contractor's work site. Police will not release the name of the contractor under investigation until charges are filed, Windred said.

Meanwhile, two Juneau teenagers are expected to be charged with misconduct involving a weapon in the first degree following the investigation into last Friday's bomb threat at the high school.

According to police, a 14-year-old student allegedly brought the explosive materials to the school to sell or give to a 17-year-old male student. Police have not identified the person who made the threat.

"Quite a few kids knew this transaction was going to take place," said Windred.

The threat resulted in the closure of the high school and adjoining Marie Drake Middle School. Students were sent home after a search located a bag containing four blasting caps and a two-and-a-half pound container of gelatine dynamite in an unassigned high school locker.

The material was removed from the school without incident.

ASSOCIATED PRESS

sion may be cut short.

launch window of only a
ments of the current mis-
mbitious schedule of 15

Please turn to Page 14

New law allows use of some wood stoves during air alert

Ordinance changes how burning bans are called

By BETSY LONGENBAUGH
THE JUNEAU EMPIRE

There's new hope on the horizon for local residents who want to keep their wood stoves burning all winter.

Beginning Wednesday, local residents who own stoves that meet Juneau City-Borough emission standards may keep their fires burning during wood smoke alerts.

In the belief that the approved stoves won't let smoke get in your eyes, the Juneau City-Borough Assembly recently approved an ordinance that allows the stoves to burn and sets up new criteria for declaring wood smoke bans.

That new criteria calls for two types of wood smoke bans – a wood smoke alert and a wood smoke emergency. Under an alert, owners of approved wood stoves who have municipal permits may continue to burn. Under an emergency, no wood stoves are allowed to burn.

Steve Gilbertson, the municipal lands and resources manager, is in charge of monitoring the air quality of Mendenhall Valley and enforcing the new ordinance. He said Friday he hopes that only air alerts will occur in the future, with air emergencies necessary in the event of extreme pollution in the valley.

"I think people have to realize this is at an experimental stage," he added.

Gilbertson also said his office now has applications for people who own approved wood stoves. In order to use those stoves during alerts, they must have permits

Please turn to Page 14

Lemon Creek vicinity to be monitored for wood smoke

THE JUNEAU EMPIRE

Lemon Creek residents may want to buy warm slippers for next winter, as their neighborhood will probably end up being subject to its own wood stove bans.

The Lemon Creek area is one place that will feel the impact of a comprehensive ordinance regulating wood stove use that was approved by the Juneau City-Borough Assembly several weeks ago.

At the urging of some assembly members, municipal staff agreed to begin monitoring the Lemon Creek area with an eye to regulating wood stove use. This winter, however, there isn't the necessary equipment in the area to effectively measure wood smoke pollution.

In next year's municipal budget, staff will be seeking $25,000 to buy a wood smoke monitor for the area. Once installed, the device will allow municipal officials to call for wood smoke bans in Lemon Creek, as well as the Mendenhall Valley.

Steve Gilbertson, lands and resources manager, said he expects the municipality may call separate wood smoke bans in each area, depending on weather conditions. He said it is now impossible to predict how often bans may be necessary in Lemon Creek.

"We do not have a lot of data for the area," said Gilbertson.

He added, however, that his office has received a lot of calls from Lemon Creek area residents who complained of wood smoke pollution.

The new proposed smoke alert area in Lemon Creek extends from the Juneau Christian School, including

Please turn to Page 14

WEATHER

Rain showers continuing through Tuesday, Page 14

Juneau Empire
1-13-86

Woodsmoke...

Continued from Page 1

from the city. The free permits are good for two years.

Gilbertson said the approved wood stoves have two things in common – very low emission standards and certification from Oregon.

Because the municipality is basing its new ordinance on a similar law in Oregon, it is accepting that state's testing procedures for wood stoves.

Many of the approved stoves – there are now 10 on the list – have catalytic converters. Others use pellet fuel to reach the low emission standards.

Gilbertson said at least four other stoves, some of which are for sale locally, have gone through the tests, but are not yet certified. He said he expects a new list from Oregon by the end of this month

Until then, he said he can only ...mmend the 10 stoves on the approved list. They are:

- Blaze King "King," a catalytic converter stove.
- Earth Stove 1000-C, a catalytic converter stove.
- Turbo 10, a catalytic converter stove.
- Fisher Tech IV, a catalytic fireplace insert.
- Timber Eze 477, a catalytic wood stove.
- Vista 640, a non-catalytic wood stove.
- Pellefier FS-1, a non-catalytic stove that burns pellet fuel.
- Whitfield, a non-catalytic stove that burns pellet fuel.
- Collins Hopper, an add-on devise that burns pellet fuel.

Those wood stoves that are on this list and sell locally cost about $1,000, not including installation.

The assembly hopes to eventually have all stoves in the city-borough meet the emission standards. To meet this goal, the new ordinance calls for all wood stoves installed and sold in Juneau to meet the Oregon emission standards beginning Aug. 1.

Gilbertson expects the most successful enforcement of this new regulation to come from the building department, which issues permits for wood stove installations.

Steve Shows, who assigns building inspections, said a building permit is required for any new installation, including replacement of an existing stove. The permits and their accompanying inspections are free and are designed to make sure wood stoves are safely installed, he said.

"Home owners are sometimes not getting a building permit and installing a stove, sometimes properly, sometimes not," he said.

During the past year, the municipality has been aided in its inspection effort by some insurance companies who now require proof of wood stove inspections before offering insurance, said Shows.

"This is the greatest plus we have seen," he said.

Shows said that "nine times out of 10," wood stoves that are inspected were installed incorrectly.

He said that currently he is able to schedule inspections with a day's notice. Those who want inspections should call a 24-hour recording phone 586-1703, before 7:30 a.m. on the day they want an inspection.

To receive a permit, they should come into the municipal building department and fill out a form. They will also receive a brochure on proper stove installation.

Lemon Creek...

Continued from Page 1

Sunny Point, back to Lemon Creek basin and to Vanderbilt Hill.

Gilbertson also said many Juneau residents remain unclear about where the boundaries are for the Mendenhall Valley wood smoke alert area.

They could be described as having a southern boundary of the airport area, an north boundary of the glacier recreational area, an east boundary running along the base of Thunder Mountain and a west boundary that bisects the Mendenhall Peninsula.

Not included in the ban are the Auke Lake area and Fritz Cove Road.

Shuttle...

Continued from Page 1

The flight plan today was devoted mainly to astronomy, and Steve Hawley spent the morning pointing two ultraviolet telescopes at star targets in a search for luminous clouds of ultraviolet radiation.

Mission Control awakened the astronauts today with the theme song from the movie "Animal House." The control center said several of the astronauts were fans of the movie, and commander Robert Gibson responded, "It sounds like our secret is out."

Columbia shed its postponement jinx with a spectacular predawn liftoff Sunday, and 9½ hours later the crew launched the world's most powerful commercial communications satellite, RCA's $50 million Satcom KU-1.

"It's on its way," Mission Control radioed after a rocket engine ignited to propel the satellite toward stationary orbit 22,300 miles above the Earth.

RCA, which paid the National Aeronautics and Space Administration $14.2 million for the delivery, said Satcom will be capable of providing video and audio communications for all of the United States except Alaska, transmitting a signal powerful enough to be received by dish antennas as small as three feet.

Nelson and Hawley will have an exclusive view of the comet as it nears the sun on its once-every-76-years swing through this part of the solar system.

"You can't observe Halley's from the ground as it makes its closest approach to the sun in January because of the sun's brightness," explained S. Alan Stern of the University of Colorado, who is principal investiga-

Nelson, who will operate the CHAMP cameras, said in an interview before the flight, "We'll be taking some photographs and spectral measurements for the purpose of documenting the comet, and we'll be doing it from above the atmosphere where we can get a real clear look at it. We're going to use the apparatus over the course of three flights, so we should be able to get a good consistent set of data on Halley's."

Stern said the instruments "primarily will be looking at water. The comet is basically an ice ball, and when the sun melts the ice, it breaks the water down into constituen... We'll study these to learn about the comet's atmosphere."

Hawley will use two telescopes to search the universe for sources of luminous clouds of ultraviolet radiation.

"Only in the last 10 years have we begun to look at the universe in the ultraviolet wavelength," he said before the mission. "The reason for that is that the observatories on Earth being beneath the atmosphere are not able to observe these wavelengths because the atmosphere is opaque to UV radiation. So we'll be getting some very fundamental data and will be dealing with questions as to where the UV emission comes from."

He said the knowledge would help astronomers mask out the UV background and thus improve the data from the $1.2 billion Hubble Space Telescope, which will be launched from a shuttle next October.

One of the telescopes also will be trained on the comet.

Rep. Bill Nelson, a Florida Democrat riding as a con-

...NCIL
...ard of trustees of Juneau Arts ...nities Council will meet at 7:30 ... Northern Light United Church. ...mbers and interested persons ... to attend.

...STAR
...neau Lodge No. 147, F. and ... meet at 7:30 tonight. All Masons ... are urged to attend.

...D
...ns of practically any skill level ...re enthusiastic about forming a ... of Alaska-Juneau pep band are ...ntact the UAJ office of student ...t 789-4528.

...ESSURE
...ood pressure testing will be con... the Mountain View Senior Cen... 1:30 a.m. to 1:30 p.m. Tuesday. ...ment is necessary. Call 586-3736 ...formation.

...S

...g set off in the Cedar Park area. ...ere set on fire.

...tip

...irefighters are reminding resi... every home should have at least ...tinguisher and everyone in the ...uld know how to use it. The Gla... nteer Fire Department offers ...s on use of fire extinguishers. ...ation, call 789-7554.

...nce calls

Volunteer Fire Department ... services teams responded to ...ver the weekend:
...al call: At 9:49 a.m. Friday, ...tient, stable, transported to ...morial Hospital.
... vehicle accident: At 10:06 p.m. ...gan Drive and the Mendenhall ..., injuries minor, both patients ...nsport.
...na calls: At 2:29 a.m. Saturday, ..., no transport; at 11:51 a.m. ...ild choking, mother dislodged ... the child was stable and taken ...ital by the family; at 2:01 a.m. ...or cuts, patient taken to the hos...

Volunteer Fire Department ... services teams responded to ...er the weekend:
...al calls: At 9:34 a.m. Friday, a ...ient, stable, transported to the ... 11:48 a.m. Sunday, no details ..., patient stable, transported to ...l; at 2:50 p.m. Sunday, patient ...minal pain, stable condition, ...d to hospital.

RECEIVED
JAN 6 1986

January 3, 1986

Senator Bill Ray
Representative Duncan
Representative Miller
P.O. Box V
State Capitol
Juneau, Alaska 99811

Re: State of Alaska
Alternative energy Loans

Dear Senator and Representatives:

We are soon providing an alternative to wood burning stoves in the Juneau area and I understand that this is presently available in Anchorage.

Our product is a pelletized wood and other fuel which burns in specially constructed stoves and burns smoke free.

I am enclosing a couple of articles for your further information.

To meet new ordinances in Juneau, many people will have to replace their wood burning stoves.

I understand that under present law, Alternative Energy Loans are available for catalytic equipped wood stoves, or catalytic converters.

Therefore it would be appreciated if the present law could be amended to authorize loans for biomass pellet fuel burning stoves or furnaces.

Steve Gilbertson, Juneau's Air Quality Control Officer, advised me that he and D.E.C. officials are in favor of this amendment.

I believe the law in question is included in A.S.45.88.010:500.

If you would like further information regarding this, I will be happy to discuss what I have with you.

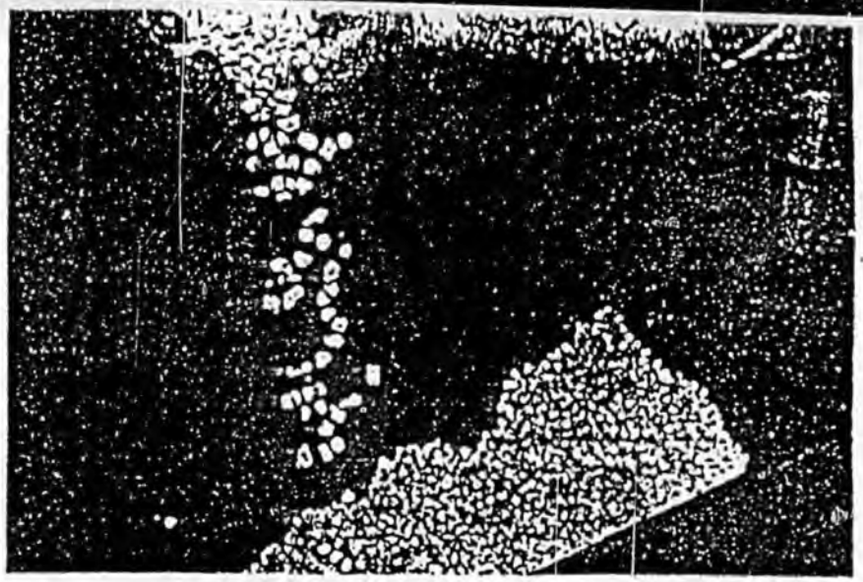
Thanking you in advance for your consideration.

Very truly yours,

Larry Traeger

Larry Traeger
546 Hemlock
Juneau, Alaska 99801

Phone: 586 3250



Heating homes with pellets

Mount Angel manufacturer designs and sells innovative, affordable furnaces

By DALE STOWELL
Of the Independent

MOUNT ANGEL — Randy Traeger shrugs as he considers the complexity of his pelletized wood burning furnace designs.

"To me, it don't look like nothing super," he says. "Once you've horsed around with it for 15 years, it doesn't seem like that much."

But he seems to know he's on to something as he cites statistics that indicate his wood furnaces burn cleaner than do natural gas or oil furnaces for as little as half the cost for fuel.

Traeger, owner and president of Traeger Industries, has been designing woodstoves and furnaces for more than 20 years and is optimistic that his latest design will catch on.

The fuel source is the most novel aspect of the new furnaces, which have been on the market since fall. Biomass pellets, produced from waste products such as pine shavings or rye stubble, are what the newly designed heating devices consume.

One ton of pellets, which costs about $100, produces as much heat as two cords of wood but leaves substantially less waste. About .6 of one percent of the pellets remain as ash — approximately two gallons of ash per ton of fuel.

During cold weather, the average home requires about one 50 pound bag per day, Traeger estimated. Average yearly consumption would be in the neighborhood of four tons, he added.

Traeger's thermostatically-controlled stove and furnace designs also attempt to transfer all of the heat produced in the units to the space in the home to be heated.

And Traeger points out another advantage to the pellet-burning systems. "They burn clean. There isn't any smoke. You can stick your nose right in the (smoke)stack."

The major drawback is availability of fuel. Traeger has several hundred tons of it stockpiled to meet the needs of customers who have purchased pellet-burning equipment. It isn't readily available anywhere else in the area.

The fuel, which resembles rabbit food pellets, has existed for several decades, Traeger said. But companies producing it have come and gone due to a lack of demand.

Randy Traeger (above) has designed and is marketing heating systems which burn pine pellets (top photo). Traeger says the new heating units burn cleaner than gas or oil at nearly half the cost for fuel. (Photos by Dale Stowell)

"There's been several plants that have been around and gone broke," he said. "There's the concept of making pelletized fuel. That's fine. But you've got to have something to burn it in. Most of them are looking at commercial applications, but a commerical application can dry up on you very quickly — just a little change in price and they'll switch from one (fuel) to the other."

Before Traeger's design, availability of fuel wasn't the only problem in home-heating pellet applications. In earlier designs, the pellets didn't burn completely, and the furnace fire would sometimes burn back into the fuel hopper.

Traeger cured the problems without knowing what caused them in other furnaces. "I really didn't look at anybody's design," he said. "I never paid any attention to them. There's no use in reinventing the wheel over again. It was a matter of taking it apart and putting it together again, taking it apart and putting it together again."

After Traeger put it together again and it worked to his satisfaction, he began developing different home heating uses. His designs range from an indoor furnace that produces nothing but home heat, to an outdoor pellet pump that will provide heat for home, hot water and even clothes drying. All of the Traeger Industries products are built at the company shop in Mount Angel.

The furnaces are also outside of Department of Environmental Quality regulations that apply to woodstoves. Traeger predicts that many wood stove manufacturers will be forced out of business by continued tightening of regulations for testing and emissions. However, he added pellet-burning furnaces would pass even the most stringent DEQ requirements.

Traeger knows of only five other pelletized fuel furnace manufacturers in the country, but believes that the heat-producing devices will increase in popularity in time.

He points to the state of Minnesota as an example of forward thinking about the new heating concept. Traeger as well as other pelletized-fuel furnace manufacturers recently donated equipment to the state as part of a Minnesota low-income heating assistance program. The state will pay for installation of the furnaces.

"The concept is, if they give people pelletized fuel, they can heat twice as many homes for the same cost as supplying them money to buy natural gas or oil," Traeger said.

According to Traeger, Minnesota also has state funds available for research and development of pelletized-fuel manufacturing and use. "They're just out after it," he said. "They're way ahead of everyone else."

Back home, Traeger said sales of the new furnaces have been good — almost better than he's wanted them to be. "I really want to go through the winter just testing it, getting a few out," he said. "It's kind of run away from us. It's been super good."

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 13, 1986

SUBJECT: Alternative energy loans for biomass fuel stoves (Work Order 14-1546)

TO: Representative Jim Duncan

FROM: George Utermohle
Legislative Counsel

I.

The draft bill that you requested is attached. The bill amends the definition of "alternative energy system" to expressly include stoves and furnaces that use biomass fuels. The effect of this amendment is to allow the Alternative Energy Revolving Loan Fund to make loans for the purchase of biomass fuel stoves and furnaces.

II.

You also asked whether the Alaska Industrial Development Authority (A.I.D.A.) can aid processors of biomass fuels.

In brief, A.I.D.A. does have the power to make loans, to insure loans, and to assist private lenders to make loans to processors of biomass fuels.

A.I.D.A. was created to provide means of financing and means of facilitating financing for

> the establishment, operation, and development of industrial, manufacturing, and business enterprises, including, without limitation, facilities for transportation, facilities for pollution control and waste disposal, facilities for the local furnishing of gas, facilities for water, facilities for industrial parks, mass commuting vehicles, facilities for local district heating or cooling, parking facilities, or a storage or training facility relating to a plant or facility. (AS 44.88.010(a)(5))

The list of facilities eligible for assistance is only illustrative and in no way restricts the kinds of projects that A.I.D.A. can support.

Provided that a project is located in Alaska and will generate additional employment, A.I.D.A. has the authority to insure loans, to make loans, or to assist private lenders in making loans for the project (AS 44.88.080(12),(13), and (15)). A.I.D.A. defines "project" to include

> (A) a plant or facility used or intended for use
>
> (i) in connection with making, processing, preparing, or producing in any manner, goods, products or substances of any kind or nature or in connection with developing or utilizing a natural resource, or extracting, smelting, transporting, converting, assembling or producing in any manner, minerals, raw materials, chemicals, compounds, alloys, fibers, commodities and materials, products or substances of any kind or nature;
>
> (ii) as an industrial park; in connection with transportation; for the prevention, limitation or control of pollution; for the disposal of sewage or solid waste; for the local furnishing of gas; for the furnishing of water; as or in connection with mass commuting vehicles; for local district heating or cooling; as a parking facility; or as a storage or training facility directly related to a plant or facility described in this paragraph;
>
> (B) a plant or facility used or intended for use in connection with a business enterprise;
>
> (C) commercial activity by a small enterprise; (AS 44.88.220(8))

This definition is broad enough to cover the facilities and equipment necessary to manufacture or produce any form of biomass fuel.

Therefore, processors of biomass fuels are eligible to apply for loans from A.I.D.A. No amendment of the Alaska Industrial Development Authority statutes is necessary.

GU:mkr
M2:020
Enclosure

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)


HB
481

MEMORANDUM

TO: Representative Steve Rieger
FROM: William Lovell and Lisa J. Rubenstein
DATE: January 20, 1986

RE: Sectional Analysis of House Bill 481, "An Act relating to civil actions on tort reform"

Pursuant to your request, I have prepared this sectional analysis of House Bill 481, referenced above.

SECTION 1

Section 1 of H.B. 481 creates a new chapter, AS 09.17.

Sec. 09.17.010 PUNITIVE DAMAGES -- This section requires that punitive damages awarded by a judge or jury accrue to the State of Alaska instead of the plaintiff. Punitive damages would be deposited in the General Fund. In effect this section treats punitive damages in a civil case the same as a fine in a criminal case.

This section reduces the financial incentive for persons to seek punitive damages in cases where such damages are not warranted. In cases where the defendant acts recklessly or with malice in causing the injury, the victim would still have the option of seeking punitive damages to punish the defendant and to deter him in the future.

Sec. 09.17.020 ITEMIZED VERDICTS -- This provision requires a jury in personal injury cases to itemize the dollar amount of damages it is awarding for (1) medical and related expenses, (2) lost income, and (3) other economic loss. Within each of these three categories, the jury must list the sum it is awarding for expenses which have already been incurred and the amount it is awarding for anticipated future losses.

This provision prevents juries from arbitrarily selecting a damage award figure and requires them to determine awards based on actual and anticipated damages.

Sec. 09.17.030 PERIODIC PAYMENTS -- (a) This subsection provides that where a judge or jury awards damages of $50,000 or more the judge must order that the judgement award be distributed through periodic payments instead of in a lump sum if either the plaintiff or the defendant requests it. If there is some question whether the defendant will make the required payments on a timely basis, the judge can order him to post a bond as security.

This provision prevents a claimant from being overcompensated for an injury by being able to recover the full amount of his damages plus the income earned from

investing a lump sum award. Most states adjust lump sum awards to reflect expected investment income, but, because of a 1967 Alaska Supreme Court decision, Alaska does not.

(b) If periodic payments are mandated under (a) above and the claimant dies, payments would continue to the claimant's spouse or children. If the claimant leaves no dependents, payments would terminate.

This subsection requires that payments only be continued as long as they are needed for the support of the victim or the victim's immediate family. Once the need for support has ended, payments will not continue to go to a claimant's estate for the benefit of creditors and distant heirs.

(c) A defendant may be held in contempt of court for failing to make the required periodic payments and can be held liable for any damages the claimant suffers as a result of his non-payment.

This subsection provides an incentive for defendants to make timely payments.

(d) Once all periodic payments have been made and the defendant has satisfied the judgment, any bond which may have been posted as security must be returned to the defendant.

(e) This subsection allows periodic payments judgments to be recorded in the real estate recording office just as judgments granting lumps sums currently are. This provision prevents a recorded judgment from becoming a lien on a defendant's property until the time the payment becomes due. Currently a judgment which has not been completely paid off becomes a lien on a defendant's property as soon as it is recorded.

Sec. 09.17.040 VERIFICATION OF CLAIMS -- This requires that many papers filed in court including suits and countersuits be signed by the claimant or the claimant's attorney. This provision mirrors Alaska Rule of Civil Procedure 11 but it goes further than the rule in that it also requires the plaintiff or the attorney to verify that the pleading is true. Filing a false claim could result in a party being held in contempt of court.

Verification of claims discourages potential plaintiffs from filing unjustified lawsuits for the sole purpose of forcing an insurance company or defendant to settle an unmeritorious claim out-of-court to avoid the cost of defending the suit in court.

Sec. 09.17.050 EFFECT OF CONTRIBUTORY FAULT -- This section codifies a 1975 Alaska Supreme Court decision which adopted what is known as the "pure" form of comparative negligence. Under this system, the plaintiff's damages are reduced in

proportion to the amount of negligence attributed to the plaintiff. For example, if a plaintiff was 90 percent at fault for his injury and the defendant was 10 percent responsible, where damages amounted to $100, the plaintiff could only collect $10 from the defendant.

Although this section does not change current law or practice, by codifying the judicial decision, it prevents the court from modifying this decision in a future case.

Sec. 09.17.060 APPORTIONMENT OF DAMAGES -- (a) This subsection directs the jury or judge to specify (1) the claimant's total damages and (2) the proportion of fault each party had in causing the accident including the claimants.

(b) This subsection describes how the jury should establish each party's fault. In determining the relative fault of the parties involved in the accident, the jury must consider each party's conduct and the degree to which each party's conduct caused the accident or injury.

(c) This subsection sets forth the procedure used to determine the actual amount of total damages for which each party is responsible. Once the jury has determined total damages and the percentage of fault of each party, damages are multiplied by the percentage figures to determine the amount each defendant owes.

Sec. 09.17.070 EFFECT OF RELEASE -- This provision permits a plaintiff to enter an out-of-court settlement with one defendant while maintaining a suit against another defendant who is not willing to settle. If the plaintiff receives a cash settlement from one defendant out-of-court, this amount is subtracted from the total damages sustained before the remaining damages are allocated among the non-settling defendants.

Sec. 09.17.900 DEFINITIONS -- (1) Under this section's definition of "fault", a party can be judged at fault for an injury if the party in question is negligent; engages in certain activities where negligence is not required in order to be held liable such as detonating explosives; violates a warranty; assumes a risk that a reasonable person normally would not assume; misuses a product such as a prescription drug; fails to take reasonable steps to avoid an injury that could have been been prevented; does not take steps to minimize an injury once it has occurred such as failing to seek medical care after sustaining an injury; or fails to comply with professional standards established by statute.

(2) "Future damages" is defined to include medical expenses, the cost of a nurse or nursing home if it is required during convalesce, wages the plaintiff could have

collected if it were not the accident, along with non-economic losses such as pain and suffering.

SECTION 2

Section 2 of the bill repeals Chapter 16 of Title 9 which is the Uniform Contribution Among Joint Tortfeasors Act adopted in 1970. This law applies where there are two or more defendants who are judged to be liable for an injury to the plaintiff. Under existing language if the plaintiff collects 100 percent of his damages from the deep pocketed defendant who was 10 percent at fault for causing the victim's injury, that defendant could then sue a second defendant who was 90 percent at fault to be reimbursed. This recovery would no longer be necessary when judgments are made on the basis of several liability.

SECTION 3

This section directs the governor to [illegible] the tort compensation system and make recommendatio[illegible] additional changes by January 31, 1987. He is also required to recommend standards for professional conduct so judges and juries would have a standard against which to judge doctors, lawyers, architects, and other professionals in malpractice cases.

SECTIONS 4 THROUGH 7

These sections identify portions of the bill which have the effect of amending court rules established by the Alaska Supreme Court. Under Article IV, Section 15 of the Alaska Constitution, legislative amendment of court rules requires a two-thirds vote of the members of each house. The following sections have the effect of amending court rules: those related to itemized verdicts, periodic payments, verification of claims, and apportionment of damages.

SECTION 8

APPLICABILITY -- The act applies to all injuries and accidents occurring the day after the act becomes effective. It does not apply to lawsuits already in progress or to injuries or accidents occurring before the date of enactment where lawsuits have not yet been filed.

SECTION 9

EFFECTIVE DATE -- The section provided for an immediate effective date.

A

DEPENDABLE INSURANCE COMPANY, INC.

ALASKA HOME OWNERS

Deductibles:

The table policy premiums anticipate a $250 flat Section I deductible. Other fixed dollar deductibles are available as follows:

Deductible	$100	$500	$1,000
Multiplier (Times $250 Ded. Prem.)	1.10	.90	.84
Maximum Prem. Credit)	N/A	-100	-175

Deductible multiplier applies to basic premium plus any Section I additions. Multiplier does not apply to scheduled personal articles or to Section II increase limits or additions.

Special Coverages:

1. Scheduled Personal Articles:

   Submit to GA for rating and binding.

   Underwriting:

   - No binding authority to agents.
   - An up-todate appraisal (within past 12 months) or recent sales receipt must be received by company before coverage will be bound.
   - Current photos may also be required.

2. Earthquake Coverage:

   - Coverage may be bound on frame structures only at a rate of 1.50 per $1,000 of the insured dwelling limit.
   - a 10% deductible applies to all earthquake coverage.
   - Earthquake coverage may not be bound on dwelling rated as masonry construction. Submit to company for approval.

3. Limit of Liability (Section II):

   The basic rates include the premium for $100,000 CPL and $1,000 Med. Pay. (For higher limits and additional Section II coverages see tables following.) (Page 15).

4. Alaska Suits:

   Additional supplementary payments (Alaska Civil Rule 82) is included in table rates.

Premium Tables

The premium tables show the basic H.O. premium for each $5,000 dwelling value from $50,000 to $250,000. To determine the premium for dwelling values not shown subtract next lower table value from next higher value and divide by 5. Multiply the quotient times the limit in excess of that for which the lower premium is illustrated to determine additional premium. (Round to nearst $.)

Example Limit Required $77,000

$80.000	Prem.	$310
$75,000	Prem.	$296
		14 ÷ 5 = 2.8
		2 (# of thousand 1,2,3, or 4)
		x2.8
		5.6 (rounded)

$6.00 (round to nearest $.01 - 49¢ = $0.)

Application

Please use DEPENDABLE application form DIC HO (10/84).

Alaska Suits

Additional and supplementary payments (Alaska Civil Rule 82) is included in table rates.

A REPORT TO THE LEGISLATURE of Washington

FROM THE

JOINT STUDY COMMITTEE

ON

INSURANCE AVAILABILITY AND AFFORDABILITY

November 13, 1985

Dick Marquardt
Insurance Commissioner, Committee Chairman

Senator Ray Moore
Chairman, Senate Financial Institutions Committee

Representative Gene Lux
Chairman, House Financial Institutions and Insurance Committee

Senator Alex Deccio
Ranking Minority Member, Senate Financial Institutions Committee

Representative Shirley Winsley
Ranking Minority Member, House Financial Institutions and
Insurance Committee

REPORT ON INSURANCE

AVAILABILITY AND AFFORDABILITY

November 13, 1985

INTRODUCTION

Six public meetings were held by the Joint Study Committee on Insurance Availability and Affordability to gather information on the current "insurance crisis" affecting Washington and the rest of the country. In the interests of readability, this report of the committee has been kept short. For readers wanting more detail, the appendices address various aspects of the problem in some depth. Copies of draft legislation, case histories and other reference materials are being prepared by the Insurance Commissioner's Office.

Five of the six meetings - held August 1 in Wenatchee, August 9 in Yakima, August 14 in Bellingham, August 21 in Spokane and September 11 in Seattle - were scheduled well in advance, to hear from people wanting to comment on any insurance problems. Testimony was sought specifically on day care liability, restaurant and liquor liability, insurance for long-haul trucking, insurance for local governments and insurance for non-profit agencies.

The sixth meeting, held October 21, was set after the insurance industry failed to offer substantive testimony at the first five sessions. Officials of 12 companies were invited to appear and give their views on the insurance crisis as well as on specific cases involving their firms. Eleven of the 12 companies invited sent representatives to the meeting. This report summarizes the committee's conclusions and recommendations.

REPORT OF THE SPECIAL COMMITTEE ON INSURANCE AVAILABILITY AND AFFORDABILITY

The Insurance Crisis - An Overview

The fact that a crisis does exist in the insurance market is apparent to anyone willing to even briefly examine the problem. The number of people directly affected by the rising cost of insurance or the lack of availability of certain types of coverage seems to grow every day.

While it is difficult to determine just how serious the problem will become and how long it will last, most industry observers feel it will continue at least through 1986. How severe its effects will be on our society, on our economy, will depend a great deal on what actions are taken, by legislation or regulation, to ease it.

The inability to obtain adequate, affordable insurance coverage deeply concerns many people. It is an emotional issue, one often colored by subjective viewpoints and misinformation. Insurance underwriting may involve speculation as well as science, and many factors in the current crisis are not easily measured or verified.

The greatest problems of cost and availability exist in the commercial insurance lines, which refers to property and casualty coverage provided to business, professional people and governments. The commercial lines are distinct from the personal lines such as auto or homeowner's insurance, which are property and casualty coverages provided to private individuals.

The Insurance Code states that the business of insurance is "affected by the public interest, requiring that all persons be actuated by good faith..." The public interest is not being served by the commercial insurance underwriters. It is clear that the property and casualty companies are not meeting the needs of business and government. In fact, the ability of business and government to function normally is being

severely curtailed, and in some cases their very existences are threatened. Many businesses and branches of local government are going without insurance coverage or are facing 200 to 300 percent increases in premiums for coverages with dangerously low liability limits.

How Did It Happen?

Property and casualty insurance goes through cycles, with competition during profitable times driving prices low and a tight market forcing prices high. The cycle often depends on outside factors, such as interest rates on investments or an unanticipated rise in the number or size of claims. The highs and lows are more extreme in the commercial insurance lines than in personal lines such as auto or homeowner's insurance.

During the past few years, insurance companies engaged in "cash flow underwriting" (see App. A), competing for every premium dollar. Lower premiums were used to get cash quickly and invest it at the high interest rates then available. Sound underwriting and investment practices, which are the bedrock on which the insurance industry was built, were either ignored or glossed over in favor of a quick return.

Price wars violate the Insurance Code (RCW 48.30.240), but policing the commercial underwriters to see that proper rates and forms are used is the job of the Examining Bureau. The Bureau, established by the Legislature (RCW 48.19.410) as a self-policing arm of the insurance companies, has been limited to property insurance. While rates must be filed with the commissioner's office before they are used, the "watchdog" role was assigned to the companies, acting through the Examining Bureau. From time to time, the commissioner's office has requested funding for field rate investigators so the commissioner could do his own rate examinations, but these requests have always been denied. The committee believes the commissioner's office should be authorized, and staffed with rate investigators, to be sure filed rates are actually being used.

During the height of the price war, so many filings came in that would have permitted even lower premiums than previously allowed, that the commissioner's rate analysts had to adopt a standard form letter of denial. For practical purposes, however, there is no policing mechanism to assure that only approved rates and forms are actually being used in the field.

The Capacity Crunch

The consumers are now paying the price for the insurers' drive for investment dollars. Today's comparatively low interest rates and new restrictions imposed by the "reinsurers," the international companies that in a sense "insure" the insurance companies, have forced a halt to cash flow underwriting. The commercial insurers now find their ability, or "capacity" to provide coverage, severely limited. The "capacity crunch" and the key role played by the reinsurers is described in Appendix B.

Growth of Court Claims

Compounding the current crisis is the long-term growth in the number and size of lawsuits companies must fight. One big insurance firm with long experience in liability coverage told the committee that in 1974, six doctors per 100 were being sued annually, but by 1985, the ratio was 16 per 100. Defense costs for that company rose from $12 per $100 in claims paid in 1950 to $58 per $100 in claims paid in 1985. Evidence given the committee pointed to court actions and legislation which increased the number of lawsuits and cases in which a defendant could be held liable. Significant growth in the size of jury awards during recent years was also shown.

The Need for Coverage

While the insurance market has been hit by such cyclical financial turmoil before, never has the "low point" been so low. The current crisis is the worst in the memory of those now in the insurance business. Unfortunately, the insurers seem determined to solve the problem, which they created, by sudden and drastic action that places often intolerable burdens on business and government.

For some businesses, insurance is an absolute necessity -- required by statute or regulation as with truckers, contractors and escrow companies. They are in a "Catch 22." The law requires insurance, but for some, insurance is not available at any price.

For most others, it is a practical necessity. Without insurance, or with inadequate protection against catastrophic loss, many businesses must severely cut back operations or simply close their doors. Governments, on the other hand, cannot "go out of business" but are forced to function with dangerously low amounts of protection or with no protection at all.

Resources of the Regulator's Office

While the insurance industry was going through the turmoil of cash flow underwriting from 1981 through 1985, more than one-fifth of the Insurance Commissioner's staff was cut. During the same period the number of authorized insurers increased by 132. More companies meant more premiums, more agents and brokers, more policy filings, more rate filings--a huge increase in paperwork. This required the commissioner to put proportionately more people onto the "paper pushing" end of the system (See App. C).

RECOMMENDATIONS

The committee unanimously adopted the following recommendations to enable the insurance commissioner to exercise more effective regulatory control of the insurance industry, to provide a means for guaranteeing insurance availability, and to prevent abusive marketing practices by insurers.

1. The Legislature should make sure insurance is available to those needing it by reauthorizing and expanding the FAIR plan. The FAIR plan, also known as the Washington Essential Property Insurance Inspection and Placement Program, would be expanded to provide liability insurance. The general idea behind the FAIR plan for fire insurance and the assigned risk pool for high-risk drivers auto insurance, both of which have been functioning for many years, is assuring that coverage is available for all.

2. The Legislature should adopt a new law requiring companies to give 120 days notice to agents and brokers prior to cancelling agency appointments. This would prevent insurers from arbitrarily and indiscriminatively cancelling contracts with agents and brokers, thereby eliminating coverage for large blocks of policyholders. This new law would give agents and brokers more latitude in getting cancelled policyholders new insurance (See App. D).

3. The Legislature should adopt a new method of funding the Insurance Commissioner's Office that would tie the amount of funding to the level of activity in the insurance industry. This would provide more stability for the regulatory staff, assuring staff cuts would not occur at the same time more industry control is needed. Funding should allow the hiring of six field rate investigators and two new rate analysts that are needed to enable better monitoring. With only three rate analysts and no field rate investigators, the commissioner now must rely on information supplied by the companies. Funding should also allow restoring six positions in the commissioner's consumer protection office lost during the budget cuts and provide supporting staff for the new personnel (See Appendices C and E).

4. The Legislature should require insurance companies to notify commercial policyholders of the reasons why their policies were cancelled or not renewed. Current law requires insurers to do this for policyholders in the personal insurance lines, and the law should be extended to cover all commercial policies.

5. The Legislature should amend existing law to improve the ability of insurance companies to comply with statutes on cancellation and nonrenewal of insurance contracts. This would involve limited changes to a bill adopted during the 1985 legislative session that required insurers to give policyholders more notice of cancellation or nonrenewal (See App. F).

In addition to the recommendations to the Legislature, the committee unanimously recommends or endorses the insurance commissioner's actions in the following areas:

1. The committee recommends that the commissioner return to "Prior Approval" on commercial rate filings. The committee recognizes that while the commissioner has the authority to do so, more staff is needed to implement it. This action would assure that the commercial insurance rates are fair and thoroughly "checked out" before they are used.

2. The committee endorses the current regulatory action by the commissioner to narrow from 40 percent to 25 percent the "judgmental" factor allowed companies in adjusting commercial insurance rates above and below the filed rate.

3. The committee endorses the commissioner's recent adoption of a regulation prohibiting insurance companies from cancelling, failing to renew or denying homeowner policies for the sole reason that day care facilities are being provided in the home.

- more -

In addition to the foregoing recommendations and endorsements, the committee is taking the following direct action.

The committee has begun setting up a Legal Action Task Force to review and collect data relevant to Washington's experience in tort law, and to recommend any changes needed to improve the availability and affordability of liability insurance. Based on testimony received by the committee, some reform of Washington's tort law appears to be needed. The committee, however, has neither the legal expertise to judge tort reform proposals, nor enough facts pertinent to Washington's experience to make informed recommendations of appropriate legislative action.

APPENDIX A

Cash Flow Underwriting

Cash flow underwriting had its roots in the runaway inflation that peaked in the late 1970s and early 1980s. Federal deficits, the oil embargo, "guns and butter" financing of the Vietnam War -- whatever the reasons for inflation, they can also be assigned blame as the root causes of the current dilemma. The excessive inflation led to excessive interest rates, which in turn led to the excesses of cash flow underwriting which resulted in the excessive measures being taken now by insurers against policyholders.

In the latter half of the 1970s, inflation pushed interest rates to unprecedented heights. Insurers began moving away from their traditionally conservative investment philosophy in favor of the short-term high yields that became available during those years. This practice picked up momentum and, by 1980, the insurance industry was engaging in a mad scramble to obtain premium income for the primary purpose of reinvesting it at the high interest rates. Sound underwriting considerations were glossed over or ignored in the rush to increase the cash flow.

The day of reckoning arrived when interest rates moved down to today's levels. About the same time, the disregard for sound underwriting started affecting the surpluses of insurance companies. An insurer's surplus is roughly equivalent to the net worth of a conventional business. It is the money available to pay claims if premiums are inadequate.

In the Spring of 1984, the reinsurers that had survived the rate cutting frenzy let it be known that, as their treaties (contracts with insurance companies) came up for renewal, sanity would have to return to the markets. By the Spring of 1985, most of the treaties that had not been cancelled had been renewed with strict requirements that the primary insurers increase their premiums -- particularly in the liability lines. The commercial underwriters had no choice but to comply. Appendix B, which follows, describes how the unregulated reinsurance market exercises ultimate control over commercial insurance underwriters.

APPENDIX B

The Capacity Crunch and the Reinsurers

The "capacity crunch" is industry jargon referring to the insurance companies' inability to write as many policies, measured by the amount of "premium" or money taken in each year from policyholders, as they did a few years ago. There are three reasons why the companies do not have the capacity to handle new policyholders or even some of their old policyholders.

The first is that the companies' surplus (money available to pay claims that exceed the total of premiums taken in) has diminished as interest rates have fallen and claim frequency increased.

Second, there are recognized industry guidelines limiting the amount of premium property and casualty insurers can write. The amount of premium, which translates into number of policies written, has a fixed relationship to the amount of surplus. Insurance companies can generally write up to three times as much premium as they have surplus. Historically, most insurers have written more policies -- more premium -- than three times their surplus, but have maintained their good ratings by passing the excess premium (policies or "risks") on to a reinsurance company. When the reinsurance carriers pulled out of the market, that practice was severely restricted or ended.

The third reason for the capacity crunch is that higher premiums on individual policies meant fewer policies could be supported by a relatively fixed or shrinking capacity. Some companies were forced to cancel policies to stay within their capacity level.

To illustrate, assume an insurer had $100 million of surplus and thus could write $300 million of premium based on its own resources. Such a company might have written as much as $400 million by passing excess premium (and risk) on to a reinsurer. The cash flow underwriting binge has not only depleted the $100 million surplus and thus the amount the company could write on its own resources, it has also caused the reinsurer to withdraw from the market. Thus, the insurance company is limited in its writings by its own resources. If, in this example, its surplus had been reduced from $100 million to $90 million, the company is now limited to $270 million of premium, instead of the $400 million it was writing when its surplus was $100 million and it had reinsurance treaties extending its writings to as much as $400 million. Capacity has been reduced by $130 million -- from $400 million to $270 million.

A company with its capacity limited is like a merchant who can sell more goods than he has on the shelf. The supply is constricted but the demand continues to grow. An insurance company in this situation will contrive to raise premiums, be very selective in its underwriting, cancel contracts with its producing agents, and generally conduct itself like any supplier in a seller's market.

Introduced: 1/16/86
Referred: Labor & Commerce,
Judiciary and Finance

BY RIEGER,COLLINS,MARROU,
MARTIN,PEARCE,VIGNALBERI,
JENKINS,M.W.MILLER,BINKLEY
AND FRANK

IN THE HOUSE

HOUSE BILL NO. 481

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 11, 49, 52, and 58; and providing for an effective date."

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

* Section 1. AS 09 is amended by adding a new chapter to read:

CHAPTER 17. LIMITATIONS ON CIVIL LIABILITY.

Sec. 09.17.010. PUNITIVE DAMAGES. In an action, whether in tort, contract, or otherwise, in which a party seeks to recover damages, any punitive or exemplary damages that may be adjudged against the party defending the claim shall be awarded to the benefit of the state and when paid deposited in the general fund.

Sec. 09.17.020. ITEMIZED VERDICTS. (a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, and economic loss shall be further itemized by category. Itemization of economic loss by category includes

(1) amounts intended to compensate for reasonable expenses that have been incurred, or that will be incurred, for necessary medical, surgical, x-ray, dental, or other health or rehabilitative services, drugs, and therapy;

(2) amounts intended to compensate for lost wages or loss of earning capacity; and

(3) all other economic losses claimed by the plaintiff or granted by the jury.

(b) A verdict shall include a determination of the amounts intended to compensate for injury or losses incurred before the verdict and amounts intended to compensate for losses that will be incurred in the future.

Sec. 09.17.030. PERIODIC PAYMENTS. (a) In an action to recover damages for personal injury, the court shall, at the request of a party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages. In entering judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for future damages. The court may require a judgment debtor to post security adequate to assure full payment of future damages awarded by judgment.

(b) A judgment ordering payment of future damages by periodic payments shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments shall be terminated on the death of the judgment creditor, except that payments may not be reduced or terminated if at the time of death there exists persons to whom the judgment creditor owed a duty of support, as provided by law. Any remaining payments shall be made to those persons to whom the judgment creditor owed the duty of support. The court that rendered the original judgment, may, upon petition of a party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

(c) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments, under (b) of this

section, the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees.

(d) Following expiration of all obligations specified in the periodic payment judgment, the obligation of the judgment debtor to make further payments shall cease and security given under (a) of this section shall revert to the judgment debtor.

(e) A certified copy of a judgment or order of the court issued under this section may be recorded under AS 09.30.010, but may not become a lien upon real property before the date that payment becomes due.

Sec. 09.17.040 VERIFICATION OF CLAIMS. Every complaint, cross-claim, and counterclaim shall be signed and verified by the claiming party or the attorney of the claiming party and shall bear a statement that the person signing the claim believes the statements made in the claim are true. If the court finds that a statement made in the complaint, cross-claim, or counterclaim is untrue, and upon motion of a party defending against the claim, the person signing the claim shall be compelled to show cause why the person signing the claim should not be held in contempt of court.

Sec. 09.17.050. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover damages for injury or death to person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.060. APPORTIONMENT OF DAMAGES. (a) In all actions involving fault of more than one party to the action, including third-

party defendants and persons who have been released under AS 09.17.-070, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.17.070; for this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.070, and enter judgment against each party liable on the basis of rules of several liability. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

Sec. 09.17.070. EFFECT OF RELEASE. A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from liability to the claimant, but it does not discharge another person liable upon the same claim unless the release, covenant not to sue, or similar agreement provides for discharge. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable

share of the obligation, determined in accordance with the provisions of AS 09.17.060.

Sec. 09.17.900. DEFINITIONS. In this chapter

(1) "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability; the term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages; legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault;

(2) "future damages" includes damages for future medical treatment, care or custody; loss of future earning capacity; or any future noneconomic loss.

* Sec. 2. AS 09.16 is repealed.

* Sec. 3. The governor is directed to review the existing system of civil litigation concerning personal injury and property damage and to make recommendations concerning improving trial procedures, the award of damages, and standards of negligence in professional malpractice. The recommendations shall be presented by January 31, 1987, to the First Session of the Fifteenth Legislature.

* Sec. 4. AS 09.17.020 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 09.17.020.

* Sec. 5. 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. 6. AS 09.17.020, 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. 7. 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, counterclaims, and cross-claims.

* Sec. 8. APPLICABILITY. Sections 1 and 2 of this Act apply to all causes of action accruing after the effective date of this Act.

* Sec. 9. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Collateral Source

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 Elimination of the Collateral Source Rule—A Partial Answer to Criticism of the Present Injury Reparations System*, 14 N.H.B.J. 20 (1972); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Peckinpaugh, *An Analysis of the Collateral Source Rule*, 32 Ins. Couns. J. 32 (1965); Schwartz, *The Collateral-Source Rule*, 41 B.U.L. Rev. 348 (1961); Note, *Unreason 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 Minn. L. Rev. 669 (1962); Moceri & Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 Gonz. 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. § 09.55-548 (1983); Ariz. Rev. Stat. Ann. § 12-565 (1982); Cal. Civ Code § 3333.1 (1976); Del. Code Ann. tit. 18, § 6862 (1974); Fla. Stat. Ann. § 768.50 (Supp. 1983); Idaho Code § 39-4210 (1977); Ill. Ann. Stat. § 110: 2-1205 (Smith-Hurd 1983); Iowa Code Ann. § 147.136 (1972); Kan. Stat. Ann. § 60-471 (1983); Neb. Rev. Stat. § 44-2819 (1978); N.H. Rev. Stat. Ann. § 507-C:7(I) (1983); N.Y. Civ. Prac. 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.[5] A more general statute abolishing the Collateral Source Rule in all tort actions has been introduced in the Kansas legislature.[6]

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?[7] (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 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

§ 2305.27 (Page 1971); R.I. Gen. Laws § 9-19-34 (Supp. 1984); S.D. Codified Laws Ann. § 21-3-12 (1978); Tenn. Code Ann. § 29-26-119 (1981); Wash. Rev. Code Ann. § 7.70.080 (1975-76).

5. Colo. Rev. Stat. § 10-4-713 (1973).

6. 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 courts 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.

Id.

7. The collateral benefits problem is not confined to tort litigation. It may be an issue in contract recovery. See Billetter v. Poseli, 94 Cal. App. 2d 858, 211 P.2d 621 (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. Hanson, 17 Ariz. 252, 150 P. 238 (1915); Anderson v. Rexroad, 180 Kan. 505, 306 P.2d 137 (1957); Georgetown Power Co. v. Neale, 137 Ky. 197, 125 S.W. 293 (1910). It may even become an issue in criminal law if some procedure is provided whereby a victim is authorized to recover restitution 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. § 8309-1 (II)(A) (Supp. 1983).

8. Restatement (Second) of Torts § 920A comment c, at 514-15 (1977).

9. The fact situation is patterned after Lewark v. Parkinson, 73 Kan. 553, 85 P. 601 (1906). Similar cases are: Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N.E. 874 (1885); Varnham v. City of Council Bluffs, 52 Iowa 698, 3 N.W. 792 (1879); Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N.W. 706 (1913). Reaching a contrary result by not allowing plaintiff to recover the reasonable value of gratuitious services as items of damage are: Morris v. Grand Ave. Ry. Co., 144 Mo. 500, 46 S.W. 170 (1898); Goodhart v. Pennsylvania Ry. Co., 177 Pa. 1, 35 A. 191 (1896).

10. Of course, the record should be silent because the clear rule in most states is that it is prejudicial to defendants to inject in the trial the fact that defendant had liability insurance. Cotter v. McKinney, 309 F.2d 447 (7th Cir. 1962); Robins Engineering, Inc. v. Cockrell, 354 So. 2d 1 (Ala. 1977); Taylor v. Atchison, T. & S.F. Ry. Co., 189 Kan. 210, 368 P.2d 281 (1962); Miles v. Seigle, 571 P.2d 866 (Okla. Ct. App. 1977). My assumption in the text is based on the likelihood of a small businessman, a livery stable operator, carrying liability insurance in the period before 1906.

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 innocent; 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 $15,800, 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 staff there. His

11. This is a more detailed analysis of the justification behind the Collateral Source Rule than courts usually give. A typical articulation of the justification appears in Rexroad v. Kansas Power & Light Co., 192 Kan. 343, 354, 388 P.2d 832, 841-42 (1964), 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 . . . .

Id.

12. This is an elaboration of the fact situations in cases like Rexroad v. Kansas Power & Light Co., 192 Kan. 343, 388 P.2d 832 (1964) and Davis v. Kansas Elec. Power Co., 15 Kan. 97, 159 P.2d 806 (1944). 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 self-insurer who can pass the cost of judgment on to consumers are: Overton v. United States, 619 F.2d 1299 (8th Cir. 1980); Aydlett v. Haynes, 511 P.2d 1311 (Alaska 1973); Taylor v. Jamison, 335 S.W.2d 902 (Ky. 1960); Isenminger v. Holden, 544 S.W.2d 550 (Mo. 1976).

medical expenses, if obtained in a private hospital, would have cost $642. 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 $1,070, 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

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 agents.

14. The right of the fire insurer to be subrogated to the claim of the insured whose loss it has paid is well established. New Hampshire Ins. Co. v. Kansas Power & Light Co., 212 Kan. 456, 510 P.2d 1194 (1973); Hume v. McGinnis, 156 Kan. 300, 133 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 holds that part of the recovery received from the tortfeasor for which he has been paid by his insurer in trust for the insurer. Deemer v. Reichart, 195 Kan. 232, 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. Leichliter, 168 Kan. 85, 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

15. Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954). While not entitled to subrogation before 1962, the Veteran's 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 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 insures depends on whether premiums charged to plaintiff and like insureds are discounted by the amount of subrogation recovery. If so, there is no serious benefit or windfall to the first party insurer. See W. YOUNG, INSURANCE, CASES AND MATERIALS 342-43 (1971) where the editor says:

> Insurance subrogation would have more friends 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 experience 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 . . . ."

Id.

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. 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.[17] If our main purpose is to guarantee compensa-

17. 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* Kansas Automobile Injury Reparations Act, KAN. STAT. ANN. §§ 40-3101 to -3121 (1981). In Manzanares v. Bell, 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.[18] The most thorough and scholarly analysis was made by John Fleming,[19] 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 reshifting 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 communities" should bear the loss . . . .[20]

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 excessively expensive and inefficient as a means of compensating automobile crash victims; that compensation distribution to accident victims 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.

Id. at 1304.

18. *See supra* note 2.
19. Fleming, *supra* note 2.

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 $68,990 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 1544-47.
21. *See* Moceri & Messina, *supra* note 2, at 311-12 (1972). *See also* the often cited passage from Hudson v. Lazarus, 217 F.2d 344, at 346 (D.C. Cir. 1954), 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 "recovers," for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, i.e. 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 services from a collateral source.

Id.

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 corrections for what they assume plaintiff will lose from having to pay attorney's fees, or recoup from having insurance. *See infra* notes 25 & 28 and accompanying text.
23. F. MacKinnon, Contingent Fees for Legal 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 full 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	No Collateral Source Rule	
Verdict	$68,990	$51,700	($68,990 less collateral benefits of $17,290)
less attorney's fees of ⅓ of recovery	$22,996	$17,233	
	$45,994	$34,467	
less subrogated benefits	$16,442	642[26]	
Plaintiff actually receives	$29,552	$33,825	

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 net loss 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 so prejudicial to the interests of

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 infra* note 40. The subrogation rights 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. AUERBACH, UNEQUAL JUSTICE 43-50 (1976).

28. Deemer v. Reichart, 195 Kan. 232, 404 P.2d 174; Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978). Some courts have decided that real party in interest statutes, such as FED. R. CIV. P. 17(a) 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, 467 F.2d 1143 (10th Cir. 1972).

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. Today, 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. Jurors may well speculate about the availability of insurance and such speculation could influence their decision one way or another. The completely uninsured 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

29. *See* cases 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 screening 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 attention[34] 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 elaborate 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 the injury or death is subject to reimbursement or indemnification from such collateral sources. 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 defendant 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 plaintiffs.[37]

The major issues on which the various statutes differ is: (1) whether it lies in the discretion of the jury to make the deduction,[38] or whether the court must make the deduction as a matter of law,[39] (2) whether the statute specifically denies the right of subrogation to the provider(s) of collateral benefits,[40] or whether this is left to implication,[41] and (3) whether the evidence which may be introduced covers all benefits received by the plaintiff,[42] whether such benefits as life and accident insurance are excluded from admissibility,[43] or whether benefits purchased by the plaintiff or his employer are excluded from admissibility.[44]

These medical malpractice statutes abolishing the Collateral Source Rule have been subjected to vigorous constitutional attack.[45] 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

30. *E.g.*, ARIZ. REV. STAT. § 12-567 (1982); KAN. STAT. ANN. §§ 65-4901 to -4908 (1980)

31. *E.g.*, ILL. ANN. 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); OHIO REV. CODE ANN. § 2307.43 (Page 1971) (limits recovery for general damages to $200,000); N.D. CENT. CODE § 26.1-14-11 (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. CODIFIED LAWS ANN. § 21-3-11 (1978) (total general damages limited to $500,000, but there is no limit on amount of special damages which are recoverable).

34. *See* Statement of the American Medical Association presented by President James S. Todd, M.D., to the Subcommittee on Health of the Ways and Means Committee of the United States House of Representatives, June 28, 1984.

35. *See* H. B. 5400, introduced in the 98th Cong. 2 Sess. (1984).

36. *See* statutes listed *supra* note 4.

37. ARIZ. REV. STAT. ANN. § 12-565 (1982)

38. *E.g.*, ARIZ. REV. STAT. ANN. § 12-565(B) (1982); WASH. REV. CODE ANN. § 7.70.080 (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 have to at least impliedly revoke the right of subrogation in the collateral source provider. Otherwise, the plaintiff would receive less than full compensation because there would be a double reduction 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.*, DEL. CODE ANN. tit. 18, § 6862 (1974); IDAHO CODE § 29-4-210 (1980).

43. *E.g.*, FLA. STAT. ANN. § 768.50(2)(a)2 (Supp. 1983); N.Y. CIV. PRAC. LAW § 4010 (McKinney 1975 & Supp. 1981).

44. S.D. CODIFIED LAWS ANN. § 21-3-12 (1978); TENN. CODE ANN. § 29-26-119 (1981); WASH. REV. CODE ANN. § 7.70.080 (1975-76).

45. An extended discussion of the constitutional issues may be found in Note, *California's Medical Injury Compensation Act: An Equal Protection Challange*, 52 S. CAL. L. REV. 829 (1979).

federal Constitution.[46] It has also been argued that state constitutional guarantees of equal protection or due 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 damages[49] or a provision guaranteeing open courts and remedies for all wrongs.[50]

The highest courts of two states, New Hampshire[51] 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 goals 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 thus reform was not essential. The Supreme Court of New Hampshire felt the means chosen by the legislature were not the most effective or were not constitutionally permissible ways to achieve the goals.[53]

46. *See* Eastin v. Bromfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D.1978).

47. *See* Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

48. *See* Eastin v. Bromfield, 116 Ariz. 576, 570 P.2d 744 (1977). Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

49. *See* Eastin v. Bromfield, 116 Ariz. 576, 570 P.2d 744 (1977)

50. *See* Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

51. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

52. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

53. The Kansas statute was declared unconstitutional by a federal district court in Doran v. Priddy, 534 F. Supp. 30 (D. Kan. 1981), on both federal and state constitutional grounds. The judge found that the distinctions between gratuitous 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 only one class of tort defendants, i.e. health providers, was an unfair classification. He felt that these discriminations 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 having a uniform operation across the state. Whether this constitutional analysis is correct and would be upheld by higher federal courts and by the Kansas courts is open to serious doubt.

The constitutional analysis made by Judge Rogers in the unreported case of Holman v. The Menninger Found. (No. 79-40-90, 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. Priddy. Judge Rogers reasoned that the validity of KAN. STAT. ANN. § 60-471 under equal protection analysis turns on which test is used, the "rational basis" test or stricter "substantial relationship" test. Those decisions which have held such statutes unconstitutional, including Doran v. Priddy, have used the "substantial relationship" test. Those courts which have used the "rational basis" test have found such statutes constitutional. After surveying the federal authorities, he concluded the appropriate test for federal equal protection was the "rational basis" test. Two Kansas Supreme Court cases considering the constitutionality of other parts of the medical malpractice act have applied the "rational basis" test and presumably would do so in evaluating KAN. STAT. ANN. § 60-471. *See* Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981) and State *ex rel.* Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221 (1978), *appeal dismissed*, 439 U.S. 808 (1978).

A substantial majority of courts which have considered the constitutionality of these statutes abolishing the Collateral Source Rule have upheld them as valid.[54] These courts use a less strict rule of legislative scrutiny under due process or equal protection analysis, the rational-basis test. This test accords greater tolerance and respect to legislative judgments about what the needs of society are and which are the best means to achieve these goals.

IV. THE GENERALIZATION OF THE MALPRACTICE REFORM TO ALL CIVIL ACTIONS

The core of the equal protection argument is that there is no rational justification for treating medical malpractice actions differently from all malpractice actions or more generally from all tort actions. In the Florida case testing the constitutionality of their Medical Malpractice Act,[55] Chief Justice Sundberg in his dissent said:

> [The Florida statute in question] essentially abolishes the collateral source rule, but only with reference to the medical profession. This common law rule typically prevents reduction of the plaintiff's tort recovery by any amounts of alternative compensation received from sources such as health insurance or disability benefits. The justifications for the rule are (1) to avoid penalizing the plaintiff who purchases insurance, (2) to avoid discouraging the purchase of insurance, and (3) to increase the deterrent effect of liability. The validity of these rationales has been debated, but commentators agree that if the collateral source rule is modified, there is no justification for confining changes to medical malpractice cases.[56]

Chief Justice Sundberg's arguments were not and should not be persuasive to the Supreme Court of Florida on the constitutional question. The constitutional structure should permit the legislatures the choice to legislate differently for medical malpractice if there are justifiable reasons for the differential treatment. The reason advanced by the legislatures which have abolished the Collateral Source Rule was the cost crisis in medical malpractice insurance. The federal Constitution and its constraints should be loose enough to give this discretion to the state legislatures.

Chief Justice Sundberg's analysis is, however, a good indication of

54. Eastin v. Bromfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Rudelph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977). *Cf.* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), where the Supreme Court of Idaho held the appropriate standard was the rational basis test, but remanded the case to the civil court for a finding on whether the national crisis in health care insurance was applicable to Idaho.

55. Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981).

56. *Id.* at 369-70 (Adkins, J., & Boyd, J., joining Sundberg, C.J., dissenting).