

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5760 HOUSE JUDICIARY

HB

166

(FILE 2)

HOUSE JUDICIARY COMMITTEE

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file #2

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SECTIONAL ANALYSIS OF HB 166

March 21, 1989

The following is an overview of House Bill 166, which seeks to remedy the high cost of insurance through gutting the civil justice system. For the most part, it is an attempt to modify the comprehensive changes made in 1986 to tort law. Where appropriate, examples have been given to clarify what rights are being taken away from victims.

S E C T I O N 1

This section attempts to justify these deprivations of victims rights. The stated purpose is to more equitably distribute the cost and risk of injury, but the actual effect would be to distribute the costs and risks only to the injured victims. A second stated purpose is to make insurance more available, but nothing in this bill will reduce insurance rates. When changes were made to the tort system in 1986, it was because proponents claimed that insurance rates would go down. Rates have not substantially decreased since that time. More changes should not even be considered unless the legislature gets a written guarantee from the insurance industry that rates will decrease as a result of this proposed legislation. The stated intent of the legislature, as written in this bill, is to reduce the costs associated with the tort system without affecting the rights of injured persons to seek redress through the courts. The true effect of this bill, however, is only to take away the rights of injured persons, without any benefit to them. Section 21 seeks to gather the facts that Section 1 claims the legislature already knows.

S E C T I O N 2

This imposes a six year statute of repose. This means that no claims may be brought six years after an injury-causing product was purchased or a building completed or an action took place.

Examples: A wing falls off of a Boeing 737 six years and one day after the airline bought it. Neither the passengers nor the airline could sue Boeing for their losses. The roof on the gymnasium in Aleknagak collapses shortly after the building is six years old. The school district and the injured children cannot recover their losses against the construction contractors or building designers.

You have surgery and the doctor leaves a sponge inside of you. It does not begin to cause you problems until more than six years later, when you discover this foreign object in your

body. You will not be able to sue the doctor for this negligent act. Similarly, you hire a lawyer to draw up a document for you. Ultimately, because of errors on the lawyer's part, you end up losing a great deal of money, but not until more than six years later. You would not be able to recover your losses from the attorney.

This six year limit applies even to minors or incompetents who were previously protected under AS 09.10.140. The statute of limitations remains two years. For lawsuits not eliminated by this section, see Section 4.

S E C T I O N S 3 & 4

Section 3 eliminates most torts from the current two year statute of limitations. Section 4 reenacts a similar two year statute of limitations for claims for personal injury, death or property damage. The new provision eliminates AS 09.10.140, which currently protects minors and incompetents.

Examples: A person is injured, resulting in a coma that lasts for 18 months. If AS 09.10.140 is eliminated, the person would then have only six months in which to file a lawsuit concerning the injury. Similarly, if a two-year old child were injured, the child would lose its right to sue this wrongdoer when the child was four years old even though a four-year old cannot understand claims for injury.

S E C T I O N 5

Makes it more difficult to obtain punitive damages award. Punitive damages represent the civil justice system's way of punishing defendants for gross, wanton, or willful misconduct. Punitive damages are infrequently awarded and when they are, it is because a jury felt very strongly about the misconduct and wanted to make an example of the defendant. Punitive damages serve as a deterrent so that businesses think twice before safety is sacrificed for profit. The 1986 statute restricted punitive damages to cases where there is clear and convincing evidence to support punitive damages. Under this section the standard would be even more restrictive. Not only would the plaintiff have to show malice, bad motive, or reckless indifference on the part of the defendant, but also would have to show conscious acts showing deliberate disregard. This is similar to a specific intent in criminal law. Wrongdoers would be insulated from punitive damages in spite of their conscious decision to ignore safety.

S E C T I O N 6

In the tort bill passed by the legislature in 1986, a victim who was injured while committing a felony lost the right to seek damages. This section now proposes to take this right from someone who is injured while engaged in any misdemeanor. A misdemeanor is defined as a crime punishable by a year or less in prison.

Examples: A person is hiking in Kachemak Bay State Park and wanders upon a private cabin that is an inholding within the park. The person decides to check out the cabin, opens the door, and a spring-loaded gun goes off, killing or injuring the person. Because the person was trespassing, they have no right to seek damages because they were engaged in a crime at the time that substantially contributed to the injury. Similarly, a citizen fearful of being robbed carries a concealed handgun. Because the gun has a manufacturing defect, it discharges. The injured person could not sue the manufacturer, despite the defect.

S E C T I O N 7

This section allows that if the person responsible for causing injury was also committing a crime, then Section 6 does not apply. In other words, if you were committing a crime and were injured, and the person who injured you was also committing a crime, then you still have recourse for damages through the courts. Two wrongs do appear to make a right in this case.

S E C T I O N 8

After a trial, a judgment is entered by the court. This provision would allow a defendant who lost a trial to prevent the plaintiff from obtaining his or her judgment. Instead, there would be a second mini-trial to set up a payment schedule over time. There are many problems with this.

Such periodic payments are called structured settlements. Structured settlements are very complicated. There is a vast difference between someone paying you \$100,000 cash today, or paying you \$10,000 per year over the next 10 years. In addition to the difference in value, there is a great difference in security. If payment is made today, you know the debt is satisfied; if all you have is someone's promise to pay, there is no guarantee you will ever receive the money. This problem does not disappear if the defendant buys an annuity from an insurance company that promises to make the payments. Undercapitalized or poorly managed insurance companies regularly fail. They also sell annuities cheaper

than strong companies. To buy a fair structure from a strong company will cost defendants the same amount as if the plaintiff were paid cash today. Why then do defendants and liability insurers want mandatory periodic payments? To cheat injured victims of the compensation the jury found due. Future payments are worth less than cash in hand. A law that said all jury awards will be reduced by 50 percent would clearly be unfair and unconstitutional. This proposal tries to do that in a backhanded manner.

The periodic payment statute sought to be changed by this section was enacted in 1986. Some of the primary proponents were brokers who make their money by selling annuity contracts. Their main pitch was that periodic payments were good for plaintiffs. The law they proposed then, however, allowed defendants to require plaintiffs to take periodic payments. When the bill was on the Senate floor, an amendment was passed that said if it was such a good idea for the injured party, then structured settlements should only be done at the request of the injured party. This legislation again proposes allowing either party to request a structured settlement. An injured party, who is no longer going to be able to continue in the line of work performed before the injury, may want a lump-sum payment to invest in a new business that is compatible with his or her capabilities. This section would allow the wrongdoer, rather than the injured person, to make the decision. The parties would then have a mini-trial about periodic payments. This would be a huge burden on the court system.

The impact of the second sentence of this section is unclear, since attorney fees are already a present value amount and contain no provision to adjust them for future value. Thus there is nothing to reduce to present value.

S E C T I O N 9

Adds a reference to existing law about increases in future payments for anticipated inflation. It does not require that such adjustments be made. What has been created here is a system in which a plaintiff can successfully try a claim, have a structured payout foisted upon him, and not even be compensated for inflation. Additionally, appropriate rates for inflation and discounting are not exact sciences. Mini-trials would be required on these issues with both sides bringing in economists to argue the case. Judges would be required to make decisions without the economic expertise to know what will be best for the claimant in the future. The court system will be controlling the entire future of injured people. By being injured, they will have sacrificed control of their destiny to the court system and insurance industry.

S E C T I O N 1 0

Creates immunity from liability for board members and officers of public corporations, electric cooperatives and telephone cooperatives, as long as they were acting within the scope of their official duties. Reviewing this amendment discloses a glaring error in the 1986 statute. The intent of the statute is to protect board members and officers for managerial decisions. As passed in 1986, it is much broader. It covers all acts within the scope of official duties. Thus, if driving an insured vehicle while dropping off a report to another board member, one of them runs a red light and kills or maims another person, there could be no recovery from the auto insurer for the injuries or death.

S E C T I O N 1 1

Opponents of victims' rights claim the collateral source rule is unfair because it gives a windfall to the victims. This is not true. The most common collateral source is health insurance bought by the victim or his employer. But health insurance policies almost always have subrogation clauses. This means that the health insurer gets paid back when damages are recovered from the wrongdoer. Thus there is no double recovery by the victim. It would be very unfair to have the victim's recovery reduced for such collateral payments because the victim would still be obligated by contract to pay back the health insurer. The collateral source rule ensures that the wrongdoer will properly bear the financial burden of his wrongdoing. It is not fair for a wrongdoer to profit because a plaintiff happens to be protected by insurance.

Example: A wrongdoer injures a person who spent his own money for a disability policy. The wrongdoer would thus receive a windfall. The same is true if the victim received gratuitous wage payments from an employer or help from family and friends.

This section replaces the collateral benefits statute enacted in 1986. Instead of being considered at a post-trial hearing, collateral benefits would now be considered by the jury and reduce the recovery. The 1986 statute served to reduce compensation to victims, but at least allowed the judge to consider countervailing costs to the claimant such as actual costs and fees incurred in the litigation.

This section also requires the jury to be instructed about any tax implications of damage awards. The IRS does not tax injury damages because they are compensation that simply replaces what the victim lost. If your house burns down, the insurance money you collect is not taxable. Damages are

replacement of capital, not new income. The judge or jury decides the amount of the loss. Taxability or non-taxability has nothing to do with that loss. This provision seeks to confuse juries with irrelevant information so they will impose their own "tax" on that which is not legally taxable, by reducing the damages they award.

S E C T I O N 1 2

Reduces the interest rate on judgments from 10.5 to 8 percent. The prime rate is now 11.5 percent. This 8% rate is well below the market rate and will encourage insurers not to settle. Insurers will be able to make money by setting it aside and collecting higher interest on it than they have to pay out, thus they lose any incentive to settle a case.

S E C T I O N 1 3

Under the 1986 statute, interest runs from the date of written notice of a claim. This section eliminates prejudgment interest on future damages, thus again providing a disincentive for insurers to settle cases.

S E C T I O N 1 4

Implements section 15.

S E C T I O N 1 5

Caps non-economic damages in a wrongful death case at \$50,000. This is particularly discriminatory to those who operate in a non-cash based society, such as rural people and homemakers. The survivors of a successful orthoscopic surgeon in Anchorage who is killed by a wrongful act stand to receive a great deal of money for the future earning potential of the victim. The survivors of a native person living in the Bush and existing in a subsistence economy with very little actual cash value, will only receive \$50,000 as the value of that life. Similarly, homemakers who do not have a W-2 to show for wages earned are only worth \$50,000 under this bill. This limit applies regardless of the number of survivors, thus reducing the recovery of each one. If a housewife had a husband and four children, each would get only \$10,000 in spite of their huge loss.

S E C T I O N 1 6

Alaska Civil Rule 82 awards partial attorneys' fees to the party who wins a lawsuit. This section would eliminate that partial reimbursement only in claims for injury or death. This is very unfair to injured people. Insurance companies use litigation to wear people down so they will settle for less money than is due them. But injured people typically have to pay their attorneys out of the damages recovered. So an injured person never pockets all her damages. Rule 82 helps ease the burden of using an attorney to protect your rights. This proposed legislation would allow big businesses and insurance companies to get partial fees from each other, but take that right away from an injured person suing an insurance company or an oil company. It is extremely unfair.

S E C T I O N 1 7

This overrules Jackson v. Power, which was a case in which a hospital was found liable for damages caused by a doctor working in its emergency room. The hospital was liable because of duties owed to emergency room patients under state regulations, national hospital accreditation standards, and its own bylaws. This section would give the hospitals immunity, even when the health care provider is the actual agent of the hospital, not just a contract physician. Enactment of this legislation would allow hospitals to avoid liability by merely posting a notice. This does not take into consideration severely injured persons who may be unconscious on the way into the emergency room and not able to read the notice. There is no requirement that the notice be seen or understood by the patient.

S E C T I O N 1 8

Requires that medical malpractice rate information be included in the annual report to the legislature presented by the director of the Division of Insurance under AS 21.06.110.

S E C T I O N 1 9

Current law gives immunity to peace officers or emergency service patrollers who handle intoxicated persons. The purpose of this amendment is unclear. It appears to be an attempt to preclude any legal action, such as an action against the governmental body employing the individual.

S E C T I O N 2 0

This section repeals three statutes. When the \$500,000 cap was instituted in 1986, an exception was made for those victims who suffer disfigurement or severe physical impairment. Repeal of AS 09.17.101(c) removes that exception.

Example: A quadriplegic or triple amputee could receive no more than \$500,000 general damages.

The second statute repealed here, AS 09.17.040(c), currently makes it possible for parties to stipulate to use the rules of Beaulieu v. Elliott to compute damages. This amendment would require the parties to use an inflation/discounting procedure that is more costly, more time consuming, and ultimately reaches the same result. It will impose an unnecessary burden on the limited resources of the court system. If the parties to litigation agree to follow the simpler procedure, the state has no legitimate reason to prevent them from doing so.

The final repealer in this section eliminates AS 09.55.548, the statute that specifically controls collateral source payments in medical malpractice cases.

S E C T I O N 2 1

Requires reports to the legislature of the effects of all these changes. To a large extent, this seeks the facts that are stated in the purpose section of the bill.

S E C T I O N S 2 2 & 2 3

Clarifies that certain sections of this bill amend the Alaska Rules of Civil Procedure.

S E C T I O N 2 4

Clarifies applicability of this act.

S E C T I O N 2 5

Provides an immediate effective date.

STATE OF ALASKA
THE LEGISLATURE

HOUSE STATE OFFICE
JUDICIAL ALASKA 99501
202-465-1000

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 30, 1990

SUBJECT: Limitation of certain civil actions
 CSHB 166(L&C)

TO: Representative Peter Goll
 Co-Chair
 House Judiciary Committee

FROM: Michael F. Ford *M.F.*
 Legislative Counsel

You have asked if AS 09.10.055(d), as amended in sec. 3 of CSHB 166(L&C) raises an equal protection problem. As explained in this memo, I believe that this section probably violates the constitutional right to equal protection of the law contained in Article I, section 1, of the Alaska Constitution.

In 1988 the Alaska Supreme Court struck down the existing version of AS 09.10.055(a). Turner Construction Company v. Scales, 752 P.2d 467 (Alaska 1988). The court found that the statute violated the state constitutional equal protection clause, because there was no substantial relationship between the protection given to design professionals, while leaving other defendants unprotected, and the goal of encouraging construction. Section 2 of CSHB 166(L&C) is an effort to repeal and reenact this same statute, AS 09.10.055(a), in a manner that avoids this unconstitutional distinction.

Section 3 of CSHB 166(L&C) would exempt certain actions relating to transportation or storage of hazardous materials, from the 15 year limit imposed under AS 09.10.055(a) as repealed and reenacted in sec. 2 of CSHB 166(L&C). This provision has the effect of shifting liability from some defendants, to those defendants who store or transport hazardous materials. Assuming the goal of sec. 2 is to encourage construction and improvement to real property, and to avoid stale claims, then to avoid an equal protection problem there must be a rational reason for not applying the same 15

Representative Peter Goll
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year period of limitation to those individuals who store or transport hazardous materials. It does not seem that a rational reason exists that would support an exception for defendants who transport or store hazardous materials as provided in this bill. This is the type of distinction that was struck down in Turner Construction Company.

In conclusion, sec. 3 of CSHB 166(L&C) would most likely be struck down if challenged as being in violation of the equal protection clause of the Alaska Constitution. Please contact me if you have further questions.

MFF:pl
WKP3/112

STATE OF ALASKA
THE LEGISLATURE

POUR LE STATE CAPITOL
JURISDICTION ALASKA 99501
907 465 0001

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 22, 1989

SUBJECT: Civil Actions - HB 166
TO: Representative Dave Donley
FROM: Michael F. Ford
Legislative Counsel

The following is a sectional analysis of HB 166 that includes comparable provisions of law from the state of California:

Section 1 - Findings and purpose.

California - No comparable provision.

Section 2 - Requires that an action for personal injury, death, or property damage be brought within six years of the date of injury, if caused by a product or by construction, or within six years of the last act alleged to be the cause of the injury. Periods of disability, such as minority, incompetency, or imprisonment do not extend the six year period. This section does not apply if the personal injury, death, or property damage was caused intentionally, or if another shorter period of limitation applies.

California - The nearest comparable provision is enclosed as attachment A. This generally prohibits an action for damages resulting from a patent defect in the design, survey, or construction of real property from being brought more than four years after substantial completion of the improvement, or if the damages result from a latent defect, an action cannot be brought more than 10 years after substantial completion of the improvement.

Section 3 - Removes actions for personal injury, death, or property damage, from the existing two year statute of limitations.

California - The comparable provision is enclosed as attachment B. This generally requires an action for personal injury, wrongful death, or other listed wrongs to be brought within one year of the accrual of the action.

Section 4 - Requires that an action for personal injury, death, or property damage be brought within two years of the time the person had the right to bring the action. The two year period is not extended for any period of disability, such as minority, incompetency, or imprisonment. The section does not apply if a shorter period of limitation is imposed.

California - See section 3 above.

Section 5 - Requires that clear and convincing evidence of malice, bad motive, or reckless indifference to the interests of another exist before punitive damages may be awarded.

California - The comparable provision is enclosed as attachment C. This generally allows punitive damages to be awarded when "oppression, fraud, or malice" exists.

Section 6 - Prohibits a person from recovering damages for personal injury or death if the injury or death occurred while the person was committing a crime and the person has been convicted of the crime. Crime includes a felony or a misdemeanor.

California - No comparable provision.

Section 7 - Provides that a person who commits a crime that results in personal injuries to that person is not prevented from recovering damages for personal injury or death, if the person liable was also engaged in the commission of a crime and has been convicted of the crime. Also defines the term "crime", to include a felony or a misdemeanor.

California - No comparable provision.

Section 8 - Requires that if a portion of a judgment is owed to an attorney under a contingent fee agreement, that portion must be reduced to a present value and paid in a lump sum, rather than as a part of periodic payments ordered by the court.

California - The comparable is enclosed as attachment D. The comparable provision applies only in medical malpractice actions. It allows either party to request periodic payment of a judgment if the award equals or exceeds \$50,000.

Section 9 - Requires that the court include an amount for inflation, when ordering that future damages be paid by periodic payments.

California - See section 8 above.

Section 10 - Prohibits recovery of damages for personal injury, death, or property damage caused by an act or omission within the official duties of a member of the board of directors or an officer of a public corporation, or electric or telephone cooperative, unless the act or omission constituted gross negligence.

California - No comparable provision.

Section 11 - Allows a person to only recover damages that are in excess of compensation received from other sources, such as private or government insurance. Also requires the court or jury to be informed of the tax implications of an award of damages.

California - The comparable provision is enclosed as attachment E. It applies only in medical malpractice actions.

Section 12 - Lowers the legal rate of interest that may be awarded on judgments from 10.5% to eight percent, unless otherwise agreed by contract.

California - The comparable provision is enclosed as attachment F. It sets the legal limit of interest on judgments at 10 percent.

Section 13 - Prohibits the award of prejudgment interest for future economic or noneconomic damages.

California - No comparable provision.

Section 14 - Technical amendment.

California - The comparable wrongful death provision is enclosed as attachment G. It provides for recovery of damages for wrongful death, by heirs of the estate.

Section 15 - Prohibits an award of nonmonetary damages in excess of \$50,000, in a wrongful death action.

California - No comparable provision.

Section 16 - Prohibits the court from awarding attorney fees in a civil action for personal injury, death, or property damage, unless specifically authorized by statute or by agreement of the parties.

California - The comparable provision is enclosed as attachment H. It does not allow a court to award attorney fees, unless provided for in statute, or by agreement of the parties.

Section 17 - Limits the liability of a hospital for civil damages caused by a person who is not an employee. Requires the hospital to post notice that certain individuals are not employees. Provides that the limitation does not apply to liability based on the hospital's own negligence or intentional misconduct. Adds certain definitions.

California - The nearest comparable provision is enclosed as attachment I. It establishes immunity only for a physician who renders obstetrical services in a hospital emergency room.

Section 18 - Requires the director of the division of insurance to annually report to the legislature regarding medical malpractice insurance rate changes occurring as a result of certain court decisions.

California - No comparable provision.

Section 19 - Limits the right of a person to bring an action against a peace officer or member of the emergency service patrol when taking an intoxicated person into custody, unless the act or commission was grossly negligent, reckless or intentional.

California - No comparable provision.

Section 20 - Repeals (1) a limit on recovery of noneconomic damages contained in AS 09.17.010(c), (2) an exception to the award of future damages contained in AS 09.17.040(c), and (3) a section regarding consideration of collateral benefits in a medical malpractice action contained in AS 09.55.548.

California - No comparable provision.

Section 21 - Requires the Department of Commerce and Economic Development to report to the legislature regarding the effect of certain insurance claims on the civil justice system.

California - No comparable provision.

Section 22 - Notice of amendment to the civil rules of court.

California - No comparable provision.

Section 23 - Notice of amendment to the civil rules of court.

California - No comparable provision.

Section 24 - Applicability.

California - No comparable provision.

Section 25 - Effective date.

California - No comparable provision.

MFF:gc
WKG8/058

Attachments(9)

A

Added Stats 1959 ch 1010 § 1

Cross References:

Limitation of action to recover on bank account § 337

Collateral References:

Cal Jur 2d Limitation of Actions § 85

16 Cal Practice, Action on Account Between Merchants § 2893

McKinney's Cal Dig Limitation of Actions §§ 11, 17

1 Am Jur 2d Accounts and Accounting § 3

Annotations

What constitutes open, current account 1 ALR 1066; 19 ALR 369; 57 ALR 201

Payment by one of two or more joint and several debtors as suspending or tolling limitation 74 ALR2d 1267

NOTES OF DECISIONS

This section, though not retroactive in effect, codifies pre-existing case law of California on subject. *Pacific States Steel Corp. v Isaacson Iron Works* (1963) 370 P2d 645.

Where the record of transactions between parties was kept on ledger sheets with supporting data attached which reflected debits and credits, the ledger sheets were kept in a single folder maintained as a unit for each year, and the folders were kept in a steel filing cabinet in the company office,

such a record was within the ambit of Code Civ Proc, § 337a, defining a bank account. *Conterman v DeLong* (1967) 251 CA2d 768, 59 Cal Rptr 801.

Where there is a question as to whether certain records qualify as a bank account, it makes no difference whether the account is kept in one book or several so long as they are permanent records and constitute a system of bookkeeping as distinguished from mere private memoranda. *Conterman v DeLong* (1967) 251 CA2d 768, 59 Cal Rptr 801.

§ 337.1. [Patent deficiency in real property improvement design, survey, construction, etc., and resulting injury to property or person: Four years]

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

- (1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;
- (2) Injury to property, real or personal, arising out of any such patent deficiency; or
- (3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought

within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

Added Stats 1967 ch 1326 § 1

Collateral References:

Within Procedure 2d p 1111.

Cal Jur 2d Limitation of Actions §§ 33, 67.

13 Am Jur 2d Building and Construction Contracts §§ 114, 132 et seq.

§ 337.15. [Latent deficiency in design, construction, survey of real property improvement, or property injury therefrom: Ten years]

(a) No action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of such development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of his performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to Section 442 in an action which has been brought within the time period set forth in subdivision (a) of this section.

the premises of a family apartment house, the trial court did not err in granting summary judgment for the contractor, where, according to information properly before the court, the infant's fall into the pool occurred more than four years after the substantial completion of the pool and at the time of the fall the pool was unfenced. As a matter of fact, the pool was an improvement to realty, and the absence of a fence constituted a patent deficiency. There was no unresolved issue of fact precluding the granting of the contractor's motion for summary judgment on the ground that the parents' complaint was barred by limitations under Code Civ. Proc., § 337.1. *Mattingly v Anthony Industries, Inc.* (1980) 109 CA3d 806, 167 Cal Rptr 292.

For purpose of determining the applicability to personal injury action of the four-year limitation period of Code Civ. Proc., § 337.1, the test to determine whether a deficiency is patent is not a subjective one, applied to each individual user, but rather it is an objective task based on the reasonable expectations of the average consumer. *Mattingly v Anthony Industries, Inc.* (1980) 109 CA3d 806, 167 Cal Rptr 292.

Code Civ. Proc., § 337.1, subd. (a), is an appropriate statute of limitations to be applied to actions based on negligence, strict liability, and attractive nuisance against a swimming pool contractor to recover damages resulting from personal injury to an infant in a fall into an outdoor, unfenced, family apartment house swimming pool. That statute, which provides that a personal injury action against a party who constructed an improvement to realty for an injury resulting out of a patently deficient design or construction in the improvement must be brought within four years after the substantial completion of the improvement, applies to a personal injury action against the contractor of such a swimming pool. Even should a complaint against him state a cause of action in strict products liability. *Mattingly v Anthony Industries, Inc.* (1980) 109 CA3d 806, 167 Cal Rptr 292.

An action by a window washer against the owners of an apartment building for injuries sustained while cleaning the outside of the building's windows, which had no window cleaning safety devices, after another worker by mistake removed weights from plaintiff's ladder, causing him to fall, in which the owners cross-complained against the building's architect, the trial court properly denied summary judgment to the architect due to the four-year statute of limitations in Code Civ. Proc., § 337.1 (limiting the time for actions against architects, contractors and the like). Such statute is a mere economic regulation touching upon neither a suspect class nor a fundamental right, and its result in a denial of equal protection of the law was constitutional, since it promoted a legitimate state interest by protecting investors from uncertain future liability, thereby encouraging construction, such that a rational basis existed for the classification. *Salinero v Pon* (1st Dist) 124 Cal App 3d 120, 177 Cal Rptr 204.

An action by a window washer against the owners of an apartment building for injuries sus-

tained while cleaning the outside of the building's windows, which had no window cleaning safety devices, after another worker by mistake removed weights from plaintiff's ladder, causing him to fall, in which the trial court granted summary judgment in favor of the building's architect on the basis of Code Civ. Proc., § 337.1 (limiting the time for actions against architects, contractors and the like), the injured worker was entitled to argue the unconstitutionality of such statute on appeal, although the architect was made a party to the action not by the complaint, but by the owners' cross-complaint, since before such motion was granted the injured worker retained the option of substituting the architect for a Doe defendant by amendment of the complaint. Thus, the trial court's ruling adversely affected his right to pursue his cause of action against the architect, given the application of res judicata or collateral estoppel principles to bar any subsequent action by the injured worker against the architect. *Salinero v Pon* (1981, 1st Dist) 124 Cal App 3d 120, 177 Cal Rptr 204.

In a wrongful death action by a young man whose mother died of pneumonia directly and proximately caused by the faulty performance of heating and air conditioning units in a 10-year-old building in which she was employed against the architect who designed and supervised erection of the building, the general contractor, the heating and air conditioning subcontractor, and the manufacturers of the heating and air conditioning units, the trial court erred in granting the motions of the architect, the general contractor, and the subcontractor, for judgment on the pleadings on the ground the deficiency in the building was "patent" within the meaning of Code Civ. Proc., § 337.1, which provides a four-year-after-completion-of-construction limitation period with respect to patent deficiencies allegedly caused by improvers of real property. The statute defines "patent deficiency" as one "which is apparent by reasonable inspection," and none of the defendants had been able to pinpoint the cause of the heating and cooling malfunctions and therefore could not remedy the problem. Thus the decedent, who knew only that the building was always too hot or too cold and was subject to great temperature fluctuations, could not be expected to solve the enigma of the heating-cooling dilemma, and the defect fell within the commonly accepted definitions of "latent," i.e., not "open" or "exposed," or "evident." *Baker v Walker & Walker* (1982, 5th Dist) 133 Cal App 3d 746, 184 Cal Rptr 245.

In a proceeding brought by the owners of a winery to compel a construction company and a firm providing design, architectural, and engineering services to arbitrate alleged roofing defects in a winery such defendants designed and constructed,

the trial court properly dismissed on the basis that both the design agreement and the construction agreement expressly prohibited a demand for arbitration being made after the date of the applicable statute of limitations. The court properly applied the four-year limitation period of Code Civ. Proc., § 337.1 (limitation period for patent defects in construction of improvements to real property), rather than the ten-year limitation period of Code Civ. Proc., § 337.15 (limitation period for latent defects in construction of improvements to real property), since substantial evidence supported the court's findings that the claimed defects should have been apparent to the owners, and were in fact known to them, by virtue of the role of the owners' full-time construction quality auditor, who was retained to monitor construction of the winery roof. *Renown, Inc. v Hensel Phelps Construction Co.* (1984, 1st Dist) 154 Cal App 3d 413, 201 Cal Rptr 242.

The provisions of Code Civ. Proc., § 337.15 (ten-year period of limitations for latent defects in construction of improvements to real property), read together with the provisions of Code Civ. Proc., § 337 (four-year period of limitations for written obligations), enacts a two-step limitation: actions founded upon a latent defect in the development of real property must be filed within four years of discovery, but in any case within ten years of the date of substantial completion of the improvement. Thus, the ten-year period set forth in § 337.15 is not absolute, but only sets the outer limit within which suit must be brought. *Renown, Inc. v Hensel Phelps Construction Co.* (1984, 1st Dist) 154 Cal App 3d 413, 201 Cal Rptr 242.

The two-year statute of limitations of Code Civ. Proc., § 339, subd. (1), rather than the four-year statute of limitations of Code Civ. Proc., § 337.1, subd. (a), was applicable to plaintiff developers' cause of action against a contractor and a subcontractor arising from delay in completion of public improvements in connection with a city redevelopment project caused by alleged patent deficiencies in the improvements. Code Civ. Proc., § 339, subd. (1), applies to actions upon a contract, obligation, or liability not founded upon an instrument in writing. Although Code Civ. Proc., § 337.1, applies to actions for patent deficiencies in the construction of improvements to real property, the intent of the Legislature in enacting Code Civ. Proc., § 337.1, was to provide a cause of action for patent deficiencies existing upon substantial completion of a project. The developers admitted that they sought damages solely for delay, not for patent deficiencies which still existed upon completion of the project. *Kralow Co. v Sully-Miller Contracting Co.* (1985, 4th Dist) 168 Cal App 3d 1029, 214 Cal Rptr 630.

§ 337.15. [Action for latent deficiency in construction or survey of real property or injury arising out of such deficiency: Ten years]

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observa-

tion of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

(1) The date of final inspection by the applicable public agency.

(2) The date of recordation of a valid notice of completion.

(3) The date of use or occupation of the improvement.

(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

Amended Stats 1979 ch 571 § 1; Stats 1980 ch 676 § 63; Stats 1981 ch 88 § 1.

Amendments:

1979 Amendment: Added ", or the surety of a person," near the beginning of subd (a).

1980 Amendment: Routine Code Maintenance.

1981 Amendment: (1) Substituted "the" for "such" before "development" in the introductory clause of subd (a); (2) substituted "that person's" for "his" in subd (c); (3) substituted "the" for "such" after "deficiency in" in subd (e); and (4) added subd (g).

Witkin Procedure (3d) Actions §§ 347, 356, 391, 352, 426, 427, 428, 429, 430, 431.

43 Cal Jur 3d Limitation of Actions §§ 28, 140.

Cal Condo Handbook 2d (Hanna) § 15.19.

Ten year limitations period of Code of Civil Procedure Section 337.15 applies to breach of contract actions. CEB Civ Litig Rep (1985) Vol 7 No. 7, p 216.

Ten year statute of limitation covers laten defect based on breach of contract. CEB Real Prop L Rep (1985) Vol 8 No. 8, p 191.

Timeliness of indemnity actions against builders—a review of new decisions under California Code of Civil Procedure Section 337.15. (1981) 19 Cal Trial Lawyers J No. 1, 103.

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been tortiously induced. *Trembath v*
(74) 43 CA3d 834, 118 Cal Rptr 124

Not Barred by Statute

was properly granted judgment in an
inst a county sheriff and the county
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y through error in his office, where the
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9, subd. 2, for actions against sheriffs
arising out of official acts. Plaintiff's
tion, when the sheriff refused to satisfy
for the funds, was either in equity or
not in tort, and the notice of claim
of the Tort Claims Act were, under the
of Gov. Code, § 814, inapplicable. *Nat'l
& Casualty Ins. Co. v Pichess* (1973)
2, 110 Cal Rptr 649.

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ion for an accounting and for declara-
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ent, the trial court erred in sustaining
to the complaint on the ground the
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e duty to account, as provided in Corp.
5021, 15022; thus the action is governed
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Proc., § 343, for "an action for relief
efore provided for." *Manok v Fishman*
CA3d 208, 107 Cal Rptr 266.

Dismissal

ction in which a limited partnership
ud and professional negligence on the
untants and that such wrongdoing was
red until after the running of the three-
provided for bringing fraud actions by
Proc., § 338, subd. (4), and the two-year
ode Civ. Proc., § 339, subd. (1), for
l negligence actions, the trial court did
refusing the partnership's instructions
acy, where its pleading alleged that the
ct on the part of the accountants took
than four years prior to the filing of
g. The governing statutes of limitation
set forth for fraud and professional
and the giving of instructions on civil
would have been entirely meaningless
have led only to confusion of the jury.
Logan & Frazer (1975) 52 CA3d 118,
tr 59.



§ 339.5. [Lessee's breach of unwritten lease: Four years]

Within Procedure (3d) Actions §§ 342, 367.

Cal Jur 3d Landlord and Tenant § 162. Limitation of Actions §§ 30, 53.

§ 340. [Personal injury; Wrongful death; Torts; Statutory penalties; Check payment by bank; Property seizure; Good faith improvements]

Within one year:

(1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

(2) An action upon a statute for a forfeiture or penalty to the people of this state.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

(4) An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

(5) An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made.

Amended Stats 1973 ch 20 § 1; Stats 1982 ch 517 § 97.

Amendments:

1973 Amendment: (1) Deleted former subd 4 which read: "An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process"; and (2) renumbered former subds 5 and 6 to be subds 4 and 5.

1982 Amendment: In addition to making changes in punctuation, (1) deleted ", or upon an undertaking in a criminal action," after "a statute" in subd (2); and (2) substituted "the good faith improver" for "he" in subd (5).

Law Revision Commission Comment:

1973 Amendment—Section 340 is amended to reflect the fact that arrest and imprisonment in a civil action is no longer permitted. See Code Civ. Proc., § 478 and Comment thereto. See also former Govt. Code, §§ 26681 et seq. (liability of sheriff for escape of person held upon civil arrest). Cf. former Code Civ. Proc., § 501 (liability of officer for escape).

1982 Amendment—Section 340 is amended to delete the reference to an undertaking in a criminal action. Undertakings of bail are no longer governed by Section 340. See *People v. Burton*, 146 Cal. App.2d Supp. 878, 305 P.2d 302 (1956). Other undertakings in criminal actions are governed by the same rules that apply to undertakings generally. See Section 337 (four-year statute of limitations). The other changes in Section 340 are technical.

Application of this section to action by county, against tortfeasor, for care and treatment of injured or diseased person: Gov C § 23004.1.

Within Procedure (3d) Actions §§ 216, 325, 328, 330, 341, 348, 355, 396, 400 et seq., 439, 458; Plead § 43; Plead § 1042; Appeal § 506.



(1985, 2d Dist) 174 Cal App 3d 111, 219 Cal Rptr 805.

Pursuant to Civ. Code, § 3291, a plaintiff is not entitled to prejudgment interest as a matter of course. Rather, prejudgment interest is authorized only if the defendant fails to accept an offer to settle made pursuant to Code Civ. Proc., § 998, and the judgment exceeds the amount of the offer. Entitlement to prejudgment interest is determined by the amount of the judgment as entered rather than the gross verdict. *Green v Franklin* (1987, 2d Dist) 190 Cal App 3d 93, 235 Cal Rptr 312.

Civ. Code, § 3291, providing for recovery of prejudgment interest on a personal injury damage award when plaintiff's settlement offer is refused and plaintiffs recovers a more favorable judgment

(Code Civ. Proc., § 998), imposes a mandatory obligation on the trial court to award prejudgment interest where the statutory conditions are met. The ordinary meaning of "shall" supports that interpretation, and nothing in the language of Civ. Code, § 3291, suggests its word "shall" should be construed as other than mandatory. The Legislature should have used the word "may" if it intended trial courts to have discretion to deny prejudgment interest. Moreover, the available legislative history leads to the conclusion the statute's language is mandatory, since the purpose of § 3291 is to guarantee the plaintiff interest and to penalize the defendant in appropriate situations. *Morrin v ABA Recovery Service, Inc.* (1987, 4th Dist) 195 Cal App 3d 200, 240 Cal Rptr 509.

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§ 3294 and following sections—general references:

Bancroft-Whitney Judicial Council Forms Manual, Form 982.1(13).

§ 3294. [When permitted]

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

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"Rendition" of a judgment within the meaning of § 974 does not include the act of giving notice thereof. *Wright v Superior Court* (1922) 57 CA 749, 207 P 910.

Notice of rendition of justice court judgment which after title of court and cause recited that in designated justice court "judgment rendered and entered denying plaintiff his claim, and assessing cost against plaintiff," and which was signed by justice, constituted substantial compliance with statute. *Brown v Superior Court* (1924) 65 CA 147, 223 P 426.

The filing of a notice of appeal from a justice's judgment on the day it was entered was a waiver of the right to notice under former § 891. *Nay v Superior Court* (1925) 72 CA 443, 237 P 566.

Judgments by default were not within former § 891. *Colthurst v Justice's Court* (1929) 100 CA 146, 279 P 832.

A motion to quash execution and modify the judgment was a waiver of the notice required by former § 891. *Morgan v Superior Court* (1930) 210 C 28, 290 P 569.

§ 667.7. [Medical negligence actions]

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a 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 which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b) (1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, 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. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), 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 all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original

judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(c) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at

some future judgment.

Added Stats 2nd effective September

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Suggested form

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Added Stats 2nd Ex Sess 1975 ch 1 § 26; Amended Stats 2nd Ex Sess 1975 ch 2 § 1.194, effective September 26, 1975, operative December 12, 1975.

Collateral References:

Witkin Procedure 2d Attorneys § 86A, Judgment § 31.

Cal Jur 3d Healing Arts and Institutions § 195, Judgments § 191.

Cal Digest of Official Reports 3d Series, Healing Arts and Institutions § 53.

Forms:

Suggested form is set out below, following notes of decisions.

Annotations:

Cost of future cosmetic plastic surgery as element of damages. 88 ALR3d 117.

Sufficiency of evidence to prove future medical expenses as result of injury to head or brain. 89 ALR3d 87.

NOTES OF DECISIONS

After appeal from a postjudgment order in a medical malpractice action, following a judgment for plaintiff, that the judgment be payable in installments pursuant to Code Civ. Proc., § 667.7, the trial court had the power to make an order disallowing certain items of costs, as the order affected the final verdict, which was not appealed, rather than the postjudgment order. However, the trial court did not have the power to make orders on matters related to the appeal, as they were then within the jurisdiction of the Court of Appeal. *Hollaway v Scripps Memorial Hospital* (1980) 111 CA3d 719, 168 Cal Rptr 782.

Upon the taking of an appeal from an order, entered after judgment for plaintiff in a medical malpractice action, providing for installment payments of the judgment pursuant to Code Civ. Proc., § 667.7, all trial court litigation had ended except the manner of payment, it was the appellate court's province to insure competent representation for plaintiff, a brain-damaged minor, while the matter was pending there, and the trial court had no jurisdiction to make orders suspending plaintiff's guardians ad litem and attorney. *Hollaway v Scripps Memorial Hospital* (1980) 111 CA3d 719, 168 Cal Rptr 782.

SUGGESTED FORM

Judgment Authorizing Periodic Payments of Prospective Damages in Medical Malpractice Action

[Title of Court and Cause]

The above-entitled cause came on for hearing before this court on ___1___, 19__2___, ___3___ [with a jury]. ___4___ appeared as attorney for ___5___, and ___6___ appeared as attorney for ___7___. Oral and documentary evidence was duly presented and the jury was properly instructed following arguments by counsel.

The jury awarded judgment in favor of plaintiff and against defendant as hereinafter set forth:

___8___ *[Specify damages to date of trial].*

___9___ *[Specify prospective damages].*

A request was made by ___10___ [plaintiff or defendant] that the award of prospective damages be made in the form of periodic payments of \$___11___ per ___12___ [month or as the case may be] until such judgment is satisfied.

It is therefore ordered that the judgment for prospective damages in the sum total of \$___13___ be made to ___14___ in ___15___ [number] installments of \$___16___, on the ___17___ of each ___18___ [month or as the case may be], ___19___ [beginning on ___20___, 19__21___, or within ___22___ (30) days after the judgment becomes final].

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of her securities at the time she was advised by defendants to change her portfolio plus the amount such securities would have earned had she kept them, less the value of securities and cash returned to her by defendants, where defendants breached their fiduciary duty in advising plaintiff to switch into unsuitable investments and engage in excessive transactions, so that she was entitled to recover for all detriment suffered (Civ Code, § 3333), where the evidence supported an inference that plaintiff's losses were due to mismanagement rather than market fluctuation, and where defendants offered no evidence as to what the experience would have been with a theoretical properly-

managed account. *Twomey v Mitchum, Jones & Templeton, Inc.* (1968) 262 CA2d 690, 69 Cal Rptr 222

Compensatory damages are designed to compensate plaintiff for harm resulting from defendant's wrongful conduct; and though it was error to instruct that compensatory damages are designed to compensate plaintiff for any wrong suffered by him as a result of defendant's wrongful conduct, the jury could not have been misled or confused by the inadvertent use of the word "wrong" for the word "harm." *Fletcher v Western Nat. Life Ins. Co.* (1970) 10 CA3d 376, 89 Cal Rptr 78

§ 3333.1. [Collateral benefits in medical malpractice actions]

(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. 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 insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

(c) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of

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(1968) 264 CA2d

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Lemere v Safeway
712, 228 P2d 296.

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CA2d 268, 290 P2d

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services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Added Stats 2nd Ex Sess 1975 ch 1 § 24.5; Amended Stats 2nd Ex Sess 1975 ch 2 § 1.19, effective December 12, 1975; Stats 1976 ch 1079 § 4.

Amendments:

1976 Amendment: The amendment made no change.

Collateral References:

Witkin Summary (8th ed) Torts § 516B.

39 Cal Jur 3d Insurance Contracts and Coverage § 510.

Cal Digest of Official Reports 3d Series, Damages § 13, Healing Arts and Institutions § 53, Public Aid and Welfare § 31.

Proof of Facts:

Medical malpractice—negligence in postoperative care of patient. 26 Am Jur Proof of Facts 2d 183.

Law Review Articles:

Psychiatric malpractice. 11 Bev Hills BJ 43.

Annotations:

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 ALR4th 589.

NOTES OF DECISIONS

In a medical malpractice action, the trial court erred in instructing the jury that, in determining the amount of any award it might make to plaintiff, it could take into consideration the extent to which payment for medical, hospital, and nursing care had already been made by insurance benefits. Though Civ. Code, § 3333.1, which abrogates the collateral source rule in actions against health care providers based on professional negligence, was in effect at the time of trial, it became effective after the alleged negligence took place and after the complaint was filed. The statute contains no explicit language making it retroactive, and its legislative history indicates that the Legislature intended that it should apply only prospectively. *Bolen v Woo* (1979) 96 CA3d 944, 158 Cal Rptr 454.

The trial court properly denied the motion of a health insurer to intervene in a personal injury action by one of its subscribers against doctors, a hospital, and manufacturers, suppliers and operators of respiratory equipment, even though the insurer's contract provided for a lien and reimbursement with respect to benefits provided for tort caused injuries, and the subscriber had separately agreed to make a good faith effort to recover the costs of benefits in the pending action. A cause of action in tort is not "property" within the meaning of CCP § 387, subd (b), which makes intervention a matter of right for persons claiming an interest relating to the property or transaction

which is the subject of the action, when disposition of the action may impede or impair that interest, and the "transaction" that was the subject of the action was the alleged tortious injury to the subscriber, in which the insurer could have no interest. Since the insurer was not a party to the action, it was not bound by an order of the trial court purporting to foreclose its claim to proceeds of a settlement between the subscriber and one of the defendants, and could pursue its claim in a separate action. *California Physicians' Service v Superior Court* (1980) 102 CA3d 91, 162 Cal Rptr 266.

The imposition of a Medi-Cal lien (Welf. & Inst. Code, § 14124.70 et seq.) by the Department of Health Services in a medical malpractice action was not prohibited by Civ. Code, § 3333.1, providing that the defendant in an action for personal injury against a health care provider based upon professional negligence may elect to introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to certain specified acts, insurance, contracts or agreements, and that no source of such collateral benefits may recover any amount against the plaintiff nor be subrogated to the rights of the plaintiff against a defendant. Payments to a recipient under the Medi-Cal program are not encompassed in Civ. Code, § 3333.1, and particularly such payments are not included within the specified payments made "pursuant to the United States Social

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CHAPTER 5

Interest and Costs

- § 685.010. Rate of interest on judgment
- § 685.020. Commencement of interest on judgment payable in installments
- § 685.030. Cessation of interest
- § 685.040. Right to costs of enforcing judgment
- § 685.050. Costs and interest under writ
- § 685.070. Memorandum of costs of enforcing judgment
- § 685.080. Motion for costs of enforcing judgment
- § 685.090. Addition of costs to judgment
- § 685.100. Deposit of levying officer's costs
- § 685.110. Law relating to prejudgment interest not affected

Cross References:

Service of notice of entry of judgment based on sister state judgment, recovery of fee: § 1710.30.

Collateral References:

Witkin Procedure (2d) Enforcement of Judgment § 240A
Am Jur 2d Costs §§ 52 et seq., Interest and Usury §§ 34 et seq.

§ 685.010. [Rate of interest on judgment]

(a) Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied.

(b) The Legislature reserves the right to change the rate of interest provided in subdivision (a) at any time to a rate of less than 10 percent per annum, regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred. A change in the rate of interest may be made applicable only to the interest that accrues after the operative date of the statute that changes the rate.

Added Stats 1982 ch 1364 § 2, operative July 1, 1983.

Legislative Committee Comment:

Section 685.010 supersedes former Section 685.010 (as enacted by 1982 Cal. Stats. ch. 150). Subdivision (a) continues subdivision (a) of former Section 685.010 which set the legal rate of interest on judgments at 10 percent as permitted by Section 1 of Article 15 of the California Constitution. Subdivision (b), which supersedes subdivision (b) of former Section 685.010, states the reserved power of

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injury, the damages recoverable under the Probate Code.

Wrongful act or neglect may be the wrongful death of any such child, consolidated therewith for trial

paragraphs. (2) amended the fifth paragraph here"; (1) added "or her" wherever it appears

4. 552. Parties § 48, Wrongful Death § 3

1 Practice Rev § 24.7.

ly for physical and emotional damages. (1981)

Proof of Facts 2d 393.

by negligence of parents in action for injury

tort committed against child's mother before

ed by parent's negligence—modern cases. 6

A.L.R.4th 52.

g action for his death. 26 A.L.R.4th 1264.

st yields on various bonds since 1920, and published by the United States Savings and League showing interest rates on savings n 1929, and where the expert took account of the need for reasonable security of investment over the period of the boy's life. Niles v San Rafael (1974) 42 CA3d 230, 116 Cal Rptr

• sum of \$1,299,637 in damages allocated for permanent care to an 11-year-old boy permanently paralyzed from the neck down was not excessive in light of an increase rate of 5½ percent being used in calculating the total cost; anticipated future expenses of medical costs may be presented to the court and expert testimony was substantial evidence supporting the award relating to the future cost of attendant care, in the absence of any contrary evidence presented by defendants. Niles v San Rafael (1974) 42 CA3d 230, 116 Cal Rptr

mental damages in the sum of \$1,604,371 awarded to an 11-year-old boy permanently paralyzed from the neck down were not excessive in light of the fact that the boy's mental and emotional capacities were intact while his body was paralyzed, which situation was predicted by life expectancy to continue for 59 years from the time of the injury and where the boy had suffered dire grief and anxiety—unhappy feelings that would perhaps recur again and again. Niles v San Rafael (1974) 42 CA3d 230, 116 Cal Rptr 733.

(G)

34. Appeal and Error

Defendants in a personal injury action did not have standing to contest the amount of attorney's fees awarded to a minor plaintiff's attorney, even if the amount of the attorney's fees were decreased.

defendants would not have to pay less, and a party not aggrieved by an order or judgment has no standing to attack the order or judgment on appeal. Niles v San Rafael (1974) 42 CA3d 230, 116 Cal Rptr 733.

SUGGESTED FORM

Complaint by Parents for Injuries to Child

[Title of Court and Cause]

Plaintiffs allege:

1. Plaintiffs, _____ and _____, were and now are husband and wife, and the mother and father, respectively, of _____, a minor, aged _____ years, born on _____, 19____.
2. Defendant, _____, is a resident of the County of _____, State of California.
3. On or about _____, 19____, the defendant _____ [insert appropriate facts], thereby causing serious injuries to _____, the minor child of plaintiffs.
4. As a direct and proximate result of the negligent acts of the defendant, _____, the minor child of the plaintiffs sustained serious injuries, consisting of _____ [insert description].
5. As a direct and proximate result of the negligent acts of the defendant, the plaintiffs have been deprived of the care, society, companionship, maintenance and support of _____, the minor child of _____ and _____, plaintiffs herein.

Wherefore, plaintiffs pray:

1. For damages in the sum of \$_____;
2. For costs of suit incurred herein; and
3. For such other and further relief as to the court seems proper.

[Signature]

Dated _____, 19____.

[Verification]

§ 377. [Wrongful death]

(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the merits of the interested party.

(b) For the purposes of subdivision (a), "heirs" shall mean the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Part 2 (commencing with Section 6400) of Division 6 of the Probate Code,

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid, and

(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support.

Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provision of law.

Amended Stats 1975 ch 334 § 1, ch 1241 § 5.5, Stats 1977 ch 792 § 1, Stats 1983 ch 842 § 12, operative January 1, 1985

Amendments:

1975 Amendment (Ch 334): (1) Designated the former section to be subd (a), (2) deleted (a) "not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother," after "person" the first time it appears; (b) ", and his dependent parents, if any, who are not heirs," after "heirs" the first time it appears; (c) "and dependent parents" after "heirs" in the fourth sentence; and (2) added subd (b).

1975 Amendment (Ch 1241): Added "or her" after "his" wherever it appears.

1977 Amendment: (1) Deleted "and" after "Probate Code," in subd (b)(1); (2) added ", and" after "valid" in subd (b)(2); and (3) added subd (b)(3).

1983 Amendment: Substituted "Part 2 (commencing with Section 6400) of Division 6" for "Division 2 (commencing with Section 200)" in subd (b)(1).

Note—Stats 1975 ch 334 also provides: § 2. It is the intent of the Legislature that the amendments to Section 377 of the Code of Civil Procedure made by Section 1 of this act eliminate the additional requirements imposed by law, in the form of specified survivors, for the maintenance of a wrongful death action for the death of a minor and include the putative spouse, children of the putative spouse, stepchildren, and parents within the class of persons who may maintain an action for wrongful death if they were dependent on the decedent. It is the further intent of the Legislature that the amendment to Section 377 of the Code of Civil Procedure made by Section 1 of this act including dependent stepchildren within the class of persons who may maintain an action for wrongful death alter the rule of law enunciated in the decision of the California Supreme Court in *Steed v Imperial Air Lines* (1974) 12 Cal 3d 115.

Law Revision Commission Comment:

1983 Revision—Section 377 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

Authority to recover exemplary damages: CC § 3294.

Within Evidence (3d) §§ 677, 1196.

Within Procedure (3d) Actions §§ 421, 490; Plead §§ 125, 174, 182, 299, 1164; PWT § 145; Trial § 324.

Within Summary (8th ed) pp 2314, 2315, 3083, 3084, 3085, 3180.

Cal Jur 3d Actions §§ 63, 135, 139, Aliens' Rights § 10, Boats and Boating § 39, Decedents Estates § 1004, Evidence §§ 239, 456, 462, 547, Limitation of Actions § 130, Parties § 48, Ships and Shipping §§ 97, 154, Statutes § 26, Wrongful Death §§ 2 et seq., 40, 50, 60, 62, 69, 70.

Modern Cal Discovery (4th ed) § 12.19.

Cal Family Law Service §§ 7:14, 40:6 et seq.

Calif Trial Handbook 2d (BW, 1987) 25:36.

Bancroft-Whitney Judicial Council Forms Manual, Form 982.1(1).

13 Am Jur Proof of Facts 2d 45 (proof of economic damages resulting from death of person in labor force).

Loss of consortium in
8 Am Jur Trials p 30
20 Am Jur Trials pp
Choice of measure of
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57 ALR3d 1289.
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survival statutes, of v.
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87 ALR3d 849.
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"guardian," in the first and second sentences of (d) in subd (c); (3) substituted "subdivision (c)" for "subdivision (d)" for "subsection (d) hereof"

erator in subdivisions (a) and (b) for prepaid rental listing service license. B & P C

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required by a provision in this code to be provided in a specified size of type, the size required, unless otherwise determined by the conventional practice in that industry, except that the type may be used for purposes of evasion of the law.

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unless the court otherwise orders, the judgment shall be given by the prevailing party, in the manner provided in this section, if the parties in open court and is entered in

Stats 1909 ch 640 § 1 and repealed by Stats 1969 ch

References:

This section: § 1293.2.

[10 Civ Proc Code]

Within Procedure (3d) Judgm § 84, Appeal § 673.

Cal Jur 3d Family Law § 723.

Cal Digest of Official Reports 3d Series, Costs.

Bancroft-Whitney Judicial Council Forms Manual, Form EJ-130.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial. 29 ALR4th 160.

Pro se litigant as entitled to award of attorneys' fees for value of his own services rendered in lawsuit under Freedom of Information Act (5 USCS § 552). 56 ALR Fed 573.

When may federal court decline to award to prevailing party attorneys' fees authorized by contract. 56 ALR Fed 871.

Award of attorneys' fees in private action brought to enforce provisions of Interstate Commerce Act regulating motor carriers. 57 ALR Fed 552.

Right of claimant's attorney to fee award under § 28(a) of Longshoremen's and Harbor Workers' Compensation Act (33 USCS § 928(a)) for unsuccessful work before Benefits Review Board, where decision of Board is reversed on appeal. 57 ALR Fed 876.

§ 1021. [Compensation of attorneys; Costs to parties]

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Amended Stats 1986 ch 377 § 2.

Amendments:

1986 Amendment: Substituted "their costs" for "costs and disbursements" near the end of the section.

Attorney's fees in actions against nonadmitted foreign insurers. Ins C § 1619.

Within Procedure (3d) Atty's § 129; Judgm §§ 107, 127, 128, 131.

Within Summary (8th ed) p 3168.

Cal Jur 3d Damages § 102, Mandamus and Prohibition § 52; Cal Jur 3d (Rev) Costs § 98.

Calif Trial Handbook 2d (BW,1987) 24:34.

Cal Practice Rev Ch 52 Costs and Attorneys' Fees.

Cal Forms—27A:23.

Fed Proc, L Ed, Judgments and Orders §§ 51:82 et seq.

Bancroft-Whitney Judicial Council Forms Manual, Forms MC-010, MC-011.

19 Am Jur Proof of Facts 2d p 335 (interference with attorney-client relationship).

Contingent fee compensation for attorney discharged without cause. 9 Cal Western LR 355.

Limiting the wrongfully discharged attorney's recovery to quantum meruit. 24 Hast LJ 771.

Mass contracts: Lawful fraud in California. 48 SCLR 1.

Enforcing the Coastal Act—Citizens' suits and attorneys' fees (1974). 49 St BJ 236.

Alexander, Consumers' rights in the legal market place: Problems of contingency fee clients who change attorneys. (1979) 54 St BJ 314.

Commercial bad faith in California: Attorney fees—Not tort liability—is the remedy for "stonewalling" (denial of liability without a reasonable basis for defense). (1987) 21 USF LR 419.

Attorney fees as recoverable costs. 63 ABAJ 510.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

Right of party who is attorney and appears for himself to award of attorney's fees against opposing party as element of costs. 78 ALR3d 1119.

Circumstances under which attorney retains right to compensation notwithstanding voluntary withdrawal from case. 88 ALR3d 246.

Allowance of counsel fees in taxpayer's action in state court. 89 ALR3d 690.

Limitation to quantum meruit recovery, where attorney employed under contingent fee contract is discharged without cause. 92 ALR3d 690.

[10 Civ Proc Code]



A staff physician of a hospital, who treats another doctor's patient at the hospital in response to a medical emergency, is protected by the Good Samaritan laws, Bus. & Prof. Code, § 2395 (providing that a physician who renders emergency care at the scene of an emergency is not liable for any damages as a result of any acts or omissions in rendering the emergency care), and Bus. & Prof. Code, § 2396 (providing that no physician who renders emergency care to a person for a medical complication arising from prior care by another person on the request of the other person is liable for any damages as a result of any acts or omissions in rendering such emergency medical care). The heart of the application of the Good Samaritan statutes is the inquiry whether a duty of professional care preexisted the emergency. Hence, a medical emergency arising from a child's birth occurring while a pediatrician was in the hospital, who then treated the child on the obstetrician's emergency request, created no duty to the child. *Burciaga v St. John's Hospital* (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

that a physician who renders emergency care at the scene of an emergency is not liable for any civil damages as a result of any acts or omissions in rendering the emergency care, and a physician who renders emergency medical care on the request of another person for medical complication arising from prior care by that person is not liable for any damages, apply to emergencies both within and without a hospital, and declare no restriction concerning the site of the emergency. *Burciaga v St. John's Hospital* (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

Bus. & Prof. Code, §§ 2395, 2396, providing that no physician who renders emergency care at the scene of an emergency or upon the request of another for medical complication arising from prior care by another will be liable for any civil damages as a result of any acts or omissions in rendering such emergency medical care, do not limit immunity to only those physicians treating patients outside the physician's specialty. *Burciaga v St. John's Hospital* (1986, 2d Dist) 187 Cal App 3d 710, 232 Cal Rptr 75.

Bus. & Prof. Code, §§ 2395, 2396, providing

§ 2395.5. Immunity for "on-call" physicians for emergency obstetrical services

(a) A licensee who serves on an on-call basis to a hospital emergency room, who in good faith renders emergency obstetrical services to a person while serving on-call, shall not be liable for any civil damages as a result of any negligent act or omission by the licensee in rendering the emergency obstetrical services. The immunity granted by this section shall not apply to acts or omissions constituting gross negligence, recklessness, or willful misconduct.

(b) The protections of subdivision (a) shall not apply to the licensee in any of the following cases:

(1) Consideration in any form was provided to the licensee for serving, or the licensee was required to serve, on an on-call basis to the hospital emergency room. In either event, the protections of subdivision (a) shall not apply unless the hospital expressly, in writing, accepts liability for the licensee's negligent acts or omissions.

(2) The licensee had provided prior medical diagnosis or treatment to the same patient for a condition having a bearing on or relevance to the treatment of the obstetrical condition which required emergency services.

(3) Before rendering emergency obstetrical services, the licensee had a contractual obligation or agreement with the patient, another licensee, or a third-party payer on the patient's behalf to provide obstetrical care for the patient, or the licensee had a reasonable expectation of payment for the emergency services provided to the patient.

(c) Except as provided in subdivision (b), nothing in this section shall be construed to affect or modify the liability of the hospital for ordinary or gross negligence.

Added Stats 1988 ch 1306 sec 1.

Note—Stats 1988 ch 1306 sec 2 provides:

SEC. 2. The Legislature finds and declares that there is a crucial need for the people of this state to receive knowledgeable and experienced emergency medical care. The Legislature further finds that physicians who serve on an "on-call" basis to hospital emergency rooms are regularly required to provide

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IMPACTS OF U.S. TORT SYSTEM CHANGES

- 1) Letter: 11/08/1989, To: David Rogers From: James Jordan
- 2) Report: Assessing the Effects of Tort Reform
- 3) Report: The Frequency and Severity of Medical Malpractice Claims
- 4) Letter: 08/05/1988 To: Mary Pierce From: Allan Kaufman, enclosure
- 5) Report: The Impact of Tort Changes on Insurance Rates
- 6) Report: State Responses to the Malpractice Insurance Crisis of the 1970s, Frank Sloan

ANTI-TRUST SUIT STATUS

- 1) Letter: 11/21/1989 To: Sam Cotten From: Richard Monkman
- 2) Letter: 10/16/1989 To: David Rogers From: Thomas Slagle, enclosure
- 3) Memo: Decision and Order

CLAIMS INFORMATION PROFESSIONAL

- 1) Liability Survey
- 2) Letter: 11/28/1989 From: Mary Pierce
- 3) Letter: 11/17/1989 to: Sam Cotten From: Janet Sloan Johnson
- 4) NICA Financial Database Sortfile

Claims Evaluations 3/28/1988

- 1) Evaluation Criteria and Report Format
- 2) Summary
- 3) Resume of Joyce Waincott
- 4) Comments on Computer Database/Coding Addendum 1
- 5) Addendum 2
- 6) Addendum 3
- 7) Letter: 08/31/1989 To: Mary Pierce From: Jetta Whittaker
- 8) Letter: To: Jetta Whittaker From: Mary Pierce
- 9) Medical Indemnity Corporation of Alaska Reports and Studies
- 10) Letter: 04/19/1989 To: Mary Pierce From: Mary VandeCastle
- 11) Letter: 05/03/1989 To: MaryAnn VandeCastle From: Art Stanford
- 12) Letter: 04/27/1989 To: MaryAnn VandeCastle From: Janet Sloan
Johnston
- 13) Letter: 11/21/1989 To: Mary Pierce From: Penne Chmielewski
- 14) Letter: 11/03/1989 To: Sam Cotten From: Douglas Smith
- 15) Liability Survey
- 16) Letter: 11/22/1989 To: David Rogers From: Ron Neupauer
- 17) Listing of Alaska Claims
- 18) Letter: 10/02/1989 To: Douglas Smith From: Ron Neupauer

- 19) Letter: 11/20/1989 To: David Rogers From: Patrick Hughes
- 20) Letter: 01/08/1989 To: David Rogers From: F. C. Ives
- 21) Alaska Professional Liability Loss and Premiums
- 22) Closed Professional Liability Claims for Alaska
- 23) Letter: 11/03/1989 To: David Rogers From: Bonnie Henkel
- 24) State of Alaska - Liability Survey
- 25) Letter: 11/02/1989 To: David Rogers From: Gary Bonham
- 26) Letter: 01/08/1990 To: Sam Cotten From: Thomas Porterfield, Jr.
- 27) Letter: 01/23/1986 From: Larry Laughman

American Institute of Architects

- 1) Survey
- 2) Letter: 07/29/1985 From: Larry Laughman
- 3) Questionnaire
- 4) Letter: 05/08/1985 To: Alaska Professional Design Council
From: Bernard Engals
- 5) Letter: 11/13/1989 To: David Rogers From: Lawrence Monin

Claims Information - Self Insured

- 1) Letter: 11/07/1989 To: David Rogers From: Brad Thompson
- 2) Letter: 12/28/1989 To: David Rogers From: Brad Thompson
- 3) Claims Made Analysis
- 4) Division of Risk Management
- 5) Letter: 10/30/1989 To: David Rogers From: Harry Sjoberg
- 6) Loss Experience Comparison
- 7) Letter: 10/30/1989 To: David Rogers From: H. P. Cutter
- 8) Letter: 11/01/1989 To: H. P. Cutter From: David Rogers

- 9) Letter: 11/17/1989 To: David Rogers From: Brian Rogers
- 10) Risk Management
- 11) State of Alaska Liability Survey
- 12) Letter: 11/17/1989 To: David Rogers From: Tom Bibeau
- 13) Liability Survey
- 14) Loss Summary
- 15) Letter: 11/28/1989 To: David Rogers From: Edward Zeine
- 16) Letter: 04/04/1989 From: Mr. Stanford
- 17) Resolution 89-24
- 18) Letter: 11/17/1989 To: David Rogers From: Gary Gandy
- 19) Ordinance #595
- 20) Letter: 11/19/1986 To: Judith Stevens From: Gary Gandy
- 21) MICA Meeting 01/15/1987

AVAILABILITY OF SERVICES

- 1) Memo: 10/17/1989 To: David Rogers From: Harlan Knudson
- 2) Letter: 01/11/1990 To: David Rogers From: Ward Hurlburt
- 3) Survey of Availability of Obstetric Care for Low-Income Women
- 4) Letter: 11/25, 1989 To: David Rogers From: David Hoffman
- 5) Report: Our Greatest Natural Resource - 01/1988
- 6) Report: The Best of Care - 09/1988
- 7) Notes: Board of Nursing
- 8) Is There a Nurse in the House? - Christine Klein
- 9) Nursing Shortage - Barbara Bathony
- 10) Letter: 10/19/1989 To: David Rogers From: Debra Gravo
- 11) Letter: 01/08/1990 From: Seth Adams
- 12) Memo: 05/30/1989 From: Terrence Brooks, enclosures

AVAILABILITY - AFFORDABILITY

INSURANCE PERCENTAGE

- 1) Letter: 11/08/1989 To: David Rogers From: James Jordan
- 2) Division of Insurance - Overview of Justification
- 3) Initiative #2 Survey
- 4) Market Availability Information
- 5) Example of Rate and Form Filing Activity
- 6) Rate Filing Compilation
- 7) Initiative Petition
- 8) Letter: 12/10/1989 To: David Rogers From: Gina McBride
- 9) Profile Alaska Market Medical Malpractice Insurance
- 10) Letter: 01/18/1990 To: David Rogers From: Harlan Knudson
- 11) Letter: 01/07/1990 To: David Rogers From: Ray Schalow, enclosures
- 12) Letter: 01/08/1990 To: David Rogers From: Keith Brown, enclosures
- 13) Letter: 01/09/1990 To: David Rogers From: Richard Ritter
- 14) Memo: 11/01/1989 To: David Rogers From: Richard Ritter
- 15) Letter: 01/20/1990 To: David Rogers From: Richard Ritter,
enclosures
- 16) Fax: 11/14/1989 To: David Rogers From: Richard Ritter, enclosures
- 17) Letter: 01/12/1990 To: David Rogers From: Gail McGill
- 18) Fax: 01/13/1990 To: David Rogers From: Frank Thomas-Mears
- 19) Letter: 01/13/1990 To: David Rogers From: Frank Thomas-Mears

PEER REVIEW PANEL RESULTS, ETC.

- 1) Letter: 10/24/1989 To: David Rogers From: William Cotton
- 2) Civil Rules 72-74
- 3) Alaska Rules of Court, Rules 7-9
- 4) Letter: 11/15/1989 To: David Rogers From: William Cotton
- 5) Letter: 11/17/1989 To: David Rogers From: William Cotton,
enclosures

CHANGES IN INSURANCE SERVICES

HOW THE PUBLIC IS TREATED

- 1) Suggested Legislative Agenda for 1987 by: National Insurance
Consumer Organization

RAND "THREE LEVEL" STUDY AND OTHER REPORTS

- 1) Report: Trends in Tort Litigation, 1987
- 2) Report: Costs and Compensation; Paid in Tort 1986 Litigation
- 3) Report: Contingent Fees for Personal Injury Litigation - 1980
- 4) Report: Medical Malpractice Liability Study - 1989

ALTERNATIVE CLAIM RESOLUTION MECHANISMS

- 1) Establishment of Alternative to Traditional Litigation
- 2) Letter: 01/02/1989 To: Governor Cowper From: Mary Pierce
- 3) Comparison of Medical Liability Reforms By: AWA, AMA, and FIAA
- 4) Physician Insurer

Model Alternative Medical Liability Determination Act

Reforming the Civil Litigation Process - 8/1984

- 1) Board of Overseers
- 2) Reforming the Civil Litigation Process
- 3) Characteristics of State-Court Annexed Arbitration Programs
- 4) Comprehensive State ADR Program Database
- 5) State Programs by Case Type
- 6) Memo: 03/15/1989 To: Sam Cotten From: Patricia Young
- 7) Court Annexed Arbitration in Hawaii
- 8) Hawaii Arbitration Rules
- 9) Executive Summary
- 10) Court-Annexed Arbitration Program - 01/1989
- 11) Court-Ordered Arbitration in North Carolina
- 12) Study Results
- 13) Summary
- 14) Memo: 11/07/1988 From: Patricia Young
- 15) Code of Virginia
- 16) Memo: 02/14/1989 From: Patricia Young

ROLES AND MECHANISMS OF STATE AGENCIES

- 1) Overview of Functions: Division of Insurance
- 2) Letter: 01/17/1989 To: John Andrews From: Donald Hitchcock
- 3) Functions of Division of Risk Management
- 4) Division of Occupational Licensing - FY 89 Performance Report

MISCELLANEOUS

- 1) Report: Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance - May 1986
- 2) Report: Tort Cost Trends
- 3) Report: Claim File Data Analysis
- 4) Report: Tort Reform: Past, Present, Future
- 5) Report: Medical Malpractice and Tort System - Peter Jacobson
- 6) Alaska Supreme Court System
- 7) Report: Their Rules, Effects and Costs to the General Public -
A. L. Tamagni, Sr.

LEGISLATIVE RESEARCH AGENCY REPORTS

- 1) Memo: 06/17/1985 To: Senator Bennett From: Carol Berryhill,
enclosures
- 2) Memo: 03/11/1989 To: Rep. Goll From: Hayden Kayden, enclosures
- 3) Memo: 04/18/1989 To: Rep. Goll From: Hayden Kayden
- 4) Memo: 03/13/1989 From: Karen Oakley, enclosures
- 5) Memo: 06/06/1988 To: Rep. Boyer From: Ed Flanagan, enclosures
- 6) Memo: 06/06/1988 To: Senator Jones From: Becky Penrose
- 7) Memo: 12/16/1987 To: Rep. Boyer From: Karen Oakley, enclosures
- 8) Colorado Chapter
- 9) Minnesota Chapter 604
- 10) North Dakota Judicial Remedies
- 11) South Dakota Non-Profit Corporation Members
- 12) State of New Jersey Assembly No. 2398
- 13) Memo: 05/28/1987 To: Rep. Swackhammer From: Gretchen Keiser,
enclosures
- 14) Report: Workmen's Compensation Committee
- 15) Memo: 01/30/1987 To: Rep. Sund From: Penelope Weyrauch,
enclosures
- 16) Memo: 11/06/1985 To: Rep. Koponen From: Mark Torgerson, enclosures

American Bar Association Journal

American Insurance Association Studies

- 1) Annual Report

Insurance Services Office, Inc.

- 1) Report: Coming Capacity Shortage

Liabilities of Municipalities 1983

- 1) Report: NIMLO 1983

Information From the National Insurance Consumer Organization

- 1) Letter: 08/14/1985 To: Rick Rule From: Ron Landsman, enclosures

United States General Accounting Office Report - 1985

California Draft Legislation - 1985

Colorado - 1985 Self-Insurance for State

Connecticut - 1895 Discussion of Sovereign Immunity Doctrine

Illinois Governmental Tort Immunity - 1985

Louisiana - 1985 Legislation on Self-Insurance Liability of Public Entities

Maine Study - 1980

Maryland 1985 Tort Claims Act Amendments

New York Draft Legislation

New York Tort Reform Article

New York Tort Reform Article

North Dakota 84 Collateral Source Rule

Ohio Legislative Alternatives 1983

Ohio Municipal Liability 1979

Oregon 1980 Self-Insurance for State Tort Liability

South Carolina 1985 Amendments to Tort Claims Act

- 1) Memo: 06/17/1985 To: Sen. Bennett From: Carol Berryhill
- 2) Memo: 09/17/1985 To: Sen. Bennett From: Carol Berryhill,
enclosures
- 3) Memo: 04/24/1985 To: Sen. Zharoff From: Elizabeth Hickerson
- 4) Memo: 03/28/1985 From: Rob Nauheim, enclosure
- 5) Memo: 03/01/1985 To: Sen. Zharoff From: Rob Nauheim, enclosures
- 6) Memo: 04/03/1985 To: Rep. Szymanski From: Jonathan Sherwood,
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SELF-REGULATION MATERIALS

- 1) Alaska Statutes
- 2) Professional Regulations
- 3) Letter: 12/22/1989 To: David Rogers From: Gary Dodson
- 4) FY 89 Stat. Information
- 5) Memo: 01/22/1990 To: David Rogers From: Linda Gohl
- 6) Annual Report Board of Registration
- 7) Procedures Manual
- 8) Circular of Information No. 189-90

Doctors, Etc.

- 1) Alaska Statutes
- 2) Professional Regulations
- 3) Health and Safety
- 4) Letter: 10/16/1989 To: David Rogers From: Pam Ventgen, enclosures
- 5) Letter: 12/21/1989 To: David Rogers From: Pam Ventgen
- 6) Letter: 10/16/1989 To: David Rogers From: Pam Ventgen
- 7) Letter: 01/16/1990 To: David Rogers From: Pam Ventgen
- 8) Alaska State Medical Board Report
- 9) Addendum A
- 10) Addendum B
- 11) Addendum C
- 12) Avoiding Liabilities for In-Office Laboratories
- 13) Avoiding Medical Record Decencies
- 14) How to Report Possible Claim

- 15) Preventing Patient Injuries
- 16) Preventing Medication Related Malpractice Claims
- 17) Report: Risk Prevention

Lawyers

- 1) Alaska Statutes
- 2) Letter: 10/29/1989 To: Sam Cotten From: Jerry Feldman, enclosures
- 3) Letter: 10/05/1989 To: Justice Matthews From: Stephen VanGoor, enclosures
- 4) Letter: 01/16/1990 To: David Rogers From: Deborah O'Regan, enclosures

Nurses, Etc.

- 1) Alaska Statutes
- 2) Professional Regulations
- 3) Letter: 01/18/1990 To: David Rogers From: Gail McGill
- 4) CSSB 156

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- 1) Alaska Statutes
- 2) Professional Regulations
- 3) Alaska Statutes
- 4) Fax: 01/16/1990 To: David Rogers From: Frank Thomas-Mears
- 5) Fax: 01/18/1990 To: David Rogers From: Frank Thomas-Mears
- 6) Alaska State Board of Dental Examiners Annual Report

RATES

- 1) Memo 10/13/1989 To: James Jordan From: Don Koch
- 2) Memo 09/01/1989 To: Paul Roller From: Don Koch
- 3) Memo 11/07/1989 To: James Jordan From: Stan Garlington
- 4) Letter: 11/06/1989 To: Sam Cotten From: Thomas Porterfield
- 5) Alaska Rate Structure for Design Professionals, Landscape Architects,
and Land Surveyors
- 6) Letter: 01/19/1990 To: Julie Krafft From: Thomas Porterfield
- 7) How Your Professional Liability Insurance Premium is Determined -
James Farber
- 8) Letter: 08/15/1988 To: Paul Roller From: Judith Ann Rudy
- 9) Filing Memo
- 10) Design Professionals Liability Continental Casualty Co.
- 11) Professional Liability Coverages and Premium Schedules
- 12) Fax: 01/17/1990 To: David Rogers From: Art Stanford
- 13) Proposed Gross Tail Premiums
- 14) Letter: 01/19/1987 To: Gary Gandy From: David Fraizer
- 15) Letter: 11/13/1989 To: David Rogers From: Art Stanford
- 16) Uninsured Hospital Staff Physician Deductible Endorsement
- 17) Hospital Rates
- 18) Letter: 12/21/1989 To: Rep. Donley From: Mary Pierce
- 19) Underwriting Practices and Procedures
- 20) Letter: 10/16/1989 To: David Rogers From: Ron Neupauer
- 21) 1989 Coverage Classification and Premium Schedule
- 22) Fax: 01/16/1990 To: David Rogers From: Ron Neupauer

23) Letter: 04/13/1989 To: Paul Roller From: Ron Neupauer

Medical Insurance Exchange of California

- 1) Report April 1989
- 2) Letter: 05/10/1989 To: Stan Garlington From: Thomas Hermes
- 3) Letter: 04/07/1989 To: Ron Neupauer From: Thomas Hermes, enclosures
- 4) Letter: 04/1988 From: Paul Roller, enclosures
- 5) Letter: 04/01/1988 To: John George From: Judith Ann Rudy
- 6) Fax: 01/18/1990 To: David Rogers From: Ray Conger
- 7) Letter: 01/06/1989 To: Paul Roller From: Michael O'Mally

The North River Insurance Company

- 1) Flexible Rating Sheet
- 2) Letter: 08/17/1983 To: Kenneth Moore From: Judith Ann Rudy, enclosure
- 3) Letter: 01/03/1986 To: John George From: Judith Ann Rudy
- 4) Filing Approval Procedures
- 5) Letter: 10/29/1987 To: John George From: Judith Ann Rudy
- 6) Letter: 08/18/1987 From: John George

COMPARISONS OF U. S. TORT SYSTEM CHANGES

- 1) Notes: Tort Reform Enacted in Other States
- 2) Controlling Liability Insurance Costs
- 3) Abolition of Modification of Collateral Source Doctrine
- 4) Establishment of Prejudgment Interest Accrual Principle
- 5) Penalties for Filing Frivolous Suits
- 6) Establishment of Immunity for Government Employees and Officials
- 7) Modification of Dram Shop Laws
- 8) Modified Statute of Limitations
- 9) Limitations on Attorney Contingency Fees
- 10) Tort Liability - Insurance
- 11) Tort Liability - Litigation
- 12) U.S. Tort Reform 1989
- 13) Statute of Limitations
- 14) Legislative Summary
- 15) Legislative Report for 101st Congress
- 16) Battle for Medical Malpractice Tort
- 17) Letter: 05/02/1989 To: Rep. Donley From: Elizabeth Kerttula,
enclosure

Special Attachment - Pre-Judgment Interest

- 1) Report: Jury Awards and Prejudgment Interest in Tort Cases

CHANGES IN TIME IN LAW OF LIABILITY AND DAMAGES

- 1) Report: Liability Perspectives and Policy

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House Liability Task Force
March 2, 1990
By: David Rogers, Special Counsel

DRAFT

SUMMARY OF DATA HIGHLIGHTS

Discussion Draft

I. AVAILABILITY AND AFFORDABILITY OF INSURANCE.

A. Availability has improved. Based on information received by the Task Force to date from the Division of Insurance and various professional liability carriers, there appear to be no significant availability problems for most professionals with certain limited exceptions. According to the Alaska Independent Insurance Agents and Broker's Association, Inc. there are some availability problems for non-professional categories like day care centers, liquor liability, small specialty and general contractors, pollution and any small business that requires liability coverage only.

B. Generally, rates appear to have stabilized within the last year or so although costs are still perceived as prohibitive and/or unreasonable for some categories, most notably testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate developer combinations, computer programers and certain physician categories including but not limited to OB/GYN. Many experts tell us that this is a cyclical business and anticipate another round of availability/affordability problems in the future.

C. Affordability is relative; the greater percentage of income represented by insurance premiums, the greater the concern. It is interesting to note that nationwide medical malpractice premiums were 6.2% of physician's gross income in 1986; the national average for Architects and Engineers is 4.2% - it is estimated that in Alaska the average is 7%. We have no comparable information for lawyers.

II. PERCENTAGE OF UNINSURED.

A. Based on information provided by the Alaska State Medical Association the total percentage of uninsured physicians in Alaska is 24% in cities, 12% in towns and 56% in the Bush. The study further indicates that OB/GYN (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. A more recent survey by the Medical Association of Family Practice and OB/GYN practitioners

indicates that 15% are uninsured (based on a response rate of over 50%); a majority of these in urban areas. The differences between these numbers may be explained by the fact that the latter survey takes into account doctors who are insured by group programs although additional information and analysis is required.

B. Only four out of 21 hospitals surveyed by MICA are uninsured/self-insured.

C. Only 2% of Dentists are uninsured.

D. There are no current and reliable Alaska statistics for lawyers, nurses, architects and engineers; although nationally it is estimated that 49% of Architectural firms do not carry liability insurance; for engineers, 42% of 1-5 person firms, 17% of 6-10 person firms and 15% of 11-25 person firms are "bare".

E. We simply do not know the answer to the question of how many professionals are uninsured (or limiting their practices, getting out of the business altogether or significantly limiting coverage) because of the cost of insurance; or for strategic and/or philosophical reasons which have nothing to do with premium expenses. A survey conducted by the various professional organizations is the best way to clarify this issue along with the related question of how many other professionals are uninsured.

III. AVAILABILITY OF SERVICES.

A. There are a variety of service gaps that we have been able to identify including: significant doctor availability problems in several communities particularly relating to obstetrical and pre-natal care, day care service needs, certain legal services gaps (worker's compensation cases, medical malpractice, low and middle income legal services), nursing shortages, and the need for travel funds to transport rural residents to urban areas for diagnosis and treatment. It is interesting to note that according to the most recent Alaska State Medical Association survey, 32% of doctors who used to practice obstetrics don't anymore, primarily due to the cost of insurance. Also note that many feel there is a crying need for a comprehensive medical insurance program which covers those many unfortunate folks who "slip through the cracks" for a variety of reasons including lack of health insurance and inability to obtain relief through the civil justice system.

B. With the exception of physicians (and possibly Day Care providers), the cost or availability of liability insurance does not appear to be a major contributing factor to these service gaps.

IV. PEER REVIEW PANEL RESULTS AND RELATED STATISTICS.

A. There is little useful information readily available from the Court System regarding peer review panel results, the frequency and severity of liability actions, the length of time it takes to process an average case and/or the costs of litigation to the court system or the parties. However, we do know that between January 1, 1987 and July 1, 1989, 177 malpractice cases have been filed in Alaska State Courts: 90 Medical Mal.; 56 Legal Mal.; and 31 "Other". And information provided by the Alaska State Medical Association suggests that as of December 22, 1989 there have been 338 medical malpractice claims processed through the peer review panel program since the current system was established in the 1970's, an average of 26 claims per year with no particular upward trends indicated. Of approximately 178 claims reviewed, the expert advisory panel sided with the defendant 138 times and with the plaintiff 40 times.

B. This information gap appears to be common throughout the United States and consistently has been identified as a problem in attempting to understand and resolve issues relating to reform of the civil justice system.

V. RESULTS AND AMOUNT OF SELF-REGULATION.

A. Based on information provided to date, it is difficult to tell if a relatively small number of professionals (repeat offenders) cause a relatively large percentage of complaints and/or disciplinary actions. Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of the total number of professionals. Please note that only Physicians, Nurses and Dentists have mandatory continuing education requirements. Lawyers have an extensive optional program.

B. Comprehensive risk management programs (including peer review, quality assurance and education) by regulators, professional associations and insurance carriers appear to be the modern trend.

C. In response to a specific Task Force question, Alaska was ranked #2 per capita in the nation in Doctor Discipline for 1987 by the Public Citizen Health Research Group (a Ralph Nader organization); up from 19 in 1986.

VI. STATE AND FEDERAL LEGISLATIVE ACTIVITY.

A. Most states have adopted "tort reform" legislation in one form or another over the years including, for example, measures relating to limits on recovery (e.g. caps), statutes of limitation and repose, modification of joint and several liability, periodic payments of awards, reduction of compensation by collateral sources and limits on attorney

contingency fees. The constitutionality of many of these measures has been challenged in state and federal courts; some upheld, some not for a variety of reasons. The most comprehensive reforms have been enacted in Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, Florida, Illinois and California.

B. During the 1980's, legislative activity on these issues peaked in 1986 when 36 state legislatures passed tort reform laws. In 1989, only seven legislatures enacted such laws, although many measures were pending. The focus of state activity appears to have shifted to regulation of the insurance industry and auto insurance matters, including "Proposition 103" and "no fault" proposals.

C. At the Federal level, Congress is most concerned with products liability issues and changes to the McCarran-Ferguson Act which, among other things, provides limited anti-trust immunity to insurers.

VII. ALTERNATIVE PROPOSALS.

A. There are a variety of alternative systems in place or under consideration which may provide some relief; although most commentators agree that more analysis is required. These include: 1) court annexed mandatory arbitration programs (with "de novo" appeal rights) for cases which fall within certain limits and other administrative arbitration and/or adjudication proposals including pre-trial peer review screening panels and voluntary, binding arbitration mechanisms; 2) "No-fault" alternatives like the Virginia Birth-Related Neurological Injury Compensation Act which establishes a fund financed by voluntary payments from physicians and hospitals to cover actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees. A similar program is operated in Florida which also allows recovery of up to \$100,000 in non-economic damages. Also note that Governor Cowper has proposed a general medical malpractice "no-fault" system and Alaska currently has arbitration and peer review systems applicable to medical malpractice, court ordered arbitration procedures for small claims (need more information on this) and recognizes certain contractual arbitration agreements; and 3) a variety of other proposals including use of direct "first party" insurance and state subsidization of certain insurance premiums for qualified applicants (see, for example, HB 449 and 450 by Donley and Gruenberg).

B. Reviewers of the Hawaii and other court annexed arbitration programs have found that they seem to achieve their goals of reducing litigation costs, increasing pace and maintaining the satisfaction of participants. A Rand

Study ("Reforming the Civil Justice System, How Court Arbitration May Help" by Deborah Hensler) indicates similar attitudes about the California and Pennsylvania programs.

VIII. THE RAND THREE-LEVEL STUDY.

A. This study, "Trends in Tort Litigation - The Story Behind the Statistics" by Deborah R. Hensler, Mary E. Viana, James Kakalik, and Mark A. Peterson, attempts to settle three highly controversial issues which dominate discussions about the need to reform our civil justice system: How much litigation is there? Are jury awards stable? How much does litigation cost and who gets the money?

B. The authors tell us that one of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics - 1) the world of routine personal injury torts, exemplified by auto suits. These occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world; 2) the world of high stakes personal injury suits such as products liability, malpractice and business torts. Here the litigation is newer, the law increasingly uncertain; and 3) the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases lead many to view them as problematic.

C. What is the story behind the statistics? The author's found that: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes -inflation adjusted - have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Please note that an article in the New York Times just brought to my attention suggests that these trends may be altering based on a recent study by two Cornell Law School professors which concludes that published opinions since the mid-1980's "have moved toward benefiting defendants over plaintiffs".

D. In response to a specific Task Force question about "who gets what" the authors tell us that: for auto cases 19% of

total litigation dollars go to the defendant's lawyers for legal fees and expenses, 26% are for plaintiffs legal fees and expenses, with 52% left for the plaintiff; Non-Auto-30%, 24% and 43% respectively; Asbestos, etc.- 37%, 26% and 37%. We have a few Alaska specific numbers on this question. For example, MICA tells us that on the average they spend approximately 18 cents on the dollar in defending claims; although this number varies depending on whether there is formal legal action, whether there is a plaintiff recovery and other factors.

IX. IMPACTS OF U.S TORT SYSTEM CHANGES- FREQUENCY, SEVERITY AND RATES.

A. While malpractice claim severity has risen roughly twice as fast as the Consumer Price Index, Patricia Danzon in a study prepared for the Rand Corporation ("Frequency and Severity of Malpractice Claims-New Evidence") tells us that certain tort reforms - particularly caps on awards, periodic payment of future damage provisions and shorter statutes of limitation/repose - appear to reduce the frequency and severity of medical malpractice claims as compared to what would have happened if the law had not been enacted. This conclusion is more or less confirmed in other studies contained in our information packet including the recent National Academy of Sciences Study (which acknowledges a "modest" reduction in medical malpractice claim frequency and severity), the 1988 Winston/Litan anthology by the Brookings Institution and the 1989 study done for the Maine Legislature by the Public Health Resource Group, Inc. (but there is disagreement over the significance of this impact).

B. However, there appears to be no definitive evidence that any reduction in claim frequency and severity effects the cost or availability of insurance; although the experience in California suggests that certain tort reform measures may at least contribute to stability (in the context of doctor owned insurance companies at any rate); and Danzon argues that certain reforms that reduce the uncertainty in estimating malpractice claim costs "may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses" (although she also mentions other factors such as litigation expenses and "changes in the timing of disbursement of loss reserves, and hence investment income").

C. The jury is still out on this one. More time may tell.

X. ALASKA CLAIMS EXPERIENCE- PRELIMINARY FINDINGS.

A) Professionals: Based on information obtained to date it appears that: 1) most medical malpractice claims/recoveries are under \$150,000; 2) there are few "jumbo" recoveries (over \$1 million), and none reported over \$3 million

(through 1988) but payments on these claims typically represent a large percentage of total losses for a given year; 3) punitive damages are rarely, if ever, awarded; 4) most claims are settled before trial, many settled without formal legal action; 5) less than half of MICA claims resulted in a payment to the claimant; and 6) MICA's defense costs, on average, are about 18 cents for every dollar, but this number varies depending on a number of factors.

B) Self-Insured/Uninsured Entities: Based on the results of a survey of several major public and private entities obtained to date, it appears that: 1) the majority of claims/recoveries are between 0 and \$50,000, claims against public entities tend to be larger; 2) most are settled prior to formal legal action; 3) there are occasional large payouts (mostly State claims) which typically represent a large percentage of total losses for a given year; and 4) defense costs do not appear to be significant but this observation requires additional information and analysis.

XI. WHAT SHOULD THE LEGISLATURE DO?

A. The four primary commentators relied on (Rand, Brookings, National Academy of Sciences and the Maine Legislative Study by the Public Health Resource Group, Inc.) agree that sweeping alternatives to the existing system are intriguing but require more study. It is less clear how they feel about partial alternatives like the Hawaii arbitration program.

B. In the meantime, Winston/Litan et al. support "fault based" rules of liability and argue that in terms of reducing uncertainty and eliminating inappropriate levels of compensation under a "fault based" system there is a strong case for limiting non-economic damages in tort cases but only in a way that takes into account the age of the injured party and the severity of the injury. In the same report, Patricia Danzon also argues for more restrictive statutes of limitation and provisions requiring periodic payment of future damages. The authors oppose stiffer regulation of insurance rates and support greater solvency regulation by state regulators.

C. On the other hand, the Maine group concludes that new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability pending more information that should be available within the next two years. If reforms are pursued they further suggest they be designed to expire after a period of time if the price of insurance and availability of essential medical services do not improve by some measure satisfactory to the legislature. In any event, the report cautions that you cannot just target one set of issues. Instead, Legislatures should develop a carefully balanced mix of changes to the tort, regulatory (for example, they

suggest requiring rate changes to be spread over time and requiring insurer's to demonstrate effective cost control programs) and medical care delivery systems (they suggest investigations of multi-claim physicians, greater efforts to diffuse potential complaints, information collection requirements and, possibly, adoption of "care standards") based on a considered understanding of what will be gained and what will be lost.

D. The National Academy of Sciences, which focuses on the issue of medical liability and obstetrical care, takes a different tack. On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking - the report concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to the traditional tort system for resolving medical malpractice claims and towards implementing these alternatives in certain circumstances.

E. Other commentators on the issues before us, like Robert Hunter, advocate various forms of insurance regulatory reform; risk management and disclosure requirements; certain tort reforms like limiting attorney's fees for both sides (although he focuses on defense fees), penalties for frivolous actions and settlement incentives; and increased use of alternative systems except in defective products and similar cases which Hunter feels should be subject to common law principles without damage limits as a necessary deterrence measure.

Finally, you may want to keep in mind the words of Gustave H. Shubert, Director of the Institute for Civil Justice of the Rand Corporation, who observed in 1986: "I think underlying all our problems with the civil justice system is the inability of this country to decide whether it wants to have a pure compensatory system or whether it wants to have a fault based liability system. We can't decide whether everybody should be compensated for every injury no matter what its cause, or whether we want compensation to be limited in a strict way, in a comparative way, or in a contributory way to those who have caused the injury. My personal assessment is that we are experiencing the disadvantages of trying to operate both systems in tandem, the worst of both worlds. We are attempting to compensate everyone with a fault-based system and we are incurring huge social overhead costs by attempting to do so. I believe it is time to focus on that overall choice and to be rational in doing so".

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MEMORANDUM

DRAFT

TO: Liability Task Force

FROM: David Rogers *DR*

DATE: February 22, 1990

RE: Summary of Data; Almost everything you ever wanted to know about liability issues (and were afraid to ask??)

Here is a general summary by category of the highlights contained in my last packet along with occasional editorial commentary as appropriate:

1. RATES: Still working on it.

2. AVAILABILITY/AFFORDABILITY OF INSURANCE: According to the information compiled by the Division of Insurance the market for professional liability insurance is "soft". Their specific findings based on a survey of major brokers placing professional liability are:

* The situation is improving which is to be expected in a soft market;

* Prices are coming down;

* Coverage is generally available but sometimes at high premium or with restrictive conditions. Non-availability appears to occur with home inspection services and any small unseasoned professional;

* Some insurers are now writing as part of a package policy;

* Policies are usually "claims made" with defense within limits and adjustment cost included in any applicable deductible;

* Pollution usually has a \$25,000 deductible;

* Costs are perceived to be prohibitive for testing labs, structural engineers, attorneys doing SEC work, pollution and asbestos work, real estate/developer combinations and computer programmers. They cited the following examples:

Lloyds- testing lab-\$1/2 million coverage
\$50,000 premium last year; \$1 million coverage
\$25,000 this year.

CNA- mechanical engineer doing some electrical
and survey-\$3 million in billings-\$1 million
coverage, \$25,000 deductible, \$129,000 premium.

* Only Allstate was identified during their survey as providing unlimited Civil Rule 82 coverage on its personal lines coverage. Demand is not there although markets could be found.

The Alaska Independent Insurance Agents and Brokers, Inc. also looked at availability/affordability of other lines of liability insurance based on a survey of members from all areas of the state. They concluded that the following categories have both availability and affordability problems: Day Care Centers, Liquor Liability, Small Specialty and General Contractors, Pollution, and any small business that requires liability coverage only (no supporting property or auto).

These findings are more or less confirmed by responses to our professional liability claims survey discussed below, informal conversations with representatives of insurance companies and in letters contained in this section from representatives of various professional organizations and regulators. Generally, there does not appear to be an availability problem for most professionals. Affordability, as Keith Brown points out, is relative. Note that Dan Rowley estimates that insurance premiums for Alaska Architectural and Engineering firms are approximately 7% of annual gross billings, as compared to the national average of 4.2%; according to the Medical Malpractice Liability Study prepared for the Maine Legislature (see discussion below) nationwide medical malpractice premiums were 6.2% of physicians gross practice income in 1986. I have no comparable statistics for Alaska. Also note that according to Mr. Rowley seven out of eleven carriers nationally have a maximum limit of \$1 million; six of those carriers don't do business in Alaska. Finally, note that in addition to the groups identified by the Division of Insurance rates for certain physicians are very high as we will see in more detail below.

3. PERCENTAGE OF UNINSURED: a) Physicians: Based on information provided by the Alaska State Medical Association the total percentage of uninsured is 24% in cities, 12% in towns and 56% in the bush. According to my notes, the study further indicates that OB (44.7%), Family Practice (34%) and Orthopedics (23%) have the largest block of uninsured. The

results of a recent detailed questionnaire sent out to over 600 doctors gives us a different picture. Based on responses from over 50% of those surveyed, 15% of the Family Practice and OB/GYN physicians are uninsured in Alaska. Apparently, this figure takes into account a variety of group insurance programs not reflected in the other information provided by the State Medical Association. The results also suggest that a majority of uninsured Family Practice and OB/GYN's are located in Anchorage and other urban areas. Please note that MICA insures approximately 50% of Alaska insured physicians, MIEC approximately 30% and CNA approximately 10% through group practices that meet CNA criteria; b) Hospitals: Based on a recent survey of 23 hospitals by MICA four (Kodiak Island, Central Peninsula Hospital, Cordova Community and Petersburg General) are uninsured/self-insured. The others are either insured through MICA (most), affiliations with a national chain or the Federal government. MICA also insures twelve health related health care facilities, many of which are "rural" including a skilled nursing facility, clinics, intermediate care facilities and home health services; c) Lawyers: Information on lawyers is based on a survey conducted several years ago when availability was limited and prices had skyrocketed; although market circumstances have changed for the better since then according to Keith Brown, former Chairman of the Alaska Bar Association's Professional Liability Insurance Committee. If I am reading the results correctly, at that time, 2-5 firms were covered by liability insurance, 120 were not; d) Architects, Engineers, Land Surveyors: There is no statistical information available for Alaska, although nationally 49% of architectural firms do not carry professional liability insurance - 42% of 1-5 person, 17% of 6-10 person and 15 percent of 11-25 person engineering firms are "bare". Rich Ritter of the Alaska Chapter of the American Institute of Architects estimates that 70% of the architect and engineering firms he does business with in Alaska carry professional liability insurance; although he is aware of one major Anchorage firm recently going bare apparently due to the high cost of insurance. Nurses: No numbers are available. Note that Gail McGill of Occupational Licensing tells us that while nurses typically are covered by their employers' policy increasing numbers are purchasing their own policies to protect themselves further; Dentists: According to Frank Thomas-Mears, writing on behalf of the Alaska Dental Society, approximately 2% of Alaska dentists are uninsured. We have no information for CPA's or other professionals at this time.

We don't have an answer to the question of how many professionals are going bare (or limiting their practices, reducing coverage or getting out of the business altogether) because they can't afford the premiums; or who do not carry insurance for philosophical or logistical reasons. A survey conducted by each professional organization is the best way

to clarify this issue along with the related question of how many professionals are in fact uninsured.

4. AVAILABILITY OF SERVICES: The information contained in this section is limited. What follows is a discussion of some of the service gaps in Alaska that I have been able to identify and comments on whether these gaps are attributable to the affordability or availability of liability insurance:

a) Health Care: There are a number of communities in the state (mostly rural) that are having difficulties recruiting and retaining physicians. According to the Health Association of Alaska and the Alaska State Medical Association Haines, Tok, Ketchikan, Dillingham, Wrangell and Petersburg (and possibly Craig) are having doctor availability problems along with other communities with specialized care gaps. In addition, according to a 1988 survey of availability of obstetric care for low income women, fewer than half of the physicians surveyed (93% of the 196 family practice and OB/GYN physicians surveyed responded) are now providing obstetric care; "within two years only slightly more than a third of the surveyed physicians may be offering obstetric services in Alaska." In the more recent survey of Family Practice and OB/GYN physicians discussed above 32% of doctors formerly providing obstetrical services have stopped performing this service primarily due to the cost of liability insurance.

Many others also attribute this situation to the cost of liability insurance and other health care cost factors. For example the Report of the Governor's Interim Commission on Health Care (September 1988) states that rural providers, especially those providing obstetrical care, have been particularly hard hit by the increase in medical liability insurance: "The cost of medical liability insurance has created a particularly severe problem for pregnant women in rural areas. Non-Native residents of Glenallen, Dillingham, Bethel, and some other communities have lost access to local obstetrical and prenatal care because local providers are either unable or unwilling to pay for the expensive premiums" (at page 57). The report contends that medical liability insurance premiums had more than doubled between 1985 and 1988. See also the comments of Harlan Knudson of the Health Association of Alaska.

For native rural residents the problem, according to Dr. Ward Hurlburt of the Public Health Service, is particularly one of finding money to fund travel costs for diagnostic and treatment services in the larger cities : " As we discussed, as health professionals, we could point to many places in our program where, with added funding, we could do a better job. If I were to select one area, however, to point to where I could see a need related to medical services for rural Alaskans, I would identify the lack of funding for travel...At this time...we are basically paying only for

emergency travel. If the State were wanting to identify an area for potential positive impact on the provision of Native services for rural Alaskans, I would suggest consideration of the development of a mechanism for supporting travel costs." The Department of Community and Regional Affairs tells us that this position was echoed in a Resolution passed in November by the North and Northwest Alaska Mayors Conference which proposed an insurance program which will cover both transportation to Anchorage or Fairbanks and services provided by non-Indian Health service facilities in these towns.

There also appears to be a nursing shortage in Alaska. According to Gail McGuill of the state Division of Occupational Licensing : "It has recently been more severe than the cyclical shortage in rural communities and in certain specialty areas of practice. Almost all acute care and long term care facilities in the state have had to utilize "traveling nurses", nurses retained through agencies for short term periods of employment...Of the four main issues discussed in this letter, I view the nursing shortage and the problems it has caused for the health care industry in our state to be the most crucial one. Although, a concentrated effort of agencies in Alaska working together to remedy the shortage has not occurred, individual agencies and organizations have been attempting to alleviate the problem with the resources available to them." There are many cited reasons for this situation including poor pay and benefits, lack of hospital administration support, limited opportunities to further professional education, inadequate staffing, state laws that limit nursing practice, lack of access to child care facilities, insufficient in service education and lack of competent support personnel. The cost (or availability) of liability insurance does not appear to be a significant contributing factor.

b) Legal Services: We have no Alaska specific information. However, from my experience over the years and in talking to others in the profession I can identify several service gaps worth noting - representation of claimants in state and federal workmen's compensation matters; certain medical malpractice claims; low income legal services that cannot be provided by Alaska Legal Services and/or the Alaska Pro Bono program; and general legal services for middle income people who don't qualify for assistance but can't afford standard legal rates for a variety of basic legal services for personal and family matters; a problem I've seen in my own practice many times which may be growing due to the increasing need for some legal services in our society. These gaps do not appear to be due to high liability insurance premiums.

c) Engineering/Architectural/etc Services: We have no Alaska specific information on this but according to Rich Ritter

of the Alaska Chapter of the American Institute of Architects there is no apparent availability problem despite the fact that over 50% of Alaska Architects, Engineers and Land Surveyors have left the state in recent years. He feels that "there is still a core group of experienced professionals remaining in Alaska available to provide professional services". It is not clear how much of the attrition is due to the cost of liability insurance versus the dramatic recent economic slump.

d) Dentists: Frank Thomas-Mears tells us that Dental services in rural areas are not impacted by affordability and availability of insurance since a majority of dental practitioners are employed by the Public Health Service and protected under the Federal Tort Claims Act. Of those private practice dentists which either contract with the PHS or native corporations most are insured.

d) Day Care: The only other significant service gap that I have been able to identify to date (other than the need for a comprehensive health insurance program to take care of people who "slip through the cracks" under our current system, a subject which is being addressed elsewhere; and sewer and water system and similar service needs which are well beyond the scope of our duties) concerns Day Care Facilities. According to the report of the Governor's Interim Commission on Children and Youth parents "often have difficulty finding child care that meets their needs and matches their resources." This is particularly a problem for parents who work rotating shifts, nights or weekends, parents with infants and parents with school age kids who need before and after school supervision: "Too few programs offer flexible hours, overnight care and flexible staffing to ensure safe care for children. Not enough family child care homes exist to accommodate the needs of parents who work a non-traditional or normal schedule. The result is a near crisis in urban and rural Alaska." Recent changes to Federal welfare laws (the Federal Family Support Act of 1988) will exacerbate this problem. It is estimated that the welfare reform work and training requirements will result in the need for day care space for an additional 2400 children statewide.

And child care is expensive. According to the Governor's Interim Commission a recent survey of 600 American families indicates that 40% of their respondents felt they cannot afford their current child care arrangement or the arrangement they would prefer. They add that evidence indicates Alaskans would agree. In March 1987 infant care ranged from \$321 to \$521 per month, pre-school care from \$301 to \$450 per month, school age child care from \$132 to \$215 per month and care for children with special needs from \$600 to \$1,200 per month. The report adds that high quality care may be even more expensive.

A variety of solutions are under discussion including a plan proposed by Virginia Johnson, Dean of the School of Education at the University of Alaska Anchorage, called the Middle School Day Care Center, which would locate day care centers at the six middle schools in the Anchorage area with the curriculum being developed by the Director of the Day Care Centers.

It is difficult to determine if the cost of liability insurance contributes to the day care service gap. It is my understanding based on several informal conversations with people familiar with these issues that affordability and availability is less of an issue at the present time, even for new facilities. It is interesting to note that current policies exclude liability for molestation/abuse related circumstances and, in some cases, require adult/child ratios that exceed state standards.

5. CLAIMS EXPERIENCE - Preliminary Findings:

a. Professionals: We requested claims experience data from all of the major admitted professional carriers. However, only information received from MICA and MIEC, the major medical liability carriers is useful. Generally, the information provided indicates that: 1) most medical malpractice claims/recoveries in Alaska fall within the 0-\$150,000 category (MICA tells us that the average claim is \$48,731; average claim where indemnity is paid is \$124,353; 2) there are few "jumbo" recoveries (over \$1 million), and none reported over \$3 million (through 1988), but payments on these claims typically represent a large percentage of total payouts for a given year (MIEC tells us that nationally about 3% of claims account for over 70% of loss costs; these numbers appear to be consistent with their Alaska experience); 3) Punitive damages are rarely, if ever, awarded; 4) most claims are settled prior to trial; many are settled without legal action; 5) for MICA at least, less than one-half of claims filed result in a payment to the claimant; 6) on the average, MICA defense costs are approximately 18 cents per dollar; this number varies depending whether the claim was settled without litigation whether there was a payment to the claimant and other factors; and 5) it is hard to predict which doctor will cause the big claims, although MIEC tells us that the highly, trained well regarded physicians often get the "jumbo" cases.

b. Self-insured/Uninsured entities: We have surveyed a wide variety of public and private "self-insured" entities. Results received from the State of Alaska, the University of Alaska, the Municipality of Anchorage, the Anchorage School District, the City of Fairbanks, the North Star Borough, the North Star Borough School District, the City and Borough of

Juneau, NANA Regional Corporation, Inc., Nabors Alaska Petroleum Services, Phillips Petroleum Company, the Carr-Gottsten Corporation, Petersburg General Hospital and Cordova Community Hospital indicates that: 1) the majority of claims are between 0 and \$50,000, public entities report more claim activity than private entities; 2) most are settled, often prior to formal legal action; 3) there are occasional large claim payouts (mostly the State of Alaska;) which typically represent a large percentage of total losses in a given year; 4) defense costs do not appear to be significant but this information requires further analysis. Please note that NANA has made two specific suggestions of issues that should be looked at by the Task Force which are contained in their letter to David Rogers dated January 31, 1990 attached.

6. ROLES AND MECHANISMS OF STATE AGENCIES: The information provided is self-explanatory. However, please note that the Division of Insurance has four primary functions: a) Market Conduct Surveillance (review and approve as appropriate all rate and form filings and perform market conduct examinations on insurance companies or producer licensees to ensure that the consumer is treated fairly in the marketplace); b) Licensing (to license qualified individuals and insurance companies to market insurance in Alaska); c) Financial Surveillance (primarily to ensure solvency - i.e. that the company has sufficient reserves to protect policy holders and pay their claims - and to determine if investments meet statutory requirements and if reinsurance agreements comply with Alaska law); and d) Consumer Complaint and Investigation (to investigate and resolve individual consumer complaints that are filed with the Division. Statistical data that is collected by this section is utilized by the market section as a means to identify licensees or trade practices that warrant further examination.

7. STATUS OF STATE SUIT AGAINST INSURANCE COMPANIES: This lawsuit was filed by 19 states against four major American primary insurance companies and a variety of reinsurance companies alleging anti-trust violations in the form of a pattern of collusion. According to the Attorney General's Office, the allegations are that leading primary insurance companies and reinsurers conspired to withdraw casualty and pollution coverage from the United States market; and that defendants coerced others to take actions which prevented other potential competitors from offering these types of coverage resulting in consumers paying more premium for less coverage than ever before. Tom Slagle of the American Insurance Organization adds that the primary thrust of the lawsuit was that various entities conspired to eliminate the occurrence policy for a claims made policy. In October of 1989, Federal District Court Judge Schwarzer granted defendants' motions to dismiss and entered final judgment

against the states. The states have appealed this decision to the Ninth Circuit Court of Appeals; a decision is expected next fall. According to the Attorney General's Office, Alaska has actively participated in this case (against the advice of advice of industry representatives according to Slagle) and intends to continue.

8. PEER REVIEW PANEL RESULTS: With the exception of information concerning the number of professional malpractice cases filed in Alaska state courts between January 1, 1987 and July 1, 1989 (177: 90 medical mal.; 56 legal mal.; 31 other), there is no official information available from the court system on peer review panel matters or other issues relating to frequency and severity of claims/judgments; although within the last year or so the court system has started to keep track of how long a case takes from start to finish. The data contained on the last page of this section regarding peer review panel results since 1977 was developed by the Alaska State Medical Association. While incomplete, it does indicate that there is no apparent upward trend in cases processed through expert advisory panels (an average of 26 per year) and defendants are not always vindicated. Of 178 cases evaluated, the panels sided with the defendant 138 times and with the plaintiff 40 times. You may also want to refer to information prepared by Al Tamagni Sr. of Pension Services Ltd. regarding pending civil cases in Anchorage Superior Court.

9. RESULTS AND AMOUNT OF SELF-REGULATION: Given the large amount of information contained in this section, I will only attempt to set out several general observations about the subject:

a) With the exception of lawyers, all target professionals (doctors, architects, engineers, land surveyors, dentists and nurses) are regulated by the Division of Occupational Licensing within the Department of Commerce and Economic Development through various regulatory Boards. Lawyers are governed by the Alaska Bar Association (and its Board of Governors) created by statute as an "instrumentality of the State". All groups also have independent professional organizations (e.g. The Alaska Dental Society, the Alaska State Medical Association, The Alaska State Nurses Association, The Alaska Chapter of the American Institute of Architects, the Juneau Bar Association, etc.)

b) All target groups are subject to a variety of admission and licensing requirements, grievance procedures, and disciplinary sanctions for improper conduct; along with certain peer review procedures, sometimes required as a condition of membership in their respective professional associations. Note that lawyers are subject to rules promulgated by the Alaska Supreme Court.

c) Only Physicians, Nurses and Dentists have mandatory continuing education requirements. For example, physicians are required to complete at least 17 continuing medical education hours per year to retain a medical license provided through hospitals, the Alaska State Medical Association, local medical societies and physician specialty associations. Lawyers have an extensive optional continuing legal education program. Architects, Engineers and Land Surveyors apparently have no continuing legal education requirements or voluntary programs.

d) Based on information gathered to date, it is difficult to determine if, in fact, a relatively small number of professionals cause a relatively large percentage of complaints/disciplinary actions but some statistics included in this section suggest that is the case. The Alaska Bar Association tells us that since 1982 there were 1505 complaints against 710 attorneys. 57% of the attorneys had only one complaint against them which accounted for 27% of the complaint volume. 18% of the attorneys had two complaints against them which accounted for 17% of the complaint volume. The remaining 25% of the attorneys had three or more complaints against them and were responsible for 56% of the complaint volume. However, additional information provided on disciplinary actions taken against lawyers suggests that there are repeat offenders but they do not dominate the statistics except in the disbarment and probation categories.

Certainly, the number of disciplinary actions taken annually appear to represent a relatively small percentage of total professionals in several of the target groups. Please note that according to the Alaska Bar Association, there has been a marked increase in informal requests for ethics opinions from Bar Counsel which suggests that lawyers are attempting to practice preventative medicine, so to speak.

e) All target groups are subject to specific statutory or regulatory provisions regarding unprofessional conduct. In addition, Physicians apparently follow the American Medical Association "Principles of Medical Ethics", as a condition of membership in the Alaska State Medical Association; Nurses apparently follow the Code of Ethics of the American Nurses Association; Lawyers are subject to a Code of Professional Responsibility promulgated by the Alaska Supreme Court; Dentists who belong to the Alaska Dental Society (2/3 of all Alaska dentists) agree to adhere to a Dental Code of Ethics (along with agreeing to be subject to peer review and mediation procedures); same with Architects, Engineers and Land Surveyors who each have separate codes adherence to which is a condition of membership to their respective professional organizations.

f) As to a specific task force question concerning Alaska physician disciplinary actions compared to other states, the information provided by the Public Citizen Health Research Group ranks Alaska #2 (per capita) in Doctor discipline for 1987; up from 19 in 1986 (Pam Ventgen tells us that in 1981 there was 1 disciplinary action; 0 in 1982; 4 in 1983; 2 in 1984; 1 in 1985; 2 in 1986; 5 in 1987; 5 in 1988 and 7 in 1989. She also points out that HB 70, passed in 1987 provided for a full time investigator and an executive secretary for the medical board which may help explain these numbers) The recommendations contained in this report are also worth noting: Increase license fees to \$500 per year and use all money to finance doctor disciplinary actions; Require periodic re-certification of doctors based on written exams and audits of doctor performance such as medical record review; Grant subpoena power to state licensing boards to go after evidence necessary to evaluate doctors; Grant state boards emergency powers to suspend a doctor's license to practice, pending investigation, when continued practice is considered to constitute a hazard to public safety; Require all hospitals to have a risk management program designed to prevent injury to patients (according to the American Hospital Association only 60 percent of hospitals have such programs and only half of these are excellent programs); Require all insurance companies to experience-rate doctors with sub-specialities, whereby doctors with the best records pay the lowest premiums, and multiple malpractice "loser" doctors pay the most; Require insurance companies to immediately disclose and forward to the state licensing board the filing of malpractice claims, as well as the results of all malpractice settlements and adjudications (see HB 146 now in House HESS); Require hospitals or other institutions taking disciplinary actions against doctors to publicly disclose and forward to the state licensing board the details of such actions; Provide immunity and confidentiality to all those reporting doctor malpractice, incompetence, substance abuse or fraud to state medical boards (see HB 146); Provide strong consumer representation on state medical boards; Do not allow the state medical society to control membership on the boards; Officials should make strong, public statements indicating a commitment to strong doctor discipline and protection of patient's safety. It is my understanding that several of these suggestions have already been adopted in Alaska.

10. MATRIX OF STATE SYSTEMS; FEDERAL ACTIVITY: It is difficult to briefly summarize this material but several general observations can be made:

a) Legislative responses to the increasing cost and availability of insurance and apparent claim trends can be broadly categorized to civil justice- or tort reform - measures, insurance regulatory reform measures and risk

management measures. According to Patricia Young formerly of the Legislative Research Agency from information provided by the National Conference of State Legislatures (NCSL), in 1986 the emphasis was on civil justice reform. The legislative focus in 1987 turned to immunities- from sovereign immunity extended to counties, cities and towns, to immunity from personal liability extended to groups of public employees and volunteers. More recently however legislative activity in civil justice reform has declined and the focus has shifted to regulation of the insurance industry, including the anti-trust suit discussed above. In 1989, the majority of legislative activity regarding liability dealt with regulation of the automobile insurance industry, including California's proposition 103 and similar measures introduced in other states.

b) The significant "tort reform" measures enacted over the years include laws relating to limits on recovery (caps) of damages; abolition or modification of Joint and Several Liability; reduction of compensatory awards by collateral sources, or at least notification to the jury of such sources; limits on attorney's contingency fees; limits on punitive damages; periodic payment of awards; penalties for frivolous suits; settlement incentives; limits on prejudgment interest; and establishment of statutes of limitation and repose. Proposals concerning alternative systems and similar issues will be discussed below. I have little "easy to read" summary information on the status of proposals regarding regulation of the insurance industry, professional competency laws and similar approaches to the problem.

c) According to the recent report by the New York law firm of Wilson, Elser, Moskowitz, Edelman and Dicker (Wilson) contained in this section, a majority of the states have considered or enacted "tort reform" laws as described above in various forms. The constitutionality of many of these measures has been challenged in state and federal courts with mixed results; some upheld, some not for a variety of reasons. See also the Alaska Attorney General's opinion for a discussion of some of these cases including the recent decision by the Washington Supreme Court on their cap mentioned below.

d) According to the Wilson Report, in 1989, the most significant activity concerning Civil Justice reform occurred in the courts rather than the Legislatures. In 1986 thirty-six state (36) legislatures passed tort reform laws (varying in degree and significance). In 1989 only seven (7) states enacted reforms; although many measures were pending (see NCSL 1989 pending legislation summary). NCSL tells us that four state courts rendered decisions in litigation questioning the constitutionality of damages caps. In Maryland, the cap on non-economic damages in all civil suits

was upheld; in Kansas, a \$100,000 cap on such damages in wrongful death actions was upheld; the Virginia Court upheld a cap on total damages in medical malpractice cases; but in Washington, the cap on all non-economic damages was ruled unconstitutional (letter from Brenda Trolin dated December 23, 1989).

e) According to the Wilson Report, states which have enacted the most extensive reforms include Alaska, Washington, Hawaii, Colorado, New Hampshire, New York, California, Florida and Illinois (See Wilson starting on page 1 of the Introduction for a detailed breakdown of how many states enacted various reform measures in 1986 and 1987; and for a discussion of 1989 tort reform enactments).

f) Alaska in 1986 enacted a series of civil justice changes including: Modified joint and several liability; caps on non-economic damages (\$500,000 except damages relating to disfigurement or severe physical impairment); increased burden of proof for establishing punitive damages; limits on a person's ability to recover damages sustained while that person was committing a felony; detailed provisions on damage award requirements; limited liability for certain directors and officers of non-profit corporations, non-profit hospitals (including hospital citizen advisory boards) and members of school boards and school districts and members of governing bodies, commissions and citizen's advisory committees of a municipality; and provisions on contributory fault, collateral benefits, apportionment of damages, offers of judgement, costs and attorneys, including pre-judgment interest, and the effects of a release. This legislation has been characterized by tort reform advocates as a "patch work quilt" of necessary compromises, and, in their view, did not go far enough toward making Alaska's civil justice system fair and predictable. As you know, Alaska also has a medical malpractice claims system created during the 1970's.

g) On the automobile insurance front, California's Proposition 103 is the biggest news. This reform measure narrowly adopted by California voters in November 1988 included a one year 20% roll back in most property/casualty "insurance charges" from November 1987 levels; a 20% automobile insurance discount for "good drivers", as defined as those with no more than one moving violation in three years; a requirement of advance state approval for insurance rate increases after November 1989; and election, instead of appointment, of the State Insurance Commissioner starting in 1990. Prop 103 also requires the Insurance Commissioner publish for consumers a list of rate comparisons, and compels insurance companies to notify their customers of the right to join an "independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum." The California Supreme Court upheld all of 103's

long term restrictions on insurance rates and practices, but struck down the provision that would require insurers to be "substantially threatened with insolvency" before they could receive relief from rollback. The Court held that insurers may charge rates above the rollback level whenever insurers can justify them as not being excessive.

Many states are also considering "No-fault" automobile insurance proposals in response to escalating auto insurance costs. Note that according to NCSL at least 20 states already have no-fault legislation in many different forms particularly on issues relating to restrictions on the right to sue, conditions necessary to sue for pain and suffering and first party coverage.

h) The Wilson Report concludes as to state activity: "In general, although state legislatures have reviewed thousands of bills addressing the Civil Justice System and insurance regulation, disputes persist as to what precisely are the problem areas, and solutions to the perceived problem areas remain elusive. It is likely that state legislative activity will continue in the area of civil justice reform and the courts will be entertaining arguments relative to the interpretation and validity of these reforms for some time." See Wilson at page 7.

i) Federal activity in this area has confined itself primarily to products liability. For the past several years Congress has seriously considered proposals to federalize products liability law. Detailed discussions of current proposals are contained in the Wilson materials at pps. 77 and 93. In addition, Congress is considering a variety of proposals to modify the McCarren-Ferguson Act, a 1945 law that provides limited anti-trust immunity to insurers and continues the authority of the state to serve as the primary regulators of the insurance industry. A proposal to modify the doctrine of Joint and Several liability also is pending in the Senate according to my sources.

j) Two final notes. On the question of "pre-judgement interest", according to a 1983 Rand Note prepared by Stephan Carrol (which hasn't been updated according to Carrol) at least 26 states had pre-judgement interest laws on the books. The Note also suggests that juries implicitly provide pre-judgement interest at a rate equal to the underlying inflation rate plus 3.7 per cent per year in addition to any applicable statutory pre-judgement interest rate.

As to contingency fees, commentators argue that limiting those fees will potentially increase the amount of compensation paid to claimants, increase the likelihood that a case is dropped, decrease the likelihood of litigation to verdict and deter frivolous suits by placing the plaintiff's lawyer at financial risk; but will also preclude some

victims with legitimate claims from obtaining representation. It is not clear whether the presence of contingency fee arrangements increases the total number of claims (See Frank Sloan "State Responses to the Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment"-Vanderbilt University, 1985). One study also concludes that in modest cases contingent fee lawyers spend less time on a case than hourly fee lawyers; but there is no statistically significant evidence of a differential in effort for larger cases, although there is an indication that if there is an effect is in the opposite direction (see Rand, "The Impact of Fee Arrangement on Lawyer Effort" by Kritznier et. al.) For detailed discussions of these issues see "Rand Three Level Study and Other Reports" and various references to the subject contained in "Impact of U.S. Tort System Changes". Note that Danzon suggests that contingency fee limits reduced the amount of settlements by 9%, reduced the number of cases litigated to verdict by 1.5%, and the number of cases dropped by 5% (See Maine Malpractice Study at page 36).

11. ALTERNATIVE PROPOSALS: Here is a summary of some of the more significant alternatives I have been able to identify that are either in effect or under consideration today:

a) Arbitration and Screening Panels: According to the Rand article by Deborah Hensler entitled "Reforming the Civil Justice Process, How Court Arbitration May Help" arbitration programs may be established by state statute or by rule of a state supreme court or a local court. Typically, under these programs the Court is authorized to compel arbitration for cases that fall within certain limits (Rand says \$25,000 is the typical cutoff); with certain exceptions. However, any of the parties to a suit may reject an arbitration award and request that the case be calendered "de novo" (without regard to the arbitration verdict). This appeal option is generally considered necessary to ensure that the litigants right to a trial is not abrogated. In 1984, Rand's Institute for Civil Justice estimated that arbitration programs are operating in more than 100 trial courts around the country and estimated that over 100,000 cases are arbitrated annually through this process. Apparently, there also are voluntary, binding program options.

Typically in court annexed arbitration programs cases are heard by private attorneys or retired judges who volunteer to serve as arbitrators and, according to Rand, receive only a small honorarium for their efforts. Arbitration hearings usually are private, informal and often brief. After giving the parties an opportunity to settle, the facts of the case are heard with the litigants often appearing as witnesses. If accepted, an arbitrator's award is entered as a judgement and is enforceable. As a disincentive for frivolous appeals, some programs require applicants who request a trial de novo

to reimburse the court for arbitrator's fees; in some programs court costs and attorneys fees may be levied on unsuccessful appellants, or applicants who do not improve their position (e.g. Hawaii-if the court does not alter the award by at least 15% in favor of the appealing party; see Patricia Young memo in this section). Note that such programs also are required by some carriers

Does it work? The reason for these programs is to reduce congestion, costs and delay. According to Rand preliminary information derived from two studies of a new program in California and an older program in Pennsylvania arbitration can and does contribute significantly to reducing congestion, costs and delay. These findings are confirmed by the Hawaii and North Carolina experiences discussed in this attachment. For example, reviewers from the University of Hawaii of the Hawaii program which covers all tort cases with a probable jury award of \$150,000 or less concluded in January of 1989 that: "Hawaii's Court Annexed Arbitration Program appears to be meeting its goals of reducing litigant costs, increasing pace, and maintaining the satisfaction of participants..." "To our knowledge no other arbitration program in the country claims to be reducing litigation costs; Hawaii leads the nation in this area." Similarly, a 1989 evaluation of the North Carolina program by the University of North Carolina concludes that the program: disposed of cases faster than standard procedures; reduced trials and out of court settlements replacing them with "promptly scheduled adversarial hearings in a courtroom before specially trained arbitrators"; and improved litigants satisfaction with the outcome and procedure used in their cases. The study also notes that attorneys were satisfied with the program and, in a survey, voted strongly in favor of continuing it.

However, the Rand study cautions that program design and implementation are critical factors in determining success. Some of the design issues that must be considered include: setting jurisdictional limits of the program, establishing procedures for determining case eligibility, adopting guidelines and procedures for selecting arbitrators and deciding how many arbitrators will hear each case, where the hearings will take place and whether there will be financial disincentives for appealing.

Please be advised that the American Medical Association, The American Hospital Association and the Physician Insurers Association of America each have proposed versions of alternative systems apparently involving arbitration or a form of administrative adjudication with various limitations on recovery. I do not have sufficient first hand information on these proposals at this time to go into specific differences but you may want to refer to the analysis prepared for MICA by Jerry Cogan. The State Alternative

version of the PIAA proposal is also included for your information. Also note that the AHA calls for a study of a Medical Indemnity Fund as a supplemental method for compensating medical malpractice victims financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

In Alaska, arbitration and peer review systems applicable to medical malpractice (AS 9.55.535 and 536) and court ordered small claims arbitration procedures (AS 9.43.190-220) are available. In addition, state law recognizes certain contractual arbitration agreements (AS 43.010-180; Uniform Arbitration Act). I have no other information on the latter two options.

b) The No-Fault Alternative to Tort Recovery: James Ludlam ("The Battle for Medical Malpractice Tort Reform: A Report From the Front Lines" prepared for the Annual Meeting of the American Academy of Hospital Attorney's, June 1989) tells us that in the 1970's and 1980's there was much discussion of possible no-fault alternatives to compensating plaintiffs for catastrophic injuries including "trip insurance" under which a patient bought his own coverage, or a system for which there would be payment without fault on the basis of a worker's compensation type schedule (similar to that proposed by Governor discussed in my introductory memo to the Task Force dated September 15, 1989). There was little or no action on these proposals. In fact, the California Medical Association and the California Hospital Association concluded that these systems would be more expensive than the existing tort system based on a study of over 25,000 charts and dropped the whole idea.

Then, in 1987 North Carolina and Virginia adopted no fault programs followed by Florida in 1988. The North Carolina program was restricted to vaccine related injuries which were compensated for out of a fund consisting of state appropriations with a limit of \$300,000. Damages only can be awarded under this system to the person receiving the vaccine.

The Virginia Birth-Related Neurological Injury Compensation Act, mentioned at our first Task Force meeting, apparently was adopted to meet a crisis in the availability of insurance for physicians practicing obstetrics (according to Ludlam, it was expected that 25% of the OB/GYN's were going to lose coverage by the end of 1987). The Act applies only to patients of physicians and hospitals that have voluntarily participated in the program by payment of \$50 per delivery with a \$150,000 maximum by a hospital and a \$5,000 fee for a physician doing obstetrics. These payments are voluntary. In addition, all other physicians are assessed a fee of \$250 as a condition of licensing. If the fund falls short there is an annual premium tax on all

liability carriers in the state. The purpose of the fund is to assure lifetime care of infants with severe neurological injuries sustained during labor, delivery and resuscitation, and to be the sole and exclusive remedy for those who participate. The fund is administered by the Industrial Commission of Virginia with the assistance of an expert panel of three physicians. Compensation is limited to actual and necessary medical and related expenses, loss of earnings from age 18-65 based on a discounted formula and reasonable expenses incurred in connection with filing the claim including attorney's fees.

Following in the footsteps of Virginia, the Florida legislature passed a comprehensive malpractice reform package in 1988. Part of the package was a no-fault state run fund to provide for the care and treatment of babies born with permanent, severe disabilities due to mechanical failure or malpractice. The Fund, administered by the State Worker's Compensation Division, is to be financed by an annual payment of \$5,000 per year by each participating physician. The parents may recover the cost of care and rehabilitation and up to \$100,000 for non-economic damages. As an aside, the total Florida legislation (114 pages) also included caps for other cases, arbitration options, a new watchdog unit called the Medical Quality Assurance Division, hospital reporting requirements of malpractice cases involving doctors and other provisions designed to provide notice of certain events. It is interesting to note that there are no caps if both parties refuse arbitration.

One final note on alternative systems. Peter Huber ("Liability-The Legal Revolution and its Consequences") calls for a return to contract principles in the form of direct first party insurance.

Other miscellaneous procedures to provide faster and less expensive ways to resolve disputes include: "fast tracks" for certain types of cases; dismissal of inactive cases; penalties for last minute settlements made after the trial is underway; procedures designed to limit filing of motions and pleadings; procedures limiting discovery; and procedures which set firm trial dates.

12. THE RAND THREE LEVEL STUDY AND OTHER REPORTS: "Trends in Tort Litigation- The Story behind the Statistics" by Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson attempts to set the record straight on many of the underlying issues that we too are attempting to sort out. They start by reminding of us of how all this began:

"Over the past two years, manufacturers, physicians, consumer advocates and trial attorneys have vigorously debated the costs and benefits of the tort system as a mechanism for compensating and deterring injuries. The

debate began with a perceived "insurance crisis". Liability insurance premiums, particularly for medical malpractice and commercial lines, increased sharply and insurance for some kinds of activities became unavailable at any price. While there is broad consensus that obtaining and paying for insurance was a pressing problem, there was little agreement about the cause or its solution. On the one hand, insurers linked rising rates and unavailability to trends in tort litigation, thus focusing attention on the legal system. In many states and at the federal level, insurers, manufacturers, health care professionals and local government officials formed coalitions to support substantive changes in tort law. On the other hand, trial attorneys and consumer groups generally opposed these changes arguing that what needed reform was not the tort law but poor management practices in the insurance industry."

The authors go on to say that not only did these groups hold different positions on these issues they also held sharply different views of reality (and presented contradictory statistical data to support their claims):

"Proponents of change argued that there has been an explosion of liability lawsuits in the past five years, that recent verdicts demonstrate that civil juries are "out of control" and that the monetary benefits delivered by the tort system to injured parties are overshadowed by the enormous costs of administering the system. Tort reform was needed to counteract these trends. Opponents of tort reform argued that the litigation explosion is a myth, that jury awards have been basically stable for 25 years, and that the transactions costs of the system are acceptable, given the systems twin objectives of compensation and deterrence. Tort reform was not only unnecessary - it might be harmful to those whom the system is intended to serve."

In the author's words, "Where does the truth lie?" In an effort to resolve these apparent contradictions and put the issues in perspective for policy makers this report attempts to answer three questions - How much litigation is there? Are jury awards stable? How much does litigation cost, and who gets the money? A summary of their basic conclusions follows:

a) One of the reasons for confusion is that there is not a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics. The FIRST is the world of routine personal injury torts, exemplified by auto suits. They occur frequently and usually involve modest injuries and relatively low financial stakes. Settled law and routine procedures lend an air of stability to this world. The SECOND is the world of high-stakes personal injury suits such as product liability, malpractice and

business torts. Here the litigation itself is newer, the law is still evolving, and the stakes per case are larger and increasingly uncertain. The THIRD is the world of mass latent injury cases, such as asbestos litigation, Dalkon Shield cases and other suits arising from mass exposure to drugs, chemicals or toxic substances. The lack of "fit" between traditional tort law and the facts of these cases leads many to view them as problematic.

b) How much tort litigation is there? Based on data compiled from the Administrative Office of the U.S. Courts, the National Center for State Courts and the Rand Institute for Civil Justice they have concluded that: accident cases are a steady or declining percentage of court action; non-auto personal injury cases such as malpractice and product liability are growing moderately in state courts and more dramatically in federal courts; and mass latent injury cases have the potential for explosive growth as new evidence of harms is developed.

c) Are jury awards stable or out of control? Based primarily on data compiled by Rand from Cook County, Illinois and San Francisco, California between 1960 and 1984 (only data available in the U.S. that can be used to discuss long term trends) they have concluded that: Plaintiffs in auto cases involving modest injuries and expense continue to obtain modest awards and, at least in recent years, these awards generally hold after trial; Plaintiffs in product liability and malpractice cases are winning more frequently and obtaining higher awards; Deep pocket defendants in product liability cases ultimately pay much, if not all the awards against them, even after post-trial adjustments; Jury behavior seems more unpredictable, but this may simply be because we do not have a very good sense of why juries make the decisions they do. The authors suggest that these trends may hold nationwide because of the similarities between the jurisdictions studied.

d) Litigation costs - How much, to whom? Based on Rand studies of litigation costs the authors state: "Our snapshot of litigation shows that the costs of litigation consumed about half of the \$29 to \$36 billion dollars that were spent on litigation. When we disaggregate these costs, we see that in more complex cases (non-auto torts) the costs of litigation were higher. In the case of asbestos claims, the only mass latent injury cases for which these data have been assembled, litigation costs constituted almost two-thirds of the total per-claim expenditure." Their specific breakdown in percentage of totals: Auto - 19% in Defendant legal fees and expenses, 26% in Plaintiff legal fees and expenses and 52% to Plaintiff; Non-auto- 30%, 24% and 43% respectively; Asbestos- 37%, 26% and 37%. See also pie charts contained on pages 27 and 28 of the report and the Tillinghast cost breakdown contained in Miscellaneous on page 15.

e) What is the story behind the statistics? Here is the authors' summary of their findings: Routine personal injury torts such as auto cases are growing slowly in frequency and costs, and their outcomes-inflation adjusted- have not changed much over the last 25 years; Higher stakes torts such as malpractice and product liability are growing faster in frequency and costs, and their outcomes have increased dramatically over the past 25 years in the jurisdictions observed intensively, and substantially in the shorter five year period for which they had national data; Mass latent injury torts, once identified, tend to explode in number, carry high transaction costs and have highly uncertain outcomes.

Unfortunately, this report does not resolve the nagging underlying question of why have we had significant affordability and availability problems that have lead to considerable debate of these issues. Is it industry practice, increased claims loss experiences, or both? I have found no study or analysis which settles this question in my mind.

Please note that a recent study by two Cornell Law School professors recently reported in the New York Times indicates that since the mid-1980's published opinions have moved toward benefitting defendants over plaintiffs suggesting a possible shift in overall trends.

The Medical Malpractice Liability Study by the Public Health Resource Group, Inc. for the Maine Legislature submitted in June 1989 is also worth noting in some detail. Here are their general findings:

a) Premium rates for Maine Physicians have been rising to "record proportions" over the last ten years.

b) Frequency, severity and losses as a percentage of income do not indicate that the liability insurance problem in Maine is out of control. It does suggest that more efficient methods of estimating reserves, reinsuring and obtaining legal services could reduce the price of premiums for policy holders while continuing to provide high quality coverage. These are areas where policy changes could achieve savings to the insurance industry and ultimately the rate payers.

c) Maine is experiencing a steady decline in physicians who provide obstetrical services; although the decline appears limited primarily to urban areas. The principal reasons reported by physicians for this decline are the price of medical malpractice insurance and fear of a malpractice suit.

d) It is not clear whether tort reforms actually have succeeded in reducing the price of insurance or the frequency or severity of claims, or whether they will succeed in reducing or stabilizing premiums or claims in the future; although it is far easier to estimate the effect of certain reforms on the frequency and severity of claims than on the price of insurance or the willingness of physicians to practice high risk specialties. For example, caps on awards have potential to reduce the dollar amount of high stakes claims and limits on attorneys fees may increase compensation to plaintiffs (while also leaving some victims with smaller claims without representation, they add). Nor is it known if these parameters would have increased more than they have in the absence of reforms. Moreover, many state reform statutes have not been in operation long enough to have a clearly measurable effect. For these and other reasons, new tort reforms at this time are questionable policy options to reduce insurance premiums and to insure medical care availability. Ongoing studies to be completed within the next two years may provide a clearer picture. If reforms are contemplated, the legislature might consider designing them to expire after a certain period of time if availability and affordability of insurance and medical services does not improve by some measure acceptable to policymakers.

e) Alternative systems are appealing because they may help reduce inefficiencies and costs of the current tort system. Unfortunately, no state has implemented an exclusive alternative and it will be years before any evidence is available on the impact of such approaches. Please note the report indicates that the Vermont Legislature is considering the AMA fault based administrative system discussed briefly above.

f) A principal goal of the government in a regulated industry like insurance is to get insurers to manage their business as efficiently as possible and provide a quality product to consumers at a reasonable price and at a fair return on investment. Accordingly, the Insurance Regulator should be directed to promulgate an investment income model and require insurers to demonstrate an effective cost control program. The report also suggests that the State could authorize insurance regulators to spread rate changes over three years and implement a merit rate system and/or system of deductibles which would have the effect of spreading the risk of claims payments and resulting rate increases to those policy holders responsible.

g) To keep professionals on their toes, the state could require investigations by the medical board of physicians who have three or more claims over a ten-year period which resulted in a payment; create an ombudsman within the board to defuse potential complaints before they are elevated to a

claim; and require the board to collect additional information on the voluntary or involuntary loss of hospital privileges in or outside the state. They also suggest that the Legislature take a look at "care standards" that have been proposed by a variety of entities.

h) They conclude: "There are many approaches to controlling the rising and unstable malpractice liability premiums in Maine and their effect on access to care. These include changes in the tort system, the insurance regulatory system and the medical care delivery system. To target one while ignoring the other will create disequilibrium and lead to policies likely to fall far short of the mark. Each has some merit and some drawbacks. Each needs to be addressed with a realistic understanding of what will be gained and what will be lost. It was no surprise to many experts that the St. Paul Companies decided to lower their premiums due in part to a reduction in expected reserve demand for outstanding claims. Considering past history, however, the medical malpractice issue is likely to revisit Maine in a very few years. The severity of the problem will depend on how comprehensive an approach the Legislature takes now."

13. IMPACTS OF U.S TORT SYSTEM CHANGES: (Frequency, Severity and Rates - this section does not attempt to discuss impacts of tort reform on victim rights and related issues, but see pros and cons discussions contained in your first information packet along with the James Ludlam article discussed above): While tort reform measures do appear to affect the frequency and severity of claims there is no solid proof to date that they also have a direct effect on the cost or availability of insurance.

Patricia Danzon of the University of Pennsylvania in a series of Rand articles (including in particular "Frequency and Severity of Malpractice Claims-New Evidence"- 1986) appears to have produced the most credible contemporary analysis of the relationship between certain tort reform provisions and the frequency and severity of medical malpractice claims. Although her study is restricted to medical malpractice claims her conclusions are worth examining in some detail:

a) Malpractice claim severity has risen roughly twice as fast as the Consumer Price Index. Nevertheless, the tort reforms enacted since the mid-1970's malpractice "crisis" affected the frequency and severity of malpractice claims over the decade from 1975-1984 in a manner broadly consistent with economic theory and previous evidence. Although claim frequency and severity have continued to rise despite reforms this trend does not indicate that the tort changes have had no effect.

b) For example, states that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes more lenient to plaintiffs. On the average, cutting one year off the statute of limitations for adults reduces claim frequency by eight percent. The effect would presumably be greater for a reduction from, say, four to three years than from ten to nine years.

c) Statutes permitting or mandating the offset of collateral benefits have apparently reduced malpractice claim severity by eleven to eighteen percent and claim frequency by fourteen percent relative to comparable states without collateral source offset. One of the reasons for this is that collateral source offsets often reduce the potential for recovery for a large number of claims, thereby reducing incentives to file.

d) Caps on awards have reduced severity by twenty-three percent. This percentage represents the average impact of the various forms of cap, over the period of 1975 and 1984, during which time some statutes were still under challenge. If the dollar thresholds are not revised periodically to keep pace with inflation, the future effect will presumably be greater, unless juries find ways of implicitly circumventing the limits by increasing allowances for uncapped components of the award.

e) Arbitration statutes apparently increased claim frequency, but reduced overall average severity. Disaggregated data would be necessary to determine whether the reduction in observed average severity results from a reduction in awards per case or simply reflects the filing of more small claims. The net effect appears to be an increase in total claim costs, but compensation of more claimants.

f) None of the other reforms analyzed, including screening panels and limits on contingency fees, appears to have had any systematic impact on claim frequency or severity.

g) Urban areas have a particularly high frequency of non-meritorious claims (those closed without payment) and claims filed more than two years after the alleged injury. Per capita income, the unemployment rate, and the number of attorneys per capita have no statistically significant effects. The surgery rate in a state increases claim frequency, and the ratio of surgeons to medical specialists increases claims severity.

h) On average, severity of malpractice claims has increased at almost twice the rate of inflation of consumer prices over the last decade.

i) The above analysis on claim frequency and severity should not automatically be translated into an effect on premiums (a subject beyond the scope of this paper) for several reasons: First, the net potential impact on premiums also depends on litigation expenses and changes in the timing of disbursement of loss reserves, and hence investment income. Second, reforms that reduce the uncertainty in estimating malpractice claims costs- namely caps on awards, periodic payment of amounts for future damages and shorter statutes of limitation/repose- may be expected to reduce premiums by a modest amount over and above the reduction in mean expected losses. This result can be expected because of the reduction in the insurer's risk. Perhaps more importantly, she adds, by reducing uncertainty, such reforms should reduce the volatility in price and availability of malpractice insurance, which is a major inefficiency of the present malpractice system.

Please note that Danzon's claim severity conclusions are more or less confirmed by actuaries Milliman and Roberston, Inc. in their August 5, 1988 letter to MICA.

While this potential positive impact on insurance costs is theoretically possible and there is evidence that the experience in California (which has had time to test the theory) and perhaps other states bears this out (the informal opinion of Ray Bacon of the California Department of Insurance and Ron Neupauer of MIEC who feels strongly that California tort reform measures have had a significant impact on rates which currently are increasing less than inflation; although he agrees that other factors also come into play), as well as evidence to the contrary, I have found no study that definitively concludes this has been the case. And I suspect no such study exists. See "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986- "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." In fact, according to Franklin Nutter, president of the Alliance of American Insurers (quoted in the attached article from Public Citizen, "The Impact of Tort Changes on Insurance Rates"), "It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums." Similarly, the Frank Sloan article entitled "State Responses to the Malpractice Insurance 'Crisis' of the 1970's: an Empirical Assessment" states: "The empirical results of the study presented here give no indication that individual state legislative actions, or actions taken collectively, had their intended effects on premiums." One last comment. When evaluating the significance of the California experience, it is useful to keep in mind that 90% of the insurance is provided by doctor owned companies which have a significant incentive to keep rates down.