ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5903 HOUSE LABOR & COMMERCE

327

> Sec. 46.03.740. OIL POLLUTION. A person may not discharge, cause to be discharged, or permit the discharge of petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen, or a residuary product of petroleum, into, or upon the waters or land of the state except in quantities, and at times and locations or under circumstances and conditions as the department may by regulation permit or where permitted under art. IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended.

> Sec. 46.03.822. STRICT LIABILITY FOR THE DISCHARGE OF HAZARDOUS SUBSTANCES. To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry. (For purposes of this statute, "hazardous substance" includes oil.)

It is important to note that AS 46.03.822 is a strict liability statute. Liability does not depend upon any showing of negligence. It should be noted, also, that the statute is directed at the person owning or having control over the substance. Therefore, liability does not depend solely on who owned the Exxon Valdez itself.

However, I do not personally know who owned the oil on the Exxon Valdez or whether Exxon had control over the oil even if it didn't own it. I also do not know whether a judgment-proof subsidiary of Exxon was involved in either the owning or transporting of the oil. Even if a subsidiary was involved, of course, there are probably ways of holding the parent company liable. Exxon appears to be accepting full responsibility at this point in time, but as the extent of damages mounts and civil penalties are brought to bear, and Exxon is tempted to deny full responsibility, these kinds of issues could become important.

In addition to these state statutes, there are federal laws that have apparently been violated. One of these is a section of the federal Clean Water Act, 33 U.S.C. 1321(b), which provides:

> The discharge of oil...into or upon the navigable waters of the United States...in such quantities as may be harmful...is prohibited.

Another federal law under which liability will probably be found is 43 U.S.C. 1653(c), which provides:

> If oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

These federal statutes are substantially parallel to the two state statutes cited above. One generally prohibits discharges; the other places strict liability on persons who discharge oil. The second federal statute cited is a strict liability statute like AS 46.03.822, and as such, involves issues similar to those discussed in relation to AS 46.03.-822.

In addition to these basic statutes prohibiting unauthorized oil discharges, there are other statutes that may have been violated during the Prince William Sound disaster. These will be discussed next.

<u>OTHER POSSIBLE BASES OF LIABILITY</u>

It is possible that some liability will attach to Exxon's or Alyeska's failure to properly implement their oil discharge contingency plans. Those plans are required under AS 46.04.-030. Regulations implementing that section require availability of equipment and other resources to effectively contain a discharge. The regulations also require notification to the state if some equipment is not readily available. See 18 AAC 75.305 - 18 AAC 75.395.

Once issues of liability for the discharge have been determined, the relevant aspect of ensuing litigation or settlement will be to determine what types of damages and costs are recoverable from the liable party or parties. These will be discussed next.

TYPES OF DAMAGES AND COSTS RECOVERABLE

To some extent, the types of damages and costs recoverable for environmental disasters are described in the liability statutes cited previously. AS 46.03.822 refers to "damages to persons or property, public or private." The federal strict liability statute, 43 U.S.C. 1653(c), refers to "all damages, including clean-up costs, sustained by any person or entity, public or private."

Further descriptions of the types of damages and costs recoverable are contained in additional statutes. For instance, AS 46.03.824 provides as follows:

> Sec. 46.03.824. DAMAGES. Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit.

In addition, AS 46.03.760(e) provides:

> (e) In addition to liability under (a) - (d) of this section, a person who violates or causes or permits to be violated a provision of AS 46.03.740 - 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment or removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs.

Furthermore, AS 46.03.780 provides:

> Sec. 46.03.780. LIABILITY FOR RESTORATION. (a) A person who violates a provision of this chapter, AS 46.04, or AS 46.09, or who fails to perform a duty imposed by this chapter, AS 46.04, or AS 46.09, or violates or disregards an order, permit, or other determination of the department made under the provisions of this chapter, AS 46.04, or AS 46.09, respectively, and thereby causes the death of fish, animals, or vegetation or otherwise injures or degrades the environment of the state is liable to the state for damages.
>
> (b) Liability for damages under (a) of this section includes an amount equal to the sum of money required

> to restock injured land or waters, to replenish a damaged or degraded resource, or to otherwise restore the environment of the state to its condition before the injury.
>
> (c) Damages under (a) of this section shall be recovered by the attorney general on behalf of the state.

The federal Clean Water Act also specifies that some types of damages are recoverable by the state under the federal law. 33 U.S.C. 1321(f)(4) - (5) provides:

> (4) The costs of removal of oil...for which the owner or operator of a vessel...is liable under subsection (f) of this section shall include any costs or expenses incurred by...any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil...in violation of subsection (b) of this section.
>
> (5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

In light of these statutes, it appears to me that the types of damages and costs that may ultimately be recoverable by the state are very broadly stated. With respect to all of these damages provisions, it will be important for the state to be able to quantify the damages caused by the oil discharge. This will not be particularly hard with respect to containment and cleanup costs, but will be more difficult with respect to loss of income, restoration of the environment, and replacement of natural resources.

In addition to this practical limit on recovery, there have been arguments made that there are caps on Exxon's liability under various statutes. These will be discussed next.

## POSSIBLE LIABILITY CAPS

One possible liability cap arises from 43 U.S.C. 1653(c), the federal law related specifically to liability for discharge of TAPS oil.

43 U.S.C. 1653(c)(3) provides:

> (3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed...The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

The "Fund" this section refers to is a fund that has been set up under federal law that has been financed by a $.05 per barrel fee collected by the operator of the TAPS. Some may call the $14,000,000 and $100,000,000 figures "liability caps," but I think that term would be erroneously applied, given the entire context of the section. It should be noted that the last sentence of the cited material says that the unpaid portion of any claim may be pursued under other applicable laws. The law further provides that it is "not to be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." 43 U.S.C. 1653(f)(9). Therefore, I think it is clear that the figures cited are caps only with regard to the money payable by the federal fund; they are not caps on Exxon's or anyone else's liability for damages and costs of cleanup. Other state and federal laws previously cited provide ample basis for collection above the limits recoverable under 43 U.S.C. 1653(c).

A second possible basis for a liability cap arises from a federal law called the Liability Limitation Act (the LLA). It is found at 46 U.S.C. 183, and reads in pertinent part:

> The liability of the owner of any vessel...for any loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner...shall not...exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Notice, however, that this law only limits the liability of the vessel owner. It was intended to encourage the building of ships by limiting the liability of a ship owner who had

no other interest involved. In the Prince William Sound disaster, Exxon probably wears at least two hats: as the owner of the vessel and as the owner of the oil on board the vessel. The LLA could only limit Exxon's liability while it wore the vessel owner's hat, not under its other hat. Moreover, the LLA does not serve to limit liability when negligence is involved. So, to the extent that negligence is shown, Exxon's liability even as the vessel owner would not be limited by the LLA.

A third kind of cap on Exxon's liability arises from a cap on civil penalties under AS 46.03.758(e). This subsection provides for a $100,000,000 cap on civil penalties assessable. However, as discussed in the following section, the per gallon maximum penalty under AS 46.03.758 is modified to such an extent in regulations that the cap, in all likelihood would never be reached.

CIVIL PENALTIES THAT CAN BE ASSESSED

The state statute under which civil penalties may be assessed in relation to the Prince William Sound disaster is AS 46.03.758, which provides, in part:

> (b) No later than the 10th day after the convening of the Second Session of the Tenth Alaska Legislature, the department shall submit to the legislature regulations establishing the following schedule of fixed penalties for discharges of oil:
>
> (1) Subject to (2) of this subsection, the penalties for the following categories of receiving environments may not exceed;
>
> (A) $10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;
>
> (B) $2.50 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and
>
> (C) $1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.
>
> (2) For discharges of oil which are caused by the gross negligence or intentional act of the discharger, or

when the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil, the penalty shall be determined by multiplying the penalty established under (1) of this subsection by a factor of five.

* * *

(d) The schedule shall vary according to the toxicity, degradability and dispersal characteristics of the oil. The schedule shall also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section shall apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty shall decrease for less productive or sensitive receiving environments.

(e) After April 19, 1978, if a discharge of oil in excess of 18,000 gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations, or $100,000,000, whichever is less,

(1) if the discharge occurs from any commercial or industrial facility other than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;

(2) if the discharge occurs from a vessel,

(A) the owner and operator of the vessel; and

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred within the territorial jurisdiction of the state, or at a deepwater port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil

to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

(3) if the discharge occurs from an offshore platform, the lessee or permittee of the tract or acreage upon which the platform is situated, and the operator of the platform.

(f) The court shall deduct from the penalties for which the person charged is liable under (e) of this section that amount of oil which was removed from the environment as a result of a cleanup operation undertaken in conformity with applicable state and federal law, unless the oil was removed by an agency of state, local or federal government. The dispersal of oil through the use of chemical agents or other means is not considered removal for the purposes of this subsection. The court may estimate the amount of oil removed.

(g) Except as provided in (f) and (j) of this section, the entire penalty specified in the regulations shall be imposed, except that a person who discharges oil into a receiving environment may demonstrate, by a preponderance of evidence, that mitigating circumstances relating to the effects of the discharge would make imposition of the full penalty inappropriate. In determining whether mitigating circumstances exist, the court shall recognize that scientific knowledge pertaining to oil spills is very limited and if there is insufficient knowledge either to predict a base case or to show mitigating circumstances varying from that base case, the administratively established schedule of penalties shall apply. If mitigating circumstances are proven by a preponderance of the evidence, the court may reduce or totally eliminate the penalty, in accordance with the purposes of this section. (Emphasis added)

* * * * * *

The schedule of civil penalties required to be adopted by regulation under this statute are contained in 18 AAC 75.500 - 18 AAC 75.600. The Department of Environmental Conservation determined that crude oil was medium in its toxicity,

degradibility, and dispersability and Prince William Sound was determined to be a sensitive environment, although not a "critical" area. (According to one source, the oil industry asserted during the development of regulations that the Sound should be designated as "without significant aquatic resources." See "Oil Spill Liability and Compensation: A Review and Evaluation of Alaska's Civil Penalty Scheme," a report prepared for The Institute for Marine Studies, University of Washington, by Wendy J. Graham (January 1989), page 33, hereafter "Civil Penalty Scheme".)

Under the regulations in 18 AAC, the base penalty for discharge into a sensitive saltwater environment is $2.00 and the factor applied based on the characteristics of crude oil is approximately .575. (See, "Civil Penalty Scheme," page 42.) Therefore, the penalty for the discharge in Prince William Sound would be something on the order of $1.15 per gallon, or $11.5 million for the approximately 10 million gallons discharged there. For the amount of oil that reached critical environments, there would be a base penalty of $2.50 per gallon, but that would still be multiplied by the .575 factor for crude oil, so the resulting penalty would not be significantly increased for those areas.

There is some discussion in "Civil Penalty Scheme," at pages 45 - 47, that the collection of civil penalties under AS 46.03.758 might offset the recovery of other types of damages, even quantifiable damages, despite the original intent that the civil penalties be a way to recover only the unquantifiable damages attributable to a discharge. Since all cases that I am aware of in which the civil penalties may have been applicable have been settled out of court, this is not a clear area of law.

It is clear, however, that the maximum civil damages available to the state for the Prince William Sound disaster will not even approach the $100 million cap in AS 46.03.758(e), being more on the order of $10 - 15 million, multiplied to $50 - 55 million if gross negligence is shown.

In addition to these civil penalties, there are criminal penalties that could be assessed. These will be discussed next.

CRIMINAL PENALTIES THAT CAN BE ASSESSED

Criminal penalties related to the Prince William Sound disaster could be assessed under AS 46.03.790, which provides, in part:

> Sec. 46.03.790. CRIMINAL PENALTIES. (a) Except as provided in (d) - (f) of this section, a person who negligently violates a provision of this chapter, AS 46.04, or AS 46.09, or of a regulation, lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09 is guilty of a class B misdemeanor.
>
> * * *
>
> (f) Notwithstanding the penalty provisions of (a) - (e) of this section, a defendant that is an organization is, upon conviction of a violation of any of the provisions listed in this section, subject to the penalties set out in AS 12.55.035(c).

The fine for a misdemeanor under AS 12.55.035(c) is $100,000. Since Exxon is an organization, this is the likely penalty that could be criminally assessed upon a finding of negligence.

HOW AND WHEN THE STATE MIGHT RECOVER MONEY

As described above, there are many statutes under which the state could seek to recover its expenses of cleanup and its damages. With respect to cleanup expenses, both AS 46.04.-010 and AS 46.08.070 require the Department of Environmental Conservation to "promptly" seek reimbursement. There are no particular directives in any other statutes for the commencement of civil suits to recover costs or damages. The state could sue the Fund established under federal law. The state could also directly sue Exxon's insurer under AS 46.-04.040(e).

Regardless of where suits are filed, they will need to be filed within the applicable statute of limitations period, but, even if they were filed yesterday, it is quite possible that no money would be recovered for years.

There are several reasons why litigation related to the Prince William Sound disaster might take many years:

(1) The state will need time to determine all its damages and costs. It seems likely that cleanup will take more than a few months, and the state will need to monitor future salmon runs, among other things, in order to fully determine the disaster's effect on the fisheries. Effects on tourism will not be immediately ascertainable either.

(2) Claims under the federal fund will need to be aggregated to determine how much proration of claims will be needed to stay under the fund's $100,000,000 cap. Therefore, it seems to me that the fund administrators will need to wait for claims to be filed from all sources before honoring any claims against the fund.

(3) Exxon may, in good faith, disagree with the state's assessment of Exxon's extent of liability and the quantification of damages. It will take time to sort out those differences of opinion.

(4) Given the high amount of financial exposure from this disaster, it will be in Exxon's economic interest to delay payment. It may also be in Exxon's interest to delay payment to put pressure on the state to settle for less money. It may be Exxon's judgment that there will be political and economic pressure on the state to get money back quickly, even if the state needs to sacrifice in terms of total amount recovered.

Eventually, the state is likely to recover significant amounts of money, although I cannot at this point judge whether that amount will be close to the actual damages suffered or cleanup money spent. Regardless of how much money is recovered, it is important to consider the statutes affecting how that recovered money is to be used. This topic will be discussed next.

USE OF RECOVERED MONEY

There are two state statutes under which the legislature has expressed its intent that money recovered from environmental actions be put into special accounts to be used for future cleanup responsibilities.

One of these statutes is AS 46.04.010, which provides for reimbursements of cleanup costs to be credited to a special

account in the general fund called the "oil and hazardous substance release mitigation account." The other statute is AS 46.08.020, which provides that "fines, penalties, or damages recovered under...law for costs incurred by the state as a result of the release...of oil" should be specially accounted for in the general fund so that the legislature may appropriate the estimated balance of the account to the oil and hazardous substance release response fund established in AS 46.08.

Neither of these two state statutes is binding because dedicated funds are prohibited in Alaska. However, they do evidence a strong legislative intent that money recovered in environmental actions be available for use related to future environmental problems.

A more binding statute in this area is a federal one. 33 U.S.C. 1321(f)(5) in the Clean Water Act requires that money recovered under that Act "shall be used to restore, rehabilitate, or acquire the equivalent of [the natural resources that were damaged]." So, to the extent that the state recovers money under that federal law, the state may be required to spend it on restoring lost resources.

<u>SUMMARY</u>

The state has several avenues for recovery of damages and costs based on the Prince William Sound disaster. Liability can probably be established under more than one law, especially considering the existence of federal laws. Actions can be filed against a number of parties, including Exxon, its insurer, and a federal fund set up to cover such disasters. Money may be recoverable for many types of damages and for reimbursement of the state's cleanup expenses. However, the time at which significant amounts of recoverable money may be expected to be received by the state is probably several years away.

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As stated earlier, this memorandum is only a general overview. Issues involving admiralty law and common law have not been discussed. They may or may not be significantly relevant. There are, in addition to state penalties, some federal penalties that Exxon might face; I have not discussed those here because your interest seemed to be the recovery of money by the state.

If you wish to have a more in-depth analysis on any particular issue, please let me know. As time allows and newly discovered facts permit, we would be happy to respond to further inquiries. Also, if you would like a copy of Ms. Graham's report about Alaska's civil penalty scheme, one could be made available.

TL:kb
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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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PHONE: (907) 465-3600

January 24, 1989

The Honorable Curt Menard
Alaska State Legislature
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: HB 68 and Ballot Measure No. 2
Our File No. 661-89-0302

Dear Representative Menard:

You have asked for our opinion on whether HB 68, which concerns strict and joint and several liability for hazardous substances releases, would conflict with the intent of Ballot Measure No. 2 adopted by the voters during the most recent general election. You have also made a generic inquiry regarding legislative repeal or amendment of laws enacted by initiative.

The short answer to your first question is no. The summary response to your second inquiry is that an initiative may not be repealed by the legislature for a period of two years after its effective date, but it may be amended at any time. Our analysis follows.

First, Ballot Measure No. 2 effected two very specific and discrete changes in the manner in which liability and damages for traditional personal injury torts will be assessed: it limits a party's liability to its actual percentage of fault and it repeals a statutory right of contribution among two or more persons who were jointly and severally liable for the tort. 1/ Ballot Measure No. 2 did not expressly repeal any other statutory provision concerning strict and joint and several liability. Most pointedly, it is silent on the strict and joint and several liability provisions of AS 46.03.758(e) and other statutes set forth in AS. 46.03 and AS 46.04 concerning oil and hazardous substance releases. For this reason, we do not believe that HB 68 would infringe upon Ballot Measure No. 2.

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1/ The precise language of Ballot Measure No. 2 amends a portion of AS 09.17.080(d) and repeals AS 09.16.

Furthermore, the intent of the voters in approving Ballot Measure No. 2 can be ascertained from the arguments made in support of the initiative. In Re Lance W., 694 P. 2d 744, 753 (Cal. 1985). See also Carman v. Alford, 644 P. 2d 192 (Cal. 1982) (election materials helpful in discerning voters' intent); Los Angeles County Transp. Comm. v. Richmond, 643 P. 2d 941 (Cal. 1982) (ambiguities in initiative resolved by referring to arguments in support). In this case, that it a relatively easy task.

The attached advertisement paid for by the coalition supporting Ballot Measure No. 2 unequivocally states that:

> Ballot Measure No. 2 will have no impact on Alaska's environmental protection laws.

(emphasis in original). See Attachment 1. In addition, the coalition supporting Ballot Measure No. 2 explicitly agreed with legislative counsel that it would have no effect on state environmental laws. Id. This advertisement is direct evidence of the voters' intent not to affect the liability provisions, including strict and joint and several liability, of state environmental laws. Enactment of HB 68, amending the provisions of AS. 46.03.822, will thus not violate the intent of the voters in approving Ballot Measure No. 2.

As to your second question, section 6 of article XI of the state constitution provides that the legislature may amend a law enacted by initiative, but may not repeal the initiative within two years of its effective date. "[T]he legislature has broad powers to amend an initiative." Warren v. Thomas, 568 P.2d 400, 402 (Alaska 1977)(fn. omitted). There could be a point at which amendment and repeal tend to converge where, for example, "the legislature has exceeded that broad power by passing an amendment which so vitiates the initiative as to 'constitute its repeal'". Supra, 568 P.2d at 402 (citation omitted). 2/ The passage of HB 68, however, does not raise this spectre.

"[A]n amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and

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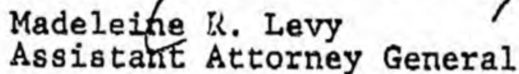
2/ The Alaska Supreme Court has reserved judgment on the precise question of when an amendment might constitute a repeal of an initiative. Warren v. Thomas, supra, 568 P. 2d at 404.

rendered repugnant to, the amendatory act." Id. (citation omitted). Nothing in HB 68 is repugnant to Ballot Measure No. 2. Nothing in Ballot Measure No. 2 is materially changed by HB 68. Ballot Measure No. 2 simply did not address the liability provisions of environmental laws, which is precisely what HB 68 does. Since the subject matter of HB 68 was not even contemplated in the adoption of Ballot Measure No. 2, it can hardly be said to materially change or be repugnant to the ballot measure.

We hope that this adequately responds to your questions. Please feel free to contact us for further information.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL



By: Madeleine R. Levy
Assistant Attorney General

MRL:jem

Attachment

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 998'1
907 465 3800

M E M O R A N D U M January 18, 1989

SUBJECT: HB 68 and repeal or amendment of an initiative (HB 68)

TO: Representative Curt Menard, Co-chair
House Resources Committee

FROM: Terri Lauterbach
Legislative Counsel

You have asked whether HB 68's amendment of AS 46.03.822(a) to provide for joint and several liability for the release or threatened release of a hazardous substance violates constitutional restrictions on amendment and repeal of initiatives. You have also asked for a general discussion of the extent to which the legislature may amend or repeal a law that has been enacted by initiative.

With regard to HB 68, it is my opinion that its amendment of AS 46.03.822(a) to provide for joint and several liability for damages described by that section does not violate constitutional restrictions on amendment and repeal of initiatives. It has the effect of amending Initiative 87-02 in a permissibly narrow way.

The constitutional provision governing this question is sec. 6, art. XI, Constitution of the State of Alaska, which provides:

> SECTION 6. ENACTMENT. If a majority of the votes cast on the proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and <u>may not be repealed by the legislature within two years</u> of its effective date. <u>It may be amended at any time</u>. An act rejected by referendum is void thirty

> days after certification. Additional procedures for the initiative and referendum may be prescribed by law. (Emphasis added.)

The Alaska Supreme Court has addressed the question whether a law may be amended and has shown a tendency to approve amendments quite broadly. Thus a reduction in penalties in an initiated law was approved in Warren v. Thomas, 568 P.2d 400 (Alaska 1977). And, in Warren v. Boucher, 543 P.2d 731 (Alaska 1975), the Alaska Supreme Court acknowledged that the power to amend an initiative was an explicit "check or balance" against the initiative process.

Furthermore, an Attorney General's opinion concluded that the legislature could alter or delete an initiative's requirement that the capital site contain no less than 100 square miles of state land as well as the requirement that the site selected be more than 30 miles from either Anchorage or Fairbanks. Op. Att'y Gen., August 19, 1975.

In my view, the Constitution asks the legislature to give deference to the wishes of the people as expressed in an initiative, at the same time recognizing that an initiative may present policy problems that the legislature may need to resolve. Because the people may not themselves address the difficulties in a particular initiative by amending it but rather must vote it up or down, the constitution permits the legislature to amend it at any time.

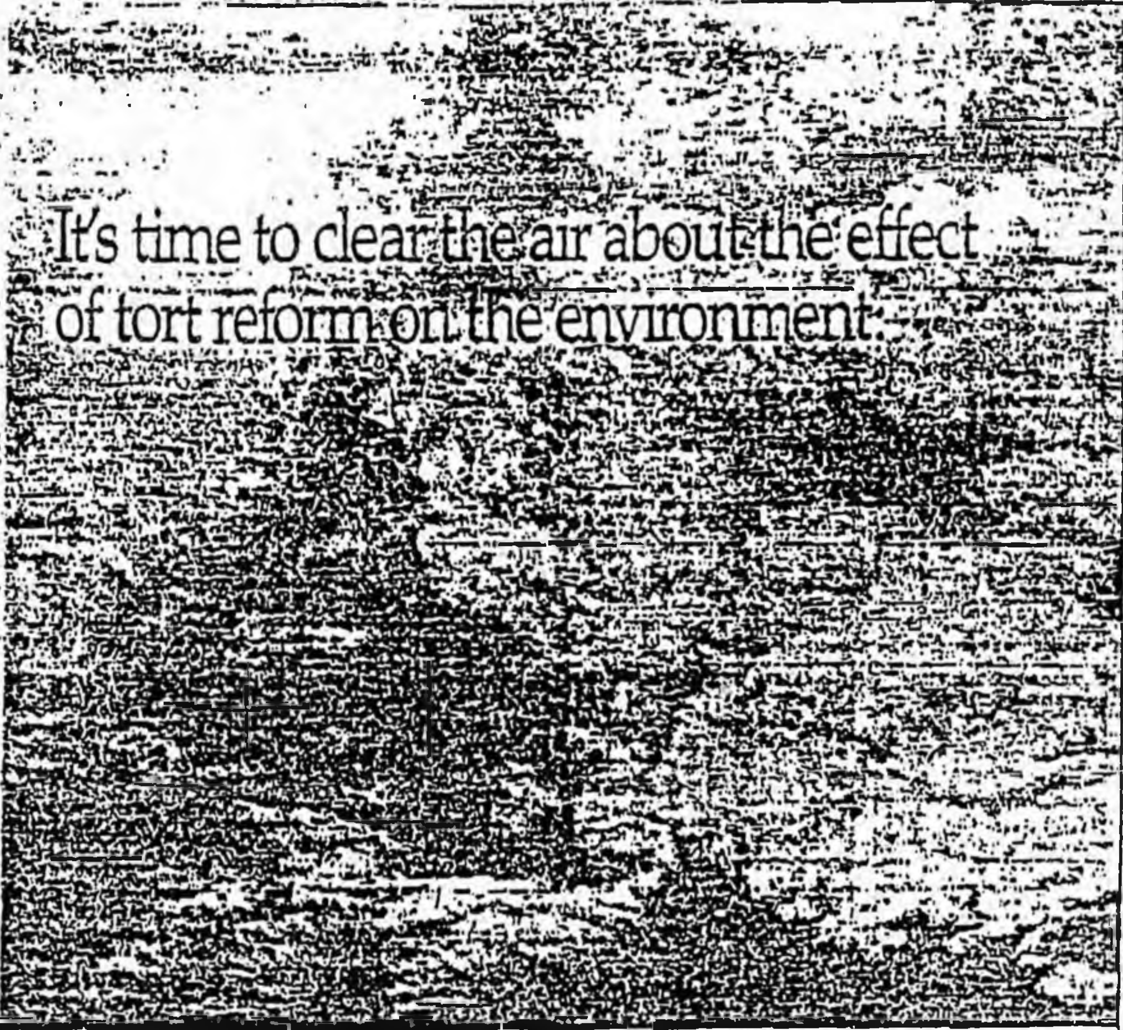
The Thomas court suggested that there could be situations in which an amendment so vitiates an act passed by initiative that it constitutes its repeal. In my opinion, that issue is not raised by the amendment in HB 68. The amendment in HB 68 changes the initiative's general rule of several liability with respect to only a limited type of tort action. In being so narrow, the amendment could not be said to vitiate the initiative.

In discussing HB 68, I hope the general parameters of legislative power to amend or repeal an initiative have been clear. The legislature may amend an initiative at any time as long as that amendment does not change the law passed by the initiative so much that it amounts to a repeal of that law. The legislature may repeal an initiative within two years of its effective date.

I hope this discussion is helpful to you. If I may be of further assistance, please let me know.

TL:gc
WKG5/105

# It's time to clear the air about the effect of tort reform on the environment.



Trial lawyers opposed to Ballot Measure No. 2 would have you believe that this measure poses a threat to our environment. They maintain that if this measure passes, polluters will escape paying for the environmental damage they cause. That's simply not true.

According to the legislature's own independent lawyer, Ballot Measure No. 2 will have *no impact* on Alaska's environmental protection laws. Similarly, it will have *no impact* on federal environmental protection laws.

The truth of the matter is that since 1986, 39 states have passed some form of tort reform. And on November 8th, it will be your turn to set the record straight.

Ballot Measure No. 2 will make Alaska's liability law more equitable. At the same time it will protect the right of the victim to receive compensation from those who are responsible.

These are the facts. Don't allow a lot of legal double-talk to cloud the issue.

Support tort reform.
Vote for Ballot Measure No. 2 on November 8th.

Paid for by Citizens' Coalition for Tort Reform, P.O. Box [illegible], Anchorage, Alaska [illegible], David McGuire, M.D., Chairman.

ATTACHMENT 1 PAGE 1 OF 1 PAGES

# Alaska Academy of Trial Lawyers

P.O. Box 102323 • Anchorage, Alaska 99510 • (907) 258-4040
Office: 540 L Street, Suite 102 • Anchorage

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April 11, 1989

The Honorable Dave Donley
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Re: H.B. 166

Dear Representative Donley:

As you know, I am the president of the Alaska Academy of Trial Lawyers, an organization of nearly 200 lawyers from all over Alaska. The recent hearings held by your committee have been the subject of much discussion and concern by the members of the Academy in relation to the lack of scheduled hearings to address toxic and environmental issues. I understand there now will be hearings to address these areas, and you are to be congratulated for this. We believe the hearings will clearly reflect that H.B. 166 is harmful to the civil rights of those victims harmed by toxic or environmental torts.

The recent disaster in Valdez has highlighted the inappropriate nature of many aspects of this bill. This bill will have an absolutely devastating effect upon the abilities of victims of future environmental or toxic torts to recover full compensation for their damages and injuries under state law.

The impact of the bill is such that it will not only harm individuals such as fisherman, but it will also harm organizations such as native corporations. For instance, have you considered, in any depth, how this bill is going to impact the rights of native corporations to recover for damages to their lands as a result of toxic or environmental torts? This is presently a very interesting question. The previously passed tort reform bill (AS 09.17.010) contains a $500,000.00 limit for non-economic damages. Therefore, it is certainly arguable that every native corporation in the

Prince William Sound has been limited by the legislature to $500,000.00 for non-economic loss as a result of the damage to their ancestral lands. Certainly, this defense is going to be raised, and it will ultimately be litigated, but this is simply one example of the devastating nature that so-called "tort reform" can have in the environmental area.

Of equal concern in relation to the $500,000.00 limitation in AS 09.17.010 is the argument that it limits punitive damages claims to $500,000.00. Imagine that! In Valdez, where the gross, criminal negligence has resulted in hundreds of millions, if not billions, of dollars in damages the punitive damages claims of each native corporation, each fisherman, each processor, etc. may be limited to $500,000.00 under state law! Even the State of Alaska's claims may be limited to $500,000.00!

As another example, the recent initiative doing away with joint and several liability is going to have a severe impact in the Valdez disaster. You can bet that the oil companies and the insurance companies are going to ultimately sue everybody in sight trying to lay off some liability, claiming that other parties are responsible for a portion of the incredible damages that have occurred. In this respect a terrible disservice to the citizens of Alaska was performed by the Coalition For Tort Reform.

Further, the six-year statute of repose proposed in the present bill H.B. 166 is disastrous in relation to environmental and toxic torts. In many instances, the damages caused by environmental pollution go on for many, many years beyond the six years. In other instances, the acts of neglect are not discovered as they have been hidden by the polluters. This has occurred over and over again across the United States. Polluters don't generally advertise that they have polluted, and quite often the environmental disaster is not apparent immediately -- unlike the Valdez situation.

As you know, environmental interests are coming together across this state, nationally and internationally, to address the Valdez situation. The so-called contingency plan of the oil companies has been found to be grossly inadequate, and governmental controls to protect us all need to be erected and strengthened. Similarly, we would hope that your committee would step back a pace or two and re-examine this bill in light of the Valdez disaster.

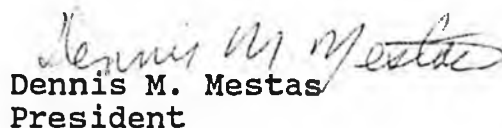
Frankly, I believe you will see increasing efforts to link so-called "tort reformers" with the Valdez disaster as the public becomes more aware of the limitations of liability passed in Alaska in the last several years. I am sure neither you nor your committee wish to be seen as assisting the oil companies and other special interests in further dismantling the legal system which provides at least some protection for victims of environmental disasters.

Indeed, the legislature would be doing a far greater service to consider repealing the limitations passed in 1986 rather than extending them further. At the very least, exceptions for toxic and environmental torts should be made and clearly the limitations provisions of AS 09.17.010 should be clarified or eliminated.

On behalf of the Academy membership, I urge you to reconsider this bill in light of the Valdez disaster. I look forward to reporting to the membership the actions of yourself and your committee in this regard.

Sincerely yours,

ALASKA ACADEMY OF TRIAL LAWYERS



Dennis M. Mestas
President

cc: House Labor & Commerce Committee:

Max F. Gruenberg, Jr.
David Finkelstein
H. A. "Red" Boucher
Virginia M. Collins
Loren Leman
Mark Boyer

## ALL CLAIMS - INCEPTION THROUGH 1988

### By Payment Size

| INDEMNITY PAYMENT | #OF SUITS/CLAIMS | PERCENTAGE |
|---|---|---|
| 0 | 165 | 61 |
| 1-1,000 | 6 | 2 |
| 1,001-5,000 | 14 | 5 |
| 5,001-10,000 | 12 | 4 |
| 10,001-25,000 | 14 | 5 |
| 25,001-50,000 | 17 | 6 |
| 50,001-75,000 | 7 | 3 |
| 75,001-100,000 | 10 | 4 |
| 100,001-150,000 | 6 | 2 |
| 150,001-200,000 | 8 | 3 |
| 200,001-500,000 | 4 | 1 |
| 500,001-750,000 | 4 | 1 |
| 750,001-2,000,000 | 2 | 1 |
| 2,000,001-3,000,000 | 2 | 1 |
| | 271 | |

Average Claim - $48,731

Average Claim where indemnity payment was made - $124,353

| | Physician Claims | Physician's Named | Number of Physicians Insured |
|---|---|---|---|
| 1976 | 2 | | 58 |
| 1977 | 4 | | 88 |
| 1978 | 5 | | 88 |
| 1979 | 2 | | 97 |
| 1980 | 10 | | 121 |
| 1981 | 7 | | 144 |
| 1982 | 15 | | 200 |
| 1983 | 15 | | 230 |
| 1984 | 29 | 39 | 285 |
| 1985 | 43 | 63 | 325 |
| 1986 | 35 | 67 | 315 |
| 1987 | 27 | 29 | 303 |
| 1988 | 20 | 21 | 279 |

MILLIMAN & ROBERTSON, INC.
CONSULTING ACTUARIES

TWO PENNSYLVANIA PLAZA NEW YORK, N.Y. 10001
TELEPHONE: 212/279-7166
FAX: MANHATTAN 212/629-5657, ELMWOOD PARK 201/794-6029

ROBERT P. ALDORISIO, F.C.A.S.
RICHARD J. BARNEY, F.S.A.
DONNA L. BERSON, A.S.A.
RICHARD S. BIONDI, F.C.A.S.
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WILLIAM F. MURPHY, F.C.A.S.
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MEREDITH A. RATAJCZAK, A.S.A.
MARCIA S. SANDER, F.S.A.
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JOY A. SCHWARTZMAN, F.C.A.S.
STEVEN G. SORRENTINO, F.S.A.

WENDELL MILLIMAN, F.S.A. (1976)
STUART A. ROBERTSON, F.S.A.
CHAIRMAN EMERITUS

August 5, 1988

Mary A. Pierce
Executive Director
Medical Indemnity Corporation of Alaska
4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503

Re: Effective Tort Reform Legislation

Dear Ms. Pierce:

You, like many other executive officers of medical societies and physician sponsored insurers, are likely involved in continuing efforts to obtain passage of effective tort reform.

At the May 1988 Physician Insurers' Association of America Annual Meeting I had the opportunity to discuss the importance of the "fine print" in tort reform legislation. So many people in the audience requested copies of my slides that I prepared the attached annotated version of those slides.

The information on pages two through four can be used as a checklist in reviewing tort reforms you may be considering. Actuarial techniques can be used to evaluate how much "fine print" in the tort reform language might affect the value of the reforms.

If you have any questions about this material, or if I can be of any other assistance to you, please feel free to call me or my associate, Spencer Gluck.

Very truly yours,

Allan Kaufman -SG.

RECEIVED
AUG 15 1988
MICA

Allan Kaufman, F.C.A.S.

AK/pr
cc: D. Bickerstaff

## How Effective is Tort Reform?

## Read the Fine Print

Tort reform can work.

The largest "laboratory" to date has been the medical professioanl liabilit- system in California. Here, a package of tort reforms including many of the currently popular elements was passed following the mid-seventies medical malpractice insurance crisis. At that time, California joined New York and Florida among the national leaders in medical liability costs. Today, California's medical liability costs are far closer to the national average.

Patricia Danzon, currently at University of Pennsylvania, compared medical liability costs from 1975 to 1984 in a number of states with and without tort reforms, calculating these average savings associated with various types of tort reforms:

| | |
|---|---|
| Caps on non-economic loss | 23% |
| Collateral sources offsets | 11-18% |
| Contingency fees limitations | 3% |
| Reduced statute of limitations | 8% per year |
| Structured settlements | Not tested |
| Joint & Several Liability | Not tested |

Of course, these estimates of savings are in comparison to what costs otherwise would have been, and represent average results for the states studied.

Remember, successful tort reform means that costs are lower than they otherwise would have been. It is unlikely that tort reform will produce costs below the starting point for an extended period.

Tort reform can also fail.

Or be relatively ineffective. Or be less effective than it might have been. For each of the types of reform listed above, there have been a number of variations in bills which have passed, and even more in bills which have been considered. Small differences in wording can have profound implications, some of which may be unintended. To evaluate an existing or proposed tort reform, be sure to read the "fine print".

We've worked on many variations of tort reforms in proposals, bills, and laws in a number of states. The following list illustrates some of the possible variations and important factors which affect the value of those reforms. The list begins with a ball-park estimate of the savings which the reforms might produce for medical professional liability.

Limitations on Non-Economic Loss

Estimated savings can range from zero to fifty percent, depending on:

1. Amount of Limitation. Proposals range from complete elimination to a $1,000,000 limitation.

2. Per Incident or Per Claimant. This distinction is significant, but without proper attention the wording of the law may not even be clear.

3. Flat or Graded. Flat limitations are more common. Graded limitations usually apply the maximum to only the most serious cases and then grade the limitation down for less serious cases (e.g. in proportion to "capacity to enjoy life").

4. Definition of Non-Economic Loss. For example, future wage loss in one jurisdiction is considered speculative and therefore non-economic.

5. Variation by Claimant Characteristic. For example, the limitation may vary by age of claimant and/or degree of injury.

6. Indexation of the Limitation for Inflation.

Collateral Source Offsets

We've estimated savings in this area from zero to fifteen percent.

1. Mandatory or Judgmental Offset. Possible wordings include: "evidence may be introduced"; "judge/jury may consider"; or "judge/jury shall reduce".

2. Offset by Judge or Jury. There's opinion (although no evidence) that offset by the judge produces greater savings.

3. Exceptions to Offset. Possibilities include medicare, life insurance, public insurance, insurance paid by claimant, insurance with subrogation provisions, insurance paid by employer.

4. Past Damages Only or Past and Future Damages. The language of a number of current laws appears to apply to past damages only, whether or not this was intended when the law was written.

5. Offset for Premium Paid by Claimant.

Contingency Fee Limitations

Estimated savings range from zero to ten percent.

1. Selected Schedule. Most limitations take the form of some kind of schedule. That schedule may include percentages higher than current prevailing fees.

2. Schedule Variations. Most schedules vary the percentage by size of award. Others may also vary the percentage by case disposition (i.e., claim, suit, trial, appeal).

3. Treatment of expenses. Are trial, court and expert fees counted as part of the schedule or in addition to the schedule fee? Alternatively, is the award/settlement reduced by expenses before the fee is applied?

Statute of Limitations

We've estimated savings ranging from zero to fifteen percent.

1. Cutoff Period. We've seen anywhere from two years to ten years.

2. Cutoff by Occurrence Date or Discovery Date. Another possibility is both, e.g. "four years from incident or two from discovery, whichever is later".

3. Definition of Discovery Date. "Did discover" or "could have discovered" or "should have discovered" etc.

4. Statute of Repose or Statute of Limitations. A statute of repose operates more restrictively. The courts may decide which it is; careful wording in the law can cause it to operate as a statute of repose.

5. Exceptions. The potential list includes infants, foreign objects, continuing treatment, drugs or radiation, and concealment or fraud.

Periodic or Structured Settlements

Estimated savings range from zero to ten percent.

1. Optional or Mandatory.

2. Size Requirements. For example, "awards over $250,000" or "awards with future damages over $100,000".

3. Applied to Economic Loss, Non-Economic Loss, or both.

4. Treatment of Inflation. Examples include inflation calculated at the jury's discretion, at a fixed rate specified by statute, or at a fixed relationship with a stated index.

5. Court Rules on Treatment of Inflation and Interest. This item refers to conditions before the change in law. Previous assumptions regarding inflation and interest may have been specified in statute or in case law. In other instances it may be difficult to determine prevailing assumptions.

6. Payment Periods. Possibilities include a specified payment period (e.g., 10 years), a specified maximum payment period, payment for life expectancy.

7. Payments May or May Not Terminate at Death. Frequently, some payments terminate (e.g., medical costs) while others may not (e.g., wage loss).

8. Financial Guarantees Required. For example, insurer with specified Best's rating.

9. Treatment of Attorney's Fees. In some instances, attorney's fees may be completely exempted from periodic payments. Other possibilities include lump-sum payments with required present value calculations or separate rules for scheduled payments.

Joint and Several Liability

We haven't estimated significant savings to doctors in this area.

1. Economic Versus Non-Economic Losses. A number of existing versions abolish joint and several liability for non-economic losses only.

2. Proportionate Liability in All Cases or Only Below A Threshhold. For example, some laws establish proportionate liability for those under 50% liable, but provide that all damages may be assessed against those over 50% liable.

3. Among Whom are Damages Apportioned. For example, in a case involving a work-related injury, may the employer be included?

* * * *

## Summary and Conclusion

There is evidence that tort reform can be an effective means for reducing the growth in liability costs. Still, simply passing a tort reform bill by no means ensures that savings will be realized. It is no accident that we included zero in each possible range of results. Some versions of tort reform may even increase costs. The fine print of the law, the court instructions used to implement the law, and court interpretations of the law will all act to determine the effectiveness of a tort reform measure. An important first step is to read the fine print.

MICA Medical Indemnity
Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503

# COVER SHEET FOR FACIMILE TRANSMITTAL

(OUR FAX NUMBER IS - 562-7804)

TO: Bill Brock
Juneau, Alaska

FAX # 00

ATTENTION: Mary Pierce

FROM: Art Stanford

RE: Prenatal Coverage Only

PAGES:

IF YOU SHOULD NOT RECEIVE THE NUMBER OF PAGES INDICATED ON THIS COVER SHEET, PLEASE CONTACT OUR OFFICE AT 563-3414.

Attached is the form letter we sent last summer to all of our policyholders regarding this new specialty class.

Only Crossroads Medical Center (Glennallen) responded and they also submitted the written protocols with the delivering physician in Anchorage.

Stan Jones, M.D. of Haines had supported and pushed for this re-classification but declined the coverage when it was finally made availablebecause "it was still to expensive for his low volume of O.B. patients".

MICA Medical Indemnity Corporation of Alaska
ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 308
ANCHORAGE, ALASKA 99503

# Bulletin

**RE: New Specialty Class: Prenatal Coverage Only**

Dear Policyholder:

Your Board of Governors is pleased to announce the creation of a new specialty class for those physicians who wish to continue providing prenatal care to their patients with delivery being performed elsewhere by a collaborating OB/GYN or Family Practictioner in an urban area hospital.

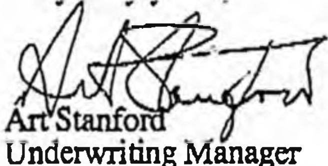
This new specialty classification has been assigned a class 2 rating which represents a premium reduction of approximately 48% over the rate for complete Family Practitioner obstetrical coverage.

The only requirements for this specific coverage are that the collaborating physician must have malpractice insurance (not necessarily with MICA) and approval by MICA of the written protocols between yourself and the physician doing the actual delivery. The protocols must be signed by both physicians, be specific as to the number of patient visits to the delivering physician prior to the due date as well as the frequency and type of the prenatal procedures that will be performed.

Your company is pleased to provide this new coverage which has been tailored to meet specific and current needs of many of our rural physician policyholders. The coverage will allow our physicians to continue providing virtually full term obstetrical services to their patients while at the same time providing optimal facilities for the actual delivery.

Please contact the MICA Underwriting Department if you have any questions regarding this new prenatal only coverage.

Very truly yours,



Art Stanford
Underwriting Manager

AS:sm

7/29/88

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 166
PUBLISH DATE:

# FISCAL NOTE

REQUEST:

Revision Date:
Title: An Act relating to civil actions amending Civil Rules 68 and 82
Sponsor: Cotten
Requester: Labor & Commerce

Agency Affected: Commerce & Economic Dev.
BRU: Division of Insurance
Components: Operations

**EXPENDITURES / REVENUES :** (Thousands of Dollars)

| OPERATING | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | 350.0 | 300.0 | 250.0 | 100.0 | 100.0 |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | | 350.0 | 300.0 | 250.0 | 100.0 | 100.0 |

| CAPITAL | | | | | | |
|---|---|---|---|---|---|---|

| REVENUE | | | | | | |
|---|---|---|---|---|---|---|

**FUNDING:** (Thousands of dollars)

| | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| GENERAL FUND | | 350.0 | 300.0 | 250.0 | 100.0 | 100.0 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | 350.0 | 300.0 | 250.0 | 100.0 | 100.0 |

**POSITIONS:**

| | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| FULL-TIME | | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

**ANALYSIS:** (Attach a separate page if necessary.)

See attached

Prepared by: Don Koch, Chief of Market Surveillance
Phone: 465-2515
Division: Insurance
Date:

Approved by Commissioner: Larry Merculieff
Phone: 465-2500
Agency: Department of Commerce & Economic Development
Date:

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

3527D-2/031089a

ANALYSIS:

Section 18 requires an analysis of medical malpractice rate changes occurring as a result of court decisions in the state involving personal injury or death. This requires a review that present staff lacks the needed expertise to conduct. We estimate that such a review could be conducted by an independent actuarial firm. This review is structured as ongoing, hence, we have estimated $110,000 per year for this work. The depth of review would be subject to negotiation and design.

Section 21 requires an extensive review with a report due by February 1992. The report would review closed insurance claims to determine the impact of the legal system on increased insurance rates or coverage decreases in crisis lines which are not defined. It would further evaluate how victims are faring under the present system and the actual impact of tort reform measures adopted. It would review actual impact on this legislation on insurance rates.

Section 21 also provides for a study of insurance finances to evaluate the cost justification of insurance rates for fault based on personal injury, death or property damage awards, settlements and court decisions. This requires considerable actuarial, economic, and legal evaluation which the Division of Insurance is not capable of providing. Initial design will result in increased expense in the first year. These figures are estimates that can only be refined through a proposal from persons capable of conducting such a study.

3527D-3

# PRESS PACKET

NATIONAL INSURANCE
CONSUMER ORGANIZATION

Embargo until 11 AM, Tuesday,
December 9, 1986
For information contact:
Bob Hunter - (305) 239-4200
Jay Angoff - (703) 549-8050

Tort Reform Will Not Reduce Insurance Rates,
Say 100+ Florida Insurers

More than 100 insurance companies have told the Florida Insurance Department that the state's recently enacted "tort reform" law will reduce general liability insurance premiums by an average of just over 1%, according to newly-released documents filed with and analyzed by the Florida Insurance Department.

At the annual meeting of the National Association of Insurance Commissioners in Orlando, Florida, National Insurance Consumer Organization President J. Robert Hunter released a summary of 277 filings by 104 insurers licensed in Florida which calculate the effect of the 1986 Florida tort reform law. 175 of the filings, or 63%, show no savings from tort reform, while none show a savings of more than 10%. The average reduction for all property/casualty lines was 1.2%; for general liability -- which includes day-care, municipal and products liability -- the average reduction was 1.3%. In contrast, Florida general liability insurers increased premiums by an estimated 120% in 1985 and 1986.

Hunter also released documents prepared by State Farm Fire and Casualty Co., Great American West, Inc., and the Insurance Services Office -- the insurance industry group that issues "advisory" rates -- demonstrating that tort reform in general would have little or no effect on rates. State Farm, for example, told the Kansas Insurance Department that restricting joint and several liability and limiting punitive damages would have no impact, while capping damages for pain

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

NATIONAL INSURANCE
CONSUMER ORGANIZATION

"ecember 9, 1986

Ms. Josephine Driscoll
President
National Association of
Insurance Commissioners
1125 Grand Avenue
Kansas City, MO 64106

Dear Madam President:

We are writing to ask that you call an emergency meeting of the insurance commissioners in states that have enacted tort reform, so that the commissioners may determine how best to ensure that the benefits of tort reform are reflected in lower insurance prices.

We are making this request because substantial evidence has recently come to light which indicates that, in general, insurance companies are not reducing rates in response to tort reforms. This evidence includes:

1. The Aetna and St. Paul Filings. Aetna Casualty and Surety Co. and St. Paul Fire and Marine Co. have undertaken closed claim studies purporting to demonstrate that the savings resulting from five major tort reforms enacted in Florida -- eliminating the collateral source rule, capping non-economic damages, restricting joint and several liability, limiting punitive damages, and requiring periodic payment of future economic damages -- would be negligible. See attachments 1A and 1B.

2. The State Farm letter. State Farm has now corroborated the Aetna and St. Paul results. In a letter to the Kansas Insurance Department State Farm concludes, on the basis of "a sampling of commercial liability claims," that the following tort reforms would bring about the following savings:

(a) eliminating the collateral source rule -- "about 1%";

(b) non-economic cap -- "will not exceed 1%";

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

# CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

02-576(2/77)

Embargo until 11 AM, Tuesday,
December 9, 1986
For information contact:
Bob Hunter - (305) 239-4200
Jay Angoff - (703) 549-8050

NATIONAL INSURANCE
CONSUMER ORGANIZATION

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Alexandria, Virginia 22314
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and suffering would reduce rates by no more than 1%. Great American West, on the other hand, told the Washington Insurance Department that tort reform could well raise rates.

The Insurance Services Office said its advisory rates would not reflect any reduction due to tort reform, and emphasized to its member companies that "any beneficial effects of tort reform cannot be quantified with any degree of accuracy" (emphasis ISO's). On the other hand, when in 1975 New York enacted tort reform that would expand liability and thus raise insurance costs, ISO immediately raised its advisory rates by 5% and provided complete actuarial justification for the increase, according to another document released by Hunter.

"It is ironic that ISO can tell us how much rates should rise when tort law expands, but can't tell us how much rates should fall when tort law is limited," Hunter said.

On the basis of the State Farm, Great American West, Florida Insurance Department and ISO documents, as well as previously released rate filings by Aetna and St. Paul, Hunter asked the President of the NAIC to take emergency action to ensure that insurance commissioners in states enacting tort reform roll back all rate increases that have taken effect since the reforms were enacted. "While reasonable minds may differ on whether it is good public policy to reduce insurance rates by limiting compensation to seriously injured people, it is surely not good policy to limit compensation to injury victims and get nothing in return," Hunter said.

The National Insurance Consumer Organization is an independent, non-profit, non-partisan consumer organization which monitors the insurance industry. It was founded by Hunter, an actuary and a former Federal Insurance Administrator, in 1980.

December 9, 1986

Ms. Josephine Driscoll
President
National Association of
Insurance Commissioners
1125 Grand Avenue
Kansas City, MO 64106

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1. The Aetna and St. Paul Filings. Aetna Casualty and Surety Co. and St. Paul Fire and Marine Co. have undertaken closed claim studies purporting to demonstrate that the savings resulting from five major tort reforms enacted in Florida -- eliminating the collateral source rule, capping non-economic damages, restricting joint and several liability, limiting punitive damages, and requiring periodic payment of future economic damages -- would be negligible. See attachments 1A and 1B.

2. The State Farm letter. State Farm has now corroborated the Aetna and St. Paul results. In a letter to the Kansas Insurance Department State Farm concludes, on the basis of "a sampling of commercial liability claims," that the following tort reforms would bring about the following savings:

(a) eliminating the collateral source rule -- "about 1%";

(b) non-economic cap -- "will not exceed 1%";

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

(c) restricting joint and several liability -- "in our sample of liability claims, no claim was found that would have been affected by the joint and several restriction";

(d) limiting punitive damages -- "in our sample, no punitive damage awards were found";

(e) , ternative payment of future economic losses -- savings "would be negligible."

State Farm also emphasized that "it will probably be several years before any effect from tort reform legislation can be expected to influence our experience." See Attachment 2.

3. The Florida Insurance Department data. As of September 30, 1986, 277 rate filings purporting to calculate the effect of the Florida tort reforms were on file with the Florida Insurance Deparment. 175, or 63%, showed no effect from the Florida tort changes, and the average reduction in all 277 filings was 1.2%. See Attachment 3. By way of contrast, insurance companies increased premiums in Florida by 62% in 1985, according to NAIC data, and are increasing them by a similar amount in 1986.

4. The Great American West letter. In Washington state, which enacted perhaps the most comprehensive tort reform package in the nation in 1986, Great American West, Inc. calculated that the new law would, if anything, raise insurance rates. Great American West concluded:

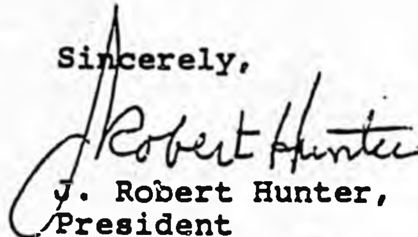
"It does not appear that the 'tort reform' law will serve to decrease our losses, but instead it potentially could increase our liability. We elect at this point, however, not to make an upward adjustment in the indications to reflect the impact of the 'tort reform' law." See Attachment 4.

5. The ISO Chief Executive Circular. Perhaps most disturbing, the Insurance Services Office has recently announced that it is issuing "advisory" rates that show no reduction resulting from tort reform, and has emphasized to its member companies that "any beneficial effects of tort reform cannot be quantified with any degree of accuracy" (emphasis ISO's). See Attachment 5. Yet when in 1975 New York enacted tort reform that would expand liability by replacing contributory negligence with comparative negligence, and would thus raise insurance costs, ISO immediately raised its advisory rates by 5%, and provided full actuarial justification for the increase. See Attachment 6. It is not readily apparent why ISO can tell us how much rates should rise when tort law expands, but can't tell us how much rates should fall when tort law is limited.

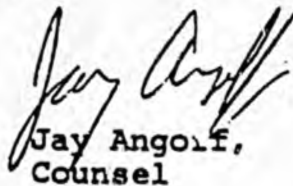
Whether it is good public policy to reduce insurance

rates by limiting compensation to seriously injured people is a question on which reasonable minds can differ. But it is clearly not good policy to limit compensation to injury victims and get nothing in return. Consistent with this view, Commissioner Gunter of Florida has recently reduced the new rates filed by Florida commercial liability insurers after the Florida tort reform law was enacted by $112 million. We ask that you take emergency action to ensure that insurance commissioners in all other states enacting tort reform do everything in their power to pass the benefits of tort reform through to insurance consumers in the form of lower insurance rates; and that they roll back, to the extent not prohibited by law, all rate increases that have taken effect since the enactment of such reforms.

Sincerely,



J. Robert Hunter,
President



Jay Angoff,
Counsel

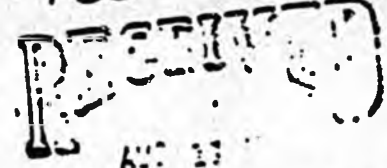
JA/ljb

attachments: as stated

Commercial Insurance Division
151 Farmington Avenue
Hartford, CT 06156
(203) 273-0123

Attachment 1A

FCC-86-2172



FORMS AND CONTRACTS

August 8, 1986

Honorable Bill Gunter
INSURANCE COMMISSIONER
Florida Department of Insurance
Tallahassee, FL 32301

ATTN: Mr. Charlie Gray, Chief
Bureau of Policy and Contract Review

Dear Mr. Gray:

RATE REVISION
CONTRACTORS LIABILITY POLICY PROGRAM
THE AETNA CASUALTY AND SURETY COMPANY
THE STANDARD FIRE INSURANCE COMPANY
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT

In accordance with your Insurance Laws, our Companies file a revised liability rate level which results in an overall selected premium increase of 17.2% with an annual premium effect of $622,250.

Our Companies' decision to revise rates results only after a thorough and comprehensive analysis. We evaluated our experience, market conditions, tort reform, and other relevant factors as they affect the establishment of adequate rate levels. The enclosed exhibits prepared by actuarial unit are submitted in support of our rate filing decision, and demonstrate that the resultant rates are neither excessive, inadequate, nor unfairly discriminatory.

We propose to implement this filing with respect to all policies written on or after January 1, 1987. So as to not delay the filing of our rate level decision, revised rate pages will be forwarded under separate cover when available.

A stamped, self-addressed envelope is enclosed for your convenience in responding.

Sincerely,

Thomas L. Rudd

Thomas L. Rudd, Superintendent
Insurance Department Affairs - Commercial Lines

BODILY INJURY CLAIM COST IMPACT OF FLORIDA TORT LAW CHANGE

Summary

The following table summarizes the expected impact of the new Florida law on bodily injury claims costs (including Allocated Loss Adjustment Expenses). The impacts shown were developed from data gathered via a special claim study conducted by the AEtna. The claim study and the analysis are detailed in the succeeding sections of this memorandum.

Impact of Tort Law Changes

Impact of Tort Law Changes

| Tort Law Change | Line of Business<br>Products Bodily Injury | <br>All Other General Liability |
|---|---|---|
| Collateral Source Offset | 0 | (0.4%) |
| Joint & Several | 0 | 0 |
| Limitation of Noneconomic Damages to $450,000 | 0 | 0 |
| Punitive Damages | 0 | 0 |
| Future Economic Damages over $250,000 Paid at Present Value | 0 | 0 |

All Other General Liability includes the bodily injury liability portion of package policies, SMP Section II, and monoline General Liability policies. The analysis as shown is based solely on AEtna data and, therefore, is applicable only to AEtna's book of business.

Claim Study

The attached special claim analysis form, designed to gather data on the impact of the tort reforms, was completed by experienced Branch Office claim personnel. Claims eligible for analysis were selected according to the following criteria:

1. Commercial Casualty claims (excluding National Accounts business) for policy years 1981 through 1985
   a. reported prior to January 1, 1986
   b. open as of May, 1986
   c. closed during the last six months

2. All claims in category (1) with indemnity payments or reserves over $25,000 were analyzed (total of 55 claims).

3. Fifty closed claims with indemnity of less that $25,000 were randomly selected.

The completed forms were reviewed for internal consistency prior to coding and analysis.

Collateral Source Analysis

Exhibits I and II detail the analysis of the revision in the collateral source rules. Exhibit I is for claims over $25,000 indemnity. Exhibit II is for claims under $25,000 indemnity.

Exhibit I shows that since the right of subrogation exists for many collateral sources available to the plaintiff, the economic losses incurred are not expected to be substantially reduced due to the law change. Furthermore, current AEtna claim settlement practices recognize, in part, the existence of collateral sources as part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff.

Exhibit II shows that for claims under $25,000, no additional savings are expected due to the change in Florida law.

Joint and Several Analysis

Exhibit III details the analysis of joint and several additional payments made by AEtna. Total joint and several payments were 4.5% of indemnity payments over $25,000. A review of each claim generating additional payments due to joint and several liability indicated no reduction in those payment due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to AEtna's insured, and the policy limits purchased.

Analysis of Limitation of Noneconomic Damages to $450,000

Nine claims had the potential for coming under the new limitation for noneconomic losses. The nine cases were identified on the basis of full liability value—not our insured's share of the liability. Data in the above format allowed for a review of whether total claim value could be reduced and whether such a reduction would impact on AEtna's incurred claim cost.

The review of the actual data submitted on these cases indicated no reduction of cost. This result is due to the impact of degree of disability on future losses, the impact of policy limits, and the actual settlement reached with the plaintiff; all seemed to reduce the expected noneconomic component of damages to less than $450,000.

Analysis of Punitive Damages

Only two cases were found where punitive damages had an impact on the claim settlement value. The total impact was estimated at less than $15,000 or less than 0.1% of total indemnity payments. Consequently, it appears that there will be no impact on AEtna's claim values due to changes in the allocation of the punitive damages awarded.

Analysis of Installment Payment of Future Economic Damages Over $250,000

Ten claims had the potential for coming under this section of the law. The review of individual cases indicated no net savings to AEtna for the following reasons:

1. interaction of policy limits, past economic losses, and future economic losses
2. settlement value of the case
3. apparent implicit recognition of the periodic nature of future damages

Overall Summary

The expected net reduction in claim costs is based on an analysis of AEtna claims. As such, the analysis is applicable only to AEtna's book of business.

Due to the level of detail of the historical claim data, informed claim judgement was required in some instances to ascertain some of the detail required for the analysis. The judgement, if any, was exercised by experienced claim adjustors and is implicit in the analysis.

The analysis shown represents the best estimate of future cost reductions if the law as currently structured remains in effect. However, the sunset provision of the law takes effect in four years. Furthermore, the law applies only to cases filed under the law, and the Florida statute of limitations is four years. Consequently, it is possible that any plaintiff who might be severely impacted by the provisions of the law would delay filing until after the law expires. If this situation arises, then the expected reductions will be lower than those indicated in this memorandum.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM

In 1986, Florida passed a number of changes to the tort system. We have reviewed the tort changes and their potential effect on our medical professional liability experience. Our review is based on a study of over 300 Florida closed claims. The total effect of the bill based on this evaluation was very small.

Evaluation:

Of the 313 closed claims that were studied, only four claims would have been effected by the law for a total effect of about 1% savings. (Exhibit A) Furthermore, all of these savings would have been eliminated if the courts had assigned only 10% more of the blame on our insureds than our claim department had estimated. It's highly likely that there would have been no savings on these claims had the bill been in effect. (Exhibit B)

Our study covered all of our Florida physicians, surgeons and hospital claims that closed in 1983 and 1984. Economic loss was determined based on the plaintiff's medical loss, weekly wage, and time lost from work. These losses were reduced for the time value of money.

We added the noneconomic loss cap to the total economic losses. The cap is $450,000 times the portion of negligence assigned to our insured. We compared this maximum award under the new law to the amount that the St. Paul actually paid on behalf of our insured.

The conclusion of the study is that the noneconomic cap of $450,000, joint and several liability on the noneconomic damages, and mandatory structured settlements on losses above $250,000 will produce little or no savings to the tort system as it pertains to medical malpractice.

Comments on other provisions of the bill:

a. Collateral source offset

The medical malpractice provisions prior to this act provided for subrogation against collateral providers. The effect of this subrogation would be similar to the effect of the collateral source rule. Therefore, the net effect of eliminating the subrogation and allowing collateral sources is negligible.

b. Itemization of Damages

Damages were itemized in our evaluation of this tort reform and no savings were shown. They are probably already implicitly itemized by either juries or our claim department when settling claims. We expect no savings from this provision.

St. Paul Fire and Marine Insurance Company
St. Paul Mercury Insurance Company
Medical Professional Liability
State of Florida

ADDENDUM
(Continued)

c. Frivolous Suit Protection

This provision can either work for or against us depending on who wins the case. No savings are expected from it.

d. Additur/Remittitur

This provision can also work for or against us. No savings are expected.

e. Punitive Damages

The legislation reduces the monetary incentive for punitive damage cases, but not total award amounts. Since these cases often have a retaliatory incentive, no savings are expected.

f. Timing of Effects

The tort changes made in Florida apply to losses occurring on or after July 1, 1986. On a claims-made policy, they will effect only the portion of our expected losses with accident date after July 1, 1986. This will impact the equivalent of our first year losses.

g. Conclusion

The tort law changes effective July 1, 1986 in Florida will, hopefully, have a positive impact on loss costs for occurrences after that date. However, to forecast the effect is highly speculative. Our evaluation of prior losses showed little or no savings under key provisions of the law and our analysis of other provisions show no expected savings. Our best estimate is no effect from the tort changes.

It can be hoped that the adoption of these tort changes will have an intangible effect on society, and further work to mitigate future loss trends. However, the trends in medical malpractice have been very high. The effect of the reform needs to be very strong to stem such trends.

Attachment 2

# State Farm Fire and Casualty Company

# State Farm General Insurance Company

112 E. WASHINGTON ST.
BLOOMINGTON, ILLINOIS 61701

October 21, 1986

Mr. Ray Rathert
Kansas Insurance Department
420 S. W. 9th Street
Topeka, Kansas 66612

Ray:

Before any discussion of State Farm and tort reform, it must first be clearly understood that most of the problems in the liability field are in lines which State Farm does not write. Because of this, the impact of tort reform on our book of business is going to be considerably different from that of a major liability writer.

We have been requested by several insurance departments to come up with some estimate of the effect of newly passed tort reform legislation on our rates in their states. We know of no way this can be done actuarially. Consequently, we resorted to judgement.

The few enacted tort reform statutes usually include items such as:

1) Collateral source of indemnity
2) A non-economic cap
3) Joint and several restriction
4) Punitive damage limitation
5) Alternate methods of payment.

A sampling of commercial liability claims provided the following:

1) Collateral source of indemnity. The sample indicated that approximately 7% of our total indemnity losses were potentially subject to a collateral source. Only about a quarter of these reflected a known collateral source. In our judgement, 50% would be a very liberal estimate of the success in reducing damages due to the existance of a collateral source. The net savings from the collateral source change is thus about 1% (7% X 25% X 50%).

2) Non-economic cap. Non-economic caps are established at such a level that our sample indicated only very few claims would exceed the cap. It is our judgement that the loss savings resulting from the non-economic cap will not exceed 1% of our total indemnity losses.

3) Joint and several restriction. In our sample of liability claims, no claim was found that would have been affected by the joint and several restriction.

4) Punitive damage limitation. Again, in our sample, no punitive damage awards were found.

5) Alternative methods of payment. On our book of business, the savings due to alternative payment methods on future economic losses would be negligible in relation to our total indemnity losses.

Although we believe the effect of tort reform on our book of business would be small, we do believe that effective tort reform legislation can have a positive impact on not only pricing but also availability. It is important to keep in mind that tort reform, or absence thereof, is only one of many factors which influence pricing and availability. Any of these other factors can produce an opposite effect which could equal or outweigh any positive effect of tort reform.

Attached are liability rate comparisons for Kansas and surrounding states. As you know, we use ISO rates for monoline policies. Even in our package policies, the original liability loadings were also derived from ISO rates.

Again, as you know, we do review our rate levels at least annually. It will probably be several years before any effect from tort reform legislation can be expected to influence our experience. Anyway, hope these brief comments will be of some use to you in your discussions of this subject.

Best regards,

Robert J. Nagel
Assistant Vice President
State Filings Division

RJN:kc/1021

Effect on Insurance Rates of Florida Tort Reforms -

for all companies filing as of 11/01/86

| % Reduction | Number of Filings | | | | |
| --- | --- | --- | --- | --- | --- |
| | Commercial General Liability | Commercial Package | Auto | Other | Total |
| Ø | 72 | 28 | 31 | 44 | 175 |
| Ø-2.5% | 12 | 25 | 5 | 3 | 45 |
| 2.5-5% | 18 | 14 | 6 | Ø | 38 |
| 5-7.5% | 7 | 1 | 7 | 1 | 16 |
| 7.5-10% | 2 | 1 | Ø | Ø | 3 |
| Over 10% | Ø | Ø | Ø | Ø | Ø |
| Total number of filings | 111 | 69 | 49 | 48 | 277 |
| Average Reduction | -1.3% | -1.5% | -1.5% | -Ø.2% | -1.2% |

Average calculated by assuming all filings are of equal premium weight. Companies that filed rates and did not calculate the effect of the new tort reforms are not included.

Source: Florida Department of Insurance

121 N. Payne Street
Alexandria, Virginia 22314
(703) 549-8050

Attachment 4

GREAT AMERICAN · WEST, INC.

200 S. MANCHESTER AVENUE
ORANGE, CA 92668
714/634-4600

April 23, 1986

Mr. Norman Figon
Rate Analyst
Washington Insurance Department
Insurance Building
Olympia, WA 98504

Re: American National Fire Insurance Company
Select Driver I Program
Select Driver II Program
Private Passenger Automobile
Rate and Rule Revision

Dear Mr. Figon:

In your letter of March 25, 1986, you indicated that we need to place a provision in our ratemaking to reflect the impact of the "tort reform" law. As an attempt to quantify, we reviewed twenty-four claim files, which represented all of our Private Passenger Automobile claims over $50,000 in the state of Washington since 1983. Of these twenty-four claims, we believe that the new law could have an impact on three claims. One claim involved a driver that was intoxicated. We estimate that we would not have paid $20,000 of the claim. On the other hand, there were two claims in which American National Fire would see an increase in its loss liability. These are contributory negligence cases in which our percent of the entire loss liability would increase. The impact of the law on these two is at least $100,000 on each of them.

From the above study, it does not appear that the "tort reform" law will serve to decrease our losses, but instead it potentially could increase our liability. We elect at this point, however, not to make an upward adjustment in the indications to reflect the impact of the "tort reform" law.

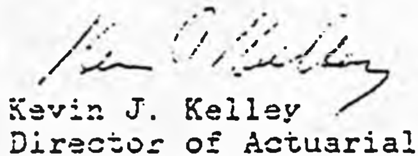
We request, therefore, that you reconsider the original filing of January 19, 1986, with an amended effective date rule of:

"For all policies written on or after June 2, 1986".

In our telephone conversation you mentioned a concern that we are selecting an increase less than our indications. Our plan of action is to take this increase, which we estimate to be slightly more than 14%, and to review the rates in the near future, such that we can effect a rate change six months after the effective date of this revision. We believe that this method will prove to be less disruptive on our book of business than other courses that we might have chosen.

We hope the above includes all the information that you need to expedite an approval of the filing.

Sincerely,



Kevin J. Kelley
Director of Actuarial

KK/nk

CHIEF EXECUTIVE
circular

Attachment 5

RECEIVED
OCT 14 1986
ISO DALLAS

October 3, 1986

# ISO POLICY DECISION ON TORT REFORM ANNOUNCED

Chief Executive CE-86-31

---

BACKGROUND

Various tort reform measures have been enacted or are still under active consideration in many states. It is clear that meaningful tort reform will have a favorable, prospective impact on loss severity and/or frequency, variable by state and line of insurance which, ultimately, will be reflected in state loss experience.

However, in some jurisdictions, an immediate rate reflection in response to tort reform is being demanded. Statutes in Florida, New York and Hawaii mandate that insurers reflect tort reform legislation in their filings. The New York Insurance Department has already advised companies of its estimates of the cost reductive effects of tort reform. Florida has mandated a 1987 rollback to adjusted 1984 rates, unless companies file 1987 rates reflecting the impact of tort reform by October 15, 1986. Hawaii has mandated a 10% decrease in rates on October 1st to reflect tort reform, with further reductions required in future years. The Washington Insurance Department is requiring that future rate filings reflect enacted tort reform even without a specific statutory requirement.

---

Insurance Services Office, Inc., 160 Water Street, New York, New York 10038 (212) 487-5000

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ISO POSITION

ISO is unable to quantify, and to reflect in its filings with a reasonable degree of certainty, any immediate cost effects of tort reform. ISO believes that the reflection of any beneficial effect of tort reform on insurance pricing, where mandated, is a matter of individual insurer judgment and not a precise actuarial exercise. Such judgment is consequently more properly applied by individual insurers, rather than by ISO in its role of acting on behalf of those affiliated insurers which elect to use ISO's services.

Therefore, the ISO Board of Directors has established — as ISO policy -- that, inasmuch as ISO cannot immediately reflect any cost effects of tort reform in its filings, any such effects are best determined by the judgment of each insurer, taking into account the distribution by coverage, class, and limits on its own book of business.

---

ISO ACTION

Consistent with this policy, ISO advisory rates will not reflect tort reform and each company must make its own assessment as to the immediate effect, if any, of tort reform on its book of business.

In New York, in order to assist companies in complying with the refiling requirements of the new law, ISO released Commercial Lines Circular CL-86-29 which contained revised manual rules utilizing the cost reductive effects promulgated by the Superintendent of Insurance, without commenting on their appropriateness.

In Florida, ISO has developed a filing procedure -- which has been approved by the Insurance Department -- whereby individual companies must supplement the ISO filing with their own individual estimates of the impact of tort reform. At the direction of the Insurance Department, ISO will collect these individual estimates and file them on behalf of each insurer. Refer to ISO Commercial Lines Circular CL-86-33 for specific details.

---

ADDITIONAL INFORMATION

ISO plans to shortly provide insurers with information which could be considered by each company in reflecting any effect of tort reform, including an analysis of the tort reform measures enacted in individual states.

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Within the next several days, ISO will release such information to insurers via Commercial Lines and Technical Services Circulars. In anticipating receipt of this material, each insurer should note ISO's strong belief that any beneficial effects of tort reform cannot be quantified with any degree of accuracy. Accordingly, providing any quantitative information does not imply that any actuarial precision can be applied to what is -- in effect -- an imprecise subject. However, the information may aid individual insurers in supplementing their judgment which, ultimately, will be the major factor in determining any beneficial pricing effect of tort reform.

---

CAUTION

In Circular CL-86-33 we detailed the Florida filing procedures which must be completed by October 15th. Since -- to avoid the rollback -- Florida rate filings require individual insurer estimates of the cost effects of tort reform and, since the judgment of each insurer will be the major component in arriving at these estimates, we urge individual insurers to promptly begin developing their own estimates, without waiting for the ISO material on tort reform which, as heretofore mentioned, will not produce precise results.

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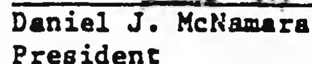

Daniel J. McNamara
President

cc: ISO Board of Directors
Actuarial Committee
Commercial Lines Committee
Personal Lines Committee

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Attachment 6

# INSURANCE SERVICES OFFICE

160 WATER STREET NEW YORK, N. Y. 10038

TELEPHONE: (212) 487-5000

COMMERCIAL CASUALTY ACTUARIAL DIVISION
RICHARD S. BIONDI, ASSOCIATE ACTUARY & MANAGER


October 15, 1975

RECEIVED
AUTO & COMPENSATION
INSURANCE BUREAU

OCT 15 1975

INSURANCE DEPT.
STATE OF N. Y.

Mr. Stanley A. Dorf, Chief Actuary
New York Insurance Department
2 World Trade Center
New York, New York 10038

Re: Comparative/Contributory Negligence -
Automobile Liability Rate Change Proposal

Dear Mr. Dorf:

Because of the change in the New York law from contributory negligence to comparative negligence, I.S.O. proposes to increase Automobile Liability (including Uninsured Motorists) rates by 5%. This proposed increase is based on a study of closed Automobile Liability claims in California, comparing the actual settlement under the comparative negligence law with the estimate of what it would have been under the earlier contributory negligence law. Enclosed is Exhibit 1 displaying the indicated rate changes by line and coverage based on the survey, and also the proposed changes of 5% for the liability coverages and "no change" for Personal Injury Protection. Exhibit 2 details the results of the claim study survey, showing number of claims, losses under both negligence laws, and comparative/contributory ratios, by line and coverage.

We have also enclosed a copy of the "Call" letter used for this survey; in it can be found a sample copy of the questionnaire form and the general instructions for completing the form. The companies participating in the study write approximately 75% of the Automobile Liability premiums written by Insurance Services Office affiliated companies. All claims reported to us were settled very shortly after the changeover in negligence laws in California; thus, claims personnel completing these forms were in a good position to compare comparative vs. contributory settlements for their claims.

Very truly yours,

George Burger

George Burger
Actuarial Assistant

GB:cm
Enc.

New York

Automobile Liability Insurance

I.S.O. Proposed Rate Increases to Reflect the Change from Contributory to Comparative Negligence*

| Coverage | Indicated Rate Change | Proposed Rate Change |
|---|---|---|
| Private Passenger | | |
| Residual Bodily Injury | + 4.1% | + 5.0% |
| Personal Injury Protection | - | 0.0 |
| Property Damage | + 4.6 | + 5.0 |
| Uninsured Motorists | +13.0 | + 5.0 |
| Total | + 4.8 | + 4.4 |
| Commercial | | |
| Residual Bodily Injury | + 6.8% | + 5.0% |
| Personal Injury Protection | - | 0.0 |
| Property Damage | + 6.9 | + 5.0 |
| Uninsured Motorists | + 0.1 | + 5.0 |
| Total | + 6.5 | + 4.7 |
| Grand Total | + 5.4% | + 4.4% |

*Note that all percent changes are weighted on New York's premium distribution.

AUTOMOBILE LIABILITY INSURANCE
Effect of Change from Contributory to Comparative Negligence*

| Coverage | (1) Number of claims | (2) Losses Under Contributory Negligence | (3) Losses Under Comparative Negligence | (4) Ratio ((3)÷(2)) |
|---|---|---|---|---|
| Private Passenger Automobiles | | | | |
| Bodily Injury | 521 | $1,098,811 | $1,144,407 | 1.041 |
| Property Damage | 1,622 | 574,730 | 601,305 | 1.046 |
| Uninsured Motorists | 43 | 101,872 | 115,072 | 1.130 |
| Total | 2,186 | $1,775,413 | $1,860,784 | 1.048 |
| Commercial Automobile | | | | |
| Bodily Injury | 318 | 517,285 | 552,522 | 1.068 |
| Property Damage | 1,018 | 361,123 | 386,135 | 1.069 |
| Uninsured Motorists | 9 | 48,305 | 48,339 | 1.001 |
| Total | 1,345 | 926,713 | 986,996 | 1.065 |
| Grand Total | 3,531 | $2,702,126 | $2,847,780 | 1.054 |

* NOTE: The above experience was taken from ISO's California Closed Claim Survey.

# MICA 1987 Twelfth Annual Report
## Medical Indemnity Corporation of Alaska

Table of Contents


Message from the Board of Governors ........ 1
Management Report ........ 2
Underwriting ........ 3
Claims ........ 4
Risk Management ........ 6
Medical Malpractice Update ........ 8
Financial Statements ........ 10
Corporate Directory ........ 16

# Message from the
# BOARD OF GOVERNORS

1987 was a year of significant change in MICA's management structure. It was also a year of greatly improved operating results. As is often the case, the achievements of 1987 were the outgrowth of positive initiatives undertaken in earlier periods.

A major factor in the improvement of operating results was a substantial decline in both the frequency and severity of claims filed in 1987.

While it would be impossible to measure the contribution of any single cause of this result, we feel confident that stricter underwriting and aggressive risk management, including the Participatory Risk Management Program (PRMP), have played important roles. If this trend continues in 1988 and in future years, our continuing objective of stabilizing premium rates should, indeed, be achievable.

More disturbing is the 1987 court decision extending the liability of hospitals for treatment provided by physicians in the hospital emergency room. These developments will be discussed in more detail later in this report.

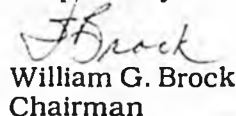
Particularly gratifying to MICA's Board of Governors was the successful transition in 1987 from contract management to self-administration. With the company's maturity, it has been possible to bring together a management staff with the skills and experience to operate the MICA program within its own organization.

MICA's Board appreciates the long and valuable support provided by Marsh and McLennan as contract administrator and the excellent cooperation provided by that organization in this transition which allowed the company to retain, in key positions, the former Marsh and McLennan employees most experienced in major functional areas of MICA's operation.

Heading up this management team is the company's new Executive Director Mary Pierce. Mary comes to MICA with a strong background in the insurance field and several years of service as a MICA board member, including chairmanship of its underwriting committee.

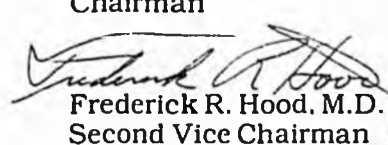
With these changes accomplished, we feel confident of your company's ability to deal with the opportunities and challenges of 1988 and beyond.

Respectfully submitted,

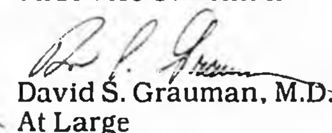


William G. Brock
Chairman

David J. Frazier
First Vice Chairman



Frederick R. Hood, M.D.
Second Vice Chairman



David S. Grauman, M.D.
At Large

# MANAGEMENT REPORT

A year of growth! In 1987 we completed our twelfth year offering professional liability protection to Alaska's medical providers — a year that challenged management but one in which we emerged with successful results.

In late 1986, the Board of Governors chose to discontinue the contract administration provided by Marsh & McLennan and move toward self administration. On April 1, 1987, MICA officially made the change, transferring experienced staff and hiring an executive director. The stage was set for MICA to develop into a full-service insurance company.

Reorganization played a key role in our growth. Greater functional definition was achieved by establishing departments — claims, underwriting, risk management/loss control, and finance — that separately service the needs of our policyholders and jointly function as a smooth-running, well-organized company.

Financially, MICA reached a new level of stability. We ended 1987 with a $3,975,476 policyholder surplus, the best in MICA's history. Several developments led to this financial growth.

Of direct impact was the decline in claims frequency and the level of severity of claims in 1987. We feel that our effective risk management program has led to our 1987 claims decrease.

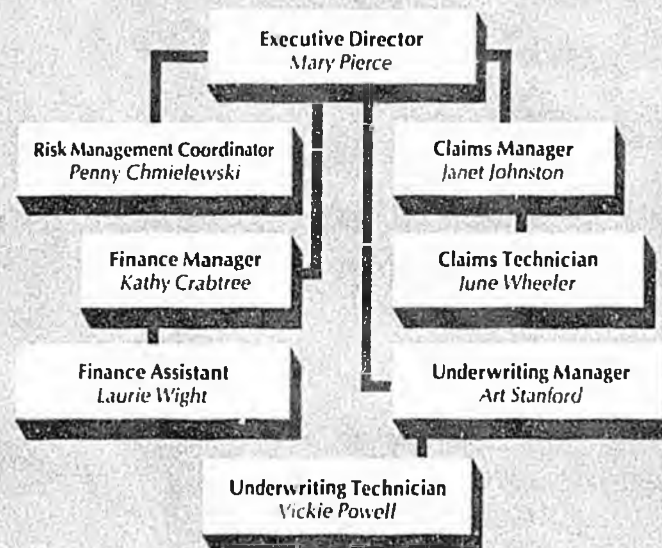
A significant contributor to favorable loss experience is successful claims management — controlling a claim after a loss has occurred. Immediate investigation may keep an incident from ever becoming a medical malpractice suit. MICA has the local talent and staff to offer immediate advice and assistance to a physician.

A further advantage for MICA is our unique position of having our own medical experts to assist in recognizing potential liability. We can therefore work toward a satisfactory resolution rather than participating in a costly discovery process. Our staff involvement means that much of the claims management work is done internally. This contributes to a cost reduction by selectively avoiding defense attorney involvement until an actual suit or other defense consideration makes it necessary.

An additional growth factor is our emphasis on prudent or equitable underwriting. We were mandated by the legislature to provide coverage to physicians at a time when insurance was unavailable. Our continuing commitment is to protect our entire policyholder population and to avoid exposing our good physicians to the financial consequences resulting from the poor loss experience of a few. Stable availability is achieved by maintaining consistent underwriting standards which were further refined in 1987.

The work done by our risk management department and committees has also led to MICA's growth and development into a mature insurance company. Criteria that had been established and were introduced in 1987 in the form of our Participatory Risk Management Program have already reaped beneficial results.

Our approach to claims, risk management criteria and underwriting philosophy provides the basis for a favorable, consistent analysis by our reinsurers. This allows MICA to continue to offer limits of liability which are both affordable and offer the medical providers necessary protection in our




*MICA's management and staff is made up of individuals highly skilled and knowledgable in the fields of insurance and health care.*

current litigious society.

External and internal occurrences have affected MICA's growth in 1987. We have always maintained a strong investment policy, sensitive to the liquidity issue of insurance regulations. Hence, the stock market dive in 1987 did not have an impact on MICA. Our investment holdings are long-term money market and bond issuances.

Internally, the choice to computerize MICA's claims, underwriting and risk management programs has been one that adds sophistication and credibility to MICA's information system.

We believe MICA is stronger today than at any time in its twelve-year history. We are grateful for dedicated committee members and advisors, for competent and loyal staff members and for the confidence you have shown in our past management of this company. It is within the framework of those components working together that the promise for a solid future will be continually renewed.

# UNDERWRITING

As a public, non-profit corporation, MICA exists to maintain stable, available professional liability insurance coverage balanced with affordable premium levels consistent with fiscally sound business practices.

Prudent and equitable underwriting remains the most important function of the company in fulfilling our statutory responsibility to the Alaskan health care community.

Stable availability of coverage at affordable cost is not effortlessly achieved nor easily maintained, but involves substantial and continuing attention by your corporation's Board of Governors.

There are states where this balance is not being achieved, and one of the most striking examples appeared in the Wall Street Journal's January 11, 1988 edition. It reports that the St. Paul Insurance Company, once the largest medical malpractice insurer in Florida, is phasing out all physicians' and surgeons' professional liability coverages in that state as a result of being granted only a portion of the rate increases requested from the Florida Division of Insurance. This "pull out," purportedly due to inadequate rates, is coupled with current burdensome rates such as those charged in two Florida counties: $200,000 for OB/GYN and $250,000 for neurosurgeons just beginning practices!

The foundation of MICA's broad-based program for achieving its premium stabilization goals involves stringent underwriting standards guided by the premise that the corporation cannot insure any health care provider with a loss or claims history of a magnitude that might jeopardize the corporation's financial structure. Application of these standards includes rejecting new applications for cause, cancellation, nonrenewal or other restrictive or modifying coverage endorsements to new or existing policies. Further, we believe that the majority of policyholders — representing only the normal exposure to loss — should not share the burden of cost disproportionately as a consequence of inordinate loss histories of the few. This philosophy is further enhanced by equitable considerations such as claims-free premium discounts as well as adverse claims experience surcharges.

However, the corporation's efforts are of little value without our policyholders' cooperation and active participation in our loss and expense containment measures. We will continue to solidify this partnership between MICA and our policyholders. With that commitment, we believe Alaska will not face the professional liability insurance crisis — coverage unavailable and unaffordable — experienced by Florida physicians or by Alaska physicians in 1976.

### UNDERWRITING COMMITTEE

Ronald Keller, M.D., Chairman
David S. Grauman, M.D.
C. Keith Campbell
David J. Frazier
Renee Murray

# CLAIMS

1987 was an encouraging year from a claims standpoint. Frequency reached a four-year low, with claims and suits reported in 1987 approximating 1983 levels (chart 1). Even more encouraging, the reported injuries were far less severe, tending to be of a temporary and minor nature compared to the catastrophic disability and death injuries seen in recent years.

1987 was a year of superlatives and precedents. Several of the catastrophic damage cases of earlier years came to final resolution. Two were settled and the settlements were the largest that MICA has ever made. One was taken to trial and the resultant verdict was adverse to the defense and constituted the largest verdict ever awarded in a malpractice case in this state.

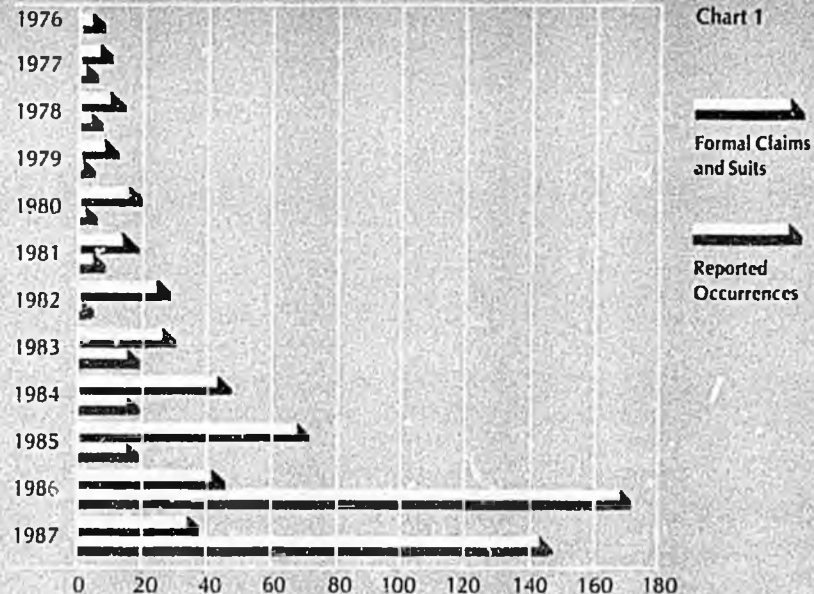
The accompanying article by corporate attorney Roger Holmes expands more fully on 1987 Supreme Court decisions which impact the investigation and defense of alleged claims of medical negligence. Each decision can reaffirm or change radically the rules of the game and have a major impact, not only on this company, but on the whole health care delivery system in Alaska.

To date three out of every four MICA files involve physicians (chart 2). This may change significantly if hospitals are increasingly held liable for doctors. As the state's major insurer of both physicians and hospitals, MICA is studying the recent court decision's implications from the various aspects of underwriting, claims management and loss prevention.

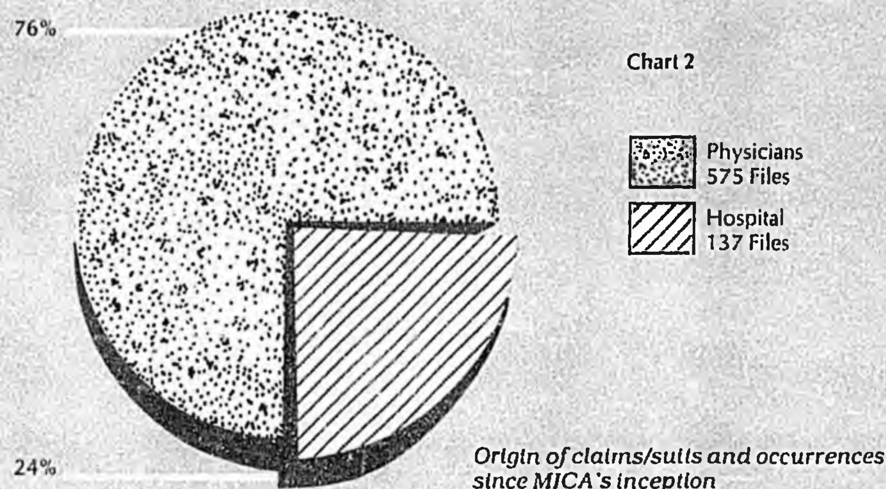
The 1987 year ended with 199 pending open files These files were from report years 1984-1987, all files for prior years having been closed. In general, the older a file is, the greater the likelihood that it is in suit.

For example, all the 1984 reported cases still pending are in suit with most of them calendared for trial during 1988. In contrast, the vast majority of files reported in 1987 involve occurrence reports on recent patient care situations with untoward outcomes. Relatively few of the 1987 files involve an actual claim or suit (chart 1). The introduction and implementation of MICA's participatory risk management program has resulted in a mushrooming of reported occurrences as required by the criteria. In contrast to actual claims and suits, these reported occurrences do not factor in underwriting considerations for premium surcharges or reductions. Most physician insureds have been diligent in their cooperation with these reporting requirements. This has necessitated an increase in staff since the investigation of reported occurrences is time and labor intensive.

A major strength for MICA — still the only professional liability carrier maintaining a local claim office — is its local expertise and local service, which allows claims to be managed in a manner unique to the insurance industry. All who are involved in processing




*Report by years since MICA's inception of both formal claims/suits & reported occurrences totaling 712 files opened.*




*Origin of claims/suits and occurrences since MICA's inception*

current litigious society.

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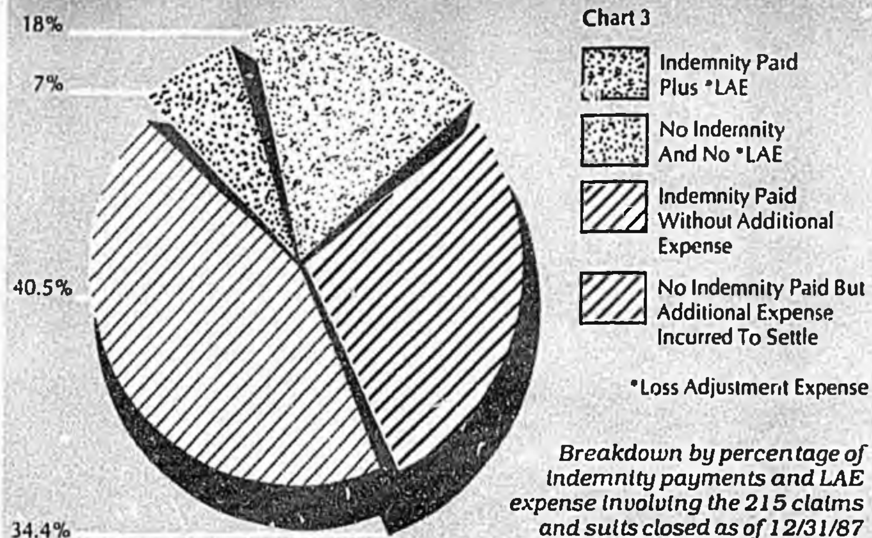
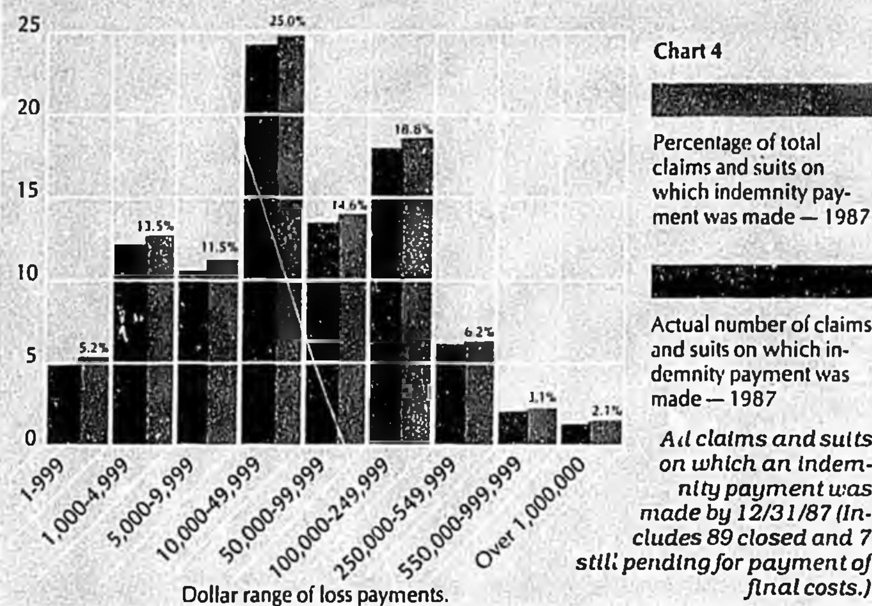
## UNDERWRITING COMMITTEE

Ronald Keller, M.D., Chairman
David S. Grauman, M.D.
C. Keith Campbell
David J. Frazier
Renee Murray




*Breakdown by percentage of indemnity payments and LAE expense involving the 215 claims and suits closed as of 12/31/87*




*All claims and suits on which an indemnity payment was made by 12/31/87 (Includes 89 closed and 7 still pending for payment of final costs.)*

and final disposition of a claim against a MICA insured are readily available.

In looking at the overall cost of a claim, it is necessary to consider not only indemnity paid on behalf of the insured, but the cost of adjusting and defending the claim.

Loss adjustment expense (LAE) refers to money spent on defense of a claim and usually reflects defense attorney fees and other costs generated outside the company (Chart 3). Staff salary and much of our internal medical review process is accomplished without any LAE attributed to the file.

One out of every four claim files closed by year end was entirely managed by claims staff with no LAE charged to the file. Of those staff-managed cases, 72 percent closed with no indemnity payment. One of every five suits and three of every four active claims pending at year-end were being managed by MICA's claims staff. This takes on increasing importance as MICA's underwriting department begins implementing a premium surcharge and premium reduction plan related to both indemnity and LAE on claims.

When a file is opened, the local adjuster turns immediately to Alaskan physicians currently practicing in the specialty involved in the case. Claims staff and defense attorneys rely heavily on the input of these local medical experts in determining questions of liability.

Cases that our physician consultants feel to be without merit are vigorously resisted by claims staff who deal directly with patients and attorneys and attempt to educate them on the medical facts of the case. Frequently such cases are abandoned by the patient.

Some cases involve identifiable injury resulting from breaches in the standard of care as identified by our local physician reviewers. In these instances, we move in the direction of prompt and equitable settlement of the case if possible.

According to MICA policy, *no* settlement can be made without the express and written consent of the insured. Not uncommonly the "request" is a "demand" for settlement within policy limits by an insured anxious to avoid potential exposure in excess of his or her policy limits.

*MICA has taken more cases to trial in the last twelve years than all other malpractice carriers writing in this state combined.* Our track record has been remarkably good with only two adverse verdicts in our history.

Final authority for settlement or trial resides in the Claims Committee and the MICA Board of Governors. The local presence of decision makers, knowledgeable about the facts of each case and the idiosyncrasies of the legal jurisdiction, obviates the need for costly discovery proceedings designed to justify settlement and/or verdict values.

The improved experience of the last two years is the result of both claim prevention and claim management. The obvious challenge of the future is to work together to prevent and manage claims and to continue what appears to be a reversal of the escalating trend of recent years.

CLAIMS COMMITTEE
Renee Murray, Chairman
Frederick R. Hood, M.D.
Ron Keller, M.D.
C. Keith Campbell

# RISK MANAGEMENT

1987 marked the fifth year for MICA's risk management emphasis — a year that brought to fruition much of our planning and effort for that program over the past four years. Good risk management has been recognized as a significant factor in cost and claims containment. Therefore, 1987 also saw MICA strengthening its focus in that area and continuing to expand its risk management educational outreach.

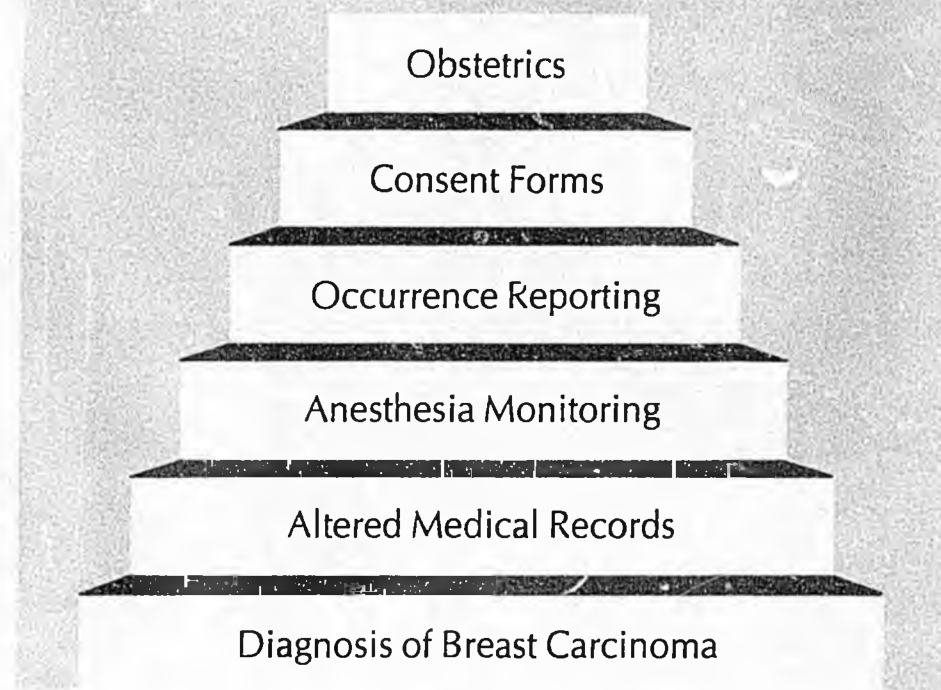
A major goal of the program during the year just past was implementation of the Participatory Risk Management Program (PRMP), which became effective with the beginning of the 1987 policy year. Along with it came a dramatic increase in the number of occurrences reported as required by the criteria — any incident with the potential to develop into a claim must be reported at the earliest opportunity. Such early reporting has enabled MICA's staff to evaluate potential problems and provide support to insured physicians by advising them about containment measures that could either remove the threat of a lawsuit or would put the physician in a better position later if a claim should occur. It is hoped that early reporting would give our claims staff and actuaries a more precise picture of the claims to be anticipated for the year.

Through PRMP, MICA-insured physicians have become aware that they are responsible for their own risk management and that participation in the program is a direct benefit to them.

A recent survey of Physician Insurance Association of America (PIAA) companies has shown that over 50 percent of those companies either now have, or are in the process of implementing, a participatory-type of program like MICA's PRMP.

The Risk Management Committee, which continues to meet monthly, has been augmented by formation of the subcommittee on obstetrics. This committee, comprised of both obstetrical specialists and family practitioners performing obstetrics, as well as neonatalogists, has been helpful in responding to the many risk management issues involved in the practice of obstetrics in Alaska.

An important function of the risk management program has been to provide educational opportunities for our insureds and for non-insureds across the state. In early 1987, risk management completed a hospital audit program. Two consultants from Practice Management and Liability Consultant Group of California, with the assistance of MICA Risk Management Committee members and staff, visited each of our insured hospitals. In addition, a couple of physicians' office practices were also surveyed as a part of our baseline risk assessment program. Once the initial anxiety surrounding the risk management audits was dispelled, the program proved to be very successful and provided a positive educational experience by which each facility was able to implement changes incorporating good risk management principles and adding to overall quality care.




During the year, three additional hospitals have chosen to be insured by MICA and are to

## MICA AV Lending Library Tapes

- Anatomy of a Malpractice Case
- Billing as a Risk Management Tool
- Communications: The Best Medicine
- Early Reporting of Incidents
- Failure to Diagnose Cancer
- Informed Consent
- Jousting
- Management of Risk in OB
- The Quality of Medical Care
- The Quality of the Medical Record
- Risk Management Issues — E.R. Medicine
- Risk Management Issues in the E.R.
- Risk Management Issues — General Surgery and Anesthesiology
- Risk Management Issues — Internal Medicine
- Risk Management Issues — Perinatalogy
- Risk Management Seminar (four-tape set)
- Time of Trial

All tapes are available in both VHS and on ¾" tape.

be surveyed at the request of the Underwriting Department. The Risk Management Committee will continue to monitor these facilities and to assist them with their risk management programs.

In May 1987, MICA presented a Risk Management Seminar for medical office assistants using the two consultants who had participated in the hospital audits. This was given both in Anchorage and in Juneau and was well attended by office personnel of both MICA and non-MICA insured physicians. Results were extremely encouraging and, immediately following the seminar, the Risk Management Department experienced a marked increase in requests by insured staffs for risk management information.

Our library of risk management audio-video tapes is another educational service that continues to grow. Tapes are available upon request by our insureds.

We look ahead to the coming year with anticipation. Plans are underway for a seminar in the spring for hospital administrators and board members which will focus on effective credentialing systems and quality review. Another seminar on communications for physicians is scheduled for early summer.

We of MICA are truly pleased with the risk management program which has evolved over the past five years and realize that this has been made possible by the joint efforts of MICA's staff, its Board of Governors, physician and committee members, and physicians over the state who have participated in the program with us. In recognition of this, the following resolution was approved by the Board of Governors of the Medical Indemnity Corporation of Alaska at its annual meeting on August 14, 1987:

> Be it resolved that the Board of Governors of MICA mandates that the present risk management program be continued in an effective form and be refined, expanded and implemented at the direction of the Risk Management Committee, and that the Executive Director of MICA be instructed to devote his utmost attention and effort to that purpose.

## RISK MANAGEMENT COMMITTEE

Frederick R. Hood, M.D.
Chairman

Roger Holmes, Esq.

Kitchner Head, M.D.

William Compton, M.D.

Burton Janis, M.D.

Ron Keller, M.D.

Theodore Shohl, M.D.

David Werner, M.D.

Steve Sitter, M.D.

George Pfaltzgraff, M.D.

## RISK MANAGEMENT SUBCOMMITTEE ON OB

William Compton, M.D., Chairman

Theodore Barton, M.D.

Clarice Dukeminier, M.D.

Sarah Isto, M.D.

Jack Jacob, M.D.

Rodney Vaught, M.D.

Cathy Baldwin-Johnson, M.D.

Lydia Eastburn, M.D.

Frederick R. Hood, M.D.
(Ex Officio Member)

# 1987 MEDICAL MALP

## By Roger F. Holmes, Esq.

1987 proved to be a very important year in Alaska for those concerned with medical malpractice. The Alaska Supreme Court rendered two opinions relevant to this area. The United States District Court issued a significant medical malpractice opinion and the first truly significant plaintiff's verdict was obtained in the medical malpractice area.

The United States District Court in Alaska ruled that drug manufacturers must provide warnings for physicians giving adequate notice of possible complications. It ruled further that how the physician communicated the medicine's dangers to the patient was the physician's own decision, and his or her independent duty. This reaffirmed a long-standing doctrine that the physician has total responsibility to notify the patient concerning possible drug complications.

In a separate issue, the Alaska Supreme Court previously had ruled that when a claimant put in issue his or her physical condition, the physician/patient privilege, as relates to that particular condition, is waived. This is the generally accepted law everywhere in the United States. Recently plaintiffs' attorneys have successfully narrowed this ruling, claiming that, although the privilege is waived, this means only that the defendant can obtain the medical records. Plaintiffs have claimed that treating physicians have no right to discuss the plaintiff's condition with defense attorneys or defendants without the plaintiff or plaintiff's attorney(s) being an actual participant in the discussion. Plaintiffs in several states have successfully convinced their Supreme Courts to narrow the physician/patient privilege waiver to require the presence of the plaintiff or plaintiff's attorney at all conferences.

This position was carried to its illogical extreme in a recent Alaska case. A health corporation was being sued for the alleged negligence of two of its physicians. The plaintiff received treatment from yet another physician employed by the health corporation. The plaintiff's attorney took the position that the health corporation, the two doctors being sued and their lawyer were not entitled to discuss the plaintiff's condition with the physician who was presently treating the plaintiff without the plaintiff's attorney being in attendance. This meant that the health corporation, which employed the physician, could not talk to its own employee about his treatment of a patient of the health corporation. Nor could the health corporation's lawyer talk to an employee of his client about the case.

The Alaska Supreme Court, rejecting what was a growing trend in the Lower 48, ruled that treating physicians may, but are not required to, consult exparte with defense counsel. Our Supreme Court has made it clear that any treating physician may consult with whomever he or she wishes once plaintiff's medical condition has been put at issue. This ruling clarifies the issue for all treating physicians. Many physicians were being threatened with a lawsuit if they discussed a plaintiff's medical condition exparte with a workers' compensation carrier, an adjuster, an attorney, etc. This ruling makes it easier for medical malpractice defendants to gather information with which to evaluate cases which are brought against them.

In *Jackson v. Fairbanks Memorial Hospital*, the Alaska Supreme Court leaped to the forefront in expanding the rights of hospital patients by holding, as a matter of law, that the hospital is responsible for the actions of all emergency room physicians. Prior to this ruling it was generally held that a plaintiff might be able to sue the hospital for the actions of an emergency room physician if the plaintiff could show that he or she reasonably believed the emergency room physician was an authorized agent of the hospital. In *Jackson* the Supreme Court held that hospitals had a nondelegable duty to provide emergency room services. The Supreme Court held that hospitals are, as a matter of law, responsible for the actions of all emergency room physicians. There are several ramifications of this decision.

The ink was hardly dry on the *Jackson* opinion before it was put to test in the case of *Justice v. Humana*. The plaintiff's attorneys dismissed the two individual emergency room physicians on the eve of trial and went to trial only against the hospital. Jury verdict studies show that plaintiffs, in medical malpractice cases, are more likely to win a verdict against a hospital than a doctor and that a verdict against a hospital is more likely to be higher than it would be against a doctor. In this case the jury awarded $1,450,000 in damages against Humana reduced by 10 percent comparative negligence — more than ten times higher than any previous

medical malpractice verdict in Alaska. Without the *Jackson* decision, the plaintiff would have had to keep the physicians involved in the case.

Possibly even more disquieting than the result in *Justice v. Humana* is additional language in the *Jackson* opinion. One of the plaintiff's claims on appeal was that the hospital should be liable for everything that goes on inside the hospital on the basis of enterprise liability. The argument is that if an enterprise impacts society and the negligent act occurred during the activity performed for the benefit or in the interest of the enterprise, the enterprise is liable. Rather than rejecting outright this theory, the Supreme Court rejected it by choosing the following language: "In short, *Jackson's* theory of enterprise liability is not *yet* the law in Alaska." (emphasis added)

Finally, the *Jackson* decision that a hospital has a nondelegable duty to provide emergency room services and is therefore liable for any negligence arising out of those services was based upon a state regulation designed to promote "safe and adequate treatment of individuals in hospitals and in the interest of public health, safety and welfare." That regulation stated, at the time the *Jackson* case arose, that an acute care hospital *shall* "ensure that a physician is available to respond to an emergency at all times." It now reads: "A general acute care hospital *must* provide surgical, anesthesia, perinatal, medical, nursing, pharmaceutical, dietetic, laundry, medical records, radiological, laboratory, and emergency care services." 7AAC12.105 (emphasis added)

The *Jackson* court specifically stated that its ruling did not extend to situations where a patient is treated by his or her own doctor in an emergency room provided for the doctor's convenience. On the other hand, plaintiffs' attorneys will no doubt now argue that *Jackson* stands for the proposition that hospitals are liable for the actions of *all* emergency room physicians, anesthesiologists, neonatalogists, radiologists, and pathologists. In short, an attempt will be made to hold the hospital responsible for the actions of every hospital-based physician, or to extend the decision to private physicians called into the hospital by emergency room physicians to consult on difficult cases.

There has been a trend in the Lower 48 and Alaska to attempt to make all physicians practicing in a hospital carry malpractice insurance. The *Jackson* case virtually guarantees that this trend in Alaska will continue. To hold hospital privileges in the future, a doctor may have to satisfy not only the hospital credentials committee, but also the hospital insuror's underwriting department.

This trend of requiring insurance to practice in a hospital has recently been taken a step further in Alaska. The second leading writer of medical malpractice insurance in Alaska now requires all obstetricians insured by it to share a call schedule only with those carrying insurance.

For many years it was felt that a willingness by juries to return big medical malpractice verdicts depended primarily on the degree of urban sophistication. Most early severe problems arose in New York, Florida, Illinois and California. Alaska, as a smaller state, has generally been one of the better places in which to try these cases. The verdict in *Justice v. Humana* may indicate that Alaskan juries are joining their counterparts "outside" in an increased willingness to award large sums of money against health care providers. Alaska's low population means that there will never be enough cases tried here to show an actual trend, but the *Justice* case may give us an indication that we are joining the ranks of urban areas where any well-prepared plaintiff's case has at least a 50 percent chance of winning.

Significant tort reform in California and Indiana has led to a substantially postive effect on the professional liability climate in those states. A look at the *Justice v. Humana* case provides insight on this.

In *Justice* the patient was seen in Anchorage with an apparent head injury. The physicians decided not to do a CAT scan. The patient was seen 48 hours later in California with increasing symptoms. A CAT scan was done in California but was misread by the physicians. Several weeks later the California physicians discovered an aneurysm. A claim was made against the Anchorage-based physicians and Humana as well as the California-based physicians. In California, where there is a meaningful cap on damages and other significant reforms, the California physicians settled for approximately $600,000. That settlement provides for repayment of half that amount out of what is recovered in Alaska. Although the total amount of the judgment against Humana has not yet been determined by the court, it is possible that the Anchorage-based defendants will end up paying almost two million dollars in this case. A large portion of that disparity can only be attributed to California's malpractice reform package.

In light of cases like *Justice* and absent significant tort reform in Alaska, we can look forward to more of the same in 1988.

# FINANCIAL STATEMENTS

## Medical Indemnity Corporation of Alaska

Board of Governors
Medical Indemnity Corporation of Alaska
Anchorage, Alaska

We have examined the balance sheets of Medical Indemnity Corporation of Alaska (MICA) as of December 31, 1987 and 1986, and the related statements of income and changes in policyholders' surplus, and cash flows for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

As discussed in Note B to the financial statements, various factors may cause the ultimate settlement of unpaid losses and loss adjustment expenses to vary significantly from the estimated amounts included in the financial statements.

In our opinion, subject to the effects on the financial statements of such adjustments, if any, as might have been required had the outcome of the uncertainty referred to in the preceding paragraph been known, the financial statements referred to above present fairly the financial position of Medical Indemnity Corporation of Alaska at December 31, 1987 and 1986, and the results of its operations and cash flows for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

Ernst & Whinney

Anchorage, Alaska
March 1, 1988

# Balance Sheets

| | December 31 | |
|---|---|---|
| **ASSETS** | **1987** | **1986** |
| Investments — Note C | | |
| Designated for retirement of notes payable | $ 2,344,563 | $ 2,675,567 |
| Undesignated | 13,858,420 | 10,724,498 |
| | 16,202,983 | 13,400,065 |
| Cash | 509,275 | 533,338 |
| Premiums receivable, less allowance for doubtful accounts of $2,000 | 63,275 | 132,402 |
| Accrued interest receivable | 312,230 | 246,188 |
| Note receivable | 11,331 | 23,112 |
| Prepaid expenses | 3,693 | |
| Reinsurance recoverable | | 163,254 |
| Furniture and equipment, less accumulated depreciation of $28,001 in 1987 and $11,288 in 1986 | 92,624 | 20,428 |
| | $17,195,411 | $14,518,787 |
| **LIABILITIES AND POLICYHOLDERS' SURPLUS** | | |
| Liabilities | | |
| Reserve for loss and loss adjustment expenses | $ 6,838,481 | $ 8,913,133 |
| Advance premiums | 1,064,261 | 322,596 |
| Liability to reinsurers | 486,390 | 14,020 |
| Accounts payable and accrued expenses | 230,803 | 227,034 |
| | 8,619,935 | 9,476,783 |
| Notes payable to State of Alaska — Note E | 4,600,000 | 5,000,000 |
| Policyholders' surplus | 3,975,476 | 42,004 |
| | 8,575,476 | 5,042,004 |
| | $17,195,411 | $14,518,787 |

See notes to financial statements.

# Statements of Income and Changes in Policyholders' Surplus

| | Year Ended December 31 | |
|---|---|---|
| | 1987 | 1986 |
| **REVENUE** | | |
| Premiums earned | | |
| Physicians | $ 5,001,683 | $ 4,422,990 |
| Hospitals | 1,706,513 | 1,283,528 |
| Related health care | 228,352 | 219,558 |
| | 6,936,548 | 5,926,076 |
| Deduct | | |
| Reinsurance ceded — Note D | 1,343,352 | 1,045,000 |
| | 5,593,196 | 4,881,076 |
| Investment income, less investment expenses of $59,551 in 1987 and $62,619 in 1986 | 1,601,914 | 1,196,065 |
| Total Revenue | 7,195,110 | 6,077,141 |
| **LOSSES AND EXPENSES** | | |
| Loss and loss adjustment expenses | 1,917,786 | 4,993,655 |
| Other underwriting expenses | 1,015,002 | 726,353 |
| Interest expense on notes payable to State of Alaska | 328,850 | 210,000 |
| Total Losses and Expenses | 3,261,638 | 5,930,008 |
| Net Income | 3,933,472 | 147,133 |
| **POLICYHOLDERS' SURPLUS (DEFICIT) AT BEGINNING OF YEAR** | 42,004 | (105,129) |
| Policyholders' Surplus At End Of Year | $ 3,975,476 | $ 42,004 |

See notes to financial statements.

# Statements of Cash Flows

| | Year Ended December 31 | |
|---|---|---|
| OPERATING ACTIVITIES | 1987 | 1986 |
| Net Income | $ 3,933,472 | $ 147,133 |
| Adjustments to reconcile net income to net cash provided by operating activities: | | |
| Change in premiums receivable, advance premiums, and deferred premiums | 810,792 | (621,999) |
| Increase in accrued interest receivable | (66,042) | (17,152) |
| Change in reserve for loss and loss adjustment expenses, and reinsurance recoverable | (1,911,398) | 2,205,941 |
| Increase (decrease) in liability to reinsurers | 472,370 | (47,980) |
| Change in note receivable, prepaid expenses and accounts payable and accrued expenses | 11,857 | 83,544 |
| Provision for depreciation | 16,713 | 3,870 |
| Amortization of bond discount and premium | (101,018) | (93,774) |
| Net realized gains on investments | (63,100) | (3,063) |
| Net Cash Provided By Operating Activities | 3,103,646 | 1,656,520 |
| INVESTING ACTIVITIES | | |
| Purchases of investments | (6,221,273) | (3,225,618) |
| Sales or maturities of investments | 2,187,366 | 1,400,000 |
| Purchase of furniture and equipment | (88,909) | (12,365) |
| Net Cash Used By Investing Activities | (4,122,816) | (1,837,983) |
| FINANCING ACTIVITIES | | |
| Change in short-term investments and money market investments | 1,395,107 | (1,394,152) |
| Repayment of note to State of Alaska | (400,000) | |
| Receipt of note from State of Alaska | | 2,000,000 |
| Net Cash Provided By Financing Activities | 995,107 | 605,848 |
| Increase (Decrease) In Cash | (24,063) | 424,385 |
| Cash at beginning of year | 533,338 | 108,953 |
| Cash At End of Year | $ 509,275 | $ 533,338 |

See notes to financial statements.

# Notes to Financial Statements

## NOTE A — ORGANIZATION AND OPERATIONS

Medical Indemnity Corporation of Alaska (MICA) is an insurance company created by the State of Alaska legislature to provide professional liability insurance to Alaskan physicians and surgeons, hospitals, and related health care organizations. MICA commenced business on June 28, 1976.

Prior to January 1, 1979, MICA issued "occurrence" basis policies which provide coverage for the policyholder for claims incurred during the policy year regardless of when the claims are reported to MICA. Since January 1, 1979, MICA has issued only "cla.ms-made" policies which provide coverage for the policyholder for claims reported during the policy year to MICA, regardless of when the claims were incurred. MICA also offers policyholders who terminate their policy the option of purchasing a "tail" (occurrence) policy which will indemnify the policyholder against future claims that occurred while a MICA policyholder.

MICA was capitalized with a note payable to the State of Alaska (see Note E).

## NOTE B — SIGNIFICANT ACCOUNTING POLICIES

*Basis of Presentation:* The accompanying financial statements are presented in conformity with generally accepted accounting principles. Variances in the accompanying financial statements that would occur had the statements been prepared in accordance with statutory accounting practices are not material.

*Premiums:* Premiums are earned ratably over the policy period to which they apply. Policies are written on a calendar year basis. MICA utilizes the services of an independent consulting actuary in the development of its premium structure.

*Reserve for Loss and Loss Adjustment Expenses:* The liability for loss and loss adjustment expenses represents an estimate of the ultimate net cost of reported and incurred but not reported claims at the balance sheet dates. The liability for reported claims has been determined using case basis estimates and reduced for amounts ceded to reinsurers. The liability for incurred but not reported claims has been determined by independent consulting actuaries using MICA's own historical loss data, giving effect to estimates of trends in claim frequency and severity. These estimated liabilities are continually reviewed and, as adjustments become necessary, such adjustments are reflected in current operations.

Due to the inherent difficulty in estimating the reserve for loss and loss adjustment expenses for medical malpractice business and the stability of statistical information used in setting reserves, actual development of the ultimate reserves may be significantly different than the amount recorded in these financial statements.

*Depreciation:* Furniture and equipment are recorded at cost and depreciated over the estimated useful lives of the assets using the straight-line method.

*Income Taxes:* MICA has received a ruling from the State of Alaska that as a public corporation created by the State of Alaska, it is exempt from state income taxes. MICA is considered exempt from federal income taxes under Section 115 of the Internal Revenue Code. Federal tax law changes and their interpretation could result in changes to the tax status of MICA.

*Reclassification:* Amounts included in the 1986 statement of changes in financial position have been reclassified to conform to the 1987 presentation.

## NOTE C — CASH AND INVESTMENTS

*Cash:* At December 31, 1987, the carrying amount of MICA's demand deposits is $509,275 and the bank balance is $182,058. Of the bank balance, $136,540 is covered by federal depository insurance.

*Investments:* Investments in government and corporate notes and bonds are carried at amortized cost. Short-term demand notes and money market investments are carried at cost. The Board of Governors has designated various investments for retirement of the notes payable to the State of Alaska. Investments at December 31, 1987 and 1986 are as follows:

| | 1987 | | 1986 | |
|---|---|---|---|---|
| | Carrying Amount | Market Value | Carrying Amount | Market Value |
| U.S. Govt. notes & bonds | | | | |
| Designated bonds | $ 749,776 | $ 749,776 | $ 675,567 | $ 675,567 |
| Undesignated | 7,573,715 | 7,871,941 | 6,771,532 | 7,630,198 |
| Canadian govt. note — undesignated | 248,047 | 285,938 | 247,734 | 310,938 |
| Corporate notes | | | | |
| Designated | 1,594,787 | 1,537,248 | | |
| Undesignated | 4,924,422 | 4,905,555 | 3,197,889 | 3,377,545 |
| Short-term demand notes and money market investments | | | | |
| Designated | | | 2,000,000 | 2,000,000 |
| Undesignated | 1,112,236 | 1,112,236 | 507,343 | 507,343 |
| | $16,202,983 | $16,462,694 | $13,400,065 | $14,501,591 |

Realized gains and losses, which are not material to the financial statements, are determined on the basis of specific identification and are

included in interest income for presentation purposes.

State of Alaska statutes define the eligible investments that MICA can own. At December 31, 1987 and 1986, MICA is in compliance with the respective statutes. MICA's investments are held by a custodial bank. The investments are uninsured and not registered in MICA's name.

## NOTE D — REINSURANCE

MICA has purchased reinsurance to indemnify itself against losses in excess of certain limits. The terms of the various reinsurance agreements are as follows:

- Claims applicable to the 1987 policy period in excess of $250,000 up to $2,000,000 (policy limits) per occurrence are 100% recoverable from reinsurers subsequent to MICA's retention of approximately the first $1,000,000 of excess losses. MICA's reinsurance policy for 1987 is based on participation through January 1, 1990. The reinsurance company's participation is generally subject to a $25,000,000 aggregate recovery if the reinsurance policy remains in force for the three year period. Termination of the reinsurance policy prior to January 1, 1990 would result in an adjustment of the $25,000,000 aggregate recovery.
- Claims applicable to the 1986 policy period in excess of $250,000 up to $2,000,000 (policy limits) per occurrence are 100% recoverable from reinsurers subsequent to MICA's retention of the first $1,000,000 of excess losses. The reinsurance company's participation is subject to a $4,500,000 aggregate recovery.
- Claims applicable to the 1985 policy period in excess of $250,000 up to $2,000,000 (policy limits) per occurrence are 83.5% recoverable from reinsurers subsequent to MICA's retention of the first $831,000 of excess losses. MICA remains liable for 16.5% of the excess losses not covered by reinsurance.
- Claims applicable to 1984 and prior policy years in excess of $200,000 up to $5,000,000 (policy limits) per occurrence are 100% covered by reinsurance agreements for the first $1,750,000 of excess losses. MICA retains the liability for the next $750,000 of excess loss. Excess losses subsequent to MICA's $750,000 retention are 100% recoverable from reinsurers.

MICA remains liable to the extent reinsurance companies are unable to meet their obligations.

Amounts which have been deducted from liability, income and expense accounts in connection with all ceded reinsurance placed with other insurance companies at December 31, 1987 and 1986 are as follows:

| | 1987 | 1986 |
|---|---|---|
| Estimated loss and loss adjustment expenses to be recovered from reinsurer | $5,830,000 | $6,219,000 |
| Reinsurance premiums | 1,343,352 | 1,045,000 |
| Loss and loss adjustment expense paid by reinsurer | 3,050,873 | 197,785 |

## NOTE E — NOTES PAYABLE TO THE STATE OF ALASKA

The Act which created MICA provided for its initial capitalization through loans up to $6,000,000 from the State of Alaska Medical Malpractice Revolving Loan Fund. At December 31, 1987, MICA had the following notes payable to the State of Alaska:

| Amount | Interest Rate | Terms |
|---|---|---|
| $3,000,000 | 7% | Repayment of this loan is to be made in installments based upon underwriting earnings computed as specified in the Act. Repayment of $597,714 is due on March 1, 1988. No repayment was due at December 31, 1986. Interest is payable quarterly. This loan is subordinated to all other obligations of MICA. |
| $1,600,000 | 6% | Repayment of this loan is to be made in four annual installments of $400,000 each December. Interest is payable quarterly. This loan is subordinated only to the obligations of policyholders and claimants. |

The remaining $1,400,000 provided under the provisions of the Act can be drawn on if operations demand.

## NOTE F — LEASES

MICA leases office space. Rental expense was $37,290 in 1987 and $30,500 in 1986.

## NOTE G — PENSION PLAN

In 1987, MICA established a defined contribution pension plan covering substantially all employees. Plan participants are required to contribute a percentage of their respective gross compensation (not to exceed 5%) to the plan. Matching contributions are made by MICA equal to 50% of the participant's contribution. Participants are fully vested in both participant and matching contributions at all times.

The Board of Governors may make additional contributions to the plan to be allocated to participants based upon participant compensation. Participant vesting in these additional contributions is based upon the participant's years of service. Pension costs are funded as they accrue. Pension expense for 1987 is $10,620.

# CORPORATE DIRECTORY

**Board of Governors**

William G. Brock *Chairman of the Board*
David J. Frazier *First Vice Chairman*
Frederick R. Hood, M.D. *Second Vice Chairman*
David S. Grauman, M.D. *At Large*
Ronald W. Keller, M.D.
Renee Murray
Kim C. Smith, M.D.
C. Keith Campbell

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David J. Frazier *First Vice Chairman*
Frederick R. Hood, M.D. *Second Vice Chairman*
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**Audit Committee**

Kim C. Smith, M.D. *Chairman*
David S. Grauman
Renee Murray

**Finance & Investment Committee**

C. Keith Campbell *Chairman*
David Grauman, M.D.
William G. Brock

**Legislative Committee**

Kim C. Smith, M.D. *Chairman*
William G. Brock

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Printer *Quality Litho Printing, Inc.*

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4/21/89

IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to medical malpractice advisory panels."

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

* Section 1. AS 09.55.536(a) is amended to read:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a <u>five-person</u> [THREE-PERSON] expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions. <u>Three members of the panel shall be persons who are not health care providers.</u>

* Sec. 2. AS 09.55.536(b) is repealed and reenacted to read:

(b) The expert advisory panel shall consider only evidence presented by the parties. Under the applicable rules of the Alaska Rules of Civil Procedure, a party may perform discovery, obtain the attendance of witnesses, examine or cross-examine witnesses, obtain a physical examination of the injured person if alive, and obtain the production of all relevant hospital, medical, or other records or materials relating to the health care provided to the injured person.

The parties may attend all hearings of the panel. The panel shall maintain a record of testimony or oral statements of witnesses, and shall keep copies of all written statements it receives.

* Sec. 3. AS 09.55.536(f) is amended to read:

(f) <u>Discovery</u> [NO DISCOVERY] may be undertaken in a case <u>before</u> [UNTIL] the report of the expert advisory panel is received. [HOWEVER, THE COURT MAY RELAX THIS PROHIBITION UPON A SHOWING OF GOOD CAUSE BY ANY PARTY.] If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

Appendix "A"

A Comparative Analysis of Various Medical Malpractice Screening Panel Statutes

| STATE | Parties Control Pres. of Evidence | Cross-Exam. Permit | Pre-Trial Disc. Permit | Parties Attend Hearing | Non-Physician Members | Report Admissible as Evidence at Trial | Statute Number |
|---|---|---|---|---|---|---|---|
| ALABAMA | YES | YES | YES | YES | YES | YES | §6-5-480 |
| ALASKA | NO | NO | NO | NO | NO | YES | §09.55.560 |
| ARIZONA | YES | YES | YES | YES | YES | YES | §12-566 |
| CONNECTICUT | YES | YES | NO | YES | YES | YES | §38.19a |
| DELAWARE | YES | YES | YES | YES | YES | YES | 18§6903 |
| FLORIDA | YES | YES | YES | YES | YES | NO | TIT45§768.57 |
| HAWAII | YES | YES | NO | YES | YES | NO | §671 |
| IDAHO | YES | YES | NO | YES | YES | NO | §6-1001 |
| INDIANA | YES | YES | YES | YES | YES | YES | §16-9.5-9-1 |
| KANSAS | NO | NO | NO | NO | YES | NO ** | §65-4901 |
| LOUISANA | YES | YES | YES | YES | YES | YES | §1299.47 |
| MAINE | YES | YES | YES | YES | YES | NO | §2801 |
| MARYLAND | YES | YES | YES | YES | YES | YES | §3-2A-02 |
| MASS | YES | YES | YES | YES | YES | YES | TIT.231§60B |
| MICHIGAN | YES | YES | YES | YES | YES | NO | §600.5040 |
| MONTANA | YES | YES | NO | YES | YES | NO | §27-6-101 |
| NEBRASKA | YES | YES | YES | YES | YES | YES | §44-2840 |
| NEVADA | NO | NO | NO | NO | YES | YES | §41A.003 |
| NEW HAMP. | YES | YES | YES | YES | YES | YES | §519-A:1 |
| NEW JERSEY | YES | YES | YES | YES | YES | YES | §4:21-1 |
| NEW MEXICO | YES | YES | NO | YES | YES | NO | §41-5-14 |
| NEW YORK | YES | YES | YES | YES | YES | YES | §148-a |
| OHIO | YES | YES | YES | YES | YES | YES | §2711.22 |
| PENN. | YES | YES | YES | YES | YES | YES | 40P.S.§1264 |
| TENNESSEE | YES | YES | YES | YES | YES | YES | §29-26-101 |
| UTAH | YES | YES | NO | YES | YES | NO | §78-14-12 |
| VERMONT | YES | YES | YES | YES | YES | NO | §7001 |
| VIRGINIA | YES | YES | YES | YES | YES | YES | §8.01-581.1 |
| WISCONSIN | YES | YES | YES | YES | YES | YES | §655.02 |
| WYOMING | YES | YES | NO | YES | YES | NO | §9-2-1501 |
| PUERTO RICO | YES | YES | YES | YES | YES | BINDING | T.26§4110 |