

ALASKA LEGISLATURE COMMITTEE FILES

1993-1994

8672

7873

HOUSE JUDICIARY

138

Representative Bill Hudson  
February 3, 1994  
Page 4

HUGHES THORSNESS GANTZ POWELL & BRUNDIN  
ATTORNEYS AT LAW

that the insurance industry is highly regulated and indeed, the state of Alaska employs a Director of Insurance and staff for the very purpose of protecting Alaska consumers.

Second, the insurance industry, even though highly regulated, is also highly competitive. The effect of competition is to also provide for a level of control on the cost of insurance products.

Third, this legislation does provide for a study of the costs to society of the civil justice system. If the goals this legislation seeks to accomplish are not furthered, additional changes can be made. This legislation certainly seems to be a significant step in the right direction.

Finally, we believe you should keep the concept of fairness in mind as you examine each of the proposals before you, aside from their effect on insurance rates, as ultimately, the cost of insurance is borne by each one of us. Is it really fair to have pre-judgment interest at an unrealistically high or for that matter low level? Does it really make sense to assume there would be no income taxes paid on a future lost wage award? Is it fair to pay pre-judgment interest on future damages? Do we, as a matter of course, wish to pay for attorney's fees in every single case? Even if you ignore the benefit we believe this legislation will ultimately have on insurance rates, the answer to these questions seems clear. We would urge each one of you to support this legislation.

If we can be of any assistance to you in evaluating any of these provisions or trying to assess the possible effect of these provisions, please let us know and we will be happy to help.

Sincerely,

HUGHES, THORSNESS, GANTZ,  
POWELL & BRUNDIN

By:   
Michael L. Lessmeier

xml13600/lp

cc: Members, House Labor  
& Commerce Committee



# Tort Reform Record

1212 New York Avenue, N.W. • Suite 515 • Washington, D.C. 20005 • (202) 682-1163

June 30, 1993

Barry Keeng ✓  
(916) 443-4900

The American Tort Reform Association was organized in 1986 to bring greater fairness and efficiency to the civil justice system through public education and the enactment of state legislation. Today it represents approximately four hundred non-profit organizations, professional societies, trade associations and businesses. ATRA accomplishes its mission primarily by coordinating and supporting the activities of legislative coalitions in each of the states, by keeping its members informed of developments and mobilizing them for action, and by keeping media attention focused on the need for civil justice reform.

The Tort Reform Record is published every June and December to record the accomplishments of the latest legislative year. It includes a single-page state-by-state summary of the reforms enacted by the states since January, 1986. An issue-by-issue elaboration of what each state has done is included. Separate documents are available on professional liability, periodic payment of awards and frivolous suit sanctions. ATRA also provides position papers and model bills on each of these issues.

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## JACKSON CONSTRUCTION

241 ASPEN STREET  
SOLDOTNA, AK 99669  
907-262-4485

Dear Committee Member !

As a concerned business man and citizen I respectfully urge you to move house Bill 292 into the House for immediate action

Insurance reform is long overdue and even tho I believe this bill does not Go far enough it is a step in the right direction.

I will do all I can to assure its passage once it reaches the House.

Respectfully I am

  
Harold A Jackson

Roland E. Gower, M.D.

A PROFESSIONAL CORP.  
2841 DE BARR RD., #41  
ANCHORAGE, ALASKA 99508  
907-279-3564

*file*

PRACTICE LIMITED TO GENERAL SURGERY

BY APPOINTMENT ONLY

February 1, 1994

Received

FEB 14 1994

ANCHORAGE

Representative Brian Porter  
House of Representatives  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801-1182

Dear Brian:

A note (from the home front) to encourage you to continue to support tort reform. House Bill 292 looks pretty good to me as it does to others in the medical field. If I can be of any help to you from this end with testimonies, information, etc., please do not hesitate to contact me.

Wishing you a successful year in Juneau.

Sincerely,



Roland E. Gower, M.D.

REG:bar

# NFIB Alaska

National Federation of  
Independent Business

FOR IMMEDIATE RELEASE  
January 10, 1993

FFI, CONTACT: Resa Jerrel  
(907) 789-4278

## TORT REFORM TOP ISSUE FOR NFIB/ALASKA

JUNEAU--Despite civil justice reforms enacted in 1986, Alaska's small business owners still suffer from sky-high liability insurance rates. "Many members tell me their premiums have continued to soar, even though there have been no claims, or only a very minor claim, against their policies," says Resa Jerrel, Director of the 4,400-member Alaska chapter of the National Federation of Independent Business. "I know of several who have been forced to drop their coverage due to premium hikes, leaving them and their customers without meaningful protection."

The failure of the '86 reforms has led NFIB/Alaska, the state's largest small-business advocacy group, to place passage of HB 292, a comprehensive tort reform bill, at the top of its legislative agenda.

A recent survey of NFIB/Alaska members found overwhelming support for all six of the bill's key reforms among the small business community:

- \* 96 percent approved barring damage suits by people who received their injuries in the course of committing a crime;
- \* 89 percent approved limiting the filing deadline for lawsuits arising from construction accidents or product liability claims to six years from the time of injury;
- \* 84 percent approved telling juries of awards already collected by a claimant for the same incident and deducting that amount from any subsequent judgement;
- \* 83 percent approved capping punitive damage awards at \$200,000 or three times the amount of actual loss, whichever is greater;

9159 Skywood Lane  
Juneau, AK 99801



The Guardian of  
Small Business

-more-

- \* 79 percent approved barring injury claimants from naming only "deep pocket" defendants;
- \* 78 percent approved limiting the economic loss awards in fatal accidents to \$50,000 if the deceased has no dependents.

"The survey results clearly show small-business owners feel the current civil justice system is neither civil nor just," Jerrel said. "It encourages people to file million-dollar lawsuits on the flimsiest of pretexts, often in the hope of being offered a settlement just to stop being a nuisance. This kind of 'civil extortion' frustrates fairness and clogs the courts, slowing the delivery of justice for all. And, it imposes tremendous costs on society, fueling insurance rate inflation and raising cost of goods and services for all Alaskan consumers."

Jerrel says pre-session conferences have left her feeling upbeat about the prospect of getting meaningful reforms enacted this year. "You get the sense from all parties involved, including the trial lawyers, that progress must be made this year," Jerrel said. "For the first time in all my years of dealing with this issue, there seems to be a determination among all the players to work together, to seek conciliation rather than confrontation."

#####

# NFIB Alaska

National Federation of  
Independent Business

January 10, 1994

The Honorable Brian Porter  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Dear Representative Porter:

The NFIB/Alaska - National Federation of Independent Business of Alaska - membership is comprised of 4300 small and independent business owners. The typical NFIB/Alaska member employs four workers and rings up gross sales of about \$190,000 per year. In aggregate, the organization's members employ nearly 50,000 workers.

The legislative agenda of NFIB/Alaska is determined by our ballot. The ballot is our annual poll of our membership on a series of issues deemed critical to small business. A majority vote, of the members in response to the poll, sets our policy and position on legislative issues. The objective of this letter is to share with you the enclosed results of the 1994 poll.

I hope this information regarding the views of small business owners on these issues will be useful to you. At your convenience, I would be happy to meet with you to discuss this years results or previous years poll results.

I look forward to working with you on these and other issues of importance to small business owners.

Sincerely,

9159 Skywood Lane  
Juneau, AK 99801



Resa Jerrel  
State Director



Enclosure

The Guardian of  
Small Business

Received

JAN 11 1994

...? BRIAN PORTER

NFIB/ALASKA BALLOT RESULTS  
1994

1. Should legislation be passed requiring voter approval of any new state tax or tax increase?

Yes 81%            No 14%            Undecided 5%

2. Should the legislature reform the Alaska tort law system by making the following changes:

a. Require construction and product liability actions involving personal injury, death, or property damage to be filed within six years of the accident?

Yes 89%            No 4%            Undecided 7%

b. Prevent injury claimants from naming only those businesses and individuals who have the deepest pockets?

Yes 79%            No 9%            Undecided 12%

c. Limit punitive damages to not more than three times that awarded for actual loss, or \$200,000, whichever is greater?

Yes 83%            No 8%            Undecided 9%

d. Limit award for economic loss to \$50,000 when the deceased is not survived by children, spouse or other dependent?

Yes 78%            No 14%            Undecided 8%

e. Make the courts and juries aware of any other awards the claimant may have received and deduct that amount from judgements?

Yes 84%            No 10%            Undecided 6%

f. Prohibit suits for damages if the injury or death occurred while the plaintiff was committing a crime?

Yes 96%            No 3%            Undecided 1%

3. Should a small-business economic impact statement be attached to all bills considered during session?

Yes 62%            No 25%            Undecided 13%

4. Should a Small business Advisory Committee in the legislature be established to review proposed legislation and recommend legislation beneficial to small business?

Yes 73%            No 18%            Undecided 9%

5. Should legislation be enacted permitting a small business to replace workers' compensation insurance with a combination of health and wage replacement insurance (known as 24-hour coverage)?

Yes 51%            No 16%            Undecided 33%

6. Should there be a limit on the number of bills legislators can introduce?

Yes 60%                      No 28%                      Undecided 12%

7. Do you currently provide health insurance to your full-time employees?

Yes 47%                      No 53%                      Undecided 0%

7a. If you answered yes to question 7, approximately how much do you currently pay for health insurance for each full-time employee each month?

Up to \$75	3%
\$76 to \$125	13%
\$126 to \$200	33%
More than \$200	51%

7b. If you provide health insurance, who pays for it?

Employer pays 100 percent	66%
Employee pays 100 percent	3%
Employer and employee share the cost.	31%

8. If your firm does not provide health insurance to employees, why not? (Check only one):

43% Premiums are too high or the firm cannot afford to pay for benefits.

17% Employees are generally covered under policy of spouse or parent.

14% The firm does not qualify for a group policy.

7% Employees prefer additional compensation in place of health insurance benefits.

3% Lack of employee interest.

16% Other. (Please detail in the Comment section.)

8a. If you do not provide health insurance, which of the following measures would you likely take to recover costs if you were required to buy health insurance for all your full-time employees? (select those that apply.)

42%	Raise prices for my product or service.
22%	Eliminate part-time jobs.
35%	Eliminate full-time jobs.
23%	Reduce hours worked for some employees.
26%	Cut or hold down other employee benefits.
51%	Cut or hold down employee wage increases.

- 18% Postpone or cut expenditures for plant and/or equipment.
- 24% I would be forced out of business.
- 6% Other. (Please explain in the Comment section.)

9. Who should have the responsibility for making health insurance purchasing decisions?

Employer 45%      Individual 42%      Undecided 13%

10. Should doctors and hospitals be required to post their fees for the services and procedure they provide?

Yes 76%      No 14%      Undecided 10%



# ALASKA STATE MEDICAL ASSOCIATION

4107 Laurel Street • Anchorage, Alaska 99508-5334 • (907) 562-2662 • FAX (907) 561-2063

January 21, 1994

Representative Brian Porter  
Alaska State Legislature  
Room 122, State Capitol  
Juneau, Alaska 99801

Dear Representative Porter:

On behalf of the Alaska State Medical Association, I urge you to support H.B. 292, Liability Reform. We believe strongly that any health system reform must include comprehensive liability reform. Our association was involved in the drafting of H.B. 292 and support all reform in the bill. Therefore, we ask you to move H.B. 292 from Labor & Commerce to House Judiciary.

Your support and sponsorship is sincerely appreciated.

Sincerely,

Ray Schalow  
Executive Director

ALASKA STATE

## HOSPITAL & NURSING HOME

ASSOCIATION

January 17, 1994

Representative Brian Porter, Member  
Labor & Commerce Committee  
House of Representatives  
Capitol Building  
Juneau, Alaska

Re: Support HB 292  
Liability Reform

Dear Representative Porter:

On behalf of community hospitals and nursing homes across the state, we ask:

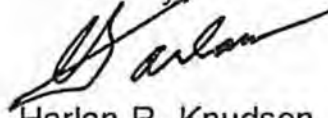
1. Your support of HB 292, the Comprehensive Liability Reform bill currently pending before the Labor & Commerce Committee.
2. Your support for bringing HB 292 to a vote before the Labor and Commerce Committee as early in the 1994 session as possible.

Attached is our position paper on the need for HB 292. We have, and continue to study other solutions to the problem of the cost surrounding liability and the need for the business and health care community to have access to reasonably priced insurance. We continue to believe the best solutions to resolving high liability costs are contained in HB 292.

I will be calling and getting on your appointment calendar to discuss this and any other health issues. Welcome back to Juneau.

*Thank you  
for support*

Sincerely,



Harlan R. Knudson  
President/CEO

Encl: (1)

cc: Gary Brewer, Alaska Regional Hospital; Sister Suzanne Brennan, Providence Hospital; Kathleen Cronen, Charter North Hospital, Jim Walsh, Valley Hospital; Tom Boling, Our Lady of Compassion Care Center and Joan Fisher, The Mary Conrad Center.

ALASKA STATE

## HOSPITAL & NURSING HOME

ASSOCIATION      January 17, 1994

Representative Bill Hudson, Chair  
House Labor & Commerce Committee  
Capitol Building  
Juneau, Alaska 99801-1182

Re: Support HB 292,  
Liability Reform

Dear Bill:

We want to thank you and members of the House Labor & Commerce Committee for having HB 292, the comprehensive liability reform bill introduced and for the two excellent hearings you and your committee have held on that bill.

We have reworked our position paper to reflect the information received at the above meetings, and at the meeting with you and the Medical Association on January 5. As mentioned, we congratulate the Trial Bar for finally recognizing there is a very serious liability problem in this state, and for offering solutions to that problem.

Our request to you is to let the House of Representatives vote on liability reform at this 1994 session. From 1988 through the 1992 session, the Labor and Commerce, and Judiciary Committee Chair took it upon themselves to deny the House a vote on this issue. We believe the members of the House, like the public will support the measures contained in HB 292.

You have heard the arguments on all sides, now we ask that you and your committee make a decision on what you feel should be in, added or deleted from HB 292, and move it on to Judiciary.

Sincerely

Encl: (1)

Harlan R. Knudson, President/CEO  
cc: Members, House Labor & Commerce Committee; Robert Valliant,  
Bartlett Memorial Hospital & Grant Asay, St. Ann's Care Center.

**Alaska State Hospital & Nursing Home Association**

**POSITION PAPER - SUPPORT HB 292. LIABILITY REFORM**

**January, 1994**

Contact: Harlan Knudson, 586-1790

**Liability Problem - Health Providers**

1. Cost of the Legal System
2. Slowness of Legal System
3. Cost of Defensive Medicine
4. Injured Party Receives Less than 50% of Award
5. Needed Care Denied Rural Areas
6. No Access or Recourse for Claims under \$100,000
7. Health Providers Cannot Afford/Do Not Have Liability Insurance

**HB 292. Comprehensive Liability Reform - SB 254 Companion**

**Bill** (Note: SB 204/HB 274 contain medical liability reform provisions included in HB 292) Purpose:

1. Reduce cost (health care, business, professional) associated with civil justice system.
2. Assure adequate and appropriate compensation for persons injured through the fault of others.
3. Increase availability and reduce cost liability insurance.
4. Establish fair and equitable timelines for resolving disputes.
5. Accumulate additional information concerning the cost of the civil justice system.

(More)

SECTIONS HB 292 IMPORTANT FOR REDUCING HEALTH COSTS:

Statute of Limitations - Current statutes must be clarified to make sure lawsuits are brought with a reasonable time. Six years is recommended, and for medical liability 2 years from the time of the incident and/or for minors two years from the time of the incident or before the 8th birthday, whichever time period is longer.

Cap on Non-economic Damages - ASHNHA supports caps on non-economic damages to limit the dollar amount of damages which a jury or judge can award a plaintiff. The recommended cap amount is \$250,000.00 indexed to the Consumer Price Index.

Limit on Punitive Damages - Provides definition of punitive damages to be "as actions of malice and conscious disregard of another person and establishes punitive damages as \$200,000 or up to three times the amount of compensatory damages awarded.

Periodic Payments - Provides for reducing the cost of compensating plaintiffs for future losses; preventing premature dissipation of damages and preventing windfall recoveries if a plaintiff should die.

Collateral Sources - Prevents double compensation for an injury. Current rules prohibits the defendant from introducing evidence that damages suffered by a plaintiff have been paid by a source other than the defendant. The court and a jury should be able to take into account the fact that part of the plaintiff's damages are already covered by other sources.

Liability Hospitals Acts/Omissions Non-Employed Personnel - Community hospitals should not be "automatic" deep pockets when a lawsuit is filed against a physician. This overturns an Alaska Supreme Court decision (Jackson v Power) holding a hospital liability for the action of an emergency room physician, even though the hospital was not negligent and did not violate any legal or regulatory requirements.

ASHNHA has under review the Trial Bar proposal requiring all health professionals to have \$5 million in liability insurance; implementing enterprise liability where a state authority, not the provider is sued; mandatory arbitration for all lawsuits under \$200,000 with a certificate of merit required before filing a medical liability lawsuit. ##end##



# Weona Corporation

We the following strongly support the passage of H.B. 292.

Please move this bill into the House as soon as possible.

Edward Quinda Sr 5TR#2 Box 9319 Eagle River, AK 344-1921

AH B... 2910 West 33rd Anch, AK 99517 344-1921

Arden A Perros 5901 E 6th Ave Sp 191 Anch AK 99504 337-4235

Brian J. Nuntzman 500 Fischer #B Anchorage AK 99518 562-1682

James H. Fuchs 3750 Perros Cir Anch AK 99515 - 349-7425

Frank... 11700-B Nix Ct Anch, AK 99515 - 344-7826

M. Y. ... P.O. Box 10000 Anchorage, AK 99517 344-1921

Matthew D. ... 5TR#2 Box 9319 Eagle River AK - 654-5100

501 Nathan Drive #3 Anchorage, AK 99518 244-1921

Debra Roberts

Mike Mc... 4021 Lillard Creek Rd. Anch. AK 344-1921

John P. ... 501 Nathan Drive #3 Anch. AK 99518 561-1579

# Alaskans For Liability Reform

Received

JAN 27 1994

REP BRIAN PORTER

January 24, 1994

TO: All Alaska Legislators

FROM: Alaskans for Liability Reform

Enclosed herein are some data reports that should be very helpful for you in supporting the General Public Civil Liability Reform of 1993-1994. They are as follows:

1. Highlights From: "The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance", read the report from the Division of Insurance, which substantiates the actions and results.
2. "NFIB Alaska Civil Liability 1994 Survey Results".
3. Highlights From: "Product Liability News"
4. Highlights From: "American Consulting Engineers Council Liability Report", and please note the percentage of claims settled without any payment to Claimant.
5. "Tort Cost Trends: An International Perspective", Excerpts from the Tillinghast Report.

**HIGHLIGHTS FROM:**

# The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance

by:

**W. KIP VISCUSI**

Department of Economics, Duke University, Durham, NC 27708

**RICHARD J. ZECKHAUSER**

Kennedy School of Government, Harvard University, Cambridge, MA 02138

**PATRICIA BORN**

Department of Economics, Duke University, Durham, NC 27708

**GLENN BLACKMON**

Delta Pacific, Olympia, WA 98501

Distributed by Alaskans For Liability Reform

P.O. Box 201668

Anchorage, AK 99520

Phone: 561-6250

## **Abstract**

"A large number of states adopted tort reforms in the mid-1980s to limit the dramatic surge in insurance losses and premiums. Evidence based on liability insurance data by state indicates that these reforms substantially influenced general liability insurance. The levels of losses, premiums, and loss ratios (a measure of insurance profitability) all reflected the impact of the reform. The large-scale reform efforts in 1986 were particularly influential. Medical malpractice insurance was much less sensitive to the reform efforts."

"Liability insurance markets in the mid-1980s were in disarray, with rapidly escalating awards and significant company losses. Substantial pressures were exerted on state legislatures to ease the burdens imposed by liability costs, and the policy process responded in many states. In this article, we examine the effect of those reforms. In particular, we seek to discover whether the tort reforms enacted in the mid-1980s had any effect on the claims paid by insurance companies or the premiums paid by consumers.

This inquiry into the effects of the tort reforms indicates that the performance of general liability insurance was quite sensitive to the liability regime. States that adopted general reforms experienced increases in insurance profitability, decreased levels of losses, and lower premiums. Although some specific reforms, such as modifications of joint and several liability, appear to be particularly influential, the general change in the liability climate that accompanies the reform effort also appears to be of consequence. The effects of tort reform on medical malpractice insurance proved less pronounced."

## **Liability reforms, 1985-1987**

"Following the explosion in liability premiums in 1985, states became much more interested in liability reforming 1986 [see table]. The most prominent of the 1986 measures were the modifications of joint and several liability rules adopted by 16 states, which composed more than half of all premiums for general liability and medical malpractice. Three other reform measures were adopted in at least ten states: limits on liability, limits on non economic damages, and our catch-all "other reform" measure. Of all the years we will consider in this analysis, 1986 is the most prominent in terms of the extent of liability reform measures."

## Liability reforms in 1986

Type of reform	Number of states	Percentage of liability premiums affected		State list <sup>a</sup>
		General liability	Medical mal-practice	
Modify joint and several liability	16	53%	55%	Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Utah, Washington, West Virginia, Wyoming <sup>a</sup>
Limits on liability	13	11%	14%	Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, New Hampshire, Tennessee, Utah, Wyoming
Limits on non economic damages	10	14%	12%	Alaska, Colorado, Florida, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Washington
Limits on punitive damages	6	9%	7%	Colorado, Florida, Minnesota, New Hampshire, New Mexico, Oklahoma
<b>Other reforms in 1986:</b>				
Modify collateral source rule	5	13%	9%	Colorado, Connecticut, Indiana, Michigan, Minnesota
Provide for structured or periodic payments	7	12%	10%	Alaska, Connecticut, Iowa, Maine, Michigan, Utah, Washington
Modify dram shop rules	11	17%	18%	Arizona, Colorado, Connecticut, Indiana, Maryland, Michigan, Montana, New Hampshire, Tennessee, Utah, Wyoming
Modify statute of limitations	4	5%	5%	Colorado, Connecticut, Maine, Washington
Limit attorney contingency fees	4	5%	3%	Connecticut, Maine, New Hampshire, Wisconsin

<sup>a</sup> Colorado, Utah, and Wyoming abrogated joint and several liability in 1986. The remaining states modified the doctrine.

**Change in real total annual insurer loss and premiums, by line 1985-1988  
(in \$ millions)**

	Losses	Premiums	Loss Ratio 85	Loss Ratio 88
General liability	\$-4.71	\$ 5678	1.12	0.62
Medical malpractice	\$ - 531	\$ 1256	1.22	0.79
Automobile	\$ 7924	\$14201	0.75	0.71

**Conclusion**

“Wholly apart from the concern with whether the stringency of the present liability system is optimal, it is, however, clear that the liability reform efforts in the mid-1980s did serve a constructive function. Before these reform efforts were enacted, liability markets were in substantial disarray. Insurance was too unprofitable to be offered at these rates over the long run. Many insurance companies denied coverage to parties seeking insurance. During this disruptive period, motels closed swimming pools, municipalities shut down playgrounds, and many firms withheld innovative but potentially risky products from the market.”

**“Insurance, like any other factor of production, should have a ready supply sold at a price that reflects its long-run cost. The liability reform efforts of the mid-1980s did more than constrain the spiraling costs of insurance. They stabilized insurance markets, and thereby fostered the sound functioning of the economy.”**

# *Tort Cost Trends: An International Perspective*

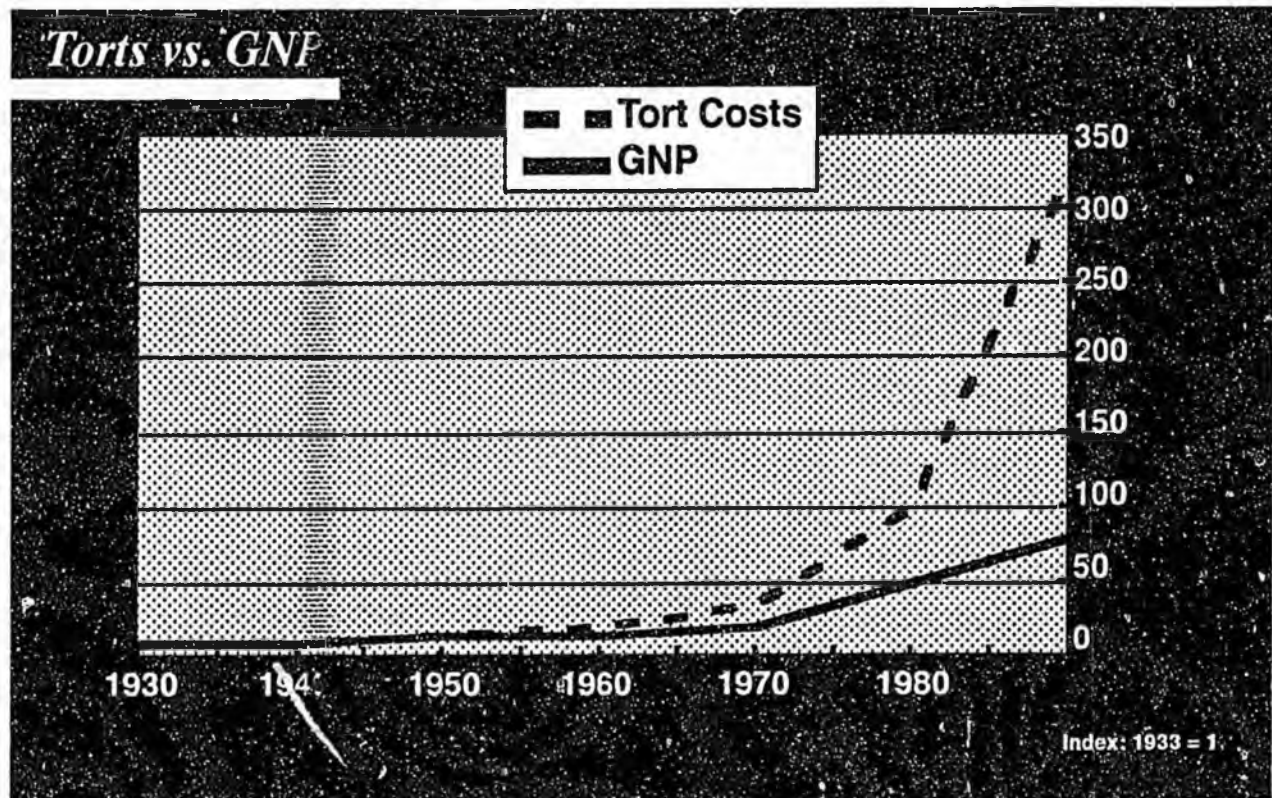
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## **Excerpts from the Tillinghast Report**

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Alaskans for Liability Reform  
Post Office Box 201668  
Anchorage, Alaska 99520  
(907) 561-6250

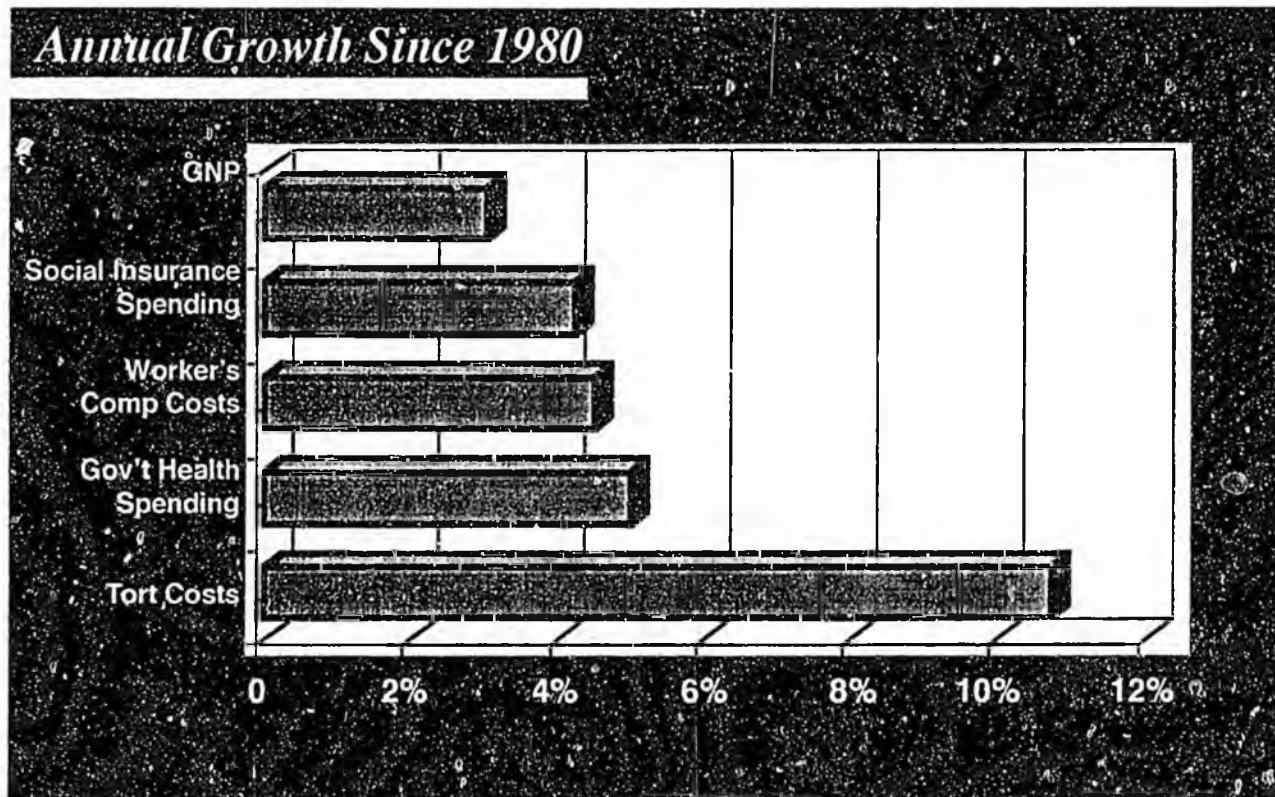
# How Does Tort Cost Escalation Compare With GNP Growth?



■ Tort cost growth far outstripped GNP growth since 1930, increasing 300 times over this 57-year period, compared with a 50-fold increase for GNP.

■ Until shortly after World War II, growth in both tort costs and the GNP ran fairly parallel. Only in the late 1940s and early 1950s did the two diverge, with tort costs consistently outpacing GNP growth.

# Since 1980, Cost Increases Have Leveled Off for All Social Systems Save Torts

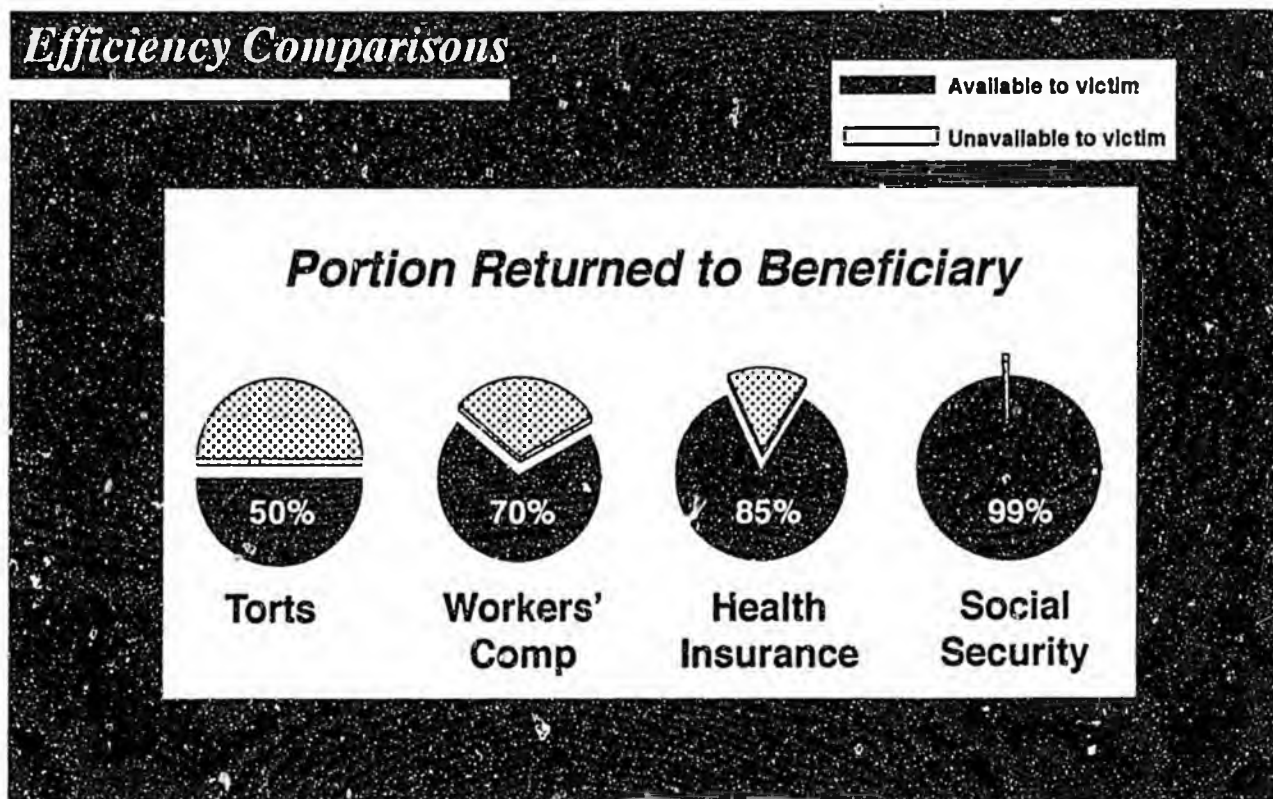


■ As noted, cost escalation has moderated for all social systems but torts. Between 1980 and 1987, for example, tort costs rose at an annual rate of 16%, or 10.6% when adjusted for inflation. This compares with the following annual increases (also adjusted for inflation) of:

- 5% for government health expenditures
- 4.5% for workers' compensation costs
- 4.2% for Social Security expenditures
- 2.7% for GNP.

# *In the Final Analysis, the Tort System Does Not Effectively Serve Victims' Needs*

## *Efficiency Comparisons*



■ If the tort system is judged as a method of compensating accident victims for their losses, it is both inefficient and unfair. Inefficient, because only half – or less – of the cost goes toward any form of compensation for victims. Unfair, because many victims receive no compensation at all.

HIGHLIGHTS FROM:

# The Effect of 1980s Tort Reform Legislation on General Liability and Medical Malpractice Insurance

by:

W. KIP VISCUSI

Department of Economics, Duke University, Durham, NC 27708

RICHARD J. ZECKHAUSER

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“Liability insurance markets in the mid-1980s were in disarray, with rapidly escalating awards and significant company losses. Substantial pressures were exerted on state legislatures to ease the burdens imposed by liability costs, and the policy process responded in many states. In this article, we examine the effect of those reforms. In particular, we seek to discover whether the tort reforms enacted in the mid-1980s had any effect on the claims paid by insurance companies or the premiums paid by consumers.

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## **Liability reforms, 1985-1987**

“Following the explosion in liability premiums in 1985, states became much more interested in liability reforming 1986 [see table]. The most prominent of the 1986 measures were the modifications of joint and several liability rules adopted by 16 states, which composed more than half of all premiums for general liability and medical malpractice. Three other reform measures were adopted in at least ten states: limits on liability, limits on non economic damages, and our catch-all “other reform” measure. Of all the years we will consider in this analysis, 1986 is the most prominent in terms of the extent of liability reform measures.”

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Type of reform	Number of states	Percentage of liability premiums affected		State list
		General liability	Medical mal-practice	
Modify joint and several liability	16	53%	55%	Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Utah, Washington, West Virginia, Wyoming <sup>a</sup>
Limits on liability	13	11%	14%	Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, New Hampshire, Tennessee, Utah, Wyoming
Limits on non economic damages	10	14%	12%	Alaska, Colorado, Florida, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Washington
Limits on punitive damages	6	9%	7%	Colorado, Florida, Minnesota, New Hampshire, New Mexico, Oklahoma
<b>Other reforms in 1986:</b>				
Modify collateral source rule	5	13%	9%	Colorado, Connecticut, Indiana, Michigan, Minnesota
Provide for structured or periodic payments	7	12%	10%	Alaska, Connecticut, Iowa, Maine, Michigan, Utah, Washington
Modify dram shop rules	11	17%	18%	Arizona, Colorado, Connecticut, Indiana, Maryland, Michigan, Montana, New Hampshire, Tennessee, Utah, Wyoming
Modify statute of limitations	4	5%	5%	Colorado, Connecticut, Maine, Washington
Limit attorney contingency fees	4	5%	3%	Connecticut, Maine, New Hampshire, Wisconsin

<sup>a</sup> Colorado, Utah, and Wyoming abrogated joint and several liability in 1986. The remaining states modified the doctrine.

**Change in real total annual insurer loss and premiums, by line 1985-1988  
(in \$ millions)**

	<b>Losses</b>	<b>Premiums</b>	<b>Loss Ratio 85</b>	<b>Loss Ratio 88</b>
General liability	\$-4871	\$ 5678	1.12	0.62
Medical malpractice	\$ - 531	\$ 1256	1.22	0.79
Automobile	\$ 7924	\$14201	0.75	0.71

**Conclusion**

“Wholly apart from the concern with whether the stringency of the present liability system is optimal, it is, however, clear that the liability reform efforts in the mid-1980s did serve a constructive function. Before these reform efforts were enacted, liability markets were in substantial disarray. Insurance was too unprofitable to be offered at these rates over the long run. Many insurance companies denied coverage to parties seeking insurance. During this disruptive period, motels closed swimming pools, municipalities shut down playgrounds, and many firms withheld innovative but potentially risky products from the market.”

**“Insurance, like any other factor of production, should have a ready supply sold at a price that reflects its long-run cost. The liability reform efforts of the mid-1980s did more than constrain the spiraling costs of insurance. They stabilized insurance markets, and thereby fostered the sound functioning of the economy.”**

**State of Alaska**  
**Department of Commerce  
and Economic Development**  
**Division of Insurance**

Division of Insurance  
P.O. Box 110808  
Juneau, AK 99811-0808  
Phone (907) 465-2627 573

Ninth Floor, State Office Building  
333 Willoughby Avenue  
Juneau, Alaska 99801  
FAX (908) 465-3422

**FAX Transmittal**

**From:** Barbara Thurston

**Date:** January 14, 1994

**To:** Rosa Jerrel

**Company:**

**Fax Number:** 789-3433

**Number of Pages:** 2

**Hard Copy to Follow:** No

Here is the information you requested on General Liability rate changes. This is a history of the rate changes filed by the Insurance Services Office (ISO) which files on behalf of most of the companies selling General Liability Insurance in Alaska.

As you can see, there are several different types of policies here...I've marked with Xs the type of filing (basic limits versus excess limits) and the type of form (professional, premises, or products liability) for each rate change.

This information was taken off a special report generated by ISO in response to my request for historical information. While I believe that it is all correct, I have not verified all the details myself, so can't guarantee that this information is free of any errors.

Let me know if you have any questions as to how to interpret this chart.

## History of ISO General Liability Rate Changes In Alaska

Approval Date	Rate Change (%)	Basic Limits	Increased Limits	Products	Premises		Professional Liability	
				All	Manufacturers & Contractors	Owners, Landlords, & Tenants	Physicians, Surgeons, and Dentists	Hospitals
1/7/84	7.8	x	x	x				
2/1/84	128.8	x	x				x	
2/17/84	40.1		x					x
10/4/84	21	x				x		
10/31/84	20	x		x				
11/29/84	5.6		x				x	
2/2/85	1.3	x			x			
2/6/85	10.7		x		x	x		
7/10/85	23.1	x				x		
11/1/85	43.8	x	x	x				
2/28/86	50	x					x	
4/14/86	7.6	x			x			
8/13/86	15.4		x					x
7/3/86	8.9		x			x		
9/5/86	3.3		x		x			
2/27/87	12.1	x				x		
3/2/87	30.8	x	x	x				
4/3/87	35	x					x	
6/15/87	31.8	x			x			
8/4/87	9.7		x					x
3/30/88	-4.3	x		x				
7/19/89	-20		x	x				
1/11/90	-13.7	x		x				
1/12/90	1.1	x	x			x		
2/19/92	8.1	x			x	x		
2/19/92	-12		x		x	x		
4/1/92	14	x				x		
11/13/92	-3.2		x		x	x		
1/7/93	0		x					x
4/16/93	-2.5	x			x	x		
8/24/93	0	x					x	

- Notes:
- 1 The effective date of an ISO filing is generally 3 to 6 months after the approval date
  - 2 The rate change is the overall average, different "classes" (e.g. neurosurgeon vs general practitioner) will probably have different changes apply to them
  - 3 "Basic" and "Increased" refer to the limits of liability under the policy. Basic limits are about \$25,000; everything else is an increased limit. People who only purchase basic limits won't be affected by an increased limit rate change. People who purchase increased limits are affected by both basic and increased limit changes.
  - 4 "Products", "Premises", and "Professional Liability" are different types of policies. Products includes completed operations (such as a construction project); Premises is what is purchased by most small businesses for risks occurring on their premises.
  - 5 The filing approved on 4/1/92 only applied to governmental subdivisions.

# NFIB Alaska

National Federation of  
Independent Business

Resa Jerrel, State Director

## Civil Liability 1994 Survey Results



# NFIB

National Federation of  
Independent Business

Distributed by:  
Alaskans For Liability Reform  
P.O. Box 201668, Anchorage, AK 99520

The following questions and answers concerning tort reform are the results from the NFIB Alaska (National Federation of Independent Business) 1994 state ballot. Those surveyed were asked:

**Should the legislature reform the Alaska tort law system by making the following changes?:**

-----

**a.) Require construction and product liability actions involving personal injury, death, or property damage to be filed within six years of the accident?**

**YES 89% NO 4% UNDECIDED 7%**

**b.) Prevent injury claimants from naming only those businesses and individuals who have the deepest pockets?**

**YES 79% NO 9% UNDECIDED 12%**

**c.) Limit punitive damages to not more than three times that awarded for actual loss, or \$200,000, whichever is greater?**

**YES 83% NO 8% UNDECIDED 9%**

**d.) Limit award for economic loss to \$50,000 when the deceased is not survived by children, spouse or other dependent?**

**YES 78% NO 14% UNDECIDED 8%**

**e.) Make the courts and juries aware of any other awards the claimants may have received and deduct that amount from judgments?**

**YES 84% NO 10% UNDECIDED 6%**

**f.) Prohibit suits for damages if the injury or death occurred while the plaintiff was committing a crime?**

**YES 96% NO 3% UNDECIDED 1%**

**HIGHLIGHTS FROM:**

# **Product Liability News**

Issue No. 7, 1993

**A Publication of The Product Liability Coordinating Committee**

1001 19th St. N., #800  
Arlington, V.A. 22209  
703-276-5045

Distributed by Alaskans For Liability Reform  
P.O. Box 201668  
Anchorage, AK 99520  
Phone: 561-6250

## **Senate Committee Passes S. 687 by Wide Margin, Sets Stage for Victory in '94**

"The (U.S.) Senate Commerce Committee recently approved the Product Liability Fairness Act, S. 687, by an unprecedented 16-4 vote."

Said Bill Fay, executive director Product Liability Coordinating Committee...

"This extremely strong vote is a testament to the leadership of the senators who are spearheading the Senate movement to change our current product liability system.

For the first time, a majority of the democrats on the Commerce Committee voted in favor of product liability legislation. The 'aye' vote on November 9 included all of the committee's nine republicans and seven of the 11 committee democrats. In past efforts in the Commerce Committee, the bill has never received more than five out of eleven democratic votes."

### **Sound Bites**

"In 1985, I opposed the legislation then being considered because I thought that it was skewed too much in favor of business. But sensible changes have been made over time to help consumers and promote fairness. Because of these changes, I now strongly support his product liability legislation."

*Sen. John D. Rockefeller (D-WV)  
in his opening statement at the  
Senate hearings on product  
liability in September*

"If a manufacturer could not count on limiting its liability to risks that were known or knowable at the time of manufacture or distribution, it would be discouraged from developing new and improved products for fear that later significant advances in scientific knowledge would increase its liability."

*Supreme Court of California  
Anderson v. Owens-Corning  
Fiberglass June 4, 1991*

"We are the only country in the world in which, if you improve a product, it can be used against you."

*Bill Fay, executive director of PLCC  
quoted in CoalVoice,  
Sept./Oct., 1993*

## Litigation Taxes: The Hidden Cost

How much do American consumers pay in hidden "litigation taxes" every year? Author Philip J. Hermann went directly to manufacturers, trade associations, insurance consultants, and others to find out. The results can be found in his book *The 96 Billion Dollar Game: You Are Losing*. Here are his findings:

Product/Service	Retail Amount	Litigation Cost	Percentage
Baseball	\$ 6.00	\$ 0.18	3.0%
Lawn Mower, Riding Rotary	700.00	42.00	6.0%
Ski Lift Ticket	40.00	2.00	5.0%
Step Ladder, 8-foot aluminum	119.00	23.86	20.0%
Maternity Delivery	1,200.00	399.50	33.0%
Hospital, 2 days for maternity	3,000.00	500.00	17.0%
DTP Vaccine	11.50	2.40	20.9%
Wheel Chair, Motorized	1,000.00	170.00	17.0%

**HIGHLIGHTS FROM:**

**American Consulting Engineers Council**  
**LIABILITY REPORT**

**Fourteenth Annual Professional Liability Survey Result 1992**

ACEC is a Washington, D.C. based national professional association representing over 5,000 private-practice consulting engineering firms. For more information, contact J. Laing Bowles at 202-347-7474

Distributed by Alaskans For Liability Reform  
P.O. Box 201668  
Anchorage, AK 99520  
Phone: 561-6250

## Claims

<u>Year</u>	<u>Claims Made Per 100 Firms</u>	<u>Claims Pending Per 100 Firms</u>
1992	45	82
1991	44	77
1990	40	60
1989	43	79
1988	47	84
1987	46	75

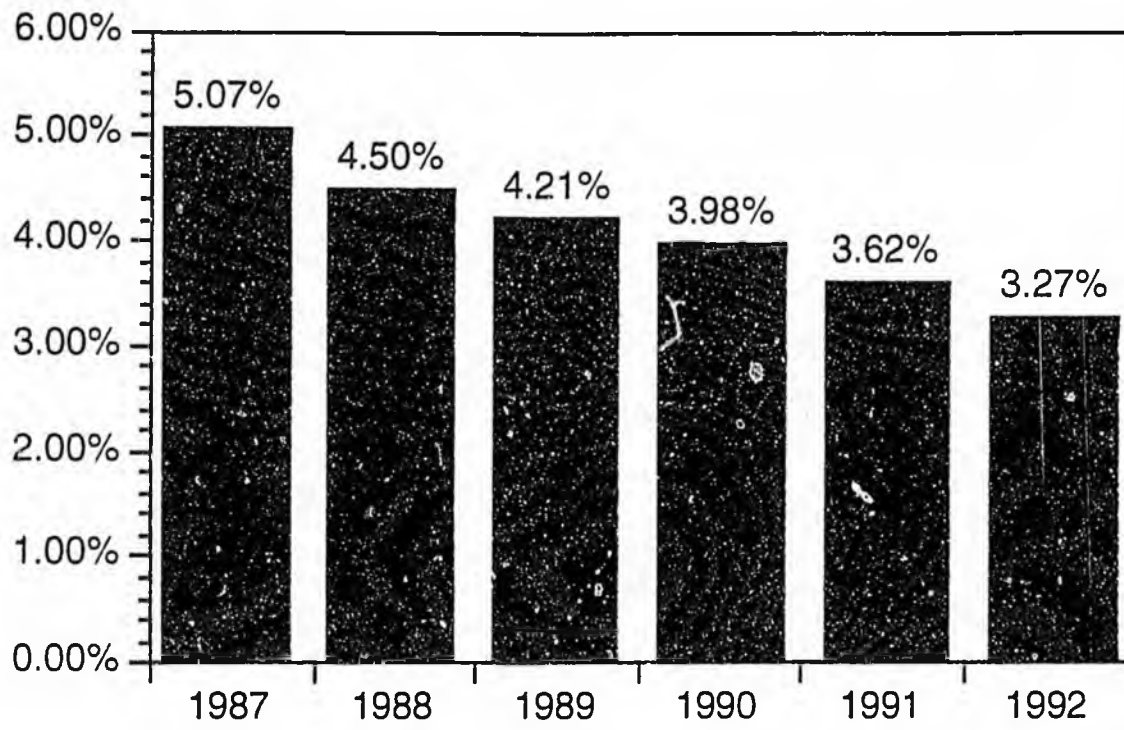
<u>Method of Resolution: 1992</u>	<u>Percent</u>
Negotiation	48 %
ADR: Mediation	10 %
Arbitration	2 %
Other ADR	3 %
Litigation	
Settled Prior to Court Award	20 %
Settled by Court Award	7 %
Other	10 %
Total	100 %

## Cost of Claims Settled

	<u>Defense</u>	<u>Award/Settlement</u>
By Firm	\$14,791	\$20,007
By Insurer	\$ 7,421	\$46,943

**Percentage of Claims Settled Without Any  
Payment to Claimant: 37%**

### Insurance Cost As A Percentage of Billings



# STATUTES OF LIMITATIONS - HOW DOES ALASKA COMPARE?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Attorney Malpractice	Oral Contract	Wrongful Death	Disfigurement/Real Property	Account/Debt	Open Personal Injury	Foreign/Personal Injury	Judgment/Personal Injury	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Tortious Trespass
Alaska	6/10/1yr AK key		6 yr 09.10.050	10 yr 09.10.030	6 yr 09.10.050		6/2 yr AK key		1 yr 45.14.505		10 yr 09.10.040		2 yr AK key		3/2 yr AK key		6 yr 09.10.070	
Arizona	3 yr 12-543		6 yr 12-548	10 yr 12-526	2 yr 12-542		2 yr 12-542		3 yr 12-543		4 yr 12-544		2 yr 12-542		no info		2 yr 12-542	
California	3 yr CCP338		4 yr CCP337	no info	1 yr CCP340		1 yr CCP340		4 yr CCP337		10 yr CCP337		3 yr CCP310		1 yr CCP340		3 yr CCP338	
Colorado	3 yr 13-80-101		3 yr 13-80-101	no info	no info		2 yr 13-80-102		6 yr 17-53-103		no info		2 yr 13-80-102		1 yr 13-80-103		no info	
Connecticut	3 yr 52-577		6 yr 52-576	10 yr 52-572	3 yr 52-577		3 yr 52-555		6 yr 52-576		20 yr** 52-598		2 yr 52-584		1 yr 52-585		3 yr 52-577	
Florida	4 yr 95-11		5 yr 95-11	no info	2 yr 95-11		3 yr 95-11		no info		5/20 yr 95-11		2 yr 95-11		4 yr 95-11		4 yr 95-11	
Georgia	2 yr 9-3-33		6 yr 9-3-21	no info	no info		4 yr 9-3-33		5 yr 9-3-25		5 yr 9-3-20		2 yr 9-3-71		1 yr 9-3-28		4 yr 9-3-30	
Illinois	5 yr 113-215		10 yr 113-206	no info	2 yr 113-213		2 yr 70-2-2		no info		20 yr 113-218		2 yr 113-212		no info		no info	
Indiana	6 yr 34-1-2-1		6 yr 34-1-2-1	no info	2 yr 34-1-2-2		2 yr 34-1-2		6 yr 34-1-2-1		10 yr 34-1-2-2		2 yr 34-1-19-1		2 yr 34-1-2-2		6 yr 34-1-2-1	
Massachusetts	3 yr 260-2A		6 yr 260-2	no info	3 yr 260-4		3 yr 299-2		no info		6 yr 260-2		3 yr 260-4		1 yr 260-5		3 yr 260-2A	
Michigan	6 yr 600.5813		6 yr 600.5807	no info	2 yr 600.5805		6 yr 600.5805		no info		10 yr 600.5809		2 yr 600.5805		2 yr 600.5809		no info	
Missouri	5 yr 516.120		5 yr 516.120	no info	5 yr 516.120		3 yr 537.100		5 yr 516.120		5 yr 516.120		2 yr 516.105		3 yr 516.130		5 yr 516.120	
New Jersey	6 yr 2A:14-1		6 yr 2A:14-1	no info	6 yr 2A:14-1		2 yr 2A:31-3		6 yr 2A:14-1		20 yr 2A:14-5		2 yr 2A:14-2		2 yr 2A:14-10		6 yr 2A:14-1	
New York	6 yr 60213		6 yr 60213	no info	3 yr 60214		2 yr 60214		no info		20 yr 60211		2.5 yr 60214		3 yr 60214		1 yr 60215	
North Carolina	3 yr 1-52		3 yr 1-52	no info	no info		2 yr 1-53		no info		10 yr 1-47		3 yr 1-15		1 yr 1-54		3 yr 1-52	
Oklahoma	4 yr 2305.09		15 yr 2305.06	no info	1 yr 2305.11		2 yr 2125.02		no info		no info		1 yr*** 2305.11		2 yr 2305.11		4 yr 2305.09	
Pennsylvania	2 yr 42-5524		4 yr 42-5525	no info	2 yr 42-5524		2 yr 42-5524		no info		4 yr 42-5525		2 yr 42-5524		2 yr 42-5524		2 yr 42-5524	
Texas	2 yr 016.003		4 yr 016.004	no info	2 yr 016.003		2 yr 016.003		4 yr 016.004		10 yr** 031.006		2 yr 016.003		no info		2 yr 016.003	
Virginia	2 yr 8.01-243		3 yr 8.01-246	no info	no info		2 yr 8.01-244		no info		20 yr 8.01-251		2 yr 8.01-243		no info		5 yr 8.01-243	
Washington	3 yr 4.16.081		6 yr 4.16.040	no info	3 yr 4.16.080		3 yr 4.16.080		no info		10 yr 4.16.020		no info		3 yr 4.16.08		3 yr 4.16.080	
Wisconsin	6 yr 893.93		6 yr 893.43	no info	6 yr 893.53		3 yr 893.54		no info		20 yr 893.40		3 yr 893.53		2 yr 893.93		6 yr 893.52	

**OTHER STATES KEY:**

\*Foreign \*\*Forum \*\*\*Real/Personal \*\*\*\*Personal  
 †acc. 110 pers. - precedes no. ††EPTL - precedes no.  
 †††CPAR - precedes no. ††††CFRL - precedes no.

**ALASKA KEY:**

Fraud - 6 yr=09.10.120(if state, political or public corp), 10 yr=09.10.230(land patent), 1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)  
 Wrongful Death - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Ct. Op. 9290, 2 yr=09.16.580  
 Disfigurement - 09.10.055 statute ruled unconstitutional by Sup.Ct. Op. 3290  
 Personal Injury - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Ct. Op. 5790, 2 yr=09.10.070  
 Medical Malpractice - 09.10.070 (after age of majority, 09.10.040 for minors)  
 Forfeiture - 3 yr=09.10.060, 2 yr=09.10.070

# The Informer

Newsletter of Alaskans for Liability Reform

January 1994

Vol. 3 No. 1

## Fair Awards for Non-Economic Loss

Incorrect information about a cap on non-economic awards has been fed to the public, primarily by trial lawyers who reap the benefit of outrageously high awards.

For example, it has been stated that the cap would be unfair for senior citizens and that calls for reform are fueled by high medical premiums. Neither statement is accurate.

HB 292 extends the definition of non-economic losses to include claims for wrongful death, adds loss of consortium, clarifies what constitutes non-economic loss, and removes the need to prove "negligence," which is difficult to establish.

The bill in no way alters compensation for economic loss, such as medical care or wheelchairs. It does establish a cap of \$500,000 for non-economic loss only - that's an extra \$500,000 over and above out-of-pocket expenses to an injured party.

Even the trial lawyers agree that the cap affects only 3% of lawsuits filed for personal injury or wrongful death.

An example of 97% of these lawsuits: A person is injured by a privately owned truck

whose owner has only \$250,000 total in insurance and assets - so no award higher than that is possible. If the same person was injured by a state-owned truck, they could be awarded millions for non-economic loss simply because the state has virtually unlimited funds and insurance.

Is that fair? HB 292 establishes a fair cap for non-economic loss that applies to all plaintiffs and defendants and prevents inflated settlements based solely on ability to pay.

### Effects of HB 292 on Non-Economic Awards

Past Wage Loss	(Fixed)	No Effect
→ Future Wage Loss	(Fixed)	<del>No Effect</del>
Past Medical Cost		No Effect
Future Medical Cost		No Effect
Past Rehabilitation Costs		No Effect
Future Rehabilitation Costs		No Effect
Other Past Economic Losses		No Effect
Other Future Economic Losses		No Effect
Past Retirement Benefit		No Effect
Future Retirement Benefit		No Effect
Pain, Suffering, Inconvenience		Limit \$500,000
Physical Impairment, Disfigurement		Limit \$500,000
Loss of Enjoyment of Life		Limit \$500,000
Loss of Consortium		Limit \$500,000

## Call to ACTION

### *YOU can make the difference*

As of 1/19/94:

HB 292 was in the House Labor and Commerce Committee. Please contact committee members, let them know you support the bill and urge them to move this bill into the House.

To get HB 292 moving, call or FAX:

Rep. Bill Hudson, chairman	phone # 465-3744	FAX # 465-6790	Rep. Joe Green	phone # 465-4931	FAX # 465-3516
Rep. Eldon Mulder	465-2647	465-3518	Rep. Brian Porter	465-4930	465-3834
Rep. Bill Williams	465-3324	465-3793	Rep. Joe Sitton	465-2327	465-2294
Rep. Jerry Mackie	465-4925	465-3517			

## ALR strives for needed reforms

ALR has doubled its efforts to get information about civil liability laws out to business and government leaders and to support passage of bills that will enact needed reforms.

Horace Hunt is now the Executive Director. He brings 16 years experience in marketing and public relations to ALR. Bruce Pozzi joined us recently to implement a public relations campaign that will get the attention of legislators, associations and the public. Lobbyists Sam Kito and Jerry Reinwand are working in Juneau to gain support for House Bill 292 and we have the backing of a number of lobbyists representing other groups.

As this legislative session begins, House Bill 292 is in the House Labor and Commerce Committee and a companion bill has been introduced in the Senate.

# STATUTES OF LIMITATIONS – HOW DOES ALASKA COMPARE?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Malpractice	Attorney Malpractice	Oral Contract	Wrongful Death	Design/Improve Real Property	Account/Debt	Personal Injury	Forum/Foreign	Judgment	Malicious Prosecution	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Trespass
Alaska	6/10/ 1 yr†	no info	6 yr	10 yr	6 yr	6 yr	6/2 yr †	6 yr †	1 yr	6/2 yr †	10 yr	2 yr	2 yr	6 yr	3/2 yr †	2 yr	6 yr	2 yr	6 yr
Arizona	3 yr	2 yr	6 yr	10 yr	2 yr	3 yr	2 yr	8 yr	3 yr	2 yr	4 yr*	1 yr	2 yr	no info	no info	1 yr	2 yr	2 yr	2 yr
California	3 yr	3 yr	4 yr	no info	1 yr	2 yr	1 yr	10 yr	4 yr	1 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr	3 yr	3 yr
Colorado	3 yr	3 yr	3 yr	no info	no info	3 yr	2 yr	2 yr	6 yr	2 yr	no info	2 yr	2 yr	2 yr	2 yr	1 yr	1 yr	no info	no info
Connecticut	3 yr	3 yr	6 yr	15 yr	3 yr	3 yr	2 yr	7 yr	6 yr	3 yr	20 yr **	no info	2 yr	2 yr	2 yr	1 yr	2 yr	3 yr	3 yr
Florida	4 yr	no info	5 yr	no info	2 yr	4 yr	2 yr	4 yr	no info	4 yr	5/20 yr	4 yr	2 yr	4 yr	4 yr	4 yr	2 yr	4 yr	4 yr
Georgia	2 yr	4 yr	6 yr	no info	no info	4 yr	2 yr	8 yr	4 yr	2 yr	5 yr*	2 yr	2 yr	2 yr	4 yr	1 yr	1 yr	4 yr	4 yr
Illinois	5 yr	5 yr	10 yr	no info	2 yr	5 yr	2 yr	10 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	1 yr	no info	no info	no info
Indiana	6 yr	no info	6 yr	no info	2 yr	6 yr	2 yr	10 yr	6 yr	2 yr	10 yr	2 yr	2 yr	6/2 yr ***	2 yr	2 yr	6 yr	6 yr	6 yr
Massachusetts	3 yr	3 yr	6 yr	no info	3 yr	6 yr	3 yr	3 yr	no info	3 yr	6 yr	no info	3 yr	3 yr	1 yr	3 yr	3 yr	3 yr	3 yr
Michigan	6 yr	no info	6 yr	no info	2 yr	6 yr	3 yr	6 yr	no info	3 yr	10 yr	2 yr	2 yr	3 yr	2 yr	1 yr	no info	no info	no info
Missouri	5 yr	no info	5 yr	10 yr	5 yr	5 yr	3 yr	10 yr	5 yr	5 yr	5 yr	2 yr	2 yr	5 yr	3 yr	2 yr	5 yr	5 yr	5 yr
New Jersey	6 yr	6 yr	6 yr	20 yr	6 yr	6 yr	2 yr	10 yr	6 yr	2 yr	20 yr	6 yr	2 yr	6 yr	2 yr	1 yr	6 yr	6 yr	6 yr
New York	6 yr	6 yr	6 yr	10 yr	3 yr	6 yr	2 yr	no info	no info	3 yr	20 yr	1 yr	2.5 yr	3 yr	3 yr	1 yr	1 yr	1 yr	1 yr
North Carolina	3 yr	3 yr	3 yr	20 yr	no info	3 yr	2 yr	6 yr	no info	3 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr	3 yr	3 yr
Ohio	4 yr	4 yr	15 yr	21 yr	1 yr	6 yr	2 yr	10 yr	no info	2 yr	no info	1 yr	1 yr	2 yr	1 yr	1 yr	4 yr	4 yr	4 yr
Pennsylvania	2 yr	2 yr	4 yr	21 yr	2 yr	4 yr	2 yr	12 yr	no info	2 yr	4 yr	2 yr	2 yr	2 yr	2 yr	1 yr	2 yr	2 yr	2 yr
Texas	2 yr	2 yr	4 yr	no info	2 yr	2 yr	2 yr	10 yr	4 yr	2 yr	10 yr**	1 yr	2 yr	2 yr	no info	1 yr	2 yr	2 yr	2 yr
Virginia	2 yr	no info	5 yr	15 yr	no info	3 yr	2 yr	5 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	no info	5 yr	5 yr	5 yr
Washington	3 yr	3 yr	6 yr	10 yr	3 yr	3 yr	3 yr	6 yr	no info	3 yr	10 yr	no info	no info	3 yr	3 yr	2 yr	3 yr	3 yr	3 yr
Wisconsin	6 yr	6 yr	6 yr	30 yr	6 yr	6 yr	3 yr	no info	no info	3 yr	20 yr	6 yr	3 yr	6 yr	2 yr	2 yr	6 yr	6 yr	6 yr

**OTHER STATES KEY:**

\*Foreign \*\*Forum  
\*\*\*to Real/2 Personal \*\*\*\*Personal

**† ALASKA KEY:**

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1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)  
**Wrongful Death** - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Ct. Op. 3290, 2 yr=09.55.580  
**Design** - 09.10.055 statute ruled unconstitutional by Sup.Ct. Op. 3290  
**Personal Injury** - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Ct. Op. 3290, 2 yr=09.10.070  
**Medical Malpractice** - 09.10.070 (after age of majority, 09.10.040 for minors)  
**Forfeiture** - 3 yrs=09.10.060, 2 yrs=09.10.070

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## Our Goals Equal Alaskans' Wishes

There are a lot of statistics on these pages, but we'd like you to take few extra minutes to examine the tables so you'll understand exactly where Alaskans stand with current civil liability statutes.

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One example of abuse is the statute of limitations on the design and improvement of a building. Many suits name only the original builder because they have the best ability to pay and ignore the fact that upkeep of the building has been out of their control for decades. Our statutes have no cutoff date for the responsibility of designers and construction companies. The only other category in Alaska's laws with no statute of limitations is murder.

In House Bill 160, ALR proposed a 10-year statute of limitation for liability suits based on construction and design. This bill passed the House but was derailed when Senator Donley increased the time to 15 years and added a 15-year statute of repose. Buildings will be judged by today's standards for work done three decades ago and those responsible for the building's upkeep during those 30 years may not even be named in a suit.

Legislators need to compare our statutes of limitations with those in other states and to recognize that the majority of Alaskans support fair reforms of our civil liability laws.

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**YES 89%    NO 4%    UNDECIDED 7%**

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d) Limit award for economic loss to \$50,000 when the deceased is not survived by children, spouse or other dependent?

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**YES 84%    NO 10%    UNDECIDED 6%**

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**YES 96%    NO 3%    UNDECIDED 1%**

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### The Informer

Janet B. Taylor  
Managing Editor

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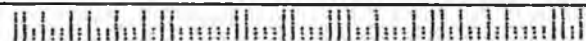
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# The Informer

Newsletter of Alaskans for Liability Reform

January 1994

Vol. 3 No. 1

## Fair Awards for Non-Economic Loss

Incorrect information about a cap on non-economic awards has been fed to the public, primarily by trial lawyers who reap the benefit of outrageously high awards.

For example, it has been stated that the cap would be unfair for senior citizens and that calls for reform are fueled by high medical premiums. Neither statement is accurate.

HB 292 extends the definition of non-economic losses to include claims for wrongful death, adds loss of consortium, clarifies what constitutes non-economic loss, and removes the need to prove "negligence," which is difficult to establish.

The bill in no way alters compensation for economic loss, such as medical care or wheelchairs. It does establish a cap of \$500,000 for non-economic loss only - that's an extra \$500,000 over and above out-of-pocket expenses to an injured party.

Even the trial lawyers agree that the cap affects only 3% of lawsuits filed for personal injury or wrongful death.

An example of 97% of these lawsuits: A person is injured by a privately owned truck

whose owner has only \$250,000 total in insurance and assets - so no award higher than that is possible. If the same person was injured by a state-owned truck, they could be awarded millions for non-economic loss simply because the state has virtually unlimited funds and insurance.

Is that fair? HB 292 establishes a fair cap for non-economic loss that applies to all plaintiffs and defendants and prevents inflated settlements based solely on ability to pay.

### Effects of HB 292 on Non-Economic Awards

Past Wage Loss	No Effect
Future Wage Loss (taxed)	<del>No Effect</del>
Past Medical Cost	No Effect
Future Medical Cost	No Effect
Past Rehabilitation Costs	No Effect
Future Rehabilitation Costs	No Effect
Other Past Economic Losses	No Effect
Other Future Economic Losses	No Effect
Past Retirement Benefit	No Effect
Future Retirement Benefit	No Effect
Pain, Suffering, Inconvenience	Limit \$500,000
Physical Impairment, Disfigurement	Limit \$500,000
Loss of Enjoyment of Life	Limit \$500,000
Loss of Consortium	Limit \$500,000

## Call to ACTION

*YOU can make the difference*

As of 1/19/94:

HB 292 was in the House Labor and Commerce Committee. Please contact committee members, let them know you support the bill and urge them to move this bill into the House.

To get HB 292 moving, call or FAX:

	<u>phone #</u>	<u>FAX #</u>		<u>phone #</u>	<u>FAX #</u>
Rep. Bill Hudson, chairman	465-3744	465-6790	Rep. Joe Green	465-4931	465-3516
Rep. Eldon Mulder	465-2647	465-3518	Rep. Brian Porter	465-4930	465-3834
Rep. Bill Williams	465-3424	465-3793	Rep. Joe Sitton	465-2327	465-2294
Rep. Jerry Mackie	465-4925	465-3517			

## ALR strives for needed reforms

ALR has doubled its efforts to get information about civil liability laws out to business and government leaders and to support passage of bills that will enact needed reforms.

Horace Hunt is now the Executive Director. He brings 16 years experience in marketing and public relations ALR. Bruce Pozzi joined us recently to implement a public relations campaign that will get the attention of legislators, associations and the public. Lobbyists Sam Kito and Jerry Reinwand are working in Juneau to gain support for House Bill 292 and we have the backing of a number of lobbyists representing other groups.

As this legislative session begins, House Bill 292 is in the House Labor and Commerce Committee and a companion bill has been introduced in the Senate.

# STATUTES OF LIMITATIONS – HOW DOES ALASKA COMPARE?

Includes statute section number

	Fraud	Conversion	Written Contract	Recovery of Land	Malpractice	Attorney Oral Contract	Wrongful Death	Design/Improve Real Property	Account/Debt	Personal Injury	Forum/Foreign	Judgment Prosecution	Malpractice	Medical Malpractice	Property Damage	Forfeiture/Penalty	Libel/Slander	Trespass
Alaska	6/10/ 1 yr†	no info	6 yr	10 yr	6 yr	6 yr	6/2 yr †	6 yr †	1 yr	6/2 yr †	10 yr	2 yr	2 yr †	6 yr	3/2 yr †	2 yr	6 yr	
Arizona	3 yr	2 yr	6 yr	10 yr	2 yr	3 yr	2 yr	8 yr	3 yr	2 yr	4 yr*	1 yr	2 yr	no info	no info	1 yr	2 yr	
California	3 yr	3 yr	4 yr	no info	1 yr	2 yr	1 yr	10 yr	4 yr	1 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr	
Colorado	3 yr	3 yr	3 yr	no info	no info	3 yr	2 yr	2 yr	6 yr	2 yr	no info	2 yr	2 yr	2 yr	1 yr	1 yr	no info	
Connecticut	3 yr	3 yr	6 yr	15 yr	3 yr	3 yr	2 yr	7 yr	6 yr	3 yr	20 yr **	no info	2 yr	2 yr	1 yr	2 yr	3 yr	
Florida	4 yr	no info	5 yr	no info	2 yr	4 yr	2 yr	4 yr	no info	4 yr	5/20 yr	4 yr	2 yr	4 yr	4 yr	2 yr	4 yr	
Georgia	2 yr	4 yr	6 yr	no info	no info	4 yr	2 yr	8 yr	4 yr	2 yr	5 yr*	2 yr	2 yr	4 yr	1 yr	1 yr	4 yr	
Illinois	5 yr	5 yr	10 yr	no info	2 yr	5 yr	2 yr	10 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	1 yr	no info	
Indiana	6 yr	no info	6 yr	no info	2 yr	6 yr	2 yr	10 yr	6 yr	2 yr	10 yr	2 yr	2 yr	6/2 yr ***	2 yr	2 yr	6 yr	
Massachusetts	3 yr	3 yr	6 yr	no info	3 yr	6 yr	3 yr	3 yr	no info	3 yr	6 yr	no info	3 yr	3 yr	1 yr	3 yr	3 yr	
Michigan	6 yr	no info	6 yr	no info	2 yr	6 yr	3 yr	6 yr	no info	3 yr	10 yr	2 yr	2 yr	3 yr	2 yr	1 yr	no info	
Missouri	5 yr	no info	5 yr	10 yr	5 yr	5 yr	3 yr	10 yr	5 yr	5 yr	5 yr	2 yr	2 yr	5 yr	3 yr	2 yr	5 yr	
New Jersey	6 yr	6 yr	6 yr	20 yr	6 yr	6 yr	2 yr	10 yr	6 yr	2 yr	20 yr	6 yr	2 yr	6 yr	2 yr	1 yr	6 yr	
New York	6 yr	6 yr	6 yr	10 yr	3 yr	6 yr	2 yr	no info	no info	3 yr	20 yr	1 yr	2.5 yr	3 yr	3 yr	1 yr	1 yr	
North Carolina	3 yr	3 yr	3 yr	20 yr	no info	3 yr	2 yr	6 yr	no info	3 yr	10 yr	no info	3 yr	3 yr	1 yr	1 yr	3 yr	
Ohio	4 yr	4 yr	15 yr	21 yr	1 yr	6 yr	2 yr	10 yr	no info	2 yr	no info	1 yr ****	2 yr	1 yr	1 yr	1 yr	4 yr	
Pennsylvania	2 yr	2 yr	4 yr	21 yr	2 yr	4 yr	2 yr	12 yr	no info	2 yr	4 yr	2 yr	2 yr	2 yr ****	2 yr	1 yr	2 yr	
Texas	2 yr	2 yr	4 yr	no info	2 yr	2 yr	2 yr	10 yr	4 yr	2 yr	10 yr**	1 yr	2 yr	2 yr	no info	1 yr	2 yr	
Virginia	2 yr	no info	5 yr	15 yr	no info	3 yr	2 yr	5 yr	no info	2 yr	20 yr	2 yr	2 yr	5 yr	no info	no info	5 yr	
Washington	3 yr	3 yr	6 yr	10 yr	3 yr	3 yr	3 yr	6 yr	no info	3 yr	10 yr	no info	no info	3 yr ****	3 yr	2 yr	3 yr	
Wisconsin	6 yr	6 yr	6 yr	30 yr	6 yr	6 yr	3 yr	no info	no info	3 yr	20 yr	6 yr	3 yr	6 yr	2 yr	2 yr	6 yr	

### OTHER STATES KEY:

\* Forum  
\*\* Personal  
\*\*\* Personal  
\*\*\*\* Personal

### † ALASKA KEY:

Fraud - 6 yr=09.10.120(if state, political or public corp), 10 yr=09.10.230(land patent),  
1 yr after discovery=12.10.020(breach of fiduciary, misconduct by police)

Wrongful Death - 6 yr=09.10.55 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.55.580  
Design - 09.10.055 statute ruled unconstitutional by Sup.Crt. Op. 3290

Personal Injury - 6 yr=09.10.055 (construction) statute ruled unconstitutional by Sup.Crt. Op. 3290, 2 yr=09.10.070

Medical Malpractice - 09.10.070 (after age of majority, 09.10.040 for minors)

Forfeiture - 3 yrs=09.10.060, 2 yrs=09.10.070

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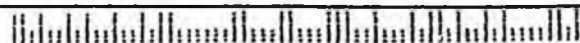
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Brett JACKSON and Linda Estrada, Petitioners,

v.

John POWER, M.D.; Fairbanks Memorial Hospital; Lutheran Hospital and Homes Society of America, Inc.; Emergency Room, Inc.; William H. Montano, M.D.; and George Vrablick, M.D., Respondents.

No. S-1677.

Supreme Court of Alaska.

Oct. 16, 1987.

Medical malpractice action was brought against hospital. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., denied patient summary judgment and petition for review was filed. The Supreme Court, Burke, J., held that: (1) hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician under enterprise liability; (2) genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public precluded summary judgment for patient on apparent authority theory; and (3) general acute care hospital's duty to provide physicians for emergency room care was nondelegable.

Affirmed in part, reversed in part, and remanded.

#### 1. Hospitals ⇌7

Doctrine of corporate negligence holds that hospital owes independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise medical treatment provided by members of its medical staff.

#### 2. Hospitals ⇌7

Generally accepted rule is that where employment relationship exists between physician and hospital, hospital will be liable, under traditional rule of respondeat superior, for any negligence or malpractice which results in injury to hospital patient,

and conversely, no liability attaches to hospital when physician is independent contractor.

#### 3. Hospitals ⇌7

Hospital could not be held vicariously liable for negligence or malpractice of independent contractor/physician, committed while treating patient in hospital's emergency room under theory of enterprise liability.

#### 4. Hospitals ⇌7

Two factors are relevant to finding of ostensible agency in hospital context, including whether patient looks to institution, rather than individual physician, for care and whether hospital holds out physician as its employee.

#### 5. Principal and Agent ⇌137(2)

Under theory of agency by estoppel, there must be actual reliance upon representation of principal by person injured.

#### 6. Principal and Agent ⇌99

Traditional rules of apparent authority are applicable to hospital-independent contractor/physician relationship.

#### 7. Judgment ⇌181(33)

Genuine issue of material fact as to whether hospital held itself out as providing emergency care services to public and whether patient reasonably believed that physician was employed by hospital to deliver emergency room service precluded summary judgment for patient in medical malpractice action against hospital on theory of apparent authority.

#### 8. Principal and Agent ⇌159(1)

Application of apparent authority in hospital/emergency room physician situation does not require express representation to patient that treating physician is employee of hospital; nor is direct testimony as to reliance required absent evidence that patient knew or should have known that treating physician was not hospital employee when treatment was rendered.

#### 9. Hospitals ⇌7

Hospital licensed as general acute care hospital had duty to provide emergency

room services and part of duty was to provide physician care in emergency room.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

#### 10. Hospitals ⇐7

General acute care hospital's duty to provide physicians for emergency room care was nondelegable, and thus hospital could not shield itself from liability by claiming that it was not responsible for results of negligently performed health care when law imposed duty on hospital to provide that health care.

#### 11. Master and Servant ⇐315

Nondelegable duty is established exception to rule that employer is not liable for negligence of independent contractors.

#### 12. Hospitals ⇐7

Rule that general acute care hospital's duty to provide physicians for emergency room care is nondelegable does not change standard of care with which physician must comply and does not extend to situations where patient is treated by his or her own doctor in emergency room provided for convenience of doctor.

#### 13. Hospitals ⇐7

Acute care hospital was vicariously liable as a matter of law for negligence or malpractice committed by physician on a patient who came to hospital seeking emergency room services; physician was provided by hospital as part of its nondelegable duty to provide nonnegligent physician care in emergency room.

Michael Cohn, Dan A. Hensley, L. Ames Luce, Law Offices of L. Ames Luce, Anchorage, for petitioners.

James J. Delaney, Howard A. Lazar, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, for respondents Fairbanks Memorial Hosp. and Lutheran Hosp. & Homes Soc.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for respondents John Power, M.D. and Emergency Room, Inc.

David C. Crosby, Council & Crosby, Juneau, for Health Ass'n of Alaska, amicus curiae.

### OPINION

BURKE, Justice.

This case presents an issue of first impression in this state, concerning health care delivery in hospital emergency rooms. The question that we must resolve is whether a hospital may be held vicariously liable for negligent health care rendered by an emergency room physician who is not an employee of the hospital, but is, instead, an independent contractor. We hold that the hospital in this case had a non-delegable duty to provide non-negligent physician care in its emergency room and, therefore, may be liable.

#### I

On the evening of May 22, 1981, sixteen year old Brett Jackson was seriously injured when he fell from a cliff. Jackson was airlifted to Fairbanks Memorial Hospital (FMH). Shortly after midnight, he was received in the hospital's emergency room.

Jackson was examined by respondent John Power, M.D., one of two emergency room physicians on duty at the time. Dr. Power's examination revealed multiple lacerations and abrasions of the patient's face and scalp, multiple contusions and lacerations of the lumbar area, several broken vertebrae and gastric distension, suggesting possible internal injuries. Dr. Power ordered several tests, but did not order certain procedures that could have been used to ascertain whether there had been damage to the patient's kidneys. Jackson had, in fact, suffered damage to the renal arteries and veins which supply blood to and remove blood from the kidneys. This damage, undetected for approximately 9 to 10 hours after Jackson's arrival at FMH, ultimately caused Jackson to lose both of his kidneys.

#### II

Jackson and his mother, Linda Estrada, (hereinafter referred to collectively as Jack-

son) filed suit. In their complaint they alleged negligence in the diagnosis, care and treatment Jackson received at FMH. Jackson moved for partial summary judgment seeking to hold FMH vicariously liable as a matter of law for the care rendered by Dr. Power. In support of his motion, Jackson advanced three separate theories: (1) enterprise liability; (2) apparent authority; and (3) non-delegable duty.

After briefing and argument, the superior court held, as a matter of law, that FMH could not be held liable under an enterprise liability theory, and that genuine issues of material fact precluded summary judgment on the two remaining theories.<sup>1</sup> We subsequently granted Jackson's petition for review of the court's ruling.

### III

[I] Initially, it is important to clarify the exact issue that we have been asked to resolve. Jackson has conceded, for purposes of this appeal, that Dr. Power was not an employee of FMH, but an independent contractor employed by respondent Emergency Room, Inc. (ERI), and that ERI and FMH are separate legal entities. Traditional rules of *respondeat superior* are, therefore, inapposite. Jackson also makes no claim that FMH was itself negligent in its selection, retention, or supervision of Dr. Power. Consequently, we have no occasion to consider the doctrine of corporate

1. The superior court also rejected three motions for summary judgment by various respondents seeking to have Linda Estrada's claim against them dismissed on the ground that it was time barred by the statute of limitations. None of the respondents cross-petitioned for review of that issue.
2. The doctrine of corporate negligence holds that a hospital owes an independent duty to its patients to use reasonable care to insure that physicians granted hospital privileges are competent, and to supervise the medical treatment provided by members of its medical staff. See *Tucson Medical Center v. Misevch*, 113 Ariz. 34, 545 P.2d 958, 960 (1976); *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 170 (1984); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). See generally, Janulis & Hornstein, *Damned If You Do, Damned If*

negligence.<sup>2</sup> Jackson asks us to resolve only whether a hospital should be vicariously liable, as a matter of public policy, for the negligence or malpractice<sup>3</sup> of an independent contractor/physician, committed while treating a patient in the hospital's emergency room, under theories of (1) enterprise liability; (2) apparent authority; or (3) non-delegable duty.

### IV

As previously noted, this case presents this court with an issue of first impression.<sup>4</sup>

[2] The generally accepted rule is that, where an employment relationship exists between the physician and the hospital, the hospital will be liable, under the traditional rule of *respondeat superior*, for any negligence or malpractice which results in injury to a hospital patient. *E.g.*, *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 11, 143 N.E.2d 3, 9 (N.Y.1957); *Weldon v. Seminole Municipal Hospital*, 709 P.2d 1058, 1059 (Okla.1985). Conversely, no liability attaches to the hospital when the physician is an independent contractor. *E.g. Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867, 871 (1986); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 908, 490 N.E.2d 823, 827 (1986). See generally Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Phy-*

*You Don't: Hospitals' Liability for Physicians' Malpractice*, 64 Neb.L.Rev. 689, 702-08 (1985); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence*, 32 Rutgers L.J. 342, 360-72 (1979).

3. Jackson has yet to prove that any negligence or malpractice did in fact occur. In order to resolve the issue presented here, however, we must assume negligence. We, of course, express no opinion as to the actual merits of Jackson's claim.
4. In *Baker v. Werner*, 654 P.2d 263, 267 n. 6 (Alaska 1982), Baker appealed the trial court's rejection of his theory of vicarious liability in a wrongful death action against a physician, hospital and attending nurse. Because we upheld the jury's finding that the defendants were not negligent, we did not reach the merits of the issue, "any theory of vicarious liability [being] irrelevant." *Id.*

sicians, 50 Wash.L.Rev. 385 (1975) (hereinafter "Comment, *Hospital Responsibility*").

Jackson concedes that Dr. Power was an independent contractor; however, he asserts that Alaska's law of *respondeat superior* mandates a result different than that which would be reached under the general rule.<sup>5</sup> Jackson argues that our decision in *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972), establishes that the law of "vicarious legal responsibility" in Alaska is "enterprise liability." Thus, he contends, if the enterprise impacts society and the negligent act occurred during an activity performed for the benefit or in the interest of the enterprise, the enterprise is liable.

[3] Jackson's argument proves unpersuasive. First, Jackson's interpretation of *Fruit* is flawed. A close reading of that case shows that we did not view "enterprise liability" as a separate theory of liability or a distinct cause of action. Rather, enterprise liability was seen as one of two widely accepted theories used by courts to justify imposition of vicarious liability in an established employer/employee context. *Id.* at 138-39. As was noted in *Fruit*:

[T]he "enterprise" theory . . . finds liability whenever the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury.

....  
The rule of *respondeat superior* however, . . . is limited to requiring an enterprise to bear the loss incurred as a result of the employee's negligence. The acts of the employee need be so connected to his employment as to justify requiring that the employer bear that loss.

5. The trial court decided the issue of the applicability of enterprise liability as a matter of law. We scrutinize questions of law under a *de novo* or independent judgment standard of review. *Hicklin v. Orbeck*, 565 P.2d 159, 163 n. 6 (Alaska 1977), *rev'd on other grounds*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). When reviewing a question of law, it is our "duty to adopt the rule of law that is most persuasive in light of precedent, reason and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

*Id.* at 140-41 (emphasis added) (footnotes omitted). See generally Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

Additionally, our decisions since *Fruit* show that we have applied the theory of *respondeat superior* only in an employer/employee context, unless one of the well established exceptions to that rule exists. See, *Parker Drilling v. O'Neill*, 674 P.2d 770, 775 (Alaska 1983); *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 349 (Alaska 1982); *Hammond v. Bechtel Inc.*, 606 P.2d 1269, 1273 (Alaska 1980); *Barton v. Lund*, 563 P.2d 875, 876 (Alaska 1977); *Luth v. Rogers & Babler Construction*, 507 P.2d 761, 763-64 (Alaska 1973). Jackson's theory presents no such exception.

Finally, the cases from other jurisdictions cited by Jackson provide little support for his theory; those cases deal only with theories of apparent agency or corporate negligence. Moreover, although at least two courts appear to have implicitly indicated a willingness to recognize a theory of enterprise liability, see *Alden v. Providence Hospital*, 382 F.2d 163, 166 (D.C. Cir.1967); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 579 P.2d 970, 977 & n. 5 (1978), to date, no court has explicitly embraced that concept.<sup>6</sup>

In short, Jackson's theory of enterprise liability is not yet the law in Alaska.

## V

Jackson next argues that the trial court erred in holding that genuine issues of material fact prevented it from granting summary judgment on his theory of apparent authority.

6. Some commentators have suggested an enterprise tort doctrine as a basis for imposing liability for any tort occurring as part of the hospital enterprise. See Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. Legal Med. 1, 3-5 (1983); Comment, *Hospital Responsibility*, *supra* at 418-19.

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Although we have recognized the doctrine of apparent authority in other contexts, see *City of Delta Junction v. Mack Trucks*, 670 P.2d 1128, 1129-30 (Alaska 1983) (national distributor and local franchise); *Perkins v. Willacy*, 431 P.2d 141, 142 (Alaska 1967) (husband and wife), this is the first time we have been asked to apply this doctrine to a hospital-independent contractor/physician relationship.

Cases from other jurisdictions show a strong trend toward liability against hospitals that permit or encourage patients to believe that independent contractor/physicians are, in fact, authorized agents of the hospitals.<sup>7</sup> These courts have held hospitals vicariously liable under a doctrine labeled either "ostensible" or "apparent" agency or "agency by estoppel." See *Porubiansky v. Emory University*, 156 Ga. App. 602, 275 S.E.2d 163, 168 (1981); *Paintsville Hospital v. Rose*, 683 S.W.2d 255, 257 (Ky.1985); *Mehlman v. Powell*, 378 A.2d 1121 (Md.1977); *Grewe v. Mt. Clemens General Hospital*, 404 Mich. 240, 273 N.W.2d 429, 432-33 (1978); *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443 (1979); *Hannola v. City of Lakewood*, 68 Ohio App.2d 61, 426 N.E.2d 1187, 1192 (1980); *Weldon*, 709 P.2d at 1060; *Themins v. Emanuel Lutheran Charity Bd.*, 54 Or.App. 901, 637 P.2d 155, 158-59 (1982); *Adamski v. Tacoma General Hospital*, 20 Wash.App. 98, 570 P.2d 970, 977 (1978); see generally Janulis & Hornstein, *supra* at 696-702. Although courts and commentators often use these terms interchangeably, they are not theoretically identical.

[4] The "ostensible" or "apparent" agency theory is based on Section 429 of the Restatement (Second) of Torts (1965), which provides:

One who employs an independent contractor to perform services for another which are accepted in the reasonable be-

7. The only exception to this modern trend of which we are aware is *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 493 N.E.2d 867 (1986). In *Greene*, the court specifically refused to apply apparent agency to a hospital-emergency room doctor relationship because "[t]he absence of the power to control the decision-mak-

ing of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

Two factors are relevant to a finding of ostensible agency: (1) whether the patient looks to the institution, rather than the individual physician, for care; and (2) whether the hospital "holds out" the physician as its employee. *Simmons v. St. Clair Memorial Hospital*, 332 Pa.Super. 444, 481 A.2d 870, 874 (1984); see also *Irving v. Doctors Hospital of Lake Worth*, 415 So.2d 55, 60-61 (Fla.App.1982); *Smith v. St. Francis Hospital*, 676 P.2d 279, 282 (Okla.App.1984).

[5] "Agency by estoppel," in contrast, is predicated on the arguably stricter standard of the Restatement (Second) of Agency § 267 (1958). Section 267 provides:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Under this theory, there must be actual reliance upon the representations of the principal by the person injured. *Mehlman*, 378 A.2d at 1123.

Thus, theoretically, there need be no causal relationship between the principal's conduct and the plaintiff's reliance to warrant a conclusion of ostensible agency; such a causal relationship and such a change of position, however, is the essence of estoppel to deny agency.

Janulis & Hornstein, *supra* at 697.

[6] Jackson, in essence, asks us to adopt a rule of ostensible agency. FMH,

ing of the emergency room physician demands that the independent relationship between hospital and emergency room physician be recognized." *Id.* 101 Ill.Dec. at 547, 498 N.E.2d at 871. We view *Greene* as an aberration dependent upon reasoning which is not particularly persuasive.

on the other hand, requests that we follow *Greene* and refuse to apply this doctrine in the hospital-physician context or, alternatively, that we adopt a rule which is essentially estoppel by agency. Although we find nothing antithetical about applying the doctrine of apparent authority to a hospital-independent contractor/physician relationship, we perceive no reason to adopt a special rule in this area. We believe that traditional rules of apparent authority provide sufficient guidelines.

In *City of Delta Junction*, we defined the doctrine of apparent authority in Alaska as follows:

Apparent authority to do an act is created as to third persons by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

670 P.2d at 1130 (quoting Restatement (Second) of Agency § 27, at 103 (1958)). We went on to emphasize that it is the principal's conduct that gives rise to his liability and not the conduct of the alleged agent; "one dealing with an alleged agent must prove that the principal was responsible for the appearance of authority, by doing something or permitting the alleged agent to do something that led others, including the plaintiff, to believe that the agent had the authority he purported to have." *Id.* (quoting W. Seavy, *Handbook of The Law of Agency* § 8, at 13 (1964)).

Relying on *City of Delta Junction*, the trial court held that existing factual disputes required Jackson to submit his apparent authority theory to the jury. When reviewing the denial of a motion for summary judgment, we must determine whether genuine issues of material fact exist, and if not, whether the moving party is entitled to judgment as a matter of law. Alaska R.Civ.P. 56(c); *Shatting v. Dilling-*

8. The clinics continued to provide an additional physician for the graveyard shift on a rotation basis.

9. Jackson testified at his deposition that he recalled being placed in the helicopter but had no recollection of being removed from it, being

*ham City School District*, 617 P.2d 9, 11 (Alaska 1980). In reaching this decision we must draw all reasonable inferences in favor of the non-moving party and against the movant. *Id.*

Drawing all reasonable inferences in the light most favorable to FMH, the record shows the following: at the time of Jackson's accident, FMH was the only civilian hospital north of Anchorage providing emergency room services in Alaska. Two road signs in Fairbanks note the location of the hospital. However, neither of these signs specifically refer to the existence of emergency room services. The signs were not constructed or situated by FMH. In fact, FMH does no advertising at all.

From the time of its establishment in 1972, FMH has never staffed its emergency room with its own physician employees, but has always relied upon local physicians to provide that service. Prior to the formation of ERI in 1977, FMH's emergency room was serviced by three local clinics, each providing one physician on a nightly basis. After 1977, ERI provided one physician on a nightly basis who worked a 14-hour graveyard shift (6:00 p.m. to 8:00 a.m.).<sup>8</sup> While on duty in the emergency room, the ERI physician was "in charge" and no FMH personnel were responsible for either scheduling or monitoring the emergency room physicians. No contractual arrangement existed between FMH and ERI for the provision of emergency room physicians.

In apparent non-life threatening situations the first person an incoming patient sees at the emergency room is the admissions clerk. Immediately adjacent to the clerk's desk is a sign which indicated that physicians from ERI were working in the emergency room. Although the exact state of Jackson's awareness is not entirely clear, there is evidence suggesting that he was admitted in a conscious state.<sup>9</sup> Nei-

taken to FMH, or of meeting the doctor who treated him. On the other hand, the medical records indicate that Jackson appeared to be neurologically stable, completely oriented and gave no indication that he was unconscious or in distress. Moreover, at his deposition, Dr.

ther Jackson nor his mother selected FMH as the place of treatment nor Dr. Power as Jackson's physician.

[7, 8] From the above, a jury could conclude that FMH held itself out as providing emergency care services to the public. A jury could also find that Jackson reasonably believed that Dr. Power was employed by the hospital to deliver emergency room service. It is also possible, however, that a jury could find to the contrary.<sup>10</sup>

Unless the evidence allows but one inference, the question of apparent authority is one of fact for the jury. *City of Delta Junction*, 670 P.2d at 1131; *Themins*, 637 P.2d at 159; *Adamski*, 579 P.2d at 978. In the case at bar, the record is not susceptible to a single inference. Thus, the trial court properly denied summary judgment on this issue.

#### VI

Jackson's final point is that the trial court erred in refusing to rule, as a matter of law, that FMH, as a general acute care hospital, has a non-delegable duty to provide non-negligent physician care in its emergency room. In essence, Jackson's position is that when a hospital undertakes to operate an emergency room as an integral part of its health care enterprise, public policy dictates that it not be allowed to insulate itself from liability by shunting that responsibility onto another.

FMH, on the other hand, argues that a hospital does not have a non-delegable duty to guarantee safe treatment in its emergency room. Physicians, not hospitals, FMH asserts, have a duty to practice medicine non-negligently. Thus, according to FMH,

Power testified that "Jackson was talking" and "completely oriented."

10. In this regard, we agree with the weight of authority that application of apparent authority in the hospital/emergency room physician situation does not require an express representation to the patient that the treating physician is an employee of the hospital. Nor is direct testimony as to reliance required absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was rendered. See cases cited *supra* p. 1380.

a hospital cannot be held to have delegated away a duty it never had.

The trial court ruled that "[t]here cannot be a non-delegable duty if there is no contractual relationship." Since it was unclear from the evidence whether or not there was any contractual relationship between ERI and FMH, the court denied Jackson's motion for summary judgment. Initially, we note the trial court's erroneous characterization of the issue. By holding that there can be no "non-delegable duty if there is no contractual relationship," the court confused the question of the existence of a duty with the issue of whether a duty is non-delegable. The flaw in this reasoning is self-evident. As FMH points out, a party cannot be held to have delegated away a duty it never had. Thus, the threshold question is whether FMH had a duty to provide emergency room care. Only if it did, is it necessary to determine what that duty entailed.

[9] FMH is licensed as a "general acute care hospital."<sup>11</sup> As such, it is required to comply with state regulations designed to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." AS 18-20.060. These regulations provided, at the time of Jackson's accident, that an acute care hospital shall "insure that a physician is available to respond to an emergency at all times." Former 7 AAC 12.110(c)(2).<sup>12</sup> Thus, at a minimum, the law imposed a duty on FMH to provide emergency care physicians on a 24-hour basis.

FMH, however, voluntarily assumed a much broader duty. At the time of Jackson's accident, FMH was accredited by the

11. A general acute care hospital is a "facility which provides hospitalization for inpatient medical care of acute illness or injury and obstetric care." 7 AAC 12.100.

12. In 1983, this regulation was amended to provide that "[a] general acute care hospital *must* provide ... [among other services not relevant here] emergency care services." 7 AAC 12.105 (emphasis added).

Joint Committee on the Accreditation of Hospitals (JCAH).<sup>13</sup> In order to receive and maintain accreditation,<sup>14</sup> FMH had to comply with the JCAH's standards promulgated in the *Accreditations Manual For Hospitals, Emergency Services*. Standard I mandates that all accredited hospitals implement a well defined plan for emergency care based on community need and the capability of the hospital. The JCAH standards also mandate, among other things, that: (1) FMH's emergency room be directed by a physician member of the active medical staff (Standard II); (2) FMH's emergency room be integrated with other units and departments of the hospital (Standard III); (3) that emergency care be guided by written policies and procedures; and (4) that the quality of care be continually reviewed, evaluated and assured through establishment of quality control mechanisms (Standard V).

Additionally, FMH's own bylaws provided for the establishment and maintenance of an emergency room. Article X, section 1(d)(1)(b) of FMH's Medical Bylaws provides for an emergency room as one of the services of the hospital. Article XI, section 3(e) provides for the creation of an emergency room committee which is required among other things to:

- (a) formulate rules and regulations for the continuous coverage of the emergency room; and
- (b) supervise the clinical work in that department.

[10] Based upon the above, it cannot seriously be questioned that FMH had a

13. The JCAH was formed in the early 1950's by the American College of Surgeons, the American College of Physicians, the American Hospital Association, and the American Medical Association. Its purpose was to establish minimum hospital standards for patient care. For details of the program, see Dornette, *The Legal Impact on Voluntary Standards in Civil Actions Against the Health Care Provider*, N.Y.L.Sch.L.Rev. 925, 925-28 (1977); Holbrook & Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospitals' Quality Assurance Committee Records*, 16 Washburn L.J. 54, 57 (1976).

14. Hospitals voluntarily seek accreditation for financial and professional prestige reasons. First, accreditation by the JCAH means the hos-

pital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395b-1 (1982); 42 C.F.R. § 405.1901(d) (1986). See generally, Dornette, *supra* n. 13 at 927, Holbrook & Dunn, *supra* n. 13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. See generally, *American Medical Association Directory of Accredited Residencies 3* (1975-76), quoted in Dornette, *supra* n. 13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. See Holbrook & Dunn, *supra* n. 13.

[11] A non-delegable duty is an established exception to the rule that an employer is not liable for the negligence of an independent contractor. W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on The Law of Torts*, § 71 at 511-12 (5th ed. 1984). According to the late Professor Prosser, such a duty "may be imposed by statute, by contract, by franchise or by charter, or by the common law." *Id.* Among the duties considered non-delegable are the following:

[T]he duty of a carrier to transport its passengers in safety, of a railroad to fence its tracks properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common passageways, to make repairs according to covenant, or to use proper

hospital qualifies to participate in the federal Medicare and Medicaid programs. Accreditation by JCAH is deemed substantial compliance with the Medicare conditions of participation. 42 U.S.C. § 1395b-1 (1982); 42 C.F.R. § 405.1901(d) (1986). See generally, Dornette, *supra* n. 13 at 927, Holbrook & Dunn, *supra* n. 13, at 58. Second, JCAH accreditation is often a prerequisite to obtaining approval of internship and residency programs. See generally, *American Medical Association Directory of Accredited Residencies 3* (1975-76), quoted in Dornette, *supra* n. 13, at 928. Finally, the institution's reputation and standing in the community is affected by whether it receives JCAH accreditation. See Holbrook & Dunn, *supra* n. 13.

care in making them, and no doubt others.

*Id.* (footnotes omitted). However:

It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than *the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.*

*Id.* at 512 (emphasis added). *Accord, Alaska Airlines v. Sweat*, 568 P.2d 916, 925-26 (Alaska 1977).

Our principal decision on non-delegable duty is *Sweat*, 568 P.2d 916. In that case, *Sweat* sued Alaska Airlines for injuries sustained in an air crash while traveling aboard a Chitina Air Service plane. *Id.* at 922. Chitina had been engaged under a contract with Alaska Airlines to service a portion of Alaska Airlines' regularly scheduled routes. *Id.* at 921, 922. Alaska Airlines contended that Chitina was an independent contractor and therefore it was not liable for Chitina's negligence. *Id.* at 923. The trial court found Alaska Airlines vicariously liable based on Restatement (Second) of Torts § 428. *Id.* On appeal, we affirmed the trial court's decision on the alternative ground that Alaska Airlines owed a common law nondelegable duty of safety to its passengers. *Id.* at 925. We reasoned:

We believe that the responsibility of a common carrier for the safety of its passengers is so important that the carrier should not be permitted to transfer it to another. A scheduled common carrier such as Alaska is given a monopoly or semi-monopoly primarily for the purpose of furnishing safe and reliable scheduled air transportation. It should not be permitted to barter away its responsibility to the traveling public by means of contracts with other carriers. If this were permissible, an air carrier could avoid liability by engaging in independent contracts for furnishing food, maintenance of its planes and conceivably even for

supplying crews. Regardless of whether such contracts may be permitted by regulatory authorities, the traveling public is entitled to look for protection to the certificated carrier responsible for the scheduled route.

*Id.* at 926.

We have little trouble concluding that patients, such as Jackson, receiving treatment at a hospital emergency room are as deserving of protection as the airline passengers in *Sweat*. Likewise, the importance to the community of a hospital's duty to provide emergency room physicians rivals the importance of the common-carriers' duty for the safety of its passengers. We also find a close parallel between the regulatory scheme of airlines and hospitals. Undoubtedly, the operation of a hospital is one of the most regulated activities in this state. Besides the license,<sup>15</sup> and certificate of need,<sup>16</sup> requirements mentioned above, a hospital must comply with state regulations promulgated to control its activities, AS 18.20.070, 7 AAC 12.610; adopt a state approved risk management program "to minimize the risk of injury to patients," AS 18.20.075; and undergo "annual inspections and investigations" of its facilities, AS 18.20.080. Failure to comply with these statutory requirements can lead to suspension or revocation of the hospital's license. AS 18.20.050.

The hospital regulatory scheme and the purpose underlying it (to "provide for the development, establishment, and enforcement of standards for the care and treatment of hospital patients that promote safe and adequate treatment" AS 18.20.010), along with the statutory definition of a hospital, (an institution devoted primarily to providing diagnosis, treatment or care to individuals, AS 18.20.130(3)), manifests the legislature's recognition that it is the hospital as an institution which bears ultimate responsibility for complying with the mandates of the law. It is the hospital that is required to ensure compliance with the regulations and thus, relevant to the instant case, it is the hospital that bears final ac-

15. See AS 18.20.020.

16. See AS 18.07.031.

countability for the provision of physicians for emergency room care. We, therefore, hold that a general acute care hospital's duty to provide physicians for emergency room care is non-delegable. Thus, a hospital such as FMH may not shield itself from liability by claiming that it is not responsible for the results of negligently performed health care when the law imposes a duty on the hospital to provide that health care.

We are persuaded that the circumstances under which emergency room care is provided in a modern hospital mandates the rule we adopt today. Not only is this rule consonant with the public perception of the hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered, it also treats tort liability in the medical arena in a manner that is consistent with the commercialization of American medicine. Finally, we simply cannot fathom why liability should depend upon the technical employment status of the emergency room physician who treats the patient. It is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the hospital will be responsible for the care rendered by physicians it has a duty to provide.

[12] This holding is necessarily limited. We do not change the standard of care with which a physician must comply, nor do we extend the duty which we find non-delegable beyond its natural scope. Our holding does not extend to situations where the patient is treated by his or her own doctor in an emergency room provided for the convenience of the doctor. Such situations are beyond the scope of the duty assumed by an acute care hospital. Rather our holding is limited to those situations where a patient comes to the hospital, as an institu-

tion, seeking emergency room services and is treated by a physician provided by the hospital. In such situations, the hospital shall be vicariously liable for damages proximately caused by a physician's negligence or malpractice.

[13] In the instant case, Jackson came to FMH as an institution seeking emergency room services. Dr. Power was a physician FMH had a non-delegable duty to provide. FMH is, therefore, vicariously liable as a matter of law for any negligence or malpractice that Dr. Power may have committed. Accordingly, the trial court's ruling on this issue must be reversed. Jackson is entitled to partial summary judgment on the issue of FMH's vicarious liability.

## VII

For the reasons outlined above, the trial court's denial of summary judgment on Jackson's theories of enterprise liability and apparent authority are **AFFIRMED**. However because we hold that FMH has a non-delegable duty to provide non-negligent physician care in its emergency room, the trial court's denial of summary judgment on the theory of non-delegable duty, is **REVERSED** and **REMANDED** with instructions to enter partial summary judgment on the issue of FMH vicarious liability in favor of Jackson.

**AFFIRMED** in part; **REVERSED** in part; and **REMANDED**.

MOORE, J., not participating.

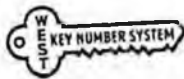


this conclusion, we do not suggest that a court apportionment would be inappropriate in other circumstances, so long as the employer has notice and an opportunity to be heard. Under the facts of this case, however, since Gossett chose the board as the appropriate forum, the board should decide the question.

[2] We reject Gossett's argument that we rule that a 50/50 apportionment is appropriate under the facts of this case as this is a factual determination which cannot be decided in the first instance on appeal. See *Parker v. Northern Mixing Co.*, 756 P.2d 881 (Alaska 1988).

The judgment of the superior court is reversed and this case is remanded to the superior court with instructions to remand it to the Workers' Compensation Board to apportion the settlement proceeds received in the third-party action from the defendant Holmes between the claim of Perry Gossett and that of Marilyn Gossett.

REVERSED AND REMANDED.



Phillip C. LAKE; Cynthia B. Lake; Jerry R. Coburn; Mary L. Coburn; and Work-mald Fire Systems, Inc.; Petitioners,

v.

CONSTRUCTION MACHINERY, INC.; JLG Industries, Inc.; McDonald Industries, Inc.; and McDonald Industries Alaska, Inc.; Respondents.

No. S-3027.

Supreme Court of Alaska.

Feb. 23, 1990.

Employee who received workers' compensation benefits for accident brought

third-party settlement to squeeze in ahead of the employer to claim some of the settlement proceeds. On the contrary, we conclude that the statute gives the employer a lien priority for the excess recovery from the third-party claim. Employee's request that we give Marilyn Gossett some of the excess recovery is denied and dismissed.

damage action against several third parties. After the Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., ruled that third parties were entitled to assert, as partial defense, that employee's employer was negligent, employee brought petition for review. The Supreme Court, Burke, J., held that although third parties could not reduce their total liability to employee in proportion to percentage of negligence attributable to employer, evidence of employer's negligence could be relevant and admissible to prove that employer was entirely at fault, or that employer's fault was superseding cause of employee's injury.

Reversed and remanded.

1. Statutes  $\S$ 190, 223.1

Ordinarily, unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when seemingly unambiguous statute must be considered in conjunction with another act.

2. Workers' Compensation  $\S$ 2249

In tort action brought by injured employee who had recovered workers' compensation benefits, defendants could not reduce their total liability to employee in proportion to percentage of any negligence attributable to employer; however, evidence of employer's negligence could be relevant and admissible to prove that employer was entirely at fault or that employer's fault was superseding cause of injury, with result that jury could allocate all or none of total fault to employer. AS 09.17-080, 23.30.055.

3. Workers' Compensation  $\S$ 2142.20

As result of exclusive liability provision of workers' compensation law, employ-

Marilyn, of course, is not claiming any portion of the excess recovery. The purpose of the apportionment she sought was to separate her recovery from the recovery by the employee. Only a portion of the latter can be considered excess recovery by the employee.

Employer argues that the board forum for deciding the apportionment and that the 50/50 division Gossett is inappropriate.

argues that "a judgment in Mr. Gossett's favor, with his claim being dismissed. As a result, we ruled that it had no effect on any part of Employer's apportioning some of the recovery by Mr. Gossett to his claim. His statement is inaccurate because, above, the judgment actually was in favor of Perry and

that no apportionment had been made as between the claim of Perry and Marilyn. Had judgment been rendered solely in favor of Perry, his claim would have been dismissed. The basis for concluding that the settlement apportioned 100 percent of the recovery to Perry. It is evident from the fact that Perry actually entered that the settlement was considered action to avoid apportionment is necessary by Marilyn is not a "credit against recovery by the employee" and thus may be applied to a credit against recovery by the employer.<sup>4</sup>

In this case, it is our view that the settlement should be made on a 50/50 basis. At the hearing before the board, Perry requested that the board apportion the settlement. In reaching its decision, the board and Marilyn split the money from the third-party action. Do you check when you get it? A: We have one checking account where it goes."

It appears to have understood the question presented as

that his wife, Marilyn Gossett, should receive half the excess recovery for her claim for loss of

excess recovery must first be apportioned to the employer for benefits it pays. The initial disbursement of the settlement until employee is no longer entitled to compensation benefits. The statute in subsection .015(g) allows a party to the

er may be joined as third-party defendant in employee's tort action only when another party asserts express indemnity claim against it. AS 23.30.055.

Robert M. Libbey, Libbey & Suddock, Anchorage, for petitioners, Phillip C. Lake, Cynthia B. Lake, Jerry R. Coburn and Mary L. Coburn.

Gary N. Bloom, Harbaugh & Bloom, Spokane, Wash., for petitioners, Jerry R. Coburn and Mary L. Coburn.

Constance Cates Ringstad and Winston S. Burbank, Call, Barnett & Burbank, Fairbanks, for petitioner, Wormald Fire Systems, Inc.

Michael C. Geraghty and David D. Floerchinger, Staley, DeLisio, Cook & Sherry, Inc., Anchorage, for respondent, Const. Machinery, Inc.

R. Craig Hesser, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for respondent, JLG Industries, Inc.

Paul H. Ashton and Colleen J. Moore, Guess & Rudd, Anchorage, for respondents, McDonald Industries, Inc. and McDonald Industries, Alaska, Inc.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

### OPINION

BURKE, Justice.

An employee injured in the course of his employment brought a damage action against several third parties. He filed this petition after the superior court ruled that the third parties were entitled to assert, as a partial defense, that the plaintiff's employer was negligent. The question that we must decide is whether the employer is one of the parties among whom the finder of fact must allocate fault pursuant to the

1. The distributor's sixth affirmative defense stated:

Pursuant to AS 09.17.080, any amount of damages which the plaintiffs may have incurred as a result of the aforementioned accident must be reduced by the percentage of fault attributable to [the employer].

rule of modified joint and several liability found in AS 09.17.080, thereby reducing the liability of the third parties to the employee. For the reasons set forth below we hold that the employer's negligence, if any, is relevant, but that its use by the jury is limited.

### I

The underlying facts are not in dispute. Phillip Lake suffered an injury in the course and scope of his employment with Wormald Fire Systems, Inc., when he fell fifty feet from a manlift.

Lake filed products liability claims against the manlift manufacturer, JLG Industries, Inc.; the distributor, Construction Machinery, Inc.; and several intermediate vendors. The distributor filed a third party complaint against the employer on a theory of express indemnity. The distributor defended partly on the ground that the finder of fact should attribute negligence among all parties allegedly responsible for Lake's injury, including the employer, and that the distributor's ultimate liability to Lake should be determined pursuant to the rule of modified joint and several liability found in AS 09.17.080(d).<sup>1</sup>

Lake moved to strike the defense, Alaska R.Civ.P. 12(f), arguing that the exclusive liability provision of the Workers' Compensation Act, AS 23.30.055, precluded the trier of fact from considering the negligence of the employer. The superior court denied the motion to strike and a subsequent motion for reconsideration. We granted Lake's petition for review.<sup>2</sup>

### II

Under the Alaska Workers' Compensation Act, AS 23.30.005-270, an employer is liable to pay compensation to an employee injured in the course and scope of employment, regardless of fault. AS 23.30.045(a),

2. The caption of this opinion lists as "petitioners" all parties who appeared and argued in favor of reversing the order below; conversely, the "respondents" are all parties who argued that the order should be affirmed.

of fact must fix the damage awards, and determine the respective percentages of fault. *Id.* The court then enters judgment on the basis of modified joint and several liability. AS 09.17.080(c), (d).

### III

Petitioners contend that the superior court erred in refusing to strike the challenged defense because AS 09.17.080(a)(2) does not specifically include statutorily immune employers in the group among whom the total fault must be allocated. Respondents contend that the purpose of AS 09.17.080 will be frustrated if the employer's fault is not considered.

This is a question of statutory interpretation subject to the independent judgment standard of review. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985). We will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy." *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[1] The interpretation of a statute begins with an examination of the language used. Ordinarily, an unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when a seemingly unambiguous statute must be considered in conjunction with another act. *Hafling v.*

party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

*Inlandboatmen's Union*, 585 P.2d 870, 872 (Alaska 1978). In that case, we will examine the legislative history and adopt a reasonable construction which realizes legislative intent, avoids conflict or inconsistency, and gives effect to every provision of both acts. *Id.* at 873, 875, 877. Thus, we will presume that the legislature enacted AS 09.17.080 with the Workers' Compensation Act in mind.

When we decided *Arctic Structures*, we noted that the view espoused in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*, 22 Cal.3d 829, 150 Cal.Rptr. 888, 587 P.2d 684 (1978), had "considerable merit." 605 P.2d at 440. Respondents argue that the legislature recognized the merit of the California rule and incorporated it into the law of Alaska when it adopted AS 09.17.080.

The legislature's intent is not apparent from the plain language of AS 09.17.080(a)(2). Although the legislature has authorized the finder of fact to allocate fault among "each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040," an employer does not fit easily within any of these categories.<sup>8</sup>

[2] When the legislature enacted AS 09.17.080, it left intact the exclusive liability and employer reimbursement provisions,

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

7. In *Associated Construction*, the California Supreme Court ruled that the total liability for the employee's injury should be equitably allocated between the employer and third party tortfeasors. 150 Cal.Rptr. at 895-96, 587 P.2d at 691-92. The third parties' liability to the employee is reduced by the employer's share of the fault. *Id.* The employer's right to credit or reimbursement is limited to the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery. *Id.*

8. See Uniform Comparative Fault Act § 2 comment, § 6 comment, 12 U.L.A. 46, 53 (Supp. 1989).

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knowing that we had declined to abrogate the rules set forth in those statutes in the past, even though developments in the principles of general tort law might suggest that course. To the contrary, we have consistently and repeatedly refused to alter the comprehensive statutory scheme governing employers' rights and liabilities for workplace accidents. Absent a clear indication of legislative intent,<sup>9</sup> we decline to retreat from the rule of law set forth in *Arctic Structures v. Wedmore*.

[3] It is irrelevant that the employer in this case is a third-party defendant based on an express indemnity agreement. As a result of the exclusive liability provision, an employer may be joined as a third-party defendant only when another party asserts an express indemnity claim against it. See *Manson-Osberg Co. v. State*, 552 P.2d 654, 658-59 (Alaska 1976); see also *Providence Washington Ins. Co. v. DeHavilland Aircraft Co. of Canada*, 699 P.2d 355, 357-58 (Alaska 1985); *Golden Valley Elec. Ass'n v. City Elec. Serv.*, 518 P.2d 65, 69 (Alaska 1974). However, the fact that the employer is a third-party indemnity defendant in any particular case is a fortuity which does not alter the rule applicable to employer fault generally, even though it might affect the ultimate liability of the parties to the agreement.

Our refusal to abrogate the workers' compensation scheme does not necessarily render evidence of employer negligence inadmissible. A third party tortfeasor may escape liability by proving that it was not negligent or that its negligence did not proximately cause the employee's injury. Thus, evidence of the employer's negligence may be relevant and admissible to

9. The workers' compensation statute was never mentioned during the house and senate debates concerning the 1986 tort reform provisions, ch. 139, § 1, SLA 1986. Alaska State Senate Floor Debate (May 5, 1986) [hereinafter Senate Debate]; Alaska State House Floor Debate (May 8, 1986) [hereinafter House Debate]. It is clear that the legislature was attempting to alleviate a perceived "crisis" in insurance rates and availability. See Senate Debate (remarks of Sens. Kelly and Faiks; House Debate (remarks of Rep. Navarre). The section on modified joint and several liability was "the heart and soul of

prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury. However, AS 09.17.080 presents a difficult factual choice: the finder of fact may allocate all or none of the total fault to the employer. It may not allocate only a portion of the total fault to the employer. Moreover, members of the bench and bar must take care in preparing jury instructions to prevent a panel from attributing to the employee any negligence of the employer.

The decision of the superior court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.



Paul A.L. NELSON, Petitioner,

v.

Loretto L. JONES, Respondent.

No. S-2663.

Supreme Court of Alaska.

Feb. 23, 1990.

Following settlement in divorce action, father brought action against mother alleging abuse of process, malicious prosecution, and defamation based upon mother's allegations of sexual abuse of their child. The Superior Court, First Judicial District, Juneau, Duane Craske, J., denied father's discovery requests, and appeal was taken.

the bill." Senate Debate (remarks of Sens. Kelly, Faiks and Halford); House Debate (remarks of Reps. Navarre, Hanley, and Pignalberi). Legislators who endorsed a form of modified joint and several liability argued that it represented a fair compromise limiting the potential liability of a tortfeasor guilty of only a small degree of negligence while at the same time permitting an injured plaintiff to recover a substantial portion of his or her damages. Senate Debate (remarks of Sen. Josephson); House Debate (remarks of Reps. Navarre and Miller).

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HEALTH ASSOCIATION OF ALASKA  
March 1990

LEGISLATIVE SUMMARY -- PROPOSED AMENDMENT TO  
HB 166 RE LIABILITY OF HOSPITALS FOR  
NONEMPLOYEE PHYSICIANS AND OTHER HEALTH PERSONNEL

On October 16, 1987, the Alaska Supreme Court ruled in Jackson v. Power (no. 3237) that a general acute care hospital has a nondelegable duty to provide emergency room services, and therefore, the hospital is vicariously liable for the negligence of an emergency room physician.

\*\* The Jackson decision imposes liability on hospitals for the negligence of non-employee emergency room physicians solely because the hospital is required by law to provide emergency room services and is regulated in the provision of those services, without requiring the plaintiff to show that the hospital has been negligent or that it has violated any specific regulatory requirement.

\*\* The implications of the Jackson decision extend far beyond the emergency room. Although the Jackson case dealt only with the relationship between the hospital and non-employee emergency room physicians, the rationale of the case logically extends to other non-employee physicians and health care providers. Under the common law prior to the Jackson decision a hospital was not vicariously liable for the negligence of the non-employees if the hospital itself was not negligent and had complied with all applicable statutory and regulatory requirements.

\*\* The Jackson decision runs counter to modern trends of apportioning liability according to fault. Recent tort reforms were designed to provide some relief to public entities, which were often named as "deep pocket" defendants, even though their share of the responsibility for the injury was negligible. The Jackson case insures that municipally owned and non-profit hospitals will be named as deep pocket defendants in every case involving physicians negligence, even though the hospital was not negligent and has done everything within its power to comply with statutory and regulatory requirements. In one recent case, for example, the plaintiff dismissed all of the allegedly negligent physician defendants and went to trial solely against the corporate hospital.

\*\* The ruling will not improve hospital and emergency room care because, by definition, the Jackson rule applies where there is no fault on the part of the hospital. Hospitals have always been liable for their own negligence, and would continue to be so liable if Jackson were legislatively repealed.

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Rule 82 Revisited: Attorney Fee Shifting in Alaska

*Kevin M. Kordziel*

*December 1993 • Volume X • Number II*  
*Duke University School of Law*

## Rule 82 Revisited: Attorney Fee Shifting in Alaska

*In 1992, the Alaska Supreme Court amended Civil Rule 82, the state's unique attorney fee-shifting provision. The revision addresses some of the practical deficiencies of former Rule 82, as well as the supreme court's concern that the rule deterred a large segment of the population from access to the courts. In addition to increasing the complexity of the rule, the supreme court has further entrenched a fee-shifting regime that is not adequately justified by its official or perceived purposes. This note concludes that Civil Rule 82 should be subjected to critical, empirical reevaluation.*

### I. INTRODUCTION

The United States is nearly unique in the world in its approach to attorney fees; under the American rule, each side generally bears its own attorney fees in litigation.<sup>1</sup> In contrast, the English "loser pays" rule, used by most other countries, requires the losing party to pay a substantial portion of the prevailing party's attorney fees.<sup>2</sup> Alaska is unique in the United States, since it has abandoned the American rule in favor of a complex fee shifting system that ordinarily requires the losing party to pay a portion of the winner's attorney fees.<sup>3</sup>

The "litigation explosion" in the United States has recently propelled attorney fee shifting into the public limelight. Segments of the business community and other tort reform advocates have called for modification or abandonment of the American rule.<sup>4</sup>

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1. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

2. See generally Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37.

3. ALAN J. TOMKINS & THOMAS E. WILLGING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* 32 (1986).

4. During the Bush Administration, the President's Council on Competitiveness issued a report calling for the adoption of a modified form of the English rule as a method to control litigation. Bradley L. Smith, Note, *Three Attorney Fee-*

According to these critics, the American rule does little to discourage borderline cases and marginally motivated plaintiffs.<sup>5</sup> They argue that requiring losing parties to pay the winners' fees would deter plaintiffs from filing non-meritorious claims, and would encourage the settlement of other claims because of the higher stakes involved with losing.<sup>6</sup> Defenders of the American rule, conversely, maintain that all Americans are entitled to their day in court.<sup>7</sup> They strongly oppose a fee system that might discourage individuals of moderate means from instituting actions to vindicate their rights.<sup>8</sup>

Amid this national debate surrounding the future of the American rule, Alaska has recently reevaluated the merits of its unique fee-shifting scheme. While there are now well over 100 federal and 2,000 state fee-shifting statutes in the United States,<sup>9</sup> Alaska is the only jurisdiction that has entirely rejected the American rule.<sup>10</sup> In its place, Alaska has fashioned a complex fee-shifting arrangement that combines a partial shift in favor of the prevailing litigant<sup>11</sup> with a federal-style offer-of-judgment device.<sup>12</sup> After a period of intense scrutiny, the Alaska Civil Rules Committee in 1992 recommended substantial revisions to Rule 82. The Alaska Supreme Court, despite input from a sizeable

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*Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2156 (1992) (citing PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1, 24-25 (1991)).

5. See, e.g., Phillip S. Figa, *The "American Rule" has Outlived its Usefulness: Adopt the "English Rule,"* NAT'L L.J., Oct. 20, 1986, at 13.

6. *Id.*

7. See, e.g., Roxanne Barton Conlin & Clarence L. King, Jr., *Revisiting the "Loser Pays" Issue: English Rule*, NAT'L L.J., Aug. 3, 1992, at 27.

8. *Id.* (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967)).

A number of countries are considering reforms that would bring their legal systems closer to the American approach. Even England, despite its heavily tax-supported legal aid system, has considered modifying the English rule. A 1991 report of Britain's Lord Chancellor called potential liability for an opponent's litigation fees and costs "arguably the major deterrent against taking legal action." *Id.* at 28 (quoting LORD CHANCELLOR'S DEPT., REVIEW OF FINANCIAL CONDITIONS FOR LEGAL AID: ELIGIBILITY FOR CIVIL LEGAL AID 37 (1991)).

9. TOMKINS & WILLGING, *supra* note 3, at 31.

10. *Id.* at 32.

11. ALASKA CIV. R. 82.

12. ALASKA CIV. R. 68. This arrangement is often referred to as a "two-way" shift, whereas fee-shifting schemes that award fees only to prevailing plaintiffs employ a "one-way" shift.

contingent of the Alaska Bar to eliminate fee shifting entirely, implemented these changes in Order No. 1118, which took effect on July 15, 1993.

This note analyzes the Alaska fee-shifting system in detail and argues that the state should retain the prolix mechanism in its present form only if it improves the legal system in identifiable, desired ways. Part II presents an overview of fee shifting in Alaska, with particular emphasis on former Rule 82 and Rule 68. Part III discusses the events and criticism leading to Rule 82's amendment. Part IV examines the amended version of Rule 82 and speculates as to its probable effects. Part V explores the possible policy rationales for Alaska's fee-shifting system and argues that the mechanism employed is not the best means to achieve these results. Finally, part VI concludes that the usefulness of amended Rule 82 must be reexamined empirically.

## II. OVERVIEW OF FEE SHIFTING IN ALASKA BEFORE THE AMENDMENT OF RULE 82

As there is not yet any reported case law discussing the operation of Rule 82 in its amended form, and since the new rule retains many of the basic provisions of the prior rule, familiarity with Alaska's pre-amendment fee-shifting scheme is essential. Alaska's well-established practice of fee shifting can be traced back to the territorial statutes of the early 1900's.<sup>13</sup> Today, Alaska Civil Rule 82 governs the allocation of attorney fees in conjunction with Rule 68, an offer of settlement device. The Alaska system, although functionally distinct from the fee taxation<sup>14</sup> approach under a pure English rule, employs a similar two-way shift.

Alaska Civil Rule 82, supported by Alaska Statutes section 09.60.010<sup>15</sup> and Civil Rule 54,<sup>16</sup> sets the general framework for

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13. Gregory J. Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 143 (1974).

14. The term "taxation," as it is used in this note, refers to the process of determining the portion of one party's litigation expenses that may be charged to another party.

15. Alaska Statutes § 09.60.010 provides:

The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully

attorney fee shifting. Rule 82, before its amendment, provided in relevant part:

(a) Allowance to Prevailing Party

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

ATTORNEY'S FEES IN AVERAGE CASES

	Judgment and, if awarded, prejudgment interest	Contested	Without trial	Non- contested
First	\$25,000	20%	18%	10%
Next	\$75,000	10%	8%	3%
Next	\$400,000	10%	6%	2%
Over	\$500,000	10%	2%	1%

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

(2) In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered. An application for attorney's fees in a default case exceeding \$50,000 must specify actual fees.

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

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

(5) A motion for attorney's fees must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1.

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contested as determined by the court.  
ALASKA STAT. § 09.60.010 (Supp. 1993).

16. Rule 54 provides in relevant part: "Except when express provision therefore is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."  
ALASKA CIV. R. 54(d).

Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees.<sup>17</sup>

Alaska's two-way fee-shifting scheme was not designed to reimburse prevailing parties<sup>18</sup> for the full amount of attorney fees incurred. Rule 82, rather, was intended to compensate a prevailing party partially for the productive work done by his or her attorney.<sup>19</sup> The fact that, in practice, the actual bill for attorney fees may have been several times the size of the fee award was considered irrelevant.<sup>20</sup> Because the schedule set out in Rule 82(a)(1) usually provided the basis for taxation when the prevailing party recovered a monetary judgment, partial compensation was the common outcome under Alaska law. In fact, Alaska trial judges estimated that the schedule determined the amount of taxation in over eighty percent of cases with monetary recovery.<sup>21</sup> This percentage scheme allowed judges to expend minimal time and resources in administering schedule-based award cases.

Before the amendment of Rule 82, however, there were many situations in which the schedule was not used to determine the size of a fee award. When the prevailing party did not obtain a monetary remedy, judges had discretion to fix a reasonable fee award.<sup>22</sup> If a judge determined that a schedule-based award did not accurately reflect the value of the legal services rendered, he or she could also depart from the schedule. Typically, this was a concern in equitable or mixed equity-law cases when an equitable remedy was sought, but some monetary relief might have been granted as well.<sup>23</sup> Also, overcompensation was a concern when large monetary recoveries were obtained with a minimum of legal services. Likewise, undercompensation could have resulted from hard-fought cases yielding small recoveries. In such cases, a judge

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17. Alaska Civ. R. 82(a) (repealed 1993).

18. The "prevailing party" is generally "considered to be the party who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'" Adoption of V.M.C., 528 P.2d 788, 795 n.14 (Alaska 1974) (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)).

19. *State v. Abbott*, 498 P.2d 712, 731 (Alaska 1972).

20. *Id.*

21. TOMKINS & WILLGING, *supra* note 3, at 42.

22. Alaska Civ. R. 82(a)(1) (repealed 1993).

23. TOMKINS & WILLGING, *supra* note 3, at 34 n.130.

would then award "a fee commensurate with the amount and value of the legal services rendered."<sup>24</sup> The current system, as amended, similarly allows judges to exercise their discretion when the schedule-based award is obviously inappropriate.<sup>25</sup>

Furthermore, in special instances full compensation was allowed under the pre-amendment rule, and this is permitted after the amendment as well.<sup>26</sup> Bad faith actions are one such instance.<sup>27</sup> Public interest<sup>28</sup> plaintiffs are also permitted full recovery, while defendants who prevail in public interest litigation may be denied any attorney fee compensation.<sup>29</sup>

Judges additionally had discretion to disallow any attorney fee award based upon the equities of the case or other valid reasons.<sup>30</sup> Moreover, the trial court retained the option of not characterizing either party as "prevailing," thereby denying any fee recovery.<sup>31</sup>

The Alaska Supreme Court granted broad discretion to trial court judges in making fee determinations under Rule 82. Upon appellate review, awards made pursuant to the schedule were presumptively valid.<sup>32</sup> Thus, the prevailing party was not required

24. Alaska Civ. R. 82(a)(2) (repealed 1993).

25. See ALASKA CIV. R. 82(b)(3); text accompanying note 120.

26. See ALASKA CIV. R. 82(b)(3); text accompanying note 120.

27. See, e.g., *Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co.*, 666 P.2d 33, 42 (Alaska 1983), *cert. denied*, 464 U.S. 1061 (1984); *Gold Bondholders Protective Council v. Atchison, T. & S. F. Ry.*, 658 P.2d 776, 779 (Alaska 1983); *Davis v. Hallet*, 587 P.2d 1170, 1171-72 (Alaska 1978); *Malvo v. J. C. Penney Co.*, 512 P.2d 575, 587-88 (Alaska 1973).

28. The four criteria that determine whether a suit qualifies as one of public interest are:

- (1) Is the case designed to effectuate strong public policies?
- (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
- (3) Can only a private party have been expected to bring the suit?
- (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

*Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); see also *Loeb v. Rasmussen*, 822 P.2d 914, 921 n.18 (Alaska 1991); *Citizens Coalition For Tort Reform v. McAlpine*, 810 P.2d 162, 171 (Alaska 1991).

29. See, e.g., *Anchorage Daily News*, 803 P.2d at 404; *City of Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974).

30. See *Haskins v. Sheldon*, 558 P.2d 487, 495 (Alaska 1976); *Cooper v. Carlson*, 511 P.2d 1305, 1309-11 (Alaska 1973).

31. *Tobeluk v. Lind*, 589 P.2d 873, 877 (Alaska 1979).

32. *Babinec v. Yabuki*, 799 P.2d 1325, 1337 (Alaska 1990).

to supply itemized records of counsel's services to justify such awards.<sup>33</sup> A trial judge's failure to adhere to the schedule without stating the reasons for deviating, however, constituted reversible error.<sup>34</sup> Upon reversal, the appellate court would ordinarily remand the fee determination, forcing the trial judge to apply the schedule or articulate an adequate explanation.<sup>35</sup> But if the trial court specified in the record its reasons for departing from the schedule, it had broad discretion to award amounts greater than those permitted under the schedule.<sup>36</sup> The Alaska courts' lenient abuse-of-discretion standard tended not to disturb trial court awards unless the determination was "arbitrary, capricious, manifestly unreasonable, or . . . stemmed from an improper motive."<sup>37</sup> Moreover, "a trial judge need not [have made] formal findings of fact and conclusions of law to justify his decision denying attorney's fees. An oral explanation on the record . . . [was] sufficient."<sup>38</sup> For example, an award exceeding fifty percent of the actual attorney expenses incurred was deemed reasonable,<sup>39</sup> but one exceeding ninety percent of the amount requested by the prevailing party was held to be excessive when there was no evidence that the losing party's claims were "frivolous, vexatious, or devoid of good faith."<sup>40</sup> An award based on claimed attorney fees that appeared to be clearly excessive required a remand for a new fee award based upon reasonable expenditures.<sup>41</sup>

When the prevailing party recovered no monetary judgment, appellate review differed slightly. As with monetary recoveries, a sufficient explanation was required if the trial court refused to award attorney fees to the prevailing party.<sup>42</sup> A mere statement

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33. *Id.*

34. *Stefano v. Coppock*, 705 P.2d 443, 446 (Alaska 1985).

35. *Id.*

36. *Taylor Constr. Servs. v. URS Co.*, 758 P.2d 99, 103 (Alaska 1988).

37. *Alvey v. Pioneer Oilfield Servs.*, 648 P.2d 599, 601 (Alaska 1982); *see also* *Alaska Placer Co. v. Lee*, 553 P.2d 54 (Alaska 1976); *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970).

38. *Urban Dev. Co. v. Dekreon*, 526 P.2d 325, 328 (Alaska 1974).

39. *Stevens ex rel. Park View Corp. v. Richardson*, 755 P.2d 389, 396 (Alaska 1988).

40. *State v. University of Alaska*, 624 P.2d 807, 818 (Alaska 1981).

41. *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 659 (Alaska 1992).

42. *Pratt v. Kirkpatrick*, 718 P.2d 962 (Alaska 1986); *see supra* note 34 and accompanying text.

that "[u]nder the circumstances justice will best be served if each party bears [its] own costs and attorney's fees" was not considered a sufficient explanation.<sup>43</sup> Generally, courts also had to explain full attorney fee awards.<sup>44</sup> If the trial court did award fees, however, it did not have to supply reasons for its judgment as long as the award was only for partial expenses.<sup>45</sup>

In practice, Alaska's former fee-shifting regime based upon schedule-based taxation was deemed a "fast, uncomplicated, easily managed enterprise" that judges conducted within minutes.<sup>46</sup> With schedule-based fee awards, taxation required nothing more than a simple motion request.<sup>47</sup> The moving party submitted affidavits containing attorneys' billing rates and the number of hours worked on the particular aspects of the case. Since fee shifting had become an accepted institution in the Alaska legal system, schedule-based awards were generally not contested.<sup>48</sup>

Not every case was so straight-forward. In approximately twenty-five to thirty percent of the cases, the prevailing party claimed, under Rule 82(a)(2), that the schedule was not an accurate basis for taxation.<sup>49</sup> In these instances, the parties would file briefs and the judge would decide whether or not to use the schedule. If a trial judge elected not to use the schedule, the taxation process became even more time-consuming. The judge had to determine what constituted a reasonable fee as well as what percentage of it would be awarded. This procedure often entailed longer briefs from the parties, and occasionally hearings and discovery.<sup>50</sup> The judge engaged in a similar reasonable fee and percentage recovery determination when the prevailing party received no monetary judgment.

Alaska judges employed varying procedures for determining what constituted reasonable fees. Some judges carefully examined each entry of the fee petitions for acceptability, recalculating the number of reasonable hours after subtracting unnecessary expendi-

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43. *Curran v. Hastreiter*, 579 P.2d 44, 530 (Alaska 1978).

44. *Moses v. McGarvey*, 614 P.2d 1363, 1368-69 (Alaska 1980).

45. *Wickwire v. Arctic Circle Air Servs.*, 722 P.2d 930, 935 (Alaska 1986).

46. TOMKINS & WILLGING, *supra* note 3, at 41-42.

47. *Id.* at 41.

48. *Id.*

49. *Id.* at 41 & n.149.

50. *Id.* at 42.

tures of time and hours spent on non-prevailing issues.<sup>51</sup> Eventually, the judges drafted a fee order containing brief findings of fact supporting the fee award.

Other judges relied on a more intuitive approach. They used their experience and general sense of the case to estimate an acceptable benchmark range for the total fee.<sup>52</sup> These judges looked at the average hourly fees in their districts and multiplied this figure by an estimate of the number of hours required for the type of case at hand. They compared this estimate with the amount requested in the fee petition. A request well above the benchmark estimate would have received closer scrutiny; otherwise, judges often "rubber-stamped" the fee request.<sup>53</sup> Using this methodology, judges completed the entire taxation process in minutes, compared with about an hour for the alternative process outlined above.<sup>54</sup>

After calculating the total reasonable fee under either of the two methods, judges had to determine the appropriate fraction of this fee to shift. The Alaska Supreme Court, before amending Rule 82, provided no set guideline for doing so. The text of former Rule 82 called for a reasonable amount "commensurate with the amount and value of legal services rendered."<sup>55</sup> Under this loose standard, trial judges applied widely varying percentages for similar types of cases, creating a high degree of unpredictability. The proportion of fees shifted would fall anywhere between twenty and eighty percent of the reasonable fees, and anything in this range would generally not be reversed on appeal.<sup>56</sup> One practitioner observed that awards at the upper end of this range were more common: "[t]he prevailing party defendant typically receives between 40% and 80% of the actual attorney fees incurred."<sup>57</sup>

In sum, schedule-based taxation operated fairly smoothly and efficiently under former Rule 82. Few schedule-based awards were appealed, computation was a simple process, and the amount of the

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51. *Id.* at 42-43.

52. *Id.* at 42, 44.

53. *Id.* at 44-45.

54. *Id.* at 44.

55. Alaska Civ. R. 82(a)(2) (repealed 1993).

56. Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, *JUDGES' J.*, Spring 1985, at 4, 6.

57. Memorandum from Mark E. Wilkerson, Esq., to Christine Johnson, Esq., Court Rules Attorney, Alaska Court System 2 (Oct. 15, 1992) (on file with *Alaska Law Review*).

award was a predictable function of the size of the judgment. When schedule-based computation was inappropriate, however, greater judicial time and resources were required at the trial court level. Additionally, the ambiguity inherent in determining a reasonable fee resulted in a large number of appealed awards. According to a 1982 survey, more than one-fifth of the cases coming before the Alaska Supreme Court contained attorney fee issues.<sup>58</sup>

A complete discussion of the Alaska fee-shifting system also requires consideration of the interaction between Rule 82 and Rule 68, a federal-style offer-of-judgment rule. Singly and in combination, these rules profoundly shape litigation and settlement incentives. Rule 68 provides:

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065 [2% per year] and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065 [2% per year].

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58. TOMKINS AND WILLGING, *supra* note 3, at 46 n.157 (citing Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321, 345).

(c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.<sup>59</sup>

Under Alaska Civil Rule 68, either party may make a formal offer of judgment to be entered for a specified amount plus costs. In practice, however, the defendant is usually the party that makes the offer. If the plaintiff rejects the offer and later obtains a recovery, which, including prejudgment interest, is less than the amount of the offer plus prejudgment interest, the defendant is treated as the "prevailing party." Consequently, the defendant would be entitled to attorney fees and costs from the time of the offer since, unlike the relatively little-used Federal Rule 68,<sup>60</sup> Alaska Rule 68 permits partial compensation for attorney fees pursuant to Rule 82. Because costs are often minimal, the impact of Alaska Rule 68 stems primarily from its interaction with Rule 82.<sup>61</sup>

The following example illustrates this relationship.<sup>62</sup> Defendant makes a settlement offer to Plaintiff for \$50,000 plus costs and attorney fees. If Plaintiff chooses to accept this offer, she may file for Rule 82 attorney fees and Rule 79 costs. Using the "contested without trial" column of the schedule in Rule 82, the fee award equals \$6,500. Adding in the minimal costs usually recoverable under Rule 79 (assume \$1,500), the total offer is worth approximately \$58,000.

Suppose, however, that Plaintiff rejects the offer, proceeds to trial and receives a judgment of only \$10,000. Also, assume that the injury occurred three years before the judgment and that the

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59. ALASKA CIV. R. 58.

60. The United States Supreme Court in *Marek v. Chesny*, 473 U.S. 1 (1985), held that a plaintiff who rejects a defendant's Federal Rule 68 offer and obtains a positive judgment less than the amount of the offer loses the right to collect post-offer attorney fees. *Id.* at 10. This rule applies only to cases governed by federal fee-shifting statutes, which are usually pro-plaintiff. Plaintiffs in the federal system, therefore, never risk having to pay the defendant's legal fees by turning down an offer of settlement, since there is no statutory basis for pro-defendant fee-shifts.

61. Kleinfeld, *supra* note 56, at 5.

62. See *id.* at 5-7 (providing the basis for the hypothetical used in this note).

relevant interest rate was 5%. Since the award plus prejudgment interest, approximately \$11,500, is less than the \$50,000 offer, Defendant will be considered the prevailing party under Rule 82. The result can be disastrous.

If Defendant's reasonable attorney fees are approximately \$60,000, and if she wisely made the settlement offer early in the discovery process so that the bulk of the fees were incurred afterwards, Plaintiff suffers a net loss from the litigation. For example, if the court shifts 30% of the reasonable fees,<sup>63</sup> Plaintiff's \$11,500 judgment and prejudgment interest will be offset by an \$18,000 fee award to the defendant and other costs allowable under Rule 68 (assume \$200 for subpoena costs for witnesses). In addition, Plaintiff incurred her own non-reimbursable costs (assume \$10,000 for expert witnesses) and pays her attorney whom she hired on a contingent fee basis (assume 30% of \$11,500, or \$3,450). As an end result of the litigation, Plaintiff's *net loss* reaches \$20,150.<sup>64</sup> But for the interplay between Rule 68 and Rule 82, Plaintiff would have been considered the prevailing party and likely been spared any net out-of-pocket expense.

### III. THE ROAD TOWARD AMENDING CIVIL RULE 82

In the spring of 1992, Chief Justice Rabinowitz of the Alaska Supreme Court appointed a subcommittee of the Civil Rules Standing Committee to consider possible changes to Rule 82. Specifically, the court requested that the subcommittee consider whether Rule 82 deterred a large segment of the population from voluntary access to the courts.

This issue came to the court's attention partly by virtue of the supreme court's own decision in *Bozarth v. Atlantic Richfield Oil Co.*<sup>65</sup> John Bozarth, a pilot employed by Atlantic Richfield ("ARCO"), was discharged for refusing to participate in his

*Bozarth*

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63. Amended Rule 82 sets a 30% fixed rate for the portion of attorney fees that are recoverable from non-monetary judgments. ALASKA CIV. R. 82; see also text accompanying note 120.

64. Actually, the loss is even higher after accounting for the provision on prejudgment interest in Rule 68. See ALASKA CIV. R. 68 (b)(1), (2). If, as in the preceding example, Plaintiff's judgment fails to exceed the amount of the offer, the prejudgment interest rate is lowered by 2%. This scenario would reduce her judgment plus interest from \$11,500 to \$10,900. Her net loss then rises by \$420, after accounting for the contingent fee arrangement, to \$20,570.

65. 833 P.2d 2 (Alaska 1992).

employer's random drug-testing program.<sup>66</sup> Bozarth sued, claiming that he was fired in retaliation for "whistle-blowing" activities.<sup>67</sup> The trial court granted ARCO's motion for summary judgment on two independent grounds.<sup>68</sup> ARCO then moved for attorney fees equal to 70% of the \$156,425 in expenses actually incurred. Finding a small overcharge, the court determined that the full amount of reasonable fees was \$152,000. The court awarded 50% of this amount, some \$76,000, as partial compensation pursuant to Rule 82.<sup>69</sup>

On appeal, in addition to contesting the summary judgment, Bozarth opposed the attorney fee award. He argued that the \$165 to \$175 per hour rate charged by defense counsel was excessive.<sup>70</sup> The supreme court found that Bozarth had failed to present evidence that such hourly fees were unreasonable, or that the work performed by the attorneys was unnecessary or inappropriate.<sup>71</sup> Additionally, the majority reasoned that the 50% proportion "[fell] comfortably within the partially compensatory standard of Civil Rule 82."<sup>72</sup> The court, therefore, held that the fee award was valid. However, the majority pointed out that the magnitude of the award was "nonetheless disturbing."<sup>73</sup> The court speculated that the increased costs of litigation may have caused Rule 82 to deter "a broad spectrum of our populace from the voluntary use of our courts."<sup>74</sup> Accordingly, the majority called for the Civil Rules Standing Committee to review this very question.<sup>75</sup>

Justice Matthews desired stronger medicine; he would have reversed *Bozarth* as to the magnitude of the fees. The dissent found the \$76,000 award to be fundamentally at odds with the Alaska Constitution's general protection of access to civil courts.<sup>76</sup>

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66. *Id.* at 2-3.

67. *Id.* at 3.

68. *Id.*

69. *Id.*

70. *Id.* at 4.

71. *Id.*

72. *Id.* (citing *Brunet v. Dresser Olympic Div. of Dresser Indus.*, 660 P.2d 846, 847-48 (Alaska 1983); *Stevens ex rel. Park View Corp. v. Richardson*, 755 P.2d 389, 396 (Alaska 1988)).

73. *Id.* at 4 n.3.

74. *Id.*

75. *Id.*

76. *Id.* at 5 (citing *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1378-79 (Alaska 1988); *Bush v. Reid*, 516 P.2d 1215, 1218-21 (Alaska 1973); *Malvo v. J. C.*

Justice Matthews analogized "substantial awards of partial fees against litigants of limited resources" to full fee awards against good-faith plaintiffs.<sup>77</sup> He reasoned that "[i]f a \$10,500 attorney's fee award is so great as to 'foreclose a particular party's opportunity to be heard' it has that effect independent of whether it represents the prevailing party's full, or merely partial, fees."<sup>78</sup> Since the Alaska Supreme Court has expressed a concern that full fee awards against good faith plaintiffs may offend plaintiffs' due process "right to be heard," the dissent argued that a similar constitutional concern existed in this case as well.<sup>79</sup> Accordingly, the dissent would have remanded the fee determination to the superior court for consideration of whether the award will "impair the constitutional right of access to the courts."<sup>80</sup>

In addition to the access issue, the subcommittee took a hard look at two other fee-shifting issues: the lack of uniformity in fee awards when the prevailing party did not receive a monetary judgment, and the absence of a requirement that trial judges articulate the reasons for an award when the schedule does not apply (absent full or nearly full fee-shifts).<sup>81</sup> At the first meeting of the subcommittee, a majority voted that no changes to the existing fee-shifting regime were necessary.<sup>82</sup> Interestingly, this initial result mirrored the prevailing opinion of the Alaska Bar.

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Penney Co., 512 P.2d 575, 588 (Alaska 1973)) (Matthews, J., dissenting).

77. *Id.* at 6 (Matthews, J., dissenting).

78. *Id.* (quoting *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973)) (Matthews, J., dissenting).

79. *Id.* (Matthews, J., dissenting).

80. *Id.* (Matthews, J., dissenting). The dissent also noted the frequency with which this issue has arisen in wrongful discharge claims and suggested that awards in such cases not exceed a fraction of the former employee's annual income. *Id.* (citing *Van Huff v. SOHIO Alaska Petroleum Co.*, 835 P.2d 1181 (Alaska 1992) (affirming award of \$117,251.50 against an employee despite evidence that it would take employee 10 years to repay the fee; fee award justified by complex pretrial discovery and fact that it was only 30% of employer's actual fees); *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653 (Alaska 1992) (holding fee award of \$80,470 to employer to be excessive)) (Matthews, J., dissenting).

81. See *supra* text accompanying notes 44-45.

82. Robert Richmond, Civil Rule 82: Status of Review 1 (unpublished handout distributed at 1992 meeting of the Anchorage Bar Association) (on file with the Alaska Judicial Council).

According to a survey of the Bar conducted in March of 1992 by the Civil Rules Committee,<sup>83</sup> a majority of the respondents opposed rescinding or substantially amending Rule 82.<sup>84</sup> Surprisingly, the responses remained relatively consistent across lines of representation. In other words, although the strength of their support differed somewhat, both plaintiffs' and defense attorneys favored retention of the existing rule.

Specifically, seventy percent of survey respondents reported that Rule 82 did not deter plaintiffs of moderate means from filing claims.<sup>85</sup> Common explanations were that attorneys sometimes failed to inform clients about the effect of Rule 82, that many plaintiffs did not initially consider the possibility of losing, and that often such plaintiffs remained unconcerned because they were ultimately judgment-proof.<sup>86</sup> Many practitioners indicated that other factors, such as a plaintiff's own attorney fee obligation, acted as a greater deterrent than did Rule 82.<sup>87</sup> Some wrote that Rule 82 had the positive effect of deterring only frivolous or non-meritorious claims.<sup>88</sup> In contrast, the minority view generally asserted that Rule 82 deterred plaintiffs of moderate means from filing valid claims against the government or large business entities and contended that powerful defendants often exploited Rule 82 by consciously incurring large attorney fees to hurt private plaintiffs.<sup>89</sup>

Over two-thirds of those surveyed indicated that former Rule 82 did not put excessive settlement pressure on moderate income

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83. The survey presented "yes or no" questions with space for respondents to supplement their answers with written comments. A summary of these comments, in conjunction with the numerical percentages, provides a great deal of insight into the perceived effects of former Rule 82. See Memorandum from Douglas Phillips & David Greene, Law Clerks, to The Honorable Daniel A. Moore, Jr., Alaska Supreme Court (May 4, 1992) (on file with *Alaska Law Review*) [hereinafter "Phillips & Greene Memorandum"].

Although the questionnaire is a useful source of information regarding how Rule 82 functions in practice, it should be remembered that attorneys' interests are not always aligned with those of their clients, who bear the financial burden of Rule 82's sanctions. See *infra* notes 168-173, 196-197, and accompanying text.

84. See *infra* Appendix for a full summary of the survey's numerical results for "yes or no" questions.

85. See *infra* Appendix (referring to question one).

86. Phillips & Greene Memorandum, *supra* note 83, at 3.

87. *Id.*

88. *Id.*

89. *Id.*

litigants.<sup>90</sup> Rather, many attorneys noted that Rule 82 required plaintiffs to assess their claims more realistically, which would often result in the settlement of weaker claims.<sup>91</sup> Respondents who did feel that the settlement pressure was excessive frequently remarked that the amount of that pressure varied depending on the wealth of the opposing party. Thus, insurance companies and other large institutional defendants could exert tremendous pressure since they were able to spend more on their defense. Some such respondents commented that Rule 82 imposed devastating results in cases that did not settle.<sup>92</sup>

When asked straight-out whether they favored rescinding Rule 82, an overwhelming majority of respondents favored retention.<sup>93</sup> In written comments, practitioners praised the rule for encouraging settlement and deterring frivolous litigation.<sup>94</sup> They also remarked that the rule's official rationale, to compensate the prevailing party partially, was an inherently fair result.<sup>95</sup> Abolitionists argued, conversely, that "Rule 82 is unfair to those of moderate means because it deters them from bringing valid claims."<sup>96</sup> In one attorney's opinion, "[w]ealthy business corporations and insurance carriers are unfazed by the rule, while those of moderate means quake in their shoes at the thought of losing their homes."<sup>97</sup> Some plaintiffs' attorneys indicated that the structure of former Rule 82 allowed defendants to receive more than plaintiffs, who could recoup attorney fees generally only to the extent that the schedule provided.<sup>98</sup> Some additionally criticized the rule as being too subjective since it failed to provide guidance as to what constitutes an appropriate award.<sup>99</sup> The judicially created public interest exception also received criticism for not comporting with the underlying rationale of Rule 82.<sup>100</sup>

Although attorneys resoundingly favored retaining Rule 82, the most significant divergence of opinion between plaintiffs' and

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90. See *infra* Appendix (referring to question two).

91. See Phillips & Greene Memorandum, *supra* note 83, at 4.

92. *Id.*; see also *supra* notes 62-64 and accompanying text.

93. See *infra* Appendix (referring to question four).

94. See Phillips & Greene Memorandum, *supra* note 83, at 6.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 7; see *infra* text accompanying note 134.

defense lawyers occurred over the questions that specifically focused on elements of the *Bozarth* access issue. Two-thirds of the respondents felt that the courts should not consider a party's ability to pay when taxing fees.<sup>101</sup> Many practitioners argued that fairness required the rule to be applied uniformly or not at all.<sup>102</sup> Others worried that consideration of a party's ability to pay would have the following negative effects: add too much complexity to the system; "encourage perpetual litigants and spurious suits;"<sup>103</sup> create too much uncertainty, thereby hampering settlements; or turn the proceedings into a "welfare contest."<sup>104</sup> Proponents of the ability-to-pay criterion, on the other hand, generally indicated that this consideration was essential to preserving access to the courts.<sup>105</sup> Several of these commentators noted that former Rule 82 had driven some plaintiffs into bankruptcy.<sup>106</sup>

Finally, attorneys offered additional comments that focused on the underlying purposes of Rule 82.<sup>107</sup> One frequent comment was that Rule 82 was not intended to be a weapon against frivolous litigation.<sup>108</sup> Rule 82 was designed to compensate prevailing parties only partially, and if deterrence of frivolous litigation is desired, there should be a separate rule earmarked with this particular goal.<sup>109</sup> Many respondents commented that any such rule aimed at deterring frivolous litigation should focus on attorneys, rather than on their clients.<sup>110</sup> Since attorneys are better able to judge whether a claim has merit, Alaska Civil Rule 11 is the proper means for deterring frivolous litigation, according to many.<sup>111</sup> Finally, some respondents remarked that the subjective and unpredictable application of Rule 82 precluded any deterrence effect whatsoever.<sup>112</sup>

After reconsideration and weighing of the preceding concerns, the Civil Rules subcommittee recommended revising Rule 82. The

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101. See *infra* Appendix (referring to question five).

102. Phillips & Greene Memorandum, *supra* note 83, at 8.

103. *Id.*

104. *Id.*

105. *Id.* at 9.

106. *Id.*

107. See *infra* Appendix (referring to question three) and note 212

108. Phillips & Greene Memorandum, *supra* note 83, at 5.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

proposed changes addressed two primary concerns: "(1) the lack of uniformity in fee awards when the prevailing party does not recover a money judgment; and (2) the absence of a requirement that trial judges articulate the reasons for an award."<sup>113</sup> The subcommittee suggested applying a fixed percentage of reasonable fees incurred, either thirty or thirty-five percent, to calculate non-schedule based awards.<sup>114</sup> Additionally, the subcommittee recommended the following set of factors to be considered by the trial court in deviating from the schedule or the fixed percentage: the complexity of the litigation, length of the trial, reasonableness of the attorneys' hourly rates, reasonableness of the number of attorneys used, diligence in efforts to minimize fees, willingness to reach a settlement agreement, reasonableness of claims and defenses pursued by each side, the relationship between the amount of work performed and significance of the matters at stake, as well as other relevant equitable factors.<sup>115</sup> Any variation would have to be explained in reference to these factors.<sup>116</sup>

The subcommittee specifically rejected adding an equitable factor to Rule 82 that would address the *Bozarth* access issue. Members speculated that an ability-to-pay factor would generate too much additional litigation and undermine the uniformity and fairness of Rule 82.<sup>117</sup> The Civil Rules Committee then voted to recommend that the Alaska Supreme Court adopt the subcommittee's proposed changes.<sup>118</sup>

On January 7, 1993, the Alaska Supreme Court issued Order No. 1118, which amended Civil Rule 82.<sup>119</sup> While the court adopted most of the subcommittee's recommendations, it also introduced a factor allowing trial judges to consider the non-prevailing party's ability to pay the opponent's fees. The order provides in relevant part:

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113. Memorandum from Christine Johnson, Esq., Court Rules Attorney, Alaska Court System, to Active Members of the Alaska Bar Association 1 (Sept. 24, 1992) (on file with *Alaska Law Review*).

114. *Id.* at 2.

115. *Id.* at 2-3.

116. *Id.* at 3.

117. *Id.* at 1.

118. *Id.* This vote was not unanimous; several members voted to eliminate the rule entirely, and two members voted to exclude the list of equitable factors. *Id.*

119. Alaska Supreme Court Order No. 1118 (Jan. 7, 1993) (amending Civil Rule 82 and Civil Rule 79). Justice Rabinowitz alone did not support amending Rule 82. *Id.* at 5-6 (Rabinowitz, J., dissenting).

1. Civil Rule 82 is repealed and reenacted to provide:
  - (a) Allowance to Prevailing Party.  
Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

- (b) Amount of Award

- (1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

[Schedule identical to that in former Rule 82]

- (2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal, or law clerk.

- (3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
        - (B) the length of trial;
        - (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
        - (D) the reasonableness of the number of attorneys used;
        - (E) the attorneys' efforts to minimize fees;
        - (F) the reasonableness of the claims and defenses pursued by each side;
        - (G) vexatious or bad faith conduct;
        - (H) the relationship between the amount of work performed and the significance of the matters at stake;
        - (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
        - (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by