

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7957 HOUSE LABOR & COMMERCE

1 \* Sec. 10. AS 09.17.030 is amended to read:

2 Sec. 09.17.030. DAMAGES RESULTING FROM COMMISSION OF A  
3 CRIME. A person who suffers personal injury or death may not recover damages for  
4 the personal injury or death if the injuries or death occurred while the person was  
5 attempting to commit or committing a felony, or fleeing from [ENGAGED IN] the  
6 commission of a felony, [THE PERSON HAS BEEN CONVICTED OF THE  
7 FELONY, INCLUDING CONVICTION BASED ON A GUILTY PLEA OR PLEA  
8 OF NOLO CONTENDERE,] and the action [FELONY] substantially contributed to  
9 the injury or death. [THIS SECTION DOES NOT AFFECT A RIGHT OF ACTION  
10 UNDER 42 U.S.C. 1983.]

11 \* Sec. 11. AS 09.17.040(a) is amended to read:

12 (a) In every case where damages for personal injury or death are awarded by  
13 the court or jury [,]

14 (1) the verdict shall be itemized between economic loss and  
15 noneconomic loss, if any, as follows:

16 (A) [(1)] past economic loss;

17 (B) [(2)] past noneconomic loss;

18 (C) [(3)] future economic loss;

19 (D) [(4)] future noneconomic loss; [AND]

20 (E) [(5)] punitive damages; and

21 (2) the amount awarded for past or future economic and  
22 noneconomic loss shall be reduced by the amount of federal and state income tax  
23 that would be paid on the amount awarded under tax rates in effect on the date  
24 of the injury or death.

25 \* Sec. 12. AS 09.17.040(d) is amended to read:

26 (d) ~~In an action to recover damages, the court shall, at the request of a~~ [AN  
27 INJURED] party, enter judgment ordering that amounts awarded a judgment creditor  
28 for future damages be paid to the maximum extent feasible by periodic payments  
29 rather than by a lump-sum payment. If a portion of the judgment awarded is owed  
30 to an attorney under a contingent fee agreement, that portion of the judgment  
31 shall be reduced to present value and paid in a lump sum.

1 \* Sec. 13. AS 09.17.040(f) is amended to read:

2 (f) A judgment ordering payment of future damages for personal injury or  
3 death by periodic payment shall specify the recipient, the dollar amount of the pay-  
4 ments, including any increases in future payments for anticipated inflation, the  
5 interval between payments, and the number of payments or the period of time over  
6 which payments shall be made. Payments may be modified only in the event of the  
7 death of the judgment creditor, in which case payments may not be reduced or  
8 terminated, but shall be paid to persons to whom the judgment creditor owed a duty  
9 of support, as provided by law, immediately before death. In the event the judgment  
10 creditor owed no duty of support to dependents at the time of the judgment creditor's  
11 death, the money remaining shall be distributed in accordance with a will of the  
12 deceased judgment creditor accepted into probate or under the intestate laws of the  
13 state if the deceased had no will.

14 \* Sec. 14. AS 09.17.070 is repealed and reenacted to read:

15 #10A Sec. 09.17.070. COLLATERAL BENEFITS. (a) Except when the collateral  
16 source is a federally funded program that by law must seek subrogation and except for  
17 death benefits paid under life insurance, a claimant in an action for personal injury or  
18 death may only recover damages that exceed amounts received by the claimant, or that  
19 with reasonable probability will be received in the future by the claimant, as  
20 compensation for the injuries from collateral sources, whether private, group, or  
21 governmental, and whether contributory or noncontributory.

22 (b) In an action for personal injury or death, a person defending a claim may  
23 introduce into evidence an amount paid or payable as a benefit to the claimant as a  
24 result of the personal injury or death under 42 U.S.C. 301 - 1397 (Social Security Act);  
25 a state or federal disability or workers' compensation act; health, sickness, disability,  
26 accident, or income-disability insurance; insurance that provides health benefits or  
27 income-disability coverage; and a contract or agreement of a group, organization,  
28 partnership, or corporation, or other collateral source, to provide, pay for, or reimburse  
29 the cost of medical, hospital, dental, or other health care services, disability, or lost  
30 wages. If a person defending a claim elects to introduce evidence described in this  
31 subsection, the claimant may introduce evidence of the amount that the claimant has

1 paid or contributed to secure the claimant's right to an insurance or contractual benefit  
2 introduced by the person defending the claim as evidence.

3 (c) Unless evidence of a collateral source has already been introduced under  
4 (b) of this section, evidence of a collateral source, other than a federal program that  
5 by law must seek subrogation and a death benefit paid under life insurance, is only  
6 admissible after the fact finder has rendered an award. The court may take into  
7 account the value of the claimant's rights to coverage exhausted or depleted by  
8 payment of the collateral benefit by adding back a reasonable estimate of their  
9 probable value, or by designating and holding for possible periodic payment under  
10 AS 09.17.040 that amount of the award that would otherwise have been deducted, to  
11 determine if the impairment of the claimant's rights actually takes place in the future.

12 (d) A person who provides a collateral benefit admissible under (a) or (b) of  
13 this section may not recover any amount against the claimant as reimbursement for  
14 those benefits and may not be subrogated to the rights of a claimant against a person  
15 defending a claim.

16 \* Sec. 15. AS 09.17.080(a) is amended to read:

17 (a) In all actions involving fault of more than one person [PARTY TO THE  
18 ACTION], including third-party defendants and persons who have been released under  
19 AS 09.17.091 [AS 09.16.040], the court, unless otherwise agreed by all parties, shall  
20 instruct the jury to answer special interrogatories or, if there is no jury, shall make  
21 findings, indicating

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

24 (2) the percentage of the total fault [OF ALL OF THE PARTIES TO  
25 EACH CLAIM] that is allocated to each claimant, defendant, third-party defendant,  
26 [AND] person who has been released from liability under AS 09.17.091, or other  
27 person responsible for the damages to each claimant regardless of whether the  
28 other person is or could have been named as a party to the action [AS 09.16.040].

29 \* Sec. 16. AS 09.17.080(c) is amended to read:

30 (c) The court shall determine the award of damages to each claimant in  
31 accordance with the findings, subject to a reduction under AS 09.17.091

1 [AS 09.16.040], and enter judgment against each party liable. The court also shall  
2 determine and state in the judgment each party's equitable share of the obligation to  
3 each claimant in accordance with the respective percentages of fault as determined  
4 under (a) of this section. An assessment of a percentage of fault against a person  
5 who is not a party may only be used as a measure for accurately determining the  
6 percentages of fault of a named party. Assessment of a percentage of fault  
7 against a person who is not a party does not subject that person to civil liability  
8 in this or another action and may not be used as evidence of civil liability in  
9 another action.

10 \* Sec. 17. AS 09.17 is amended by adding a new section to read:

11 Sec. 09.17.091. EFFECT OF RELEASE. When a release or covenant not to  
12 sue or not to enforce judgment is given in good faith to one of two or more persons  
13 civilly liable for the same injury or the same wrongful death

14 (1) it does not discharge any of the other persons from liability for the  
15 injury or wrongful death unless its terms so provide; but it reduces the claim against  
16 the others to the extent of any amount stipulated by the release or the covenant, or in  
17 the amount of the consideration paid for it, whichever is the greater, and

18 (2) it discharges the person to whom it is given from all liability for  
19 contribution to any other person.

20 \* Sec. 18. AS 09.30.065 is amended to read:

21 Sec. 09.30.065. OFFERS OF JUDGMENT. At any time more than 10 days  
22 before the trial begins either the party making a claim or the party defending against  
23 a claim may serve upon the adverse party an offer to allow judgment to be entered in  
24 complete satisfaction of the claim for the money or property or to the effect specified  
25 in the offer, with cost then accrued. If within 10 days after the service of the offer the  
26 adverse party serves written notice that the offer is accepted, either party may then file  
27 the offer and notice of acceptance together with proof of service, and the clerk shall  
28 enter judgment. An offer not accepted within 10 days is considered withdrawn and  
29 evidence of that offer is not admissible except in a proceeding to determine the form  
30 of judgment after verdict. If the judgment finally entered on the claim as to which an  
31 offer has been made under this section is not more favorable to the offeree than the

1 offer, the offeree shall pay the actual costs and attorney fees incurred by the  
2 offeror from the date the offer was made [THE INTEREST AWARDED UNDER  
3 AS 09.30.070 AND ACCRUED UP TO THE DATE JUDGMENT IS ENTERED  
4 SHALL BE ADJUSTED AS FOLLOWS:

5 (1) IF THE OFFEREE IS THE PARTY MAKING THE CLAIM, THE  
6 INTEREST RATE SHALL BE REDUCED BY FIVE PERCENT A YEAR;

7 (2) IF THE OFFEREE IS THE PARTY DEFENDING AGAINST THE  
8 CLAIM, THE INTEREST RATE SHALL BE INCREASED BY FIVE PERCENT A  
9 YEAR].

10 \* Sec. 19. AS 09.30.070(a) is amended to read:

11 (a) The rate of interest on judgments and decrees for the payment of money  
12 is three percent above the 12th Federal Reserve District discount rate in effect on  
13 January 2 of the year in which the judgment or decree is entered [10.5 PERCENT  
14 A YEAR], except that a judgment or decree founded on a contract in writing,  
15 providing for the payment of interest until paid at a specified rate not exceeding the  
16 legal rate of interest for that type of contract, bears interest at the rate specified in the  
17 contract if the interest rate is set out in the judgment or decree.

18 \* Sec. 20. AS 09.30.070 is amended by adding a new subsection to read:

19 (c) Prejudgment interest may not be awarded for future economic damages,  
20 future noneconomic damages, or for punitive damages.

21 \* Sec. 21. AS 09.55.535(k) is amended to read:

22 (k) The provisions of the Uniform Arbitration Act, AS 09.43.010 - 09.43.180,  
23 apply to arbitrations under this section if they do not conflict with the provisions of  
24 this section; arbitrations under this section shall be conducted in accordance with  
25 procedures established by any rules of court which may be adopted and according to  
26 provisions of AS 09.55.540 - 09.55.547 [AS 09.55.540 - 09.55.548] and AS 09.55.554  
27 - 09.55.560, and AS 09.65.090. ~~AS 09.55.548~~

28 \* Sec. 22. AS 09.55.580(c) is amended to read:

29 (c) Except as provided in AS 09.17.010 and (g) of this section, in [IN]  
30 fixing the amount of damages to be awarded under this section, the court or jury shall  
31 consider all the facts and circumstances and from them fix the award at a sum which

1 will fairly compensate for the injury resulting from the death. In determining the  
2 amount of the award, the court or jury shall consider but is not limited to the  
3 following:

4 (1) deprivation of the expectation of pecuniary benefits to the  
5 beneficiary or beneficiaries, without regard to age thereof, that would have resulted  
6 from the continued life of the deceased and without regard to probable accumulations  
7 or what the deceased may have saved during the lifetime of the deceased;

8 (2) loss of contributions for support;

9 (3) loss of assistance or services irrespective of age or relationship of  
10 decedent to the beneficiary or beneficiaries;

11 (4) loss of consortium;

12 (5) loss of prospective training and education;

13 (6) medical and funeral expenses.

14 \* Sec. 23. AS 09.55.580 is amended by adding a new subsection to read:

15 ~~271~~ (g) The amount awarded by the court or jury under this section for pecuniary  
16 damages may not exceed \$10,000 if the deceased is not survived by a spouse, minor  
17 child, or dependent. In this subsection, "dependent" means a father, mother, child,  
18 grandchild, or sibling who was dependent on the deceased at the time of death.

19 \* Sec. 24. AS 09.60.010 is repealed and reenacted to read:

20 Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING  
21 PARTY. The supreme court shall determine by rule or order the costs, if any, that  
22 may be allowed a prevailing party in a civil action. Unless specifically authorized by  
23 statute or by agreement between the parties, attorney fees may not be awarded to a  
24 party in a civil action for personal injury, death, or property damage related to or  
25 arising out of fault. In this section, "fault" has the meaning given in AS 09.17.900.

26 \* Sec. 25. AS 09.65 is amended by adding a new section to read:

27 Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

28 (a) A hospital is not liable for civil damages as a result of an act or omission by a  
29 health care provider who is not an employee or actual agent of the hospital if the  
30 hospital provides notice that the health care provider is an independent contractor. The  
31 notice required by this subsection must be posted conspicuously in all admitting areas

1 of the hospital, published at least annually in a newspaper of general circulation in the  
2 area, and must be in substantially the following form:

3 Notice of Limited Liability

4 The following health care providers are independent contractors  
5 and are not employees of the hospital:

6 (List specific health care providers)

7 The hospital is responsible for exercising reasonable care in granting staff privileges  
8 to practice in the hospital, for reviewing those privileges on a regular basis, and for  
9 taking appropriate steps to revoke or restrict privileges in appropriate circumstances.

10 The hospital is not otherwise liable for the acts or omissions of a health care provider  
11 who is an independent contractor.

12 (b) This section does not preclude liability for civil damages that are the  
13 proximate result of the hospital's own negligence or intentional misconduct.

14 (c) In this section,

15 (1) "health care provider" has the meaning given in AS 18.23.070,  
16 except that it does not include a hospital or an employee of the hospital;

17 (2) "hospital" has the meaning given in AS 18.20.130 and includes a  
18 <sup>#12(b)</sup>governmentally owned or operated hospital.

19 \* Sec. 26. AS 09.17.010(c), 09.17.040(c) and AS 09.55.548 are repealed.

20 \* Sec. 27. AS 09.17.080(a), as amended in sec. 15 of this Act, has the effect of amending  
21 Alaska Rule of Civil Procedure 49 by requiring the jury to answer the special interrogatory  
22 listed in AS 09.17.080(a)(2), regarding the percentages of fault to be allocated among the  
23 parties.

24 \* Sec. 28. AS 09.30.065, as amended by sec. 18 of this Act, has the effect of amending  
25 Alaska Rule of Civil Procedure 68 by providing that if a judgment is not more favorable to  
26 the offeree than the offer, the offeree shall pay actual costs and attorney fees incurred by the  
27 offeror.

28 \* Sec. 29. AS 09.30.070(c), added by sec. 20 of this Act, has the effect of amending  
29 Alaska Rule of Civil Procedure 68 by providing that prejudgment interest may not be awarded  
30 for future economic or noneconomic damages.

31 \* Sec. 30. AS 09.60.010, as repealed and reenacted by sec. 24 of this Act, has the effect

1 of amending Alaska Rule of Civil Procedure 82 by providing that attorney fees may not be  
 2 awarded in a civil action for personal injury death, or property damage, unless authorized by  
 3 statute or by agreement of the parties.

4 \* Sec. 31. <sup>IA</sup> SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the  
 5 application of a provision of this Act to any person or circumstance is held invalid, the  
 6 remainder of this Act and the application to other persons shall not be affected.

7 \* Sec. 32. APPLICABILITY. This Act applies to all causes of action accruing on or after  
 8 the effective date of this Act.

9 \* Sec. 33. This Act takes effect July 1, 1994.

A M E N D M E N T # 1

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 12, after line 18:

Insert a new bill section to read:

"\* Sec. 26. AS 44.23.020(b) is amended to read:

(b) The attorney general shall

(1) bring, prosecute, and defend all necessary and proper actions in the name of the state for the collection of revenue;

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(4) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature;

(5) draft legal instruments for the state;

(6) make a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office; [,] and

(B) on needed legislation or amendments to existing law,

including a review of the civil justice system in the state; and

(7) perform all other duties required by law or that [WHICH] usually pertain to the office of attorney general in a state;

(8) prepare, publish, and revise, as it becomes useful or necessary to do so, an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the

contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication."

Renumber the following bill sections accordingly.

A M E N D M E N T 1A

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 3, line 2:

Delete "attorney general"

Insert "division of insurance"

Page 3, line 3:

Delete "an annual"

Insert "a"

Page 13, after line 3:

Insert a new bill section to read:

"\* Sec. 31. REPORT. (a) The division of insurance shall compile information necessary to determine if the civil justice system is adequately serving claimants and whether a disproportionate amount of compensation dollars are being absorbed by the system. In examining the civil justice system as required under this subsection, the division of insurance shall also consider the effect of the health care and insurance systems in the state on the civil justice system.

(b) The information compiled under (a) of this section shall be reported back to the legislature by June 1, 1995."

Re-number the following bill sections accordingly.

AMENDMENT # 2 oe

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 3, line 13:

Delete "AS 09.10.140"

Insert "the disability of ~~minority~~ described under AS 09.10.140(a)"

Page 4, line 4:

Delete "AS 09.10.140"

Insert "the disability of [minority] described under AS 09.10.140(a)"

Page 5, line 8:

Delete "AS 09.10.140"

Insert "the disability of minority described under AS 09.10.140(a)"

AMENDMENT

# 3

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 3, line 14:

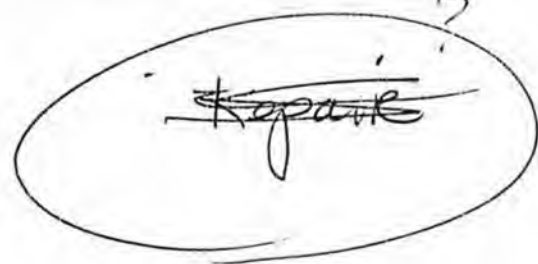
Delete "the action is brought"

Insert "commenced"

Page 3, lines 16 - 18:

Delete "a product alleged to have caused the personal injury, death, or property damage was purchased"

Insert "a newly manufactured product was first used for its intended purpose; however, the limitation of this paragraph does not apply to a claim for faulty maintenance of a product"



A M E N D M E N T 4A

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 3, after line 10:

Insert a new bill section to read:

\*\* Sec. 2. AS 08.64 is amended by adding a new section to read:

Sec. 08.64.125. MEDICAL PRACTICE PARAMETERS. (a) The board shall appoint a committee representative of medical specialties for the purpose of developing medical practice parameters. The practice parameters shall, consistent with appropriate standards of care, be designed to prevent claims of medical malpractice and to eliminate the practice of defensive medicine undertaken to avoid civil litigation. Medical practice parameters shall be adopted by the board by regulation and shall apply to the practice of medicine in the areas of anesthesiology, obstetrics, gynecology, emergency medicine, radiology, and other medical specialties determined by the committee.

(b) Practice parameters developed under (a) of this section

(1) must consider the needs of health care consumers and others in the health care system;

(2) are admissible as evidence in a civil action alleging professional negligence brought against a person licensed under this chapter; and

(3) must be revised at least every two years."

Renumber the following bill sections accordingly.

Page 12, line 20:

Delete "sec. 15"

Insert "sec. 16"

Page 12, lines 24:

Delete "sec. 18"

Insert "sec. 19"

Page 12, line 28:

Delete "sec. 20"

Insert "sec. 21"

Page 12, line 31:

Delete "sec. 24"

Insert "sec. 25"

Page 13, after line 3:

Insert a new bill section to read:

"\* Sec. 32. TRANSITION. The State Medical Board shall adopt by regulation the initial practice parameters required under AS 08.64.125, enacted by sec. 2 of this Act, by January 1, 1997."

Renumber the following bill sections accordingly.

AMENDMENT # 5

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER

TO: CSHB 292( ) "J" Version

Page 5, line 15:

Delete "damages"

Insert "all damage claims [DAMAGES]"

*delete*

*WD*

#  
AMENDMENT 6A

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 5, after line 22:

Insert a new bill section to read:

"\* Sec. 8. AS 09.17.010 is amended by adding a new subsection to read:

(d) The limit under (b) of this section does not apply to noneconomic damages awarded by a court or jury against a person who was convicted of a class A or unclassified felony, if the person bringing the action was a victim of that offense and the action is based in that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Renumber the following bill sections accordingly.

Page 5, line 28:

Delete "a new subsection"

Insert "new subsections"

Page 5, after line 31:

Insert a new subsection to read:

"(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person convicted of a class A or unclassified felony if the person bringing the action was a victim of that offense and the action is based on that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Page 11, line 14:

Delete "a new subsection"

Insert "new subsections"

Page 11, after line 18:

Insert a new subsection to read:

"(h) The limit under (g) of this section does not apply to damages awarded by a court or jury against a person convicted of a class A or unclassified felony if the deceased was a victim of that offense and the action is based on that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Page 12, line 20:

Delete "sec. 15"

Insert "sec. 16"

Page 12, line 24:

Delete "sec. 18"

Insert "sec. 19"

Page 12, line 28:

Delete "sec. 20"

Insert "sec. 21"

Page 12, line 31:

Delete "sec. 24"

Insert "sec. 25"

AMENDMENT #7

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER

TO: CSHB 292( ) "J" Version

Page 5, line 26:

Delete "and"

Insert "or"

AMENDMENT #8

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 6, lines 21 - 24:

Delete all material and insert:

"(2) the amount of economic damages awarded for past or future gross earnings shall be reduced by the amount of federal and state income tax that would have been paid on the earnings under tax rates in effect on the date of the injury or death."

AMENDMENT #9

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 6, after line 31:

Insert a new bill section to read:

\*\* Sec. 13. AS 09.17.040(e) is amended to read:

(e) Except as provided in this subsection, if a judgment is paid by periodic payments, the [THE] court shall [MAY] require security be posted [,] in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment."

Renumber the following bill sections accordingly.

Page 12, line 20:

Delete "sec. 15"

Insert "sec. 16"

Page 12, line 24:

Delete "sec. 18"

Insert "sec. 19"

Page 12, line 28:

Delete "sec. 20"

Insert "sec. 21"

Page 12, line 31:

Delete "sec. 24"

Insert "sec. 25"

A M E N D M E N T 10A

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "I" Version

Page 7, line 16, after "subrogation":

Insert "or when the collateral source has a right of subrogation by law or contract,"

Page 7, line 30, after "wages.":

Insert "However, evidence of a collateral source that has a right of subrogation under law or contract may not be introduced under this subsection."

Page 8, line 5:

Delete "and"

Insert "or when the collateral source has a right of subrogation by law or contract, and except for"

A M E N D M E N T # 11

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 10, after line 27:

Insert a new bill section to read:

\*\* Sec. 22. AS 09.55.580(a) is amended to read:

(a) Except as provided under (f) of this section, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to economic [PECUNIARY] loss. When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration."

Renumber the following bill sections accordingly.

Page 11, line 4:

Delete "pecuniary"

Insert "economic" [PECUNIARY]

Page 11, line 15:

Delete "pecuniary"

Insert "economic"

Page 12, line 31:

Delete "sec. 24"

Insert "sec. 25"

AMENDMENT 12(b)

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 1, lines 1 - 2, after "Procedure":

Delete "49, 68, and 82"

Insert "11, 49, 68, 82, and 95"

Page 12, after line 18:

Insert a new bill section to read:

"\* Sec. 26. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If it is alleged or appears that a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall immediately set the matter for hearing. If the court determines

that a pleading, motion, or other paper is signed in violation of this section, the court shall impose upon the person who signed it, a represented party, or both, an appropriate sanction that shall include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney fees, and monetary sanctions that are not less than \$500 nor more than \$10,000."

Renumber the following bill sections accordingly.

Page 13, after line 3:

Insert a new bill section to read:

"\* Sec. 32. AS 09.65.125, added by sec. 26 of this Act, has the effect of amending Alaska Rules of Civil Procedure 11 and 95 by requiring an immediate hearing to consider appropriate sanctions for certain failures relating to the signing of pleading, motions, or other papers."

Renumber the following bill sections accordingly.

*Modify*  
*#4*

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 3, after line 10:

Insert a new bill section to read:

"\* Sec. 2. AS 08.64 is amended by adding a new section to read:

Sec. 08.64.125. MEDICAL PRACTICE PARAMETERS. (a) The board shall appoint a committee representative of medical specialties for the purpose of developing medical practice parameters. The practice parameters shall, consistent with appropriate standards of care, be designed to prevent claims of medical malpractice and to eliminate the practice of defensive medicine undertaken to avoid civil litigation. Medical practice parameters shall be adopted by the board by regulation and shall apply to the practice of medicine in the areas of anesthesiology, obstetrics, gynecology, emergency medicine, radiology, and other medical specialties determined by the committee.

(b) Practice parameters developed under (a) of this section

- (1) are admissible as evidence in a civil action alleging professional negligence brought against a person licensed under this chapter; and
- (2) must be revised at least annually."

Renumber the following bill sections accordingly.

*consumers & industry*  
*every 2 years*  
*Jan 1 1997*

Page 4, lines 2-28:

~~Delete all material~~

Renumber the following bill sections accordingly.

*P. H. Hudson*  
*1/27/94*

*P. H., line 6.*  
*clarification*

A M E N D M E N T # 6

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 5, after line 22:

Insert a new bill section to read:

\*\* Sec. 8. AS 09.17.010(c) is repealed and reenacted to read:

(c) The limit under (b) of this section does not apply to noneconomic damages awarded by a court or jury against a person who was convicted of a class A or unclassified felony, if the person bringing the action was a victim of that offense and the action is based in that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Renumber the following bill sections accordingly.

Page 5, line 28:

Delete "a new subsection"

Insert "new subsections"

Page 5, after line 31:

Insert a new subsection to read:

"(c) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a person convicted of a class A or unclassified felony if the person bringing the action was a victim of that offense and the action is based on that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Page 11, line 14:

Delete "a new subsection"

Insert "new subsections"

Page 11, after line 18:

Insert a new subsection to read:

"(h) The limit under (g) of this section does not apply to damages awarded by a court or jury against a person convicted of a class A or unclassified felony if the deceased was a victim of that offense and the action is based on that offense. In this subsection, "victim" has the meaning given in AS 12.55.185."

Page 12, line 19:

~~Delete "AS 09.17.010(c), 09.17.040(c)"~~  
Insert "AS 09.17.040(c)"

Page 12, line 20:

Delete "sec. 15"

Insert "sec. 16"

Page 12, line 24:

Delete "sec. 18"

Insert "sec. 19"

Page 12, line 28:

Delete "sec. 20"

Insert "sec. 21"

Page 12, line 31:

Delete "sec. 24"

Insert "sec. 25"

AMENDMENT # 10

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 7, line 16, after "subrogation":

Insert "or when the collateral source has a right of subrogation by law or contract"

Page 7, line 22:

Delete "In"

Insert "Except for collateral sources that have a right of subrogation under law or contract, in"

Page 8, line 5:

Delete "and"

Insert "or when the collateral source has a right of subrogation by law or contract and except for"

it, a represented party, or both, an appropriate sanction, that may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney fees, and monetary sanctions that are not less than \$500 nor more than \$10,000."

Renumber the following bill sections accordingly.

Page 13, after line 3:

Insert a new bill section to read:

"\* **Sec. 32.** AS 09.65.125, added by sec. 26 of this Act, has the effect of amending Alaska Rules of Civil Procedure 11 and 95 by requiring an immediate hearing to consider appropriate sanctions for certain failures relating to the signing of pleadings, motions, or other papers."

Renumber the following bill sections accordingly.

A M E N D M E N T 12A

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 1, lines 1 - 2, after "Procedure":

Delete "49, 68, and 82"

Insert "11, 49, 68, 82, and 95"

Page 12, after line 18:

Insert a new bill section to read:

"\* Sec. 26. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall immediately set the matter for hearing and shall impose upon the person who signed

A M E N D M E N T # 12

OFFERED IN THE HOUSE BY REPRESENTATIVES HUDSON AND PORTER  
TO: CSHB 292( ) "J" Version

Page 1, lines 1 - 2, after "Procedure":

Delete "49, 68, and 82"

Insert "11, 49, 68, 82, and 95"

Page 12, after line 18:

Insert a new bill section to read:

\*\* Sec. 26. AS 09.65 is amended by adding a new section to read:

Sec. 09.65.125. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by the Alaska Rules of Civil Procedure or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument of the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate

sanction, that may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney fees, and monetary sanctions that are not less than \$500 nor more than \$10,000."

Renumber the following bill sections accordingly.

Page 13, after line 3:

Insert a new bill section to read:

"\* Sec. 32. AS 09.65.125, added by sec. 26 of this Act, has the effect of amending Alaska Rules of Civil Procedure 11 and 95 by requiring sanctions for certain failures relating to the signing of pleadings, motions, or other papers."

Renumber the following bill sections accordingly.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

667 or 465-2450  
465-2029  
101

130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

May 7, 1993

SUBJECT: Sectional Summary of HB 292

TO: Representative Bill Hudson

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

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Limits the time within which a person may bring an action for personal injury, death or property damage to six years from the date a product alleged to have caused the injury, death, or property damage was purchased or the date of the last act alleged to have caused the injury, death, or damage.

Section 2. Limits the time within which a person can bring an action for professional negligence against a health care provider to two years, unless the person is less than six on the date of injury, in which case the person has until their eighth birthday. Provides for certain exceptions to the time limit.

Section 3. Conforming amendment for section 4.

Section 4. Limits the time within which a person can bring an action for personal injury, death or property damage to two years after accrual of the action. Eliminates the exceptions contained in AS 09.10.140 to the time limit for bringing a personal injury action.

Section 5. Adds wrongful death as a type of action subject to the limit contained in AS 09.17.010.

Representative Bill Hudson

May 7, 1993

Page 2

Section 6. Imposes a cap of \$500,000 on each separate incident or injury, as opposed to each claim based on a separate incident or injury.

Section 7. Requires that a person must show clear and convincing evidence of malice and conscious acts showing disregard of another person by the person from whom the punitive damages are sought, in order to receive punitive damages.

Section 8. Limits the amount awarded as punitive damages to not more than three times the amount of compensatory damages or \$200,000, whichever is greater.

Section 9. Prohibits a person from recovering damages if the person suffers the damages while committing a crime, and the crime substantially contributed to the damages.

Section 10. Provides that the prohibition in section 9, does not apply if the person liable for the damages was also engaged in the commission of a crime and the crime substantially contributed to the injury or death.

Section 11. Requires that a verdict be itemized when damages are awarded for either personal injury and death. Requires reduction of an amount awarded for past or future damages, by the amount of federal and state income tax that would be paid.

Section 12. Allows any party to require future damages be paid by periodic payment instead of as a lump-sum. Requires that a judgment amount paid to an attorney under a contingent fee agreement be reduced to present value and paid as a lump sum.

Section 13. Requires that a judgment ordering payment of future damages by periodic payment, include increases in future payments for anticipated inflation.

Section 14. Provides that a claimant may only recover damages that exceed amounts received from collateral sources, with certain exceptions. Allows the claimant and a person defending a claim to introduce certain evidence regarding collateral sources. Requires that evidence of a collateral source is only admissible after the fact finder has rendered an award, with certain exceptions. Prohibits a person who provides a collateral benefit from bringing an action based on the provision of the benefit.

Section 15. Conforming amendment for section 17.

Section 16. Conforming amendment for section 17.

Section 17. Allows a person to release another person from civil liability. Provides for reduction of the claim against others by the amount of the release. This section corrects a problem created by the tort reform initiative enacted in 1987.

Representative Bill Hudson

May 7, 1993

Page 3

Section 18. Increases the penalty imposed under AS 09.30.065 from five to 50 percent.

Section 19. Ties the rate of interest on judgments to an amount one percent above the federal reserve rate in effect on January 2 of the year in which the judgment is entered.

Section 20. Prohibits the award of prejudgment interest on future damages or punitive damages.

Section 21. Conforming amendment for section 25.

Section 22. Conforming amendment for section 23.

Section 23. Limits the amount awarded in pecuniary damages for wrongful death to \$50,000.

Section 24. Limits the civil liability of a hospital for an act or omission of a health care provider who is not an employee of the hospital.

Section 25. Repealers.

Section 26. Court rule change section.

Section 27. Court rule change section.

Section 28. Applicability section.

Section 29. Effective date.

MFF:glc  
93-399.glc

# Alaskans For Liability Reform

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 in to 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
		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 110805  
Juneau, AK 99811-0805  
Phone (907) 465-2887/573

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: Resa 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.



# 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, VA 22209  
703-276-5045

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

## 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%

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

**HIGHLIGHTS FROM:**

# **Product Liability News**

Issue No. 7, 1993

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P.O. Box 201668  
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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:

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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:

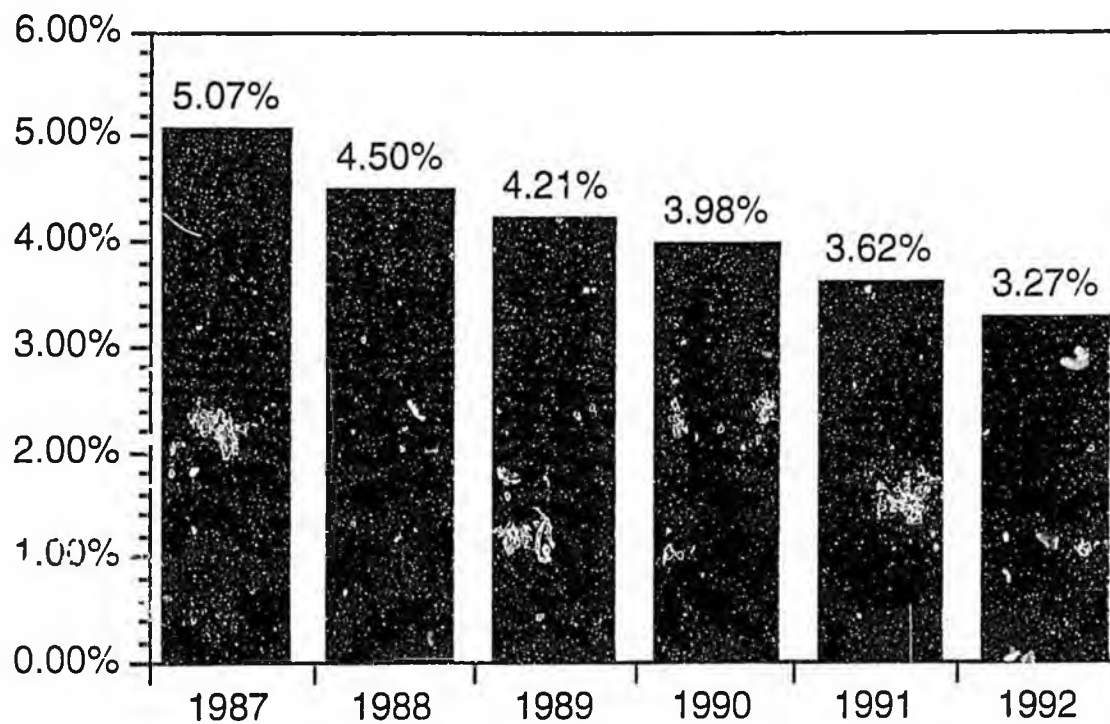
# American Consulting Engineers Council LIABILITY REPORT

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

### Insurance Cost As A Percentage of Billings



# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

HIGHLIGHTS FROM:

# American Consulting Engineers Council LIABILITY REPORT

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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

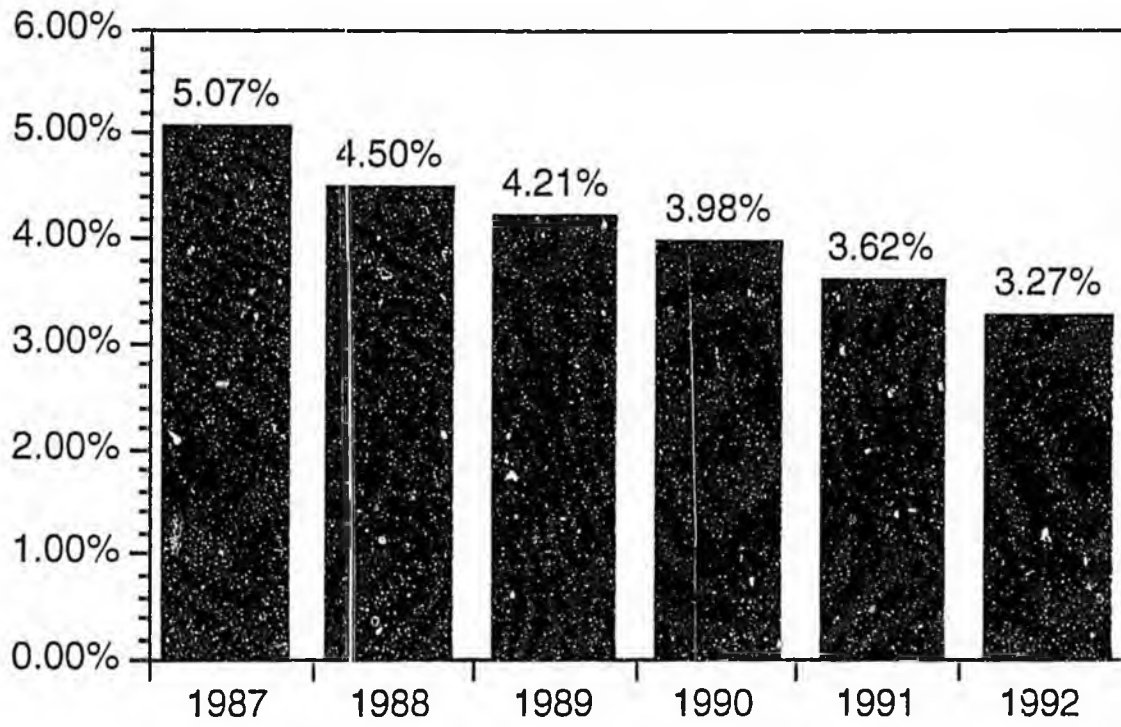
<u>Method of Resolution: 1992</u>	<u>Percent</u>
Negotiation	48 %
ADR: Mediation	10 %
Arbitration	2 %
Other ADR	3 %
Litigation	
Settled Prior to Court Award	20 %
Settled by Court Award	7 %
Other	10 %
Total	100 %

## 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



# *Tort Cost Trends: An International Perspective*

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## **Excerpts from the Tillinghast Report**

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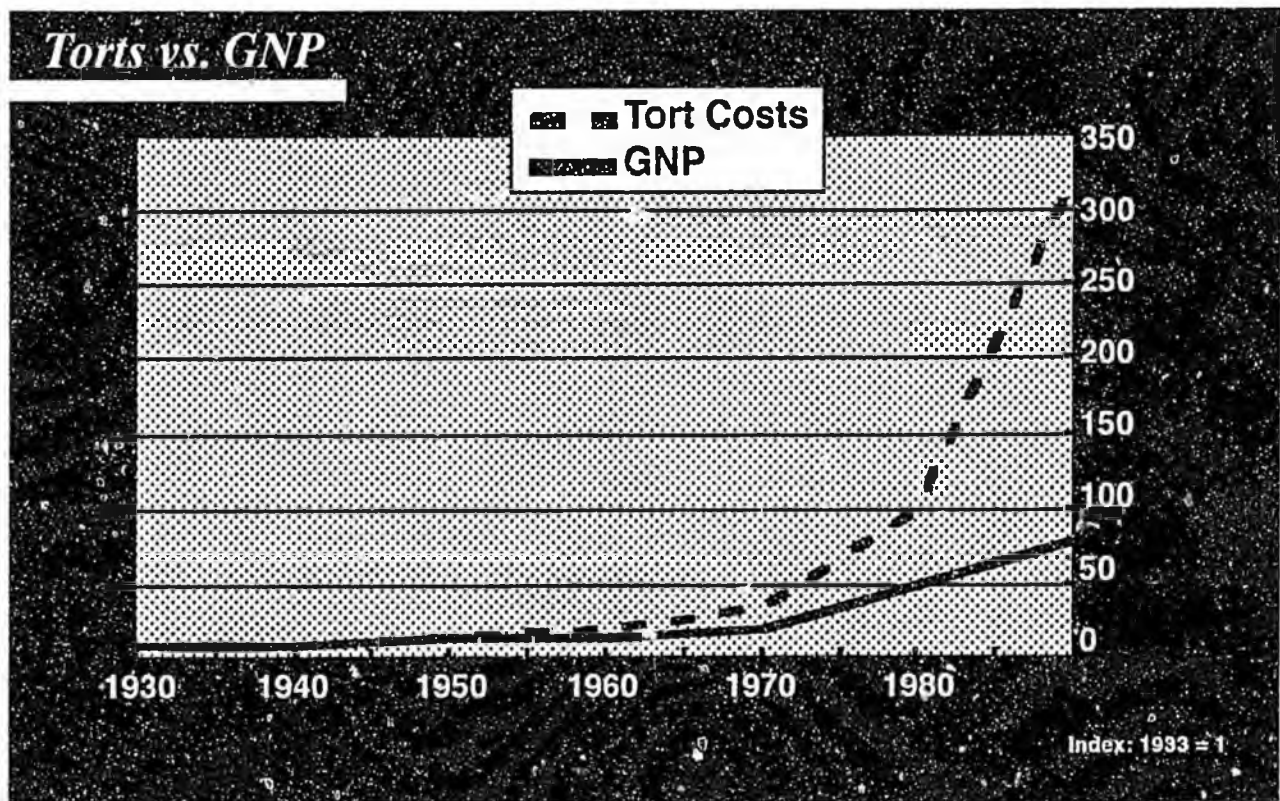
Alaskans for Liability Reform

Post Office Box 201668

Anchorage, Alaska 99520

(907) 561-6250

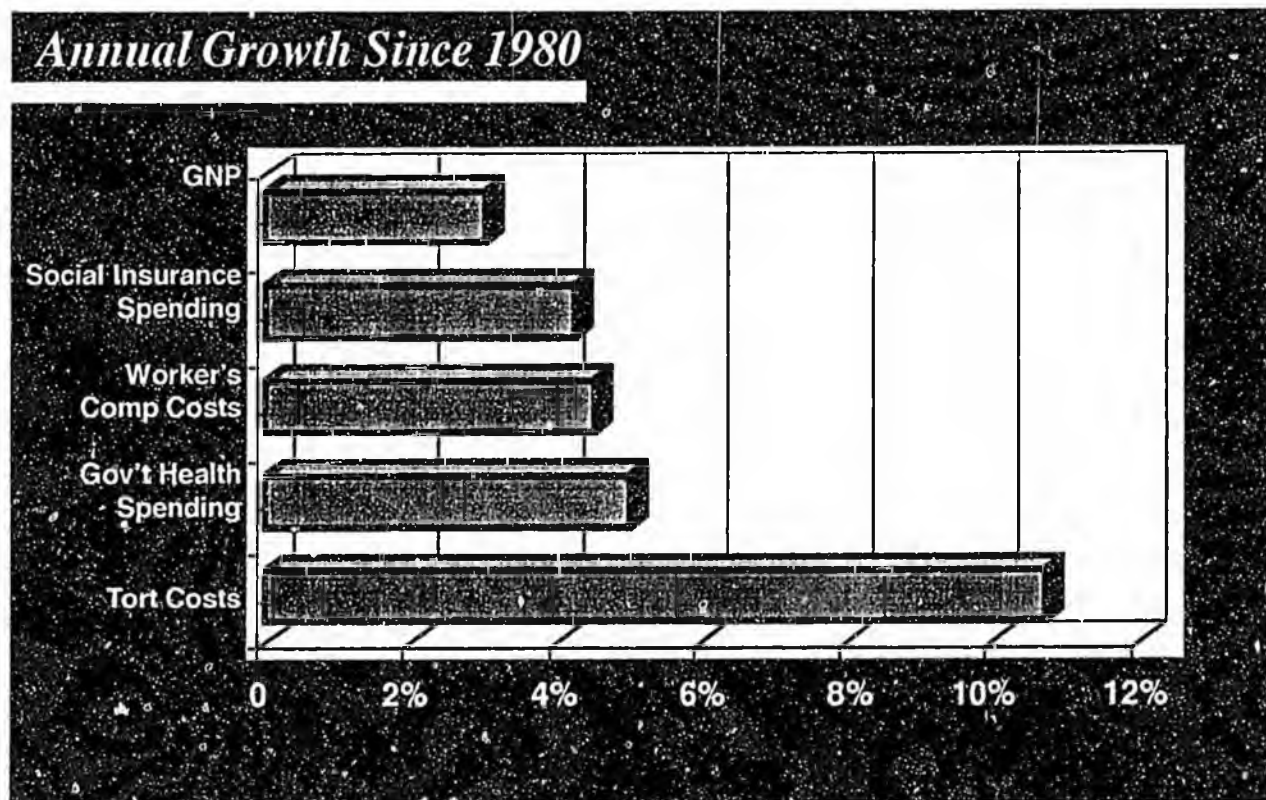
# *How Does Tort Cost Escalation Compare With GNP Growth?*



■ 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.

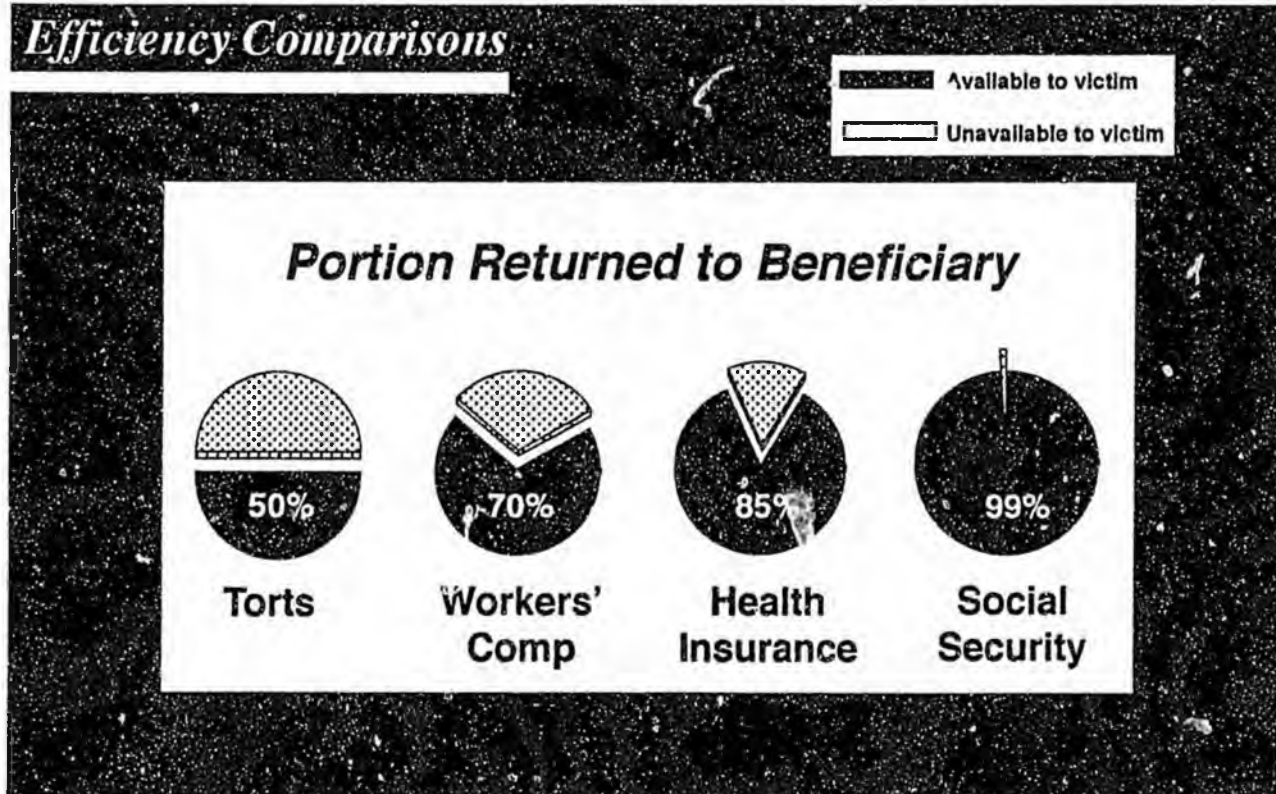
# *Since 1980, Cost Increases Have Leveled Off for All Social Systems Save Torts*



■ 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*



■ 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.

# NFIB Alaska

National Federation of  
Independent Business

January 21, 1994

The Honorable Bill Hudson  
Chairman  
House Labor and Commerce Committee  
Alaska State House  
Pouch V  
Juneau, Alaska 99811

RE: HB 292 Tort Reform

Dear Representative Hudson:

The NFIB/Alaska, National Federation of Independent Business of Alaska, membership is comprised of 4,400 small and independent business owners. On behalf of our members I want to offer our support for HB 292.

During the year, the field staff of NFIB/Alaska visits literally thousand of small business owners in the state. One recurring theme our staff continues to hear is concern with the cost of insurance.

I recently received a letter from one of our Anchorage field staff in which he said in part:

"Come walk with me for a day and listen to the disgust of members across this state who are mortified about the amount of insurance premiums they pay for workers' comp, liability, malpractice, etc., and they are dumbfounded to understand why because they have -- in most cases -- NEVER had a claim!"

In response to our 1991 and 1994 poll of members on liability insurance the members that wrote comment about Liability Insurance, expressed a sense of frustration. Although they had no claims or a few minor claims, their cost had increased. Several members commented they no longer carried liability insurance due to the cost. Anything, you can do to help stabilize their cost, I am sure would be greatly appreciated. We would urge you to move HB 292 on to the next committee of referral.

9159 Skywood Lane  
Juneau, AK 99801



Enclosed is a copy of the results of our 1994 poll of our members on six of the bill's key reforms. I hope this information regarding the thoughts of small business owners on liability

The Guardian of  
Small Business

Page: 2  
HB 292

insurance will be useful to you. If you have any questions regarding this information, please do not hesitate to contact me.

I look forward to working with you on this and other issues of importance to the small business members of NFIB/Alaska.

Sincerely,

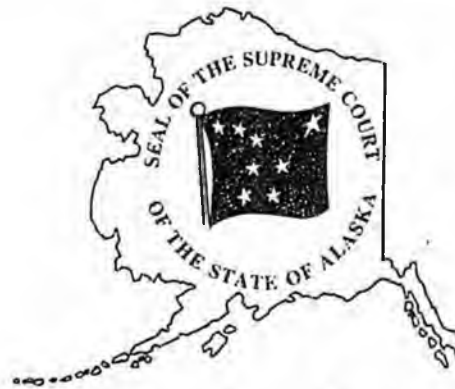


Resa Jerrel  
NFIB/Alaska  
State Director

Enclosure

The 1994 survey of NFIB/Alaska members found overwhelming support among the small business community for all six of the key reforms contained in HB 292:

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



Alaska Court System  
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

CHARLES S. CHRISTENSEN III  
Staff Counsel

303 K Street  
Anchorage, AK 99501  
(907) 264-8228

January 24, 1994

The Honorable Bill Hudson  
Chairman, House Labor and  
Commerce Committee  
State Capitol, Room 108  
Juneau, Alaska 99811

Dear Representative Hudson:

Thank you for giving me the opportunity to testify on House Bill 292, relating to civil actions, on November 22, 1993.

As I stated at the meeting, the supreme court generally does not take a position on legislation. Passage of legislation is a matter of public policy which our constitution leaves to the purview of the legislature. The exception to this general rule is when legislation directly affects the internal administration of the courts. The majority of HB 292 does not fall into this category, and the court takes no position on those sections of the bill. However, HB 292 does propose to change one important court rule, Civil Rule 82. As you know, that rule provides that the prevailing party in a civil suit is entitled to recover a portion of its attorney fees. HB 292 would repeal Rule 82 in tort cases. I have been instructed by the supreme court to state its opposition to this change. This position is not taken lightly; this is the first time in many years that the court has formally opposed a change to one of its rules.

I have reviewed the materials submitted by the group "Alaskans for Liability Reform." The stated justification for the repeal of Rule 82 is to "reduce litigation costs and court time, and streamline the civil process for expediency and fairness." The supreme court disagrees that this would be the result of the repeal of Rule 82.

Rule 82 and its predecessors have been around in Alaska since 1884, so we have had a good opportunity to see how it works. The rule has been continuously revised over the years, and the supreme court completed a substantial multi-year revision process in July, 1993. The latest revisions were intended to make the operation of the rule even more fair, and we believe that this goal has been achieved.

The Honorable Bill Hudson  
January 24, 1994  
Page 2

In a very basic sense, Rule 82 is a rule which recognizes the reality of attorney's fees. Such fees are an inherent part of any civil justice system. Rule 82 has a dual effect: it provides partial compensation to the party who wins a lawsuit, and it streamlines the civil justice process. These effects are manifested as follows:

First, Rule 82 discourages unfounded lawsuits by plaintiffs. Relatively few plaintiffs are willing to press a frivolous case against a defendant if they know that it is very likely that they will end up paying a substantial amount in attorney's fees to the defendant. Rule 82 weeds out many of those plaintiffs who know that their claim has no real merit.

Second, Rule 82 gives a plaintiff a personal stake in a lawsuit. This personal stake would otherwise be lacking in a case where the plaintiff was represented by an attorney with a contingent fee arrangement. The significance of giving the plaintiff a personal financial stake is that a plaintiff is more likely to disclose the weak points of his case to his attorney up front, and to express a more realistic attitude in evaluating it. This enables the attorney to evaluate the client's case more fairly at the beginning of the process, by shifting the emphasis away from sympathy, revenge, or so-called "principle." Cases which are evaluated fairly and early by the plaintiff and his attorney are more likely to settle early.

Third, Rule 82 makes it more likely that insurance companies will settle claims before the hiring of lawyers or the filing of lawsuits. If a claim is clearly valid, the company has an economic incentive not to allow the plaintiff to file a suit. Thus, Rule 82 gives insurance companies an extra incentive to evaluate claims early and fairly. Without Rule 82, the insurance company of a potential defendant cannot, without incurring expenses to itself, sit around and wait to see if the plaintiff is serious enough to hire an attorney and file a lawsuit.

Fourth, Rule 82 allows plaintiffs with small cases to bring them. Understand that attorneys generally will not handle cases under \$20,000 or \$30,000 on a contingent fee basis. The amount of work relative to the potential payback makes it too great a risk. Small plaintiffs have to pay attorneys on an hourly bases, just as defendants do. The reality is that a plaintiff will not file a claim for a small amount, if he knows that he will end up giving most of it to a lawyer. Rule 82 ensures that if the plaintiff wins, the defendant will pay at least a portion of the plaintiff's fees. Without Rule 82, defendants would have an incentive to ignore meritorious small claims, because they know that it would not be economical for the plaintiff to hire an attorney.

Fifth, Rule 82 discourages marginal appeals by the losing party. Borderline appellate grounds can be bargained against the Rule 82 fee award in most instances. By this mechanism, the rule again prompts a realistic evaluation of the merits of the case before an appeal is filed.

The Honorable Bill Hudson  
January 24, 1994  
Page 3

Finally, in a very basic sense, Rule 82 is fair. In each lawsuit there is a winner and a loser. One party has a claim or a defense that is valid, and the other does not. Rule 82 ensures that the party who prevails is at least partially compensated for the cost of prosecuting or defending the suit. Without Rule 82, the winning party is solely responsible for its own attorney's fees, solely responsible for bearing the costs of a lawsuit in which it should never have been involved. The court does not believe that this is a fair result.

Thank you for your consideration. Please advise if you have any questions or comments.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'C. S. Christensen III', written in a cursive style.

C. S. Christensen III  
Staff Counsel

# Alaska Women's Lobby

P.O. Box 210685  
Anchorage, Alaska 99521  
(907) 333-0719

## PRESENTATION TO HOUSE LABOR AND COMMERCE COMMITTEE

Monday, November 22, 1993

### Committee Substitute for HB 292

#### Steering Committee

#### Anchorage Members:

Virginia Allen  
Nancy Groszek  
Theda Pittman  
Rhonda Roberts  
Glenda Straube  
Jana Verrou

#### Fairbanks Members:

Marsha Hubbard  
Patty Kastele  
Drena Melnyre  
Wendy Redman  
Nadine Winters

#### Juneau Members:

Sara Boesser  
Shirley Dean  
Barbara Miklos  
Cindy Smith  
Carla Timpone

#### Lobbyist:

Sherrie Markin Goll  
P.O. Box 22156  
Juneau, Alaska 99802  
(907) 463-6744

Thank you for inviting me here today to testify on behalf of the Alaska Women's Lobby.

As you know, there was tort reform in 1986 and tort reform again in 1988. I thought we already gave away the store, yet once again we see before us even more so-called tort reform in 1993. The Alaska Women's Lobby believes that it is simply not good public policy to make further onerous changes, all of which are detrimental to your constituents, without any quantitative or qualitative analysis of the effects of existing tort reform laws.

From listening to the previous speaker for the Medical Association, I would like to recommend that, before any legislation be passed, that independent research be undertaken to ascertain the following, at a minimum:

- 1) Whether medical tests are done merely for the self-protection of physicians. If so, to what extent.
- 2) Whether or not we have a doctor shortage in Alaska. If we do, is it truly because of tort issues?
- 3) The previous speaker testified that awards are sometimes based on who has the most eloquent attorney. So, let's find out who has more money to hire the most expensive attorney, and who are those so-called eloquent attorneys, anyway?
- 4) Let's survey jurors who have served on successful and unsuccessful cases and determine the reasoning for their decisions.

*"Most politicians will not stick their necks out unless they sense grass-roots support... neither you nor I should expect someone else to take our responsibility. If we remain passive, they will surely win."*

*- Katharine Hepburn*

- 5) What % of physicians in Alaska have had liability claims filed against them.
- 6) What % of tort cases filed have been settled, lost and won. What was the amount of the awards and the % and amount of those upheld on appeal. What % of the awards went to attorneys fees, court costs, expert witnesses, other costs not directly benefiting attorneys, and how much went to the victim?
- 7) What is the true effect of previous tort reform on insurance rates? And is the high cost of insurance rates really due to torts or greed of insurers?

I do agree with the saying that "if you've got a problem, fix it." But the real question here is "do you really have a problem" and if you think so, what are you basing it on? Horror stories told by insurance companies and the medical profession? And if you're introducing legislation based on anecdotal stories, how about some from the victim's side? Actually, I'm sure you would agree that passing legislation based on anecdotes is bad public policy.

Look, I am not here today to take sides with or pick on lawyers, doctors, corporations or others. But I am here to take sides with your constituents and our constituents. And I do not care to pussy foot around this issue.

You know, in order to get tort reform passed in Alaska years ago, we heard over and over again how if we didn't do tort reform then insurance costs would escalate unbelievably and doctors wouldn't be able to practice. But neither tort reform in Alaska, nor in other states, caused insurance costs to decline. In fact, an industry study by the Insurance Services Office determined that tort reforms did not affect its rates.

Well, we listened when they cried "wolf" then, and it appears that the legislature is still listening to those crying "wolf" about the need for so-called tort reform. By the way, the word "reform" always sounds good, but let's call it like it is: a desire to protect those with money from having to answer for their negligent acts. This so-called reform is a crime against those, through no fault of their own, who become quadraplegics, widowed, left childless, ~~and~~ in horrific circumstances.

And more than anything else, this legislation is an insult to anyone who has or who could possibly sit in the jury box (and that means most all Alaskan adults). What you are saying is that innocent victims cannot have their day in court because you simply trust the judgement

of insurance companies, medical professionals, and yourselves over the judgement of twelve independent and objective jurors who have heard all of the facts.

I am not going to spend this committee's time picking apart every disgusting piece of this anti-constituent legislation. There are excellent reports that have been made available to you which factually describe the onerous impact of this legislation. Even some sources in the insurance industry, independent insurance task forces, and independent researchers have produced studies and reports which clearly indicate that the provisions in this legislation are unnecessary. Again, legislation such as this is not based on any factual evaluation of the tort system operating in Alaska now. It is, instead, based on anecdotes, myths and misconceptions.

Even though I said I wouldn't pick it apart, there is one part of the legislation which is, unbelievably, more perplexing and stupefying than other parts. This bill would preclude a claim of sexual abuse from a victim if it is not filed within 6 years after the abuse occurred. Well, any mental health professional can tell you that to survive the abuse, victims place the memories out of reach in their minds and only when they really feel safe, do these memories return. I know this for fact, because I was 40 years old before all the horrible memories returned. So, you would victimize me again by not allowing me to seek simple, legal redress in civil court? Who are you to decide if I have my day in court? Even if the legal system is overburdened, and frankly less than 3% of all civil suits are actual tort cases, you still do not have the right to take away my access to justice, fairness and equity through my constitutional access to the courts. And what does this provision mean when the legislature has already passed other legislation extending the amount of time that a sexual abuse victim can file against the abuser?

I am offended that insurance companies and doctors are not accused by legislators of trying to line their pockets or keeping their pockets full of what they've already got, but I have read and heard statements by legislators inferring that we should not listen to attorneys because of their vested monetary interests. Well, I think it should be all or none. Either we agree that all vested parties have some altruistic motives or none of them do!

And since when do we give special protection to one specific profession: health care providers (but we really mean doctors). Why are you willing to provide a special provision allowing only 2 years to seek redress? I have my own personal story. I will never forget being with my mom in the hospital when she had serious back problems and listening to the doctor ridiculing my

mom for "daring" to play doctor by telling him that she had a lump in her breast. He ignored her, but she died several years later from this cancer which started as a lump in her breast. Oops! Too late, two years has gone by and tough luck. Sorry, I thought she was just another hysterical woman. Again, how dare you take away my right to redress in the courts. Now, granted, I never tried to sue anyone over this negligent act, but I certainly should have the right to do so. And that doctor should have had to answer for his outrageous action or lack of.

I know that the majority of the members of this committee believe that we need tougher criminal laws and that there should be stricter accountability of those in the criminal arena. Most people don't care why a criminal does what he or she does, whether they themselves were emotionally or physically abused as children. We don't seem to care about that. By God, regardless of original fault, we want them to be held accountable for their actions.

Yet, why aren't you willing to demand white collar accountability. Why shouldn't people or corporations who ruin people's lives through negligence, through malpractice, through careless and reckless conduct, have to answer for their mistakes. Why aren't you willing to hold them accountable? And why are you willing to make the innocent victims suffer even more than they already do? This bill is one of the most anti-consumer pieces of work perpetrated by the legislators against their own constituents. And believe me, if it was your daughter, wife or mother who lost her life to cancer through a negligent act of another person...if it was your child who was paralyzed from the neck down because of a corporation's negligence...YOU WOULD WANT ACCOUNTABILITY!!!

To sum it up, you have before you legislation not based on any review of the existing system, but legislation based on hype. Nevertheless, legislation which would punish your innocent constituents. For those who want to pass this bill out of committee, you should be ashamed for agreeing to deny innocent victims their rights! I know some of you and I consider you to be kind and caring persons. How could you even consider creating an unfair, inevitable and extremely biased system?

Please think carefully about what you are doing. Thank you for your time.

*Glenda  
Straube*

LAW OFFICES

*Michael J. Schneider, P.C.*

TELEPHONE (907) 277-9306

880 "N" STREET, SUITE 202

FAX (907) 274-8201

ANCHORAGE, ALASKA 99501

November 30, 1993

Representative Bill Hudson  
House Labor & Commerce Committee  
3379 Meander Way  
Juneau, Alaska 99801

Re: HB#292  
(8/25/93 Work Draft)  
Section 14: Collateral Benefits

Dear Representative Hudson:

During my testimony regarding HB#292, it became clear to me, particularly in light of some of Representative Porter's questions, that I had simply failed to make myself understood as to a problem with the bill that I think is important. While I think that the collateral benefits portion of the bill is a bad idea, I recognize that members of the committee may be of a different mind. The purpose of this letter is to explain a narrow but very important flaw in Section 14 as it is currently drafted.

The Way It is Supposed To Work

Assume plaintiff and defendant are involved in a motor vehicle collision. The accident is entirely defendant's fault, and plaintiff played no role in causing the accident. Assume that plaintiff's damages are \$100,000 and that \$25,000 of that total sum is comprised of medical expenses that plaintiff incurred because of the accident. Assume that plaintiff's automobile insurance policy had a medical payment provision with limits equal to or greater than plaintiff's medical bills and that plaintiff's insurer thus paid all of the \$25,000 in medical expenses that plaintiff incurred.

Under current law, plaintiff's claim would be for \$100,000. Though plaintiff's medical expenses were paid by plaintiff's insurance company, plaintiff would not receive a double recovery (a windfall). This is because virtually every policy of insurance (whether an auto policy, or a privately acquired health policy, or some other type of policy) contains a subrogation provision allowing the insurance company to be repaid out of any recovery from defendant. Thus, while plaintiff would obtain \$100,000, plaintiff would be contractually and equitably compelled to pay

Representative Bill Hudson  
House Labor & Commerce Committee  
Page Two  
November 30, 1993

back plaintiff's medical payments insurance carrier the \$25,000 that had been advanced to pay for plaintiff's medical expenses in the first place.

HB#292, § 14, would change the way a claim like this is handled. Under the same facts assumed above, plaintiff's claim would be for \$75,000. That's the most that plaintiff could recover against defendant. When plaintiff's medical payment carrier asserts its subrogation claim for \$25,000, that claim will probably be denied for the following reasons:

1. HB#292, § 14(d) provides that plaintiff's insurance company can no longer assert its subrogation claim (this, of course, assumes the constitutionality of this provision, an issue upon which I offer no opinion).
2. The common law conditions precedent to a subrogation recovery (i.e., that plaintiff be fully compensated and that plaintiff receive money for the element of damages paid for by the party seeking subrogation) would not have occurred. Plaintiff has been statutorily deprived of plaintiff's claim for medical expenses. So no part of plaintiff's recovery should be subject to a subrogation claim for medical payment.

Though there are many reasons why § 14 of HB#292 is a bad idea, in the scenario set forth above, and assuming the constitutionality of § 14(d), plaintiff would recover all of plaintiff's damages, and because of (d) there would be no "double dipping" into plaintiff's recovery.

In Most Cases, Plaintiff's Recovery Will Be "Double Dipped."

Assume the same facts set forth above, but this time assume the very common situation where plaintiff is a nongovernmental worker whose medical bills were paid by health insurance provided to plaintiff by plaintiff's employer as an employee welfare benefit. If HB#292 § 14 passes the legislature, a plaintiff in this setting will have a recovery of \$75,000, even though they have \$100,000 in damage. HB#292 § 14 presumes that plaintiff has been made whole because plaintiff's health insurer, or some other insurer, has paid plaintiff's \$25,000 in medical bills. After plaintiff receives \$75,000 from the lawsuit, plaintiff's group health carrier will again assert a subrogation claim asking to receive back its \$25,000. Note that if this claim is successful a plaintiff with \$100,000 in damages will end up with \$50,000; \$25,000 has been reduced because of the provisions of HB#292 § 14; another \$25,000 will be lost if the health insurer's subrogation claim against plaintiff's \$75,000 recovery is successful.

Representative Bill Hudson  
House Labor & Commerce Committee  
Page Three

Why would a subrogation claim by a group insurer in this setting be successful? The answer is that such a claim is governed exclusively by the provisions of the Employee Retirement Income Security Act [29 U.S.C. § 1132(a)(1)(B)] (ERISA). The insurance carrier's right to share in the fund of money generated by plaintiff's claim against defendant will not likely be affected by the fact that plaintiff's claim for medical benefits has been eliminated by HB#292 § 14, that plaintiff recovered nothing from defendant specifically for medical benefits, that plaintiff received less than a full recovery, or that HB#292 § 14(d) purports to preclude a subrogation claim against plaintiff's recovery.

Plaintiff thus ends up defending a second lawsuit brought by the subrogation carrier which plaintiff will likely lose. Plaintiff's damages have been double-dipped, and a plaintiff with \$100,000 in damages, after all is said and done, walks away with \$50,000 less the costs incurred in fighting with its own health care provider. Whether one likes HB#292 § 14 or not, this is clearly not the outcome envisioned by its drafters, but it is certainly an outcome that many, many plaintiffs are likely to face.

#### Authority

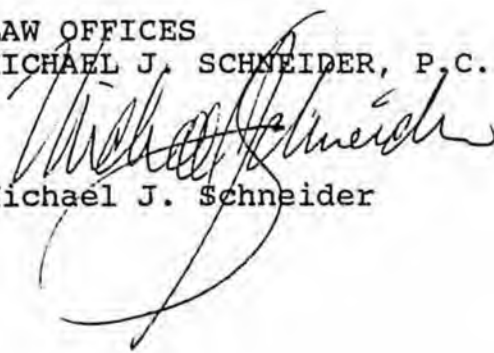
ERISA expressly provides that its civil enforcement procedures supersede any and all state laws insofar as they relate to any employee benefit plan covered by ERISA. See 29 U.S.C. § 1144(a), Pilot Life Ins. Co. v. Dedeaux (US), 107 S.Ct. 1549, 95 LE2d 39 (1987), and Lee v. Prudential Ins. Co., 673 F.Supp. 998 (N.D. Cal. 1987). When I begin exploring the vagaries of ERISA, I generally consult an article found in Causes Of Action, Vol. 18, p. 1. § 4 specifically discusses preemption of state law claims.

#### Conclusion

Even on the questionable assumption that HB#292 § 14 is a good idea, its intent will not be realized by a large number of plaintiffs because of the preemptive effect of ERISA.

Sincerely yours,

LAW OFFICES  
MICHAEL J. SCHNEIDER, P.C.

  
Michael J. Schneider

ATL

P.O. Box 102323 • Anchorage, Alaska 99510  
Office: 540 L Street, Suite 206 • Anchorage, AK 99501  
• (907) 258-4040 • FAX (907) 276-7185

August 31, 1993

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Representative Bill Hudson  
Alaska State Legislature  
Room 108  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative Hudson:

In anticipation of the first hearing on the omnibus tort reform legislation, House Bill 292, the Alaska Academy of Trial Lawyers has prepared a sectional analysis of this bill. Please find a copy of this analysis, "A Report on the Impact of House Bill 292 on Alaskan Families", enclosed.

Representatives from the Alaska Academy of Trial Lawyers will be present at the September 10 House Labor and Commerce Committee hearing in Anchorage to give testimony on HB 292. We would be pleased to answer any questions about tort reform generally or about specific sections of the bill, prior to, during or following the hearing.

If you would like additional information, we would be happy to provide materials to you or your staff. Please contact Debra Gravo, Executive Director, or me at the Academy office. We look forward to working with you in the future.

Sincerely,



Loretta Lure  
Academy Staff  
lal/encl.

**A Report  
on the Impact of House Bill 292  
on Alaskan Families**

Prepared by

**THE ALASKA ACADEMY OF TRIAL LAWYERS**

540 L Street, Suite 206

Anchorage, Alaska 99501

Telephone (907) 258-4040

August 1993

## FOREWORD

Legislation which would radically degrade civil jury trials for accident victims has been introduced in the Alaska Legislature. House Bill 292 is long and technical. It is hard to understand. Yet it is very important and controversial. It will affect the lives of accident victims for generations, by reducing or eliminating the amount they can expect to receive for their losses. It seeks to benefit commercial interests whose carelessness has hurt people.

This report is a guide to the meaning and impact of House Bill 292. It is prepared by men and women who actually represent victims in court. Consider the following:

*Little known fact:* The jury system already tends to protect defendants unless evidence of fault is quite strong. Defense lawyers are rarely willing to waive a jury trial.

Changes adopted by the Alaska Legislature in 1986, and by the public in 1988, have further tipped the playing field in favor of defendants.

Since those changes were made, there is no evidence of an insurance crisis or pattern of excessive verdicts.

Many of the proposed changes are radical in scope, and would make Alaska the *most anti-victim* of all the United States.

The citizens of Alaska will get no payback in the form of reduced insurance premiums for the victim's rights given away by this legislation.

The proposed changes will lower the quality of our jury trials, and will unfairly penalize unfortunate Alaskans who have done nothing wrong.

This report will give you the tools to draw your own conclusions.

## HOUSE BILL 292

### LOCKING THE COURTHOUSE DOORS SECTIONS 1-4

Some cases never get off the ground, because the victim has delayed and missed filing deadlines. That's OK, so long as the victim had a chance. House Bill 292, however, introduces something entirely new into Alaska law: locking the courthouse doors to innocent victims of wrongful conduct, before they ever have a chance to file a claim; at times, before they even become a victim. Here's an example:

Remember the jet that recently dropped an engine over Anchorage? That plane, like 95% of the US fleet, was more than six years old. Suppose it had crashed, killing persons on the ground and all passengers. The families of dead Alaskans would have no claim, because Section 1 grants immunity to any product on its sixth birthday. The families of dead outsiders would all sue in their home states; only the Alaskans would lose out.

No matter how dangerous the product, how negligent the design, how callous and indifferent the manufacturer, amnesty is granted to any product after only six years! The effect on individual lives will, with certainty, be cruel. Even middle class families would be bankrupted by the loss of a breadwinner, rendered unable to pay the mortgage, forced from the family home and perhaps onto welfare ... because of this thoughtlessly radical legislation.

Alaska is not a manufacturing state. We import almost all our products from other states or countries. What conceivable economic interest does Alaska have in granting amnesty to bad products? No other state does. The proposal is as naive as it is cruel. The bill locks the courthouse door in other ways, too.

An architect negligently designs a school roof, which collapses under a heavy snow load six years later (this recently happened). Assume dozens of schoolchildren and teachers are killed. Because of the bill's inflexible six year rule, *their families have no right to sue.*

Without adequate research, a drug manufacturer sells the drug DES to pregnant women. The moms are fine. Around age nineteen, their daughters develop vaginal cancer. *The daughters have no rights.*

A child is sexually abused by her teacher at age eleven. She develops the strength and insight to seek help at age seventeen, but *she has no legal rights.* She can't sue because six years have passed.

A negligently tested blood transfusion causes AIDS, which is discovered six years later. *No claim.*

Make no mistake about it, this iron rule of six years is radical. It means that even the most outrageous, evil, time bomb behavior gets amnesty, so long as the harm it causes does not occur within six years. The sole exception is for doctors, who get their amnesty after only two years. For example:

A doctor and a radiologist negligently miss clear evidence of cancer. Another doctor finds it two years later, after it has spread and become inoperable. The patient spends his entire estate on medical bills, and dies a lingering death. *The courthouse door is locked.*

Current law requires victims to sue within a short time, but never cuts off rights before a harm occurs or is discovered. Even the Queen of Hearts said, "Hanging first, trial second". These rules say, "Maiming first, trial—never".

## HANDCUFFING THE JURY: DAMAGE CAPS SECTIONS 5-6, 22-23, 25

Juries are the conscience of our community. The typical jury includes engineers, accountants, teachers, businesspeople, homemakers, government employees, and workers. In the end juries tend to be quite conservative, and hold victims to a high standard of proof. A prominent defense lawyer who advises the "tort reform" group says that the defense lawyer who waives jury trial commits malpractice. Insurance defense lawyers always insist on a jury trial.

There is zero evidence that our Alaskan juries are not fair and reasonable. Large verdicts are definitely not routine. Nationally, the Rand Corporation keeps track. Its data base reveals that in the past quarter century, jury verdicts have only kept pace with inflation. The U.S. General Accounting Office has determined that large verdicts are not arbitrarily awarded, but rather reflect the severity of injury and the high cost of medical care.

Ignoring all this, the bill slaps Alaskan juries in the face, decreeing they can't be trusted to render fair verdicts. It does this by arbitrarily "capping" the amounts juries can award. The bill includes the most radical jury trial limitation in the United States. An example:

A successful businessman is killed due to carelessness. He's thirty-four, and made \$250,000 per year. He has a wife and three kids. Even though the businessman would have made millions in his lifetime, the jury is not permitted to award more than fifty thousand dollars for loss of income, or a little over two month's earnings.

None of the other forty-nine states limits jury awards for lost income. The provision is reckless extremism, pure and simple. If the businessman had survived but could never work again, the bill would not limit his income recovery. But it would still handcuff the jury. For example:

The accident left our businessman a quadriplegic. He can't move his body below his neck, has lost all bowel and bladder control, sexual response, and requires round-the-clock attendant care. If his nose itches, he can't scratch. He can't parent his kids, work, travel, play sports, turn a page, or hunt. At times he wishes he were dead, but even that would require help. Damages for these "noneconomic" injuries to him and his family are limited to \$500,000.

It is important to note that the proposed cap limits the recovery "per injury." This means that not only will the quadriplegic businessman be unfairly compensated for his lifetime of suffering, but his wife and children will also be denied the right to all

of their losses. First, keep in mind that a portion of the award will be paid to the family's legal representative to pay the costs of litigating the claim. After that, the recovery must be divided between the family members affected by the tragic accident. (This means that bigger families receive less for the exact same loss!) Then the damages must be spread out over the victim's lifetime. What do the three children recover for losing everything a father is supposed to be? Almost nothing. What about the devoted wife who must take care of her husband as if he was a helpless infant? She has no social life and no physical relationship with her severely injured spouse. She too gets almost nothing for her loss. And what about the quadriplegic husband and father? His daily life is unpleasant, difficult and sad. He is truly a burden to his family and he knows it. Under the cap, the quadriplegic may recover around \$5,000 each year for his physical pain and emotional suffering. That means he gets about \$14 a day for his "noneconomic" injuries. Such cruel treatment of innocent victims who have been horribly injured cannot be justified by anyone.

This cap only targets those who are catastrophically injured. Persons suffering moderate injuries are allowed full compensation from juries. It is Alaskans with amputated limbs, gruesome burns, blindness, paralysis, and debilitating brain damage who will be affected by this extremist rule.

The cap will not lower insurance rates. Caps affect a tiny percentage of total insurance payout. Most claims are resolved for less than \$25,000. Jury verdicts with pain and suffering damages which do exceed the proposed \$500,000 cap are extremely rare. Legislation which affects only a few innocent, catastrophically injured Alaskans per year will not bring down insurance rates. What's happening here is truly shameful; the neediest victims are sacrificed, without any corresponding benefit to Alaskans as a whole.

## HANDCUFFING THE JURY: PUNITIVE DAMAGES SECTIONS 7-8

Occasionally the conduct of a defendant is so revolting that a jury assesses punitive damages. This punishes the wrongdoer, and makes him clean up his act in the future. Under existing law, the conduct must be outrageous, and it must be proven by clear and convincing evidence. Punitive damages are rarely awarded.

The bill lets criminals off the hook. Now, a driver who is high on drugs and kills meets the "outrageous" test, due to his reckless indifference to safety. The bill would require proof of "conscious acts" by a stoned driver, who of course will say he did not know what he was doing.

The bill insults jury intelligence by capping the punitive award at the greater of \$200,000 or three times compensatory damages. This limit handcuffs the jury in the rare case where that is not enough. For example:

A major auto manufacturer realizes a design feature will kill people. It calculates the cost of changing the design, versus the money it will have to pay to the families of victims, and decides it's more profitable to ignore the defect (this is what happened with the Ford Pinto). It only changes this policy after a punitive damage award forces its hand.

In this type of case, the triple multiplier limit would handcuff the jury; nothing short of a high penalty could affect the profit motivated conduct of a reckless business. There are occasional cases where this type of jury power is needed.

Some corporations profit from systematic small thefts over thousands of transactions, as follows:

An insurance company brings in half a billion dollars in premiums selling old people \$25,000 policies to cover gaps in medicare. It then systematically denies or underpays claims. An occasional \$200,000 punitive damage award is peanuts to the insurer, just a cost of doing business. The scam continues.