ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7960 HOUSE LABOR & COMMERCE

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· Advisory Committee on Anesthe-
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mmittees are made up as follows.
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specialty area. It consists of 6

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Society of Anesthesiologists; and

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sumers, appointed by the Speaker

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by the Board of Registration in
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or, at least one of whom is board
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n Obstetrics and Gynecology con-
e of the specialty area. It consists

ospital, appointed by the Board of
submitted by the Maine Medical

(2) One physician who practices in a medium-sized hospital appointed by the Board of Osteopathic Examination and Registration from nominations submitted by the Maine Osteopathic Association;

(3) One physician who practices primarily in a rural area, appointed by the Board of Registration in Medicine from nominations submitted by the Maine Medical Association;

(4) One physician who practices primarily in a rural area, appointed by the Board of Osteopathic Examination and Registration from nominations submitted by the Maine Osteopathic Association;

(5) One family practice physician, appointed by the Board of Registration in Medicine from nominations submitted by the Maine Academy of Family Physicians;

(6) One board-certified physician, appointed by the Governor in consultation with the Maine Chapter of the American College of Obstetricians and Gynecologists; and

(7) Three public members:

(a) One representing the interests of payors of medical costs, appointed by the President of the Senate;

(b) One representing the interests of consumers, appointed by the Speaker of the House of Representatives; and

(c) One representing allied health professionals, appointed by the Governor.

D. The Medical Specialty Advisory Committee on Radiology consists of members with an interest in and knowledge of the specialty area. It consists of 6 members:

(1) One physician who practices in a tertiary hospital, appointed by the Board of Registration in Medicine;

(2) One physician who practices in a medium-sized hospital, appointed by the Board of Registration in Medicine;

(3) One physician who practices primarily in a rural area, appointed by the Board of Registration in Medicine;

(4) One board-certified radiologist, appointed by the Governor in consultation with the Maine Radiological Society; and

(5) Two public members:

(a) One representing the interests of payors of medical costs, appointed by the President of the Senate; and

(b) One representing the interests of consumers, appointed by the Speaker of the House of Representatives.

3. **Terms.** Each member serves a term of 3 years.

4. **Proceedings.** The medical specialty advisory committees shall conduct all proceedings pursuant to the Maine Administrative Procedure Act.[1]

5. **Board of Registration in Medicine; administration and funding.** The Board of Registration in Medicine shall provide funding and administrative support to the medical specialty advisory committees. The Board of Registration in Medicine may accept funds from outside sources, including the Board of Osteopathic Examination and Registration, to help finance the operation of the medical specialty advisory committees.

1989, c. 931, § 4; 1991, c. 319, §§ 2, 3, eff. June 17, 1991.

[1] Section 1151 et seq. of title 4; § 8001 et seq. of title 5.

Historical and Statutory Notes

Amendments

1991 Amendment. Laws 1991, c. 319, § 2, in subsec. 1, added to list of specialty areas the Medical Specialty Advisory Committee on Radiology.

Laws 1991, c. 319, § 3, in subsec. 2, added par. D.

§ 2973. Practice parameters; risk management protocols

Each medical specialty advisory committee shall develop practice parameters and risk management protocols in the medical specialty area relating to that committee. The practice parameters must define appropriate clinical indications and methods of treatment within that specialty. The risk management protocols must establish standards of practice designed to avoid malpractice claims and increase the defensibility of the malpractice claims that are pursued. The parameters and protocols must be consistent with appropriate standards of care and levels of quality. The Board of Registration in Medicine and the Board of Osteopathic Examination and Registration shall review the parameters and protocols, approve the parameters and protocols appropriate for each medical specialty area and adopt them as rules under the Maine Administrative Procedure Act.[1]

1989, c. 931, § 4.

[1] Section 1151 et seq. of title 4; § 8001 et seq. of title 5.

§ 2974. Report to Legislature

Each medical specialty advisory committee shall provide a report to the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Office of the Executive Director of the Legislative Council setting forth the parameters and protocols developed by that medical specialty advisory committee and adopted by the Board of Registration in Medicine and the Board of Osteopathic Examination and Registration. The medical specialty advisory committees also shall report the extent to which the risk management protocols reduce the practice of defensive medicine.

The Medical Specialty Advisory Committee on Anesthesiology, the Medical Specialty Advisory Committee on Emergency Medicine and the Medical Specialty Advisory Committee on Obstetrics and Gynecology shall provide this report by March 1, 1991. The Medical Specialty Advisory Committee on Radiology shall provide this report by September 1, 1991.

1989, c. 931, § 4; 1991, c. 319, § 4, eff. June 17, 1991.

Historical and Statutory Notes

Amendments

1991 Amendment. Laws 1991, c. 319, § 4, deleted deadline of March 1, 1991, from first par., and added second par., which set deadlines for reports by two of the advisory committees.

§ 2975. Application to professional negligence claims

1. **Introduced by defendant.** In any claim for professional negligence against a physician or the employer of a physician participating in the project established by this subchapter in which a violation of a standard of care is alleged, only the physician or the physician's employer may introduce into evidence, as an affirmative defense, the existence of the practice parameters and risk management protocols developed and adopted pursuant to section 2973 for that medical specialty area.

2. **Burden of proof; parameters and protocols.** Any physician or physician's employer who pleads compliance with the practice parameters and risk management protocols as an affirmative defense to a claim for professional negligence has the burden of proving that the physician's conduct was consistent with those parameters and protocols in order to rely upon the affirmative defense as the basis for a determination that the physician's conduct did not constitute professional negligence. If the physician or the physician's employer introduces at trial evidence of compliance with the parameters and protocols, then the plaintiff may introduce evidence on the issue of compliance. This subsection does not affect the plaintiff's burden to prove the plaintiff's cause of action by a preponderance of the evidence as otherwise provided by law.

3. **No change in burden of proof.** Nothing in this subchapter alters the burdens of proof in existence as of December 31, 1991, in professional negligence proceedings.

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plaintiff's cause of action by a
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subchapter alters the burdens of
essional negligence proceedings.

4. **Application.** This section applies to causes of action accruing between January 1, 1992 and December 31, 1996.

1989, c. 931, § 4.

§ 2976. Physician participation

Any physicians practicing in a medical specialty area for which practice parameters and risk management protocols have been developed and adopted pursuant to section 2973, shall file notice with the Board of Registration in Medicine or the Board of Osteopathic Examination and Registration prior to November 1, 1991, indicating whether they elect to participate in the project. The medical liability demonstration project authorized by this subchapter does not begin with respect to a medical specialty area unless at least 50% of the physicians licensed in the State and practicing in that specialty area elect to participate. Continuation of a project is not dependent on the level of participation. Enrollments may be accepted by the boards after the initial enrollment period, but a physician may not be reenrolled after enrolling and terminating initial enrollment.

1989, c. 931, § 4; 1991, c. 734, § 1, eff. March 26, 1992.

Historical and Statutory Notes

Amendments

1991 Amendment. Laws 1991, c. 734, § 1, added provision that enrollments may be accepted by the boards after the initial enrollment period, but that a physician may not be reenrolled after enrolling and terminating initial enrollment.

§ 2977. Evidence; inadmissibility

Unless independently developed from a source other than the demonstration project, the practice parameters and risk management protocols are not admissible in evidence in a lawsuit against any physician who is not a participant in the demonstration project or against any physician participating in the project who is defending against a cause of action accruing before January 1, 1992 or after December 31, 1996.

1989, c. 931, § 4.

§ 2978. Information and reports

1. **Reports by insurers.** Any insurance company providing professional, malpractice or any other form of liability insurance for any physician practicing in a medical specialty area described in section 2972 or for any hospital in which that practice has taken place shall provide to the Bureau of Insurance in a format established by the superintendent the following:

A. A report of each claim alleging malpractice during the 5-year period ending December 31, 1991, involving any physician practicing in a medical specialty area described in section 2972. Each report must include the name of the insured, policy number, classification of risk, medical specialty, date of claim and the results of the claim, including defense costs and indemnity payments as a result of settlement or verdict, as well as any awards paid in excess of policy limits. For any claim still open, the report must include the amount of any funds allocated as reserve or paid out. The insurance company shall annually report on any claims that have remained open;

B. For the 5-year period ending December 31, 1991, an annualized breakdown of the medical liability premiums earned for physicians practicing in the medical specialty areas described in section 2972. This information must be provided according to a schedule established by the Bureau of Insurance;

C. A report of each claim brought against any physician practicing in a medical specialty area described in section 2972, alleging malpractice as a result of incidents occurring on or after January 1, 1992 and before January 1, 1997, that includes, but is not limited to, the name of the insured, policy number, classification of risk, medical specialty, date of claim and the results of each claim, including defense costs and indemnity payments as a result of settlement or verdict, any awards or amounts paid

in excess of policy limits and any finding, if made, of whether the physician's practice was consistent with the parameters and protocols developed and adopted under section 2973. These reports must be provided not less than semiannually according to a schedule established by the Bureau of Insurance. At the discretion of the Bureau of Insurance, reports must be provided until all claims are closed; and

D. An annualized breakdown of the medical liability premiums earned, as of January 1, 1992, for physicians practicing in the medical specialty areas described in section 2972. This information must be provided according to a schedule established by the Bureau of Insurance.

2. **Reports by Bureau of Insurance and Board of Registration in Medicine.** The Bureau of Insurance and the Board of Registration in Medicine shall report the results of the project to the Governor and to the joint standing committees of the Legislature having jurisdiction over insurance and judiciary matters and to the Office of the Executive Director of the Legislative Council by December 1, 1997. The report must include the following.

A. The Bureau of Insurance shall report:

(1) The number of claims brought against physicians in the project alleging malpractice as a result of incidents occurring on or after January 1, 1992;

(2) The results of any closed claims described in this section, including defense costs and indemnity payments as a result of settlement or verdict;

(3) The status of all open claims described in this section, including defense costs, indemnity payments and any amounts held in reserve; and

(4) The effect of the project on the medical liability claims experience and premiums of those physicians in the project.

B. The Board of Registration in Medicine shall quantify and report on any identifiable impact of the project on the cost of the practice of defensive medicine.

(1) The Board of Registration in Medicine shall establish an economic advisory committee to establish the methodology for evaluating the effect of the project on the cost, utilization and the practice of defensive medicine. The economic advisory committee shall report the methodology developed to the Board of Registration in Medicine by January 1, 1992.

3. **Immunity.** All insurers reporting under this section and their agents or employees, the superintendent and the superintendent's representatives, the Board of Osteopathic Examination and Registration and its agents and employees and the Board of Registration in Medicine and its agents or employees, including members of the medical specialty advisory committees established under section 2972, are immune from liability for any action taken by them pursuant to this subchapter.

4. **Confidentiality.** Reports made to the superintendent and report records kept by the superintendent are not subject to discovery and are not admissible in any trial, civil or criminal, other than proceedings brought before or by the Board of Registration in Medicine or the Board of Osteopathic Examination and Registration. The superintendent shall maintain the reports filed in accordance with this section and all information derived from the reports that identifies or permits identification of the insured or the incident for which a claim was made as strictly confidential records. Information derived from reports filed in accordance with this section that does not identify or permit identification of any insured or incident for which a claim was made may be released by the superintendent or otherwise made available to the public.

5. **Rules.** The superintendent and the Board of Registration in Medicine may adopt rules necessary to implement this subchapter.

1989, c. 931, § 4.

DAVID H. THORSNESS
JAMES M. POWELL
BRIAN J. BRUNDIN
MARCUS R. CLAPP*
JOE M. HUDDLESTON
CARL J. O. BAUMAN
DENNIS M. BUMP*
MARY K. HUGHES
FRANK A. RIFFENER
R. CRAIG MESSER
ROBERT L. MANLEY
JAMES M. GORSKI
TIMOTHY R. BYRNES
JAMES M. SEEDORF
RONALD E. NOEL*
FREDERICK J. ODSEN
MICHAEL L. LESSMEIER**
STEVEN S. TCRVOOREN
MATTHEW K. PETERSON
JOSEPH R. O. LOESCHER
KENNETH D. LOUGEE*
CARL M. SUTHERLAND
JOHN D. THORSNESS

HUGHES THORSNESS
GANTZ POWELL & BRUNDIN
Est. 1939
ATTORNEYS AT LAW

509 WEST THIRD AVENUE
ANCHORAGE, ALASKA 99501-2273
TELEPHONE (907) 274-7522
TELECOPIER: (907) 263-8320

*590 UNIVERSITY AVENUE
SUITE 200
FAIRBANKS, ALASKA 99709-3652
TELEPHONE (907) 479-3161
TELECOPIER: (907) 474-2629

**ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249
TELEPHONE (907) 586-5812
TELECOPIER: (907) 463-3020

GREGORY W. LESSMEIER**
JAMES N. BARKELEY
WILLIAM M. WALKER
PAUL H. CRAGAN*
DAVID S. CARTER
ANN S. BROWN*
TIMOTHY R. REDFORD
PAUL S. WILCOX
KENNETH M. GUTSCH
CLYDE E. SNIFFEN, JR.
VICKI L. BUSSARO
SHELDON E. WINTERS**
DAVID F. LEONARD*
LINDA J. JOHNSON
JOHN C. WENDLANDT
PAUL K. WHARTON
CYNTHIA M. KLEPASKI*
GREGORY S. FISHER
RON L. SAYER
JOHN J. TIEMESSEN*
KIMBERLEE A. COLDO
SHANE J. OSOWSKI
JAMES E. CURTAIN**

OF COUNSEL
JOHN C. HUGHES
RICHARD O. GANTZ

Reply to: JUNEAU

February 3, 1994

Representative Bill Hudson
Alaska House of Representatives
State Capital
Juneau, Alaska 99811

Re: CSHB 292

Dear Representative Hudson:

I am writing to you on behalf of State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company. State Farm presently has approximately 32 percent of the automobile insurance market in the state of Alaska. State Farm Fire & Casualty has 43 percent of the homeowners' insurance market. Collectively State Farm has had significant experience with Alaska's civil justice system which goes back for at least 20 years. It is from this perspective that we offer our comments regarding the CS for HB292, which is presently before you.

You probably already know that we had no involvement in the introduction or drafting of this legislation. Since our day-to-day activities will be affected significantly by this legislation, we feel compelled to comment on it. We feel compelled to comment for another reason, for regardless of whether we wish to be a part of this debate, we nonetheless are brought into it by those who believe the only reason for tort reform is insurance reform.

At the outset we wish to commend your committee for the efforts it has and is making toward finding balance in an area where there are strong feelings on all sides. Many people have

vastly different opinions about where as a matter of fairness to draw the line on issues such as statutes of repose and caps for non-economic damages. While we have no opinion on those particular issues, it is easy to make the observation that efforts to impose reasonable limitations will have a positive effect on the goals your committee seeks to further through the introduction of this legislation. There are other areas addressed by this legislation which we feel strongly about and the following will set forth those areas.

1. Section 11 (Reduction of future wage loss awards by income taxes). We have always questioned the logic behind not reducing awards for future earnings by the amount of federal and/or state income tax. Section 11 would alleviate what is currently a windfall and we are very much supportive of this change.

2. Sections 16 and 17 (several liability). These sections alleviate an obvious problem in the interpretation of the 1988 several liability initiative. We found it incredible that one of the opponents to this legislation has argued the changes proposed by Sections 16 and 17 to be significant when compared to the way things are currently done. Frankly the rulings we have received on this issue have been different in almost every case. We doubt if anyone else's experience has been different.

What we also find to be incredible is how the clear intent of the 1988 initiative has been so frustrated by those who are unwilling to enforce the intent of the voters. As you will recall the voters in 1988 were told that "the initiative would make each party liable for damages only equal to his or her share of fault and repeal the law concerning reimbursement from other parties." Unfortunately this has not proven to be the case. The changes that you propose in Sections 16 and 17 would simply ensure that indeed a party would be held responsible only for his or her percentage of fault, regardless of who the plaintiff chose to sue. We very much support this change as it will simply give effect to what the voters decided in 1988.

3. Section 19 (offers of judgment) is a change we also support. This provision represents an attempt to encourage parties to reasonably and fairly evaluate their cases. We think the effect of a provision such as this will indeed be significant.

4. Section 20 (pre-judgment interest) is a change which is long overdue. The proposal would key pre-judgment interest to what a party could realistically hope to earn on their money, which of course is the intent of pre-judgment interest. No longer would there be the risk that pre-judgment interest is arbitrarily either too high or too low.

5. Section 21 (pre-judgment interest on future damages) is

also a provision we are very much in support of. This again operates to remove the windfall of awarding pre-judgment interest on future damages or punitive damages, which again as a matter of logic and fairness seems most appropriate.

6. Finally, we are supportive of Section 26, which eliminates costs and attorney's fees that are presently awarded as a matter of course in almost every case. The current issue of who is the "prevailing party" in civil litigation is one that is litigated probably more frequently than any other issue. Indeed, every consumer who purchases an insurance policy from us in Alaska pays for Rule 82 coverage. Eliminating this would not only reduce litigation on this issue, but would remove an element of cost that is present in the current system.

Aside from the above comments which relate to specific sections of the proposed legislation before you, we have a general comment we would like to make. We are, of course, aware that any time legislation such as this is proposed, the opponents will respond by arguing it should not be passed unless there are guarantees the passage will reduce insurance rates by a specific percentage. We wish the issues were so simple. To see they are not, we need only look back at the 1988 initiative. Although we thought then and even now the issue of several liability to be a simple one, there has been a great deal of litigation about the issue of whether fault is to be allocated only amongst those parties the plaintiff has chosen to sue, or amongst all. We are now rapidly approaching the five-year anniversary of the effective date of this initiative and this seemingly simple issue has still not been answered.

We suspect that even if the legislation before you is passed, the meaning of many of these provisions will be disputed for years to come. The opponents of this legislation are talented and at least in some cases well-financed groups who have a great deal of personal stake in the enforcement of the provisions before you. It may be years before the true benefit of this legislation will be felt.

There is a second reason the benefit we fully expect to result from this legislation is not easily quantifiable. Many aspects of civil litigation remain subjective and not quantifiable, especially over the short term. One need only look at the natural disasters which have befallen literally every region of our country in the past five years to see that.

Although we fully expect this legislation to have a positive effect on insurance premiums, those that oppose legislation of this nature for the purported reason that there is no guarantee insurance rates will be affected need only to understand that there are a number of controls in the system that prevent an insurer from having an excessive level of profit. The first is

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

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

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

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

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

Sincerely,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Michael L. Lessmeier

Michael L. Lessmeier

xml13600/lp
cc: Members, House Labor
& Commerce Committee

Questionable Doctors

DISCIPLINED BY STATES OR THE FEDERAL GOVERNMENT

A Public Citizen Health Research Group Report/May 1991

Ingrid VanTuinen/Phyllis McCarthy/Sidney Wolfe, M.D.
First Edition by Nicole Simmons

ALASKA

1989 serious action rate: 5.3/1000
1989 ranking: 7th

According to Alaska State Medical Board member Thomas J. Conley, M.D., the Alaska Board was galvanized in the spring of 1987 after "a number of dynamic new members" were appointed to the Board and the parent agency, the Division of Occupational Licensing, got a new director.[1]

The Board soon requested legislation to restructure itself and to reform the Medical Practice Act along the lines recommended by the Federation of State Medical Boards, Conley said. He added that, for the first time, the reform measure authorized the Board to hire an executive secretary and a full-time investigator. The measure also instituted stringent requirements for reporting possible violations of the medical practice laws to the Medical Board.

The statistics we have compiled show that the Board has indeed become much more active since reform legislation was passed. However, the Board was not able to provide Public Citizen with a list of physicians disciplined or with copies of disciplinary orders. Alaska is one of 9 states that failed to provide us with information about individual doctors by our January 2, 1991 deadline. The information on Alaska physicians comes from other state disciplinary boards and federal agencies which have sanctioned Alaska doctors.

> Readers should remember that if they want the most current information on the status of a physician's license, they should contact the medical board of the state in which the physician practices or had practiced.

State Data

Alaska disciplined a comparatively high proportion of its small number of physicians in 1989. In that year, according to the Federation of State Medical Boards, it took 8 disciplinary actions against MDs and DOs, 4 of which were "serious."[2] Compared to the 755 MDs in the state,[3] Alaska had a serious disciplinary action rate of 5.3 actions per 1,000 MDs, ranking seventh on that list (see Table 8, p. 27). Its total disciplinary action rate was 10.6 per 1,000 MDs for a ranking of 8th on that list (see Table 9, p. 28).

In the table below we show data from the Federation on Alaska's disciplinary actions.

- ALASKA -

DISCIPLINARY ACTIONS AGAINST MDs AND DOs:

	1984	1985	1986	1987	1988	1989
Revocations	0	0	0	1	1	0
Suspensions	0	0	1	2	0	1
Probations	0	0	1	2	2	3
Other Actions	0	0	0	0	2	4
Total Actions	0	0	2	5	5	8

Recommendations

1. The Alaska Division of Occupational Licensing should publish a regular newsletter or other list of disciplined practitioners, and this list should be available to the public by mail upon request.

2. Notices of disciplinary actions should be sent to the press and to all hospitals and other health care providers in the state.

3. The legislature should permit the Board to discipline a doctor on the basis of a felony conviction. A conviction is not now a valid reason for discipline in Alaska.[4]

Addresses

Alaska State Medical Board
Division of Occupational Licensing
Pam Ventgen, Executive Secretary
3601 C St., Suite 722
Anchorage, AK 99503
(907) 561-2878
The Medical Board regulates MDs, DOs, and podiatrists.

Barbara Branson, Records and Licensing Supervisor
(907) 465-3262

Alaska Division of Occupational Licensing
Randall Burns, Director
PO Box D-LIC
Juneau, AK 99811-0800
(907) 465-2534

Alaska Board of Chiropractic Examiners
Anchorage Center for Chiropractic, Inc.
Kenneth O. Ketz, Chairperson
500 E. Tudor
Anchorage, AK 99503
(907) 561-4864

- ALASKA -

Alaska Board of Dental Examiners
Timothy J. Woller, Chairperson
1460 McKinley Drive
Fairbanks, AK 99701
(907) 479-6755

Notes

1. Conley, Thomas J. M.D., "Boards in Change - The Alaska Experience," Federation Bulletin May 1990, page 135.

2. Winn, James R., "Official 1989 Federation Summary of Reported Board Actions," FSMB News Release December 1990.

3. American Medical Association, Physician Characteristics and Distribution in the U.S., 1990 Edition.

4. Federation of State Medical Boards, Exchange. Section 3: Physician Licensing Boards and Physician Discipline, 1989/1990 edition.

DISCIPLINARY ACTIONS

EUFEMIO, JOHNNY G, DR was disciplined by MARYLAND on March 6, 1981.
Disciplinary action: 36-month Probation
Reprimand

EUFEMIO, JOHNNY, MD of ELMHURST, NY was disciplined by NEW YORK on March 6, 1986.
Disciplinary action: 36-month Probation
Notes: FINE $500.00, 3 YEAR SUSPENSION STAYED

FEMIO, JOHN J, MD of KODIAK, AK was disciplined by NEW YORK on December 28, 1967.
Disciplinary action: Reprimand

MOSELEY, CHARLES H., MD of ANCHORAGE, AK was disciplined by NORTH CAROLINA on April 27, 1988.
Notes: CONSENT ORDER
UNSPECIFIED

STEVENS, GEORGE V, MD of ANCHORAGE, AK was disciplined by CALIFORNIA on January 11, 1990.
Disciplinary action: 120-month Probation
Offense: Substandard care, incompetence or negligence
Notes: CONTROLLING EXCESSIVE LOSS OF BLOOD IN NUMEROUS TONSILLECTOMIES CONSTITUTES NEGLIGENCE

TABLE 8
SERIOUS DISCIPLINARY ACTIONS (REVOCATIONS, SUSPENSIONS, AND PROBATIONS) BY STATE MEDICAL LICENSING BOARDS IN 1989

RANK	STATE	# SERIOUS ACTIONS	# OF DOCTORS	SERIOUS ACTIONS PER 1000 MDs
1	MISSOURI	74	10,536	7.02
2	GEORGIA	78	11,467	6.80
3	MISSISSIPPI	24	3,621	6.63
4	OKLAHOMA	31	5,063	6.12
5	WEST VIRGINIA	20	3,394	5.89
6	IOWA	25	4,604	5.43
7	ALASKA	4	755	5.30
8	COLORADO	37	7,434	4.98
9	SOUTH CAROLINA	29	5,951	4.87
10	INDIANA	45	9,291	4.84
11	LOUISIANA	39	8,688	4.49
12	MINNESOTA	44	10,165	4.33
13	KENTUCKY	28	6,555	4.27
14	ILLINOIS	112	26,349	4.25
15	ARKANSAS	15	3,834	3.91
16	NEBRASKA	11	2,902	3.79
17	TENNESSEE	35	9,987	3.50
18	OHIO	77	22,706	3.39
19	FLORIDA	94	30,377	3.09
20	NEW MEXICO	9	2,987	3.01
21	RHODE ISLAND	8	2,685	2.98
22	MONTANA	4	1,411	2.83
23	NORTH CAROLINA	36	12,928	2.78
24	WYOMING	2	738	2.71
25	OREGON	17	6,296	2.70
26	NEW JERSEY	51	20,045	2.54
27	UTAH	8	3,294	2.43
28	ALABAMA	16	6,812	2.35
29	HAWAII	6	2,691	2.23
30	NEVADA	4	1,819	2.20
31	NEW YORK	130	59,906	2.17
32	DELAWARE	3	1,392	2.16
33	ARIZONA	17	7,975	2.13
34	CALIFORNIA	141	76,272	1.85
35	SOUTH DAKOTA	2	1,089	1.84
36	MICHIGAN	33	18,229	1.81
37	D.C.	7	3,885	1.80
38	PENNSYLVANIA	51	30,093	1.69
39	MASSACHUSETTS	33	20,958	1.57
40	WISCONSIN	15	9,784	1.53
41	KANSAS	7	4,745	1.48
42	IDAHO	2	1,384	1.45
43	VIRGINIA	18	13,299	1.35
44	VERMONT	2	1,587	1.26
45	MAINE	3	2,485	1.21
46	WASHINGTON	11	10,886	1.01
47	MARYLAND	16	16,268	0.98
48	TEXAS	29	30,900	0.94
49	NORTH DAKOTA	1	1,190	0.84
50	CONNECTICUT	5	10,474	0.48
51	NEW HAMPSHIRE	0	2,393	0.00
TOTALS		1,509	570,579	

Collateral references. — Constitutionality and construction of statute authorizing constructive or substituted service of process on, and continuation of pending action against foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state, 18 ALR2d 544.

Probate, in state where assets are found, of will of nonresident which has been admitted to probate in state of domicil, 20 ALR3d 1033.

Sec. 09.05.040. Service of process on resident who leaves state after accident. A resident who has operated a motor vehicle, or has owned a motor vehicle operated with the express or implied consent of the owner which has been involved in an accident or collision on a public highway, and who has moved to another state after the accident or collision shall be treated as a nonresident for service of process as provided under AS 09.05.020 and 09.05.030. (§ 1 ch 59 SLA 1963)

NOTES TO DECISIONS

Section operates in conjunction with AS 09.05.020. — In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with this section to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to these provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

In an action for damages arising from an automobile collision in this state, the statute of limitations is not tolled by the defendant's absence from the state, as provided by AS 09.10.130, when, during the defendant's absence, the plaintiff had the right to proceed against him under AS 09.05.020, which, in conjunction with this section, makes the commissioner of revenue the agent of the absent defendant for purposes of service of process. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Chapter 10. Limitations of Actions.

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, § 1 et seq.

53 C.J.S., Limitations of Actions, § 1 et seq.

When statute of limitations begins to run against actions to recover interest, 36 ALR 1085.

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 ALR 1182.

What amounts to commencement of suit to enforce mechanic's lien, 75 ALR 695.

Law requiring service of notice before bringing suit, as affecting time from which statute of limitations begin to run, 95 ALR 1188; 3 ALR2d 711.

When "bail" deemed to have taken place for purposes of statute of limitations which fixes commencement of period at time of judicial sale, 101 ALR 1348.

When limitation commences to run against suit for reformation of instrument, 106 ALR 1338.

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitations, upon failure of previous actions commenced within the period, 120 ALR 376; 79 ALR2d 1309.

Duress or undue influence as tolling or suspending statutes of limitations, 121 ALR 1294.

Commencement of action as suspending of running of limitations against claim which is subject of setoff, counterclaim, or recoupment, 127 ALR 909.

When statute of limitations commences to run against action to recover tax, 131 ALR 822.

War as suspending running of limitations in absence of specific statutory provisions to that effect, 137 ALR 1454; 140 ALR 1513; 141 ALR 1511.

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 ALR 767.

Application and limits of rule that death of person liable does not interrupt running of statute of limitations, 174 ALR 1423.

Validity of contractual waiver of statute of limitations, 1 ALR2d 1445.

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 ALR2d 711.

New party brought in after statute has run, 8 ALR2d 6.

Fraud as tolling period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

First and last day included or excluded for purposes of statute, 20 ALR2d 1249.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 ALR2d 236.

Promissory estoppel as to statute of limitations, 48 ALR2d 1079.

Raising defense of statute by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings, 61 ALR2d 300.

Raising statute by motion for summary judgment, 61 ALR2d 341.

Validity of statute enlarging limitation period, 79 ALR2d 1080.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action, 80 ALR2d 1399.

General appearance as avoiding otherwise effective bar of statute of limitations, 82 ALR2d 1200.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 ALR2d 965.

Statute limiting time for probate as applicable to will probated in another jurisdiction, 87 ALR2d 721.

Federal court's adoption of state period of limitation, in action to enforce federally created right, as including related or subsidiary state laws or rules as to limitations, 90 ALR2d 265.

Extraterritorial operation of limitation applicable to statutory cause of action, other than by reason of "borrowing statute," 95 ALR2d 1162.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 ALR3d 1234.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR3d 1197.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 ALR3d 1361.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Agreement of parties as estopping reliance on statute of limitations, 43 ALR3d 756.

Promises to settle or perform as estopping reliance on statute of limitations, 44 ALR3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 703.

Validity of contractual provision establishing period of limitations longer than that provided by state statute of limitations, 84 ALR3d 1172.

Relation back of amended pleading substituting true name of defendant for fictitious name used in earlier pleading so as to avoid bar of limitations, 85 ALR3d 130.

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 ALR3d 293.

Delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 ALR3d 1057.

Statute of limitations as bar to arbitration under agreement, 94 ALR3d 533.

Laches or acquiescence as defense, so as to bar recovery or arrearages of permanent alimony or child support, 5 ALR4th 1015.

Statutes limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 16 ALR4th 926.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 ALR4th 530.

Sec. 09.10.010. General limitations on civil actions. No person may commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute. (§ 1.01 ch 101 SLA 1962)

Cross references. — For commencement of action, see Civ. R. 3; for relation back of amendment to pleading to date of original pleading, see Civ. R. 15(c).

NOTES TO DECISIONS

This section codifies the general policies of granting repose and assuring fresh evidence at trial by establishing certain time limits for all civil actions. Haakanson v. Wakefield Seafoods, Inc., Sup. Ct. Op. No. 1943 (File Nos. 3428, 3492), 600 P.2d 1087 (1979).

The defense of the statute of limitations must be specifically pleaded. Devine v. Cordovado, 15 Alaska 232, 143 F. Supp. 561 (D. Alas. 1954).

Foreclosure actions. — The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclosure a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Tort actions. — A tort action must be commenced within two years after the cause of action has accrued. Silverton v.

Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Quoted in Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Sec. 09.10.020. When action commenced. [Repealed, § 1 ch 27 SLA 1966. For present law, see Civ. R. 3.]

Sec. 09.10.030. Actions to recover real property in 10 years. No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action. (§ 1.03 ch 101 SLA 1962)

Cross references. — For adverse possession, see AS 09.25.050.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

This section is a statute of repose. Roberts v. Jaeger, 5 Alaska 190 (1914).

And presupposes that there never has been a deed. Roberts v. Jaeger, 5 Alaska 190 (1914).

But section may be basis of new title. — While this statute purports only to bar the remedy, it is clear that it can be the basis of a new title, which may be asserted offensively as well as defensively. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

This section can be utilized as the basis of a new title. Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

This statute not only establishes a time limit within which an action to recover real property must be brought, but also constitutes the method by which a claimant may establish a new title through adverse possession. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

Such as right of way. — While this section purports only to bar a remedy, it may be used as the basis of establishing an easement of right of way across another's land. Hamerly v. Denton, Sup. Ct. Op. Nos. 24, 47 (File No. 47), 359 P.2d 121 (1961).

And possessory right may be protected by action. — In Noble v. Melchoir, 5 Alaska 729 (1917), the court said: "The possessory right thus acquired by defendant is a property right, for the protection of which an appropriate action may be maintained by the occupant." Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948). See notes under analysis line II, "Adverse Possession."

Applicability of provision requiring possession or seizure within 10 years. — The provision of this section that no action may be maintained unless it appears that the plaintiff or his predecessor was seized or possessed of the premises within 10 years is not inapplicable to any party except a plaintiff. Juneau Independent School Dist. v. Smith, 13 Alaska 1, 92 F. Supp. 617 (D. Alas. 1950).

Essential difference between requirements for claim under color of title and one without such color of title is in the number of years of possession

required. In both cases, there must be uninterrupted, adverse and notorious possession, but only seven years is required under AS 09.25.050 as opposed to 10 years under this section. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

A trust once established is not within the statute of limitations. Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).

If defendants were holding land as trustees for the plaintiff or its grantor, the statute would not run, until there was some act of disavowal done by said trustees which showed unequivocally that they were holding adversely to the alleged cestui que trust. Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).

As possession of trustee is presumed to be possession of cestui que trust. — Alaska N. Ry. v. Alaska Cent. Ry., 5 Alaska 304 (1915).

Owner of land should not be disturbed in absence of clear proof of surrender of rights. — Before a court would be justified in interfering with an owner's enjoyment of his own land, it ought to be satisfied by the clearest kind of proof that the owner has surrendered that absolute jus disponendi which the law guarantees to him. Roberts v. Jaeger, 5 Alaska 190 (1914).

Statute does not run until plaintiff acquires title. — The statute of limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905).

To start the statute of limitations running against a plaintiff, who relied on a townsite trustee's deed, he must have been disseized, and in order to be disseized he must have at some time have been seized of title, either of fee or freehold, and until the issuance of patent to him he was not so seized. Valentine v. McGrath, 4 Alaska 102 (1910); Alaska & N.W.T.T. Co. v. Bernhoffer, 4 Alaska 99 (1910).

It is the delay, the duration of time after title seized, that raises the bar of the statute; this may not be by relation, else one ought be barred before time seized. Valentine v. McGrath, 4 Alaska 102 (1910).

Thus, the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues. Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905).

The action of an owner on his own land does not start the running of adverse possession. Karvonen v. Dyer, 261 F.2d 671 (9th Cir. 1958).

Foreclosure actions. — In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Quoted in Alaska Nat'l Bank v. Linck, Sup. Ct. Op. No. 1372 (File No. 2754), 559 P.2d 1049 (1977).

Stated in Walsh v. Emerick, Sup. Ct. Op. No. 2072 (File No. 4655), 611 P.2d 28 (1980).

II. ADVERSE POSSESSION.

A. Generally.

Legal title gives constructive possession until ouster by adverse possession. — A legal title gives a right of possession as well as the legal seizin, and possession coextensive with the right, until there is an ouster by adverse possession. Tyee Consol. Mining Co. v. Langstedt, 121 F. 709 (9th Cir. 1903), rev'd on other grounds, 136 F. 124 (9th Cir. 1905).

Supposition underlying adverse possession. — Adverse possession presupposes the existence of some title or right to possession in another which is adverse to the one claiming title by adverse possession. Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

The good faith of the claimant is not a relevant issue under the ten-year adverse possession statute. Lott v. Muldoon Road Baptist Church, Inc., Sup. Ct. Op. No. 602 (File No. 1103), 466 P.2d 815 (1970).

Elements required under AS 09.25.050 and this section. — Under both AS 09.25.050 applicable when possession is under color of title and this section applicable in other cases, the claimant must satisfy the basic elements of adverse possession in establishing his or her claim. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

Three basic requirements for adverse possession are: (1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Possession must be open, notorious, visible, continuous for the statutory period and under a claim of right. City of Anchorage v. Nesbett, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

Purpose of requirements. — The main purpose of nearly all the requirements is essentially the same, that is, to put the record owner on notice of the existence of an adverse claimant. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

From the standpoint of the true owner, the purpose of the various requirements of adverse possession — that the nonpermissive use be actual, open, notorious, continuous, exclusive and hostile — is to put him on notice of the hostile nature of the possession so that he, the owner, may take steps to vindicate his rights by legal action. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974); Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Adverse possession gives no ice of rights. — Where a person is in visible possession of real property adverse to the world and open and notorious, notice must be taken of his actual rights. A purchaser would be placed upon notice thereby. Nordling v. Carlson, 265 F.2d 507 (9th Cir. 1958).

Mere occupation of the premises, even for the statutory period, does not establish title. Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

Occupant cannot hold adversely who admits title is in United States. — To constitute adverse possession there must be, among other requisites, an entry under claim of right hostile to the true owner and to the world, and an occupant of land cannot hold adversely while he admits the title to be in the United States. Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905).

Effect of patent on adverse claims. — Since the issuance of a patent has the effect of cutting off, as against the United States and its grantees, all adverse claims based on use or occupancy not initiated pursuant to any statute providing for ultimate title, in the absence of any color of title, adverse possession by the defendant claiming title by such possession must be shown for the period of 10 years prior to the commencement of a proceeding under this section. Juneau Independent School Dist. v. Smith, 13 Alaska 1, 92 F. Supp. 617 (D. Alas. 1950).

When statute of limitations begins to run. — See notes to Tyee Consol. Mining Co. v. Langstedt, 136 F. 124 (9th Cir. 1905); Valentine v. McGrath, 4 Alaska 102 (1910); and Alaska & N.W.T.T. Co. v. Bernhoffer, 4 Alaska 99 (1910), under analysis line I, "General Consideration."

Burden of proof upon adverse possessor. — A party claiming title to real property by adverse possession must bear the burden of proving each element by clear and convincing evidence. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

Plaintiff may show adverse possession by his predecessors. — An instruction was error which failed to let the jury consider the adverse possession of plaintiff's predecessors in interest in determining whether plaintiff had acquired title by adverse possession. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Without attempts to transfer title. — It is the transfer of possession, not title, which is the critical element, because a paper transfer is not necessary to connect adverse possessions. The privity required is that there must be a continuous possession by mutual consent, so that the possession of the true owner shall not constructively intervene. Ringstad v.

Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

If there is agreement to transfer possessor's rights. — If successive possessions are connected by any agreement or understanding which has for its object a transfer of the rights of the possessor, and is accompanied by a transfer of possession in fact, it is sufficient to constitute a continuous possession. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Thus, grantee may tack grantor's possession of lands not covered by deed. — It is generally held that if, in connection with the conveyance of lands, there are circumstances showing an intent to transfer to the grantee the possession of other adjacent land occupied by the grantor and not covered by the deed, there is created such a privity that the grantee is permitted to tack the period of the grantor's occupancy to his own in establishing title by adverse possession to the land not mentioned in the deed. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

Adverse possessions may be tacked. — That the adverse possession may be by different occupants, where a privity exists between them, is almost universally held. The essential thing is that the continuity of possession is not broken so that the owner's constructive possession will attach and allow him to recover the land. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

The adverse possession may be by different occupants, where a privity exists between them. Penn v. Ivey, Sup. Ct. Op. No. 2120 (File No. 4113), 615 P.2d 1 (1980).

Claim by prescription. — The requisites for a claim by prescription are essentially the same as for adverse possession except that a prescriptive claim is limited to certain rights in the land of another such as an easement. City of Anchorage v. Nesbett, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

To establish a prescriptive right to an easement, the user must have been open, continuous, and adverse, under claim of title or right, and with the knowledge and acquiescence of the owner of the servient estate. Roberts v. Jaeger, 5 Alaska 190 (1914).

Use alone for the statutory period, even with the knowledge of the owner, would not establish an easement. Hamerly v. Denton, Sup. Ct. Op. No. 24, 74 (File No. 47), 359 P.2d 121 (1961).

A road and bridge used for 20 full years by the public, under conditions creating a prescriptive right, that right becoming vested and determined at the end of 20 years, it was immaterial to decide whether the length of time required in Alaska for a prescriptive right of way is 20 years or 10 years, the latter time being the limitation by this section for bringing an action relating to the possession of real property. Clark v. Taylor, 9 Alaska 298 (1938).

City's use of property by maintaining power line on it. — See City of Anchorage v. Nesbett, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

Adverse possessor prevailed. — Where defendant in ejectment action showed by competent evidence that he entered upon land at a time when he had a right to do so, and under a claim of right, and had ever since been in the actual, exclusive, and continuous possession thereof, holding adversely to the plaintiff and his predecessors in interest during the statutory period, to wit, more than 10 years after the issuance of patent to the plaintiff's predecessor and before the commencement of action, judgment was for defendant. Noble v. Melchoir, 5 Alaska 729 (1917).

B. Actual Possession.

Possession must be actual and continuous. — Where the plaintiff has the better and superior right and title, the defendants' alleged adverse possession could not avail them, unless it was actual and continuous, as constructively the plaintiff is in possession by reason of its superior title and right. Pacific Coal & Transp. Co. v. Pioneer Mining Co., 205 F. 577 (9th Cir. 1913).

Only property actually possessed by the claimant during the whole statutory period may be acquired by adverse possession. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

Actual possession defined. — Actual possession means a pedis possessio which is definite, positive, and notorious. Pacific Coal & Transp. Co. v. Pioneer Mining Co., 205 F. 577 (9th Cir. 1913).

There cannot be constructive possession in two persons claiming to hold adversely at one and the same time. Pacific Coal & Transp. Co. v. Pioneer Mining Co., 205 F. 577 (9th Cir. 1913).

C. Notorious Possession.

"Notorious" possession. — The requirement that the possession must

have been reasonably visible to the record owner is "notorious" possession so that if the owner visits the property, he would be put on notice and be able to assert his rights. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Imputed knowledge of adverse possessor's activities. — In determining if an adverse possession is reasonably visible to the true owner, the test is not whether the owner in fact knows of the adverse possessor's activities, but whether the owner can be charged with such knowledge. In addition to imputing such knowledge, courts generally recognize that community repute, as well as physical visibility, is relevant evidence that the true owner has been put on notice. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

Character of the land must be considered with reference to the requirement of sufficient notoriety. Hence, the same acts are not required for uninhabited and forested land as for urban lots. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Acts alone may be sufficient to put owner on notice. — Where the user has acted, without permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone (without any explicit claim of right or intent to dispossess) may be sufficient to put the true owner on notice of the nonpermissive use. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Being on the property at least once a year for a half or full day and walking the boundary lines hardly would give indication to the owner that there was a hostile claim. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Flying over property in an airplane gives no notice of possession. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

The physical facts of entry and continued possession may themselves evidence an intent to occupy and hold as of right sufficient in law to support the acquisition of rights by prescription. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Repute as owner, without evidence of possession on the land, is not alone sufficient. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Payment of taxes is a critical factor although it is only regarded so in connection with a visible physical presence on the land. Shilts v. Young, Sup. Ct. Op. No. 1460 (File No. 3003), 567 P.2d 769 (1977).

Claimants' leasing of property and exclusion of threatening interferences. — Claimants' behavior in leasing the property and excluding others from the land when their interest was threatened satisfied the requirement that an adverse possessor act as if he owns the land rather than as if he is merely on the land with the permission of the true owner. Bentley Family Trust v. Lynx Enters., Inc., Sup. Ct. Op. No. 2604 (File Nos. 6015, 6038), 658 P.2d 761 (1983).

D. Exclusive Possession.

Exclusive dominion over property required. — To deprive the record owner of his title, the adverse claimant's acts must "evince a purpose to exercise exclusive dominion over the property." Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

An owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Where possession was actual, open, notorious, and continuous, with a claim of ownership, but was not shown to be either exclusive or hostile, the possession was not adverse, and the statute of limitations never began to run. Tyee Consol. Mining Co. v. Langstedt, 121 F. 709 (9th Cir. 1903), rev'd on other grounds, 136 F. 124 (9th Cir. 1905).

The exclusive use requirement is often defined quite similarly to certain of the other requirements of adverse possession. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Total exclusivity is not required. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

A claimant's possession need not be absolutely exclusive; it need only be a type of possession which would characterize an owner's use. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018

(File Nos. 1660, 1661), 519 P.2d 826 (1974).

Occasional clamdiggers could not destroy the exclusive character of adverse use where such casual intrusions were clearly not considered by the user to interfere or conflict with his own use. In allowing strangers to come on the land to dig clams and in allowing friends, relatives and others occasional use of the land, the user was merely acting as any other hospitable landowner might. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

E. Continuous Possession.

Possession must be actual and continuous. — See note under this catchline under analysis line II B, "Actual Possession."

One of the requirements for acquisition of title by adverse possession is that the possession must be continuous for the statutory period in order to prevent the original owner's possession from constructively attaching to the land, thus starting the statute running anew, because the owner must be out of possession for 10 years in order for the statute to be a bar to an action to recover the land. Ringstad v. Grannis, 12 Alaska 190, 171 F.2d 170 (9th Cir. 1948).

A showing that use was openly adverse to the owner's interest must be for the full statutory period of ten years. If during that period it is established that the adverse claimant has done something to recognize the owner's title, the continuity of the adverse possession period is interrupted and the ten-year period of limitation does not begin to run again in the adverse claimant's favor until he repudiates the owner's title. Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

F. Hostile Possession.

Possession presumed to be with permission. — When one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. Hamerly v. Denton, Sup. Ct. Op. Nos. 24, 47 (File No. 47), 359 P.2d 121 (1961); Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969); Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

This presumption that one who enters into possession or use of another's property does so with the owner's permission is rebutted by the adverse claimant's showing that he was not on the property by permission and establishing that the record title holder could have ejected him from possession throughout the statutory period. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

Which presumption may be overcome only by clear evidence of assertion of hostile right. — The presumption that one who enters into possession or use of another's property does so with the owner's permission is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i. e., by proof of a distinct and positive assertion of a right hostile to the owner of the property. Hamerly v. Denton, Sup. Ct. Op. Nos. 24, 47 (File No. 47), 359 P.2d 121 (1961); Ayers v. Day & Night Fuel Co., Sup. Ct. Op. No. 532 (File No. 944), 451 P.2d 579 (1969).

See note to Tyee Consol. Mining Co. v. Langstedt, 121 F. 709 (9th Cir. 1903), rev'd on other grounds, 136 F. 124 (9th Cir. 1905), under catchline "Exclusive dominion over property required" under analysis line II D, "Exclusive Possession."

As there is no presumption user is hostile. — The adversary character of the holding or enjoyment is one of the tests of the sufficiency of that holding or enjoyment, and there is no more reason for indulging in the presumption that a 10-year simple user of a right of way is hostile than there is for indulging in the presumption that any other simple holding of land for 10 years is hostile to the true owner. Roberts v. Jaeger, 5 Alaska 190 (1914).

Acquiescence of owner in hostile acts of possessor. — The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

The word "hostile" is frequently used as a term of art meaning that the claim is "adverse" or under "claim of right," and that it is not subordinate to the title of the true owner. City of Anchorage v. Nesbett, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

For discussion of when use is permissive as opposed to "hostile" or under a "claim of right," see City of Anchorage v. Nesbett, Sup. Ct. Op. No. 1111 (File No. 2040), 530 P.2d 1324 (1975).

The test for determining the existence of the requisite degree of hostility is a fairly objective one. The question is whether or not the claimant acted toward the land as if he owned it. His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant. Peters v. Juneau-Douglas Girl Scout Council, Sup. Ct. Op. No. 1018 (File Nos. 1660, 1661), 519 P.2d 826 (1974).

The claimant's beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant. The proper determination of whether the required degree of hostility exists is whether the acts of the claimant are the acts of an owner, sufficient to give the record owner notice of the possessor's claim. Penn v. Ivey, Sup. Ct. Op. No. 2120 (File No. 4113), 615 P.2d 1 (1980).

Finding of hostility not clearly erroneous. — Although it is clear that the hostility requirement is not satisfied if the adverse claimant had the permission of the record owner to use the property, the trial court's finding of hostility was not clearly erroneous where the only evidence of permissive use before the trial court was the record owner's own testimony and this evidence was directly contradicted by the adverse claimant who testified that such a conversation had never taken place. Penn v. Ivey, Sup. Ct. Op. No. 2120 (File No. 4113), 615 P.2d 1 (1980).

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, §§ 84-88, 119-122.

53 C.J.S., Limitation of Actions, §§ 34 — 42, 118.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 ALR 864; 100 ALR2d 1094.

Oil and gas royalty as real property for purpose of determining applicable statute of limitations, 90 ALR 770; 101 ALR 884; 131 ALR 1371.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by statute of limitations, 14 ALR2d 598.

Owner's surveying of land as entry thereon tolling running of statute of limitations for purposes of adverse possession, 76 ALR3d 1202.

Sec. 09.10.040. Action upon judgment or sealed instrument in 10 years. No person may bring an action upon a judgment or decree of a court of the United States, or of a state or territory within the United States, and no action may be brought upon a sealed instrument unless commenced within 10 years. (§ 1.04 ch 101 SLA 1962)

NOTES TO DECISIONS

The presence of a seal, where required, is not a mere formality, but is a matter of substance. Carklin v. Grigsby, 9 Alaska 378 (1938). See AS 09.25.130.

Instruments purporting to be under seal should be plainly and unequivocally so drawn in order to distinguish them from other instruments of a less solemn character, and the rule as to what constitutes a sealed instrument should be strictly interpreted on that account. Carklin v. Grigsby, 9 Alaska 378 (1938).

Mere recital without mark, etc., is insufficient. — In order to convert a mortgage into a sealed instrument, it is necessary that some seal or scroll or mark that can be identified as a seal be affixed thereto, and the mere recital that the same is under seal, whether such recital appears in the body of the instrument, or in the acknowledgment, is insufficient. Carklin v. Grigsby, 9 Alaska 378 (1938).

Mortgage as sealed instrument. — The parties to a mortgage may make it a

sealed instrument if they so desire and thus bring it within this section. Carklin v. Grigsby, 9 Alaska 378 (1938).

The question as to whether or not a mortgage is a sealed instrument is one of fact to be determined by the court upon an inspection of the instrument itself. Carklin v. Grigsby, 9 Alaska 378 (1938).

Mistake, etc., as ground for correcting a mortgage to make it a sealed instrument, see Carklin v. Grigsby, 9 Alaska 378 (1938).

Child support payments are judgments at the time each payment accrued. Thus, the applicable statute of limitations on actions to recover arrearages in child support payments is that applicable for judgments, which is 10 years. Young v. Williams, Sup. Ct. Op. No. 1693 (File No. 3310), 583 P.2d 201 (1978).

Effect of filing complaint. — The filing of a complaint tolls the applicable statute of limitations and has the legal effect of commencing an action. Hamilton v. Seattle Marine & Fishing Supply Co., Sup. Ct. Op. No. 1401 (File No. 2695), 562 P.2d 333 (1977).

Law of place where action brought governs. — A statutory limitation on the time for commencing actions is generally considered to be a matter of procedure, and thus governed by the law of the place where the action is brought. Hamilton v. Seattle Marine & Fishing Supply Co., Sup. Ct. Op. No. 1401 (File No. 2695), 562 P.2d 333 (1977).

Creditor's efforts to enforce money judgment obtained in state of Washington were not time barred. — See Hamilton v. Seattle Marine & Fishing Supply Co., Sup. Ct. Op. No. 1401 (File No. 2695), 562 P.2d 333 (1977).

Quoted in Ro. .s v. Robbins, Sup. Ct. Op. No. 2523 (File No. 6109), P.2d (1982).

Collateral references. — 34 Am. Jur., Limitation of Actions, §§ 79-91, 137-157.

53 C.J.S., Limitation of Actions, §§ 58-66, 125-132.

Suspension or removal of bar of statute of limitations as against judgment, 21 ALR 1038; 166 ALR 768; 45 ALR2d 967.

Seal as affecting running of limitations on negotiable instruments, 53 ALR 1174; 97 ALR 617.

Retrospective application of statute of limitations to actions on judgment already barred, 67 ALR 304.

Statute of limitations applicable to interest on judgment, 120 ALR 719.

Part payment or promise to pay judgment as affecting the running of statute of limitations, 45 ALR2d 967.

Sec. 09.10.050. Actions to be brought in six years. No person may bring an action (1) upon a contract or liability, express or implied, excepting those mentioned in AS 09.10.040 or 09.10.055; (2) for waste or trespass upon real property; or (3) for taking, detaining, or injuring personal property, including an action for its specific recovery, except those mentioned in AS 09.10.055; unless commenced within six years. (§ 1.05 ch 101 SLA 1962; am § 1 ch 61 SLA 1967)

Cross references. — For limitation on action against subdivider in contested transactions, see AS 34.55.030(f).

NOTES TO DECISIONS

Quasi-contractural recovery. — Quasi-contractual recovery is an implied contract for the purpose of applying statutes of limitation. Estate of Waters v. Hoadley, Sup. Ct. Op. No. 638 (File No. 1169), 474 P.2d 85 (1970).

Relief from duressed contract. — In seeking relief from a duressed contract, the action is on an implied contract under the six-year statute of limitations. Estate of Waters v. Hoadley, Sup. Ct. Op. No. 638 (File No. 1169), 474 P.2d 85 (1970).

Mortgage not under seal is governed by this section. — The parties to a mortgage may make it a sealed instrument if they so desire and thus bring it within the 10-year statute. If they do not choose to avail themselves of that opportunity the instrument must perforce be governed by the law applicable to instruments not under seal and suit thereon must be brought within six years or the action is barred and the lien expires by operation of law. Carklin v. Grigsby, 9 Alaska 378 (1938).

Misrepresentation and negligence are tort concepts, not contract, and the two-year statute of limitation (AS 09.10.070) respecting torts governs. Austin v. Fulton Ins. Co. Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in AS 09.10.070, rather than this section, applied. Van Horn Lodge, Inc. v. White, Sup. Ct. Op. No. 2336 (File No. 4447), 627 P.2d 641 (1981).

When statute of limitations begins to run in contract actions. — The statute of limitations begins to run in contract causes of action from the time the right of action accrues. This is usually the time of the breach of the agreement, rather than the time that actual damages are sustained as a consequence of the breach. Howarth v. First Nat'l Bank, Sup. Ct. Op. No. 1188 (File No. 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

It is not material that the injury from the breach is not suffered until afterward, the commencement of the limitation being contemporaneous with the origin of the cause of action. Howarth v. First Nat'l Bank, Sup. Ct. Op. No. 1188 (File No. 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

If plaintiff can prove that defendant bank had a contractual duty "to preserve and protect" his property, including a duty to maintain fire insurance, in consideration for assignment of right, title and interest in all moneys due or to become due to plaintiff under a real estate contract with another party, and the bank does not fulfill its duty either by acting as the insurer of the property or by contracting with an insurance company, then the statute of limitations will not bar recovery, and breach would not occur until plaintiff's property suffered fire damage and additionally defendant bank refused to compensate plaintiff. Howarth v. First Nat'l Bank, Sup. Ct. Op. No. 1188 (File No. 2203), 540 P.2d 486 (1975), aff'd on rehearing, 551 P.2d 934 (1976).

Statute of limitations begins to run from execution of demand note. — Paper payable on demand is due immediately, so an action may be brought at any time after date and delivery of the note without any further demand than the suit, so that the statute of limitations begins to run from its date. North Am. Trading & Transp. Co. v. Byrne, 4 Alaska 26 (1910).

A promissory note, payable on demand, becomes due immediately and the statute of limitations commences to run on the date of its execution. Backland v. Ferguson, 11 Alaska 348.

Unless note or circumstances show it was not immediately due. — The rule that paper payable on demand is due immediately may not apply where there is something on the paper, or in the circumstances under which it is given, to show that it was not the intention that it should become due immediately. North Am. Trading & Transp. Co. v. Byrne, 4 Alaska 26 (1910).

Action against bank official by depositor for conversion. — Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six-year statute of limitations in this section rather than two-year statute of limitations in AS 09.10.070. Vest v. First Nat'l Bank, Sup. Ct. Op. No. 2629 (File No. 5969), 659 P.2d 1233 (1983).

Discharging debris on mining claim. — An action for injury to mining claims by discharge of debris thereon was an action for trespass upon real property and not an

action on the case, and was governed by the six-year limitation provided in this section, where the debris was discharged more or less directly over the surface of the ground below, not principally through its deposition in a stream. Erceg v. Fairbanks Exploration Co., 9 Alaska 264, 95 F.2d 850 (9th Cir.), cert. denied in 9 Alaska 292, 305 U.S. 615, 59 S. Ct. 74, 83 L. Ed. 392 (1938).

Tax refunds. — The taxpayer is not limited to recovery of overpayments according to AS 43.15.010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common-law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under this section, the six-year statute of limitations applicable to recovery of personal property. State v. Wakefield Fisheries, Inc., Sup. Ct. Op. No. 779 (File Nos. 1397, 1398), 495 P.2d 166 (1972).

Foreclosure actions. — In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (this section), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Slipping on ice as breach of implied contractual duty. — Where, in a suit for injuries suffered by plaintiff when she slipped and fell on ice which had accumulated near the entrance to a lodge where she had been a paying guest, plaintiff contended that she was injured by reason of defendants' breach of their implied contractual duty as innkeepers to keep their premises in reasonably safe condition for their guests and, therefore, that the six-year statute of limitations should control, it was held that the controlling statute of limitations was the two-year statute governing tort actions, and not the six-year statute relating to actions on contract. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Applied in State v. Reefer King Co., Sup. Ct. Op. No. 1344 (File Nos. 2605, 2606, 2607), 559 P.2d 56 (1976), modified on rehearing on other grounds, 562 P.2d 702 (1977); Clary v. Stack Steel & Supply Co., Sup. Ct. Op. No. 2093 (File No. 4194), 611 P.2d 80 (1980); Municipality of Anchorage v. Sisters of Providence in Wash., Inc., Sup. Ct. Op. No. 2343 (File Nos. 5017, 5018, 5329), 628 P.2d 22 (1981); Roberts v. Brooks, Sup. Ct. Op. No. 2544 (File No. 5616), 649 P.2d 710 (1982).

Quoted in King v. First Nat'l Bank, Sup. Ct. Op. No. 2525 (File No. 5380), P.2d (1982).

Stated in Walker v. White, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Cited in Oaks v. Rojcewicz, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d 839 (1966); Palfy v. Hepp, Sup. Ct. Op. No. 513 (File No. 942), 448 P.2d 310 (1968); Alaska Airlines v. Lockheed Aircraft Corp., 430 F. Supp. 134 (D. Alaska 1977); Straight v. Hill, Sup. Ct. Op. No. 2256 (File No. 4610), 622 P.2d 425 (1981); Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., Sup. Ct. Op. No. 2286 (File No. 4698), 623 P.2d 324 (1981); State, N.S.E. Regional Aquaculture Ass'n v. Alex, Sup. Ct. Op. No. 2488 (File Nos. 5065, 5086, 5142), 646 P.2d 203 (1982).

Collateral references. — What constitutes a contract in writing within statute, 3 ALR2d 809.

Statute of limitations applicable to action for encroachment, 24 ALR2d 903.

Timely suit to enforce policy as interrupting limitations against claimant's amended pleading to reform it, or vice versa, 92 ALR2d 168.

What statute of limitations governs action by contractee for defective or

improper performance of work by private building contractor, 1 ALR3d 914.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 ALR3d 1197.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 ALR3d 1265.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass, 15 ALR3d 1228.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 ALR3d 1438.

Time limitations as to claims based on uninsured motorist clause, 28 ALR3d 580.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations, 41 ALR3d 1111.

What statute of limitations covers action for indemnity, 57 ALR3d 833.

What statute of limitations governs action for interference with contract or other economic relations, 58 ALR3d 1027.

What statute of limitation applies to action for surplus of proceeds, from sale of collateral, 59 ALR3d 1205.

Choice of law as to applicable statute of limitations in contract actions, 78 ALR3d 639.

When statute of limitations begins to run against action to recover money paid by mistake, 79 ALR3d 754.

Limitation of action against insurer for breach of contract to defend, 96 ALR3d 1193.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 ALR4th 677.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 ALR4th 1214.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 ALR4th 1285.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 ALR4th 456.

Sec. 09.10.055. Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

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

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

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company. (§ 2 ch 61 SLA 1967)

Collateral references. — What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor, 1 ALR3d 914.

When statute of limitations begins to run on negligent design claim against architect, 90 ALR3d 507.

Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect or engineer for injury or death arising out of defective or unsafe condition of improvement to real property, 93 ALR3d 1242.

Statutes of limitation — actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 ALR4th 866.

Sec. 09.10.060. Actions to be brought in three years. (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation. (§ 1.06 ch 101 SLA 1962)

Sec. 09.10.070. Actions to be brought in two years. No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. (§ 1.07 ch 101 SLA 1962)

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

The policy of the law is to allow a reasonable but definitely limited time for the bringing of an action after which the matter is put to rest. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Purpose of statute of limitations. — The goal of the statute of limitations and the substituted service procedure is to provide speedy adjudication of claims. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No 1359), 488 P.2d 716 (1971).

The purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971); McCracken v. Davis, Sup. Ct. Op. No. 1389 (File No. 2849), 560 P.2d 771 (1977); Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d 181 (1978).

Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. McCracken v. Davis, Sup. Ct. Op. No. 1389 (File No. 2849), 560 P.2d 771 (1977).

This section reflects a state policy that a plaintiff's commencement of action is the affirmative step necessary to assure that his assertion of a claim is timely. Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d 181 (1978); DeHusson v. City of Anchorage, Sup. Ct. Op. No. 1673 (File No. 2996), 583 P.2d 791 (1978).

This section and AS 09.55.580 compared. — See Haakanson v. Wakefield Seafoods, Inc., Sup. Ct. Op. No. 1943 (File Nos. 3428, 3492), 600 P.2d 1087 (1979).

Insurance adjusters not required to advise on applicability of statutes of limitations. — Insurance adjusters, as a matter of law, are not required to give advice in regard to the potential applicability of statutes of limitations. Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Applied in Lillegraven v. Tengs, Sup. Ct. Op. No. 109 (File No. 173), 375 P.2d 139 (1962); State v. Baker, Sup. Ct. Op. No. 227 (File No. 428), 393 P.2d 893 (1964); Alaska Airlines v. Lockheed Aircraft Corp., 430 F. Supp. 134 (D. Alaska 1977).

Quoted in Maier . City of Ketchikan, Sup. Ct. Op. No. 291 (File No. 489), 403 P.2d 34 (1965); Adkins v. Nabors Alaska Drilling, Inc., Sup. Ct. Op. No. 2056 (File No. 4410), 609 P.2d 15 (1980); Norman v. Nichiro Gyogyo Kaisha, Ltd., Sup. Ct. Op. No. 2511 (File No. 5254), 645 P.2d 191 (1982); King v. First Nat'l Bank, Sup. Ct. Op. No. 2525 (File No. 5380), P.2d (1982); Shiffman v. "K", Inc., Sup. Ct. Op. No. 2603 (File Nos. 5615, 6312), 657 P.2d 401 (1983).

Cited in Barrow Dev. Co. v. Fulton Ins. Co., 418 F.2d 316 (9th Cir. 1969); Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979); Bendix Corp. v. Adams, Sup. Ct. Op. No. 2042 (File Nos. 3960, 3966), 610 P.2d 24 (1980).

II. TORTS.

A. Generally.

This section is generally considered by Alaska courts to be a "tort" statute. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

It is a "residual" statute in that it governs all claims for injury to the person unless "specifically provided otherwise" in some other statute. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

A tort action must be commenced within two years after the cause of action has accrued. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

The uniform limitations period impliedly allows every victim of tortious conduct in Alaska, regardless of where he resides and regardless of whether the alleged tortious conduct was by a governmental unit or not, to commence an action for damages within two years without complying with any other time limit. Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d 181 (1978); DeHusson v. City of Anchorage, Sup. Ct. Op. No. 1673 (File No. 2996), 583 P.2d 791 (1978).

The statute of limitation as to torts does not usually begin to run until the tort is complete. Austin v. Fulton Ins. Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

When tort complete. — A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Austin v. Fulton Ins. Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

Municipalities prohibited from requiring shorter notice period for tort claims. — AS 09.65.070, authorizing actions against municipalities, impliedly prohibits municipalities from requiring a potential plaintiff to submit notice of tort claims, as a condition to bringing an action, within a period shorter than the period provided by the statute of limitations. Johnson v. City of Fairbanks, Sup. Ct. Op. No. 1672 (File No. 3444), 583 P.2d

181 (1978); DeHusson v. City of Anchorage, Sup. Ct. Op. No. 1673 (File No. 2996), 583 P.2d 791 (1978).

Action for unlawful imprisonment. — Allegation that defendant in his capacity as United States attorney caused plaintiff to be arrested on criminal complaints sworn out by codefendants "without probable cause or investigation" purports to state a claim in tort against defendant subject to a two-year period of limitation under this section. Williams v. Coughlan, 17 Alaska 147, 244 F.2d 6 (9th Cir. 1957).

Action to enforce liability of third person under Workmen's Compensation Law. — From the express language of the Workmen's Compensation Law as to liability of third persons, the right sought to be enforced is based on tort rather than on contract and this section is therefore the applicable statute of limitations. Dierks v. Alaska Air Transp., Inc., 14 Alaska 159, 109 F. Supp. 695 (D. Alas. 1953).

Wrongful interference with right to preserve dead body. — There is a claim for relief for wrongful interference with the right to preserve a dead body. Burns v. Anchorage Funeral Chapel, Sup. Ct. Op. No. 778 (File No. 1465), 495 P.2d 70 (1972).

A claim for relief for wrongful interference with the right to preserve a dead body belongs exclusively to the surviving spouse or to the next of kin of the decedent. This substantive right is in the surviving spouse or next of kin, whether the claim is analyzed as a tortious invasion of a property right or infliction of emotional harm. Burns v. Anchorage Funeral Chapel, Sup. Ct. Op. No. 778 (File No. 1465), 495 P.2d 70 (1972).

It is generally the law in this country that the right to possess, preserve, and bury, or otherwise dispose of a dead body belongs to the surviving spouse and, if none such, then to the next of kin in the order of their relation to the decedent; that a violation of that right is a tort; and that damages for mental suffering are recoverable for a willful invasion of the rights relating to dead bodies. Burns v. Anchorage Funeral Chapel, Sup. Ct. Op. No. 778 (File No. 1465), 495 P.2d 70 (1972).

Personal injuries resulting from breach of warranty in sale of goods. — In an action to recover damages for personal injuries resulting from an alleged breach of warranty in the sale of goods, the two-year statute of limitations for personal injury actions does not apply. Sinka v. Northern Commercial Co., Sup. Ct. Op. No. 747 (File Nos. 1360, 1361), 491 P.2d 116 (1971).

Where an action is correctly brought within the framework of the Uniform Commercial Code, the applicable statute of limitations is that provided by the Code, although the damages sought are for personal injuries. Sinka v. Northern Commercial Co., Sup. Ct. Op. No. 747 (File Nos. 1360, 1361), 491 P.2d 116 (1971).

By the repealer section provided by the Alaska legislature in enacting the Uniform Commercial Code (§ 10.103, ch. 114, SLA 1962) providing in part that "... all acts and parts of acts inconsistent with this Act are hereby repealed," the general two-year statute of limitations (this section) was repealed to the extent that it might otherwise control recovery for personal injuries resulting from breach of warranty under the Code. Sinka v. Northern Commercial Co., Sup. Ct. Op. No. 747 (File Nos. 1360, 1361), 491 P.2d 116 (1971).

Action against bank official by depositor for conversion. — Action against bank official for conversion of payroll checks endorsed by plaintiff for deposit to his bank account and for passing forged checks written on plaintiff's account was governed by six-year statute of limitations in AS 09.10.050 rather than two-year statute of limitations in this section. Vest v. First Nat'l Bank, Sup. Ct. Op. No. 2629 (File No. 5969), 659 P.2d 1233 (1983).

Slipping on ice as breach of implied contractual duty. — See same catchline in note to AS 09.10.050.

B. Strict Liability.

There is no other statute specifically limiting the period for bringing strict liability claims. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

To require strict liability claims to be brought within two years is a reasonable interpretation of the public policy of Alaska. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

Although the genesis of strict liability lies in warranty theory, it is now clear that breach of warranty itself was originally considered a species of fraud or misrepresentation, sounding in tort. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

Even in its present form, strict liability is more nearly akin to tortious negligence than to contractual warranty, because no

contract is required and because strict liability may not be disclaimed. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

But longer limitation allowed those in privity with defendant. — There are valid reasons for allowing a longer limitation period under AS 45.05.242 [now AS 45.02.725], to plaintiffs who have contracted with the defendant, or who otherwise satisfy the privity requirement, than to those who have not. Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

As to reasons for allowing longer limitation period to plaintiffs contracting with the defendant, see Anderson v. Fairchild Hiller Corp., 358 F. Supp. 976 (D. Alaska 1973).

Cause of action based on damage to a generator due to engine failure was barred by the two-year statute of limitations applicable to "economic loss" caused by a defective product. Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., Sup. Ct. Op. No. 2286 (File No. 4698), 623 P.2d 324 (1981).

C. Misrepresentation and Negligence.

Misrepresentation and negligence are tort concepts, not contract, and the two-year statute of limitation (this section) respecting torts governs. Austin v. Fulton Ins. Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

Negligent misrepresentation is a tort falling under the two-year statute of limitations. Estate of Waters v. Hoadley, Sup. Ct. Op. No. 638 (File No. 1169), 474 P.2d 85 (1970).

A cause of action for misrepresentation in a business transaction is complete when the injured person has been deprived of his property or otherwise has suffered pecuniary loss or has incurred liability as a result of a misrepresentation. Austin v. Fulton Ins. Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

Where the essence of a plaintiff's complaint in an action for legal malpractice was negligence, the period of limitation found in this section, rather than AS 09.10.050, applied. Van Horn Lodge, Inc. v. White, Sup. Ct. Op. No. 2336 (File No. 4447), 627 P.2d 641 (1981).

Legal malpractice. — This section is the proper statute to be applied in attorney malpractice actions based on negligence. Greater Area, Inc. v. Bookman, Sup. Ct. Op. No. 2589 (File No. 5557), P.2d (1982).

Statute of limitations for legal malpractice does not begin to run until client discovers, or reasonably should discover, existence of all elements of his cause of action; thus, if client discovers his attorney's negligence before he suffers consequential damages, the statute of limitations will not begin to run until client suffers actual damages. Greater Area, Inc. v. Bookman, Sup. Ct. Op. No. 2589 (File No. 5557), P.2d (1982).

Negligent failure to procure earthquake coverage. — Where plaintiff's claim based upon defendant's negligent failure to procure or issue earthquake coverage, and plaintiff's claim based upon defendant's negligent misrepresentations did not ripen until the earthquake loss occurred in March 1964, the statute of limitation did not commence to run until that time, and plaintiff's action, instituted in February of 1966, was brought within the two-year statutory period. Austin v. Fulton Ins. Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

Where plaintiff's interest was in being protected against earthquake loss, there was no invasion, or infringement upon, or impairment of such interest until there had been a loss by earthquake, because until that event occurred such protection could avail the plaintiff nothing. His interest, which is legally protected, was in having such protection when it was needed, at the time of the loss and not before. Thus, there must be an injury or harm to plaintiff as a consequence of defendant's negligence to serve as a basis for recovery of damages before the tort becomes actionable and before the period of limitation commences to run. Austin v. Fulton Ins Co., Sup. Ct. Op. No. 498 (File No. 911), 444 P.2d 536 (1968).

D. Libel.

When period of limitations begins to run. — Normally the period of limitations for libel begins to run when the libel is "published." Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

"Publication" imports communication to a third party. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

But courts have differed on exactly when it occurs. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

When publication occurred. — Where defendant wrote a letter to plaintiff's employer, accusing plaintiff of conduct

which was "highly unethical and a gross impropriety" and a week later the employer wrote a letter to defendant in which he acknowledged that he had received the letter, "publication" of the alleged libel occurred on the date the employer wrote his reply. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

III. FORFEITURE OR PENALTY TO STATE.

Item (2) of this section deals with civil penalties. State v. American Can Co., Sup. Ct. Op. No. 41 (File No. 75), 362 P.2d (1961).

Action to forfeit contraband. — Since a forfeiture action is independent of any other criminal proceedings, this can only mean an action must be brought within two years of the seizure. United States v. Three Thousand Two Hundred Thirty-Six Dollars, 167 F. Supp. 495 (D. Alas. 1958).

Where money was seized in a gambling raid on September 11, 1955, and the libel in rem filed on December 12, 1957, the libel was barred by this section. United States v. Three Thousand Two Hundred Thirty-Six Dollars, 167 F. Supp. 495 (D. Alas. 1958).

IV. OTHER STATUTORY LIABILITY.

Tax refunds. — The taxpayer is not limited to recovery of overpayments according to AS 43.15.010. The common law has long recognized a cause of action in assumpsit to recover overpayments of taxes. Because the statutory remedies do not explicitly supersede the common-law remedies, they are intended as a supplement, and the earlier remedy in assumpsit is still available. Hence, a claim for a refund was timely under AS 09.10.050, the six-year statute of limitations applicable to recovery of personal property. State v. Wakefield Fisheries, Inc., Sup. Ct. Op. No. 779 (File Nos. 1397, 1398), 495 P.2d 166 (1972).

Borough's levy of past years' taxes. — Six-year statute of limitations provides for in AS 09.10.120, rather than two-year limitation provided for in AS 09.10.070(a)(3) was applicable to borough's efforts to levy past years' taxes. Alascom, Inc. v. North Slope Borough, Sup. Ct. Op. No. 2622 (File Nos. 6037, 6090), P.2d (1983).

Recovery of back pay for discrimination under the Equal Pay for Women Act is limited to that earned within two years prior to commencement of her suit. Brown v. Wood, Sup. Ct. Op. No. 1551 (File Nos. 2564, 2565), 575 P.2d 760 (1978), modified on other grounds, 592 P.2d 1250 (1979).

V. PROCEDURE.

A. Generally.

Amendment related back to date of original complaint. — Since the amendment adding parties plaintiff related back to the date of the original complaint, the two-year tort statute of limitations was no bar to prosecution of the claim for relief. Burns v. Anchorage Funeral Chapel, Sup. Ct. Op. No. 778 (File No. 1465), 495 P.2d 70 (1972).

Where an amendment to a complaint did not state a new claim for relief but related back to the date of the original complaint, it was not barred by the statute of limitations. Jakoski v. Holland, Sup. Ct. Op. No. 1015 (File Nos. 1724, 1795), 520 P.2d 569 (1974).

As did cross-claim. — Cross-claim filed more than two years after the cause of action arose but less than two years after the original answer was filed related back to when the original answer was filed and was not barred by this section. Estate of Thompson v. Mercedes-Benz, Inc., Sup. Ct. Op. No. 952 (File No. 1672), 514 P.2d 1269 (1973).

Addition of defendant after expiration of statute of limitations. — Trial court did not abuse its discretion in finding that Alaska case law did not mandate the addition of a party defendant after the expiration of the applicable statute of limitations. McCracken v. Davis, Sup. Ct. Op. No. 1389 (File No. 2849), 560 P.2d 771 (1977).

Claim not barred. — Where the last day for the running of the statute of limitations fell on a Saturday, when the court was closed, and the following Monday was a legal holiday, the claim which was filed on the next Tuesday was not barred by the statute of limitation. Davis v. Sturm, Ruger & Co., Sup. Ct. Op. No. 1356 (File No. 3141), 557 P.2d 1133 (1976).

Equitable estoppel. — The doctrine of equitable estoppel as a prohibition against unjust reliance upon a statute of limitations is a salutary one and therefore the supreme court adopts the rule for Alaska. Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Both federal and state authorities have established that the doctrine of equitable estoppel is available as a bar to inequitable reliance upon statutes of limi-

tations. Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

Establishing equitable estoppel. — To establish an equitable estoppel it is generally necessary that the party seeking to assert it show that the other party made some misrepresentation, or false statement or acted fraudulently, and that he reasonably relied on such acts or representations of the other party, and due to such reliance did not institute suit timely. Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

There is authority to the effect that equitable estoppel requires more than inaction or silence by a person who has no obligation to speak or act. Yet there can be circumstances where inaction or silence combined with acts or representations can give rise to an appropriate situation calling for the application of the estoppel doctrine. Groseth v. Ness, Sup. Ct. Op. No. 370 (File No. 617), 421 P.2d 624 (1966).

A party who fraudulently conceals from a plaintiff the existence of a cause of action may be estopped to plead the statute of limitations if the plaintiff's delay in bringing suit was occasioned by reliance on the false or fraudulent representations. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

Where plaintiffs were never lulled into a false sense of security by any specific conduct on the part of the defendant implying that the statute of limitations would not be raised, there is no evidentiary basis for invocation of the doctrine of equitable estoppel. Garfield v. Clark, Sup. Ct. Op. No. 1476 (File No. 2867), 567 P.2d 777 (1977).

Defendants estopped to urge section. — Repeated promises to pay the taxes in consideration of forbearance by the city from taking legal steps to collect them in reliance upon which the city forbore to take legal action estopped the defendants from urging the statute of limitations. Demmert v. City of Klawock, 14 Alaska 20, 199 F.2d 32 (9th Cir. 1952).

Defendant not estopped to plead statute. — See Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

Waiver of statute. — An escrow agreement as to payment of taxes constituted a waiver of the statute of limitations. Demmert v. City of Klawock, 14 Alaska 20, 199 F.2d 32 (9th Cir. 1952).

The running of the limitation period is an affirmative defense which if not pled was waived. Municipality of Anchorage v. Sisters of Providence in Wash., Inc., Sup. Ct. Op. No. 2343 (File Nos. 5017, 5018, 5329), 628 P.2d 22 (1981).

Application of foreign period of limitations. — Where the foreign limitation qualifies or conditions the right of action, Alaska will apply the foreign period of limitations, even though longer than Alaska's own period of limitations. Marine Constr. & Design Co. v. Vessel Tim, Sup. Ct. Op. No. 448 (File No. 821), 434 P.2d 683 (1967).

B. Tolling Statute.

Commencement of the action interrupts the running of the statute. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

And Civ. R. 3 controls. — With respect to the manner of commencing a civil action as it may bear upon the time for commencing the action under a statute of limitations, there is no reason why Civ. R. 3 should not be controlling. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Definition of "commenced" in Civ. R. 3. — In Civ. R. 3, which states that "a civil action is commenced by filing a complaint with the court," is to be found the definition of the term "commenced" as used in statutes of limitations. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

Filing of the complaint tolls the statute of limitations. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

The two-year statute did not constitute a defense to plaintiff's claim, because the running of the statutory period was interrupted by the filing of her complaint before the expiration of two years from the date of her injury. Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

And not the further act of issuing summons. — See Silverton v. Marler, Sup. Ct. Op. No. 186 (File No. 341), 389 P.2d 3 (1964).

Civil R. 27 petition to perpetuate testimony is not a complaint for the purposes of Rule 3 and the statutes of limitations. Chiei v. Stern, Sup. Ct. Op. No. 1400 (File Nos. 2710, 2711), 561 P.2d 1216 (1977).

Statutes of limitation aided by substituted service. — Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses. In the attainment of those ends, substantial aid is provided by statutes establishing

substituted service. By this means, the equivalent of personal service is made obtainable on absent defendants. For purposes of lapse of time, Alaska statutes place an absent defendant in a motor vehicle case on an equal plane with those present within the state. Thus, where substituted service is available, the usual statute of limitations should apply untolled. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

A tolling provision will not operate to suspend a statute of limitations when substituted service is available in an auto accident case. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

To apply the tolling statute (AS 09.10.130) to a situation where the defendant is at all times amenable to service is repugnant to the general purposes of statutes of limitations. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

In cases arising from motor vehicle accidents in which the defendant subsequently leaves the state, AS 09.05.020 operates in conjunction with AS 09.05.040 to authorize service upon an absent defendant by serving the commissioner of revenue. Pursuant to these provisions, the commissioner of revenue is, as a matter of law, appointed as defendant's statutory agent so that service upon him is of the same effect and validity as personal service upon the defendant. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Tolling of statute by concealment or nondisclosure of negligence. — A concealment or nondisclosure of negligence tolls the statute until the injured party has actual notice of the negligence or, in the exercise of ordinary care, should have known of the negligence. Sharrow v. Archer, Sup. Ct. Op. No. 2609 (File No. 6135), 658 P.2d 1331 (1983).

This section was tolled during plaintiff's minority, i.e., until he was 19 years of age. Turnbull v. Bonkowski, 274 F. Supp. 733 (D. Alas. 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

Computation of the limitations period provided by this section subsequent to the removal of the disability of minority is to be made by excluding the first day and including the last. Turnbull v. Bonkowski, 274 F. Supp. 733 (D. Alas. 1967), aff'd, 419 F.2d 104 (9th Cir. 1969).

Section is not tolled by imprisonment unless plaintiff imprisoned on date of last tort. — AS 09.10.140 does not toll the two-year limitation provided by this section where the record in the case does not show that on the latest date of the tortious acts plaintiff was imprisoned. Williams v. McNealy, 16 Alaska 509, 239 F.2d 150 (9th Cir. 1956). See also Williams v. Strand, 16 Alaska 512, 239 F.2d 151 (9th Cir. 1956).

Tolling of statute of limitations during disability of parolee. — See Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973).

Time spent on parole not to toll section after December 14, 1973. — After December 14, 1973, the date of the opinion in Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), holding former AS 11.05.070 [now AS 33.30.310] and AS 33.15.190 unconstitutional in depriving parolees of the right to initiate civil suits, time spent on parole shall not toll the statute of limitations, provided however, that any person on parole as of that date shall, in any event, have one year from that date within which to bring an action. State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

But section was tolled by time spent on parole prior to that date. — See State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

The supreme court's finding in Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), that former AS 11.05.070 [now AS 33.30.310] and AS 33.15.190 were unconstitutional in depriving the parolee of access to the courts may not properly be considered retroactive. State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, §§ 102-106.

53 C.J.S., Limitation of Actions, §§ 74, 174-176.

Estoppel against defense of limitations in tort actions, 77 ALR 1044.

Limitation of actions as to slander of title based on recording of instrument purporting to affect title, 39 ALR2d 860.

When statute of limitations begins to run against action for false imprisonment or false arrest, 49 ALR2d 922.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 ALR3d 1438.

What constitutes "publication" of libel in order to start running of period of limitations, 42 ALR3d 807.

What statute of limitations covers action for indemnity, 57 ALR3d 833.

When statute of limitations commences to run against claim for contribution or indemnity based on tort, 57 ALR3d 867.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 ALR3d 927.

Statutes of limitations in illegitimacy or bastardy proceedings, 59 ALR3d 685.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 ALR3d 1277.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident, 71 ALR3d 849.

Tort claim against which period of statute of limitations has run as subject of setoff, counterclaim, cross bill, or cross action in tort action arising out of same accident or incident, 72 ALR3d 1065.

Minority of surviving children as tolling limitation period in state wrongful death action, 85 ALR3d 162.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 88 ALR3d 1336.

What statute of limitations governs actions based on strict liability in tort, 91 ALR3d 455.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 ALR3d 844.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 ALR3d 218.

What statute of limitations governs damage action against attorney for malpractice, 2 ALR4th 284.

What statute of limitations governs action arising out of transaction consummated by use of credit card, 2 ALR4th 677.

When statute of limitations begins to run in dental malpractice suits, 3 ALR4th 318.

What statute of limitations governs physician's action for wrongful denial of hospital privileges, 3 ALR4th 1214.

Availability of and time for bringing action against former director, officer, or stockholder in dissolve corporation for personal injuries incurred after final dissolution, 20 ALR4th 414.

Sec. 09.10.080. Actions to be brought in one year. No person may bring an action against a peace officer for the escape of a person arrested or imprisoned on civil process unless commenced within one year. (§ 1.08 ch 101 SLA 1962)

NOTES TO DECISIONS

Only this section and AS 09.10.090 provide for one-year statute of limitations. — See Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., Sup. Ct. Op. No. 940 (File No. 1780), 514 P.2d 223 (1973).

No provision whatever is made for a limitation period of less than one year from the accrual of the cause of action. Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., Sup. Ct. Op. No. 940 (File No. 1780), 514 P.2d 223 (1973).

Sec. 09.10.090. Actions for penalty. No person may bring an action upon a statute for the penalty given in whole or in part to the person who will prosecute for the same unless commenced within one year after the commission of the offense. If the action is not commenced within one year by a private party, it may be commenced on behalf of the state within two years after the period of limitation by a private party has expired. (§ 1.09 ch 101 SLA 1962)

NOTES TO DECISIONS

Only this section and AS 09.10.080 provide for one-year statute of limitations. — See Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., Sup. Ct. Op. No. 940 (File No. 1780), 514 P.2d 223 (1973).

No provision whatever is made for a limitation period of less than one year from the accrual of the cause of action. Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., Sup. Ct. Op. No. 940 (File No. 1780), 514 P.2d 223 (1973).

Sec. 09.10.100. Other actions in 10 years. An action for a cause not otherwise provided for may be commenced within 10 years after the cause of action has accrued. (§ 1.10 ch 101 SLA 1962)

NOTES TO DECISIONS

Foreclosure actions. — In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Cited in Straight v. Hill, Sup. Ct. Op. No. 2256 (File No. 4610), 622 P.2d 425 (1981).

Sec. 09.10.110. Accrual of cause of action upon mutual, open, and current account. In an action brought to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties, the cause of action accrues from the date of the last item proved in the account on either side. But when a period of more than one year elapses between any of a series of items or demands, they are not included as part of the account. (§ 1.11 ch 101 SLA 1962)

Collateral references. — Mutual account, 22 Am Jur POF2d, pp. 513-537.

When is account "mutual" for purposes of rule that limitations run from last item in open, current, and mutual account, 45 ALR3d 446.

Sec. 09.10.120. Actions in name of state, political subdivisions, or public corporations. An action brought in the name of or for the benefit of the state, any political subdivision, or public corporation may be commenced only within six years of the date of accrual of the cause of action. However, if the action is for relief on the ground of fraud, the limitation commences from the time of discovery by the aggrieved party of the facts constituting the fraud. (§ 1.12 ch 101 SLA 1962)

NOTES TO DECISIONS

Imposition of limitation period upon assessment and collection of taxes. — Constitutional grant of power to exempt property from taxation, contained in Alaska Const., art. IX, § 4, encompasses power to require that taxes be assessed and collected within a certain period of time or be forever barred. Alascom, Inc. v. North Slope Borough, Sup. Ct. Op. No. 2622 (File Nos. 6037, 6090), P.2d (1983).

Borough's levy of past years' taxes. — Six-year statute of limitations provides for in AS 09.10.120, rather than two-year limitation provided for in AS 09.10.070(a)(3) was applicable to borough's efforts to levy past years' taxes. Alascom, Inc. v. North Slope Borough, Sup. Ct. Op. No. 2622 (File Nos. 6037, 6090), P.2d (1983).

Sec. 09.10.130. Effect of absence from state or concealment. When the cause of action accrues against a person who is out of the state or concealed in the state, the action may be commenced within the periods provided in this chapter after that person returns to the state or when the concealment ceases. If a person departs from the state or conceals one's person after the cause of action accrues, the time of absence or concealment is not part of the time limited for the commencement of the action. (§ 1.13 ch 101 SLA 1962)

NOTES TO DECISIONS

Purpose. — It is the apparent purpose of this section — the tolling statute — to prevent a plaintiff's being deprived an opportunity to prove his cause of action by the defendant absenting himself from the jurisdiction for the duration of the period of limitation. The tolling statute preserves the plaintiff's cause of action until service has been made available and practical, by the defendant's presence in the state, for a time equal to the total period of limitation. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Section is in pari materia with AS 09.10.220. — The provision of AS 09.10.220 is one of limitation. It is in pari materia with this section. Alaska Credit Bureau v. Fenner, 12 Alaska 158, 80 F. Supp. 7 (D. Alaska 1948).

It is based on Statute of Anne. — This section in common with like statutes in practically every state, is based on ch. 16, § 19, of the Statute of Anne, which declares, in substance, that if any person against whom there should be any cause of action, was at the time such action accrued beyond the seas, the action might be brought against him on his return within the time limited for bringing such action. Alaska Credit Bureau v. Fenner, 12 Alaska 158, 80 F. Supp. 7 (D. Alas. 1948).

Statute of limitations does not run until defendant is in jurisdiction. — The statute of limitations of this jurisdiction cannot begin to run until there is found someone within the jurisdiction of the forum capable of being sued. Van Schuyver v. Hartman, 1 Alaska 431 (1902).

It starts to run on his return. — If the party should be out of the district at the time the cause of action arises against him, the statute does not begin to run until after the return of the defendant. Van Schuyver v. Hartman, 1 Alaska 431 (1902).

Or on his first coming into state. — The statute of limitations of Alaska does not begin to run until after the defendant comes into this jurisdiction. Van Schuyver v. Hartman, 1 Alaska 431 (1902).

Since this section applies to causes of action against nonresidents. — This section, considered in conjunction with AS 09.10.220, is not limited to residents, and a limitation under this chapter does not begin to run against a nonresident upon a cause of action accruing elsewhere until he enters this jurisdiction and can be served with process. Alaska Credit Bureau v. Fenner, 12 Alaska 158, 80 F. Supp. 7 (D. Alas. 1948). But see Murray v. Farrell, 2 Alaska 360 (D. Alas. 1948).

As well as residents. — The construction uniformly given the Statute of Anne by the courts of England and this country is that the clauses excepting the operation of the statute apply to residents and nonresidents alike. Alaska Credit Bureau v. Fenner, 12 Alaska 158, 80 F. Supp. 7 (D. Alas. 1948).

Limitation of forum controls. — Statutes of limitations affect the remedy, but not the right of action. Necessarily, therefore, the law of the forum must control in all matters affecting procedure. Van Schuyver v. Hartman, 1 Alaska 431 (1902).

A tolling provision will not operate to suspend a statute of limitations when substituted service is available in an auto accident case. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

To apply the tolling statute (this section) to a situation where the defendant is at all times amenable to service is repugnant to the general purposes of statutes of limitations. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

The tolling statute (this section) does not apply in an action for personal injuries where a person, at all times during his absence, is subject to substituted service of process under Alaska's nonresident motorist statutes. (AS 09.05.020). Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

In an action for damages arising from an automobile collision in this state, the statute of limitations is not tolled by the defendant's absence from the state, as provided by this section, when, during the defendant's absence, the plaintiff had the right to proceed against him under AS 09.05.020, which, in conjunction with AS 09.05.040, makes the commissioner of revenue the agent of the absent defendant for purposes of service of process. Byrne v. Ogle, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Cited in Straight v. Hill, Sup. Ct. Op. No. 2256 (File No. 4610), 622 P.2d 425 (1981).

Collateral references. — 51 Am. Jur. 2d, Limitation of Actions, §§ 146-169.

54 C.J.S., Limitation of Actions, §§ 208-215.

What constitutes concealment which will prevent running of statute of limitations, 173 ALR 576; 1 ALR2d 630.

Provision of statute of limitations excluding period of defendant's absence from the state as applicable to a local cause of action against individual who was a nonresident when the same arose; motorist having a statutory process agent, 17 ALR2d 502, 516.

Absence of judgment debtor from state as suspending or tolling running of period of limitations as to judgment, 27 ALR2d 839.

Tolling of statute of limitations during absence from state as affected by fact that party claimed benefit of limitations remained subject to service during absence or nonresidence, 55 ALR3d 1158.

Sec. 09.10.140. Disabilities of minority, incompetency and imprisonment. If a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues either (1) under the age of majority, or (2) incompetent by reason of mental illness, or (3) imprisoned on a criminal charge, or in execution under sentence of a court for a term less than the person's natural life, the time of the disability is not a part of the time limited for the commencement of the action. But the period within which the action may be brought is not extended in any case longer than two years after the disability ceases. (§ 1.14 ch 101 SLA 1962; am § 1 ch 46 SLA 1979)

Effect of amendments. — The 1979 amendment substituted "age of majority, or (2) incompetent by reason of mental illness" for "age of 19 years, or (2) insane" in the first sentence.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Limitation period in wrongful death statute construed in pari materia with general limitations provisions. — See Haakanson v. Wakefield Seafoods, Inc., Sup. Ct. Op. No. 1943 (File Nos. 3428, 3492), 600 P.2d 1087 (1979).

Disability must exist when cause of action arises. — This section tolls the statute only during the continuance of a disability which existed at the time the cause of action arose. Williams v. Coughlan, 17 Alaska 147, 244 F.2d 6 (9th Cir. 1957). See AS 09.10.180.

II. MINORITY.

This statute expresses the public policy that favors safe-guarding the interests of minors. Haakanson v. Wakefield Seafoods, Inc., Sup. Ct. Op. No. 1943 (File Nos. 3428, 3492), 600 P.2d 1087 (1979).

Extent to which disability tolls statute. — The disability of a minor statutory beneficiary tolls the running of the two-year time limit for commencing a wrongful death action until the disability is concluded. Haakanson v. Wakefield Seafoods, Inc., Sup. Ct. Op. No. 1943 (File Nos. 3428, 3492), 600 P.2d 1087 (1979).

Determination of age. — Since one is in existence on the day of his birth, he is, in fact, on the first anniversary of his birth, of the age of one year plus a day or some part of a day. The plaintiff did, then, reach the age of nineteen years on the day before the nineteenth anniversary of his birth, and he instituted his suit more than two years thereafter. Turnbull v. Bonkowski, 419 F.2d 104 (9th Cir. 1969).

AS 09.10.070 tolled during plaintiff's minority. — See same catchline in note to AS 09.10.070, analysis line V B, "Tolling Statute."

III. INCOMPETENCY.

Test for mental condition tolling statute of limitations. — Courts have interpreted liberally the type of mental condition that will toll a statute of limitations. The general test is whether a person could know or understand his legal rights sufficiently well to manage his personal affairs. It does not require a formal finding of incompetency by a court. Adkins v. Nabors Alaska Drilling, Inc., Sup. Ct. Op. No. 2056 (File No. 4410), 609 P.2d 15 (1980).

A person who suffered a severe head injury may be within the provisions of the tolling statute. Adkins v. Nabors Alaska Drilling, Inc., Sup. Ct. Op. No. 2056 (File No. 4410), 609 P.2d 15 (1980).

IV. IMPRISONMENT.

Imprisonment not in effect when claim accrued does not toll statute. — Since plaintiff's period of imprisonment was not in effect at the time his claims accrued, the statute of limitations was not tolled by this section. Williams v. Coughlan, 17 Alaska 147, 244 F.2d 6 (9th Cir. 1957).

Item (3) of this section does not toll the two-year limitation provided by AS 09.10.070 where the record in the case does not show that on the latest date of the tortious acts plaintiff was imprisoned. Williams v. McNealy, 16 Alaska 509, 239 F.2d 150 (9th Cir. 1956). See also Williams v. Strand, 16 Alaska 512, 239 F.2d 151 (9th Cir. 1956).

Tolling of statute of limitations during disability of parolee. — See Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973).

Time spent on parole not to toll statute after December 14, 1973. — After December 14, 1973, the date of the opinion in Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), holding former AS 11.05.070 [now AS 33.30.310] and AS 33.15.190 unconstitutional in depriving parolees of the right to initiate civil suits, time spent on parole shall not toll the statute of limitations, provided however, that any person on parole as of that date shall, in any event, have one year from that date within which to bring an action. State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

But statute was tolled by time spent on parole prior to that date. — See State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

The supreme court's finding in Bush v. Reid, Sup. Ct. Op. No. 973 (File No. 1841), 516 P.2d 1215 (1973), that former AS 11.05.070 [now AS 33.30.310] and AS

33.15.190 were unconstitutional in depriving the parolee of access to the courts may not properly be considered retroactive. State v. McCracken, Sup. Ct. Op. No. 978 (File No. 1781), 520 P.2d 787 (1973).

Collateral references. — Imprisonment as tolling statute of limitations, 24 ALR2d 618.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 ALR2d 965.

Imprisonment of party to civil action as tolling statute of limitations, 77 ALR3d 735.

Minority of surviving children as tolling limitation period in state wrongful death action, 85 ALR3d 162.

Sec. 09.10.150. Death of a party before expiration of limitation period. [Repealed, § 5 ch 78 SLA 1972.]

Sec. 09.10.160. Disability of alien during war. When a person is an alien subject or citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (§ 1.16 ch 101 SLA 1962)

NOTES TO DECISIONS

Armistice is not end of state of war. — An armistice is simply a cessation of hostilities during a state of war, having in contemplation a renewal of hostilities thereafter, not a cessation of a state of war. Afric v. Alaska United Gold Mining Co., 6 Alaska 540 (1922).

Collateral references. — War as suspending running of limitations in absence of specific statutory provision to that effect, 137 ALR 1454; 140 ALR 1518; 141 ALR 1511.

Sec. 09.10.170. Injunction against commencement of action. When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition is not a part of the time limited for the commencement of the action. (§ 1.17 ch 101 SLA 1962)

Sec. 09.10.180. Disability. No person may claim the benefit of a disability unless it existed when the right of action accrued or began before the time for commencing the action expired. (§ 1.18 ch 101 SLA 1962)

Sec. 09.10.190. Coexisting disabilities. — When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they all are removed. (§ 1.19 ch 101 SLA 1962)

Sec. 09.10.200. Acknowledgment or promise. No acknowledgment or promise is sufficient evidence of a new or continuing contract to take the case out of the operation of this chapter unless the acknowledgment or promise is contained in writing, signed by the party to be charged, and, as to instruments affecting real estate, acknowledged and recorded in the office of the recorder of the district where the original contract was filed or recorded. This section does not alter the effect of any payment of principal or interest. (§ 1.20 ch 101 SLA 1962)

NOTES TO DECISIONS

An acknowledgment need not be direct, unqualified and unconditioned. The purpose of the statute of limitations is to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses and this purpose is not advanced by imposing rigorous requirements of formality on acknowledgments. Such requirements would only heighten the statute's unfortunate effect of occasionally barring meritorious claims. Walker v. White, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Personal note not subject to recordation requirement. — Although a note was executed in connection with the sale of real estate, where it is a personal note, it therefore is not subject to the recordation requirement of this section. Walker v. White, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Unrecorded letters acknowledging mortgage debt. — Where letters allegedly acknowledging a mortgage debt were not recorded, they cannot revive any time-barred remedies based on a deed of trust, which is an "instrument affecting real estate" within the meaning of this section. Walker v. White, Sup. Ct. Op. No. 2196 (File No. 4574), 618 P.2d 561 (1980).

Sec. 09.10.210. Payment on account. When a past due payment of principal or interest is made upon any evidence of indebtedness, the running of the time within which an action may be commenced starts from the time the last payment is made. (§ 1.21 ch 101 SLA 1962)

Collateral references. — Acceptance of past-due interest as waiver precluding acceleration which will institute limitations period, 97 ALR2d 1016.

Sec. 09.10.220. When nonresident's cause of action barred. When a cause of action has arisen in another state or in a territory or foreign country between nonresidents of this state, and by the laws of the state, territory, or country where the cause of action arose that action cannot be maintained because of a lapse of time, the action shall not be maintained in this state. (§ 1.22 ch 101 SLA 1962)

NOTES TO DECISIONS

Section pari materia with AS 09.10.130. — The provision of this section is one of limitation. It is in pari materia with AS 09.10.130. Alaska Credit Bureau v. Fenner, 12 Alaska 1588, 80 F. Supp. 7 (D. Alaska 1948).

Local statute of limitations governs unless it recognizes foreign statute of

limitations. — Unless the law of the forum recognizes the statute of limitations of the foreign state wherein the cause of action accrues, the law of the forum or the local law must determine whether an action is or is not preserved to the party having the cause of action. This upon the principle that all statutes of limitations affect the remedy, and hence that the law of the forum must govern in deciding whether or not the remedy or the action may be had. Murray v. Farrell, 2 Alaska 360 (1905).

This section does not prevent action not barred in foreign jurisdiction from being barred here. — This section declares, in substance, that if an action is barred in the state, territory, or country where the cause of action arose, an action upon the same subject matter or cause of action will be barred under our laws, but the section cannot be taken to include the converse of this statement, namely, that if not barred by the statute of the foreign jurisdiction, the action will not be barred by the local statute for Alaska. Murray v. Farrell, 2 Alaska 360 (1905).

But law of foreign jurisdiction governs in suit to enforce foreign judgment. — A suit to enforce a judgment in a foreign jurisdiction, in so far as statutes of limitations are concerned, should be treated as analogous to execution thereon in the state of rendition, and governed by the law of that state as to enforcement by execution. Alaska Credit Bureau v. Burnell, 11 Alaska 82 (1946).

Thus, if judgment is unenforceable where rendered, it cannot support action in another state. — If the judgment sued on is dormant in the state where rendered, in the sense that it is absolutely dead and incapable of being enforced or revived, it cannot support any action in another state. Alaska Credit Bureau v. Burnell, 11 Alaska 82 (1946).

Where judgment of a foreign jurisdiction, which is the foundation of a judgment in this state, could not have been proceeded upon in the state of its rendition because it has ceased to have life by the passage of more than by six years from its rendition, it is without life in this jurisdiction, and the court had no jurisdiction to entertain it. Alaska Credit Bureau v. Burnell, 11 Alaska 82 (1946).

Creditor's efforts to enforce money judgment obtained in state of Washington were not time barred. — See Hamilton v. Seattle Marine & Fishing Supply Co., Sup. Ct. Op. No. 1401 (File No. 2695), 562 P.2d 333 (1977).

Applied in Malekos v. Chloe Ann Yin, Sup. Ct. Op. No. 2580 (File Nos. 5767, 5817), P.2d (1982).

Quoted in Marine Constr. & Design Co. v. Vessel Tim, Sup. Ct. Op. No. 448 (File No. 821), 434 P.2d 683 (1967).

Sec. 09.10.230. Certain actions relating to real property. No person may bring an action for the determination of a right or claim to or interest in real property unless commenced within the limitations provided for actions for the recovery of the possession of real property. But no person may bring an action to set aside, cancel, annul, or otherwise affect a patent to land issued by this state or the United States, or to compel a person claiming or holding under a patent to convey the land described in the patent or a portion of the land to the plaintiff in the action, or to hold the land in trust for or to the use and benefit of the plaintiff, or on account of any matter, thing, or transaction which was had, done, suffered, or transpired before the date of the patent unless commenced within 10 years from the date of the patent. In an action upon a new promise, fraud, or mistake, the running of the time within which an action may be commenced starts from the making of the new promise or the discovery of the fraud or mistake. This section does not bar an equitable owner in possession of real property from defending possession by means of the equitable title. The right of an equitable owner to defend possession in an action or by complaint for injunction is not barred by lapse of time while an action for the possession of the real property is not barred by the provisions of this chapter. (§ 1.23 ch 101 SLA 1962)

NOTES TO DECISIONS

Foreclosure actions. — In the absence of a controlling statute a foreclosure action is subject to the same period of limitations as the underlying debt. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (AS 09.10.050), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. Dworkin v. First Nat'l Bank, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Cited in United States v. Pacee, 564 F.2d 306 (9th Cir. 1977).

Collateral references. — When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 ALR2d 1094.

Sec. 09.10.240. Commencement of action after dismissal or reversal. If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or, if the plaintiff dies and the cause of action in favor of the plaintiff survives, the heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision. (§ 1.24 ch 101 SLA 1962)

NOTES TO DECISIONS

Section did not toll policy limitation of 12 months. — See Barrow Dev. Co. v. Fulton Ins. Co., 418 F.2d 316 (9th Cir. 1969).

Dismissal of claim without prejudice. — An action was not time-barred when brought within one year after a timely action on the same claim was dismissed without prejudice. Atlas Enters., Inc. v. Consolidated Constr. Co., Sup. Ct. Op. No. 1526 (File No. 2982), 572 P.2d 68 (1977).

Quoted in Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983); Shiffman v. "K", Inc., Sup. Ct. Op. No. 2603 (File Nos. 5615, 6312), 657 P.2d 401 (1983).

Cited in Oaks v. Rojcewicz, Sup. Ct. Op. No. 318 (File No. 580), 409 P.2d 839 (1966).

Collateral references. — Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 ALR2d 1075.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 ALR2d 285.

Appellate court's power to remit portion of verdict or judgment covering period barred by statute, 26 ALR2d 956.

Successive actions as within statutory provision fixing time within which new action may be commenced after nonsuit or judgment not on merits, 54 ALR2d 1229.

Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state, 55 ALR2d 1038.

Determination of beginning of period allowed by statute for commencement of new action after failure, otherwise than on the merits, of action timely begun, 79 ALR2d 1270.

Voluntary dismissal or nonsuit as within provision of statute extending time for new action in case of dismissal or failure of original action otherwise than upon the merits, 79 ALR2d 1290.

Character or kind of action or proceeding within operation of statute permitting new action after limitation period, upon failure of timely action, 79 ALR2d 1309.

Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417.

Statute permitting new action after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 ALR3d 1043.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 ALR3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations, 13 ALR3d 979.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 ALR3d 452.

Chapter 15. Parties.

Cross references. — For rules of court on parties, see Civ. R. 17-25.

Collateral references. — 59 Am. Jur. 2d, Parties, §§ 1-44.

67A C.J.S., Parties, §§ 1-8.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 ALR2d 1317.

Contract made in consideration of naming child as enforceable by child, 21 ALR2d 1067.

Maintainability of bastardy proceedings by infant prosecutrix in her own name and right, 50 ALR2d 1029.

Capacity of local or foreign personal representative to maintain action for death under foreign statute providing for action by personal representative, 52 ALR2d 1016.

Capacity of foreign domiciliary, or of ancillary, personal representative to maintain action for death, under statute of forum providing for action by personal representative, 52 ALR2d 1048.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 ALR2d 1247.

Capacity of guardian to sue or to be sued outside state where appointed, 94 ALR2d 162.

Right of illegitimate child to maintain action to determine paternity, 19 ALR4th 1082.

calculated. **Salmine v. Knagin**, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. **Truckweld Equipment Co. v. Swenson Trucking**, Op. No. 2545, 649 P2d 234 (Alaska 1982).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended and a brief description of the services reflected by those hours would be submitted. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Prevailing defendant was entitled to costs incurred after date of his offer of judgment. **Hutchins v. Schwartz**, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

As the prevailing party at trial, defendant could receive the maximum amount of attorney fees under Civil Rule 82; the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. **Hutchins v. Schwartz**, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. **Wickwire v. State**, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. **Wickwire v. State**, Op. No. 3116, 725 P2d 695 (Alaska 1986).

Pretrial offers not in compliance with Civil Rule 68 should not be considered in determining questions of costs and attorney fees; accordingly, trial court erred when it used past settlement negotiations, which did not result in an offer of judgment in compliance with Civil Rule 68, to justify a reduction in the amount of attorney's fees that it would have awarded. **Myers v. Snow White Cleaners & L. Supply**, Op. No. 3419, 770 P2d 750 (Alaska 1989).

The argument that trial courts should never be permitted to award fees in excess of those established under the "noncontested" or "without trial" schedules of Civil Rule 82 following acceptance of an offer of judgment under Civil Rule 68 was rejected. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

Where an offer of judgment specifies only a lump sum figure without any provision for attorney's fees, attorney's fees may be awarded by the trial court in accordance with standard Civil Rule 82 principles; where extraordinary circumstances would otherwise justify deviation from the Civil Rule 82 schedule, such deviation is appropriate following acceptance of the offer of judgment under Civil Rule 68. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

A trial court may not use past settlement negotiations as a reason to justify a reduction or increase in the amount that it would otherwise have awarded; accordingly, where trial court considered, among other things, the fact that party made ridiculously low settlement offers, reversal of the attorney fee award was required. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

B. Prejudgment Interest

The phrase "judgment finally obtained by the offeree" within this rule includes the amount assessed as prejudgment interest but does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in the "judgment finally obtained by the offeree" and to compare that total to the amount of the offer of judgment in order to determine whether the offeree should pay the costs. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offeree interest on a judgment from the date of the offer through date of judgment when offeree ultimately recovers less than amount offered. **Continental Ins. Co. v. U.S. Fid. & Guar. Co.**, Op. No. 1298, 555 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees — including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Amended by Order #1138

Rule 69. Execution—Examination of Judgment Debtor—Restraining Disposition of Property—Execution After Five Years.

(a) **Execution — Discovery.** Process to enforce a judgment shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with these rules and applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

(b) **Examination of Judgment Debtor in Court.**

sufficient to state the name of the first party on each side with appropriate indication of other parties.

(b) **Paragraphs — Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference — Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) **Conformity With Rule 76.** All pleadings shall be prepared and filed in conformity with the provisions of Rule 76.

(Adopted by SCO 5 October 9, 1959)

Note: AS 10.06.915, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 10 by requiring that certain documents be attached to a complaint that appeals the disapproval of a writing under AS 10.06.915 by the commissioner of commerce and economic development.

Annotations

Cases

A complaint for additional payment of work done under a construction contract was skillfully and artfully drawn where

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Rule 11. 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 his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his 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 for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense 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.

(Adopted by SCO 5 October 9, 1959; amended by SCO 743 effective December 15, 1986; and by SCO 1009 effective January 15, 1990)

Note: AS 10.06.628, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 11 by requiring that a complaint for an involuntary dissolution of a corporation under AS 10.06.628 be verified.

Annotations

Cases

Sanctions for failure to sign a pleading are a matter in the discretion of the trial court. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Where appellants did not draw the trial court's attention to the failure of counsel to sign the complaint and made no motion to strike under this rule, and it was not contended that counsel's failure to sign was anything other than an oversight, the trial court had no opportunity to pass on the matter and failure to comply with this rule was not considered the first time on appeal. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

The purpose of this rule requiring signature of counsel as plainly set out in its present wording has been to insure the good faith of counsel by holding them strictly accountable for all the allegations contained in the complaint. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Imposition of attorney fees and monetary sanctions against defense attorney in criminal case for filing frivolous, unnecessary and legally deficient pleadings was error requiring remand where attorney was not given notice of the charges against him nor a hearing on the issue of sanctions. **Weidner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney had no right to jury trial on issue of whether sanctions should be imposed against him for filing frivolous, unnecessary and legally deficient pleadings in a criminal case. **Weidner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney was not entitled to discovery at hearing on sanctions for filing frivolous, unnecessary and legally deficient pleadings in a criminal case, since notice requirements, in conjunction with any affidavits filed by the prosecution, would

alert him to the issues. Weidner v. Superior Court, Third Judicial Dist., Op. No. 589, 715 P2d 264 (Alaska App 1986).

Attorney was not entitled to a change of judge as a matter of right at hearing on sanctions for filing frivolous, unnecessary and legally deficient pleadings in a criminal case. Weidner v. Superior Court, Third Judicial Dist., Op. No. 589, 715 P2d 264 (Alaska App 1986).

Where the complaint mentioned this rule only in the context of an abuse of process claim and the plaintiffs did not motion the superior court to impose sanctions under the rule, the issue of whether sanction should have been imposed pursuant to the rule was not properly raised below and would not be heard on appeal. Kollodge v. State, Op. No. 3355, 757 P2d 1028 (Alaska 1988).

On review of a lower court's decision to impose sanctions under this rule, all factors relevant to the issue of whether the attorney's inquiry into facts and law was reasonable are reviewed under an abuse of discretion standard. Keen v. Ruddy, Op. No. 3538, 784 P2d 653 (Alaska 1989).

This rule creates an objective standard of "reasonableness under the circumstances" and is intended to be more stringent than a mere "good faith" formula. Keen v. Ruddy, Op. No. 3538, 784 P2d 653 (Alaska 1989).

Where plaintiff's legal theories were frivolous and the suit was brought in bad faith, plaintiff's attorney could not have signed the pleadings with a reasonable belief that the pleadings were supported by existing law or that there was a good faith argument for extending the law; accordingly, imposition of sanction against attorney was appropriate. Keen v. Ruddy, Op. No. 3538, 784 P2d 653 (Alaska 1989).

Argument that $100 sanction against attorney under this rule was too low was rejected; although $100 was a small sum compared to the attorney's fees imposed against the attorney's client, it nevertheless carried with it a stigma and a message of disapproval. Keen v. Ruddy, Op. No. 3538, 784 P2d 653 (Alaska 1989).

A trial court's imposition or nonimposition of sanctions remains subject to review only for abuse of discretion. Alaska Federal S & L v. Bernhardt, Op. No. 3562, 794 P2d 579 (Alaska 1990).

This rule no longer strictly requires wilful conduct or subjective bad faith to impose sanctions; the determining factor is whether there was a reasonable basis for the attorney's signature. Alaska Federal S & L v. Bernhardt, Op. No. 3562, 794 P2d 579 (Alaska 1990).

This rule concerns the veracity and propriety of purpose of affirmative representations by counsel; it does not reach omissions. Alaska Federal S & L v. Bernhardt, Op. No. 3562, 794 P2d 579 (Alaska 1990).

Under this rule, a court cannot impose sanctions on a party simply for losing; instead, a court imposes sanctions on an attorney or party when it finds that the pleading signed by him: (1) is not well grounded in fact, or (2) is not warranted by existing law or a reasonable argument for its extension, modification or reversal, or (3) was interposed for an improper purpose. State Employees Ass'n v. Pub. Emp. Ass'n, Op. No. 3711, 813 P2d 669 (Alaska 1991).

Sanctions under this rule against new bargaining representative, that filed suit against the previous bargaining representative seeking injunctive and monetary relief from attempts by the old representative to collect back dues, were an abuse of discretion; the new representative's legal arguments and theories of relief were not so devoid of merit as to justify the imposition of sanctions. State Employees Ass'n v. Pub. Emp. Ass'n. Op. No. 3711, 813 P2d 669 (Alaska 1991).

Sanctions against plaintiff's attorney for filing a disqualification motion against opposing counsel were improper where the affidavit by plaintiff's attorney demonstrated that the motion was well granted in fact and the trial court allowed only one day in which to decide whether to file the motion. Matter of Benson, Op. No. 3749, 826 P2d 200 (Alaska 1991).

Claims by employee, who was suspended and then terminated from his employment for marijuana use, that he was entitled to reinstatement and back pay as remedy for his suspension and that the employer's discriminatory treatment of him constituted a violation of the covenant of good faith and fair dealing were not frivolous. Luedtke v. Nabors Alaska Drilling, Inc., Op. No. 3844, 834 P2d 1220 (Alaska 1992).

Where trial court's sanction order was improperly entered without factual findings and without hearing, normal procedure would have been to remand the award of sanctions to the trial court for entry of findings, but appellate court instead reversed the award because it found no evidence in the record that could possibly support it. Luedtke v. Nabors Alaska Drilling, Inc., Op. No. 3844, 834 P2d 1220 (Alaska 1992).

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) **When Presented.** A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless otherwise directed when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The state or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 40 days after the service upon the attorney general of the pleading in which the claim is asserted. A non-governmental party shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim within 40 days after service upon an officer or agency of the state appointed, authorized or designated as agent to receive service for such party pursuant to statute. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the

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of all insurance proceeds payable under the deed of trust and automatically descived those proceeds, thus continued acceptance of the insurance payments, by the sellers after issuance of a temporary restraining order against foreclosure did not constitute an implied agreement on the part of the sellers to an extension of the temporary restraining order. Ostrow v. Higgins, Op. No. 3085, 722 P2d 936 (Alaska 1986).

As a general rule, when the court's findings of fact and conclusions of law are sufficient to warrant injunctive relief under CR 52(a), they, almost of necessity, also state reasons for the injunction's issuance that are sufficient to satisfy this rule. Dunlap v. Bavarian Village Condo. Association, Op. No. 3511, 780 P2d 1012 (Alaska 1989).

Rule 66. Receivers.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by the other similar officers appointed by the court shall be in accordance with the practice set forth by statute. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by law and these rules.

(Adopted by SCO 5 October 9, 1959)

Cross References

CROSS REFERENCES: AS 09.40.240; AS 09.40.250

Annotations

Cases

Where Rule 66, [Federal] R. Civ. P., which governs the practice in the territorial district court does not expressly provide for the verification of the petition for appointment of a receiver, the rule does provide that the practice in the administration of estates by receiver shall be in accordance with the practice theretofore filed in the federal courts, and that practice required the complaint to be verified. Wood v. Gray, Op. No. 29, 359 P2d 951, 952 (Alaska 1961).

Rule 67. Deposit in Court—Collection and Enforcement of Child Support Payments.

(a) Upon notice to every other party and upon leave of court, a party may deposit with the court all or any part of any sum of money or any other thing capable of physical delivery which is the subject of action or due under a judgment. Money deposited with the court under this rule shall be managed in accordance with the provisions of Rule 5, Rules Governing the Administration of All Courts. The court shall release the deposit to the party entitled to it when that party becomes entitled to it. No interest shall accrue against a party making a deposit, to the extent of that deposit, after it is made.

(b) All orders for payment or modification of child support shall be entered on a form developed by the administrative director. A party may lodge a duplicate of the court form produced by a laser printer or similar device. A device may also print, in a contrasting typestyle equivalent to that produced by a typewriter, text that otherwise would have been entered by a typewriter or word processer. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it is identical to the current version of the court form.

(Adopted by SCO 5 October 9, 1959; amended by SCO 251 effective July 1, 1976; by SCO 465 effective June 1, 1981; by SCO 474 effective July 1, 1981; by SCO 1085 effective January 15, 1992; and by SCO 1093 effective July 15, 1992)

Annotations

Cases

Isolated in itself a payment document filed by defendant in a personal injury case in the superior court which was not served upon the plaintiff's and which stated in substance that the full policy amount plus $1,000 as costs to date were paid into registry of court with a request that the court notify plaintiff's of such tender and relieve the defendant of liability for costs and attorney's fees, was neither a confession of judgment under Civil Rule 57(b) nor an offer of judgment under Civil Rule 68 but could at most, be considered a deposit in court under Civil Rule 67(a). Albritton v. Estate of Larson, Op. No. 413, 428 P2d 379 (Alaska 1967).

Rule 68. Offer of Judgment.

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

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

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

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

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

(Adopted by SCO 5 October 9, 1959; amended by SCO 818 effective August 1, 1987)

Annotations

Cases

I. In General
II. Payment of Costs
  A. Construction
  B. Prejudgment Interest

I. In General

A payment document which, in itself, did not have the criterion of an offer of judgment and could, at most, be considered as a deposit in the superior court, made under the provisions of Civil Rule 67(a), was by virtue a stipulation of the parties as reasonably construed converted into an offer of judgment which plaintiff's accepted under the stipulation. **Albritton v. Estate of Larson**, Op. No. 413, 428 P2d 379 (Alaska 1967).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. **Miklautsch v. Dominick**, Op. No. 538, 452 P2d 438 (Alaska 1969).

An offer of judgment and acceptance thereof is a contract and the amount of the offer of judgment must be definite so that it is clear there is a meeting of the minds on an essential term of the contract. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

This rule does not apply to eminent domain proceedings. **Anchorage v. Schaventus**, Op. No. 1183, 539 P2d 1169 (Alaska 1975).

The purpose of this rule is to encourage settlement and to avoid protracted ligitation. **Continental Ins. Co. v. U.S. Fid. & Guar. Co.**, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Offer of judgment that paralleled Form 128, Forms for Rules of Civil Procedure, differing only in that it supplied defendant's identity and filled in blank spaces, was valid compliance with Civil Rule 68. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

This rule applies not only when the offeree obtains judgment in his favor but also when the offeree does not prevail at all. **Wright v. Vickaryous**, Op. No. 2075, 611 P2d 20 (Alaska 1980).

A contract for an entry of judgment is not formed if the written notice of acceptance of an offer under this rule is not served within the ten day limit. **Gumear v. Interior Credit Bureau**, Op. No. 2339, 627 P2d 647 (Alaska 1981).

A defendant is not bound under this rule to make an offer of judgment commensurate with any degree of compensation. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment under this rule must be in writing to be valid. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment made pursuant to this rule is irrevocable for 10 days after it is served on the adverse party. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Where written offer of judgment by defendant was silent as to an offset for sums which had been advanced to plaintiff for medical treatment, defendant was required to pay the full amount of the offer without the offset. **Rules v. Sturn**, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Joint offers are excluded from the penal cost provisions of this rule. **Brinkerhoff v. Swearingen Aviation Corp.**, Op. No. 2666, 663 P2d 937 (Alaska 1983).

The cost provision of this rule refers to those costs permitted by the Civil Rules and the Administrative Rules. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

This rule awards actual costs although it does not award actual attorney's fees. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Where settlement offer to plaintiffs specifically designated the amount offered to each plaintiff individually, did not contain a proviso mandating joint acceptance, and could be construed as permitting one plaintiff to accept and the other to go to trial, the settlement offer came within the penal cost provisions of this rule. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Joint offers of settlement are generally excluded from the penal cost provisions of this rule. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Because an offer of a lump sum presents problems of apportionment between offerees, it is treated as a joint offer and excluded from the penal cost provisions of this rule. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Failure of court, which made an award of attorney fees at variance with the schedule in the Civil Rules, to state its specific reasons for the amount awarded, required reversal. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Offer of judgment was not invalid as indefinite regarding the amount for attorney's fees. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Trial court did not err in refusing to deduct the amount of worker's compensation benefits received by plaintiff from his judgment against defendant in computing the "judgment finally

obtained" for purpose of comparing plaintiff's judgment with the prejudgment offer made by defendant. **Alyeska Pipeline Service Co. v. Beadles**, Op. No. 3151, 731 P2d 572 (Alaska 1987).

To the extent that the trial court concluded that defendant prevailed because much of his attorney fees were incurred after his offer of judgment was made, the trial court considered an impermissible factor; while consideration of that factor is relevant in determining the amount of attorney fees to be awarded under this rule, it is irrelevant to the determination of which party prevailed in the action. **Mitchell v. Smith**, Op. No. 3220, 742 P2d 220 (Alaska 1987).

Offer of settlement made by multiple defendants, one of which was counterclaiming against the plaintiff, was sufficient to trigger the penal cost sanctions of this rule where the settlement offer clearly indicated that all claims between the parties would be resolved if the offer were accepted. **Taylor Const. Services, Inc. v. URS Co.**, Op. No. 3364, 758 P2d 99 (Alaska 1988).

Judgment of $162,000 for plaintiff, offset by an award of $223,700 to a counterclaiming defendant, was clearly less favorable than a joint and several settlement offer by all of the defendants of $70,000 which included dismissal of the counterclaim; thus award of costs to defendants pursuant to this rule was proper. **Taylor Const. Services, Inc. v. URS Co.**, Op. No. 3364, 758 P2d 99 (Alaska 1988).

This rule expresses the exclusive way by which settlement offers can be taken into account in determining costs and attorney fees. **Myers v. Snow White Cleaners & L. Supply**, Op. No. 3419, 770 P2d 750 (Alaska 1989).

This rule does not preclude the making of an offer of judgment while a motion to amend the pleading is pending. **Farr v. Stepp**, Op. No. 3570, 788 P2d 35 (Alaska 1990).

Superior court erred in considering defendant's recovery on a counterclaim in determining whether penal sanctions were to be imposed under this rule since defendant's offer of judgment was silent regarding the counterclaim, which was pending when the offer was made. **Farr v. Stepp**, Op. No. 3570, 788 P2d 35 (Alaska 1990).

II. Payment of Costs

A. Construction

The provision of this rule that a party who made an offer of judgment which was not accepted, is not responsible for costs incurred after the making of the offer, did not apply to a case where judgment finally obtained was more favorable than the offer and where the offeror was an insurance company which had offered the insurance policy limit, and was not a party to the main cause, but had appealed from a garnishment proceeding. **Liberty National Insurance Company v. Eberhart**, Op. No. 281, 398 P2d 997 (Alaska 1965).

Even if it may be assumed that appellants were "prevailing party" within the meaning of Civil Rules 54(d) and 82(a) (1), the trial court's determination as to denial of attorney's costs where the action was settled pursuant to Civil Rule 68 was not disturbed on appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. **Albritton v. Estate of Larson**, Op. No. 413, 428 P2d 379 (Alaska 1967).

Where in a personal injury action the defendant had filed a payment document which, in itself, could be considered at best a deposit in court under Civil Rule 67(a) but by stipulation between the parties was converted into an offer of judgment, and by virtue of such stipulation and the court's order appended thereto, plaintiff's causes of action were dismissed with prejudice, the action had been settled pursuant to Civil Rule 68 and under the "with costs then accrued" portion of said rule the trial court was vested with wide discretion in determining award of attorney's fees. **Albritton v. Estate of Larson**, Op. No. 413, 428 P2d 379 (Alaska 1967).

If the judgment recovered at trial is less than an offer of judgment, the offeree is liable for the costs incurred by the offeror subsequent to the time the offer was made. **Miklautsch v. Dominick**, Op. No. 538, 452 P2d 438 (Alaska 1969).

For purposes of this rule, an offer of judgment that specifies only a total sum must be construed as including the defendant's assessment of all the damages that the plaintiff is entitled to, including that occasioned by the loss of the use of the money. **Davis v. Chisnt**, Op. No. 919, 513 P2d 475 (Alaska 1973).

An offer of judgment will be construed as including the defendant's assessment of all the damages that plaintiff is entitled to, including costs and attorney's fees. **Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.**, Op. No. 993, 517 P2d 1406 (Alaska 1974).

An award of costs and attorney's fees to both the plaintiff and the defendant are properly computed as of the date the offer of judgment is made and not at a later time when accepted. **Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.**, Op. No. 993, 517 P2d 1406 (Alaska 1974).

Where radically different standards of partial compensation are applied in awarding attorney's fees to the parties, the award will be considered an abuse of discretion unless there are findings or an explanation by the trial court supporting such disparate treatment. **Irving v. Bullock**, Op. No. 1261, 549 P2d 1184 (Alaska 1976).

This rule does not require that costs incurred prior to an offer of judgment be awarded; such awards are within the trial court's discretion. **Continental Ins. Co. v. U.S. Fid. & Guar. Co.**, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

An award of $5,000.00 for attorney's fees to defendant, a "limited prevailing party" under Civil Rule 68, was not manifestly unreasonable when actual attorney's fees were $14,053.12, considering that Rule 68 is designed to encourage reasonable settlement after a lawsuit is filed. **Scott v. Robertson**, Op. No. 1674, 583 P2d 188 (Alaska 1978).

An award of attorney's fees under Civil Rule 68 is designed to "partially" compensate the prevailing party. **Scott v. Robertson**, Op. No. 1674, 583 P2d 188 (Alaska 1978).

Court should make factual determination of offeror's actual expenses incurred after offer of judgment, then take into account the partial recovery principles of Civil Rule 82 in awarding offeror reasonable partial attorney's fees and costs based on such factual determination. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been

calculated. **Salmine v. Knagin**, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. **Truckweld Equipment Co. v. Swenson Trucking**, Op. No. 2545, 649 P2d 234 (Alaska 1982).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended and a brief description of the services reflected by those hours would be submitted. **Hayes v. Xerox Corp.**, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Prevailing defendant was entitled to costs incurred after date of his offer of judgment. **Hutchins v. Schwartz**, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

As the prevailing party at trial, defendant could receive the maximum amount of attorney fees under Civil Rule 82; the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. **Hutchins v. Schwartz**, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. **Wickwire v. State**, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. **Wickwire v. State**, Op. No. 3116, 725 P2d 695 (Alaska 1986).

Pretrial offers not in compliance with Civil Rule 68 should not be considered in determining questions of costs and attorney fees; accordingly, trial court erred when it used past settlement negotiations, which did not result in an offer of judgment in compliance with Civil Rule 68, to justify a reduction in the amount of attorney's fees that it would have awarded. **Myers v. Snow White Cleaners & L. Supply**, Op. No. 3419, 770 P2d 750 (Alaska 1989).

The argument that trial courts should never be permitted to award fees in excess of those established under the "noncontested" or "without trial" schedules of Civil Rule 82 following acceptance of an offer of judgment under Civil Rule 68 was rejected. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

Where an offer of judgment specifies only a lump sum figure without any provision for attorney's fees, attorney's fees may be awarded by the trial court in accordance with standard Civil Rule 82 principles; where extraordinary circumstances would otherwise justify deviation from the Civil Rule 82 schedule, such deviation is appropriate following acceptance of the offer of judgment under Civil Rule 68. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

A trial court may not use past settlement negotiations as a reason to justify a reduction or increase in the amount that it would otherwise have awarded; accordingly, where trial court considered, among other things, the fact that party made ridiculously low settlement offers, reversal of the attorney fee award was required. **Van Dort v. Culliton**, Op. No. 3630, 797 P2d 642 (Alaska 1990).

B. Prejudgment Interest

The phrase "judgment finally obtained by the offeree" within this rule includes the amount assessed as prejudgment interest but does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in the "judgment finally obtained by the offeree" and to compare that total to the amount of the offer of judgment in order to determine whether the offeree should pay the costs. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. **Davis v. Chism**, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offeree interest on a judgment from the date of the offer through date of judgment when offeree ultimately recovers less than amount offered. **Continental Ins. Co. v. U.S. Fid. & Guar. Co.**, Op. No. 1298, 555 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees — including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. **Farnsworth v. Steiner**, Op. No. 1955, 601 P2d 266 (Alaska 1979).

Amended by Order #1138

Rule 69. Execution—Examination of Judgment Debtor—Restraining Disposition of Property—Execution After Five Years.

(a) **Execution — Discovery.** Process to enforce a judgment shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with these rules and applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

(b) **Examination of Judgment Debtor in Court.**

BETWEEN 57% AND 88% OF MEDICAL MALPRACTICE CIVIL LIABILITY LAWSUITS AND CLAIMS ARE WITHOUT MERIT

Alaskans For Liability Reform

An analysis of frivolous civil liability lawsuits and claims against hospitals and physicians in Alaska from 1977 through 1989*

*Information for this report is based on a March, 1992 report by the Legislative Research Agency and presented to Representative Mark Boyer per his research request # 91.222, "State Approaches to Medical Malpractice."

OVERVIEW

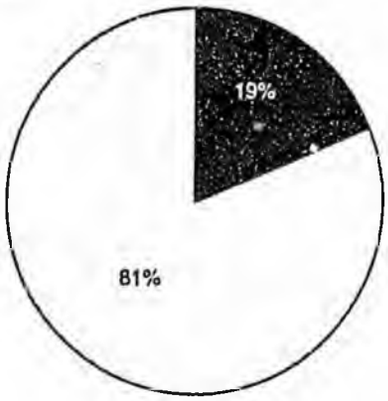
Civil justice in Alaska has generally been developed by the courts on a case-by-case basis. This has resulted in an chaotic system of rules that are often ambiguous and contradictory. The result is high malpractice and liability insurance premiums, lawsuits filed decades after construction or delivery of services, and exorbitantly high costs of litigation to the parties involved and to the taxpayers who pay for our civil justice system.

As the information in these pages shows, a high percentage of the claims and lawsuits filed against Medical Indemnity Corporation of Alaska (**MICA**, a primary medical malpractice insurer created by the Alaska Legislature) and Medical Indemnity Exchange of California (**MIEC**) are settled without payment. This suggests that many claims are frivolous, weak or unfounded. And yet the cost of litigating this avalanche of poorly-supported liability claims takes its toll on the parties involved as well as our civil justice system.

During the period 1977 - 1989, the average cost to defend a MICA lawsuit that resulted in payment equalled 19 percent of the amount eventually paid. Meanwhile, 57 percent of the MICA lawsuits settled without any payment. And 61 percent of the MICA claims that never reached a lawsuit settled without payment. During the period 1980 - 1989, some 88 percent of the closed MIEC claims settled without payment.

Alaskans for Liability Reform support amending the Alaska Rules of Civil Procedure and the Alaska Civil Liabilities Act to ensure all parties in a law suit are treated fairly, suits are brought and concluded within a reasonable time period, and awards made by the courts are reasonable and fair.

1977 - 1989, the cost of defending a MICA lawsuit averaged 19% of the amount of the settlement paid

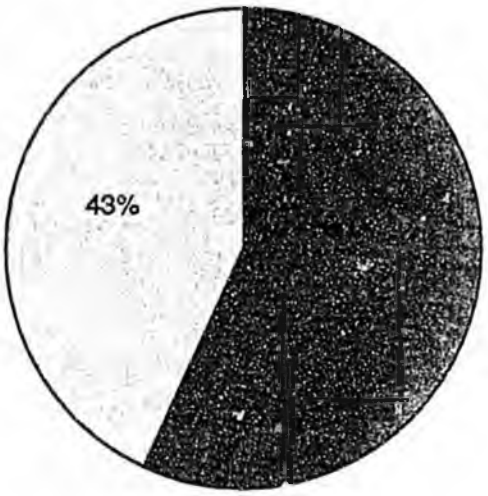


average cost of defense as % of average settlement paid

average settlement paid

OVERVIEW

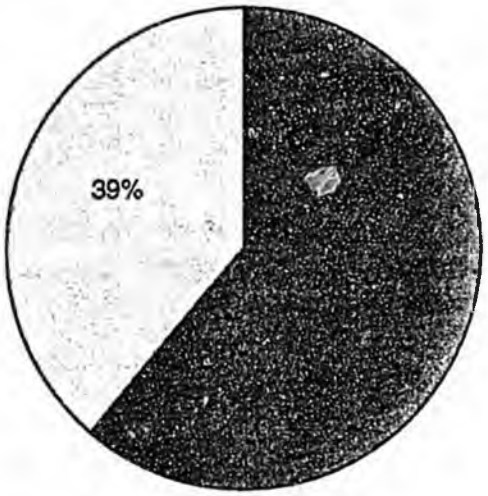
From 1977 - 1989, of the 174 MICA lawsuits, 57% settled without payment



lawsuits settled with payment

lawsuits settled without payment

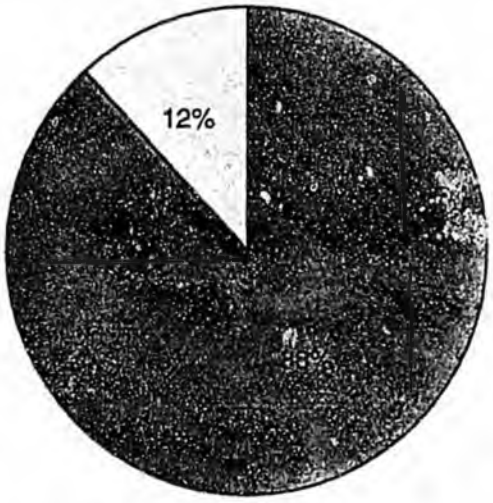
From 1977 - 1989, of the 119 MICA claims, 61% settled without payment



claims settled with payment

claims settled without payment

From 1980 - 1989, of the 181 closed MIEC claims, 88% settled without payment

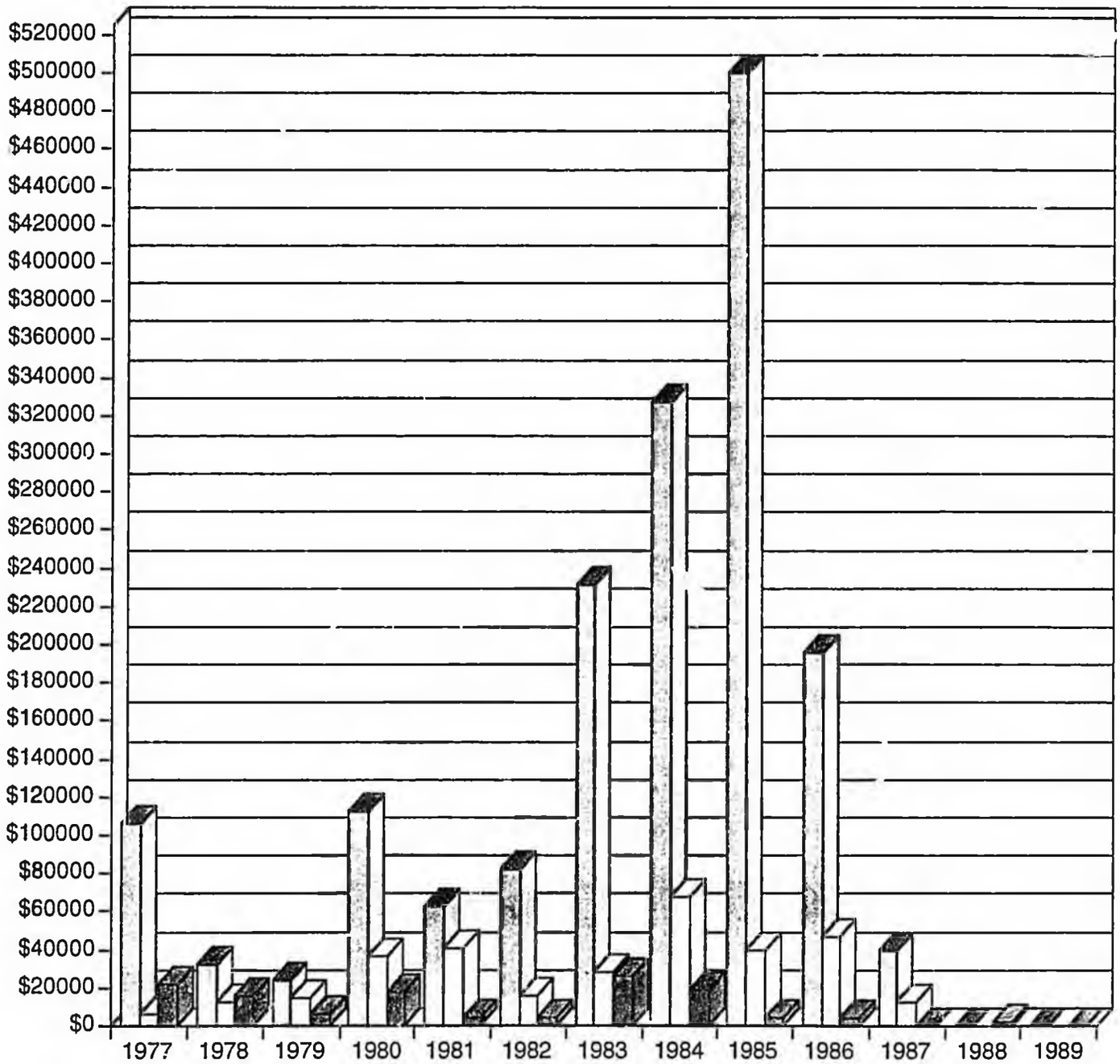


claims settled with payment

claims settled without payment

1977-89 SUMMARY, MICA LAWSUITS

Average cost of defense compared to settlement payment



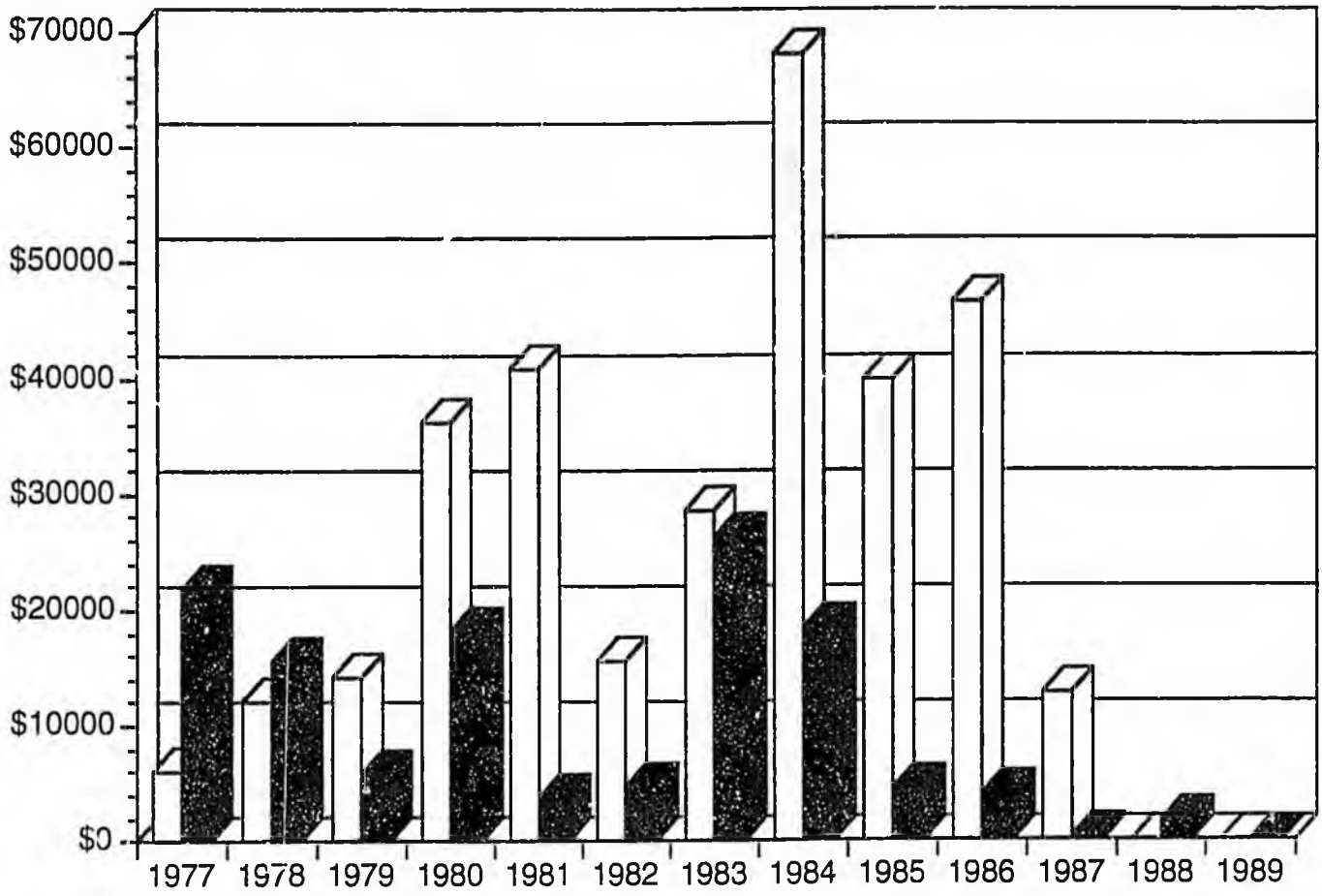
Average settlement in cases where payment was made

cost of defense in cases where payment was made

cost of defense in cases where no payment was made

SUMMARY, MICA LAWSUITS 1977-89

Average cost of defense in cases with payment vs cost of defense in cases without payment

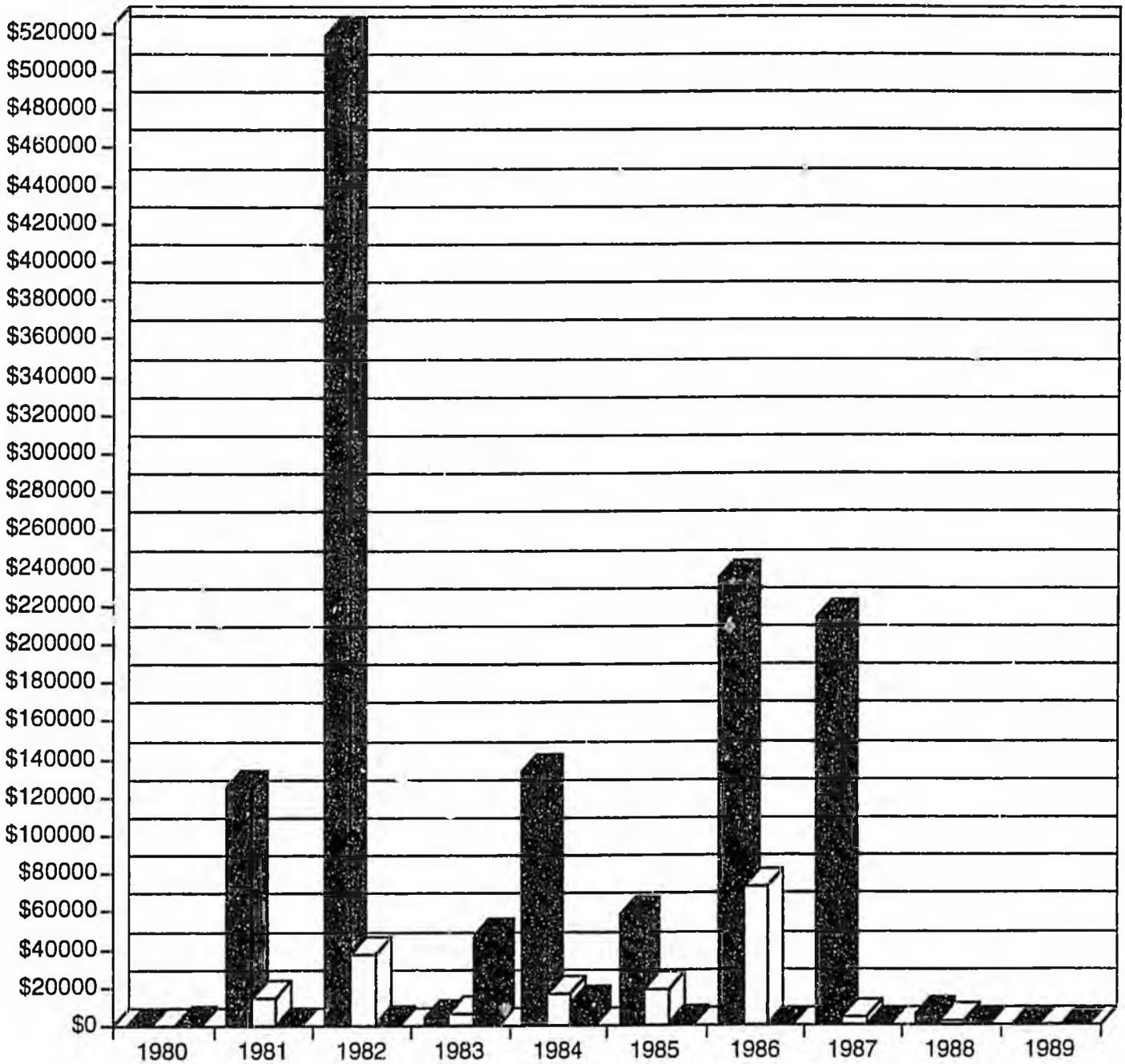


cost of defense in cases where payment was made

cost of defense in cases where no payment was made

1980-89 SUMMARY, MIEC CLAIMS

Average cost of MIEC defense compared to settlement payment



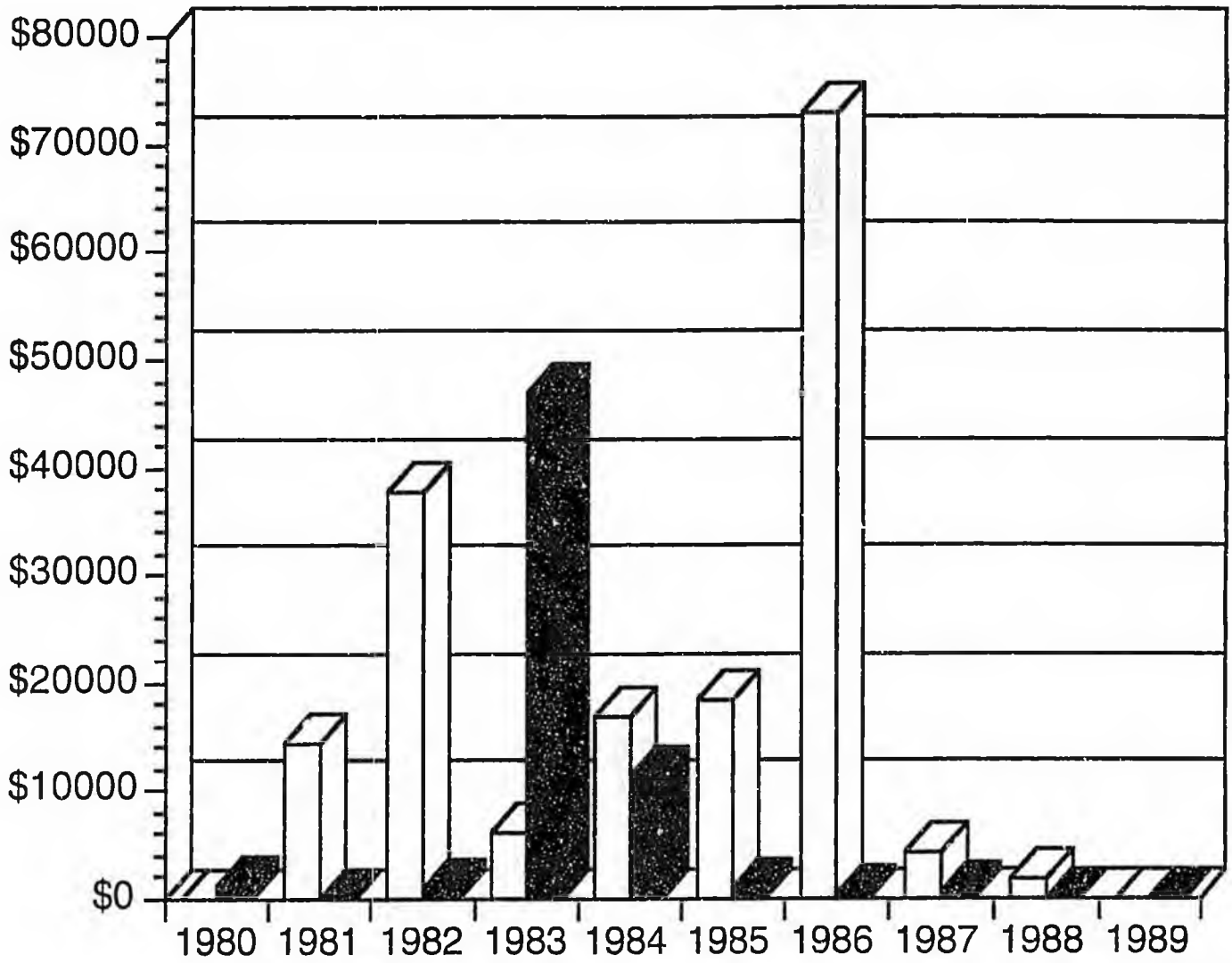
Average settlement in MIEC claims where payment was made

cost of defense in claims where payment was made

cost of defense in claims where no payment was made

SUMMARY, MIEC CLAIMS 1980-89

Average cost of defense in MIEC cases with payment vs cost of defense in cases without payment



cost of defense in MIEC claims where payment was made

cost of defense in MIEC claims where no payment was made

1977 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 8

Number (and percentage) settled without payment: 4 (50%)
Number (and percentage) settled with payment: 4 (50%)
Average settlement: $106,250
Average cost of defense in cases resulting in no payment: $21,880
Average cost of defense in cases resulting in payment: $6,053

Total number of MICA claims: 5

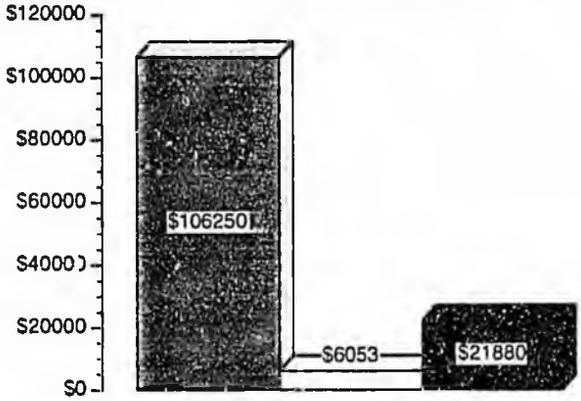
Number (and percentage) settled without payment: 4 (80%)
Number (and percentage) settled with payment: 1 (20%)
Average settlement: $7,500
Average cost of defense in cases resulting in no payment: $12,222
Average cost of defense in cases resulting in payment: $1,240

50% of all 1977 MICA lawsuits settled without payment

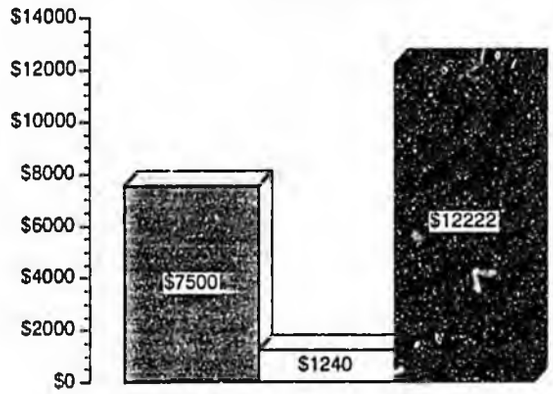
80% of all 1977 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements

1977 MICA lawsuits



1977 MICA claims



- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

No data available for 1977

1978 MICA LAWSUITS & CLAIMS

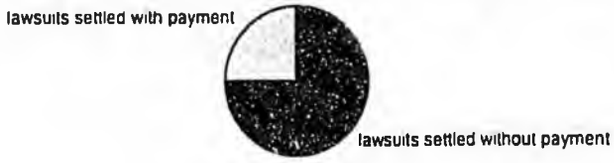
Total number of MICA lawsuits: 8

Number (and percentage) settled without payment: 6 (75%)
Number (and percentage) settled with payment: 2 (25%)
Average settlement: $32,500
Average cost of defense in cases resulting in no payment: $15,470
Average cost of defense in cases resulting in payment: $12,148

Total number of MICA claims: 3

Number (and percentage) settled without payment: 2 (66%)
Number (and percentage) settled with payment: 1 (33%)
Average settlement: $35,426
Average cost of defense in cases resulting in no payment: $190
Average cost of defense in cases resulting in payment: $0

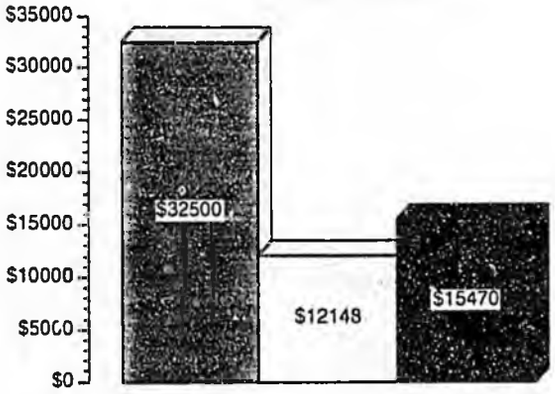
75% of all 1978 MICA lawsuits settled without payment



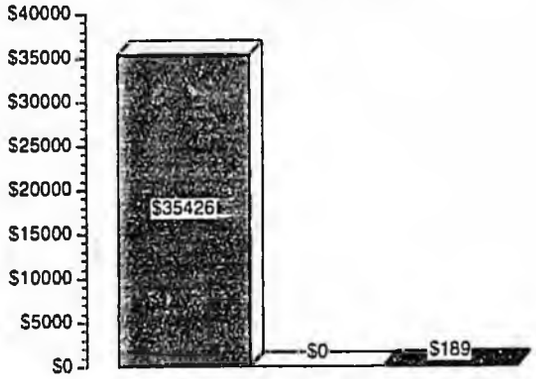
66% of all 1978 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements

1978 MICA lawsuits



1978 MICA claims



- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

No data available for 1978

1979 MICA LAWSUITS & CLAIMS

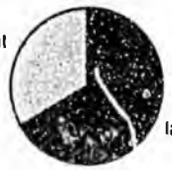
Total number of MICA lawsuits: 6

Number (and percentage) settled without payment: 4 (66%)
Number (and percentage) settled with payment: 2 (33%)
Average settlement: $23,500
Average cost of defense in cases resulting in no payment: $5,850
Average cost of defense in cases resulting in payment: $14,294

Total number of MICA claims: 2

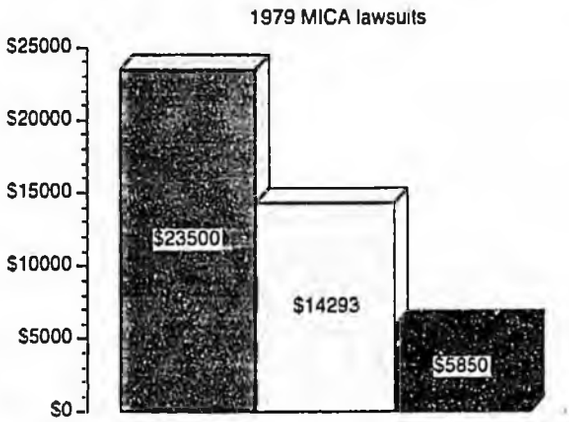
Number (and percentage) settled without payment: 2 (100%)
Number (and percentage) settled with payment: 0 (0%)
Average settlement: $0
Average cost of defense in cases resulting in no payment: $545
Average cost of defense in cases resulting in payment: $0

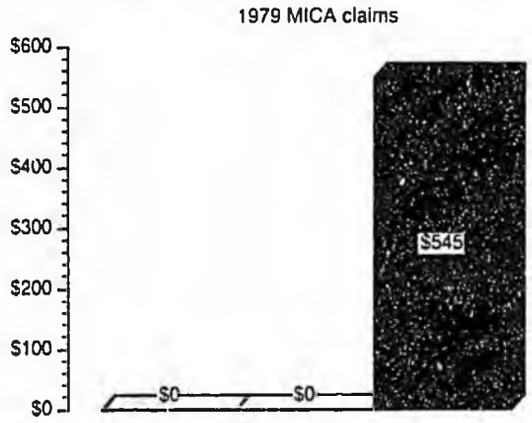
66% of all 1979 MICA lawsuits settled without payment



100% of all 1979 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements





- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

No data available for 1979

1980 MICA LAWSUITS & CLAIMS

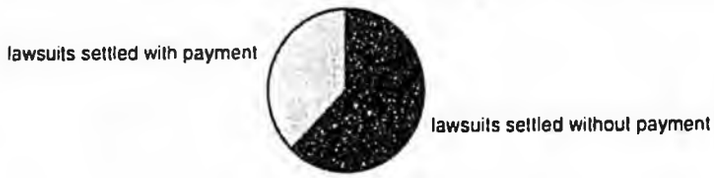
Total number of MICA lawsuits: 8

Number (and percentage) settled without payment: 5 (63%)
Number (and percentage) settled with payment: 3 (37%)
Average settlement: $112,917
Average cost of defense in cases resulting in no payment: $18,144
Average cost of defense in cases resulting in payment: $36,186

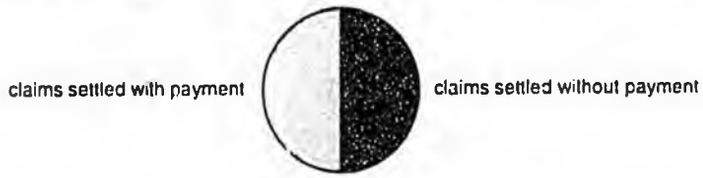
Total number of MICA claims: 6

Number (and percentage) settled without payment: 3 (50%)
Number (and percentage) settled with payment: 3 (50%)
Average settlement: $33,904
Average cost of defense in cases resulting in no payment: $871
Average cost of defense in cases resulting in payment: $2,351

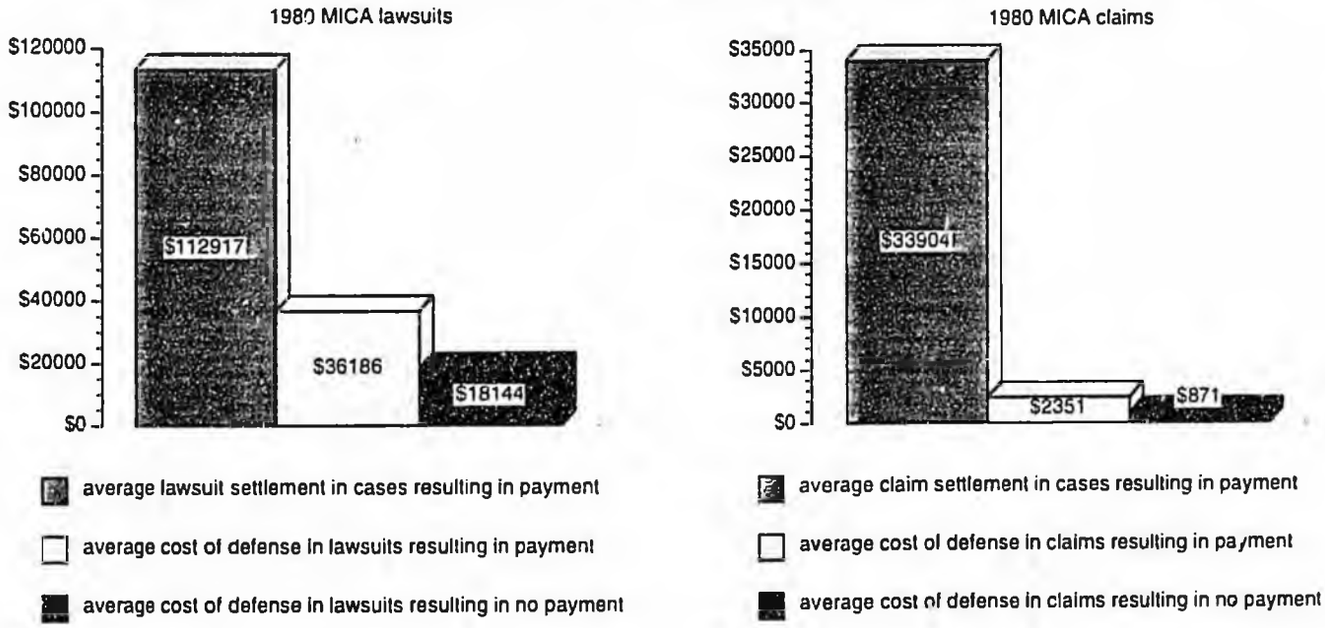
63% of all 1980 MICA lawsuits settled without payment



50% of all 1980 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements



MIEC CLAIMS 1980

Total number of MIEC claims: 3

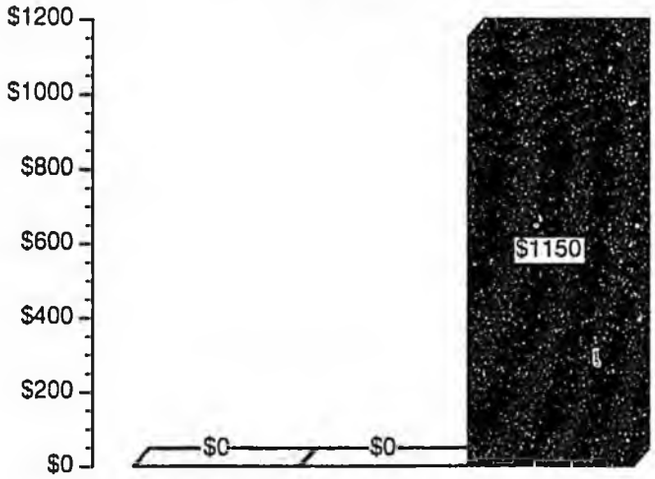
Number (and percentage) settled without payment: 3 (100%)
Number (and percentage) settled with payment: 0 (0%)
Average settlement: $0
Average cost of defense in cases resulting in no payment: $1,150
Average cost of defense in cases resulting in payment: $0

100% of all 1980 MIEC claims settled without payment

claims settled without payment

Cost of defending claims as compared to settlements

1980 MIEC claims



average claim settlement in cases resulting in payment

average cost of defense in claims resulting in payment

average cost of defense in claims resulting in no payment

1981 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 7

Number (and percentage) settled without payment: 3 (43%)
Number (and percentage) settled with payment: 4 (57%)
Average settlement: $62,500
Average cost of defense in cases resulting in no payment: $3,842
Average cost of defense in cases resulting in payment: $40,892

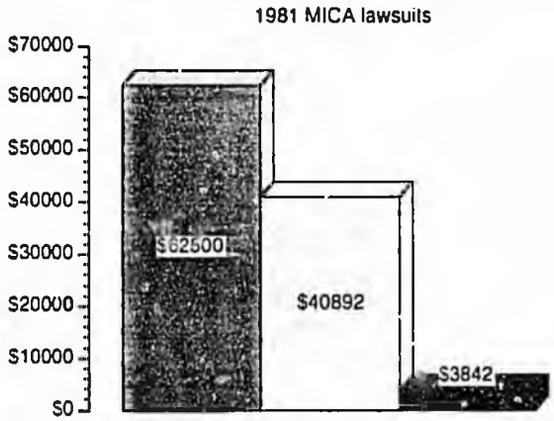
Total number of MICA claims: 7

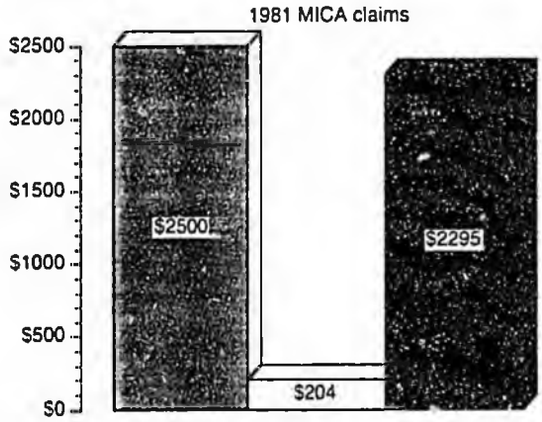
Number (and percentage) settled without payment: 1 (14%)
Number (and percentage) settled with payment: 6 (86%)
Average settlement: $2,500
Average cost of defense in cases resulting in no payment: $2,295
Average cost of defense in cases resulting in payment: $204

43% of all 1981 MICA lawsuits settled without payment

14% of all 1981 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements





average lawsuit settlement in cases resulting in payment
average cost of defense in lawsuits resulting in payment
average cost of defense in lawsuits resulting in no payment

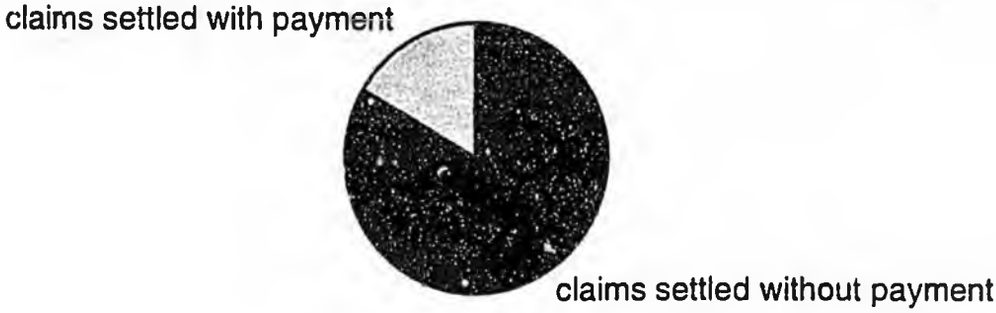
average claim settlement in cases resulting in payment
average cost of defense in claims resulting in payment
average cost of defense in claims resulting in no payment

MIEC CLAIMS 1981

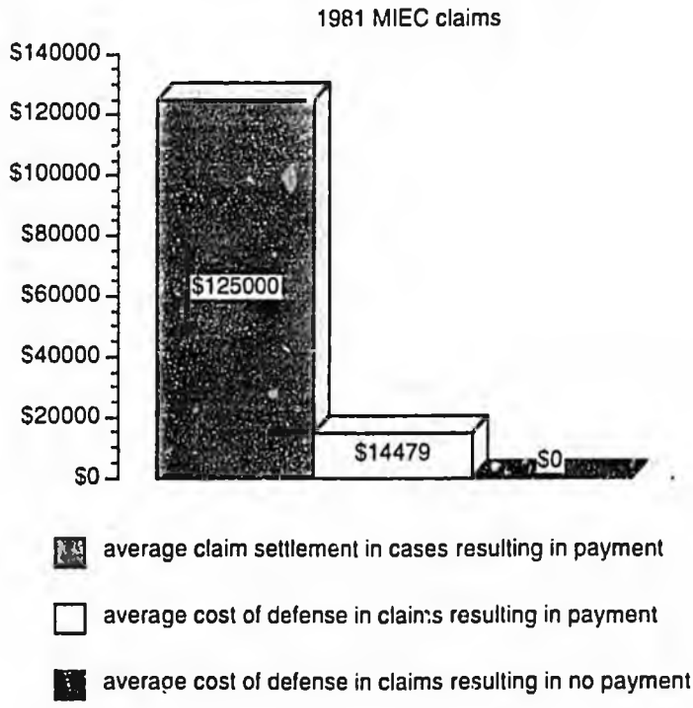
Total number of MIEC claims: 6

Number (and percentage) settled without payment: 5 (83%)
Number (and percentage) settled with payment: 1 (17%)
Average settlement: $125,000
Average cost of defense in cases resulting in no payment: $0
Average cost of defense in cases resulting in payment: $14,479

83% of all 1981 MIEC claims settled without payment



Cost of defending claims as compared to settlements



1982 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 20

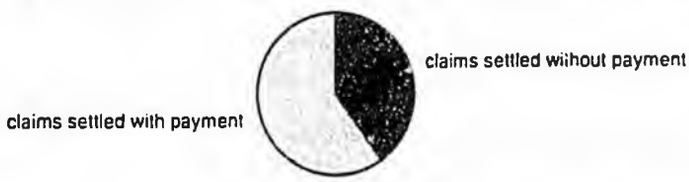
Number (and percentage) settled without payment: 8 (40%)
Number (and percentage) settled with payment: 12 (60%)
Average settlement: $82,469
Average cost of defense in cases resulting in no payment: $4,695
Average cost of defense in cases resulting in payment: $15,620

Total number of MICA claims: 5

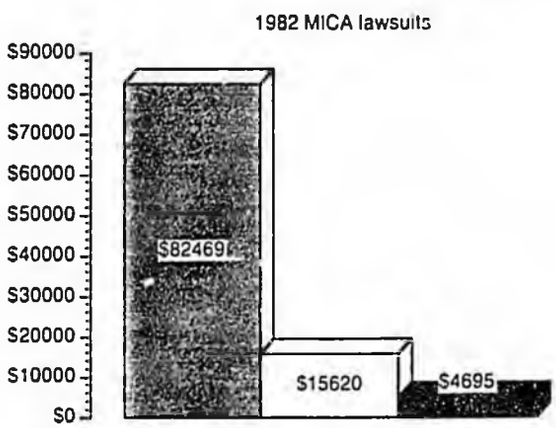
Number (and percentage) settled without payment: 2 (40%)
Number (and percentage) settled with payment: 3 (60%)
Average settlement: $63,722
Average cost of defense in cases resulting in no payment: $3,588
Average cost of defense in cases resulting in payment: $2,306

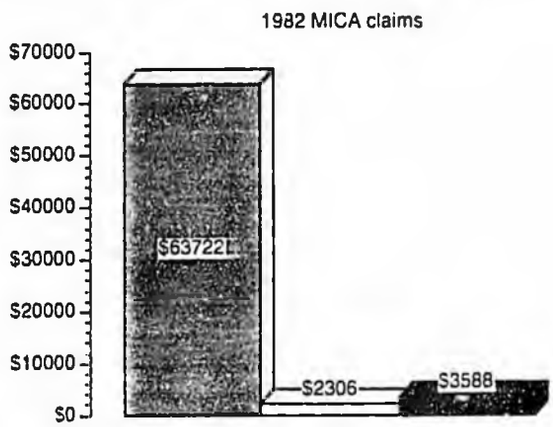
40% of all 1982 MICA lawsuits settled without payment

40% of all 1982 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements





- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

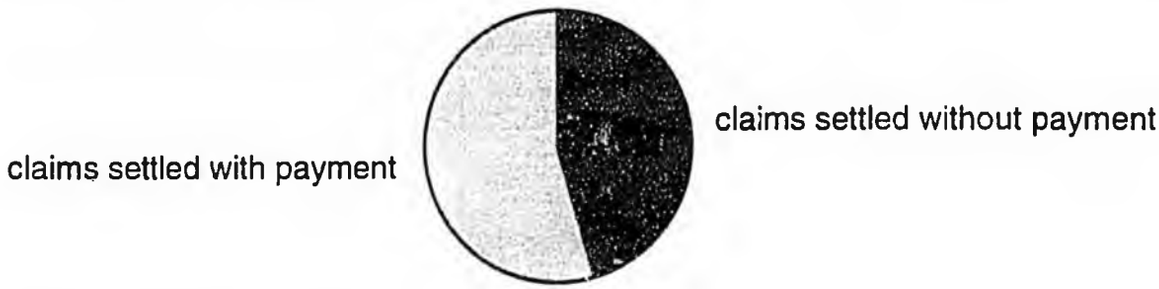
- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

MIEC CLAIMS 1982

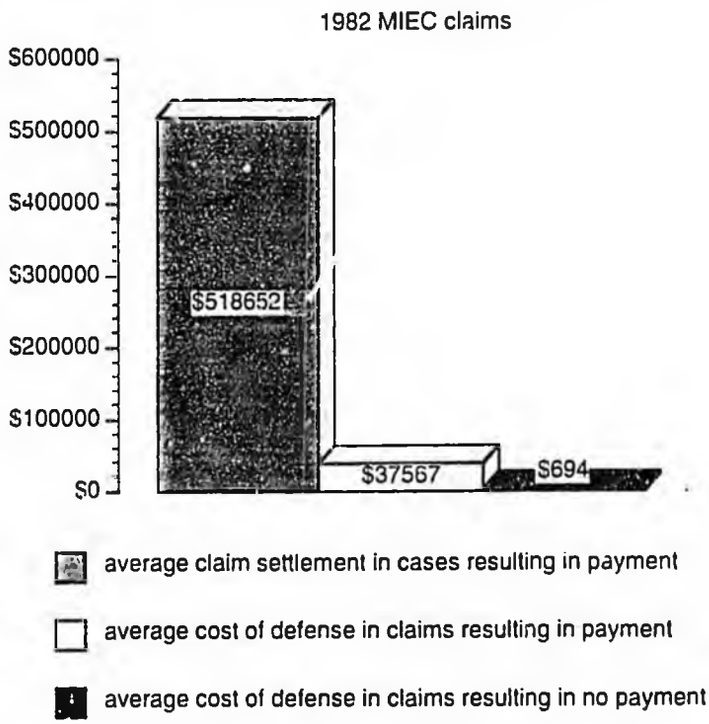
Total number of MIEC claims: 11

Number (and percentage) settled without payment: 5 (45%)
Number (and percentage) settled with payment: 6 (55%)
Average settlement: $518,652
Average cost of defense in cases resulting in no payment: $694
Average cost of defense in cases resulting in payment: $37,567

45% of all 1982 MIEC claims settled without payment



Cost of defending claims as compared to settlements



1983 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 18

Number (and percentage) settled without payment: 10 (55%)
Number (and percentage) settled with payment: 8 (45%)
Average settlement: $230,938
Average cost of defense in cases resulting in no payment: $26,252
Average cost of defense in cases resulting in payment: $28,538

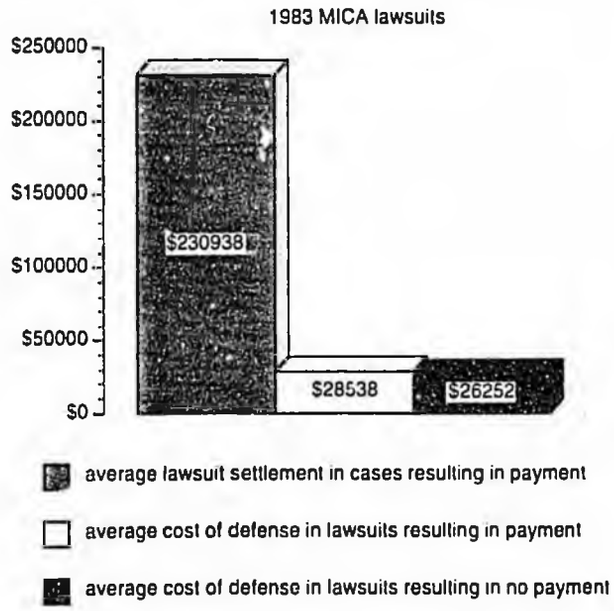
Total number of MICA claims: 7

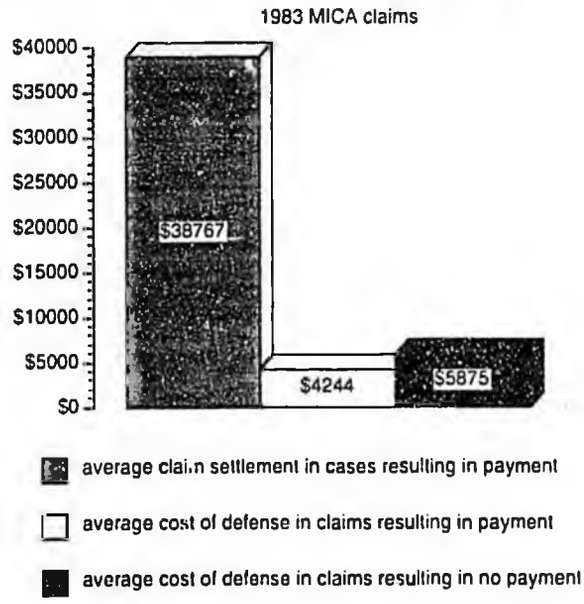
Number (and percentage) settled without payment: 4 (57%)
Number (and percentage) settled with payment: 3 (43%)
Average settlement: $38,767
Average cost of defense in cases resulting in no payment: $5,875
Average cost of defense in cases resulting in payment: $4,244

55% of all 1983 MICA lawsuits settled without payment

57% of all 1983 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements



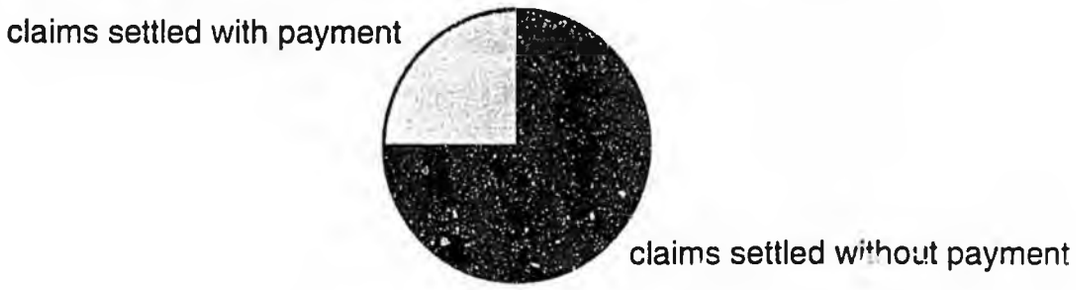


MIEC CLAIMS 1983

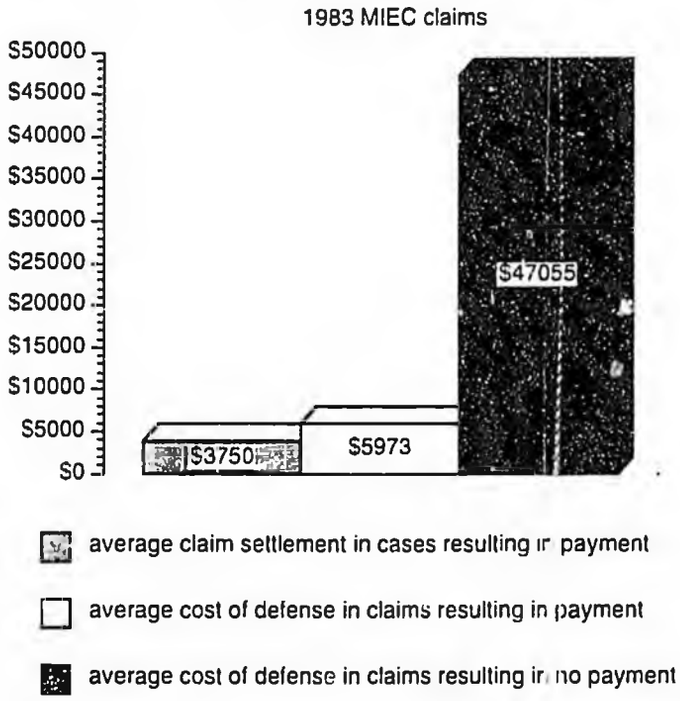
Total number of MIEC claims: 8

Number (and percentage) settled without payment: 6 (75%)
Number (and percentage) settled with payment: 2 (25%)
Average settlement: $3,750
Average cost of defense in cases resulting in no payment: $47,055
Average cost of defense in cases resulting in payment: $5,973

75% of all 1983 MIEC claims settled without payment



Cost of defending claims as compared to settlements



1984 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 32

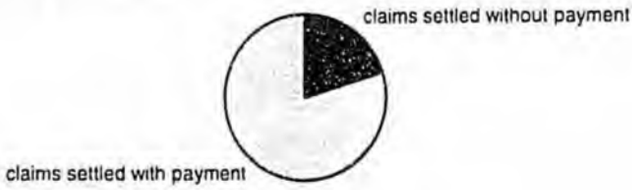
Number (and percentage) settled without payment: 17 (53%)
Number (and percentage) settled with payment: 15 (47%)
Average settlement: $326,607
Average cost of defense in cases resulting in no payment: $18,393
Average cost of defense in cases resulting in payment: $68,101

Total number of MICA claims: 10

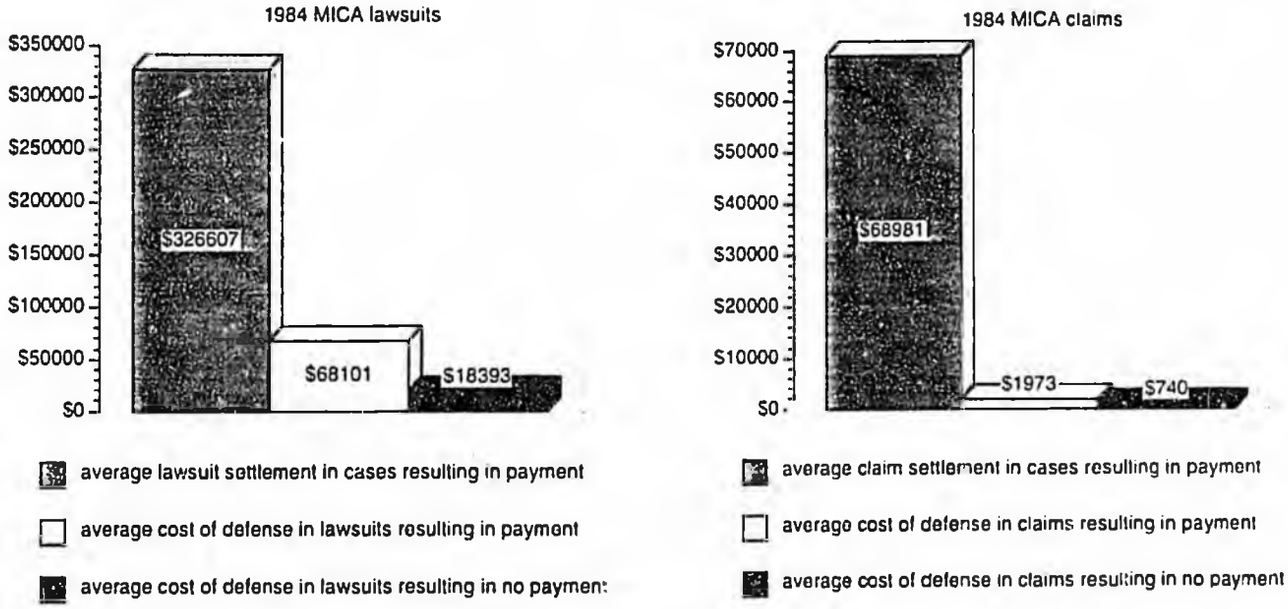
Number (and percentage) settled without payment: 2 (20%)
Number (and percentage) settled with payment: 8 (80%)
Average settlement: $68,981
Average cost of defense in cases resulting in no payment: $740
Average cost of defense in cases resulting in payment: $1,973

53% of all 1984 MICA lawsuits settled without payment

20% of all 1984 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements



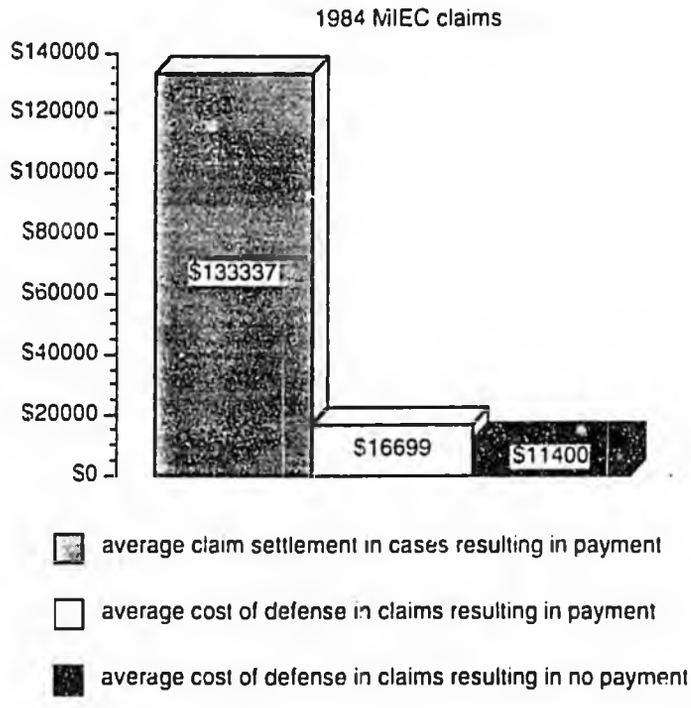
MIEC CLAIMS 1984

Total number of MIEC claims: 13

Number (and percentage) settled without payment: 9 (69%)
Number (and percentage) settled with payment: 4 (31%)
Average settlement: $133,337
Average cost of defense in cases resulting in no payment: $11,400
Average cost of defense in cases resulting in payment: $16,699

69% of all 1984 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1985 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 32

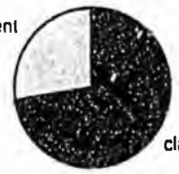
Number (and percentage) settled without payment: 20 (63%)
Number (and percentage) settled with payment: 12 (37%)
Average settlement: $499,950
Average cost of defense in cases resulting in no payment: $4,449
Average cost of defense in cases resulting in payment: $39,950

Total number of MICA claims: 29

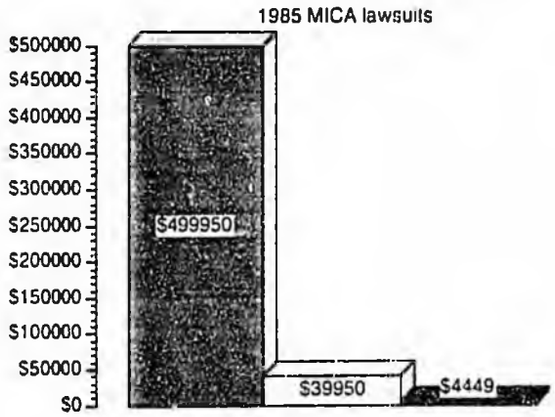
Number (and percentage) settled without payment: 21 (72%)
Number (and percentage) settled with payment: 8 (28%)
Average settlement: $126,672
Average cost of defense in cases resulting in no payment: $705
Average cost of defense in cases resulting in payment: $1,757

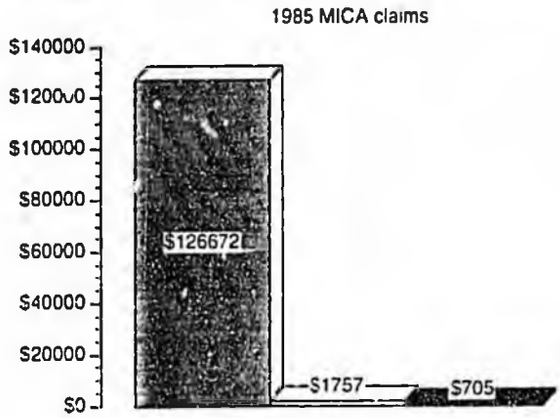
63% of all 1985 MICA lawsuits settled without payment

72% of all 1985 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements





- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment
- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

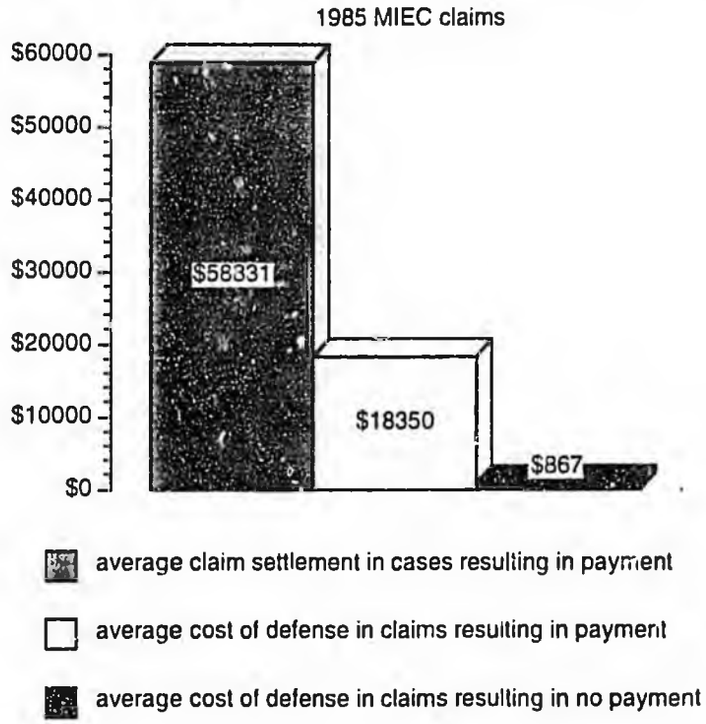
MIEC CLAIMS 1985

Total number of MIEC claims: 60

Number (and percentage) settled without payment: 57 (95%)
Number (and percentage) settled with payment: 3 (5%)
Average settlement: $58,831
Average cost of defense in cases resulting in no payment: $867
Average cost of defense in cases resulting in payment: $18,350

95% of all 1985 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1986 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 22

Number (and percentage) settled without payment: 12 (55%)
Number (and percentage) settled with payment: 10 (45%)
Average settlement: $195,994
Average cost of defense in cases resulting in no payment: $3,904
Average cost of defense in cases resulting in payment: $46,737

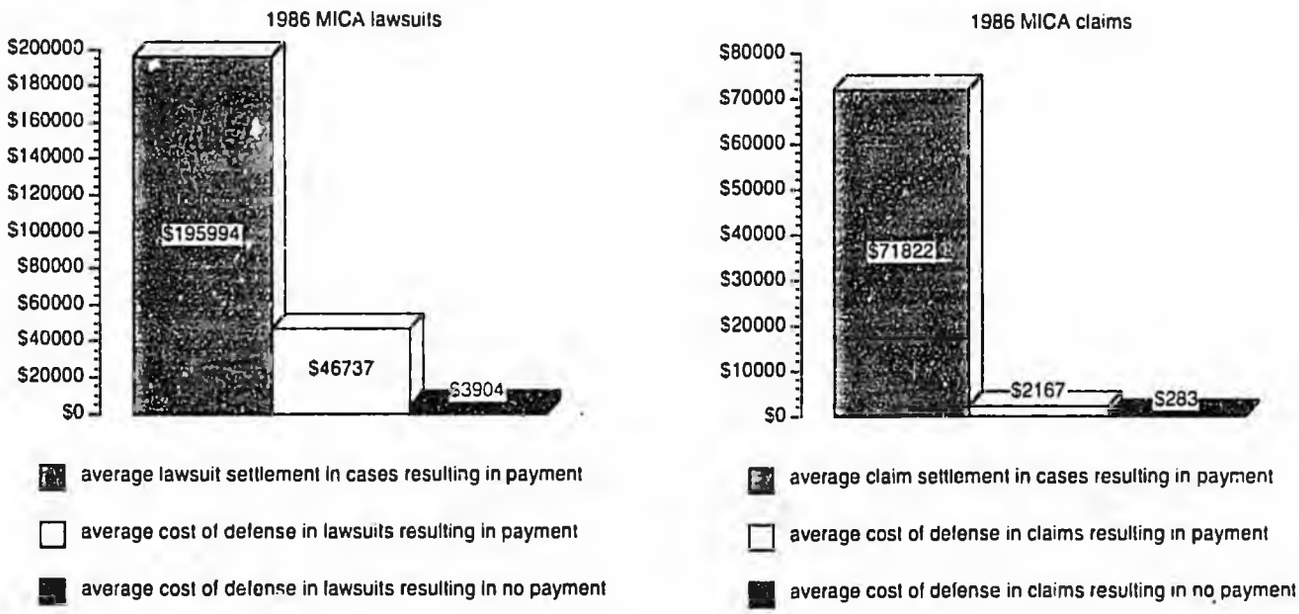
Total number of MICA claims: 16

Number (and percentage) settled without payment: 7 (44%)
Number (and percentage) settled with payment: 9 (56%)
Average settlement: $71,822
Average cost of defense in cases resulting in no payment: $283
Average cost of defense in cases resulting in payment: $2,167

55% of all 1986 MICA lawsuits settled without payment

44% of all 1986 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements



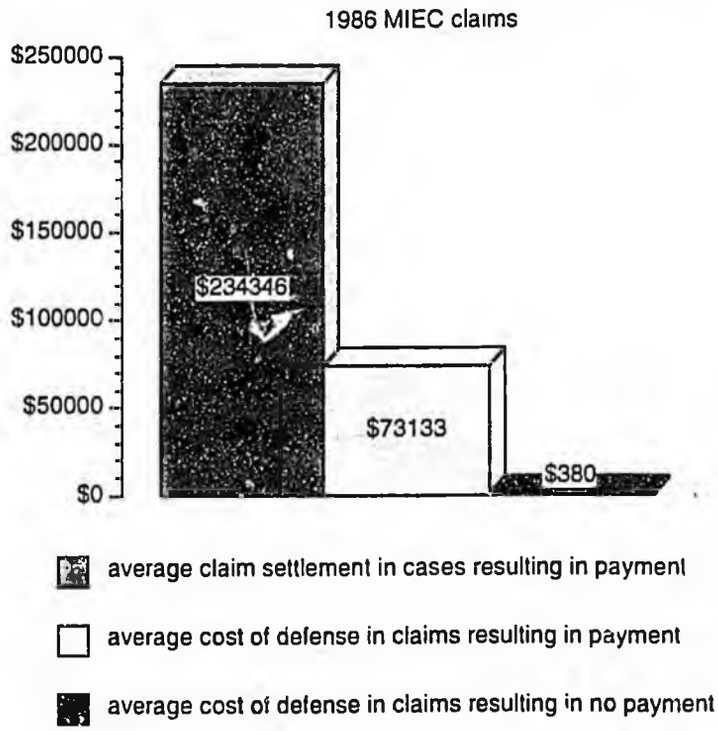
MIEC CLAIMS 1986

Total number of MIEC claims: 60

Number (and percentage) settled without payment: 58 (97%)
Number (and percentage) settled with payment: 2 (3%)
Average settlement: $234,346
Average cost of defense in cases resulting in no payment: $380
Average cost of defense in cases resulting in payment: $73,133

97% of all 1986 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1987 MICA LAWSUITS & CLAIMS

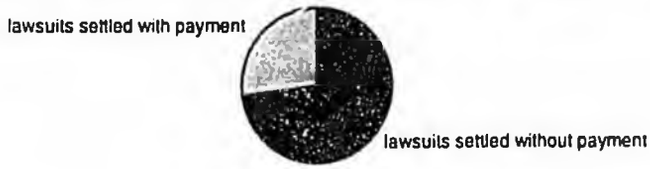
Total number of MICA lawsuits: 11

Number (and percentage) settled without payment: 8 (73%)
Number (and percentage) settled with payment: 3 (27%)
Average settlement: $39,607
Average cost of defense in cases resulting in no payment: $187
Average cost of defense in cases resulting in payment: $12,781

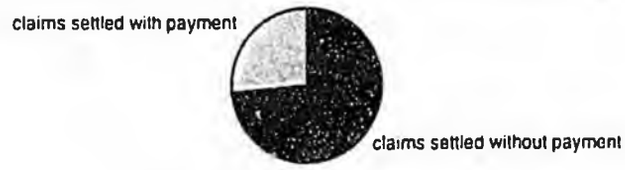
Total number of MICA claims: 15

Number (and percentage) settled without payment: 11 (73%)
Number (and percentage) settled with payment: 4 (27%)
Average settlement: $50,517
Average cost of defense in cases resulting in no payment: $378
Average cost of defense in cases resulting in payment: $5,435

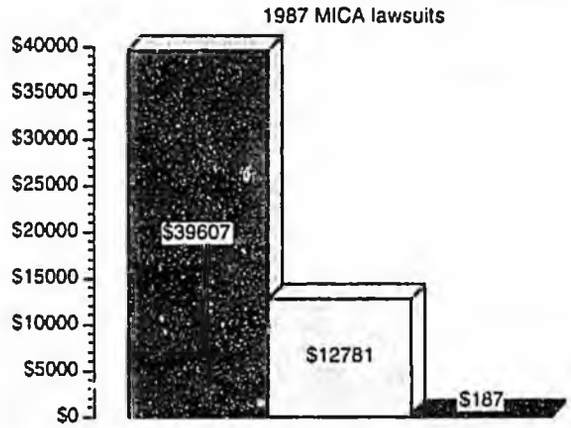
73% of all 1987 MICA lawsuits settled without payment

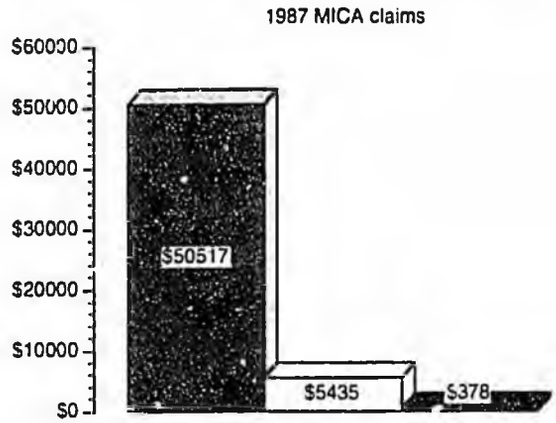


73% of all 1987 MICA claims settled without payment



Cost of defending suits & claims as compared to settlements





- average lawsuit settlement in cases resulting in payment
- average cost of defense in lawsuits resulting in payment
- average cost of defense in lawsuits resulting in no payment

- average claim settlement in cases resulting in payment
- average cost of defense in claims resulting in payment
- average cost of defense in claims resulting in no payment

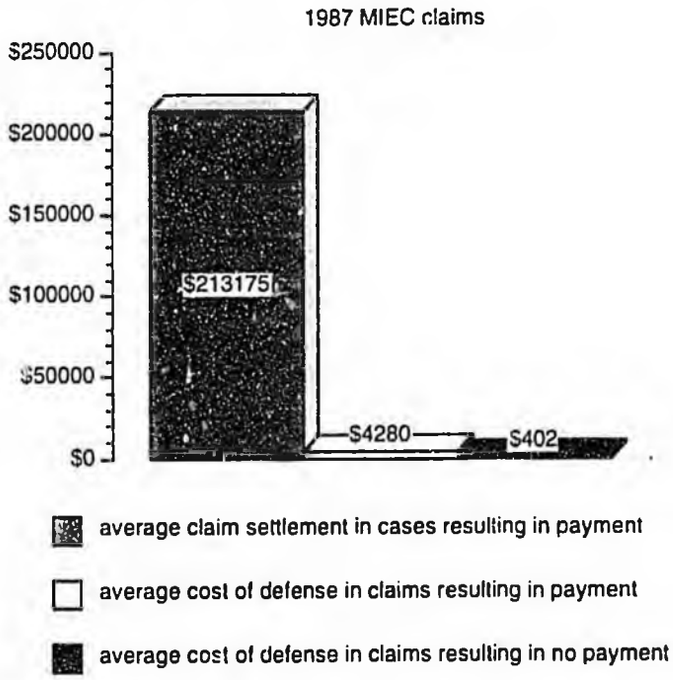
MIEC CLAIMS 1987

Total number of MIEC claims: 17

Number (and percentage) settled without payment: 15 (88%)
Number (and percentage) settled with payment: 2 (12%)
Average settlement: $213,175
Average cost of defense in cases resulting in no payment: $402
Average cost of defense in cases resulting in payment: $4,280

88% of all 1987 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1988 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 2

Number (and percentage) settled without payment: 2 (100%)
Number (and percentage) settled with payment: 0 (0%)
Average settlement: $0
Average cost of defense in cases resulting in no payment: $1,609
Average cost of defense in cases resulting in payment: $0

Total number of MICA claims: 11

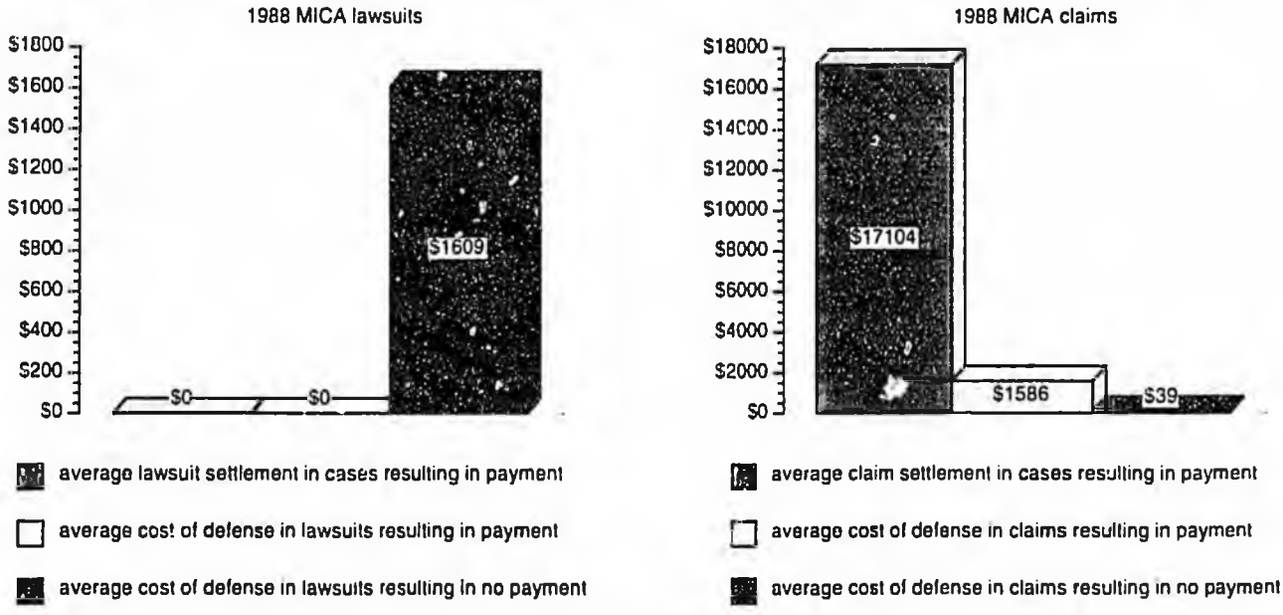
Number (and percentage) settled without payment: 8 (73%)
Number (and percentage) settled with payment: 3 (27%)
Average settlement: $17,104
Average cost of defense in cases resulting in no payment: $39
Average cost of defense in cases resulting in payment: $1,586

100% of all 1988 MICA lawsuits settled without payment

lawsuits settled without payment

73% of all 1988 MICA claims settled without payment

Cost of defending suits & claims as compared to settlements



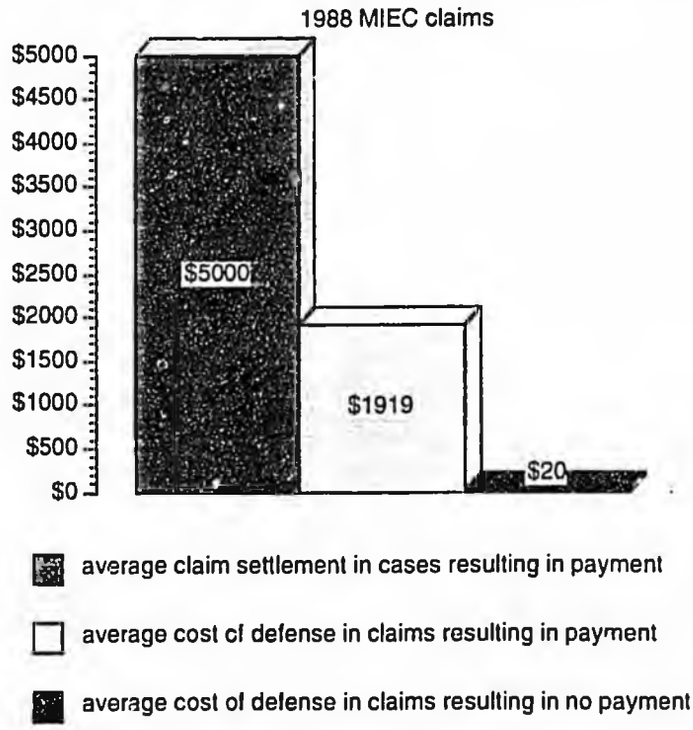
MIEC CLAIMS 1988

Total number of MIEC claims: 3

Number (and percentage) settled without payment: 2 (67%)
Number (and percentage) settled with payment: 1 (33%)
Average settlement: $5,000
Average cost of defense in cases resulting in no payment: $20
Average cost of defense in cases resulting in payment: $1,191

67% of all 1988 MIEC claims settled without payment

Cost of defending claims as compared to settlements



1989 MICA LAWSUITS & CLAIMS

Total number of MICA lawsuits: 0

Number (and percentage) settled without payment:
Number (and percentage) settled with payment:
Average settlement:
Average cost of defense in cases resulting in no payment:
Average cost of defense in cases resulting in payment:

Total number of MICA claims: 3

Number (and percentage) settled without payment: 0 (0%)
Number (and percentage) settled with payment: 3 (100%)
Average settlement: $3,459
Average cost of defense in cases resulting in no payment: $0
Average cost of defense in cases resulting in payment: $479

There were no 1989 MICA lawsuits reported settled

0% of all 1989 MICA claims settled without payment

claims settled with payment

Cost of defending suits & claims as compared to settlements