ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8403 SENATE LABOR & COMMERCE

8-LS1512\E
Utermohle
2/7/94

CS FOR SENATE BILL NO. 251( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): **SENATOR JACKO**

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the commercial fishing revolving loan fund and the fisheries**
2 **enhancement revolving loan fund."**

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

4 * Section 1. AS 16.10.310(a) is amended to read:
5 (a) The department may
6 (1) make loans to
7 (A) individual commercial fishermen who have been state
8 residents for a continuous period of two years immediately preceding the date
9 of application for a loan under AS 16.10.300 - 16.10.370 and have had a
10 crewmember or commercial fishing license under AS 16.05.480 or a permit
11 under AS 16.43 for the year immediately preceding the date of application and
12 any other two of the past five years, and who actively participated in the
13 fishery during those periods,
14 (i) for the purchase of entry permits;

1 **<u>(ii) to upgrade existing vessels and gear for the</u>**
2 **<u>purpose of improving the quality of Alaska seafood products; or</u>**
3 **<u>(iii) to satisfy past due federal tax obligations that</u>**
4 **<u>may result in the execution upon and involuntary transfer of the</u>**
5 **<u>individual commercial fishermen's entry permits;</u>**
6 (B) an individual for the repair, restoration, or upgrading of
7 existing vessels and gear, for the purchase of entry permits and gear, [AND]
8 for the construction and purchase of vessels**<u>, or to satisfy past due federal tax</u>**
9 **<u>obligations that may result in the execution upon and involuntary transfer</u>**
10 **<u>of the individual's entry permits</u>**, if the individual has been a state resident
11 for a continuous period of two years immediately preceding the date of
12 application for a loan under AS 16.10.300 - 16.10.370, and either
13 (i) because of lack of training or lack of employment
14 opportunities in the area of residence**<u>,</u>** does not have occupational
15 opportunities available other than commercial fishing; or
16 (ii) is economically dependent on commercial fishing for
17 a livelihood and for whom commercial fishing has been a traditional
18 way of life in Alaska;
19 (2) designate agents and delegate its powers to them as necessary;
20 (3) adopt regulations necessary to carry out the provisions of
21 AS 16.10.300 - 16.10.370, including regulations to establish reasonable fees for
22 services provided;
23 (4) establish amortization plans for repayment of loans, which may
24 include extensions for poor fishing seasons or for adverse market conditions for
25 Alaskan products;
26 (5) enter into agreements with private lending institutions, other state
27 agencies, or agencies of the federal government, to carry out the purposes of
28 AS 16.10.300 - 16.10.370;
29 (6) enter into agreements with other agencies or organizations to create
30 an outreach program to make loans under AS 16.10.300 - 16.10.370 in rural areas of
31 the state;

1 (7) allow an assumption of a loan if
2 (A) the applicant has been a state resident for a continuous
3 period of two years immediately preceding the date of the request for an
4 assumption; and
5 (B) approval of the assumption would be consistent with the
6 purposes of AS 16.10.300; an applicant for a loan assumption may not be
7 disqualified because the applicant does not meet the loan eligibility
8 requirements of (1) of this subsection;
9 (8) prequalify loan applicants for a limited entry permit loan and charge
10 a fee not to exceed $200 for prequalification;
11 (9) charge and collect the fees established under this subsection;
12 (10) refinance a debt obligation incurred by a borrower or borrowers
13 under this section if the borrower or borrowers otherwise qualify for a loan under
14 AS 16.10.300 - 16.10.370; the department shall collect a refinancing loan origination
15 charge of one-half percent of the amount of the debt obligation that has been
16 refinanced when the first refinancing payment is due**;**
17 **(11) refinance debt obligations, not to exceed $300,000, incurred by**
18 **a borrower or borrowers for the purchase of a commercial fishing vessel or gear**
19 **if the borrower or borrowers otherwise qualify for a loan under AS 16.10.300 -**
20 **16.10.370; the department may collect a refinancing loan origination charge as**
21 **provided by regulation**.
22 * **Sec. 2.** AS 16.10.320(d) is amended to read:
23 (d) The total of balances outstanding on loans made to a borrower under
24 AS 16.10.310(a)(1)(A) may not exceed $300,000. The total of balances outstanding
25 on loans made to a borrower under AS 16.10.310(a)(1)(B) may not exceed $100,000.
26 **The total of balances outstanding on all loans, including debt refinancing under**
27 **AS 16.10.310(a), made to a borrower under AS 16.10.300 - 16.10.370 may not**
28 **exceed $300,000.**
29 * **Sec. 3.** AS 16.10.340 is amended by adding a new subsection to read:
30 (c) Money in the fund that the commissioner determines to be excess to that
31 needed to carry out the purpose of AS 16.10.300 - 16.10.370 may be used to carry out

1 the purpose of AS 16.10.500 - 16.10.560.

2 * **Sec. 4.** AS 16.10.505(a) is amended to read:

3 (a) There is created within the Department of Commerce and Economic
4 Development a revolving fund to be known as the fisheries enhancement revolving
5 loan fund. Except as provided in (b) **and (c)** of this section, the fund shall be used to
6 carry out the purposes of AS 16.10.500 - 16.10.560 and for no other purpose. All
7 principal and interest payments, and money chargeable to principal or interest that is
8 collected through liquidation by foreclosure or other process on loans made under
9 AS 16.10.500 - 16.10.560, shall be paid into the fisheries enhancement revolving loan
10 fund.

11 * **Sec. 5.** AS 16.10.505 is amended by adding a new subsection to read:

12 (c) Money in the fund that the commissioner determines to be excess to that
13 needed to carry out the purpose of AS 16.10.500 - 16.10.560 may be used to carry out
14 the purpose of AS 16.10.300 - 16.10.370.

8-LS1512\J
Utermohle
2/15/94

2/15/94 NEW CS

CS FOR SENATE BILL NO. 251(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

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9 of application for a loan under AS 16.10.300 - 16.10.370 and have had a
10 crewmember or commercial fishing license under AS 16.05.480 or a permit
11 under AS 16.43 for the year immediately preceding the date of application and
12 any other two of the past five years, and who actively participated in the
13 fishery during those periods,
14 (i) for the purchase of entry permits;

1 **(ii) to upgrade existing vessels and gear for the**
2 **purpose of improving the quality of Alaska seafood products; or**
3 **(iii) to satisfy past due federal tax obligations that**
4 **may result in the execution upon and involuntary transfer of the**
5 **individual commercial fishermen's entry permits, to the extent**
6 **allowed under (d) of this section;**
7 (B) an individual for the repair, restoration, or upgrading of
8 existing vessels and gear, for the purchase of entry permits and gear, [AND]
9 for the construction and purchase of vessels**, or, to the extent allowed under**
10 **(d) of this section, to satisfy past due federal tax obligations that may**
11 **result in the execution upon and involuntary transfer of the individual's**
12 **entry permits**, if the individual has been a state resident for a continuous
13 period of two years immediately preceding the date of application for a loan
14 under AS 16.10.300 - 16.10.370, and either
15 (i) because of lack of training or lack of employment
16 opportunities in the area of residence**,** does not have occupational
17 opportunities available other than commercial fishing; or
18 (ii) is economically dependent on commercial fishing for
19 a livelihood and for whom commercial fishing has been a traditional
20 way of life in Alaska;
21 (2) designate agents and delegate its powers to them as necessary;
22 (3) adopt regulations necessary to carry out the provisions of
23 AS 16.10.300 - 16.10.370, including regulations to establish reasonable fees for
24 services provided;
25 (4) establish amortization plans for repayment of loans, which may
26 include extensions for poor fishing seasons or for adverse market conditions for
27 Alaskan products;
28 (5) enter into agreements with private lending institutions, other state
29 agencies, or agencies of the federal government, to carry out the purposes of
30 AS 16.10.300 - 16.10.370;
31 (6) enter into agreements with other agencies or organizations to create

1 an outreach program to make loans under AS 16.10.300 - 16.10.370 in rural areas of
2 the state;
3 (7) allow an assumption of a loan if
4 (A) the applicant has been a state resident for a continuous
5 period of two years immediately preceding the date of the request for an
6 assumption; and
7 (B) approval of the assumption would be consistent with the
8 purposes of AS 16.10.300; an applicant for a loan assumption may not be
9 disqualified because the applicant does not meet the loan eligibility
10 requirements of (1) of this subsection;
11 (8) prequalify loan applicants for a limited entry permit loan and charge
12 a fee not to exceed $200 for prequalification;
13 (9) charge and collect the fees established under this subsection;
14 (10) refinance a debt obligation incurred by a borrower or borrowers
15 under this section if the borrower or borrowers otherwise qualify for a loan under
16 AS 16.10.300 - 16.10.370; the department shall collect a refinancing loan origination
17 charge of one-half percent of the amount of the debt obligation that has been
18 refinanced when the first refinancing payment is due**;**
19 **(11) refinance debt obligations, not to exceed $300,000, incurred by**
20 **a borrower or borrowers for the purchase of a commercial fishing vessel or gear**
21 **if the borrower or borrowers otherwise qualify for a loan under AS 16.10.300 -**
22 **16.10.370; the department may collect a refinancing loan origination charge as**
23 **provided by regulation**.
24 * Sec. 2. AS 16.10.310 is amended by adding a new subsection to read:
25 (d) The department may not make a loan to an individual under (a)(1) of this
26 section to satisfy past due federal tax obligations unless the individual has filed past
27 and current federal tax returns with the federal government and has executed an
28 agreement with the federal government for repayment of past due federal tax
29 obligations. An individual may receive only one loan under (a)(1) of this section to
30 satisfy past due federal tax obligations during the individual's lifetime. A loan made
31 under (a)(1) of this section to satisfy past due federal tax obligations may not exceed

1 $30,000.

2 * **Sec. 3.** AS 16.10.320(d) is amended to read:

3 (d) The total of balances outstanding on loans made to a borrower under
4 AS 16.10.310(a)(1)(A) may not exceed $300,000. The total of balances outstanding
5 on loans made to a borrower under AS 16.10.310(a)(1)(B) may not exceed $100,000.
6 **The total of balances outstanding on all loans, including debt refinancing under**
7 **AS 16.10.310(a), made to a borrower under AS 16.10.300 - 16.10.370 may not**
8 **exceed $300,000.**

9 * **Sec. 4.** AS 16.10.340 is amended by adding a new subsection to read:

10 (c) If the commissioner determines that the fund contains money that is excess
11 to that needed to carry out the purpose of AS 16.10.300 - 16.10.370, then the
12 commissioner may use one-half of the money to carry out the purpose of AS 16.10.500
13 - 16.10.560.

14 * **Sec. 5.** AS 16.10.505(a) is amended to read:

15 (a) There is created within the Department of Commerce and Economic
16 Development a revolving fund to be known as the fisheries enhancement revolving
17 loan fund. Except as provided in (b) and (c) of this section, the fund shall be used to
18 carry out the purposes of AS 16.10.500 - 16.10.560 and for no other purpose. All
19 principal and interest payments, and money chargeable to principal or interest that is
20 collected through liquidation by foreclosure or other process on loans made under
21 AS 16.10.500 - 16.10.560, shall be paid into the fisheries enhancement revolving loan
22 fund.

23 * **Sec. 6.** AS 16.10.505 is amended by adding a new subsection to read:

24 (c) Money in the fund that the commissioner determines to be excess to that
25 needed to carry out the purpose of AS 16.10.500 - 16.10.560 may be used to carry out
26 the purpose of AS 16.10.300 - 16.10.370.

27 * **Sec. 7.** AS 16.10.520 is amended by adding a new subsection to read:

28 (f) The commissioner may not make a loan under AS 16.10.500 - 16.10.550
29 from funds available under AS 16.10.340(c), unless the commissioner determines, in
30 consultation with the appropriate regional planning team established under
31 AS 16.10.375, that the hatchery or other enhancement or rehabilitation activity for

1 which the loan is requested will provide a significant contribution to common property
2 fisheries, be operated in a manner beneficial to the public interest, and be managed in
3 a financially viable manner that is reasonably expected to result in repayment of the
4 loan.

Sec. 6th immediate effective date

8-LS1512\U.2
Utermohle
3/21/94

AMENDMENT #1

OFFERED IN THE SENATE BY SENATOR ADAMS

TO: CSSB 251(FIN)

Page 6, lines 5 - 31:

Delete all material.

Renumber the following bill sections accordingly.

Page 7, line 2:

Delete "Sections 2 and 9"

Insert "Sections 2 and 5"

Page 7, line 4:

Delete "secs. 2 and 9"

Insert "secs. 2 and 5"

8-LS1512\U.5
Utermohle
3/21/94

AMENDMENT #2

OFFERED IN THE SENATE BY SENATOR ADAMS

TO: CSSB 251(FIN)

Page 6, lines 8 - 9:

Delete all material.

Insert "commissioner shall transfer the excess money to the general fund."

Page 6, lines 21 - 22:

Delete "may be used to carry out the purpose of AS 16.10.300 - 16.10.370"

Insert "shall be transferred to the general fund"

Page 6, lines 23 - 31:

Delete all material.

Renumber the following bill sections accordingly.

Page 7, line 2:

Delete "Sections 2 and 9"

Insert "Sections 2 and 8"

Page 7, line 4:

Delete "secs. 2 and 9"

Insert "secs. 2 and 8"

SB
254

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM   January 18, 1994

SUBJECT: Sectional Summary of SB 254

TO: Senator Drue Pearce

FROM: Michael F. Ford
Legislative Counsel

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

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

Section 1. Findings and Purpose.

Section 2. Limits the time within which a person may bring an action for personal injury, death or property damage to six years from the date a product alleged to have caused the injury, death, or property damage was purchased, of substantial completion of certain construction, or the date of the last act alleged to have caused the injury, death, or damage. Provides an exception for certain civil actions.

Section 3. Limits the time within which a person can bring an action for professional negligence against a health care provider to two years, unless the person is less than six on the date of injury, in which case the person has until their eighth birthday. Provides for certain exceptions to the time limit.

Section 4. Conforming amendment for section 4.

Section 5. Limits the time within which a person can bring an action for personal injury, death or property damage to two years after accrual of the action. Eliminates the exceptions contained in AS 09.10.140(a) to the time limit for bringing a personal injury action.

SECTIONAL ANALYSIS

<u>Section 6.</u> Adds wrongful death as a type of action subject to the limit contained in AS 09.17.010. Adds loss of consortium as a type of damage that may be recovered.

<u>Section 7.</u> Imposes a cap of $500,000 on all claims arising out of a single injury or death, as opposed to each claim based on a separate incident or injury.

<u>Section 8.</u> Requires that a person must show clear and convincing evidence of malice and conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought, in order to receive punitive damages.

<u>Section 9.</u> Limits the amount awarded as punitive damages to not more than three times the amount of compensatory damages or $200,000, whichever is greater.

<u>Section 10.</u> Prohibits a person from recovering damages if the person suffers the damages while committing a felony, and the action substantially contributed to the injury or death.

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

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

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

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

<u>Section 15.</u> Conforming amendment for section 17.

<u>Section 16.</u> Conforming amendment for section 17.

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

Section 18. Changes the penalty imposed under AS 09.30.065 to actual costs and attorney fees.

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

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

Section 21. Conforming amendment for section 26.

Section 22. Conforming amendment for section 23.

Section 23. Limits the amount awarded in pecuniary damages for wrongful death to $10,000 if the deceased is not survived by a spouse, child, or dependent.

Section 24. Prohibit the award of attorney fees in a civil action for personal injury, death, or property damage.

Section 25. Limits the civil liability of a hospital for an act or omission of a health care provider who is not an employee of the hospital.

Section 26. Repealers.

Section 27. Court rule change section.

Section 28. Court rule change section.

Section 29. Court rule change section.

Section 30. Court rule change section.

Section 31. Severability clause.

Section 32. Applicability section.

Section 33. Effective date.

MFF:pl
94-041.plm

NFIB Alaska

National Federation of
Independent Business

January 21, 1994

The Honorable Tim Kelly
Chairman
Senate Labor and Commerce Committee
Alaska State House
Pouch V
Juneau, Alaska 99811

RE: SB 254 Tort Reform

Dear Senator Kelly:

The NFIB/Alaska, National Federation of Independent Business of Alaska, membership is comprised of 4,400 small and independent business owners. On behalf of our members I want to offer our support for SB 254.

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

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

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

9159 Skywood Lane
Juneau, AK 99801

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

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

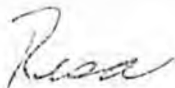
The Guardian of
Small Business

N.F.I.B. POSITION LETTER

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

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

Sincerely,



Resa Jerrel
NFIB/Alaska
State Director

Enc osure

The 1994 survey of NFIB/Alaska members found overwhelming support among the small business community for all six of the key reforms contained in SB 254:

* 96 percent approved barring damage suits by people who received their injuries in the course of committing a crime;

* 89 percent approved limiting the filing deadline for lawsuits arising from construction accidents or product liability claims to six years from the time of injury;

* 84 percent approved telling juries of awards already collected by a claimant for the same incident and deducting that amount from any subsequent judgement;

* 83 percent approved capping punitive damage awards at $200,000 or three times the amount of actual loss, whichever is greater;

* 79 percent approved baring injury claimants from naming only "deep pocket" derendants; and,

* 78 percent approved limiting the economic loss awards in fatal accidents to $50,000 if the deceased has no dependents.

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 11, 1993

MEMORANDUM

TO: Senator Tim Kelly

FROM: Patricia Young
Legislative Analyst

RE: Status of Tort Reform in Alaska
Research Request 93.177

You asked for background information on the issue of tort reform nationwide. You also requested an overview of reform measures in Alaska, and wished to know the current status of tort reform in the state.

In this country, the civil justice, or tort, system has become closely bound with the doctrine expressed by Supreme Court Justice Oliver Wendell Holmes that for every wrong there is a remedy. This idea--that persons who are injured or suffer damages as a result of negligence on the part of others have the right to be compensated, or *made whole*--became a major issue in this country during the 1970s and again in the 1980s when liability insurance became significantly more costly. During those periods, many states passed measures affecting one or more aspects of the tort system in efforts to limit liability for injury or damage and thereby to increase the availability and to decrease the cost of liability insurance.

Civil justice reform is one response to what has been termed the liability insurance "crisis." Other legislative approaches include insurance regulation and risk management.

Civil justice reform, expressed by limits to liability, is generally opposed by trial lawyers and consumer and victim advocate organizations but championed by business, insurance, and medical interest groups. Historically, citizens could not sue the crown (or in this country, the government), but as sovereign immunity has diminished, governments have shown increasing interest in such limits as well. During 1986, at least 10,000 bills were introduced and 44 states enacted legislation either general in nature or targeting specific areas such as medical malpractice or product liability. In 1987 more than 13,000 bills were introduced, with the focus on immunities--from sovereign immunity extended to counties, cities, and

towns, to immunity from personal liability extended to groups of public employees and volunteers.[1]

According to Brenda Trolin, program principal, labor and insurance, at the National Council of State Legislatures (NCSL), civil justice reform began slowing in 1987. Proponents of tort reform continue to argue that changes restricting liability or limiting damage awards will reduce insurance costs; however, no direct relationship between laws regarding liability and the cost and availability of insurance exists. As Franklin Nutter, president of the Alliance of American Insurers, pointed out, "It is clearly impossible to say that if you adopt a certain tort reform you will get 'X' reductions in premiums."[2] A variety of factors--including underwriting practices and costs, investment returns, market behavior, domestic interest rates, and the national economy--determine actual costs for insurance. Thus, despite the massive attempts to alleviate insurance problems, effective solutions remained elusive.

While most states were reviewing automobile insurance issues in 1989, the "most significant civil justice activities [that year] were actually court rulings interpreting previously enacted tort reforms."[3] Clearing the courts of cases instigated under previous laws takes several years. Another several years must pass before a sufficient number of cases under new laws have been processed to determine whether changes have had the desired consequences. Thus, the impacts of medical malpractice reform measures passed during the mid-1970s were only beginning to be meaningfully charted by the end of 1989.

Nevertheless, as Deborah Hensler of the Rand Corporation Institute for Civil Justice recently noted, the tort reform picture remains unclear. In 1986 the Rand Corporation recommended that states and the federal government systematically measure the results of any changes; however, after seven years, overall statistics on the effects of tort reform are largely unavailable.[4]

Reformers continue to propose measures aimed at product liability and at limiting physician liability and reducing medical malpractice insurance premiums. Nevertheless, according to the American Tort Reform Association, no major tort reform measures passed in any state

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[1]Brenda Trolin, "State Legislatures and Tort Reform--1986 and 1987," *1987 NCSL State Legislative Summary: Liability Insurance* (Denver: NCSL, 1987), pp. 2-3.

[2]Quoted in *Public Citizen*, "The Impact of Tort Changes on Insurance Rates," attached.

[3]Trolin, letter, December 23, 1989.

[4]Deborah Hensler, quoted in "Tort Tales Lash Back," *The National Law Journal*, August 3, 1992, p. 37.

in 1992 and only one passed in 1991.[5] In fact, according to Ms. Trolin, current civil justice activity for the most part involves efforts to repeal or reverse changes made to the tort system within the past few years.[6]

Because reform measures have provided little or no discernable relief to the high cost of insurance, legislative activity in civil justice reform has declined and the focus has shifted more to regulation of the insurance industry. In general, states adopted a "wait and see" attitude and many, including Alaska, established task force committees to study the impact of tort reform measures and to consider regulatory actions to moderate future insurance cycles. That shift in focus was punctuated by the 1988 antitrust lawsuit filed by 19 state attorneys general, including Alaska's, charging that four of the largest insurers colluded to fix prices and limit commercial and general liability coverage. The Supreme Court is expected to rule on the case by summer, and the face of the $30-billion-a year insurance industry could change significantly if the ruling is in favor of the states.

Tort reform measures dating back to the mid-1980s were recently charted for individual states in a sidebar to Margaret Cronin Fisk's "The Reform Juggernaut Slows Down," *The National Law Journal*, November 9, 1992. Information for the chart, entitled "The Tort Movement's Progress Across the Nation," (p. 35) was provided by the American Tort Reform Association, the Association of Trial Lawyers of American, and the office of the general counsel of the American Medical Association. Another sidebar to the same article, entitled "Record on 'Reform' Mixed in the Courts," (p.34) lists major decisions on damage caps, collateral source restrictions, and mandatory periodic payments. Ms. Fisk's article, along with two other recent *National Law Journal* articles, "Tort Tales Lash Back," August 3, 1992, and "Debate Still Rages on Torts," November 16, 1992, provide an excellent overview of the tort reform experience. All are included in Attachment A.

Tort Reform in Alaska

Alaska's major tort reform measures were passed as Senate Bill 377 in 1986 (Chapter 139 SLA 1986), which resulted in most of the current AS 09.17, Limitations on Civil Liability (see Attachment B). Among the provisions are a $500,000 cap on non-economic damages (with disfigurement and severe physical impairment as exceptions); no punitive damages unless supported by clear and convincing evidence; periodic payments of damage awards;

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[5]Margaret Cronin Fisk, "The Reform Juggernaut Slows Down, *The National Law Journal*, November 9, 1992, p. 1.

[6]Trolin, telephone conversation, February 1993.

limited liability for directors and officers of nonprofit organizations; and post-verdict admittance of collateral source compensation. Joint liability was eliminated in 1988.

In 1989 and 1990, the Alaska House Liability Task Force collected and reviewed information on liability in Alaska and in other states. David Rogers, special counsel to the group, reported that although consensus was reached on few issues, the task force agreed on the following two "critical points":

- There is a need to further consider alternative dispute resolution mechanisms which may represent at least a partial solution to many of the problems identified by critics of the present system including: unreasonable delay, excessive costs of litigation, unpredictability and fairness of compensation and lack of access to the court.

- There is a need for further information and analysis of issues concerning the insurance industry and regulation of professional conduct.[7]

More recent bills have focused on specific portions of the issue, such as immunity for volunteer rescue groups (1988), immunity for peace officers taking intoxicated persons into protective custody (1989), liability for zoos and zoo operators (1990), and immunity for response to a release or threatened release of oil (1992). A number of bills dealing with specific areas of liability are currently before the legislature; however, a major reform bill, is expected to be introduced soon.[8]

Attachment C includes a number of additional articles and publications on the issue of civil justice reform from a variety of viewpoints. I hope this information is helpful to you. If you have further questions, please let me know.

Attachments

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[7]As quoted by Maureen Weeks, "State Approaches to Medical Malpractice," Legislative Research Agency Report 91.222, March 17, 1992, pp. 58-59, attached.

[8]More detailed information on prior legislative efforts can be found in David Rogers, "Final Report of the House Liability Task Force," pp. 1-2, attached.

Addressing the Myths & Misconceptions about Personal Injury & the Civil Justice System

Compiled by
The Alaska Academy of Trial Lawyers

January 1993

EXECUTIVE SUMMARY

A. Access to Justice

1. Right of Trial by Jury -- The Foundation of Our Society
   a. A fundamental guarantee in the Alaska State Constitution.
   b. The jury, as conscience of the community, promotes safety and equity.
   c. Critics of the jury system are the most likely to request a jury trial.

B. Tort Restrictions Do Not Reduce Insurance Rates

1. Evidence indicates that tort restrictions have no significant impact on insurance premiums or availability
2. A case history -- medical negligence restrictions have little impact on rates

C. The Litigation Crisis: Debunking the Myths

1. Personal injury cases represent a small percentage of the courts' workload
2. If there is a "litigation explosion", it is being driven by businesses suing businesses, not by personal injury actions
3. Most cases are resolved prior to trial

D. Large Jury Verdicts are Uncommon

1. Huge jury verdicts, such as million dollar verdicts, are the exception rather than the rule
2. Jury verdicts can be reduced -- the actual payout to the plaintiff may be less than the jury verdict

E. "Horror Stories" Make Bad Public Policy

1. Some examples of "horror stories"

F. The Costs of Personal Injury

1. Injured Persons Bear the Burden of Personal Injury
   a. The injured person bears the brunt of the cost of injury.
   b. Personal injury liability compensation does not pay for the actual cost of injuries.

G. Civil Justice System Promotes Safety in America's Economy

1. Tort Law Improves American Products
   a. The tort system saves lives, reduces injuries and promotes public safety.
   b. Insurers reap benefits while projections of future losses have decreased.

Preface

We have recently celebrated the Bicentennial of the Bill of Rights of the American Constitution. That Constitution and those of the States, including Alaska, declare as fundamental, the right to jury trial and equal access to civil justice for all.

And yet today our civil justice system and the rights of injured victims and consumers are under attack. Politicians in search of solutions to such complex matters as runaway medical costs, the budget deficit and America's competitiveness in the market, oftentimes skew statistics to perpetuate unfounded myths and misconceptions about our legal system in an attempt to pin the problem on lawyers and the injured victims they represent. The multi-million dollar propaganda efforts of insurance companies and their corporate colleagues have borne fruit in biased judges, alienated juries, regressive state and federal legislative efforts, and a social environment permeated by an uncaring attitude toward the rights of the injured victims.

For more than a decade, the legislative debate over the "liability insurance crisis" has assumed that a crisis existed and focused on restriction of the rights of victims of negligence to recover fair compensation to resolve that crisis. Despite any hard data to support their claims, representatives of the insurance industry have asserted that restriction of victims' tort rights will result in lower liability insurance rates. In response to these assertions, the Alaska Legislature has adopted some of the most severe restrictions of those rights of any state in the country.

In 1989, then Speaker of the House, Sam Cotton, at the request of several fellow representatives, formed the Alaska Liability Insurance Task Force. The task force was comprised of legislators and members of medical, insurance, consumer and legal organizations familiar with liability insurance issues. The most significant finding from the data collected by the task force was that, with some exceptions, there is <u>no liability insurance crisis in Alaska.</u>

Although there were minor differences in the conclusions reached in the various studies collected by the Liability Insurance Task Force, the general consensus was that, at best, restrictions on the rights of victims to receive fair compensation through the tort system have had only a "modest", if any, impact on liability insurance rates. More importantly, the consensus among the scholars was that state legislatures should direct their attention away from the tort system and towards alternative solutions to resolving any existing liability insurance problems.

What these studies did not address is the extent to which the public is forced to financially support those tort victims who have been disenfranchised from the legal system because of existing restrictions on tort recovery and the extent to which this gap would widen if further restrictions on tort victims' rights were enacted.

CORRECTION

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c. Claims that the tort system stifles innovation is a ruse.
d. The cost of liability claims is minor compared to the GNP.

H. Medical Negligence Facts vs. Myth

1. Medical Negligence Claims -- The Real Facts
   a. Lawsuits protect the public -- the benefits outweigh the costs.
   b. The frequency and severity of medical negligence claims has remained relatively constant.

I. Medical Negligence -- Debunking the Myths

1. Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury
2. Rather than seeking large settlements, most injured patients sue for other reasons
3. Very few incidents of medical negligence result in a claim
4. Elderly and minority patients are at a greater risk of being injured by medical negligence

J. Physician Discipline System Does Not Remove Bad Doctors

1. The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors
2. A small number of physicians are responsible for most of the negligence
3. Medical disciplinary boards do a very poor job of regulating physicians

K. Medical Negligence Insurance -- Costs and Profits

1. Medical liability insurance is less than 1% of the total cost of health care
2. Medical negligence insurance is highly profitable for both private and physician-owned insurance companies

L. Medical Negligence Restrictions Are No Solution

1. Tort restrictions will not resolve the problem of access to health care

Preface

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And yet today our civil justice system and the rights of injured victims and consumers are under attack. Politicians in search of solutions to such complex matters as runaway medical costs, the budget deficit and America's competitiveness in the market, oftentimes skew statistics to perpetuate unfounded myths and misconceptions about our legal system in an attempt to pin the problem on lawyers and the injured victims they represent. The multi-million dollar propaganda efforts of insurance companies and their corporate colleagues have borne fruit in biased judges, alienated juries, regressive state and federal legislative efforts, and a social environment permeated by an uncaring attitude toward the rights of the injured victims.

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What these studies did not address is the extent to which the public is forced to financially support those tort victims who have been disenfranchised from the legal system because of existing restrictions on tort recovery and the extent to which this gap would widen if further restrictions on tort victims' rights were enacted.

ACCESS TO JUSTICE

RIGHT OF TRIAL BY JURY -- THE FOUNDATION OF OUR SOCIETY

A fundamental guarantee in the Alaska State Constitution.

- A Guaranteed Right: Article I, Section 16 holds that in civil cases where the amount in controversy exceeds $250, the right of trial by jury is preserved.

The jury, as conscience of the community, promotes safety and equity.

- Juries Promote Safety: Over 5 million Americans serve on juries each year. As the conscience of the community, their decisions determine guilt or innocence, safety and security, life and death. Countless improvements aimed at preventing injuries and saving lives might never have occurred without trial by jury and its time-tested ability to bring about changes for the better.

- A Triumph of American Democracy: According to the consumer group, Public Citizen, "The right to collect damages through the civil justice system is one of the great triumphs of American democracy. It allows anyone, no matter how poor, to challenge the largest corporation or government agency and reclaim compensation for wrongful injuries. It forces wrongdoers to change their products and practices to prevent further injuries and avoid further liability."[1]

Critics of the jury system are the most likely to request a jury trial.

- The Ultimate Irony: The loudest critics of the jury system are insurance companies and the defendants they represent in personal injury litigation -- corporations, local government, and doctors. Ironically, the party most likely to request a jury trial in personal injury litigation is the defendant. In fact, insurers almost always demand a jury trial.

TORT RESTRICTIONS DO NOT REDUCE INSURANCE RATES

Evidence indicates that tort restrictions have no significant impact on insurance premiums or availability.

- Insurance Services Office (ISO) Says "NO REDUCTION": A 1987 ISO study determined that tort "reforms" enacted in 1986 would have little or no impact for the majority of liability claims filed with insurers.[2] In October 1986, ISO determined that

its rates would not reflect recent state tort restrictions because ISO was unable to determine any cost effect of the tort law changes.[3]

• Insurers Say "NO REDUCTION": Insurers required to provide Washington State Insurance Commissioner Richard Marquardt with evaluations of the effects of tort reforms on proposed rate filings indicated that there was no way to make such a determination, and that the 1986 law would have a minimal effect on rates. Responses from insurers in other states indicate that tort restrictions do not resolve insurance price fluctuation, reduce rates or increase availability.[4]

• Washington State Insurance Commissioner Says "NO REDUCTION": In 1987, Commissioner Marquardt told a U.S. House committee, "It is difficult, if not impossible, to pin a price tag on tort reform or to even assess accurately its effect on insurance availability and affordability. Based on our research, by the middle of 1986, general liability rates had begun to stabilize throughout the United States -- not just in the states that had adopted tort reform.[5]

• 1991 Washington Insurance Commissioner Report Says "NO REDUCTION": A 1991 report by Marquardt to the Legislature notes that insurance rates in recent years have stabilized and coverage is more readily available, however, tort changes cannot be credited as the reason. Insurers still find it difficult to quantify the impact tort reform on insurance rates. A 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system.[6]

• Best's Says "NO REDUCTION": A 1989 Best's Review article on a presentation by David B. Mathis, CEO of Kemper Reinsurance, quoted Mathis as saying, "The only way to achieve stability in the market is through adequate price levels. First of all, despite the publicity it has received, tort reform has turned out to be a non-event in terms of its impact on the big picture.".[7]

A case history -- medical negligence restrictions have little impact on rates.

• 1970 Limitations Fail: A study of medical negligence legislative limits passed in various states from 1974 to 1978 concluded that the changes, either individually or collectively, did not reduce or stabilize insurance rates.[8] Following adoption of MICRA in 1975, California's medical liability insurance premiums continued to rise (increases of 16% to 337% between 1980 and 1986.) Indiana, which adopted the most restrictive medical negligence laws of any state, had premium increases of 53% to 116% during the early 1980s.[9]

• The Crisis of 1985-1986: Despite the fact that tort restrictions had little or no effect on resolving the so-called crisis of the 1970s, a number of states passed laws restricting medical negligence actions during the mid-1980s when liability premiums began to skyrocket.

• Rate Reduction Not Due to Liability Restrictions: Nationwide, medical liability premiums began dropping early in 1989 due to a reduction in claim filings and a reduced increase in the costs to settle claims.[10]

THE LITIGATION CRISIS: DEBUNKING THE MYTHS

Personal injury cases represent a small percentage of the courts' workload.

• The courts are overburdened with over 18 million civil lawsuits filed in state courts each year: This 18 million dollar figure includes millions of routine cases such as small claims, traffic and other ordinance violation cases, domestic relations, estate and contract matters. The most recent figures from the National Center for State Courts show that the number of tort cases filed in state courts was less than half a million, or less than three percent of all state filings.

• Federal Courts: Studies of federal tort filings show lawsuits are on the decline. Over the last thirty years, tort cases as a percentage of federal civil cases dropped by nearly half, from 38.4 percent in 1960 to 20.1 percent in 1990. Product liability litigation is shrinking even faster. It has been reported that federal product liability cases, other than those involving asbestos, have been shrinking steadily in recent years, falling 40 percent between 1985 and 1990.

If there is a "litigation explosion," it is being driven by businesses suing businesses, not by personal injury actions.

• Businesses Suing Businesses: According to a University of Wisconsin study, federal litigation between corporations has increased astronomically, growing more than 1000% between 1971 and 1986.[11]

• State Courts: According to the National Center for State Courts, tort filings are not increasing at a faster rate than other major categories of civil filings. The most dramatic increases in civil cases are real property and contract cases, not torts.[12]

• Federal Courts: Nationally, between 1979 and 1987 contract cases filed in Federal District Courts more than

tripled and property cases quadrupled -- far exceeding growth in personal injury filings.[13]

Most cases are resolved prior to trial.

• Most Cases Are Settled: Only 5% of all personal injury cases filed in state courts go to trial. Complex actions, such as medical negligence cases, are more likely to go to trial than cases such as automobile personal injury (11% of medical negligence cases filed result in trials). Most cases are settled, withdrawn or dismissed prior to trial. 6% of all personal injury cases are uncontested by the defendant.[14]

LARGE JURY VERDICTS ARE UNCOMMON

Huge jury verdicts, such as million dollar verdicts, are the exception rather than the rule.

• Huge Verdicts are Rare: Huge personal injury payouts are a rarity. The largest settlements and verdicts are made to the most seriously injured victims.[15] If anything, juries are very cautious and reticent to adequately compensate injured persons. The multi-million dollar advertising campaigns of the insurance industry have used anecdotal information to make the public feel guilty about fairly compensating persons negligently injured by others.[16]

• Million Dollar Verdicts are Uncommon: According to Business Week, "Over the past 14 years in our nation of 240 million people there has been only 1,642 awards of $1 million or more. Furthermore, two-thirds of the 1,642 cases involved victims who suffered either permanent paralysis, brain damage, amputations or death."[17]

• Alaska Personal Injury Verdicts are Lower than National Verdict Average: Alaska personal injury verdicts currently average 8.1% below national verdict values.[18]

• The Most Severely Injured Persons Receive the Higher Verdicts: Product liability and medical negligence victims generally sustain more severe injuries and are more likely to receive a larger jury verdict. While the 1988 average verdict for personal injury litigation in U.S. state courts was $89,622, the highest average verdict was in the area of medical negligence ($146,831).[19]

Jury verdicts can be reduced -- the actual payout to the plaintiff may be less than the jury verdict.

• Verdicts Can be Reduced on Appeal or Settlement: The actual payout to the plaintiff is reduced after the trial verdict in about 20% of cases. The larger the verdict, the greater the likelihood that the verdict will be reduced. Of the cases where a verdict is reduced, the average actual payout is about half (53%) of the original verdict amount.[20]

"HORROR STORIES" MAKE BAD PUBLIC POLICY

Use of outrageous and atypical examples to create the impression of abuses and/or weaknesses in the civil justice system are common. Cases cited by tort critics alleging frivolous lawsuits and excessive jury verdicts are very often misleading and inaccurate.

Some examples of "horror stories":

• The Pure Fabrication -- The Lawn Mower and the Hedge Story: A widely-circulated story given in the mid-'80s as an example of our litigious society told of a man who successfully sued a lawn mower manufacturer for injuries suffered while using one of their lawn mowers to trim his hedge. In fact, this case is fictitious. It does not exist. It was a fabrication of tort reform proponents.

• Failure to Disclose All Pertinent Facts -- The Phone Booth Near the Road: In 1986, President Reagan noted that it was absurd for a California man to recover damages from a telephone company because he was in one of their booths when it was struck by a drunk driver.[21] The facts conveniently left unstated included: 1) The company knew the booth was too close to the street because it had been hit before; 2) complaints had been filed with the telephone company stating that the booth was difficult to exit because the door jammed; 3) the trial court had granted a lower court summary judgment to the company, but the California Supreme Court remanded the case to the lower court because the risk of injury was foreseeable by the telephone company; and 4) the case was ultimately settled.[22]

• Not Appropriately Placing Blame - Beware of Horse Manure: In 1987, a CBS "60 Minutes" segment focused on a lawsuit against a ladder manufacturer in which the plaintiff recovered $300,000. According to the manufacturer, the plaintiff was injured when the temperature increased from 20 to 40 degrees and the ladder slipped because it had been placed in a manure pile. "We didn't warn him about the viscosity of horse manure," said the manufacturer. To their credit, "60 Minutes" ran a follow-up segment in which a number of

alleged tort horror stories were rebuked. In re-examining the ladder story, reporter Ed Bradley noted, "Several jurors...told us the viscosity of horse manure had nothing to do with their verdict. They said they were persuaded by the plaintiff's contention that the ladder was defective, and that's why he was injured."[23]

• The Tort System Works -- The Psychic and the CAT Scan: A Philadelphia jury awarded $1 million to a woman who claimed she lost her psychic powers after undergoing a CAT scan. In fact, the woman had warned the doctor of previously having had an adverse reaction to a similar procedure. She then suffered anaphylactic shock when the procedure was performed. The jury that returned a $988,000 verdict had been instructed to disregard the woman's alleged loss of earnings because she was no longer able to "read auras." The judge found the verdict excessive and ordered a new trial. This case demonstrates that the safeguards in the process work.[24]

THE COSTS OF PERSONAL INJURY

INJURED PERSONS BEAR THE BURDEN OF PERSONAL INJURY

The injured person bears the brunt of the cost of injury.

• The Injured Person Pays First: Whether or not an injured person is reimbursed for a personal injury from another source, the initial cost of the injury is borne by the injured person and his or her family. The costs of injury include medical bills, lost wages and property damage. Personal injury often causes additional losses, such as the inability to pay bills (the house, the car), increased debt obligations and interest payments, and increased stress on family relationships. The burden of locating reimbursement for medical, wage loss, and other costs of injury falls on the injured person.

• When Defendants Don't Pay and Victims Can't, Taxpayers Do: Most personal injury cases involve significant medical and related expenses. When the victim can't pay and the defendants aren't required to fully compensate for injuries, the uncompensated cost of care is usually borne by government agencies -- in other words, by you and me as taxpayers.

• 38% of Economic Damages are Paid Out of Pocket: The total annual economic loss associated with nonfatal injuries in the U.S. is $175.9 billion. 38% of this total economic burden is not reimbursed by any outside source and is paid for out-of-pocket by those who are injured. 64% of wages lost due to injury are not

reimbursed and are borne exclusively by those injured.[25]

Personal injury liability compensation does not pay for the actual cost of injuries.

• Only a Small Number of Victims Receive Personal Injury Liability Compensation: Only 10% of all accident victims receive personal injury liability compensation. The personal injury system plays a greater role in compensating motor vehicle injury victims. Those injured in motor vehicles are more likely to receive personal injury liability compensation (31%) compared to persons injured in some other manner.[26]

CIVIL JUSTICE SYSTEM PROMOTES SAFETY IN AMERICA'S ECONOMY

TORT LAW IMPROVES AMERICAN PRODUCTS

The tort system saves lives, reduces injuries and promotes public safety.

• Product Liability and Tort Law Promote Safety: There are huge benefits of the current tort system. Businesses devote greater attention to safety. There is a heightened consumer perception that products are safer and of higher quality. Workplace and other injuries have been reduced resulting in thousands of lives saved and millions of injuries prevented. The existence of these very large benefits should give policymakers cause for careful reflection as they are pressed to weaken product liability and tort law in general. Reducing the costs of the system may reduce the benefits and leave society worse off.[27]

• The Tort System Contributes to a Competitive Society: Without a strong tort law, the ethical corporation would have a competitive disadvantage and would be tempted to put profits before public safety. The American focus on safety in conjunction with punitive damages will produce the top quality products needed to compete in the international marketplace. "Our analysis suggests that the rules of product liability make a good deal of economic sense."[28]

• Punitive Damage Awards Do Not Undercut United States Competitiveness: Perhaps nothing is more grossly exaggerated than claims about punitive damage awards, particularly in product liability cases. The most comprehensive study ever conducted on punitive damages in product liability cases -- a survey of the past 25 years -- indicated just 355 cases in the entire country. That's only ten per year for the entire country. The

median punitive damage jury award was $1.5 million, with post-trial activity sharply reducing the median amount actually paid to $250,000. The study also found that 82 percent of businesses assessed punitive damages subsequently implemented safety measures such as product recalls or improved warnings and instructions.[29]

• Harmful Products are Removed or Altered: Examples of unsafe products which have been removed from the marketplace due to the tort system include the Dalkon Shield, asbestos, flammable baby clothes, and unsafe infant formula. Examples of products redesigned to improve safety resulting from the tort system include the Ford Pinto, safety devices on machinery and childproof caps.[30]

• Product Liability Expense Adds Little Cost to Consumer Goods: A new study by the National Insurance Consumer Organization (NICO) found that product liability expenses added but a tiny amount to the cost of consumer goods. The total cost of product liability insurance amounts to 0.14 percent of the cost of the more than $1.8 trillion worth of retain sales in the U.S. in 1991. The study used insurance industry data which broke out liability premiums as a separate line item for the first time.[31]

Insurers reap benefits while projections of future losses have decreased.

• A Shift Toward Defendants: During the mid-80's judicial decisions in product liability cases nationwide shifted toward defendants. Dismissal of product claims and new legal grounds for defendants have increased during the past half decade.[32]

• Insurers Continue to Make Big Profits: While projections of future losses have decreased, insurers' reserving practices and insurance rates have not. Why? Insurers are focusing on restricting state and federal liability laws. They can't claim a need for change while recognizing reduced losses and greater profits.[33]

• Insurers Use Natural Disasters to Raise Rates: The day Hurricane Andrew rolled into Miami, a top insurance company executive for American International Group, issued a memo to regional presidents and vice presidents saying "This is an opportunity to get price increases now. We must be first and it begins by establishing the psychology with our own people."[34]

Claims that the tort system stifles innovation is a ruse.

• Dangerous Products Kept From Market for Good Reason: Tort restriction proponents claim that the threat of litigation keeps products off the market. When Consumer Union examined the list of products being held from the market, the reasons they were pulled of the market were based on valid safety concerns. For example, the Jeep CJ-7, which tends to roll over at low speeds, and an anesthesia gas machine for which the manufacturer had failed to conduct tests of the design of critical components, were on the list of products pulled from the market because the tort system was "stifling innovation".[35]

• Corporate Report Says Liability Suits Do Not Impede Competition: "The most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality...For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention...Where product liability has had a notable impact - where it has most significantly affected management decision making - has been in the quality of the products themselves."[36] In addition, numerous federal agency studies of industry competitiveness conducted during the 1980's fail to mention the liability system.

The cost of liability claims is minor compared to the GNP.

• The Cost of Liability Claims v. U.S. Productivity: The total compensation from tort liability claims to persons with nonfatal traumatic injuries in the U.S. amounts to only three-tenths of one percent of the Gross National Product of the United States.[37] The total cost of all commercial liability insurance premiums in the U.S. in 1990, including general liability, automobile liability, and umbrella insurance was only $48 billion, less than 1% of the U.S. Gross National Product.[38]

MEDICAL NEGLIGENCE FACTS vs. MYTH

MEDICAL NEGLIGENCE CLAIMS -- THE REAL FACTS

Lawsuits protect the public -- the benefits outweigh the costs.

• Restrict Patients' Rights at Our Peril: One very important aspect of medical negligence litigation is the useful examination of the practice of medicine itself. Because the buyer of medical care cannot be expected to evaluate the quality of medical care, the market cannot adequately identify incompetent health care providers. "The data suggest that to eliminate or seriously restrict

a patient's right to file a malpractice claim is a step we would undertake at our peril."[39]

• Medical Negligence Standard of Care: Under Alaska law, a physician is responsible for the harm caused when the physician fails to use reasonable care in providing medical care. Other professionals, such as architects, bankers, and lawyers are also required to exercise reasonable care in their professional activities.

The frequency and severity of medical negligence claims has remained relatively constant.

• Closed Claim Study in Minnesota: The Minnesota Insurance Commissioner conducted a study of medical negligence insurance claims filed in Minnesota, North Dakota and South Dakota. The study examined all claims filed from 1982 to 1987 for the two largest medical negligence insurers in the region. 27% of the claims were closed with a payment average of $54,629; the median was zero. Only one-tenth of one percent of the claims resulted in a payment exceeding $1 million, and only 4% exceeded $100,000. Of the 3% of cases that actually went to trial, the defense prevailed in 81 percent of them. In the 20 favorable jury verdicts for the period, no pain and suffering damages were awarded. No cases involved punitive damages. A final note on the Commissioner's study: Saint Paul announced a rate cut of 25 percent on its medical malpractice premiums in Minnesota.[40]

• Unjust Payments are Rare: A new study of medical malpractice cases finds that, despite popular belief, unjustified payments are rare. The study is one of the first systematic attempts to asses the quality of care in malpractice cases and was based on 8,231 cases filed in New Jersey over the past 15 years. The data came from the state's doctor-owned insurance company and the authors contend that their findings are relevant to the nation as a whole. In concluding that unjustified payments are not the norm, the study contradicts the conventional wisdom among doctors, which is that malpractice litigation is a lottery and that verdicts often depend on the whim of jurors.[41]

• Stable Rate of Frequency: The Minnesota closed claims study identified little measurable change in claim frequency over a six year period. The frequency rate was actually greater in 1983 than in 1987 and the average payment appeared to be decreasing over the period of the study. In fact, the study concluded the "data does not substantiate the litigation explosions assertion."[42]

Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury.

• The System Works: The findings of a closed claims study of obstetric claims from a large physician-owned insurance company between 1982 and 1988 indicate that non-meritorious claims were not compensated. Where a claim was paid, poor physician judgment was the primary source of error and "the size of the settlement was commensurate with the seriousness of the injury." The study concluded that "These results should help to reassure physicians who are concerned that the tort process itself is unjust. Frivolous claimants do not, as a rule, prevail."[43]

Rather than seeking large settlements, most injured patients sue for other reasons.

• Lack of Communication -- What Really Happened: According to a recent survey of 187 families who filed suits against physicians, the primary reasons for pursuing litigation were to find out what happened.[44] Poor communication by medical personnel with the patient was often cited by respondents. In addition, a prior relationship with a medical provider did not protect the provider from legal action. Physicians are finding that apologizing reduces litigation and promotes quick resolution of claims. Douglas Phillips, President of the Physicians Insurance Association of America, said that "Communicating with the patient is probably the most important aspect of loss prevention."[45]

Very few incidents of medical negligence result in a claim.

• Few Negligently Injured Patients Receive Liability Compensation: Only one in every ten incidents of medical negligence result in a liability claim, and only one in twenty-five receive compensation through the liability system.[46] Is this evidence of litigiousness -- that 70 or 80 percent of the people injured by an incompetent or negligent act do nothing about it?

Elderly and minority patients are at a greater risk of being injured by medical negligence.

• Increased Risk of Being a Negligence Victim: In a study of New York hospital discharges, patients with the highest risk of being injured due to medical negligence included elderly patients, minority patients in hospitals that treat a high proportion of minorities, patients in

government-operated hospitals and patients in non-teaching hospitals.[47]

PHYSICIAN DISCIPLINE SYSTEM DOES NOT REMOVE BAD DOCTORS

The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors.

• New York Study: A Harvard study reviewed 30,121 hospital patient discharges from 51 New York state hospitals in 1984. Of these, 280 patients included an adverse event which was caused by negligence. It is estimated that 27,177 cases of medical negligence occurred in New York during 1984, resulting in 6,895 deaths and 877 instances of severe permanent disability. Only 1 in 8 injured patients filed suit and only 1 in 16 received any liability compensation.[48]

• Many Deaths are Preventable: Physicians reviewing 182 hospital deaths in 12 hospitals found that in at least 14% of the cases examined, the deaths could have been prevented. In addition, a small number of factors caused most of the preventable deaths.[49]

A small number of physicians are responsible for most of the negligence.

• Florida: 4% of the physicians practicing medicine in Florida have had 2 or more liability claims filed against them. This group is responsible for 42% of the total claims paid out from 1975 - 1986.[50]

• Illinois, Pennsylvania and Texas: 2% of all physicians practicing in Cook County, Illinois (sued 6 or more times) were defendants in 36% of the medical negligence litigation from 1973 to 1986. 57% of the physicians were not named in any lawsuit and 79% of those sued during this period were named only once or twice.[51] Studies in Pennsylvania[52] and Texas[53] had similar results.

Medical disciplinary boards do a very poor job of regulating physicians.

• New York: The New York Office of Professional Conduct takes an average of 236 disciplinary actions annually compared to an estimated 27,000 cases of medical negligence occurring each year.

• A National Disgrace: An estimated quarter million injuries and death resulted from medical negligence in American hospitals in 1988. Medical disciplinary boards in the U.S. issued an annual average of only 1,481

serious disciplinary actions against physicians from 1987 to 1990.[54]

MEDICAL NEGLIGENCE INSURANCE -- COSTS AND PROFITS

Medical liability insurance is less than 1% of the total cost of health care.

• Premiums vs. National Health Care Costs: Insurance companies argue that liability expenses are a primary factor in skyrocketing health care costs. The facts refute this allegation. In 1989, medical negligence insurance premiums in the U.S. were $5 billion.[55] National health care expenditures for 1989 were $604 billion.[56] Thus less than 1% of the national cost of health care can be attributed to medical liability premiums.

• The Texas Experience: A recent study commissioned by the Texas Hospital Association, the Texas Medical Association and the Texas Trial Lawyers Association concluded that medical liability costs -- insurance premiums and damages from lawsuits -- make up less than 1 percent of health care expenditures in Texas, consistent with national findings. The study found that reforming the medical professional liability system would have minimal cost savings impact on the overall health care delivery system in Texas.[57]

• Losses Paid vs. National Health Care Costs: Nationwide, only 43% of medical negligence insurance premiums earned -- $2.14 billion or one third of 1% of the cost of health care -- were paid out for all losses in 1989.[58] Insurers are retaining 57% of the premiums earned.

Medical negligence insurance is highly profitable for both private and physician-owned insurance companies.

• National Data: In 1989, the net profit of medical negligence insurers in the U.S. was 27.9 cents for every dollar of premium earned. From 1985 to 1989, insurers' annual average profit on medical negligence insurance was 9.2% of premiums earned.[59] Between 1985 and 1990, the net worth of medical liability insurance companies more than doubled from $835 billion to $1,691 billion.[60]

• Minnesota Study: A study of medical negligence closed claims from 1982 to 1987 by the Minnesota Commerce Commissioner found no increase in claim frequency, loss payments and loss expenses. Yet, premiums tripled resulting in a determination that St. Paul Companies --

the nation's largest medical liability insurer -- was substantially overcharging policyholders. St. Paul agreed to refund $1.5 million to physicians in Minnesota.[61]

• Physicians Sue Insurer For Excessive Premiums: In 1989, physicians in Colorado won a $4.1 million judgment against PHICO Insurance Company. The court found that the insurer created a sense of crisis and panic to justify a large premium increase.[62] Physicians in Virginia also sued PHICO for illegal conduct when the company canceled thousands of doctors policies in 1986.

• Physician-Owned Companies: An investigation by the Arizona New-Times revealed that MICA, a doctor-owned company, paid out only 30 cents of every dollar it took in. In addition, the company received a 36% rate hike in 1987. Despite a reduction in lawsuits in 1987 and its own data showing claim frequency decreasing, the company still projected increased lawsuits for 1988.

MEDICAL NEGLIGENCE RESTRICTIONS ARE NO SOLUTION

Tort restrictions will not resolve the problems of access to health care.

• The Tail Wagging the Dog: Due to the high cost of health care, a large number of Americans have no health care coverage. Blaming medical liability costs, which are less than 1% of the cost of health care, for the problem of health care access is ludicrous. Altering less than 1% of the health care costs would have no significant impact on the total cost of health care.[63]

• Reasons for Costs of Medical Care: There are numerous reasons for the increased cost of medical care, including technological advances, increases in population, increased wages as well as general and medical inflation. In a recent GAO report, medical liability costs are not even mentioned as a contributing factor of increasing health care costs.[64]

• Restrictions on Compensation Don't Work: Conventional wisdom about medical liability is not supported by the facts. Limits on verdicts and attorney's fees will not curb the incidence of litigation. Nearly 80% of the injured patients receiving liability compensation have economic losses which exceed the compensation received. This percentage is even greater for settlements. Limits on compensation will only exacerbate the current short fall.[65]

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Alaska State Legislature

Senator Tim Kelly, Chair
Senator Steve Rieger, Vice Chair
Senator Bert Sharp
Senator Judy Salo
Senator Georgianna Lincoln

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MEMORANDUM

TO: Senator Rieger, Vice Chair
Senator Sharp
Senator Lincoln
Senator Salo

FROM: Senator Kelly, Chair

DATE: January 27, 1994

RE: Analysis of SB 254 - Tort Reform Legislation

Attached is an analysis prepared for HB 292, the companion bill in the House to SB 254. While it was prepared for the House version, it tracks accurately with the Senate bill.

Thank you.

Alaska Civil Liability Act of 1993 -1994

Part I

Proposed legislation as supported by
Alaskans for Liability Reform

September 1993

HOUSE BILL NO. 292

A BILL FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 68, and 82; and providing for an effective date."

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

Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

(1) civil justice in this state has generally been developed by the courts on a case-by-case basis: this process has resulted in some significant changes in the law, and the legislature has periodically intervened to bring about needed reforms.

(2) the level of malpractice insurance premiums discourage physicians, architects, engineers, attorneys, and other professionals from initiating or continuing their practice or offering needed services to the public:

(3) society as a whole cannot afford the price of lawsuits years after construction, manufacture, the delivery of services and other actions; the widespread use of claims made insurance policies makes it impossible to adequately and economically insure against actions for an unlimited period of time; likewise it is extremely difficult to defend against a claim that has become stale after information and witnesses have disappeared;

(4) on the whole society is better served with a statute of repose even though in a few limited instances injuries may go without compensation;

(5) hospitals that comply with the disclosure requirements set out in this Act should not be liable for the negligence of independent contractors; to this extent this Act is intended to overrule the case of Jackson V. Powers, 743, P.2d 1376 (Alaska 1987);

(6) the issues in the Act were intended to be addressed in a comprehensive way in 1986; however, the legislation passed in 1986 fell short of accomplishing the goals of legislature and the problems that existed in 1986 still exist in 1993.

(b) It is the purpose of this Act to

(1) enact further reforms that create a more equitable distribution of the cost and risk of injury;

(2) reduce costs associated with the civil justice system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available:

(3) help match losses with compensation by helping to

(A) ensure that money paid to an injured person is available when anticipated expenses or losses occur;

(B) ensure that a claimant with substantial injury requiring long-term treatment will have money available for future medical; care;

(C) reduce reparation system costs by elimination those portions of awards that are not needed to compensate the claimant;

(D) eliminate duplicate recoveries; and

(E) reduce the costs of litigation;

(4) ensure that in actions involving the fault of more than one person, the fault of each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages be determined and awards be allocated in accordance with their fault;

(5) reduce the amount of litigation proceeding to trial by modifying the allocation of attorney fees and court costs based on the offer of judgment and the final court award thereby providing a financial incentive to both parties to settle the dispute;

(6) accumulate additional information concerning the costs to society of the civil justice system as it is presently constituted by having the attorney general compile useful information and present an annual report to the legislature; this information is necessary to determine whether the civil justice, health care, and insurance systems as they are presently constituted are fairly serving victims and whether a disproportionate amount of compensation dollars is absorbed by the system;

(7) enact a stature of repose that meets the tests set out in Turner Construction Co., Inc. v. Scales, 752 P.2d 467 (Alaska 1988);

(8) clarify the circumstances in which hospitals are held directly liable for the actions of health care providers not employed by the hospital.

Statute of Limitations
House Bill No. 292

Section 2. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.052. CERTAIN ACTIONS THAT MUST BE BROUGHT IN SIX YEARS. (a) Notwithstanding AS 09.10.140, a person may not bring an action for personal injury, death, or property damage unless the action is brought within six years of the earlier of the date

(1) a product alleged to have caused the personal injury, death, or property damage was purchased;

(2) of substantial completion of the contruction alleged to have caused the personal injury, death, or property damage, or

(3) of the last act alleged to have caused the personal injury, death, or property damage.

(b) This section does not apply if

(1) the personal injury, death, or property damage was caused intentionally;

(2) facts that would give notice of a potential cause of action are intentionally concealed; or

(3) a shorter period of time for bringing the action is imposed under another provision of law.

(c) In this section, "substantial completion" means the date when construction is sufficiently completed to allow the owner or a person authorized by the owner to occupy the improvement or to use the improvement in the manner for which it was intended.

Statute of Limitations
Summary of Amendments

Section 2: Adds a new section to AS 09.10.
The purpose of amendments to Sections 1 through 4 is to make it clear that legal actions involving personal injury, death, or property damage must be brought within a fair and reasonable time. All crimes, except murder, have a statute of limitations in our legal code. The same standard of fairness should also apply to civil lawsuits.

The amendment sets a six-year statute of limitations on legal actions for injury, death, or property damage. The time period is measured from the date the product in question was purchased, construction completed, or the last act that allegedly caused the harm.

The six-year statute of limitations would not apply if the injury, death, or property damage was caused by an intentional act or if there was an intentional concealment of facts that resulted in a delay of over six years before the basis for legal action was known. The amendment does not apply if a shorter period of time for bringing a particular legal action is imposed under another provision of law.

The terms for completed construction are defined and clarified to avoid misinterpretation by litigants or courts.

Statute of Limitations
House Bill No. 292

Sec. 3. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. LIMITATION ON ACTIONS AGAINST HEALTH CARE PROVIDERS. (a) Notwithstanding AS 09.10.140, an action based on professional negligence may not be brought against a health care provider unless

(1) the action is brought within two years from the date of the alleged negligent act or omission; or

(2) if the injured person is, on the date of the alleged negligent act or omission less than six years of age, the action is brought before the person's eighth birthday.

(b) The limitation imposed under (a) of this section is tolled during any periods in which there exists

(1) fraud, including fraud or collusion by a parent, guardian, insurer, or health care provider, resulting in the failure to bring an action on behalf of an injured minor.

(2) intentional concealment of facts that would give notice of a potential action; or

(3) the undiscovered presence of a foreign body, that has no therapeutic or diagnostic purpose or effect, in the body of the injured person and the action is based on the presence of the foreign body.

(c) In this section,

(1) "health care provider" has the meaning given in AS 09.55.560;

(2) "professional negligence" means a negligent act or omission by a health care provider in rendering professional services;

(3) "professional services" means services provided by a health care provider that are within the scope of services for which the health care provider is licensed, and that are not prohibited under the health care provider's license or by a hospital in which the health care provider practices.

Statute of Limitations
Summary of Amendments

Section 3: Adds a new section to AS 09.10.

This amendment adds two new sections to the statutes on Medical Malpractice. The first sets a two-year statute of limitations on actions against health care providers based on professional negligence or omission.

The second part of this amendment states that the two-year limitation does not apply to minors under the age of six. Minors must bring any legal actions within two years or before their eighth birthday – whichever is longer. Tolling of the time limitation provides additional protection for minors. The clock stops, if fraud by a parent, guardian, insurer, or health provider is the reason action was not taken. Time is also extended for minors if there was an intentional concealment of facts or an intentional concealment or undiscovered presence of a foreign body with no therapeutic or diagnostic purpose, provided this specifically applies to the legal action being brought.

The third part of this amendment defines terms to ensure that the statute is understood and applied fairly.

Reference Court Case: Johnson v. Siegfried
Supreme Court Opinion 3890, Oct. 2, 1992

Statute of Limitations
House Bill No. 292

Sec. 4. AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS TO BE BROUGHT IN TWO YEARS. A [NO] person may not bring an action (1) for libel, slander, assault, battery, seduction, or 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.

Sec. 5. AS 09.10 is amended by adding a new section to read:

Sec. 09.10.075. LIMITATION ON ACTIONS INVOLVING INJURY TO PERSON OR PROPERTY. (a) Notwithstanding AS 09.10.140, a person may not bring an action for personal injury, death, or property damage unless the action is brought within two years of the accrual of the action.

(b) This section does not apply if a shorter period of time for bringing the action is imposed under another provision of law.

New Text Underlined [DELETED TEXT BRACKETED]

Statute of Limitations
Summary of Amendments

Section 4: Amends the language in 09.10.070
This changes "no person may bring" to "a person may not bring action" and removes unclear and conflicting language from the statute.

The existing two year limit for actions involving libel, slander, assault, battery, seduction, or false imprisonment remains the same. However, the amendment deletes the limitation for injury or rights of another not specifically provided for by other statutes.

Section 5: Adds a new amendment to 09.10.
The amendment places a two-year limit on actions involving injury, death, or property damage after the date claimants could reasonably believe they had a claim.

Cap on Noneconomic Awards
House Bill No. 292

Sec. 6. AS 09.17.010(a) is amended to read:

(a) In an action to recover damages for personal injury or wrongful death [BASED ON NEGLIGENCE], damages for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

Sec. 7. AS 09.17.010(b) is amended to read:

(b) The amount of damages awarded by a court or a jury under (a) of this section may not exceed $500,000 for all claims, including a loss of consortium claim, arising out of a single injury or death [EACH CLAIM BASED ON A SEPARATE INCIDENT OR INJURY].

New Text Underlined [DELETED TEXT BRACKETED]

Cap on Noneconomic Awards
Summary of Amendments

Section 6: Amends the language in 09.17.010(a)
This section extends the definition for noneconomic losses to include claims for wrongful death as well as personal injury. The definition is clarified by removing "negligence," which is difficult to establish or disprove. The change further defines noneconomic losses to include loss of consortium (the right to a husband's or wife's fellowship).

Section 7: Amends the language in 09.17.010(b)
Language is altered in this section to clarify how the existing cap should be applied and to include loss of consortium for consistency.

This prevents someone from collecting over $500,000 by filing multiple claims for the same incident or injury .

Reference Court Case: Gillespie v. Beta Construction and DOT. 3AN-90-8414 CV

Punitive Damages
House Bill No. 292

Sec.8. AS 09.17.020 is amended to read:

Sec. 09.17.020. PUNITIVE DAMAGES. Punitive damages may not be awarded in an action, whether in tort, contract, or otherwise, unless supported by clear and convincing evidence of malice and conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought.

Sec. 9. AS 09.17.020 is amended by adding a new subsection to read:

(b) The amount of punitive damages awarded by a court or jury under (a) of this section, may not exceed three times the amount of compensatory damages awarded or $200,000, whichever amount is greater.

New Text Underlined [DELETED TEXT BRACKETED]

Punitive Damages
Summary of Amendment

Section 8: Amends the language in AS 09.17.020
The current statute allows punitive damages to be awarded when there is "clear and convincing evidence," but does not explain evidence of what actions. The amendment defines evidence as actions of malice and conscious disregard of another person.

Section 9: Adds a new subsection to AS 09.17.020
Any awards for punitive damages will be at least $200,000 or up to three times the amount of compensatory damages awarded.

Reference Court Case: Underwriters at Lloyds London v. The Narrows, L & L Enterprises.
3AN089-09272 CI Supreme Court Opinion 3923, January 29, 1993

Damages Resulting from Commission of a Crime
House Bill No. 292

Sec. 10. AS 09.17.030 is amended to read:

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

New Text Underlined [DELETED TEXT BRACKETED]

Damages Resulting from Commission of a Crime
Summary of Amendment

Section 10: Amends the language in AS 09.17.030
The statute prevents a person or their estate from suing for personal injury or death that occurred while that person was in the process of committing a felony, provided the criminal activity contributed to the injury. The amendment includes injuries or death that occur if a felony is attempted or result while the person is attempting to escape and removes the necessity for the person to be convicted.

Reference Court Case: John Miller v. Anchorage Police Department
3 AN-90-8009

Damage Calculation
House Bill No. 292

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

(a) In every case where damages for personal injury <u>or death</u> are awarded by the court or jury [,]

<u>(1)</u> the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

<u>(A)</u> [(1)] past economic loss;
<u>(B)</u> [(2)] past noneconomic loss;
<u>(C)</u> [(3)] future economic loss;
<u>(D)</u> [(4)] future noneconomic loss; [AND]
<u>(E)</u> [(5)] punitive damages; <u>and</u>

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

<u>New Text Underlined</u> [DELETED TEXT BRACKETED]

Damage Calculation
Summary of Amendments

Section 11: Amends the language in AS 09.17.040(a).
The term "death" is added so that the statute applies to damages awarded for legal actions involving both personal injury and death.

Outline numbers and letters are altered so new text can be added.

The added text states that after past and future economic and noneconomic losses have been calculated by the court, the amount of state and federal taxes that would have been paid is subtracted from the award. The amount of tax should be calculated using the state and federal tax rate at the time of the injury or death.

IRS code 104(A)(2) allows income from awards involving personal injury or death to be tax exempt. Under current statutes, awards are calculated as the gross loss to the claimant. Therefore, the prevailing party is awarded their actual past and projected loss, plus the amount they would have paid in taxes under normal circumstances. Claimants are being compensated as if future earnings were tax exempt.

This amendment ensures that the prevailing party is fairly compensated for actual after-tax losses. At the same time, it prevents awards from being inflated by as much as 34% and protects the non-prevailing party from being unfairly penalized. Specifying how the tax rate should be calculated removes the need to speculate how much future taxes will be and prevents future litigation for award adjustments.

Periodic Payments
House Bill No. 292

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

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

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

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

New Text Underlined [DELETED TEXT BRACKETED]

Periodic Payments
Summary of Amendments

Section 12: Amends the language in AS 09.17.040(d)
Changes the phrase "an injured party" to "a party." This allows anyone involved in the suit, rather than just the claimant, to request periodic payments for amounts awarded for future damages.

If any portion of the judgment awarded to the prevailing party is due the attorney because of a contingent fee agreement, that portion is to be paid in a lump sum under the present value at the time of the award.

Since contingent fees are based on a percentage of the award, the amount attorneys receive increases as periodic payments are adjusted upward for inflation. Attorneys earn their fee at the time of the legal action. Allowing that fee to increase with future payments means courts are essentially giving attorneys an annual raise.

Section 13: Amends the language in AS 09.17.040(f)
The words "for personal injury or death" are added to the statute. This clarifies what type of damage awards are being regulated by this statute.

Courts must specify the percentageor the method for increases by which future periodic payments will increase to cover inflation.

By specifying the amount or method allowed for inflation, the amendment prevents future litigation for an adjustment of the original award and avoids problems such adjustments could have on the tax exempt status of future income payments.

Collateral Benefits
House Bill No. 292

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

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

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

Collateral Benefits
Summary of Amendment

Section 14: Repeals AS 09.17.070 and reenacts it so collateral benefits are deducted from damage awards. This prevents unjust enrichment of claimants who collect multiple awards for the same loss. Claimants are not restricted from bringing legal actions, but courts and juries can be made aware of other awards before making new judgements.

Amendment (a): Claimants in cases of personal injury or death may only recover damages that exceed the amount previously paid by collateral sources as compensation for the same loss. Claimants receive the difference between the judgment and compensation received from other sources.

Collateral sources subject to this statute are identified as: private, group, or government, either contributory or non-contributory. Exceptions are made for collateral benefits from federally funded programs that, by law, must be offset and for death benefits paid under life insurance.

Amendment (b): A person defending a claim may introduce into evidence other benefits already awarded to the claimant as a result of the same personal injury or death. This conforms to provisions made in the Social Security Act (42 U.S.C. 301-1397).

The benefits which may be introduced are defined as compensation for the cost of medical, hospital, dental, health care services, disablility, or lost wages from state or federal income disability or workers compensation, insurance for health, sickness, disability, or income-loss, and contracts or agreements with a group, organization, partnership, or corporation.

If the defendant introduces evidence of collateral benefits, the claimant may introduce into evidence the amount spent to secure that award.

Collateral Benefits
House Bill No. 292

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

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

Collateral Benefits
Summary of Amendment

Amendment (c): If the defendant does not introduce evidence of collateral benefits paid to the claimant, then that evidence is not admissible until after the judgment has been made. The court may restore the claimant's expenses with an additional award or assign a dollar amount for periodic payments, which will be distributed if impairment of the claimant's future rights to coverage actually takes place.

Amendment (d): A person that provides a collateral benefit admission may not use that judgment as a basis for legal action and may not use it to restrict a claimant's rights against a defendant.

Reference Court Case: Justice v. Humann
Case No. 3AN 86-122-CV

Apportionment of Fault
House Bill No. 292

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

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

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

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

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Apportionment of Fault
Summary of Amendments

Section 15: Amends the language in AS 09.17.080(a)
The word "party" creates a loophole that restricts apportionment of fault to those named in the legal action. Claimants can name only the wealthiest of those at fault hoping to recover 100% of the damages from them, then pursue restitution from others in separate suits. By considering all persons or entities which contributed to a loss, each is fairly apportioned a degree of fault based on their own actions.

The words "party to the action" have been removed and replaced with "person." The statute number is changed to conform with amended sections of the law.

Parties to each claim is removed to clarify language and interpretation. This broadens the statute so that all persons found responsible for a loss are considered when the percentage of fault is determined.

Apportionment of Fault
Summary of Amendments

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

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under AS 09.17.091 [AS 09.16.040], and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. An assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in this or another action and may not be used as evidence of civil liability in another action.

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Apportionment of Fault
Summary of Amendments

Section 16: Amends the language in AS 09.17.080(c)
Changes the statute number to conform with revised laws and clarifies the rules so that while all parties that contributed to an injury or death are fairly consideredwhen assessing the percentage of fault, those not named in the lawsuit cannot be held liable in a separate lawsuit.

Effect of Release
House Bill No. 292

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

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

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

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

Effect of Release
Summary of Amendment

Section 17: Adds a new section to AS 09.17.
The purpose of this amendment is to allow claimants to settle a legal claim with one person without the release applying to everyone named in the lawsuit.

When two or more people are liable for the same injury or wrongful death, the claimant may reach an agreement with one person not to sue or enforce a judgment. Unless the agreement stipulates, this does not release the other persons named in the legal action from liability. The agreement does limit claims against the other parties to the amount agreed to in the release or the amount of consideration paid - whichever is greater.

The person with whom the claimant reached the agreement is not liable for compensation to any other person.

Offers of Judgment
House Bill No. 292

Sec. 18. AS 09.30.065 is amended to read:

Sec. 09.30.065. OFFERS OF JUDGMENT. 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 cost then accrued. If within 10 days after the 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 that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the offeree shall pay the actual costs and attorney fees incurred by the offeror from the date the offer was made [THE INTEREST AWARDED UNDER AS 09.30.070 AND 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 SHALL BE REDUCED BY FIVE PERCENT A YEAR;

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

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Offers of Judgment
Summary of Amendments

Section 18: Amends the language in 09.30.065

The existing statute says that prior to 10 days before trial begins, either party can make an offer to settle a claim, plus accrued cost. This must be accepted within 10 days and correctly recorded by the clerk. It also allows additional cumulative interest of 5% and when added to prejudgment interest can be 15.5%.

If the court's judgement is less favorable to the recipient of the offer, the person who refused the offer must pay the offerer's costs and attorney fees incurred since the date when the higher offer to settle was made.

This prevents unfair charges being assessed to the person who made an offer to settle prior to a judgement and the judgment was less than offered. The change also removes the additional 5% interest penalty. this should encourage all parties to seriously consider all offers and force a factual assessment by opposing counsel regarding the worth of the claim. The changes discourage frivolous litigation without merit.

Prejudgment Interest
House Bill No. 292

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

(a) The rate of interest on judgments and decrees for the payment of money, including prejudgment interest, shall be adjusted annually on the second day of January of each year at three percent above the 12nd Federal Reserve District discount rate. [10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

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

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

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Prejudgment Interest
Summary of Amendments

Section 19 amends the language in AS 09.30.070(a)
The amendment changes the interest rates on judgments and decrees from a set 10.5% a year to a floating rate of 3% above the federal discount rate in effect January 2nd of the year of the judgment. This rate is not used if a different rate has previously been agreed to by contract.

Federal discount rates have been as low as 1% (1942) and as high as 14% (1981). Allowing annual adjustments for prejudgment interest brings charges in line with the current market and prevents unfairly high or low rates.

Section 20 amends AS 09.30.070 by adding a subsection
The amendment eliminates interest charges on damages that have not been incurred at the time of the trial.

The purpose of prejudgment interest is to allow claimants reimbursement of funds that would normally have been in their possession plus any interest that amount could have earned prior to the trial. This is not the case in damages awarded for future losses as these sums can be invested and interest earned on the funds. Prejudgment interest is subject to federal income tax and attorney fee commission.

Section 21
House Bill No. 292

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

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

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Section 21
Summary of Amendment

Section 21: Amends the language in AS 09.55.535(k).

Amends the section on application of the Uniform Arbitration Act so that it applies to the statutes as listed after adoption of House Bill No. 292.

Section 25 of this bill calls for the repeal of AS 09.55.540 - 09.55.548 of the current Medical Malpractice Act..

Wrongful Death
House Bill No. 292

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

(c) Except as provided in AS 09.17.010 and (g) of this section, in [IN] fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

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

(2) loss of contributions for support;

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

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

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

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

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Wrongful Death
Summary of Amendment

Section 22: Amends the language in AS 09.55.580(c).

Section 22 legislates how courts or juries should fix awards in legal actions involving wrongful death. The content of this section has not been altered. The change explains that any exceptions to this statute are defined in AS 09.17.010 and section (g) below.

Reference Court Case: Gillespie v. Beta Construction and DOT Supreme Court Opinion No. 3904

Section 23: Adds a subsection to AS 09.55.580.

This section states that the award for economic loss is limited to $10,000 when the deceased is not survived by spouse, dependent children, or other dependents. This ensures the statute conforms with other legislation on cases of wrongful death and clearly defines "dependent."

Reference Court Case: Gillespie v. Beta Construction and DOT Supreme Court Opinion No. 3904

Costs and Attorney Fees
House Bill No. 292

Sec. 24. AS 09.60.10. COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY. The supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death, or property damage related to or arising out of fault. In this section, "fault" has the meaning given in AS 09.17.900.

Costs and Attorney Fees
Summary of Amendments

Section 24: This section limits the supreme court in setting up rules that govern the amount awarded to prevailing parties for attorney fees and costs in a civil action, including cases based on fault.

This section is intended to eliminate Rule 82, reduce litigation costs and court time, and streamline the civil process for expediency and fairness.

Civil Liability of Hospitals for Nonemployees
House Bill No. 292

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

Sec. 09.65.096. CIVIL LIABILITY OF HOSPITALS FOR NONEMPLOYEES.

(a) A hospital is not liable for civil damages as a result of an act or omission by a health care provider who is not an employee or actual agent of the hospital if the hospital provides notice that the health care provider is an independent contractor. The notice required by this subsection must be posted conspicuously in all admitting areas of the hospital, published at least annually in a newspaper of general circulation in the area, and must be in substantially the following form:

Notice of Limited Liability

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

(List specific health care providers)

The hospital is responsible for exercising reasonable care in granting staff privileges to practice in the hospital, for reviewing these privileges on a regular basis, and for taking appropriate steps to revoke or restrict privileges in appropriate circumstances. The hospital is not otherwise liable for the acts or omissions of a health care provider who is an independent contractor.

Civil Liability of Hospitals for Nonemployees
Summary of Amendments

The purpose of these amendments is to clarify the circumstances in which hospitals are held directly liable for the actions of health care providers not employed by the hospital. Current law permits claimants to sue only the hospital rather than the independent contractor who may have less ability to pay. Hospitals are held responsible for carefully selecting and monitoring independent contractors and for notifying the public which health care providers are independent contractors. However, since a hospital lacks direct authority over independent contractors, they cannot fairly be held civilly liable for damages caused solely by the actions or omissions of a contract worker.

Section 25: Adds a new section to AS 09.65

Hospitals are not liable for civil damages because of the actions or omissions by an independent contractor whenever the claim is only based on those actions, provided the hospital publishes which health care providers are independent contractors. A notice of limited liability must be posted in all admissions areas and published in area newspapers annually.

The hospital must also use caution and prudence in granting staff privileges to independent health care providers, have a review process to monitor independent contractors, and be prepared to revoke or restrict privileges when needed.

Civil Liability of Hospitals for Nonemployees
House Bill No. 292

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

(c) In this section,

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

(2) "hospital" has the meaning given in AS 18.20.130 and includes a governmentally owned or operated hospital.

Civil Liability of Hospitals for Nonemployees
Summary of Amendments

Hospitals are liable for civil damages if the hospital or hospital employees were negligent or acted with intentional misconduct.

The final amendment defines health care provider and hospital as the terms are used in this statute.

Reference Court Case: Jackson v. Powers
Supreme Court Opinion 3237

Sections 26 - 30
House Bill No. 292

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

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

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

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

Sec. 30. AS 09.60.010, as repealed and reenacted by sec. 24 of this Act, has the effect of amending Alaska Rule of Civil Procedure 82 by providing that attorney fees may not be awarded in a civil action for personal injury, death, or property damage, unless authorized by statute or by agreement of the parties.

Sections 26 - 30
Summary of Amendments

Section 26: Repeals the qualifiers on the cap on noneconomic damages, *Beulieu v Elliot*, and unifies the collateral source laws for medical related and other types of lawsuits.

Sections 27 - 30: Designates changes in the relevant Court rules made by sections 15, 18, 20, and 24 of House Bill No. 292.

Sections 31 - 33
House Bill No. 292

Sec. 31. SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of a provision of this Act to any person or circumstance is invalid, the remainder of this Act and the application to other persons shall not be affected.

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

Sec. 33. This Act takes effect July 1, 1994.

Sections 31 - 33
Summary of Amendments

Section 31: Ensures the integrity of the Act by preventing the entire content being invalidated because of special circumstances that apply to only part of the statute.

Sections 32 and 33: Specifies that the amendments apply to all legal actions on or after the effective date, regardless of whether the claim arises from an event prior to the passage of this bill.

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

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Abstract

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

Key words: tort reform, general liability insurance, medical malpractice

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

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

Table 1. Definition of legal reforms

Preexisting Reforms: A dummy variable that equals 1 if the state had one of the following liability reforms prior to 1985: modification of joint and several liability rules, provisions for structured or periodic payments, modification of dram shop rules, caps on punitive damages, and modifications to statute of limitations.

Modify Joint and Several Liability: A dummy variable that equals 1 if the state either abolished or modified the statute that allows an injured plaintiff to collect his entire award from any one defendant regardless of the defendant's assigned percentage of fault.

Limits on Liability: A dummy variable that equals 1 if the state enacted limits on liability awards or established immunities.

Limits on Noneconomic Damages: A dummy variable that equals 1 if the state set caps on the amount of noneconomic damages recoverable. Noneconomic damages are compensation for pain and suffering or mental anguish.

Limits on Punitive Damages: A dummy variable that equals 1 if the state set caps on the amount of punitive damages recoverable. Punitive damages are damages awarded over and above medical expenses or lost wages, where the wrong done to the plaintiff was aggravated by willful conduct of the defendant.

Other Reforms: A dummy variable that equals 1 if the state enacted at least one of the following reforms: provide for structured or periodic payments, modification of dram shop rules, modification to statute of limitations, limit attorney contingency fees, or modify the collateral source rule.

Reforms in 1985 (1986, 1987): A dummy variable that equals 1 if the state enacted at least one of the above-mentioned reforms in 1985 (1986, 1987).

market performance in 1988 differed from that in 1985, it was necessary to construct indicators of the liability regimes over that period. The first legal reform definition in table 1 pertains to reforms before the baseline year 1985. Did the state already have on the books a reform measure that was adopted by other states during the study period?

The next four legal reform definitions listed in table 1 address specific liability reform provisions contained in a number of state liability reform laws: modifications of joint and several liability, limits on liability awards, limits on noneconomic damages, and limits on punitive damages. These measures do not exhaust all the reforms that states undertook, but they are the individual measures that economic theory suggests would be most effective in limiting insurance costs. Other reform measures, though perhaps not inconsequential, are aggregated into a single variable, in part because there were so many.[6]

Tables 2a–2d provide a summary of the reform efforts undertaken in different years.[7] Table 2a shows the starting point in 1984, the year before the start of our study period. The most common statutory liability limitations are modifications of joint and several liability and limits on punitive damages, each of which had been adopted by roughly one fifth of all the states. Other liability limitations were much less common, with the most prevalent being the modification of dram shop rules.[8]

Table 2b summarizes the liability reforms that took place in 1985. As is indicated, very few states undertook any kind of reforms in that year; the amount of premiums affected by the liability reforms was less than 10% for all the cases listed in the table. Following the explosion in liability premiums in 1985, states became much more interested in liability reform in 1986 (table 2c). The most prominent of the 1986 measures were the modifications of joint and several liability rules adopted by 16 states, which composed more than half of all premiums for general liability and medical malpractice.[9] Three

CORRECTION

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Key words: tort reform, general liability insurance, medical malpractice

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

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

1. Insurance market performance and the impetus for liability reform

Liability insurance coverage pays claims that relate to tort litigation. In most situations, such claims are settled out of court.[1] From 1975 to 1979 the number of product liability cases in the federal courts rose fivefold, from 2,393 to 13,408. What was most impressive about this increase was not the fact that litigation increased, but rather that this increase was highly concentrated over a narrow time period. In particular, in the single year 1984 to 1985, there was an increase in litigation of 7,677 product liability cases in the federal courts to 12,507 cases.

Although litigation provides one indicator of trends in liability costs, the ultimate concern of corporations is the price tag associated with these claims. With general liability insurance, which includes liability for all injuries arising out of the property or manufacturing operations of firms, premiums rose from $3.1 billion in 1975 to $19.1 billion in 1988. More remarkable than this sixfold increase in premium levels over 13 years is that almost the entire increase in premiums was concentrated in a two-year period, as general liability premiums rose from $6.5 billion in 1984 to $11.5 billion in 1985 and $19.4 billion in 1986. Even this explosion in premiums probably understates the real increase in liability costs, because there is widespread evidence that insurance coverage was being denied altogether to some would-be insureds.

The rise of asbestos litigation and hazard warnings cases accounted for much of the increase in general liability insurance costs, but there was also substantial cost pressure in the medical malpractice area. Medical malpractice premiums escalated by 56% from 1984 to 1985 and an additional 26% from 1985 to 1986.[2] Put somewhat differently, this two-year period accounted for 62% of the total growth in medical malpractice premiums from 1981 to 1990.

Other lines of insurance experienced increases as well, but not so great as in the products liability and medical malpractice area. For example, the largest single year premium increase experienced in the past decade for commercial automobile insurance was the 25.6% rise in premiums from 1985 to 1986.[3]

Affected firms responded to this increase in liability costs by pressuring state legislatures to pass liability reform laws that would limit their insurance costs. The majority of states responded by enacting tort reform of some kind, though states differed significantly in the measures they implemented. States responded with reform legislation, despite a general lack of understanding about how the existing liability rules affected insurance markets or how specific reforms might change their performance.

Indeed, there was some skepticism about the ability of a state to affect insurance cost and availability, and about the relevance of liability rules in a particular state to insurance cost and availability within it. For example, some legal scholars have speculated that, irrespective of the liability statutes that are adopted in the particular state, the courts may simply adjust their interpretation of the standard so that the net effect of the statutory change will be minimal. Moreover, the insurance industry has traditionally placed little emphasis on state differences. In the case of product liability coverage, for example, ratemaking is done on a national basis rather than on a state basis because state differences are believed to be less important than the more systematic industry differences.[4]

Table 1. Definition of legal reforms

Preexisting Reforms: A dummy variable that equals 1 if the state had one of the following liability reforms prior to 1985: modification of joint and several liability rules, provisions for structured or periodic payments, modification of dram shop rules, caps on punitive damages, and modifications to statute of limitations.

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The next four legal reform definitions listed in table 1 address specific liability reform provisions contained in a number of state liability reform laws: modifications of joint and several liability, limits on liability awards, limits on noneconomic damages, and limits on punitive damages. These measures do not exhaust all the reforms that states undertook, but they are the individual measures that economic theory suggests would be most effective in limiting insurance costs. Other reform measures, though perhaps not inconsequential, are aggregated into a single variable, in part because there were so many.[6]

Tables 2a-2d provide a summary of the reform efforts undertaken in different years.[7] Table 2a shows the starting point in 1984, the year before the start of our study period. The most common statutory liability limitations are modifications of joint and several liability and limits on punitive damages, each of which had been adopted by roughly one fifth of all the states. Other liability limitations were much less common, with the most prevalent being the modification of dram shop rules.[8]

Table 2b summarizes the liability reforms that took place in 1985. As is indicated, very few states undertook any kind of reforms in that year; the amount of premiums affected by the liability reforms was less than 10% for all the cases listed in the table. Following the explosion in liability premiums in 1985, states became much more interested in liability reform in 1986 (table 2c). The most prominent of the 1986 measures were the modifications of joint and several liability rules adopted by 16 states, which composed more than half of all premiums for general liability and medical malpractice.[9] Three