

ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8916 SENATE JUDICIARY

A M E N D M E N T

Section 2. Statute of Repose

Page 4, line 3 after "intended":

Insert "unless otherwise provided by contract"

repose.5

A M E N D M E N T

Section 4. Statute of Limitations

Page 4, after line 20:

Add a new subsection:

"(c) With respect to actions for personal injury suffered by a child, this statute shall be tolled during the period of minority described in AS 09.10.140(a)."

statute.1

A M E N D M E N T

Section 4. Statute of Limitations

Page 4, line 20:

Following "law"

Insert "or to a claim against a third-party defendant to
assess a percentage of fault."

statute.2

A M E N D M E N T

Section 4. Statute of Limitations

Page 4, line 19:

Delete "shorter"

Insert "longer"

statute.3

A M E N D M E N T

Section 4. Statute of Limitations

Page 4, lines 19 through 20:

Delete all material.

statute.4

A M E N D M E N T

Section 5. Noneconomic Damages

page 5, line 25 following "section":

Insert ",unless as a result of one or more of the multiple injuries the claimant, over time, is injured to the extent described in (c), (A), (B), (C), (D), or (E)."

noneconomic.1

A M E N D M E N T

Section 5. Noneconomic Damages

Page 4, line 30:

Delete \$300,000

Insert \$1,000,000

Page 5, line 1:

Delete \$500,000

Insert \$5,000,000

noneconomic.2

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, line 12 after "damages":

Insert "It is the intention of the legislature that revenue received by the state under this section be appropriated for the purpose of consumer protection."

punitive.1

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, after line 8

Insert a new subsection to read:

"(d) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a corporation which, when the outrageous conduct occurred, paid the chief executive officer more than one million dollars per year in salary."

punitive.2

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, line 9:

Delete all of subsection (d).

punitive.3

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, after line 12

Add a new subsection:

"(e) The limit under (b) of this section does not apply to punitive damages awarded against a person who profited financially from the bad acts described in AS 09.17.020; in which case, punitive damages shall not exceed three times the amount of the profit made or reasonably estimated to be made from the bad acts, or \$300,000 whichever is greater."

punitive.4

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, after line 12

Insert a new subsection to read:

"(e) The limit under (b) of this section does not apply to punitive damages awarded by a court or jury against a defendant if the court or jury determines that the outrageous conduct involved an obviously high risk of serious bodily injury to a person."

punitive.5

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, lines 9 through 12

Delete all material.

Insert: "In a civil action in which punitive damages are plead, the claimant shall file with the court and serve on the Attorney General, within 60 days, a Notice of Claim of Punitive Damages. The Attorney General shall file a notice of election or rejection to join the punitive damage claim within 120 days. If the State joins the claim the court shall require that one-half of any punitive damages award be deposited into the general fund of the State. If the State joins the punitive damages claim, and the claimant is not the prevailing party, then the State shall pay one-half of the costs and attorney fees awarded against the claimant."

punitive.6

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, line 6

Delete "felony"

Insert "crime"

punitive.7

A M E N D M E N T

Sections 6 and 7. Punitive Damages

Page 6, lines 1 through 3

Delete all of subsection (b).

Insert a new subsection to read:

"(b) The amount of punitive damages awarded by a court or jury under (a) of this section shall be based on the individual facts and evidence presented to the court and shall be sufficient to deter wrongdoing and to protect the public interest."

punitive.8

A M E N D M E N T

Section 13. Offers of Judgment

Page 8, line 31 after "JUDGMENT":

Insert "(a)"

Page 9, following line 20:

Insert a new subsection to read:

"(b) This section does not apply if the offeree or the real party in interest is a minor."

offer.1

A M E N D M E N T

Section 13. Offers of Judgment

Page 8, line 31 after "JUDGMENT"

Insert "(a)"

Page 9, line 13, insert a new subsection to read:

"(b) This section does not apply if the offeree is sixty five or over, and application of the offer of judgment rule would bankrupt the offeree."

offer.2

A M E N D M E N T

Section 13. Offers of Judgment

Page 9, following line 20

Insert a new subsection to read:

"() This section does not apply if the attorney fees of the offeror are being paid by an insurance company."

offer.3

A M E N D M E N T

Section 13. Offers of Judgment

Page 8, following "JUDGMENT":

Insert a new subsection:

"(a)"

Page 9, following line 20:

Insert a new subsection:

"(b) A party's principal residence is exempt from execution under a judgment for costs and attorney's fees issued under this section."

offer.4

A M E N D M E N T

Section 13. Offers of Judgment

Page 9, line 13

Insert "This provision shall not apply in the event that the court rules that the rejection of the offer was reasonable, given the information available to the rejecting party at the time of the rejection."

offer.5

A M E N D M E N T

Section 13. Offers of Judgment

Page 9, line 10

delete "at least five percent less"

insert "not substantially more"

offer.6

A M E N D M E N T

Section 13. Offers of Judgment

Page 9, line 10

delete "at least five percent less"

insert "not substantially more"

Page 9, line 13, after "made"

insert "In this section "substantially" means an amount not less than 20% of the offer not accepted."

offer.7

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 158 (FIN) AM

Revision Date: 02/05/96
Title: Tort Reform

Dept. Affected: Alaska Court System
BRU: Trial Courts

Sponsor: Rep. Porter
Requestor: _____

Component: _____
COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES	3.0	3.0	3.0	3.0	3.0	3.0
TRAVEL						
CONTRACTUAL	7.9	7.9	7.9	7.9	7.9	7.9
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	11.0	11.0	11.0	11.0	11.0	11.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (
----------------------	--	--	--	--	--	--

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	11.0	11.0	11.0	11.0	11.0	11.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	11.0	11.0	11.0	11.0	11.0	11.0

Estimate of any current year (FY 96) cost: None

Positions

Full-Time						
Part-Time	1.0	1.0	1.0	1.0	1.0	1.0
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Agency: Alaska Court System

Phone: 264-8228
Date: 02/06/96

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System

Date: 02/06/96

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Alaska Court System
Fiscal Analysis
CSHB 158 (FIN) AM

CSHB 158 (Fin) am proposes numerous changes to that portion of the civil justice system which deals with personal injury and property damage. These changes are primarily intended to redistribute costs and risks associated with personal injury and property damage.

The Alaska Court System provides the primary forum in this state for the resolution of tort claims. The fiscal impact of the majority of these changes will be neutral or is impossible to reasonably predict. However, at least one of the proposed changes will have the effect of increasing the costs to the state of administering the tort system.

CSHB 158 (Fin) am repeals and reenacts AS 09.17.070, relating to collateral benefits. This amendment essentially provides that the amount which a defendant owes to a plaintiff will be reduced by whatever insurance benefits or other benefits the plaintiff has already received as compensation. Implementation will require extra trial time, in order for the jury to hear testimony regarding the types of coverage which might be involved, the amounts paid, and determining which payments may be offset. The current statute relating to collateral benefits is substantially less complex. Moreover, at the present time only the judge hears the testimony, and then only if the jury has returned a verdict for the plaintiff. The proposed system is thus less efficient and results in longer trials and more jury costs.

CSHB 158 (Fin) am can be expected to save some judicial costs by reducing the motion practice currently engaged in on issues which were not clearly resolved the last time tort laws were amended. The amount of savings is speculative, and this note assumes that it is offset by the longer trials and increased appeals that will result until the supreme court resolves issues created by the procedural and substantive changes made by CSHB 158 (Fin) am. In this regard, note that several of the pro-tort reform attorneys who testified in favor of HB 292 last session conceded that that bill would result in increased litigation for a period of years, until all the legal issues were resolved by appeals to the supreme court. One of these attorneys estimated the period of increased litigation at five to seven years.

This fiscal note makes the following assumptions:

In superior court in FY 94, there were 875 tort cases filed. Approximately 38 tort trials were held, with approximately 50 percent returning a verdict for plaintiff; there were approximately 47 tort cases decided by summary judgment, with all returning a verdict for the defendant; and there were approximately 38 default judgments entered, with all entered for the plaintiff. Determining collateral benefits will average one-half day of court time, including jury time. Time spent is discounted by two-thirds in default cases.

In district court in FY 94, there were 532 tort cases filed (other than small claims). Approximately 21 tort trials were held; approximately 26 tort cases were decided by summary judgment; and approximately 21 default judgments were entered. Because of the lower dollar value of cases, not as much time will be invested by litigants in determining collateral benefits; it is assumed that one-half as much court time will be used. District court jury costs are also less, because half as many jurors are used.

Alaska Court System
Fiscal Analysis
CSHB 158 (FIN) AM

Personal Services

<u>Position</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Pro Tem Judge, fully vested, Anchorage, PPT, 1 month	\$2,013	\$1,028	\$3,041

Contractual Services

Jury Fees 7,925

Superior Court-

38 - 1/2 day length collateral benefit hearings with 13 jurors at \$12.50 a half day (from trials)

6,175

District Court-

20 - 1/2 day length collateral benefit hearings with 7 jurors at \$12.50 a half day (from trials)

1,750

Estimated Total Cost

\$10,966

Alaskans for Liability Reform

RECEIVED

APR 15 1996

Ans'd.....

Memo

To: Legislators
From: Alaskans for Liability Reform
Date: April 9, 1996

Enclosed is a copy of a report we received on Punitive Damages.

BRIEFING



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The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings

By Steven Hayward[†]

HIGHLIGHTS:

- This study offers new data on the frequency and the effects of punitive damages, based on a detailed review of more than 1000 lawsuits filed and concluded in San Francisco County Superior Court.
- Punitive damages are demanded in 27 percent of all cases where they are conceivably recoverable.
- Lawsuit filing data show that business and government defendants are four times as likely as an individual defendant to face a lawsuit that demands punitive damages.
- Lawsuits that include punitive damage demands take one-third longer to resolve than suits without these demands. The average lawsuit in our 1000 case sample took 15 months to resolve; cases with punitive damage demands took an average of 21 months to resolve.

[†] Steven Hayward is vice president, research for the Pacific Research Institute. William S. Loughman, an attorney and senior fellow in legal studies for the Pacific Research Institute, conducted the research into lawsuit filings.

- Punitive damage demands play a significant role in the out-of-court settlement process, where the vast majority of lawsuits are settled. Punitive damage demands tilt the playing field in favor of demanding parties, and increase out-of-court settlement amounts.
- Studies of punitive damage jury verdicts have been interpreted to suggest that the risk of receiving an adverse punitive damage judgment is remote. Closer scrutiny of the data, we argue, will show that the probability of punitive damage awards is vastly understated by these studies, in part because the data have been improperly qualified.

Introduction

The controversy over punitive damages in civil litigation has centered around the number of punitive damage awards, and the dollar amounts of such awards. Comprehensive data on this issue are scarce because there is no complete statistical database of trial verdicts. However, we believe that the focus of research on the number of punitive damage verdicts is misplaced to some extent. Focusing only on trial verdicts understates the scope and nature of the problem because the overwhelming majority of all lawsuits are resolved out of court. According to surveys of lawsuits, less than 2 percent of all cases go to trial. Looking only at the 2 percent of cases that reach a jury is like looking only at the visible tip of a large iceberg: it ignores the larger unseen part below the water line that may do more harm. Thus, to argue that punitive damage awards are rare is to miss an obvious point: *jury verdicts of any kind are rare*. No one would say, however, that because jury verdicts are rare, lawsuits themselves are insignificant or costless. Yet this is the inference that has been drawn from various punitive damage studies that focus only on trial verdicts.¹

The right question to ask about the civil litigation process is: *what is occurring in the other 98 percent of cases that are resolved out-of-court?* Because 98 percent of cases are resolved out of court, it is important for researchers and for public policy makers to understand what is going on in these cases, and how the legal rules, including the relative probability of punitive damages, affect the outcomes of the negotiation process for out-of-court settlements.

A large proportion of lawsuits today include punitive damage demands. Because 98 percent of lawsuits are resolved out-of-court, an important threshold question to answer is: *Do punitive damage demands in lawsuit filings have a significant effect on the out-of-court settlement process?*

¹ For example, the recent federal Department of Justice estimates of civil suit verdicts in state courts, discussed below, generated numerous newspaper headlines to the effect that "punitive damages are rarely awarded."

In an attempt to shed light on this question, the Pacific Research Institute conducted a detailed examination of more than 1000 lawsuit filings in San Francisco County Superior Court. We conclude that punitive damages are used as a weapon to generate more favorable out-of-court settlements, especially against business and government defendants.

What Lawsuit Filings Data Tell Us

Most punitive damage studies focus on verdicts in the handful of cases that proceed to trial. There are no empirical studies that examine how often, and against whom, punitive damage demands are employed.

In an attempt to shed light on these issues, we have scrutinized a month's worth of lawsuits filed between January 2, 1991 and February 1, 1991 in the Civil Division of the California Superior Court for the County of San Francisco. There were 1,024 lawsuits filed in this venue during this time period. Our analysis seeks to determine what patterns exist with respect to the distribution of claims for punitive damages and statutorily mandated multiple damages. We reviewed each case to determine the type of case, the principal cause of action claimed, whether punitive damages were demanded, how the case was resolved, and how long it took to resolve. We picked cases from 1991 because over 98 percent of cases from this time period had been resolved, either by trial, settlement, or dismissal, so most could be traced out to their conclusion. (A complete description of the methodology used in surveying and classifying these cases is available upon request.)

The highlights of the analysis of these cases include:

- 78 percent of all punitive damage demands were filed against a business defendant. (See Figure 1 below.)
- Government defendants face punitive demands in more than one-third of lawsuits filed against government agencies. (See Table 1 below.)
- Lawsuits that include punitive damage demands take about six months longer to resolve than lawsuits that do not include punitive damage demands.
- The probability of a punitive damage award if a case proceeds to trial is 14 percent or higher. For business defendants, the probability is more than 20 percent.

HB

158

(File 2)

465-3922

Dear S. Taylor —

Attached is a mark up
position paper

re the collateral benefits

part of the Tort reforms

Will call if any
questions! Thanks

for all your help!

— M

LAW OFFICES

Michael J. Schneider, P.C.

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ANCHORAGE, ALASKA 99501

FACSIMILE COVER SHEET

TO: Senator Taylor

FIRM: _____

DATE: 5/4/95

FAX: 465-3922 PHONE: _____

RE: _____

FROM: Mike Schneider

CLIENT NAME: _____ CLIENT NO. _____

COMMENTS: _____

TOTAL NO. OF PAGES (INCLUDING COVER SHEET): 4

Contact Karolynn at 277-9306 if all pages are not received.

Section ¹³ 21

COLLATERAL BENEFITS

History and Current Law Regarding the Collateral Source Rule

The "Collateral Source Rule" prevents introducing evidence about the injured plaintiff's right to workers' compensation benefits or other insurance proceeds paid for by the injured party before the injury. The rule was based on the principal that a wrongdoer is not entitled to have their liability reduced merely because the injured victim was fortunate enough to have received compensation for their injuries or expenses from a "collateral source" such as workers' compensation or private insurance. It was further assumed that the jury, if it were to find out about such receipts, would be improperly influenced in evaluating both liability and damages. The collateral source rule in this form was applied in Alaska courts since before statehood, but was formally adopted by the Alaska Supreme Court thirty years ago in Ridgeway v. North Star Terminal and Stevedoring Co., 378 P.2d 647 (Alaska 1963). The 1976 legislature changed the collateral source rule as applied in medical malpractice cases. See AS 09.55.548. Ten years later, in 1986, the legislature adopted AS 09.17.070 regarding collateral benefits. That bill made it virtually impossible for an injured victim to ever "collect twice" by allowing the defendant to present evidence of collateral benefits received by the plaintiff that the plaintiff did not have to repay because of a subrogation clause. The plaintiff's award would be reduced if these collateral source benefits exceeded plaintiff's attorney's fees and costs in bringing the action. This statute was applicable to all cases other than malpractice cases and is the current law.

How the Current Law Works

No cases have been found where a plaintiff's award has been reduced under current law because plaintiffs virtually never receive a "double recovery." They almost always must repay their insurance carriers because of "subrogation clauses" in their insurance contracts. The litigation process is almost never a "break even" experience for injured victims. In a rare instance where a plaintiff obtains a double recovery, the current law would make such a recovery impossible by allowing the court to reduce the damage award.

The Proposed Law: HB ¹⁵⁸ 292, Section 13

This legislation interferes with the right to contract (most particularly between insurance consumers and insurance companies) by eliminating subrogation rights.¹ It places upon an injured victim who has exhibited the social responsibility and forethought to acquire insurance against catastrophic loss the

¹ This is the intent of the bill. However, with medical and disability insurance provided as an employee benefit (most coverage is provided in this fashion) cannot be effected by state law. Injured Alaskans are therefore certain to have their claims "double dipped".

burden of funding the litigation, while at the same time depriving the plaintiff and plaintiff's insurer of damages actually suffered as a result of the injury. Juries will be prejudiced and confused by this information. The court system will pay the price of prolonging virtually every trial because of this bill.

Hypothetical Case

John Reckless owns a semi tractor and operates it as the owner/operator. John has a drinking problem. John gets into his semi truck, gets drunk, and crashes into a vehicle operated by Joe Plaintiff. Joe Plaintiff is seriously injured and permanently disabled. Joe loses his job, loses his house because of his inability to make house payments, and can no longer work at his occupation. Joe has, however, had the foresight to acquire disability and medical insurance. Joe's medical bills are \$150,000.00, and he is receiving a disability income check as he retrains for future employment.

He and his attorney will have to fight over the amount of probable future benefits from both the medical policy and the disability policy. See Subsection (a). The jury will hear that Joe has received a good deal of money and may thus be confused about whether or not he is entitled to more and the extent and nature of his injuries. Unfairly, the jury won't hear about the extent of Reckless' insurance coverage.

Joe's insurance companies aren't very happy either. While they assumed a certain risk in insuring Joe, they have now parted with \$150,000.00 in medical bills and thousands of dollars of disability payments. They have no subrogation claim against Joe's recovery under subsection (d) of this bill.

Because the collateral benefits are no longer recoverable, the potential benefit to Joe and his attorney are dramatically reduced. In cases where liability is difficult, or other aspects of the case make it problematic, Joe may be without recourse against this wrongdoer. The wrongdoer and the wrongdoer's insurance company have received the benefit of Joe's forethought and expense in procuring insurance while the public pays for a longer, more confusing, more expensive trial.

Conclusion

The current law on collateral benefits is much more restrictive than rules in other states and completely eliminates the possibility of any "double recovery" by the plaintiff. Further invasions of victims' rights benefit only wrongdoers and their insurance companies. The bill is bad public policy. It injures innocent insurance concerns just as it harms plaintiffs.

c:\docs\secl4.pos

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Kneeland Taylor
James J. Hanlon

May 4, 1995

Senator Robin Taylor

By fax: 465-3922

Dear Senator Taylor:

I just reviewed the most recent tort "reform" bill, i.e. CS FOR HOUSE BILL NO. 158 (FIN). I have been following it, and I remain deeply concerned.

I am a registered Republican. I ran for the House in 1980 and now practice law. About 1/3 of my practice is plaintiffs' work, while the rest is litigation oriented.

I am sickened to see that the tort "reform" bill still includes provisions apportioning fault to non-parties. [Sections 11 and 12]. I believe these sections will cause plaintiffs to drag more people into court so that defense counsel cannot point to empty chairs.

It is true that if Sections 11 and 12 remain in the tort "reform" bill, life will be more difficult for plaintiffs' lawyers. That is the goal of the business interests that support it. But Sections 11 & 12 will make life more difficult for Alaskans such as doctors, engineers, and other working people.

Let me give you an example of an accident I witnessed. A reckless driver in a pick up truck crossed the center line of the Seward Highway and crashed head-on into a van driven by a man, his wife, and two young boys. The woman died instantly and the two young boys survived. The vehicle was opened with the "jaws of death", and the man extracted, still alive. The man was kept alive for several hours through the heroic efforts of the rescue workers, passing motorists, including a doctor "good Samaritan", and various doctors at Humana. The man eventually died at Humana Hospital, with the immediate cause being (I believe) accumulated blood within his chest cavity. A risky procedure involving punching a hole in his chest at the accident site might have saved his life, but was not attempted.

The driver of the pick-up truck walked away uninjured. I saw that. I assume that he had liability insurance, and that a claim was eventually made by the two orphaned boys.

Under present law, the auto insurance lawyer representing the pick-up driver will need to sue the doctors, and rescue workers and

bring them into the case if he/she is to blame the doctors and rescue workers for "malpractice". The auto insurance lawyer will not do so, however, since the claim against the doctors and rescue workers is frivolous.

If Sections 11 and 12 are enacted, the auto insurance lawyer will not need to bring the doctors and rescue workers into the case in order to blame them. The auto insurance lawyer can blame whoever he/she wishes without them being there.

That is good for auto insurance lawyers and auto insurance companies. But it is bad for doctors and ordinary Alabamans. It is bad because plaintiffs will have no choice but to sue doctors and other relatively innocent persons every time a defense lawyer indicates in an interrogatory response that the defendant is blaming someone else for an accident. The plaintiff will have no choice because the plaintiff will need the doctor (or other innocent) in court to explain to the jury that the auto insurance lawyer is wrong.

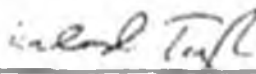
I was at the accident scene described above, and I heard the cries of the two orphaned boys. It is very distressing to me that a majority of our Legislature (not you, thank God) feels that the system is too harsh to the driver of the pickup who orphaned the two boys. If I had been elected to the Legislature, I would support a variety of measures to make the system compel greater responsibility (and/or punishment) for people who kill on our highways.

But I accept the political reality, which is that a majority in the Legislature wants to be more lenient to those who negligently kill and maim. I accept it because I understand the rationale; namely that there is a widespread belief that there is much frivolous litigation.

But what I do not accept is the idea that in the name of tort "reform" the Legislature is about to stimulate the filing of frivolous claims. And that is what sections 11 and 12 will do.

In conclusion, I strongly urge you to seek amendment of the bill that will remove the provisions of Sections 11 and 12 which allow juries to apportion fault to non-parties. If not amended, the Legislature will have created procedural nightmares in numerous cases, which will stimulate litigation, insurance costs, etc.

Finally, I want to thank you in advance for your support for sensible legislation in this area. I also want to thank you for holding hearings which I have been told will be fair.


Kneeland Taylor

**AKPIRG****ALASKA PUBLIC INTEREST RESEARCH GROUP**

Post Office Box 101093 / Anchorage, Alaska 99510-1093

(907) 278-3661 FAX (907) 278-9300

To: State Senator Robin Taylor
From: Stephen Conn, Executive Director
Subject: Tort bill SB 158
May 3, 1995

AkPIRG supports your decision to seek additional testimony and review of SB 158 during the interim and not to rush to judgment. The public has been subjected to a debate by anecdote which in no way deals with the implications of destroying the privatized policing of our market place without consideration of the alternatives: no policing or socialization of the process. It takes courage to stand firm against the pressures to destroy the system without creating an alternative to the tort system.

In previous testimony before House and Senate committees, I have noted that proponents of tort reform have not made their case either for previous reforms or the new round of proposed changes. I suggested that the task be delegated to the Alaska Judicial Council, an academic think tank or to a legislative task force.

In what is the first analysis of a public policy issue ever performed, this month's issue of Consumer Reports deals with lawsuit reform. I hope you will share this unbiased report with your colleagues. Many Alaskans look to Consumer Reports as a valuable guide to the market place.

NewsWatch

Starting this month, we will be reporting in this space on the many new initiatives—in the courts, in the states, and in Congress—that may have major impacts on the American consumer. We begin with tort

reform, an emotionally charged issue that, as the Wall Street Journal recently observed, has degenerated into a "duel of...deserving polls, studies and 'horror stories' that aren't always what they seem."

Is lawsuit reform good for consumers?

In February 1992, 79-year-old Stella Liebeck of Albuquerque spilled scalding coffee in her lap after leaving the take-out window at McDonald's. She sued the fast-food chain, and a jury awarded her \$2.7 million in punitive damages.

The Liebeck case has been cited again and again in the current legislative battle over tort reform. ("Tort" is a legal term covering claims for personal injury, medical malpractice, and defective products.) As part of the Contract With America, Republican lawmakers have advanced a series of bills that would cap punitive damages, discourage "frivolous" lawsuits, and protect drug companies from suits involving approved drugs.

At first glance these seem like laudable goals. But, as a closer look at the Liebeck case makes clear, the issue is more complicated.

What tort-reform advocates don't point out is that Liebeck was hospitalized for eight days with third-degree burns over 6 percent of her body. They don't reveal that at the time Liebeck was burned, McDonald's already faced more than 700 claims from people also scalded by coffee there. Nor do they mention that McDonald's served its coffee at 180° to 190° F, considerably hotter than other fast-food restaurants.

Liebeck tried to settle her claim for \$20,000, but McDonald's refused. After the initial multimillion-dollar jury award, the trial court reduced the punitive award to \$480,000. Liebeck ended up accepting a settlement for an undisclosed sum.

As of this writing, Congress is considering several legislative proposals to change the American civil justice system. In the area of product liability, many of the proposed changes under consideration would tip the scales of justice against consumers. Here are some of those proposals:

☐ **Punitive damage caps.** A key provision of a tort-reform bill that passed the House of Representatives in March would cap punitive damages at \$250,000, or three times the amount awarded the plaintiff for economic injury, whichever is greater. (Economic injury includes lost wages and medical expenses.)

For all the fuss about punitive damage awards, such awards are very rare. Nationwide, punitive damages were

awarded in product-liability cases only 355 times during the 25-year period from 1965 to 1990—or an average of 14 a year. That's even though consumer products, not including automobiles, are responsible for an estimated 29,000 deaths and 30 million injuries each year. Nor are product-liability cases "clogging the courts," as some allege. Tort filings represent only 9 percent of the courts' civil cases, and only 4 percent of that number are product-liability cases.

Punitive damages are intended to punish egregious corporate wrongdoing and to deter further consumer injuries. Indeed, there is evidence that punitive damages do make products safer. In nearly 80 percent of product-liability cases that resulted in punitive damages, the manufacturers subsequently took safety measures to prevent additional lawsuits. In one case, for example, a company that continued to sell a step ladder with braces it knew to be inadequate redesigned the ladder only after losing a product-liability suit and incurring punitive damages. The cap on punitive damages would, in effect, allow manufacturers simply to budget for future fines as a cost of doing business, significantly reducing the law's previous incentives for them to make products safer.

☐ **Pain-and-suffering caps.** A related provision in the bill that passed the House would cap pain-and-suffering awards in lawsuits involving doctors, hospitals, medical devices, and drugs at \$250,000—an amount that would vastly undercompensate consumers injured by medical negligence or unreasonably dangerous drugs.

☐ **"Loser pays" provisions.** In the name of discouraging frivolous lawsuits, Republican lawmakers initially proposed a "loser pays" system that would have required the losing party to pay the winner's legal fees. That provision was later modified to what could be called an "even if you win, you lose" provision. The modified version that passed the House

of Representatives stipulates, for example, that if an injured consumer chooses to go to trial rather than accept a settlement offer, he or she could be forced to pay the defendant's attorney's fees and costs if the jury ultimately awards a sum less than the settlement offer.

Obviously, many injured consumers would not be willing to accept the financial risk of going to trial under such a rule. Only the very poor, who would have nothing to lose, and the very rich, who could afford to lose, would be likely to press their cases. The huge majority of Americans would, in effect, be gambling their life savings if they chose to pursue a case after being offered a low-ball settlement.

☐ **The FDA defense.** Under proposed legislation, manufacturers of defective or unreasonably dangerous drugs and medical devices would be shielded from punitive damages if their products had been approved by the U.S. Food and Drug Administration. Though the FDA has been vigilant in protecting the American consumer's interests in recent years, the data it reviews before a drug or device is marketed don't always show every problem. Some approved drugs and devices ultimately have proved dangerous, such as the *Dalkon Shield* intrauterine device and *Versed*, a sedative.

The irony, of course, is that the very political forces that want drug and

medical-device makers off the hook once their products receive FDA approval have also been seeking to make it more difficult for the agency to police the marketplace. The likely result if this legislation becomes law would be a double blow for American consumers: weaker oversight by the FDA and little legal recourse if a drug or medical device harms them.

Though the tort-reform debate appears to be about frivolous lawsuits, what it's really about is corporate responsibility. In the end, the most important question will be who—if anyone—can be held accountable when an American consumer is killed, injured, or debilitated through no fault of their own.



A closer look at the now-famous case of the woman who sued McDonald's over scalding coffee shows the issue of tort reform is not what some lawmakers would have you believe.



- P.O. Box 73398
- 600 Driveway St.
- Fairbanks,
- Alaska 99707

- Telephone
(907) 452-1181
- FAX #
(907) 451-6188

May 4, 1995

To: Senators

From: Richard J. Gregory
 President of: Sourdough Express, Inc.
 Borealis Moving & Storage, Inc.
 Greatland Leasing, Inc.
 Sourdough Properties, Inc.

Re: HB 158 Tort (Liability) Reform

Please support HB 158. This bill would reduce the costs associated with the civil justice system, match losses with compensation, create equitable distribution of the cost and risk of injury and much more necessary areas of reform.

Sincerely,

Richard J. Gregory

May 5, 1995

Senator Robin Taylor, Chairman
Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

HB 158

I am opposed to HB 158 especially punitive damages, noneconomic damages, and period payments.

A noneconomic damage cap of \$300,000 would not deter Ford, Exxon, or McDonald's to make changes. The few corporations that are responsible for wrongdoing or personal injury need an incentive to keep the products they make and the services they offer safe.

Punitive damages may not be awarded unless the judge rules there is clear and convincing evidence the wrongdoer has acted outrageously.

- Judges rarely rule for punitive damages. In Alaska, punitive damages have been awarded less than once each year since statehood. (Attorney Tim Dooley, Anchorage—279-7327.)
- Alaska personal injury verdicts currently average 8.1% below national verdict values (Personal Injury Verdict Survey, Alaska Edition 1991)
- The jury listens to all the facts then decides the penalty. The jury consists of 12 Alaskans who make a fair and impartial decision that will deter the wrongdoer from outrageous acts in the future.
- A \$300,000 punitive damage cap will not deter the few companies who are wrong doers to maintain safety in the goods they produce and services they offer.

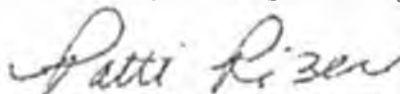
Periodic Payments benefit the wrongdoer only.

- When a victim has taken the time, money, and physical and mental effort to take a wrongdoer to court, when the case is over, it should be over. Prolonging a relationship with the wrongdoer of the tragedy is unfair to the victim.
- Victims usually spend a great deal of money and time during the court process. They often need to pay large debts when the case is over. Periodic payments may hurt the victim even more financially.

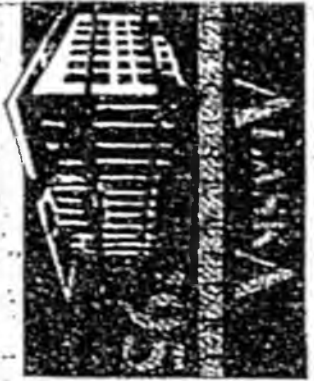
I have been a victim. My son died while skiing at Seibu Corporation's Alyeska Resort December 8, 1991. The ski resort had no written missing person procedures. A ski liability bill, whose major sponsor was Seibu Corporation, was introduced in 1992 and passed in 1994. This bill mandates written missing person procedures in the Operating Plans of all Alaska ski resorts. However, Seibu's 1994-95 Operating Plans **DO NOT** contain these procedures and other requirements of the new law. This is the situation where a \$300,000 penalty will not promote safety.

Most companies in Alaska produce safe goods and services. But the few who are guilty of outrageous acts need to be punished. Why is the legislature trying to protect these wrongdoers?

Please vote no on HB 158.



Patti Rizer • 5530 Rabbit Creek Road • Anchorage, AK 99516
345-1743 (phone) • 345-5212 (fax)



Liability

limits bill hits wall

Senator vows to hold hearings on reform

By RALPH THOMAS
Daily News reporter

JUNEAU — A bill to revamp Alaska's civil liability laws probably won't go any further this year after Republican Sen. Rob. Taylor shared it.

The Wrangell lawyer is among the most vocal critics of the measure, which would greatly limit people's ability to sue negligent doctors and builders.

After the bill passed the House last week, Republican leaders had indicated they might try to steer it around its most obvious destination — the Senate Judiciary Committee, chaired by Taylor. As chairman, Taylor alone could sit on the bill.

Earlier this week, however, Senate President Drue Pearce sent the bill to Taylor's committee. Taylor said it was referred to him only after he agreed to hold a series of hearings before the legislature reconvenes next year.

Though he's making no promises, Taylor said he likely will let the measure

Please see Page B-2, TONT

Some thing in House Judiciary + House Finance.

Liability bill hits snag in Taylor's committee; senator promises hearings

damage claims. or er- at h is s en- ily at got en- the al



Taylor

ity that they lean up their act." r is pushing the ility reform — or arm — legislation lf of a broad coal- professionals rang- s doctors and archi- o-engineers—and ors. Trial lawyers ling the effort to

kill the bill. Porter and his supporters argue the state's existing liability laws are unfair and leave doctors and businesses under the constant threat of expensive and often frivolous lawsuits. Such suits, they contend, clog the courts and help drive up the cost of liability insurance. During Wednesday's hearing, Loper said plaintiffs are frequently over-compensated by juries. When Taylor asked for statistics showing that, she said she would have to get back to him. Taylor and other tort reform foes say Porter's bill would tilt the justice system in favor of negligent

professionals, at the expense of their victims. Under Porter's bill, contractors who construct defective buildings would be shielded from damage claims after eight years. Likewise, doctors who cause injuries or misdiagnose diseases couldn't be sued if the error goes undiscovered for eight years. People could make a claim beyond the eight years only if they could prove there was gross negligence or fraud, or that the error had been covered up. Current law gives a victim 15 years to file a lawsuit in construction cases, but there are no time limits for other types of cases.

The time-limit provisions in Porter's bill do not apply to defective products. Others provisions of the bill would: • In most cases, limit to \$300,000 the amount a jury can award in "non-economic damages" to compensate for pain and suffering. • Limit punitive damages to \$300,000, or three times what was awarded in economic damages, whichever is greater. Half of any such awards would have to be given to the state and could only be collected if the plaintiff proves there was "outrageous conduct, including acts done with malice or bad motives." Taylor said he would try

to hold more hearings before the legislature adjourns this month. He said he also plans to hold several hearings around the state during the summer and fall. Taylor refused to say whether he would let the bill out of his committee, but he pointed out that the other 11 Republicans in the Senate majority could pull the bill away from him at any time. Even if the bill clears the Senate next year, it would still have to get past Democratic Gov. Tony Knowles. The governor's chief lobbyist said last week the administration "firmly opposed" the measure.

TORT: Liability limits l

Continued from Page B-1

out of his committee next year.

Rep. Brian Porter, House Bill 158's chief sponsor, said he would rather have seen it go to some other committee. "But you do what you have to do," said Porter, R-Anchorage.

Taylor held an initial hearing Wednesday to review the bill. For more than two hours, Taylor grilled Porter aide Daniela Loper on nearly every one of the measure's provisions. Taylor, who said he has fought numerous medical malpractice cases, seemed particularly agitated about sections protecting doctors and hospitals

from damage cl:

Taylor said afterward that

such claims have been

"the only thing that ever got

the attention of the

medical community

Porter is pro civil liability reform

on behalf of a

tion of professionals from doctors to engineers to contractors. They are leading the

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ing from doctor-

to—engine-

contractors. They

are leading the

May 5, 1995

To: Robin Taylor

Fr: Patti Rizer

FYI.

There seem to be no statistics about these "large, common punitive damages" in Alaska. The research of Jim Dooley in Alaska shows about 1 punitive damage award a year (these are ^{statewide} the ones that did not get overturned). Jim also said only 3 are more than \$1 million.

Jim is an attorney in Anchorage, and he attends the ^{HBI 58} hearings. He was on hand to hear you "grill" Daniel Lopez. Are some people really dumb, or are they just ignorant? Obviously they have never been a victim.

If there is anything I can do to help squash this bill, please let me know.

DILLON & FINDLEY, P.C.
510 "L" Street, Suite 603
Anchorage, AK 99501
Phone: (907) 277-5400
Fax: (907) 277-9896

FACSIMILE

Date: 5/5/95

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465 3922

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PLEASE DELIVER TO: Senator Robin Taylor

Document(s): Letter from Ray R. Brown re: comments on HB 158, section 17 & 13

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May 5, 1995

VIA FAX # 465-3922

Senator Robin Taylor, Chairman
Senate Judiciary
State Capitol
Juneau, AK 99801-1182

Re: Comments on HB 158, Sections 17 & 18

Dear Senator Taylor:

It is my understanding that you had some concerns or questions regarding sections 17 and 18 of HB 158. Although much of the grossly offensive language was deleted by amendment, problems still remain.

First, section 17 effectively amends ARE 702 (a) by establishing limited and specific foundational requirements for expert witnesses in the area of medical malpractice. Since the trial court would be precluded from allowing an otherwise well qualified expert to testify under this provision, the rule of evidence (in these limited cases) has been usurped. I don't believe that this particular section (as amended) passed by the requisite two-thirds majority so it is probably void ab initio.

Even assuming that the section as amended does not change or usurp ARE 702 (a), it is still somewhat problematic.

First, it eliminates certain health care practitioners from testifying in cases where board certification is unnecessary. That is, many well qualified medical doctors are not board certified in any particular area. Under this provision, a General Practitioner who routinely sets broken bones could not testify against an Orthopedic Surgeon no matter how bad he or she bungled a routine procedure. Taken to its logical extreme, an argument could be made under this section to preclude a Neurologist from testifying against an Orthopedic Surgeon even though the issue in question dealt with neurological damage caused by an orthopedic procedure. While the neurologist could testify as to the neurological damage, he or she could not testify as to the standard of care regardless of the degree of deviation.

Senator Robin Taylor
May 5, 1995
Page 2

What the drafters are trying to do is to force a match-up of Orthopedists to Orthopedists and Gynecologists to Gynecologists. This is an effective way to significantly limit the pool of available experts due to inter-disciplinary loyalty.

I have always been concerned with section 18, but much of the language was gutted from the originally proposed statute by amendment. Nonetheless, I remain skeptical of this new definition of "professional negligence". First, there is no reason to redefine "professional negligence" for health care providers. Second, it limits professional negligence to health care providers who are rendering "professional services". This could effectively eliminate those health care providers who are used and paid as consultants such as on-call specialists or other persons who are not directly rendering the health care.

Regarding "professional services" I remain skeptical as to the purpose for the inclusion of this definition. Under the original section, it was included in language immunizing doctors (or other health care providers) if they operated outside the scope of their licensing requirements. Fortunately, it was so blatantly offensive that it was amended out by stipulation. There is no purpose to leave this definition in the section as amended other than to further underscore the legislative intent to overrule Jackson v. Powers under section 19.

I hope that this answers any questions which you might have regarding these two sections. I would be more than happy to address other problematic sections under this bill and will make myself available at your convenience. In the meantime, thank you for your continued fight against such bad public policy. Your help is greatly appreciated.

Yours very truly,



Ray R. Brown

RRB:eh

ant11\cay1r505.12r

LAW OFFICES OF
FRIEDMAN, RUBIN & WHITE

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Jeffrey K. Rubin
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Michael N. White
John A. Bernitz

James H. McComas, Of Counsel

H. Don Taylor, Senator
for Robin Taylor
State Capitol
Juneau, AK 99801-1184

1227 West 9th Avenue, Suite 201
Anchorage, Alaska 99501
(907) 258-0704
Telex: (907) 278-6449

May 9, 1995

By FAX to: 465-3922

RE: Tort Reform

Dear Senator Taylor:

For every frivolous lawsuit filed by a greedy plaintiff, there is at least one frivolous defense to a meritorious lawsuit. Accordingly, I would like to suggest the following amendment to the current tort reform bill under consideration:

1. If a defendant is found to have raised frivolous defenses to a lawsuit, the defendant shall pay an amount equal to its defense costs, one-half of which shall be paid to the plaintiff, and one-half of which shall be paid to the state.

2. There shall be a rebuttable presumption that a defense was frivolous if the plaintiff prevails in the lawsuit.

Sincerely,


Jeffrey A. Friedman

JAF:mg

X

P.O. Box 230029
Anchorage, Alaska 99523
(907) 346-3611 or 346-2474
May 8, 1995

Post-It™ Fax No. 7671	Date 5/8/95	# of pages 2
To Senator Robin Taylor	From J. J. [unclear]	
Co/Dept.	Co.	
Phone #.	Phone # 346 3611	
Fax # 465 3922	Fax # 346 2474	

Senator Robin Taylor
Chairman of the Senate Judiciary Committee
State House
Juneau, Alaska FAX 465-3922

Dear Senator:

RE: House Bill 158

I discovered that the Russians really don't have a word for "insurance." Thus, they use a Russian word which translates into the English word "fear." The backers of HB 158 are fear-mongering once again with half-truths and mistruths to the public.

INSURANCE COMPANY PROPAGANDA:

- *The high cost of malpractice insurance is linked to the high volume of medical malpractice suits.*

FACTS:

- *Less than one dozen jury verdicts have been won by plaintiffs in medical malpractice suits since Statehood!*
- *Less than ten medical malpractice cases are tried each year in Alaska. (Court System)*
- *The Alaska Medical Association refers 30 or less cases to medical malpractice panels each year. (Alaska Medical Association)*

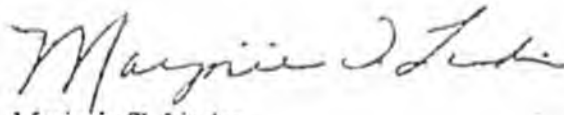
Besides doctors, the insurance industry is holding other professionals, contractors, and businesses hostage with high rates that are warranted mainly by the industry's greed, rather than the true risks. What rip-off artists! The real culprits in rate escalation are the insurance companies, not catastrophically injured people who are trying to collect their just due.

Senator Robin Taylor
May 8, 1995
Page - 2 -

HB 158 does not address the avarice of the insurance industry. It chooses to pick on the little guys instead of making insurance companies accountable for their high profits, fancy offices, executive salaries, and perks.

**PLEASE VOTE AGAINST THIS "INSURANCE COMPANY BABY", HOUSE
BILL 158!**

Yours truly,



Marjorie T. Linder

Alaska Telecom, Inc.

P.O. Box 110541
Anchorage, Alaska 99511
(907) 344-1223
(907) 344-1612 (Fax)

Charge Code:

Facsimile Cover Sheet

Date: May 4, 1995

Pages Following: 0

To: Senator Robin Taylor

Fax Number: 465-3922

From: Lloyd Morris


Subject: HB 158

I wish to voice my support for *HB 158 Tort Reform*.

Alaskan Business and Citizens need laws that put in better balance the intents of our legal system and abolish the abuses. I believe *HB 158* is working in this direction.

I urge you to support this Bill.

Cordially



Lloyd V. Morris

LVM:bmh

MAY - 7 - 95 SUN 13:56 JENSEN
CAROL JENSEN
4800 E. 112th Avenue
Anchorage, Alaska 99516-1612
(907) 346-3321

P. 01

May 7, 1995

To: Senate Judiciary Committee

RE: HB 158

*Please distribute
to all members
of Cmte.*

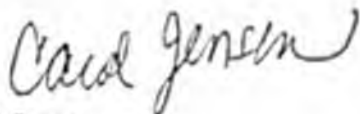
I am opposed to this bill, but my messages to legislators have apparently been ignored. I'm sure I am not alone in my opposition.

This is a strong anti-consumer, anti-public bill. It protects the guilty while further punishing the innocent victims. I agree that some lawsuits are frivolous. However, these could be eliminated by passing legislation to the effect that "a reasonable degree of negligence or error must be shown before a damage lawsuit can be initiated" and caps put on damage awards. This would go a long way toward reforming the system and eliminate the "spilled hot coffee at MacDonalds" type of lawsuits.

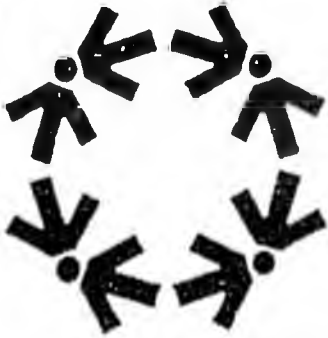
On the other hand, a great many lawsuits, especially involving death and dismemberment due to a negligent or poor quality doctor, or poorly designed building, toy etc. are legitimate and victims should be compensated for loss of wages, medical costs and punitive damages for themselves and their families. Otherwise, you have an open invitation for professionals that are trusted by the public to be negligent and careless, knowing that the law protects their actions. They may end up hurting scores of innocent people. Ill effects of exposure to certain procedures or chemicals are not always known until many years later. The guilty party or parties should be held accountable no matter how long it takes the effects to surface.

The Congress is already hard at work to pass legislation similar to Rep. Porter's. I don't think the State Legislature should waste anymore time on this.

Thank you,



Carol Jensen



AKPIRG

ALASKA PUBLIC INTEREST RESEARCH GROUP

Post Office Box 101093 / Anchorage, Alaska 99510-1093

(907) 278-3661 FAX (907) 278-9300

April 4, 1995

Governor Tony Knowles and Members of the Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 158 - The So-Called "Tort Reform" Bill.

Dear Governor Knowles, and Members of the Legislature:

I have reviewed House Bill 158 at the request of the Alaska Public Interest Research Group. The provisions of this bill are nothing short of radical. Their effect will be to unjustifiably punish ordinary citizens. The bill's provisions, whatever their intentions, in fact are harmful to citizens who have been victims of injustice. That is, the bill punishes people who file just and valid lawsuits; it punishes people who have played by the rules, and who have pursued only legitimate grievances. At the same time, it benefits wrongdoers, insurance companies who do not wish to pay valid claims, and the attorneys who represent these special and usually wealthy interests. For example, the punitive damages provision subsidizes and protects wrongdoers who not only cause injury, but who do so "maliciously". This bill is ill-advised. By subsidizing wrongdoers at the expense of the innocent public, HB 158 will ensure that citizens live in a less just, less safe, and less desirable society.

The playing field in this nation's state and federal courts is already tilted in favor of wealthy defendants. HB 158, if enacted, will only make the process for those who seek justice, but are of average and low incomes, more hazardous and difficult than it already is. Alaska has a proud tradition of protecting its citizens. It has passed comprehensive hazardous substance laws, and has enacted laudable civil rights laws. HB 158 departs from this tradition. I have reviewed this bill in detail, and summarize some, but not all, of my concerns in the attached memorandum.

I urge that you oppose passage of this bill. I would ask that you work instead on measures that: 1) provide for equal access to the courts for Alaskans of average and low incomes, and, 2) protect the public's health and safety. HB 158 undermines both of those goals.

Sincerely,

Ralph Nader
P.O. Box 19312
Washington, DC 20036
202-387-8014

MEMORANDUM

To: Governor Knowles and Members of the Alaska State Senate and House of Representatives.

From: Ralph Nader

Re: Summary of Concerns About HB 158.

Date: April 4, 1995.

I have reviewed HB 158, and highlighted some of my concerns about this bill below.

1. IMMUNITY FROM SUIT AFTER EIGHT YEARS: Section 2 of HB 158 would lock the courthouse doors to innocent citizens who have been hurt by the carelessness of others. It does so by preventing them from seeking justice by a date in advance of the time they suffer pain, or should have learned that they have suffered injury. Section 2 proposes an eight-year "statute of repose." The statute would allow some wrongdoers full immunity from suit provided that their misconduct and errors do not cause discoverable injuries within the first eight years of their conduct. Thus, children rendered sterile by a physician's malpractice; movie-goers injured by a negligently-designed roof that collapses eight years and one month after the theater was constructed; and families forced to litigate against aggressive outsiders because a lawyer negligently drafted a will ten years previously would have absolutely no recourse against the people that were paid good money for their bad work in prior years. Examples of injuries that are not discovered, or which do not develop within eight years of a defendant's misconduct include cancers, birth defects, and other serious maladies.

HB 158's radical eight-year cutoff puts all Alaskans at risk that they will be seriously injured and have no rights to seek compensation from those whose misconduct caused their plight by letting wrongdoers off the hook after eight years. The law currently provides a deterrent effect that causes people to act responsibly, and with the interest of public safety in mind. Section 2 will encourage wrongdoers, by immunizing them for their misconduct, to increasingly act without regard to the public interest, and the public's health and safety.

2. RENDERING THOSE WITH THE MOST POWER IMMUNE FROM PUNISHMENT: Sections 6 and 7 would limit punitive damages to \$300,000 or three times compensatory damages. Currently punitive damages are allowed only to punish people found, by "clear and convincing" evidence, to have engaged in outrageous or malicious conduct, either intentionally or recklessly. Such people and businesses are not deserving of a state subsidy. It is outrageous that the Legislature would pass a law to protect these people.

The arbitrary cap on punitive damages effectively renders the wealthiest individual and corporate actors immune from meaningful punishment. Under the proposed law, any entity that

can afford to occasionally pay (when and if it gets caught) \$300,000 or three times compensatory damages, can afford to behave recklessly toward or to intentionally hurt Alaskans. This section, like others, immunizes those least deserving of protection for their gross misconduct, and invites them to increasingly act without regard to the public interest, and the public's health and safety.

3. SHUTTING THE COURTHOUSE DOORS TO ALL BUT THE WEALTHIEST ALASKANS: Section 14 of HB 158 makes a small, but significant change to an existing rule that would make filing suit too financially risky for any but the most affluent Alaskans. The current "Offer of Judgment" rule allows a person who makes a reasonable settlement offer a moderate award if he or she does better at trial than the amount of his or her offer. Section 14 would allow the person offering settlement their **full costs and attorney fees** if they managed at trial to beat, even by one dollar, their offer. Given that corporate attorneys charge in the range of \$160 - \$225 per hour for their work, this provision will result in attorney fee awards of hundreds of thousands of dollars to wrongdoers.

The proposed change would turn litigation, already expensive and risky, into a game of "Russian Roulette." Most litigation lasts well over one year; often two or three years elapse between the filing of the complaint and trial. An Alaskan of moderate income cannot afford to pay an insurance company's lawyer or lawyers for three years of litigation bills if his or her lawyer guesses wrong about what the jury will do with the damages portion of the case.

For example, consider a person whose back is badly injured by a toxic and defective product, or in a car wreck that was not his fault. Prior to the injury, the person had started a new job as a maintenance mechanic and had worked there for two weeks. He has three children and equity in a home. He files suit against the person who caused his injury. The savvy insurance company makes an offer of judgment of \$30,000, which, by rule, is open for 10 days. The injured worker does not yet know how long he will be off work or if his new job will be waiting for him when the doctor releases him to work. He does not know what his medical bills will be or what his long-term prognosis will be. He is afraid that \$30,000 will not cover his damages. However, his lawyer tells him that if he goes to trial and gets one penny less than \$30,000, he will now be liable to pay an attorney's fee that could well exceed \$100,000. If he is of ordinary means, he cannot afford to expose his family to the risk of that kind of liability. He is forced to accept the insurance company's offer.

It is the rule rather than the exception that damages cannot be fixed with certainty. Given this, Section 14 will in the broad run of cases force people to settle for pennies on the dollar for their injuries. This will in almost all cases ensure that citizens recover much less than full compensation for their injuries. It will, again, eradicate the current deterrent effect of the law such that wrongdoers will see it in their financial interest to cut corners, and act irresponsibly.

4. NO GRACE PERIOD FOR CHILDREN: Currently, Alaska law protects children from having to file a lawsuit until after they reach the age of 18. Section 4 of HB 158 would require children to become litigants within two years of suffering an injury, or be forever barred

from bringing suit. Section 4 would expose already injured children to the rigors of cross-examination and trial. It would put the parents or guardians of these children under enormous pressure to avoid asserting their child's rights to avoid further traumatizing their child.

5. ARBITRARY LIMITS FOR THE MOST SERIOUSLY INJURED: Section 5 of HB 158 would cap damages for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and loss of consortium to \$300,000. The cap would be raised to \$500,000 for quadriplegics, or those suffering permanent loss of a limb or permanent loss of cognitive ability.

This bill hurts the most gravely injured Alaskans. It hits hard at those who need the right to seek justice the most. This section damages only the most seriously injured - and only the people who have suffered the most injustice. Again, it acts as a subsidy to wrongdoers, and encourages conduct that places the public's health and safety at risk. An example illustrates the inequities of this section. Consider a teenage girl who suffers a broken leg in a bad car accident. She will likely receive full and fair compensation for her minor pain and suffering, loss of time from sports and school, etc. However, her friend and fellow passenger suffers a mutilated face, a crushed pelvis (rendering her an unlikely candidate for childbirth), and severely impaired and lacerated hands in the same accident. This friend, whose entire life has been horribly altered, is arbitrarily limited to \$300,000 in damages (minus court deposition costs, witness costs, exhibit costs, and attorney's fees) for pain and suffering, physical impairment and loss of enjoyment of life that will last throughout her lifetime.

Limiting loss of consortium to \$300,000 is grossly unfair to the survivors of deceased family members who worked inside the home or who lived a rural subsistence lifestyle. The two children of a doctor who is killed in an accident will be handsomely compensated for a large lost stream of income. The six children of a stay-at-home mom or a subsistence provider will be limited by an arbitrary, and often inadequate cap on damages, as these deceased parents, under HB 158, were producing no "traditional" monetary income.

CONCLUSION: The changes proposed by HB 158 arbitrarily benefit the wealthiest entities at the expense of smaller Alaskan businesses and hard-working citizens. This memorandum highlights some of the more drastic of these proposals: the one that protects those who maliciously, intentionally or recklessly hurt Alaskans; the one that caps recovery for the most severely injured Alaskans; the one that offers immunity to those wrongdoers lucky enough to have their errors go undetected for eight years; the one that requires Alaskan children to become litigants; and the one that would force any Alaskan of average or above-average means to accept early low-ball settlement offers from insurance companies to avoid the risk of bankruptcy.

HB 158 cloaks dangerous, harmful policies with misleading rhetoric. The real goals of tort reform, are not fairness, predictability, and equal access to the court system. Instead the civil justice system in Alaska could be seriously damaged by the cruel measures proposed in HB 158 by the defendants' lobby. I urge you to help expose these dangers in HB 158 and to work to defeat it.

FAX

Date

Number of pages including cover sheet

2

TO: *Senator Taylor*

FROM:

Friedman, Rubin & White
1227 W. 9th Avenue,
Suite 21
Anchorage, AK 99501

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Fax Phone

Phone 907-258-0704

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CC:

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Ex-Tort Reformer's Son Carries on the Fight

His father was an insurance lobbyist but had a change of heart before he died.

BY ANDREW DEUM
Illustration by Bob D'Amico

BEHIND THE OTION abstract tort reform battle human tales of pain and suffering, and for one Indiana family—the family of the late Frank Cornelius—the debate has hit home with particular force.

Mr. Cornelius was once a lobbyist for Indiana's insurance companies, promoting change to the state's tort system. Then, after a series of mishaps left him in a wheelchair, he became a vocal anti-tort reform advocate. He died March 1, 1990, as the state legislature in Indiana and the Congress in Washington, D.C., moved ahead on tort reform bills. His son has taken up the fight against limiting the victims' rights.

Mr. Cornelius, who wrote and talked extensively about the evils of tort reform, said he had firsthand knowledge from both sides of the debate. As a lobbyist for the Insurance Institute of Indiana, he claimed that in 1975 he had helped pass what was then one of the nation's first tort reform bills, one that capped total damages in medical malpractice at \$500,000.

But in the early 1980s, after the mishaps left 75 seriously injured, he became as tough a foe of reform as any trial lawyer. He wrote numerous guest columns for newspapers, worked with unions groups in several states and allied with John Nader's Public Citizen to testify against Indiana tort reform.

After his death at age 50, his son, Todd, decided to take up his father's legacy. He has testified against a new tort reform bill before the Indiana legislature, worked with the Indiana Trial Lawyers Association and expressed an interest in sitting tort reform efforts at the federal level.

Todd told legislators his father turned his back on tort reform. "The only thing tort reform helps is the insurance companies and big business at the expense of people like my dad—and our family,"

the younger Mr. Cornelius said. "My father said, 'Nobody has to die sometime—but not everybody has to go through what I've been through.'"

In his testimony before Indiana lawmakers, Todd Cornelius also handed out a posthumous statement from his father, said the late Mr. Cornelius, who worked a regulator and also took phone calls 24 hours a day. "I have a unique perspective. I used to be a lobbyist for the insurance industry of Indiana. This legislation is bad. It will keep innocent people like myself from suing lawyers for injuries or it will make it extremely difficult to prove cases."

Todd said until the advent of everyday litigators, litigants had their day in court. Mr. Cornelius said, "I learned the hard way that I made other lawyers learn the way I did."

Knee Injury

According to Todd, Mr. Cornelius hurt his knee in 1989, had arthroscopic surgery and contracted the degenerative nervous disorder spasm as reflex sympathetic dystrophy. He called his doctor, who had gone missing, and was told to wait for his return to schedule an appointment. It was too late. He underwent physical therapy. But the therapist misread instructions on a machine and sent a jolt of electricity through his leg, rendering the disorder intractable.

In 1990, Mr. Cornelius had surgery to install a liver into his leg for blood clots. Doctors used the wrong instrument and punctured several holes in the vein from his leg to his heart. "My father should have died in death to his wife not called for help," said Todd. "A physician trying to save his life punctured his lung."

The \$500,000 malpractice cap, Mr. Cornelius claim some cases had been raised to \$750,000 but was still insufficient for someone with his needs. Under that law, "medical negligence was responsible for the first \$500,000. The rest was covered by a medical malpractice

policy more than \$5 million, he told reporters. He sued a hospital and physical therapist and settled for 100,000, the highest amount allowed under the law he had helped get enacted. He also settled a products liability suit for 5100,000. In another products suit he sued, a judge ruled Feb. 17 for summary judgment for two defendants, *Cornelius v. Bank Inc.*, 89001-9205 P0866 (Super. Ct., Marion Co.).

The current Indiana tort reform package, which passed the state House and deadlocked 5-3 on April 3 in a Senate committee, has four provisions: bringing comparative fault into products liability cases for the first time, a loser pays provision with a ceiling of \$1,000, a punitive damages cap of three times compensatory damages, of which 75 percent goes to a state fund, and a government standards defense.

'Rude Awakening'

Though the current state proposals are not specific to medical issues, Mr. Cornelius said the bill covers a wide range of products liability issues and, he noted, an allegedly defective product was a factor in his father's injuries. Said the younger Mr. Cornelius, 25, a theology student, "Once Dad passed away I decided since he would not do it someone needed to tell his story and I was the only one in the family willing to do it."



Comment: After an injury led to grave disorders, Frank Cornelius became an ardent critic of tort reform.

CAUSE AT A GLANCE

VENUE: Hearts and minds of Indiana legislators and public

PROTAGONISTS: Frank Cornelius, deceased; Todd Cornelius, neophyte lobbyist

STAKES (SHORT-TERM): Further tort reform initiatives in the state

STAKES (LONG-TERM): Federal tort reform legislation and plaintiffs' access to the courts

SUMMARY: Erstwhile tort reformer Frank Cornelius is injured, his treatment lead to a conversion, Mr. Cornelius turns into a plaintiffs' advocate but dies. His son

Mr. Borman, assistant director of the Indiana Trial Lawyers and director of the Hoosier Alliance for Consumer Rights, applauds Todd's efforts, despite his inexperience. "He's never done this before," said Mr. Borman, noting that for a newcomer to legislative battles seeing votes on political grounds rather than the merits can be hard to take. "It's a rude awakening."

Mr. Borman said he had not heard of the elder Mr. Cornelius until a 1990 Indianapolis Star series on medical malpractice, the two finally met about 13 months ago, when Mr. Cornelius' anti-tort reform efforts kicked into high gear. By that time, he was working with the National Center for Patients Rights, which hooded him up with Mr. Nader's Public Citizen for testimony in Congress last year on medical malpractice, said Pamela Gilbert, former director of Public Citizen's Congress Watch.

Mr. Borman isn't sure of the ultimate effect of the elder Mr. Cornelius' activities. "He sensitized the public to what the real impact of these types of [reforms] can have on victims and their families," said Mr. Borman. "Did he change votes? I don't know. Did he make people realize what caps do? Yeah, I think so."

No Overall Cap?

But American Tort Reform Association President Sherman Joyce, whose group has long pushed for state reforms, pointed out that the bill Mr. Cornelius said he helped pass and later blasted was not the kind ATRA has lobbied for.

"We focus on non-economic damages as opposed to an overall cap," he said. The model that ATRA embraces is based on California's Medical Injury Compensation Reform Act of 1975, which set a cap of \$250,000 on non-economic damages in medical liability cases but allowed for a better payment of future medical costs without a cap.

"His situation was tragic," said Mr. Joyce.

Said if he was concerned about the impact of the younger Mr. Cornelius on the debate in Indiana, Mr. Joyce said, "I'm not close enough to make a judgment. We understand legislative efforts are under way in Indiana, and Mr. Cornelius is free to express himself to make his case."

Adele Lash, a spokeswoman for the Indiana State Medical Association, said she was not familiar with the details of the Cornelius saga, except for what she saw in local news coverage. But she added, "We still think that our law works and has worked for the last 20 years."

Parting Shot

But the exact role of Mr. Cornelius in helping enact the law he came to loathe was called into question by his former employer, the Insurance Institute of Indiana. The group's president, Stephen Williams, said Mr. Cornelius lobbied for the association but the institute did not have an active role in that specific legislative debate.

"This is no negative reflection on Frank," said Mr. Williams. "That is the way things worked back then." He added that he noticed Mr. Cornelius claimed he had a key role in passage of the medical malpractice act. "That's not true," he said, adding that it was more of a team effort.

Mr. Williams went on to say he could not speculate on Mr. Cornelius' true motives in his campaign against tort reform.

Todd Cornelius said every state representative he has spoken to so far remembered his father's role in lobbying for the bill. "He did have a lot to do with it," said the younger Mr. Cornelius, noting he is not surprised the insurance industry is distancing itself. "Big business says what is good for them and will make them feel good."

The trial lawyers Mr. Borman acknowledged it may be true no one fully remembers who did what 20 years ago except for anecdotal recollections, but that is beside the point.

"It is highly ironic that a guy who worked in that position at the time got injured later and then phylogenetically switched," said Mr. Borman. "Frank changed his belief because of what happened to him personally."

In one of his guest columns, Mr. Cornelius issued a parting shot to the injurers he said he both helped create and suffered from. "Medical negligence cannot be reduced simply by restricting legal rights," he said.

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Tragedy Alters Lobbyist's Views

Damages capped for tort reformer injured by malpractice

While a lobbyist for the insurance industry, Frank Cornelius helped push through legislation that rewrote tort law in Indiana. The medical malpractice legislation that was passed in 1975 came at the dawn of the tort reform movement, and included a cap on damages associated with several such laws.

Cornelius, 49, has lived to rue his role in that legislation, speaking out through op-ed pieces and interviews.

"I think tort reform as we know it is totally bad," he said. "We have a judicial system that I found quite adequate if allowed to function its own way."

Knee Surgery Gone Awry

What changed Cornelius' mind on tort reform was a series of nightmarish incidents beginning in February 1989 when he underwent arthroscopic surgery on his knee.

After returning home he began experiencing pain and made several calls to his doctor who, he reports, told him to get a bedpan and then left on a skiing trip. The pain did not subside, and consultation with another doctor showed he was suffering from a degenerative nerve disorder often caused by trauma or infection resulting from surgery.

This was only the beginning. During physical therapy his condition was complicated by receiving an electric shock when a therapist misread instructions on a medical device. In August 1990, a doctor using the wrong instrument left holes in the main vein of Cornelius' leg. Still another doctor punctured Cornelius' left lung while trying to save his life.

As a result, Cornelius uses a wheelchair and needs a respirator to breathe. He has been told he has about two years to live. He claims his medical costs and lost wages amount to more than \$5 million.

Cornelius sued the hospital and physical therapist, settling for \$500,000, which was the total amount of damages allowable for a single malpractice incident under legislation he helped get passed. The limit has since been raised to \$750,000.

He also has settled a product liability suit for \$100,000 and receives workers compensation. After subtracting attorney fees, Cornelius estimates he has netted close to \$400,000 in damages.

He acknowledges there is an aspect of poetic justice in his fate. But he adds, "If

there is a God, and I believe there is, what happened to me has a purpose. It changed my way of thinking and looking at things."

It obviously has changed his way of thinking on tort reform. In an Oct. 7 article in *The New York Times*, Cornelius writes: "Medical negligence cannot be reduced simply by restricting consumers' legal rights. That will happen only when the medical industry begins to effectively police its own."

Sherman Joyce, president of the American Tort Reform Association (ATRA), said of Cornelius' situation: "Obviously this is very unfortunate. I suspect it is not typical."

He said Indiana made a "good faith" effort to deal with rising medical costs in the late 1970s by placing limits on liability.

"In defense of this statute it is important that one single incident not be used to demonstrate its unfairness," Joyce said. "You can probably find a single incident under any circumstances."

Nonetheless, the reforms pushed by ATRA are not as harsh as Indiana's early legislation. The group doesn't support a limit on economic damages but does support caps on noneconomic damages like pain and suffering. "We just want balanced and fair rules," Joyce said.

—Henry J. Reske



Frank Cornelius

Alaska State Legislature

Sen. Robin Taylor, Chairman
Sen. Lyda Green, Vice Chairman
Sen. Mike Miller
Sen. Al Adams
Sen. Johnny Ellis



State Capitol
Juneau, Alaska 99801-1182
(907) 465-3717
Fax: (907) 465-3922

Senate Judiciary Committee MEMORANDUM

TO: Members of the 19th Alaska State Legislature

FROM: Senator Robin L. Taylor *RLT*

DATE: April 27, 1995

RE: Tort Reform

Product Liability Suits brought by grieving members of families left behind have encouraged this type of responsible behavior by companies like Bernzomatic. IN 33 YEARS OVER 40 CARBON MONOXIDE POISONING DEATHS HAVE BEEN ASSOCIATED WITH THE USE OF THIS HEATER.

SAFETY WARNING

Bernzomatic Portable Heater Recall

Bernzomatic repeats its recall of its 30-year-old Model TX900 & TX900A portable Gas Radiant Heaters due to the risk of Carbon Monoxide Poisoning.

Stop Using This Heater!

Carbon Monoxide is an odorless and colorless gas - you can't see or smell it, but it can cause serious injury or death. Over 40 Carbon Monoxide poisoning deaths have occurred since 1962 in association with the use of the heater in poorly ventilated areas. The most recent occurred in 1994. The company believes that some of the original 38,000 heaters may still be in homes, garages, camping areas, etc.

Bernzomatic will refund \$250.00 for each Bernzomatic Model TX900 or TX900A heater that is returned to Bernzomatic. Check your heater today to see if it meets the description below. If it does, call Bernzomatic immediately. 1-800-625-7811 (8:00 a.m. - 4:30 p.m. EST Monday - Friday)

The heater is housed in a green metal cabinet approximately 3 inches wide x 14 inches high x 7 inches deep with room inside for one or two 18" or propane gas cylinders. The name Bernzomatic appears on the front of the heater. The name Bernzomatic, the model number TX900 or TX900A and the description Portable Gas Radiant Heater appear on the instructions on the inner side of the rear door.



BERNZOMATIC

Without Product Liability Suits there will be no reason for companies to take responsible action to stop the careless killing of innocent people.

Are you sure you understand TORT REFORM?

Tim and Barb Dooley
643 "O" Street
Anchorage, Alaska
99501
(907) 274-7068

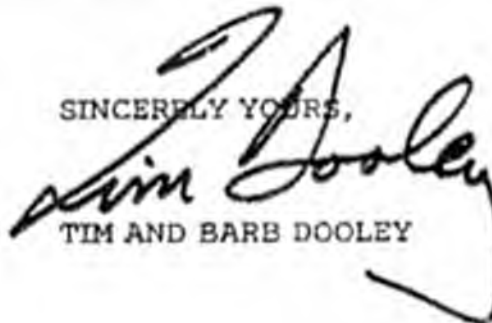
DEAR SENATOR:

SUBJECT: PLEASE VOTE AGAINST THE TORT "REFORM" BILL

WE ARE LIFELONG REPUBLICANS, BUT WE ARE ASHAMED THAT THE
REPUBLICAN PARTY IS PUSHING THE TORT "REFORM" BILL. WHY WOULD
YOU WANT TO LIMIT PUNITIVE DAMAGES TO ONLY \$300,000 AGAINST
SOMEONE WHOM A JURY HAS FOUND HAS ACTED INTENTIONALLY,
MALICIOUSLY, AND OUTRAGEOUSLY? REP. PORTER SAYS THIS BILL
PROTECTS BUSINESS. ARE YOU REALLY PROTECTING BUSINESS? SMALL
BUSINESS? WHY DO YOU WANT A BUSINESS OPERATING THAT A JURY HAS
FOUND HAS ACTED INTENTIONALLY, MALICIOUSLY, AND OUTRAGEOUSLY?
WHY WOULD THIS BE GOOD FOR ALASKANS?

IF A CIVIL LAWSUIT WAS BROUGHT AGAINST THE OKLAHOMA
TERRORISTS, THIS BILL WOULD LIMIT THE PUNITIVE DAMAGES AGAINST
THEM TO ONLY \$300,000. (OR REQUIRE INDIVIDUAL LAWSUITS BY SEVERAL
HUNDRED PLAINTIFFS AND THUS CLOG THE COURTS.) THIS IS AN IDIOT'S
BILL. PLEASE VOTE AGAINST THIS BILL!

SINCERELY YOURS,


TIM AND BARB DOOLEY

RECEIVED MAR 17 1995

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CLIFFORD H. SMITH
DENNIS L. McCARTY

Facsimile
(907) 225-6441

VIA FACSIMILE 907-465-3922

March 16, 1995

Senator Robin Taylor
State Capitol, Room 30
Juneau, Alaska 99801-1182

*File
Tort Reform*

Dear Robin:

I thought I would give you my thoughts about the tort reform legislation.

First off, for myself and the rest of the Ketchikan Bar Association, we would like to thank you for your efforts to forestall the effort to pass this legislation.

Secondly, I understand that you are under a great deal of pressure from your Republican colleagues to not block the bills this time around. I also understand how you might feel alone in your efforts and you might wonder if the effort is worth it.

As you know, I am conservative and so are many of the other members of the K.B.A. However, I know of none of the members who support this effort for change. The reasons for this are numerous but some are apparent. The lower part of Southeast Alaska is a blue-collar community. It is composed of loggers, fishermen, construction workers and miners, the very population base that would be most hurt and affected by this legislation. These are the people who have dangerous jobs and occupations. These are also your constituents. You have a conservative base but it is blue-collar conservatism, not fat cat Anchorage conservatism. In addition, most of the K.B.A. members and yourself have experience with claims and have dealt with insurance companies. If we believe that this legislation will benefit anyone or anything other than their respective pocket books, I have some extra swampland in Florida to sell the folks of Alaska.

One last purely political observation. You will never be defeated by a Democrat because you voted against and stopped this from happening to the good people of Alaska.

CLIFFORD H. SMITH

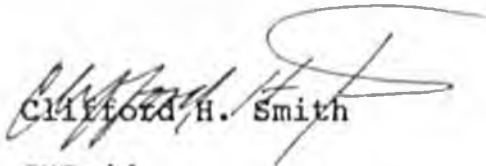
A Professional Corporation

Senator Robin Taylor
March 16, 1995
Page 2

Keep up the good work and you are not alone.

Remember Cliff Taro supported Campbell.

Yours truly,


Clifford H. Smith

CHS:jd

cc: Rick Friedman
Debra Gravo

FAX

TRANSMITTAL

To: SENATOR ROBIN TAYLOR

Fax No. 907-465-3922 Date: 3/16/95

From: CLIFFORD H. SMITH

File No. _____ Operator: jd

Pages: 3 (Including Cover Sheet)

Documents sent: Letter dated 3/16/95

Original to follow via: mail no original to follow

Message:

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Second error at hospital leads to death

The Associated Press

TAMPA, Fla. — The same hospital where a surgeon amputated the wrong leg of a patient is acknowledging another mistake — two weeks later — that led to the death of a 77-year-old man.

Leo Alfonso died March 3 after a respiratory technician at University Community Hospital mistakenly removed his ventilator.

Alfonso died less than an hour later, though health care workers tried for 30 minutes to revive him.

The employee should have checked the patient's identity visually, by speaking to him, by reading his chart and by checking his identification.

The hospital said the worker, who has been employed for 2½ years, has a clean record. She was suspended.

On Feb. 20, a surgeon at the hospital amputated a diabetic man's left leg below the knee, though it was his right leg that was supposed to have been removed.

University Community Hospital blamed the amputation mistake on a communication breakdown.

Crushed by My Own Reform

By Frank Cornelius

In 1975, I helped persuade the Indiana Legislature to pass what was acclaimed as a pioneering reform of the medical malpractice laws: a \$500,000 cap on damage awards, and elimination of all damages for pain and suffering. I argued successfully that such limits would reduce health care costs and encourage physicians to stay in Indiana — the same sort of arguments that now underpin the medical industry's call for national malpractice reform.

Today, from my wheelchair, I rue that accomplishment. Here is my story.

On Feb. 22, 1989, I underwent routine arthroscopic surgery after injuring my left knee in a fall. The day I left the hospital, I experienced a great deal of pain and called the surgeon several times. He called back the next day and told my wife to get me a bedpan. He then left on a skiing trip. I sought out another surgeon, who immediately diagnosed my condition as reflex sympathetic dystrophy — a degenerative nervous disorder brought on by trauma or infection, often during surgery.

A few months later, when a physical therapist improperly read the instructions on a medical device, I received a tremendous current of electricity through my left leg. This seriously complicated my condition.

In August 1990, another physician proposed a medical procedure, but used the wrong instrument; that left me with several holes in the vena cava, the main vein from the legs to the heart. I would have bled to death in my room if my wife had not come to see me that evening and called for help. As another physician tried to save my life, he punctured my left lung.

The cost of this cascading series of medical debacles is painful to tally:

- I am confined to a wheelchair and need a respirator to keep breathing. I have not been able to work.
- I have continuous physical pain

Frank Cornelius is a former lobbyist whose clients included the Insurance Institute of Indiana.

in my legs and feet, prompting my doctor to hook me up to an apparatus that drips morphine. My pain used to rate a 10 on a scale of 1 to 10. Now it's about a 4.

• Twice, I have received last rites from my church.

• My marriage is ending, and the emotional fallout on our five children has been difficult to witness, to say the least.

• At the age of 49, I am told that I have less than two years to live.

My medical expenses and lost wages, projected to retirement age if I should live that long, come to more than \$5 million. Claims against the hospital and physical therapist have been settled for a total of \$500,000 — the limit on damages for a single incident of malpractice. The Legislature has since raised that cap to \$750,000, and I may be able to collect some extra damages if I can sue

I lobbied for limits on malpractice suits. Now I'm sorry.

those responsible for the August-1990 incident that nearly killed me. But apparently because of bureaucratic inertia, the state medical review panel that certifies such claims has yet to act on mine.

The kicker, of course, is that I fought to enact the very law that limits my compensation. All my suffering might have been worthwhile, on some cosmic scale, if the law had accomplished its stated purpose. But it hasn't.

Indiana's health care costs increased 139.4 percent from 1980 to 1990 — just about the national average. The state ranked 32d in per capita health care spending in 1990 — the same as in 1980.

It's understandable that the damage cap has done nothing to curb health care spending; the two have almost nothing to do with each other. In 1992, the Congressional Budget

HEALTH CARE SECOND OPINIONS

An occasional series.

Office reported that medical malpractice litigation accounted for less than 1 percent of total health care spending. I doubt that the percentage in Indiana is much different.

Proponents of Indiana's damage cap argue that doctors here pay less for malpractice insurance than their colleagues in other states. What they don't say is that malpractice premiums are artificially low because insurers need to offer only \$100,000 of coverage. Negligently injured patients who are entitled to more than \$100,000 must look to Indiana's state-run excess compensation fund.

Because that fund is supported by a surcharge on doctors, the true cost of malpractice insurance in Indiana can be calculated only by adding premiums and surcharges together. And the surcharge for the compensation fund has ballooned.

Doctors and insurers have spent millions propagating the myth that America is awash in unjustified malpractice suits and crazy jury verdicts. And apparently they have captured the attention of the President and Congress: malpractice damage caps were part of many health care measures in Congress this year, and they are sure to be back when the issue resurfaces in the next session.

The prospect that these "reforms" will be enacted is frightening. Make no mistake, damage caps are arbitrary, wholly disregarding the nature of the injury and the pain experienced by the plaintiff. They make it harder to seek and recover compensation for medical injuries; extend unwarranted special protection to the medical industry; and remove the only effective deterrent to negligent medical care, since the medical profession has never done an effective job of disciplining negligent doctors.

Medical negligence cannot be reduced simply by restricting consumers' legal rights. That will happen only when the medical industry begins to effectively police its own. I don't expect to live to see that day. I

New York Times, Oct. 7, 1994

Juries Are Just Saying No

By Russell F. Moran

THE EAST ISLIP, L.I. Common Sense Legal Reform bill, soon to be considered by Congress, is the magnum opus of the tort reform movement. This item in the "Contract With America" would make major changes in Federal civil litigation, especially concerning product liability suits and punitive damages, all in response to a perceived groundswell of dubious lawsuits.

But there is a problem: It's too late.

The tort reform movement has already been heard, loud and clear, by its target audience: the jury. Jurors have listened attentively to the argument that American business, staggering under the burden of giant verdicts, is losing its competitiveness. If you are a doctor or a homeowner, the reformers have argued for years, insurance premiums will keep skyrocketing because greedy trial lawyers and their clients are out to get you.

Well, the jury is in, and the verdict is for the defendant — and his insurance company. Civil juries are finding for the defendant as never be-

Russell F. Moran, a lawyer, is publisher of *The New York Jury Verdict Reporter*.

fore. In New York (where litigation is so intense it could use a musical score), there is a clear pattern, and it is most dramatic in product liability lawsuits. From 1981 to 1987, 51 percent of the verdicts in these cases were in favor of the defendant. In the next seven-year period, 1988 to 1994, that rate rose to 62 percent. The trend is mirrored nationally, and it flies in the face of the conventional wisdom that product liability verdicts are strangling American industry.

The trend is also clear in the number of cases filed. From 1985 to 1991, the number of product liability cases (excluding asbestos claims) in the Federal courts decreased by 40 per-

Too late for tort reform. We have it already.

cent. Not only are product liability verdicts going for defendants, but defendants' odds of winning are improving in negligence cases in general, including ordinary motor-vehicle and slip-and-fall lawsuits. In New York, defendants are now winning 44 percent, compared to 41 percent seven years ago.

And how goes the medical malpractice "crisis"? Here, too, New York juries have been killing toward the defendant. Verdicts for physicians in malpractice cases increased from 60 percent in 1981-87 to 63 percent in 1988-94. A recent national study showed that doctors win 71 percent of the time — this despite a Harvard Medical School finding that in one recent year in New York State alone, 23,000 to 31,000 patients suffered injuries while hospitalized, leading to as many as 7,000 deaths. (These are medical, not legal, statistics.)

Contrary to the rantings of the American Medical Association, only about 2 percent of people injured by a physician's negligence ever file suit, according to *The New England Journal of Medicine*. And those who do sue hardly clog the courts. Only 9.8 percent of medical malpractice cases go to trial, and only 5 percent go all the way to verdict.

While doctors are understandably upset over huge malpractice premiums, they should turn their ire toward the folks who collect them. According to the National Association of Insurance Commissioners, medical malpractice insurance is the most profitable line of business.

There is strong evidence that there was never a problem to begin with. A General Accounting Office study questioning the existence of a "litigation explosion" noted that only 10 percent of the seven million

CLINTON &



CONGRESS

cases filed in state courts across the country are tort cases of any kind. This is not surprising in light of a Rand Corporation study that of all accident victims, only 7 per-

cent receive compensation through the court system.

Just as the health care debate led to massive adjustments in the health system, so has the legal reform debate resulted in a new industry of arbitration and mediation known as alternative dispute resolution. An entire shadow justice system is sprouting before our eyes. Reform is here! But the reformers still clamor for more.

The tort system has grown with the accumulated wisdom of centuries of common law. Just as the criminal justice system is society's way of expressing disapproval of certain behavior, the civil justice system is society's way of righting it wrong by compensating the victim. To the extent that we tamper with the right to a day in court, we risk leaving that victim with nothing but anger and feelings of revenge, emotions that our society already has in superabundance. □

New York Times
Jan. 16, 1995

STEVE SIMS
1769 Wickersham Drive
Anchorage AK 99507
Phone: 563-7281

March 6, 1995

Senator Drive Pearce
Alaska State Senate President
State Capitol
Juneau, AK 99801-1182

Representative Gail Phillips
Speaker of the House
State Capitol
Juneau, AK 99801-1182

Re: Tort Reform

Dear Senator Pearce and Representative Phillips:

I was disappointed to read in the Anchorage Daily News on February 20, 1995 that like most everyone else, some of our legislators were persuaded by a three sentence sound bite in the case of McDonald's continual serving of scalding hot coffee. Even Dear Abby backed off on this one and admitted she made a mistake in criticizing the jury verdict after she received a letter from the attorney who won the case. (Enclosed summary)

Enclosed are two other fuller explanations of what happened in that case.

If you were to check with the Anchorage Natural Gas Company you would find out that hot water is not supposed to be set at more than 130 degrees and preferably, not more than 120 degrees. For every 10 degrees you increase temperature, there is a substantial and large increase in the degree of burn and the quickness of the burn. At 190 degrees it is a scalding and an instantaneous burn through all layers of skin.

I know about hot coffee from a personal experience having once bought a cup of coffee from McDonald's on Dimond Boulevard about 10 years ago, which left me with a blister on my lip when I tried to blow on it and take a small, quick sip. I have never gotten an actual blister on my lip sipping hot coffee elsewhere. The coffee was still not drinkable when it was time to leave the restaurant and I had already finished my meal. After all, this is a "fast food service" type of restaurant. The jury did not fail to understand that a business that sells "fast food" will not have any coffee refills if they leave their coffee at 40 to 50 degrees hotter than the normal standard coffee maker that people are used to dealing with. No refills means increased profit.

I respectfully submit that changing Alaska law will make no difference on what occurs to McDonald's in New Mexico anyway.

Senator Pearce/Representative Phillips

March 6, 1995

Page 2

There is virtually no such thing as an outrageous verdict that is upheld in civil law. If a jury renders too high a verdict in a civil case, the judge reduces it as they did in the McDonald's case.

You might note that the Exxon-Valdez 5 billion verdict was extensively criticized outside by corporate America and the Wall Street Journal. Which of the Alaska senators and representatives are going to say that that verdict was too high? But then you, like jurors, know the facts of the case a bit better than the press outside with their corporate advertisers demanding and getting editorials favorable to their position in the guise of news stories.

No tort attorney wants to take a ridiculous lawsuit because it will lose. He or she will not be paid. They will also have a dissatisfied client.

COURT AWARDED ATTORNEY FEES SHOULD BE ABOLISHED

When you preclude people from having their disagreements adjudicated--which are inevitable in any society--you basically send the message that one should arm themselves and settle their differences on the freeway as we see happening too often nowadays.

In a tribal society, if you have a problem with your neighbor, you can take it to the chief and the chief will sort it out without charging the subjects for his opinion. The same system exists in virtually all societies with different sophisticated levels and procedures. In Alaska, the Court system has already made it so no middle class person with assets of more than \$50,000 can go to court without possibly being wrong and incurring a huge judgment for costs and attorney fees against them because they guess wrong as to what the law is on close questions.

No other state in the union punishes people for litigating grey areas of the law or highly disputed factual situations like Alaska has since 1959. A few institutional corporate defendants like that law because it stops people from questioning what they do. The plaintiff trial lawyers like that law because it adds 10 to 20 percent to any judgment they get and they keep one-third of it. Nobody ever speaks out on behalf of the middle class and moderately monied people who cannot have their problems adjudicated without suffering the threat of bankruptcy. It seems the legislative members are either bought by the large corporations on the one hand or bought by the "liberals" on the other hand, and nobody stands up for the vast majority of people who are somewhere in the middle. God forbid they should ever have to settle a dispute in court in Alaska.

Senator Pearce/Representative Phillips
March 6, 1995
Page 3

CAPS ON AWARDS

With regards to the proposed caps on damages that tort reform proposes, I suggest you check how much it costs to raise your liability limits from \$100,000 to \$1,000,000 by the simple expediency of buying an umbrella policy for less than \$200. This Umbrella covers yourself and protects your family if you are hit by an uninsured drunken driver as well as affording you additional liability coverage. The amount of insurance that can be procured for very little extra money is one million dollars.

If any legislator were put in a wheelchair for life or brain damaged by a drunken driver, I do not suspect that they would think that half a million dollars was sufficient compensation when the lifetime costs of care alone would far exceed one million dollars.

Unfortunately all the proposed caps do is encourage insurance companies to never settle for the full amount of the cap because they can never be charged more than the cap. So when you place a \$300,000 cap on something, you really place a \$200,000 cap unless someone is willing to go all the way through the court system and incur the large costs and anxiety of doing so.

With the caps tort reform proposes, the Oil Companies could pollute and take their cases to Alaska State Court where their liability will be limited.

I would like this letter to become part of the record of testimony of any committees that consider bills in so called "tort reform".

We are all subject to manipulation and misinformation with sound bytes from this information age in which we live. This McDonald's case is just the latest example. It sounded outlandish to me until I tried Paul Harvey's diction, "And now you know the rest of the story."

Best regards,



STEVE M. SIMS

nls
MC/L5
Enclosure

cc: Representative Brian Porter
Senator Robin Taylor

Spotlight

JURY AWARDS PUNITIVE DAMAGES AGAINST MCDONALD'S FOR EXCESSIVELY HOT COFFEE.

Liebeck v. McDonald's Restaurants, N.M., Bernalillo County 2d Jud. Dist. Ct., No. CV-93-02419, Sept. 14, 1994.

Stella Liebeck, a 79-year-old retiree, bought a 49-cent cup of coffee from a McDonald's Restaurant drive-through in Albuquerque, New Mexico. Liebeck's grandson stopped the car so Liebeck could add cream and sugar. As she placed the styrofoam cup between her knees and tried to remove the lid, the entire contents spilled in her lap.

Liebeck suffered third-degree scalding burns to her inner thighs, penneum, and buttocks. She was hospitalized for eight days, and despite debridement and skin grafting, she suffered permanent scarring. Liebeck's injuries disabled her for two years. Her medical bills totaled about \$10,000.

Liebeck called on ATLA members Kenneth R. Wagner of Albuquerque and S. Reed Morgan and Jerry R. McKenney of Houston to represent her in a suit against McDonald's Corporation and the local franchisee.

Suit alleged the coffee had been defective because of (1) its excessive heat and (2) inadequate warnings. Plaintiff also asserted breach of warranties of fitness for a particular purpose and of merchantability in that the extreme temperature made the coffee unfit for consumption. Plaintiff sought punitive damages for McDonald's conscious indifference to its customers' safety, claiming it knew the coffee was dangerous but sold it anyway.

The franchisee was dismissed after McDonald's stipulated it had had control over the coffee, cup, and lid.

Morgan knew he faced an uphill battle in convincing the jury to find for his client, let alone award punitive damages. As the jury foreman later noted, "[I] wasn't sure why I needed to be there to settle a coffee spill."

Plaintiff presented evidence that in the 10 years before the accident defendant had received at least 700 complaints of coffee burns. At trial, counsel elicited testimony that McDonald's requires franchisees to serve coffee at 180 to 190 degrees Fahrenheit, while coffee brewed at home is usually between 135 and 140 degrees.

Charles Baxter of Dallas, Texas, served as plaintiff's burn specialist. He testified that 190-degree coffee causes full thickness burns—third-degree burns to the muscle/fatty tissue layer—in less than three seconds. Coffee served at 160 degrees, however, would have to contact the skin for about 20 seconds before causing a third-degree burn.

Baxter also pointed out that a liquid above 140 degrees cannot be consumed and that as its temperature increases, the rate at which it burns tissue increases exponentially. He testified that the fast food industry had failed to react to published warnings from the Shriners' Burn Institute in Cincinnati, Ohio, that the industry was causing serious scald burns by serving beverages above 140 degrees.

Plaintiff's warnings expert, Lila Laux of Denver, Colorado, told the jury that although people know coffee is hot, they do not know how severe burns can be. She said McDonald's should have had warnings indicating the severe risk of burns. Mechanical engineer Kenneth Diller of Austin, Texas, testified that considering the painful nature of burn injuries, the risk of harm was unacceptable.

Some of the most damaging evidence came from McDonald's own executives and consultants. Plaintiff's counsel elicited testimony that defendant (1) knew of the risk of severe burns from its coffee, (2) decided not to warn customers about the risk despite knowing most consumers would not recognize it, (3) knew its coffee was not fit for consumption as served, and (4) did not intend to change its policies in light of the evidence at trial.

During closing argument, plaintiff's counsel pointed out that McDonald's has laboratories and a school, "Hamburger University," devoted to the study of selling food and drink; yet despite 700 burn complaints over a 10-year period, it had never consulted a burn specialist or a thermodynamicist. Counsel estimated defendant's daily gross coffee sales were over \$1.3 million and suggested punitive damages equal to two days of coffee sales would send a message to McDonald's and others in the industry.

The jury awarded \$200,000 compensatory damages and \$2.7 million punitive damages. The compensatory award was reduced to \$160,000 for plaintiff's 20 percent comparative negligence, for a total of about \$2.9 million.

The trial court then reduced the punitive award to \$480,000, or three times the compensatory award.

The parties have now reportedly reached a confidential settlement.

Morgan wrote shortly after the successful verdict, "The evidence established that a consumer—through no fault of his or her own, or following a momentary inadvertence or mistake—can wind up with an excruciatingly painful, disfiguring, expensive, and possibly life-threatening injury. . . . Why did the company ignore what it knew? Why had it not studied the risk?"

JW

Dear Ann Landers...

Advice columnist Ann Landers included a letter in her January 16th column defending the famous jury verdict in favor of a woman who spilled a cup of hot McDonald's coffee in her lap. The letter was a result of an earlier column in which Landers wrote, "The once noble profession of law has sunk to a new low."

In response, plaintiff's attorney S. Reed Morgan of Houston wrote that the jury considered the severity of his client's injuries, which required skin grafts and kept her in the hospital eight days. He also cited the high number of McDonald's burn cases that preceded this one and the fact that no effort was made to change corporate operations.

"The civil justice system worked the way it is supposed to — to protect individuals from corporate indifference," Morgan wrote.

"And it is not just some lawyers doing that, it is a jury of 12 fellow citizens. That is the beauty of the American court system," he concluded.

"Thank you for reducing the heat and adding a little more light," Landers replied. "And now I think we should cool it."

FORUM / LETTERS

McDonald's coffee suit wasn't a travesty of justice

By JUDY ALLEN

My mother was burned severely by a cup of McDonald's coffee while seated in a parked car in a McDonald's parking lot in Albuquerque three years ago. She was trying to add cream and sugar to the coffee.

What she did not know is that McDonald's, by corporate policy, kept its coffee between 180-190 degrees. That meant that if she spilled it, it would cause life-threatening third degree burns in two to seven seconds.

Everyone expects coffee to be hot; people expect a shower to be hot. But they don't expect to be hospitalized by a cup of coffee or the shower.

My mother spent eight days in the hospital, received skin grafts and took more than two years to recover her health of today. The pain was excruciating. There is permanent scarring over 16 percent of her body.

McDonald's knew these facts. Yet, McDonald's wanted this case to go to trial and would not settle.

At trial, McDonald's own expert witnesses verified what our expert witnesses said.

They admitted the product was too hot for consumption when sold.

They did not contest the fact that it took 25 minutes to cool to a drinkable temperature.

The quality assurance manager from McDonald's then said, under oath, that they had an admittedly incomplete list of more than 700 burn cases. In fact, he was surprised that the number wasn't much larger. The number is now more than 1,000.

Our attorney pointed out that he had questioned this man several years earlier for a client with a similar severe burn. Thus, this executive admitted he was personally aware of the nature of the burns that come from the scalding hot product.

The manager also said he knew customers were not aware of the danger of third degree burns from the product. He admitted in the past six years he had done nothing to make the product safer. He had not consulted any burn expert. He stated he had no intention of turning down the heat, despite the fact many more people would be burned.

Further, McDonald's had spent money on a statistician to say in court that my mother and all the other burn cases were statistically insignificant, and thus, there was no reason for the corpora-

Everyone expects coffee to be hot; people expect a shower to be hot. But they don't expect to be hospitalized by a cup of coffee or the shower.

tion to do anything.

Our case pointed out that for every degree of temperature increase over 140 degrees, burns occur exponentially faster. The reasonable jury told this callous and irresponsible corporation that its behavior was unacceptable. The jury unanimously fined punitive damages of two days of coffee sales, which turned out to be \$27 million.

Judge Scott said of McDonald's:

"I think that there was evidence and argument about McDonald's knowledge that the coffee could cause serious third degree full tissue burns.

"I think the demeanor of the witnesses testifying as well as the subject of the testimony clearly indicates that McDonald's knew that the coffee, at the time it was served, was too hot for human consumption.

"I heard no evidence of any present intention to correct mat-

ters by simply turning down the manual thermostats on the coffee brewers. Finally McDonald's consciously made no serious effort to warn its consumers."

However, Judge Scott reduced the punitive damages to three times compensatory damages.

The system worked because the initial punitive award brought public attention to this issue.

If my mother did not want to accept the reduced award, she was given the option of retrying the case. She chose a confidential settlement, details of which we are not privileged to know.

What did McDonald's do with the money it probably did not have to pay to my mother? Did it spend it as a responsible corporation should, in finding ways to make its product safe?

McDonald's has spent money on an advertising campaign to make my mother look foolish and say she didn't take responsi-

bility for her actions.

Whereas McDonald's still is not taking responsibility for its actions, Stella Liebeck did. She tried to help future McDonald's customers from old to young be safe.

Did you know the Consumer Product Safety Commission in 1977 advised Americans to turn down our water heaters to 135 degrees to reduce the 200 U.S. child fatalities per year due to scalding? The Shriner's Burn Center in 1994 warned all restaurants to stop serving hot drinks above 135 degrees.

Please understand that the system worked as it was supposed to. The judge currently has the capability to reduce excessive judgments, if he so deems. It is so obvious that lawsuits like this bring attention to dangerous defective products.

Because the government does not wish to regulate the sale of all products, is it appropriate to remove any redress from those who would be injured by corporations that knowingly and callously sell defective products?

[1] Judy Allen is the daughter of Stella Liebeck, the woman who won a lawsuit against McDonald's for selling coffee that caused her serious burns.

Alaska Legislative Digest

An Inside View of Alaska Policy

PUBLISHER: Mike Bradner

Business Office: 349-7711
3037 South Circle
Anchorage, AK 99507
Fax: (907) 522-1761

April 24, 1995
No. 1295

Governor moves his priority bill half way:

House passes oil royalty break!

The House last week, after prolonged debate, passed CSHB-207, legislation that will allow the Commissioner of Natural Resources to adjust the state royalty rates on new fields determined to be marginal and older fields that have become marginal or shut-in. Most such fields would also come under the state's economic limit factor applied to severance taxes on small oil fields and wells. This would mean most fields qualifying for royalty reduction would also pay no severance taxes. In terms of imposed state cost, this would mean most state revenue burden would be substantially lifted.

The heavily amended version of the bill passed the House April 18, but reports are the Senate is likely to delay action final until the last days of the session (and maybe final hours), using the bill as trading stock with the House and Gov. Knowles. The bill is a priority for both House Republicans and the Knowles Administration.

The Senate may use the bill to exact commitments for their priorities. However, Senate Resources chairman Sen. Loren Leman is committed to prompt action, scheduling the bill for almost immediate hearing (Saturday, April 22)

Continued page 8

The tort reform bill back to House floor, and is now expected to pass

The tort reform bill was scheduled back on the House floor Monday, April 23, and this time the bill is expected to pass. CSHB-158 ran into trouble on the House floor March 28th, and was pulled back off the floor. The bill is slated for floor action Monday, April 24th, with backers saying they now have the votes. The House bill seeks to put in place a two-tier system for economic and non-economic damages, capped at \$300,000 and \$500,000. Punitive damages are left open ended, but with half of punitive awards accruing to the general fund. The logic regarding punitive damages is that the punitive award is a penalty, and is awarded without regard to personal loss by the plaintiff. Advocates claim that the penalty should not act as a magnet for plaintiff lawyers to pursue litigation for monetary gain. House backers also say they have the needed votes in the Senate, and say that the bill will emerge from Sen. Robin Taylor's Judiciary Committee, a critic of the tort bill.

Inside this week:

SB-16: University lands bill
alive in the House Page 8

Senate budget Page 3

Looking for construction work?
Watch University AHEC bills Page 3

I wonder WHO SAID THAT?

... Schools/ Local Gov't ...

School funding remains unclear ?

Both Houses have passed what might be called "half funding," leaving out education. House Chair Mark Hanley is trying to sell two years of "flat-funding" for schools, forcing schools to eat enrollment growth. We are told right now the odds are about 50-50 between flat funding, and funding enrollment growth.

The Tenure etc. bills: The House bill (HB-217) has moved out of Judiciary to House Labor and Commerce, while the Senate's SB-132, will be back before Senate Finance this week.

****See our "local supplement" for the inside on tenure bills and school funding**

Rural/nonprofit insurance pools: This bill (HB-223) is apparently dead in House Community and Regional Affairs where it went through a series of hearings. The expectation was many of the rural/nonprofit pools would join the larger municipal league pool. The bill was opposed by the State Division of Insurance, which questioned the whether such organizations had the fiscal depth to pay claims. The Senate version of the bill (SB-104) is "on hold" in Senate Labor and Commerce.

As expected: Shared revenue cuts 5% to 10%

As expected, reductions for the state's revenue it shares with local government in two programs, municipal assistance and revenue sharing, is now firmly framed between the House and Senate cuts. The Senate proposes a 5% cut from FY-95 (current), the House a 10% cut.

It should be noted that very small communities qualifying for the \$25,000 minimum under "revenue sharing" will not be reduced. Their allocation is fixed in statute at \$25,000. Under municipal assistance major commercial communities, such as Fairbanks, Anchorage, and a few others, also have a floor not subject to reduction. This amount relates to receipts major commercial communities formerly received as a share of the old gross business tax. This tax was repealed, and its local revenue contribution replaced, when the municipal assistance program was enacted shortly after beginning pipeline oil flow.

HB-185: Senior/local tax exemption: This bill is in House Finance and is expected to move on to the floor. Basically the problem is that the exemption program is a mandate imposed on local governments requiring them to give up tax base, i.e., granting tax exemptions to senior citizens. HB-185 The bill reduces the mandatory exemption from \$150,000 to \$75,000. The average value, or exemption currently is roughly \$87,300.

Flat tax on brink of passage: HB-86 is in Senate Finance one step short of the Senate floor and passage. This bill allows municipalities to apply some kind of flat tax to various classes of personal property (wing span, boat length, etc.), instead of trying to establish actual value. *Note: Finance referral waived 4/20. HB-86 now in Senate Rules.*

Motor vehicle local taxes: HB-272 attempts to shift more flexible taxation of motor vehicles to local initiative. Basically the tax is local, but the most efficient place to collect the tax is at the point of vehicle registration, a state function. The rates are fixed in statute, subject to change from time to time. *Now in House Finance committee, the concept is resisted by commercial transport interests who fear higher classes and rates for their vehicles.*

HB-122: Sharing marine fuel taxes: Now in House Finance, this bill could find a future --perhaps next year. The idea is to relate shared marine fuel taxes to the need to maintain local harbor facilities that must support watercraft.

HB-28: School weapons possession bill: This bill has passed the House has a single Senate committee referral --Judiciary. This bill makes state law conform to federal requirements regarding possession of weapons on, or near schools, and at school events.

HB-215: Grounds for school suspension: This bill expands grounds for suspension when a student is a threat to the welfare, safety and morals of other pupils. The bill would add suspension due to threat to a threat to persons employed or volunteering at school.

The bill passed the House on a 37 to 0 vote, and as we went to passed the Senate 19 to 0.

Note: Many bills are now being "short referred" in each House, meaning sent to only one committee, as the session nears its finale.

Alaskans For Liability Reform

MEMO

To: All House Representatives
From: Alaskans for Liability Reform
Date: April 6, 1995
Subject: HB 158

Attached is a response form Norcal Mutual Insurance Correcting the Information provided by the Division of Insurance per a distribution from Senator Robin Taylor, dated March 22, 1995.

Our question is, Do you support the public or the Plaintiff Attorney Lobby?



Alaska Office

4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503-6068(907) 563-3414
(907) 563-7800 FACSIMILE

April 5, 1995

Dept. of Commerce & Economic Development
Division of Insurance
P.O. Box 110805
Juneau, AK 99811-0805

ATTN: Marianne K. Burke, Director

RE: NORCAL v MICA Rate Differences

Dear Director Burke:

I received a copy of your March 24, 1995 letter to Senator Robin Taylor in which you state that since 1990 there has been an approximate 60% rate decrease for physicians/surgeons coverage in the MICA/NORCAL rate configuration. You also indicated an approximate 15% rate decrease in hospital rates.

The purpose of this letter is to point out that your comments are inaccurate regarding the percentages of reduction in physician's premiums but I can certainly understand and explain how the erroneous conclusions were reached.

What has not been taken into account is the Rate Class changes that NORCAL instituted upon its assumption of MICA's assets and liabilities in January 1991.

I am enclosing a copy of MICA's 1990 rate card which reflects Rate Classes in effect at that time and also NORCAL's 1995 Rate Card providing its Rate Classes as well. You will note that there is a considerable difference between the two which is even more clearly delineated in the enclosed Rate Class Comparison Chart (see Exhibit A).

Let me give you a very simple example of how your letter and rate comparison in particular is extremely misleading. Your letter to Senator Taylor indicates Emergency Room Practice physicians are Class 5. Under NORCAL's current Rate Class, Emergency Department Physicians are indeed Class 5 but under MICA's Rate Class system they were Class 2-A. Thus, to legitimately compare 1990 to 1995 rates, you must compare premium for the current Class 5 with MICA's 1990 Class 2-A. Your comparison actually reflects the difference (under the Class 5 category)

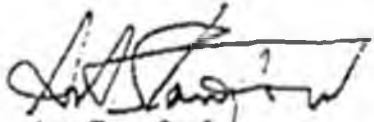
between NORCAL's current Class 5 (the middle of 11 Rating Classes) and MICA's Class 5 which was the most costly Rate Class reserved for such high risk specialities as neurosurgery.

When you make the comparison between the correct rates (see Exhibit B) at the \$1M/\$2M limit of liability for Emergency Department Physicians, you will note that there was actually only an 18% reduction (\$25,537.00 now as compared to \$31,020.00 in 1990) rather than the 74% decrease as indicated on your chart. Indeed, when comparing rate differences for the 5 classes you have outline in your letter, I arrive at an average reduction from 1990 to 1995 of 14.4%. You can easily calculate other specialty reductions by utilizing the premium schedules I am enclosing for years 1990 and 1995 (Exhibits C and D). I'm sure you'll find absolutely no support for concluding rates have decreased by 60% and more likely in the range of 15%

It should also be noted that NORCAL's ability to institute overall rate decreases is a reflection of its capacity and economy of size which allows for a much greater spread of risk and a lower administrative charge. Whereas MICA covered only a few hundred physicians, NORCAL insures over 10,000 and MICA's written premium of approximately \$5M can be compared to NORCAL's of approximately \$100M.

I would be more than happy to discuss these rates with you if you have any additional questions. We would very much appreciate a letter from you after you have had a chance to review the enclosed material regarding the relative change between MICA's 1990 rates and NORCAL's 1995 rates.

Very truly yours,


Art Stanford
Underwriting Manager

Enclosures

CC: Senator Robin L. Taylor
Representative Brian Porter
Roger Holmes, Esq.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX 110805
JUNEAU, ALASKA 99811-0805
PHONE (907) 465-2515

March 24, 1995

The Honorable Robin L. Taylor
Alaska State Senate
State Capitol
Juneau, AK 99801-1182

Dear Senator Taylor:

As you requested March 22, 1995, we have gathered information regarding the relationship between Medical Indemnity Corporation of Alaska (MICA) and NORCAL Mutual Insurance Company medical malpractice rates.

We have compared two limits of liability, \$500,000 per accident/\$1,000,000 aggregate limit (500/1M) and \$1 million per accident/\$2,000,000 aggregate limit (1M/2M), for physician/surgeon rates and hospital rates. The physician/surgeon rates have also been compared by physician classification. NORCAL has revised some of the class definitions by moving some specialties to lower classifications and by increasing the number of classes since 1990. The following list gives definitions for the classes that are common to both MICA and NORCAL.

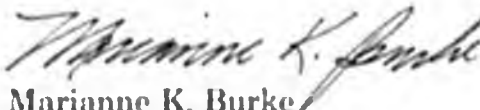
- Class 1 Pathology, Psychiatry
- Class 2 Internal Medicine-Except Left Hart Cath, Neurology, Dermatology
- Class 3 Ophthalmology
- Class 4 Neonatology
- Class 5 Emergency Room Practice, Therapeutic Radiology

The average change for physician/surgeon rates is a decrease of approximately 60 percent, while the hospital average change is a decrease of approximately 15 percent. The mature claims-made premiums for the two limits of liability for each physician/surgeon class, along with the percentage change by class, are given on the attached exhibit. The hospital mature claims-made premiums for the two limits of liability and the corresponding percent change are also on the attached exhibit.

You also requested information regarding the Alaska Municipal League's Joint Insurance Arrangement (JIA) Pool Surplus. The division has no oversight authority of the JIA and does not receive any information regarding the entity. They report directly to the Legislature.

Please let me know if we can be of any further assistance.

Sincerely,


Marianne K. Burke
Director

MKB/cw622.ins
032495b

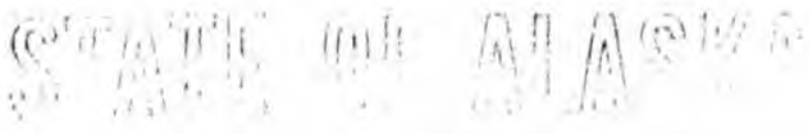
Physician/Surgeon

Class	500/1M			1M/2M		
	1995	1990	Percent Change	1995	1990	Percent Change
	NORCAL Rate	MICA Rate		NORCAL Rate	MICA Rate	
1	5696	9970	-43%	7396	13103	-44%
2	8807	16116	-45%	11640	21464	-46%
3	11478	30162	-62%	15284	40576	-62%
4	12851	39582	-68%	17157	53393	-68%
5	18995	71433	-73%	25539	96729	-74%

Acute Care Hospitals

Mature Premium

Limit of Liability	1995	1990	Percent Change
	NORCAL Rate	MICA Rate	
500/1M	4376	5130	-15%
1M/2M	6310	7551	-16%



TONY KNOWLES, GOVERNOR

DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX 110805
JUNEAU, ALASKA 99811-0805
PHONE (907) 465-2515

April 10, 1995

RECEIVED APR 12 1995

Mr. Art Stanford
Underwriting Manager
NORCAL Mutual Insurance Company
4000 Old Seward Highway, Suite 203
Anchorage, AK 99503-6068

Dear Mr. Stanford:

Re: *NORCAL vs. MICA Rates*

Thank you for your letter of April 5, 1995, clarifying the rate class changes that were instituted by NORCAL after assumption of MICA's assets and liabilities.

The rate comparisons made in the letter to Senator Taylor were based upon the information that was available to us from the archived MICA files. Your information appears to be more complete than the information that we were able to find regarding the rate class definitions.

With your additional information, we concur with your conclusion that the rate changes for physicians and surgeons is approximately a 15% decrease.

Sincerely,

Marianne K. Burke
Director

MKB/go816.ins
0-11095a

cc: Senator Robin Taylor

Representative Brian Porter

Roger Holmes, Esq.

01-04-95 13:17 0907 563 FAX 1 NORCAL MUTUAL IS- Q (K) LUL



NORCAL Mutual Insurance Company
Alaska Office

4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503
Fax: (907) 562-7004
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FAX

Page #1 of 1 pages.
If you do not receive all of the pages,
please call (907) 563-3414 as soon
as possible.

TO: David McGuire, M.D. FAX #(907) 5638824:
ATTN: Cynthia DATE: 4/1/95
FROM: Art Stanford
RE: Rate Comparisons: Alaska versus California

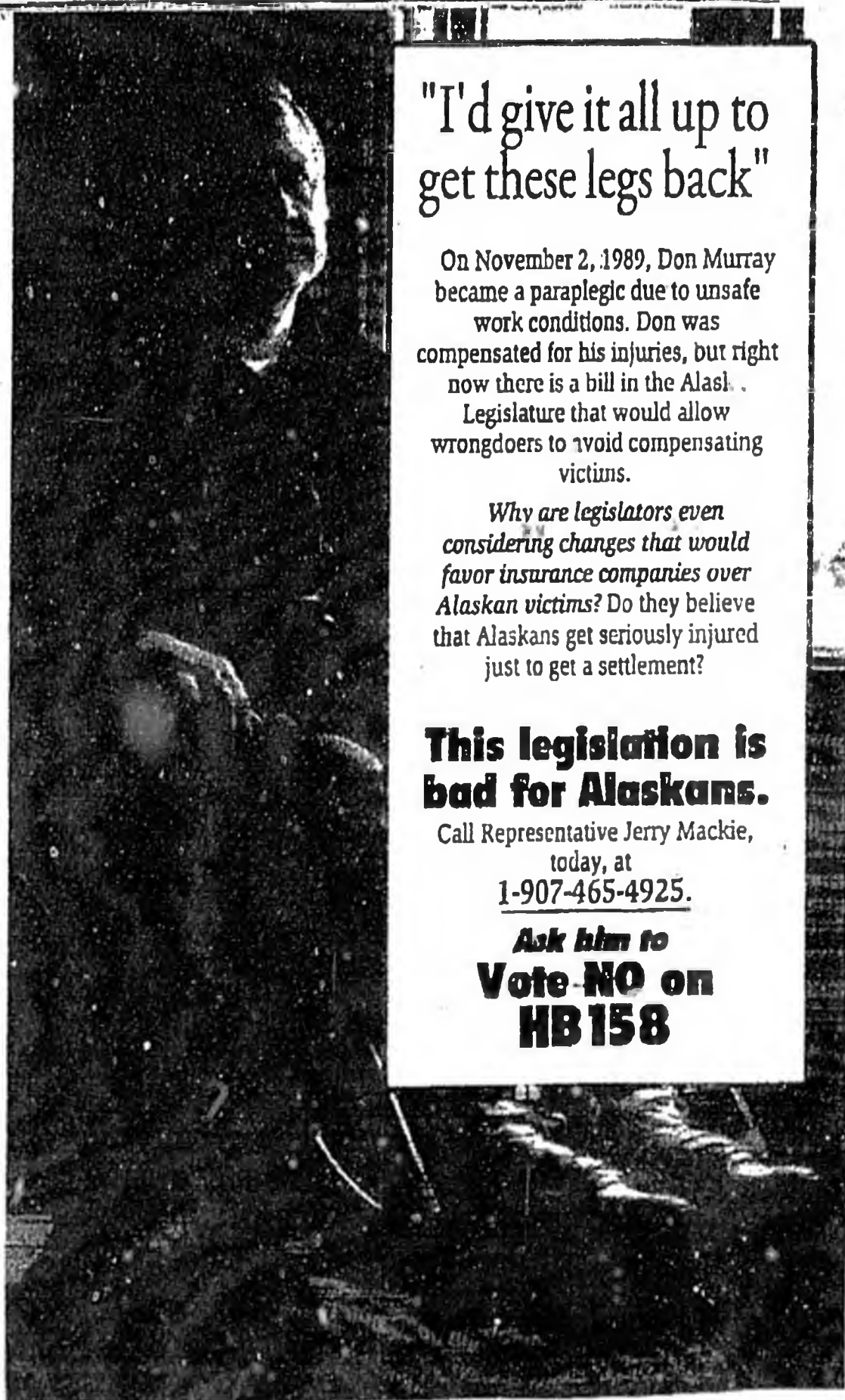
We have two different rates in California (northern and southern counties) with the southern area being the higher premium. I will only give you the southern rates. All of the figures will be at the \$1M/\$3M limits of liability and at the 5th or mature year of the 5 year claims-made cycle.

OB/GYN \$38892. (Calif.) - \$64510. (Ak.). Orthopedic Surgery \$31816. (Calif.) and \$556705. (Ak.). Family Practice (no surgery-no O.B.) \$7012. (Calif.) and \$1438. (Ak.).

As we have said many times before, we believe California's rates are a direct reflection of its tort reform legislation known as the Medical Indemnity Compensation Reform Act (MICRA).

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"I'd give it all up to get these legs back"

On November 2, 1989, Don Murray became a paraplegic due to unsafe work conditions. Don was compensated for his injuries, but right now there is a bill in the Alaska

Legislature that would allow wrongdoers to avoid compensating victims.

Why are legislators even considering changes that would favor insurance companies over Alaskan victims? Do they believe that Alaskans get seriously injured just to get a settlement?

This legislation is bad for Alaskans.

Call Representative Jerry Mackie, today, at 1-907-465-4925.

**Ask him to
Vote NO on
HB158**

*Ketchikan
Daily News
April 6, 1995*

DAVID A. MCGUIRE, M.D.

Orthopedic Surgery

DISTRICT OF THE AMERICAN SOCIETY
OF ORTHOPAEDIC SURGEONS

4040 LAUREL STREET
SUITE 202
ANCHORAGE, ALASKA 99508

PHONE 907-862-4142

April 7, 1995

Dear Senator:

As you know, the issue of Tort Reform may be presented to you.

Please note the FAX from Norcal. While it is true the insurance costs have decreased, these are nevertheless quite high, higher than they need to be.

If you want to lower the costs of health care, one place to start is with the cost of insurance. These costs are a direct reflection of our Tort laws.

Please support HB-358.

Sincerely,


David A. McGuire, M.D.

cc:Mail for: Terry Otness

Subject: h229.ih.FTP

From: sled@sleaska.edu (SLED Login) at CC2MHS1 2/27/95 11:46 AM

To: Terry Otness at JNU_CAPITOL

FILE h229.ih

104th CONGRESS

1st Session

To impose certain requirements on medical malpractice liability claims.

IN THE HOUSE OF REPRESENTATIVES

January 4, 1995

Mr. Dornan introduced the following bill; which was referred to the Committee on the Judiciary and, in addition, to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To impose certain requirements on medical malpractice liability claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Medical Injury Compensation Reform Act of 1995'.

SEC. 2. GENERAL PROVISIONS.

(a) Congressional Findings:

(1) Effect on interstate commerce: The Congress finds that the health care and insurance industries are industries affecting interstate commerce and the medical malpractice litigation systems existing throughout the United States affect interstate commerce by contributing to the high cost of health care and premiums for malpractice insurance purchased by health care providers.

(2) Effect on federal spending: The Congress finds that the medical malpractice litigation systems existing throughout the United States have a significant effect on the amount, distribution, and use of Federal funds because of--

(A) the large number of individuals who receive health care benefits under programs operated or financed by the Federal Government;

(B) the large number of individuals who benefit because of the exclusion from Federal taxes of the amounts spent by their employers to provide them with health insurance benefits;

(C) the large number of health care providers and health care professionals who provide items or services for which the Federal Government makes payments; and

(D) the large number of such providers and professionals who have received direct or indirect financial assistance from the Federal Government because of their status as such professionals or providers.

(b) Applicability: This Act shall apply with respect to any medical malpractice liability claim and to any medical malpractice liability action brought in any State or Federal court, except that this Act shall not apply to--

(1) a claim or action for damages arising from a vaccine-related injury or death to the extent that title XXI of the Public Health Service Act applies to the claim or action; or

(2) a claim or action in which the claimant's sole allegation is an allegation of an injury arising from the use of a medical product.

(c) Preemption of State Law: Subject to section 10, this Act supersedes State law only to the extent that State law differs from any provision of law established by or under this Act. Any issue that is not governed by any provision of law established by or under this Act shall be governed by otherwise applicable State or Federal law.

(d) Federal Court Jurisdiction Not Established on Federal Question Grounds: Nothing in this Act shall be construed to establish any jurisdiction in the district courts of the United States over medical malpractice liability actions on the basis of section 1331 or 1337 of title 28, United States Code.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) Claimant: The term 'claimant' means any person who alleges a medical malpractice liability claim or, in the case of an individual who is deceased, incompetent, or a minor, the person on whose behalf such a claim is alleged.

(2) Economic damages: The term 'economic damages' means damages paid to compensate an individual for losses for hospital and other medical expenses, lost wages, lost employment, and other pecuniary losses.

(3) Health care professional: The term 'health care professional' means any individual who provides health care services in a State and who is required by State law or regulation to be licensed or certified by the State to provide such services in the State.

(4) Health care provider: The term 'health care provider' means any organization or institution that is engaged in the delivery of health care services in a State and that is required by State law or regulation to be licensed or certified by the State to engage in the delivery of such services in the State.

(5) Injury: The term 'injury' means any illness, disease, or other harm that is the subject of a medical malpractice liability action or claim.

(6) Medical malpractice liability action: The term 'medical malpractice liability action' means a civil action (other than an action in which the claimant's sole allegation is an allegation of an intentional tort) brought in a State or Federal court against a health care provider or health care professional (regardless of the theory of liability on which the action is based) in which the claimant alleges a medical malpractice liability claim.

(7) Medical malpractice liability claim: The term 'medical malpractice liability claim' means a claim in which the claimant alleges that injury was caused by the provision of (or the failure to provide) health care services.

(8) Medical product: The term 'medical product' means a device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act) or a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act).

(9) Noneconomic damages: The term 'noneconomic damages' means damages paid to compensate an individual for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary losses, but

does not include punitive damages.

(10) Secretary: The term 'Secretary' means the Secretary of Health and Human Services.

(11) State: The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

SEC. 4. EFFECTIVE DATE.

(a) In General: Except as provided in subsection (b) and section 11, this Act shall apply with respect to claims accruing or actions brought on or after the expiration of the 3-year period that begins on the date of the enactment of this Act.

(b) Exception for States Requesting Earlier Implementation of Reforms:

(1) Application: A State may submit an application to the Secretary requesting the early implementation of this act with respect to claims or actions brought in the State.

(2) Decision by secretary: The Secretary shall issue a response to a State's application under paragraph (1) not later than 90 days after receiving the application. If the Secretary determines that the State meets the requirements of this Act at the time of submitting its application, the Secretary shall approve the State's application, and this Act shall apply with respect to actions brought in the State on or after the expiration of the 90-day period that begins on the date the Secretary issues the response. If the Secretary denies the State's application, the Secretary shall provide the State with a written explanation of the grounds for the decision.

SEC. 5. STATUTE OF LIMITATIONS.

(a) In General: No medical malpractice liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the expiration of the 4-year period that begins on the date the alleged injury occurred.

(b) Exception for Minors: In the case of an alleged injury suffered by a minor who has not attained 6 years of age, no medical malpractice liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the date on which the minor attains 10 years of age.

SEC. 6. ATTORNEYS' FEES.

(a) Limitation on Contingency Fees: An attorney shall not contract for or collect a contingency fee for representing a claimant in a medical malpractice liability action in excess of the following:

(1) 40 percent of the first \$50,000 (or portion thereof) of the amount recovered by the claimant.

(2) 33 1/3 percent of the next \$50,000 (or portion thereof) of the amount recovered by the claimant.

(3) 25 percent of the next \$500,000 (or portion thereof) of the amount recovered by the claimant.

(4) 15 percent of any amounts recovered by the claimant in excess of \$600,000.

This subsection applies whether the recovery is by settlement, arbitration, or judgment.

(b) Calculation of Periodic Payments: If periodic payments are awarded to the claimant pursuant to section 7(b), the court shall place a total value on these payments based upon the projected life expectancy of the claimant and include this amount in computing the total award from which attorneys' fees are calculated under subsection (a).

(c) Effect of Failure To Comply: Failure to comply with this section by an attorney at law shall be grounds for professional discipline by the appropriate State agency responsible for the conduct of disciplinary actions against attorneys-at-law.

(d) Definitions: For purposes of this section--

(1) the term 'contingency fee' means any fee for professional legal services which is in whole or in part contingent upon the recovery of any amount of damages, whether through judgment or settlement; and

(2) the term 'recovered' means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim, except that costs of medical care incurred by the claimant and the attorney's office overhead costs or charges shall not be deductible disbursements under this paragraph.

SEC. 7. CALCULATION AND PAYMENT OF DAMAGES.

(a) Limitation on Noneconomic Damages: The total amount of noneconomic damages that may be awarded to a claimant for losses resulting from the injury which is the subject of a medical malpractice liability action may not exceed \$250,000, regardless of the number of parties against whom the action is brought or the number of actions brought with respect to the injury.

(b) Periodic Payments for Future Losses: If more than \$50,000 in damages for expenses to be incurred in the future is awarded to the claimant in a medical malpractice liability action, the court shall, at the request of either party, enter a judgment ordering such damages to be paid on a periodic basis determined appropriate by the court (based upon projections of when such expenses are likely to be incurred).

(c) Mandator Offsets for Damages Paid by a Collateral Source: The total amount of damages received by a claimant in a medical malpractice liability action shall be reduced by any other payment that has been or will be made to the individual to compensate the claimant for the injury that was the subject of the action, including payment under--

- (1) Federal or State disability or sickness programs;
- (2) Federal, State, or private health insurance programs;
- (3) private disability insurance programs;
- (4) employer wage continuation programs; and
- (5) any other source of payment intended to compensate the claimant for such injury.

SEC. 8. NOTICE OF ACTION.

(a) Notice Requirement:

(1) In general: No medical malpractice liability action may be commenced unless the defendant has been given at least 90 days notice of the intention to commence the action.

(2) Contents of notice: The notice under paragraph (1) shall include the legal basis of the medical malpractice liability claim on which the action is based and the type of loss sustained, including the specific nature of the injuries suffered.

(b) Effect on Statute of Limitations: If the notice under paragraph (1) is served within 90 days before the expiration of the statute of limitations for filing the medical malpractice liability action, the time for commencing the action shall extend for 90 days after the notice under paragraph (1) is served.

(c) Effect of Failure To Comply: Failure to comply with this section shall not invalidate any court proceedings in the medical malpractice liability action involved, and shall not affect the jurisdiction of the court to render a judgment in the action, but a failure to comply with this section by an attorney at law shall be grounds for professional discipline by the appropriate State agency