ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
8917 SENATE JUDICIARY

responsible for the conduct of disciplinary actions against attorneys-at-law.

SEC. 9. INJUNCTIVE RELIEF.

Whenever any person has engaged or is about to engage in any conduct in violation of this Act, the appropriate court may, upon application of an interested party, issue an injunction or other appropriate order restraining such conduct.

SEC. 10. PREEMPTION.

(a) In General: The preceding provisions of this Act supersede any State law only to the extent that State law—

(1) permits the recovery of a greater amount of damages by claimant;

(2) permits the collection of a greater amount of attorneys' fees by a claimant's attorney; or

(3) establishes a longer period during which a medical malpractice liability claim may be initiated.

(b) Effect on Sovereign Immunity and Choice of Law or Venue: Nothing in subsection (a) shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) waive or affect any defense of sovereign immunity asserted by the United States;

(3) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976;

(4) preempt State choice-of-law rules with respect to claims brought by a foreign country or a citizen of a foreign country; or

(5) affect the right of any court to transfer venue or to apply the law of a foreign country or to dismiss a claim of a foreign country or of a citizen of a foreign nation on the ground of inconvenient forum.

SEC. 11. PERMITTING STATE PROFESSIONAL SOCIETIES TO PARTICIPATE IN DISCIPLINARY ACTIVITIES.

(a) Role of Professional Societies: Notwithstanding any other provision of State or Federal law, a State agency responsible for the conduct of disciplinary actions for a type of health care practitioner may enter into agreements with State or county professional societies of such type of health care practitioner to permit such societies to participate in the licensing of such health care practitioner, and to review any health care malpractice action, health care malpractice claim or allegation, or other information concerning the practice patterns of any such health care practitioner. Any such agreement shall comply with subsection (b).

(b) Requirements of Agreements: Any agreement entered into under subsection (a) for licensing activities or for review of any health care malpractice action, health care malpractice claim or allegation, or other information concerning the practice patterns of a health care practitioner shall provide that—

(1) the health care professional society conducts such activities or review as expeditiously as possible;

(2) after the completion of such review, such society shall report its findings to the State agency with which it entered into such agreement;

(3) the conduct of such activities or review and the reporting of such findings be conducted in a manner which assures the preservation of confidentiality of health care information and of the review process; and

(4) no individual affiliated with such society is liable for any damages or injury directly caused by the individual's actions in conducting such activities or review.

(c) Agreements Not Mandatory: Nothing in this section may be

construed to require a State to enter into agreements with societies described in subsection (a) to conduct the activities described in such subsection.

(d) Effective Date: This section shall take effect 2 years after the date of the enactment of this Act.

cc:Mail for: Terry Otness

Subject: s243.is.FTP

From: sled@sled.alaska.edu (SLED Login) at CC2MHS1 2/27/95 12:07 PM

To: Terry Otness at JNU_CAPITOL

FILE s243.is

S 243 IS
104th CONGRESS
1st Session
To provide greater access to civil justice by reducing costs and delay, and for other purposes.

IN THE SENATE OF THE UNITED STATES
January 19 (legislative day, January 10), 1995

Mr. Grassley introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide greater access to civil justice by reducing costs and delay, and for other purposes.

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 'Civil Justice Reform Act of 1995'.

SEC. 2. DIVERSITY OF CITIZENSHIP JURISDICTION; AWARD OF ATTORNEYS' FEES TO PREVAILING PARTY.

(a) Award of Fees: Section 1332 of title 28, United States Code, is amended by inserting after subsection (e) the following new subsection:

(f)(1) The prevailing party in an action under this section shall be entitled to attorneys' fees only to the extent that such party prevails on any position or claim advanced during the action. Attorneys' fees under this paragraph shall be paid by the nonprevailing party but shall not exceed the amount of the attorneys' fees of the nonprevailing party with regard to such position or claim. If the nonprevailing party receives services under a contingent fee agreement, the amount of attorneys' fees under this paragraph shall not exceed the reasonable value of those services.

(2) In order to receive attorneys' fees under paragraph (1), counsel of record in any actions under this section shall maintain accurate, complete records of hours worked on the matter regardless of the fee arrangement with his or her client.

(3) The court may, in its discretion, limit the fees recovered under paragraph (1) to the extent that the court finds special circumstances that make payment of such fees unjust.

(4) This subsection shall not apply to any action removed from a State court under section 1441 of this title, or to any action in which the United States, any State, or any agency, officer, or employee of the United States or any State is a party.

(5) As used in this subsection, the term 'prevailing party' means a party to an action who obtains a favorable final judgment (other than by settlement), exclusive of interest, on all or a portion of the claims asserted in the action.'.

(b) Study and Report: (1) The Director of the Administrative Office of the United States Courts shall conduct a study regarding the effect of the requirements of subsection (f) of section 1332 of title 28, United States Code, as added by subsection (a) of this section, on the caseload of actions brought under such section.

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which study shall include--

(A) data on the number of actions, within each judicial district, in which the nonprevailing party was required to pay the attorneys' fees of the prevailing party; and

(B) an assessment of the deterrent effect of the requirements on frivolous or meritless actions.

(2) No later than 4 years after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit a report to the appropriate committees of Congress containing--

(A) the results of the study described in paragraph (1); and

(B) recommendations regarding whether the requirements should be continued or applied with respect to additional actions.

(c) Repeal: No later than 5 years after the date of enactment of this Act, this section and the amendment made by this section shall be repealed.

SEC. 3. OFFER OF JUDGMENT.

(a) In General: Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

CHAPTER 114--PRETRIAL PROVISIONS

"Sec.

"1721. Offer of judgment.

"Sec. 1721. Offer of judgment

"(a)(1) In any civil action filed in a district court, any party may serve upon any adverse party a written offer to allow judgment to be entered for the money or property specified in the offer.

"(2) If within 14 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance and the clerk shall enter judgment.

"(3) An offer not accepted within such 14-day period shall be deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine reasonable attorney fees.

"(4) If the final judgment obtained by the offeree is not more favorable than the offer made under paragraph (1) which was not accepted by the offeree, the offeree shall pay the offeror's reasonable attorney fees incurred after the expiration of the time for accepting the offer, to the extent necessary to make the offeror whole.

"(5) In no case shall an award of attorney fees under this section exceed the amount of the judgment obtained. The court may reduce the award of costs and attorney fees to avoid the imposition of undue hardship on a party.

"(6) The fact that an offer is made under this section shall not preclude a subsequent offer.

"(7)(A) Subject to the provisions of subparagraph (B), when the liability of 1 party has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial.

"(B) The court may shorten the period of time an offeree may have to accept an offer under subparagraph (A), but in no case shall such period be less than 7 days.

"(b) A party making an offer shall not be deprived of the benefits of an offer it makes by an adverse party's subsequent offer, unless the subsequent offer is more favorable than the judgment obtained.

"(c) If the judgment obtained includes nonmonetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer included all such nonmonetary relief.

'(d) This section shall not apply to class or derivative actions under rules 23, 23.1 and 23.2 of the Federal Rules of Civil Procedure.

'(e)(1) Except as provided under paragraph (2), the provisions of this section shall not be construed to prohibit an award or reduce the amount of an award a party may receive under a statute which provides for the payment of attorney's fees by another party.

'(2) The amount a party may receive under this section may be set off against the amount of an award made under a statute described in paragraph (1).'.

(b) Technical and Conforming Amendment: The table of chapters for part IV of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

SEC. 4. PRIOR NOTICE AS A PREREQUISITE OF FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT.

(a) In General: Chapter 23 of title 28, United States Code, is amended by adding at the end the following:

'Sec. 483. Prior notice of civil action

'(a)(1) No less than 30 days before filing a civil action in a court of the United States the claimant intending to file such action shall transmit written notice to any intended defendant of the specific claims involved, including the amount of actual damages and expenses incurred and expected to be incurred. The claimant shall transmit such notice to any intended defendant at an address reasonably expected to provide actual notice.

'(2) For purposes of this section, the term 'transmit' means to mail by first class-mail, postage prepaid, or contract for delivery by any company which physically delivers correspondence as a commercial service to the public in its regular course of business.

'(3) The claimant shall at the time of filing a civil action, file in the court a certificate of service evidencing compliance with this subsection.

'(b) If the applicable statute of limitations for such action would expire during the period of notice required by subsection (a), the statute of limitations shall expire on the thirtieth day after the date on which written notice is transmitted to the intended defendant or defendants under subsection (a). The parties may by written agreement extend that 30-day period for an additional period of not to exceed 20 days.

'(c) The requirements of this section shall not apply--

'(1) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;

'(2) if the assets that are the subject of the action or would satisfy a judgment are subject to flight, dissipation, or destruction, or if the defendant is subject to flight;

'(3) if a written notice prior to filing an action is otherwise required by law, or the claimant has made a prior attempt in writing to settle the claim with the defendant;

'(4) in proceedings to enforce a civil investigative demand or an administrative summons;

'(5) in any action to foreclose a lien; or

'(6) in any action pertaining to a temporary restraining order, preliminary injunctive relief, or the fraudulent conveyance of property, or in any other type of action involving exigent circumstances that compel immediate resort to the courts.

'(d) If the district court finds that the requirements of subsection (a) have not been met by the claimant, and such defect is asserted by the defendant within 60 days after service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including

attorneys' fees, shall be imposed upon the claimant. Whenever an action is dismissed under this subsection, the claimant may refile such claim within 60 days after dismissal regardless of any statutory limitations period if--

'(1) during the 60 days after dismissal, notice is transmitted under subsection (a); and

'(2) the original action was timely filed in accordance with subsection (b).'.

(b) Conforming Amendment: The table of sections at the beginning of chapter 23 of title 28, United States Code, is amended by adding at the end the following:

'483. Prior notice of civil action.'.

SEC. 5. CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) Exhaustion of Administrative Remedies: Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended--

(1) by amending subsection (a) to read as follows:

'(a) In any action brought pursuant to section 1979 of the Revised Statutes of the United States, by any adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall continue such case for a period not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.'; and

(2) in subsection (b)--

(A) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(B) by inserting immediately after '(b)' the following:

'(1) Upon the request of a State or local corrections agency, the Attorney General of the United States shall provide the agency with technical advice and assistance in establishing plain, speedy, and effective administrative remedies for inmate grievances.'.

(b) Proceedings in Forma Pauperis: Section 1915(d) of title 28, United States Code, is amended to read as follows:

'(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious.'.

(c) Effective Date: The amendments made by subsections (a) and (b) shall take effect on the date of the enactment of this Act.

SEC. 6. EXPERT WITNESSES.

(a) In General: Chapter 119 of title 28, United States Code, is amended by inserting after section 1828 the following new section:

'Sec. 1829. Multiple expert witnesses

'In any civil action filed in a district court, the court shall not permit opinion evidence on the same issue from more than 1 expert witness for each party, except upon a showing of good cause.'.

(b) Technical and Conforming Amendment: The table of sections for chapter 119 of title 28, United States Code, is amended by inserting after the item relating to section 1828 the following new section:

'1829. Multiple expert witnesses.'.

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendments to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

Except as expressly provided otherwise, this Act and the amendments made by this Act shall become effective 90 days after

the date of the enactment of this Act. This Act shall not apply to any action or proceeding commenced before such effective date.

cc:Mail for: Terry Otness

Subject: h93.ih.FTP

From: sled@sled.alaska.edu (SLED Login) at CC2MHS1 2/27/95 11:33 AM

To: Terry Otness at JNU_CAPITOL

FILE h93.ih

104th CONGRESS
1st Session

To provide that the prevailing party in a tort action is entitled to recover attorneys' fees from the nonprevailing party.

IN THE HOUSE OF REPRESENTATIVES

January 4, 1995

Mr. Sensenbrenner introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that the prevailing party in a tort action is entitled to recover attorneys' fees from the nonprevailing party.

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

SECTION 1. AWARD OF ATTORNEYS' FEES.

The prevailing party in any civil action brought in a State or Federal court for money damages for injury or loss of property or personal injury or death caused by a negligent act or omission shall be entitled to recover from the nonprevailing party a reasonable attorney's fee. If sought by the prevailing party, the court shall award an attorney's fee under this section, whether the prevailing party is a plaintiff or defendant, unless the court finds special circumstances that would render such an award unjust.

SEC. 2. DEFINITION.

For purposes of this Act, the term `State' includes the District of Columbia.

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104th CONGRESS

1st Session

To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 4, 1995

Mr. Kyl introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

Be it enacted by the Senate and House of Representa- tives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may he cited as the `Medical Care Injury Compensation Reform Act of 1995'.

SEC. 2. FINDINGS; PURPOSE.

(a) Findings: Congress finds that--

(1) 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) the Federal Government has a major interest in health care as a direct provider of health care through the Public Health Service, as a source of payment for health care through Medicare, Medicaid, and other programs, and has a demonstrated interest in assessing the quality of care, access to care, and the costs of care through the evaluative activities of several Federal agencies;

(3) there is increasing concern that health care liability claims have significant negative effects on the health care system, including--

(A) increasing costs attributable to defensive medical practices, including the rising cost of medical liability insurance and costs attributable to the inefficiencies in the civil justice system;

(B) adverse effects on the quality of health care through the encouragement of defensive health care practices including unnecessary tests and procedures; and

(C) adverse effects on patient access to care because the fear of liability discourages health care professionals from continuing to practice in high risk specialties and certain geographic regions of the country;

(4) it has been demonstrated that the civil justice system is a costly, inefficient, and inequitable mechanism for resolving claims against health care providers and producers;

(5) a disproportionately large percentage of funds expended to compensate patients who suffer health care injuries is distributed to a few individuals, while others are denied adequate compensation;

(6) an exorbitant portion of awards in medical malpractice actions goes towards paying the transaction costs of the judicial system rather than compensating individuals for health care injuries; and

(7) there is optimism that alternative dispute resolution systems have the potential to significantly improve the adverse effects of the medical liability environment; however, more data and analysis is necessary to fully understand the benefits of various procedural devices.

(b) Purpose: The purposes of this Act are to--

(1) provide incentives to States to develop alternative dispute resolution procedures to attain a more efficient, expeditious, and equitable resolution of health care malpractice disputes;

(2) enhance general knowledge concerning the benefits of different forms of alternative dispute resolution mechanisms; and

(3) establish uniformity and curb excesses in the State-based medical liability systems through federally-mandated reforms.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) Alternative dispute resolution system: The term 'alternative dispute resolution system' means a system that is enacted or adopted by a State to resolve medical malpractice claims or medical product liability claims instead of resorting to a judicial proceeding in a State court.

(2) Claimant: The term 'claimant' means any person who brings a health care liability action and, in the case of an individual who is deceased, incompetent, or a minor, the person on whose behalf such an action is brought.

(3) Clear and convincing evidence: The term 'clear and convincing evidence' is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, except that such measure or degree of proof is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.

(4) Economic losses: The term 'economic losses' means losses for hospital and other medical expenses, lost wages, lost employment, and other pecuniary losses.

(5) Health care liability action: The term 'health care liability action' means any civil action brought pursuant to State law in which a plaintiff alleges a medical malpractice claim against a health care provider, health care professional, or medical product producer.

(6) 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.

(7) 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 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.

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

(9) Medical malpractice claim: The term `medical malpractice claim' means any claim relating to the provision of (or the failure to provide) health care services without regard to the theory of liability asserted, and includes any third-party claim, cross-claim, counterclaim, or contribution claim in a health care liability action.

(10) 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).

(11) Medical product liability claim: The term `medical product liability claim' means any claim in which a claimant alleges an injury arising from or relating to the use of a medical product.

(12) Medical product producer: The term `medical product producer' means any entity that is the designer, manufacturer, producer, or seller of a medical product that is the subject of a medical product liability claim.

(13) Noneconomic losses: The term `noneconomic losses' means 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.

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

(15) State: The term "State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

TITLE I--GRANTS TO STATES FOR ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

SEC. 101. GRANTS TO STATES.

(a) In General: The Secretary shall make grants to States for the implementation and evaluation of alternative dispute resolution systems.

(b) Eligibility: A State is eligible to receive a grant under this section if the State submits to the Secretary an application at such time, in such form, and containing such information and assurances as the Secretary may require, including--

(1) a description of the alternative dispute resolution system that the State intends to implement with amounts received under the grant;

(2) assurances that the State will comply with all data gathering requirements promulgated by the Secretary under section 102(a), and

(3) any information and assurances necessary to enable the Secretary to determine whether the State's alternative dispute resolution system meets the qualification standards for such systems developed by the Secretary under section 102(a).

(c) Number of Grants:

(1) In general: Except as provided in paragraph (2), the Secretary shall award not less than 10 grants each fiscal year under this section.

(2) Exception: Notwithstanding paragraph (1), the Secretary may award less than 10 grants under this section in a fiscal year if the Secretary determines that there are an inadequate number of applications submitted that meet the eligibility and approval requirements of this section in such fiscal year.

(d) Designation of Model States:

(1) In general: The Secretary shall designate each State receiving a grant under this section as a model alternative dispute resolution State.

(2) Extension of period of grant: Upon application to the Secretary, a State designated under paragraph (1) shall be eligible for a 2-year extension of the grant received under this section.

(3) Dissemination of information to other states: The Secretary shall disseminate information on the alternative dispute resolution systems implemented by the States designated under paragraph (1) to other States, health care professionals, health care providers, and other interested parties.

SEC. 102. ADMINISTRATION.

(a) Standards and Regulations for Alternative Dispute Resolution Grant Program:

(1) In general: In consultation with the Director of the Agency for Health Care Policy and Research, the Secretary shall develop and promulgate standards and regulations necessary to carry out the grant program established under section 101, including--

(A) qualification standards for alternative dispute resolution systems that States must meet in order to receive grants under such section; and

(B) regulations establishing data gathering requirements for States receiving grants under such section.

(2) Criteria for programs: In developing qualification standards for alternative dispute resolution systems under paragraph (1)(A), the Secretary shall take into account the effectiveness of such systems in--

(A) supporting access to health care;

(B) encouraging improvements in the quality of health care;

(C) enhancing and not impairing the physician-patient relationship;

(D) encouraging innovation that leads to an improved level of health care;

(E) compensating for avoidable medical injury due to provider fault and not compensating for injury which is unavoidable by standard medical practice;

(F) resolving claims promptly and in amounts proportional to the injury;

(G) providing predictable outcomes; and

(H) operating efficiently in terms of financial costs, professional energies, and governmental processes.

(b) Technical Assistance: The Secretary shall provide States with technical assistance to enable States to submit applications for grants under section 101, including information on the establishment and operation of alternative dispute resolution systems.

(c) Evaluation of Alternative Dispute Resolution Systems: Not later than 4 years after awarding the first grant to a State under section 101, the Secretary shall prepare and submit to Congress a report describing and evaluating the alternative dispute resolution systems implemented by States with funds provided under such grants, and shall include in the report--

(1) information on--

(A) the effect of such systems on the cost of health care within the State,

(B) the impact of such systems on the access of individuals to health care within the State, and

(C) the effect of such systems on the quality of health care provided within such State; and

(2) an analysis of the feasibility and desirability of establishing a national alternative dispute resolution system.

TITLE II--UNIFORM STANDARDS FOR MALPRACTICE CLAIMS

SEC. 201. APPLICABILITY.

Except as provided in section 209, this title shall apply to any health care liability action brought in a Federal or State court and to any medical malpractice claim or medical product liability claim subject to an alternative dispute resolution system.

SEC. 202. CALCULATION AND PAYMENT OF DAMAGES.

(a) Periodic Payments for Future Losses: No person may be required to pay more than $100,000 in a single payment in damages (whether for economic or noneconomic losses) for expenses to be incurred in the future, but shall be permitted to make such payments on a periodic basis. The periods for such payments shall be determined by the court, based upon projections of when such expenses are likely to be incurred.

(b) Limitation on Noneconomic Losses: The total amount of damages that may be awarded to an individual and the family members of such individual for noneconomic losses resulting from an injury which is the subject of an action or claim may not exceed $250,000, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

(c) Mandatory Offsets for Damages Paid by a Collateral Source:

(1) In general: The total amount of damages received by an individual shall be reduced (in accordance with paragraph (2)) by any other payment that has been or will be made to the individual to compensate the individual for the injury that was the subject of the action or claim.

(2) Amount of reduction: The amount by which an award of damages to an individual shall be reduced under paragraph (1) shall be--

(A) the total amount of any payments (other than such award) that have been made or that will be made to the individual to compensate the individual for the injury that was the subject of the action or claim; minus

(B) the amount paid by the individual (or by the spouse, parent, or legal guardian of the individual) to secure the payments described in subparagraph (A).

(d) Attorney's Fees: A claimant's attorney's fees may not exceed--

(1) 25 percent of the first $150,000 of any award or settlement paid to the claimant; or

(2) 15 percent of any additional amounts paid to the claimant

(e) Limitation on Punitive Damages: The total amount of punitive damages that may be assessed with respect to an action or claim may not exceed twice the total amount of the damages awarded to compensate the claimant for losses resulting from the injury which is the subject of the claim or action, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

SEC. 203. JOINT AND SEVERAL LIABILITY FOR NONECONOMIC LOSSES.

The liability of each defendant for noneconomic losses shall be several only and shall not be joint, and each defendant shall be liable only for the amount of noneconomic losses allocated to the defendant in direct proportion to the defendant's percentage of responsibility (as determined by the trier of fact).

SEC. 204. UNIFORM STATUTE OF LIMITATIONS.

(a) In General: No medical malpractice claim or medical product liability claim may be initiated after the expiration of the 2-year period that begins on the earlier of the date which the alleged injury that is the subject of such action was discovered or the date on which such injury 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 or medical product 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. 205. SPECIAL PROVISION FOR CERTAIN OBSTETRIC SERVICES.

(a) In General: In the case of a medical malpractice claim or medical product liability claim relating to services provided during labor or the delivery of a baby, if the defendant health care professional did not previously treat the plaintiff for the pregnancy, the trier of fact may not find that the defendant committed malpractice and may not assess damages against the defendant unless the malpractice is proven by clear and convincing evidence.

(b) Applicability to Group Practices or Agreements Among Providers: For purposes of subsection (a), a health care professional shall be considered to have previously treated an individual for a pregnancy if the professional is a member of a group practice whose members previously treated the individual for

the pregnancy or is providing services to the individual during labor or the delivery of a baby pursuant to an agreement with another professional.

SEC. 206. UNIFORM STANDARD FOR DETERMINING NEGLIGENCE.

(a) Standard of Reasonableness: Except as provided in subsection (b), a defendant may not be found to have committed malpractice unless the defendant's conduct at the time of providing the health care services that are the subject of the action was not reasonable.

(b) Actions Brought Under Strict Liability: Subsection (a) shall not apply to any action in which the claimant asserts that the defendant is liable under a theory of strict liability.

SEC. 207. RESTRICTIONS ON PUNITIVE DAMAGES RELATING TO MEDICAL

PRODUCT LIABILITY CLAIMS.

(a) Restrictions for Approved Products or Devices:

(1) In general: Punitive damages otherwise permitted by applicable law shall not be awarded with respect to any medical product liability claim alleged against a medical product producer if--

(A) the drug or device that is the subject of such claim--

(i) was subject to approval under section 505 or premarket approval under section 515 of the Federal Food, Drug, and Cosmetic Act by the Food and Drug Administration with respect to--

(I) the safety of the formulation or performance of the aspect of the drug or device; or

(II) the adequacy of the packaging or labeling of the drug or device, and

(ii) was approved by the Food and Drug Administration; or

(B) the drug or device is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) Exception in case of withheld information, misrepresentation, or illegal payment: The provisions of paragraph (1) shall not apply if it is determined on the basis of clear and convincing evidence that the medical product producer--

(A) withheld from or misrepresented to the Food and Drug Administration information concerning such drug or device that is required to be submitted under the Federal Food, Drug, and Cosmetic Act or section 352 of the Public Health Service Act that is material and relevant to the action; or

(B) made an illegal payment to an official of the Food and Drug Administration for the purpose of securing approval of the drug or device.

(b) Separate Proceeding To Determine Punitive Damages:

(1) Considerations: At the request of a medical product producer in a health care liability action in which a medical product liability claim is alleged against the producer, the trier of fact shall consider in a separate proceeding--

(A) whether punitive damages are to be awarded and the amount of the award; or

(B) the amount of punitive damages following a determination of punitive liability.

(2) Evidence: If a separate proceeding is requested in accordance with paragraph (1), evidence relevant only to the claim of punitive damages (as determined by applicable State law) shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded to the claimant.

(c) Criteria for Determining Amount of Punitive Damages: Subject to the limitation on punitive damages provided in section 202(e), all relevant evidence shall be considered in determining the amount of punitive damages assessed with respect to a medical product liability claim, including--

(1) the financial condition of the medical product producer;

(2) the severity of the harm caused by the conduct of the medical product producer;

(3) the duration of the conduct or any concealment of the conduct by the medical product producer;

(4) the profitability of the conduct to the medical product producer;

(5) the number of products sold by the medical product producer of the kind causing the harm complained of by the claimant;

(6) awards of punitive or exemplary damages to persons similarly situated to the claimant;

(7) prospective awards of compensatory damages to persons similarly situated to the claimant;

(8) any criminal penalties imposed on the medical product producer as a result of the conduct complained of by the claimant; and

(9) the amount of any civil fines assessed against the defendant as a result of the conduct complained of by the claimant.

SEC. 208. JURISDICTION OF FEDERAL COURTS.

The district courts of the United States shall not have jurisdiction of any health care liability action based on sections 1331 or 1337 of title 28, United States Code.

SEC. 209. PREEMPTION.

(a) In General: This title supersedes any State law only to the extent that the State law permits the recovery by a claimant or the assessment against a defendant of a greater amount of damages, permits the awarding of a greater amount of attorneys' fees, establishes a longer period during which a medical malpractice claim or medical product liability claim may be initiated, or establishes a less strict standard of proof for determining whether a defendant has committed malpractice, than the provisions of this title.

(b) Effect on Sovereign Immunity and Choice of Law or Venue: Nothing in this title shall be construed to--

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) waive or affect any defense of sovereign immunity asserted by the United States;

(3) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976,

(4) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or

(5) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground in inconvenient forum.

FORM #9 (8/89)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

[redacted],

Plaintiff(s),

v.

[redacted] M.D. and
[redacted] HOSPITAL ALASKA, INC.,

Defendant(s).

Case No. 3AN-91-6699 Civil.

NOTICE OF THE FILING OF EXPERT ADVISORY PANEL'S REPORT(S)

TO: Attorneys/parties of record

RECEIVED
FEB 24 1992
LIBBEY & SUDDOCK

You are hereby notified that the Expert Advisory Panel has filed its Report(s) in the above-captioned action, pursuant to A.S. 09.55.536. A copy of the panel's Report(s) accompanies this Notice.

Cassette tape(s) or written statement(s) submitted by the panel with the Report(s) will be held in the court file for your review upon request.

This medical malpractice action will no longer be held separate from the other civil case files.

DATED this 24th day of February, 1992.

CLERK OF COURT

By Diane Abbott
Deputy Clerk

Enclosures: Report(s)

Description of Cassette(s)/Statement(s):

micro-cassette of interviews with Dr. [redacted] and Priscilla Reeves, R.N.

This is to certify that on 2-24-92 a copy of this Notice was sent to the attorneys/parties of record:

Hedland Brayton Gilmore & Murphy

and professional association:

[redacted].

Diane Abbott
Deputy Clerk

REPORT BY THE EXPERT ADVISORY PANEL

CASE NAME: [redacted] vs [redacted], M.D. and Humana Hospital Alaska, Inc.

CASE NUMBER: 3AN-91-6689 Civil

REPORT ON DEFENDANT: [redacted], M.D.

The expert advisory panel in the above-referenced case, being duly appointed, has reviewed all the medical records and exhibits provided by the parties and makes the following report on the above-named defendant, pursuant to Alaska Statute 09.55.536.

QUESTION: What was the disorder for which the plaintiff came to medical care?

ANSWER: Painful right knee - possibly secondary to the patella [illegible] due to a torn meniscus.

QUESTION: What would have been the probable outcome without medical care?

ANSWER: Probable continued painful right knee.

CASE NUMBER: 3AN-91-6689 Civil
DEFENDANT: [redacted], M.D.

QUESTION: Was the treatment selected appropriate for the case?

ANSWER: Yes.

QUESTION: Did an injury arise from the medical care?

ANSWER: Yes.

REPORT, Page thr[illegible]
CASE NUMBER: 3AN-91-6689 Civil
DEFENDANT: [redacted], M.D.

QUESTION: If an injury did arise from the medical care, what is the nature and extent of the medical injury?

ANSWER: The incorrect knee was operated upon. This caused the patient surgical pain and secondary weakness in that leg requiring rehabilitation. It would be anticipated that the patient should recover from this surgical procedure.

QUESTION: If an injury did arise from the medical care, what specifically caused the medical injury?

ANSWER: Surgical procedure was performed on the incorrect leg.

QUESTION; If an injury did arise from the medical care, was the medical injury caused by unskillful care?

ANSWER. No.

QUESTION: If a medical injury had not occurred, how would the plaintiff's condition differ from the plaintiff's present condition?

ANSWER:

This is unknown since the preoperative condition of the left knee and leg is not known and cannot be compared with the present testing information.

DATED: January 30, 1992

Panel Member Panel Member Panel Member

**ALL PANEL MEMBERS MUST SIGN THE REPORT, UNLESS DISSENTING REPORTS ARE FILED.

***COMPLETION OF ATTACHMENT "A" IS MANDATORY.

ALL EXHIBITS EXAMINED BY PANEL THAT ARE NOT REPRODUCIBLE ON PAPER, SUCH AS X-RAYS, SLIDES, MODELS, ETC.

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ATTACHMENT "A"

REPORT, Page five.
CASE NUMBER: 3AN-91-6689 Civil
DEFENDANT: [redacted], M.D.

PERSONS INTERVIEWED BY EXPERT PANEL

REMINDER: You must maintain a recording of any testimony or written statements of witness and you must file copies of all tapes or written statements with your report.

1. [redacted] M.D. - January 29,1992
2. Priscilla Reaves R.N. - January 29, 1992
3.
4.
5.
6.
7.
8.
9.
10.

ALL TREATISES OR MEDICAL LITERATURE REFERENCED BY THE EXPERT ADVISORY PANEL

1. Medical Records provided by Mr. John Sukkock
2. Medical Records provided by Mr. Sigurd E. Murphy
3. Medical Records provided by Timothy J. Lamb
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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

RECEIVED MAR 1 7 1995

Greetings, ALEC member:

In this packet, you will find recent publications on issues ranging from prison overcrowding to telecommunications regulation. We have also included remarks made by U.S. Speaker of the House Newt Gingrich (R-Ga.) during the orientation for freshmen Republican congressmen. You will note in the speech numerous references to decentralized government, free enterprise and empowerment. The new Speaker provides critical insights into the new congressional leadership and the policies, many of which are part of the ALEC agenda, which they are advocating.

In the State Factor entitled ***Conditional Early Release***, ALEC researchers show there is a workable solution to two problems whose answers seem to be in opposition. They demonstrate that there is indeed a way to ease prison and jail overcrowding while keeping violent criminals off the streets.

In The State Factor, ***The Impact of Competition on Universal Service in the Local Telecommunications Marketplace***, you will learn why governments should allow the industry to develop and compete in open markets, where it flourishes. But to accomplish this, change is required in the regulatory structure.

Roughly 30 states have enacted laws requiring students in certified public accountant programs to take an additional 30 hours of college credit in order to graduate. In The State Factor, ***The 150 Hour Law***, ALEC illustrates how the law hurts students, accounting firms, taxpayers, and eventually consumers.

ALEC Proceedings features speeches made at the 1993 Annual Meeting in Traverse City, Michigan, the 1993 National Orientation Conference and the 1994 National Leadership Summit on Economic Growth in San Antonio, Texas.

As usual, I am confident you will find all the information useful in fulfilling your legislative duties.

Sincerely,

Samuel A. Brunelli
Executive Director

American Legislative Exchange Council ■ 910 17th Street N.W. ■ Fifth Floor ■ Washington, D.C. ■ 20006 ■ (202) 466-3800

House GOP Freshman Orientation
Leadership for America's 21st Century

Honorable Newt Gingrich
Speaker, U.S. House of Representatives

The world is in a period of transition of historic proportions. Across the planet middle class voters are shaking governments with their outspoken discontent and unhappiness. Voter dissatisfaction is translating into political unpopularity and then political unpopularity is translating into defeat, even collapse of governments. From the fall of the Soviet empire to the replacement of the Italian postwar political system, the annihalation of the French Socialists, the virtual elimination of the Canadian governing party, (which fell from 153 seats to two seats in the 1993 election), to the replacement of the LDP as the governing party of Japan after a 38 year monopoly of power, again and again the working middle class is displaying its anger and dissatisfaction by punishing governments.

Here in the United States the same kind of voter dissatisfaction powers the term limits movement (77% public support) the United We Stand effort and the Ross Perot presidential candidacy (19%, one of the highest third-part votes in over a century), the election of Republicans the the New York, Los Angeles, and Jersey City mayoralities and the rebellion against government interference in the West and against property tax increases in the Midwest and East.

The challenge to political leaders is to find solutions that actually give voters some hope that their lives will improve. Promises based on inadequate or wrong analysis are not solutions. They are merely campaign slogans bound to fail and thus increase cynicism and alienation.

The failure of politicians in America and across the planet has not been a failure of money or courage. It has been an intellectual failure of the postwar political system that is now obsolete and incapable of regenerating itself.

The current failure of governments is not inevitable and it need not be long lasting. The voters do not need to adjust to malaise, or become dramatically more patient, or lower their standards and expectations. (all pleas from political elites who have failed and would like to lower the curve for measuring the success of government, asking the voters to behave like the SAT board and pretend that incompetence and non-performance should be scored higher because, "times have changed").

We need a generation of leadership that recognizes our current problems are largely intellectual and that we need new ideas. Even more importantly, we need a new framework for these ideas. (what Thomas Kuhn called a Paradigm Shift in The Structure of Scientific Revolutions).

An easy way to contrast the timidity of the failed political elites and the boldness and comprehensiveness of thought needed for successful leadership in our generation is the difference between the words reform and replace.

The besieged elites of the old order want to reform their failing governments. These futile reform efforts invariably involve bigger bureaucracies and higher taxes. They inevitably lead to poorer services at a higher cost and create voter discontent.

New leadership recognizes that the obsolete, failing, current system needs to be replaced, not reformed. New leadership recognizes that the current welfare state structure of government is built on an industrial-era model within a nation-state economy on social worker assumptions that have clearly failed. Raising taxes to try to improve the obsolete is simply throwing money away, increasing the agony and lengthening the political-financial burden on those who work more to earn less.

home pay and the greatest range of options we will have to be very market-oriented, very entreprenurial, very focused on the requirements of the competition. This will require rethinking litigation, regulation, taxation, education, and the delivery systems and bureaucracies of government to reshape each so it contributes to, rather than undermines, our ability to compete in a world market.

3. The welfare state has failed. It is impossible to maintain civilization with twelve-year-olds having babies, fifteen-year-olds killing each other, seventeen-year-olds-dying of AIDS and eighteen-year-olds receiving diplomas they cannot read. All these things are happening in America today and American civilization is decaying. The Great Society experiment in replacing families with social workers, the work ethic with government payments, the neighborhood with a public housing bureaucracy and police with social workers has simply failed. We must replace the welfare state with an opportunity society dedicated to rebuilding personal strength, the family structure, the fabric of community, and the energetic pursuit of happiness which is at the core of American civilization.

4. The combination of the third wave information revolution, the economic pressures of the emerging world market, the failures and dangers of the collapsing welfare state, and the bankrutcy of the post-intellectual elite of the old order have led to a level of citizen alienation that may be deeper than anything America has seen since the American revolution. From term limits to ratings of Congress to virtually universal cynicism and contempt for both the process of self government and the people who participate in it, the simple fact is that Americans feel alienated, unrepresented, and in many ways betrayed by those to whom they have loaned power. Inventing the third wave of information revolution self government system that rebounds the voter to those entrusted with public office may be one of the most important and most difficult challenges of our time.

5. We must find a new path to replace the welfare state with an opportunity society and to replace the centralized government approach with a dramatically, even radically decentralized approach that relies on each and every citizen and each community to provide leadership and creativity. This requires a degree of devolving power out of Washington that virtually no one has thought through at this point. Furthermore, this devolution of power cannot just be to shift responsibility and resources between Washington and the State Capitals. It is not enough just to return power to state and local government. We must think through the process of returning power to local citizens, local voluntary associations, private businesses, and only then to local, state, and finally federal governments.

America is now facing a series of changes so profound that only an aroused, informed citizenry will be able to think through, decide and implement enough changes on a large enough scale and with enough understanding of local conditions and local realities.

It is impossible for a small group of politicians or bureaucrats to understand a country this vast and a people so diverse and numerous. Only a boldly decentralized system will be able to work through the many changes that the third wave information age and the world market will make necessary in the next few years.

Yet a decentralized system that relies on citizen leadership and on voluntary activities actually requires a more thorough approach to developing principles, tools, habits and values. A decentralized system has to have some core beliefs and core principles which are widely understood and agreed to if it is to be effective.

Decentralization only works if people have a clear sense of their general direction and the principles, values, framework and habits which mark that direction. In a very real sense, freedom actually requires more learning, more knowledge than slavery. As a slave, you simply do what you are told. As a free person, you must have some core framework of thought which enables you to function effectively in a free society.

While a core set of ideas is impotant for a free person, the concept of a core set of ideas is more important for a free nation. Defining the rules of the game. Outlining what it means to be an American. Creating a framework of expectations so people will know what their civilization expects of them and what rewards they will get if they meet the expectations (What Yankelovich called a giving and getting contract). Each of these core concepts has to be outlined and clearly understood if America is to work as a society.

Precisely because we want our central government to be limited in its powers and authority and we want our bureaucrats to stay out of our life and our neighborhood, it is vital that we bind ourselves by intellectual principles

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

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New leadership must build a new team around new assumptions that are designed to replace rather than reform the welfare state. This new framework must take into account the objective realities of the information revolution (Toffler's third wave of change), the emerging world market, and the basic lessons of American civilization that have worked for over 300 years and need to be restudied and reapplied to the emerging new global economic and technological realities.

This new intellectual framework has been emerging over the last quarter century in widely scattered efforts at explaining the modern world. Peter Drucker's The Age of Discontinuities (1969), Kenneth Boulding's The Meaning of the Twentieth Century (1964), and Alvin and Heidi Toffler's Future Shock (1970), The Third Wave (1980), and War and Anti-War (1993), George Gilder's Microcosm (1989), Edwards Deming's Out of the Crisis (1982), have all outlined the scale of change we are living through. No one who reads these works could believe the entire technological and economic framework of our lives can change while somehow the structure of government can remain the same.

Our job as leaders is to understand this new third wave, information revolution, and the need to compete within a pervasive global market and develop a replacement for the welfare state. By combining technological potential and economic realities with the classic strengths of American civilization it is possible to develop a new model of a successful America that will be dramatically more prosperous, more powerful, and more desirable.

There is every reason to believe that Americans could live safely in the healthiest, most prosperous society on the planet with the highest quality of life, the best standard of living, and the greatest range of choices.

There is every reason to believe that the next generation could have a greater opportunity to pursue happiness than any generation in American history.

The economic opportunities and technological opportunity will be available if we can stop obsolete political elites and an obsolete welfare state from blocking the future and protecting the past.

This paper is an initial introduction to the ideas necessary to replace the welfare state with an opportunity society. It is designed for elected officials and would-be elected officials as an introduction to leadership in an age of extraordinary change.

The changes that are coming are so great that no one knows the answers. That includes this paper. Consider this a work in progress open for critique and improvement, and feel free to send me your ideas and your suggestions.

This challenge is so great that only a team effort can bring about the transformation that is needed. It is to that teamwork and the rewards of that transformation that this paper is dedicated.

I. An analysis, planning, decision and implementation model

Vision
Strategies
Projects (a definable, delegatable achievement)
Tactics (Daily behavior)

II. The five great truths of our generation.

1. The information revolution is so powerful that it is the third great wave of change in human history. Only the rise of agriculture and the rise of industry are comparable. Alvin Toffler's The Third Wave describes the pervasive ways in which every aspect of life will be transformed by this revolution. We must rethink society and government within the challenge of this enormous change.

2 The world market is real and will shape our lives. Our children will compete with workers in other countries the way our parents competed with workers in other American states. South China will set the price of labor for the next two generations. If we want our children to have the highest standard of living with the highest take-

home pay and the greatest range of options we will have to be very market-oriented, very entrepreneurial, very focused on the requirements of the competition. This will require rethinking litigation, regulation, taxation, education, and the delivery systems and bureaucracies of government to reshape each so it contributes to, rather than undermines, our ability to compete in a world market.

3. The welfare state has failed. It is impossible to maintain civilization with twelve-year-olds having babies, fifteen-year-olds killing each other, seventeen-year-olds-dying of AIDS and eighteen-year-olds receiving diplomas they cannot read. All these things are happening in America today and American civilization is decaying. The Great Society experiment in replacing families with social workers, the work ethic with government payments, the neighborhood with a public housing bureaucracy and police with social workers has simply failed. We must replace the welfare state with an opportunity society dedicated to rebuilding personal strength, the family structure, the fabric of community, and the energetic pursuit of happiness which is at the core of American civilization.

4. The combination of the third wave information revolution, the economic pressures of the emerging world market, the failures and dangers of the collapsing welfare state, and the bankrutcy of the post-intellectual elite of the old order have led to a level of citizen alienation that may be deeper than anything America has seen since the American revolution. From term limits to ratings of Congress to virtually universal cynicism and contempt for both the process of self government and the people who participate in it, the simple fact is that Americans feel alienated, unrepresented, and in many ways betrayed by those to whom they have loaned power. Inventing the third wave of information revolution self government system that rebounds the voter to those entrusted with public office may be one of the most important and most difficult challenges of our time.

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Precisely because we want our central government to be limited in its powers and authority and we want our bureaucrats to stay out of our life and our neighborhood, it is vital that we bind ourselves by intellectual principles

rather than governmental rules.

III. Vision

We must build a prosperous safe America in which every American has a sense of personal strength and unlimited opportunity and in which the pursuit of happiness has led the American people to create an American nation economically, militarily, and morally able to help the entire human race achieve self government, safety, and prosperity. We must build an America in which the combination of the opportunities created by the third wave information revolution and the changes requires to be the most productive, competitive nation in the world has created an opportunity society with the best health, the best learning, the greatest safety, the highest standard of living, the best quality of life, and an empowerment of citizens which has led to the greatest range of personal, family, community, and business opportunities in the world.

IV. Leadership for America's 21st Century.

1. Listen-Learn-Help-Lend is our four step process necessary for leadership in a third wave information revolution in America. There will be no singular leaders directing from above. This leader-team will be the key model and leaders will always begin by listening and learning, then helping and only leading as the fourth step in the process.

2. The elected leader has multiple roles of descending importance and they are often the opposite in importance from the traditional pattern of the welfare state. In order of power and impact they are:

A. Visionary definer, agenda setter, and value articulator for the community. The leader in the "bully pulpit" of Theodore Roosevelt's phrase.

B. Symbol of community power and standing. Going to key events sends the signal of status and legitimacy. Use your office to honor, empower, and strengthen those who are doing what you believe is important.

C. Recruiter of talent and energy and gatherer of community resources to achieve goals you believe in.

D. Administrator and manager of government. Note that in the welfare state managing the government has crowded out the three most important roles of community leadership. Remember that the urgent drives out the important. Leadership is forcing the important ahead of the urgent. The best book to help you distinguish between the urgent and to teach you to delegate the less important so you focus on the more important is Peter Drucker's The Effective Executive. You should buy a copy, read it, and reread it every five years.

3. The Jeffersonian model of a free society is the key to understanding why leaders must focus first on leading the community and last on managing the government. In a free society the vast bulk of the energy and resources are outside government. Focusing on managing the bureaucracy actually limits the leader and reduces his or her resources. The Jeffersonian model deliberately limits government so the other aspects of a free society can flourish. Jefferson understood that a deliberately limited but effective government could sustain and encourage freedom and prosperity but a large , pervasive government would inevitably crowd out the elements that are vital to a free people. Gordon Woods , a leading intellectual historian of the American Revolution and the Founding Fathers helped me understand this very sophisticated Jeffersonian model of freedom which is the basis of the country Alexis De Tocqueville described in Democracy in America. The Jeffersonian model has four components and if any one crowds out or squeezes down the others, the entire process of freedom, prosperity, and safety suffers.

1. American Civilization and Culture. The habits and practices of a free society	3. Free Markets, private property, the rule of law incentives, the pursuit of happiness
2. Civic Responsibility, personal responsibility, doing your duty to society	4. Limited but effective government

The leader's job is to draw upon each of the four sectors as appropriate and to weave them together in a synergistic whole. Only by seeing yourself as the leader of all four components can you truly draw on all the resources and strengths of a free society. By overemphasizing the role of government, the Great Society experiment undermined the other three. Sometimes conservatives so ignore the role of limited effective government that they weaken the potential synergism. Economic conservatives often overstate the importance of section three while social conservatives tend to focus on one and two.

4. Listen to your community. You have in your community people and institutions in all four sectors who are busy inventing the tools of the third wave information revolution, learning to compete in the world market and seeking to replace the failed welfare state with more effective approaches. Listen to them and learn from them. Offer to help them in each of your four roles as community leader. Then recruit them to help you lead by helping you develop the vision, strategies, projects and tactics you need to transform your community from the welfare state into an opportunity society for all your citizens.

V. The five building blocks of American civilization.

1. Personal Strength. Without personal strength it is impossible to maintain a free society. Every policy should be examined to see if it increases personal responsibility, productivity, safety, and self-reliance or if it undermines them.

2. Entreprenurial Free Enterprise. The application of personal strength to the pursuit of hapiness by fostering a spitit of "can do" enthusiasm and determination to get the job done

3. The spirit of innovation and discovery. The zest for new ideas, new inventions and new learning, which made Benjamin Franklin, Thomas Edison, the Wright brothers , Henry Ford and in our times Bill Gates, Steven Spielberg, and Jack Horner are good examples of the spirit of learning inventing and discovering.

4. The system and culture of quality and profound knowledge as developed by Edward Deming. Deming's systemization of a culture of productivity and teamwork provides a framework for extraordinary breakthrough in productivity by virtualy any system in virtually any endeavor. Popularized first in Japan it is in fact based in the Classic American virtues of the period. 1910-1940 (hard work, integrity, committment to achievement, etc.) Joseph Juran and Phil Cosby are important contributors to this movement emphasizing somewhat different approaches than Deming.

5. The lessons of American history. American has liberated, empowered, and liberated to pursue happiness more people from more ethnic religious, racial and cultural backgrounds than any other civilization in history. Yet America's elites insist on seeking answers in European socialism, academic theories, and any other source which avoids the habits and practices of America. For over three hundred years America has been successful in creating unique opportunities for people. As a general principle it is useful to begin seeking a solution or thinking through a problem by asking how other Americans in other eras have solved similar problems or met similar challenges.

VI. Further steps toward renewing American civilization.

Since this is clearly a very brief introduction to an extraordinarily complex topic you might find it useful to look at some of the steps that are being taken to develop these ideas further.

1. Renewing American civilization. A twenty hour course taught each Winter at Rhinehart College in Waleska, Georgia. The current course is available on videotape every Wednesday from 1 to 3 PM eastern time on National Empowerment Television (a new satellite cable channel). The audio and videotape versions are also available by calling 1-800-TO-RENEW. A new version will be taught in January, 1995 and will be available in Washington. Congressman Pete Hoekstra) (teaches the course at Hope College in Michigan)

2. The Progress Report. A television call in show hosted by Newt Gingrich and Heather Higgins and Produced by the Progress and Freedom Foundation. It is on from 10 to 11 PM every Tuesday evening and focuses on new ideas, new inventions, and breakthroughs that make progress possible.

3. GOPAC (202-484-2282) a Republican campaign organization that develops training tapes, seminars and conference calls dedicated to sharing new solutions, new proposals, and new lessons that will help transform the welfare state nto an opportunity society.

4. The Congressional Institute (202-547-4600) a nonprofit foundation open to all citizens who want to help develop the process of self government in the third wave of the information age. Every state and local community should consider developing a similar nonprofit (and therefore much more independent, innovative, inexpensive, and flexible than a government system would be) institution to work with entreprenurial activists and inventors to develop experiments from which will grow the self government and citizen involvement of the future. Jerry Klimer, the head of the Institute would be glad to share his experiences and insight with both Democratic and Republican Legislators.

5. American Civilization a new monthly newspaper that will be reporting on the inventions, ideas solutions and experiments that will help America make the transition to a third wave information age country capable of competing succesfully in the world market with an opportunity society that offers every citizen full participation in the pursuit of happiness and responsibility of citizenship. Frank Gregorsky, the editor is looking for both readers and good success stories, you can reach him by phone (202-484-2312), fax. (202-484-9326) or e-mail (PFF @ AOL.COM).

6. The Progress and Freedom Foundation
7. The American Legislative Exchange Council (ALEC)
8. The Heritage Foundation
9. Project for the Republican Future
10. Americans for Tax Reform

VII. Zones of Invention and Creativity

1. Health
2. Jobs
3. Public Safety
4. Learning
5. The culture and systems of poverty and violence
6. The patterns of government and bureaucracy
7. Litigation
8. Bureaucracy, regulation and the spirit of speed limits
9. Taxation in the world market in the third wave information age

VIII Last Thoughts

"Our generation has a rendezvous with destiny." When President Franklin Roosevelt said those words America was on the verge of world War II and our continued freedom required defeating Nazi Germany, Fascist Italy, and Imperial Japan. Our parents and grandparents rose to the challenge.

After World War II our destiny required us to contain the Soviet Empire for 45 years until it collapsed. We rose to the challenge.

Today our destiny is to be found here at home. We cannot aford another generation of decay, violence, and despair. Our generation must replace the welfare state with an opportunity society if American civilization is to be renewed and the American dream restored.

No one knows how to complete the transformation from an industrial second wave society to an information third wave society. No one truly knows what we have to do to be the most productive and most competitive country in the world. No one has invented a new model of self government that reestablishes public accountability and public faith in elected officials and the government insturments necessary for a free society.

We are all in this quest together. This is our generation's rendezvous. We need your involvement and help. Together we can give our children and grandchildren the freedom safety and prosperity we want for them.

Together we can create the renewal of America which will allow us to lead the human race to the rule of law, private property, self government, and safety.

On the one hand are the barbarism, violence and brutality of Bosnia, Rwanda, Haiti and all too many of our own streets and neighborhoods. On the other hand there is the decency, safety and opportunity to pursue happiness inherent in the founding fathers dream of America.

We will decide by our commitments, our courage, and our creativity which path our children and grandchildren (and their country) will be on.

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

February 10, 1995

Senator Taylor
State Capitol, Room 30
Juneau, Alaska 99801

HAND DELIVERED

Dear Senator Taylor,

Earlier this week I dropped off a copy of HB 158, the omnibus tort "reform" bill along with an executive sectional review. The sectional review contained a misstatement as to section 2, eight year statute of repose. This section does not pertain to product liability, only liability for negligent construction and design.

I have attached a corrected sectional summary. A detailed sectional analysis should be available for distribution the end of next week. I will forward that summary to you as soon as I have completed it. I am sorry for any confusion caused by the mistaken analysis of section 2 earlier this week.

Sincerely,

Debra C. Gravo

Debra C. Gravo
Executive Director
dch/encl.

EXECUTIVE SECTIONAL SUMMARY
Prepared by Alaska Action Trust

HB 158, "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 68, and 95; amending Alaska Rule of Evidence 702; and providing for an effective date."

Introduced February 6, 1995

Sponsor(s): Representatives Porter and Toohey

Referrals: House Judiciary and Finance

****

Section 1: Findings and Purpose.

Section 2: Statute of repose of eight years; eliminates liability for negligent construction and design after eight years.

Section 3: A minor has until their 8th birthday to sue a health care practitioner for malpractice; decreases amount of time to address injuries sustained by children.

Section 4: 2-year statute of limitations for torts.

Section 5: 2-year statute of limitations for personal or property injury.

Section 6: Noneconomic damages capped at $300,000 except for most severely injured, cap at $500,000; limits amount that can be recovered in cases of catastrophic injury.

Section 7: Punitive damage standard of proof raised to "clear and convincing evidence of malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought"; makes it practically impossible to punish willful offenders.

Section 8: Punitive damages are capped at three times compensatory or $300,000 whichever is greater and half of the award goes to general fund of state.

Section 9: Economic damages will be reduced by federal and

state income tax; eases financial responsibility of wrongdoers.

Section 10: Periodic payments are available at the defendant's request for awards over $100,000; takes away injured party's right to choose how judgment will be paid.

Section 11: If judgment is paid by periodic payments, the court requires a security be posted except if entity is state or authorized insurer.

Section 12: Payment of future damages by periodic payment will include increases in future payments for anticipated inflation.

Section 13: Changes collateral benefit rules; affects injured party's ability to be reimbursed for insurance costs and ability to choose a doctor.

Section 14-15: Changes apportionment of fault statute; shifts responsibility for wrongdoing to parties who are missing or immune from prosecution.

Section 16: Releases.

Section 17: Offers of judgment.

Section 18: Interest on judgments is 3% above Federal Reserve rate.

Section 19: Prejudgment interest is not awarded for future economic damages, future noneconomic damages and punitive damages; allows wrongdoers to profit from delaying the settlement process.

Section 20: Uniform Arbitration Act.

Section 21-22: Medical expert witness qualification.

Section 23: Contingent fees are to be calculated after the portion of the punitive damage award which goes to the state is deducted.

Section 24: Overrules Jackson v Powers; eliminates hospitals' responsibility for negligent acts caused by contract emergency room health care providers.

Section 25: No damages for personal injury by anyone engaged in felony.

Section 26: Signing of pleading and sanctions.

Section 27: 09.55.548 is repealed.

Section 28: Civil Rule 49 is amended.

Section 29-30: Civil Rule 68 is amended.

Section 31-32: Rule of Evidence 702 is amended.

Section 33: Civil Rule 95 is amended.

Section 34: Severability clause.

Section 35: Applicability clause.

Section 36: Effective date: July 1, 1995.

Classified cont. from F-5

Mike Moody
276 1100

Sent to me by (Bob) R. W. Nestel (I called him (back and

Gun seller settles with injured teen

Western Auto agrees to pay more than $4.25 million in '89 accidental shooting

By SHEILA TOOMEY
Daily News reporter

A gun retailer that won, then lost, a jury verdict last year, has paid more than $4.25 million to settle out of court the case of a permanently disabled Nikiski youth.

Kevin Taylor was 11 in 1989 when the rifle he was playing with fell apart, discharging a .22-caliber bullet into his brain. After more than six operations and years of rehabilitative treatment, Taylor, now 17, is entering his senior year at Nikiski high school and must use a wheelchair, said his attorney, Mike Moody.

The Taylor family had no health insurance and has incurred about $500,000 in medical bills so far, Moody said. And Kevin will require specialized care for the rest of his life.

The case came to public notice in March 1994 when a Kenai jury concluded the Taylors were not entitled to any damages. Co[illegible] pers indicated the jury pa[illegible] had turned down a plaintiffs settlement offer of [illegible] trial million. $4.25

Jurors apparently co[illegible] cluded the company was not responsible for a design defect. The gun was manufactured by Savage Arms Corp., which has since gone into bankruptcy, and was sold by Western Auto.

The fact that Taylor's father bought the rifle second-hand further complicated the issues.

But Western Auto's pleasure at the outcome was short-lived. In November, Kenai Superior Court Judge Jonathan Link threw out the jury verdict and ordered a new trial. In an unusually harsh opinion, Link accused Western attorneys and the jury forewoman of improper conduct. Link also ruled that the rifle was in fact defective in design.

The case was headed into a second trial when both sides signed off on the out-of-court settlement.

Lawyers for both sides refused to say exactly how much Western Auto paid. "All I can tell you is that it is a lot more than the well-publicized offer of $4.25 million that we rejected," Moody said.

Jim Powell, an attorney for Western, said his client paid off despite a belief that the judge's rulings were reversible on appeal. So, why settle if that's so?

"It takes time, it costs money; and the injuries were very serious," Powell said.

"And nothing is ever certain."

Western could not appeal Link's rulings until after the second trial. And even if the appeals courts agreed with them, all Western could get is a third trial, he said.

The Taylors originally asked for $7.8 million. "Finally they decided to get reasonable," Powell said.

Because Kevin Taylor is a minor, the money will go into a formal trust and be administered by a committee "to provide for his needs over his lifetime," Moody said. "It's really nice that it worked out well in the end."

DATE: AUGUST 14, 1995

TO: THE HONORABLE ROBIN TAYLOR
CHAIRMAN, JUDICIARY COMMITTEE

FROM: CATHY CRAWFORD
ASSOCIATE BROKER Cathy Crawford

PHONE: 789-5099

FAX: 789-0054

RE: PUBLIC HEARINGS ON TORT REFORM, HB 158

This memo is regarding the above HB 158. I have not read the bill, but have heard some of the input. I certainly do agree that we need to have changes made.

I, personally, am in danger of having my real estate license suspended for three months. The reason was the lending institution relied on an engineers phone call regarding a report he made to her and turned down a loan; the Buyer relied on the lending institution's suggestion. HOWEVER, when we gave testimony the engineer testified that he did not like the Seller and wanted to sour the deal so he lied to the lending institution.

Our attorney has the engineer's statements taped in his deposition and also when he was testifying at the hearing. When the commission met, these facts were disregarded, and although I was trying to consummate this transaction in a happy ending, this is what I am facing.

This is the sort of thing that happens to real estate people. The Good Lord knows that there are enough things that can go wrong, and we certainly do not need any help from other people. As far as I am concerned, this was a frivolous law-suite and should never have even been brought to a hearing when the Real Estate Commission knew in advance that the Engineer lied to make the deal fall through.

If you are interested in learning more about this case, I will be glad to talk with you. These sorts of things goes on all the time, but it seems that there is nothing that real estate people can do to protect ourselves. If we do something wrong, then we should answer for it. But the frivolity, vendictivness of persons surely does make it a hardship for us.

I therefore am urging this HB 158 to be passed. Even if it cannot protect me, it surely will protect other small business.

Thank you for letting me speak my mind.

cc: Thyra Shaub, State Director

Tort reform by Florida bar

The United States
Law Week
Extra Edition No. 1
Supreme Court
Opinions

June 30, 1995 • THE BUREAU OF NATIONAL AFFAIRS, INC. WASHINGTON, DC • Volume 63, No. 48

OPINIONS ANNOUNCED JUNE 21, 1995

The Supreme Court decided:

ATTORNEYS—Solicitation

Florida ethics rule requiring lawyers to wait 30 days before sending targeted direct mail solicitation letter to victims of accident or disaster materially advances state's substantial interests in protecting privacy and tranquillity of personal injury victims and reputation of legal profession, as shown by state bar's detailed study indicating that public views direct mail solicitations in immediate wake of accidents as intrusion on privacy that reflects poorly upon profession, and is reasonably tailored in scope and duration to do so, and thus does not violate First Amendment's protection of commercial speech. (*Florida Bar v. West For It Inc.*, No. 94-276) ..... Page 4644

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To Mary Roberts | From Jan
Co./Dept. | Co.
Phone # Roberts called | Phone #
Fax # for the | Fax #

[illegible] 2232(c)'s prohibition of wiretap disclosure. (*U.S. v. Aguilar*, No. 94-270) ..... Page 4651

Full Text of Opinions

No. 94-270

UNITED STATES, PETITIONER *v.* ROBERT P. AGUILAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Syllabus

No. 94-270. Argued March 20, 1995—Decided June 21, 1995

Respondent Aguilar, a United States District Judge, was convicted of illegally disclosing a wiretap in violation of 18 U.S.C. §2232(c), even though the authorization for the particular wiretap had expired before the disclosure was made. Aguilar also lied to Federal Bureau of Investigation (FBI) agents during a grand jury investigation. He also was convicted of endeavoring to obstruct the due administration of justice under §1503. The Court of Appeals reversed both convictions, reasoning that Aguilar's conduct in each instance was not covered by the statutory language.

Held:

1. Uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient to make out a violation of §1503's prohibition of "endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice." The "nexus" requirement developed in recent court of appeals decisions—whereby the accused's act must have a relationship in time, causation, or logic with grand jury or judicial proceedings—is a correct construction of §1503's very broad language. (Under that approach, the accused must take action with an intent to influence such proceedings. It is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. Moreover, the endeavor must have the "natural and probable effect" of interfering with the due administration of justice, *see, e.g., United States v. Wood*, 6 F. 3d 692, 695, so that a person lacking knowledge that his actions are likely to affect a pending proceeding necessarily lacks the requisite intent to obstruct, *Pettibone v. United States*, 148 U.S. 197, 206-207. The Government did not show here that the FBI agents acted as an arm of the grand jury, that the grand jury had subpoenaed their testimony or otherwise directed them to appear, or that respondent knew that his false statements would be provided to the grand jury. Indeed, the evidence goes no further than showing that respondent testified falsely to an investigating agent. What use will be made of such testimony is so speculative that the testimony cannot be said to have the "natural and probable effect" of obstructing justice.

2. Disclosure of a wiretap after the authorization expires violates §2232(c), which provides criminal penalties for anyone who, "[1] having knowledge that a Federal . . . officer has been authorized or has applied for authorization . . . to intercept a wire . . . communication, [2] in order to obstruct, impede, or prevent such interception, [3] gives notice or attempts to give notice of the possible interception to any person." Contrary to the Court of Appeals' holding, the statutory language does not require that the wiretap application or authorization be pending or in force at the time of the disclosure. Such a narrow purpose is not evidenced by the term "such interception" in the statute's second clause, which merely establishes that the defendant must intend to obstruct the interception made pursuant to the application or authorization of which he has the knowledge required by the first clause. Similarly, the phrase "possible interception" in the third clause was not designed to limit the punishable offense to cases where the interception was factually "possible," but was intended to recognize the fact that at the time the prohibited notice was given it very likely could not be known whether or not there would be an interception. Moreover, without the word "possible," the statute would only prohibit giving notice of "the interception" and would not reach the giving of notice of an application which has not yet resulted in an authorization or an authorization which has not yet resulted in an interception. Finally, the statute need not be read to exclude disclosures of completed wiretaps because of concern that a broader construction would run counter to the First Amendment. The Government's interest in nondisclosure by officials in sensitive confidential positions is sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns.

31 F. 3d 1475, affirmed in part, reversed in part, and remanded.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, so that corrections may be made before the preliminary print goes to press.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. *See United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

provision which ends it. Indeed, given the already broad terms of the other clauses in §1503, to limit the omnibus clause in the manner respondent urges would render it superfluous. See *United States* v. *Howard*, 569 F. 2d 1331, 1333 (CA5 1978).

Respondent next contends that because Congress in 1982 enacted a different statute, 18 U. S. C. §1512, dealing with witness tampering, and simultaneously removed from §1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub. L. 97-291, 96 Stat. 1249-1250, 1253, his witness-related conduct is no longer punishable under the omnibus clause of §1503. The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt "endeavors to influence, obstruct, or impede, the due administration of justice." The fact that there is now some overlap between §1503 and §1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of §1503 and the other provisions of §1503 itself. It hardly leads to the conclusion that §1503 was, to the extent of the overlap, silently repealed. It is not unusual for a particular act to violate more than one criminal statute, see, *e.g.*, *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), and in such situations the Government may proceed under any statute that applies, see, *e.g.*, *United States* v. *Batchelder*, 442 U. S. 114, 123-124 (1979); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45-46 (1952). It is, moreover, "a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976); see also *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936).

Finally, respondent posits that the phrase "'corruptly . . . endeavors to influence, obstruct, or impede'" "may be unconstitutionally vague," in that it fails to provide sufficient notice that acting to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a long-standing and well-accepted meaning. It denotes "(a)n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it is not offered by another." *United States* v. *Ogle*, 613 F. 2d 233, 238 (CA10) (internal quotation marks omitted), cert. denied, 449 U. S. 825 (1980). See also Ballentine's Law Dictionary 275 (3d ed. 1969); Black's Law Dictionary 345 (6th ed. 1990). As the District Court here instructed the jury:

> "An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person." App. 117.

Moreover, in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible. Acts specifically intended to "influence, obstruct, or impede, the due administration of justice" are obviously wrongful, just as they are necessarily "corrupt." See *Ogle*, *supra*, at 238; *United States* v. *North*, 910 F. 2d 843, 941 (CADC 1990) (Wilkins, J., concurring in part and dissenting in part), modified, 920 F. 2d 940 (CADC 1990); *United States* v. *Reeves*, 752 F. 2d 995, 999 (CA5), cert. denied, 474 U. S. 834 (1985).

* * *

The "nexus" requirement that the Court today engrafts into §1503 has no basis in the words Congress enacted. I would reverse that part of the Court of Appeals' judgment which set aside respondent's conviction under that statute.

JAMES A. FELDMAN, Assistant to Solicitor General (DREW S. DAYS III, Sol. Gen., EDWARD HARRIS, Asst. Atty. Gen., MICHAEL R. DREEBEN, Dep. Sol. Gen., and PATTY MERKAMP STEMLER, Dept. of Justice Atty., on the briefs) for petitioner. ROBERT D. LUSKIN, Washington, D.C. (JOSEPH G. DAVIS, COMEY BOYD & LUSKIN, P.A., PAUL B. MELTZER, PETER A. LEEMING, and LAW OFFICES OF MELTZER & LEEMING, P.C., on the brief) for respondent.

No. 94-226

FLORIDA BAR, PETITIONER v. WENT FOR IT, INC., AND JOHN T. BLAKELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Syllabus

No. 94-226. Argued January 11, 1995—Decided June 21, 1995

Respondent lawyer referral service and an individual. Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Bates* v. *State Bar of Arizona*, 433 U. S. 350, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Florida Bar rules do not violate the First and Fourteenth Amendments.

(a) *Bates* and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the "intermediate" scrutiny framework set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "'narrowly drawn,'" *id.*, at 564-565.

(b) The Florida Bar's 30-day ban on targeted direct-mail solicitation withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unwanted contact by lawyers and in preventing the erosion of confidence in the profession that such repeated intrusions have engendered. Second, the fact that the harms targeted by the ban are quite real is demonstrated by a Bar study, effectively unrebutted by respondents below, that contains extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. *Edenfield* v. *Fane*, 507 U. S. ____, ____; *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466, 475-476, and *Bolger* v. *Young Drug Products Corp.*, 463 U. S. 60, 72, distinguished. Third, the ban's scope is reasonably well tailored to its stated objectives. Moreover, its duration is limited to a brief 30-day period, and there are many other ways for injured Floridians to learn about the availability of legal representation during that time.

21 F. 2d 1036, reversed.

QUIST, C. J., and SCALIA, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

JUSTICE O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar--Advertising Issues*, 571 So. 2d 451 (Fla. 1990). Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that "[a] lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4-7.6(a) states that "[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.6 as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc. represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit. *The Florida Bar v. McHenry*, 605 So. 2d 452 (Fla. 1992). Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Florida Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Florida Bar's extensive study, the Magistrate Judge found that the rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Florida Bar's motion for summary judgment on the ground that the rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, 808 F. Supp. 1543 (MD Fla. 1992), relying on *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977), and subsequent cases. The Eleventh Circuit affirmed on similar grounds, 21 F. 3d 1036 (1994). The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached, 21 F. 3d, at 1045. We granted certiorari, 512 U. S. ___ (1994), and now reverse.

II

A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid-1970s, we adhered to the broad rule laid out in *Valentine v. Chrestensen*, 316 U. S. 52, 54 (1942), that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising." In 1976, the Court changed course. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, we invalidated a state statute barring pharmacists from advertising prescription drug prices. At issue was speech that involved the idea that "I will sell you the X prescription drug at the Y price." *Id.*, at 761. Striking the ban as unconstitutional, we rejected the argument that such speech "is so removed from 'any exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.*, at 762 (citations omitted).

In *Virginia State Board*, the Court limited its holding to advertising by pharmacists, noting that "[p]hysicians and lawyers . . . do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.*, at 773, n. 25. One year later, however, the Court applied the *Virginia State Board* principles to invalidate a state rule prohibiting lawyers from advertising in newspapers and other media. In *Bates v. State Bar of Arizona*, *supra*, the Court struck a ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." *Id.*, at 372. Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation.

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. See, e. g., *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of*

Supreme Court of Ohio, 471 U. S. 626, 637 (1985); *In re R. M. J.*, 455 U. S. 191, 199 (1982). Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "'[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board of Trustees of State University of N. Y. v. Fox*, 492 U. S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). We have observed that "'[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.'" 492 U. S., at 481, quoting *Ohralik*, *supra*, at 456.

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.*, at 563–564. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "'narrowly drawn,'" *id.*, at 564–565.

II

"Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions," *Edenfield v. Fane*, 507 U. S. ___, ___ (1993) (slip op., at 6). The Florida Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. See Brief for Petitioner 8, 25–27, 21 F. 3d, at 1043–1044.[1] This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect[] the administration of justice." *In Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d, at 455; see also Brief for Petitioner 7, 14, 24; 21 F. 3d, at 1043 (describing Bar's effort "to preserve the integrity of the legal profession"). Because direct mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. See Pet. for Cert. 14–15; Brief for Petitioner 28–29. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." Brief for Petitioner 28, quoting *In re Arts*, 126 N. J. 448, 458, 599 A. 2d 1265, 1270 (1992).

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975); see also *Ohralik*, *supra*, at 460; *Cohen v. Hurley*, 366 U. S. 117, 124 (1961). Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." See *Edenfield*, *supra*, at ___ (slip op., at 7). In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U. S. 455, 471 (1980). Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Frisby v. Schultz*, 487 U. S. 474, 484–485 (1988).

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest 'in a direct and material way.'" *Rubin v. Coors Brewing Co.*, 514 U. S. ___, ___ (1995) (slip op., at 10), quoting *Edenfield*, *supra*, at ___. That burden, we have explained, "'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" 514 U. S., at ___, quoting *Edenfield*, *supra*, at ___. In *Edenfield*, the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPAs). We observed that the State Board of Accountancy had "present[ed] no [illegible] pursuit solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." *Edenfield*, *supra*, at ___ (slip op., at 9). Moreover, "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions." *Ibid.* In fact, we concluded that the only evidence in the record tended to "contradict[] rather than strengthe[n] the Board's submissions." *Id.*, at ___ (slip op., at 10). Finding nothing in the record to substantiate the State's allegations of harm, we invalidated the regulation.

The direct-mail solicitation regulation before us does not suffer from such infirmities. The Florida Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June

[1] At prior stages of this litigation, the Bar asserted a different interest, in addition to that urged now, in protecting people against undue influence and overreaching. See 21 F. 3d, at 1042–1043; cf. *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466, 474–476 (1988); *Ohralik v. State Bar Assn.*, 436 U. S. 447, 462 (1978). Because the Bar does not press this interest before us, we do not consider it. Of course, our precedents do not require the Bar to point to more than one interest in support of its 30-day restriction, a single substantial interest is sufficient to satisfy *Central Hudson*'s first prong. See *Rubin v. Coors Brewing Co.*, 514 U. S. ___, ___ (1995) (slip op., at 7–9) (deeming only one of the government's proffered interests "substantial").

1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. Summary of the Record in No. 74, 987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising (hereinafter Summary of Record), App. H, p. 2. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Magid Associates, Attitudes & Opinions Toward Direct Mail Advertising by Attorneys (Dec. 1987), Summary of Record, App. C(4), p. 6. Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.*, at 7. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." *Ibid.* Significantly, 27% of direct mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail. *Ibid.*

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" (The Miami Herald, Sept. 29, 1987) and "Solicitors Out of Bounds" (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. See Summary of Record, App. B, pp. 1–8 (excerpts from articles); see also Pelta, Legal Advertising—Opening Pandora's Box, 19 Stetson L. Rev. 43, 116 (1989) (listing Florida editorials critical of direct-mail solicitation of accident victims in 1987, several of which are referenced in the record). The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "'appalled and angered by the brazen attempt'" of a law firm to solicit him by letter shortly after he was injured and his fiancee was killed in an auto accident. Summary of Record, App. I(1), p. 2. Another found it "'despicable and inexcusable'" that a Pensacola lawyer wrote to his mother three days after his father's funeral. *Ibid.* Another described how she was "'astounded'" and then "'very angry'" when she received a solicitation following a minor accident. *Id.*, at 3. Still another described as "'beyond comprehension'" a letter his nephew's family received the day of the nephew's funeral. *Ibid.* One citizen wrote, "'I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste . . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind.'" *Ibid.*

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the rule lacked "any factual basis," Plaintiffs' Motion for Summary Judgment and Supplementary Memorandum of Law in No. 92-370-Civ. (MD Fla.), p. 5—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, JUSTICE KENNEDY complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. *See post*, at 6. As stated, we believe the evidence adduced by the Bar is sufficient to meet the standard elaborated in *Edenfield*, *supra*. In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, *see City of Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50–51 (1986); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 584–585 (1991) (SOUTER, J., concurring in the judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992). Nothing in *Edenfield*, *supra*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Edenfield*, targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988). Making no mention of the Bar's study, the court concluded that "'a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.'" 21 F. 3d, at 1044, quoting *Shapero*, *supra*, at 476. In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper." 21 F. 3d, at 1044.

While some of *Shapero*'s language might be read to support the Court of Appeals' interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero*'s treatment of privacy was casual. Contrary to the dissent's suggestions, *post*, at 3, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. *See* generally Brief for Respondent in *Shapero* v *Kentucky Bar Assn.*, O. T. 1987, No. 87-16. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. *Ibid.* Second, in contrast to this case, *Shapero* dealt with a broad ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching. 486 U. S., at 475. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

We find the Court's perfunctory treatment of privacy in *Shapero* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Florida Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." Brief for Petitioner 6; *cf.* Summary of Record, App. I(1)

(citizen commentary describing outrage at lawyers' timing in sending solicitation letters). The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Florida Bar's study.

Nor do we find *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), dispositive of the issue, despite any superficial resemblance. In *Bolger*, we rejected the Federal Government's paternalistic effort to ban potentially "offensive" and "intrusive" direct-mail advertisements for contraceptives. Minimizing the Government's allegations of harm, we reasoned that "[r]ecipients of objectionable mailings . . . may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" *Id.*, at 72, quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971). We found that the "'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'" 463 U. S., at 72 (ellipses in original), quoting *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (SDNY), summarily aff'd, 386 F. 2d 449 (CA2 1967). Concluding that citizens have at their disposal ample means of averting any substantial injury inhering in the delivery of objectionable contraceptive material, we deemed the State's intercession unnecessary and unduly restrictive.

Here, in contrast, the harm targeted by the Florida Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, *see post*, at 4–5, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. *See* Brief for Petitioner 7, 14, 24, 28.[1] Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former. We see no basis in *Bolger*, nor in the other, similar cases cited by the dissent, *post*, at 4–5, for dismissing the Florida Bar's assertions of harm, particularly given the unrefuted empirical and anecdotal basis for the Bar's conclusions.

Passing to *Central Hudson*'s third prong, we examine the relationship between the Florida Bar's interests and the means chosen to serve them. *See Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S., at 480. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context. *Ibid.* "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Ibid.* (citations omitted). Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. ___, ___, n. 13 (1993) (slip op., at 7, n. 13), for example, we observed that the existence of "numerous and obvious less burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."

Respondents levy a great deal of criticism, echoed in the dissent, *post*, at 8–10, at the scope of the Bar's restriction on targeted mail. "[B]y prohibiting written communications to all people, whatever their state of mind," respondents charge, the rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." Brief for Respondents 14. This criticism may be parsed into two components. First, the rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the rule is unconstitutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. *Id.*, at 15. Second, the rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Florida Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less burdensome alternatives" to Florida's short temporal ban. *Cincinnati*, *supra*, at ___, n. 13 (slip op., at 7, n. 13). The Bar's rule is reasonably well-tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida

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[1] Missing this nuance altogether, the dissent asserts apocalyptically that we are "invalidating leading First Amendment precedents," *post*, at 1, 6–6. We do no such thing. There is an obvious difference between situations in which the Government acts in its own interests, or on behalf of entities it regulates, and situations in which the Government is motivated primarily by paternalism. The cases cited by the dissent, *post*, at 4–5, fall on the latter situation.

permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4–7.2(a), Rules Regulating The Florida Bar ("[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4–7.4"); *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar—Advertising Issues*, 571 So. 2d, at 461. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent, see *post*, at 9. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding lawyers when they need one. *See, e. g.*, Summary of Record, App. C(4), p. 7; *id.*, App. C(5), p. 8. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, *e. g.*, *Gentile v. State Bar of Nevada*, 501 U. S. 1030 (1991); *In re Primus*, 436 U. S. 412 (1978). This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "'subordinate position'" of commercial speech in the scale of First Amendment values. *Fox*, 492 U. S., at 477, quoting *Ohralik*, 436 U. S., at 456.

We believe that the Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-part *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is *reversed*.

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977). The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U. S. 557, 566 (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. See, *e.g.*, *Edenfield v. Fane*, 507 U. S. ___, ___ [113 S. Ct. 1792, 1798] (1993). If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. *Ante*, at 5. The State says two different interests meet this standard. The first is the interest

"in protecting the personal privacy and tranquility" of the victim and his or her family. Brief for Petitioner 8. As the Court notes, that interest has recognition in our decisions as a general matter, but it does not follow that the privacy interest in the *cases* the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466 (1988). In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct in-person solicitations and direct mail solicitations. *Shapero*, like this case, involved a direct mail solicitation, and there the State recited its fears of "overreaching and undue influence." *Id.*, at 475. We found, however, no such dangers presented by direct mail advertising. We reasoned that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.*, at 475-476. We pointed out that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.*, at 474. In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." *Id.*, at 475. The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978) (a lawyer's direct, in-person solicitation of personal injury business may be prohibited by the State). *See also Edenfield, supra*, (an accountant's direct, in-person solicitation of accounting business did implicate a privacy interest, though not one permitting state suppression of speech when other factors were considered).

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." *Carey v. Population Services International*, 431 U. S. 678, 701 (1977). And in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.*, at 648.

We have applied this principle to direct mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. *See Bolger v. Young's Drug Products Corp.*, 463 U. S. 60, 70 (1983) (REHNQUIST, J., concurring) [illegible] 398 U. S. 910 (1970)). In *Bolger*, we held that a statute designed to "shield[d] recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 463 U. S., at 71 (citing *Carey, supra*, at 701). It is only where an audience is captive that we will assure its protection from some offensive speech. *See Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U. S. 530, 542 (1980). Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Bolger, supra*, at 72. The occupants of a household receiving mailings are not a captive audience, *ibid.*, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectional mailings need do is to take "the 'short, though regular, journey from mail box to trash can.'" *Ibid.* (citation omitted). As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." *Ibid.* If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the *amicus* brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise *from* an unethical or improper practice, the majority begs a most critical question by assuming that direct mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as *amicus* the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted State interest in a direct and material way. *Edenfield*, 507 U. S., at __ [113 S. Ct., at 1800]. The burden of demonstrating the reality of the asserted harm rests on the State. *Ibid.* Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar, one of the adverse parties, and submitted to the District Court in this case. *See ante*, at 6. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any

productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," *ante*, at 9, but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech. *See, e.g., Edenfield*, 507 U. S., at __ [113 S. Ct., at 1800-1801].

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record . . . and I don't know the answer to that question." Tr. of Oral Arg. 25. Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson*, 447 U. S., at 569-571; *Board of Trustees of State University of N.Y. v. Fox*, 492 U. S. 469, 480 (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, *see ante*, at 14, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, *see, e.g.*, United States Sentencing Commission, Guidelines Manual §1B1.1, comment., n. 1(b), (h), (j) (Nov. 1994), and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement. *Ante*, at 14.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services. Cf. *Thiaimen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3-4 (1964).

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. *See, e.g.*, Rules Regulating the Florida Bar, Rule 4-1.5 (Statement of Client's Rights) (effective Jan. 1, 1993). The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation. For those with minor injuries, the victims too ill-informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. N. Y. Times, June 11, 1995, section 3, p. 1, col. 1. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct

mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," see *Shapero*, 486 U. S., at 490 (O'CONNOR, J., dissenting), the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients." *Ohralik*, 436 U. S., at 461.

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a newfound and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U. S., at __ [113 S. Ct., at 1796]. By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

BARRY SCOTT RICHARD, Tallahassee, Fla. (GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL, P.A., WILLIAM P. BLEWS, and JOHN A. DEVAULT III, on the briefs) for petitioner. BRUCE S. ROGOW, Fort Lauderdale, Fla. (BEVERLY A. POHL, HOWELL L. FERGUSON, and LANDERS & PARSONS, on the briefs) for respondents.

Robin, Thought you might enjoy this . . .

Terry

PS. Wrg, Psg + KTN won't sign or agree to sign before their meeting later this month. Carlson said he would agree if the money comes from elsewhere, not SE Interlie

Terry

Fairbanks Daily News-Miner, Tuesday, May 9, 1995

l for $29 million

Associated Press

—Pablo Picasso's rare blue period portrait of iend, An el Fernandez de Soto, sold for $29 nday at otheby' auction in New York.

Tony nominations

"Show Boat."

who plays Norma Sunset Boulevard," ea Luker of "Show award for best ac al

Jerick, as a young king the corporate to Succeed," leads ntenders for best al. His challengers ghell of "Sunset two "Show Boat" rt Jacoby and John

," Jean Cocteau's bout a dysfunction so received nine cluding best play. It "Arcadia" by Tom ing Our Say" by "Love! Valour! by Terrence McNally.

Four of the five performers in "Indiscretions" were nominated for acting awards.

Eileen Atkins, the love-starved spinster of "Indiscretions," received a nomination for best actress and will compete against Mary Alice of "Having Our Say," Cherry Jones of "The Heiress" and Helen Mirren of "A Month in the Country." Atkins' co-star, Kathleen Turner, was not nominated.

Ralph Fiennes, the star of "Hamlet," was nominated for best actor and faces Roger Rees of "Indiscretions," Brian Bedford of "The Moliere Comedies" and Joe Sears of "A Tuna Christmas."

The Tony nominations were made by a 17-member panel of theater professionals. The winners will be announced June 4.

Senate GOP fails again on tort reform

The New York Times

WASHINGTON—Republicans in the Senate failed again on Monday to act on a measure intended to reduce the number of civil lawsuits, even though Sen. Bob Dole, the majority leader, had scaled back the proposal drastically to attract the needed votes.

An effort to shut off debate on the legislation, which the Senate has been considering for three weeks, not only failed to win the needed two thirds majority, but fell short of even a simple majority, with 43 in favor and 49 opposed.

As a result, Senate leaders are planning to take a scalpel to the bill on Tuesday morning to pare it even further. The measure that is expected to emerge would set limits on damages only in lawsuits involving faulty products. That would make it similar to the original Senate bill, which Dole, R-Kan., had sought to expand to bring it closer to the sweeping version passed by the House last month.

Sen. Slade Gorton, R-Wash., predicted that the bill, thus amended, was likely to pass. Sen. John D. Rockefeller IV, D-W.Va., who with Gorton has been pressing for national standards in product liability lawsuits, said he thought the measure would attract enough Democrats to be approved on Tuesday.

If the Senate passes even a scaled-back version of the bill, it would still have to be negotiated with the House measure to come up with a final version.

The past two weeks of heated debate and negotiation over this issue have provided a stark demonstration of how the Senate's majority Republicans are a far less potent force in their chamber than is the Republican majority in the House. The Senate Republicans, and especially Dole, have been frustrated in their efforts to move quickly with the kind of major legislation that their Republican counterparts in the House have been able to pass.

Dole, who is seeking the Republican presidential nomination, took a gamble on broadening the Senate measure to match the House version. He apparently did not have a clear idea of the depth of his support, however, a miscalculation that is the equivalent of a trial lawyer's asking a question of a witness without knowing the answer.

"He didn't really know how many votes were there," another Senate staff aide said. "He just wanted to test the waters."

The House last month passed bills that would set limits on punitive damages in all civil lawsuits in both federal and state courts.

But the more lawyer-friendly Senate was expected to balk at such sweeping changes, and it began considering a more modest proposal. That bill, sponsored by Gorton and Rockefeller, would have set limits on punitive damages only in lawsuits involving faulty products, for items as diverse as ice-cream makers to artificial limbs. Dole, however, expanded the measure to match much of the House legislation.

Last Thursday, as President Clinton accused the Senate of planning to enact a measure that would protect rapists, drunken drivers and child abusers, senators refused to go along with Dole's sweeping changes. Dole's effort to halt debate then also failed to attract even a simple majority.

On Friday, Dole and other Republicans scaled back the measure to limit punitive-damage awards in product liability lawsuits; but they added language that would limit damages in all civil lawsuits involving small companies and individuals whose net worth did not exceed $500,000.

It was this measure that could not attract enough votes to end the debate again on Monday.

Before Monday's vote, Dole had given his approval to scale back the bill further, conceding that the version he produced Friday would not win.

The bill to be considered on Tuesday would limit punitive damages a jury may award someone in a product liability lawsuit to whichever is greater, $250,000 or twice the amount of damages for lost wages, medical expenses and "pain and suffering." Punitive damages may be awarded by juries in especially outrageous circumstances. The bill would also allow a judge to remove that limit under certain circumstances, including those in which the conduct of the manufacturer was especially heinous.

Robert Brandon, a lobbyist for several consumer groups, said that the provision was largely meaningless because under the bill a company that objected to a judge's removing the limit could demand and be granted a new trial. Brandon said that no successful plaintiff would want to risk a second trial against a large company.

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Edward B. Mecham, CPA
S. Dirk Richardson, CPA

A Member of the
AICPA Private
Company Practice
Section

May 8, 1995

Senator Robin Taylor
Senate Judiciary Committee
Alaska State Capital
Juneau, AK 99801

Dear Senator Taylor:

I am writing in regard to House Bill 158 which would revise the Civil Liability statutes of the State of Alaska. I understand that HB158 is presently being reviewed by the Senate Judiciary Committee. I request that you send the bill to the floor of the Senate for prompt action. I further ask that if any amendments are proposed to the bill, you do whatever you can to retain Section 12 of the bill intact. That Section is designed to bring fairness to the imposition of liability against parties who have had only a small part in an action resulting in awarded damages. Many other states have recognized the need for such fairness and have revised their statutes to provide that fairness. I am asking that you help your colleagues in the Senate pass this bill and provide Alaskans with fairness also.

Sincerely,

Edward B. Mecham

Edward B. Mecham, C.P.A.
Partner

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Sincerely,

Dirk Richardson

S. Dirk Richardson, CPA
Partner

SHAFFER & HARRINGTON
Certified Public Accountants
479 Katlian Street, Suite Three Sitka, Alaska 99835 (907) 747-6984 Fax (907) 747-5988

May 11, 1995

Senator Robin Taylor
Senate Judiciary Committee
Alaska State Capital
Juneau, Alaska 99801

VIA FAX (907) 465-3922

Dear Senator Taylor,

I respectfully request your support of CSHB 158. I feel the legislation is in the best interest of the State of Alaska.

If I recall correctly, you were an active supporter of limited liability/tort reform for the Forest Products industry as it relates to EPA violations. CSHB 158 will have a far greater impact on business and individual rights than what you supported in the past.

I urge you to inform the constituents of our District. This is very important legislation and most Sitkan's are not aware of your present position or the significant changes proposed for Alaska State Law.

Tort Reform has been a national priority for years. I am a member of the Alaska State Board of Public Accountancy. Significant numbers of Alaska firms are waiting for Alaska limited liability legislation. Many of the National Firms practicing in Alaska have already organized under different State law for limited liability protection.

Sincerely,

Bradley L. Shaffer, CPA

SHAFFER & HARRINGTON
Certified Public Accountants

THE NATIONAL
LAW JOURNAL

ALSO IN THIS SECTION

BusinessWatch

MONDAY, MAY 1, 1995 SECTION B

No Growth In Tort Cases For Six Years

Study's findings are at odds with Republican rhetoric.

BY HARVEY BERKMAN
NATIONAL LAW JOURNAL STAFF REPORTER

AFTER INCREASING by nearly one-third between 1984 and 1986, the number of tort filings in state courts remained stable for six years before falling slightly in 1993, and in federal court the number has been stable for a decade, according to a study by the U.S. Department of Justice.

The study, released by Justice April 13, also shows that medical malpractice and products liability suits made up a small percentage of all state tort cases completed in the fiscal year ending June 30, 1992.

The study's findings are at odds with the perception purveyed by Republicans in Congress who contend that the number of tort cases, particularly products liability suits, has skyrocketed.

According to the study, medical malpractice and products liability suits made up 8.3 percent of 378,000 tort cases completed in state courts in the nation's 75 most populous counties in 1992. Auto and premises liability suits represented three of every four tort cases completed.

The time of disposition varied by tort type. The quarter-million auto cases ended in a mean of 16.7 months, with only one out of five taking more than two years. The 31,400 products liability and medical malpractice cases took 25 to 26 months on average to resolve, with roughly two out of five taking more than two years.

Medical malpractice cases were also the most likely to reach a verdict. 6.9 percent did so, compared to 2.9 percent for tort suits overall. One possible reason: Defendants won 74 percent of medical verdicts, compared with just under half of the premises liability suits and a third of the auto cases. ■

Oil Manufacturers Clash Over Mandated Calif. Gas

Six companies say Unocal Corp.'s patent for clean gas is invalid because all seven helped to develop the formula.

BY ANDREW BLUM
NATIONAL LAW JOURNAL STAFF REPORTER

IN A CASE in which state regulations meet patent law, six major oil companies have sued Unocal Corp., alleging that it has created a monopoly with an invalid patent for a reformulated gasoline which California law mandates for the state.

The six—Atlantic Richfield Co., Chevron U.S.A. Inc., Exxon Corp., Mobil Oil Corp., Shell Oil Products Co. and Texaco Refining and Marketing Inc.—allege in a suit filed on April 13 that Unocal essentially did an end run around the other companies in obtaining a patent for a product that had been developed by a consortium of all seven. If Unocal is allowed to charge a license fee to the companies, it will reap $80 million a year, they say. *Atlantic Richfield Co. v. Unocal Corp.*, 95-2379 RG (C.D. Calif.).

The companies' suit argues that the patent is invalid because the RFG fuels "were not invented by Unocal, are in the public domain and cannot be part of any valid and enforceable patent, and, therefore, Unocal has no legal right to demand that plaintiffs pay license royalties."

The companies are seeking a declaratory judgment to invalidate Unocal's patent, which they claim they only learned of through a Unocal statement about the patent for California Phase 2 RFG released Jan. 31. Under California regulations, the gas, designed to reduce auto emissions, must be produced and ready for the market by March 1996. To meet the mandate, oil producers have spent

[SEE "GAS" PAGE B21]

Unfair Advantage? *With its patent, Unocal [illegible] the rights to the low-emissions gasoline that California has mandated to be sold on [illegible] March 1, 1996.*

BUSINESS NEWS INDEX

BUSINESS ELSEWHERE

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May 8, 1995 Via Fax: 465-3922

Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Attn: Senator Robin Taylor

Subject: HB 158 Tort (Liability) Reform

Dear Senator Robin Taylor;

I strongly support the passage of tort reform as represented in HB 158. This bill addresses the need to reduce costs associated with the Civil Justice system, match losses with compensation, and create equitable distribution of the cost and risk of injury.

These and other changes contained in HB 158 will begin the process of reducing out-of-control and unnecessary costs associated with business liability.

Please support this important legislation by voting for passage of HB 158.

Very truly yours,

H. C. Price Co.

Wesley P. Nason
Vice President

WPN/KLL/rd/294

PETRO MARINE SERVICES
Petroleum Marketing to the Marine Industry

May 9, 1995

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

Dear Sen Taylor,

I am writing to you in your role as the Chairman of the Senate Judiciary Committee to inform you of my strong support for House Bill 158, a bill aimed at tort reform This bill would reduce costs associated with the civil justice system, match losses with compensation and create equitable distribution of the cost and risk of injury, as well as focus on other necessary areas of reform

I am sure you are very familiar with this bill, and instead of reiterating its details, I would like to briefly describe my concerns about our legal system To be candid, it's out of control I speak as an entrepreneur who has built a very small business into one of Alaska's larger businesses I take considerable pride in the service we provide and the fact that I have been involved only once in 35 years of business as a defendant in a lawsuit We're far from finished When we complete the purchase of White Pass facilities in Southeast Alaska and the Yukon Territory, our annual revenues are expected to top $200 million a year

Our company, and many others like us, however, face numerous challenges and among the most onerous is a legal system that seems to make victims out of innocent parties who may just happen to be the target of spurious lawsuits We seem to have thrown out the idea of moral right and wrong in favor of a system that rewards those who endlessly make the most outrageous demands

PO Box 389 • Seward Alaska 99664 Phone (907) 224 3190 • Fax (907) 224 3037

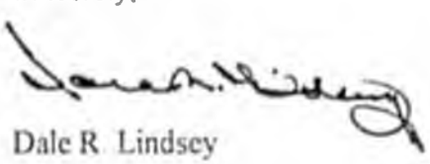
A HARBOR ENTERPRISES COMPANY

I am certainly not in favor of a system without reasonable controls and in which "anything goes." In fact, we need protection from those with a litigious mentality as much as the next person. I strongly support bringing some realism back into the legal system and doing whatever is appropriate to reduce the number of frivolous lawsuits filed by irresponsible plaintiffs.

House Bill 158 will not solve all these problems. It is relatively narrow in that it generally would begin the process of limiting certain damages, as well as attorney fees. Part of the reason I so strongly support it is that it has taken us so many years just to get to this point. If passed, this bill would send a clear message to the legal system that we all must be held more accountable for exercising poor judgment. For example, by ensuring that in suits involving the fault of more than one person awards would be allocated in accordance with their fault, we would take a significant step forward by curtailing the feeding frenzy that results from attorneys seeking out all the "deep pockets" they can find.

That is just one example, and as I said, there is no need to go over the entire bill because I am confident you are familiar with it. Instead, I will simply and respectfully urge your support for House Bill 158. I appreciate your time and consideration on this important matter.

Sincerely,



Dale R. Lindsey
President & CEO

Oregon Health Plan faces threat

■ The governor says cuts in Medicaid proposed by the GOP might kill the state's innovative program

By RICHARD L. HILL
of The Oregonian staff

The Oregon Health Plan probably wouldn't survive the amputation of Medicaid funds proposed by congressional Republicans.

Gov. John Kitzhaber made that prognosis Wednesday in response to a bill by House GOP leaders that aims to cut $182 billion from Medicaid by 2002.

Passage of the bill would result in an immediate 15 percent cut from the state's Medicaid services, he said, and "virtually ensure that the Oregon Health Plan will not continue."

The plan, which provides health care to the poor, would lose $230 million in funding in the next two years and more than $2.6 billion in the seven-year time frame of the proposal, said Kitzhaber, who was the plan's main architect when he was state Senate president.

At a press conference, Kitzhaber said that 130,000 poor Oregonians now have primary basic health care who didn't have it two years ago, before the health plan went into effect.

He and other supporters said that by providing basic care to more people, the health plan has helped shrink welfare rolls and reduced costly hospital emergency room care.

The health plan, passed by the 1989 Legislature and launched in 1994, is the state's answer to rising medical costs and shrinking access to treatment. About 400,000 Oregonians are on Medicaid rolls, an increase of about 50 percent, from before the plan was fully in place this year.

Members of Oregon's congressional delegation vowed Wednesday to seek changes in the bill, which is being considered this week by the House Commerce Committee.

Rep. Ron Wyden, D-Ore., who sits on the committee, said he would propose an amendment Thursday to protect Oregon and a few other states that have innovative Medicaid programs in place.

"This bill tears the heart and soul out of Oregon's initiative," Wyden said. "But we're in a very, very uphill battle in the committee."

Wyden said he would encourage President Clinton to veto any bill that threatens the Oregon Health Plan.

Rep. Jim Bunn, R-Ore., said the bill would be "a disaster" for Oregon in its current form. Bunn said he would offer an amendment to help protect the Oregon Health Plan when the bill reaches the House floor in early October.

"I'm working with the leadership on this," Bunn said. "They have to under-

Please turn to HEALTH, Page C7

Health: Bunn vows to defend Oregon plan

■ Continued from Page C1

stand Oregon's situation — that we have already through efficiency cut costs drastically. As it stands, this plan would punish Oregon for leading the way in reforming health care."

Medicaid is a federal-state health program for 36 million poor Americans. The federal government pays 62 percent of the cost, while the state pays 38 percent.

Because the Medicaid program involves federal funds, it must meet certain federal standards. So Oregon had to acquire federal waivers from Medicaid regulations before its program could begin.

The House GOP plan would allow Oregon to continue with its experiment with managed care, but with less money. The proposal, which is aimed at slowing the national rate of Medicaid's annual growth from about 10 percent to 4 percent, would replace Medicaid with block grants to states.

Jean I. Thorne, Oregon's Medicaid director, said the problem with the Republican plan is it involves a formula that uses Medicaid cost figures from fiscal year 1994 — Oct. 1, 1993, to Sept. 30, 1994 — before the Oregon Health Plan was fully implemented.

"In fiscal 1995, we had a one-time, 27 percent growth in Medicaid costs because that's when we brought in 130,000 Oregonians," Thorne said. "Then we're expecting another 9 percent increase in fiscal '96 — so that's a 36 percent increase."

The Republican plan would give the state about a 11 percent increase for fiscal 1996 over fiscal 1994.

"I think we would be hurt worse than any state because of the growth that we had in our one-year start-up," Thorne said.

Kitzhaber said, "Perhaps the most outrageous aspect of this proposal is that it paralyzes Oregon because of our efficiency."

He pointed out that Oregon's per-capita Medicaid costs are among the lowest in the nation at $3,800, "well below the national average of $4,200." Oregon ranks 36th in individual Medicaid spending.

"But states like New York that spend in excess of $8,000 per capita will actually be rewarded for their inefficiency and for their unwillingness to address this problem," he said.

Kitzhaber said he would have to call a special session of the Legislature to deal with the $230 million potential loss to the state if the House bill gets through Congress. Senate Republicans still are working on their Medicaid plan.

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Oregonian (OR)
September 21, 1995

BREAD & CIRCUSES

YOU have to hand it to Senate Republicans. It doesn't seem possible that anyone could take on high-priced trial lawyers in a political fight and lose, but they managed it.

The political fight in question is over tort reform, and the frustration is that a popular conservative reform can find no support. Michael L. Horowitz is a veteran of Washington's wars—he served as President Reagan's first term OMB General Counsel and also co-chaired his Cabinet Council's working group on legal reform. Now a senior fellow at the Hudson Institute, he has a plan that delivers on a key plank of the Contract with America; it would cut the income of Bill Clinton's favorite trial lawyer constituency by 50 per cent and slash auto insurance premiums by $26 billion. It's intelligent, populist conservatism, and it's even bipartisan. Horowitz's tireless promotion of "Consumer Payoff Tort Reform" has led to endorsements ranging from Robert Bork to former ACLU President Norman Dorsen, from the *Wall Street Journal* to Anthony Lewis. Big-city mayors, consumer groups, and the NFIB all support it. Unfortunately, not enough Republicans in Congress do.

Here's the scandal. Lawyers pocket an estimated 60 cents of every dollar spent in the tort system. Horowitz has two proposals to deliver a far larger share of tort awards to injured parties than to their lawyers. Under the first, the enrichment of lawyers who drag out litigation would be eliminated by encouraging defendants to make early settlement offers. Should an offer be accepted, the plaintiff's lawyer's fee would be limited to capped hourly charges; if rejected, contingency fees could be charged only against recoveries in excess of the offer. Both sides would thus reduce their costs, and lawyers no longer profit out of all proportion to the risk they assume; they would be compensated only for the value they add. "Simple and ingenious," declares Derek Bok, a former dean of the Harvard Law School.

The second proposed reform Horowitz is only too happy to credit to its original 1984 sponsor—Dick Gephardt (who now opposes tort reform). Suppose defendants agree early on to reimburse claimants for all the uninsured economic costs of their claims—past and future. If the offer is accepted, the transaction costs in these undisputed cases would be effectively eliminated; if rejected, plaintiffs would face a higher burden of proof for noneconomic damages (pain and suffering, etc.). The overall effect would be to reduce malpractice, auto, and comparable insurance rates by an estimated 20 to 40 per cent. And because pain and suffering awards are generally figured to be triple the economic damages, the Gephardt plan would sharply reduce the incentive to make innumerable doctor's visits in order to drive awards up. This is not trivial. FBI Director Louis Freeh recently estimated that American households pay over $200 annually in higher health-insurance premiums owing to tort-related health care fraud. And most of the money goes eventually to pay legal fees.

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Better yet, these reforms split the liberal coalition by clearly favoring injured plaintiffs at the expense not of defendants but of their lawyers. This is a wedge issue—and a sweet one. The tort bar's political contributions helped elect Bill Clinton. And the *quid* for that *quo* was not long in coming; his health care proposal last year would have permitted lawyers to continue receiving windfall profits from protracted malpractice litigation. If Republicans can now force him to choose—either defend greedy lawyers or enrage his most generous supporters—he will be in a nice fix.

Greedy lawyers were not the target when tort reform was debated inside the Beltway. Last March, Horowitz watched dispiritedly as the tort-reform debate developed into the usual media psychodrama: the Republicans taking rights away from injured consumers by capping damage awards so that their big-business buddies could maim on the cheap while Democrats looked out for the interests of the little guy.

Even so, with the help of some Democratic defections, the House passed both product-liability reform and a broad tort-reform measure covering medical malpractice claims. But the product-liability reform that passed the Senate was more modest, and general tort reform languished altogether there. Now, the expectation is that while both Houses will agree on a product-liability bill of some kind, the present wasteful and costly tort system will remain largely intact—unless there is a new approach that changes the terms of debate.

The basic political problem, Horowitz believes, is that the cap on pain and suffering awards which the Senate refused to adopt is too easily caricatured as taking rights away from consumers with no visible payoff. Freshman Senator Fred Thompson of Tennessee said that he couldn't—and wouldn't—explain such a limit to the parents of a severely injured child.

Fortunately, a few Republicans can recognize a good thing when they see one. The Horowitz "early offer" reforms and his auto-insurance "consumer choice" plan (all of which states can opt out of) have been combined in a bill co-sponsored by Senators Mitch McConnell and Spencer Abraham. In the House, Chris Cox and David McIntosh are promoting the same reforms. If they can persuade their colleagues of their merits, every insured American could receive a "litigation tax" break, courtesy of the new Republican majority, before next year's elections.

Bill Clinton would then have a major fight on his hands with the tort bar. If he can't stop tort reform, maybe they'll sue. It's an open-and-shut case of breach of promise. —KATE O'BEIRNE

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

Oregon Health Plan faces threat

■ The governor says cuts in Medicaid proposed by the GOP might kill the state's innovative program

By RICHARD L. HILL
of The Oregonian staff

The Oregon Health Plan probably wouldn't survive the amputation of Medicaid funds proposed by congressional Republicans.

Gov. John Kitzhaber made that prognosis Wednesday in response to a bill by House GOP leaders that aims to cut $182 billion from Medicaid by 2002.

Passage of the bill would result in an immediate 15 percent cut from the state's Medicaid services, he said, and "virtually ensure that the Oregon Health Plan will not continue."

The plan, which provides health care to the poor, would lose $230 million in funding in the next two years and more than $2.6 billion in the seven-year time frame of the proposal, said Kitzhaber, who was the plan's main architect when he was state Senate president.

At a press conference, Kitzhaber said that 130,000 poor Oregonians now have primary basic health care who didn't have it two years ago, before the health plan went into effect.

He and other supporters said that by providing basic care to more people, the health plan has helped shrink welfare rolls and reduced costly hospital emergency room care.

The health plan, passed by the 1989 Legislature and launched in 1994, is the state's answer to rising medical costs and shrinking access to treatment. About 400,000 Oregonians are on Medicaid rolls, an increase of about 50 percent, from before the plan was fully in place this year.

Members of Oregon's congressional delegation vowed Wednesday to seek changes in the bill, which is being considered this week by the House Commerce Committee.

Rep. Ron Wyden, D-Ore., who sits on the committee, said he would propose an amendment Thursday to protect Oregon and a few other states that have innovative Medicaid programs in place.

"This bill tears the heart and soul out of Oregon's initiative," Wyden said. "But we're in a very, very uphill battle in the committee."

Wyden said he would encourage President Clinton to veto any bill that threatens the Oregon Health Plan.

Rep. Jim Bunn, R-Ore., said the bill would be "a disaster" for Oregon in its current form. Bunn said he would offer an amendment to help protect the Oregon Health Plan when the bill reaches the House floor in early October.

"I'm working with the leadership on this," Bunn said. "They have to under-

Please turn to HEALTH, Page C7

Health: Bunn vows to defend Oregon plan

Oregonian (OR)
September 21, 1995

■ Continued from Page C1

stand Oregon's situation — that we have already through efficiency cut costs drastically. As it stands, this plan would punish Oregon for leading the way in reforming health care."

Medicaid is a federal-state health program for 36 million poor Americans. The federal government pays 62 percent of the cost, while the state pays 38 percent.

Because the Medicaid program involves federal funds, it must meet certain federal standards. So Oregon had to acquire federal waivers from Medicaid regulations before its program could begin.

The House GOP plan would allow Oregon to continue with its experiment with managed care, but with less money. The proposal, which is aimed at slowing the national rate of Medicaid's annual growth from about 10 percent to 4 percent, would replace Medicaid with block grants to states.

Jean L. Thorne, Oregon's Medicaid director, said the problem with the Republican plan is it involves a formula that uses Medicaid cost figures from fiscal year 1994 — Oct. 1, 1993, to Sept. 30, 1994 — before the Oregon Health Plan was fully implemented.

"In fiscal 1995, we had a one-time, 27 percent growth in Medicaid costs because that's when we brought in 130,000 Oregonians," Thorne said. "Then we're expecting another 9 percent increase in fiscal '96 — so that's a 36 percent increase."

The Republican plan would give the state about a 14 percent increase for fiscal 1996 over fiscal 1994.

"I think we would be hurt worse than any state because of the growth that we had in our one-year start-up," Thorne said.

Kitzhaber said, "Perhaps the most outrageous aspect of the proposal is that it paralyzes Oregon because of our efficiency."

He pointed out that Oregon's per capita Medicaid costs are among the lowest in the nation at $3,800, "well below the national average of $4,250." Oregon ranks 36th in individual Medicaid spending.

"But states like New York that spend in excess of $8,000 per capita will actually be rewarded for their inefficiency and for their unwillingness to address this problem," he said.

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Health Care Reform

The Seattle Times (WA)
September 18, 1995

Insurance firms seek large rate increases

BY KERY MURAKAMI
Seattle Times Olympia bureau

OLYMPIA – Just months after health-care reform died in the state Legislature, insurance companies are requesting double-digit rate increases – and reviving the debate over how, or whether, to control spiraling costs.

Pierce County Medical is asking for a 34 percent premium increase for policies bought by individuals. Blue Cross of Washington & Alaska has asked for a 19 percent increase for individual policyholders.

State Insurance Commissioner Deborah Senn has already approved a 22 percent rate increase for Medical Services Corp. in Eastern Washington and a 14.2 percent boost for King County Medical – both for individuals.

Supporters of the Legislature's 1993 Health Care Reform Act say they were right earlier this year when they predicted large rate increases if the reforms were repealed.

But some conservatives blame the few parts of the 1993 act that survived, such as requiring insurance companies to insure people with pre-existing conditions.

They say the rate increases show reform should be scaled back further.

"Before, companies turned the sickest people away," said Julie Pisto, Pierce County Medical spokeswoman. "Suddenly, the doors are being opened, and people are coming on with serious conditions."

Pisto said the company estimates it will lose $9 million this year because it is paying out more claims.

Because many group plans were already open to people with pre-existing conditions, it is the individual insurance buyers with serious problems who are driving up costs, she said.

Senn said rate-increase applications from insurance companies show a number of other factors are driving up costs, including "some bad investments by some of the companies."

She and Democratic legislators, among them Senate Health Committee Chairman Kevin Quigley of Lake Stevens, said regardless of the reasons for rising rates, several health-care reforms the Legislature killed this year would have kept the increases modest.

The reforms would have lumped people in the same age groups together when setting insurance rates, spreading the cost of those with pre-existing conditions among a large group of people.

When that idea died, Quigley

PLEASE SEE *Rate* ON B 2

Insurers seeking double-digit rate increases; critics say demise of health reform is to blame

Rate

CONTINUED FROM B 1

and other legislators tried to lump individual policyholders together with small businesses to spread the costs.

But small businesses balked, and House Republicans and Gov. Mike Lowry negotiated a deal that put individuals in their own pool.

The Legislature also removed a provision of the 1993 reforms that limited how much insurance rates could rise. Small businesses and such Republican opponents of the 1993 reforms as Rep. Philip Dyer, R-Issaquah, called the premium cap "government-imposed price fixing." Dyer, who chaired the House Health Care Committee, business groups, and the insurance industry said market competition would keep rates down.

Insurance companies, for the most part, did not ask for large rate increases the past two years.

But Quigley and Senn say it was the pressure of the health-care reforms that kept rates low and that now, with the pressure lifted, insurance rates are skyrocketing.

"The insurance industry was working to defeat the reforms, saying let the free market work. Now they turn around and give people the whammy," said Sen. Rosa Franklin, D-Tacoma, whose district encompasses many of the 20,000 people affected by Pierce County Medical's rate increase. Franklin wants insurance companies to explain themselves Friday at a meeting of the Senate Health and Long-term Care Committee.

Dyer, though, said the rate increases are the cost of opening insurance to more people. Spreading the cost to small businesses would discourage them from insuring their employees, he said.

BREAD & CIRCUSES

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LAW OFFICES OF
MURPHY L. CLARK

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ANCHORAGE, AK 99503

TEL: (907) 274-0057
FAX: (907) 274-1729

August 25, 1995

Mr. Joe Ambrose
Chief of Staff, Sen. Robin Taylor
352 Front Street
Ketchikan, AK 99901

Re: The Narrows Alaska Supreme Court Brief

Enclosed are the first 58 pages of the captioned subject being sent to you as in accordance with Mr. Clark's instructions.

Very truly yours,
LAW OFFICES OF MURPHY L. CLARK

Nancy Korting

Nancy Korting

:nk

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

SEP 14 RECD/KTD

MEMORANDUM September 11, 1995

SUBJECT: Punitive damage awards (Work Order No. 9-LS1256)

TO: Senator Robin Taylor
Attn: Joe

FROM: Michael F. Ford
Legislative Counsel

You have asked for a review of Alaska Supreme Court opinions in which the court has examined punitive damage awards. The following are those cases since the Strum, Ruger & Co. decision in which the court has reviewed this issue. In general, the lower court awards of punitive damages have been upheld.

1. Clary Ins. Agcy. v. Doyle - 620 P.2d 194 (AK 1980). In this case an award of $190,000 in punitive damages was upheld. There were no compensatory damages, but the plaintiff was successful in requiring the defendant to act as insurer for the plaintiff in a worker's compensation case.

2. Ben Lomond, Inc. v. Campbell - 691 P.2d 1042 (AK 1984). In this case the plaintiff was awarded $13,000 in compensatory damages and $50,000 in punitive damages. The court upheld both awards and specifically mentioned that the ratio between punitive and compensatory damages of 2.38:1 was reasonable.

3. AK. Village, Inc. v. Smalley - 720 P.2d 945 (AK 1986). In this case the court upheld awards of $235,000 in compensatory and $550,000 in punitive damages. Again the court found that a reasonable relationship existed between the two awards.

4. Pletnikoff v. Johnson - 765 P.2d 973 (AK 1988). In this case the court reversed an award of $1,000,000 in punitive damages. The reversal was required because the Supreme Court also reversed on the underlying issue of liability. In reversing the lower court the Supreme Court concluded that because the issue of punitive damages was intertwined with the issue of liability, reversal on the punitive damage award was also required.

These are the only cases I found in which the issue of the award of punitive damages was an issue. As you are probably aware, there may be quite a few more cases in which the award of punitive damages is reduced by the trial judge and not by the appellate court.

Please contact me if you have further questions.

MFF:lmb
95-254.lmb

DATE: AUGUST 14, 1995

TO: THE HONORABLE ROBIN TAYLOR
CHAIRMAN, JUDICIARY COMMITTEE

FROM: CATHY CRAWFORD
ASSOCIATE BROKER Cathy Crawford

PHONE: 789-5099

FAX: 789-0054

RE: PUBLIC HEARINGS ON TORT REFORM, HB 158

This memo is regarding the above HB 158. I have not read the bill, but have heard some of the input. I certainly do agree that we need to have changes made.

I, personally, am in danger of having my real estate license suspended for three months. The reason was the lending institution relied on an engineers phone call regarding a report he made to her and turned down a loan; the Buyer relied on the lending institution's suggestion. HOWEVER, when we gave testimony the engineer testified that he did not like the Seller and wanted to sour the deal so he lied to the lending institution.

Our attorney has the engineer's statements taped in his deposition and also when he was testifying at the hearing. When the commission met, these facts were disregarded, and although I was trying to consummate this transaction in a happy ending, this is what I am facing.

This is the sort of thing that happens to real estate people. The Good Lord knows that there are enough things that can go wrong, and we certainly do not need any help from other people. As far as I am concerned, this was a frivolous law-suite and should never have even been brought to a hearing when the Real Estate Commission knew in advance that the Engineer lied to make the deal fall through.

If you are interested in learning more about this case, I will be glad to talk with you. These sorts of things goes on all the time, but it seems that there is nothing that real estate people can do to protect ourselves. If we do something wrong, then we should answer for it. But the frivolity, vendictivness of persons surely does make it a hardship for us.

I therefore am urging this HB 158 to be passed. Even if it cannot protect me, it surely will protect other small business.

Thank you for letting me speak my mind.

cc: Thyes Shaub, State Director

To [illegible] =JAY=

THE NEW YORK TIMES OP-ED TUESDAY, MARCH

In Praise of Greedy Lawyers

By [illegible] McWhorter

[illegible] a rallying [illegible] Republican [illegible] has hit [illegible] with [illegible] legal [illegible] the House [illegible] scheduled to begin debat[illegible] related bills next week [illegible] key provision [illegible] the losing party to pay [illegible] other's legal fees in a category [illegible] that almost exclusively [illegible] corporate defendants — [illegible] devastate the plaintiff trade [illegible] inhibiting the Davids from going [illegible] the Goliaths and their high-[illegible] counsel.

Let's give the ambulance chasers [illegible] due. They have long been the [illegible] guardians of every Ameri[illegible] right to a day in court. They [illegible] the true voice of the grassroots.

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[illegible] of a lawyer's office.

The court [illegible] not only [illegible] [illegible] legal [illegible] "[illegible]"

Let's G[illegible]

Ending T[illegible]

Herman Kachel[illegible]

By Diane McWhorter

[illegible] a rallying [illegible] of the Republican [illegible] has hit [illegible] scapegoat with [illegible] mass appeal [illegible] contingency-fee law[illegible] evil of our [illegible] been socked [illegible] Accountability [illegible] legal [illegible] the House this month. The [illegible] is scheduled to begin debating [illegible] related bills next week.

[illegible] act's key provision — which [illegible] the losing party to pay some of the other's legal fees in a category [illegible] suits that almost exclusively involves corporate defendants — would devastate the plaintiff trade by inhibiting the Davids from going after the Goliaths and their high-powered counsel.

Let's give the ambulance chasers their due. They have long been the last-ditch guardians of every American's right to a day in court. They [illegible] the true voice of the grassroots, [illegible] being claimed as the private [illegible] of the Grand Old Party.

[illegible] the great Supreme Court Justice [illegible] Black. On top of the better known disgrace of being a onetime member of the Ku Klux Klan, he was also the quintessential damage suit lawyer. The populist sympathies that ultimately made him one of the Court's most determined champions of the individual's rights were professionally rooted in his practice as a personal injury specialist in Birmingham before he left [illegible] in 1927.

[illegible] Black's neo-industrial Alabama, the plaintiffs' lawyer was sometimes the only thing that stood between a client and virtual bondage to the iron and coal magnates who ruled Birmingham. Because there were no labor unions or Government

The distinguished history of the ambulance chaser.

agencies to offer them a hedge against destitution, injured workers sought relief in the court system — which had also been rigged against them. The Legislature had passed such statutes as the "fellow servant" law, which absolved the employer of liability if a plaintiff's injury was caused by a co-worker. (One of Hugo Black's regular adversaries invoked this defense against a coal miner whose hip had been broken — by a company mule.)

But the business elite wasn't able to get around the constitutional right to a trial by jury. In a blue-collar town like Birmingham, where a maimed or cheated plaintiff had better than average odds of getting a jury of true peers, brilliant courtroom performers like Black managed to win severe judgments against the rich and almighty. Personal-injury Robin Hoods were the community's vital agent for evening the balance of power.

Fittingly, after moving to Washington, Black would help upend the oligarchs' universe as one of the Congressional powers behind the New Deal. The same white-shoe lawyers [illegible]

who had [illegible] with him in Alabama courtrooms now mounted constitutional test cases and other [illegible] against [illegible] Franklin Delano Roosevelt's [illegible]

Today, the Republican Contract With America vows to scale back the New Deal's complex vision of Government to basic "common sense," as one of the House tort bills is titled. And while the crackdown on nuisance suits may seem like a long overdue move against citizens' abuses of their freedoms, it is important to remember that inalienable rights have historically been a nuisance where the profit motive is concerned.

The only client Hugo Black represented before the Supreme Court was surely a pest in the eyes of society: an injured black convict laborer, leased by the state like chattel to private coal mining operations. But that case called up pioneering the future landmark issue of an indigent person's right to counsel.

Since Black's day, personal injury law has evolved from a labor specialty to a middle-class consumer movement. And as plaintiffs' lawyers have organized into a powerful vested interest, it is often hard to detect any civil rights in the litigious whine of our culture's aggressive victims. The constitutional principle at stake today, however, has remained constant since Black began insisting on "every citizen's unconditional right to a day in court," as his biographer, Roger K. Newman, describes it, "to resolve any claims against overreaching corporations."

A case that bridges the gap from that day to this makes the point: the long litigation leading to the 1972 Federal court decision that exposed asbestos as a national public health crisis. The original plaintiff, a Texas insulation installer who had developed asbestosis, sued 11 manufacturers in 1966 but lost the case. Had the House's "loser pays" rule been in force then, that worker, assuming he was still alive, might still be writing checks to the industry's legal talent — if he had been [illegible] foolish enough to sue in the first place.

Sure, some jury awards are outrageous. But they are the inescapable price of a jury system. Moreover, in adding [illegible] punitive damages — which the tort reform bills would drastically cap — serve as a kind of civil law pillory, exposing corporate rascals to community scrutiny and perhaps even deterring others from future abuses.

The fact is, corporate accountability would be a casualty of the tort reformers' zeal to [illegible] lawsuits [illegible] [illegible] [illegible] [illegible]

Diane McWhorter is writing a [illegible] history of Birmingham, Ala.

privacy of a lawyer's office.

The court is a vehicle not only of justice but of discovery — and when its findings are momentous, they can lead to Congressional hearings and progressive laws.

Hugo Black had a good [illegible] [illegible] [illegible] benefit from the package of legal measures now facing the Senate — household names like Aetna, Dow Chemical, Johnson & Johnson, [illegible] Philip Morris, which dominate the membership list of the American Tort Reform Association. He called them "organized money." □

Let's Ge[illegible]

Ending T[illegible]

Teach Teache[illegible]

Imagine [illegible] [illegible] [illegible] [illegible]

[illegible]

Half the Truth

[illegible]

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M[illegible]

Planned Parenthood believes in

Respect [illegible]

Responsibility [illegible]

Reproductive Rights [illegible]

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JUDICIARY COMMITTEE
DELIVERY ACCEPTANCE LOG

MEETING DATE 2/9/96

BILL NUMBERS HB 158

LEGISLATOR	ACCEPTED BY	TIME	DATE
SEN. GREEN. RM 423			
SEN. MILLER. RM 125			
SEN. ADAMS RM 417	Chief Dem.		
SEN. ELLIS RM 9	Messenger		

Official Business

COMMITTEE:
SENATE JUDICIARY

DATE: February 19, 1996

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Subject of meeting:
CSHB 158(FIN)am(ct rls pfld)(efd fld)
CIVIL LIABILITY

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A Report on the Impact of House Bill 158 on Injured Alaskans

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SUPPORTING DOCUMENTS

TABLE OF CONTENTS

INTRODUCTION

In Alaska, certain groups recognize that they would profit if our jury system of damages for civil wrongs (torts) were significantly limited. Their solution is two pronged. Keep victims out of court, by locking the courtroom doors or by making claims too risky. Handcuff the jury so that it cannot award full compensation. Naturally, it is necessary to justify this solution in noble sounding policy goals.

House Bill 158 begins with a statement of high sounding goals, and then slashes away at the jury system. Every section takes from the victim, and gives to the wrongdoer. In this sense House Bill 158 could be termed the "Wrongdoer's Relief Act of 1995".

This report will briefly examine the erroneous premises behind the legislative findings and goals in Section One of the bill. Then, each infringement on our jury system will be analyzed in plain English, so that the proposed transfer of rights, power, and money from the victims to the wrongdoers can be more clearly seen for what it is.

SECTION 1
LEGISLATIVE FINDINGS

A. THE JURY SYSTEM AND VICTIMS NEED STILL MORE OF THE LEGISLATIVE LASH, FOR THE GOOD OF SOCIETY.

Implicit throughout this "findings and purposes section" is the premise that the transfer of power from victims to those accused of wrongdoing which has occurred in Alaska over the past twenty five years does not go far enough. What follows is a synopsis of tort reform already on the books.

1. Doctors accused of medical malpractice are entitled to an immediate stay of discovery against them. They proceed to a hearing before their professional colleagues. The opinion of these colleagues is admissible in evidence at trial. A.S. 09.55.536. There is no requirement of impartiality; members of the panel may be rabidly opposed to injury claims. Indeed, one panel recently refused to find an orthopedic surgeon guilty of medical malpractice for performing a surgery on his patient's wrong knee.

2. In medical malpractice litigation, the court may order periodic payment of the judgment. A.S. 09.55.548.

3. Lawsuits may not be brought for injury, death, or property damage caused by construction defects more than fifteen years old. A.S. 09.10.055.

4. Punitive damages may only be awarded upon proof by clear and convincing evidence, a higher than normal standard. 09.17.020.

5. Wrongdoers in Alaska are not jointly liable. A.S. 09.17.080. This is a very significant change in the law which puts Alaska in a distinct minority of American jurisdictions. This law ended what is popularly known as "deep pocket" liability, and puts the risk of insolvency by one of several wrongdoers on the victim alone.

6. Non-economic damages are limited to $500,000, except in cases of disfigurement or severe physical impairment. A.S. 09.17.010.

7. Damage awards are reduced by collateral benefits not subject to subrogation (payback to the victim's insurer). A.S. 09.17.010.

8. Municipalities are not liable for negligent failure in conducting safety inspections. A.S. 09.65.070.

9 Social hosts are never liable for furnishing liquor to other adults. A.S. 04.21.020

10 Bar and liquor-store owners are not liable for sales to minors made in good faith reliance on identification, criminal negligence must be shown. A.S. 04.21.020, 052.

11 Bars and liquor stores are not liable for selling to drunks or allowing them to remain on premises, unless criminal negligence is proven. A.S. 04.16.030

12 Ski operators are not liable for ski accidents caused by the inherent risks of skiing. A.S. 05.45.010.

13 The State is not liable for its oil spill response absent gross negligence. A.S. 46.08.[illegible]

14 Oil spill contractors are not liable for property damage absent gross negligence. A.S. 46.03.823

15 No damages can be awarded to a person injured while in the commission of a felony. A.S. 09.65.210

16 An owner is not liable for death or injury occurring on unimproved land. 09.65.200

17 Real estate agents are not liable for mistaken information they innocently pass on to buyers. A.S. 09.65.230

18 Members of non-profit boards are immune for their torts. A.S. 09.65.170.

19 A person rendering emergency aid cannot be sued. A.S. 09.65.90.

Unsatisfied with these special protections for negligent actors, the drafters of House Bill 138 seek further erosion of our jury system.

B. THE SKY IS FALLING: INSURANCE.

Also implicit in the legislative findings is the notion that society faces an intolerable insurance crisis. "Insurance is now generally available and well priced. (Deborah Ballen, Vice President, American Insurance Association, testimony before U.S. Senate Subcommittee, April 5, 1990.) The real cause of the "insurance crisis" of the 1980's was the insurance industry's reliance on flawed investment strategies based on the high interest rates of the late 1970's.

See "The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It On You", Consumer Reports (August 1986). Notably, the State of Alaska joined nineteen other states in an antitrust case against various insurance companies for manipulating the market to artificially restrict coverage in select areas.

The major insurance problem facing Alaskans is the high price of insurance coverage for obstetrical practitioners in rural communities. This problem can only be solved by addressing it head on. It cannot be solved by tinkering with the tort system in general, and hoping that the effects will eventually trickle down to bush doctors who deliver babies. To date, the medical community and the legislature have shown no interest in specific solutions proposed by either consumer groups or trial lawyers.

C. THE SKY IS FALLING: MEDICAL MALPRACTICE

Also implicit in the legislative findings is the belief that society's health care concerns can be resolved by restricting medical malpractice lawsuits. Patients have rights that politicians should not restrict. If the legislature truly had the interests of patients and doctors at heart, it would work to reduce medical injuries through well proven risk management principles, rather than reducing compensation.

Every year, medical negligence injures hundreds of thousands of Americans. A recent Harvard University study found that in New York alone, medical negligence causes from seven thousand to twenty nine thousand deaths annually. New England Journal of Medicine, Vol. 325, No. 4, July 25, 1991. A Rand Corporation study found that between twelve to twenty seven per cent of patient deaths could have been prevented absent sub-standard medical care. Annals of Internal Medicine, Vol. 109, No. 7, October 1, 1988.

Notwithstanding this public health epidemic, few malpractice victims sue, and fewer still recover. The Harvard study concluded that fewer than two per cent of medical malpractice victims file suit. Most of those claimants do not succeed. A comprehensive 1994 study of medical malpractice jury verdicts reveals that patients win fewer than one third of the cases which go to trial. USA Today, citing Jury Verdict Research Study, 4/4/94. The rate of medical

malpractice claims has "steadily declined" since 1985 Consumer Reports, July 1992. "The price of medical malpractice and professional liability [insurance] coverage for health care organizations remains stable and capacity is plentiful" Business Insurance, 3/28/94.

Incredibly, Alaska does not require that doctors be insured. Providence Hospital in Anchorage is one of the few major hospitals in the United States which permit physicians to practice without insurance.

In Alaska, juries are extraordinarily solicitous of physicians. If the case is not so overpowering that it settles out of court, it will almost certainly be lost before the jury. Alaskan juries have found for the claimant and against a doctor fewer than a dozen times in the thirty five years since statehood.

A recent Duke University study of 2,000 medical malpractice cases in North Carolina reveals a median award of only $36,500 The Atlanta Constitution, 2/1/93. A study by the American College of Physicians found that unjustified malpractice awards are "uncommon" Annals of Internal Medicine, Vol. 117, No. 9, 1992.

The total elimination of all medical malpractice claims would save Americans less than one per cent of health care costs. Department of Health and Human Services, Office of the Secretary. On average, per-physician premiums are less than four per cent of practice receipts. Medical Economics, November 4, 1991. The average cost per malpractice claim "for most health care organizations" has decreased in recent years Business Insurance, 3/28/94. When Alaskan physicians sold MICA, their own insurance company, several years ago, each member received a substantial payment based on MICA's surplus.

In 1994 the Congressional Office of Technology Assessment released a study of "defensive medicine" It revealed that a small percentage of procedures are ordered solely due to physician concern for malpractice exposure. The study concluded that "most malpractice reforms are unlikely to have much effect on defensive medicine" OTA Study, 7/21/94.

Caps on damage awards have no discernible effect on health care costs or doctor's

insurance premiums. Indiana's $730,000 cap on damages, or California's $250,000 cap on non-economic damages, have not reduced health care costs in those states. Indiana's health care cost ranking has remained identical before and after the cap. California's has gotten worse. Families USA Foundation, 1990. In twelve years following California's enactment of the cap, medical malpractice premiums in that state rose 191%.

State medical associations are notoriously lax in policing their own profession to sanction or remove repetitively negligent physicians. Because of the tort system, Alaskans receive better medical care. "It is sad but true that many physicians practice more carefully than they did in the past because they have an eye on the potential litigant...If the courts and insurance companies and the fear of malpractice become the most important disciplinary weapon in medicine—distasteful as the idea may be to physicians—so be it." Derbyshire, 'Malpractice, Medical Discipline and the Public', 19 Hospital Practice 109, 216 (1984). See also Schwartz and Komesar, "Doctors, Damages and Deterrence: An Economic View of Medical Malpractice", 298 New England Journal of Medicine 1282 (1978).

LOCKING THE COURTHOUSE DOORS
SECTIONS 2-5
HOUSE BILL 158

House Bill 158 locks the courthouse door to many innocent victims of wrongful conduct, before they ever have a chance to file a claim. For example, if a homeowner builds a deck without a railing, and a child falls off more than eight years later, the child cannot sue. If the roof of Anchorage's Performing Arts Center collapsed during a performance, the age of that building would immunize all architects and contractors. A high voltage line installed contrary to standards; abandoned blasting caps or dynamite at a mine; a will negligently drafted by a lawyer: such negligence will go unpunished if it escapes discovery or does not cause harm within eight years. A lottery would control the rights of Alaskans; the losers would be locked out of the courtroom. The Alaska Supreme Court says, "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so". Hanebuth v. Bell Helicopter International, 694 P.2d 143, 147 (Ak. 1984). During the Hickel

administration, the Office of the Attorney General studied the predecessor to House Bill 158, and concluded, "The Alaska Supreme Court would probably find the proposed statute of repose invalid under several alternative provisions of the Alaska Constitution...we believe that the proposed statute of repose establishes distinctions between classes of people in a way that is not justifiable under the equal protection clause."

Section 5 of the bill locks children out of the courthouse. Now, the statute of limitations does not commence until children turn eighteen. House Bill 158 eliminates that protection. Section 3 provides special discriminatory treatment of babies and toddlers, if a doctor is at fault.

HANDCUFFING THE JURY: DAMAGE CAPS
SECTION 6

Juries are the conscience of our community. The typical jury includes engineers, accountants, teachers, business people, housewives, government employees, and workers. Juries tend to be quite conservative, and to hold victims to a high standard of proof. A prominent defense lawyer who advises the "tort reform" group privately says that the defense lawyer who waives jury trial is a fool. Insurance defense lawyers always insist on a jury trial. The notion that Alaskan juries are incompetent and unreliable is nonsense.

Large verdicts are not routine. A Rand Corporation study proves that in the past quarter century, jury verdicts have only kept pace with inflation. The U.S. General Accounting Office has determined that large verdicts are not arbitrarily awarded, but rather reflect the severity of injury and the high cost of medical care.

Ignoring all this, the bill slaps Alaskan juries in the face, decreeing they can't be trusted to render fair verdicts. It does this by arbitrarily "capping" the amounts juries can award. With few exceptions, verdicts for pain, suffering, and lost enjoyment of life are limited to $300,000. Paralyzed and severely brain injured victims are limited to $500,000.

A quadriplegic can't move his body below his neck, has lost all bowel and bladder control, all sexual response, and requires round the clock attendant care. If his nose itches, he

can t scratch. He can t parent his kids, work, travel, play sports turn a page, or hunt. Suicidal thoughts are common. Damages for these "non-economic" injuries to him and his family are limited to $500,000.

Note that the victim only gets a portion of this money, perhaps half, because it must be shared with others in the family who have claims for loss of consortium. The actual quadriplegic s award for pain and suffering, spread out over his lifetime, could easily amount to only $3,000 for each year spent in a wretched condition.

This cap only targets those who are so seriously injured they have pain and suffering claims beyond $300,000. Persons suffering mild to moderate injuries are allowed full compensation. It is Alaskans with amputated limbs, gruesome burns, blindness, paralysis, and debilitating brain damage who will be affected by this harsh rule.

The cap will not lower insurance rates. Caps affect a tiny percentage of total insurance payout. Most cases settle for less than $25,000. Cases with pain and suffering damages exceeding $300,000 are extremely rare. Legislation which affects only a few innocent, catastrophically injured Alaskans per year will bring down the rates of most people a few pennies a year, at most. What's happening here is truly shameful: the neediest victims are sacrificed, without any corresponding benefit to Alaskans as a whole.

HANDCUFFING THE JURY: PUNITIVE DAMAGES SECTIONS 7-8, 23

Occasionally the conduct of a defendant is so repugnant that a jury assesses punitive damages. Under existing law, the conduct must be outrageous, and it must be proven by clear and convincing evidence. Punitive damages are rarely awarded.

When juries speak, corporate America listens. That's why defectively designed cribs no longer strangle infants. Trucks have back-up alarms. Once harmful medical devices have been redesigned. Auto fuel systems have been strengthened. Cancer causing asbestos no longer poisons homes, schools and workplaces. Farm machinery has safety guards.

Punitive damage cases are very uncommon. A comprehensive study of punitive dam-

ages in products liability cases found only 355 punitive awards between 1965 and 1990. One quarter were asbestos cases. Eighty per cent of the time, the manufacturer enacted a safety measure after the verdict. In the much maligned MacDonald s coffee spill case, two things happened. The judge lowered the punitive damage award to $450,000; and MacDonald's finally turned down the temperature of its coffee, something that 750 prior accidents and complaints had not been able to accomplish. The bill lets criminals off the hook. Now, a driver who is high on drugs and kills meets the "outrageous" test, due to his reckless indifference to safety. The bill would require proof of "conscious acts" by a drunk driver, who will claim he did not know what he was doing.

The bill insults jury intelligence by capping the punitive award at the greater of $300,000 or three times compensatory damages. Some corporations profit from systematic small thefts over many thousands of transactions. Limiting punitive damages to an arbitrary level undercuts their deterrent value, since reckless or malicious defendants might find it more cost effective to continue their bad behavior. This is precisely the decision making employed by the Ford Motor Company regarding its Pinto automobile. The company determined that it would be cheaper to sell the defectively designed car, and risk paying damage awards to injured consumers, than it would be to make the car significantly safer at a cost of $11 per car.

The conservative United States Supreme Court recently upheld a substantial punitive award, in the millions, where the compensatory damages were $19,000 but heavy deterrence was needed. Few other states limit punitive damages. Why should Alaskan juries faced with overwhelming evidence of outrageous conduct be handcuffed?

The bill allocates one half of the punitive damage award to the state, with no fee thereon to the lawyer. This creates a disincentive to the plaintiff and the lawyer to pursue such a case, particularly when the compensatory damages are modest. If an insurance company swindles its insured out of $20,000, the most the client could recover in punitive damages would be $150,000. That is simply not enough to justify the risk and expense the lawyer and client must bear to pursue such a case over the course of several years.

Why would the legislature want to limit the power of the jury to correct the conduct of corporations which are proven guilty by clear and convincing evidence of intentionally malicious behavior? At a time when the legislature is raising criminal penalties to hold individuals accountable for their behavior, why is reducing penalties for the malicious conduct of foreign corporations a high priority?

INCOME TAXES
SECTION 9

This section commands that we take the income taxes which a victim would have paid in the future if uninjured, and credit them to the wrongdoer. Congress gives injury victims a break by not taxing their recoveries. The bill strips victims of this tax break, and hands it over to wrongdoers.

Most states do not deduct taxes from future lost income awarded by a jury. Figuring out future taxes is highly speculative. The tax code changes, as does the victim's tax status. Will he or she marry? When? How many children? Own a home? Have an IRA? All these unknowns affect tax liability. The jury is in effect asked to fill out twenty or thirty future tax returns by gazing in a crystal ball.

At a time when everyone is concerned with the expense and delay of lawsuits, does it make sense to add more complexity, court time, and jury aggravation?

AN ADMINISTRATIVE NIGHTMARE: PERIODIC PAYMENTS
SECTIONS 10-12

Once a lawsuit is over, it's over. The judgment is paid in a lump sum. Future lost wages have been adjusted downward to reflect their early payment. In order to preserve the value of his lost income award, the victim must immediately invest this money, so interest will augment it and permit regular withdrawal to match what his salary would have been. Similarly, the jury has decided on the correct amount to pay the victim for future pain and suffering. The case is closed.

Rather than the straightforward system, House Bill 158 would allow the wrongdoer to pay the victim's future losses on the installment plan. Victim and wrongdoer would be joined for life by ongoing payment obligations. Such payments will be expensive to administer, and they won't accomplish anything beyond enriching outside insurance companies.

To set the payment level, the judge will guess the average inflation over the remaining life of the victim. If the judge guesses low, the victim will lose, because the wrongdoer will eventually be able to pay the victim in cheap dollars. A wrong guess could never be fixed, and could wipe a victim out.

The flexibility and discretion a victim currently possesses is eliminated. If the victim has an expensive medical crisis, the timing and amount of payments can't be adjusted. The bill mechanistically assumes the victim's needs are the same at age twelve and age seventy.

Insurance companies are not required to post security for their future payments. Insurance companies become insolvent each year. As of 1987, Executive Life had assets in the billions and the highest possible rating. Now it's bankrupt, with a trail of broken dreams behind it. One hurricane through New Orleans, one California earthquake, could devastate an insurance company. Why leave an Alaskan accident victim dependent for life on the solvency of one company?

Who is the big winner here? Out of state insurance companies get to control the victim's money. They get to invest it any way they want. It's like an interest free loan.

COLLATERAL BENEFITS
SECTION 14

Collateral benefits are automatic payments to an injured person from sources such as medical insurance, state medicaid, or workers' compensation benefits. When an injured person sues, he or she makes claim for medical bills or lost wages which might have already been partially paid by insurers. If the jury awards these damages, the insurers or the state of Alaska get paid back, so there is no double recovery by the victim. This is called subrogation. Subrogation rights are included in virtually all health insurance policies. Reimbursements of

workers' compensation and medicaid payments are required by Alaska statutes. The state hires an accounting firm to monitor its medicaid liens.

The bill would cancel these repayments to insurers and the state, and instead reduce the damages payable by wrongdoers. To provide a benefit to proven wrongdoers, the bill penalizes every health and workers' compensation insurance carrier doing business in Alaska, plus raids the state treasury.

This section tells the jury about the victim's insurance, but not the wrongdoer's. It will increase the cost of health and worker's compensation insurance. It's a misguided, flagrantly unfair imposition on the innocent in favor of the guilty.

TURNING A TRIAL INTO A CIRCUS
SECTIONS 14-15

The boring, technical language of these sections conceals a revolution in how jury trials will work. Under current rules, the parties to a lawsuit each have a lawyer. The jury listens to everyone, and assigns percentages of fault to the plaintiffs and the defendants. This legislation totally changes that, by permitting the jury to assign fault to "empty chairs", persons who have not been sued, have not defended, and are not present in the courtroom. The empty chairs pay nothing, but their fault decreases the award to the victim.

This rule change degrades the fairness of our jury trials. For example:

> Victim is heavily burned in a LP-gas explosion caused by Defendant. She would have survived, except she is a drinker and a smoker. With weakened liver, heart and lungs, she doesn't have a chance. Victim's husband and kids sue Defendant. Defendant has a smart lawyer, who consumes two months of court time presenting evidence against the tobacco and liquor industries for failure to warn victim of health hazards. Those empty chairs of course do not fight back. Although such cases have never prevailed in the United States when defended, the jury buys the argument. End result: Defendant 40%, Marlboro 30%, Johnnie Walker 30%. Only Defendant pays; scotch and cigarette don't, because they were never sued. Victim loses 60% of her damages.

The bill gives defendants every incentive to accuse peripherally involved people. Reputations will be smeared in court by defendants, with no chance for the person behind the empty chair to respond. The average duration of jury trials will increase, as the truth finding quality of those trials degrades.

Alaskan workers will be especially disadvantaged by this change. Now, the workers' compensation law gives employers immunity from civil suit, and no fault can be allocated to them. The bill maintains employer immunity, but burdens the worker with the employer's fault. In every case where a worker is hurt, the defense will criticize the employer in absentia, alleging inadequate safety rules, insufficient procedural manuals, lack of inspection and supervision, failure to buy modern equipment, to train employees, and the like. The employer will have no reason to defend its conduct since the employer is immune and is not obligated to pay its share of the fault. Yet, every bit of fault the jury ascribes to the absent and unrepresented employer will directly diminish the injured worker's verdict.

These provisions are the real sleepers of the bill. Wrapped in dry technical prose is a radical transformation of jury trials, so that much of the trial is about people and companies who are not present in the courtroom. Not only victims will be hurt; taxpayers will pay for longer trials. Individuals and companies will be publicly pilloried and defamed without a chance to respond. Much of the fairness built into our system as we have known it since statehood will be abandoned.

A REWARD FOR STALLING
SECTION 16

Section 16 deals with a partial settlement of a case between a victim and one of several wrongdoers. It is poorly drafted. If it is interpreted to mean that a partial settlement is deducted from the jury award, and that the remaining defendant's percentage of fault is then applied to that reduced number, it becomes mathematically impossible for the plaintiff to fully recover, unless the jury finds the remaining defendant 100% at fault.

Under current law, a defendant who goes to trial pays his percentage of the fault as

found by the jury. It may be that the muddled drafting of this section seeks to change that by crediting to such a defendant any overpayment by a settling defendant. Such a provision allocates to victims all of the risks, and none of the benefits, of pretrial settlements. A victim can only break even or lose by a partial pretrial settlement. A defendant can only break even or win by failing to settle. Settlement is discouraged, and stalling is encouraged. This proposal will increase the cost of litigation by discouraging pretrial settlement.

CONFISCATION OF THE HOMES AND SAVINGS OF VICTIMS SECTION 17

The current "Offer of Judgment" rule is a procedural device to encourage pretrial settlement by giving a moderate reward to one who makes an offer, and after rejection does better at trial. House Bill 155 raises the stakes exponentially, by increasing the price of misjudgment to an intolerable level: full costs and attorney fees to the person making the offer.

This provision is breathtaking in its scope and ferocity. Not only will the victim who loses at trial pay the defendant's entire attorney fee and all costs. Also, the victim who wins at trial, but guesses wrong about the size of the verdict, will pay just as if he had lost. The victim pays if he loses, the victim pays if he wins.

Suppose an accident victim suffers a broken back, is in the hospital a long time, and has one hundred thousand dollars in medical bills. His lawyer researches other jury verdicts, and concludes the case is worth two hundred fifty thousand dollars. The defendant made an early offer of judgment of $125,000, only twenty five thousand above the medical bills. The jury awards $120,000. Now the victim must pay attorney fees and costs, which could easily wipe out the entire judgment. The defendant, proven guilty before a jury, goes scott free. The accident victim is stuck with $100,000 in medical bills he can't pay. Doctors, hospitals and the State of Alaska will therefore have to subsidize this benefit to the wrongdoer.

This example is a simple one. A case may have multiple defendants, each making an offer of judgment. If the plaintiff guesses wrong on any of the offers, he can be wiped out.

even if he wins the case. Or the defendants may suddenly accuse a non-party of fault, and invalidate the assumptions on which a plaintiff earlier rejected an offer of judgment.

Such a system would further erode personal responsibility in Alaska, because it would force injured citizens to back down from holding wrongdoers fully accountable. Victims would choose between accepting a low offer and the risk of financial ruin. Winning a trial is never guaranteed, much less recovering a particular sum from a particular defendant out of many defendants and non-party players. This section gives excessive leverage to insurance companies to undercompensate injured Alaskans. The result: middle class plaintiffs will be forced to accept an insurance company's lowball offer. Who among us would risk his home and life savings betting on a lawyer's prescience regarding the exact size of a jury award from each defendant and each empty chair? This is one of the most anti-victim sections of House Bill 158.

MORE REWARD FOR STALLING
SECTIONS 18-19

Currently a wrongdoer pays 10.5% annual interest from the time he receives notice of suit, until the jury decides the case. This is fair, because the wrongdoer has held money due the victim for several years, and has been able to invest it.

The bill would eliminate most of this duty to pay interest. First, it would exempt most of the judgment, the future part, from any interest at all. Secondly, it would cut the remaining interest to the federal discount rate plus 3%. Insurance companies are businesses who play hardball. If they can make money by delaying settlement, they will do so. This section gives them every incentive to delay.

The State of Alaska charges tax deadbeats a minimum of 11%. When the prejudgment interest rate is eliminated for some damages and lowered for other damages, insurance companies are in effect given a low interest loan for as long as they can stall the proceedings. It shouldn't be allowed.