ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672
9556 SENATE JUDICIARY

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Sue's insurance company gets to keep. And, of course, the less Vic gets.

Bad Tort Reform even allows some people who hurt others to walk away scot-free.Say Vic is parking his snowblower and his garage roof collapses on top of him. Whether Vic could recover anything from the builder would depend, under Porter's bill, on how old the garage was. It if was 7 years old, no problem; 8 years, tough luck, Vic.

So when someone tries to tell you that you should support some bill just because it's tort reform, ask if it's good tort reform or bad tort reform. You already do the same with cholesterol -- why else would anyone eat frozen yogurt instead of Ben and Jerry's?

Jeff Bush is Deputy Commissioner of Commerce & Economic Development. He was a member of Gov. Tony Knowles' Civil Justice Reform Task Force.

RECEIVED 2

LAW OFFICES OF
FRIEDMAN, RUBIN & WHITE

Richard H. Friedman
Jeffrey K. Rubin
Jeffrey A. Friedman
Michael N. White
Les Gara
James H. McComas, Of Counsel
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1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704
Telefax: (907) 278-6449

To: Robin Taylor

From: Rick Friedman

Robin,

Thanks for introducing the "Task Force" bill. Needless to say, everyone up here is very grateful and willing to do anything to help you along.

I am enclosing a "closing argument" for punitive damages which has some concepts you may want to use if you end up debating this issue.

As always, let me (us) know what we can do.

Rick

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Robin,

I don't know if this affidavit would be of any use to you, but I thought it wouldn't hurt to send it on.

Rick

From: John C. McCarthy
Especially for: The Western Trial Lawyers Association
Sun Valley, Idaho,
Saturday, March 1, 1997
8:50 to 9:30 AM

A CLOSING ARGUMENT FOR PUNITIVE DAMAGES

Planning your closing argument in a punitive damage case starts with jury selection, if not with motions in limine.

I feel it is essential in voir dire to prepare the jury for its role in deciding whether or not to assess punitive damages and, if so, how much will be appropriate to do the job the law asks them to do - - punish the defendant. You may even have to duke it out with the trial judge before starting jury selection to make certain the deck is clear for you to question prospective jurors about their attitudes concerning punitives and their possible role in fixing them.

But in order for the plaintiff's attorney to do that he or she must understand what his or her role is and then get that message across in voir dire as part of the screening of jurors. Obiously, you want to try to select only those who are eager to play the right role, enthusiastically, fully and effectively.

So, here is the approach I use: THE COP ON THE BEAT. This is the message I try to convey to the judge and to the jurors. You have to use your own words that work for you and for the situation that you face. Each case is different.

Surprisingly, despite a national mood for tougher anti-crime legislation and tougher sentences for criminals, when it comes to corporate crime, we have little help from lawmakers, prosecutors or the courts. They leave it almost entirely up to jurors like those called to duty in this case and private attorneys like us.

For over 40 years as a private attorney I have been a cop on the beat trying to protect consumers, employees, insureds and other victims of corporate fraud and deceit. I am a private cop because there are no police to protect my neighbors. There never have been.

I am also their private prosecutor because there are no laws that any public attorney, district attorney or attorney general can enforce that will restore to my neighbors what has been taken from them as a result of corporate fraud or deceit in the (manufacture and marketing of defective and dangerous products) (bad faith denial of insurance benefits due a policyholder) (firing of good employees because they are too old, the wrong sex or race) etc. Adapt to your case.

My beat is the courtroom and my only weapon has been the law of punitive damages. And I am permitted to use it only when I can prove that the corporate defendant acted with full knowledge and malice and succeeded in unlawfully injuring my innocent neighbor. If I cannot prove my charge with clear and convincing evidence, I not only lose, I do not get paid.

The lawful purpose of punitive damages is to punish the guilty corporation, to discourage it from continuing to profit from cheating and injuring the public, and to send a public message to other like-minded corporations. Jail sentences serve the same purpose for individuals who commit the same acts. But a corporation cannot be sentenced to jail. It cannot be executed no matter how many lives, careers or fortunes it has unlawfully destroyed.

It is out of an historical sense of fairness that Americans are careful to fit the punishment to the crime. Eighty percent support the death penalty because they feel it is necessary to punish severely individuals who maliciously commit deadly crimes. Americans also feel strongly that the death penalty saves lives because it is a deterrent to such criminal conduct.

Therefore, when jurors find a corporation guilty of deliberately, unlawfully and maliciously causing death or injury or property loss to their consumer victims, they must be ready, willing, and able to impose appropriate punishment. And the only way the law provides for that is through fines fixed by jurors in the form of punitive damages.

If jurors refuse to do so, are not permitted to do so or are limited in the fines they can assess, doesn't that put an easily affordable price on corporate crime? Why should the wealthiest and most powerful corporations who commit the most reprehensible fraud be given the green light for open season on our fellow Americans?

The cop on the beat can do only so much. The prosecutor in the courtroom can do only so much. The judge can do only so much. If corporate crime is to be brought under control in America, it is up to ordinary Americans, sitting as jurors, to do it. And I will prove this is such a case.

One well-publicized report of a carefully considered jury's verdict assessing punitive damages does more to deter growing corporate crime against Americans than any politician's campaign promise ever could do.

KENNETH O. JARVI

101 East 9th Avenue, Suite 9B
Anchorage, Alaska 99501-3677
(907) 276-4271

March 20, 1997

Senator Robin Taylor
Chair, Senate Judiciary Committee
Alaska State Legislature
State Senate
State Capitol
Juneau, Alaska 99801

Dear Senator Taylor:

I know you are aware that current Alaska Statute §09.17.010 puts a cap on non-economic damages for victims of personnel injury, but fairly recognizes that it does not apply to that small percentage of cases which involve severe physical impairment or disfigurement. By contrast, the current legislation being propounded by Representative Porter from Anchorage effectively obliterates the rights of severely injured persons for fair compensation. SS HB 58 creates a $500,000 cap on non-economic damages and does not create a exception for severely injured persons. Simply stated, if a person's life is trashed because of someone's tort liability, $500,000 for non-economic damages is inadequate.

The question with regard to this proposed legislation is really one of fairness. These catastrophic injury cases represent very few of all cases in the judicial system. These victims have had the quality of their lives changed in a significant way, and in a way which no one would willingly exchange places with them for any amount of money. Why should they be picked on? There is nothing unfair about having a paraplegic, hemiplegic, quadriplegic, or brain injured person fully compensated for their losses. With their life dramatically changed and frequently effectively destroyed, this compensation in these small minority of cases is really all the "system" has to offer.

I am a registered Independent and have been for my 30-plus years in Alaska, but I have closely followed Republican philosophy. I thought Republican philosophy meant less government interference with citizens exercise of their rights, not more. Why pick on these trauma induced crippled people by stripping them of the only justice that the system can offer?

My experience in dealing with insurance companies is the less they have at risk, the more difficult they are to deal with and the more unreasonable they become. I would suggest that establishing caps that relate to catastrophic injuries will be a greater incentive for the insurance companies to contest cases of merit. When they have less at risk, they can afford to be contentious. Reduce the risk of exposure of these insurance companies and you will see more, not less, of these cases in court.

I note that the sponsor statement relating to SS HB 58 states that liability insurance is unavailable. This has to be a misstatement, whether unwittingly or intentional I don't know. But, clearly, the sponsor of SS HB 58 was a member of the Governor's Task Force and the Governor's Task Force concluded that no insurance crisis exists in Alaska at this time in terms of cost or availability (See Task Force Report at page 55).

Perhaps in the present context, it is too easy for truth to be a victim. It appears that severely injured trauma victims are easy prey. They have none of the powerful, well paid lobbyists that the insurance industry or the big business interests have. If the proponents of SS HB 58 are successful in their effort to effectively eliminate severely injured trauma victim's rights, then my question is what is the quid pro quo? I have heard or seen nothing from the insurance industry that it has committed itself to a reduction in rates. There is a good reason for this. It won't do so. Further, we all know why. When the trauma victim's rights are savagely stripped, this will simply create a windfall for the insurance companies. They will not change their premiums one wit. As a consequence, the insurance consumer will continue to pay as they have. The victims, those who became severely crippled, will give up substantial rights in exchange for nothing. The insurance consumer gets nothing more, but our friendly insurers sure do: substantially limited exposure for the same premium dollar. Since there is no insurance crisis in terms of availability or affordability, who benefits? Not the consumer, and certainly not the severely injured trauma victim.

What happened to the Republication philosophy of no new taxes? The treatment in the tort reform bill regarding punitive damages is to give 50% of any hard won recovery to the State. This is simply a tax on plaintiffs who have suffered substantial damages caused by outrageous conduct of a defendant, but who have had the guts and stamina to pursue a case against defendants who deserve what they get.

I know as a lawyer, you have a comprehension of how difficult it is to successfully pursue a punitive damage case. Punitive damages are so infrequently awarded that instead of putting a 50% tax on a plaintiff who has the guts and stamina to pursue such a case, the Legislature should do the opposite: create a incentive for the prosecution of such cases because it does

effectively root out some genuinely bad actors who deserve what they get. At the very least, the Legislature should not create a disincentive to pursue these difficult cases. Under current law, the conduct of the defendant has to be outrageous and intentional or be outrageous and evidence a reckless disregard for the safety of other people. With this stiff criteria, juries almost never award punitive damages. When they do, the verdicts are reviewed by courts and then are frequently reduced.

If there was some benefit to be gained, maybe these draconian in-roads on the rights of severely injured people would make sense. If there is a quid pro quo, it is not obvious. All I would ask is that in the consideration of the proposed bill coming from the House that the Senate consider the unfairness of obliterating the severely injured victim's rights, that is what SS HB 58 proposes to do.

Sincerely yours,

Kenneth O. Jarvi

KOJ/sel/5119

Law Offices of
FRIEDMAN, [illegible]IN & WHITE
1227 West 9th Avenue, Second Floor
Anchorage, Alaska 99501
(907) 258-0704

AFFIDAVIT OF ROBERT BELLOTT

Robert Bellott, being first duly sworn, deposes and states his belief is as follows:

1. I live in Anchorage, Alaska, and worked in Alaska as an insurance agent for State Farm for over 20 years. I worked in this capacity through August, 1996.

2. As an agent, I sold various forms of liability insurance for businesses and other insureds. The types of liability insurance I sold included personal and commercial liability umbrella policies; automobile liability coverage; general liability coverage; and package insurance policies that included liability insurance components.

3. Liability insurance has become more costly since 1985, and its cost has steadily risen. All forms of liability insurance of which I am aware have risen almost every year, if not every year, since 1985.

4. I have been informed that the Alaska legislature enacted a tort reform measure in 1986. I am aware of no reduction in the cost of liability insurance associated with this measure.

Dated this 16th day of October, 1996.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Robert Bellott

SUBSCRIBED AND SWORN to before me this 16th day of October, 1996, at Anchorage, Alaska.

Notary Public in and for Alaska
My commission expires: 6/2/00

Law Offices of
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(907) 258-0704

Jeffrey Friedman
P.O. Box 111841
Anchorage, AK 99511-1841

jeffjan@alaska.net

January 25, 1997

Senator Sean Parnell
State Capitol
Juneau, AK 99801-1182

Sent by Fax to 465-2278

Dear Senator Parnell:

I am writing to you about the various tort reform bills before the Legislature this year. Since I am a lawyer, many people will say I am biased, and my opinion should be discounted. But I am also an owner of an office building in Anchorage, a small business owner, a husband, and a father. To say that lawyers can not be trusted to provide reasonable opinions on tort reform is no different than suggesting that each Legislator's vote is determined solely by what will garner the most campaign contributions. While that may occasionally be true, I'd like to think that most people, including Legislators and lawyers, are capable of putting the public interest ahead of any personal interests.

I know what it means to have to make a payroll each month, and I know how important it is to have affordable commercial and consumer insurance. None of the tort bills will have a major effect on my law practice's income. Similarly, none of these bills will lower my insurance premiums by more than a couple of dollars. What they will do, however, is make life much more difficult for victims harmed by the wrongful conduct of others.

For example, under the proposed Statute of Repose in HB 58, if my son's school roof should happen to collapse on his head because of a negligent design calculation, I won't be able to recover a dime for his medical expenses because the building is more than 8 years old. On top of that, the school district won't be able to recover any money to rebuild the school. Instead, the district will have to raise taxes to cover that cost.

Unfortunately, people make mistakes. Sometimes, those mistakes cause injury and property damage which someone has to pay for. Proponents of tort reform seem to think the victims should be required to pay this cost rather than the negligent tortfeasor. I believe the person causing the harm should pay this cost. That is the person in the best position to be careful to avoid the harm, is the person in the best position to include the cost of potential harm in the cost of his or her product, and is the person in the best position to purchase insurance to protect against this risk.

People talk about outrageous jury verdicts, and frivolous lawsuits. Despite this talk, they can point to very few examples here in Alaska. **Legislation ought to be based on facts, not rumor.** When you examine actual cases, you find that the claims and defenses raised are valid, and the jury's verdict is reasonable. In the very rare case when the verdict is excessive, the trial judge or appellate court is quick to reverse the result. No system of resolving disputes is perfect, but the current system works very well. Several of the proposed changes will make the system more expensive. Overall, the proposed changes will make the system less efficient, and shift the cost of injury away from the wrongdoer and on to the victim.

Of course, politics requires compromise. I have looked at the various bills being proposed. If some tort reform must pass, I urge you to do what you can to ensure it is SB 15. SB 15 in its present form is not perfect, but it is a reasonable compromise.

Sincerely,

Jeff Friedman

cc: Sen. Robin Taylor (by fax)

Edmond W. Burke
4003 Heritage Way
Missoula, Montana 59802
Tel. (406) 542-2720
Fax (406) 543-6996

VIA FAX & FIRST CLASS MAIL

March 23, 1997

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

Re: Exemplary Damage Awards, Proposed Legislation.

Dear Robin:

Although I now make my home in Montana, my interest in Alaska remains strong: I still have a daughter living there and, since moving here, I have become part of a small Anchorage law firm, Burke, Bauermeister and Brelsford.

I have been interested in the debate in Alaska concerning "tort reform," and my colleagues tell me that you are a leader in the fight against artificial caps on non-economic losses and punitive or exemplary damage awards. With this in mind, I am sending you suggested language for a bill intended to create a stir with regard to at least one of these issues: exemplary damages. (Needless to say, my suggested language would have to be put in proper legislative form, before it would be ready for submission as an actual bill; for the most part, however, I think the language could -- and probably should -- remain unchanged.)

Despite the shrill cry of those seeking to avoid exposure to the threat of exemplary damage, it is entirely clear that such damages serve a very useful purpose. Moreover, I see absolutely no reason for the Alaska Legislature to limit anyone's liability for the sort of wanton and malicious conduct required, under existing law, as the prerequisite for an award of exemplary damages. As former Justice Morrison of Montana once warned, in Owens v. Parker Drilling, Co., 676 P.2d 162, 166 (Mont. 1984):

> There are those who distrust the lay person's capacity for reasoned and dispassionate judgment. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process.

The bill which I am proposing may help preserve the right of an Alaska jury to award exemplary damages which are meaningful, by accomplishing two things: First, such a bill should clarify the main purpose in awarding exemplary damages -- protection of the public; such damages are wrongly, but all too often, seen only as an opportunity for greedy plaintiffs' lawyers and a financial "windfall" to the successful plaintiff. Second, such legislation will provide a direct benefit the people of Alaska, by requiring a share of any punitive damage award to be placed in the Permanent Fund Earnings Reserve Account, at no cost to the State and without destroying the only incentive there is for an individual plaintiff to undertake the added difficulty and personal financial risk necessary to obtain an award of exemplary damages.

If nothing else, the introduction of such a proposal in the present session might at least improve the quality of the debate concerning "tort reform." It would be quite interesting, for example, to hear some of your fellow-legislators' answers, when asked whether they oppose all or any part of the proposed bill and, if so, why.

I plan to call you later this week for an update on where things are headed in Juneau. Perhaps we can kick this and some of the other aspect of "tort reform" around then. Meanwhile, keep up the good fight; there's no doubt, you're on the side of the angels on this one.

Sincerely yours,

Edmond W. Burke

CORRECTION

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

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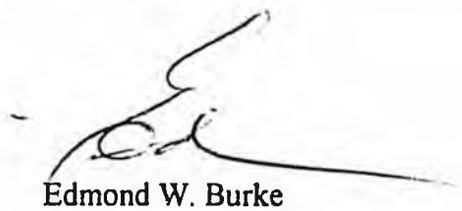
Sincerely yours,



Edmond W. Burke

PROPOSED LEGISLATION

WHEREAS, it is in the best interest of the people of Alaska to hold accountable those guilty of malicious or wanton conduct, including acts intended to harm the person or interests of another, without lawful justification or excuse, and any act or omission involving gross negligence or reckless disregard for the safety or interests of another; and

WHEREAS, the compensatory damages which may be awarded to the plaintiff in a civil action may not exceed in amount that which is necessary to provide reasonable compensation for the plaintiff's injuries; and

WHEREAS, the defendant's conduct, in some cases, is sufficiently egregious to call for the award of exemplary damages as well, in order to punish the defendant and protect the public from similarly egregious conduct in the future; and

WHEREAS, in order to achieve these important public goals, every award of exemplary damages must be great enough to inflict upon the defendant just punishment for the particular act or omission supporting the award, and sufficient in amount to be likely to deter the defendant and others from engaging in similar conduct in the future; and

WHEREAS, the full and consistent realization of these important and necessary public goals is often hindered by the reluctance of some jurors and judges to award an individual plaintiff the amount necessary for their accomplishment;

NOW, THEREFORE, BE IT ENACTED:

A. **Exemplary Damages.** When appropriate, exemplary damages may be awarded against the defendant in a civil action.

1. Exemplary damages are appropriate when it is shown by clear and convincing evidence that a defendant is guilty of malicious or wanton conduct causing harm to the person or interests of another. Such conduct includes, but is not limited to, the following:

(a) Any act intended by the defendant to cause harm to the person or interests of another, provided such act is not one which has been declared justified or excused by the applicable law;

(b) Any act or omission on the part of the defendant amounting to gross negligence under the particular circumstances; and

(c) Any act or omission on the part of the defendant demonstrating reckless disregard for the personal safety and interests of another.

2. Awards of exemplary damages shall be based upon the egregiousness of the defendant's conduct, the importance of discouraging like conduct in the future and the defendant's wealth, and every such award shall great enough to accomplish the following goals:

(a) The award must inflict just punishment upon the defendant, for the particular act or omission supporting the award, and

(b) The award must be great enough to be likely to deter the defendant and others from engaging in like conduct in the future.

B. **Public Share of Exemplary DamageAwards; Deposit in the Alaska Permanent Fund Earnings Reserve.** Exemplary damages awarded in a civil action belong, in part, to the principal intended beneficiary of every such award, the people of the State of Alaska. Such damages shall be divided and the State's share thereof administered as follows:

1. When exemplary damages are awarded in a civil action, the State and the party obtaining the award shall each be entitled to one-half (50%) the amount of the award remaining after deducting such person's full litigation costs and attorneys' fees;

2. The State's one-half (50%) share of the net proceeds of the exemplary damage award will be deposited, upon receipt, in the Alaska Permanent Fund Earnings Reserve Account, and administered according to the provisions of AS 37.13.145.

When Courts Become Political Battlegrounds

Alabama politics has been overwhelmed by an all-consuming fight over tort reform

By Dale Russakoff
Washington Post Staff Writer

STATES

BIRMINGHAM

The sacred Southern rituals of Saturday afternoon football and Sunday morning prayer are safe, for now, from the unholy wars of Alabama politics. The "skunk ad" is off the air, no longer incessantly interrupting touchdown drives with word that a candidate for Supreme Court Justice "stinks." The letters full of tawdry details from his 20-year-old divorce have stopped circulating in fundamentalist Christian churches across Alabama.

But this high-financed nastiness was no passing symptom of Campaign '96. Alabama politics has fallen into the grip of a national showdown between two of the country's most powerful interest groups, trial lawyers and business groups, whose money now overwhelms elections for once-obscure offices in this small state. The recent judicial campaign reached senatorial heights of more than $5 million. Legislative races have approached $500,000.

In Alabama, dubbed "Tort Hell" by Forbes magazine, both sides are struggling to control a court system in which populist-style plaintiffs' lawyers regularly win eye-popping civil damage awards by whipping up juries to "send a message" to Big Business. Among the more spectacular verdicts was $150 million against General Motors Corp., won by a rural factory worker paralyzed in a car wreck. (It recently was settled in a postverdict conference for an undisclosed amount.)

According to consultants for both major parties, this struggle has come to dominate all politics in Alabama. They say this year's Supreme Court race, in which a Republican backed by the state Business Council unseated a Democrat backed by the state trial lawyers' group, marked the height, but by no means the limit, of the trend. Already, both sides are gearing up for 1998, when the terms of three justices, the governor and the lieutenant governor will expire.

"This is literally killing politics in Alabama," says political scientist Natalie Davis, who ran unsuccessfully for the U.S. Senate in the Democratic primary this year. "The trial lawyers and the Business Council control most of the money in politics. The trial lawyers pick the Democrat and the Business Council picks the Republican and it's all about your stand on tort reform.

"If you poll voters to see what they're concerned about," Davis says, "they'll say education, health care, jobs, seniors and crime. They never say tort reform. But the big money cares only about tort reform. Then the candidates go to the airwaves with all the garbage and money they can dig up, and voters are turned off and they say: Government doesn't work for me."

Although Alabama is commonly viewed as behind the times, it may be the leading edge in this front. As Washington gives more power to states to regulate issues from the environment to banking to welfare, well-financed groups are pouring resources into political races in capitals from Albany, N.Y., to Sacramento, Calif., political analysts say.

In this year's Supreme Court contest, the Republican, Harold See, is estimated to have raised more than $3 million. He retained Virginia consultant John Dexdourff, who says he was surprised to find that a state judicial race could command national strategists. The Democratic incumbent, Associate Justice Kenneth Ingram, with an estimated $2 million—much of it from the Democratic Party—hired Hank Sheinkopf, a member of President Clinton's media team.

FROM A TELEVISED POLITICAL AD

This attack ad was paid for by forces behind Alabama Supreme Court Justice Kenneth Ingram.

Exact fund-raising totals are unavailable because Alabama does not require final campaign finance reports until January, obscuring the vast sums that typically pour in during the final days, often from out of state. Moreover, there are no limits on individual or political action committee donations, resulting in huge contributions from wealthy trial lawyers as well as big companies.

THE STORY OF HOW TORT REFORM came to overwhelm Alabama politics dates to the early 1980s, when plaintiffs' lawyers began winning huge punitive damage verdicts, mostly against insurance firms for fraudulent practices by agents.

The plaintiffs' attorneys had a strong moral argument on their side. "Alabama has very weak regulatory bodies and so lawsuits are very important in setting standards for corporate conduct," Birmingham lawyer Sam Heldman says.

They also had political history on their side. Just as former governor George C. Wallace incited populist anger at big business through the 1970s, some of the most successful plaintiffs' lawyers came to specialize in stem-winding summations urging juries in low-income counties to punish greedy, out-of-state corporations by assessing huge punitive damages against them.

The state's premier trial lawyer is Jere Beasley, Wallace's former lieutenant governor, who has won his largest victories in desperately poor rural counties. Beasley, who represented the paraplegic plaintiff in the General Motors case, was listed in Forbes among the top 20 highest-earning trial lawyers in the country, taking in $6 million in 1994. He has tried many of his cases in his native Barbour County, before a judge who is his former law partner.

"They draw on the same school of thought the George Wallaces and the Huey Longs tapped into," says Gere White, a Birmingham lawyer who represents business. "It's us against them. It's the idea that the reason you're downtrodden is these big Northern corporations are taking advantage of you. It's the civil equivalent of the O.J. Simpson verdict: payback time."

The issue quickly became political as increasingly wealthy trial lawyers raised large sums to help elect pro-plaintiff judicial candidates. Business PACs responded by raising even larger sums for legislative candidates committed to curbing punitive damage awards. Says one business lawyer: "You can't buy legislators here, but you can rent them. In 1986, business rented a lot of them."

The next year, the legislature passed a broad tort-reform package, including a $250,000 ceiling on punitive damages. But the year after that, the trial lawyers roared back when the head of their state association, Ernest "Sonny" Hornsby, who had won a series of big-ticket fraud verdicts, was elected chief justice over a business-backed candidate. In the first full-dress battle between the interest groups, the two campaigns spent a then-record $800,000.

THE HIGH COURT PROCEEDED TO strike down most of the major 1987 tort reform provisions as unconstitutional, unleashing another round of punitive damage verdicts, including a now-notorious $4 million judgment against BMW of North America for touching up a damaged car and selling it as new to an Alabama physician. The state Supreme Court cut the damages to $2 million, which the U.S. Supreme Court then struck down as "grossly excessive," since the actual damages were $4,000. (The U.S. Supreme Court has since taken the extraordinary step of overruling four other damage awards in Alabama.)

Two years ago, business forces picked off Hornsby in an election so close it had to be decided by a federal court, which invalidated 2,000 absentee ballots that were not properly notarized or witnessed. The state high court, including justices who contributed to Hornsby's campaign, earlier had voted to count the ballots, which would have given Hornsby his victory margin.

The battle took an even nastier turn this year with Ingram, a Hornsby ally up for reelection, and See, a Chicago-trained law professor at the University of Alabama, as his business-backed challenger.

At one point, a "Committee for Family Values," which turned out to be financed by a number of trial lawyers, ran an ad saying See had a "secret" past, and had "abandoned his wife and two children, had a love affair . . . and fled Illinois for Alabama" 20 years earlier. See responded with an ad featuring his daughter from that marriage declaring that the attack had not "a shred of truth." His ex-wife also issued a statement denouncing the ad.

Another ad featured footage of a skunk fading into a picture of See, and the message: "Some things you can smell a mile away. . . . Harold See doesn't think average Alabamians are smart enough to serve on juries." The words, "Slick Chicago Lawyer," were plastered over See's face.

Each side called the other a puppet; Ingram, of "rich, personal injury lawyers . . . trying to buy the Alabama Supreme Court," and See, of "giant insurance companies and big businesses" who want to deny Alabamians their "right to a trial by jury."

Beasley, whose firm raised $37,500 for a pro-Ingram PAC in a single day, says he believes the final finance reports will show that tobacco and insurance giants bankrolled See. Indeed, an ad attacking the high court, sponsored by a group called Alabama Voters Against Lawsuit Abuse, featured a telephone number that rang at a national business-backed coalition based in California.

See's victory, with 53 percent of the vote, leaves the plaintiff-backed forces on the high court with a one-vote margin.

With three of the nine justices' terms up in 1998, along with those of the governor and lieutenant governor, civic leaders shudder to think how much mud and money will converge here in two years.

As a remedy, Alabama Bar Association President Warren Lightfoot is calling for an end to the election of judges—a practice in 20 states—in favor of merit appointments, with periodic votes to retain or dismiss them.

"Our courts will not be able to function if justices have to engage in this kind of campaigning," Lightfoot says.

But others say that both plaintiff and business forces oppose the effort, in part because the current system enriches them all.

Says one attorney in a corporate practice: "I've had people in my firm say, 'Sure this is terrible, but look at all this business they create.'"

The New York Times

Ex-Prosecutors and Deputies in Death Row Case Are Charged With Framing Defendant

By DON TERRY

WHEATON, Ill., Dec. 12 — In a sweeping and rare indictment, three former DuPage County assistant prosecutors and four sheriff's deputies were charged here today with conspiracy and obstruction of justice in the wrongful murder convictions of two young Hispanic men, who spent years on death row before being released from prison last year.

The two men were released after an investigator admitted he had lied in earlier testimony about important evidence in the case. Today's indictment charges that that evidence was fabricated.

The men were convicted in 1985 in the abduction, rape and murder of a 10-year-old girl.

Charging prosecutors for their conduct during criminal investigations or prosecutions is almost unheard of. No one interviewed, from

A rare case of law-enforcement officials being charged with fabricating evidence.

legal scholars to former and current prosecutors, could recall a similar case anywhere in the country.

"It happens very, very infrequently," said Samuel R. Gross, a professor at the University of Michigan Law School. "Three former prosecutors. Wow. This is extraordinary."

One of the former prosecutors charged today in the 47-count indictment, Robert K. Kilander, is now a DuPage County judge.

The 1983 murder of the girl shocked this affluent county west of Chicago. Today's indictment is the latest legal twist in the case, which saw two innocent men sent to death row largely because sheriff's deputies testified that one of the men, Rolando Cruz, had told them about a dream he had about the killing, including details only the killer could have known. That testimony was the cornerstone of the prosecution's case against Mr. Cruz and the other man, Alexandro Hernandez.

Defense lawyers had long contended that investigators fabricated the dream. Last year, during the third trial for Mr. Cruz, held after two previous convictions were overturned on appeal, a DuPage County judge ordered him acquitted after another sheriff's deputy said he had earlier testified falsely that other investigators had said Mr. Cruz had told them about the dream.

That officer, DuPage County Sheriff's Lieut. James T. Montesano, was one of those indicted today.

After Mr. Cruz's acquittal, a grand jury was convened to review the investigation and prosecution. A special prosecutor, William J. Kunkle Jr., was put in charge.

"In a free society there must always be a line between vigorous prosecution and official misconduct, between advocacy and unfairness, and between justice and injustice," Mr. Kunkle said in announcing the indictment late this afternoon. "This indictment charges that line was crossed by seven people."

In addition to Judge Kilander and Lieut. Montesano, the others indicted are , sheriff's deputies Thomas E. Vosburgh, Dennis Kurzawa and Robert L. Winkler and former prosecutors Thomas L. Knight and Patrick J. King Jr. Mr. King is now an assistant United States Attorney in Chicago, and Mr. Knight is in private practice.

Even before today's announcement, word of the indictment had sparked a heated debate on what impact the charges will have. Joseph E. Birkett, the DuPage County States Attorney, the local prosecutor, said the indictments will have a chilling effect on prosecutors everywhere.

"Charging prosecutors for conduct in the performance of their duties is unheard of," Mr. Birkett said. "If this type of allegation can be made, prosecutors will have to second guess everything they do. This is devastating to law enforcement."

Prosecuting prosecutors for official misconduct is difficult because there has to be almost overwhelming evidence that the prosecutors knowingly used false evidence or testimony, a violation of law and ethics that Professor Gross said was exceedingly rare. When it happens, he said, it is usually in high-profile cases like this, where there was enormous pressure

Three of those indicted yesterday in Illinois in the wrongful murder convictions of two men are, from left, Thomas L. Knight and Robert K. Kilander, former prosecutors, and Sheriff's Lieut. James T. Montesano.

to solve the case, and political futures were on the line.

Thomas Breen, a defense lawyer, who was a prosecutor for 10 years in neighboring Cook County, which includes Chicago, represents Mr. Cruz. Mr. Breen said the indictments should have no impact on the vast majority of honest prosecutors.

"But it should certainly chill the kind of conduct alleged in the indictment, which is perjury and obstruction of justice," he said. "I hope it freezes it solid. We're beginning to lose track of due process and the pursuit of truth in many cases. The Cruz case is absolutely one of them."

Mr. Breen insisted, as did the other defense lawyers who worked long to free Mr. Cruz, that because someone is indicted does not mean someone is guilty and cautioned against a rush to judgement. "Just ask Rolando about that," he said.

Terry Ekl, another former Cook County prosecutor, is representing Mr. Knight, who prosecuted the men at their first trial in 1985.

Mr. Ekl said that there was no basis to indict his client, and that Mr. Knight had testified twice before the grand jury in the case "because he has nothing to hide."

Mr. Ekl said Mr. Knight believed the police had been telling the truth about the dream, and still believed them. "Now, we're making martyrs out of murderers and indicting prosecutors who were trying to protect the public," Mr. Ekl said. "If Tom Knight is prosecuted in this case, there probably isn't a prosecutor in the country who is safe."

"These guys did not do anything wrong," said Brian Telander, a lawyer for Mr. Vosburgh. "They have good hearts. They are good people, with families. All they wanted to do is the right thing. They didn't make up statements."

Mr. Cruz, who is 33, was 19 when he was convicted. He was sentenced to die after both of his first two trials. In setting Mr. Cruz free, the judge, Ronald Mehling, said the state's case against him was built on lies, mistakes and sloppy police work.

Lawrence Marshall, a law professor at Northwestern University and one of Mr. Cruz's lawyers, said he hoped the trials of the prosecutors and deputies will open "the public's eyes to the fact that the system is way far from perfect and that there is a grave risk of executing innocent people even when a police officer stands up and says 'I heard a confession.'"

Since 1994, five men, including Mr. Cruz, have been released from death row in Illinois because of lack of evidence or because of evidence of innocence. Since the mid-1970's, nearly 70 people have been released from death row nationwide.

"It is quite certain that some innocent people have been executed in the past," Professor Gross said. "It will happen again. We can't keep lucking out forever as we did with Rolando Cruz."

Mr. Hernandez spent more than three years on death row before his conviction was overturned. He was convicted during a second trial and was sentenced to 80 years in prison. Last year, he, too, was freed.

The murder of the girl, Jeanine Nicarico horrified DuPage County, home to a string of well-off Chicago suburbs where the people vote Republican and play polo. She was home alone from school with the flu when someone kicked in the front door of her family's home in Naperville, Ill., and took her away. Her body was found two days later in a field.

"To this day," Mr. Birkett said, "it is probably one of the most shocking murders that has occurred here, and that will never change."

The trial of a third defendant, a 21-year-old white man, Stephen Buckley, ended in a hung jury. He was released in 1987, when the authorities decided not to pursue the case against him.

Another man, Brian Dugan, who has never been charged in the case, admitted in 1985, according to his lawyer, to being the girl's lone killer. DNA tests, which excluded Mr. Cruz and Mr. Hernandez as the source of semen found in the child, have implicated Mr. Dugan, who is serving a life sentence for the rapes and murders of a 7-year-old girl and a 27-year-old woman.

Mr. Dugan has refused to tell the authorities his story unless they promise not to seek his execution.

For years, several law-enforcement officials said Mr. Cruz and Mr. Hernandez were innocent. Mary Brigid Kenney, a lawyer in the Illinois Attorney General's office, who was in charge of fighting Mr. Cruz's appeals to save his life, resigned in 1992 in protest, saying the state was trying to kill an innocent man.

Menorahs Bloom From Act of Vandalism

By JENNIFER PRESTON

NEWTOWN TOWNSHIP, Pa., Dec. 12 — At 5 A.M. Sunday, Judith and Martin Markovitz were awakened by the sound of breaking glass. Vandals had walked across their front lawn and smashed in their living room window to destroy an electric menor-

Tort-reform battle heats up in Juneau

Both sides on the issue appeal to human element

By NATALIE PHILLIPS
Daily News reporter

Christy Tengs Fowler is selling the family liquor store after 44 years of business. She said a frivolous lawsuit drove her to it.

Seven years ago, a 20-year-old used fake identification to buy wine coolers at the family's store in Haines. A couple of hours later, he crashed his pickup truck and died. His parents sued for more than $100,000, but eventually settled out of court for $37,500. Two years later, a passenger in the vehicle also sued, but his claim was dismissed.

"It was like blackmail," Fowler said. "It made me lose faith in the inherent goodness of mankind. It's still upsetting. Something has got to be done to stop these frivolous lawsuits. We need some protection."

Fowler is a poster child for the forces gathered in Juneau to push for changes to state laws that dictate who can sue whom, when they can sue and for how much.

Business owners, medical professionals and insurance industry leaders insist that

Please see Page B-3, TORT REFORM

TOM MORPHET

Christy Tengs Fowler, owner of The Alaska Liquor Store in Haines, stands in front of her store, which closed after she was sued twice.

Senate leader is confident Legislature will pass a bill

By RALPH THOMAS
Daily News Juneau Bureau

JUNEAU — During a recent speech to state business leaders, Senate President Mike Miller made a promise: the Legislature will put another tort reform bill on Gov. Tony Knowles' desk this year.

But what Miller, R-North Pole, didn't say is what that bill will look like by the time it reaches the governor.

Much of its identity will be hammered out in the coming weeks in the Senate during a sort of tort-reform summit meeting between all of the main players.

Lawmakers recently waded back into the high-stakes issue when the House went to work on a massive new bill aimed at limiting the number and size of civil damage claims and putting an end to so-called frivolous lawsuits.

The 25-page, 65-section measure, which was approved by the House last week, was put together by Republican Rep. Brian Porter of Anchorage, who has been leading the tort reform

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Anchorage Daily News

LEGISLATURE: Senator expects bill

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charge for the past four years.

Porter's bill includes many of the provisions suggested last fall by a governor's task force. But it also still includes some of the controversial sections that prompted Knowles to kill last year's legislation.

The battle now moves to the Senate, where, as in the House, a larger and stronger Republican-led majority clearly has the votes to quickly pass the bill. But what is not clear is whether the House and Senate will have the two-thirds vote needed to override another Knowles veto.

Senate Majority Leader Robin Taylor, a lawyer himself and longtime critic of tort reform, said Friday he hopes it doesn't come to that.

Taylor, R-Wrangell, who has a bill in the Senate that mirrors the governor's task force recommendations, is trying to work out a compromise between all sides.

The goal in the end, Taylor said, is to come up with a bill everyone can live with.

TORT REF

Continued from Page B-3

Doctors and medical professional are winning four out of five cases brought against them, according Dr. Rodman Wilson, who served on the governor's commission and who has long been an advocate of tort reform.

"There is no question that people are injured from medical care from time to time," he said. What needs fixing is the system. It's cumbersome, it costs both sides a great deal of money and it's a distraction, he said.

Limits on damages might streamline the system.

"It would serve the public well to get on with life, and that is what the tort reform efforts are generally about," Wilson said.

A MATTER OF FAIR COMPENSATION

Don Murray won't talk about that moment he took his life-changing fall: "I can't get keyed up about it, I'm prone to seizures."

But he will talk about Alaska's tort reform effort.

"If they are going to set a cap at $500,000, they (should) just as well put it at zero," Murray said. "The case would never go to court and you could never get an attorney to take it."

That's not to say he couldn't still receive millions of dollars to cover his actual medical costs and loss of income. But it would mean his wife, who had to quit her job to care for him, would be limited in how much money she could collect for giving up her job and the dramatic change in her life.

"A $500,000 total cap for him and his wife for noneconomic damages? Is that really fair compensation?" asks Murray's attorney, Christine Schleuss.

And if the reforms were in place at the time of Murray's case, he would have had less leverage to use during settlement negotiations.

Murray will never walk

ORM: Old adversaries stick with old arguments as issue heats up

again. He has no control over his bodily functions. And he is constant pain, Schleuss said.

"And you are saying to a company that is huge and absolutely had the control to provide him with a safe work site that they owe him only $500,000 for pain and suffering?" she asked.

What a lot of people don't realize is that capping liability amounts means the financial burden of long-term care will shift from businesses to taxpayers, Schleuss said.

Amid the debate are concerns among lawyers and fishermen that tort reform will upend the the $5 billion record verdict against Exxon three years ago.

It would, said Lloyd Miller, one of the attorneys who represented the fishermen and others in their lawsuit against the oil giant. Maritime cases often take into account the law of the state where the event occurs, he said.

Fishermen and other plaintiffs are "gravely concerned" that the latest wave of tort reform will gut the settlement, Miller said. If the state does set caps, Exxon might cite the legal change to the U.S. 9th Circuit Court of Appeals and argue that the people of Alaska object to large punitive damage verdicts.

Under two of the proposals coming out of Juneau, the verdict would have been far less. The proposed caps aren't "even a blip on (Exxon's) radar," he said.

In most cases, large punitive damage awards are overturned or settled out of court for lesser amounts, anyway, according to several national studies and a state study.

The $2.9 million verdict against McDonald's for serving scalding hot coffee is a case in point.

The jury returned the verdict after learning that the company had received at least 700 reports of coffee burns and had settled claims arising from some of those injuries for more than $500,000.

The company offered to pay the 81-year-old woman $800 for her burns. A mediator suggested McDonald's settle for $225,000. But McDonald's fought it.

The jurors decided the woman was partially to blame for the injury but came back with the large punitive damage award because they thought McDonald's had been reckless and malicious.

A judge later reduced the award to $640,000. And rather than appeal, McDonald's and the woman settled out of court for an undisclosed sum.

Tort reform at a glance

	Current law	Porter's HB 58	Taylor's SB 15	Governor's SB 43	Alaska Chamber of Commerce ballot initiative
Punitive Damages	No monetary cap	State gets 50 percent of all awards. Awards are limited to three times actual damages or $300,000, whichever is greater. If the act was motivated by financial gain, the cap is four times damages or $600,000.	Three times actual damages or $500,000, whichever is greater. If the act was motivated by financial gain, cap is average net income over five years or twice the amount of financial gain resulting from the incident.	Three times actual damages or $500,000, whichever is greater. If the act was motivated by financial gain, cap is average net income over five years or twice the amount of financial gain.	State gets 75 percent of all awards. Awards are limited to three times actual damages or $300,000, whichever is greater.
Statute of repose	Allows 15 years to file a lawsuit	Eight years, unless the injury was caused by a hazardous waste, gross negligence, a defective product, or intentional act.			Eight years, unless injury was caused by hazardous substance, gross negligence or defective product
Health-care provider protections	A medical advisory panel reviews malpractice lawsuits and advises if the claims are legitimate.	Lawsuits over birth injuries must be filed before child is 8. Hospitals not liable for emergency room physicians on contract, as long as the physician carries $500,000 in insurance and a notice is posted in the admitting area and published annually in the local newspaper.	Eliminates the medical advisory panel.		Lawsuits over birth injuries must be filed before child is 8. Hospitals not liable for contract employees, such as emergency room physicians, as long as they post a notice in the admitting area and publish it annually in the local newspaper.
Damages for pain and suffering	Cap of $500,000 but no limit if someone is disfigured or severely impaired physically.	Capped at $300,000 unless the victim is a paraplegic, quadriplegic, lost a limb, suffers permanent brain damage or severe third-degree burns. Then the cap is $500,000.	Would add word "severe" to definition of disfigurement.	Would add word "severe" to definition of disfigurement.	Capped at $300,000 unless the victim is a paraplegic, quadriplegic, lost a limb, has severe third-degree burns or suffers permanent brain damage. Then the cap is $500,000.
Trial alternatives	Parties can go to an arbitrator, but the decision is nonbinding.	Creates a pilot alternative dispute-resolution program.	Creates alternative dispute-resolution program. Cases under $100,000 must undergo non-binding arbitration.	Creates pilot alternative dispute-resolution program.	
Allocation of fault	Jury can assign fault only to parties named in the lawsuit.	Jury can assign a percentage of fault to a person or company not named in the lawsuit.			Jury can assign a percentage of fault to a person or company not named in the lawsuit
Reports & studies		State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from insurance companies.	State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from insurance companies.	State evaluates the effects of tort reform by collecting out-of-court settlement information, which will remain confidential, as well as information from insurance companies.	

The language
Making sense of legal lingo

Tort - A wrongful act, in which one party hurts another. Tort laws allow the injured party to sue and collect money. It does not include criminal actions or breach of contract.

Tort reform - A nationwide movement driven by business owners, medical professionals and insurance companies to rewrite the civil laws governing who can sue, when they can sue and how much they can sue for after an injury.

Damages - Refers to the amount of money a person is claiming they lost or should be awarded as a result of another person injuring them.

Compensatory damages - The amount of money required to pay for the actual monetary losses that result from an injury, for example, lost earnings and medical bills.

Punitive damages - The amount of money a court or a jury decides a defendant should pay as a penalty for outrageous or reckless conduct. The punitive damage award is designed to punish and deter others.

Economic damages - The amount of money a person seeks for compensation to cover their actual losses, such as wages and future lost wages and medical bills.

Noneconomic damages - The amount of money a person seeks in compensation for changes in their life, for instance pain and suffering and loss of companionship.

Statute of limitations - A law that requires lawsuits to be filed within a specific period of time after a person has been injured. Once the statute of limitations has expired, a lawsuit cannot be filed.

Statute of repose - Cuts off the right of an injured person to file a lawsuit after a specified period of time, which is set by law. It is measured from the delivery of a product or completion of work. For example, the current statute of repose is 15 years. If a 10-year-old building collapsed under current law, a claim against the architect and construction company could be filed. If the building was 16 years old, under existing law, it would be too late to sue.

INFORMATION RELATED TO: SB 15 & HB 58

Distributed by Senate Judiciary at the request of:

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Tort Reform

With the proposed Tort Reform the State of Alaska will be in the business of waiting for one of its residents to be killed, maimed or injured in order to collect a portion of the victim's insurance.

The Governor's Tort Reform Task Force had 28 people testify. 18 were violently opposed, of the 10 remaining 7 represented insurance companies and 3 represented small businesses. Small business is under the assumption that once tort reform is passed their premiums will automatically go down. According to the insurance company's own testimony at committee meetings it was stated that there will be no reduction in premiums for 5-7 years.

Punitive damages seem to be the State's main contention for tort reform. If that is the case, get rid of punitive damages. The State of Washington does not allow punitive damages by order of the Washington Supreme Court. They do not have any caps, and seem to be functioning just fine. If the State of Alaska thinks that punitive damages are necessary, they can take the insurance company to court and whatever is received pass on to the victim. Therefore you have accomplished your purpose to penalize the company for unsafe products.

The new Tort Reform bill has $300,000 caps on personal loss, I don't think its the state's job to determine the value of one person's life to their loved ones. Do not place caps on anything.

Since the early 80's 3500 cases have been filed.. 95% of these were settled out of court for under $100,000. You can bet they were on the low end of $100,000. There are no statistics allowed listing what each victim received, there is no way to tell exactly what was paid because the courts are prevented from revealing the out of court settlements. The remaining 5% go to court, in other words 150 out of 3500. 1 in 20 of those court cases result in punitive damages. So only approximately 7 cases received punitive awards. It hardly seems worth the state's time to pursue punitive damages. All of the committee meetings and task force expenses probably cost more than the state could ever anticipate collect-

(2)

ing in punitive damages.

There were a few outlandish cases through the years which awarded astronomical punitive damages. For example, a bad paint job on a Mercedes Benz, the victim was awarded $10,000,000, an amount significantly reduced by the judge.

The new Tort Reform contains incentives for quick settlements, under 30, 60, 90 day time limits. The incentives are directed to force lawyers to settle early, sometimes at the expense of their clients. If a victim wanted to continue on with the case and was counseled for early settlement, the victim would generally follow the advice of their lawyer. There seem to be too many variables for this portion of the bill to work properly. These incentives will also restrict lawyers from accepting cases on a contingency basis, which leaves victims without representation.

The new bill contains language of eliminating "deep pockets". I think that it is a shame to pick on the medical profession, especially those who work in emergency rooms. Only a specialized group of people can work in this field requiring quick decisions. I noticed that part of the requirements now is the posting of which doctors are working under contract and which are working for the hospital.

1. Most people who are admitted into emergency rooms are in no shape to look for bulletin boards.
2. If someone refuses a contract doctor's services is there always trauma hospital staff available to handle that emergency?
3. If not, why post the names on a bulletin board?
4. If trauma doctors are required to have $500,000+ insurance policies the patient gets it in the neck again because this expense is reflected in their bill.

If this tort reform bill passes as indicated with contract doctors treated differently than in-house personnel, this type of institutional avoidance of responsibility will become widespread. For example, construction companies who now hire contractors will be able to hire contract workers and relieve the prime contractor of all responsibility. If we are going to eliminate "deep pockets" and "double-dipping" then maybe we ought to start with the legislature. I do not personally mind "double-dipping". If you've worked hard for a.

retirement you should be able to collect it while working a new job. The Valdez oil spill trial was trying to relieve the responsibility of the ship from Hazelwood because he happened to in his cabin and not on deck. Since the beginning of time the ship's captain has always been responsible for the actions of his crew. This has always applied to prime contractors whether they are running a hospital or building a house. With the new legislation you cannot sue your personal insurance company if you have sued the doctor. Where does the state get the right to tell me how to deal with an insurance company that I pay premiums to for coverage?

Most of the Governor's Tort Reform Task Force recommendations were not accepted by the Tort Reform Committee. This brings me back to the question "Why do we have task forces of this nature?" This always results in a multiplication of expenses. The committee already in place is under no obligation to accept recommendations from the task force. Typically they don't. A more appropriate type of task force would be one dealing with building roads, schools, etc. where everyone is going in the same direction.

Mr. Tardiff, attorney for the State of Washington, works all tort cases. His telephone #1-360-753-6200, if you have questions, he would be a good source of information.

After checking with the election commission on campaign contributions I received numerous files and I noticed that some legislators could not afford to run their campaigns without corporate or insurance contributions. With the small percentage of donations received from the public some could not afford a cab ride across town. It makes one wonder where the loyalty lies, with corporate America or with their constituents.

I would like to publicly thank Senator Rick Halford for the help he gave me to produce the Sex-Offender Registration document. Without his help I would still be scratching my ____ nose. I would also like to thank Litta Evans who set up the Sex-Offender Registration list by city, which makes it easier for the public to digest the information. It also allows for the addition of the names of those yet to comply with the statute. I found 35 names on the list of people who are now working for the state in a variety of positions, some

ALASKA STATE LEGISLATURE

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Senate Judiciary Committee

INFORMATION RELATED TO: HB 58

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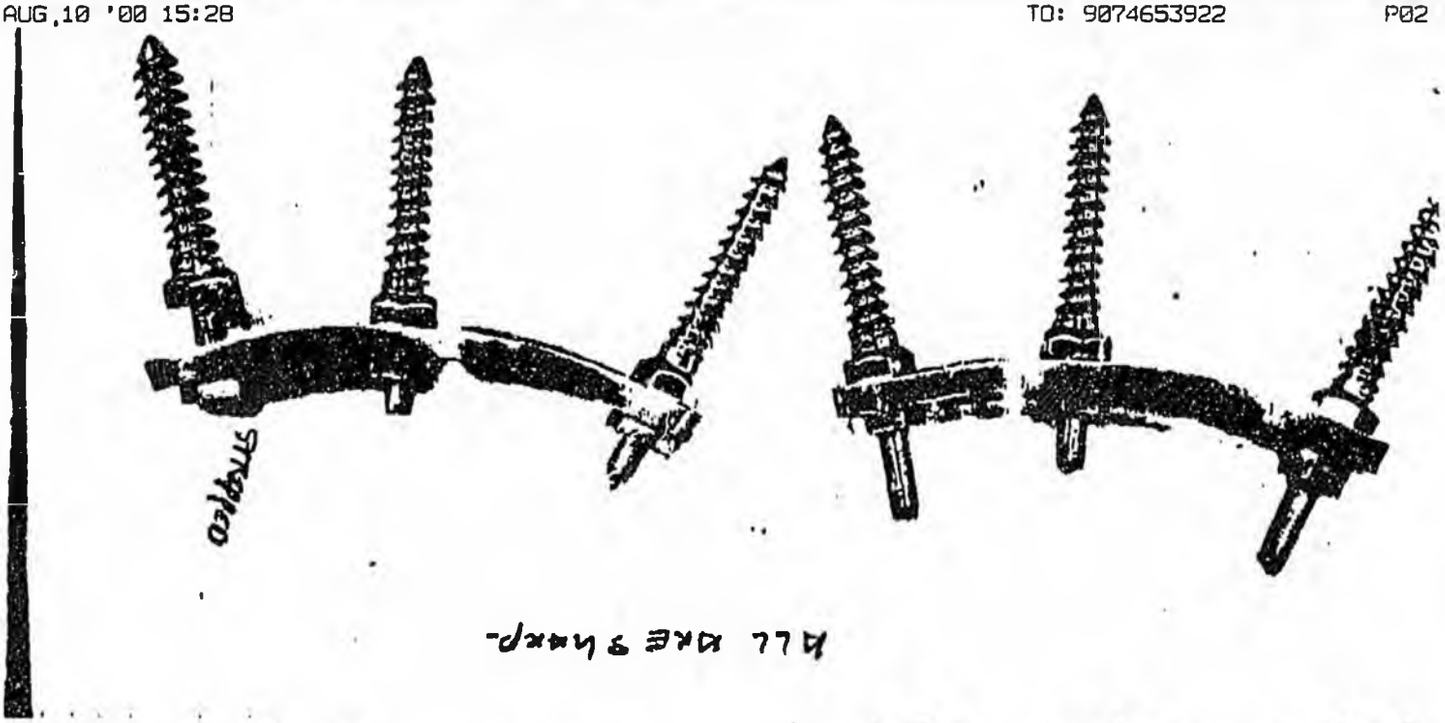

ALL ARE SHARP-

Here is a copy of the plates + screws that were installed in me, (unknown to me). There is approx 300,000 ea persons across the U.S. who were used as guinea pigs and were not told - Alaska has a high percentage Rate of persons per population Rate.

I have much documentation and a movie from F.D.A. Commissioner David Kessler.

I have a list of appx 50 persons in Anchorage area now who are 100% disabled like myself. I have 1.6 mil documented loss.

No on have Bill #58

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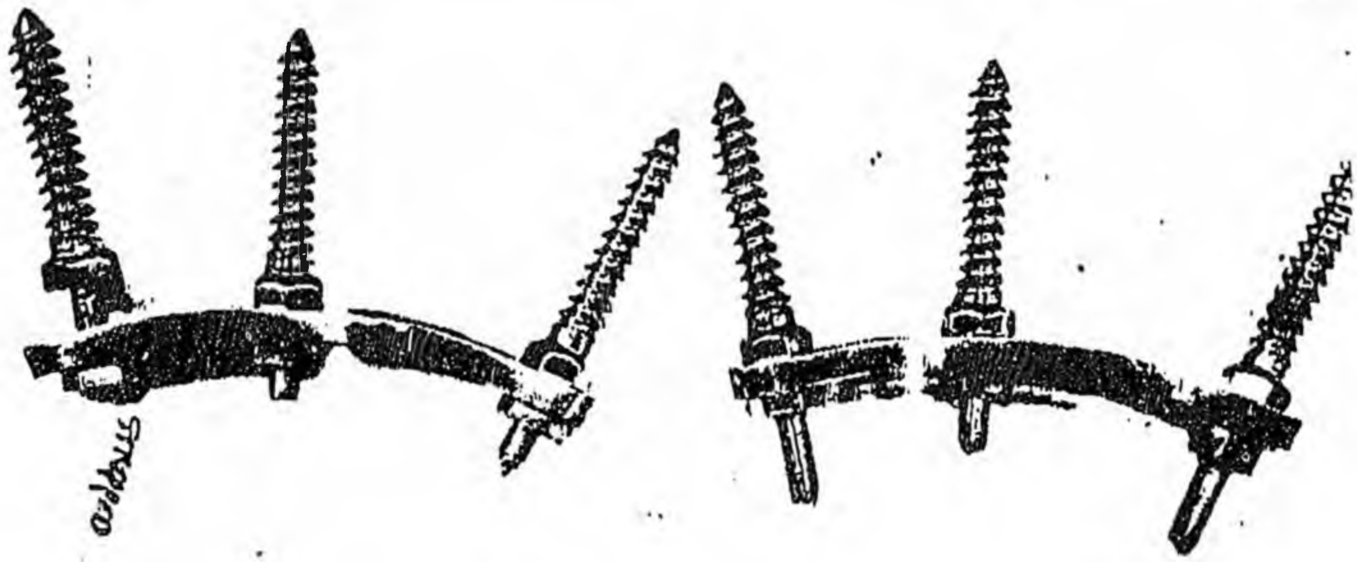


ALL ARE SHARP.

To Laura Chase

6 pages additional

The one page marked
Attn. Operating Surgeon. ACROMED PRODUCT [illegible]
see warning label - That is where
they are putting these plates and screws -
in the pedicles of our spines - with out
our knowledge.

Don P
373-6754
373-6759 FAX

VSP® BONE PLATES AND BONE SCREWS

[redacted]

VSP Implants, like any other temporary internal fixation devices, have a finite useful life. The patient's activity level has a significant impact on this useful life. Your patient must be informed that any activity increases the risk of loosening, bending, or breaking of the implant components. It is essential to instruct patients about restrictions to their activities in the postoperative period and to examine the patient postoperatively to evaluate the development of the fusion mass and the status of the implant components. Even if solid bone fusion occurs, implant components may nevertheless bend, break, or loosen. Therefore, the patient must be made aware that implant components may bend, break or loosen even though restrictions in activity are followed.

Because of the limitations imposed by anatomic considerations and modern surgical materials, metallic implants cannot be made to last indefinitely. Their purpose is to provide temporary internal support while the fusion mass is consolidating. These types of implants are more likely to fail if no bone graft is used or if a pseudoarthrosis develops. If the implants do break, the decision to remove them must be made by the physician who must consider the condition of the patient and the risks associated with the presence of the broken implant.

The surgeon may determine to remove these implants after bone fusion occurs. The possibility of a second surgical procedure must be discussed with the patient, and the risks associated with a second surgical procedure must also be discussed.

See the AcroMed Catalog and Price List for important warranty information.

DESCRIPTION

Bone Screws

The VSP Bone Screws are fabricated from stainless steel conforming to ASTM F 1314, and are composed of two sections: a long cancellous section with an integral fixed lower nut, and a machine threaded section topped with an hexagonal drive head.

The screws and plates are adjoined utilizing a double nut locking system. The screw features an integral fixed lower nut that is machined directly from the same piece of metal stock.

Bone Plates

The VSP Bone Plates are fabricated from ASTM F138 implant grade stainless steel. The plates have nested slots and variable lengths to provide surgical latitude. The plates have between one to five slots, (44mm to 196mm length) with their length increasing by half slot increments. Longer plates are available as special order items.

The slots, with their precisely machined tapered nests, offer the possibility of accurate yet variable screw placement. It is important that the plates be contoured to mirror or to create the desired anatomic curves.

Use the shortest plate possible for each procedure. Minimal plate length will reduce the possibility of plate interference with other bony structures.

Washers

To optimize proper plate/screw/bone alignment there are washers available in 3mm and 5mm heights. A tapered, or wedge-shaped, washer is available to fill nonsymmetric gaps. All washers have a chamfered inner hole for proper fit over the integral nut. All are manufactured from implant grade stainless steel.

Sterilization

Implants and instruments of the VSP system are supplied clean and not sterile. AORN recommended practices for in-hospital sterilization should be followed for all components.

Testing has shown the following RECOMMENDATIONS FOR STERILIZATION:

Cycle:	Vacuum
Temperature:	270°
Exposure time:	6 min.

INDICATIONS

CAUTION: U.S.A. and Canadian Law restricts this device to sale by or on the order of a physician.

These devices are used for fixation of fractures of the proximal or distal end of long bones, such as intracapsular, intertrochanteric, intercervical, supracondylar, or condylar fractures of the femur; for fusion of a joint; or for surgical procedures that involve cutting a bone.

[redacted] or lumbar spine.

USAGE

A screw should never be bent during insertion. Tightening of the top nut, or adjustment, if bending occurs, the screw must be replaced.

Plates should only be contoured with a plate contouring instrument. If the plate is not accurately contoured to fit flush with the bottom nut, tightening the top nut will bend the screw above the bottom nut and may result in early metal fatigue and possible screw failure.

In cases where a small mismatch between the plate the bottom nut is unavoidable, a washer that is wedge shaped may be used to fill the gap between the bo nut and the plate, thereby reducing or preventing s bending.

If a divergent screw will not allow easy applicati the plate it is better to remove it, and either institu an additional site or accept one less screw, than t undue force that might damage either the screw, the or both.

POSTOPERATIVE MOBILIZATION

Because bone plates and bone screws are used (of the most difficult problems requiring orthopedic patient handling for two to four months post-operati very important while the fusion mass matures and bec able to share load with the implant.

Until x-rays confirm maturation of the fusion mas ternal immobilization (such as bracing or casti recommended.

Instructions to the patient to restrict stress on the ins are an equally important part of the attempt to avo occurrence of clinical problems that may accompan tion failure.

In younger patients, once the fusion mass has reached implants may be removed to allow the fused bone to to a better state of load transfer. This is, as with all pr care, left to the discretion of the operating surgeon.

CONTRAINDICATIONS

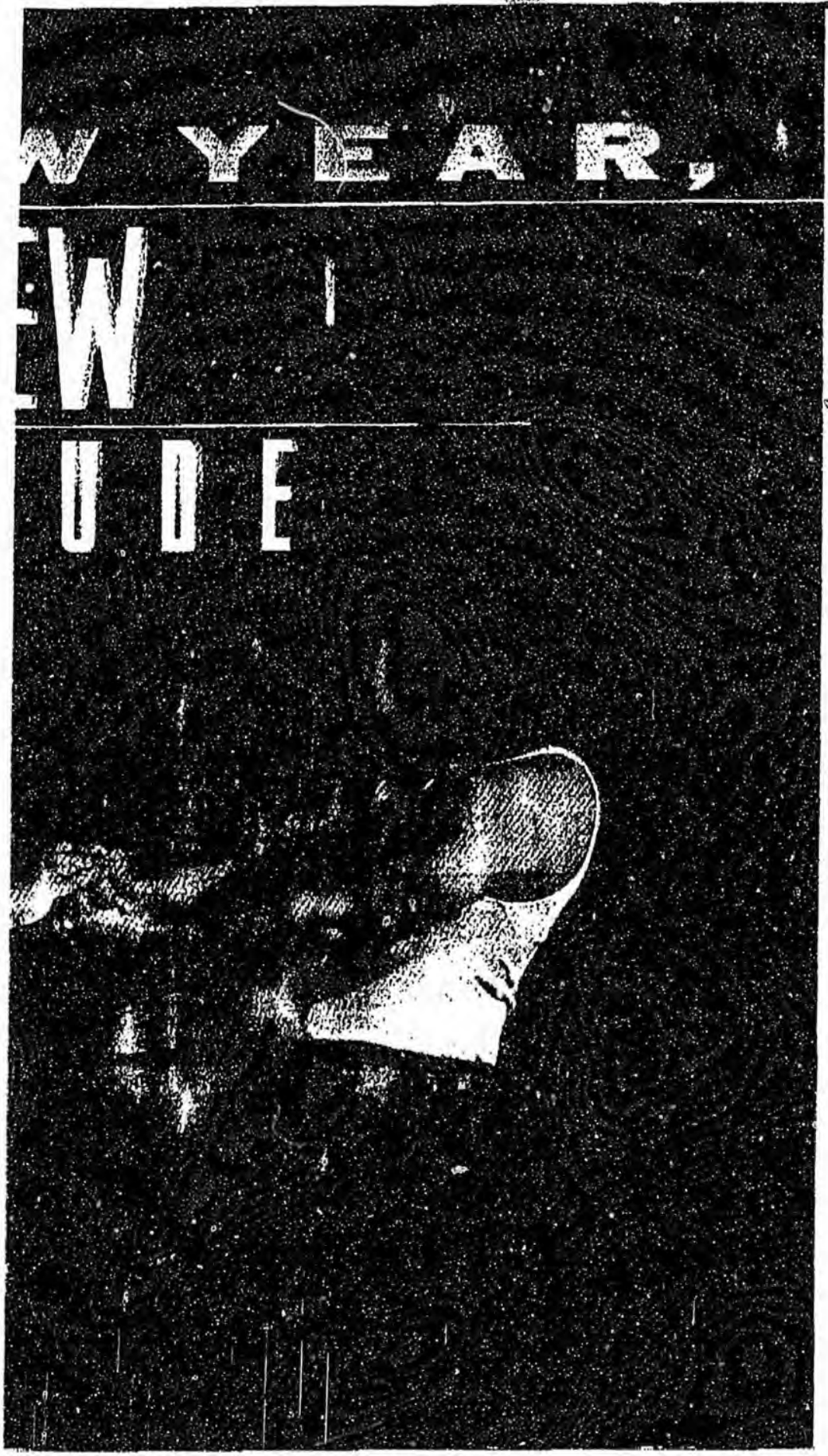
Disease conditions which have been shown to b and predictably managed without the use of intern tion devices are relative contraindications to the u these devices.

Active systemic infection or infection located in th of the proposed implantation are contraindicatio implantation.

Severe osteoporosis may prevent adequate fixation thus preclude the use of this or any other temporary int fixation implant.

Any entity or condition that totally precludes the pos of fusion, i.e., cancer, kidney dialysis, or osteopenia or ative contraindications. Other relative contraindicc include obesity, certain degenerative diseases, and to body sensitivity. In addition, the patient's occupatic activity level or mental capacity may be relative c traindications to this surgery. Specifically, patients because of their occupation or lifestyle, or because of ditions such as mental illness, alcoholism or drug ab

ANCHORAGE DAILY NEWS



BOB HALLINEN / Anchorage Daily News

Don Patterson holds the screws that were removed from his spine.

Device designed to help only hurt

By LINDA WEIFORD
Daily News reporter

The steel hardware implanted in Don Patterson's lower back was supposed to relieve his pain.

But the backaches he suffered before surgery were nothing compared to the pain, tingling and paralysis he experienced afterward, he said.

It's time for someone to pay, Patterson said, and it appears he's about to get his wish.

Patterson, 53, twisted his vertebrae in 1989 while working as a longshoreman in Ketchikan. Unable to perform certain manual work, he flew to Seattle several

Please see Page C-2, BACK PAIN

There are tried and tested roads to becoming one, and I'm not talking about winning the lottery.

Instead, take a look at "The Millionaire Next Door: The Surprising Secrets of America's Wealthy" (Longstreet Press, Atlanta, Ga., 253 pages, $22) by Thomas J. Stanley and William D. Danko.

These writers/academics have spent 20 years studying the wealthy in America and how they got that way. Their studies include interviews with more than 500 millionaires and surveys of thousands more.

Their research will surprise many who think of the wealthy as super-consumers out to flaunt their wealth.

"Usually, the wealthy individual is a businessman who has lived in the same town for all of his adult life," the authors

compulsive saver and investor. And he has made his money on his own."

Among the "secret" of the wealthy, Stanley and Danko found seven factors that created the wealth:

They live well below their means.

They allocate their time, energy and money efficiently, in ways conducive to building wealth.

They believe financial independence is more important than displaying high social status.

Their parents did not provide economic outpatient care.

Their adult children are economically self-sufficient.

They are proficient in targeting market opportunities.

They choose the right occupation.

It's not easy work, the authors warn,

For example, in discussing what profession to go into, the authors list the top 20 high-income producing occupations.

Along with the doctors and lawyers are economics teachers, management analysts, astronomers and those managers in marketing, advertising and public relations.

The bottom line, whether Stanley and Danko are discussing what car to buy or how to raise your child, is to take their advice: Be frugal.

"Most people have it all wrong about wealth in America," they write. "Wealth is not the same as income. If you make a good income each year and you spend it all, you are not getting wealthier. You are just living high. Wealth is what you accumulate, not what you spend."

Miles said putdown humor is that men use to maintain control o an argument.

"A lot of men's argument use of humor. Mockery is accepted be ending an argument. It's a curren emotion. Women aren't adversar during a debate as a way of putt winning the point by making their she said. "If women don't want argument, how much less do they iating another person?"

Miles said women's disadvanta tral to their lack of power and lo

"Women only seem to be in c We've had 1000 years of male of equal-opportunity legislation,

BACK PAIN: Device that should have helped, merely hurt W

Continued from Page C-1

months later where a doctor fastened a metal device to the sides of Patterson's spine.

The framework of plates, screws and nuts — called a pedicle screw — was to act as an internal scaffold to support Patterson's vertebrae. Over time, it was supposed to help fuse his bones together, resulting in less pain and more mobility to his back.

Instead, it left him with nerve damage, scar tissue and constant distress, he said.

"I had expected the operation to make me better," said Patterson, now of Wasilla. "Instead, I lived with unbearable pain for seven years. I lost my job and my home."

Today the pedicle screw — and the company that marketed it — are the target of a class-action lawsuit brought by Patterson and several thousand more alleging the product was illegal and seriously harmed them.

But a $100 million settlement could be reached as soon as this week.

AcroMed Corp., the Cleveland company that sells the pedicle screw, announced last month it would pay that amount to settle the more than 300 lawsuits filed against it. Lawyers will bring the proposed agreement to the table today, said patients' attorney Scot Levenstein of Philadelphia, where cases nationwide are consolidated.

Patterson first heard of AcroMed in 1993 while watching a "20/20" news segment on television, he said. Seated in a chair with acne across his lap, he was stunned to learn the pedicle screw lodged to his vertebrae was illegal.

Though the device was twice rejected by the Food and Drug Administration for use in the spine, AcroMed markets it for that purpose anyway, according to the report. In turning down AcroMed's application, the FDA cited the risk that the screw could cause nerve damage and bone fractures.

"For the first time I finally understood what was wrong with me," he said.

Patterson turned to local doctors for help. But none of them wanted to touch me," he said. "They just didn't know enough about the screw to feel comfortable taking it out."

A Chicago back specialist removed the device from Patterson's spine last year. The tingling in his legs has disappeared and he no longer falls. But he still suffers pain from scarring left by the jagged ends of the metal rods, he said.

Patterson joined in the class-action suit against AcroMed last month. Two days later, the company agreed to settle.

AcroMed said in a statement it was settling the cases despite its belief "that claims arising from these devices in spinal fusion surgeries are without

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Hines said women's disadvantage in arguments is central to their lack of power and low status in society.

Women only seem to be in control in the workplace. We've had 10,000 years of male dominance and 20 years of equal-opportunity legislation," she said.

...l: Device that should have helped, merely hurt Wasilla man

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Patterson joined in the class-action suit against AcuMed last month. Two days later, the company agreed to settle.

AcroMed said in a statement it was settling the cases despite its belief "that claims arising from these devices in spinal fusion surgeries are without merit. Thousands of other patients have had good results with the screw, the company said.

In the past, AcroMed has denied it violated FDA rules, saying the agency gave it mixed messages on how to proceed with marketing the product.

Patterson, forced to collect disability payments from the state has another version of how the pedicle screw turned up in operating rooms across the country:

"AcroMed abused a system that was designed to protect the public. It was profit, plain and simple."

11/6/97
Arch Daily

Illegal screws cause lifetime of pain

By CASEY RESSLER
Frontiersman reporter

Don Patterson has lived with excruciating back pain every day for the last seven years. And now he is committed to helping others beat the system and the doctors who implanted illegal screws into their backs, which could have paralyzed them.

Patterson was injured in a ferry accident in Ketchikan in 1989. He had his back operated on a short time later and was fitted with two plates and six screws in his back but he was never told the screws had not been approved by the Federal Drug Administration.

In fact, he wasn't even told the screws were inserted into the pedicles of his spine.

"I went to Seattle and was told that I was having a simple fusion done," Patterson said. "Nobody even told me that I was having a bone graft done and screws inserted into my spine."

He lived with the tremendous pain for seven years, and then he saw a startling segment on the television news program "20/20" in 1993 about screws that were being used illegally in back surgery patients. Sure enough, he was a guinea pig.

> ***"I went to Seattle and was told that I was having a simple fusion done. Nobody even told me that I was having a bone graft done and screws inserted into my spine."***
>
> *Don Patterson*

The spine screws were rejected twice by the FDA for use in patients, but the inventor, Dr. Arthur Steffee of Cleveland, had a better idea. He changed the name to pedicle screws and they were approved, paving the way for thousands of patients to be fatally scarred for life.

It is estimated that more than 300,000 Americans have been fitted with the screws and plates, and they complain of more severe pains or suffer paralysis as a result. The screws were supposed to relieve some of Patterson's pain, but that didn't happen.

"It felt like someone was taking a screwdriver and driving it through my spine," Patterson said. "I will live the rest of my life like this because the screws were illegal."

The screws in Patterson's back were never filed down, so 13 millimeters of the metal screws were exposed, digging into his spine and causing extreme discomfort, he said. In other cases, the screws simply broke off and were left to roam in the spine.

There are several manufacturers of the screws, and recently one of them, Acromed, has been spending time in a federal courtroom as patients battle back. The medical giant settled out of court, and now thousands of pain-stricken patients are recovering lost damages.

Patterson has collected thousands of research items in his Fairview Loop home, and he is trying to help out people who may be entitled to part of the settlement. He is in touch with lawyers on an almost daily basis, and he can help others who are suffering through a similar experience.

"I found out by accident that this had been done to me. It is time for people to know what doctors have done to them in the past," Patterson said. "Many people think that because they are doctors, they can be trusted, but that is not true."

For information about the screws, people may contact Patterson at 373-6754. He is more than willing to discuss the different manufacturers and the effects of the screws. He can also inform people where they can get help.

"I lived with it for seven years, and I don't want someone else to have to go through this," Patterson said. "There is help available to people who need it."

Don Patterson shows off the
in his back for seven years. H
FDA-approved after seeing a p

Project seeks old Alaska

With only a year left of funding from a national grant, the Alaska Newspaper Project's two

"No Known Holdings" mark missing issues of a community's

CASEY RESSLER/Frontiersman

ows off the plates and screws that he had
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ings" mark "Our research has given us a
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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-2105

MEMORANDUM March 15, 1997

SUBJECT: Sectional Summary of CSSB 15(JUD).

TO: Senator Robin Taylor
Attn: Laura

FROM: Michael F. Ford
Legislative Counsel

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

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

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Section 3. Requires that a civil action for waste or trespass upon real property be brought within six years.

Section 4. Requires that a civil action based on a contract, except for a judgment or sealed instrument, be brought within three years.

Section 5. Requires that an action for injury to personal property be brought with two years.

Section 6. Provides that the limit on damages for pain and suffering, or noneconomic damages does not apply to damages for severe disfigurement or severe physical impairment.

Section 7. Provides that punitive damages may only be awarded as provided under this section. Imposes a cap on punitive damages under subsections (f) and (g).

Section 8. Amends the definition of "fault" to include intentional acts or omissions.

Section 9. Establishes a formula for increasing or reducing the rate of interest applicable to a judgment by either two, three, or five percent, depending on whether an offer of judgment is accepted or rejected.

Section 10. Changes the rate of interest applicable to a judgment from a fixed rate of 10.5 percent to a floating rate determined under subsection (c) enacted in sec. 11.

Section 11. Establishes a method for determining the rate of interest to be paid on a judgment.

Section 12. Establishes a alternative dispute resolution pilot program for certain civil cases. Only certain cases filed in Anchorage are required to be mediated. Requires that the program operate for at least five years, under a structure set by the supreme court. Requires fees and costs be shared equally by the parties to the case. Requires the Alaska Judicial Council to annually evaluate the program.

Section 13. Provides that in a judgment entered against the state, the rate of interest is the floating rate established under AS 09.30.070.

Section 14. Provides that in eminent domain actions, the compensation awarded must include interest at a rate of 10.5 percent.

Section 15. Requires that certain civil actions must be arbitrated. Requires the court to appoint an arbitrator and establishes time lines for reaching a decision. Provides that the decision is admissible in the civil action and that a party that rejects the decision and loses in later civil litigation is liable for actual costs and attorney fees.

Section 16. Provides that a person who is injured or killed cannot recover civil damages, if the person was committing a felony, or was engaged in conduct that constitutes the commission of a felony and the conduct substantially contributed to the injury or death and is proved by clear and convincing evidence. Provides that the section does not apply if the person is acquitted.

Section 17. Requires that the Alaska Judicial Council collect and evaluate certain information regarding civil litigation.

Section 18. Limits the amount of punitive damages that can be recovered in an unlawful employment action.

Section 19. Requires the director of the division of insurance to evaluate the effect of the provisions of this Act and the financial health and profitability of insurers doing business in the state. Requires insurers to provide information to the state and provides for an annual report to the legislature and the governor.

Section 20. Establishes a private cause of action for a violation of the unfair trade practice provisions of AS 21.36.125, or of a trade practice or claim regulation adopted by the director. Requires notice be given to the insurer and to the director. Allows for the recovery of foreseeable damages, costs, attorney fees, and punitive damages.

Section 21. Limits the authority of the court to award punitive damages in employment cases.

Section 22. Increases the jurisdiction of the district court to claims that do not exceed $100,000.

Section 23. Imposes a penalty on insurers who deny medical coverage under a motor vehicle insurance policy and later are determined to have wrongfully denied coverage.

Section 24. Requires that uninsured and underinsured motor vehicle insurance be excess coverage, payable even when other policy coverage is not exhausted.

Section 25. Amends civil rule 16.1(c) to prohibit filing of a motion to set trial until after the parties meet to discuss settlement required under sec. 26.

Section 26. Amends civil rule 16.1 to require a meeting of the parties to discuss settlement and to establish discovery guidelines.

Section 27. Amends civil rule 41(a) to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 28. Repeals and reenacts civil rule 68, to provide a formula for increasing or decreasing the interest rate applicable to a judgment depending on an offer of judgment made in the case. The rule is changed to be consistent with sec. 9.

Section 29. Changes the limit the use of discovery in a medical malpractice action from 80 to 60 days.

Section 30. Increases the fine that can be imposed by a court against an attorney to $10,000.

Section 31. Amends district court civil rule 1(a)(1) to limit the use of discovery.

Section 32. Amends district court civil rule 4 to require a maximum of 270 days before a case goes to trial.

Section 33. Amends appellate rule 511 to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 34. Repealers.

Section 35. Repealers.

Section 36. Repealers.

Section 37. This section sets out the intent of the legislature to amend civil rules 49 and 26(b) and (d).

Section 38. This section sets out the intent of the legislature to amend civil rule 68.

Section 39. This section sets out the intent of the legislature to amend civil rule 100.

Section 40. This section sets out the intent of the legislature to amend civil rule 79(b).

Section 41. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 42. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 43. Applicability section.

Section 44. Severability clause.

Section 45. Instruction to the revisor of statutes regarding technical amendment.

Section 46. Effective date for court rule change sections.

Section 47. Effective date.

MFF:pl
97-069.plm

Harry Blanas
5616 S. Tahiti Loop
Anchorage, AK 99507

RECEIVED APR 7 1997

March 30, 1997

To: Representatives and Senators
of the State of Alaska
Juneau, AK 99802

Re: Tort Reform

Please take notice of the attached letter from a group of Alaskan citizens concerned about the results of the tort reform bill currently before the legislature.

In the year 1970 an appeal was taken to the Alaska Supreme Court by an insurer to an employer, challenging the extent of the Workers' Compensation Act in a work injury. After reviewing the pertinent law, in Searfus v. Northern Gas Co., 427 P.2d 966 (Alaska 1970,) the court concluded and held:

> "The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product."

In the law, the product is the insurance policy contract. The cost is the premiums an insurer charges an employer who in turn is charges the public for insurance the law requires.

Based on this Supreme Court Decision, the Workers Compensation law worked somewhat for twenty years.

In the year 1989, the legislature reformed the law pressured by the insurance companies relentless lobbying, as now in this tort reform.

The Workers' Compensation law, after that reform, does not work and results in the unjust enrichment of the insurance companies, who continue to charge the public without performing as their contracts manifest and without recourse. This insurance industry swindle makes Al Capone look like a choir boy.

Please, do not fix what is not broken and can still work. If anything at all, the Workers Compensation Act must be restored as it was prior to the change in the eighties.

Sincerely yours,

Harry Blanas
Phone: 561-3399Re: Tort Reform

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

WHY ALASKANS SHOULD WORK TO DEFEAT HB 58 -- TORT REFORM

There are a number of compelling reasons to work to defeat tort reform as proposed by HB 58, Representative Porter's bill. Some of those reasons include the following:

* In 1989, the Insurance Companies lobbied the Alaska Legislature for a more stringent Worker's Compensation Act. Their efforts paid off and new regulations governed Worker's Compensation. Because of the insurance company efforts, workers now have a narrow recovery in most injury cases, and the injured worker is grossly undercompensated.

* Due to the 1989 changes to the Worker's Compensation Act, injured alaskans are forced to accept whatever insurance companies offer.

* Due to the 1989 changes, injured alaskans have much more difficulty retaining attorneys who can afford to take a worker's compensation case. However, the insurance companies can still afford to compensate high priced legal counsel to defend insurance companies from having to pay claims.

* As a result of the 1989 Worker's Compensation Act changes,

  - There has been no reduction in prices or services to consumers.

  - There has been no reduction in insurance costs to employers.

Insurance companies have been systematically cutting off avenues for injured persons to receive compensation for injuries. Now that insurance companies have changed the Worker's Compensation Act, they are wanting to limit tort actions, hence cutting off one of the only avenues for injured alaskans to recover damages.

The Worker's Compensation legislation worked well until 1989 when the legislature reformed the Worker's Compensation Act. It has not worked well since. Don't let the legislature make the same mistake with tort reforms -- at least not the reforms proposed by Representative Porter in HB 58.

IF YOU THINK ALASKA
NEEDS TORT REFORM

READ ON

Sectional Analysis of HB 58 (Tort Reform)

The Governor's Advisory Task Force on Civil Justice Reform studied court statistics on cases in Alaska and heard from two nationally recognized experts on civil justice reform. Contrary to the stated need for HB 58, the Task Force found that there was no explosion in the number of tort cases filed, no evidence of high jury awards, and no evidence of significant numbers of frivolous lawsuits. The Task Force found no evidence of any crisis in insurance cost or availability, or that tort reform in Alaska would have any effect on insurance rates for Alaskans. The following explains why HB 58 neither helps Alaskans nor follows the recommendations of the Governor's Task Force.

Section 5: Reduces the ability of those injured by faulty design or construction to recover for their injury by prohibiting claims after eight years from completion of the construction, even if the negligent work is not discovered until after then. ***The Governor's Task Force did not recommend any changes to the statute of repose.*** This provision will prevent local governments, school districts and homeowners from recovering damages for faulty construction which is typically not discovered until a fire, roof collapse or other event occurs long after completion of the project.

Section 6: Gives only doctors and other health care professionals special protection when their negligence injures young children. This section requires malpractice actions affecting children under six years of age to be filed by the child's eighth birthday, even if the effect of the doctor's negligence can't be recognized because of the infant's age. No other person or professional is given this special protection. ***The Governor's Task Force did not recommend any changes regarding when lawsuits must be filed for injuries to children.***

Section 8: This provision <u>reduces</u> the existing cap on non-economic damages. Section 8 not only limits the non-economic damages which can be recovered for <u>all</u> claims to $300,000, in most situations, but also does not allow non-economic damages to exceed $500,000, even when someone is quadriplegic and has suffered permanent brain damage. Current law at least allows the cap to be exceeded when injuries are serious. ***The Governor's Task Force did not recommend reductions to the cap on non-economic damages because this only harms those who are most severely injured.***

Section 9: This section changes the current legal definition for punitive damages by eliminating reckless conduct as the basis for an award of punitive damages. This means that punitive damages cannot be assessed against a drunk driver and could not have been assessed against Exxon for the oil spill. ***The Governor's Task Force did not recommend any changes in the definition of punitive damages.***

Section 10: Section 10 places an absolute cap on punitive damages regardless of the wealth of the wrongdoer or the nature of the wrongdoer's conduct. This section also requires 50% of punitive damages to be deposited to go to the state. This section only benefits large multi-national corporations, like Exxon, against whom a punitive damage award of $600,000 would have no effect. ***The proposal of the Governor's Task Force on punitive damages allowed for consideration of the financial gain of the defendant and did not recommend that punitive damages go to the state.***

Section 11: This section reduces all damages an injured person might receive by a federal income tax rate, *even though these damages are not taxed under state or federal law.* This unfair provision means that an injured person's recovery is automatically reduced 20%-30%. *No such proposal was made by the Governor's Task Force.*

Sections 12-14: Force an injured person to accept any damages which are awarded for past injury as installment payments to be paid over time in the future. This takes away the choice of injured Alaskans to decide for themselves whether periodic payments are fair, or meet their needs. *This proposal was rejected by the Governor's Task Force.*

Section 15: This section requires a jury to reduce the damages an injured person can receive by the amount of insurance payments the person has received for the injury, or might receive in the future. *The Governor's Task Force concluded that such a proposal would increase the cost of insurance and rejected the idea.* This provision in HB 58 will only make trials more time consuming and complicated.

Sections 16-19: These sections allow responsibility for injury to be allocated to a person or corporation which is not even brought into the lawsuit or into the courtroom. This means that someone at fault can shift blame to an "empty chair" without the jury ever hearing evidence to the contrary. *The Governor's Task Force rejected this proposal because innocent victims might be denied full recovery.* Section 19 even allows punitive damages to be allocated to someone who is not in the courtroom.

Section 21: This section forces injured persons to guess about the outcome of their case with near certainty at the risk of having to pay all the defendant's actual attorney's fees. This section and Section 16 encourages a negligent defendant to delay disclosing actors who may be at fault. *The changes to Section 21 are far harsher to victims then the recommendations about offers of judgment made by the Governor's Task Force.*

Other Sections make it more difficult for those injured to have experts testify on their behalf (Sec. 20); give special protection to hospitals (Sec. 35); limit attorney fee recoveries in punitive damage cases (Sec. 34); and make trials more complicated (Sec. 49). *None of these changes were recommended by the Governor's Task Force.*

HB 58 (tort reform legislation) does not protect individuals and you should not be mislead to believe that it does. If what you have just read is unsettling to you, please contact your legislator and the governor and let them know that torn reform will limit access to the civil justice system and should not happen.

Office of the Governor
P.O. Box 110001, Juneau, AK 99811-0001
☎ 465-4500
Fax: 465-3532

*ADN 4/5/97

LETTERS TO THE DAILY NEWSPORTER BILL NEGATES LEGAL RIGHTS

Does Brian Porter really understand that his tort reform bill takes away legal rights?

He tells readers the legislative cap on pain and suffering still will be $500,000 "in aggravated cases." But his bill only lists forms of paralysis and brain damage as "aggravated," not blindness, burns or anything else people would say was "aggravated." Other injuries get capped at $300,000.

He tells readers that his bill will reduce "statutes of limitations and the statute of repose to a reasonable length in order to prevent assertion of stale or fraudulent claims." Does he understand that the statute of repose kills off legal claims even before the injury is discovered and sometimes before the injury happens? The only thing "stale" is the dangerous conduct that leads to the injury. The only thing "fraudulent" is legislative elimination of a legal claim before a victim knows she should bring it.

His bill will "prevent lawyers from running up exorbitant fees," but how? His bill will keep people from finding lawyers to take their cases.

Porter states the threat of "unlimited subjective damages" has "the in terrorem effect" of "extorting oversized settlements from partially at fault to totally innocent defendants." For Porter to conclude that availability of legal rights when a person is injured is the same thing as an in terrorem contract clause ruled unenforceable and against public policy (like one requiring celibacy as a condition of inheritance) suggests for Porter, "meaningful tort reform" should eliminate fundamental legal rights as against public policy.

- Steve Conn, executive director
Alaska Public Interest Research Group

*ADN 4/7/97

TORT REFORM AIDS CORPORATISM

Welcome to the brave new world of corporatism, compliments of corporate director Brian Porter and HB 58 (tort reform).

Those 50 words of the Seventh Amendment are dead and the malignancy is speeding to the others. HB 58 is right out of the pages of Adolf Hitler's "Mein Kampf" and Karl Marx's "Das Capital."

Our legal system is now privatized and our state CEO will sign it into law.

Corporatism now governs us. What happened to America?

-- Joseph T. Dugan
Anchorage

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Section 7. Provides that punitive damages may only be awarded as provided under this section. Imposes a cap on punitive damages under subsections (f) and (g).

Section 8. Amends the definition of "fault" to include intentional acts or omissions.

Section 9. Establishes a formula for increasing or reducing the rate of interest applicable to a judgment by either two, three, or five percent, depending on whether an offer of judgment is accepted or rejected.

Section 10. Changes the rate of interest applicable to a judgment from a fixed rate of 10.5 percent to a floating rate determined under subsection (c) enacted in sec. 11.

Section 11. Establishes a method for determining the rate of interest to be paid on a judgment.

Section 12. Establishes a alternative dispute resolution pilot program for certain civil cases. Only certain cases filed in Anchorage are required to be mediated. Requires that the program operate for at least five years, under a structure set by the supreme court. Requires fees and costs be shared equally by the parties to the case. Requires the Alaska Judicial Council to annually evaluate the program.

Section 13. Provides that in a judgment entered against the state, the rate of interest is the floating rate established under AS 09.30.070.

Section 14. Provides that in eminent domain actions, the compensation awarded must include interest at a rate of 10.5 percent.

Section 15. Requires that certain civil actions must be arbitrated. Requires the court to appoint an arbitrator and establishes time lines for reaching a decision. Provides that the decision is admissible in the civil action and that a party that rejects the decision and loses in later civil litigation is liable for actual costs and attorney fees.

Section 16. Provides that a person who is injured or killed cannot recover civil damages, if the person was committing a felony, or was engaged in conduct that constitutes the commission of a felony and the conduct substantially contributed to the injury or death and is proved by clear and convincing evidence. Provides that the section does not apply if the person is acquitted.

Section 17. Requires that the Alaska Judicial Council collect and evaluate certain information regarding civil litigation.

Section 18. Limits the amount of punitive damages that can be recovered in an unlawful employment action.

Section 19. Requires the director of the division of insurance to evaluate the effect of the provisions of this Act and the financial health and profitability of insurers doing business in the state. Requires insurers to provide information to the state and provides for an annual report to the legislature and the governor.

Section 20. Establishes a private cause of action for a violation of the unfair trade practice provisions of AS 21.36.125, or of a trade practice or claim regulation adopted by the director. Requires notice be given to the insurer and to the director. Allows for the recovery of foreseeable damages, costs, attorney fees, and punitive damages.

Section 21. Limits the authority of the court to award punitive damages in employment cases.

Section 22. Increases the jurisdiction of the district court to claims that do not exceed $100,000.

Section 23. Imposes a penalty on insurers who deny medical coverage under a motor vehicle insurance policy and later are determined to have wrongfully denied coverage.

Section 24. Requires that uninsured and underinsured motor vehicle insurance be excess coverage, payable even when other policy coverage is not exhausted.

Section 25. Amends civil rule 16.1(c) to prohibit filing of a motion to set trial until after the parties meet to discuss settlement required under sec. 26.

Section 26. Amends civil rule 16.1 to require a meeting of the parties to discuss settlement and to establish discovery guidelines.

Section 27. Amends civil rule 41(a) to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 28. Repeals and reenacts civil rule 68, to provide a formula for increasing or decreasing the interest rate applicable to a judgment depending on an offer of judgment made in the case. The rule is changed to be consistent with sec. 9.

Section 29. Changes the limit the use of discovery in a medical malpractice action from 80 to 60 days.

Section 30. Increases the fine that can be imposed by a court against an attorney to $10,000.

Section 31. Amends district court civil rule 1(a)(1) to limit the use of discovery.

Section 32. Amends district court civil rule 4 to require a maximum of 270 days before a case goes to trial.

Section 33. Amends appellate rule 511 to require parties to a civil action to submit certain information required under AS 09.68.130.

Section 34. Repealers.

Section 35. Repealers.

Section 36. Repealers.

Section 37. This section sets out the intent of the legislature to amend civil rules 49 and 26(b) and (d).

Section 38. This section sets out the intent of the legislature to amend civil rule 68.

Section 39. This section sets out the intent of the legislature to amend civil rule 100.

Section 40. This section sets out the intent of the legislature to amend civil rule 79(b).

Section 41. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 42. This section sets out the intent of the legislature to amend civil rule 82(b).

Section 43. Applicability section.

Section 44. Severability clause.

Section 45. Instruction to the revisor of statutes regarding technical amendment.

Section 46. Effective date for court rule change sections.

Section 47. Effective date.

MFF:pl
97-069.plm

Anchorage Daily News

Senator —

Thought you might find these interesting

Cheers,
Elaine Piggee

RECEIVED JAN 30 1997

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GOVERNMENT & SOCIETY

When Courts Become Political Battlegrounds

Alabama politics has been overwhelmed by an all-consuming fight over tort reform

By Dale Russakoff
Washington Post Staff Writer

BIRMINGHAM

The sacred Southern rituals of Saturday afternoon football and Sunday morning prayer are safe, for now, from the unholy wars of Alabama politics. The "skunk ad" is off the air, no longer incessantly interrupting touchdown drives with word that a candidate for Supreme Court justice "stinks." The letters full of tawdry details from his 20-year-old divorce have stopped circulating in fundamentalist Christian churches across Alabama.

STATES

But this high-financed nastiness was no passing symptom of Campaign '96. Alabama politics has fallen into the grip of a national showdown between two of the country's most powerful interest groups, trial lawyers and business groups, whose money now overwhelms elections for once-obscure offices in this small state. The recent judicial campaign reached senatorial heights of more than $5 million. Legislative races have approached $500,000.

In Alabama, dubbed "Tort Hell" by Forbes magazine, both sides are struggling to control a court system in which populist-style plaintiffs' lawyers regularly win eye-popping civil damage awards by whipping up juries to "send a message" to Big Business. Among the more spectacular verdicts was $150 million against General Motors Corp., won by a rural factory worker paralyzed in a car wreck. (It recently was settled in a postverdict conference for an undisclosed amount.)

According to consultants for both major parties, this struggle has come to dominate all politics in Alabama. They say this year's Supreme Court race, in which a Republican backed by the state Business Council unseated a Democrat backed by the state trial lawyers' group, marked the height, but by no means the limit, of the trend. Already, both sides are gearing up for 1998, when the terms of three justices, the governor and the lieutenant governor will expire.

"This is literally killing politics in Alabama," says political scientist Natalie Davis, who ran unsuccessfully for the U.S. Senate in the Democratic primary this year. "The trial lawyers and the Business Council control most of the money in politics. The trial lawyers pick the Democrat and the Business Council picks the Republican and it's all about your stand on tort reform.

"If you poll voters to see what they're concerned about," Davis says, "they'll say education, health care, jobs, seniors and crime. They never say tort reform. But the big money cares only about tort reform. Then the candidates go to the airwaves with all the garbage and money they can dig up, and voters are turned off and they say: Government doesn't work for me."

Although Alabama is commonly viewed as behind the times, it may be the leading edge in this front. As Washington gives more power to states to regulate issues from the environment to banking to welfare, well-financed groups are pouring resources into political races in capitals from Albany, N.Y., to Sacramento, Calif., political analysts say.

In this year's Supreme Court contest, the Republican, Harold See, is estimated to have raised more than $3 million. He retained Virginia consultant John Deardourff, who says he was surprised to find that a state judicial race could command national strategists. The Democratic incumbent, Associate Justice Kenneth Ingram, with an estimated $2 million—much of it from the Democratic Party—hired Hank Sheinkopf, a member of President Clinton's media team.

FROM A TELEVISED POLITICAL AD

This attack ad was paid for by forces behind Alabama Supreme Court Justice Kenneth Ingram.

Exact fund-raising totals are unavailable because Alabama does not require final campaign finance reports until January, obscuring the vast sums that typically pour in during the final days, often from out of state. Moreover, there are no limits on individual or political action committee donations, resulting in huge contributions from wealthy trial lawyers as well as big companies.

THE STORY OF HOW TORT REFORM came to overwhelm Alabama politics dates to the early 1980s, when plaintiffs' lawyers began winning huge punitive damage verdicts, mostly against insurance firms for fraudulent practices by agents.

The plaintiffs' attorneys had a strong moral argument on their side. "Alabama has very weak regulatory bodies and so lawsuits are very important in setting standards for corporate conduct," Birmingham lawyer Sam Heldman says.

They also had political history on their side. Just as former governor George C. Wallace incited populist anger at big business through the 1970s, some of the most successful plaintiffs' lawyers came to specialize in stem-winding summations urging juries in low-income counties to punish greedy, out-of-state corporations by assessing huge punitive damages against them.

The state's premier trial lawyer is Jere Beasley, Wallace's former lieutenant governor, who has won his largest victories in desperately poor rural counties. Beasley, who represented the paraplegic plaintiff in the General Motors case, was listed in Forbes among the top 20 highest-earning trial lawyers in the country, taking in $6 million in 1994. He has tried many of his cases in his native Barbour County, before a judge who is his former law partner.

"They draw on the same school of thought the George Wallaces and the Huey Longs tapped into," says Gere White, a Birmingham lawyer who represents business. "It's us against them. It's the idea that the reason you're downtrodden is these big Northern corporations are taking advantage of you. It's the civil equivalent of the O.J. Simpson verdict: payback time."

The issue quickly became political as increasingly wealthy trial lawyers raised large sums to help elect pro-plaintiff judicial candidates. Business PACs responded by raising even larger sums for legislative candidates committed to curbing punitive damage awards. Says one business lawyer: "You can't buy legislators here, but you can rent them. In 1986, business rented a lot of them."

The next year, the legislature passed a broad tort-reform package, including a $250,000 ceiling on punitive damages. But the year after that, the trial lawyers roared back when the head of their state association, Ernest "Sonny" Hornsby, who had won a series of big-ticket fraud verdicts, was elected chief justice over a business-backed candidate. In the first full-dress battle between the interest groups, the two campaigns spent a then-record $800,000.

THE HIGH COURT PROCEEDED TO strike down most of the major 1987 tort reform provisions as unconstitutional, unleashing another round of punitive damage verdicts, including a now-notorious $4 million judgment against BMW of North America for touching up a damaged car and selling it as new to an Alabama physician. The state Supreme Court cut the damages to $2 million, which the U.S. Supreme Court then struck down as "grossly excessive," since the actual damages were $4,000. (The U.S. Supreme Court has since taken the extraordinary step of overruling four other damage awards in Alabama.)

Two years ago, business forces picked off Hornsby in an election so close it had to be decided by a federal court, which invalidated 2,000 absentee ballots that were not properly notarized or witnessed. The state high court, including justices who contributed to Hornsby's campaign, earlier had voted to count the ballots, which would have given Hornsby his victory margin.

The battle took an even nastier turn this year with Ingram, a Hornsby ally up for reelection, and See, a Chicago-trained law professor at the University of Alabama, as his business-backed challenger.

At one point, a "Committee for Family Values," which turned out to be financed by a number of trial lawyers, ran an ad saying See had a "secret" past, and had "abandoned his wife and two children, had a love affair . . . and fled Illinois for Alabama" 20 years earlier. See responded with an ad featuring his daughter from that marriage declaring that the attack had not "a shred of truth." His ex-wife also issued a statement denouncing the ad.

Another ad featured footage of a skunk fading into a picture of See, and the message. "Some things you can smell a mile away. . . . Harold See doesn't think average Alabamians are smart enough to serve on juries." The words, "Slick Chicago Lawyer," were plastered over See's face.

Each side called the other a puppet; Ingram, of "rich, personal injury lawyers . . . trying to buy the Alabama Supreme Court," and See, of "giant insurance companies and big businesses" who want to deny Alabamians their "right to a trial by jury."

Beasley, whose firm raised $37,500 for a pro-Ingram PAC in a single day, says he believes the final finance reports will show that tobacco and insurance giants bankrolled See. Indeed, an ad attacking the high court, sponsored by a group called Alabama Voters Against Lawsuit Abuse, featured a telephone number that rang at a national business-backed coalition based in California.

See's victory, with 53 percent of the vote, leaves the plaintiff-backed forces on the high court with a one-vote margin.

With three of the nine justices' terms up in 1998, along with those of the governor and lieutenant governor, civic leaders shudder to think how much mud and money will converge here in two years.

As a remedy, Alabama Bar Association President Warren Lightfoot is calling for an end to the election of judges—a practice in 20 states—in favor of merit appointments, with periodic votes to retain or dismiss them.

"Our courts will not be able to function if justices have to engage in this kind of campaigning," Lightfoot says.

But others say that both plaintiff and business forces oppose the effort, in part because the current system enriches them all.

Says one attorney in a corporate practice: "I've had people in my firm say, 'Sure this is terrible, but look at all this business they create.'" ■

The New York Times

Ex-Prosecutors and Deputies in Death Row Case Are Charged With Framing Defendant

By DON TERRY

WHEATON, Ill., Dec. 12 — In a sweeping and rare indictment, three former DuPage County assistant prosecutors and four sheriff's deputies were charged here today with conspiracy and obstruction of justice in the wrongful murder convictions of two young Hispanic men, who spent years on death row before being released from prison last year.

The two men were released after an investigator admitted he had lied in earlier testimony about important evidence in the case. Today's indictment charges that that evidence was fabricated.

The men were convicted in 1985 in the abduction, rape and murder of a 10-year-old girl.

Charging prosecutors for their conduct during criminal investigations or prosecutions is almost unheard of. No one interviewed, from legal scholars to former and current prosecutors, could recall a similar case anywhere in the country.

A rare case of law-enforcement officials being charged with fabricating evidence.

"It happens very, very infrequently," said Samuel R. Gross, a professor at the University of Michigan Law School. "Three former prosecutors. Wow. This is extraordinary."

One of the former prosecutors charged today in the 47-count indictment, Robert K. Kilander, is now a DuPage County judge.

The 1983 murder of the girl shocked this affluent county west of Chicago. Today's indictment is the latest legal twist in the case, which saw two innocent men sent to death row largely because sheriff's deputies testified that one of the men, Rolando Cruz, had told them about a dream he had about the killing, including details only the killer could have known. That testimony was the cornerstone of the prosecution's case against Mr. Cruz and the other man, Alexandro Hernandez.

Defense lawyers had long contended that investigators fabricated the dream. Last year, during the third trial for Mr. Cruz, held after two previous convictions were overturned on appeal, a DuPage County judge ordered him acquitted after another sheriff's deputy said he had earlier testified falsely that other investigators had said Mr. Cruz had told them about the dream.

That officer, DuPage County Sheriff's Lieut. James T. Montesano, was one of those indicted today.

After Mr. Cruz's acquittal, a grand jury was convened to review the investigation and prosecution. A special prosecutor, William J. Kunkle Jr., was put in charge.

"In a free society there must always be a line between vigorous prosecution and official misconduct, between advocacy and unfairness, and between justice and injustice," Mr. Kunkle said in announcing the indictment late this afternoon. "This indictment charges that line was crossed by seven people."

In addition to Judge Kilander and Lieut. Montesano, the others indicted are , sheriff's deputies Thomas E. Vosburgh, Dennis Kurzawa and Robert L. Winkler and former prosecutors Thomas L. Knight and Patrick J. King Jr. Mr. King is now an assistant United States Attorney in Chicago, and Mr. Knight is in private practice.

Even before today's announcement, word of the indictment had sparked a heated debate on what impact the charges will have. Joseph E. Birkett, the DuPage County States Attorney, the local prosecutor, said the indictments will have a chilling effect on prosecutors everywhere.

"Charging prosecutors for conduct in the performance of their duties is unheard of," Mr. Birkett said. "If this type of allegation can be made, prosecutors will have to second guess everything they do. This is devastating to law enforcement."

Prosecuting prosecutors for official misconduct is difficult because there has to be almost overwhelming evidence that the prosecutors knowingly used false evidence or testimony, a violation of law and ethics that Professor Gross said was exceedingly rare. When it happens, he said, it is usually in high-profile cases like this, where there was enormous pressure to solve the case, and political futures were on the line.

Thomas Breen, a defense lawyer, who was a prosecutor for 10 years in neighboring Cook County, which includes Chicago, represents Mr. Cruz. Mr. Breen said the indictments should have no impact on the vast majority of honest prosecutors.

"But it should certainly chill the kind of conduct alleged in the indictment, which is perjury and obstruction of justice," he said. "I hope it freezes it solid. We're beginning to lose track of due process and the pursuit of truth in many cases. The Cruz case is absolutely one of them."

Mr. Breen insisted, as did the other defense lawyers who worked long to free Mr. Cruz, that because someone is indicted does not mean someone is guilty and cautioned against a rush to judgment. "Just ask Rolando about that," he said.

Terry Ekl, another former Cook County prosecutor, is representing Mr. Knight, who prosecuted the men at their first trial in 1985.

Mr. Ekl said that there was no basis to indict his client, and that Mr. Knight had testified twice before the grand jury in the case "because he has nothing to hide."

Mr. Ekl said Mr. Knight believed the police had been telling the truth about the dream, and still believed them. "Now, we're making martyrs out of murderers and indicting prosecutors who were trying to protect the public," Mr. Ekl said. "If Tom Knight is prosecuted in this case, there probably isn't a prosecutor in the country who is safe."

"These guys did not do anything wrong," said Brian Telander, a lawyer for Mr. Vosburgh. "They have good hearts. They are good people, with families. All they wanted to do is the right thing. They didn't make up statements."

Mr. Cruz, who is 33, was 19 when he was convicted. He was sentenced to die after both of his first two trials. In setting Mr. Cruz free, the judge, Ronald Mehling, said the state's case against him was built on lies, mistakes and sloppy police work.

Lawrence Marshall, a law professor at Northwestern University and one of Mr. Cruz's lawyers, said he hoped the trials of the prosecutors and deputies will open "the public's eyes to the fact that the system is way far from perfect and that there is a grave risk of executing innocent people even when a police officer stands up and says 'I heard a confession.'"

Since 1994, five men, including Mr. Cruz, have been released from death row in Illinois because of lack of evidence or because of evidence of innocence. Since the mid-1970's, nearly 70 people have been released from death row nationwide.

"It is quite certain that some innocent people have been executed in the past," Professor Gross said. "It will happen again. We can't keep fucking out forever as we did with Rolando Cruz."

Associated Press

Three of those indicted yesterday in Illinois in the wrongful murder convictions of two men are, from left, Thomas L. Knight and Robert K. Kilander, former prosecutors, and Sheriff's Lieut. James T. Montesano.

Mr. Hernandez spent more than three years on death row before his conviction was overturned. He was convicted during a second trial and was sentenced to 60 years in prison. Last year, he, too, was freed.

The murder of the girl, Jeanine Nicarico horrified DuPage County, home to a string of well-off Chicago suburbs where the people vote Republican and play polo. She was home alone from school with the flu when someone kicked in the front door of her family's home in Naperville, Ill., and took her away. Her body was found two days later in a field.

"To this day," Mr. Birkett said, "it is probably one of the most shocking murders that has occurred here, and that will never change."

The trial of a third defendant, a 21-year-old white man, Stephen Buckley, ended in a hung jury. He was released in 1987, when the authorities decided not to pursue the case against him.

Another man, Brian Dugan, who has never been charged in the case, admitted in 1985, according to his lawyer, to being the girl's lone killer. DNA tests, which excluded Mr. Cruz and Mr. Hernandez as the source of semen found in the child, have implicated Mr. Dugan, who is serving a life sentence for the rapes and murders of a 7-year-old girl and a 27-year-old woman.

Mr. Dugan has refused to tell the authorities his story unless they promise not to seek his execution.

For years, several law-enforcement officials said Mr. Cruz and Mr. Hernandez were innocent. Mary Brigid Kenney, a lawyer in the Illinois Attorney General's office, who was in charge of fighting Mr. Cruz's appeals to save his life, resigned in 1992 in protest, saying the state was trying to kill an innocent man.

Menorahs Bloom From Act of Vandalism

By JENNIFER PRESTON

NEWTOWN TOWNSHIP, Pa., Dec. 12 — At 5 A.M. Sunday, Judith and Martin Markovitz were awakened by the sound of breaking glass. Vandals had walked across their front lawn and smashed in their living room window to destroy an electric menu-

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

TO: Laura Chase
Senate Judiciary Committee

FROM: Shari Kochman
Deputy Legislative Director

DATE: March 18, 1997

RE: SB15

This is to advise you that no fiscal note is necessary from the Department of Health and Social Services on SB 15 because the health statutes cited in the bill do not relate to any departmental functions.

A fiscal note is forthcoming from the Human Rights Commission which is housed within the Governor's Office.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CS SB15 (JUD)

Revision Date:
Department: Commerce and Economic Development
Title: An Act relating to civil actions; relating to motor vehicle liability insurance and bonds;
BRU: Insurance
Component: Insurance
Sponsor: Taylor
Requestor:
COMPONENT SERIAL NO. 324

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)
This bill does not have a fiscal impact on the component.

Prepared by: Marianne K. Burke, Director
Division: Insurance
Phone: 465-2515
Date: March 14, 1997

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 3-14-97

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 15 (JUD)

Revision Date:
Title: " . . . to civil actions; . . .to motor vehicle liability insurance and bonds; amending . . .Rules of Civil Procedure . . .
Sponsor: Senator Taylor
Requester: Senate Judiciary Committee

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: Criminal Division
General Legal Services
COMPONENT SERIAL NO. 2085/2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	83.8	83.8	83.8	83.8	83.8	83.8
TRAVEL	1.1	1.1	1.1	1.1	1.1	1.1
CONTRACTUAL	350.0	350.0	350.0	350.0	350.0	350.0
SUPPLIES	1.6	1.6	1.6	1.6	1.6	1.6
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	436.5	436.5	436.5	436.5	436.5	436.5
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	179.0	179.0	179.0	179.0	179.0	179.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
1007 Interagency Receipts	257.5	257.5	257.5	257.5	257.5	257.5
TOTAL	436.5	436.5	436.5	436.5	436.5	436.5

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends Title 9, the Alaska Code of Civil Procedure; AS 18.80.225, relating to punitive damages for unlawful employment practices; AS 22.15.030(a), relating to the jurisdiction of the district court; AS 21.06, relating to the responsibilities of the Division of Insurance; AS 21.36, relating to insurance claim settlement practices; AS 28.22, relating to motor vehicle liability insurance; and a number of the Rules of Court to provide various changes intended to bring about reforms in the manner in which the state's civil justice system handles personal injury claims. The Judiciary Committee Substitute is intended to decrease the costs of resolving cases, discourage frivolous litigation, promote fair compensation for injured parties, and promote the predictability of outcomes in civil litigation.

Among the changes proposed in the bill are limits on punitive damages, clarification that people who intentionally hurt others will be held liable for their fair share of the harm, the establishment of an alternative dispute resolution project to facilitate resolution of cases without the expense of trial, streamlined district court

Prepared by: Joan M. Kasson
Division: Administrative Services Division
Phone: 465-5370
Date: 3/17/97

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 3/17/97

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ANALYSIS CONTINUATION:

procedures and changes in superior court procedures intended to decrease overall litigation expense, and changes in the interest rate on judgments and decrees and changes in court procedures designed to encourage early settlement and payment of damages.

CSSB 15 (JUD) would also require mandatory arbitration for all personal injury, death, or property damage cases where the amount of controversy is $100,000 or less, with certain limited exceptions.

The Department of Law anticipates that some costs would be incurred for payment of the state's share of the alternative dispute resolution project, and those increased costs would probably be offset by savings due to the streamlining of court procedures. However, the requirement for mandatory arbitration would cause new costs. The department anticipates that approximately 100 cases per year would require mandatory arbitration: 65 tort claims, 30 prisoner litigation cases, and 5 cases in other categories, primarily environmental claims. This estimate is based on the number of cases the department currently has where claims for damages are $100,000 or less. If future plaintiffs claim damages greater than $100,000, they could avoid the effect of the bill and the number of cases going to mandatory arbitration could be less.

Each case going to arbitration would require, on average, approximately 20 hours of attorney time specifically to prepare for and attend the arbitration hearing, in addition to the time ordinarily spent preparing the case (20 hours @ $87/hr, or $1,740). In addition, witness fees and costs could be expected to be approximately $1,500 per case. The bill does not specify who would pay the cost of arbitration, and our estimate of costs assumes the state would be required to pay one-half of the arbitrator's fee, estimated at $150/hr for 25 hours. These cost estimates of $5,115 per case are conservative. Medical cases, for example, could be expected to involve considerably more in-house attorney time and increased costs for expert witnesses.

The estimated cost for mandatory arbitration would be offset by any savings from cases settling at the arbitration level, and not proceeding to trial. As a practical matter, very few of these types of cases go to trial. Most are either won or lost on motion practice, or settled prior to trial. An average of three tort cases, where the amount in controversy is $100,000 or less, actually proceed to trial each year, and if all are assumed to be settled at the arbitration level, a potential savings of $75,000 is possible ($25,000 per case). This potential savings is reflected in our cost estimate.

The cost estimate is based on the department's standard attorney cost schedule ($87/hour) and includes clerical support, communications, space, supplies, data processing, and other normal overhead expenses. Witness and arbitrator costs are included separately.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. CSSB 15 (JUD)

ANALYSIS CONTINUATION:

	# cases	cost/case	total	
GENERAL LEGAL SERVICES				
Special Litigation (torts)				
Department of Law attorney time	65	$1,740	$113,100	
Witness costs/fees		$1,500	$97,500	
Arbitrator cost/fees		$1,875	$121,875	
Total		$5,115	$332,475	
Estimated potential savings	3	($25,000)	($75,000)	
			$257,475	IAR
Other, non-tort, claims for damages				
Department of Law attorney time	5	$1,740	$8,700	
Witness costs/fees		$1,500	$7,500	
Arbitrator cost/fees		$1,875	$9,375	
Total		$5,115	$25,575	GF
CRIMINAL DIVISION				
Prisoner litigation cases				
Department of Law attorney time	30	$1,740	$52,200	
Witness costs/fees		$1,500	$45,000	
Arbitrator cost/fees		$1,875	$56,250	
Total		$5,115	$153,450	GF
TOTAL DEPARTMENT OF LAW	100		$436,500	

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 1/13/97

FURTHER: Finance

Date of 5-Day Notice: 3/6/97
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3-13-97

Judiciary Committee considered SENATE BILL NO. 15

"An Act relating to punitive damages in a civil action for discrimination related to employment; relating to arbitration in a civil action; amending Rules 79(b) and 82(b), Alaska Rules of Civil Procedure, and repealing Rule 72.1, Alaska Rules of Civil Procedure; and providing for an effective date."

and recommends:

[✓] be replaced with ____ CS SB15 (JUD)

[ ] adopt previous ____ CS _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR*_____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
		Mike Miller	✓		
		Jerry Ellis	✓		
CHAIR:	✓	CHAIR:			

NEW FISCAL NOTE(S):

Date	Zero	Fiscal

1-SB
All the rest to SB&CS

FN Forthcoming

[ ] APPR(

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal

*Include fiscal notes accompanying Governor's bill

0-LS0169\E
Ford
3/7/97

CS FOR SENATE BILL NO. 15(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR TAYLOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Rules 16.1, 26, 41, 49, 72.1, 79(b), 82(b), 95, and 100, Alaska Rules of Civil Procedure; amending Rules 1 and 4, Alaska District Court Rules of Civil Procedure; amending Rule 511, Alaska Rules of Appellate Procedure; and repealing Rule 72.1, Alaska Rules of Civil Procedure; and providing for an effective date."

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

*** Section 1.** PURPOSE. It is the purpose of this Act to

(1) reduce the time and costs associated with civil litigation;

(2) improve access to justice for individuals and small businesses;

(3) provide for fair but not excessive compensation for persons injured through the fault of others;

(4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior; and

(5) collect information on the civil justice system and on the insurance industry to inform the public policy debate on tort reform related issues.

* **Sec. 2.** AS 06.05.473(h) is amended to read:

(h) After the payment of all other claims, including interest at the rate **of 10.5 percent a year** [ESTABLISHED UNDER AS 09.30.070], the department shall pay claims that are otherwise valid but that were not filed within the time prescribed.

* **Sec. 3.** AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. Certain property actions to be brought in six years. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

* **Sec. 4.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. Contract actions to be brought in three years. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law.

* **Sec. 5.** AS 09.10.070(a) is amended to read:

(a) A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) **for taking, detaining, or injuring personal property, including an action for its specific recovery; (3)** upon a statute for a forfeiture or penalty to the state; or **(4)** [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

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

(c) The limit under (b) of this section does not apply to damages for **severe** disfigurement or severe physical impairment.

* **Sec. 7.** AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. Punitive damages. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrent with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed,

a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous;

(2) was the result of malicious or hostile feelings toward the plaintiff; or

(3) evidenced reckless indifference to the rights or safety of others.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded, and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has

determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) or (h) of this section or otherwise provided by law, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or

(2) the sum of $500,000.

(g) Except as provided in (h) of this section or otherwise provided by law, if the fact finder finds that the conduct proven under (b) of this section was motivated by financial gain, it may award an amount of punitive damages not to exceed the greatest of

(1) the amount calculated under the limitation in (f) of this section;

(2) the average net annual income earned by the defendant for the five years before the date the trial began; or

(3) two times the amount of financial gain that the defendant received or expected to receive as a result of the defendant's misconduct.

(h) Notwithstanding (f) or (g) of this section and except as otherwise provided by law, if the fact finder finds that the conduct proven under (b) of this section was employment related, an award of punitive damages may not exceed

(1) the amount calculated under the limitations of (f) of this section if the conduct of the employer affected only one employee; or

(2) the greater of the amounts calculated under the limitations of (f) or (g) of this section if the employer engaged in a pattern or practice affecting more than one employee.

(i) Punitive damages may not be awarded against a person that is immune by law from an award of punitive damages.

(j) In this section, "employment related" includes conduct of hiring, firing,

transferring, promoting, demoting, or terminating an employee by an employer.

* **Sec. 8.** AS 09.17.900 is amended to read:

Sec. 09.17.900. Definition. In this chapter, "fault" includes acts or omissions that are in any measure negligent, [OR] reckless, **or intentional** toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

* **Sec. 9.** AS 09.30.065 is amended to read:

Sec. 09.30.065. Offers of judgment. At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is not more favorable to the offeree than the offer, the interest awarded under AS 09.30.070 and accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate shall be **adjusted as follows:**

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Rule 26(a)(1), Alaska Rules of Civil Procedure, the interest rate shall be reduced by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Rule 26(a)(1), Alaska Rules of

Civil Procedure, but more than 90 days before the trial began, the interest rate shall be reduced by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be reduced by two percent [REDUCED BY FIVE PERCENT A YEAR];

(2) if the offeree is the party defending against the claim, the interest rate shall be adjusted as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Rule 26(a)(1), Alaska Rules of Civil Procedure, the interest rate shall be increased by five percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Rule 26(a)(1), Alaska Rules of Civil Procedure, but more than 90 days before the trial began, the interest rate shall be increased by three percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the interest rate shall be increased by two percent [INCREASED BY FIVE PERCENT A YEAR].

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

(a) Notwithstanding AS 45.45.010, the [THE] rate of interest on judgments and decrees for the payment of money, including prejudgment interest, shall be determined in accordance with (c) of this section [IS 10.5 PERCENT A YEAR], except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

* **Sec. 11.** AS 09.30.070 is amended by adding a new subsection to read:

(c) Except as otherwise provided in (a) of this section, the rate of interest on judgments and decrees for the payment of money is the rate for a five-year constant maturity United States Treasury note published in the applicable Federal Reserve H.15 Statistical Release, plus one and one-half percent. This rate is the rate in effect as of the first business day of the month during which prejudgment interest begins to accrue

on a claim under (b) of this section and remains constant with respect to the claim until the judgment or decree is satisfied. This rate of interest shall be determined as of the first business day of every month by the administrative director of the Alaska Court System.

* **Sec. 12.** AS 09.43 is amended by adding a new article to read:

Article 3. Alternative Dispute Resolution.

Sec. 09.43.310. Findings; purpose. The legislature finds that providing a formalized program of alternative dispute resolution procedures within the existing civil litigation system can promote the timely and efficient resolution of many civil disputes. The purpose of AS 09.43.310 - 09.43.390 is to provide for an initial pilot program of alternative dispute resolution of certain civil cases filed in the superior court on or after January 1, 1998.

Sec. 09.43.320. Pilot program for alternative dispute resolution. (a) The supreme court shall provide for a pilot program under AS 09.43.310 - 09.43.390 for the submission of civil cases filed in the superior court, Third Judicial District, to alternative dispute resolution procedures. The program shall begin January 1, 1998, and operate for at least five years.

(b) The following types of cases may not be included in the pilot program:

(1) divorce and dissolution;

(2) adoption, custody, support, visitation, and emancipation of children;

(3) children in need of aid cases under AS 47.10 or delinquent minors cases under AS 47.12;

(4) domestic violence protective orders under AS 18.66.100 - 18.66.180;

(5) estate, guardianship, and trust cases filed under AS 13;

(6) cases when no answer to the complaint or petition is filed by any party to the case with the court.

Sec. 09.43.330. Structure of pilot program. (a) The supreme court shall provide criteria for the screening of covered cases under the program to determine if the cases are appropriate for referral to alternative dispute resolution. The criteria shall be constructed so that at least 50 percent of the estimated number of covered cases

filed in a calendar year are referred to alternative dispute resolution.

(b) The supreme court shall establish minimum qualifications for a person to be listed to conduct alternative dispute resolution procedures under AS 09.43.310 - 09.43.390. The supreme court shall establish a list of persons determined to meet those qualifications and the current schedule of fees charged by the person listed.

(c) For a case referred under the program, the parties may mutually agree to select a person to conduct the alternative dispute resolution procedure regardless of whether the person appears on the list established under (b) of this section or whether the person meets the minimum qualifications to be selected for the list. If an agreement cannot be reached, the trial court judge assigned the case shall appoint a person from the list. A person selected or appointed under this subsection has judicial immunity for conducting the alternative dispute procedure to the same extent as a judge and shall abide by applicable rules of confidentiality related to alternative dispute resolution procedures established by the supreme court.

(d) Fees and costs to conduct an alternative dispute resolution procedure under AS 09.43.310 - 09.43.390 shall be shared equally among the parties to the case being referred unless the court finds a party wholly or partially indigent and orders total or partial payment at public expense. The supreme court shall establish guidelines for the determination of total or partial indigency under the program. Fees and costs borne at public expense under this subsection constitute a lien on any recovery in the case by that party and shall be paid first from the recovery.

(e) The superior court shall establish standards for the timely referral to and the conclusion of the alternative dispute resolution procedure required under this program. The standards must include that the alternative dispute resolution procedure

(1) shall terminate no more than 100 days after the defendant's answer is served unless the trial court grants a time extension in an exceptional case and for good cause shown; and

(2) be limited to no more than 12 hours for the procedure unless the parties mutually agree to a longer period.

Sec. 09.43.340. Evaluation of pilot program. (a) The Alaska Judicial Council shall evaluate annually the efficacy of the pilot program. Among other

factors, the evaluation shall address the speed with which cases are resolved, the satisfaction of the parties to the cases, the expenditures made by the parties to the cases, and the expenditure of court resources.

(b) The council shall work with the court system to create a system for efficient collection of information needed to evaluate the program. The council shall report the results of its evaluation to the governor and legislature each year by March 31.

Sec. 09.43.390. Definitions. In AS 09.43.310 - 09.43.390,

(1) "alternative dispute resolution procedure" includes mediation and early neutral evaluation;

(2) "covered cases" means civil cases described in AS 09.43.320(a) and not excluded from participation in the program by AS 09.43.320(b);

(3) "program" means the alternative dispute resolution pilot program established in AS 09.43.320.

* **Sec. 13.** AS 09.50.280 is amended to read:

Sec. 09.50.280. Judgment for plaintiff; punitive damages. If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with **interest as provided under AS 09.30.070** [LEGAL INTEREST FROM THE DATE IT BECAME DUE] and without punitive damages.

* **Sec. 14.** AS 09.55.440(a) is amended to read:

(a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment must include interest at the rate **of 10.5 percent a year** [SET OUT IN AS 09.30.070] on the amount finally awarded **that** [WHICH] exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

* **Sec. 15.** AS 09.55.535 is repealed and reenacted to read:

Sec. 09.55.535. Mandatory arbitration. (a) A person who files an action for personal injury, death, or property damage shall also submit the claim to the court for arbitration unless the action is excluded under (b) of this section.

(b) A person is not required to comply with (a) of this section if the

(1) amount in controversy, excluding interest, costs, and attorney fees, exceeds $100,000;

(2) parties have, under a written agreement made before the accrual of the action, agreed to submit the claim to arbitration; or

(3) action

(A) is a class action;

(B) seeks equitable or declaratory relief;

(C) concerns the title to real property;

(D) is a probate action;

(E) is an appeal from a court of limited jurisdiction;

(F) involves divorce or domestic relations;

(G) is an appeal from action by an administrative agency;

(H) is subject to the alternative dispute resolution procedure under AS 09.43.320.

(c) When a claim is submitted as required by (a) of this section, the court shall appoint an arbitrator to review the claim. The arbitrator appointed to review the claim shall interview the parties and examine all records or materials relating to the claim and may compel the attendance of witnesses, interview the parties, or consult with medical specialists.

(d) An arbitrator appointed under this section shall conduct a prehearing settlement conference within 30 days after the appointment. The arbitrator shall establish a period for discovery and a date for a hearing. The hearing date may not be more than 120 days after the settlement conference.

(e) An arbitrator shall render a decision within 30 days after hearing a claim under (d) of this section. The decision must contain findings of fact and conclusions of law. The decision of the arbitrator may be rejected by a party.

(f) If the decision of the arbitrator is rejected by a party, the action may

proceed in the appropriate court. The arbitrator's decision is admissible in that action to the extent allowed under the Alaska Rules of Evidence and may be used by a party to support or oppose a claim of damages. If a party rejects the decision of the arbitrator and litigates the action in court but is not the prevailing party in the action, the court shall award actual costs and attorney fees to the opposing party.

(g) The provisions of AS 09.43.010 - 09.43.180 (Uniform Arbitration Act) apply to an arbitration under this section to the extent the provisions do not conflict with the provisions of this section.

* **Sec. 16.** AS 09.65.210 is repealed and reenacted to read:

Sec. 09.65.210. Damages resulting from the commission of a felony or other conduct that would constitute a felony. (a) Except as provided in (b) of this section, a person who suffers personal injury or death may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, and the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the felony substantially contributed to a personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony or a class A or class B felony for which the person was not convicted and if the conduct

(A) substantially contributed to the injury or death; and

(B) is proven by the defendant in the civil trial by clear and convincing evidence; or

(3) fleeing after the commission, by that person, of conduct that would constitute an unclassified felony or a class A or class B felony, or being apprehended for conduct that would constitute an unclassified felony or class A or class B felony if

(A) the conduct during the flight or apprehension substantially contributed to the injury or death; and

(B) the conduct that would constitute a felony is proven by the defendant in the civil trial by clear and convincing evidence.

(b) If the person is acquitted of all unclassified, class A, and class B felonies

arising from the conduct, this section does not preclude the person from recovering damages for those injuries or death.

(c) This section does not affect a right of action under 42 U.S.C. 1983.

* **Sec. 17.** AS 09.68 is amended by adding a new section to read:

Sec. 09.68.130. Collection of settlement information. (a) Except as provided in (c) of this section, the Alaska Judicial Council shall collect and evaluate information relating to the compromise or other settlement of all civil litigation. The information, including the case name and file number, a general description of the claims being settled, the dollar amount of the settlement, to whom it is to be paid, and any nonmonetary terms, shall be collected on a form developed by the council for that purpose.

(b) The information received by the council under (a) of this section is confidential. This restriction does not prevent the disclosure of summaries and statistics in a manner that does not allow the identification of particular cases or parties.

(c) The requirements of (a) of this section do not apply to the following types of cases:

(1) divorce and dissolution;

(2) adoption, custody, support, visitation, and emancipation of children;

(3) children in need of aid cases under AS 47.10 or delinquent minors cases under AS 47.12;

(4) domestic violence protective orders under AS 18.66.100 - 18.66.180;

(5) estate, guardianship, and trust cases filed under AS 13;

(6) small claims under AS 22.15.040.

* **Sec. 18.** AS 18.80 is amended by adding a new section to read:

Sec. 18.80.225. Punitive damages for unlawful employment practices. (a) In an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed

(1) $50,000 if the employer has less than 101 employees;

(2) $100,000 if the employer has more than 100 but less than 201 employees;

(3) $200,000 if the employer has more than 200 but less than 501 employees;

(4) $300,000 if the employer has more than 500 employees.

(b) This section may not be construed to allow an award of punitive damages against the state.

(c) In this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

* **Sec. 19.** AS 21.06 is amended by adding a new section to read:

Sec. 21.06.087. Insurance report. (a) The director shall require reporting of and shall compile information necessary to evaluate

(1) the effect of the measures enacted in this Act on the availability and cost of insurance in the state; and

(2) the financial health and profitability of insurers doing business in the state.

(b) Information described in (a) of this section shall be provided by all insurers doing business in this state in the format specified by the director and must include factual information stating premiums, claims, expenses, and an allocation of investment profits or losses by line of business written in this state. Information shall be compiled by the division in a way that protects the identity of individual insureds.

(c) The director shall adopt regulations to implement and interpret this section, including requiring insurers doing business in the state to provide information necessary for the division of insurance to carry out its responsibilities under (a) and (b) of this section.

(d) Beginning June 1, 1999, the information compiled under (a) of this section shall be reported to the governor and the legislature annually.

(e) The division may consult with the Alaska Judicial Council when determining what information to require to be reported under (a) - (c) of this section and when implementing the compilation required under (a) of this section.

* **Sec. 20.** AS 22.10.020(i) is amended to read:

(i) The superior court is the court of original jurisdiction over all causes of action arising under the provisions of AS 18.80. A person who is injured or aggrieved by an act, practice, or policy **that** [WHICH] is prohibited under AS 18.80 may apply to the superior court for relief. The person aggrieved or injured may maintain an action on behalf of that person or on behalf of a class consisting of all persons who are aggrieved or injured by the act, practice, or policy giving rise to the action. In an action brought under this subsection, the court may grant relief as to any act, practice, or policy of the defendant **that** [WHICH] is prohibited by AS 18.80, regardless of whether each act, practice, or policy, with respect to which relief is granted, directly affects the plaintiff, so long as a class or members of a class of which the plaintiff is a member are or may be aggrieved or injured by the act, practice, or policy. The court may enjoin any act, practice, or policy **that** [WHICH] is illegal under AS 18.80 and may**, subject to AS 18.80.225,** order any other relief, including the payment of money, that is appropriate.

* **Sec. 21.** AS 22.15.030(a) is amended to read:

(a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(2) for the recovery of specific personal property [,] when the value of the property claimed and the damages for the detention do not exceed **$100,000** [$50,000];

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding **$100,000** [$50,000];

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) for establishing the fact of death or cause and manner of death of any person in the manner prescribed in AS 09.55.020 - 09.55.069;

(6) for the recovery of the possession of premises in the manner

provided under AS 09.45.070 - 09.45.160 when the value of the arrears and damage to the property does not exceed **$100,000** [$50,000];

(7) for the foreclosure of a lien when the amount in controversy does not exceed **$100,000** [$50,000];

(8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest, and attorney fees does not exceed **$100,000** [$50,000];

(9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving protective orders for domestic violence under AS 18.66.100 - 18.66.180.

* **Sec. 22.** Rule 16.1(c), Alaska Rules of Civil Procedure, is amended to read:

(c) Motion to Set Trial and Certificate. **Unless otherwise ordered by the court, a** [A] motion to set trial may not be filed until **after the meeting of parties under paragraph (n) of this rule has occurred and the scheduling order under Rule 16(b) has been issued** [105 DAYS AFTER SERVICE OF THE SUMMONS AND COMPLAINT]. A party seeking to obtain a trial date must serve and file a motion to set trial together with a certificate, signed by counsel, stating:

(1) That the issues in the case have actually been joined;

(2) That all parties have completed discovery or will have a reasonable opportunity to do so within the next 60 days;

(3) That the procedure for listing witnesses and exhibits and providing exhibit copies, as set forth in paragraph (d) of this rule has been completed;

(4) Whether trial by jury has been timely demanded;

(5) The estimated number of days for the trial, including estimates for each party's case and for jury selection;

(6) The names, addresses and telephone numbers of all attorneys and pro se parties who are responsible for the conduct of the litigation;

(7) Which, if any, statute or rule entitles the case to preference on the trial calendar;

(8) That the parties have complied with paragraph (k) of this rule.

* **Sec. 23.** Rule 16.1(n), Alaska Rules of Civil Procedure, is repealed and reenacted to read:

(n) **Meeting of Parties.** Except when otherwise ordered, the parties shall, as soon as practicable after the exchange of initial disclosures required under Rule 26(a)(1) and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case and to develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the proposed discovery plan. The proposed discovery plan shall indicate the parties' views and proposals concerning

(1) what changes should be made in the timing or forms of subsequent disclosures under the rules, including a statement as to when the disclosures required under Rule 26(a) were made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(4) whether a scheduling conference is unnecessary;

(5) whether there will be dispositive or partially dispositive motions filed in the case and whether other deadlines should be set aside pending resolution of the dispositive or partially dispositive motions by the court; and

(6) any other orders that should be entered by the court under Rule 16(b) and (c).

* **Sec. 24.** Rule 41(a), Alaska Rules of Civil Procedure, is amended by adding a new paragraph to read:

(3) Settlement Information. If a voluntary dismissal under this rule is the result of compromise or other settlement of the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice

of dismissal made under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the information required under AS 09.68.130 has been submitted to the Alaska Judicial Council. A stipulation of dismissal made under (1)[b] of this subsection must be accompanied by such a certification signed by or on behalf of all parties who have appeared in the action. The requirements of this paragraph do not apply to the types of cases listed in AS 09.68.130(c).

* **Sec. 25.** Rule 68, Alaska Rules of Civil Procedure, is repealed and reenacted to read:

Rule 68. Offer of Judgment. (a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10-day period following service of the offer. If, within 10 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

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

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065;

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

(c) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the court's award of attorney's fees under Rule 82 shall be adjusted as follows:

(1) if the offeree is the party making the claim, the court shall adjust its award of attorney's fees to the offeree as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Rule 26(a)(1), the attorney's fees award shall be reduced by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Rule 26(a)(1) but more than 90 days before the trial began, the attorney's fees award shall be reduced by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be reduced by 20 percent;

(2) if the offeree is the party defending against the claim, the court shall adjust its award of attorney's fees to the offeror as follows:

(A) if the offer was served no later than 30 days after both parties made the disclosures required by Rule 26(a)(1), the attorney's fees award shall be increased by 50 percent;

(B) if the offer was served more than 30 days after both parties made the disclosures required by Rule 26(a)(1) but more than 90 days before the trial began, the attorney's fees award shall be increased by 30 percent;

(C) if the offer was served 90 days or less but more than 10 days before the trial began, the attorney's fees award shall be increased by 20 percent.

(d) When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made 90 days or less but more than 10 days before trial begins, if it is served not less than 10 days before the commencement of hearings to determine the amount or extent of liability.

* **Sec. 26.** Rule 72.1(g), Alaska Rules of Civil Procedure, is amended to read:

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the panel has been filed or until **60 days after selection of the panel** [80 DAYS HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

* **Sec. 27.** Rule 95(b), Alaska Rules of Civil Procedure, is amended to read:

(b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed **$10,000.00** [$1,000.00] against any attorney who practices before it for failure to comply with these rules or any rules promulgated by the supreme court.

* **Sec. 28.** Rule 1(a)(1), District Court Rules of Civil Procedure is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures required under Civil Rule 26(a) and to the taking by each party of the deposition of one or more opposing parties and of one additional person who is not a party.**

* **Sec. 29.** Rule 4, District Court Rules of Civil Procedure, is amended by adding a new subsection to read:

(b) Unless otherwise permitted by order of the court in exceptional cases and for good cause shown, all parties shall file a memorandum to set the case for trial, as set out in Civil Rule 40(b), no later than 180 days after service of the complaint on all parties to the case. The parties shall submit a joint memorandum to set the case for trial, which may state their separate positions if they do not agree concerning the information or estimates to be provided in the memorandum. The court shall set the trial to commence on a date not less than 30 and not more than 90 days after the filing of the memorandum to set the case for trial, unless a continuance is granted by the court under Civil Rule 40(e).

* **Sec. 30.** Rule 511, Alaska Rules of Appellate Procedure, is amended by adding a new subsection to read:

(e) **Settlement Information.** If a dismissal under (a) or (b) of this rule is the result of compromise or other settlement between the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A dismissal by agreement under (a) of this rule must be accompanied by a certification

signed by the attorneys of record for all parties that the information required under AS 09.68.130 has been submitted to the Alaska Judicial Council. A dismissal by the appellant or petitioner made under (b) of this rule must be accompanied by such a certification signed by the appellant's or petitioner's attorney of record. The requirements of this subsection do not apply to the types of cases listed in AS 09.68.130(c).

* **Sec. 31.** AS 08.64.326(a)(12); AS 08.68.270(10); AS 09.55.536, 09.55.560(2), and 09.55.560(3) are repealed.

* **Sec. 32.** Rules 16.1(k)(4) and 72.1, Alaska Rules of Civil Procedure, are repealed.

* **Sec. 33.** AS 09.17.020(a), (c), (d), and (e), as repealed and reenacted by sec. 7 of this Act, have the effect of amending

(1) Rule 49, Alaska Rules of Civil Procedure, by requiring the jury to conduct a separate proceeding for the determination of a punitive damages award after it has determined that punitive damages are allowed in a case; and

(2) Rule 26(b) and (d), Alaska Rules of Civil Procedure, by affecting the scope, limits, timing, and sequence of discovery allowed in a case.

* **Sec. 34.** AS 09.30.065, as amended by sec. 9 of this Act, has the effect of amending Rule 68, Alaska Rules of Civil Procedure, by altering the manner in which interest under AS 09.30.070 is adjusted under AS 09.30.065 when a judgment is not more favorable to the offeree than the offer.

* **Sec. 35.** AS 09.43.310 - 09.43.390, as enacted by sec. 12 of this Act, has the effect of amending Rule 100, Alaska Rules of Civil Procedure, by making the mediation process mandatory for certain civil cases in the superior court, Third Judicial District, and by expanding the scope of the rule to include other forms of alternative dispute resolution in addition to mediation.

* **Sec. 36.** AS 09.55.535(f), as enacted in sec. 15 of this Act, has the effect of amending Rule 79(b), Alaska Rule of Civil Procedure, by allowing the award of actual costs in certain actions.

* **Sec. 37.** AS 09.55.535(f), as enacted in sec. 15 of this Act, has the effect of amending Rule 82(b), Alaska Rule of Civil Procedure, by allowing the award of actual attorney fees in certain actions.

* **Sec. 38.** APPLICABILITY. (a) Sections 1, 9, 15, 21 - 23, 25 - 29, 31, and 32 of this Act apply to all civil actions filed on or after the effective date of those sections.

(b) Sections 3 - 8, 10, 11, 13, 16, 18, and 20 of this Act apply to all causes of action accruing on or after the effective date of those sections.

(c) Section 12 of this Act applies only to those civil actions covered by the pilot program for alternative dispute resolution established under the provisions of AS 09.43.310 - 09.43.390, as enacted by sec. 11 of this Act, filed on or after January 1, 1998.

(d) Sections 17, 24, and 30 of this Act apply only to all voluntary dismissals of civil actions filed with the state court on or after January 1, 1998.

(e) Section 19 of this Act applies to all insurers doing business in this state on or after the effective date of that section.

* **Sec. 39.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

* **Sec. 40.** REVISOR'S INSTRUCTION. Due to the addition of AS 09.43.310 - 09.43.390 in sec. 12 of this Act, in AS 21.89.100(d), the revisor of statutes shall substitute "AS 09.43.010 - 09.43.220" for "AS 09.43."

* **Sec. 41.** (a) AS 09.17.020(a), (c), (d), and (e), as repealed and reenacted by sec. 7 of this Act, take effect only if sec. 33 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(b) AS 09.43.310 - 09.43.390, as enacted by sec. 12 of this Act, takes effect only if sec. 35 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

(c) The amendments or the repeal of the following court rules takes effect only if all amendments and the repeal listed in this subsection receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska:

(1) Rule 16.1(c), Alaska Rules of Civil Procedure, as amended by sec. 22 of this Act;

(2) Rule 16.1(n), Alaska Rules of Civil Procedure, as amended by sec. 23 of this Act;

(3) Rule 16.1(k)(4), Alaska Rules of Civil Procedure, repealed by sec. 32 of

this Act.

(d) AS 09.68.130, as enacted by sec. 17 of this Act, takes effect only if secs. 24 and 30 both receive the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 42.** Sections 24 and 30 of this Act take effect January 1, 1998.

* **Sec. 43.** Except as provided in sec. 42 of this Act, this Act takes effect immediately under AS 01.10.070(c).

0-LS0169\B
Ford
3/11/97

CS FOR SENATE BILL NO. 15(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR TAYLOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil actions; amending Rules 16.1, 26, 41, 49, 72.1, 79(b), 82(b), 95, and 100, Alaska Rules of Civil Procedure; amending Rules 1 and 4, Alaska District Court Rules of Civil Procedure; amending Rule 511, Alaska Rules of Appellate Procedure; and repealing Rule 72.1, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. PURPOSE. It is the purpose of this Act to

(1) reduce the time and costs associated with civil litigation;

(2) improve access to justice for individuals and small businesses;

(3) provide for fair but not excessive compensation for persons injured through the fault of others;

(4) increase the predictability of case outcomes to reduce inappropriate litigation and settlement behavior; and

(5) collect information on the civil justice system and on the insurance industry to inform the public policy debate on tort reform related issues.

* **Sec. 2.** AS 06.05.473(h) is amended to read:

(h) After the payment of all other claims, including interest at the rate <u>of 10.5 percent a year</u> [ESTABLISHED UNDER AS 09.30.070], the department shall pay claims that are otherwise valid but that were not filed within the time prescribed.

* **Sec. 3.** AS 09.10.050 is repealed and reenacted to read:

Sec. 09.10.050. Certain property actions to be brought in six years. Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property.

* **Sec. 4.** AS 09.10 is amended by adding a new section to read:

Sec. 09.10.065. Contract actions to be brought in three years. Unless an action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, excepting those described in AS 09.10.040 or as otherwise provided by law.

* **Sec. 5.** AS 09.10.070(a) is amended to read:

(a) A person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) <u>for taking, detaining, or injuring personal property, including an action for its specific recovery; (3)</u> upon a statute for a forfeiture or penalty to the state; or <u>(4)</u> [(3)] upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

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

(c) The limit under (b) of this section does not apply to damages for <u>severe</u> disfigurement or severe physical impairment.

* **Sec. 7.** AS 09.17.020 is repealed and reenacted to read:

Sec. 09.17.020. Punitive damages. (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrent with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed,