

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

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decision. An insurer with control over defense and settlement must at all times act in good faith, and it may not insulate itself from a bad faith excess judgment by simply obtaining a hold harmless agreement from its insured.<sup>1329</sup>

Accordingly, even when an insurer acts at the insistence of the insured in refusing to settle the claim, an insurer is still susceptible to a bad faith judgment against it. An insurer must operate as a fiduciary in the insured's best interest but the insurer cannot defer to the insured's wishes regarding settlement of the case.<sup>1330</sup>

An insurer can also be liable in bad faith for delays in offering policy limits, failing to disclose policy limits, and failing to inform the insured of settlement overtures. Liability still attaches for these omissions when the third-party plaintiff refuses settlement offers so long as there was an opportunity to settle the case at some point in the claim process.<sup>1331</sup> For example, the Third District Court of Appeal decided a case in which an insured's daughter seriously injured a pedestrian in a car accident. The pedestrian's attorney contacted the insurer and requested disclosure of the insured's policy limit. But, the attorney never made a specific monetary demand. Ultimately, the insurer tendered an offer of policy limits, despite the injured pedestrian's lack of demand. The offer was rejected. At trial, the jury returned a verdict against the insured for \$250,000. The insured filed suit against his insurer, alleging bad faith.<sup>1332</sup> The Third District Court found bad faith and noted:

Any question about the possible outcome of a settlement effort should be resolved in favor of the insured; the insurer has the burden to show not only that there was no realistic possibility of settlement within policy limits, but also that the insured was without the ability to contribute to whatever settlement figure that the parties could have reached. [citations omitted]. Whether the insurer's delay in disclosing the policy limits foreclosed settlement negotiations and prevented an offer to settle is a relevant and material fact.<sup>1333</sup>

Thus, there is an affirmative duty on the part of the insurer to seek settlement of a claim against the insured within the policy limits. When

<sup>1329</sup> Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 786 (Fla. 1980).

<sup>1330</sup> See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 120-121.

<sup>1331</sup> See Powell v. Prudential Property & Casualty Ins. Co., 504 So. 2d 12 (Fla. 3d DCA 1991), rev. denied, 598 So. 2d 77 (Fla. 1992).

<sup>1332</sup> While the Powell v. Prudential Property & Casualty Ins. Co. case arose in a general tort context, the same result would have existed in the medical malpractice context, substituting in the fact pattern a doctor for the car driver and an injured patient for the pedestrian.

<sup>1333</sup> Id. at 14-15.

the insurer fails to obtain a settlement, it then has the burden of demonstrating that the plaintiff would not have accepted a settlement offer within policy limits at any time.

Furthermore, under section 627.4147, Florida Statutes, all medical malpractice insurance policies must contain a clause authorizing the insurer "to determine, to make, and to conclude, without the permission of the insured, any . . . settlement offer . . . if the offer is within the policy limits."<sup>1334</sup> This statute further proclaims that it "is against public policy for any insurance . . . policy to contain a clause giving the insured the exclusive right to veto any . . . settlement offer . . . when such offer is within the policy limits."<sup>1335</sup> The result of this provision is that the insurance carrier is expected to make an independent evaluation of the claim and to act accordingly, including settling the case, regardless of the insured's position as to whether settlement is appropriate. These statutory provisions place pressure on the insurer to settle claims filed against their insureds, at the risk of being liable to either the insured or a third-party plaintiff for the entire judgment rendered against the insured, and irrespective of the coverage limits of the insured's policy.

Despite this pressure to settle claims, however, the statutes also place a constraint on the insurer's ability to settle when the insured objects to the settlement. Section 627.4147(1)(b), Florida Statutes, also contains the following language: "any offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interest of the insured." This standard is open to many interpretations, including the insured's out-of-pocket expense, financial position, and the impact settlement may have on future employment possibilities or the insured's professional reputation.

The damages recoverable in bad faith actions under present law in Florida, as well as the other standards discussed above, have little relationship to the public purposes of asset protection, making specified coverage available, or encouraging reasonable behavior.<sup>1336</sup> When a \$5,000,000 judgment is entered against an insured because of the insurer's failure to settle, the implication is that the "real" amount of the insured's damages is \$5,000,000, when the insured may never have such an amount of reachable assets. Accordingly, the insurer is required to pay beyond the combination of its policy limits and the accumulated and future assets of the insured, with no rational basis. The conclusion is that the plaintiff is financially better off if the insurer behaves badly than if the insurer behaves properly.

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<sup>1334</sup> Section 627.4147(1)(b), Florida Statutes. This mandate does not apply to all liability insurance contracts but almost all contracts give the insurer the exclusive right to settle.

<sup>1335</sup> Section 627.4147(1)(b)1, Florida Statutes.

<sup>1336</sup> See Vincent Rio, J.D., Summary of Comments to Medical Malpractice Task Force 1.

Like Florida, California allows bad faith causes of action when an insurer breaches its duty to attempt to settle meritorious claims.<sup>1337</sup> However, California does not require that the insured contract away his right to trial when the insurer feels that the case should be settled. Thus, when an insured refuses to consent to settle and the insurance contract allows the insured to veto settlement, the insurer cannot be held liable in bad faith for refusing to settle the plaintiff's claim against the insured's consent.<sup>1338</sup>

Other states also expressly articulate the standards that constitute bad faith acts. For example, Illinois law provides that seven factors should be considered in determining whether the insurer has failed to act in the good faith interests of the insured. These factors include:

- whether the insurer has considered the advice of the insurer's own adjuster;
- whether the insurer refuses to negotiate a settlement;
- what advice the insurer receives from its defense counsel;
- whether the insurer keeps the insured fully aware of the claimant's willingness to settle;
- whether the insurer conducts an adequate investigation into the claim;
- whether there exists a substantial prospect of an adverse verdict; and
- the potential for damages that exceed the policy limits.<sup>1339</sup>

Finally, Michigan is instructive as to an example in limiting damages in bad faith cases. In Michigan, the relationship with the insured is not a fiduciary relationship.<sup>1340</sup> On the other hand, the duty is greater than that of a buyer and seller of products and services. The duty of using good faith in settlement negotiations is a duty to protect the insured—it is of a fiduciary nature.<sup>1341</sup> The insurer must fulfill its policy-contracted obligation with the utmost loyalty to its insured.<sup>1342</sup>

Michigan law provides that bad faith may exist if the defense attorney advises the insurer that defense of the case is hopeless, recommends settlement, the insurer refuses to settle, and the jury returns a judgment in excess of policy limits.<sup>1343</sup> Arbitrary, reckless, indifferent, or intentional disregard of the interest of the insured amounts to bad faith.<sup>1344</sup>

<sup>1337</sup> See section 790.03, California Statutes.

<sup>1338</sup> See *Carlile v. Farmers Ins. Exchange*, 219 Cal. Rptr. 773 (Cal 3d DCA 1985).

<sup>1339</sup> See *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100 (Ill. 5th DCA 2002).

<sup>1340</sup> *Drouillard v. Metropolitan Life Ins. Co.*, 107 Mich. App. 608, 621 (1981).

<sup>1341</sup> *Lisiewski v. Countrywide Ins. Co.*, 75 Mich. App. 631, 637 (1977).

<sup>1342</sup> *Meirthew v. Last*, 376 Mich. 33, 38 (1965).

<sup>1343</sup> *City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645 (1929).

<sup>1344</sup> *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 426 Mich. 127 (1986). This case outlines twelve factors that the "factfinder may take into account . . . in deciding whether or not the defendant

The most unique principle of Michigan's bad faith law is the insurer's liability for bad faith in the case of excess judgments. Michigan law limits the bad faith exposure of an insurer "by precluding collection on the judgment from the insurer beyond what is or would actually be collectable from the insured."<sup>1345</sup> In Frankenmuth Mutual Ins. Co. v. Keeley, Charles Keeley, the son of the insured, shot the plaintiff, Boone, rendering Boone a quadriplegic.<sup>1346</sup> The plaintiff demanded policy limits of \$50,000, but the insurer initially offered to settle for \$20,000 on the basis that the policy excluded intentional acts. Within the month and after the plaintiff filed his lawsuit, the insurer offered to settle for \$25,000. Two and one-half years later, after much litigation over the claim and the coverage, the insurer tendered policy limits. Boone rejected this offer. The case proceeded to trial and the jury determined the damages to be \$500,000, but found that the plaintiff, Boone, was 50 percent at fault. Judgment was entered against Keeley for \$250,000. Boone agreed to forbear any action against Keeley for the excess judgment, and Keeley agreed to pursue action against the insurer for the excess judgment and to pay any sums recovered from the insurer to the plaintiff.<sup>1347</sup>

On first hearing, the majority of the Michigan Supreme Court held that "the insurer is liable for the excess without regard to whether the insured has the capacity to pay."<sup>1348</sup> On rehearing, the Michigan Supreme Court essentially reversed itself and limited the bad faith liability of the insurer to the amount that can actually be collected from the insured.<sup>1349</sup>

The reasoning behind the Michigan rule on bad faith liability rests on the issue of causal relationship to damages. The question was "whether . . . there was a causal relationship between the bad-faith conduct that the [judge] found in the handling of the claim and the loss claimed by Keeley resulting from the entry of the judgment in the amount of \$250,000."<sup>1350</sup> Accordingly, the question should be whether the insurer caused damage to

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[insurer] acted in bad faith . . ." *Id.* at 137-139. The Florida Legislature may want to consider adopting some or all of these factors.

<sup>1345</sup> Frankenmuth Mutual Ins. Co. v. Keeley, 433 Mich. 525, 565 (1989). The quoted language is from the dissenting opinion of Justice Levin; however, Justice Levin's dissent was adopted by the majority in Frankenmuth Mutual Ins. Co. v. Keeley (on rehearing), 436 Mich. 372, 376 (1990).

<sup>1346</sup> *Id.* at 547.

<sup>1347</sup> *See id.* at 547-549.

<sup>1348</sup> *Id.* at 528. The court also adopted what is known as the "judgment rule," as contrasted with the "prepayment rule." The "prepayment rule" requires that the insured make some payment on the judgment before pursuing an action for bad faith against the insurer, while the judgment rule simply requires the entry of a judgment. *Id.* at 553. This portion of the majority opinion was adopted by the dissent on first hearing and then by the majority on rehearing. *See Frankenmuth Mutual Ins. Co. v. Keeley* (on rehearing), 436 Mich. 372 (1990).

<sup>1349</sup> *Id.* at 565.

<sup>1350</sup> *Id.* at 551.

the insured, and if so, what actual damage the insurer sustained. In reaching the decision that the Michigan law should be that the insurer is not required to pay more than the insured is able to pay on the judgment, the Michigan Supreme Court quoted extensively from a New York Court of Appeals case and from Judge Keeton:

I do not suggest—although there are a number of decisions so holding—that an insured must pay the judgment before he, or another on his behalf, is able to proceed against a bad faith insurer. However, there must be some showing that he has been damaged. In the case before us, there is not the slightest evidence, or even intimation, that the insured was harmed by the judgment, that he had any assets which were imperiled or that either his reputation or credit was impaired.

In short, the complaint in this case should be dismissed not only because there is no evidence that the insurer acted in bad faith but also because there is no evidence that the insured suffered any damaged.<sup>1351</sup>

Judge Keeton has expressed the following view:

When it seems almost certain the insured will never pay anything at all on the excess judgment if the claim against the insurer is denied, arguments that the insured has been damaged by the increase in debts are rather weak support for any cause of action at all, much less for a measure of damages equal to the amount of the increase in the insured's debts. However, other courts have concluded that the entry of judgment against a person constitutes a loss and that the insured's "loss does not turn on whether the judgment has been satisfied." Since, absent a discharge of the obligation through a bankruptcy proceeding, the third party's judgment can remain as an outstanding obligation for extended periods of time, in many circumstances there is considerable uncertainty in regard to predicting whether the insured may ultimately have resources or assets that may be taken to satisfy some portion of the judgment.

Third party claimants are not in a position to assert that they were harmed as a result of the insurer's conduct in regard to having not settled the tort claim. The insurer's duty was to the insured, not to the claimant. Furthermore,

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<sup>1351</sup> Gordon v. Nationwide Mutual Ins. Co., 30 N.Y. 2d 427, 441, 285 N.E.2d 849 (1972).

in one sense, a third party benefits from the insurer's refusal to settle because the insurer's refusal to settle resulted in the claimant's obtaining a judgment in excess of the amount the claimant had offered to accept in settlement. Thus, although the third party claimant deserves further compensation, the theoretical justification for imposing liability on the insurer does not warrant a recovery by such a claimant any more than the innocent victims of an under-insured tortfeasor would be entitled to indemnification beyond the amount of the applicable coverage from a liability insurer who had not refused a settlement.<sup>1352</sup>

The Task Force finds that the Michigan law that precludes the collection on the judgment from the insurer beyond what is or would actually be collected from the insured is sound in principle, public policy, and reasoning.

### Information Presented to the Task Force

The Task Force heard testimony that certain aspects of bad faith law have resulted in costing consumers more than it benefits them.<sup>1353</sup> According to testimony, one of the most frequent complaints of defendant medical providers is that they are not responsible for the plaintiff's injury and that they do not want to settle the case because they want to prove their "innocence" in court.<sup>1354</sup> However, insureds with low policy limits, as compared to the possible amount of a jury verdict, are often required by the law of bad faith to accept settlement offers that otherwise would be rejected.<sup>1355</sup>

For example, a physician is sued for \$5,000,000 by a plaintiff who alleges medical malpractice on the part of the physician. The physician has \$300,000 in liability coverage and \$100,000 of reachable assets. The physician, based on evaluation of the case, appears to be innocent and when this insurer refuses to settle based on such an evaluation, he or she prevails 90 percent of the time. Under current law, if this case is lost at trial, the insurer would be liable for the \$5,000,000 verdict. The difference of \$4,600,000 was not caused by the insurer's bad faith but the plaintiff is the recipient of the windfall anyway.<sup>1356</sup> This scenario is the environment in which cases are litigated and it forces insurers to settle

<sup>1352</sup> Frankenmuth Mutual Ins. Co. v. Keeley, 433 Mich. 525, 554-556 (1989).

<sup>1353</sup> See Vincent Rio, J.D., Summary of Comments to Medical Malpractice Task Force 2.

<sup>1354</sup> See Tommy Dukes, J.D., testimony, Oct. 21, 2002, pg. 239.

<sup>1355</sup> See Vincent Rio, J.D., testimony, Nov. 22, 2002, pg. 121.

<sup>1356</sup> See Vincent Rio, J.D., Summary of Comments to Medical Malpractice Task Force 1-2.

cases at, near, or even somewhat above policy limits to avoid bad-faith claims.<sup>1357</sup>

The following solutions were provided to the Task Force:

- Restore the insured as the owner of the bad faith cause of action.<sup>1358</sup>
- The common law cause of action, as outlined by the Supreme Court in 1980<sup>1359</sup> should be preempted by the Florida Legislature so that only insureds, not third-party plaintiffs, can bring a bad faith cause of action against its insurer.<sup>1360</sup> In addition, section 624.155, Florida Statutes, should be amended to limit the proper party in a bad faith cause of action to the insured only.
- Legislatively identify common sense standards of what constitutes bad faith.<sup>1361</sup>
- The current law is vague as to what defines bad faith. Examples of some standards that were presented to the Task Force, include: (1) the insurer's proper investigation of a claim, providing an insurer with a reasonable period in which to investigate all aspects of potential liability of the insured and of the plaintiff's potential damages without being in bad faith; (2) no bad faith if the insurer tenders its policy limits sixty days before trial; (3) the insurer's willingness to negotiate, allowing the insurer to consider the interest of all its insureds in defending claims that it believes to be overstated; (4) clarify that an insurer has no affirmative duty to initiate settlement negotiations when it believes such an action would be detrimental to the ultimate settlement; (5) disallow bad faith claims when an insured refuses to consent to a proposed settlement and/or when the insurer agrees to indemnify the insured for excess judgments collectible from the insured's reachable assets; (6) the insurer's consideration of the advice of its defense counsel; and (7) whether the insurer informed the insured of the offer to settle within the limits of coverage, the right to retain personal counsel and the risks of litigation.<sup>1362</sup>

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<sup>1357</sup> *Id.* at 2.

<sup>1358</sup> See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 117-118.

<sup>1359</sup> See *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980).

<sup>1360</sup> Section 624.155(7), Florida Statutes, currently provides that "[t]he civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." *Id.*

<sup>1361</sup> See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 117-118.

<sup>1362</sup> See Vincent Rio, J.D., *Summary of Comments to Medical Malpractice Task Force 3*.

- Calculate the maximum liability for bad faith as the amount of damages that were actually caused by the acts of bad faith, limited by the amount of the reachable assets of the insured.<sup>1363</sup>
- The bad faith claimant should be required to prove that he has sustained actual financial damage as a result of the bad faith of the insurer and the claim of bad faith should be limited to such actual damage. In addition, the insured should be entitled to retain his assets while the insurer pays any excess judgment, up to the amount of the reachable assets of the insured. If the financial circumstances of the insured improved over the life of the judgment, the insurer should be responsible for such excess payments.<sup>1364</sup>

In response, the Task Force heard testimony that the current state of the law in Florida adequately protects insured and ensures that insurers protect insureds' assets.<sup>1365</sup> Insurers control the defense of the case and decide when and if to settle.<sup>1366</sup> The plaintiffs' bar testified that because judgments in Florida are effective for twenty years, a proposal to limit the bad faith exposure of an insurer to the reachable assets of the insured at the time of judgment may expose the insured's future assets.<sup>1367</sup>

## Findings and Recommendations

The Task Force finds that there is a problem with the state of the law in Florida on the issue of bad faith. The problem is that the cost of settlement made under the veil of the bad faith law in Florida is a major factor in raising loss costs that insurers must pay and, in turn, in raising malpractice insurance premiums. The problem stems from the fact that third parties can sue the insurer for bad faith, when the good-faith duty is owed by the insurer to the insured. There is no corresponding good faith duty that extends from the insurer to injured plaintiffs who are not part of the insured/insurer contractual relationship. The law on bad faith is lacking in logical standards that constitute (or at least evidence) bad faith on the part of an insurer. Finally, a limitation on the amount of damages for which an insurer would be liable would promote consistency and predictability in the market.

The Task Force finds calculating the damages recoverable in an action for bad faith based on the actual damages caused by the insurer would have several beneficial effects. First, this calculation would allow insurers to

<sup>1363</sup> See Vincent Rio, J.D., testimony, Nov. 22, 2002, pgs. 123-124.

<sup>1364</sup> *Id.* at 121.

<sup>1365</sup> See Lake Lytal, J.D., testimony, Nov. 22, 2002, pgs. 123-124.

<sup>1366</sup> *Id.* at 124.

<sup>1367</sup> *Id.* at 126.

honor requests from well-informed insureds who prefer that actions be defended rather than settled because of the threat now posed by Florida bad faith standards and calculations of damages. Second, this calculation would enable insurers to more effectively resist the coercive effect of these standards and measurements of damage, which raise the costs of settlements and premiums. The assets of insureds would remain fully protected. The protection of assets that are replaced by insurance may logically be expected to encourage the purchase of insurance.

The Task Force recommends the following legislative solutions:

**Recommendation 1.** The Legislature should restore the insured as the owner of the bad faith cause of action. The common law cause of action, as outlined by the Supreme Court in 1980<sup>1368</sup> should be legislatively cured so that the Florida Legislature preempts that rule and only insureds, not third-party plaintiffs, can bring a bad faith cause of action against its insurer.<sup>1369</sup> In addition, section 624.155, Florida Statutes, should be amended to also limit the proper party in a bad faith cause of action to the insured only.

**Recommendation 2.** The Legislature should articulate standards of what constitutes bad faith on the part of an insurer.

**Recommendation 3.** The Legislature should require that the maximum liability for bad faith be calculated as the amount of damages that were actually caused by the acts of bad faith, limited by the amount of the reachable assets of the insured.

**Recommendation 4.** The Legislature should require that, if an insurer is found to be in bad faith or settles a case for bad faith, the Department of Insurance be notified of such finding.

**Recommendation 5.** The Department of Insurance should conduct an investigation into the specific allegations of the insurer and into the insurer's general practices and should take necessary action against the insurer to punish and prevent future bad faith practices.

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<sup>1368</sup> See *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980).

<sup>1369</sup> Section 624.155(7), Florida Statutes, currently provides that "[t]he civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state." *Id.*

## Alternative Insurance Products

### Issue

The Task Force voted at its January 8, 2003 meeting, by a 5-0 vote, to examine the following issues with respect to alternative insurance products in the context of medical malpractice cases:

- Should the Department of Insurance be directed to work with physicians and hospitals to expand self-insurance options?
- Should the Legislature create tax and other regulatory incentives for the creation of mutual, trust, and other physician-owned insurance companies to provide coverage?
- Should the patient compensation fund be reactivated?
  - Should there be mandatory participation by physicians and hospitals?
  - Should there be caps on payments?

### Current Situation

The Florida Insurance Code provides several alternative insurance products that can be used by healthcare providers to provide medical malpractice insurance coverage. These include commercial Self-Insurance Funds in section 624.462, Florida Statutes, Risk Retention Groups in section 627.942, Florida Statutes, and Medical Malpractice Risk Management Trust Funds in section 627.357, Florida Statutes.

Only the Medical Malpractice Risk Management Trust Fund statute is a specific alternative for commercial medical malpractice insurance; the other forms of self-insurance are available to any group providing self-insurance. A Medical Malpractice Risk Management Trust Fund is authorized to purchase insurance, specific excess insurance, and aggregate excess insurance. The fund is authorized to hire consultants for loss prevention and claims management coordination, and pay claims; the "prudent" investment of trust funds is also authorized. The Department of Insurance is directed to adopt rules to implement the section including ensuring the funds meet a requirement that a trust fund created pursuant to the act maintain sufficient reserve to cover contingent liabilities in the event of a dissolution.

The funding of a trust fund created pursuant to the section is provided by premiums paid by members. Additionally, each member has a contingent

assessment liability to pay actual losses when there is a deficiency due to claims or liquidation. A member's share of any deficiency is to be computed by applying against the member's premium the ratio of the total deficiency to the total premiums earned. If a member fails to pay the assessment, the other members are proportionately liable for that amount. This assessment must be made if assets of the trust fund are insufficient to discharge the funds liabilities and meet the requirements of law or if a judgment remains unpaid for thirty days.

The Department of Insurance must review and approve all expense factors related to rates before a new rate can be implemented. For the Department to approve rates and the associated expense factors, the rates must be justified and reasonable for the benefits and services provided.

The statute provides that the premiums, contributions, and assessments are subject to taxation at 1.6 percent instead of the 1.75 percent provided in section 624.509(1) and (2), Florida Statutes, for insurance premiums and assessments generally.

In 1992, the statute was amended to provide that no Medical Malpractice Risk Management Trust Fund could be formed after October 1, 1992. Currently there are only two trust funds in existence: the South Pinellas Medical Malpractice Risk Management Trust Fund, and the Central Dade Medical Malpractice Risk Management Trust Fund.

## Information Presented to the Task Force

Speakers on both sides of the medical malpractice issue discussed the need to reactivate the provisions of section 627.357, Florida Statutes, to again allow physicians and hospitals to create self-insurance funds. Speakers agreed that making this alternative form of insurance available would provide a viable insurance option to healthcare providers.

Mr. Neal Roth indicated physicians and hospitals needed the authority to create the self-insurance trust funds.<sup>1370</sup> To encourage the creation of these trust funds, Mr. Roth suggested the Legislature should provide tax incentives such as exemption from the tax on premiums and exemption of the companies from payment to the guarantee fund. He also suggested the Department of Insurance should be given additional authority to review the capitalization requirements for these trust funds.

Mr. Bruce Hill, an Orlando attorney who represents hospitals, also recommended removing the prohibition on creation of self-insured trust

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<sup>1370</sup> Neal Roth, J.D., testimony, Nov. 22, 2002, pgs. 129-130.

funds.<sup>1371</sup> Mr. Hill was general counsel and chief trial counsel for the Florida Hospital Trust Fund created in the 1970s in response to that medical malpractice insurance crisis. Mr. Hill testified that the fund worked well until 1995, when the insurance companies under-cut the rates to the point it was more cost effective for the hospitals to purchase commercial insurance.<sup>1372</sup> At that point, the trust fund stopped selling insurance. Currently, all of the claims against the fund have been paid and an excess \$30 million is to be refunded to the member hospitals.<sup>1373</sup> Mr. Hill testified that the fund was heavily regulated by the Department of Insurance to ensure the rates were actuarially sound and the investments were secure. He explained that the reason the fund worked was a low expense ratio resulting from no advertising and no agents. Additionally, the members who ran the trust fund had an interest in ensuring that the fund operated cost effectively because they had to pay part of the bill if assessments became necessary. Finally, the member-run trust fund encouraged the participating hospitals to maintain better risk management programs to reduce claims.<sup>1374</sup>

David McKinney, an executive with Pro National Assurance Company, pointed out some of the concerns with newly-formed alternative risk groups.<sup>1375</sup> First, they face the same uncertainty in claims experience that the insurance companies are facing and the managers often do not have the experience to assess those risks. This allows mistakes in underwriting and claims evaluation.<sup>1376</sup> Because of the significant lag time for claims to be made these problems can be long term in nature. Additionally, the physician-run operations are subject to losing members when the insurance market softens and commercial insurance rates decrease.<sup>1377</sup> His last major point was the fact that under these funds, the members are jointly and severally liable for all claims. He stated the key to a strong fund was having "good people" running the insurance program who know what they are doing.<sup>1378</sup>

Mr. Steve Roddenberry<sup>1379</sup> discussed the regulation of risk retention groups with the Task Force. After an extensive discussion of commercial insurance, Mr. Roddenberry brought up concerns regarding the regulation of risk retention groups.<sup>1380</sup> The rates and forms of risk retention groups domiciled outside of Florida are not subject to review by the Department

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<sup>1371</sup> Bruce Hill, J.D., testimony, Nov. 22, 2002, pgs. 143, 146-150.

<sup>1372</sup> *Id.*

<sup>1373</sup> *Id.*

<sup>1374</sup> *Id.*

<sup>1375</sup> David McKinney, testimony, Nov. 22, 2002, pgs. 151-155.

<sup>1376</sup> *Id.*

<sup>1377</sup> *Id.*

<sup>1378</sup> *Id.*

<sup>1379</sup> Steve Roddenberry, Director, Department of Insurance.

<sup>1380</sup> Steve Roddenberry, testimony, Nov. 4, 2002, pg. 401.

of Insurance.<sup>1381</sup> Further, they do not have the same minimum capital or surplus requirements as insurance companies and they are not eligible for the guarantee fund if a failure should occur.<sup>1382</sup>

## Findings and Recommendations

The Task Force finds the healthcare community has an option to address medical malpractice self-insurance programs. Further, the Task Force finds that the Department of Insurance does not have sufficient rule-making authority to provide protection to the healthcare professionals and the victims of medical malpractice utilizing or making claims against self-insurance funds.

The Task Force recommends the Legislature encourage the use of self-insurance funds by healthcare providers and expand the rulemaking authority of the Department of Insurance to adopt rules providing for better regulation of the self-insurance programs to ensure they remain solvent and provide the insurance coverage purchased by participants.

The Task Force finds that removing the limitation on the creation of Medical Malpractice Risk Management Trust Funds would provide an additional opportunity for medical facilities and providers to have insurance rather than "go bare," quit practicing medicine, or reduce services provided. Additionally, the creation of these funds would increase the opportunities to ensure that injured parties are compensated.

**Recommendation 1.** The Legislature should repeal the prohibition against creating Medical Malpractice Risk Management Trust Funds in section 627.357, Florida Statutes.

**Recommendation 2.** The Legislature should encourage the creation of self-insured options for healthcare providers.

**Recommendation 3.** The Legislature should expand the rulemaking authority of the Department of Insurance for self-insurance programs to ensure they remain solvent and provide the insurance coverage purchased by participants.

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<sup>1381</sup> *Id.*  
<sup>1382</sup> *Id.*

## Insurance Code Reform

### Issue

The Task Force voted at its January 16, 2003 meeting, by a 5-0 vote, to examine the following issues with respect to insurance code reform:

- Should the Department of Insurance be authorized to require insurers to provide:
  - How much insurers pay for the different categories of damages;
  - How much claimants actually received in settlements or verdicts that are reduced post trial; and,
  - How much insurers pay in cases involving multiple defendants?
- Should the Department of Insurance prohibit punitive damages or bad faith judgments from being included in the rate base?

### Current Situation

Section 627.912, Florida Statutes, requires all insurance companies, self-insurers, and joint underwriting associations providing professional liability insurance to a healthcare practitioner<sup>1383</sup> to report any claim or action for damages for personal injuries claimed to have been caused by error, omission, or negligence in the performance of the insured's professional services, or based on a claim the services were performed without consent. These reports must be made only if the claim resulted in a final judgment or a settlement in any amount.<sup>1384</sup> The reports must contain the following specific information:

- (2) The reports required by subsection (1) shall contain:
  - (a) The name, address, and specialty coverage of the insured.
  - (b) The insured's policy number.
  - (c) The date of the occurrence which created the claim.
  - (d) The date the claim was reported to the insurer or self-insurer.
  - (e) The name and address of the injured person. This information is confidential and exempt from the provisions

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<sup>1383</sup> Section 627.912 (1), Florida Statutes, provides the reports must be made for any practitioner of medicine licensed under chapter 458, any practitioner of osteopathic medicine licensed under chapter 459, any podiatric physician licensed under chapter 461, any dentist licensed under chapter 466, any hospital licensed under chapter 395, any crisis stabilization unit licensed under part IV of chapter 394, any health maintenance organization certificated under part 1 of chapter 641, any clinics included in chapter 390, any ambulatory surgical center defined in section 395.002, and any member of the Florida Bar.

<sup>1384</sup> Section 627.912(1), Florida Statutes.

of s. 119.07(1), and must not be disclosed by the department without the injured person's consent, except for disclosure by the department to the Department of Health. This information may be used by the department for purposes of identifying multiple or duplicate claims arising out of the same occurrence.

(f) The date of suit, if filed.

(g) The injured person's age and sex.

(h) The total number and names of all defendants involved in the claim.

(i) The date and amount of judgment or settlement, if any, including the itemization of the verdict, together with a copy of the settlement or judgment.

(j) In the case of a settlement, such information as the department may require with regard to the injured person's incurred and anticipated medical expense, wage loss, and other expenses.

(k) The loss adjustment expense paid to defense counsel, and all other allocated loss adjustment expense paid.

(l) The date and reason for final disposition, if no judgment or settlement.

(m) A summary of the occurrence which created the claim, which shall include:

1. The name of the institution, if any, and the location within the institution at which the injury occurred.

2. The final diagnosis for which treatment was sought or rendered, including the patient's actual condition.

3. A description of the misdiagnosis made, if any, of the patient's actual condition.

4. The operation, diagnostic, or treatment procedure causing the injury.

5. A description of the principal injury giving rise to the claim.

6. The safety management steps that have been taken by the insured to make similar occurrences or injuries less likely in the future.

(n) Any other information required by the department to analyze and evaluate the nature, causes, location, costs, and damages involved in professional liability cases.

Subsection (4)<sup>1385</sup> provides that the entity making the report is not liable for any action taken in reporting to the Department of Insurance. However, the department may impose a fine of \$250 per day per case, up

<sup>1385</sup> Section 627.912, Florida Statutes.

to \$1,000 per case for violations of the requirements of the section. The subsection related to fines only applies to claims accruing on or after October 1, 1997.<sup>1386</sup>

According to the Department of Insurance, some insurers may not report as required and others, such as self-insurers, off-shore captive companies, risk retention groups, and surplus lines companies do not report at all.<sup>1387</sup>

Section 456.049, Florida Statutes, requires medical professionals to report any claim or action for damages for personal injury if the claim was not covered by an insurer required to report under section 627.912, Florida Statutes, where the claim resulted in a final judgment or settlement in any amount or a final disposition with no payment on behalf of the licensee.<sup>1388</sup>

The report is to be filed with the Department of Health no later than sixty days after the occurrence of the judgment, settlement, or determination of no payment. The report must contain the following:

- (a) The name and address of the licensee.
- (b) The date of the occurrence which created the claim.
- (c) The date the claim was reported to the licensee.
- (d) The name and address of the injured person. This information is confidential and exempt from s. 119.07(1) and shall not be disclosed by the department without the injured person's consent. This information may be used by the department for purposes of identifying multiple or duplicate claims arising out of the same occurrence.
- (e) The date of suit, if filed.
- (f) The injured person's age and sex.
- (g) The total number and names of all defendants involved in the claim.
- (h) The date and amount of judgment or settlement, if any, including the itemization of the verdict, together with a copy of the settlement or judgment.
- (i) In the case of a settlement, such information as the department may require with regard to the injured person's incurred and anticipated medical expense, wage loss, and other expenses.

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<sup>1386</sup> Section 627.912(4), Florida Statutes.

<sup>1387</sup> Steve Roddenberry, Deputy Director of the Division of Insurer Services at the Florida Department of Insurance.

<sup>1388</sup> This includes injuries alleged to have been caused by error, omission, or negligence in the performance of the licensee's professional services or based on a claimed performance of professional services without consent.

(j) The loss adjustment expense paid to defense counsel, and all other allocated loss adjustment expense paid.

(k) The date and reason for final disposition, if no judgment or settlement.

(l) A summary of the occurrence which created the claim, which shall include:

1. The name of the institution, if any, and the location within such institution, at which the injury occurred.

2. The final diagnosis for which treatment was sought or rendered, including the patient's actual condition.

3. A description of the misdiagnosis made, if any, of the patient's actual condition.

4. The operation or the diagnostic or treatment procedure causing the injury.

5. A description of the principal injury giving rise to the claim.

6. The safety management steps that have been taken by the licensee to make similar occurrences or injuries less likely in the future.

(m) Any other information required by the department to analyze and evaluate the nature, causes, location, cost and damages involved in professional liability cases.

On a national level, each entity making a medical malpractice payment under a policy of insurance, self-insurance, or otherwise in settlement of or to satisfy a judgment related to medical malpractice on behalf of a healthcare provider must, report to the National Practitioner Data Bank.<sup>1389</sup> The information to be reported includes:

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitioner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

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<sup>1389</sup> 42 U.S.C. section 11131.

If an entity that is required to report to the data bank fails to report, it is subject to a civil penalty of not more than \$10,000 for each payment not reported.<sup>1390</sup>

Section 627.062, Florida Statutes, provides the requirements to be met by medical malpractice insurance companies in establishing rates and to be used by the Department of Insurance in reviewing the rates filed. The rates filed are not to be excessive, inadequate, or unfairly discriminatory.<sup>1391</sup> The Department is required to review all rate filings to determine if the rate is excessive, inadequate, or unfairly discriminatory.<sup>1392</sup> In making that determination, the statute requires the Department to consider a series of criteria, including the past and prospective loss experience within and without Florida.<sup>1393</sup> The statute does not provide guidance regarding what losses should be included in determining the loss experience. Further, there is no provision in the statute prohibiting insurance companies providing medical malpractice insurance from considering bad faith awards or punitive damage awards in determining rates.

Section 627.651, Florida Statutes, provides for the calculation of rates for automobile insurance. Subsection (12) of that section prohibits motor vehicle insurers from including any portion of a judgment or settlement resulting from a bad faith action or punitive damages award or settlement against the insurer in the insurers rate base or to justify a rate or a rate change. Further, the insurer may not include any attorney fees or costs related to defending a bad faith or punitive damages claim in establishing rates or justifying a rate change.

## Information Presented to the Task Force

According to Mr. Steve Roddenberry,<sup>1394</sup> the Department of Insurance does not warrant the accuracy of the data contained in the closed claim database. The database was established only to allow consumers to look up whether a doctor had a claim filed against him or her.<sup>1395</sup> It was never intended to be a "barometer of the medical malpractice insurance market."<sup>1396</sup>

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<sup>1390</sup> *Id.*

<sup>1391</sup> Section 627.062(1), Florida Statutes.

<sup>1392</sup> Section 627.62(2)(b), Florida Statutes.

<sup>1393</sup> Section 627.062(2)(b)1, Florida Statutes.

<sup>1394</sup> Steve Roddenberry, Deputy Director of the Division of Insurer Services at the Florida Department of Insurance.

<sup>1395</sup> Steve Roddenberry, testimony, Nov. 4, 2002, pg. 398.

<sup>1396</sup> *Id.* at 399.

Mr. Roddenberry also discussed the issue of whether punitive damages and bad faith claims should be included in the determination of rates. He stated that while Florida law does not specifically prohibit the inclusion of those losses in rate determinations for medical malpractice insurance policies, the Department of Insurance tries to exclude those losses now.<sup>1397</sup> He testified the Department does all it can "to ensure that bad faith losses are either immaterial or backed out of claim losses prior to considering a rate increase."<sup>1398</sup>

## Findings and Recommendations

The Task Force finds that section 627.912, Florida Statutes, does not require the covered insurers to provide information related to the amount paid in settlement or verdict for the categories of damages, the amount claimants actually received in settlements or verdicts reduced after a trial, or how much insurers pay in cases involving multiple defendants. Further, the information collected by the Department of Health pursuant to section 456.049, Florida Statutes, is not forwarded to the Department of Insurance for inclusion in the closed claims database. The information reported to the National Practitioner Data Bank is more comprehensive than the information reported to the Florida Department of Insurance. Further, the Task Force finds there is nothing in law that prohibits a medical malpractice insurer from including judgments or settlements of punitive damages or bad faith claims in establishing insurance rates or in the justification of a rate change.

**Recommendation 1.** The Legislature should authorize the Department of Insurance to require insurers to provide additional information on closed claims and to penalize the insurers for failure to provide the required data.

**Recommendation 2.** The Department of Health should forward the information collected pursuant to section 456.049, Florida Statutes, to the Department of Insurance

**Recommendation 3.** The Legislature should require every entity reporting to the National Practitioner Data Bank to report the same information to the Department of Insurance for inclusion in the closed claim data files.

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<sup>1397</sup> Steve Roddenberry, testimony, Jan. 16, 2003, pg. 47.

<sup>1398</sup> *Id.* at 48.

**Recommendation 4.** The Legislature should require the Department of Insurance to compile and review the collected data and fine those entities failing to fully comply with the requirements of law.

**Recommendation 5.** The Legislature should include in section 627.062, Florida Statutes, related to the setting of rates for most insurers, the provisions of section 627.0651(12), Florida Statutes, prohibiting the inclusion of payments made by insurers for bad faith or punitive damages claims.

## Chapter 11 - Conclusion

*"Our Harvard medical practice study found both the medical and legal systems in urgent need of change. We discovered that in New York's hospitals more than 100,000 patients were injured annually because of medical management practices, more than one-quarter from negligence. (More recently we have found a similar picture in Utah and Colorado.) Fewer than 7 percent of New York's injured patients received compensation through the courts, however, of those, fewer than 20 percent were injured because of negligence. So the legal system is even more prone to error than the medical system it attempts to judge."*

Howard Hiatt & Paul Weiler, No Fault Medical Coverage Would Cure Many Ills, The Boston Globe A27 (Nov. 5, 1999)

This Task Force has received extensive testimony and written information related to the current healthcare provider liability insurance crisis. Information was presented to the Task Force on the extent of the crisis, the impact of the crisis on the provision of healthcare in Florida and the nation, and the causes of the crisis. The suggested causes included the medical malpractice insurance underwriting cycle, insurance company investment losses, and the significant increases in medical malpractice insurance company claims losses resulting from the increased frequency and severity of claims. Based on the Task Force's analysis of the information presented, the Task Force set out findings in chapter 5 of this report related to the extent and causes of the crisis.

The Task Force also received extensive testimony and documentation related to proposed solutions to the healthcare provider liability insurance crisis. The Task Force examined an extensive list of proposals from various persons or entities meant to address the crisis in whole or in part. Chapters 6 through 10 of this report examine the law and related testimony as well as documentary information received by the Task Force regarding those proposed legislative changes the Task Force determined would have some impact in addressing this crisis and in minimizing or removing the possibility this problem will arise again in the future.

In chapters 6 through 10, the Task Force proposes a comprehensive package of reforms including changes to improve the quality of care provided in our medical institutions, improved healthcare provider discipline, tort reforms, reforms to the alternative dispute resolution process, and insurance reforms. The Task Force is of the opinion that,

while these comprehensive reforms are important, the centerpiece and the recommendation that will have the greatest long-term impact on healthcare provider liability insurance rates, and thus on the availability and affordability of healthcare in Florida, is a \$250,000 cap on non-economic damages.

In summary, the last few years have resulted in a marked decrease in profitability for professional healthcare liability insurance in the State of Florida. With an industry combined ratio of 184.2 percent, the viability of this market may be threatened if conditions continue to deteriorate.

The recommendations are listed below and are also listed, along with the discussions regarding each proposed recommendation, in chapters 6 through 10 of this report.

## Recommendations

### Healthcare Quality

**Recommendation 1.** The Legislature should establish a Patient Safety Authority, or an entity similar in concept, as both a short-term and long-term strategy to improve patient safety. There are two options that should be considered. The first option, which is recommended by the Institute of Medicine, is to have two systems, one for the mandatory reporting of adverse events and another for the voluntary reporting of near misses. The second option is to have a single entity, similar to the Patient Safety Authority in Pennsylvania, that would analyze all adverse events and near misses. Experts would analyze these data and make recommendations to facilities about how to reduce these events and near misses. Information would not be subject to discovery in lawsuits.

**Recommendation 2.** The Legislature should timely develop or adopt a statewide electronic medical record and physician medication ordering system. The system should be developed in partnership with hospitals, physicians, and other healthcare providers. The physician medication ordering system should be implemented first. The system could then be implemented in stages with a possible approach of beginning with a web-based data exchange platform that establishes interconnectivity between providers. Another possibility is to begin with business functions, which provide an early return on investment, and then include clinical functions.

**Recommendation 3.** The Legislature should consider creating a statutory public-private non-profit entity that would administer the Patient Safety Authority, statewide electronic medical record, and build an information technology infrastructure to support the delivery of healthcare that would include a statewide physician medication ordering system. Funding could

possibly come from a \$1 per year surcharge on all health professional licenses; all hospital, ambulatory care surgery center, nursing home, home health agency, and birth center discharges; and all individuals in managed care plans and insurance plans licensed under chapters 627 and 640, Florida Statutes. Health providers, insurers, businesses, and government would be represented on the governing board of directors. Options for implementation include:

- Affiliating with a university for the analysis of voluntarily-reported adverse events and "near misses."
- Contracting with an information technology firm(s) for a statewide physician medication ordering system, web-based platform for health provider interconnectivity, and electronic patient record.
- Developing a business plan and future financing strategy to supplement the \$1 annual surcharge, which will likely be necessary to achieve full implementation.
- Including in the business plan a strategy to begin with computerizing business functions, for providers to quickly achieve cost-savings due to automation efficiencies, and then include clinical functions.

**Recommendation 4.** The Legislature should be encouraged to authorize the two "no fault" medical malpractice demonstration projects recommended in the IOM November 2002 report, Fostering Rapid Advances in Healthcare, at a university healthcare system or statutory teaching hospital. This project would be governed by criteria compatible with that proposed by the IOM.

**Recommendation 5.** If Recommendation 4 is implemented, contingency fees for attorneys should be eliminated from the claims bill process in the no-fault demonstration project.

**Recommendation 6.** The Legislature should require each hospital and ambulatory surgery center to have a patient safety plan, a patient safety committee, and a patient safety officer. Members of the public should have representation on patient safety committees.

**Recommendation 7.** The Legislature should require healthcare providers to notify patients who experience serious medical injuries to be notified of the injury in person.

**Recommendation 8.** The Legislature should examine the feasibility of using Medicaid funding to create a pilot project for an electronic medical record and a physician medication ordering system for Medicaid patients.

**Recommendation 9.** The Legislature should examine the feasibility of developing a process in the Insurance Code for hospitals and other healthcare facilities to receive malpractice insurance discounts if they implement certified patient safety programs.

**Recommendation 10.** The Legislature should establish a high-technology simulation center for use by all health providers. Florida should encourage use of this center by practitioners in other states to help offset the costs for the center.

**Recommendation 11.** The Legislature should require all medical schools, nursing schools, and allied health schools to include in their curricula courses on patient safety and patient safety improvement.

**Recommendation 12.** The Legislature should require the Agency for Health Care Administration (AHCA) to conduct a study to determine if it is feasible to provide information to the public to help them make better healthcare decisions regarding the choice of a hospital. The information would not be presented in a "report card" format. AHCA should be provided with sufficient resources to conduct the study in cooperation with hospitals, physicians, and other healthcare providers and provide the Governor and Legislature with a report.

## Physician Discipline

**Recommendation 13.** The Legislature should allow the healthcare provider regulatory boards to appoint administrative law judges with expertise in the profession to hear standard of care cases.

**Recommendation 14.** The Legislature should statutorily provide that standard of care decisions are, as a matter of law, infused with overriding policy considerations best left to the healthcare provider regulatory boards.

**Recommendation 15.** The Legislature should authorize the healthcare provider regulatory boards to reassess and resolve conflicting evidence in standard of care cases based on the record in the case.

**Recommendation 16.** The Legislature should require physician profiles to provide professional qualifications information regarding physicians to consumers.

**Recommendation 17.** The Legislature should provide for an audit of the Department of Health's disciplinary process and closed claims files.

**Recommendation 18.** The Florida Legislature should strengthen Florida's peer review requirements so they can lead to earlier dismissal of meritless claims brought against hospitals by aggrieved physicians and protect physicians and hospitals from costly lawsuits and liability.

**Recommendation 19.** The Legislature should expand the DOH's subpoena authority to include the retrieval of patient records when the patient refuses to cooperate, is unavailable, or fails to execute a patient release. Records obtained under these circumstances would be confidential.

**Recommendation 20.** The Legislature should require that all first offense citations be non-disciplinary and non-reportable to the national data banks.

**Recommendation 21.** The Legislature should expand the timeframe for forwarding cases to the Division of Administrative Hearing from fifteen days to forty-five days when a demand for a formal hearing, pursuant to section 120.57(1), Florida Statutes, is received.

**Recommendation 22.** The Legislature should require all healthcare provider regulatory boards to designate those violations that may be handled in a one-time, non-reportable, and confidential mediation proceeding. Appropriate standard of care cases shall be included.

**Recommendation 23.** The Legislature should modify upward the dollar amount threshold for closed claims cases to be reported and investigated by the Department.

**Recommendation 24.** The Legislature should grant exclusive authority to the healthcare provider regulatory boards to determine the amount of administrative costs to be recovered when final action occurs and a respondent is disciplined.

**Recommendation 25.** The Legislature should change the burden of proof in disciplinary actions from the "clear and convincing evidence" standard, to the "greater weight of the evidence" standard, which is the same burden of proof for a medical malpractice case.

**Recommendation 26.** The Legislature should expand the healthcare provider regulatory board's rulemaking authority in the areas of Internet prescribing and sexual misconduct cases so as to better address critical areas of discipline.

## Tort Reform

### Cap on Non-Economic Damages

**Recommendation 27.** The Legislature should, in medical malpractice cases, cap non-economic damages at \$250,000 per incident. The Task Force believes that a cap on non-economic damages will bring relief to this current crisis. Without the inclusion of a cap on potential awards of non-economic damages in a legislative package, no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare. Although the Task Force was offered other solutions, there is no other alternative remedy that will immediately alleviate Florida's crisis of availability and affordability of healthcare. The evidence before the Task Force indicates that a cap of \$250,000 per incident will lead to significantly lower malpractice premiums.

The Legislature should commission and fund a study of the impact of the \$250,000 cap on non-economic damages. An interim report should be submitted to the Legislature five years after date of enactment.

### Communications with Subsequent Treating Physicians

**Recommendation 28.** The Legislature should amend the Florida Statutes to allow *ex parte* communication between defense counsel for a defendant in a medical malpractice lawsuit and the plaintiff's treating physicians.

**Recommendation 29.** As an alternative, the Legislature may consider requiring the plaintiff to execute a medical information release when filing a lawsuit that would allow for the defendant to conduct *ex parte* interviews with the plaintiff's treating physicians only in areas potentially relevant to the plaintiff's alleged injury or illness.

### Expert Witness Qualifications

**Recommendation 30.** The Legislature should examine ways to improve the use of in-kind experts at trial.

### Limitation on Liability Related to Emergency Services

**Recommendation 31.** The Legislature should retain the definition of "reckless disregard," as that term is currently defined by statute, as it is sufficient.

**Recommendation 32.** The Legislature should repeal references to patient stabilization in section 768.13(2)(b)2a, Florida Statutes.

### Sovereign Immunity

**Recommendation 33.** The Legislature should amend section 768.28, Florida Statutes, to define healthcare professionals providing services in emergency rooms or trauma centers as agents of the state for purposes of sovereign immunity.

### Periodic Payment of Damages

**Recommendation 34.** The Legislature should amend the Florida Statutes to allow the periodic payment of future non-economic damages.

**Recommendation 35.** The Legislature should amend the Florida Statutes to terminate the payment of future economic and non-economic damages on the death of the plaintiff.

### Pre-Suit Reform

**Recommendation 36.** The Legislature should require experts reviewing pre-suit claims and defenses and rendering opinions be qualified, in that they possess similar if not identical credentials and expertise in the field of healthcare services of the defendant's particular specialty.

**Recommendation 37.** The Legislature should require the expert who reviews pre-suit claims and defenses and renders opinions be subject to discovery and his or her testimony be admissible in any future proceeding.

## Joint and Several Liability

**Recommendation 38.** Joint liability has a negative impact on a medical malpractice insurer's ability to forecast future losses and contributes to the insurer's paid losses. Accordingly, the Legislature should amend section 768.81, Florida Statutes, to provide that a defendant's liability for both economic and non-economic damages be several only.

## Set Off of Settlement Proceeds

**Recommendation 39.** The Legislature should amend the set off statutes, sections 46.015 and 768.041, Florida Statutes, to clarify that set off amounts should be applied to jury damage awards, including both economic and non-economic damages, even when fault is several only.

## Alternative Dispute Resolution

### Mandatory Mediation

**Recommendation 40.** The Legislature should encourage pre-suit mediation by providing for confidentiality of any pre-suit mediation in a medical malpractice case in the same manner as is provided for mediation occurring after suit is filed.

**Recommendation 41.** The Legislature should amend the mandatory mediation provisions of section 766.108, Florida Statutes, to require mediation within 120 days of filing suit and to provide sanctions if a good-faith offer of settlement is refused.

**Recommendation 42.** The Legislature should not make admissible at trial the fact that mandatory mediation occurred or that offers of settlement were made, but should make this fact admissible for purposes of enforcing the attorney fees and costs. The mediator should maintain a report of the issues and facts presented at the mediation and the final settlement offers of each party at the mandatory mediation.

**Recommendation 43.** The Legislature should enact specific criteria similar to those in the offer of judgment statute to be considered by the court in making the determination as to how close in amount to the offer the judgment must be and the criteria to be used in evaluating the amount of the attorney fees and costs to be awarded in addition to the standards generally considered in awarding fees and costs.

**Recommendation 44.** The Legislature should require the court to consider, in addition to all other criteria, whether the issues and facts presented at mediation were significantly the same issues presented at trial.

### Voluntary Binding Arbitration

**Recommendation 45.** The Legislature should amend the definitions of "economic damages" and "non-economic damages" as provided in sections 766.202 and 766.207, Florida Statutes, to provide that such damages are recoverable in voluntary binding arbitration only if the claimant has the right to recover such damages under general law, including the Wrongful Death Act.

**Recommendation 46.** The Legislature should provide for an aggregate cap on non-economic damages in arbitrated cases of multiple defendants.

## Insurance Reform

### NICA

**Recommendation 47.** The Legislature should maintain the NICA program because of its success and should further consider and study the issues for broadening the NICA program, as discussed in this report.

### Bad Faith

**Recommendation 48.** The Legislature should restore the insured as the owner of the bad faith cause of action. The common law cause of action, as outlined by the Supreme Court in 1980 should be legislatively cured so that the Florida Legislature preempts that rule and only insureds, not third party plaintiffs, can bring a bad faith cause of action against its insurer. In addition, section 624.155, Florida Statutes, should be amended to also limit the proper party in a bad faith cause of action to the insured only.

**Recommendation 49.** The Legislature should articulate standards of what constitutes bad faith on the part of an insurer.

**Recommendation 50.** The Legislature should require that the maximum liability for bad faith be calculated as the amount of damages that were

actually caused by the acts of bad faith, limited by the amount of the reachable assets of the insured.

**Recommendation 51.** The Legislature should require that, if an insurer is found to be in bad faith or settles a case for bad faith, the Department of Insurance is to be notified of such finding.

**Recommendation 52.** The Department of Insurance should conduct an investigation into the specific allegations of the insurer and into the insurer's general practices and should take necessary action against the insurer to punish and prevent future bad faith practices.

### Alternative Insurance Products

**Recommendation 53.** The Legislature should repeal the prohibition against creating Medical Malpractice Risk Management Trust Funds in section 627.357, Florida Statutes.

**Recommendation 54.** The Legislature should encourage the creation of self-insured options for healthcare providers.

**Recommendation 55.** The Legislature should expand the rulemaking authority of the Department of Insurance for self-insurance programs to ensure they remain solvent and provide the insurance coverage purchased by participants.

### Insurance Company Regulation

**Recommendation 56.** The Legislature should authorize the Department of Insurance to require insurers to provide additional information on closed claims and to penalize the insurers for failure to provide the required data.

**Recommendation 57.** The Department of Health should forward the information collected pursuant to section 456.049, Florida Statutes, to the Department of Insurance.

**Recommendation 58.** The Legislature should require every entity reporting to the National Practitioner Data Bank to report the same information to the Department of Insurance for inclusion in the closed claim data files.

**Recommendation 59.** The Legislature should require the Department of Insurance to compile and review the collected data and fine those entities failing to fully comply with the requirements of law.

**Recommendation 60.** The Legislature should include in section 627.062, Florida Statutes, related to the setting of rates for most insurers, the provisions of section 627.0651(12), Florida Statutes, prohibiting the inclusion of payments made by insurers for bad faith or punitive damages claims.

HB

474

# HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: February 16, 2004

FURTHER REFERRALS:

Date of Committee Action: March 31, 2004

The JUDICIARY Committee considered:

HB 474

HOUSE BILL NO. 474

LIABILITY FOR AIRPORTS AND AIRSTRIPS

"An Act relating to civil liability associated with aircraft runways, airfields, and landing areas."




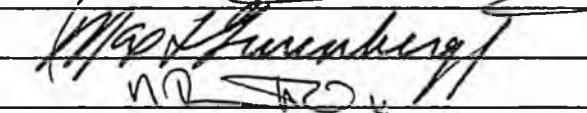
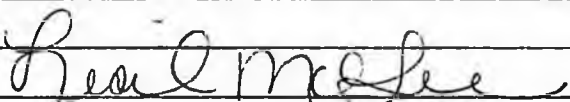
Recommends it be replaced with  HCS or  CS for HB 474 (JUD)  
 For Senate Bills with new title:  Technical Title  New Title: HCR \_\_\_\_\_  Same Title  New Title

- attach amendments
- add new referral to \_\_\_\_\_ Committee
- Letter of Intent \_\_\_\_\_ Committee

List of Abbrev for Depts.:  
 ADM  
 CED  
 COR  
 CRT  
 EED  
 DEC  
 DFG  
 GOV  
 HSS  
 LEG  
 LAW  
 IWF  
 MVA  
 DNR  
 DPS  
 REV  
 DOT  
 UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
<u>DOT</u>				✓

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	SANGIS	X			
	HOLM	✓			
	Gora		✓		
 NR 2004	Greenberg	✓		✓	
Chair: 	McBee	✓			
Chair:					

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB474-DOT-CO-3-19-04  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DOT&PF  
 Title Civil Liability relating to airports RDU Administration & Support  
 Component Commissioner's Office  
 Sponsor Holm  
 Requester House Judiciary Component No. 530

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Nona Wilson Phone 465-6973  
 Division Legislative Liaison Date/Time 3/19/04 12:10 PM  
 Approved by: John MacKinnon Date 3/19/2004  
 Agency Deputy Commissioner

OK to change " and " to " or on  
 HOUSE ROLL CALL - 2003/2004 *page 2*

Subject:

Date: *line 14*

Representative	Yea	Nay	Exc	Abs
<u>Anderson</u>	☺			
Berkowitz				
Chenault				
Cissna				
Coghill				
Crawford				
Croft				
Dahlstrom				
Fate				
Foster				
<u>Gara</u>	✓			
Gatto				
<u>Gruenberg</u>	~			
Guttenberg				
Harris				
Hawker				
Heinze				
<u>Holm</u>				
Joule				
Kapsner				
Kerttula				
Kohring				
Kookesh				
*Kott				
Lynn				
Masek				
<u>McGuire</u>	OK			
Meyer				
Morgan				
Moses				
Rokeberg				
<u>Samuels</u>	IM			
Seaton				
<del>Stevens</del> <u>Ogg</u>	○			
Stoltze				
Weyhrauch				
Whitaker				
Williams				
Wilson				
Wolf				
	Yea	Nay	Exc	Abs
<b>TOTALS</b>				

**CS FOR HOUSE BILL NO. 474(JUD)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY THE HOUSE JUDICIARY COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES HOLM, McGuire**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to civil liability associated with aircraft runways, airfields, and landing**  
2 **areas."**

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

4 **\* Section 1.** AS 09.65.093 is amended to read:

5 **Sec. 09.65.093. Civil liability relating to aircraft runways, airfields, and**  
6 **landing areas. (a) Except as provided in (c) of this section, a [A NATURAL]**  
7 **person who without compensation constructs, maintains, or repairs an aircraft**  
8 **runway, airfield, or landing area may not be held civilly liable, except for an act or**  
9 **omission that constitutes gross negligence or recklessness or intentional misconduct,**  
10 **for the injury to or death of a person or for damage to an aircraft, resulting from the**  
11 **use of the runway, airfield, or landing area to take off, land, park, or operate an**  
12 **aircraft.**

13 **(b) A [NATURAL] person who is the owner or operator of an aircraft runway,**  
14 **airfield, or landing area [THAT IS LOCATED ON PRIVATE LAND] is not civilly**

1 liable, except for an act or omission that constitutes gross negligence or recklessness  
 2 or intentional misconduct, for the injury to or the death of a person or for damage to an  
 3 aircraft, resulting from the use or attempted use of the runway, airfield, or landing area  
 4 to take off, land, park, or operate an aircraft while the runway, airfield, or landing  
 5 area [IS]

6 (1) is marked as closed by placement of a large "X" on the runway, in  
 7 accordance with Federal Aviation Administration guidelines [THAT IS READILY  
 8 VISIBLE FROM THE AIR]; and

9 (2) if listed or chartered, is designated as closed in the appropriate  
 10 aeronautical charts and publications published by the Federal Aviation Administration.

11 \* Sec. 2. AS 09.65.093 is amended by adding a new subsection to read:

12 (c) The immunity from civil liability under (a) of this section does not limit  
 13 the liability of an owner or operator of an aircraft runway, airfield, or landing area to a  
 14 provider of flight services and its passengers under contract with the owner or  
 15 operator.

The Amendment said "and" but  
 sponsor wants it to say "or."  
 Are you ok w/ that change  
 now for the JUD CS?  
 (If not, they'll have to do  
 floor A. or something.)

Please let me know :)  
 Thanks,  
 Vanessa

# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Rep. Tom Anderson, Vice-Chair  
Rep. Jim Holm  
Rep. Dan Ogg  
Rep. Ralph Samuels  
Rep. Les Gara  
Rep. Max Gruenberg



State Capitol, Room 120  
Juneau, AK 99801-1182  
(907) 465-4990  
Fax (907) 465-6592

## House Judiciary Committee

### Memorandum

**To:** Don Bullock, Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** March <sup>31</sup>25, 2004  
**Re:** CS Request

---

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1745\D, HB 474, incorporating the attached amendment (23-LS1745\D.1 as amended). The bill was passed out of committee today.

If you have any questions, please call me at 4990. Thank you!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

~~AMENDMENT #1~~  
AMENDMENT #2 - PASSED

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLM

TO: CSHB 474( ), Draft Version "D"

GRUENBERG

1 Page 1, line 6:

2 Delete "A [NATURAL]"

3 Insert "Except as provided in (c) of this section, a [A NATURAL]"

4

5 Page 2, following line 9:

6 Insert a new bill section to read:

7 "\*\* Sec. 2. AS 09.65.093 is amended by adding a new subsection to read:

8 (c) The immunity from civil liability under (a) of this section does not apply to

9 an owner or operator of an aircraft runway, airfield, or landing area with respect to the

10 provider of flight services, <sup>and its passengers</sup> under contract with the owner or operator."

*limit the liability of*

*a*

*and its passengers*

23-LS1745VD  
Bullock  
3/23/04

**CS FOR HOUSE BILL NO. 474( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES HOLM, McGuire**

**A BILL**  
**FOR AN ACT ENTITLED**

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5       **Sec. 09.65.093. Civil liability relating to aircraft runways, airfields, and**  
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7 **maintains, or repairs an aircraft runway, airfield, or landing area may not be held**  
8 **civilly liable, except for an act or omission that constitutes gross negligence or**  
9 **recklessness or intentional misconduct, for the injury to or death of a person or for**  
10 **damage to an aircraft, resulting from the use of the runway, airfield, or landing area to**  
11 **take off, land, park, or operate an aircraft.**

12       (b) A [NATURAL] person who is the owner or operator of an aircraft runway,  
13 airfield, or landing area [THAT IS LOCATED ON PRIVATE LAND] is not civilly  
14 liable, except for an act or omission that constitutes gross negligence or recklessness

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2 aircraft, resulting from the use or attempted use of the runway, airfield, or landing area  
3 to take off, land, park, or operate an aircraft while the runway, airfield, or landing  
4 area [IS]

5 (1) is marked as closed by placement of a large "X" on the runway, in  
6 accordance with Federal Aviation Administration guidelines [THAT IS READILY  
7 VISIBLE FROM THE AIR]; and

8 (2) if listed or charted, is designated as closed in the appropriate  
9 aeronautical charts and publications published by the Federal Aviation Administration.

AMENDMENT #1 - WITHDRAWN

OFFERED IN THE HOUSE

BY REPRESENTATIVE HOLM

TO: CSHB 474( ), Draft Version "D"

1 Page 1, line 6:

2 Delete "A [NATURAL]"

3 Insert "Except as provided in (c) of this section. a [A NATURAL]"

4

5 Page 2, following line 9:

6 Insert a new bill section to read:

7 "\*\* Sec. 2. AS 09.65.093 is amended by adding a new subsection to read:

8 (c) The immunity from liability under (a) of this section does not apply to  
9 an owner or operator of an aircraft, runway, airfield, or landing area with respect to the  
10 provider of flight services <sup>or to</sup> under contract with the owner or operator."  
~~of passenger~~

HB 474 Rescinded  
A#1 by Rep. Gara - ~~PASSEI~~

P.1, L.13  
After "landing area"  
Insert "described in (a)"

## Overview

### Part 139 Airport Certification

## What is Part 139 Certification?

14 CFR Part 139 requires the FAA to issue airport operating certificates to airports that—

1. Serve scheduled and unscheduled air carrier aircraft with more than 30 seats;
2. Server scheduled air carrier operations in aircraft with more than 9 seats but less than 31 seats; and
3. The FAA Administrator requires to have a certificate.

This Part does not apply to airports at which air carrier passenger operations are conducted only by reason of the airport being designated as an alternate airport.

Airport Operating Certificates serve to ensure safety in air transportation. To obtain a certificate, an airport must agree to certain operational and safety standards and provide for such things as firefighting and rescue equipment. These requirements vary depending on the size of the airport and the type of flights available. The regulation, however, does allow the FAA to issue certain exemptions to airports that serve few passengers annually and for which some requirements might create a financial hardship.

**For more information on recent changes made to 14 CFR Part 139, go to New Federal Airport Certification Requirements.**

## Basic Phases of a Part 139 Inspection

To ensure that airports with Airport Operating Certificates are meeting the requirements of Part 139, approximately 35 FAA Airport Certification Safety Inspectors conduct certification inspections. These inspections typically occur annually, but the FAA can also make unannounced inspections. Certification inspections generally include the following steps:

- **Pre-Inspection review of office airport files and airport certification manual.**
- **In-briefing with airport management.** Organize inspection time schedule, meet with different airport personnel.
- **Administrative inspection of airport files, paperwork, etc.** Also includes the updating of the Airport Master Record (FAA Form 5010) and review of the Airport Certification Manual/Specifications (ACM/ACS), Notices to Airmen (NOTAM), airfield self inspection forms, etc.
- **Movement area inspection.** Check the approach slopes of each runway end; inspect movement areas, in order to ascertain condition of pavement, markings, lighting, signs, abutting shoulders, and safety areas; observe ground vehicle operations; ensure the public is protected against inadvertent entry and jet or propeller blast; check for the presence of any wildlife; check the traffic and wind direction indicators.
- **Aircraft rescue and fire fighting inspection.** Conduct a timed-response drill; review aircraft rescue and firefighting personnel training records, including annual live-<sup>...</sup> emergency medical care training; check equipment and prot availability.
- **Fueling facilities inspection.** Inspection of fuel farm and m documentation of their quarterly inspections of the fueling fa fueling agent concerning completion of fire safety training.
- **Night inspection.** Evaluate runway/taxiway and apron lightir beacon, wind core, lighting, and obstruction lighting for comp night inspection is conducted if air carrier operations are conc airport at night or the airport has an instrument approach.
- **Post inspection briefing with airport management.** Discuss violations and/or discrepancies if any are found; agree on a re

VANESSA:

CAN YOU ADD THESE OR  
PASS OUT TO THE COMMITTEE  
REGARDING HB 474.

IT ANSWERS THE ~~QUESTION~~  
CONTRACT AIR CARRIERS LANDING  
ON COMPANY STRIPS, QUESTION  
PART (A)

TODD

Airport Certification Status List

3/29/2004

Note: Airport classifications may change - for more information contact your FAA Regional Airports Office

State	Airport Name	Associated City	Airport Ident.	Date of Reissued /New Part 139 Certificate	New Part 139 Classification	ARFF Index
Alabama	Anniston Metro	Anniston	ANB		Class IV	
Alabama	Birmingham Int'l	Birmingham	BHM		Class I	
Alabama	Dannelly Field	Montgomery	MGM		Class I	
Alabama	Dothan	Dothan	DHN		Class I	
Alabama	Huntsville Int'l	Huntsville	HSV		Class I	
Alabama	Mobile Downtown	Mobile	BFM		Class II	
Alabama	Mobile Regional	Mobile	MOB		Class I	
Alabama	Northwest Alabam Regional	Muscle Shoals	MSL		Class I	
Alabama	Talladega Munic.	Talladega	ASN		Class IV	
Alabama	Tuscaloosa Munic	Tuscaloosa	TCL		Class IV	
Alaska	Anchorage Int'l	Anchorage	ANC		Class I	
Alaska	Bethel	Bethel	BET		Class I	
Alaska	Cold Bay	Cold Bay	CDB		Class I	
Alaska	Deadhorse	Deadhorse	SCC		Class I	
Alaska	Dillingham	Dillingham	DLG		Class I	
Alaska	Fairbanks Int'l	Fairbanks	FAI		Class I	
Alaska	Five Mile	Five Mile	FVM		Class IV	
Alaska	Galbraith Lake	Galbraith Lake	GBH		Class IV	
Alaska	Gustavus	Gustavus	GST		Class I	
Alaska	Homer	Homer	HOM		Class I	
Alaska	Iliamna	Iliamna	ILI		Class I	
Alaska	Juneau Int'l	Juneau	JNU		Class I	
Alaska	Kenai Munic	Kenai	ENA		Class I	
Alaska	Ketchikan Int'l	Ketchikan	KTN		Class I	
Alaska	King Salmon	King Salmon	AKN		Class I	
Alaska	Kodiak	Kodiak	ADQ		Class I	
Alaska	Merle K (Mudhole) Smith	Cordova	CDV		Class I	
Alaska	Nome	Nome	OME		Class I	
Alaska	Petersburg James Johnson	Petersburg	PSG		Class I	
Alaska	Port Heiden	Port Heiden	PTH		Class I	

Airport Certification Status List

3/29/2004

<u>Alaska</u>	<u>Prospect Creek</u>	Prospect Creek	PPC	Class IV
Alaska	Ralph Wien Memorial	Kotzebue	OTZ	Class I
<u>Alaska</u>	<u>Red Dog</u>	Red Dog	AED	Class IV
Alaska	Sand Point	Sand Point	SDP	Class I
Alaska	Sitka Rocky Gutierrez	Sitka	SIT	Class I
Alaska	St Paul Island	St Paul Island	SNP	Class I
Alaska	Ugnu-Kuparuk	Kuparuk	UBW	Class IV
Alaska	Unalaska	Unalaska	DUT	Class I
Alaska	Valdez	Valdez	VDZ	Class I
Alaska	Wiley Post-Will Rogers Mem	Barrow	BRW	Class I
Alaska	Wrangell	Wrangell	WRG	Class I
Alaska	Yankutat	Yankutat	YAK	Class I
<del>American Samoa</del>	<del>Fitiuta</del>	<del>Fitiuta</del>	<del>FAQ</del>	<del>Class III</del>
<del>American Samoa</del>	<del>Ofu</del>	<del>Ofu</del>	<del>Z08</del>	<del>Class III</del>
<del>American Samoa</del>	<del>Pago Pago Int'l</del>	<del>Pago Pago</del>	<del>PPG</del>	<del>Class I</del>
<del>Arizona</del>	<del>Ernest Love Field</del>	<del>Prescott</del>	<del>PRC</del>	<del>Class II</del>
<del>Arizona</del>	<del>Flagstaff Pulliam</del>	<del>Flagstaff</del>	<del>FLG</del>	<del>Class I</del>
<del>Arizona</del>	<del>Grand Canyon National Park</del>	<del>Grand Canyon</del>	<del>GCN</del>	<del>Class I</del>
<del>Arizona</del>	<del>Kingman</del>	<del>Kingman</del>	<del>IGM</del>	<del>Class II</del>
<del>Arizona</del>	<del>Lake Havasu City</del>	<del>Lake Havasu City</del>	<del>HII</del>	<del>Class III</del>
<del>Arizona</del>	<del>Laughlin/Bullhead Int'l</del>	<del>Bullhead City</del>	<del>IFP</del>	<del>Class I</del>
<del>Arizona</del>	<del>Page Munic.</del>	<del>Page</del>	<del>PGA</del>	<del>Class II</del>
<del>Arizona</del>	<del>Phoenix Sky Harbor Int'l</del>	<del>Phoenix</del>	<del>PHX</del>	<del>Class I</del>
<del>Arizona</del>	<del>Pinal Airpark</del>	<del>Marana</del>	<del>MZJ</del>	<del>Class IV</del>
<del>Arizona</del>	<del>Show Low Munic.</del>	<del>Show Low</del>	<del>SOW</del>	<del>Class III</del>
<del>Arizona</del>	<del>Tucson Int'l</del>	<del>Tucson</del>	<del>TUS</del>	<del>Class I</del>
<del>Arizona</del>	<del>Williams Gateway</del>	<del>Phoenix</del>	<del>IWA</del>	<del>Class II</del>
<del>Arkansas</del>	<del>Adams Field</del>	<del>Little Rock</del>	<del>LIT</del>	<del>Class I</del>
<del>Arkansas</del>	<del>Arkansas Int'l</del>	<del>Blytheville</del>	<del>BYH</del>	<del>Class II</del>
<del>Arkansas</del>	<del>Baxter Co. Reg.</del>	<del>Mountain Home</del>	<del>BPK</del>	<del>Class III</del>
<del>Arkansas</del>	<del>Boone Co.</del>	<del>Harrison</del>	<del>HRO</del>	<del>Class III</del>
<del>Arkansas</del>	<del>Drake Field</del>	<del>Fayetteville</del>	<del>FYV</del>	<del>Class I</del>
<del>Arkansas</del>	<del>Fort Smith Reg</del>	<del>Fort Smith</del>	<del>FSM</del>	<del>Class I</del>
<del>Arkansas</del>	<del>Jonesboro Munic.</del>	<del>Jonesboro</del>	<del>JBR</del>	<del>Class III</del>

To the Committee: The following are changes suggested by the Aircraft Owners and Pilots Association (AOPA) to ensure clarity and make the statute more comprehensive. This is included for your consideration.

BILL ID: HB 474

00 HOUSE BILL NO. 474

01 "An Act relating to civil liability associated with aircraft runways, airfields, and landing  
02 areas."

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

04 \* Section 1. AS 09.65.093 is amended to read:

05 Sec. 09.65.093. Civil liability relating to aircraft runways, airfields, and  
06 landing areas. (a) A [NATURAL] person who without compensation maintains or  
07 repairs an aircraft runway, airfield, or landing area may not be held civilly liable,  
08 except for an act or omission that constitutes gross negligence or recklessness or  
09 intentional misconduct, for the injury to or death of a person or for damage to an  
10 aircraft, resulting from the use of the runway, airfield, or landing area to take off, land,  
11 or operate an aircraft.

12 (b) A [NATURAL] person who is the owner or operator of an aircraft runway,  
13 airfield, or landing area ~~that is located on private land~~ is not civilly liable, except for  
14 an act or omission that constitutes gross negligence or recklessness or intentional  
01 misconduct, for the injury to or the death of a person or for damage to an aircraft,  
02 resulting from the use or attempted use of the runway, airfield, or landing area to take  
03 off, land, or operate an aircraft while the runway, airfield, or landing area is

04 (1) marked as closed by placement of a large "X" on the runway, in accordance with FAA  
guidelines that is readily visible

05 ~~from the air; and~~

06 (2) if listed and/or charted, change the designation to listed as closed in the appropriate aeronautical  
charts and

07 publications published by the Federal Aviation Administration.

---

Changes requested in HB 474:

Section (1) (b) line 13: ~~delete "that is located on private land."~~

Limits on civil liability when an airport owner or operator closes an airstrip should cover public as well as private land. Limiting the protection to owners/operators on private land only discourages operation of airstrips on public land, which is still the majority of the state of Alaska. Without protection, which this statute provides, the burden to develop and maintain airstrips for access to remote areas falls exclusively on state government, which doesn't have the resources to develop or maintain these assets.

Section (1) (b) line 04, ~~replace "that is readily visible from the air"~~ with ***"on the runway, in accordance with FAA guidelines."***

As presently worded, the definition on how to mark a closed runway is vague, and could be confused with ground targets used by aerial survey firms. Instead of putting the state in the business of defining

how to mark runways, it would be cleaner to reference the FAA guidelines, which are consistent across all states.

Section (1) (b) line 06, replace "*listed as*" with "*if listed and/or charted, change the designation to*"

Not all airports are charted. By changing the wording in this section, it requires the owner/operator to change the designation, if it is published in the aviation publication and charts, in addition to marking the runway. But if it has not been charted, the markings alone will suffice.

## HB474

### Sectional Analysis

#### **Section 1;**

This is the only section. It leaves the statute intact and makes some specific changes for clarity and to be more comprehensive. Most importantly, it removes the word "natural" from both clauses. This deletion has the effect of broadening the protections to the legal definition of "person" as defined in AS 01.10.060 (8).

AS 01.10.060 (8) reads: "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person;

# Alaska State Legislature

Representative Jim Holm  
District 9

**Session**

Capitol Building, Room 110  
Juneau, AK 99801  
Phone: (907) 465-3466  
Fax: (907) 465-2937

**Interim**

119 N. Cushman St.  
Fairbanks, AK 99701  
Phone: (907) 456-7423  
Fax: (907) 451-9293

---

DATE: March 1, 2004

TO: Representative Lesil McGuire, Chair  
House Judiciary Committee

FROM: Representative Jim Holm

RE: HB 474

Please schedule HB 474, Liability for Voluntary Airstrip Maintenance, for hearing in the House Judiciary Committee at your earliest convenience.

Back-up information is attached.

Thank you very much for your help with this bill.

# STATE OF ALASKA



*Interim:*

119 North Cushman, Rm. 205  
Fairbanks, Alaska 99701  
(907) 456-7423  
Fax: (907) 451-9293

*Session:*

State Capitol Building  
Juneau, Alaska 99801  
(907) 465-3466  
Fax: (907) 465-2937

## REPRESENTATIVE JIM HOLM DISTRICT 9

### Sponsor Statement for HB474

HB474 will remove the word "natural" from state statute to offer equal protection to all "persons". AS 09.65.093 is treating owners of private airstrips unfairly by granting liability protections to certain volunteers over others. Our current statute offers *some* protection to owners or users of private airstrips who spend their own time, effort and money on upkeep. At the same time, others who spend the same personal resources on their strips are not protected from liability.

Our past legislature has seen the justice in giving some statutory liability protection to people who freely or out of necessity maintain public or personal airstrips without being compensated. AS09.65.093 roughly states that if a "natural person", without being paid, repairs or maintains an airstrip, other users cannot hold that "natural" person liable for civil damages. There is an exception for extremely irresponsible conduct and private owners are required to take the extra steps of notifying the public with markings and listings in aeronautical publications. The reasoning goes that if people are nice enough to do this free maintenance then they should not be punished for the kind act. These very same protections are currently withheld from a "person" legally defined in AS 01.10.060 (8): "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

Where we feel this protection is unjustly withheld is at the point when an organization performs the same service without pay. If a group, corporation or other organization repairs or maintains an airstrip without being paid, they *are* liable for users of that strip. It seems unreasonable to say that an individual can perform this service for free, but a group cannot

do the same without extra liability. It also seems to be poor policy to discourage the organized public from offering free services to their communities. These are services which, otherwise, may eventually have to be performed by the state. If not, we would allow airstrips to fall into general disrepair. Allowing this to happen would create an even more dangerous landing situation around the State.

Please join me in making this repair to our statute.

# Alaska State Legislature

Representative Jim Holm

District 9

**Session**

Capitol Building, Room 110

Juneau, AK 99801

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## HB474

### Sectional Analysis

**Section 1;**

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AS 01.10.060 (8) reads: "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person;



AIRCRAFT OWNERS AND PILOTS ASSOCIATION

March 2, 2004

Representative Jim Holm  
State Capitol, Room 110  
Juneau, AK 99801-1182

Dear Representative Holm,

The Aircraft Owners and Pilots Association (AOPA) is a membership association consisting of over 400,000 pilots and aircraft owners nationwide, 4,600 of whom reside in the state of Alaska. AOPA is committed to ensuring the continued viability, growth, and development of aviation and airports in Alaska and the United States.

The Aircraft Owners and Pilots Association strongly supports House Bill 474, regarding civil liability relating to runways, airfields, and landing areas. This bill will help protect airport owners and operators that devote their time and resources to operate and maintain airstrips and landing areas in Alaska.

We anticipate that this bill will help protect the operation of these vital components of our transportation infrastructure.

On behalf of the 4,600 AOPA members in Alaska, thank you for sponsoring this bill.

Sincerely,

Tom George  
Alaska Regional Representative

---

TOM GEORGE  
ALASKA REGIONAL REPRESENTATIVE  
PERSONAL ADDRESS: P.O. BOX 83750 FAIRBANKS, AK 99708  
907-388-9955 (PHONE) 907-455-9001 (FAX)  
E-MAIL: [tom.george@aopa.org](mailto:tom.george@aopa.org)

To the Committee: The following are changes suggested by the Aircraft Owners and Pilots Association (AOPA) to ensure clarity and make the statute more comprehensive. This is included for your consideration.

BILL ID: HB 474

00 HOUSE BILL NO. 474

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08 except for an act or omission that constitutes gross negligence or recklessness or  
09 intentional misconduct, for the injury to or death of a person or for damage to an  
10 aircraft, resulting from the use of the runway, airfield, or landing area to take off, land,  
11 or operate an aircraft.

12 (b) A [NATURAL] person who is the owner or operator of an aircraft runway,  
13 airfield, or landing area ~~that is located on private land~~ is not civilly liable, except for  
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01 misconduct, for the injury to or the death of a person or for damage to an aircraft,  
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03 off, land, or operate an aircraft while the runway, airfield, or landing area is

04 (1) marked as closed by placement of a large "X" on the runway, in accordance with FAA  
guidelines that is readily visible

05 ~~from the air;~~ and

06 (2) if listed and/or charted, change the designation to listed as closed in the appropriate aeronautical  
07 charts and

07 publications published by the Federal Aviation Administration.

---

Changes requested in HB 474:

Section (1) (b) line 13: ~~delete "that is located on private land."~~

Limits on civil liability when an airport owner or operator closes an airstrip should cover public as well as private land. Limiting the protection to owners/operators on private land only discourages operation of airstrips on public land, which is still the majority of the state of Alaska. Without protection, which this statute provides, the burden to develop and maintain airstrips for access to remote areas falls exclusively on state government, which doesn't have the resources to develop or maintain these assets.

Section (1) (b) line 04, replace "~~that is readily visible from the air~~" with "on the runway, in accordance with FAA guidelines."

As presently worded, the definition on how to mark a closed runway is vague, and could be confused with ground targets used by aerial survey firms. Instead of putting the state in the business of defining

how to mark runways, it would be cleaner to reference the FAA guidelines, which are consistent across all states.

Section (1) (b) line 06, replace "*listed as*" with "*if listed and/or charted, change the designation to*"

Not all airports are charted. By changing the wording in this section, it requires the owner/operator to change the designation, if it is published in the aviation publication and charts, in addition to marking the runway. But if it has not been charted, the markings alone will suffice.

**HB**

**484**



# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Rep. Tom Anderson, Vice-Chair  
Rep. Jim Holm  
Rep. Dan Ogg  
Rep. Ralph Samuels  
Rep. Les Gara  
Rep. Max Gruenberg



State Capitol, Room 120  
Juneau, AK 99801-1182  
(907) 465-4990  
Fax (907) 465-6592

## House Judiciary Committee

### Memorandum

**To:** Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** March <sup>31</sup> 25, 2004  
**Re:** CS Request

---

Please create a final draft House Judiciary Committee Substitute for work order # 23-GH2046A, HB 484, incorporating the attached amendment. The bill was passed out of committee today.

If you have any questions, please call me at 4990. Thank you!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

AMENDMENT #1 - PASSED

OFFERED IN THE HOUSE

TO: HB 484

Page 2, lines 5 and 6:

Delete: ", as a condition of probation,"

Page 2, line 14:

Between "under" and "this" insert: "(a) of"

Page 2, line 15:

After "conviction." insert: "The court shall include the imposition of a surcharge under (c) of this section in the order revoking probation."

Page 2, line 20:

After "28.30.032(o)." insert: "The state may enforce payment of a surcharge under this section under AS 09.35 as if it were a civil judgment enforceable by execution. This subsection does not limit the authority of the court to enforce surcharges."


# STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

## DEPARTMENT OF CORRECTIONS *Office of the Commissioner*

P.O. Box 112000  
Juneau, AK 99811-2000  
PHONE: (907) 465-4652  
FAX: (907) 465-3390

TO: Representative Lesil McGuire, Chairman  
House Judiciary Committee

FROM: Commissioner Marc Antrim   
Department of Corrections

DATE: February 26, 2004

RE: House Judiciary Committee Hearing Request for HB484, An Act Relating to  
Corrections Fees/Surcharges

---

At the convenience of the Chairman, I respectfully request that the House Judiciary Committee schedule a hearing to discuss HB484, An Act Relating to Corrections Fees/Surcharges.

Thank you for your consideration of this request. Please contact me or Portia Parker at 465-4652 if you have any concerns, questions or would like supplemental information about HB484.

Attachments: Governor's Transmittal Letter and HB484.

FRANK H. MURKOWSKI  
GOVERNOR  
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

P.O. Box 110001  
JUNEAU, ALASKA 99811-0001  
(907) 465-3500  
FAX (907) 485-3532  
WWW.GOV.STATE.AK.US

February 13, 2004

The Honorable Pete Kott  
Speaker of the House  
Alaska State Legislature  
State Capitol, Room 208  
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would impose a surcharge on persons convicted of an offense and on persons whose probation is revoked. The bill also would require a person under state probation or parole supervision to pay an application fee for a requested transfer of that supervision to another state.

Alaska has an urgent need to mitigate the cost of its correctional facilities. The bill imposes a surcharge on a person who pleads guilty or nolo contendere to, or is convicted of, a crime if the person was arrested and taken to a correctional facility or is sentenced to a term of imprisonment. The amount of the surcharge depends on the seriousness of the crime: \$100 for a felony and \$50 for a misdemeanor.

The bill also would impose a surcharge on a person placed on probation after conviction of a crime. The surcharge is collected only if the defendant's probation is revoked for a probation violation and the person was either arrested and taken to a correctional facility for the violation, or sentenced to prison for it.

Alaska participates in the Interstate Compact for Adult Offender Supervision (Compact), which regulates the transfer of supervision for persons under state probation and parole. The bill would establish an application fee for persons under active probation or parole supervision who request an interstate transfer of supervision under the Compact. According to the Department of Corrections, the great majority of other states already impose a fee for similar services. The bill also would require the applicant to post a bond or deposit cash, which would be forfeited if the state must escort the person back to Alaska for confined supervision.

I urge your prompt and favorable consideration of this proposal.

Sincerely yours,

A handwritten signature in black ink that reads "Frank H. Murkowski".

Frank H. Murkowski  
Governor

Enclosure

**HOUSE BILL NO. 484**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**Introduced: 2/16/04**

**Referred: Judiciary, Finance**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act imposing a correctional facility surcharge on persons convicted of a crime  
2 under state law, and on persons whose probation is revoked; relating to fees and  
3 expenses for interstate transfer of probation or parole; and providing for an effective  
4 date."

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

6 \* Section 1. AS 12.55 is amended by adding a new section to read:

7           **Sec. 12.55.041. Correctional facility surcharge.** (a) In addition to any fine  
8 or other penalty prescribed by law, a defendant who pleads guilty or nolo contendere  
9 to, or is convicted of, a crime under state law shall pay a correctional facility surcharge  
10 if, in connection with the crime, the defendant

11                   (1) was arrested and taken to a correctional facility, regardless of  
12 whether the defendant was released or admitted to the facility; or

13                   (2) is sentenced to serve a term of imprisonment.

14           (b) The court shall impose a single surcharge under (a) of this section on a

1 defendant being sentenced for one or more crimes in a single judgment. The  
2 surcharge is

3 (1) \$100 if the judgment includes a sentence for a felony;

4 (2) \$50 if the judgment does not include a sentence for a felony.

5 (c) If the court places the defendant on probation, the court shall order, as a  
6 condition of probation, that the defendant pay an additional correctional facility  
7 surcharge of \$100. The additional surcharge shall be suspended, but later imposed if  
8 the defendant's probation is revoked and, in connection with the probation revocation,  
9 the defendant

10 (1) was arrested and taken to a correctional facility, regardless of  
11 whether the defendant was released or admitted to the facility; or

12 (2) is ordered to serve a term of imprisonment for the probation  
13 revocation.

14 (d) The court shall include a surcharge imposed under this section in the  
15 judgment of conviction. For a surcharge that is not paid by the person as required by  
16 this section, the state shall seek reimbursement from the person's permanent fund  
17 divided as provided under AS 43.23.065. For purposes of collection and priority of  
18 attachment under AS 43.23.065, a surcharge imposed under this section is accounted  
19 for in the same manner as a cost of imprisonment under AS 28.35.030(k) and  
20 28.35.032(o).

21 (e) In this section, "correctional facility" has the meaning given in  
22 AS 33.30.901.

23 \* Sec. 2. AS 33.36 is amended by adding a new section to read:

24 **Sec. 33.36.145. Application fee; deposit.** (a) A person under probation or  
25 parole supervision by the Department of Corrections who applies for a transfer of  
26 supervision to another state under the Interstate Compact for Adult Offender  
27 Supervision shall pay to the Department of Corrections a nonrefundable application  
28 fee of \$100.

29 (b) Before the Department of Corrections may transfer supervision of a person  
30 to another state under the Interstate Compact for Adult Offender Supervision, the  
31 person shall execute and file with the clerk of court a bond, with sufficient solvent

1           sureties, in the amount of \$1,250, or deposit in the registry of the court cash in the  
2           amount of \$1,250. The bond or cash is forfeited if the state is required to assist in the  
3           applicant's return to the state for continued supervision.

4       \* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to  
5 read:

6           **APPLICABILITY.** (a) Section 1 of this Act applies to offenses committed on or after  
7 the effective date of this Act.

8           (b) Section 2 of this Act applies to applications for transfer of supervision under the  
9 Interstate Compact for Adult Offender Supervision received on or after the effective date of  
10 this Act regarding offenses committed before, on, or after the effective date of this Act.

11       \* **Sec. 4.** This Act takes effect July 1, 2004.

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: HB 484  
 (H) Publish Date: 2/16/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act imposing a correctional facility surcharge....." RDU Criminal  
 Component Collections and Support  
 Sponsor Rules  
 Requester Governor Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	40.0	40.0	40.0	40.0	40.0	40.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	4.0	4.0	4.0	4.0	4.0	4.0
Supplies	1.0	1.0	1.0	1.0	1.0	1.0
Equipment	1.5	1.5	1.5	1.5	1.5	1.5
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>	<b>200.5</b>	<b>449.5</b>	<b>657.3</b>	<b>719.3</b>	<b>740.4</b>	<b>767.4</b>
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	46.5	46.5	46.5	46.5	46.5	46.5
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>	<b>46.5</b>

Estimate of any current year (FY2004) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill amends AS 12.55 by adding a requirement that a defendant who pleads guilty or nolo contendere to, or is convicted of a crime under state law shall pay a correctional facility surcharge if the defendant is incarcerated in connection with the crime. The surcharge imposed by the court shall be \$100 if the judgment includes a felony sentence; and \$50 if not. The bill also includes a provision for a surcharge if the defendant is placed on probation. It includes a provision for a fee in the event a person on probation or parole applies for transfer of supervision to another state, and it includes a requirement for a bond or cash deposit to be forfeited in the event the state is required to assist in the applicant's return to the state for continued supervision.

Passage of this legislation will have a fiscal impact on the Department of Law if the Court System

Prepared by: Kathryn Daughhete, Director Phone 465-3673  
 Division Administrative Services Division Date/Time 2/3/04 7:55 AM  
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 2/3/2004  
 Agency Department of Law

FISCAL NOTE #1

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

BILL NO. HB 484

ANALYSIS CONTINUATION

begins to transfer the responsibility to collect surcharges - both those that are proposed in this legislation, and those that currently exist in AS 12.55.039 - to the Collections Unit. At this time, the data base and system that is used in the collections effort is at full capacity and cannot be reprogrammed to handle different types of obligations. Thus the basis for this fiscal note is the assumption that the new surcharges will be commingled with the cost of incarceration amounts the Department of Law currently collects and transfers to the Department of Corrections.

The collections unit collects unsecured debts owed to the state. The majority of these debts are criminal judgments (fines, judgments for the cost of appointed counsel, judgments for the cost of incarceration on DUI charges, and court and collection costs in minor offense cases). The collections unit also collects civil judgments, including attorney fee awards, on behalf of the State and civil penalties issued by agencies such as OSHA and APOC. Effective January 1, 2002, the collections unit expanded its work to include the collection of restitution on behalf of victims in criminal and juvenile delinquency proceedings. Passage of the victim restitution legislation with a reduced fiscal note has challenged the unit to resolve system capacity issues. A rebuilt, expandable database that could handle additional types of collection items as well as those already under collection is planned for, but because the plan entails no new financial or human resources, the timeline for completion is uncertain. A second significant issue is the implementation of the Court System's new management information system which will begin to allow the Courts to transfer uncollected surcharges to the Department of Law at a yet uncertain point in the future. Up until now, the Court System has not transferred responsibility to collect any surcharges to the unit.

In the event this legislation passes and the court system begins sending these debts to the collections unit, an additional Administrative Clerk would be needed to deal with the added workload, since at this juncture we are still manually entering judgments into our computerized database.

Any additional revenues that will be generated through passage of this legislation are uncertain, however we have estimated as follows:

Number of Felony Convictions resulting in Jail Time - 2,000 x \$100= \$200,000  
Number of Probation Revokees - 2,000 x \$100=\$200,000  
Number of Misdemeanor Convictions resulting in jail time - 18,000 x \$50= \$900,000

Total surcharges imposed through this legislation would thereby reach \$1,300,000 annually. We have used collection statistics based on years of actual experience collecting fines and other types of debts to the state to come up with the numbers shown as annual anticipated revenues. In the first year, our historical collection rate has been 18.23%. In the second year it has been 19.32%, in the third year it has been 15.38%. Then it drops to 2.84%, 1.4%, and 2.2% in years four through six. However in the first year we anticipate no new revenues from felony probation revocations because such revocations will apply to felonies committed before the effective date of the legislation. Revenue collections quickly climb in the 2nd through 4th year, and then begin to level off where presumably they will hover around \$750,000 per year provided no major swings in the amount of the permanent fund dividend or changes to the laws that govern the garnishment order for certain debts to the state, and no new laws that would require collection of new types of debt that may supersede a criminal judgment.

In terms of new revenues, it is important to note that because the Department of Law does not presently have the capability to track a new type of debt, it will not be possible to distinguish between cost of incarceration charges and the surcharges proposed in this legislation. Whatever positive effects the general fund may see as a result of the surcharges will be in the form of revenues in excess of fee supported services authority in the Department of Corrections operating budget.

**HB**

**487**



# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: HB 487  
 (H) Publish Date: 2/16/04  
 Dept. Affected: Health & Social Services  
 RDU Juvenile Justice  
 Component Delinquency Prevention

Revision Date/Time (Note if correction):

Title RELATING TO DETENTION OF JUVENILES

Sponsor (RLS) BY REQUEST OF THE GOVERNOR

Requester \_\_\_\_\_

Component No. 248

**Expenditures/Revenues**

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>CAPITAL EXPENDITURES</b>						
<b>CHANGE IN REVENUES (0)</b>						

**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: \_\_\_\_\_

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The proposed changes to statute will have no fiscal impact on the Division of Juvenile Justice. The proposed changes will put the state in compliance with the federal Juvenile Justice and Delinquency Act (JJQPA) formula grant program.

Prepared by: Karen Forrest  
 Division: Juvenile Justice  
 Approved by: Joel S. Gilbertson, Commissioner  
 Agency: Department of Health and Social Services

Phone 465-2339  
 Date/Time 02/11/2004  
 Date 02/12/2004

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: HE 487  
 (H) Publish Date: 2/16/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title Juvenile Detention RDU Alaska State Troopers  
 Component AST Detachments  
 Sponsor Rules Committee  
 Requester Governor Component No. 2325

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill will amend AS 47.12.240, AS 47.30.705 and AS 47.37.170. The stated purpose of this bill is to preserve Alaska's federal formula grant receipts of approximately \$700,000 and to meet certain requirements to apply for other federal grant money. The bill, in essence, states that "emergency protective custody under these sections may not include placement of a minor in a jail or secure facility". The bill addresses minors who are taken into protective custody for mental health issues or those in protective custody due to intoxication because of drugs or alcohol.

The Department of Health and Social Service, Division of Juvenile Justice, has committed to supplying training and training materials to law enforcement officers to insure compliance with this statute.

There is no fiscal impact anticipated by the Department of Public Safety.

Prepared by: Lt. Al Storey Phone 269-4532  
 Division Alaska State Troopers Date/Time 2/12/04 3:19 PM  
 Approved by: Commissioner William Tandeske Date 2/12/2004  
 Agency Department of Public Safety

SB 340 /HB 487 Relating to the Detention of Juveniles  
Department of Health and Social Services  
Division of Juvenile Justice- 2/20/04

**Highlights related to the Proposed Legislation:**

- ❖ Modifies AS 47.12.240, AS 47.30.705 and AS 47.37.170 to prohibit the placement of minors in a jail or secure facility who are in protective custody due to mental illness, grave disability, intoxication or incapacitation by alcohol or drugs.
- ❖ Required for DHSS/DJJ to be in compliance with the 2002 reauthorization of the federal Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) that went into effect on October 1, 2003.
- ❖ Does not affect existing statutory provisions for the detention of minors for delinquent or "criminal-type" offenses described in AS 47.12.240. The emphasis is on ensuring that state statute comports with the federal requirements for not holding non-offenders in a locked facility when they have not committed a crime.

**Background:**

**DHSS, DJJ receives approximately \$700,00 annually through the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) formula grant program.** Funds are used to pay for a variety of services, including nonsecure shelters and prevention/intervention services for juveniles. States receiving JJDP funds must meet four core juvenile justice mandates. The mandates along with the actual numerical standards for "violations" are:

- a. Deinstitutionalization of status offenders and non-offenders: 5.7 per 100,000;
- b. Separation of juveniles from adult offenders in institutions: Zero (0);
- c. Removal of juveniles from adult jails and lockup facilities: 9.0 per 100,000;
- d. Reduction of disproportionate minority contact: no statistical de minimis.

**Alaska is currently out of compliance with these standards at a fairly significant rate.** Violation rates for the first three core mandates in FY02 and FY03 are as follows:

- a. Deinstitutionalization: FY02 at 47.70 and FY03 at 37.82;
- b. Separation from Adult offenders: FY02 at 21.35 and FY03 at 4.1; and,
- c. Jail Removal: FY02 at 68.08 and FY03 at 47.05.

**Without passage of this legislation, the Department will lose 40% of the FFY2004 grant award, or \$280,000 in the first year and an additional 40% of the FFY2005 award, for a total anticipated loss of \$560.0 in federal grant funds.**

If violations of the JJDP Act are incurred once the statute is changed, the argument can be made to OJJDP that all violations were in violation of existing state law, which is an allowable "exception" to the de minimum numerical standards for monitoring compliance with the JJDP Act.

The change in state statute is consistent with best practice, i.e. juveniles should not be held in a locked facility when they have not committed a crime.

The Division will continue to work with local and state law enforcement, as well as within this Department with the Division of Behavioral Health, to further develop the alternatives that will provide the appropriate response for these juveniles.

**Subject: Support for SB340 - Dentention of Minors**

**Date:** Tue, 2 Mar 2004 14:26:05 -0900

**From:** "Schultz, Anne G." <Anne\_Schultz@health.state.ak.us>

**To:** "Vanessa\_Tondini@legis.state.ak.us" <Vanessa\_Tondini@legis.state.ak.us>

Dear Vanessa:

Will you please pass on to House Judiciary Committee members the following message regarding SB 340?

Advisory Board members were able to visit with many legislators during their Juneau meeting last week. Their packets included their top five legislative priorities for this session. One of the bills they strongly support is SB 340. This issue has been a priority for board members for a number of years. They have asked that I reaffirm their support for this bill as you address it in committee on Friday, March 5 at 1 pm..

Thank you for your assistance. Including this message in members' meeting packets will be greatly appreciated.

Anne Schultz

Acting Executive Director

Advisory Board on Alcoholism and Drug Abuse

PO Box 110608

Juneau AK 99811 - 0608

(907) 465-5114 or 1-888-464-8920

Fax: (07) 465-4410

# STATE OF ALASKA

## DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601  
JUNEAU, ALASKA 99811-0601  
PHONE: (907) 465-3030  
FAX: (907) 465-3068

February 17, 2004

Honorable Lesil McGuire, Chair  
House Judiciary Committee  
Alaska State Capitol; Rm. 118  
Juneau, AK 99801-1182

Dear Representative McGuire,

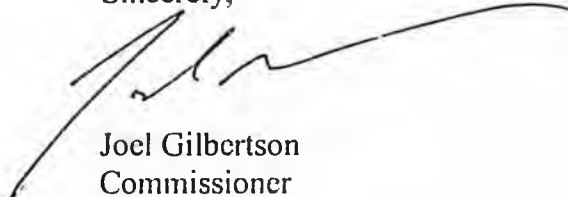
The Department of Health and Social Services respectfully requests a hearing in the House Judiciary Committee on House Bill 487 "An Act relating to the detention of delinquent minors in correctional facilities; relating to emergency detention of minors for evaluation for involuntary admission for mental health treatment; relating to detention of intoxicated minors incapacitated by alcohol or drugs; and providing for an effective date."

The purpose of this bill is to bring Alaska into compliance with recent revisions to the federal Juvenile Justice and Delinquency Act. Under the Act, emergency protective custody of juveniles may not include placement in a locked jail or youth facility. Failure to comply with this federal requirement jeopardizes receipt of approximately \$700,000 in federal funds that are a cornerstone of the department's juvenile justice program.

The Governor's transmittal letter and zero fiscal note relating to HB 487 are on file with the committee.

Your favorable consideration of this request will be appreciated.

Sincerely,



Joel Gilbertson  
Commissioner

cc: Mike Tibbles, Director  
Legislative Office, Office of the Governor  
Patty Ware, Director, DJJ

# STATE OF ALASKA

## DEPT. OF HEALTH AND SOCIAL SERVICES

DIVISION OF ADMINISTRATIVE SERVICES

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 1100  
JUNEAU, ALASKA 99811-0650  
PHONE: (907) 465-3082  
FAX: (907) 465-2199

March 25, 2004

The Honorable Lesil McGuire, Chair  
The Honorable Tom Anderson, Vice-Chair  
House Judiciary Committee  
State Capitol, Room 118, 432  
Juneau, AK 99801-1182

Dear Representatives McGuire and Anderson:

The following information is provided in response to questions raised during the House Judiciary meeting with the Division of Juvenile Justice on HB 487, Relating to Detention of Minors:

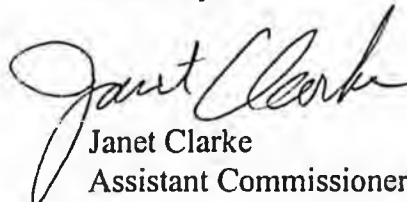
**How did the definition for "gravely disabled" become part of the mental health statute, AS 47.30.915? Is "gravely disabled" associated at all with a physical disability?**

It is not clear how the phrase "gravely disabled" became part of AS 47.30.915. However, it is generally assumed that at some point the Department needed a codified provision to primarily protect individuals who demonstrate such a profound diminished mental capacity so as to pose a danger to themselves through self-neglect.

Gravely disabled is not directly related to a physical disability. Instead it is behavior due to a mental disorder. Examples include people who are too confused to feed themselves, clothe themselves in the winter, walk outside without clothes on in freezing weather, walk into traffic without paying attention to traffic, smoke in bed and fall asleep in bed while smoking, or walk into the woods and get lost.

If you need additional information or require further clarification, please contact me at 465-1630.

Sincerely,

  
Janet Clarke  
Assistant Commissioner

cc: Representative Jim Holm, Capitol Building, Room 416  
Representative Dan Ogg, Capitol Building, Room 409  
Representative Ralph Samuels, Capitol Building, Room 412  
Representative Les Gara, Capitol Building, Room 422  
Representative Max Gruenberg, Capitol Building, Room 112  
Joel Gilbertson, Commissioner  
Sherry Hill, Special Assistant  
Patty Ware, Director, Juvenile Justice  
Bill Hogan, Director, Behavioral Health  
Laura Baker, Budget Chief, Administrative Services

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