ARTICLES

ALASKA'S APPORTIONMENT OF DAMAGES STATUTE: PROBLEMS FOR LITIGANTS
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I. INTRODUCTION

In the 1980s, a hue and cry was heard throughout the United States that something had to be done about skyrocketing liability insurance premiums. In some circles, the culprit was alleged to be the abuses and excesses of the civil justice system.¹ This controversy reached Alaska, and in an effort to provide a remedy, the legislature enacted the Limitations on Civil Liability Act, Alaska Statutes sections 09.17.010-.900.² This legislation, commonly known as the Tort Reform Act,³ was intended to effect certain changes in civil tort litigation in order to alleviate the so-called insurance “crisis.”⁴

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1. See Tort Reform Symposium, 24 SAN DIEGO L. REV. 795-1002 (1987). See also Cornelius J. Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 WASH. L. REV. 233 (1987) (suggesting that substantial increases in liability insurance premiums may have been precipitated by the insurance industry's need to offset the results of bad investments).

2. Act of 1986, ch. 139, § 1, 1986 Alaska Sess. Laws 1. The Senate had one version of the legislation, C.S.S.B. 377 (Fin) am, and the House had another, H.C.S. C.S.S.B. 377 (Jud) am H. The legislature ultimately enacted a third version promulgated by the Conference Committee, C.C.S. S.B. 377. See infra part II.B. The legislative shorthand translates as follows: C.S.S.B. 377 (Fin) am stands for Committee Substitute for Senate Bill 377. The Senate Finance Committee ultimately referred the bill, which then underwent amendment by the full Senate before being passed. H.C.S. C.S.S.B. 377 (Jud) am H stands for House Committee Substitute for C.S.S.B. 377. In this instance, the House Judiciary Committee ultimately referred the bill and the House amended and passed it. C.C.S. S.B. 377 indicates Conference Committee Substitute for S.B. 377.


4. See Lake v. Constr. Mach., Inc., 787 P.2d 1027, 1031 n.9 (Alaska 1990). See also C.S.S.B. 377 (Fin) am § 1. Though this section was excluded from the legislation as enacted, it contained a recitation of the findings and purpose of the Senate's legislative
An important element of the Act was the apportionment of damages provision, Alaska Statutes section 09.17.080, which provided a procedural framework within which the factfinder in a given lawsuit could allocate fault and apportion damages among concurrent tortfeasors. Shortly after

scheme. This section recognized both the escalating costs of liability insurance and the need to initiate legislative reforms of common law doctrines. Lake and C.S.S.B. 377 (Fin) am are discussed in more detail infra part II.B.

5. Alaska Statutes section 09.17.080, as originally enacted in 1986, was modeled largely on section 2 of the Uniform Comparative Fault Act. UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 49 (Supp. 1991). The Alaska statute reads as follows:

Apportionment of damages. (a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under [Alaska Statutes section] 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

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

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under [Alaska Statutes section] 09.16.040.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to a reduction under [Alaska Statutes section] 09.16.040, and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) The court shall enter judgment against each party liable on the basis of joint and several liability, except that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

ALASKA STAT. § 09.17.080 (1986). This version of the statute is discussed at length infra part II.B.

6. Fault is defined in Alaska Statutes section 09.17.900:

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

ALASKA STAT. § 09.17.900 (1986). Section 1(b) of the Uniform Comparative Fault Act is virtually identical. UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 43 (Supp. 1991).

7. Terminology has caused some confusion in this area. See WILLIAM LLOYD PROSSER & W. PAGE KEETON, THE LAW OF Torts § 46 at 322 (5th ed. 1984) [hereinafter PROSSER & KEETON]. For the purposes of this article, the phrase "concurrent tortfeasors" (as opposed to another commonly used phrase, "joint tortfeasors") will be used to describe
passage of the Act, Alaska's voters made their sentiments on the subject of tort reform known through a 1987 ballot initiative. This initiative amended Alaska Statutes section 09.17.080(d) and repealed the Alaska Uniform Contribution Among Joint Tortfeasors Act, Alaska Statutes sections 09.16.010-060.

This article will not attempt to evaluate the desirability or undesirability of tort reform. Instead, it will focus on an analysis of the apportionment of damages statute, addressing each of the following subjects: (1) the legal developments in Alaska prior to tort reform with respect to concurrent tortfeasors; (2) the intent of the legislature in passing the Tort Reform Act, including Alaska Statutes section 09.17.080; and (3) the intent of the electorate in amending the statute and repealing contribution. Next, a hypothetical factual scenario will be introduced to facilitate an analysis of the operation of Alaska Statutes section 09.17.080 as enacted by the legislature and a significant problem associated with that version of the statute, as well as an analysis of the operation of the statute as amended by ballot initiative and the predominant problem arising under that version. These analyses reference various arguments which litigants can marshal in support of their respective positions concerning the operation of the statute.

The most prevalent problem with section 09.17.080 as amended is its failure to provide any clear-cut indication whether one concurrent tortfeasor singled out by a claimant as the only defendant has any means of allocating fault to fellow tortfeasors. Both the legislature and the Alaska Supreme Court have indicated that they favor an equitable sharing of the obligation to pay damages among concurrent tortfeasors. It is also inferable that the electorate, in passing the 1987 ballot initiative, intended to impose limitations on a concurrent tortfeasor's obligation to respond in damages. That obligation was intended to be in proportion to the tortfeasor's share

persons whose negligence contributes to a single occurrence, including, if indicated by the context, a contributorily negligent claimant. "Claimant" will be used to mean "plaintiff," in order to be consistent with Alaska Statutes sections 09.17.080 and 09.17.060, which equate the terms. See also supra note 5.

8. See Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991) (briefly discussing the origin of the ballot initiative). The ballot initiative is also discussed infra part II.C.

9. Section 1 of the 1987 Initiative Proposal No. 2 amended Alaska Statutes section 09.17.080(d) to read: "The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault." Section 2 of the 1987 Initiative Proposal No. 2 repealed Alaska Statutes sections 09.16.010-.060, the Alaska Uniform Contribution Among Joint Tortfeasors Act.

10. In this article, "legislative purpose" and "legislative intent" are meant to refer to the purposes of both the Alaska legislature in enacting those provisions of Alaska Statutes section 09.17.080 not amended by ballot initiative, and the Alaska voters in passing Initiative Proposal No. 2.
of the fault. Nonetheless, it is debatable whether Alaska Statutes section 09.17.080, as amended, accords concurrent tortfeasors the fairness intended by the legislature, the court and the voters.

The amended apportionment of damages statute provides for the several liability\textsuperscript{11} of concurrent tortfeasors with no right of contribution.\textsuperscript{12} It is arguable that this provision allows a claimant to exercise unfettered discretion as to who, among concurrent tortfeasors, will be subject to an allocation of fault and apportionment of damages. By bringing a claim against only one of two or more concurrent tortfeasors, the claimant can "target" a particular tortfeasor, leaving him or her no recourse against fellow tortfeasors. A targeted tortfeasor who is given no means of allocating fault to fellow tortfeasors is arguably being denied the ability to equitably apportion the obligation to pay damages among them. If the statute operates in this manner, it impedes the fair apportionment of damages.

Available legal authority affords no ready answer to the question whether a targeted concurrent tortfeasor has any means of allocating fault to other tortfeasors. Because ultimate resolution of this and other problems involving the operation of Alaska Statutes section 09.17.080 cannot be predicted with any degree of certainty, litigants will undoubtedly continue to dispute the statute's operation until authority emerges which provides definitive guidance. Should the legislature conclude that the statute is in need of clarification, it could enact amendatory language for that purpose.\textsuperscript{13} In the alternative, if called upon to do so, the Alaska Supreme Court could interpret the operation of the statute. The court could also provide an answer to the central question without interpreting the statute's operation. Finally, the court could conclude that the statute in its present form provides no acceptable means of allocating fault and apportioning damages to other tortfeasors. If the right to such an allocation and

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\textsuperscript{11} Black's Law Dictionary defines "several liability" as "[l]iability separate and distinct from liability of another to the extent that an independent action may be brought without joinder of others." \textsc{Black's Law Dictionary} 1374 (6th ed. 1991).

\textsuperscript{12} Black's Law Dictionary provides the following definitions of contribution:
1) Right of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.
2) Under \textit{the principle of "contribution,"} a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of \textit{the} judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.

\textsc{Black's Law Dictionary} 328 (6th ed. 1991). \textit{But see} Colt Industries Operating Corp. v. Frank W. Murphy Manufacturer, Inc., 822 P.2d 925 (Alaska 1991), where a majority of the Alaska Supreme Court, for contribution purposes, calculated the number of pro rata shares without accounting for all settling tortfeasors.

\textsuperscript{13} See Matanuska-Susitna Borough v. Hammond, 726 P.2d 166, 176 n.21 (Alaska 1986) (holding that "subsequent legislation declaring the intent of a previous enactment is entitled to great weight").
apportionment is accorded constitutional status, the supreme court may strike down Alaska Statutes section 09.17.080 as unconstitutional. In any case, until such time as the legislature or the supreme court acts, apportionment of damages among concurrent tortfeasors will be the object of considerable disagreement among litigants.14

II. THE DEVELOPMENT OF THE LAW OF CONCURRENT TORTFEASORS IN ALASKA

A. An Overview of the Law Prior to Tort Reform

At common law, concurrent tortfeasors were jointly and severally liable15 without a right of contribution.16 Each tortfeasor was liable for a claimant’s damages in their entirety.17 Even though a single tortfeasor might be required to pay the entire judgment, such a party did not have the right to claim against other tortfeasors.18 However, a claimant was barred from recovery by his contributory negligence.19 Until fairly recently, Alaska subscribed to these rules.20

14. Here and elsewhere, unless the context indicates otherwise, reference to “litigants” is intended as an abbreviated means of designating all individuals impacted in some way by the controversy surrounding the operation of Alaska Statutes section 09.17.080. Those individuals include, but are not necessarily limited to, litigants, attorneys, trial courts, insureds and insurers.

15. See BLACK’S LAW DICTIONARY 837 (6th ed. 1991) (stating that “[a] liability is said to be joint and several when the [claimant] may sue one or more of the parties to such liability separately, or [any] of them together at his option”).

16. See generally PROSSER & KEeton, supra note 7, § 67 at 475, § 50 at 336-38, and cases cited therein.


18. See generally PROSSER & KEeton, supra note 7, § 50 at 336-38, and cases cited therein.


20. The inference that concurrent tortfeasors were jointly and severally liable arises from the holdings in cases such as Ehredt v. Dehavilland Aircraft Co. of Canada, 705 P.2d 913 (Alaska 1985), and City and Borough of Juneau v. Alaska Elec. Light & Power, 622 P.2d 954 (Alaska 1981).

In Vertecs Corp. v. Reichhold Chemicals, Inc., 661 P.2d 619 (Alaska 1983), the Alaska Supreme Court discussed implied indemnity, but the court did not see fit to adopt it. In Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430-33 (Alaska 1979), the court sketched the history of contribution in Alaska, noting that there was no right to contribution prior to enactment of the Alaska Uniform Contribution Among Joint Tortfeasors Act. ALASKA STAT. §§ 09.16.010-060 (1970), repealed by Initiative Proposal No. 2, § 2 (1989). In the watershed Kaatz case, 540 P.2d at 1037, the rule of contributory negligence was replaced by the rule of comparative negligence. More detailed discussions of the last three cases, which can be termed landmark decisions in Alaska prior to tort reform, appear infra immediately below.
Also, an affirmative defense traditionally available to a defendant at common law is the negligence of a third person not a party to the litigation that was the sole cause of a claimant's damages.21 The alleged defendant-tortfeasor can avoid all liability to the claimant if successful in her assertion of this defense. Nevertheless, this affirmative defense is probably of limited utility. The typical lawsuit is unlikely to name a party in the complaint who ultimately has no liability for the damages, while others wholly responsible for the damages are not sued.

In 1970, the Alaska Legislature adopted pro rata contribution22 when it enacted the 1955 version of the Uniform Contribution Among Joint Tortfeasors Act.23 With the advent of pro rata contribution, and in the absence of any indemnification claim,24 contribution became the method whereby one concurrent tortfeasor could cross-claim against other tortfeasors for having to respond in damages to the claimant. If need be, the tortfeasor seeking contribution could initiate an action for contribution against the other tortfeasors when the claimant herself had not sued them. In Ogle v. Craig Taylor Equipment Co.,25 the Alaska Supreme Court set forth the elements of a contribution claim:

First, the claimant must be a tortfeasor. Second, the contribution defendant must be a tortfeasor. Third, they must be jointly and severally liable in tort for the same injury. Fourth, the claimant must have paid more than [her] pro rata share of the common liability. Fifth, the claimant must have extinguished the contribution defendant's liability for the injury or wrongful death. Sixth, if the liability was extinguished by settlement, the amount must be reasonable.26


22. Under a pro rata contribution scheme, each concurrent tortfeasor is responsible for an equal share of the damages, regardless of the individual tortfeasors' percentage of fault. See BLACK’S LAW DICTIONARY, supra note 12.


24. See Vertecs Corp. v. Reichhold Chemicals, Inc., 661 P.2d 609 (Alaska 1983). See also BLACK’S LAW DICTIONARY 769 (6th ed. 1991) (defining indemnity as "[a] contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technologically or passively at fault to another who is primarily or actively responsible").


26. Id. at 725-26 (citations omitted). The statute at issue in Ogle was former Alaska Statutes section 09.16.010, which provided in relevant part:

(a) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to
Passage of the Act was a welcome development for many litigants because it afforded them the opportunity to distribute risk-bearing among fellow tortfeasors and, if the contributing tortfeasors were solvent, to distribute loss-bearing among them as well.\(^{27}\)

In 1975, the Alaska Supreme Court's decision in *Kaatz v. State*\(^ {28}\) abrogated the rule of contributory negligence and replaced it with that of pure comparative negligence. In response to criticism that allocating responsibility under the new rule would be a difficult task for a jury, the supreme court reasoned that """"although jurors' verdicts are not precisely scientific, an allocation of proportionate fault approaches reality more closely than the total loss or victory represented by the contributory negligence rule.""""\(^ {29}\) Four years after *Kaatz*, in *Arctic Structures, Inc. v. Wedmore*,\(^ {30}\) the court explained that """"in abandoning the rule of contributory negligence in favor of comparative negligence, [it] was concerned with the inequity of requiring an injured plaintiff to bear damages far in excess of his or her own measure of fault simply because the plaintiff was less than completely free of negligence.""""\(^ {31}\)

In *Arctic Structures*, certain litigants attempted to persuade the supreme court that, notwithstanding the pro rata contribution provision, contribution ought to be proportionate.\(^ {32}\) The underpinning of their argument was that the concept of proportionality of fault, first introduced with the rule of comparative negligence in *Kaatz*, should be extended to concurrent tortfeasors. The claimants suggested that the relative degrees of fault of contributing co-defendants and third-party defendants should be the measure of the respective litigants' contribution.\(^ {33}\) The supreme court, feeling constrained by the legislative mandate, declined the invitation to

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the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.


31. *Id.* at 429.
32. *Id.*
33. *Id.*
engraft proportionate contribution on Alaska law, stating: "[i]n light of Alaska's existing pro rata legislative scheme for apportionment of damages among joint tortfeasors and the public policies implemented by the legislation, we hold that the common law rule of joint and several liability should not be judicially modified."34 Despite holding as it did, the court noted that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability."35

Although Arctic Structures made it clear that the rule of joint and several liability would not be judicially modified in those circumstances, the Alaska Supreme Court also indicated that it would be favorably disposed to a legislative modification of the rule to comport with the Uniform Comparative Fault Act. Referring to the apportionment of damages provision of the Act, the court stated:

Though the common law rule of joint and several liability does impose the risk of uncollectibility upon the solvent defendants, we are not convinced that as a general rule the alternative, which would cast the total risk of uncollectibility upon the injured plaintiff, is an improvement. In assessing the advisability of such a change, we think it significant that the National Conference of Commissioners on Uniform State Laws has declined to abolish joint and several liability in the Uniform Comparative Fault Act which was approved by the National Conference in 1977. Rather, that Act adopts a compromise position requiring contribution among multiple defendants based on relative degrees of fault and allowing reallocation of the damages where the obligation of a defendant proves uncollectible.36

As for the reallocation feature in the Act, the court quoted the commentary of the National Conference of Commissioners on Uniform State Laws ("the Commissioners") that "[i]t avoids the unfairness both of the common law rule at [sic] joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant."37

In a 1983 Alaska Supreme Court case, Vertecs Corp. v. Reichhold Chemicals, Inc.,38 one of the parties argued for the adoption of implied indemnity,39 whereby a concurrent tortfeasor whose fault was minimal

34. Id. at 435 (footnote omitted). Referring to the significance of this holding in Arctic Structures, the court has stated elsewhere that it was "most reluctant to modify an existing legislative scheme in order to achieve an equitable result." State v. Wien Air Alaska, Inc., 619 P.2d 719, 720 (Alaska 1980).
35. Arctic Structures, 605 P.2d at 429 n.5 (quoting Li v. Yellow Cab Co., 532 P.2d 1226, 1231 (Cal. 1975)).
36. Id. at 431-32.
37. Id. at 432 (quoting UNIF. COMPARATIVE FAULT ACT § 2 cmt., 12 U.L.A. 49 (Supp. 1991)).
39. For the purposes of this article, "implied indemnity" refers to indemnification that
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might shift all liability to another tortfeasor who was substantially at fault in causing the alleged damages. This argument was rejected, primarily on the grounds that statutory contribution provided the superior means of shifting the obligation to pay for a claimant's losses among concurrent tortfeasors. The Alaska Supreme Court expressed its sympathy for a tortfeasor who had to satisfy an entire judgment, remarking that "it is indeed grating to contemplate that [she] may well shoulder the entire loss while the tortfeasor bearing a large degree of fault suffers none." The court went on to indicate that "shifting the loss from one bearing a minor degree of blame to a greatly more blameworthy tortfeasor is in accord with the tort principle that those at fault should bear the consequences of their defalcations."

On the eve of tort reform, two signals had emerged from this line of cases: the Alaska Supreme Court would be receptive to both proportionate fault and proportionate contribution, once the latter had been statutorily instituted. The Tort Reform Act and ballot initiative brought substantial changes in the law in both these areas.

B. The Tort Reform Act of 1986

Tort reform was intended to address a number of perceived deficiencies in the civil justice system. The legislature was apparently dissatisfied with the pace at which tort law was undergoing change in the courts. As the Senate Finance Committee stated:

Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms.

The legislature also expressed concern for the government's increasing exposure to lawsuits and for the rising cost of liability insurance for both

is without a contractual basis, either express or implied. See Fairbanks North Star Borough v. Kandik Constr., Inc., 823 P.2d 632 (Alaska 1991); Otis Elevator Co. v. Garber, 820 P.2d 1072 (Alaska 1991); See also supra note 24 (discussing the definition of indemnity).

40. See Vertecs, 661 P.2d at 619.
41. Id. at 623-24.
42. Id. at 624. The supreme court further recognized "the modern tort goal of shifting losses in a socially desirable fashion so that the loss is most efficiently spread throughout society." Id.
44. C.S.S.B. 377 (Fin) am, § 1(a).
government and the private sector, especially health care providers. In view of these factors, one purpose of the legislation, according to the Senate, was to "enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." The Senate summarized its intentions with respect to tort reform as follows: "[I]t is the intent of the legislature to reduce costs associated with the tort system, while ensuring that adequate and appropriate compensation for persons injured through the fault of others is available." Both the Senate and House introduced their respective versions of the legislation on January 31, 1986. The Senate bill made its way through various committees and passed the Senate on May 5, 1986. Of particular interest to the analysis here was that the Senate bill provided for pure several liability and the repeal of contribution. Senator Rodey proposed amending the bill to delete the provision for several liability and replace it with a provision for modified joint and several liability. The amendment failed.

The House bill encountered a bumpier road, but a version of the legislation was passed on May 8, 1986. The House bill provided for modified joint and several liability and the repeal of contribution. An amendment was introduced by Representative Cotten, proposing that the

45. See id. § 1(b), (c).
46. Id. § 1(a).
47. Id. § 1(e).
48. See S. JOURNAL, 14th Leg., 2d Sess. 1691 (1986); H. JOURNAL, 14th Leg., 2d Sess. 1941 (1986).
49. See S. JOURNAL, 14th Leg., 2d Sess. 2117, 2400-01, 2534-35, 2577 (1986).
50. Id. at 2616, 2618.
51. Section 2 of C.S.S.B. 377 (Fin) am added Alaska Statutes title 09 by adding a new chapter, Alaska Statutes chapter 09.17. This new chapter included section 09.17.080(d). Section 7 of C.S.S.B. 377 (Fin) am provided for the repeal of contribution. This section was not enacted by the legislature. See infra text accompanying notes 59-60. Contribution was ultimately repealed as part of the ballot initiative. See infra part II.C.; ALASKA STAT. ch. 09.17 (Supp. 1991).
52. See S. JOURNAL, 14th Leg., 2d Sess. 2610-11 (1986). Modified joint and several liability, as that phrase is used in this article, refers to the liability provided for in Alaska Statutes section 09.17.080(d) prior to amendment by ballot initiative. See also Lake v. Constr. Mach., Inc., 787 P.2d 1027, 1029-30 (Alaska 1990).
53. See S. JOURNAL, 14th Leg., 2d Sess. 2611 (1986).
54. See H. JOURNAL, 14th Leg., 2d Sess. 3228, 3247 (1986).
55. Section 1 of H.C.S. for C.S.S.B. 377 (Jud) am H added Alaska Statutes title 09 by adding a new chapter, Alaska Statutes chapter 09.17. This new chapter included section 09.17.080(d). Section 9 of H.C.S. for C.S.S.B. 377 (Jud) am H provided for the repeal of contribution. This section was not enacted by the legislature. See infra text accompanying notes 59-60. Contribution was ultimately repealed as part of the ballot initiative. See infra part II.C.; ALASKA STAT. ch. 09.17 (Supp. 1991).
provision for modified joint and several liability be replaced with one for pure several liability. It failed.\textsuperscript{56}

Neither body would retreat from its version of the legislation and it was referred to a Conference Committee on May 11, 1986.\textsuperscript{57} The Conference Committee requested and was granted limited powers of free conference, with contribution being among the areas subject to free conference.\textsuperscript{58} On the last day of the legislative session, May 12, 1986, the Conference Committee offered a compromise version of the legislation, which, interestingly, opted for modified joint and several liability but retained contribution, which had been repealed in both the Senate and House versions.\textsuperscript{59} The Conference Committee Substitute for Senate Bill

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\item \textsuperscript{56} See H. JOURNAL, 14th Leg., 2d Sess. 3237-38 (1986).
\item \textsuperscript{57} See S. JOURNAL, 14th Leg., 2d Sess. 2815 (1986); H. JOURNAL, 14th Leg., 2d Sess. 3380, 3386-87 (1986).
\item \textsuperscript{58} See S. JOURNAL, 14th Leg., 2d Sess. 2865-66 (1986); H. JOURNAL, 14th Leg., 2d Sess. 3438 (1986). The limited powers of free conference are provided in Rule 42 of the Rules of Legislative Procedure. That rule affords Conference Committees the power to depart from the House and Senate versions of the legislation referred to them, but only on limited topics authorized by the House and Senate. ALASKA R. LEG. P. 42.
\item \textsuperscript{59} See H.C.S. C.S.S.B. 377 (Jud) am H § 1. Leaving contribution in effect apparently was not the result of any conscious design on the part of the Conference Committee. Two lobbyists, one for and one against the Tort Reform Act, described developments in the Conference Committee as follows:
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\item 3. On May 11, 1986, not having reached a satisfactory compromise, the Conference Committee gave the bill to the special interest groups and requested them to devise a compromise with which all sides would agree. Each side was under great pressure to reach an acceptable compromise and to come out of the 1986 legislative session with an appropriate Tort Reform bill.
\item 4. May 12, 1986 was the last day of the legislative session. As of 2:10 PM on May 12 we had not yet formulated a bill acceptable to all parties.
\item 5. Until 2:10 PM on May 12, each version of the bill contained an explicit repealer of [Alaska Statutes section] 09.16, the Contribution Among Joint Tortfeasors Act.
\item 6. Between 2:10 PM and 4:00 PM on May 12, 1986, the last day of the legislative session, the parties agreed on a compromise bill. This bill did not eliminate joint liability, but rather limited a tortfeasor's liability to the plaintiff to two times the percentage the tortfeasor was found at fault. The parties recognized that, given this compromise, it was necessary to continue to allow tortfeasors the right of contribution against joint tortfeasors, who had not paid their percentage of fault. The two times percentage of fault provision was put in for the benefit of the plaintiff and as a compromise reluctantly accepted by the tort reform group to obtain the bill. No one consciously addressed the issue of how contribution would be handled in light of the bill, but no inference may be drawn from the legislative process that the two times percentage of fault would apply in contribution between joint tortfeasors.
\item 7. This compromise bill excluded the repealer of [Alaska Statutes section] 09.16 because, having formulated a successful compromise bill on the last day of the legislative session, the parties did not have time to consider the implications of repealing [section] 09.16 in light of the final compromise. The parties therefore elected to omit the repealer of [section] 09.16, leaving to future legislatures and courts the task of defining and determining the relationship between the Tort Reform Act and the Contribution Among Joint Tortfeasors Act.
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377 was then passed by both houses of the Alaska Legislature.\textsuperscript{60}

The Limitations on Civil Liability Act borrowed somewhat selectively from the Uniform Comparative Fault Act. In addition to adopting a modified version of the Act's apportionment of damages provision\textsuperscript{61} and its definition of fault,\textsuperscript{62} the legislature also adopted the provision of the Uniform Act pertaining to contributory fault.\textsuperscript{63} The legislature chose to retain the existing Alaska contribution act rather than to enact the contribution scheme set forth in sections 2(c) and (d), 4, 5 and 6 of the Uniform Comparative Fault Act, despite the Commissioners' admonition that "pro rata contribution . . . is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved."\textsuperscript{64} Evidently, the legislature must have concluded that proportionate fault, modified joint and several liability and pro rata contribution were compatible.

Part of the Commissioners' comment to section 2 of the Uniform Comparative Fault Act is also significant. That section incorporates statutory contribution into the apportionment of damages framework, enabling a defendant-tortfeasor to bring claims against others, make them parties to the action and potentially allocate fault to them.\textsuperscript{65} The Commissioners commented that "[b]oth plaintiffs and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant."\textsuperscript{66} After providing a method whereby a defendant could bring other tortfeasors into an action, it was reasonable for the


60. \textit{See S. JOURNAL, 14th Leg., 2d Sess. 2885-86 (1986); H. JOURNAL, 14th Leg., 2d Sess. 3467 (1986).}

61. \textit{See supra note 5.}

62. \textit{See supra note 6.}

63. \textit{See supra note 5.}

64. \textit{See supra note 6.}

65. \textit{See supra note 5.}

66. \textit{See supra note 5.}
Commissioners to structure the allocation of fault in section 2 in terms of parties to the action. The Alaska Legislature ultimately retained the original Alaska Uniform Contribution Among Joint Tortfeasors Act in the process of passing the Tort Reform Act and, consistent with section 2 of the Uniform Comparative Fault Act, Alaska Statutes section 09.17.080(a) initially refers to the fault of parties to the action. However, the point that, without contribution, a defendant typically has no claim against her fellow concurrent tortfeasors, and thus no other means of making them parties to an action, was apparently lost on the legislature and others involved in the legislative process.\textsuperscript{67}

To date, the only reported decision that applied the pre-ballot initiative version of Alaska Statutes section 09.17.080 is \textit{Lake v. Construction Machinery, Inc.}\textsuperscript{68} In that case, an injured worker brought a products liability claim against the manufacturer, the distributor and several intermediate vendors of the "manlift" from which he fell. The distributor interposed a partial affirmative defense based on Alaska Statutes section 09.17.080, asserting that the plaintiff's damages had to be reduced by the percentage of fault of the employer. Under the Alaska Workers' Compensation Act,\textsuperscript{69} the "liability of an employer prescribed in [Alaska Statutes section] 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee... and anyone otherwise entitled to recover damages from the employer or fellow employee."\textsuperscript{70} The issue presented was whether fault could still be allocated to the employer notwithstanding the exclusive liability provision.

Before tackling the central question, the Alaska Supreme Court briefly explained the operation of Alaska Statutes section 09.17.080: "[u]nder the new statute, the finder of fact must fix the damage awards, and determine the respective percentages of fault. The court then enters judgment on the basis of modified joint and several liability."\textsuperscript{71} The court then observed the following:

The legislature's intent is not apparent from the plain language of [Alaska Statutes section] 09.17.080(a)(2). Although the legislature has authorized the finder of fact to allocate fault among "each claimant, defendant, third-party defendant, and person who has been released from liability under [Alaska Statutes section] 09.16.040," an employer does not fit easily within any of these categories.\textsuperscript{72}

\textsuperscript{67} See supra note 59.
\textsuperscript{68} 787 P.2d 1027 (Alaska 1990).
\textsuperscript{69} ALASKA STAT. §§ 23.30.005-270 (1990).
\textsuperscript{70} Lake, 787 P.2d at 1029 n.3 (quoting Alaska Statutes section 23.30.055).
\textsuperscript{71} Id. at 1029-30 (citations omitted).
\textsuperscript{72} Id. at 1030.
Despite the absence of a category to which an employer belonged, the court recognized that "evidence of an employer's negligence may be relevant and admissible to prove that the employer was entirely at fault, or that the employer's fault was a superseding cause of the injury." The court ultimately held that under Alaska Statutes section 09.17.080, the factfinder could allocate all or none of the fault to the employer, but could not allocate a portion of it.

The decision gives rise to more questions than it answers. Notably, it allows for fault to be allocated under the statute to one who is not a party to the action. It is unclear, however, if the operation of Alaska Statutes section 09.17.080 in this manner is restricted to non-party employers. It also remains unclear whether the all-or-nothing limitation on allocation to the non-party employer is due solely to the unique status of employers under the Alaska Workers' Compensation Act or if the limitation would apply in every case. In addition, it remains unclear whether a partial affirmative defense is still at issue when the allocation of fault is all-or-nothing.

With respect to this last question, it is noteworthy that the issue in Lake arose because the employer pleaded the statute as a partial affirmative defense. This fact presumably caused the court to analyze and apply Alaska Statutes section 09.17.080. Otherwise, it is difficult to discern how allocating all or none of the fault under the statute would produce a markedly different result than pleading and proving the affirmative defense that the employer is negligent and wholly responsible for the damages, a defense that has always been available. Resort to the procedure provided by the statute is redundant where an all-or-nothing limitation is placed on the allocation of fault.

At this stage of its development, the law still provided for statutory contribution, a method by which one tortfeasor could bring other tortfeasors into an action or cross-claim against them in order to more equitably distribute damages. Despite the retention of pro rata contribution, which, as the Commissioners pointed out, was antithetical to the principle of proportionate fault, the statute preserved, perhaps inadvertently, a mechanism for loss-shifting between concurrent tortfeasors. The ballot initiative possibly changed that.

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73. Id. at 1031. See supra part II.A. for a discussion of the affirmative defenses.
74. See Lake, 787 P.2d at 1031.
C. The 1987 Ballot Initiative Amendments

As indicated, in the eleventh hour of the 1986 session, the legislature settled on a version of the act which provided for modified joint and several liability and the retention of contribution. Soon thereafter, the Citizens Coalition for Tort Reform, Inc., took up the gauntlet of tort reform with the 1987 ballot initiative. It will become evident in later discussion that the intent of the electorate in passing the ballot initiative, to the extent it can be determined, is of crucial importance. A rule of statutory construction recognized in Alaska provides that a statute is to be interpreted by examining its language construed in light of its purpose. Because the statute in question has been amended by ballot initiative, it is appropriate to explore the intent of the voters. In other jurisdictions, voter intent in an initiative has been

75. The Citizens Coalition for Tort Reform came under some scrutiny by the Alaska Supreme Court in Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991). In that litigation, the central issue was whether section 3 of Initiative Proposal No. 2 was properly excluded from Ballot Measure No. 2 by then Lt. Governor Stephen A. McAlpine on the basis that it prescribed a court rule. See infra note 76. Although it is possible to surmise that the Coalition represented certain interests, the court offered this assessment of the organization in discussing an award of attorney's fees against the Coalition: "our review of the record shows that the Coalition simply has failed to explain who or what it is. Instead, it has maintained near anonymity throughout the course of its lawsuit. All we really know about the Coalition is that it is a 'nonprofit corporation.'" Citizens Coalition, 810 P.2d at 171. Later in its opinion, the court appeared to question the genuineness of the Coalition's self-proclaimed motive, remarking that "the Coalition offers only its own pursuit of its lawsuit as proof that its true motive was to benefit the electorate of the state by providing an opportunity to vote on an important initiative." Id.

76. See Citizens Coalition, 810 P.2d at 162. See also ALASKA CONST. art. XI, § 1 (providing that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum"). Consistent with other provisions of article XI of the state constitution, Alaska Statutes section 15.45.010 prescribes the procedure to be followed in ballot initiatives. For example, article XI, section 7 restricts the use of a ballot initiative, stating in pertinent part that "[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." ALASKA STAT. § 15.45.010 (1988). Accordingly, Alaska Statutes section 15.45.010, employing similar language, indicates that an initiative may not be used for those purposes. ALASKA STAT. § 15.45.010 (1988).


78. See, e.g., In re Lance, 694 P.2d 744, 754 (Cal. 1985); State ex rel. Palmer v. Hart, 655 P.2d 965, 967 (Mont. 1982); City of Spokane v. Taxpayers of City of Spokane, 758 P.2d 480, 483 (Wash. 1988). The Alaska Supreme Court has indicated that deference to the intent of the voters is appropriate in a related context: Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. Rather, absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision. Citizens Coalition, 810 P.2d at 169 (citations omitted). See also State v. Lewis, 559 P.2d 630 (Alaska), cert. denied and appeal dismissed, 432 U.S. 901 (1977). Following this reasoning, a court should defer to the meaning the voters placed on Alaska Statutes section
inferred from election pamphlets,\textsuperscript{79} ballot summaries and legislative staff analyses.\textsuperscript{80}

Once sections 1 and 2 of the initiative met the requirements for placement on the ballot,\textsuperscript{81} Alaska law required the publication of an election pamphlet describing the ballot measure.\textsuperscript{82} Accordingly, the pamphlet included a general summary of the proposition prepared by the lieutenant governor,\textsuperscript{83} a summary prepared by the Legislative Affairs Agency,\textsuperscript{84} a statement by the Citizens Coalition for Tort Reform in

\textsuperscript{80} Section 3 of Initiative Proposal No. 2, pertaining to attorney's fees, was ultimately excluded from the ballot measure. \textit{See Citizens Coalition}, 810 P.2d at 164. Initiative Proposal No. 2, sections 1 and 2 are referenced on the ballot as Ballot Measure No. 2.

\textsuperscript{81} Pursuant to Alaska Statutes section 15.58.020(6)(B), the following summary appeared in the pamphlet:

This initiative changes the way damages can be collected from parties to lawsuits who share fault for injury to persons or property. The law now says that a party more than half responsible could be liable for the total judgement. Parties may collect from each other amounts paid over their share. Parties less than half responsible pay only up to twice their fault. The initiative would make each party liable only for damages equal to his or her share of fault, and repeal the law concerning reimbursement from other parties.

\textit{ELECTION PAMPHLET, BALLOT MEASURE No. 2} (1988).

\textsuperscript{82} In accordance with the provisions of Alaska Statutes section 15.58.020(6)(C), the agency summarized the initiative as follows:

This measure will affect lawsuits in which two or more persons are at fault. The new law would tell the court to enter judgment against each person at fault, but only in an amount that represents that person's share of the fault. Existing law now tolls the court to enter judgment against each person at fault in an amount equal to the total liability of all persons at fault. Those at fault are required to share the total cost of the fault. The measure repeals that law. The measure applies to suits based on acts occurring after its effective date.

\textit{ELECTION PAMPHLET, BALLOT MEASURE No. 2} (1988).
support of the measure, and a statement by Alaskans for Fairness in opposition to it.

It can be inferred that various contributors to the pamphlet understood that the statute as amended would operate to provide for the allocation of fault to persons who were responsible for a claimant's damages and to limit the obligation to pay damages in accordance with that allocation of fault. Selected excerpts from the pamphlet underscore these conclusions. The Legislative Affairs Agency's summary referred to a court entering "judgment against each person at fault, but only in an amount that represents that person's share of the fault." Also, the Coalition’s statement in support of the initiative indicated that:

joint and several liability . . . forces people to pay for damages caused by somebody else and it contributes to inflated damage awards and encourages lawsuits based on who has money instead of who's at fault.
If [the initiative] is passed and you do something wrong, you pay for it.
But you would not be forced to pay for something you didn’t do.

Assuming that these excerpts accurately reflect voter intent and not simply the intent of the drafters, they suggest that the electorate’s purpose was to impose limitations on a tortfeasor’s obligation to pay damages. That obligation would be commensurate with the tortfeasor’s share of the fault, when compared with that of all other tortfeasors.

85. The Coalition’s supporting statement reads:
Supporters of this ballot measure believe it isn’t fair to hold people responsible for things that aren't their fault. Yet, under current law, defendants found liable in a civil suit can be forced to pay damages equal to twice the amount of their fault. In other words, if you are 50 percent responsible for an injury you could be forced to pay 100 percent of the damages. The current law -- called joint and several liability -- is simply unfair. It forces people to pay for damages caused by somebody else and it contributes to inflated damage awards and encourages lawsuits based on who has money instead of who’s at fault. If Ballot Measure No. 2 is passed and you do something wrong, you pay for it. But you would not be forced to pay for something you didn’t do -- which could happen under present law. This initiative will make the civil justice system more fair by assessing damages on the basis of a person’s degree of fault, instead of on how much money or insurance he/she has. Thus, if you are found to be 20 percent responsible for someone’s injury or property damage, you pay only 20 percent of the award. Ballot Measure No. 2 will make the civil justice system more fair, while ensuring that people are held accountable for injuries or damage they cause. Please vote YES on Ballot Measure No. 2.

86. Although the ballot measure passed, the statement in opposition is relevant to the issues discussed in this article. In part, the statement reads:
The insurance companies pushing Ballot Measure No. 2 are telling us wrongdoers should only pay their own share of the loss. That sounds good. But the insurance companies are not telling us what happens when one of the wrongdoers cannot pay anything. This is a common problem. Under Ballot Measure No. 2, the insurance company wins, and the victim loses.

87. Id.; see also supra note 84.
88. Id.; see also supra note 85.
Alaskan voters went to the polls on November 8, 1988, and passed Ballot Measure No. 2. After a 90-day statutory grace period, concurrent tortfeasors in Alaska became severally liable for a claimant's damages without a right to contribution. However, the success with which the statute accomplishes its purpose of equitably apportioning damages is questionable.

III. PROBLEMS PRESENTED BY THE OPERATION OF ALASKA STATUTES SECTION 09.17.080

To facilitate an understanding of the operation of Alaska Statutes section 09.17.080 in both its pre- and post-ballot initiative versions, the following hypothetical situation will be employed. On a particular evening, David patronizes the Great Land Bar. He arrives sober and is served liquor by the owner/bartender, Bob, to the point where he is clearly intoxicated. This conduct gives rise to the potential for civil liability of the bar as a licensed vendor of alcoholic beverages. David then drives home in violation of Alaska Statutes section 28.35.030(a)(1).

Travelling home from the Great Land Bar, David uses Alaska Highway 1, a road designed, constructed and maintained by the State of Alaska. A portion of Highway 1 is known as Deadman's Curve because many accidents have occurred there in the past. The design of Deadman's Curve employs reverse camber, that is, the road is banked the opposite of what would ordinarily counteract the effect of centrifugal force on vehicles negotiating the curve. The state incorporated reverse camber into the design in order to facilitate drainage of the roadway. Designing Deadman's Curve with reverse camber may have been either a planning decision or an operational decision of the State of Alaska, thus giving rise to the question whether the state is immune from liability.

89. Ballot Measure No. 2 was approved by 71.8% of the voters. See OFFICE OF THE LIEUTENANT GOVERNOR, STATE OF ALASKA OFFICIAL RETURNS, NOVEMBER 8, 1988 GENERAL ELECTION (1988).

90. See ALASKA STAT. § 15.45.220 (1988).
91. See ALASKA STAT. § 04.21.020 (1986) (stating in relevant part that a person who provides alcoholic beverages to a drunken person, as defined in Alaska Statutes section 04.21.080(b)(8), may "be held civilly liable for injuries resulting from the intoxication of that person"). See also ALASKA STAT. § 04.16.030 (Supp. 1991) (applying section 04.21.020 to "a licensee, an agent, or an employee").
93. See id. § 09.50.250. This statute provides in pertinent part that:
[a] person . . . having a . . . tort claim against the state may bring an action against the state in the superior court. . . . However, an action may not be brought under this section if the claim . . . is an action for tort . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency . . . .
At Deadman's Curve, David loses control of his vehicle and has difficulty regaining control due to the reverse camber. His vehicle crosses the center line and slams head-on into another vehicle being driven by Paula. Although the accident leaves David unscathed, Paula suffers serious personal injuries. Her damages total one million dollars. David's automobile insurance affords coverage at the required statutory minimums. Great Land Bar has liquor liability insurance with relevant policy limits of $1,000,000. Under the terms of this policy, Bob is also covered. Apart from any insurance proceeds, David and Bob are judgment-proof in that they have no ability to respond in damages. The State of Alaska has the resources to make good on any judgment resulting from this incident.

A. The Operation of Alaska Statutes section 09.17.080 Prior to Amendment

Cases requiring the application of Alaska Statutes section 09.17.080 in its pre-initiative form are limited in number, as that version of the statute was in force for a relatively short period of time. For the former statute to be at issue, the accident in the illustrative factual scenario must have taken place prior to March 5, 1989. However, this statute would still apply to a number of tort actions in which the statute of limitations is tolled due to the application of the "discovery rule." In addition, the discussion is analytically useful as it provides a comparison for the later section on the post-amendment statute. The most significant problem that arises under the former statute involves the relationship between proportionate allocation of fault, modified joint and several liability, and pro rata contribution. The following discussion will focus on this problem.

From Paula's perspective, the most desirable strategy would be to sue the Great Land Bar and the State of Alaska, assuming the latter has no immunity. They are likely both at fault and have adequate resources.

Id. Alaska has long adhered to the planning-operational test to determine whether a particular governmental act qualified for discretionary function immunity as provided in the above statute. Under that test, planning decisions are discretionary acts that do not give rise to tort liability, whereas non-discretionary operational decisions do. See, e.g., Johnson v. State, 636 P.2d 47 (Alaska 1981); Carlson v. State, 598 P.2d 969 (Alaska 1979).

94. In the circumstances described, the mandated minimum coverage would be $50,000. See ALASKA STAT. § 28.22.101(d)(1) (1989).

95. The "discovery rule," which is generally applied to tort actions, provides that the statute of limitations does not begin to run until "a reasonable person [in like circumstances would have] enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights." Mine Safety Appliance v. Stiles, 756 P.2d 288, 291 (Alaska 1988). For further discussion of the discovery rule as applied by courts in Alaska, see Cameron v. State, 822 P.2d 1362, 1365 (Alaska 1991).
between them to cover the damages. They, on the other hand, would want to dilute their percentages of fault by bringing a contribution action against David. The state and Great Land Bar can bring about a reduction in their "equitable share[s] of the obligation" by effecting a substantial allocation of fault to David.

There is one aspect of the operation of the statute that merits discussion as a preliminary matter. In circumstances where a substantially judgment-proof party such as David is allocated more than the lion's share of the fault, Alaska Statutes section 09.17.080 can operate to the detriment of claimants. This is a drawback that the pre-amendment version of the statute shares with section 09.17.080 as amended. For example, if the respective allocations of fault were David-80%, Great Land Bar-10%, and the state-10%, the apportionment of damages under Alaska Statutes section 09.17.080 would be David-$800,000, Great Land Bar-$100,000, and the state-$100,000. However, applying the provision for modified joint and several liability of Alaska Statutes section 09.17.080(d) in its pre-amendment form, the collectible damages are David-$50,000, Great Land Bar-$200,000 (twice the percentage of fault), and the state-$200,000 (again, twice the percentage). Claimants such as Paula can realize significant shortfalls when attempting to satisfy their judgments. In this example, only $450,000 can realistically be recovered.

As for the allocation problem associated with the operation of the pre-amendment version of section 09.17.080, it is easy to hypothesize circumstances under which the statute's provision for proportionate fault would conflict with the pro rata contribution provision of the now-repealed Alaska contribution act. Assume, for example, that David has not been made a party to the action. Between the remaining defendants,

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96. ALASKA STAT. § 09.17.080(c) (Supp. 1991).
97. See supra note 5.
98. ALASKA STAT. § 09.17.080(d) (1986), amended by Initiative Proposal No. 2, § 1 (1989) (providing that a party allocated less than 50% of the total fault may not be liable for more than twice the percentage of fault allocated to that party).
99. Under the pure several liability provision of the statute as amended, recoverable damages in this example are reduced even further, to $250,000, as only $100,000 can be recovered from Great Land Bar and $100,000 from the state. See ALASKA STAT. § 09.17.080 (Supp. 1991).
100. See ALASKA STAT. § 09.16.010(b) (repealed 1989) (providing in part that "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's pro rata share of the common liability"); ALASKA STAT. § 09.16.020(1) (repealed 1989) (stating that "[i]n determining the pro rata shares of tortfeasors in the entire liability... their relative degrees of fault shall not be considered"). See also Ogle v. Craig Taylor Equip. Co., 761 P.2d 722 (Alaska 1988).
101. The issue whether fault can be allocated to non-parties is addressed infra part III.C. The same analysis would apply to the circumstances here under the pre-amendment version of the statute, where a co-tortfeasor, for some reason, cannot be made party to the action through contribution. The relevant section, Alaska Statutes section 09.17.080(a), was
Great Land Bar and the state, the former is allocated 90% of the fault and the latter 10%. There are two possible outcomes. The state can argue that under section 09.17.080, the maximum amount it must pay is $100,000. Great Land Bar, in having to pay the remaining $900,000, is merely paying the equitable share of the judgment apportioned to it. On the other hand, Great Land Bar, in accordance with the statutory contribution provisions, can arguably recover from the state the amount it paid in excess of its pro rata share. In this case, that amount is $400,000. Since the state is also liable to Paula for $100,000, it must pay damages of $500,000 even though it is allocated only 10% of the fault.

In *Lake v. Construction Machinery, Inc.*, the Alaska Supreme Court indicated the approach it would take to reconcile this conflict. The court had to interpret section 09.17.080 in conjunction with the Alaska Workers' Compensation Act. The justices stated that they would "examine the legislative history and adopt a reasonable construction which realizes the legislative intent, avoids conflict or inconsistencies, and gives effect to every provision of both acts." As illustrated in the above example, giving effect to every provision of each act yields inconsistent and conflicting results. It is impossible to maintain the complete integrity of both acts. The question then is whether contribution or apportionment ought to be emphasized in the reconciliation.

The Alaska Legislature, in enacting section 09.17.080, preserved pro rata contribution in the face of the Commissioners' warning that it was incompatible with proportionate fault. This suggests that the legislature specifically intended to retain contribution in that form. According legislative intent its due, a strong argument can be made for giving effect to pro rata contribution over apportionment. The legitimacy of this argument is questionable, however, because both houses of the legislature had provided for the repeal of contribution and it was ultimately retained by the Conference Committee only due to the need to meet the legislative session deadline. The reality underlying the retention of pro rata contribution strengthens the case for giving precedence to the apportionment statute. Moreover, a standard rule of statutory construction dictates that a more recent statute prevail over an earlier enactment.

unaffected by the ballot initiative.

105. See supra p. 12.
106. See supra note 59 and accompanying text.
107. See Chevron U.S.A. v. Hammond, 726 F.2d 483 (9th Cir. 1984), *cert. denied,*
Alaska Statutes section 09.17.080, as the later statute, should control. Sections 09.17.080(c) and (d) require judgment to be entered in terms of the parties' equitable shares of the obligation in accordance with their respective percentages of fault.

It was stated at the outset of this article that the ultimate resolution of problems with the statute cannot be predicted with any certainty. The preceding discussion is proof of that; good arguments can be made for giving precedence to either act. However, in one sense, this problem has already been resolved. Because statutory contribution was repealed in the ballot initiative, the conflict between the acts is limited to cases arising prior to the repeal becoming effective.

B. The Operation of Alaska Statutes Section 09.17.080 as Amended

Now assume that the hypothetical accident took place subsequent to March 5, 1989, such that the statute in its amended form governs. Paula's objective would again be to maximize recovery. David will likely be found at fault and has $50,000 in insurance coverage to apply to the damages. Thus, if David is allocated more than 5% of the fault, full recovery is not possible. There is little point in claiming against the bartender, Bob, separately since he has no personal assets which can be reached to satisfy the judgment. The bar will probably be found at fault and has sufficient insurance coverage to satisfy any damages in their entirety. The state will also likely be found at fault and has the resources to satisfy a judgment, but it may be immune. Further, if the state succeeds in obtaining a dismissal of the claim brought against it, as a prevailing party, it is entitled to recover costs and attorney's fees.\(^9\)

The prudent choice for Paula would be to avoid claiming against David, Bob and the state, and to bring an action against Great Land Bar only. The ensuing discussion assumes this to be Paula's strategy. The bar's preferred strategy would be to find a means to allocate fault to others, especially David, so that its damages are proportionately reduced. As for these third-parties, their interests align with those of Paula; they do not wish to be made parties. Should fault be allocated to them, they will be required to respond in damages.

There are a variety of means by which a targeted concurrent tortfeasor can possibly allocate fault to other tortfeassors: she could be permitted to

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108. See supra pp. 18-19.
109. See ALASKA R. CIV. P. 79, 82 (providing for costs and partial attorney's fees to be recovered by the prevailing party).
bring one of several substantive causes of action against other tortfeasors, the other tortfeasors could be held to be indispensable parties, or she could plead Alaska Statutes section 09.17.080 as a partial affirmative defense. Each of these means is discussed in turn below.

1. **Substantive Causes of Action.**
   
a. **The Implications of Alaska Statutes section 09.17.080.** With the repeal of contribution, the question arises whether Great Land Bar has any substantive causes of action against concurrent tortfeasors. Alaska Statutes section 09.17.080 is a procedural statute; its operation is intended to effect changes in several rules of civil procedure.\(^{110}\) As such it does not create a substantive cause of action against concurrent tortfeasors as the contribution statute did.\(^{111}\) Moreover, the wisdom of according any weight to the provisions of the statute to resolve the issue whether a tortfeasor should have any substantive claims is debatable. Alaska Statutes section 09.17.080 is not directly implicated in circumstances where the question is the viability of substantive causes of action, especially when those claims are not statutory in origin. Nonetheless, litigants can still be expected to dispute the statute’s import using rules of statutory construction to underscore their respective arguments.

   When possible, a statute is to be interpreted in light of its plain meaning.\(^{112}\) An argument can be made that the meaning of the statute is plain; since it does not provide for causes of action against concurrent tortfeasors, none exist. However, language in Alaska Statutes sections 09.17.080(a) and (a)(2) that provides for fault to be allocated to “third-party defendants”\(^{113}\) implies that a litigant in the bar’s position has a cause of action against third-persons. In the hypothetical, since Paula has claimed against only the Great Land Bar, the bar is the only party that can procedurally bring in third-party defendants.\(^{114}\) On the other hand, litigants in Paula’s position can counter that this language merely provides for an indemnification claim against third-party defendants. Since there can be no indemnity between concurrent tortfeasors, either express or

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110. The preamble to the Conference Committee Substitute for Senate Bill 377 reads: “An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 52, 58, and 82; and providing for an effective date.” But see Ogle v. Craig Taylor Equip. Co., 761 P.2d 722, 725 (Alaska 1988) (stating that “[a] change in the amount of liability is clearly a substantive change”). The amount of a concurrent tortfeasor’s liability changes depending on to whom the factfinder allocates fault and apportions damages under Alaska Statutes section 09.17.080.

111. See ALASKA STAT. § 09.16.010 (repealed 1989).


113. ALASKA STAT. § 09.17.080(a), (a)(2) (Supp. 1991).

114. See ALASKA R. CIV. P. 14(a).
implied, this is a claim Great Land Bar is not entitled to make in these circumstances.\textsuperscript{115}

In the alternative, the parties can argue for different interpretations of Alaska Statutes section 09.17.080 based on another rule of statutory construction, that a statute is to be interpreted by examining its language construed in light of its purpose.\textsuperscript{116} A claimant can assert that the intent of the legislature and electorate is readily inferable from the amended statute's provision for several liability and the simultaneous repeal of contribution. The purpose, according to this argument, is to remove any recourse for defendants against concurrent tortfeasors. In contrast, a targeted concurrent tortfeasor can point out that allowing the statute to operate in this manner is antithetical to both the legislature's interest in creating "a more equitable distribution of the cost and risk of injury"\textsuperscript{117} and the voters' intention to do away with a system whereby a person is forced to pay for damages caused by someone else.\textsuperscript{118}

It is questionable whether a plain meaning has emerged from the language of Alaska Statutes section 09.17.080 or whether the statute is amenable to a definitive interpretation through an examination of its purpose. Again, the immediate issue is the defendant-tortfeasor's ability to bring substantive claims that are not statutorily based, and section 09.17.080 is not directly implicated. Thus, it is reasonable to disregard the provisions of this procedural statute in resolving the issue. Even without any negative implications from Alaska Statutes section 09.17.080, tortfeasors still have a difficult task trying to convince a trial court that, without statutory contribution, they ought to have some other substantive cause of action against concurrent tortfeasors. Since there are no statutory claims, any cause of action must necessarily be of judicial origin.\textsuperscript{119} The

\textsuperscript{115} See Otis Elevator Co. v. Garber, 820 P.2d 1072, 1072-75 (Alaska 1991); Vertecs Corp. v. Reichhold Chemicals, Inc., 661 P.2d 619, 621-26 (Alaska 1983). It is noteworthy that bringing indemnitors into an action will not necessarily lead to a redistribution of the allocation of fault, since a contractual indemnitor may not be at fault. When such an indemnitor is brought in, the fault of the indemnitee is simply visited upon the indemnitor; the allocation of fault vis-a-vis the other parties remains constant.


\textsuperscript{117} See supra part II.B., discussing C.S.S.B. 377 (Fin) am, § 1(a).

\textsuperscript{118} See supra part II.C., discussing the election pamphlet and information contained therein.

\textsuperscript{119} At least two courts have already recognized such a cause of action. In Dunaway v. The Alaskan Village, Inc., No. 3AN-90-3526 Civil (Alaska Super. Ct. July 25, 1991), the court concluded that since section 09.17.080 did not establish a procedure for bringing potentially liable parties before the court, the defendant had a right to implied indemnity, and thus a cause of action, against tortfeasors the claimant chose not to join in the action. A federal district court agreed, noting that "[i]f there is no way to get a potential defendant before the court whom the [claimant] does not wish to sue, the obvious intention of the people is frustrated." Robinson v. U-Haul Co., No. A90-0467 Civil (D. Alaska Feb. 21,
likely choices are equitable contribution and implied indemnity. For a tortfeasor to prevail and be allowed either or both of these claims, he or she must distinguish several legal developments in Alaska.

b. Equitable Contribution. It is important to acknowledge that before the advent of statutory contribution, the Alaska Supreme Court did not see fit to recognize any form of contribution. There is case law indicating the court’s distaste for contribution except as previously authorized by the legislature. In the face of this legal history, a trial court would be loath to accept a litigant’s invitation to institute contribution judicially. However, there are reasons for a trial court to conclude at this time that the supreme court might depart from its previously held position. First, equitable contribution would give effect to the provision in Alaska Statutes section 09.17.080(d) for several liability in proportion to fault.

Second, it would prevent a claimant from exercising undue control over litigation. Third, permitting a concurrent tortfeasor to bring a claim for equitable contribution, thereby potentially diluting her equitable share of the obligation to pay damages, would be in harmony with the supreme court’s attitude that tortfeasors ought to be treated fairly.

Prior to tort reform, a concurrent tortfeasor was jointly and severally liable for a claimant’s damages in their entirety. A litigant singled out by a claimant as the only defendant from among two or more concurrent tortfeasors and who paid the entire judgment received every benefit to which a tortfeasor was entitled under the law. Under Alaska Statutes section 09.17.080, a tortfeasor is severally liable for her equitable share of the judgment in accordance with her allocated percentage of fault. Now, when a tortfeasor is targeted from among two or more, she is being denied the right to be adjudged severally liable for her equitable share of the damages. In such circumstances, a cause of action, equitable contribution, for example, is needed to effect the provision for several liability in proportion to fault. However, claimants can argue that the statute makes no reference to tortfeasors but instead references parties to

120. See supra note 39 for a discussion of implied indemnity. For the purposes of this article, equitable contribution refers to contribution not statutorily mandated. Whether the equitable contribution would be pro rata or proportionate would depend on other considerations. The latter is compatible with the provision in Alaska Statutes section 09.17.080 for proportionate allocation of fault.


122. Equitable contribution, as a claim used in conjunction with Alaska Statutes section 09.17.080, would operate so that each tortfeasor contributed to the claimant its equitable share of the obligation embodied in the claimant’s judgment. Because liability is several in proportion to fault, it does not involve one tortfeasor contributing to another tortfeasor.

123. See ALASKA STAT. § 09.17.080(c) (Supp. 1991).
the action when providing for allocation of fault. Thus, a tortfeasor is being accorded all the rights to which she is entitled under section 09.17.080, as the only one made a party to the action.

Also, a claim for equitable contribution prevents a claimant from controlling the litigation -- a presumably salutary attribute of statutory contribution. The enactment of statutory contribution maintained a tortfeasor's joint and several liability for all damages. By bringing a contribution claim, a tortfeasor could reduce his or her obligation by requiring another solvent tortfeasor to contribute to the judgment. It was beyond the power of a claimant to prevent this apportionment of the liability. Here, if no means are made available to a tortfeasor to bring in concurrent tortfeasors, the claimant has complete control over who is obligated to make good on a judgment.

Finally, the Alaska Supreme Court has indicated in the past that fundamental fairness should extend to concurrent tortfeasors. Subsequently, the apportionment of damages statute, in its own right, emphasized equitable sharing of the obligation to pay damages among tortfeasors in proportion to their respective percentages of fault. Alaska Statutes section 09.17.080(c) provides for those at fault to pay their equitable share of the obligation to the claimant. Given this development, even more significance can be attached to the court's pre-statute pronouncement that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability." In Vertecs v. Reichhold Chemicals, the supreme court took an unfavorable view of circumstances in which one tortfeasor had to pay more than his equitable share of a judgment. The court stated that "it is indeed grating to contemplate that [the tortfeasor] may well shoulder the entire loss." Based on these expressions of solicitude for tortfeasors, it is reasonable to conclude that the supreme court would uphold a trial court's initiative to allow a claim for equitable contribution.

c. Implied Indemnity. As is the case with equitable contribution, precedents from the Alaska Supreme Court would lead a tortfeasor, at first glance, to be pessimistic about the court's receptivity to a claim for implied indemnity; the holding in Vertecs, for example, squarely rejects it.

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124. See id. § 09.17.080(a).
126. Arctic Structures, 605 P.2d at 429 n.5 (quoting Li v. Yellow Cab Co., 532 P.2d 1226, 1231 (1975)).
128. Id. at 623-24.
129. Id. at 626.
However, despite this decision, subsequent developments in the law could prompt the supreme court to alter its previous position and affirm a trial court's allowance of a cause of action for implied indemnity.

In Vertecs, the supreme court based its rejection of implied indemnity primarily on two factors: its preference for the existing statutory contribution scheme and the difficulty in determining when to apply the all-or-nothing loss-shifting technique of implied indemnification. Since the decision in Vertecs, Alaska Statutes section 09.17.080 has been enacted by the legislature and amended by ballot initiative. Its provisions, as amended, eliminate the first factor and provide a means for avoiding the problem presented in the second. First, statutory contribution no longer exists. Deference need not be paid to the will of the legislature, as previously manifested in the contribution act. Second, loss-shifting does not have to be all-or-nothing. The allocation-of-fault/apportionment-of-damages framework provided by section 09.17.080 can be used to allocate percentages of fault between the tortfeasor brought into the action on the claim (the indemnitee) and the tortfeasor bringing the claim (the indemnitor).1

On the other hand, litigants opposing implied indemnification claims can point out that, no matter how persuasive the argument that the supreme court should change its position, the court has in fact rejected the claim. Thus, it is for that court, not the lower trial courts, to decide the issue. Moreover, the supreme court has recently reaffirmed its holding in Vertecs that claims for indemnification will not lie where the indemnitee is negligent.2

Reasons were discussed above3 for concluding that the Alaska Supreme Court might alter its previous stance on nonstatutory contribution. These reasons also support an argument that the court might change its position on implied indemnification. A cause of action for implied indemnification is an alternative means to give effect to the provision for

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130. Id. at 624-26.
131. There is one particular conceptual difficulty associated with the use of a claim for implied indemnity. Indemnification typically requires the indemnitor to pay the entire amount that the indemnitee is obligated to pay. See, e.g., Industrial Risk Insurers v. Creole Production Services, Inc., 746 F.2d 526, 528 (9th Cir. 1984); Vertecs, 661 P.2d at 619. On the other hand, under the provision for several liability in Alaska Statutes section 09.17.080(d), a tortfeasor will never pay the obligation of another tortfeasor. Indemnification and several liability therefore appear to be at cross-purposes. The problem is solved if the implied indemnification claim is allowed to serve no other purpose than to provide a mechanism for allocating fault and apportioning damages to the tortfeasor-indemnitee. It should not operate so as to require the tortfeasor-indemnitee to pay the entire share of the obligation of the tortfeasor-indemnitee, who ought to remain severally liable for damages in proportion to whatever fault is allocated to him or her.
133. See supra part III.B.1.b.
several liability in proportion to fault, to avoid placing control of one significant aspect of the litigation exclusively in the hands of claimants, and to limit a concurrent tortfeasor's obligation to pay damages. The preceding discussion of these considerations demonstrated that equitable contribution satisfied them. Implied indemnification satisfies these considerations in the same way.

Alaska Statutes section 09.17.080 is of doubtful utility in deciding the question whether one tortfeasor has substantive causes of action against fellow tortfeasors. If a trial court were to permit claims for equitable contribution or implied indemnity, it is not unreasonable to believe that the Alaska Supreme Court would countenance such initiative. The larger question whether a claimant can restrict which tortfeasors are allocated fault is then answered without interpreting the statute.

2. Concurrent Tortfeasors as Indispensable Parties. The doctrine of indispensable parties provides another approach for deciding this larger question without directly implicating Alaska Statutes section 09.17.080. Civil Rule 19 governs indispensability issues. The rule provides for the dismissal of the action against the moving party unless all indispensable parties are joined in the action. In applying Rule 19, the Alaska Supreme Court has held that “[a]n indispensable party is one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over that party.”

At common law, concurrent tortfeasors who are jointly and severally liable for damages are not considered indispensable parties. Because each concurrent tortfeasor is liable for a claimant’s damages in their entirety, one tortfeasor is not in a position to object that the absence of the others as parties results in inequitable treatment. With the advent of several liability in proportion to fault, where a party is severally

134. ALASKA R. CIV. P. 19(a) (providing in relevant part that “[a] person . . . shall be joined as a party in the action if . . . in his absence complete relief cannot be accorded among those already parties”). See also ALASKA R. CIV. P. 19(b) (stating in part that “[i]f a person cannot be made a party as described in subsection (a)(1) . . . the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable”).


138. See PROSSER & KEETON, supra note 7, § 47 at 327 (stating that “each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it. The defendant cannot compel the plaintiff to make the others parties to the action, or complain because they have not been joined . . . ”).
liable for only its “equitable share of the obligation,” the argument that concurrent tortfeasors are not indispensable parties is not as compelling.

Again, under the common law of joint and several liability, a concurrent tortfeasor who is singled out by a claimant and who pays the entire judgment receives all rights to which a negligent defendant is entitled. However, the provisions of Alaska Statutes sections 09.17.080(c) and (d) decree that a defendant-tortfeasor is to be liable for her equitable share of the judgment in proportion to her fault. If a claimant is allowed to restrict the parties defending in the litigation to a single tortfeasor, that tortfeasor is being denied the benefit of several liability in proportion to her fault vis-a-vis the fault of the other tortfeasors. The judgment that results from following the procedure set forth in section 09.17.080 is intended to represent the total of all concurrent tortfeasors’ equitable shares of the obligation in accordance with their respective percentages of fault. Arguably, a truly equitable judgment is an impossibility without making all severally liable concurrent tortfeasors parties to the action. A trial court reaching this conclusion would grant a defendant-tortfeasor relief under Rule 19, which would in all likelihood prompt the claimant to sue the indispensable parties, thus making them amenable to allocations of fault.

Forcing claimants to sue others against their will, at the risk of having their lawsuits dismissed altogether, is an awkward means of achieving an equitable apportionment of damages. There can be several reasons claimants might not want to sue particular tortfeasors. The most obvious is that the claimant believes that no other entity is at fault. Additionally, considering the statute’s provision for several liability in proportion to fault, claimants will not wish to diminish their potential for recovering full damages by suing judgment-proof tortfeasors. Undue burden and expense can also discourage a litigant from claiming against other tortfeasors. Given any reluctance to sue certain tortfeasors, it is doubtful whether a claimant will diligently pursue claims she is coerced into bringing.

Application of the indispensable party doctrine in this context also poses problems related to the assessment of court costs and fees. In the event concurrent tortfeasors are deemed to be indispensable, yet the claims against them are for some reason dismissed, they are entitled to awards of costs and attorney’s fees. Where the claimant’s efforts are half-hearted, she should have to pay. Conversely, the defendant-tortfeasor who forces a claim through a Rule 19 motion should be required to pay if the claim is dismissed, despite reasonable efforts on the claimant’s part to prosecute it. In this situation, the defendant-tortfeasor should be obligated

139. ALASKA STAT. § 09.17.080(c) (Supp. 1991). Equitable shares are determined as the end result of following the statute’s procedure for allocating fault.
140. See supra note 109.
to pay the claimant's costs and attorney's fees incurred in bringing the claim.

Holding that concurrent tortfeasors are indispensable parties solves the problem for the targeted tortfeasor and avoids the need to interpret the operation of Alaska Statutes section 09.17.080. The solution is achieved, however, at the cost of instituting an awkward, possibly unworkable procedure.


a. Analysis of the Issue Whether Fault Can Be Allocated to Non-Parties. One alternative to allocating fault to third-parties by making them parties against whom substantive claims can be brought is to allocate fault to them by pleading Alaska Statutes section 09.17.080 as a partial affirmative defense. In the preceding discussion, where it was assumed that Paula sued only Great Land Bar, arguments for and against different means by which David could also be made a party were discussed. Great Land Bar, if allowed a claim for equitable contribution or implied indemnity against David, could bring him into the action as a third-party defendant. Paula, if forced to bring a negligence claim against David following a successful Rule 19 motion by the bar, could add him as another party-defendant. Neither of these scenarios directly implicates the operation of section 09.17.080. Once David was made a party to the action, the statute's operative provisions for allocation of fault and apportionment of damages could be brought to bear against him.

Unlike the above situations, the operation of Alaska Statutes section 09.17.080 is at issue when the question is whether fault can be allocated and damages apportioned to others on the basis of a partial affirmative defense. That much has already been decided by the Alaska Supreme Court in Lake v. Construction Machinery, Inc. The question then is whether section 09.17.080 should be interpreted literally, restricting the allocation of fault solely to the parties to the action, or whether the statute should be interpreted more broadly, allowing fault to be allocated to non-party tortfeasors. The holding in Lake allows for fault to be allocated, subject to an all-or-nothing limitation, to one who is not a party to the action. While it is difficult to discern the extent to which the holding in

141. See Lake v. Constr. Mach., Inc., 787 P.2d 1027 (Alaska 1990). There may be conceptual contexts other than that of a partial affirmative defense where it is arguable that the statute operates to allocate fault to non-parties. Despite the conceptual basis for such an allocation, the analysis of the intended operation of the statute should not materially differ.

142. Id.
Lake may be given wider application, the decision is some indication of the supreme court’s attitude toward the allocation of fault to non-parties. Relying on the holding in Lake and other legal authority such as rules of statutory construction, litigants can be expected to offer arguments along the following lines.

To an extent, the partial affirmative defense can be analogized to the affirmative defense that a non-party third-person is negligent. Under both defenses, persons alleged by a defendant to be responsible for damages need not be otherwise pled against or made parties. At trial, the evidence, arguments of counsel, and jury instructions with respect to the two defenses would not materially differ. Because they are conceptually similar, the innovation of the partial affirmative defense does not entail an extreme departure from established law. However, an important distinction between the defenses is that the partial affirmative defense depends on Alaska Statutes section 09.17.080 to effect it, whereas the other originated in the common law. With legislation now occupying a place in the analysis, legislative intent ought to have a bearing on the resolution of the issue. If section 09.17.080 is not intended to allocate fault to non-parties, a party should not be allowed to circumvent the statute’s objective by pleading it as a partial affirmative defense.

As discussed above, one rule of statutory construction requires a statute to be given its plain meaning. Arguably, the Alaska Legislature has manifested its intent with respect to the operation of the statute by wording Alaska Statutes section 09.17.080 to structure the allocation of fault in terms of parties to the action. In contrast, legislatures in other jurisdictions have indicated their intent to allow allocation of fault to non-parties by wording their respective statutes to that effect. Despite the relatively straightforward wording of section 09.17.080, the Alaska

143. See supra text accompanying note 21.
145. ALASKA STAT. § 09.17.080(a) (Supp. 1991). However, the discussion supra part II.B. reveals how the original drafters of the uniform act restricted the allocation of fault under the statute to parties only because contribution was part of the legislative scheme.
146. See, e.g., ARIZ. REV. STAT. ANN. § 12-2506(B) (Supp. 1991) (providing that "the trier of fact shall consider the fault of all persons . . . regardless of whether the person was, or could have been, named as a party to the suit"); COLO. REV. STAT. ANN. § 13-21-111-5(2) (1987) (providing that "the jury shall return a special verdict . . . determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action"); IND. CODE ANN. § 34-4-33-5(b) (Burns 1986) (providing that "the jury shall determine the percentage of fault of the claimant, of the defendant, and of any person who is a non-party"); N.D. CENT. CODE § 32-03.2-01 (Supp. 1991) (providing that "[t]he court . . . shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party"); WASH. REV. CODE ANN. § 4.22.070 (West 1989) (providing that "in all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity").
Supreme Court indicated in Lake that "the legislature's intent is not apparent from the plain language of [Alaska Statutes section] 09.17.080(a)(2)." The court ultimately held that either all or none of the fault could be allocated to the non-party employer. Assuming that the holding in Lake ought to apply broadly and not be restricted to the facts of that case, it would appear that the supreme court finds the language of section 09.17.080 insufficient to answer the question whether fault can be allocated to non-parties.

Resort to another rule of statutory construction may be helpful in resolving the issue. It is possible to interpret Alaska Statutes section 09.17.080 by examining its language construed in light of its purpose. It is inferable that the purpose of the legislation was to restrict the allocation of fault and apportionment of damages to parties to the action. Notwithstanding the holding in Lake, the applicability of which is problematic in circumstances other than those present in that case, allocating fault to non-parties is arguably contrary to the express intent of the legislature and the electorate to limit the allocation of fault to those who are parties to the action. If, on the other hand, the purpose of the statute, as explained by the Senate, is to distribute the cost and risk of injury equitably by ensuring that a tortfeasor only pays the portion of the damages commensurate with her share of the fault, then the statute ought to be construed so that fault can be allocated to non-parties. To allow a claimant to thwart this purpose through selective pleading does violence to the purpose of section 09.17.080.

It is uncertain whether available legal authority can resolve the issue whether a claimant can allocate fault to non-parties by pleading the statute as a partial affirmative defense. None of the foregoing arguments with respect to the intent of Alaska Statutes section 09.17.080 are so compelling as to necessarily carry the day with any court, especially the Alaska Supreme Court.

147. Lake, 787 P.2d at 1030.
148. Id. at 1031.
149. See Vail v. Coffman Engineers, 778 P.2d 211, 213 (Alaska 1989). See also supra part II.C.
150. See supra pp. 13-14.
151. See supra text accompanying notes 46-47.
152. See supra pp. 17-18.
153. Judge Zervos of the Alaska Superior Court, using this reasoning, has allowed fault to be allocated to non-parties under Alaska Statutes section 09.17.080. This result was, according to Judge Zervos, consistent with the voters' intent in passing the ballot initiative and necessary to "avoid injustice." Owens v. Robbins, No. 1SI-90-354 Civil (Alaska Super. Ct. Sept. 27, 1991) (order granting plaintiffs' motion to establish the law of the case).
b. Analysis of the Issue Whether Fault Can Be Allocated to All Non-Parties. Assuming for the sake of discussion that fault can be allocated to non-parties, there is the related issue whether all non-party tortfeasors should be amenable to allocations of fault. It is important to note that allocating fault and apportioning damages to non-parties does not necessarily translate into an ability on the part of claimants to recover damages from them. Procedural due process is the obvious obstacle to collecting damages from those who are not made parties to an action.154 However, where they are not sued and their status remains that of non-parties, fault would still be allocated to them, and damages, although unrecoverable, apportioned accordingly. The allocation of fault simply serves to diminish the proportionate share of the fault and damages of tortfeasors who are parties.

There are two broad categories of non-parties relevant to this issue: those non-parties against whom a claimant has a claim, but for some reason the claim is not brought, and those non-parties against whom a claimant has no recourse, for example, an entity with immunity. Irrespective of the category to which a non-party belongs, if the procedure set forth in Alaska Statutes section 09.17.080 were followed, damages would ordinarily be apportioned to non-parties in accordance with their respective allocations of fault.155 The question then becomes whether it is fair to claimants who cannot collect damages from non-parties to allow fault to be allocated to non-parties in both categories.

Where the claimant decides not to claim against a third-person tortfeasor in order to avoid diluting the potential damage recovery, it seems fair to allocate fault to that non-party. Conversely, in circumstances where the claimant cannot claim against the third-party tortfeasor because of immunity, allocating fault to the non-party seems unfair. A concurrent tortfeasor who is a party to the action can plead the partial affirmative defense and potentially reduce his or her liability by allocating fault to the immune tortfeasor, while the other party to the action, the claimant, is foreclosed from even bringing a claim against that entity. Once more, the intent of Alaska Statutes section 09.17.080 is the key to resolving the question. Unfortunately, the intent of the statute is unclear with respect to the issue whether fault can be allocated to non-parties at all, and, a fortiori, the statute’s intent is similarly unsettled regarding the related issue whether fault can be allocated to all non-parties.

154. A non-party, although possibly apprised of the litigation, presumably does not otherwise participate in it. Requiring a non-party to then respond in damages violates that person’s right to be heard. See U.S. CONST. amends. V, XIV; ALASKA CONST. art. I, § 7.

155. ALASKA STAT. § 09.17.080(c) (Supp. 1991).
4. The Constitutionality of Alaska Statutes section 09.17.080. A constitutional challenge to Alaska Statutes section 09.17.080 could be propounded by an aggrieved litigant and considered by a court only as a last resort. A variety of means have been discussed that provide a method whereby a targeted concurrent tortfeasor can possibly allocate fault to other tortfeasors. Some of these approaches, like the partial affirmative defense, involve construing the statute. Others, such as those allowing substantive claims to be brought against other tortfeasors, make construing the statute unnecessary. Allowing a defendant-tortfeasor to utilize any of them would enable a court to avoid a constitutional challenge to the statute. This approach would be in keeping with the judiciary's historic deference to the legislature. Statutes are presumed to be constitutional, and, whenever possible, are construed so as to avoid rendering them constitutionally invalid. In the event that none of the discussed means are made available to the defendant-tortfeasor, a court, in addressing a constitutional challenge, would either find Alaska Statutes section 09.17.080 constitutionally valid or would strike the statute down.

From an analytical standpoint, it is necessary to consider the operation of Alaska Statutes section 09.17.080 in conjunction with the repeal of statutory contribution in the ballot initiative. A tortfeasor's current predicament is not so much caused by the statute itself as it is by the repeal of statutory contribution. Had contribution been retained, the primary problem facing courts would have been reconciling the apparent conflict between the two acts. However, because the repeal of contribution is a constitutional exercise of legislative power, the only avenue open to the courts is to ponder the constitutionality of the operation of Alaska Statutes section 09.17.080 in terms of what the statute itself provides.

Assuming that a trial court is not persuaded to allow a defendant-tortfeasor the means to allocate fault to other tortfeasors, the defendant can challenge the constitutionality of Alaska Statutes section 09.17.080 through a claim for declaratory relief. Denying a party that was singled out as a defendant any means of allocating fault and apportioning damages to

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159. See ALASKA STAT. § 22.10.020(g) (1988) (permitting a party to plead that the court "declare the rights and legal relations of [the] party seeking the declaration").
concurrent tortfeasors is arguably violative of both due process and equal protection rights.\textsuperscript{160}

\textit{a. Substantive Due Process.} Substantive due process provides a defendant-tortfeasor with the weakest constitutional grounds for challenging Alaska Statutes section 09.17.080. The Alaska Supreme Court has held that "[s]ubstantive due process is denied only when a legislative enactment has no reasonable relationship to a legitimate governmental purpose.\ldots The constitutional guarantee of substantive due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy."\textsuperscript{161} When considering such a due process challenge, the court has further indicated that it would place the burden of proof on the claimant:

The party claiming a denial of substantive due process has the burden of demonstrating that no rational basis for the challenged legislation exists. This burden is a heavy one, for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification.\textsuperscript{162}

The purpose of Alaska Statutes section 09.17.080 has been discussed previously in a number of contexts. The statute is intended to provide for the distribution of the risk and cost of injury through allocation of fault and apportionment of damages among concurrent tortfeasors. There can be no dispute that this purpose furthers a legitimate public policy. Section 09.17.080 will effectuate that distribution in all circumstances save those where a claimant brings an action against fewer than all concurrent tortfeasors. In those situations, the operation of the statute is arguably unfair to the tortfeasors against whom claims are made. However, a conclusion that the statute is constitutionally invalid because of this unfairness is unfounded. For example, in \textit{Arctic Structures, Inc. v. Wedmore},\textsuperscript{163} the Supreme Court of Alaska detected no substantive due process infirmity in requiring a tortfeasor to pay greater damages because the statute dictated that contribution be pro rata instead of proportionate to fault.\textsuperscript{164} Under Alaska Statutes section 09.17.080, a targeted tortfeasor is simply required to pay more to the plaintiff than he or she would have otherwise paid had other tortfeasors also been sued. While it is arguably unfair, the statute is underpinned by an undeniably legitimate policy.

\textsuperscript{160} See \textit{ALASKA CONST.} art. I, §§ 1, 7; \textit{U.S. CONST.}, amends. V, XIV.


\textsuperscript{162} \textit{Id.}

\textsuperscript{163} 605 P.2d 426 (Alaska 1979).

\textsuperscript{164} \textit{Id.} at 437 n.37.
b. Procedural Due Process. A defendant-tortfeasor may stand on more solid ground when challenging Alaska Statutes section 09.17.080 on procedural due process grounds. The precise requirements of procedural due process depend on the particular circumstances of the case;\textsuperscript{165} the inquiry focuses on "the nature of the governmental function involved and the private interest affected by governmental action."\textsuperscript{166}

In \textit{Arctic Structures}, the issue was similar to that addressed here. The defendant argued that the procedures afforded by pro rata contribution were violative of the due process right to contribution in proportion to fault. The Alaska Supreme Court rejected the argument, observing that "it is doubtful whether the defense of a co-defendant's negligence ever has been available separately from its relationship to the lack of negligence on the part of the defendant asserting the claim."\textsuperscript{167} The court did recognize, however, that the advent of statutory contribution brought about situations in which the negligence of concurrent tortfeasors was taken into account when distributing the obligation to pay damages.\textsuperscript{168} With the repeal of contribution in the ballot initiative, a defendant-tortfeasor effectively returns to common law status; accordingly, an argument can be made that the defense of concurrent tortfeasors' negligence is once again unavailable. Thus, the language of \textit{Arctic Structures} indicates that Alaska Statutes section 09.17.080 does not operate to deny a defendant anything to which he or she is constitutionally entitled.

Nevertheless, there is reason to conclude that the changes in the law brought about by Alaska Statutes section 09.17.080 might cause the supreme court's position with respect to defendant-tortfeasors to differ from that expressed in \textit{Arctic Structures}. Figuring prominently in the court's reasoning was "the doctrine of joint and several liability[,] which ultimately makes each concurrently negligent defendant liable for the whole of the plaintiff's loss."\textsuperscript{169} Joint and several liability provided the basis for the court's conclusion that pro rata apportionment did not violate due process rights. In its present form, Alaska Statutes section 09.17.080 provides for the \textit{several} liability of concurrent tortfeasors in proportion to their fault. Their equitable shares of the obligation to the claimant are determined on that basis. This provision is manifestly incompatible with a procedure whereby a tortfeasor can be singled out by a claimant with no recourse

\textsuperscript{165} McMillan v. Anchorage Community Hospital, 646 P.2d 857, 863-64 (Alaska 1982).
\textsuperscript{166} \textit{Arctic Structures}, 605 P.2d at 436.
\textsuperscript{167} \textit{Id}. This statement parallels the affirmative defense discussed \textit{supra} part II.A. That defense allows a defendant to avoid all liability by proving that the plaintiff's injury was caused entirely by the negligence of another.
\textsuperscript{168} \textit{Arctic Structures}, 605 P.2d at 436.
\textsuperscript{169} \textit{Id}. at 437.
against concurrent tortfeasors.\textsuperscript{170} It remains to be seen whether a court would find that this incompatibility makes the statute unconstitutional.

c. Equal Protection. The most viable constitutional challenge to Alaska Statutes section 09.17.080 is an equal protection claim. Where persons who are similarly situated are classified by legislation and treated differently, equal protection analysis seeks to determine whether the classification in question is reasonable or constitutionally impermissible.\textsuperscript{171} \textit{Turner Construction Co. v. Scales}\textsuperscript{172} involved an equal protection issue similar to that raised here.\textsuperscript{173} The Alaska Supreme Court stated that the first step in the equal protection analysis is to determine “whether the constitutional claimant asserts a fundamental constitutional right or the statute uses a suspect classification. If the answer to either question is ‘yes,’ then the statute is unconstitutional . . . absent a compelling state interest.”\textsuperscript{174} However, if both of these questions are answered in the negative, the more relaxed “fair and substantial relationship” test is to be applied.\textsuperscript{175}

In \textit{Wilson v. Municipality of Anchorage},\textsuperscript{176} a claimant asserted that a statute granting immunity to the municipality in certain circumstances violated equal protection. The Alaska Supreme Court, after first noting that one had no fundamental right to sue a particular party, observed that “the interest in redressing wrongs through the judicial process is significant.”\textsuperscript{177} The court recognized that the plaintiff had the opportunity to sue and recover from a private party, thus redressing the wrong done him.\textsuperscript{178} However, the desire to recover from the municipality, a “deep pocket” tortfeasor, was held to be an economic interest entitled to only minimal protection. The court concluded that the plaintiff did not fall within a suspect class, and that no fundamental right was involved. Accordingly, the court applied the fair and substantial relationship test, and ruled the statute constitutional in light of the

\begin{footnotesize}
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\item[170.] \textit{See supra} parts III.B.1.b. & III.B.2.
\item[172.] 752 P.2d 467 (Alaska 1988).
\item[173.] In \textit{Turner}, the plaintiff argued that the statute of repose, which provided different periods of repose for design professionals than for others, was unconstitutional because it failed to protect all similarly situated defendants. \textit{Id.} at 470. \textit{See also infra} immediately below.
\item[174.] \textit{Id.} at 470 (citation omitted).
\item[175.] \textit{Id.} at 471.
\item[176.] 669 P.2d 569 (Alaska 1983).
\item[177.] \textit{Id.} at 572.
\item[178.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
municipality's objectives and the limited constitutional importance of Wilson's interest.\textsuperscript{179}

In the hypothetical addressed in this article, the targeted tortfeasor asserted the right to allocate fault and apportion damages to other tortfeasors. It is analogous to the interest involved in Wilson. Though a tortfeasor seeking to allocate fault to concurrent tortfeasors is not exactly on the same conceptual footing as the claimant in Wilson, the interests in both instances are economic. The former seeks to dilute the obligation to pay damages; the latter wants to enhance the opportunity to collect them. It is relatively clear that the fair and substantial relationship test would be applied to Alaska Statutes section 09.17.080. That test is intended to "be flexible and dependent upon the importance of the rights involved. Based on the nature of the right, a greater or lesser burden will be placed on the [party asserting the constitutionality of the statute] to show that the classification has a fair and substantial relation to a legitimate governmental objective."\textsuperscript{180} As mentioned above, the right to have fault allocated to others will likely be identified as merely an economic interest deserving only minimal protection.

After determining the appropriate standard of analysis, a court must examine the purpose of the statute at issue and determine "whether it is a legitimate exercise of the state's police power."\textsuperscript{181} The legitimacy of the purpose of Alaska Statutes section 09.17.080 is clear. The distribution of "losses in a socially desirable fashion so that the loss is most efficiently spread throughout society"\textsuperscript{182} has already been recognized by the supreme court as a legitimate purpose.

Finally, a court must "examine the means to determine whether they substantially further the statutory purpose."\textsuperscript{183} In Turner Construction Co., Alaska Statutes section 09.10.055, a statute of repose, was subject to an equal protection challenge.\textsuperscript{184} The statute provided for different

\textsuperscript{179} Id. at 573.
\textsuperscript{180} State v. Erickson, 574 P.2d 1, 12 (Alaska 1978).
\textsuperscript{182} Vertecs Corp. v. Reichhold Chemicals, 661 P.2d 619, 624 (Alaska 1983).
\textsuperscript{183} Turner Constr. Co., 752 P.2d at 471.
\textsuperscript{184} See ALASKA STAT. §§ 09.10.030–230 (1983 & Supp. 1991). These sections include various provisions which impose limitations on bringing civil actions in Alaska, including statutes of repose. In Turner Construction Co., the court stated:

A statute of repose differs from a statute of limitation in that the former may bar a cause of action before it accrues, because the statute begins to run from a specific date unrelated to the date of injury. A cause of action thus precluded is \textit{damnum absque injuria}, a loss without a remedy.

In contrast, a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights.

\textit{Turner Constr. Co.,} 752 P.2d at 469 n.2.
periods of repose on actions to recover damages arising out of a deficiency in the planning or design of an improvement to real property. The period of repose for such actions against design professionals, such as architects and construction contractors, was six years, whereas the period for actions against other parties, such as property owners, was eight years. The Alaska Supreme Court held that the classification scheme did not substantially further the statute’s purpose of promoting construction by protecting those involved in the business against stale claims. A relevant aspect of the court’s decision is the observation that the statute served to eliminate the statutory right of contribution among tortfeasors which existed at that time. Finally, the court warned that it would “not hypothesize facts which would sustain otherwise questionable legislation.”

The resolution of the equal protection issue with respect to Alaska Statutes section 09.17.080 depends, in the first instance, on whether the statute creates a classification. Claimants can maintain that the statute does not create separate classifications of defendants. In effect, all defendant-tortfeasors are treated the same; it is simply up to the claimant to select from among them the ones to be sued. However, this articulation of the statute’s operation ignores the reality of the situation. As a practical matter, Alaska Statutes section 09.17.080 produces disparate treatment among tortfeasors, depending on which concurrent tortfeasors the claimant chooses to sue. Some defendant-tortfeasors will have recourse against fellow tortfeasors, potentially reducing their obligation to the claimant; others will have no such recourse. The statute’s operation in this manner essentially effects a classification of those tortfeasors.

The aforementioned classification scheme frustrates the purpose of Alaska Statutes section 09.17.080, which is to equitably apportion damages among concurrent tortfeasors. Moreover, like the statute of repose at issue in Turner Construction Co., which operated to eliminate the right of contribution in certain circumstances, Alaska Statutes section 09.17.080(a) serves to diminish the right expressed in Alaska Statutes section 09.17.080(c), that the parties pay their “equitable share[s] of the obligation to each claimant in accordance with the respective percentages of fault.” The apportionment is not equitable unless all tortfeasors are

187. Id. at 471.
188. Id.
189. Id. (citing Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976)).
made parties to the action. Thus, a solid case can be made that Alaska Statutes section 09.17.080 is violative of equal protection.

IV. CONCLUSION

By no means have all the problems involving the operation of Alaska Statutes section 09.17.080 been discussed. Considerable attention has been paid to the most pronounced problems. These include the conflict between the pre-ballot initiative statute’s provision for proportionate fault and pro rata contribution, and the lack of a clear indication to litigants whether one concurrent tortfeasor singled out by a claimant as the only defendant has any means to allocate fault to fellow tortfeasors under the post-ballot initiative statute. Existing authority provides insufficient guidance as to the intended operation of the statute in both respects. At the outset, it was suggested that the statute’s operation needed clarification through either legislative or judicial action, or that some judicial means needed to be employed to circumvent the operation of Alaska Statutes section 09.17.080 to prevent the allocation of fault. Until one of these developments occurs, or until the statute is declared unconstitutional, Alaska Statutes section 09.17.080 will continue to be a source of controversy and unanswered questions among litigants.