ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
May 6, 2001
5:08 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

Representative Scott Ogan, Vice Chair

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 161(FIN)
"An Act relating to the withholding of salary of justices, judges, and magistrates; relating to prompt decisions by justices, judges, and magistrates; relating to judicial retention elections for judicial officers; and providing for an effective date."

- MOVED HCS CSSB 161(JUD) OUT OF COMMITTEE

CS FOR SENATE BILL NO. 176(L&C) am
"An Act prohibiting certain coercive activity by distributors; relating to certain required distributor payments and purchases; prohibiting distributors from requiring certain contract terms as a condition for certain acts related to distributorship and ancillary agreements; allowing dealers to bring certain court actions against distributors for certain relief; and exempting from the provisions of the Act franchises regulated by the federal Petroleum Marketing Practices Act, situations regulated by the Alaska gasoline products leasing act, and distributorship agreements relating to motor vehicles required to be registered under AS 28.10."

- MOVED HCS CSSB 176(JUD) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: SB 161

SHORT TITLE:TIMELY JUDICIAL DECISIONS/ JUDGES' PAY
SPONSOR(S): JUDICIARY

Jrn-Date	Jrn-Page		Action
03/23/01	0786	(S)	READ THE FIRST TIME - REFERRALS
03/23/01	0786	(S)	JUD
04/04/01		(S)	JUD AT 1:30 PM BELTZ 211
04/04/01		(S)	-- Meeting Postponed to 4/5/01--
04/05/01		(S)	JUD AT 1:30 PM BUTROVICH 205
04/05/01		(S)	<Bill Held Over to 4/9/01> -- Meeting Canceled --
04/09/01		(S)	JUD AT 4:35 PM BELTZ 211
04/09/01		(S)	Heard & Held - Meeting Postponed to after Adjournment-
04/20/01		(S)	JUD AT 1:30 PM BELTZ 211
04/20/01		(S)	Moved CS(JUD) Out of Committee
04/23/01	1212	(S)	JUD RPT CS 2DP 1DNP 2NR NEW TITLE
04/23/01	1213	(S)	DP: TAYLOR, DONLEY; DNP: ELLIS;
04/23/01	1213	(S)	NR: COWDERY, THERRIAULT
04/23/01	1213	(S)	FN1, FN2: (CRT)
04/23/01	1213	(S)	FIN REFERRAL ADDED AFTER JUD
04/25/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/25/01		(S)	Heard & Held
04/25/01		(S)	MINUTE(FIN)
05/03/01		(S)	FIN AT 6:30 PM SENATE FINANCE 532
05/03/01		(S)	Moved CS(FIN) Out of Committee -- Time Change --
05/04/01	1485	(S)	FIN RPT CS 5DP 3NR NEW TITLE
05/04/01	1485	(S)	DP: DONLEY, KELLY, GREEN, LEMAN, WARD;
05/04/01	1485	(S)	NR: HOFFMAN, OLSON, WILKEN
05/04/01	1485	(S)	FN3: ZERO(CRT)
05/04/01	1493	(S)	RULES TO 1ST SUP CALENDAR 4OR 5/4/01
05/04/01	1505	(S)	READ THE SECOND TIME
05/04/01	1505	(S)	FIN CS ADOPTED UNAN CONSENT
05/04/01	1505	(S)	ADVANCED TO THIRD READING Y15 N5
05/04/01	1505	(S)	READ THE THIRD TIME CSSB

			161(FIN)
05/04/01	1506	(S)	PASSED Y15 N5
05/04/01	1506	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/04/01	1506	(S)	ELLIS NOTICE OF RECONSIDERATION
05/04/01		(S)	RLS AT 1:00 PM FAHRENKAMP 203
05/04/01		(S)	-- Time Change --
05/04/01		(S)	MINUTE(RLS)
05/05/01	1524	(S)	RECON TAKEN UP - IN THIRD READING
05/05/01	1524	(S)	PASSED ON RECONSIDERATION Y16 N4
05/05/01	1524	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
05/05/01	1558	(S)	TRANSMITTED TO (H)
05/05/01	1558	(S)	VERSION: CSSB 161(FIN)
05/05/01	1571	(H)	READ THE FIRST TIME - REFERRALS
05/05/01	1571	(H)	JUD
05/06/01		(H)	JUD AT 3:00 PM CAPITOL 120

BILL: SB 176
SHORT TITLE:DISTRIBUTORSHIPS
SPONSOR(S): LABOR & COMMERCE BY REQUEST

Jrn-Date	Jrn-Page		Action
04/05/01	0956	(S)	READ THE FIRST TIME - REFERRALS
04/05/01	0957	(S)	L&C, JUD, FIN
04/19/01		(S)	L&C AT 1:30 PM BELTZ 211
04/19/01		(S)	Heard & Held MINUTE(L&C)
04/24/01		(S)	L&C AT 1:30 PM BELTZ 211
04/24/01		(S)	Moved CSSB 176(L&C) Out of Committee MINUTE(L&C)
04/25/01	1259	(S)	L&C RPT CS 5DP SAME TITLE
04/25/01	1259	(S)	DP: PHILLIPS, DAVIS,
04/25/01	1259	(S)	AUSTERMAN, LEMAN, TORGERSON
04/25/01	1259	(S)	FN1: ZERO(CED)
04/25/01		(S)	JUD AT 1:30 PM BELTZ 211
04/25/01		(S)	Moved CS(L&C) Out of Committee
04/26/01	1277	(S)	JUD RPT CS(L&C) 4DP
04/26/01	1277	(S)	DP: TAYLOR, THERRIAULT,

			COWDERY, ELLIS
04/26/01	1277	(S)	FN1: ZERO(CED)
04/28/01	1338	(S)	FIN REFERRAL WAIVED REFERRED TO RULES
05/01/01	1400	(S)	RULES TO CALENDAR 5/1/01
05/01/01	1405	(S)	READ THE SECOND TIME
05/01/01	1405	(S)	L&C CS ADOPTED UNAN CONSENT
05/01/01	1405	(S)	AM NO 1(TITLE AM) ADOPTED UNAN CONSENT
05/01/01	1406	(S)	ADVANCED TO THIRD READING UNAN CONSENT
05/01/01	1406	(S)	READ THIRD TIME CSSB 176(L&C)(TITLE AM)
05/01/01	1407	(S)	PASSED Y19 N1
05/01/01	1407	(S)	TAYLOR NOTICE OF RECONSIDERATION
05/01/01		(S)	RLS AT 12:15 PM FAHRENKAMP 203
05/01/01		(S)	-- Time Change --
05/01/01		(S)	MINUTE(RLS)
05/02/01	1447	(S)	RECON TAKEN UP - IN THIRD READING
05/02/01	1447	(S)	RETURN TO SECOND FOR AM 2 UNAN CONSENT
05/02/01	1448	(S)	AM NO 2 ADOPTED UNAN CONSENT
05/02/01	1448	(S)	AUTOMATICALLY IN THIRD READING
05/02/01	1448	(S)	PASSED ON RECONSIDERATION Y18 N1 A1
05/02/01	1450	(S)	TRANSMITTED TO (H)
05/02/01	1450	(S)	VERSION: CSSB 176(L&C) AM
05/03/01	1501	(H)	READ THE FIRST TIME - REFERRALS
05/03/01	1501	(H)	L&C, JUD
05/05/01		(H)	JUD AT 1:00 PM CAPITOL 120
05/05/01		(H)	<Bill Postponed>
05/05/01		(H)	L&C AT 12:00 PM CAPITOL 17
05/05/01		(H)	Moved HCS CSSB 176(L&C) Out of Committee
05/05/01		(H)	MINUTE(L&C)
05/06/01	1586	(H)	L&C RPT FORTHCOMING HCS(L&C) 2DP 5NR
05/06/01	1586	(H)	DP: CRAWFORD, HAYES; NR: HALCRO, KOTT,
05/06/01	1586	(H)	MEYER, ROKEBERG, MURKOWSKI
05/06/01	1586	(H)	FN1: ZERO(CED)
05/06/01	1616	(H)	RECEIVED HCS(L&C) NT

05/06/01	1616	(H)	TITLE CHANGE PENDING HCR
05/06/01		(H)	JUD AT 3:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR DAVE DONLEY
Alaska State Legislature
Capitol Building, Room 506
Juneau, Alaska 99801
POSITION STATEMENT: Testified on behalf of Senate Judiciary Standing Committee, sponsor of SB 161.

CHRIS CHRISTENSEN, Deputy Administrative Director
Office of the Administrative Director
Alaska Court System
820 West 4th Avenue
Anchorage, Alaska 99501
POSITION STATEMENT: Testified on SB 161.

JOHN HAXBY
Waukesha Alaska Corporation
PO Box 11098
Anchorage, Alaska 99511
POSITION STATEMENT: Testified on SB 176.

JANEECE HIGGINS, General Manager
Alaska Rubber & Supply, Inc.
5811 Old Seward Highway
Anchorage, Alaska 99518
POSITION STATEMENT: Testified on SB 176.

DEBORAH LUPOR
PO Box 771757
Eagle River, Alaska 99577
POSITION STATEMENT: Testified on SB 176.

ACTION NARRATIVE

TAPE 01-81, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 5:08 p.m. Representatives Rokeberg, James, Coghill, and Meyer were present at the call to order. Representatives Berkowitz and Kookesh joined the meeting as it was in progress.

SB 161 - TIMELY JUDICIAL DECISIONS/ JUDGES' PAY

CHAIR ROKEBERG announced the first order of business, CS FOR SENATE BILL NO. 161(FIN), "An Act relating to the withholding of salary of justices, judges, and magistrates; relating to prompt decisions by justices, judges, and magistrates; relating to judicial retention elections for judicial officers; and providing for an effective date."

Number 0106

SENATOR DAVE DONLEY, Alaska State Legislature, came forth on behalf of the Senate Judiciary Standing Committee, sponsor of SB 161. He stated that SB 161 updates and clarifies existing law requiring judges to provide a salary warrant indicating they don't have any decisions that have been pending for more than six months. It also sets out state policy, in Section 1, for the majority of cases to be decided within six months and for appellate cases to be decided within six months of oral argument.

SENATOR DONLEY reported that SB 161 also provides information to be included in the voter's guide regarding any judicial officer who was up for retention and failed to issue a salary warrant. [Senate Bill 161] provides an annual report to the legislature of how many cases had been pending more than the periods of time that are set out in the policy as well as additional information about the types of cases that are taking longer than the target dates or times.

SENATOR DONLEY said SB 161 clarifies that information regarding salary warrants of the judges is public information. In the past, there was some difficulty with the Department of Administration refusing to provide that information to the [Alaska] Judicial Council, which is in charge of ranking and reviewing the judges; without being able to get the information, the judicial council had difficulty making a full analysis.

REPRESENTATIVE COGHILL asked Senator Donley for the rationale behind the 2004 effective date.

SENATOR DONLEY responded that he thinks the effective date is a holdover from the original bill, which had stricter guidelines for appellate courts. The late effective date was there to give the court more time to "gear up" and clear its docket.

Number 0386

REPRESENTATIVE JAMES asked Senator Donley what would happen if the six months go by and the judges don't do what they are supposed to do.

SENATOR DONLEY answered that existing law has been in place since statehood whereby in order for judges to get their paychecks, they must sign an affidavit saying they have had no matter pending for more than six months. Whereas [SB 161] provides some fine-tuning, it doesn’t change that basic system.

REPRESENTATIVE JAMES asked whether many [judges] have not been getting paid.

SENATOR DONLEY replied that most have been getting paid, because most have been able to sign their affidavits. He stated that there are instances when judges don't get paid and have to deal with a backlog.

REPRESENTATIVE JAMES asked whether it is just a delay in their paychecks.

SENATOR DONLEY answered in the affirmative. He said [the judges] won't lose their money; once they catch up, they receive their back pay.

Number 0537

REPRESENTATIVE JAMES asked whether [SB 161] allows for this to be recorded in the election bulletin.

SENATOR DONLEY answered affirmatively. He said for the first time, a state policy is adopted consistent with the goals of the court system. Also, it is specified that if a judge hasn't been able to fill out the affidavits and has violated the time period, that information would be put before the voters in the voter's guide. He added that the judge has the opportunity to respond to that in the voter's guide.

REPRESENTATIVE JAMES asked whether there have been studies regarding the costs to the people in court when a judge takes an extended time to make a decision.

SENATOR DONLEY responded that most decisions in the appellate courts have been accomplished in under a year. He thinks there are about 20 cases currently before the supreme court that have been there for more than a year; few cases have been there for

more than two years; and one case has been there for more than three years since the final pleading. The court recognizes that it is too long and is trying to live with the policy of getting them done within a year.

CHAIR ROKEBERG asked where in the bill the one-year policy is mentioned.

SENATOR DONLEY answered that it is on page 1, line 13, and states "that virtually all appellate cases be decided within one year following the date that the case is taken under advisement".

Number 0730

CHAIR ROKEBERG asked whether it is reflected in the statute.

SENATOR DONLEY explained that the original bill did include a one-year provision for appellate courts. The court strongly objected and said it was unfair to hold individual justices responsible for the collective inability of the appellate courts to reach a final decision. Additionally, the courts said the position of the court administration was that legislative mandates, as far as judicial time decision periods, are unconstitutional. While recognizing that the six-month [rule] has worked well, they believe expanding it to include appellate courts would foster litigation which would likely lead to a decision that it was unconstitutional. Therefore, that has been deleted [from the original bill] and policy guidelines and reporting [back to the legislature] were inserted, which the court system does not oppose.

CHAIR ROKEBERG asked whether the [final Senate version] reflects a reaffirmation on the existing state statute and policy, and clarifies it in relationship to a pamphlet and other reporting.

SENATOR DONLEY responded that that is a fair assessment. He said it is consistent with existing policy and policy guidelines that are being adopted by the supreme court, yet for the first time this is made public information.

CHAIR ROKEBERG asked whether previously this information was not open to the public.

SENATOR DONLEY responded that several years ago the Alaska Judicial Council requested that the Department of Administration

provide information regarding judicial warrants, but the department refused.

Number 0963

CHRIS CHRISTENSEN, Deputy Administrative Director, Office of the Administrative Director, Alaska Court System, came forth and stated that the purpose of this legislation is to encourage timeliness and eliminate any unnecessary delay in judicial decision-making. He said:

> The chief justice and other members of the supreme court share Senator Donley's concern. And as many of you know, they have been taking many steps in the last two years to address timeliness issues. Last year the supreme court adopted very detailed time standards for the trial courts.
>
> "Time standard" is a quantifiable goal for the delivery of court services to litigants. Different time standards were adopted for different kinds of cases. Our computer system is antiquated, but we hope to start issuing quarterly reports on the achievement of these time standards later this year. Last October, we used federal funds to train all judges on case management techniques. We have established a mentoring program so that judges who are particularly efficient can take new judges or less efficient judges under their wings and teach them the tricks of the trade.
>
> As the chief justice told you during her State of the Judiciary speech a few months ago, the supreme court is also committed to shortening time in appellate cases. About two weeks before this legislation was introduced, the court adopted time standards for appellate court cases and new procedures for flagging and monitoring cases so that cases that are being delayed don’t languish.
>
> I would note that this is very unusual. While it is pretty common for supreme courts to adopt time standards for the trial courts, it's almost unheard-of for a court outside to adopt it for itself, but our supreme court thinks this is important.

Judicial timeliness is an important issue to everybody in this room. We've been actively taking steps to address it [and] we're going to continue. Now, while the court system did oppose the original version of Senate Bill 161, the bill sponsor has done a great deal of work on it during the committee process. We're very appreciative of his interest in our concerns, and we do not oppose the bill in its current form.

The bill makes a statement of legislative intent that we believe is a reasonable expression of the legislature's will. In fact, it is very, very similar to the standards which the supreme court has been adopting. It does provide for some extra reporting requirements on judicial timeliness, both for the benefits of the electorate and for the benefit of the legislature as it's working on the annual budget.

Number 1094

MR. CHRISTENSEN continued:

The issue of the six-month rule has come up. ... As Senator Donley noted, the rule has been on the books since 1959. Before any judge or magistrate - we have 99 judges and magistrates - can get a paycheck, every two weeks they just sign this one affidavit that they have nothing before them that's ready for a decision to be made that has been languishing for more than six months.

Because the supreme court and the court of appeals are committees, the rule applies to the member who is assigned the job of writing the majority opinion. That opinion has to be out in six months; however, the full opinion may not be released for some additional length of time because it is subject to negotiation and revision by the other majority members. After the majority opinion is finished, and only then, can a dissent be written. And then, typically once the dissent is written, the majority opinion is redrafted to answer the dissent.

Right now, we have about 20,000 state employees, and the 99 judicial officers are the only ones who have

their paychecks withheld if they are behind on their work.

Now, I work two hats. I'm the deputy director, an administrator, and as an administrator I like the six-month rule because it keeps the cases moving. As a lawyer, on the other hand, and the person who serves as a general counsel for the institution, I do believe that the existing six-month rule is unconstitutional and wouldn't survive a legal challenge. It [has] been followed for 40 years as a matter of comity - comity being respect for the reasonable wishes of a coordinate branch government.

The legislature is the funding authority; the legislature has expressed a desire that decisions be made within six months; the legislature has generally provided funding and resources adequate to get cases resolved within six months; therefore, it would be unreasonable not to respect the legislature's wishes.

Last fiscal year we had about 150,000 new cases filed with the court system. During that fiscal year, courts disposed of 150,000 existing cases; that's a lot of cases. And during that year there were, I believe, 25 occasions when a judge or magistrate could not execute the affidavit and had their paycheck withheld for some period of time, until they could execute the affidavit. Twenty-five delays out of 150,000 cases under the performance measure that's been set by the legislature is really a pretty good record, but it's not perfect.

You might ask, "Why is the supreme court imposing new time standards and training judges to be more efficient?" And pretty simply, the six-month rule applies to the period of time once a decision is ready to be made. There's a whole period of time in a case before [a] decision is ready to be made, when the lawyers are spinning their wheels, conducting discover [and] having hearings. ... We strongly believe that through better case management techniques and riding herd on the lawyers a little better, we can get that period of time down as well.

Mr. Chairman, the basis for our view that the law wouldn’t survive a legal challenge is what's happened

in other states. There are about a half a dozen states or so that have a similar law to our six-month rule. It's been challenged three times - in Wisconsin, Montana, and Nevada. Each time, the law was thrown out for reasons which are directly applicable under the Alaska constitution.

First, our constitution provides that a judge's compensation shall not be diminished during the term of office, except by a general reduction applicable to all state employees. Now, Mr. Chairman, as you know, money has a time value, and if you withhold a judge's salary for a period of time, you have the effect of diminishing it.

I think the record ... was set about 15 years ago by an Anchorage judge; she was carrying an active caseload of 800 cases, and she had one case that was delayed beyond six months, ... and she had her paycheck withheld for over four months. It is sort of difficult to argue that that didn't have the effect of diminishing her salary during the course of the year.

Number 1314

MR. CHRISTENSEN continued, stating:

Second, under our constitution the supreme court is charged with administering the judicial branch, not the legislature. The six-month rule is really sort of a micromanagement that goes to the very heart of the supreme court's authority to administer our branch. It applies to the work of every judge, every day, in every case.

Mr. Chairman, there is also a whole line of cases from other states in which the legislature has timelines for courts to conduct themselves ... but has not put the penalty of withholding paychecks. There's about a dozen of those cases and with almost unanimity - I think with one exception - those cases hold that legislatures can't set those timelines.

There is a rule of constitutional law that one branch of government can't set a timeline for another branch to carry a constitutional function. This rule is generally invoked to protect the executive or the

legislature from court orders, but rules like this do cut both ways.

Notwithstanding our belief that the current law is probably unconstitutional, you've never heard us come into the legislature and complain about it. And I would suspect that none of you have ever been approached by your local judge and heard complaints about it. We do hear grumbling from time to time in court administration, ... and our answer [is] always the same: "If you don't like the law, file a lawsuit. But until you file a lawsuit and get it thrown out, get your cases done and get your affidavit in if you want a paycheck."

Our goal, I think, is to make sure that circumstances don't arise which would cause 1 of the 99 individual judicial officers to decide to file a lawsuit to throw out the six-month rule. In the states where it has been thrown out, the lawsuits have always been brought by individual judges who were unhappy that their check was withheld, never by the supreme court or the court system as an institution.

This bill in its current form eliminates all those things which we believe might have resulted in a legal challenge to the existing six-month rule.

CHAIR ROKEBERG asked whether [there could be a legal challenge] if [judges] decide to do so based on constitutional issues.

Number 1440

MR. CHRISTENSEN responded that they could if they wanted to; however, he suspects most won't because they believe they have adequate resources.

REPRESENTATIVE BERKOWITZ asked whether the court system has the authority to impose its own sanctions on its membership.

MR. CHRISTENSEN answered that Wisconsin threw its version of the six-month rule out; the supreme court, in its opinion, struck down the six-month rule but adopted a court rule that was very similar.

REPRESENTATIVE JAMES remarked that she wishes [the committee] would do that, because this language doesn't seem proper.

However, she agrees "they ought to pull us out of the fire" and put in a court rule. She asked Mr. Christensen whether it will be more effective to have information in the election bulletin.

MR. CHRISTENSEN responded that [the Alaska Court System] does not oppose that. He said he could provide the list of the 25 times judges had their paychecks withheld last year; that has always been a public record.

REPRESENTATIVE JAMES remarked that she is willing to support that because she thinks it is important for people to know.

Number 1653

REPRESENTATIVE BERKOWITZ stated that it seems to him [the legislature] is running afoul by requiring the court officers to insert information about their salary warrants in the election pamphlet.

CHAIR ROKEBERG said there could be a debate in terms of power, which resides in the legislature, to establish election statutes and how elections are conducted. He said that would even strengthen the position.

REPRESENTATIVE BERKOWITZ asked whether [the legislature] would require any publication, for example, of APOC (Alaska Public Offices Commission) violations or ethics convictions in the legislature.

REPRESENTATIVE JAMES responded that there is a difference between putting it in the election pamphlet and putting it on the ballot.

CHAIR ROKEBERG stated that according to correspondence from the Alaska Judicial Council requesting the information in order to perform their job, he thinks it is legitimate.

Number 1770

MR. CHRISTENSEN noted that Bill Cotton from the Alaska Judicial Council has said he is going to put this on their web site along with the other information.

REPRESENTATIVE BERKOWITZ, in reference to the election pamphlet, stated that the judicial officers are bound by some strict ethical requirements about what they can and can't say, in terms of their ability to run elections. He asked whether it would be

permissible for a judicial officer who was required to put this information in an election pamphlet to offer an explanation.

MR. CHRISTENSEN responded that he didn't know.

Number 1821

SENATOR DONLEY remarked that they do have the opportunity to respond.

CHAIR ROKEBERG asked whether, if there is a charge made in public during the course of the election, the judge has a right to respond.

MR. CHRISTENSEN responded that once a campaign committee has formed, a judge has the right to raise money and respond.

SENATOR DONLEY remarked that he thinks a judge has the right to respond on his or her own.

MR. CHRISTENSEN stated that there is a very strict code of judicial ethics that restricts a lot of what a judge is able to say about a case that's pending or impending in any court of the state. For example, if a judge has handled a case and there are charges against him or her in that case, the judge can't publicly make certain comments while it's still pending in the supreme court.

CHAIR ROKEBERG remarked that if it were printed in the pamphlet that [the judge] did not receive his or her warrants a certain number of times, the judge should have the right to respond. He asked whether it is because of "standing" issues that this hasn't been challenged before.

Number 1930

MR. CHRISTENSEN responded that a judge would have standing to challenge; so, probably, would the institution. However, he didn't know whether a member of the public would have that power. The only people who suffer any financial hardship are the 99 judicial officers. Logically, they're the only ones who would be willing to spend the money to be relieved of the burden.

SENATOR DONLEY informed the committee that he is willing to take advice from the court system as far as the effective date.

CHAIR ROKEBERG asked Mr. Christensen, "What's the burn rate on your case backlog?"

MR. CHRISTENSEN answered that there is nothing mandatory about the case backlog in [the bill].

CHAIR ROKEBERG asked whether this should be in effect for the next election.

MR. CHRISTENSEN responded that since it's now more advisory than mandatory, he believes it would be fine to start the beginning of next year.

REPRESENTATIVE JAMES made a motion to adopt Amendment 1, on page 6, line 11 [to change the effective date to] January 1, 2002.

Number 2034

REPRESENTATIVE BERKOWITZ objected.

SENATOR DONLEY said he didn't have any objection to the date.

MR. CHRISTENSEN remarked that he wouldn't have any objection.

REPRESENTATIVE BERKOWITZ explained that his objection to the bill is not because of its subject, but is based on his respect for the separation of powers.

REPRESENTATIVE MEYER stated that the administration has said it is OK with this date; if that weren't true, he would agree with Representative Berkowitz.

REPRESENTATIVE BERKOWITZ remarked that he doesn't always agree with the administration.

CHAIR ROKEBERG pointed out that it is not the administration but the courts. He commented that he thinks if this bill merits consideration by the legislature, it should be enforced for the next election.

Number 2148

A roll call vote was taken. Representatives Coghill, Meyer, James, and Rokeberg voted in favor of Amendment 1. Representatives Berkowitz and Kookesh voted against it. [Representative Ogan was absent.] Therefore, Amendment 1 was adopted by a vote of 4-2.

Number 2155

REPRESENTATIVE JAMES moved to report CSSB 161(FIN), as amended, out of committee with individual recommendations and the accompanying zero fiscal note.

REPRESENTATIVE BERKOWITZ objected. He stated that he thinks [the legislature] is violating the separation of powers by compelling the judiciary to do something. He said he'd be interested in hearing how this action is not a violation of the separation of powers.

CHAIR ROKEBERG responded that the administration of the elections is in purview of the legislature, which is the primary reason [why this is not a violation of the separation of powers]. He said he thinks the public has the right to know this information.

REPRESENTATIVE BERKOWITZ remarked that he doesn't dispute that; however, he is disputing that the legislature is compelling not only information about elections, but that the court system and the judicial officers must file affidavits. He said he thinks it is an inappropriate intrusion of the legislature on matters that should be left internally to the judiciary.

REPRESENTATIVE JAMES noted that this has been existing law since statehood, and she doesn’t think [the committee] should be discussing that portion of it.

REPRESENTATIVE BERKOWITZ responded that there was an indication that it is unconstitutional, and it is only for the sake of comity that the courts have not pursued an objection.

Number 2248

A roll call vote was taken. Representatives Coghill, Meyer, James, and Rokeberg voted in favor of moving CSSB 161(FIN), as amended. Representatives Berkowitz and Kookesh voted against it. [Representative Ogan was absent.] Therefore, HCS CSSB 161(JUD) was reported from the House Judiciary Standing Committee.

SB 176 - DISTRIBUTORSHIPS

CHAIR ROKEBERG announced the final order of business, CS FOR SENATE BILL NO. 176(L&C) am, "An Act prohibiting certain

coercive activity by distributors; relating to certain required distributor payments and purchases; prohibiting distributors from requiring certain contract terms as a condition for certain acts related to distributorship and ancillary agreements; allowing dealers to bring certain court actions against distributors for certain relief; and exempting from the provisions of the Act franchises regulated by the federal Petroleum Marketing Practices Act, situations regulated by the Alaska gasoline products leasing act, and distributorship agreements relating to motor vehicles required to be registered under AS 28.10." [Before the committee was HCS CSSB 176(L&C).]

Number 2282

JOHN HAXBY, Waukesha Alaska Corporation, came forth to discuss SB 176. He told members the company was started in 1972 by his father, and he himself has been operating the business since 1984. There are approximately 13 employees, and the main business involves the sale and distribution of machinery for all services throughout Alaska. He stated:

> Over the last 30 years, we've been in relationships with manufacturers. Relationships change over time, and there are occasions where distributor agreements are yanked without warning. In many cases this can cause irreparable harm financially. Alaskan small businesses see immediate losses in jobs and, in our case, it has resulted in some $300,000 in unsold inventory, which remains on our shelf.
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> Basically, what SB 176 does ... is it levels the legal playing field in Alaska. Legal challenges are extraordinarily expensive, and in most cases deep-pocketed Outside manufacturers simply run you out of money. Cases like this can and have easily run into hundreds of thousands of dollars. ... In one noticeable instance ... legal bills have exceeded $1 million and climbing, even in a case in which the local Alaskan company has won in every court that's south of the 9th Circuit. And in that particular case, there are continuing appeals.
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> This bill also keeps manufacturers from forcing unwanted or unordered inventory on Alaskan businesses. It's not uncommon to be made part of quotas unknown to yourselves, and [be] told, "Hey, you're going to take this inventory because you're our distributor. Take

it or we’re going to terminate you or we're not going to have a relationship anymore."

The bill also allows for the orderly disposition of inventory if a distributor agreement is in fact yanked. It returns precious capital for that inventory, which would be remaining at the time of termination of the distributor agreement, to be returned. The inventory would go back to the manufacturer and there would be a repurchase by the manufacturer of that inventory. This allows Alaskans to take that capital and reinvest it in businesses here in the state.

Number 2399

MR. HAXBY continued:

The bill also allows that in the event of a death of a distributor or the death of a dealer that an orderly and equitable return of inventory can be accomplished quickly. It's especially important in these cases to be able to have an orderly disposition of inventory and/or the business, because many times the IRS [Internal Revenue Service] comes in and they value the business according to the past performance of the business.

In the event that a distributorship is in fact yanked - and the IRS comes and says, "We have a tax bill because your business is valued at 'X' dollars," and they assess a tax value - ... the value of the business may in fact go to zero and ... the tax liability remains with the estate of itself. So, theoretically, it has the possibility to wipe out the heirs after the death of a dealer.

I read through this committee substitute and I have pretty much agreed with the way it is written at this time, with the exception ... on page 6, ... line 11, where it talks about distributor agreement [meaning] a written agreement. In the original language ... three other words [were] in there, which stated "expressed, implied, [and] oral". And I think it’s important to note that oral agreements are, ... especially in Alaska, relatively common.

TAPE 01-81, SIDE B
Number 2472

MR. HAXBY went on to say:

> I'd like to ask for your support of this bill. I think that it's good for Alaskan businesses. I think it's good for Alaskan employees, and that it should treat everyone in Alaska similar.

REPRESENTATIVE BERKOWITZ asked whether anyone with legal expertise intended to testify.

CHAIR ROKEBERG answered no.

REPRESENTATIVE JAMES stated that she understands the conflict between big businesses and the little businesses, and between the supplier and the person who is having these distributors' products on his or her shelves. She said she has a lot of experience with this and wished this had been law on the books when she was a bankruptcy trustee. Also, as an accountant, she has seen people who have had a distributorship taken away, which was disastrous. She stated that she thinks this is a good idea to protect Alaskan businesses. She noted that she is concerned whether having an in-state distributor will be a problem.

CHAIR ROKEBERG responded that [yesterday in the House Labor and Commerce Standing Committee] the testimony was that many times the manufacturers end up being distributors. He stated that he had added [to the bill], "manufacturers with 50 or fewer employees," which generally covers most manufacturers in Alaska.

REPRESENTATIVE JAMES said she has also worked with wholesalers and knows they have rules and regulations about whether or not their product is being properly displayed and managed. She stated that she doesn't think that will affect people in Alaska, and she doesn’t think anything in the bill would be an unfair trading practice.

Number 2285

JANEECE HIGGINS, General Manager, Alaska Rubber & Supply, Inc., testified via teleconference. She stated:

> We had a signed dealer agreement in place .... Regional sales [representatives] made oral changes to that agreement with regard to volume discounts. For

15 years we followed the instructions of the sales [representatives], and every month the paperwork was filed, accepted, and discounts were applied to our account.

The parent company sold the manufacturing plant and the variances were noted. Because we had not followed the original signed document procedures, they demanded we repay all discounts, and when we refused we were terminated as a dealer. Since the paperwork had been mailed, the distributor also charged the owners and previous general manager with RICO [Racketeer Influenced and Corrupt Organizations Act] violations and criminal charges. These were very serious charges.

We have prevailed at every level, and the ruling by the court provided that the oral changes made by the sales representative and accepted for 15 years by the distributor, in fact, became the new dealer agreement. This case has been to the 9th Circuit, and we have prevailed at that level as well. Oral agreements and oral changes to existing agreements happen every day of the business world, and I urge you to keep language in this bill to cover that issue.

As a side note, we also have dealers to set up throughout the state. We support them with inventory, training, and technical data. This bill will affect us from both sides of the distributor-dealer agreement, and we feel it is fair.

CHAIR ROKEBERG asked Ms. Higgins for the name of the case in the 9th Circuit [Court of Appeals].

MS. HIGGINS responded that it was Aeroquip vs. Alaska Rubber & Supply, Inc. and the partners were Don Adams, Drennon (ph) Adams, Tom Moore (ph), and Alaska Interior Rubber. It is still being appealed, and the legal bills are $1.2 million. Furthermore, the 9th Circuit upheld the ruling of the lower courts.

CHAIR ROKEBERG asked whether the 9th Circuit had remanded it to Judge Singleton [of the U.S. District Court].

MS. HIGGINS answered in the affirmative.

CHAIR ROKEBERG asked whether the 9th Circuit talked about the oral or the implied contracts.

MS. HIGGINS answered that that was the basis of the whole thing being upheld.

Number 2101

DEBORAH LUPOR testified via teleconference. She stated:

> This is an important concern. [For] many small businesses, one of their major complaints is that [they don't] have the time, the staff, or the resources to respond to legal challenges. Whether somebody slips and falls on the sidewalk and sues for damages, or ... on the other side, the big guys decide to yank a distributorship agreement, ... they just don't have the resources to respond.
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> I want to mention that in talking to a number of business owners, what I discovered is that yanking the distributorship agreement has nothing to do with performance in many, many cases. It has everything to do with developing new markets. Or maybe a new management comes in or maybe a big distributor is trying to sign up somebody in Seattle, and the Seattle guy goes, "Well, I will take your product only if I get the Alaska market as well." And before you know it, the Alaska business, who has trained employees and built infrastructure and has come, in fact, to depend on this product, ... is suddenly, with sometimes no notice, sometimes 30 days, ... gone. And they're left with inventory that here in the Municipality of Anchorage they continue to pay inventory tax [on].
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> ... I'm also very concerned about what happens when the dealer dies and passes his estate on to family. They're already dealing with a horrific loss, and then to get stuck with huge IRS bills that may actually leave them in the red with no business at all even to pay that bill is beyond contemplation. I thank you for hearing this bill [and] I urge you to pass it.

Number 1984

CHAIR ROKEBERG announced that [the committee] has received suggestions for [three] amendments. He noted that they are

issues discussed the day before at the House Labor and Commerce Standing Committee hearing. He offered the following corrections: the first one should say page 3, line 22, instead of [line] 16; the second one, page 3, line 26, instead of [line] 20; and the third one, page 6, line 11.

CHAIR ROKEBERG made a motion to adopt conceptual Amendment 1, on page 3, line 22, to insert "without cause" following "terminates a distributorship agreement". He explained that this is a requirement that the distributor actually purchases the business if there is a termination. He said this is whether it's willful or not. With termination, there would be a statutory mandate to terminate; however, it seems to him that there would have to be a termination without cause. If there is a breach of contract on the part of the dealer, the distributor shouldn't have to buy the business if the dealer didn’t meet his or her bargain.

MR. HAXBY remarked that he understands; however, when this had been discussed with Legislative Legal [and Research Services] new issues regarding what is "cause" were brought up. He said that had to be taken out because they couldn't give every definition for cause.

CHAIR ROKEBERG stated that it troubles him and asked, if there is a termination because the dealer is not performing, whether the distributor has to buy the dealer out.

MR. HAXBY responded that the value of the business would be decimated.

CHAIR ROKEBERG asked whether the "crucible" of the marketplace would take care of the valuation, which is why the House Labor and Commerce Standing Committee deleted "good will".

MR. HAXBY concurred.

Number 1826

REPRESENTATIVE BERKOWITZ remarked that [the committee] is trying to itemize what the harm is in Sections 1 and 2, and suggested that the distributor be liable for damages incurred.

CHAIR ROKEBERG said he thinks that is difficult because of the nature of the inventory and the assets in the inventory.

REPRESENTATIVE BERKOWITZ noted that the bill states, "the distributor shall be liable for damages incurred".

CHAIR ROKEBERG replied that hopefully being more specific will avoid litigation.

REPRESENTATIVE BERKOWITZ remarked that it seems if the distributor chose to disregard any of these requirements, he or she would go to court.

Number 1768

REPRESENTATIVE JAMES stated that she can support purchasing back the inventory, since it is her experience that leftover inventory is worth nothing. She added that she agrees with Representative Berkowitz's statement that [the distributor] should pay the damages; however, she thinks they need to pay at least 85 percent of the cost of inventory.

CHAIR ROKEBERG informed Representative James that on page 2 that is included under "**Disposition of merchandise remaining upon contract termination.**"

REPRESENTATIVE BERKOWITZ pointed out that AS 45.45.710 is the buy-back provision, and AS 45.45.740 specifies other damages. He stated that itemizing like this can also have the effect of being exclusionary.

CHAIR ROKEBERG responded that it is not damages per se; it's the valuation of the business.

REPRESENTATIVE BERKOWITZ replied that, for example, there could be costs that have nothing to do with assets, good will, or machinery; it could be the time the individual spent pursuing. He suggested just saying [the distributors] are liable for damages.

CHAIR ROKEBERG remarked that there is a "without cause termination" and [the committee] wanted to narrow it.

Number 1640

MR. HAXBY suggested that the change not be made. Typically, he said, in a business valuation there are all kinds of things that are taken into account at that time. He said good will was eliminated specifically because it was thought to be something that was not definable. Most of the time, in a business valuation, growth rates and growth curves of the business are looked at. If it is gaining 25 percent year over year, then

that may have a multiple of earnings for one business. If it is in decline, however, it would have a more limited valuation. Rather than addressing damages, which are tough to define, a methodology like this allows it to be accomplished more quickly.

REPRESENTATIVE JAMES remarked that good will can be measured; people buy businesses, including good will.

CHAIR ROKEBERG agreed that it can be recognized; however, if there is a termination with or without cause, the statute would force the distributor to pay.

REPRESENTATIVE BERKOWITZ stated that it can't be done without cause. He expressed that every agreement is governed by the covenant of good faith and fair dealing.

CHAIR ROKEBERG responded that he thinks the contract has to be respected here.

REPRESENTATIVE BERKOWITZ stated that a distributor can't just cut somebody off without suffering consequences. When there is a breach of the implied covenant, then the question arises as to what the damages are. In most instances when there are disputes between parties, the parties are allowed to "hammer out" the differences amongst themselves. [The legislature] tries not to mandate, through the legal system, specific results for instances between types of parties. Here, [the legislature] is trying to deal with a contract dispute, and should be careful about prescribing a result.

CHAIR ROKEBERG remarked that he thinks [the committee] is trying to narrow the issues.

Number 1499

REPRESENTATIVE JAMES stated that Chair Rokeberg is talking about a small business in Alaska with a huge distributorship Outside, and this small business has no opportunity to go to court. If something is in state law, [the distributors] will change the way they do business with Alaska.

CHAIR ROKEBERG agreed and said that is why [the committee] wants to add machinery and assets into the bill.

MR. HAXBY noted that other states have laws similar to this.

REPRESENTATIVE BERKOWITZ remarked that this is what "tort reform" was about. [The legislature] took away some "hammers" from the small businessperson by limiting punitive damages.

Number 1416

CHAIR ROKEBERG withdrew conceptual Amendment 1.

[Amendment 2, which was not offered, would have amended page 3, line 26; it read: "Insert the words 'good will,' following 'including'".]

CHAIR ROKEBERG made a motion to adopt Amendment 3, which read:

> Page 6, Line [11]
>
> Delete the words "a written agreement"
>
> Insert the words "an agreement, whether expressed, implied, oral, or written,"

[The foregoing was corrected regarding the change to line 11, and would place the language following "'distributorship agreement' means".]

REPRESENTATIVE BERKOWITZ suggested that it say "a valid agreement".

CHAIR ROKEBERG offered that the amendment could read, "to be consistent with a valid agreement that's enforced by UCC [Uniform Commercial Code]".

REPRESENTATIVE BERKOWITZ stated, "within parameters."

CHAIR ROKEBERG remarked that he is concerned about that, given the history of this case from Ms. Higgins.

REPRESENTATIVE BERKOWITZ responded that with her case there is implied contract and there is detrimental reliance.

CHAIR ROKEBERG stated that there is some type of an addition to the contract because of the implied actions of the parties.

Number 1335

REPRESENTATIVE MEYER stated that [the House Labor and Commerce Standing Committee] spent a lot of time on this, and he was on

the opposite side from Chair Rokeberg. He noted that [the committee] thought if a person were to go into business with a large corporation, it should be in writing.

CHAIR ROKEBERG responded that according to the witness today, this common business activity doesn't necessarily mean "you have to go around and amend your contract every time you have a ... long-term relationship."

REPRESENTATIVE MEYER said this is supposed to be written for future events, and he thinks [the legislature] would want more people to put their agreements in writing, rather than doing them orally and by handshake.

REPRESENTATIVE JAMES stated:

> You wouldn't get one because the salesman has the right. He's on the grounds to make this agreement, has the rationale, ... and is authorized to do it in this particular case. And then he notifies that this has been changed and this is happening. If that had gone back to the place where they got the written agreement, they'll never get one.

REPRESENTATIVE KOOKESH remarked that he doesn’t have a problem with [Chair Rokeberg's] valid agreement with the UCC.

Number 1222

REPRESENTATIVE COGHILL said [the committee] should study how the UCC deals with contracting some of the oral agreements. He suggested adding the expressed, implied, oral, [or written] language.

REPRESENTATIVE MEYER objected to Amendment 3 [as written and provided in committee packets].

CHAIR ROKEBERG remarked that he thinks this is the right way to go, and is willing to go to UCC language.

REPRESENTATIVE BERKOWITZ asked, assuming Amendment 3 passes and [the committee] finds that it crosses wires with the controlling case law, whether [Chair Rokeberg] would help repair the problem on the [House] floor.

CHAIR ROKEBERG answered that he would, but doesn't think [there will be a problem].

REPRESENTATIVE MEYER stated that he thinks it is poor business practice to not have an agreement in writing.

Number 0940

A roll call vote was taken. Representatives Berkowitz, Kookesh, James, Coghill, and Rokeberg voted in favor of Amendment 3. Representative Meyer voted against it. [Representative Ogan was absent.] Therefore, Amendment 3 was adopted by a vote of 5-1.

Number 0925

REPRESENTATIVE JAMES moved to report HCS CSSB 176(L&C), as amended, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, HCS CSSB 176(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

Number 0902

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 6:35 p.m.