

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

March 15, 2002

1:10 p.m.

**MEMBERS PRESENT**

Representative Norman Rokeberg, Chair  
Representative Scott Ogan, Vice Chair  
Representative Jeannette James  
Representative John Coghill  
Representative Kevin Meyer  
Representative Ethan Berkowitz

**MEMBERS ABSENT**

Representative Albert Kookesh

**COMMITTEE CALENDAR**

HOUSE BILL NO. 499

"An Act relating to the sale, lease, exchange, or other disposition of business property and assets."

- HEARD AND HELD

HOUSE BILL NO. 501

"An Act relating to the use of unclaimed property to pay court-ordered restitution; and providing for an effective date."

- MOVED HB 501 OUT OF COMMITTEE

HOUSE BILL NO. 489

"An Act relating to cruelty to animals."

- HEARD AND HELD

**PREVIOUS ACTION**

BILL: HB 499

SHORT TITLE:DISPOSITION OF BUSINESS ASSETS

SPONSOR(S): JUDICIARY

Jrn-Date	Jrn-Page		Action
02/27/02	2407	(H)	READ THE FIRST TIME - REFERRALS
02/27/02	2407	(H)	JUD

02/27/02 2407 (H) REFERRED TO JUDICIARY  
03/15/02 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 501

SHORT TITLE: UNCLAIMED PROPERTY & RESTITUTION

SPONSOR(S): JUDICIARY

Jrn-Date	Jrn-Page		Action
02/27/02	2408	(H)	READ THE FIRST TIME - REFERRALS
02/27/02	2408	(H)	JUD
03/15/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 489

SHORT TITLE: CRUELTY TO ANIMALS

SPONSOR(S): REPRESENTATIVE(S) CHENAULT

Jrn-Date	Jrn-Page		Action
02/19/02	2319	(H)	READ THE FIRST TIME - REFERRALS
02/19/02	2319	(H)	JUD
02/19/02	2319	(H)	REFERRED TO JUDICIARY
02/22/02	2370	(H)	COSPONSOR(S): KOTT
03/01/02	2450	(H)	COSPONSOR(S): CROFT
03/06/02	2497	(H)	COSPONSOR(S): JAMES, FOSTER
03/15/02		(H)	JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

HEATHER M. NOBREGA, Staff  
to Representative Norman Rokeberg  
House Judiciary Standing Committee  
Alaska State Legislature  
Capitol Building, Room 118  
Juneau, Alaska 99801  
POSITION STATEMENT: Presented HB 499 and HB 501.

THEODORE M. PEASE, JR., Attorney  
Burr, Pease & Kurtz, PC  
810 North Street  
Anchorage, Alaska 99501  
POSITION STATEMENT: Testified in support of HB 499, provided  
information regarding Savage Arms Inc. v. Western Auto Supply  
Co., and responded to questions.

RONALD COBURN, Chairman and Chief Executive Officer  
Savage Sports Corporation

(No address provided)

New Hampshire

POSITION STATEMENT: Provided testimony during discussion of HB 499.

JAMES D. DeWITT, Attorney

813 Lancaster Drive

Fairbanks, Alaska 99709

POSITION STATEMENT: Provided testimony during discussion of HB 499 and urged its passage.

RACHEL LEWIS

Unclaimed Property Section

Treasury Division

Department of Revenue

PO Box 110405

Juneau, Alaska 99811-0405

POSITION STATEMENT: Answered questions regarding HB 501.

#### **ACTION NARRATIVE**

TAPE 02-30, SIDE A

Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives Rokeberg, Ogan, James, Coghill, and Meyer were present at the call to order. Representative Berkowitz arrived as the meeting was in progress.

#### HB 499 - DISPOSITION OF BUSINESS ASSETS

Number 0047

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 499, "An Act relating to the sale, lease, exchange, or other disposition of business property and assets."

Number 0082

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, House Judiciary Standing Committee, Alaska State Legislature, explained that HB 499 was created in response to a decision made by the Alaska Supreme Court in the Savage Arms, Inc. v. Western Auto Supply Co. case. Last year the Alaska Supreme Court considered, for the first time, the doctrine of successor liability, which holds, for example, that when a corporation

purchases a company and its assets, the general rule is that the purchasing company is not held responsible for the selling company's liabilities unless the purchasing company expressly assumes those liabilities. The successor liability theory, she noted, holds that there are exceptions to this [general] rule, and the courts throughout the nation have [recognized these] different exceptions to this rule.

MS. NOBREGA said that the Alaska Supreme Court decided to adopt two exceptions to the aforementioned general rule. She remarked that there are varying opinions on the validity of these [two] exceptions, noting that one of these exceptions has not been adopted by most of the courts around the country and is also not recognized by the [American Law Institute's Restatement (Third) of the Law of Torts ("Third Restatement of Torts")] which is a general doctrine that many attorneys and courts refer to as the rule of law regarding certain issues.

MS. NOBREGA, referring to the two exceptions to the general rule of not being held liable for a [selling] company's assets, said:

We have decided that [one of] these exceptions [is] not appropriate [with regard to] corporate liabilities in this state. And we have decided to present HB 499, which basically says, unless you expressly assume these liabilities, you will not be held responsible for the liabilities [of] the corporation whose assets you are purchasing. We have applied this principle to corporations, to limited liability companies (LLCs), [to] partnerships, and [to] general businesses across the board so that there is uniform application [of] this rule.

MS. NOBREGA, in response to the question of why she thinks the state should adopt this policy, said that in her opinion, it is the generally accepted policy across the nation, and what the Alaska Supreme Court did was to adopt [an area] of the law that could be considered a "fringe [area] of exceptions," and HB 499 would just be going back to the generally accepted practice.

CHAIR ROKEBERG asked, then, if it would be fair to say that by adopting HB 499, the legislature would be adopting somewhat of a national standard so that commerce can take place in a more orderly and uniform fashion.

MS. NOBREGA said yes.

Number 0358

REPRESENTATIVE BERKOWITZ surmised, however, that the policy adopted via HB 499 would be a change from the existing state policy as articulated through various [Alaska] Supreme Court decisions.

MS. NOBREGA said that she does not necessarily agree with Representative Berkowitz's statement because the general policy is that a purchasing company is not held liable for the [selling] company's liabilities unless expressly assumed. And so this was the general rule until just last year, when the [Alaska] Supreme Court decided that there were exceptions.

CHAIR ROKEBERG requested confirmation that in its decision, the Alaska Supreme Court stated that "... neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case," and thus Alaska had heretofore relied on common law.

MS. NOBREGA confirmed this.

CHAIR ROKEBERG opined that the statement made by the Alaska Supreme Court begs the Legislature to make a specific policy decision.

Number 0488

THEODORE M. PEASE, JR.; Attorney; Burr, Pease & Kurtz, PC, urged the committee, on behalf of his client, Savage Arms, Inc., to pass HB 499. He said that HB 499 would repudiate and overturn a doctrine of corporate successor liability that was embraced by the Alaska Supreme Court in a ruling handed down about a year ago in the Savage Arms, Inc. v. Western Auto Supply Co. case. He opined that HB 499 is vitally important to the continuing existence of Savage Arms, as well as to business and commerce - indeed, to any person or company that ever bought all or part of the assets of an ongoing business, or that plans to do so in the future. Therefore, he added, he is also speaking on behalf of fairness and predictability in business and commercial dealings.

MR. PEASE said that when a person, partnership, or corporation buys assets from another company, the buyer must be able to know what is being bought and not be at risk of being held liable years later for the seller's liabilities that were unknown at the time of the sale or that, in fact, may not even have existed. The Alaska Supreme Court, however, adopted a doctrine

called "continuity of enterprise," which does just that: [holds the purchaser liable]. Mr. Pease opined that a brief recitation of the Savage Arms, Inc. v. Western Auto Supply Co. case would make clear the unfairness of the Alaska Supreme Court's ruling and its devastating effect on a company like Savage Arms that purchases assets from another company and then finds itself subject to a liability it did not know about at the time of sale.

MR. PEASE recounted that on April 8, 1989, in Kenai, Alaska, a young man named Taylor - who was a minor - was badly injured when a .22 caliber rifle malfunctioned. The rifle had been manufactured in 1982 by a company called Savage Industries, Inc., which at that time was manufacturing under the "Savage" name and had been making these firearms for some time. Savage Industries manufactured this particular gun and sold it to Western Auto Supply Co. ("Western Auto"), which then sent it out to a store in Maine where it was sold in 1983; the gun was then resold two or three times after that and ended up in Kenai, where it was purchased as a used gun by Taylor's father - Jack Taylor.

Number 0718

MR. PEASE noted that on February 2, 1988, before the accident happened, Savage Industries, which was in bad financial condition, filed for bankruptcy. When the bankruptcy was filed, there were efforts made to find somebody to purchase some or all of the assets of "this defunct company." Some investors in Texas thought they'd have a go of it, so they incorporated a Texas corporation called Savage Arms, Inc., and entered into negotiations with the trustee in bankruptcy; they worked out an agreement to purchase most, but not all, of the assets. They purchased the name; four lines of product, though not the line of firearm that was later involved in the court action; and the manufacturing plant. They agreed on a price, they got it approved by the bankruptcy court, and the deal closed in November of 1989, but in the meantime, the accident with Mr. Taylor's son occurred, although nobody at either of the companies knew about it.

MR. PEASE explained that for about a year and a month, the new company - Savage Arms - went about making firearms. [At this time] Mr. Taylor filed suit in Kenai against Savage Industries, not knowing that that company had gone bankrupt. Upon finding out about the bankruptcy, he proceeded to sue Western Auto. Western Auto was a big company with plenty of assets and plenty

of insurance with Allstate Insurance Company ("Allstate") and Certain Underwriters at Lloyd's of London ("Underwriters"); "so they came in to defend." It was a long defense and "they" ultimately settled with the plaintiff in June of 1995 for \$5.4 million. Meantime, Western Auto - or its insurers, Allstate and Underwriters - "saw a big a exposure here so they were looking around for somebody to lay it off on and recover from."

MR. PEASE relayed that "they" brought in Savage Arms; "they" found that Savage Arms bought assets [from Savage Industries], and so sued Savage Arms on a theory of successor liability, specifically, "continuity of enterprise," which had been discussed by some courts but adopted by almost none. He added that [this theory] was really out of favor and had never been the law in Alaska. He noted that this third-party action of Western Auto against Savage Arms was separated - severed - while the main action went forward. However, once the settlement was made, "it" heated up and there were various motions before Judge Jonathan Link [Third Judicial District Kenai, Superior Court, Alaska Court System] related to what the law is, whether there was a cause of action, and whether Texas law should apply.

MR. PEASE recounted that Judge Link made rulings on these various motions and concluded that there should be some sort of successor liability in Alaska. "He didn't really articulate it, but after he made his rulings, he urged Savage Arms to petition the [Alaska] Supreme Court to review it before the case went any further," added Mr. Pease. "We accepted that invitation, we filed a petition for review, it was accepted by the Alaska Supreme Court, and Judge Link stayed the proceedings in the case while that was decided." In due course - March of 2000 - the Alaska Supreme Court came down with its decision, which adopted "this generally rejected" theory of successor liability, and sent [the case] back to Judge Link for further trial with "that doctrine in place." Mr. Pease relayed that this trial is set for November, 2002.

Number 0976

MR. PEASE pointed out that HB 499 is, by its terms, made retroactive so that if it passes during this [Legislative] session, which he hopes will happen, it will apply to the pending case. He noted that while there have been some concerns expressed regarding whether laws "like this" can be made retroactive, his research has indicated that, clearly, the legislature can do so; "there's a statute that says that laws are not retroactive unless the legislature makes them

retroactive, and the Alaska Supreme Court has recognized that." He added that in many cases, laws have been made applicable retroactively.

MR. PEASE opined that fairness requires retroactivity in this case because in adopting "this rule," the Alaska Supreme Court was relying on a couple of law review articles, one written so recently that it came out after the briefing had been completed. He noted that one of the authors [of the aforementioned articles] was advocating for this theory of [successor] liability. This author had added, however, that if it is applied, it needs to be prospective in effect because it's not the accepted law; it would be unfair to make people liable who had no knowledge of any potential liability and who had relied upon the prior law. Mr. Pease indicated that the author, in his article, said:

The purchaser has to know in advance if he's going to be held liable under this theory. Now that means ... that any decision imposing expanded successor liability can be prospective only with regard to asset acquisitions that occur after the court has announced the rule of expanded successor liability.

MR. PEASE said: "When we got the [Alaska Supreme] Court's decision, we petitioned them to reconsider and we called their attention specifically to that, and said, 'Look, if you're going to do this, for goodness sakes, in all fairness, you've got to do it only prospectively - but don't apply it to us.'" He added that there was no further opinion forthcoming on that petition; "they just denied it." The only way that justice can be done, he opined, is if HB 499 is made retroactive.

Number 1147

MR. PEASE said that under HB 499, a purchaser is liable, of course, for any liabilities assumed by that purchaser. There is also, he noted, one other exception [regarding liability] not affected by HB 499: if it's a fraudulent case - if there's an attempt [to escape liability] - then the purchaser remains liable. He pointed out HB 499 says that "except as otherwise expressly provided by another statute" - for example, as in AS 34.40.010-130 - a successor is not liable. He said "HB 499 is needed for fairness, for helping any business that wants to get into business, to know what he is getting into."

MR. PEASE noted that although the court says that a purchaser can get insurance for "this" and can factor "this" into the price, the fact is, there is no insurance for "this." He opined that if this case goes forward under the doctrine that the Alaska Supreme Court has espoused, the jury will be given an opportunity to find liability against Savage Arms, which will be "looking at \$8 [million] or \$10 million, and they're out of business; it's that simple." He offered a final point for members' consideration: When [the Taylor boy] was injured, the company that made the rifle was bankrupt, and if Savage Arms had not been formed as a corporation and bought any of Savage Industries' assets, [the plaintiff] would have had nowhere to go other than Western Auto; now, Western Auto is trying to get its money back from Savage Arms.

REPRESENTATIVE JAMES, after noting that she has served as a bankruptcy trustee, opined that the Alaska Supreme Court decision will have a chilling effect on bankruptcy trustees during any liquidation proceedings regarding corporate assets. When a corporation goes bankrupt, the more [money] that can be gotten "in a chunk," the better, since that money then goes to the creditors. She posited that it would be better to adopt HB 499 than to allow the court decision to remain in effect.

REPRESENTATIVE BERKOWITZ asked whether passage of HB 499 would jeopardize the injured boy's settlement of \$5.4 million.

MR. PEASE said no.

Number 1382

REPRESENTATIVE BERKOWITZ asked whether any of the "ownership or upper management" of Savage [Industries] become any of the ownership or upper management of Savage Arms.

MR. PEASE said: Yes and no. Although the stock of Savage Arms is not owned by any of the original owners of Savage Industries, the chief executive officer (CEO) of Savage Arms - who is now a substantial owner of it - had, at the time of the bankruptcy, been managing Savage Industries; "he'd been brought in to try and turn it around."

REPRESENTATIVE BERKOWITZ sought confirmation that this person was not entirely new to the equation, that this was someone who was aware of the preexisting company's conditions.

MR. PEASE, in response, said that the new company, Savage Arms, was actually incorporated by a company called Challenger, Ltd., which was a large, publicly traded company. To his understanding, he said, Challenger was approached by the principal shareholders of Savage Industries for the purpose of "setting this company up and buying some of the assets." He noted that the principal shareholder of Savage Industries was a partnership called Cerrito Partners, Ltd., and that although Cerrito Partners may have had some shares in Challenger, this did not constitute a major holding.

REPRESENTATIVE BERKOWITZ asked whether Savage Arms was insured and, if not, why not.

MR. PEASE said that to his understanding, any insurance that Savage Arms had did not cover any past liabilities of Savage Industries.

REPRESENTATIVE BERKOWITZ observed, then, that it was a question of what kind of coverage Savage Arms chose to acquire rather than not having access to "prior coverage."

MR. PEASE said that he did not think it was available.

REPRESENTATIVE BERKOWITZ, after noting that this issue is the subject of ongoing litigation, asked whether "the other party" was given notice of today's hearing and would be testifying later.

MR. PEASE said that he did not notify "them," and did not believe "they" were going to testify. In response to questions, he confirmed that the accident involving the Taylor boy occurred before the closing of the asset sale of Savage Industries.

Number 1597

REPRESENTATIVE BERKOWITZ said: Putting aside the facts of this case and looking at how this bill would work in the future, suppose there was a situation in which a manufacturer produced a product while aware that there were some defects in the product, and the owners then sell the company. The owners of this hypothetical company will get "good dollars" for the sale of the company because, under HB 499, the liabilities aren't going to transfer. How is a victim of the defective product going to be entitled to compensation if this bill were to pass?

MR. PEASE surmised that if the claim were known about, it would probably be considered a fraudulent transaction.

REPRESENTATIVE BERKOWITZ, notwithstanding Mr. Pease's statement, said:

But you know the liabilities aren't transferred; ... if we merge, and I know that the company I'm selling you has some liabilities, you're not acquiring those liabilities. Because of that, you're not responsible for anything, at least as I understand the bill. I get top dollar, since I'm, in essence, selling you a company without having those kind of liabilities, and you don't acquire the liabilities. How does the injured party -- who/where are they going to go for compensation.

MR. PEASE said that if the company that manufactured the product has substantial assets and sold them for full market value, [that company] would have the full market value in the company treasury, though [that company] might invest it in something else. Of course if [that company] had insurance covering liabilities, the insurance would still be there to cover loses resulting from any accidents that occurred while the premiums were being paid, he added. If it's a wealthy ongoing company, the injured party has "somebody" to recover from; if it's a company that's right on the brink of bankruptcy, the injured party cannot recover. He pointed out that if the sale hadn't taken place, the injured party would not be able to recover anything anyway. So, he added, it really depends [on the specifics of the situation].

MR. PEASE said that what the Alaska Supreme Court is doing, via its ruling, is giving a windfall to an injured party against "an innocent purchaser who had nothing to do with the manufacture of this gun."

REPRESENTATIVE BERKOWITZ reminded Mr. Pease that he was not referring to the Savage Arms, Inc. v. Western Auto Supply Co. situation. An innocent purchaser, "in my mind," he said, is someone who is totally unaware of anything that happened prior to the purchase. "If you have people acquiring a company who were actively involved in the prior company, they're not innocent in the sense that all you had is a transaction; you haven't had a change in ownership or management," he added.

Number 1781

MR. PEASE said he is having trouble understanding why Representative Berkowitz thinks "this injured party is being hurt by a sale like this." A purchaser is not going to purchase the assets of a company if the purchaser knows that by doing so, he/she will be subjected to a \$10 million liability suit, for example.

REPRESENTATIVE BERKOWITZ said that is his point: HB 499 provides that "you're not subject to that liability, so you can buy it without acquiring the liability." And the predecessor has sold the company, so the predecessor now has cash; how does the injured party go back and get compensation, he asked. "You can't get it from the new owner because they're insulated on account of this bill, and you can't get it from the old owner because all they have is money - they're not the corporation anymore."

MR. PEASE interjected, saying that that money goes to the seller - the entity that made the defective product - so those assets are [still] available unless the seller goes and hides them somewhere, which could result in a fraudulent-conveyance situation.

REPRESENTATIVE BERKOWITZ said, "So you think that an injured party would have a cause of action against a prior owner, or a prior holder of a corporation?"

MR. PEASE said that if it were a corporation, [the cause of action] would be against the corporation.

REPRESENTATIVE BERKOWITZ stipulated, hypothetically, that the corporation has been sold or merged.

CHAIR ROKEBERG asked: What if the corporation had been liquidated?

MR. PEASE said that if the corporation has been liquidated and there is a claim there, the injured party can "move against the corporation." Whatever the selling entity is, if liquidation occurs without making provisions for claims, it could be considered a fraudulent transfer.

REPRESENTATIVE BERKOWITZ asked: What's the fraud?

MR. PEASE clarified that it would be fraud if the seller - who has the money - knows about any claims:

If the seller knows it's got this big liability out here, so it sells its assets off to somebody else and ... takes the money, liquidates the corporation, puts [the money] in its own pocket, and the reason for [doing all of this] is to avoid this liability, that's a fraudulent situation.

Number 1903

CHAIR ROKEBERG asked whether it is typical for "a larger class 'C' type corporation" to have insurance if solvent, or, if the company doesn't have insurance, it is usually because it isn't solvent and is probably "in bankruptcy." Therefore, he opined:

The only way that they could avoid being entirely judgment-proof is if there were a sale of some of their assets - or their entire asset-and-liability base, if there was an assumption of the stock. So, typically, if you get a C corporation in an asset-merger situation, you're going to have the purchaser purchase all of their stock and, therefore, would automatically inherit the liabilities as well as the assets. Is that correct?

MR. PEASE replied: If they buy the stock.

CHAIR ROKEBERG said:

But if they didn't buy the stock, they would buy just the assets out of a bankruptcy court, which would leave at least some money in the corpus of the remainder corporation that would be available for anybody who had a claim against it. Is that correct?

MR. PEASE said that is correct.

CHAIR ROKEBERG continued: "So without the ability to sell the assets out of bankruptcy court, there would be no way to make any money available for somebody who had a legitimate claim - either a creditor or a victim of a tort. Is that correct?"

MR. PEASE said that was a fair statement.

CHAIR ROKEBERG said that he is familiar with situations in which the company is on the verge of bankruptcy and, rather than proceed with bankruptcy, the company liquidates its assets at

that particular juncture to save what value the company has. He added:

Therefore, when you have an assuming entity that takes over the asset base, they don't want to have the liabilities along with that, [since] if they were to ... not buy the stock, for example, ... just the assets, ... they can cut off the liabilities that may be attached to [the selling] entity. Is that correct?

MR. PEASE said that is correct.

CHAIR ROKEBERG stated that he has a potential conflict of interest with HB 499.

Number 2035

RONALD COBURN, Chairman and Chief Executive Officer, Savage Sports Corporation, testified via teleconference and said that his company is Massachusetts-based, Delaware-registered, and is a private company. In response to a question, he said that Savage Sports is a holding company that includes the company that is now called Savage Arms, Inc. As background, he explained that he used to be vice president of a company called Savage Industries, Inc., which he joined in 1987, and which by February 1988 had filed for bankruptcy. He noted that he had no part in that filing, and was just one of 17 different vice presidents at the time. Savage Industries let off 80 percent of its employees, dropped 10 or 11 products, and started looking for new owners.

MR. COBURN recounted that in November of 1989, Savage Industries sold certain assets to a public company called Challenger, Ltd., and left behind the discontinued products. Savage Industries was under the oversight of the Massachusetts bankruptcy court, and the sale was viewed as the only way to save both some employees and continuity of the company. He explained that at the time, he was made an officer [in order] to join Challenger and begin a program to develop new products and new markets on [Challenger's] behalf. In December of 1990, Jack Taylor filed a suit against a number of parties for having made a firearm, or sold a firearm, or repaired a firearm, which was then involved in an accident with his son.

MR. COBURN explained that the distributor that sold the firearm defended the action. At the time, Savage Industries was in bankruptcy. "We had no idea that this took place, we had no

idea that an accident took place at the time; our first understanding of an accident was when the suit was filed in 1990," he added. After the case was tried and won by the defendants, "insurance" had some difficulties in their summary, apparently; the judge ruled that there was jury misconduct and that improper closing arguments were made by the distributors' attorney, and so ordered a new trial even though the defendant had won. The distributors' insurance providers settled for \$5.4 million. "There [was] no input with Savage Arms at that time; it was two years later that Savage Arms, Inc. was sued by the insurance company through the distributor," he added.

CHAIR ROKEBERG asked: Was that under a theory of subrogation?

MR. COBURN said: Correct, and successor liability. "They" were trying to recoup what the settlement cost and "their" legal fees, which at the time was over \$8 million. Savage [Arms] appealed to the courts on the grounds that they did not make the product; they did not distribute the product; they made no profit from the product; and that the company [that had done all these things - Savage Industries] was in bankruptcy and had sold assets, which did not include that product, to a new company, specifically based on the liability's staying with the old bankrupt company as part of the purchase and sale agreement.

Number 2195

MR. COBURN said that the original intent of both parties, both the selling party - [Savage] Industries - and the purchasing party - [Savage] Arms - was to start a new company. [Savage] Industries "stayed behind," they continued to have assets, they continued to have liabilities, it was not a party to the new company; [Savage Industries] did have stock [in Savage Arms] that was part of the purchase price but it had no authorship or ownership of [Savage Arms] otherwise. "Allstate Insurance was the insurance company rather than ... the distributor," he added. Texas law should have prevailed, he opined, because Texas was where the agreement between Savage Industries and Savage Arms was conducted in the first place; the owners of "the company that sold" lived in Texas, and it was incorporated in Texas; the "new owners of the company were living and incorporated in Texas," and they had their offices there; and there was nobody in Massachusetts, where the company was manufacturing, involved in that transaction at all.

MR. COBURN noted that Alaska's court system has previously ruled in both directions, and because of "this confusion" his party

asked the Alaska Supreme Court to intervene and provide an opinion. He added that it was a big surprise to his party to find that the Alaska Supreme Court [favored] successor liability, particularly when the company that he currently manages had no involvement whatsoever in the product [that caused the accident], never made the product, never made a product like it, and had no involvement in the "first case". Now, he said, "we are defending ourselves for successor liability."

MR. COBURN, in response to previously asked questions, said that there [was] no insurance; when [Savage] Industries sold their company, they closed down the business a year later and stopped paying insurance premiums. Had Savage Arms, the purchasing company at the time in 1989, known that there would have been liability in any form, they could have taken out insurance, "but the purchase and sale agreement specifically stated otherwise"; there was not supposed to be any carryover liability whatsoever on the assets.

Number 2320

MR. COBURN said that he was not an officer of Savage Industries; he only became an officer of Savage Arms "in the new purchase of the company in 1989. So there really was no continuity of authorship or senior management between the two companies, he offered. Since "this" has happened, the owners of the company, Challenger, got into financial difficulties, closed down the business and started a second business, and then closed that one down and opened a third business. He noted that he purchased a company from [Challenger] in 1995 with a similar agreement that no liability would transfer - that [Challenger] would take full ownership [of any liabilities]. Unfortunately, he added, [Challenger] is not now in a financial position to support him.

MR. COBURN remarked that as it stands now, he owns a company that has been held liable for something that happened in 1989, which he only became aware of in 1990, and "it was too late to get insurance to cover it." "The total amount is in excess of \$12 million," he said, but the income last year from "the total company" was less than \$1 million, and so any settlement or judgment against his company would put him out of business; the company is heavily leveraged, which was how he purchased it in the first place.

MR. COBURN said that what he views as unfair is that had "we had any understanding of this liability - had it been something we'd

have considered - we could have gotten insurance or we could have changed the selling or purchasing price to allow for that eventuality." The company was purchased with the understanding that no liability of those assets would go forward. In Texas, where this whole transaction took place, the law specifically states that liability is precluded from transferring to a new company unless that company knowingly accepts the liability.

REPRESENTATIVE JAMES asked if the bankruptcy filed by Savage Industries was a "Chapter 11."

MR. COBURN said that it was.

REPRESENTATIVE JAMES asked whether the sale involved the folks running the corporation rather than the bankruptcy trustee.

MR. COBURN said that was correct.

REPRESENTATIVE JAMES asked what percentage of Savage Industries was purchased.

Number 2440

MR. COBURN said "there were 11 product lines." "When the company went into bankruptcy, it was hemorrhaging really badly"; it had \$19 million in debt and \$4 million of assets, so it discontinued almost every single product line except one, it let off 78 percent of its workforce, and it closed down two out of three of its factories. Therefore, there weren't many assets left to sell, but there were some that were viable and so the company kept those and proceeded to look for a new owner.

REPRESENTATIVE JAMES asked whether the rest [of the assets] were sold to someone else.

MR. COBURN said that according to his understanding, "there was no really value in the rest," so the company did not gain any return for the balance; "I think they just liquidated and closed down."

REPRESENTATIVE JAMES said: So then for all practical purposes, the purchaser of the assets actually purchased the company. Is that correct?

MR. COBURN said: They purchased the name of the company and one product line, plus the right to "mix up" all their products if they chose to in the future. "We did not know at the time -

this is Challenger - what would happen to [Savage] Industries, they didn't tell us what they were going to do; we thought initially [that] they were going to start up again, if they could, or sell more assets - raise more money," he added, but to his knowledge they were unable to sell more assets.

REPRESENTATIVE JAMES asked what the purchase price was.

MR. COBURN said it was \$1 million.

REPRESENTATIVE JAMES pointed out that if the company had a total of \$4 million in assets and sold some assets to [Challenger] for \$1 million, "that certainly isn't all of it." "Is it because it was such a good deal," she asked.

MR. COBURN said that wasn't it; nobody else wanted [the remainder of the assets]. [Savage Industries] tried to sell their company from 1985 all the way through the declaration of bankruptcy in 1988, and it wasn't until November of 1989 that they were able to sell [certain] assets to Challenger; [Savage Industries] was distressed: distressed assets and distressed conditions. The difference between a distressed purchase and the true market value is substantial, he explained; nobody was interested in buying the company.

TAPE 02-30, SIDE B  
Number 2506

REPRESENTATIVE BERKOWITZ requested confirmation that the product line that is the subject of this litigation was not purchased.

MR. COBURN confirmed that.

REPRESENTATIVE BERKOWITZ asked: So, in order for you to be found liable based on the "continuity of enterprise" theory, doesn't the court have to find that there was a de facto continuation of the same business with the same name?

MR. PEASE, answering in Mr. Coburn's stead, posited that the Alaska Supreme Court decision does not require that it be the same product line. He offered that the record of the case made it clear that the product line that the [Taylor] boy was injured by had not been purchased.

REPRESENTATIVE BERKOWITZ said that according to his understanding, then, it is still a subject for the trier of fact to determine whether or not liability exists.

MR. PEASE said that's right, but under the criteria spelled out by the Alaska Supreme Court.

REPRESENTATIVE BERKOWITZ said that his concern is:

We're jumping in ahead of the trier of fact's ability to come to a determination in this case. But there is no showing that the continuity of enterprise theory that the court espouses is, on its face, wrong policy for the State of Alaska. What the bill would do would in essence immunize your client prior to going to court.

MR. PEASE said: And anyone else in a like position, past or future.

Number 2397

JAMES D. DeWITT, Attorney, testified via teleconference. He indicated that the implications of the Savage Arms decision are serious in regards to his own legal practice. He remarked that he felt so strongly about this court decision that he wrote an article for the Alaska Bar Rag taking the Alaska Supreme Court to task for its decision. He said that his primary concern is that the court gave this decision retrospective application rather than limiting it to prospective application. "My reaction to reading this decision was to notify my malpractice carrier that I may have screwed up some 100-150 asset sales that I have done in my professional career, because the reach factor is without limitation." He acknowledged that he did not know how the court, the House Judiciary Standing Committee, or the legislature wants to balance the risk Representative Berkowitz has addressed: the risk that when someone is hurt by a product, there may not be anyone available to respond in damages.

MR. DeWITT noted that the legislature gets tasked with finding that balance. He added, however, that it strikes him as being fundamentally unfair to change the rules, not just in the middle of the game, but after the game is over and everybody has gone home, which, he opined is what the Alaska Supreme Court did in the Savage Arms decision. The effect of this decision, he added, is to punish the successful. According to Fortune magazine, 90 percent of all businesses fail in the first two years, so if young Mr. Taylor had been injured by the product of a company that failed quickly and promptly, he'd be without a

remedy, but if the business succeeds and prospers, then he gets some money, he noted.

MR. DeWITT, referring to issue of fraudulent conveyances, said that he is "not completely satisfied that statute provides protection." He posed the hypothetical sale of a corporation owned by ten people. It is sold to a new corporation owned by the same ten people; the management is the same, the ownership is the same, and the product lines are same. Mr. Pease, he surmised, is satisfied that such a situation would constitute a fraudulent conveyance under Alaska statutes, and yet he, Mr. DeWitt, said that that is kind of a stretch for the statute. In fact, he observed, what that is, is a lesser form of successor liability that has the approval of the courts in a majority of the states, and so is probably the majority rule. It doesn't have to be an identity of ownership, it doesn't have to be a discounted price, and it doesn't have to be anything inherently crooked either. "If it's just too much the same, then the court's not going to respect the sale," he noted.

Number 2207

MR. DeWITT pointed out that the sale that occurred in the Savage Arms case was nothing like the aforementioned hypothetical situation; "it was a sale out of bankruptcy." And as Representative James can attest to, he said, all of this could have been avoided if the first corporation, after filing bankruptcy, had confirmed a Chapter 11 plan that said, "All of our debts are discharged; we don't owe the money anymore," and then had sold the assets or a portion of the assets to a successor corporation. If such had been done, the lawsuit driving this legislation would not have occurred. He said that in a sense, the unsuccessful are being punished as well in terms of the employees of the failed corporations and their wage claims, the creditor claims, and everyone else. Mr. DeWitt urged the enactment of HB 449 and, if Representative Berkowitz prevails in his concerns, that at least HB 499 be passed "not giving Savage Arms prospective effect."

CHAIR ROKEBERG remarked that many times, businesses on the verge of bankruptcy or failure endeavor to sell assets to try to save any remaining "monetary basis" their firms have.

MR. DeWITT confirmed that that does happen. He surmised that Chair Rokeberg's point is that such a decision "impacts persons in that position" and the impact is real - its financial; "it doesn't, if you will, kill the deal, but it's going to reduce

the price in very significant ways." He said he supposed the minimum impact on a price would be to reduce it by the amount of suitable long-term insurance premiums, in order to guard against unknown risks - "some broad, blanket form of policy" that the seller would require, to insure both the purchaser and the seller in the event of a claim not known at the time of the sale. He added that once a claim is known about, it can be dealt with during the course of the negotiations.

CHAIR ROKEBERG opined that "the general applicability of this principal in business in commerce transactions is much greater than [the] narrow area of product liability."

MR. DeWITT said he agreed, but added that the claims that are known about are easier to deal with than unknown claims. He noted that in a commercial transaction, a person would generally go to his/her creditors and offer what was available, even if it was not sufficient to cover those liabilities, rather than simply filing for bankruptcy. Most creditors, he opined, would prefer the former option. And most people know who their commercial creditors are, he noted, although he is aware of some companies whose records were in such bad shape that they did not know who their creditors were. But those cases are the exception, and to the extent that those creditors can't be identified, that should not be the legislature's problem.

Number 2025

REPRESENTATIVE BERKOWITZ said that in looking at HB 499 and other aspects of [the Savage Arms case] - and putting aside the continuity of enterprise theory - the Alaska Supreme Court talked about other means of exception to the rule of non-liability for asset transfers. Specifically, the Alaska Supreme Court said:

Courts have traditionally recognized four exceptions to this rule of non-liability, where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the asset purchase amounts to a consolidation or merger, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.

REPRESENTATIVE BERKOWITZ said that according to his interpretation, HB 499 seems to throw out all of those [exceptions].

MR. DeWITT surmised that Representative Berkowitz's concern is that because Section 1, [paragraph] (2), of HB 499 specifies that "except as otherwise expressly provided by another statute" a purchasing entity is not responsible for [prior] liabilities, it is referring only to [AS 34.40.010-130], and so would not include the exceptions referred to by the Alaska Supreme Court. Mr. DeWitt said that he disagrees with that interpretation. He relayed that in past litigation, he has had success in getting the current statute to reach to those exceptions.

MR. DeWITT posited that that statute is going to "give you what you need to use that exception" in a pure sham transaction, "where there is a substantial identity between the buyer and the purchaser"; or where the price is fraudulent for one reason or another; or where there are other "badges" of fraud. The harder case, he noted, is going to be when there is an overlap of ownership, when the price is depressed and suspiciously depressed, "or some variation on that." He said that this is where perhaps he and Mr. Pease disagree on whether the statute is going to provide adequate remedy to creditors. Notwithstanding this, he said that at a minimum, what needs to be fixed is: "make it prospective only; don't allow the effect of [the Savage Arms case] to be retrospective."

Number 1889

REPRESENTATIVE BERKOWITZ indicated that he agrees on that point. He noted, however, that another one of the exceptions states that "the purchaser expressly or implicitly agrees to assume liability"; he wanted to make sure that neither that nor the [exception] that states "the asset purchase amounts to a consolidation or merger" is upset by HB 499.

MR. DeWITT said that HB 499 does not preclude a purchaser from assuming debt.

REPRESENTATIVE BERKOWITZ asked what HB 499 does for the instance of a de facto merger or consolidation.

MR. DeWITT conceded that the court is going to have to decide whether a de facto merger is a species of fraudulent conveyance. He added that he did not understand HB 499 to be taking away a court's "equitable" powers, either.

REPRESENTATIVE BERKOWITZ, on the latter point, said that as he reads Section 1, [paragraph] (1), in essence, the corporation

gets to make that determination itself because the language stipulates that the sale, lease, exchange, or other disposition by a corporation of any, all, or substantially all of its assets or property isn't considered a merger unless "they" file a plan of merger. He said that it seems to him that if a company simply doesn't file a plan of merger, regardless of the reason, it enables the corporation rather than the court to make the ultimate determination.

MR. DeWITT acknowledged that the language is as Representative Berkowitz describes in the case of a merger; however, mergers aren't quite that straightforward, he noted, and there are de facto mergers in which a court, after the fact, deems there to have been a merger. Notwithstanding this, he remarked: "We're a long ways from [an] asset sale getting to a de facto merger." He said he sees the risk that Representative Berkowitz is pointing to, but offered that the court will be willing to extend fraudulent conveyances to reach that specific risk, since there already is a body of law pertaining to the doctrine of equitable merger.

Number 1762

REPRESENTATIVE BERKOWITZ asked: Even in non-fraudulent situations?

MR. DeWITT said yes. Although, he added, the indicia of equitable merger, at least in his experience, tend to include badges of fraud.

REPRESENTATIVE BERKOWITZ, in terms of drafting, asked: Wouldn't it be preferable just to spell it out? To clarify his point, he said that it seems to him that when the legislature spells things out for the courts, [statutes] are more likely to be interpreted in a fashion that the legislature intends, compared to instances when "we just sort of throw the ball up in the air and leave the room."

MR. DeWITT agreed.

REPRESENTATIVE BERKOWITZ said he would feel more comfortable with some express declaration of what the legislative intent is regarding de facto mergers - "even those that may or may not ultimately be fraudulent." There are times when the court needs a little direction, he added.

CHAIR ROKEBERG asked Mr. DeWitt whether he thinks HB 499 is clear on the issue of "assumption of liability or assets."

MR. DeWITT said yes and no. He added that in his experience, "the more words you put in, the more opportunities for ambiguities you have." He offered that language could be written, for example, to the effect that sham transactions aren't under the protection of this [proposed] statute. Another option would be to statutorily adopt the "Restatement of Torts' Third standard," which, he added, is the standard "our court rejected." Even there, he noted, he would urge for "prospective and not retrospective application."

CHAIR ROKEBERG surmised, then, that Mr. DeWitt is not necessarily happy with the way HB 499 is drafted.

MR. DeWITT clarified that his concern is that "we have prospective rational for a rule of law that's being applied retroactively." The proposed legislation fixes that problem. If the legislature wishes to go further and tinker with the "continuity of enterprise" decision, "that's great too," though "clearer is better." And stability is even better, he noted; stability is even more important. He continued:

With this standard ... we hurt liquidation companies and hurt creditors who had nothing to do with any of this. We also hurt Alaska [when] we make our businesses less attractive as purchase candidates to larger companies ... in the other states ... because you can't quantify - you can't manage the risk - short of severely handicapping the purchase price.

Number 1520

CHAIR ROKEBERG asked Mr. DeWitt to clarify his statements regarding the retrospective application of HB 499.

MR. DeWITT opined that HB 499 "is just peachy" for purposes of getting rid of the retrospective application problem. He added, however, that he is not comfortable advising the legislature on issues of tort law and risk allocation regarding what the rules ought to be prospectively. To the extent that he represents both buyers and sellers, everybody involved gets a better deal - a more certain deal - if HB 499 is enacted in a nice clear way that reverses [the Savage Arms decision] and returns to a more conventional standard.

MR. COBURN, returning to the question of why assets were sold for \$1 million when Savage Industries was worth \$4 million, said that the purchasing company, Challenger, additionally took on \$10 million of then-current debt. In response to further questions, he clarified that Challenger paid \$1 million into the estate of [Savage] Industries to satisfy the creditors - and only the creditors. Challenger then put another \$1 million of its own money into working capital after the sale was completed, and assumed \$10 million of current liability from [Savage] Industries as part of the deal.

CHAIR ROKEBERG surmised, then, that [Challenger] knew precisely what the scope of that liability was.

MR. COBURN said they did; they had details on all open liabilities. He added that that was why "it was worth so little in cash: because of the liabilities."

CHAIR ROKEBERG closed public testimony on HB 499.

REPRESENTATIVE ROKEBERG said that he is not comfortable with HB 499, but added that one of the things that might assuage him the most is if the committee heard from the "other side of the litigation." He noted also that fundamentally, he is uncomfortable interceding in ongoing litigation. He said he would feel more comfortable that "we weren't favoring one side or another," which, he opined, would be inappropriate, by hearing from the "other law firm" before taking action on HB 499.

MR. PEASE noted that opposing counsel is Jim Powell from the firm of Hughes Thorsness Powell Huddleston & Bauman, LLC.

Number 1225

REPRESENTATIVE BERKOWITZ remarked that he wants to make sure that the committee is "not dispensing of more than the continuity of enterprise theory," and that other theories remain available. He noted that the committee has not yet had an express conversation regarding the theory that the [Alaska Supreme] Court used in adopting the continuity of enterprise theory. He also mentioned that if the committee intends to expand the scope of HB 499 beyond simply addressing the continuity of enterprise theory, then he would prefer that the committee statutorily "spell out" its intention.

CHAIR ROKEBERG recalled that Mr. DeWitt had indicated that one option would be to adopt in statute language from the Third Restatement of Torts. He asked Mr. Pease to comment.

MR. PEASE noted that the Third Restatement of Torts does not adopt the continuity of enterprise theory, and that he agrees with Mr. DeWitt that "the general language is better." He mentioned that in the Savage Arms case, the [Alaska Supreme Court] refused to consider the "product line" theory as being inapplicable to the case. And although that theory was not considered in the Savage Arms case, he pointed out that it might be applicable in other cases, and, thus, he opined, it would be best to have, as Texas does, a general statement that limits successor liability to liabilities assumed and to fraud situations.

CHAIR ROKEBERG mentioned that he would like to proceed with HB 499, and that he has concerns regarding the late hour of the legislative session.

REPRESENTATIVE BERKOWITZ noted that legislation can move quickly, and offered that there is still plenty of time.

CHAIR ROKEBERG noted that it would probably be at least a week before another hearing on HB 499 occurs.

REPRESENTATIVE JAMES noted that regardless of what "the other side" has to say, this issue is an important one and she is willing to move it out of committee today.

REPRESENTATIVE MEYER said that he agrees with Representative James, adding that since this meeting was publicly noticed, if there was any interest from the other party, "they should have been here."

Number 0949

REPRESENTATIVE JAMES moved to report HB 499 out of committee with individual recommendations and the accompanying zero fiscal note.

Number 0935

REPRESENTATIVE BERKOWITZ objected. He said that he thinks it is fundamentally unfair to intercede in ongoing litigation without extending an express invitation to both sides of the litigation in order that they may both testify before the committee. He

also noted that even though Mr. DeWitt has suggested changes, no amendments to HB 499 have been proposed. On a third point, he said: "It's better form for us, as drafters of legislation, to expressly spell out when - if we're going to do away with continuity of enterprise - are we going to except product line or duty to warn exceptions, [and] where are we going with de facto consolidations." "We haven't done any of that," he cautioned, saying that gives him a lot of concern.

CHAIR ROKEBERG, referring to Representative Berkowitz's third point, asked Mr. Pease: "Have we not done that by setting out [an] expression of the precise procedure [regarding] how to make that business transaction work?"

MR. PEASE said, "I believe so." The language in [HB 499] is broad enough to tell the [Alaska] Supreme Court that they shouldn't adopt product line or duty to warn theories, he opined; [the current statute] needs this general language.

CHAIR ROKEBERG suggested that HB 499 could be amended to say that the legislature is specifically overturning the findings [in the Savage Arms] case. He asked Mr. Pease if it would give him any more comfort.

MR. PEASE said that it might give Representative Berkowitz more comfort.

REPRESENTATIVE BERKOWITZ remarked that he tends to give the [Alaska] Supreme Court a lot of deference, and that he gives even a little more deference to the thought that they put into creating their opinion. He reminded members that Mr. Pease is speaking as an advocate of HB 499 on behalf of a client, and although that is an appropriate role for Mr. Pease, it is not the legislature's role; the legislature is supposed to think more globally.

CHAIR ROKEBERG asked Representative Berkowitz if he would assist in developing some amendments if the bill were to be held over.

REPRESENTATIVE BERKOWITZ said he would.

Number 0725

CHAIR ROKEBERG noted that he might have a potential conflict of interest, were he to be sued [regarding this issue].

REPRESENTATIVE JAMES withdrew her motion to report HB 499 out of committee.

CHAIR ROKEBERG announced that HB 499 would be held over and that the public testimony would be reopened when it is next heard.

CHAIR ROKEBERG called an at-ease from 2:34 p.m. to 2:37 p.m.

HB 501 - UNCLAIMED PROPERTY & RESTITUTION

Number 0643

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 501, "An Act relating to the use of unclaimed property to pay court-ordered restitution; and providing for an effective date."

Number 0609

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, House Judiciary Standing Committee, Alaska State Legislature, informed the committee that [the need for] HB 501 was brought to her attention by the Department of Revenue. This legislation would enable the department to take unclaimed property and use it to satisfy a criminal defendant's unpaid restitution or judgments awarded to the state. Currently, the department is required to take additional court action - via a Writ of Execution - before the unclaimed property can be used towards the collection of fees. This legislation would make this additional court action unnecessary and thus the unclaimed property would be available for restitution and judgments owed to the state. Ms. Nobrega highlighted that child support obligations still have priority, and that [HB 501] doesn't impact any civil judgments.

REPRESENTATIVE BERKOWITZ asked whether there are any other obligations that aren't specified [in HB 501].

Number 0450

RACHEL LEWIS, Unclaimed Property Section, Treasury Division, Department of Revenue, indicated that currently, the only obligation is child support [and HB 501 would add the aforementioned second obligation].

CHAIR ROKEBERG requested an example of why HB 501 would be necessary.

MS. LEWIS explained that there have been several cases in which persons residing in a correctional facility have made claims on unclaimed property. She explained that after a few phone calls, she was able to determine that these individuals did owe restitution or have an outstanding judgment against him/her, but Ms. Lewis wasn't able to pay the judgment or restitution directly because a Writ of Execution was still required. Ms. Lewis noted that there are only a handful of such cases a year; in the seven years that she has been in her position, [HB 501] might apply to only about 15 such cases.

Number 0331

REPRESENTATIVE BERKOWITZ moved to report HB 501 out of committee with individual recommendations and the accompanying zero fiscal notes. There being no objection, HB 501 was reported from the House Judiciary Standing Committee.

CHAIR ROKEBERG called an at-ease from 2:43 p.m. to 2:44 p.m.

HB 489 - CRUELTY TO ANIMALS

Number 0291

CHAIR ROKEBERG announced that the sponsor of HOUSE BILL NO. 489, "An Act relating to cruelty to animals," has requested that the hearing on it be postponed for the purpose of redrafting. [HB 489 was held over.]

**ADJOURNMENT**

Number 0236

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:45 p.m.