ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 5, 2002
1:11 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair (via teleconference)
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer

MEMBERS ABSENT

Representative Ethan Berkowitz
Representative Albert Kookesh

COMMITTEE CALENDAR

HOUSE BILL NO. 376
"An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

- MOVED CSHB 376(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 393
"An Act relating to unfair and deceptive trade practices and to the sale of business opportunities; amending Rules 4 and 73, Alaska Rules of Civil Procedure; and providing for an effective date."

- MOVED CSHB 393(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 385
"An Act relating to the attorney fees and costs awarded in certain court actions relating to unfair trade practices; and amending Rules 54, 79, and 82, Alaska Rules of Civil Procedure."

- MOVED CSHB 385(JUD) OUT OF COMMITTEE

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. 472
"An Act relating to persons who buy and sell secondhand articles and to certain persons who lend money on secondhand articles."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 376
SHORT TITLE:FISH & GAME IN NAVIGABLE WATERS
SPONSOR(S): REPRESENTATIVE(S)OGAN

Jrn-Date	Jrn-Page		Action
02/01/02	2121	(H)	READ THE FIRST TIME - REFERRALS
02/01/02	2121	(H)	RES, JUD
03/01/02		(H)	RES AT 1:00 PM CAPITOL 124
03/01/02		(H)	Heard & Held
03/01/02		(H)	MINUTE(RES)
03/04/02		(H)	RES AT 1:00 PM CAPITOL 124
03/04/02		(H)	Failed To Move Out Of Committee
03/04/02		(H)	MINUTE(RES)
03/15/02		(H)	RES AT 1:00 PM CAPITOL 124
03/15/02		(H)	Moved Out of Committee
03/15/02		(H)	MINUTE(RES)
03/18/02	2575	(H)	RES RPT 4DP 2NR
03/18/02	2575	(H)	DP: CHENAULT, GREEN, FATE, MASEK;
03/18/02	2575	(H)	NR: STEVENS, SCALZI
03/18/02	2575	(H)	FN1: INDETERMINATE(DFG)
03/18/02	2592	(H)	FIN REFERRAL ADDED AFTER JUD
03/25/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/25/02		(H)	Scheduled But Not Heard
04/05/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 393
SHORT TITLE:SALES OF BUSINESS OPPORTUNITIES
SPONSOR(S): REPRESENTATIVE(S)STEVENS

Jrn-Date	Jrn-Page		Action
02/08/02	2182	(H)	READ THE FIRST TIME - REFERRALS
02/08/02	2182	(H)	L&C, JUD
02/25/02		(H)	L&C AT 3:15 PM CAPITOL 17
02/25/02		(H)	Heard & Held
02/25/02		(H)	MINUTE(L&C)

02/27/02		(H)	L&C AT 3:15 PM CAPITOL 17
02/27/02		(H)	Moved Out of Committee
02/27/02		(H)	MINUTE(L&C)
03/01/02	2435	(H)	L&C RPT 2DP 5NR
03/01/02	2435	(H)	DP: CRAWFORD, HAYES; NR: ROKEBERG,
03/01/02	2435	(H)	MEYER, KOTT, HALCRO, MURKOWSKI
03/01/02	2435	(H)	FN1: INDETERMINATE(LAW)
03/01/02	2445	(H)	FIN REFERRAL ADDED AFTER JUD
03/18/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/18/02		(H)	Heard & Held
			MINUTE(JUD)
04/05/02		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 385
SHORT TITLE:UNFAIR TRADE PRACTICES ATTY FEES/COSTS
SPONSOR(S): REPRESENTATIVE(S)CROFT

Jrn-Date	Jrn-Page		Action
02/06/02	2164	(H)	READ THE FIRST TIME - REFERRALS
02/06/02	2164	(H)	JUD
03/22/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/22/02		(H)	Heard & Held
			MINUTE(JUD)
04/05/02		(H)	JUD AT 1:00 PM CAPITOL 120

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
03/15/02		(H)	JUD AT 1:00 PM CAPITOL 120
03/15/02		(H)	Heard & Held
03/15/02		(H)	MINUTE(JUD)
04/05/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

BILL CHURCH, Staff
to Representative Scott Ogan
Alaska State Legislature
Capitol Building, Room 108

Juneau, Alaska 99801
POSITION STATEMENT: Presented HB 376 on behalf of the sponsor, Representative Ogan.

HEATHER M. NOBREGA, Staff
to Representative Norman Rokeberg
House Judiciary Standing Committee
Alaska State Legislature
Capitol Building, Room 118
Juneau, Alaska 99801
POSITION STATEMENT: Provided information about the proposed committee substitute for HB 393 and responded to questions; provided information about the proposed committee substitute for HB 385 and responded to questions.

CYNTHIA DRINKWATER, Assistant Attorney General
Fair Business Practices Section
Civil Division (Anchorage)
Department of Law (DOL)
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-1994
POSITION STATEMENT: During discussion of HB 393 responded to questions.

STEVE CONN, Executive Director
Alaska Public Interest Research Group (AkPIRG)
PO Box 101093
Anchorage, Alaska 99510
POSITION STATEMENT: During discussion of HB 393 spoke briefly about disseminating information to the public.

JAMES M. POWELL, Attorney
Hughes Thorsness Powell Huddleston & Bauman, LLC
550 West 7th Avenue, Suite 1100
Anchorage, Alaska 99501-3563
POSITION STATEMENT: Testified in opposition to HB 499, provided information regarding Savage Arms Inc. v. Western Auto Supply Co., and responded to questions.

THEODORE M. PEASE, JR., Attorney
Burr, Pease & Kurtz, PC
810 North Street
Anchorage, Alaska 99501
POSITION STATEMENT: During discussion of HB 499, responded to comments made by Mr. Powell and to questions posed by the committee.

TERRY BANNISTER, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Terry Miller Building, Room 329
Juneau, Alaska 99801
POSITION STATEMENT: Spoke as the drafter of HB 499 and responded to questions.

RAY R. BROWN, Attorney; Member
Alaska Academy of Trial Lawyers (AATL)
510 L Street, Suite 603
Anchorage, Alaska 99501
POSITION STATEMENT: Testified in opposition to HB 499.

ACTION NARRATIVE

TAPE 02-42, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:11 p.m. Representatives Rokeberg, Ogan (via teleconference), James, Coghill, and Meyer were present at the call to order.

HB 376 - FISH & GAME IN NAVIGABLE WATERS

[Contains brief mention of the commission proposed by HB 266 and SB 219.]

Number 0026

CHAIR ROKEBERG announced that the first order of business would be HOUSE BILL NO. 376, "An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

Number 0063

BILL CHURCH, Staff to Representative Scott Ogan, Alaska State Legislature, sponsor, presented HB 376 on behalf of Representative Ogan. Paraphrasing the sponsor statement, he said:

> In 1953, the U.S. Congress passed the Submerged Lands Act, which affirmed the constitutional doctrine giving state sovereignty over all navigable waters within

their borders. This sovereign power was devolved to the State of Alaska on equal footing in the Statehood Act and Compact. In an Anchorage Daily News article dated March 3, 2000, Governor Knowles said, "No governor of any state would - or should - ever voluntarily relinquish authority back to the federal government." He went on to say, "As Alaska's governor, I believe it is my clear responsibility, even [in] the face of a difficult political battle, to vigorously defend this important aspect of state sovereignty." Additionally the governor said, "The Alaska State Supreme Court has ruled exactly the opposite of federal court and unanimously said the State of Alaska controls all navigable waters."

In New York v. United States, 1992, the U.S. Supreme Court ruled that Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." By choosing not to appeal the Ninth Circuit Court of Appeals decision in the John v. U.S. case to the U.S. Supreme Court, Governor Knowles made Alaska a second-class state, ignoring the fact that we were admitted to the union on equal footing. This bill affirms that the State of Alaska has not assented to federal control of fish and game in or on the navigable waters and submerged lands in Alaska.

Number 0213

MR. CHURCH paraphrased the fourth paragraph of the sponsor statement, which read:

In the "Alaska 'Digest' Email News" of September 3-9, 2001, Alaska [Senator] Frank Murkowski supported appealing the Ninth Circuit Court of Appeals decision to the U.S. Supreme Court. Murkowski said, "I don't believe such an appeal would endanger justified subsistence protections, but it would protect the rights Alaskans thought they had secured at Statehood. An appeal would actually help to end the discord over subsistence by providing finality to the legal arguments. That would help all Alaskans come together and settle this in Alaska, where it should be settled." Governor Knowles abrogated his "clear responsibility to defend this important aspect of state sovereignty."

MR. CHURCH, again paraphrasing the sponsor statement, said:

> [House Bill] 376 further strengthens the State's position with language asserting that the State may not expend funds to adopt [or] enforce the implementation of federal regulatory programs for control of fish and game in or on the navigable waters or submerged lands in the state. It does not, however, prevent authorities from conducting emergency, life saving, statutory, or other appropriate activities.

CHAIR ROKEBERG asked Mr. Church to speak to Amendment 1.

MR. CHURCH said that Amendment 1 adds a paragraph (4) to Section 3 of HB 376. Paragraph (4) would ensure that the state is not prohibited from "participating in or cooperating with a joint state-federal program relating to the identification of navigable waters in the state". Such a program, he surmised, would be specifically designed to help settle the issue of who has control of the navigable waterways within Alaska.

CHAIR ROKEBERG sought confirmation that there is legislation pending that would establish "a commission on this topic."

MR. CHURCH said that there is: HB 266 and SB 219. He confirmed that the purpose of Amendment 1 is to allow for the cooperative activity of that proposed commission.

Number 0399

REPRESENTATIVE MEYER made a motion to adopt Amendment 1. There being no objection, Amendment 1 was adopted.

REPRESENTATIVE MEYER asked Mr. Church whether he agrees with the indeterminate fiscal note [provided by the Alaska Department of Fish & Game (ADF&G)]. He added that he is having a hard time seeing where there would be additional costs.

MR. CHURCH said that he did not agree with the fiscal note. He said that one of the main reasons he disagrees is that back in the 21st legislature, when Representative Ogan introduced HB 109, which added "Glacier Bay National Park and Preserve or the navigable waters within or adjoining the park and preserve" to AS 16.20.010(a)(2), the ADF&G had submitted a zero fiscal note. He opined that the indeterminate fiscal note submitted by the

ADF&G for HB 376 merely reflects that the department is concerned that fiscally, under dual federal/state subsistence management, it will not be able to achieve, in a cooperative manner, its constitutional mandate of maintaining the sustained yield principle. He stated that HB 376 is not intended to impact or limit the ADF&G's ability to maintain its constitutional mandate. Therefore, he doesn't believe that an indeterminate fiscal note is appropriate; rather, it should be the same as was submitted for HB 109 - a zero fiscal note.

REPRESENTATIVE MEYER asked what the difference is between HB 109 and HB 376.

REPRESENTATIVE OGAN, as the sponsor, explained that HB 109 just dealt with navigable waters in Glacier Bay and associated [areas], whereas HB 376 deals with navigable waters statewide.

CHAIR ROKEBERG posited, then, that if there was a zero fiscal note "for Glacier Bay" there should also be a zero fiscal note [for HB 376].

MR. CHURCH agreed.

Number 0632

REPRESENTATIVE MEYER made a motion to adopt Amendment 2, which would turn the ADF&G's indeterminate fiscal note into a zero fiscal note. There being no objection, Amendment 2 was adopted.

REPRESENTATIVE OGAN, returning to the issue of HB 376, said: "It's really unfortunate that we're at this juncture."

CHAIR ROKEBERG asked Mr. Church, "It's my understanding that because we cannot expend any funds, would any cooperative activities between the federal Fish and Wildlife Service and [ADF&G] be curtailed, or would those activities have to be stopped because of this bill, were it enacted?"

MR. CHURCH replied: Not at all. He pointed out that language in HB 376 specifies: "the state may not expend funds to adopt or enforce the implementation of a federal regulatory program, or part of a program". He said that according to his understanding, the cooperative action currently taking place is that of tracking and maintaining the resources in adequate numbers to support all users, if at all possible. He noted that the information the ADF&G receives from federal agencies is

important in ensuring that those resources are maintained as required.

REPRESENTATIVE JAMES, referring to a letter provided by the Department of Law (DOL), said:

> The second paragraph ... indicates that the state law is naturally preempted to the extent of any conflict with federal statute. And I agree that's where we are today, and that the state has no other alternative except to go where we're going. But I disagree with the fact that there isn't some remedy. And ... we ought to be able to take the remedy of taking this issue to the U.S. Supreme Court, because I believe that the law on the books in ANILCA [Alaska National Interest Lands Conservation Act] is against our U.S. Constitution, ... specifically under equal protection....
>
> Had ANILCA mentioned, as the identification for the rural priority, that it was for Natives - which it has already been, in court, determined not to be Indian Law - but had they put Native, I think we'd be in a different situation today. But they put "rural", and we've heard recent testimony that 50 percent of the people living in the rural area are Native and the other 50 percent are not, so there's a definite issue in the state in applying this. And the language in ANILCA is what we're being driven under; so, therefore, I am confirmed, again, that ANILCA - by itself, as is stated - is unconstitutional under U.S. law under the equal protection [clause].

Number 0967

CHAIR ROKEBERG opined that Representative James's comments say, in a nutshell, what the majority of the committee believes. He said that it is unfortunate that the governor did not pursue "our legal remedies that were underway." He noted that one of his concerns, as implied in the letter from the DOL, is that [if HB 376 is adopted], the state regulators will have difficulty coordinating with the federal regulators, particularly with regard to keeping track of harvests. He asked, "Is there anything constraining in this bill that would prohibit that?"

MR. CHURCH said no, there isn't. "Quite to the contrary, I believe that the bill allows the room for the state to operate

and fulfill its mission," he added. [House Bill 376] is not intended to hinder the legitimate efforts of the ADF&G; it's not intended to prohibit the state from protecting and enhancing the state's fish and wildlife resources. He said the state has a priority of maintaining opportunities for all users of fish and game; HB 376 is just part and parcel of that process.

REPRESENTATIVE OGAN offered that HB 376 is consistent with the Alaska Supreme Court ruling that the state, not "the feds," control the navigable waterways in Alaska. He remarked that HB 376 does not say that the state is not going to manage its [resources]; it is simply saying, in statute, that the state is not willfully ceding its sovereignty to the feds.

CHAIR ROKEBERG mentioned that the governor issued a press release that morning pertaining to the commencement on May 15 [2002] of a special session regarding subsistence.

REPRESENTATIVE OGAN mentioned that he would be back in Juneau around May 1.

Number 1178

REPRESENTATIVE JAMES moved to report HB 376, as amended, out of committee with individual recommendations and the accompanying amended zero fiscal note. There being no objection, CSHB 376(JUD) was reported out of the House Judiciary Standing Committee.

REPRESENTATIVE JAMES, with regard to the issue of fiscal notes, remarked that when the departments are "given a chore that they're already supposed to be doing, they shouldn't have a fiscal note."

CHAIR ROKEBERG called an at-ease from 1:32 p.m. to 1:33 p.m.

HB 393 - SALES OF BUSINESS OPPORTUNITIES

Number 1273

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 393, "An Act relating to unfair and deceptive trade practices and to the sale of business opportunities; amending Rules 4 and 73, Alaska Rules of Civil Procedure; and providing for an effective date." Chair Rokeberg noted that Doug Letch, staff to Representative Gary Stevens, Alaska State Legislature, sponsor, was present.

Number 1318

REPRESENTATIVE MEYER moved to adopt the proposed committee substitute (CS) for HB 393, version 22-LS1356\J, Bannister, 4/3/02, as a work draft. There being no objection, Version J was before the committee.

Number 1335

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, House Judiciary Standing Committee, Alaska State Legislature, explained that Version J incorporates the amendments that were discussed during the previous hearing on HB 393. She mentioned that the language regarding the exemption limit of $200 is located on line 5 of page 13, and that the sponsor and the Department of Law (DOL) recommend that this limit be raised to $250.

REPRESENTATIVE JAMES, referring to business opportunities (biz opps) that she has seen advertised on television, asked how the DOL determines whether the provisions of HB 393 would apply to those biz opps.

Number 1450

CYNTHIA DRINKWATER, Assistant Attorney General, Fair Business Practices Section, Civil Division (Anchorage), Department of Law (DOL), remarked that it is difficult to make a general statement without knowing which ads Representative James is referring to. However, once a person calls in and is told how much the initial payment is, if it is more than $200, Ms. Drinkwater explained, then it can be determined that the provision of HB 393 would apply.

CHAIR ROKEBERG noted that the language in HB 393 specifies that in order to qualify for the exemption, the total amount of the payments cannot exceed $200.

REPRESENTATIVE JAMES remarked that according to her observation, the price paid for a biz opp grows over time: only a small amount of money may be required at first, but folks are subsequently talked into making further payments. She asked how the DOL plans to handle those kinds of operations, particularly those that use interstate television advertising. Is the DOL going to wait for people to make individual reports, or will it take those advertisements off of the television if those

companies don't do what HB 393 requires? How is HB 393 going to be implemented?

MS. DRINKWATER offered that the way HB 393 would work is similar to how Alaska's telemarketing law currently works: when the DOL becomes aware - either through consumer complaints or through other means - of businesses who are operating in the state without registering, the DOL can send those businesses a cease-and-desist letter notifying them that they are in violation of the law and that they have to register.

REPRESENTATIVE JAMES mentioned that she still has concerns that neither the public nor the entities selling biz opps will have any idea that this law exists. She posited that the goal ought to be to educate the public so that folks don't contact fraudulent biz opps to begin with.

MS. DRINKWATER noted that by requiring companies to register, consumers will be provided with more information about the companies, and the DOL will have an additional enforcement tool to use when fraudulent businesses try to evade the law.

REPRESENTATIVE JAMES opined that Alaska's television stations should be notified of the provisions in HB 393 [if it becomes law] so that those stations can prohibit such advertisements.

Number 1663

REPRESENTATIVE MEYER, referring to the $200 limit, opined that fraudulent biz opps should be prohibited regardless of the amount charged. He also opined that regardless of what the limit is, the provisions of HB 393 would not apply to legitimate businesses such as Mary Kay [Inc.], Amway [Corporation], or Avon [Products, Inc.], for example. He asked why the DOL is recommending a $250 limit.

MS. DRINKWATER said that the $250 limit is offered as a compromise to ensure that the Direct Selling Association (DSA) and other legitimate businesses do not oppose HB 393. She offered that some sort of limit was called for because although the DOL wants to provide as much protection as it can to consumers, it would not be possible for the DOL to pursue every case, and a $250 limit is used in other states and seems to be a reasonable limit. She pointed out that HB 393 would not cover products that appear to be scams; rather, HB 393 is intended to cover fraudulent biz opps, which are marketing schemes that may include selling products.

REPRESENTATIVE MEYER noted that if, for $199, a company is selling faulty software which supposedly enables people to start their own businesses, those companies would not be covered under HB 393 because of the $200 or $250 exemption.

MS. DRINKWATER pointed out, however, that even if the cost of the software was above the exemption threshold, in the aforementioned example, the software by itself would not be considered a business opportunity unless the person/entity that sold the software promised "to do something else with it." For example, she said:

> If they promised to sell you medical billing software by which you could do medical billing from your home and make thousands of dollars, and ... they promised, then, to provide you [with] the names of doctors who wanted to use outside medical billing services, that would be a business opportunity. But if they're just selling you the software, it would not be. And if they were selling you just software that was defective or fraudulent, it may well be that our general consumer protection law would cover that scenario, but not necessarily the business opportunity statute.

MS. DRINKWATER, in response to questions about the limit that other states have, explained that those limits range from $200 to $500: nine states have a threshold between $200 and $300, and 13 states have a $500 threshold as does the Federal Trade Commission (FTC). She added that 23 states - including Alaska - have business opportunity [bills/statutes], but not all of those states require registration.

Number 1928

STEVE CONN, Executive Director, Alaska Public Interest Research Group (AkPIRG), testified via teleconference, noting simply that AkPIRG, AARP, and the Better Business Bureau (BBB) could assist in disseminating information about HB 393 and the scams that it is intended to target.

Number 1965

CHAIR ROKEBERG made a motion to adopt Amendment 1, which would replace "$200" with "$250" on page 13, line 5. There being no objection, Amendment 1 was adopted.

Number 1983

REPRESENTATIVE MEYER moved to report the proposed committee substitute (CS) for HB 393, version 22-LS1356\J, Bannister, 4/3/02, as amended, out of committee with individual recommendations and the accompanying fiscal note. There being no objection, CSHB 393(JUD) was reported from the House Judiciary Standing Committee.

HB 385 - UNFAIR TRADE PRACTICES ATTY FEES/COSTS

Number 2012

CHAIR ROKEBERG announced that the next order of business would be HOUSE BILL NO. 385, "An Act relating to the attorney fees and costs awarded in certain court actions relating to unfair trade practices; and amending Rules 54, 79, and 82, Alaska Rules of Civil Procedure." [At the hearing on 3/22/02, the proposed committee substitute (CS) for HB 385, version 22-LS1224\C, Bannister, 3/21/02, was adopted as a work draft.] Chair Rokeberg noted that the committee also had before it for consideration the proposed committee substitute (CS) for HB 385, version 22-LS1224\F, Bannister, 4/2/02.

Number 2023

HEATHER M. NOBREGA, Staff to Representative Norman Rokeberg, House Judiciary Standing Committee, Alaska State Legislature, explained that Version F deletes Section 1 of Version C, which would have waived, for a [plaintiff], the requirement that he/she pay attorney fees as stipulated by [Civil Rule 82 of the Alaska Rules of Civil Procedure]. With Version F, she explained, "we're keeping the award of full [attorney fees] when the state brings forth the lawsuit." She confirmed that with regard to Rule 82 as it applies to plaintiffs, Version F maintains the status quo.

CHAIR ROKEBERG relayed that the sponsor of HB 385 "reluctantly concedes that half a loaf is better than none." Version F, he noted, gives the attorney general the right to have full award of attorney fees when prevailing in lawsuits pertaining to unfair trade practices.

MS. NOBREGA confirmed that currently, Rule 82 applies to all parties in such lawsuits, including the attorney general; with Version F, if the attorney general brings forth the lawsuit and is the prevailing party, Rule 82 would be waived and the state

would get full attorney fees. That money would then go into the general fund (GF) with the intention that it would be used to help further fund the [Fair Business Practices Section] of the Department of Law (DOL).

Number 2170

CHAIR ROKEBERG moved to adopt the proposed committee substitute (CS) for HB 385, version 22-LS1224\F, Bannister, 4/2/02, as a work draft. There being no objection, Version F was before the committee.

Number 2193

REPRESENTATIVE JAMES moved to report the proposed committee substitute (CS) for HB 385, version 22-LS1224\F, Bannister, 4/2/02, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 385(JUD) was reported out of the House Judiciary Standing Committee.

CHAIR ROKEBERG called an at-ease from 1:55 p.m. to 1:59 p.m.

HB 499 - DISPOSITION OF BUSINESS ASSETS

Number 2209

CHAIR ROKEBERG announced that the last 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." Chair Rokeberg noted that the committee was awaiting the arrival of the drafter and a proposed committee substitute for HB 499; that at the last hearing on HB 499, Mr. Pease presented information [regarding Savage Arms Inc. v. Western Auto Supply Co.]; and, as requested by Representative Berkowitz, that the committee would hear testimony from "opposing counsel."

Number 2254

JAMES M. POWELL, Attorney, Hughes Thorsness Powell Huddleston & Bauman, LLC, relayed appreciation for the opportunity to testify on HB 499. He explained that he represented [Western Auto Supply Co. ("Western Auto")], which he termed "the innocent retailer," in the Savage Arms Inc. v. Western Auto Supply Co. case, which stemmed from an accident that occurred in Kenai. He said that he had three points to address:

The first is, I'd like to give you a little bit of background [regarding] who the players are and what's going on that's not apparent on the surface and may not have been shared with you previously by other people. The second point relates to some problems that I think will be created by HB 499 as it is presently drawn.... And the third thing relates to the retroactivity of this bill and some problems that I think that creates.

MR. POWELL elaborated:

First of all, just so that it is clear, ... I want to address some of the misunderstandings that I think might have been generated, ... so that you'll be accurately tuned in to what is really going on here. This accident occurred in April of [1989], and this change in "Savage" occurred in October of that year: On October 31 [Savage Industries, Inc. ("Savage Industries")] signed the agreement for sale of assets and they ceased to do business, and on ... November 1 the new company [Savage Arms, Inc. ("Savage Arms")] - just recently formed - started up and went forward as a going concern.

We believe that we can show in the court - and made some representations to the supreme court on that - that essentially the shareholders were the same: a group called [Cerrito Partners, Ltd. ("Cerrito Partners")] were the shareholders in Savage [Industries] and also - through some corporations - continued to control the new company that was made. It was simply a change of -- some slight changes that were made. They were the same officers, the same employees, the same plant, the same product that they were manufacturing; they had the same patents and ... equipment; and they advertised to the public, "We've been in business for 100 years" - in effect, "You can trust us [because] we've been around a long time." With that, we think that we can make out a case ... against them, at least on the "continuity of enterprise," probably on [just the continuity of] ... [Side A of the tape ends mid-sentence.]

TAPE 02-42, SIDE B
Number 2375

MR. POWELL continued:

> ... the business - although [because of] the shareholders, because some corporate entities were involved, [it] becomes a little more difficult for us. What I think has not been shared with you is that Cerrito Partners is a group of Texas businessmen - very wealthy businessmen - who, as part of this transaction - although not in October and November of 1989, but not too long after that - signed a guarantee, in order to promote the sale and the operation of the business, ... that they would ... indemnify Savage Arms against any judgment that was made as the result of the Kevin [Taylor] incident in Kenai, Alaska. ...

MR. POWELL indicated that Savage Sports Corporation ("Savage Sports") was also involved, but added that he wouldn't go into that point right now. He said:

> They continue, this company that Cerrito Partners has. It was [Challenger, Ltd. ("Challenger")] and then it was [Intelect Communications, Inc. ("Intelect")] - [it was] actually Intellect that signed the indemnity agreement - and they have changed their name again to [TerraForce Technology Corporation ("TerraForce")], which is a publicly traded company under the symbol TERA. And TerraForce, in their SEC [U.S. Securities and Exchange Commission] filings, publicly acknowledged that they have this guarantee on this judgment. So, what this is all about is, this group of Texas businessmen have this promise and they're trying to find a way out of their promise. And, as drawn, [HB 499] arguably will give them an out. ... And I doubt that that information has been shared with you, so that you know what is really going on with regard to the tremendous interest that Savage Arms has in helping us out with Alaska law: they're trying to get out of an obligation that they have.

MR. POWELL added:

> Likewise, in that situation, I represented Western Auto; we were innocent in the transaction, but we were a retailer, and retailers have an obligation to stand good for any problems with a product, and then they're supposed to be able to [go] back against the people

that made the product. "Savage" would not participate in the trial, and so we had to defend their product as best we could, and eventually we ended up settling the claim for $5.4 million. So Kevin Taylor is out of the picture, and we are now trying to recover that amount of money, our defense costs as well, and a lot of interest that has accumulated over the years.

Number 2279

CHAIR ROKEBERG asked Mr. Powell whom he is [currently] representing.

MR. POWELL said that he was retained to defend Western Auto. Western Auto, being a responsible company, he added, had insurance; they had a primary policy with Allstate Insurance Company ("Allstate") for $5 million, and an excess policy with Certain Underwriters at Lloyd's of London ("Underwriters"). He explained that it was actually Underwriters that brought him in, 30 days before trial, to defend the action, and that Allstate, which had the major interest, paid defense costs of nearly $1 million.

REPRESENTATIVE JAMES relayed her appreciation that Mr. Powell has filled in "some gaps." She said that in the beginning, she was concerned because she thought that the whole case, as initially presented by Mr. Pease, revolved around a bankruptcy sale and the purchaser of the bankruptcy's assets, and so "there should have been a separation of responsibility there." However, because it was a Chapter 11 bankruptcy rather than a Chapter 7 bankruptcy, it was not a sale by the trustee; it was merely "a sale by the company to the same person, which is not an arms-length transaction," she noted. The main person was the same person in both [companies]; therefore, she opined, "there is no severance of any relationship or any knowledge or anything else in that [transaction]." She said she is surprised that the bankruptcy judge agreed to a sale that didn't specifically have a severance of liability; however, because [the sale was to] the same person, she suspected that [the judge] assumed that there would be no severance of the liability.

CHAIR ROKEBERG observed that the issue of whether it's the same person or not is "a matter of material fact" and is a central point to the whole case.

REPRESENTATIVE JAMES agreed. She noted, however, that another point the committee was not initially aware of was the existence of "this guarantee that was made." She added:

> For the life of me, I can't figure out why they did that. There had to be some reason, and I don't think they've told us ... why they did that, because that seems extremely unusual to have done that unless they knew they were liable.

Number 2139

MR. POWELL responded:

> We have not been able to take the testimony to ask ... what was the motivation. It appears to be that "Savage" ... [was] transferring the stock, and the people who were investing $20-plus million, as I recall, wanted to have some protection against this judgment that was out there when they were selling the stock a few years after. It may have been in [1990 or 1991] that this happened, and Savage Sports was being formed about that time, and the investors wanted some protection against this claim coming back. They continued to do business as Savage Arms, and so that's why this guarantee was given, as I understand it.

CHAIR ROKEBERG asked: Were "they" aware of a claim at the time?

MR. POWELL said that at that time, "they were; they specifically identified this litigation - the Taylor case."

CHAIR ROKEBERG relayed that after Mr. Powell finishes his presentation, the committee would be focusing on:

> The concepts that we're dealing with as a matter of law; that is to say, ... whether or not we should, by statute, overturn the doctrine that the [Alaska] Supreme Court utilized, number one, and, number two, speak to the issue on the retroactivity vis-a-vis "prospectivity". ... I've concluded that I agree with the [American Law Institute's Restatement (Third) of the Law of Torts ("Third Restatement of Torts")], and I do not agree with Justice Eastaugh on the "[continuity] of enterprise" theory. ... Just to refresh everybody's memory, there was a case at the [Alaska] Superior Court level - the finding - and then

> the parties asked the [Alaska] Supreme Court to rule on the point of law, which just has to be this whole idea of successor liability. They've issued that, but they've remanded the case back to the [Alaska] Superior Court. So this case is still in progress; so that's another issue that we have to be sensitive to.

Number 2037

MR. POWELL, continuing with his presentation, opined that as written, HB 499 goes too far, in effect giving carte blanche to businesses that might want to do "what we are alleging and we hope we can prove that 'Savage' has done." It is an open invitation for business owners that have marginal businesses to "do a little restructuring" - sell their assets to another corporation that would be almost identical and would be owned by the same people. They could perhaps do this every year, he suggested, as a sort of prophylactic move. Would this be considered fraud? He posited that under HB 499, it might just become a precautionary move that businesses would engage in per their lawyers' advice. Proving fraud is very difficult, he added; he has never seen it successfully proven in the courtroom, even after 37 years of practice. "It is like a criminal proceeding, and you have to go to the intent; 'what did the person know and what did they intend' is really tough to prove," he noted. A business owner who is getting stiffed on a bill for $10,000 or $20,000 or $30,000 isn't going to have the resources to be able to prove fraud. He reiterated that HB 499 goes too far: to just say that there is no successor liability would really change the climate of the way Alaska business is done.

CHAIR ROKEBERG asked Mr. Powell, as a matter of public policy, whether the insertion of "product liability" would give him more comfort.

MR. POWELL said that it would: it would avoid a lot of problems for innocent retailers who are at the mercy of unscrupulous manufacturers that take advantage of "this apparent void in our law" regarding successor liability. He observed that cases involving product liability usually involve substantial claims.

CHAIR ROKEBERG asked whether there were any other areas of HB 499 that the committee should focus its attention on.

MR. POWELL referred to the "retroactivity aspect" of HB 499. He pointed out that none of the tort-reform packages adopted over

the years have retroactive provisions; none of them attempt to reach back in time

CHAIR ROKEBERG asked: "Why did the court do it, then?

Number 1884

MR. POWELL explained that as a general rule when dealing with particular litigants, the court has to hand down decisions based on the past actions of those particular litigants. [Some] rulings must have retroactive application; otherwise, he noted, nobody would ever bring a case to the courts. If a court ruling could only be applied prospectively, it would be the same as going to court and being told, "[We] can't help you out in the particular factual situation that you have, [but] thank you for bringing it to our attention ...; the next people that bring it up, they're going to get a good deal." Therefore, as a practical matter, on many occasions the court has said, "We will address this issue, and we will make it applicable to these facts, since it's not been addressed before and we're addressing it for the first time." He noted that this is what occurred when the [Alaska] Supreme Court made its interlocutory ruling in the Savage Arms Inc. v. Western Auto Supply Co. case.

MR. POWELL said that retroactivity raises questions, and that he could provide the committee with case examples that illustrate that there are problems with retroactivity. Something that the committee may not have considered, he explained, "has to do with the potential taking that occurs if the state tries to make it retroactive and affect transactions that have already taken place: there may be some financial exposure to the state." He added, "Nothing would make me happier than for the state to step in and pay off this judgment, but I don't think that's a good deal for the [state]. He elaborated:

> I think that would be backing into a potential problem that the state should not back into, by the potential taking by a retroactivity that affects litigation that's in process. I think we would have a good case for inverse condemnation and a taking by the state, and I ... don't want you to be blindsided by that; I think that is a problem with making it retroactive, at least ... for this case, which is so far along, which occurred so long ago, and we're just sort of in the closing chapters of it here.

Number 1771

CHAIR ROKEBERG mentioned that the legislature has the statutory authority to make laws retroactive, "particularly if it is curative legislation."

MR. POWELL acknowledged that there is an exception for curative legislation, and asked permission to submit [written] comments on [the issue of retroactivity] to the committee by the following Friday.

CHAIR ROKEBERG agreed to that.

REPRESENTATIVE JAMES alluded to the possibility that any action taken via HB 499 might not necessarily affect the current case that Mr. Powell and Mr. Pease are involved in.

CHAIR ROKEBERG, after mentioning that the aforementioned case is merely the genesis for HB 499 and discussion of it helps put things in context, pointed out that the specifics of that case are not the issue that is before the committee.

REPRESENTATIVE JAMES posited that the committee needs to look at the decision that was made in the court: "It appears to me that there is a conflict and something we should fix."

Number 1662

THEODORE M. PEASE, JR.; Attorney; Burr, Pease & Kurtz, PC; testified via teleconference, noting that he is representing Savage Arms. In response to comments made by Mr. Powell, Mr. Pease explained that the aforementioned guarantee was a guarantee given to Mr. Coburn, the present owner of Savage Arms, who was seeking protection [from] a potential judgment against Savage Arms in the Savage Arms Inc. v. Western Auto Supply Co. case. Mr. Pease noted that the company which gave that guarantee, and from which Mr. Coburn bought the stock in 1995 - Intelect - is now, itself, in a rather precarious situation and is reportedly not in a "position to respond." He indicated that this guarantee was given years after [the original sale of assets by Savage Industries] took place.

MR. PEASE, turning to issues raised by the legislation, remarked that the latest version of HB 499 that he has seen makes it clear that fraud is not exempted. With regard to the issue of retroactivity, he said that clearly statutes permit, and the courts certainly recognize, that the legislature has the authority to make laws retroactive. To do so, he remarked, the

legislation has to either be curative or be made specifically retroactive, as is the case with HB 499.

MR. PEASE opined that the point raised in a memorandum by the drafter, that the state risks financial exposure because of "taking," is absurd. He posited that Article I, Section 18, of the Alaska State Constitution, which is cited in that memorandum, "has to do with instant title," and that HB 499 does not address private property or contract rights. He mentioned that even Section 15 of Article I does not address tort law. He opined that nothing prohibits making HB 499 retroactive, and that doing so is critically important in ensuring uniform application. He mentioned that at this time, he will not be commenting on the insertion of "product liability" language.

CHAIR ROKEBERG noted that insertion of such language is his own suggestion. He reiterated that he tends to agree with the Third Restatement of Torts with regard to "what law should apply here in terms of successor liability, which would include the 'mere [continuation]' doctrine, but it repudiates specifically the '[continuity] of enterprise' and the 'product line' doctrines." "And I think that's what we want to do," he remarked. He opined that HB 499 rightly makes contract and corporate law the primary focus, but that it may not serve the public interest because of language throughout the bill that says, "in tort or otherwise", which is very broad. He added:

> So, if they're contractually set forth - that there is a prohibition on the responsibility for liabilities - and then we run into a product liability situation, I think I've come to the conclusion that the traditional four-pronged standards ... expressed and articulated in the "Restatement" should prevail and be the standard in the state of Alaska, as they are in about 47 other states. And that would require that we amend the bill to at least include product-liability cases. And then that would leave the "mere continuation" doctrine, as expressed in our supreme court and other jurisdictions, available.

Number 1197

CHAIR ROKEBERG asked Mr. Pease to comment.

MR. PEASE asked where such a change would be located.

CHAIR ROKEBERG referred to page 1, line 14, and suggested inserting the language, "except for product liability or successor interest product liability," or something similar.

MR. PEASE argued that such a change would "take all product-liability cases out of this rule," and so "the same thing could happen again.

CHAIR ROKEBERG stated that [via a committee substitute (CS)] the committee "will be adopting specific language overturning the 'continuity of enterprise' - and I'd also like to add the 'product line' doctrines - and excluding them from consideration."

MR. PEASE said: "It's a step in the right direction, ... but I think the basic problem still remains that we've got an Alaska Supreme Court that is a very adventuresome court in the tort area.

CHAIR ROKEBERG agreed, adding that that is why he wanted to "rein them in."

MR. PEASE said that there is too much left open in these doctrines, "these four 'Restatement' exceptions," that the court could still use to come up with "successor-liability areas" that are unpredictable and unfair to parties involved in commercial transactions.

CHAIR ROKEBERG said he agreed, in the main, with Mr. Pease's thrust. He added that he is concerned, however, with coming up with legislation that fits the public's overall best interests. Noting that the drafter of HB 499 had arrived, Chair Rokeberg asked Mr. Pease to comment on inverse condemnation, which, it had been suggested, could subject the state to a $14-million bill if the state were sued because of the inclusion, in HB 499, of a retroactive provision.

MR. PEASE said that the eminent-domain section of the Alaska State Constitution deals with personal property or real property that the state has taken. He offered that HB 499 instead deals with an area of tort law; thus the concept of eminent domain does not apply. He reiterated that not even Section 15 of Article I applies with regard to HB 499. He opined that "this" is an effort to intimidate, and that "it" just isn't fair.

CHAIR ROKEBERG asked Mr. Pease to provide, in writing, additional comments regarding the "retroactivity and taking" issue.

Number 0872

TERRY BANNISTER, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, referring to her memorandum of February 12, 2002, said that, basically, the state is not allowed to take property, and that in saying that, she is not talking about eminent domain; rather, she is talking about a basic requirement that the state cannot take property without providing a person with just compensation. She explained that once the property is vested, the person actually owns the property.

CHAIR ROKEBERG said, "But we're talking about a judgment here."

MS. BANNISTER, with regard to judgments, explained that "once a judgment has been entered for someone, generally they're considered to have a vested right in what they've been given under the judgment," although, she acknowledged, a judgment could be changed during the appeal process. "But once you get to something [that] can be called [a] vested right like that, you run the risk of triggering this clause" in the Alaska State Constitution that requires a person be compensated if that right is taken, she said. She also mentioned that one could possibly argue that there could be an "impairment of contract, too, if you were to change the effect of contracts, ... if the big part of the contract ... were this consideration of what liabilities the person would be exposed to, and they based it on the current law at the time." "So, if you went back and changed all their contracts in the past, and this was a primary consideration - a make or break consideration - in the contract, you would have an impairment-of-contracts issue," she added.

CHAIR ROKEBERG mentioned that Alaska did not have too many manufacturers.

MS. BANNISTER remarked: "Well, we're talking here about a lot of transfers of property between companies; there's a lot involved here."

CHAIR ROKEBERG, pointing out that the "subject case" that prompted the legislation involves product liability and successor interests, conceded that HB 499 covers a multitude of transactions that may have happened in the past. He remarked

that case law and common law are the law of the state, and that, presumably, Alaska statutes are silent on this issue, or else everybody would have been aware of "it." He surmised that in Alaska, there would probably not be too many cases similar to that of Savage Arms Inc. v. Western Auto Supply Co., in which successor liability and product liability in a manufacturing setting are the main issues; "we won't find ourselves in that situation too many times."

MS. BANNISTER concurred.

CHAIR ROKEBERG noted that testimony has indicated that the insurers of Western Auto have paid a [settlement] of $5.4 million and are now seeking recovery from Savage Arms in the amount of $14 million. He asked Ms. Bannister: "In your opinion, would we be taking a risk, were we to put a retroactive applicability section in this bill?"

Number 0503

MS. BANNISTER, in response, said: "Anytime you do that, when you've had a judgment entered, you're going to be taking a risk. I don't know how it'll eventually turn out, but ...

CHAIR ROKEBERG interjected to ask: "Has the state ever been sued for inverse condemnation? Is that what that is?"

MS. BANNISTER said that she would have to check the cases, adding that she was not sure that it would be called inverse condemnation. She reiterated that it could be considered, arguably, that once there is a judgment, the right to whatever one gets out of that judgment "would be considered a vested right, and the issue attaches." She indicated that [a retroactive provision] would go back and say that that judgment doesn't apply any more.

CHAIR ROKEBERG, referring to the legal situation that prompted the creation of HB 499, said: "We've got a settlement that was made, we've got a ..."

MS. BANNISTER interrupted to ask whether there was a judgment entered. She pointed out that "usually when you have a settlement, you enter a judgment based on the settlement."

MR. POWELL explained: "There was a judgment of dismissal; there was a court order officially approving the minor's [Taylor's] settlement - the amounts, the [attorney] fees, and that."

CHAIR ROKEBERG said: "And then there is the subrogation, and now the case is proceeding because it's been remanded back to the [Alaska] Superior Court. So, could you say there's a final judgment?"

MR. POWELL said: "It's not strictly accurate to say there's a final judgment because there is no judgment entered against us except the judgment of dismissal based upon the fact that we paid a ton of money to the injured parties."

Number 0411

CHAIR ROKEBERG said:

> Right. But I guess one of the concerns I have, and I don't understand and I don't think the -- is that we're kind of in the middle of the case, if you will, here, because there was a third party brought in. And then there was a unique situation where the case [was] ruled on in part by the [Alaska] Supreme Court and then remanded back to the [Alaska] Superior Court for final adjudication. So, we don't have a final judgment or anything; we're right in the middle of it. So, Ms. Bannister, can the legislature, in your opinion, act now?

MS. BANNISTER replied that there are issues there and she did not know how it would come out.

CHAIR ROKEBERG said: "Okay, so it's an issue that ... you can't counsel us, one way or another, how it would.

MS. BANNISTER added: "It depends also -- did they remand it as -- you're taking about the remand from the court with the instructions on this ...?

CHAIR ROKEBERG interjected, saying: "On the theory of law ..."

MS. BANNISTER pointed out: "Well, they tell you, basically, how to go for it. ... It's just very complicated because the remand tells you what law to apply."

CHAIR ROKEBERG said: Well, that's what happened there. The [Alaska] Supreme Court, by their ruling, decided which law to apply.

MS. BANNISTER said: "It's not a clean remand like ..."

CHAIR ROKEBERG, interjecting, said: "And then that's what we're going to be trying to overturn here, in this [proposed] statute.

MS. BANNISTER said: "I think it's an issue, and I just don't know how it'll come out."

CHAIR ROKEBERG asked: "Is there a potentiality the state could be liable for $14 million, which is the amount in question at this juncture?"

Number 0292

MS. BANNISTER asked: "You mean the party received $14 million?

CHAIR ROKEBERG said: "Well, they're praying for it, because that's -- they got [$5.4 million] and there's the fees and interest."

MS. BANNISTER said:

> Well, I think there's the potential, yeah. ... I can't say how it would come out, though, because whenever you've gotten that far, ... the issue goes right there - ... the issue is present. You can't just say, "Well, they haven't quite reached the point where the right has vested"; the right has vested to this extent ... and you've gotten instructions from the court. And I think the issue is present, and I don't know how it would be resolved.

MR. PEASE said:

> I think we're getting carried away. Semantics and other things are getting involved here. This suggestion that [you're] liable, frankly, I think is totally out of place. Let's suppose this thing plays out: this statute is passed - made retroactive. Then it goes back down to the court, and there are proceedings. And, say, the lower court says, "Well, in the light of this, what the state has done, I'm dismissing the action." Then Mr. Powell (indisc.) this to the [Alaska] Supreme Court and says, "You can't do this, (indisc.) got a vested right here based on your previous (indisc.)." The court's then either going to say, "Yes, it is" [or] "No, it isn't." If

> they say, "No, it isn't," the case is over; if they say, "Yes, it is," then it goes back under the [Alaska] Superior Court again, by the law which the (indisc.) originally laid out, which is this 'continuity of enterprise' theory. (Indisc.) it's not (indisc.) inverse Allstate. It's just not realistic. Things just don't happen that way.

[Committee staff distributed the proposed committee substitute (CS) for HB 499, version 22-LS1490\S, Bannister, 4/5/02.]

CHAIR ROKEBERG asked Ms. Bannister to research "this particular issue regarding our position in [the] course of the trial, and also this issue on potential liability to the legislature as to 'taking.'"

MS. BANNISTER agreed to do more research, but cautioned that "it will still remain an issue - it will not go away." She noted that a long time ago, she did research on "this type of thing," and that it just comes down to the fact that she can't say for sure; it'll just remain an issue.

CHAIR ROKEBERG, mentioning that the legislature, within certain parameters, can create retrospective statutes, asked whether [HB 499] could be considered curative legislation.

MS. BANNISTER offered that it could be considered curative to some extent, but cautioned that generally, curative legislation addresses very serious, major problems. She mentioned that during the Depression, for example, when people's farms were being taken, some retroactivity was allowed because it was a such a major social issue.

TAPE 02-43, SIDE A
Number 0001

MS. BANNISTER mentioned that although "the issues" would be factors in the court's forthcoming decision, none of them would be determinative. "I can't tell you what would be determinative at this time," she added.

CHAIR ROKEBERG asked Ms. Bannister to "check and see if there's ever been anything analogous to this, where the legislature has interceded in court ... in the middle of a case." He noted that he would not want to subject the state to a judgment stemming from "a taking."

MS. BANNISTER offered that instead of the state being held liable, the court might simply say, "You can't do this, we have to follow the other way." In that case, she noted, there wouldn't be any liability; the court would not "switch the awards" [if the language] was found to be unconstitutional.

CHAIR ROKEBERG asked Ms. Bannister to describe the changes encompassed in Version S of HB 499.

MS. BANNISTER said that according to her understanding of her instructions, essentially she was to keep the language in the original bill, but make an exception for the "products liability, in which case, in the products-liability situation, you would have the four exceptions that are in the 'Restatement' apply." To this end, she pointed out, these four exceptions have been added, via [subsection] (b), to Sections 2-6 and 8.

CHAIR ROKEBERG asked whether the four exceptions needed to be specified.

Number 0272

MS. BANNISTER pointed out that it would not be a good idea to simply refer in statute to the "Restatement"; for clarity, the four exceptions should be specifically identified. She concurred that the "balance of the bill" remains, pointing out that the language in the introductory part of [subsection (a) of Section 2] has been changed slightly to "parrot, more or less, ... some language in the 'Restatement'" and to include the term "fraudulent transfer," which is used in AS 34.40.

CHAIR ROKEBERG suggested that the definition of "mere continuation" could be tightened up. He then asked Ms. Bannister to speak to the "product line" doctrine. He relayed that in the Savage Arms Inc. v. Western Auto Supply Co. case, the court used the term "new doctrines" when it talked about "continuity of enterprise" and "product line," but when it adopted the "continuity of enterprise" [doctrine], it declined to consider the "product line" [doctrine], saying that it did not fit the facts. Chair Rokeberg said that he wanted to reject the "product line" [doctrine], and asked Ms. Bannister whether the [Legislative] Intent section could specify rejection of that [doctrine] too, even though it was not specifically considered in the aforementioned case.

MS. BANNISTER pointed out that intent language is simply that - intent language.

CHAIR ROKEBERG said: "By what you've done, that should be pretty clear. ... Would it not?"

MS. BANNISTER observed, "you've set the parameters out, here."

CHAIR ROKEBERG, after referring to specific wording in the Savage Arms Inc. v. Western Auto Supply Co. case, reiterated that he wanted HB 499 to expressly reject the "product line" [exception].

MS. BANNISTER agreed that language to that effect could be added [to the Legislative Intent section], even though "you've laid out what they can use ... in the other parts" of the bill.

Number 0620

RAY R. BROWN, Attorney; Member, Alaska Academy of Trial Lawyers (AATL), testified via teleconference in opposition to HB 499. After noting that he did not yet have a copy of Version S, he said that he finds it troubling that "litigants are making a point on a specific bill involving a specific case that is still active," and are thereby attempting to influence a decision on a pending case or influence the ramifications of the results of a pending case. He said that he agrees with Mr. Powell that fraud is very difficult to prove. He explained that the problem he has with HB 499 is that it reaches much further than simply addressing the Savage Arms Inc. v. Western Auto Supply Co. case. He opined that the language, "in tort or otherwise", which was mentioned earlier, is extremely broad and expansive with regard to a liability or an obligation of the disposing corporation. He posited that such language would have more of an impact on commercial litigation than it would on tort law.

MR. BROWN shared aspects of a case he recently concluded involving the North Slope Borough as the plaintiff, and opined that had HB 499 been in effect at that time, it would have vitiated the liability of the offending tort-feasor, a substantial corporation that had several iterations of itself between the initial activity and the time of litigation, before finally being subsumed by a large, global "filter" corporation. Had HB 499 been in place, he added, the North Slope Borough would have been out approximately $7 million and the village water purification projects that it had engaged in with the offending tort-feasor would not have been completed.

Number 0809

MR. BROWN offered:

> In a day when we have so many problems right now with potential corporate abuses, and I think right offhand of [Enron Corporation] and [Global Crossing, Ltd.], unless I've misread this bill and the breadth of this bill to address a very simple issue of "continuity of enterprise," this would do away with -- it would be better to sell a corporation to an Alaska corporation than to declare bankruptcy. You'd get the benefit of your bargain: you'd get the money as the selling CEO [Chief Executive Officer] or some of the directors, and you wouldn't have to worry about preferential transfers as long as you sold the corporation to an Alaska corporation that was protected under this [proposed] statute.
>
> I think the issue regarding inverse condemnation is inapplicable, and I think that should be the least of the legislature's concern about how this would impact the state of Alaska. I doubt it would impact the state of Alaska at all; they are not a party to that underlying Savage [Arms] litigation. So, I can't imagine that it would have any direct impact - it could; I haven't analyzed it to that extent - but I think it does have a significant impact on a lot more far-reaching issues than what was addressed by the Savage Arms case. And I would certainly urge this body to look at this very closely and to work very closely with the attorney general's office, and not just plaintiffs' lawyers, not just defense lawyers, but all of us that practice in this field, because it will have some far-reaching effects, far beyond a products-liability case.

CHAIR ROKEBERG thanked Mr. Brown for his testimony and asked him to "follow up on that."

Number 0915

REPRESENTATIVE JAMES moved to adopt the proposed committee substitute (CS) for HB 499, version 22-LS1490\S, Bannister, 4/5/02, as a work draft. There being no objection, Version S was before the committee.

CHAIR ROKEBERG announced that copies of Version S would be made available to all interested parties. He mentioned that he is interested in hearing more from Mr. Brown regarding some of the issues that he raised. Chair Rokeberg announced that HB 499 [Version S] would be held over.

ADJOURNMENT

Number 0991

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:07 p.m.