ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE
March 22, 2002
3:25 p.m.

MEMBERS PRESENT

Representative Lisa Murkowski, Chair
Representative Andrew Halcro, Vice Chair
Representative Kevin Meyer
Representative Pete Kott
Representative Norman Rokeberg
Representative Harry Crawford
Representative Joe Hayes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR SENATE BILL NO. 37(FIN)
"An Act relating to collective negotiation by competing physicians with health benefit plans, to health benefit plan contracts, to the application of antitrust laws to agreements involving providers and groups of providers affected by collective negotiations, and to the effect of the collective negotiation provisions on health care providers."

- MOVED HCS CSSB 37(L&C) OUT OF COMMITTEE

HOUSE BILL NO. 290
"An Act relating to membership in the Comprehensive Health Insurance Association."

- HEARD AND HELD

PREVIOUS ACTION

BILL: SB 37
SHORT TITLE:PHYSICIAN NEGOTIATIONS WITH HEALTH INSURE
SPONSOR(S): SENATOR(S) KELLY

Jrn-Date	Jrn-Page		Action
01/12/01	0073	(S)	READ THE FIRST TIME - REFERRALS
01/12/01	0073	(S)	JUD, FIN

01/22/01	0137	(S)	L&C REFERRAL ADDED AFTER JUD
01/22/01		(S)	JUD AT 1:30 PM BELTZ 211
01/22/01		(S)	Heard & Held
01/22/01		(S)	MINUTE(JUD)
02/21/01		(S)	JUD AT 1:30 PM BELTZ 211
02/21/01		(S)	Moved CS(JUD) Out of Committee
02/21/01		(S)	MINUTE(JUD)
02/22/01	0467	(S)	JUD RPT CS 2DNP 3NR NEW TITLE
02/22/01	0467	(S)	NR: TAYLOR, COWDERY, THERRIAULT;
02/22/01	0467	(S)	DNP: ELLIS, DONLEY
02/22/01	0467	(S)	FN1: (LAW)
02/22/01	0467	(S)	FN2: (CED)
02/22/01	0467	(S)	FN3: INDETERMINATE(ADM)
02/22/01	0467	(S)	FN4: ZERO(HSS)
03/01/01		(S)	L&C AT 1:30 PM BELTZ 211
03/01/01		(S)	Heard & Held
03/01/01		(S)	MINUTE(L&C)
03/08/01		(S)	L&C AT 1:30 PM BELTZ 211
03/08/01		(S)	Heard & Held
03/08/01		(S)	MINUTE(L&C)
03/13/01		(S)	L&C AT 1:30 PM BELTZ 211
03/13/01		(S)	Moved CS(L&C) Out of Committee
03/13/01		(S)	MINUTE(L&C)
03/14/01	0653	(S)	L&C RPT CS 2DP 3NR NEW TITLE
03/14/01	0653	(S)	NR: PHILLIPS, DAVIS, TORGERSON;
03/14/01	0653	(S)	DP: AUSTERMAN, LEMAN
03/14/01	0653	(S)	FN1: (LAW)
03/14/01	0653	(S)	FN2: (CED)
03/14/01	0653	(S)	FN3: INDETERMINATE(ADM)
03/14/01	0653	(S)	FN4: ZERO(HSS)
03/28/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
03/28/01		(S)	Heard & Held
03/28/01		(S)	MINUTE(FIN)
03/28/01		(S)	FIN AT 6:00 PM SENATE FINANCE 532
03/28/01		(S)	Moved CS(FIN) Out of Committee
03/28/01		(S)	MINUTE(FIN)
03/29/01	0853	(S)	FIN RPT CS 3DP 1DNP 4NR NEW TITLE
03/29/01	0853	(S)	DP: KELLY, WILKEN, LEMAN;
03/29/01	0853	(S)	NR: DONLEY, AUSTERMAN, OLSON,

			GREEN;
03/29/01	0853	(S)	DNP: HOFFMAN
03/29/01	0853	(S)	FN1: (LAW)
03/29/01	0854	(S)	FN2: (CED)
03/29/01	0854	(S)	FN4: ZERO(HSS)
03/29/01	0854	(S)	FN5: ZERO(S.FIN/ADM)
04/04/01		(S)	RLS AT 10:45 AM FAHRENKAMP 203
04/04/01		(S)	MINUTE(RLS)
04/04/01	0932	(S)	RULES TO CALENDAR 1OR 4/4/01
04/04/01	0933	(S)	READ THE SECOND TIME
04/04/01	0933	(S)	FIN CS ADOPTED UNAN CONSENT
04/04/01	0933	(S)	ADVANCED TO THIRD READING UNAN CONSENT
04/04/01	0933	(S)	READ THE THIRD TIME CSSB 37(FIN)
04/04/01	0933	(S)	PASSED Y13 N6 E1
04/04/01	0934	(S)	ELLIS NOTICE OF RECONSIDERATION
04/05/01	0961	(S)	RECONSIDERATION NOT TAKEN UP
04/05/01	0962	(S)	TRANSMITTED TO (H)
04/05/01	0962	(S)	VERSION: CSSB 37(FIN)
04/06/01	0875	(H)	READ THE FIRST TIME - REFERRALS
04/06/01	0875	(H)	L&C, JUD, FIN
04/23/01		(H)	L&C AT 3:15 PM CAPITOL 17
04/23/01		(H)	Heard & Held
04/23/01		(H)	MINUTE(L&C)
03/22/02		(H)	L&C AT 3:15 PM CAPITOL 17

BILL: HB 290
SHORT TITLE:COMPREHENSIVE HEALTH INSURANCE ASS'N
SPONSOR(S): REPRESENTATIVE(S)ROKEBERG

Jrn-Date	Jrn-Page		Action
01/14/02	1951	(H)	PREFILE RELEASED 1/4/02
01/14/02	1951	(H)	READ THE FIRST TIME - REFERRALS
01/14/02	1951	(H)	L&C, FIN
01/30/02		(H)	L&C AT 3:15 PM CAPITOL 17
01/30/02		(H)	Heard & Held
01/30/02		(H)	MINUTE(L&C)
02/01/02		(H)	L&C AT 3:15 PM CAPITOL 17
02/01/02		(H)	Heard & Held
02/01/02		(H)	MINUTE(L&C)
03/22/02		(H)	L&C AT 3:15 PM CAPITOL 17

WITNESS REGISTER

SENATOR PETE KELLY
Alaska State Legislature
Capitol Building, Room 518
Juneau, Alaska 99801
POSITION STATEMENT: Testified as the sponsor of SB 37.

JOHN DUDDY, Orthopedic Surgeon;
Member, Anchorage Physicians & Surgeons Association
16110 Bridgewood Circle
Anchorage, Alaska 99516
POSITION STATEMENT: Testified in support of SB 37.

MICHAEL HAUGEN, Executive Director
Alaska Physicians & Surgeons, Inc.
4120 Laurel Street, Suite 206
Anchorage, Alaska 99508
POSITION STATEMENT: Discussed the reasoning behind SB 37.

TED CRUZ, Director
Office of Policy Planning
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
POSITION STATEMENT: Reviewed the FTC's stance on SB 37.

ED SNIFFEN, Assistant Attorney General
Fair Business Practices Section
Civil Division (Anchorage)
Department of Law
1031 W 4th Avenue, Suite 200
Anchorage, Alaska 99501-1994
POSITION STATEMENT: Expressed concerns with Version X of SB 37.

MIKE WIGGINS, Vice President
National Accounts
Aetna
Seattle, Washington
(No address provided)
POSITION STATEMENT: Testified that Aetna is opposed to SB 37.

ACTION NARRATIVE

TAPE 02-41, SIDE A
Number 0001

CHAIR LISA MURKOWSKI called the House Labor and Commerce Standing Committee meeting to order at 3:25 p.m. Representatives Murkowski, Halcro, Meyer, Rokeberg, and Crawford were present at the call to order. Representatives Kott and Hayes arrived as the meeting was in progress.

SB 37-PHYSICIAN NEGOTIATIONS WITH HEALTH INSURE

CHAIR MURKOWSKI announced that the first order of business would be CS FOR SENATE BILL NO. 37(FIN), "An Act relating to collective negotiation by competing physicians with health benefit plans, to health benefit plan contracts, to the application of antitrust laws to agreements involving providers and groups of providers affected by collective negotiations, and to the effect of the collective negotiation provisions on health care providers."

CHAIR MURKOWSKI reminded the committee that when this bill was before the committee [last session] there were concerns that resulted in the committee requesting an advisory opinion from the Federal Trade Commission (FTC), which was issued in January. In response to the FTC's advisory opinion, the sponsor has drafted a committee substitute (CS), Version 22-LS0323\X, Bannister, 3/15/02. Chair Murkowski informed the committee that testimony at today's hearing would be by invitation only because there has already been fairly extensive public testimony. Chair Murkowski passed the gavel to Representative Halcro.

Number 0260

REPRESENTATIVE ROKEBERG moved to adopt Version 22-LS0323\X, Bannister, 3/15/02, as the working document. There being no objection, Version X was before the committee.

Number 0271

SENATOR PETE KELLY, Alaska State Legislature, testified as the sponsor of SB 37. Senator Kelly announced that he would address some of the objections to the bill and the things that have been done in response to those objections. He reminded the committee that a group of physicians in Fairbanks came together as an association in order to collectively negotiate with an insurance company to obtain [that insurance company's] business. However, the FTC became involved. Through that process it was learned that although the federal government requires that antitrust provisions be applied in a blanket way, the U.S. Supreme Court determined such [a blanket application] wouldn't always work.

The court decided that there would be times when there could be a buyer-seller situation in which large companies could have such market power that they could impose a "take-it-or-leave-it" scenario when negotiating business. Therefore, the U.S. Supreme Court determined that a state action doctrine could be created in those situations because there needed to be protection for these smaller organizations. The court said that active state oversight from a state entity was necessary, which is what SB 37 provides. This legislation allows physicians to come together to negotiate with these huge corporations and not be in violation of antitrust provisions. Senator Kelly highlighted that one of the most important reasons for this [legislation] is quality of care. In the past, insurance companies have required that the discussion of some of the higher cost alternatives to health care not be discussed with patients. Furthermore, the insurance companies wouldn't pay for those alternatives either. Therefore, the physicians wanted to be able to come together to discuss this collectively and have some market power in opposition to these large insurance companies. He noted that in the last few years insurance companies have decreased from about 18 major insurance companies to about 6 due to mergers, which have resulted in the insurance companies gaining more market share. Senator Kelly characterized the situation in Alaska as one in which large corporations were dealing unfairly with some of the smaller contractors. The protection anticipated by the U.S. Supreme Court is the existence of the state action doctrine.

Number 0505

SENATOR KELLY said that one of the early problems with SB 37 was the fear that [implementing] something like this in the competitive market might result in an increase in prices. That fear is the reason the legislation is voluntary. There were also concerns with regard to boycotts and retribution, which has been addressed in the bill. The unions didn't want some provisions of the bill and thus those were deleted. The nurses didn't want some of the provisions of the bill and those too were deleted. The provisions that remain are the structure that has the least impact on as many groups as possible, while still allowing the physicians to negotiate with some of these huge corporations that are currently operating in Alaska on a "take-it-or-leave-it" basis. Senator Kelly referred to a document in the committee packet [entitled "Senate Bill 37 How does it work?"]. The document illustrates the times when the process ends. The process allows the physicians to come together to have discussions without fear of the FTC.

SENATOR KELLY remarked that he wasn't surprised that the FTC disapproves of this because the FTC's charge is to carry out the provisions of antitrust laws. He characterized the situation as a turf [war]. Senator Kelly reiterated that this all comes down to the quality of care provisions. "Physicians should be able to walk across the hall and begin to discuss with another physician how they are going to react to an insurance company that is in the market and requiring the quality of care issues to be ... under a 'gag order' or they're just saying we're ... not going to give any money for those higher cost alternatives at all," he said. He then requested that the technical questions be directed to Mr. Haugen, Executive Director, Alaska Physicians & Surgeons, Incorporated.

Number 0812

REPRESENTATIVE CRAWFORD said he understood that the process can be stopped. However, he questioned with whom one would negotiate once the process is stopped.

SENATOR KELLY answered that one would be entering the situation that exists today unless the physicians re-apply and re-enter negotiations from the beginning of the process.

REPRESENTATIVE CRAWFORD pointed out that if iron workers, for example, ended negotiations with their employers, the employers could negotiate with another group of iron workers. However, the physicians are the only group that provide medical care and thus those are the only people with whom the negotiations can take place.

SENATOR KELLY clarified that if the [physicians and the insurance companies] failed to come to an agreement and they were no longer under the provisions of the state action doctrine, the [insurance companies] would then be negotiating with individual [physicians] rather than a collective group. He reiterated that the process could begin again if [the physicians] re-apply.

Number 0981

REPRESENTATIVE MEYER asked if Senator Kelly agreed with the fiscal notes, which seem a bit steep.

SENATOR KELLY responded that the original $7 million fiscal note was indefensible. He pointed out that the fiscal note was

reduced because the original fiscal note was wrong and there have been some changes to the bill.

REPRESENTATIVE MEYER inquired as to how this bill will help his constituents.

SENATOR KELLY mentioned that he didn't believe this legislation would impact rates. Senator Kelly posed a situation in which the physicians in the state are under a "gag" order as discussed earlier. As a single physician, the single physician has almost no market power to negotiate with insurance companies. However, that can possibly be overcome if physicians are allowed to come together as a group [and negotiate], and these quality of care issues relate directly to anyone's constituents.

REPRESENTATIVE MEYER related his understanding that [under the gag order scenario] a physician may be reluctant to do some additional testing because the insurance company wouldn't cover it.

SENATOR KELLY agreed.

Number 1172

VICE CHAIR HALCRO turned to the issue of improving the availability of care and lowering the cost. He then directed attention to the FTC's response on page 3, which says "These widespread effects are not simply theoretical possibilities." In fact, there are cases that the FTC has evaluated how costs have tended to increase when these type of bargaining rights are implemented. The FTC response also mentions the Alaska Health Network, Inc. case. Vice Chair Halcro asked whether Senator Kelly felt that the fact that participation in this process is voluntary mutes the agreements with regard to consumer harm and the FTC's comment, "Such legislation would not likely improve the quality of care."

SENATOR KELLY replied yes. He then directed attention to page 7 of the FTC's response, which says, "Moreover, even collective bargaining over other, more clearly 'non-price' issues in a health plan contract can have a substantial effect on the ultimate costs paid by consumers." He interpreted the opinion of the FTC to be that quality of care and price are the same thing. Therefore, it's impossible for the physicians who want to negotiate only in regard to the quality of care issues to ever separate the issues and thus those fee-related issues have to be included in the state action doctrine.

Number 1297

REPRESENTATIVE KOTT inquired as to which companies the physicians would be able to make arrangements with were this bill to pass.

SENATOR KELLY answered, "Blue Cross, essentially." He said he wasn't sure that Aetna would be involved, and therefore he deferred to Mr. Haugen with regard to Aetna. In further response to Representative Kott, Senator Kelly specified that Washington, Texas, and New Jersey have similar provisions to SB 37. He noted that there is legislation pending in several states. Furthermore, similar federal legislation [has been introduced].

REPRESENTATIVE KOTT asked if there is a track record that one could review in order to determine whether the delivery of health care has increased and costs remained stable.

SENATOR KELLY responded that in Texas there has been no impact because Texas hasn't successfully had negotiations.

Number 1389

JOHN DUDDY, Orthopedic Surgeon; Member, Anchorage Physicians & Surgeons Association, said that he would inform the committee of the reasons why physicians wholeheartedly support SB 37. He characterized this matter as a larger issue than the need to negotiate. Mr. Duddy expressed concern that health care providers are coming together and almost becoming monopolies. He predicted the same would occur in Alaska. Over the last few years the number of major insurers has decreased. Mr. Duddy informed the committee that one of the reasons he moved to Alaska almost three years ago was related to the lack of pre-authorization that [was required]. However, that's beginning to happen here now. Mr. Duddy mentioned problems that are occurring in the Lower 48 such as the problems with health maintenance organizations (HMOs), the limitation of care, the early retirement of physicians, and physicians not accepting new patients. With the [decrease] in the number of providers, recruitment of new physicians is difficult. According to a Kaiser study, Alaska is 49th for the number of per capita physicians and he predicted that the situation is going to only get worse. This legislation may [allow] dialogue between physicians and health care providers. Mr. Duddy said he didn't believe that SB 37 would increase medical costs, however, he

felt that it would actually decrease medical costs because of the less expensive alternatives that are available.

MR. DUDDY informed the committee that some of his colleagues have attempted to communicate with the insurance companies on an individual basis or an individual group basis with regard to defining physical therapy and other aspects of medicine. However, were Mr. Duddy to so with other local physicians, it would be an antitrust violation. This legislation should help eliminate the aforementioned problem.

Number 1544

REPRESENTATIVE HAYES related his belief that this type of legislation has been implemented in states that have HMOs. Since Alaska doesn't have HMOs, how would this legislation aide physicians, he asked.

MR. DUDDY emphasized, "We don't have HMOs yet, we will." The trend is toward [HMOs] as insurance companies are starting to dictate the practice of medicine. He said that in his three years here, he has noticed that the things requiring pre-authorization [have increased], which is how [HMOs] started in the Lower 48. "We're trying to be pro-active," he said. Alaska has quality physicians and that must be maintained, he said.

REPRESENTATIVE HAYES said that although he didn't have a problem with physicians negotiating with insurance companies, he was concerned with the pricing element in SB 37. He questioned whether physicians would remain supportive of the bill if the pricing element was eliminated.

MR. DUDDY replied that he didn't know.

[Vice Chair Halcro returned the gavel to Chair Murkowski.]

Number 1649

MICHAEL HAUGEN, Executive Director, Alaska Physicians & Surgeons, Inc., explained that the distinction between fee negotiations and non-fee negotiations is addressed as a bifurcated process in the bill. The bifurcated process requires a two-step approval by both the insurance companies and the physicians to proceed to prices. Mr. Haugen specified that including fee negotiations is important because the FTC historically, as expressed in its advisory response, hasn't made much distinction between fees and the potential to raise costs

of medical care in non-fee related issues such as alternative treatments. The physicians face a bit of a dilemma if the fees are eliminated because it exposes physicians to another level of potential liability. He posed a situation in which physicians discuss the best practice/protocol for a particular disease and the protocol happened to be more expensive. If the insurance company decided that it didn't like the way these discussions were going, then the insurance company could notify the FTC who, if so inclined, could say such discussions do impact costs. Therefore, this may have to be litigated in court, he remarked. Mr. Haugen explained that the desire was to make this as simple as possible by including a blanket statement that both costs and fee negotiations would be protected under the rubric of the state action document.

Number 1752

TED CRUZ, Director, Office of Policy Planning, Bureau of Competition, Federal Trade Commission (Commission), testified via teleconference. Mr. Cruz explained that the FTC response attempts to broadly address policy issues that are implicated by the legislation and access the likely legal risks the physicians would face were they to engage in collective negotiations under this legislation. Mr. Cruz provided the following testimony:

> The Commission has historically opposed legislation seeking to allow physician collective bargaining and it's opposed it as official Commission testimony before the United States Congress concerning federal legislation. And it has opposed it in staff comments submitted to a number of jurisdictions that considered similar legislation.
>
> Two points, I think are quite relevant. The first is that it has been the judgment of the Commission and the experience of the Commission that allowing physicians to collectively bargain will harm consumers. In particular it will harm consumers by facilitating price fixing, which is likely to raise the cost of insurance for consumers, raise the out-of-pocket expenses and co-payments that consumers will have to pay at their doctors, raise the costs for senior citizens participating in Medicare health plans, raise the cost for governments paying for insurance, and also for paying for the uninsured. So, all of that, as was referenced earlier in this discussion, is not simply the judgment of the FTC

based upon theoretical principles but rather it is the actual practice we have discovered when examining instances when doctors have attempted to collectively bargain. The result has consistently been that consumers have paid higher prices.

The second point that I'd like to make is that we do not believe that such legislation is likely to improve quality of care. Typically on legislation seeking to authorize physician collective bargaining, quality of care is a principle argument that is advanced in favor. Several observations are relevant. First, historically, when physicians have collectively bargained they have tended to collectively bargain not over quality of care but over price. Quite simply, they have behaved in their economic best interest. The example that the Commission has used before is that one does not expect that the United Autoworkers collectively bargaining are going to ensure safe cars. And, instead, government relies on other mechanisms to address quality of care. One expects, rather, the United Autoworkers address the financial incentives and welfare of their members.

Number 1929

The [third] point that I think is highly relevant to the discussion is collective bargaining (indisc.) care issues is already legal under the antitrust law. There's been considerable discussion of that this afternoon, and I believe, unfortunately, some misunderstanding of a passage in the letter we sent to you on page 7 where we discuss terms other than "price" terms that could have a significant impact. That paragraph on page 7, I'd like to observe that what we were discussing there was [reimbursement] methodology. Although not a direct price term, it's obviously closely related and in particular is not a term that is addressing quality of care, rather it's addressing financial reimbursement. So, in our letter we discuss at considerable length beginning on page 5, the current state of the law, which allows physicians to deal collectively with quality of care. In fact, we have observed that the Federal Trade Commission has never once brought a case against physicians for collectively bargaining over quality of care issues. The concern has been not quality of care, which is the

justification that is frequently advanced in support of this legislation, but rather what has happened in actual practice, which is that physicians have historically bargained seeking to increase prices and the result has been higher prices paid by consumers.

The [fourth] and final point I would make very briefly is that in our judgment, the aspect of this legislation rendering collective bargaining voluntary, we do not believe will correct this problem. Very briefly, the physicians collectively bargaining over price: the question of whether an increased price will be passed on to consumers is one that as a matter of economics tends upon the relative elasticity's of supply and demand vis-à-vis the health plan and vis-à-vis consumers. And where the incidents of those increased prices fall depends upon the particular market conditions. The fact that here it's voluntary for health plans would suggest that health plans would be most likely to agree to collective bargaining for a physician where they themselves would not bear the brunt of the higher cost but rather where consumers would pay the higher cost .... The voluntary aspect does not address the principle concerns raised by this bill.

I would, finally, note that as currently drafted, the staff of the Federal Trade Commission expressed the concern that physicians would remain liable under the antitrust law because there's a substantial likelihood that the active supervision provided for in the bill would not be sufficient to immunize that conduct.

Number 2064

REPRESENTATIVE HALCRO related his understanding then that in the case in which the market is underserved or there isn't much competition, those carriers could agree to collective negotiations and agree to pay the costs knowing full well the costs could be passed to the consumers.

MR. CRUZ agreed that such could be a possible outcome.

CHAIR MURKOWSKI pointed out that the FTC's letter to the committee is signed by Mr. Cruz and [Joseph Simmons] Director [of the Bureau of Competition]. However, page 1 of the letter contains a footnote specifying that the FTC authorized the

Office of Policy Planning to submit the comments. She asked if the statement that this [letter] was approved by all FTC commissioners is accurate.

MR. CRUZ replied yes. He explained that the letter was the position of the Office of Policy Planning and the Bureau of Competition. However, before the letter was sent it was submitted to the full FTC who, after a number of edits, unanimously voted the letter out.

REPRESENTATIVE HAYES asked if eliminating the pricing provisions in the bill would alleviate some of the concerns Mr. Cruz sees.

MR. CRUZ answered that it would improve it substantially. However, then the question becomes in regard to what the bill would actually accomplish because the current law allows collective bargaining on the subject of quality of care.

Number 2183

REPRESENTATIVE HALCRO asked if there have been cases in which the market conditions dictate that allowing physicians to collectively bargain would actually work. Or, does this application consistently not work to the benefit of the consumer, he asked.

MR. CRUZ said that it depends upon what the FTC was precisely addressing, which is why [the response letter] attempts to bifurcate between the broader questions of policy and the more narrow questions of the legal risks to physicians acting under particular legislation. On the broader question of policy, the FTC has had a long-standing view that as a matter of principle and experience, physician collective bargaining is likely to be detrimental to consumers. The FTC has not endeavored, on this bill or others, to examine the particular characteristics of a market in a given state. However, given the FTC's experience with physician collective bargaining in various contexts and the markets response to that collective bargaining, the FTC views such bargaining as likely harming consumers and resulting in high prices.

CHAIR MURKOWSKI returned to the point of the legal risk to the physicians. She pointed out that the final paragraph of the FTC's letter makes reference to the fact that if this legislation fails to provide for the level of supervision that would be required under the state action doctrine, the liability/risk would remain with the physicians. Chair

Murkowski expressed the need to be clear that if the legislature were to pass something, regardless of certain protections that the legislature could put in place, the FTC remains the ultimate enforcer.

MR. CRUZ pointed out that these matters of individual physician liability under the antitrust law are likely to be resolved in the courts. He further pointed out that even if the FTC decided that particular conduct didn't violate an antitrust law and didn't merit an investigation, it would insulate physicians from private liability. He noted that antitrust laws are subject to enforcement by state and federal enforcers as well as private litigators. The state action doctrine operates as an immunity to liability, but it's an immunity that's conferred only when, under U.S. Supreme Court language, "the state has and exercises the ultimate authority over the challenged anti-competitive conduct and engages in a 'pointed re-examination' that effectively makes the conduct the state's own." In the judgment of the Bureau of Competition and the Office of Policy Planning, that's unlikely to be satisfied under the terms of this legislation. Therefore, physicians engaging in collective bargaining could face significant liability for violating the antitrust laws under this legislation.

TAPE 02-41, SIDE B

SENATOR KELLY clarified that the term "collective bargaining" is a legal term that deals with negotiations under employment agreements with unions. However, [this matter] deals with collective negotiations.

REPRESENTATIVE KOTT asked if Mr. Cruz could comment on any pending federal legislation.

MR. CRUZ answered that he was aware of legislation that has been introduced, but he wasn't aware that it had moved at the federal level.

Number 2336

ED SNIFFEN, Assistant Attorney General, Fair Business Practices Section, Civil Division (Anchorage), Department of Law, testified via teleconference. He confirmed that he reviewed Version X this morning and the comments in his March 19, 2002, letter are still applicable. Mr. Sniffen noted the [department's] concurrence with the FTC's conclusions in regard to the problems that SB 37 faces. Mr. Sniffen said that the

department still has significant concerns with [Version X]. For instance, the state action doctrine is still of concern for the reasons expressed by the FTC. He explained that there were five amendments, one of which added a sentence requiring the attorney general to request more written communication during the process of review. Three of the amendments were merely word changes. One of those word changes was changing the length of time the attorney general has to review information from 30 days to 60 days, which the department still doesn't believe to be a sufficient amount of time. There were also changes from the discretionary word "may" to "must". The final amendment was to modify the definition of "health benefit plan" the impact of which the Division of Insurance will discuss. Those amendments do nothing to fix the problems with regard to the state action doctrine. Mr. Sniffen said, "We still don't see how this bill can rise to the level of the Supreme Court's enunciation of that test for the reasons expressed by Mr. Cruz of the FTC." With regard to earlier comments that there is similar legislation in other states, Mr. Sniffen stressed that none of those are exactly like SB 37. For instance, Washington's legislation doesn't allow price negotiations. The Texas legislation has very restrictive language with regard to the percentage of physicians from specific specialties who are allowed to get together and negotiate provisions that aren't included in SB 37. Therefore, Mr. Sniffen cautioned the committee in regard to the comments that there is similar legislation in other states.

Number 2194

CHAIR MURKOWSKI related her understanding of Mr. Sniffen's letter that Washington's legislation was amended such that it is a study bill establishing a joint selection committee on collective negotiations. However, Chair Murkowski said she had understood that Washington already had its legislation in place and it doesn't include discussions regarding price terms, which varies from SB 37.

MR. SNIFFEN clarified that Washington does have in place some provisions allowing physician negotiations on non-price terms under very restrictive control. This year the Washington Medical Association attempted to introduce legislation that would allow the negotiation of price terms and that bill, Washington HB 2360, was converted into a study bill. The committee should have a copy of that bill. He pointed out that the Washington attorney general made comments to the effect that the information provided by the Washington Medical Association differed dramatically from the information the [Washington

attorney general] had with respect to the need for this legislation in Washington.

MR. SNIFFEN, in response to Chair Murkowski, agreed that amending SB 37 such that references to the price terms are eliminated would render the legislation meaningless because physicians can already negotiate on [quality of care issues]. Mr. Sniffen cautioned analogies between SB 37 and the Washington legislation even if the price provision was taken out of SB 37. Washington's regulations controlling physician negotiations are quite different, even on non-price terms, than those in SB 37.

REPRESENTATIVE ROKEBERG related his understanding that when this legislature passed the "Patient's Bill of Rights" provisions for noneconomic negotiations were included.

MR. SNIFFEN said that he wasn't familiar with that.

CHAIR MURKOWSKI agreed that there was reference to the noneconomic terms.

Number 2006

MIKE WIGGINS, Vice President, National Accounts, Aetna, testified via teleconference. He informed the committee that his current position is the overall account manager for the State of Alaska's self-funded medical plan that Aetna administers. Mr. Wiggins announced that [Aetna] remains opposed to SB 37, even in its most recent version, Version X. Mr. Wiggins disagreed with the findings that this legislation will benefit competition. He explained that the competition in Alaska is limited to Alaska's small market and the high cost of medical care. Collective negotiations by physicians will only result in higher costs of health insurance and doesn't offer a meaningful prospect for cost reductions to insurance companies and their [members]. He said he believes this to be true even when fees aren't negotiated because negotiation of non-fee items have a direct relation to cost. Mr. Wiggins noted continued disagreement with the contention that insurance companies have substantial market power in Alaska because the only company that may hold a large share of Alaska's privately insured market is Blue Cross. However, the bill is written such that the market power is determined to be 15 percent of the geographical area, which is in most cases an individual community. He explained that although Aetna only has 5.3 percent of the private insurance market in Alaska, there are probably individual markets in Alaska in which Aetna holds 15 percent of the local

market. That [can] hardly be considered market power given that there are over 20 health insurance companies doing business in Alaska. Mr. Wiggins said, "One likely effect of the bill in this area of health insurance where the premiums are the highest is on the individual and the small group market, where the ability to afford health care insurance is probably the lowest." He pointed out that at least two bills seeking ways to reduce the cost of health insurance for those employed by small businesses and nonprofits have been introduced this session. He highlighted that large insurers are generally self-insured and won't be subject to this legislation. In conclusion, Mr. Wiggins strongly urged the committee to consider the FTC letters and the opposition to SB 37 from the Department of Law and the Division of Insurance. He also urged the committee to review the regulations adopted by Texas on this subject.

Number 1867

REPRESENTATIVE HAYES asked if Mr. Haugen had any response to the 5:0 vote of the FTC on the letter sent to the committee.

MR. HAUGEN related his feeling that the federal government's views on antitrust issues are a bit conflicted. For example, President George W. Bush supports this type of legislation as [evidenced] in his signing it [when he was governor] in Texas. Furthermore, President Bush appointed Charles Rivers (ph) as the Chief Enforcer of Antitrusts in the U.S. Department of Justice. Mr. Rivers wrote the version of the physicians negotiation bill that Washington, D.C., implemented. However, the FTC's position is clear.

REPRESENTATIVE HAYES pointed out that this bill was heard almost a year ago. He asked if during that time, Mr. Haugen has attempted to get confirmation from another group in the federal government to support the claim that the federal government is conflicted on this issue.

MR. HAUGEN replied no, but said that as one who has read the Texas opinion and the FTC opinion, and observed President Bush's actions on this matter, he has concluded that [the federal government] is conflicted.

number 1758

REPRESENTATIVE MEYER asked if the Texas law is similar [to the legislation before the committee].

MR. HAUGEN answered that as far as he knew, the Texas version, the New Jersey version, and Alaska's version are all based on a model produced by the American Medical Association (AMA). Although all the bills were changed in various ways, they all utilize the same basic premise of the U.S. Supreme Court's state action doctrine mechanism which allows the state to oversee physician negotiations.

REPRESENTATIVE MEYER asked whether the consumer benefited from the legislation in New Jersey and Texas.

MR. HAUGEN pointed out that New Jersey just passed its legislation, while Texas passed its legislation about three years. Mr. Haugen explained that there is a rule-making process to implement such a bill, for which he believes the attorney general in Texas was responsible. From what he understands, that process became so onerous that physicians said it was unworkable. Therefore, the physicians returned to the [Texas] legislature and requested that the legislature specify what was necessary to make the negotiations move forward. Mr. Haugen said that to his knowledge the clarification legislation passed. Mr. Haugen informed the committee that there was one instance in which the physicians approached Blue Cross in Texas and Blue Cross refused [to negotiate].

CHAIR MURKOWSKI announced that the fiscal note for [Version X] had just arrived. She turned the legislation over to the committee for discussion.

Number 1631

REPRESENTATIVE HAYES moved the following conceptual amendment [Amendment 1]:

Page 2
Delete lines 28-31 through page 3, lines 1-11

Renumber accordingly.

REPRESENTATIVE HAYES said he is very uncomfortable with the price aspect of this legislation, and therefore he wanted to eliminate all the pricing negotiation mechanisms.

REPRESENTATIVE HALCRO objected.

REPRESENTATIVE HAYES reiterated his concern with allowing price negotiations in this legislation. He noted his belief that

allowing price negotiations could ultimately hurt consumers. Therefore, adoption of [conceptual Amendment 1] would alleviate some of his concerns.

REPRESENTATIVE HALCRO recalled earlier testimony that elimination of the pricing negotiations would basically render this legislation moot. Therefore, he questioned whether Representative Hayes assumed that upon adoption of his amendment the legislation would remain in committee since it no longer serves any purpose.

REPRESENTATIVE HAYES said that he didn't believe his amendment would render the legislation moot. Rather, he felt that the legislation would provide physicians with more latitude to know that they can have [collective] discussions on matters outside of price.

REPRESENTATIVE HALCRO highlighted that the FTC already testified that physicians already have substantial negotiating power to discuss quality of care.

Number 1408

SENATOR KELLY agreed with Representative Hayes that the legislation wouldn't be left moot [with the adoption of conceptual Amendment 1]. He related his belief that the FTC's discussion on that point may have been a bit overzealous, as he believes much of the testimony was. He explained that the bill wouldn't be moot [with the adoption of conceptual Amendment 1] because when physicians came together to negotiate before, they operated outside the protections of the state action doctrine and were "zapped" on their discussion over and above the discussions of price because the [FTC] said they were related. At least with the state action doctrine, the terms of care and non-price issues can fall under a state action doctrine. Although [the FTC's testimony] was that physicians can negotiate non-price items and not fall under the sanctions of the FTC, Senator Kelly pointed out that the physicians in Fairbanks didn't find that to be the case. Therefore, [with the adoption of conceptual Amendment 1] at least a state action doctrine is created for the non-price issues that the FTC has said can be considered price issues.

REPRESENTATIVE ROKEBERG said that he was a bit distressed because the testimony has been that there is nothing prohibiting [collective physician negotiations for quality of care issues]. He recalled that passage of the Patient's Bill of Rights

included substantial statutory language to allow for noneconomic discussions. Whether this legislation, expands that power, he said he wasn't certain. He requested Mr. Haugen's opinion.

MR. HAUGEN said he didn't recall that specific language [being included in the Patient's Bill of Rights]. "You can write all kinds of great language in state law to protect physicians, but outside of the rubric of the state action doctrine it really doesn't mean that much; the federal government can still come in and get the doctors," he explained. In further response to Representative Rokeberg, Mr. Haugen specified that physicians have always been able to enter into individual negotiations.

SENATOR KELLY pointed out that the state oversight is lacking when a statute is written because the U.S. Supreme Court doesn't recognize that.

Number 1180

CHAIR MURKOWSKI asked whether adoption of [conceptual Amendment 1] would take care of the references to price negotiations.

MR. SNIFFEN answered that to remove all the price-related provisions of the bill would require removal of subsection (d) [on page 3 of Version X] as well as other references to prices. He said that the legislation would have to be reviewed in order to eliminate all the price-related provisions of the bill. Mr. Sniffen questioned whether the legislation still has any utility once those provisions are removed. He suggested that [without the pricing provisions], the bill will create a level of bureaucracy that the physicians would have to go through before negotiating non-price terms. Why would one want to implement an expensive oversight provision to allow something that can already be done, he asked.

CHAIR MURKOWSKI surmised then that deletion of the price terms would eliminate the need for the bill because [the Department of Law] holds the opinion that physicians can already negotiate terms.

MR. SNIFFEN agreed.

CHAIR MURKOWSKI posed a situation in which [physicians] are negotiating quality of care issues that ultimately impact the price and asked if such would be a discussion of quality of care or price. She pointed out that ultimately quality of care can impact price.

MR. SNIFFEN agreed that some quality of care issues have an impact on price, and therefore he guessed that it would have to be addressed on a case-by-case basis with regard to down-stream pricing issues.

CHAIR MURKOWSKI questioned, then, whether there would be some merit to legislation establishing the procedure [a physician] would need to go through in negotiating the quality of care terms in order to provide protection to the physicians.

MR. SNIFFEN said that if there were legislation allowing the negotiation of non-price terms, the legislation would have to define those terms. One would have to carefully craft the definition for quality of care. If a system is going to be established to protect price-related quality of care issues, then one faces the same problems that occur when price issues are kept in the bill, he said.

Number 0905

REPRESENTATIVE HALCRO asked if Mr. Sniffen knows of any cases in Alaska in which physicians have been scolded for discussing quality of care issues.

MR. SNIFFEN replied no. He only knew of the Fairbanks case mentioned earlier. In the Fairbanks case, he recalled that the FTC determined that the quality of care issues discussed were connected to the price-related terms such that they warranted review.

SENATOR KELLY explained that in the Fairbanks case, the physicians were originally sanctioned because of price-related issues. However, through the process it was determined that the quality of care was linked to the price. Senator Kelly emphasized, "You have to have the protection of the quality of care or else the FTC, who is not in the business of allowing any encroachment on the antitrust provisions, is going to take every opportunity to stop ... these negotiations when they can." If a state action doctrine isn't created, [physicians] won't ever be able to survive an overzealous FTC board who doesn't want any encroachment on the antitrust provisions because [the FTC] will always be able to link price and quality of care.

CHAIR MURKOWSKI expressed some confusion because she recalled that initially eliminating the pricing terms seemed to eliminate some of the major concerns. However, if quality of care and

pricing are so connected, would there ever be a safe zone, she asked.

SENATOR KELLY said he thinks there is safe zone. The FTC is mainly concerned with physicians who discuss the actual price of the contract with the insurance companies, which is what conceptual Amendment 1 would address. However, the issue of potential impacts to cost because of quality of care is a different matter. Perhaps, price and costs are being mixed. Still, the FTC has found it sufficient to send "Nasty-Grams" over cost issues. Senator Kelly related that conceptual Amendment 1 [would eliminate] price fixing [while allowing] costs related to quality of care to be protected under the state action doctrine.

Number 0655

REPRESENTATIVE CRAWFORD announced that is opposed to the intent of SB 37 because he believes that physicians are in a monopolistic position in certain areas of the state. Representative Crawford explained, "If we were to amend this out, it wouldn't be a problem for me. My problem lies in that if this is allowed to stay alive, it can be amended again." He foresaw this as being a major contention in a conference committee.

SENATOR KELLY highlighted that anything can be amended.

REPRESENTATIVE CRAWFORD reiterated that he is opposed to the spirit of this legislation whether amended or not.

SENATOR KELLY said that he didn't object to conceptual Amendment 1. Senator Kelly charged that this legislation allows for the physicians to have some market power, bargaining power, to include some of those [alternative procedures] in the care of their patients. He viewed that as valuable.

REPRESENTATIVE MEYER recalled testimony that were [conceptual Amendment 1 adopted there would be increases in] the associated bureaucracy and costs.

SENATOR KELLY predicted that the Department of Law and the FTC would oppose this legislation were it whittled "down to the draft number." He related his belief that the bill would still work with the [adoption of conceptual Amendment 1]. If the physicians feel that the bureaucracy is problematic, the physicians have the option not to negotiate.

REPRESENTATIVE MEYER surmised then that even with conceptual Amendment 1 the legislation would still meet the intent.

SENATOR KELLY said, "With one exception." He noted his disagreement with Mr. Sniffen about the need to delete subsection (d).

Number 0332

A roll call vote was taken. Representatives Kott, Rokeberg, Hayes, Meyer, and Murkowski voted for the adoption of conceptual Amendment 1. Representative Crawford voted against the adoption of conceptual Amendment 1. Therefore, conceptual Amendment 1 was adopted by a vote of 5:1.

CHAIR MURKOWSKI turned to an amendment from the sponsor that is included in the committee packet. The amendment [Amendment 2] reads as follows:

> On page 8, line 28;
>
> After "health benefit plan" delete through line 29.
>
> Insert;
>
> "means a health care insurer as defined in AS 21.54.500(17) but does not include a multiple employer welfare arrangement or any self insured health benefit plan."
>
> [Punctuation provided.]

SENATOR KELLY indicated that the amendment was [proposed] by the Alaska Medical Association who would be better qualified to address the amendment.

REPRESENTATIVE ROKEBERG related his belief that this amendment attempts to overcome the [Department of Law's] objection to the Employee Retirement and Income Security Act of 1974 (ERISA) stuff.

Number 0124

SENATOR KELLY clarified that the intent of the bill was what is included in the amendment and it was an oversight that the "health benefit plan" was left in.

REPRESENTATIVE ROKEBERG surmised that [the intent of the amendment is to] only include Blue Cross and commercial insurers, which is typical of any health care mandate.

SENATOR KELLY stated that the intent of [the amendment] was to overcome ERISA problems.

REPRESENTATIVE ROKEBERG remarked that this amendment merely cleans up the legislation.

SENATOR KELLY said his understanding was that there was no intention to impact the ERISA law.

REPRESENTATIVE ROKEBERG related his understanding that the Multi-Employer Welfare Arrangement (MEWA) is something that states often try to regulate, but that ERISA wants to avoid.

TAPE 02-42, SIDE A

CHAIR MURKOWSKI pointed out that the memo from Terry Bannister, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, says that it doesn't matter whether "health benefit plan" is replaced with "health care insurer" because it won't eliminate the preemption issue.

REPRESENTATIVE ROKEBERG agreed. In regard to how this change would help, Representative Rokeberg explained that it would add MEWA that is a disputed area under ERISA.

Number 0158

REPRESENTATIVE ROKEBERG moved Amendment 2 as specified earlier. There being no objection, Amendment 2 was adopted.

Number 0158

REPRESENTATIVE ROKEBERG moved to report HCS CSSB 37, Version 22-LS0323\X, Bannister, 3/15/02, as amended out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE HALCRO objected. He recalled the grave concerns the committee had when this legislation was heard a year ago. He reminded committee members that the FTC letter details why it opposes this type of legislation. Furthermore, testimony from the Department of Law outlines that some of the states with

similar legislation have far more controls and oversight than the State of Alaska will have. Representative Halcro identified his main concern: the legislation hasn't been shown to be necessary. Representative Halcro directed attention to the information from the FTC's website with regard to the Fairbanks case against the Alaska Health Care Network. That information seems to illustrate that the infractions were more than physicians wandering from the path of quality of care. Representative Halcro related his belief that the FTC [was justified] in regard to the complaints levied in the Fairbanks case. Overall, Representative Halcro said he believes that Alaska's health care market is fragile with very few suppliers. He said that he couldn't see this legislation improving, rather he could only predict that it would worsen. Representative Halcro noted his consistent opposition to this legislation as well as his belief that the legislation shouldn't leave the committee.

REPRESENTATIVE MEYER said that with the adoption of [conceptual Amendment 1], the legislation has the potential to improve health care overall.

CHAIR MURKOWSKI commented that conceptual Amendment 1 has made the legislation more palatable. She noted her concern with the communication from the physicians who stated that this legislation is necessary in order to level the playing field with these large insurance companies. She said that this legislation may level the playing field between the insurance companies and the physicians, but the concern was with regard to the impact on the consumer. Chair Murkowski announced that she is willing to entertain this legislation because the pricing reference has been eliminated, and if the measure continues in that direction she announced that she may ultimately support the legislation. She mentioned that she agreed with the sponsor that a physician could innocently begin discussions with regard to matters of quality of care, but those matters could ultimately impact price.

REPRESENTATIVE HALCRO reminded the committee of the FTC's and the Department of Law's testimony that eliminating the pricing references results in the legislation serving no purpose. He asked if Senator Kelly supported keeping the pricing reference out of the legislation or would he be supportive of inserting it back in the legislation.

SENATOR KELLY answered, "I would probably support it. ... That doesn't mean that I wouldn't necessarily consider putting it back in."

A roll call vote was taken. Representatives Rokeberg, Hayes, Meyer, and Murkowski voted for reporting HCS CSSB 37, Version 22-LS0323\X, Bannister, 3/15/02, from committee. Representatives Crawford and Halcro voted against reporting HCS CSSB 37, Version 22-LS0323\X, Bannister, 3/15/02, as amended from committee. Therefore, HCS CSSB 37(L&C) was reported out of the House Labor and Commerce Standing Committee by a vote of 4:2.

HB 290-COMPREHENSIVE HEALTH INSURANCE ASS'N

CHAIR MURKOWSKI turned to the next order of business, HOUSE BILL NO. 290, "An Act relating to membership in the Comprehensive Health Insurance Association."

REPRESENTATIVE ROKEBERG, Alaska State Legislature, spoke as the sponsor of HB 290. He directed attention to an overview of the committee substitute (CS) by the Division of Insurance. He explained that the CS goes from the premium percentage payment to covered lives. The Division of Insurance came up with 260,000 covered lives over which the premium will be spread. With the $3 million assessment that is currently in the Alaska Comprehensive Health Insurance Association (ACHIA), the individual cost per life is decreased to about $.96. However, there is a caveat that when the program looks at a family of say five, there are five covered lives and an adjustment is made such that perhaps they charge each person $2. Representative Rokeberg explained that by using this formula it will be spread over the self-insureds, which is how the stop loss and those normally covered by ERISA are addressed. Moreover, [the formula] takes in the state. He informed the committee that he has an amendment that includes the employee's of the state and one for transition. He acknowledged that there has been concern with regard to the costs.

CHAIR MURKOWSKI announced that she would hold HB 290 until Monday.

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 5:20 p.m.