

ALASKA STATE LEGISLATURE
SENATE LABOR & COMMERCE COMMITTEE

May 4, 2002
9:05 am

MEMBERS PRESENT

Senator Ben Stevens, Chair
Senator Alan Austerman
Senator John Torgerson
Senator Bettye Davis

MEMBERS ABSENT

Senator Loren Leman

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 274(L&C)

"An Act relating to the qualification of a physician used for an employer's independent medical examination and to the authority of the Alaska Workers' Compensation Board to provide an expedited hearing when an employee needs medical treatment; and providing for an effective date."

MOVED SCSHB 274(L&C) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 246(JUD)

"An Act relating to regulation of a person providing insurance for the cost of medical care, to confidentiality of insurance records, to insurance hearings, to insurance fees, to annual and quarterly statements by insurers, to managed care insurance, to taxes on insurance, to insurer certificates of authority, to risk based capital for insurers, to unauthorized and nonadmitted insurers, to surplus lines insurance, to health insurance, to life insurance, to annuity insurance, to consumer credit insurance, to insurer liquidation, to multiple employer welfare arrangements, to the Alaska Insurance Guaranty Association, to hospital and medical service corporations, and to regulation of insurance producers, agents, brokers, managers, and adjusters; and providing for an effective date."

MOVED CSHB 246(JUD) OUT OF COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 393(L&C)

"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 SCSHB 393(L&C) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 499(JUD)

"An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in *Savage Arms, Inc. v. Western Auto Supply*, 18 P.3d 49 (Alaska 2001) as it relates to products liability; providing that a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor only if the acquisition is accompanied by an agreement for the successor to assume the liability, results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor, constitutes a consolidation or merger with the predecessor, or results in the successor's becoming a continuation of the predecessor; defining 'business entity' that acquires assets to include a sole proprietorship; and applying this Act to the sale, lease, exchange, or other disposition of assets by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business entity that occurs before, on, or after the effective date of this Act."

MOVED CSHB 499(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

HB 274 - See Labor and Commerce minutes dated 3/14/02.

HB 246 - See Labor and Commerce minutes dated 4/30/02.

HB 393 - See Labor and Commerce minutes dated 4/30/02.

HB 499 - No previous action to record.

WITNESS REGISTER

Representative John Coghill
State Capitol Bldg.
Juneau AK 99811

POSITION STATEMENT: Sponsor HB 274.

Representative Lisa Murkowski

State Capitol Bldg.
Juneau AK 99811

POSITION STATEMENT: Sponsor of HB 246.

Mr. Bob Lohr, Director
Division of Insurance
Department of Community and Economic Development
3601 C Street, Ste. 1324
Anchorage AK 99503

POSITION STATEMENT: Commented on HB 246.

Ms. Katie Campbell, Life and Death Actuary
Division of Insurance
Department of Community and Economic Development
POB 110805
Juneau AK 99811-0805

POSITION STATEMENT: Commented on HB 246.

Representative Gary Stevens
State Capitol Bldg.
Juneau AK 99811

POSITION STATEMENT: Sponsor of HB 393.

Mr. Gene Dau
AARP
Juneau AK 99801

POSITION STATEMENT: Supported HB 393

Ted Pease, Atty
Burr, Pease & Kurtz
810 N St.
Anchorage AK

POSITION STATEMENT: Supported HB 499.

Mr. Jim Powell, Atty
550 W 7th Ave.
Anchorage AK 99501-3563

POSITION STATEMENT: Opposed HB 499.

ACTION NARRATIVE

TAPE 02-28, SIDE A

Number 001
#HB274

HB 274- WORKERS' COMP: MEDICAL EXAM

CHAIRMAN BEN STEVENS called the Senate Labor & Commerce Committee meeting to order at 9:05 am and announced HB 274 to be up for consideration.

REPRESENTATIVE COGHILL, sponsor of HB 274, said that it ran into a problem with due process with the expedited hearing and that was deleted. Now the doctors are simply required to have a license in a place where the examination occurs.

SENATOR TORGERSON moved to adopt the CS to HB 274, LS0 983\L. There were no objections and it was so ordered.

SENATOR AUSTERMAN moved to pass SCS HB 274(L&C) with individual recommendations and \$0 fiscal note. There were no objections and it was so ordered.

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#HB246

HB 246-OMNIBUS INSURANCE BILL

CHAIRMAN STEVENS announced HB 246 to be up for consideration.

REPRESENTATIVE LISA MURKOWSKI, sponsor, said this bill was requested by the Division of Insurance. She said that it was much more comprehensive last year and that they had dealt with the Gramm-Leach-Blighly provisions. She said the changes in terms of policy matters are limited to two areas. The first is as they related to multiple employer welfare arrangements. Essentially, past employee welfare benefit plans have been regulated as an insurer. HB 246 sets up a less burdensome regulatory structure for them. The other area is issues that relate to the confidentiality of records. HB 246 provides for confidential information sharing arrangements. Confidentiality provisions are required for Alaska to remain accredited by the National Association of Insurance Commissioners.

She said that the other provisions correct existing insurance laws. Essentially, the director went through the insurance provisions and did a lot of the cleanup, addressing things like fees for late payment of premium taxes, establishing minimum benefit levels for stop loss insurance contracts and for the first time, it provides for an annual fee to operate as a joint insurance arrangement. It also revises the assessment formula for the guarantee fund and has more corrections and clarifications.

SENATOR TORGERSON asked if the joint insurance arrangements affect the AML-JAI's. He also had questions on the confidentiality on page 36 where, "the director may withhold the rating form from public inspection for as long as the director determines that it is necessary to protect the service corporation" is deleted and replaced with "confidential". He

wanted to know why they did that.

REPRESENTATIVE MURKOWSKI replied that Director Lohr was on line to answer the last question and pointed out that the joint insurance arrangements are discussed under section 48.

MR. LOHR, Director, Division of Insurance, answered Senator Torgerson's last question saying that basically there are certain types of documents that are invariably declared confidential by the division including work papers from an examination by the division. The degree of confidentiality associated with a case by case determination is not enough to satisfy other states or the National Association. Basically, a state that shares the contents of an exam with other states is information that will not get out to the public or to third parties. This language is designed to do exactly that.

SENATOR TORGERSON noted his concern was with section 58 on page 36.

MS. KATIE CAMPBELL, Life and Health Actuary, said this particular provision, section 3, they put in a definition of what it actually means to be confidential. This provision was tightened up a little bit, because Blue Cross/Blue Shield is the only entity that has to file rates with the division and they're very concerned that they're the only ones who have to file, so all the details of the rating information are kept confidential for proprietary reasons.

SENATOR TORGERSON asked what impacts this has on joint insurance arrangements.

MS. CAMPBELL explained that although the division doesn't have regulatory authority over JAI's, they are often asked to be brought into that to do some work on it and there are costs associated with it.

MR. LOHR added that basically JAI's are not in the business of insurance. The chapter that sets them up states that specifically.

However, each of the JAI's from time to time accuses the other ones of intruding into what is the business of insurance, which would then become regulated by the division to the extent that they are going outside the boundaries of the joint insurance arrangement.

The expenses are born by the fee payers to the division, since

they are entirely a fee-supported agency. So the fees are passed on to the JAI's.

SENATOR TORGERSON asked what other JAI's the state has besides AML.

MR. LOHR replied that there is Alaska Public Entities Insurance.

SENATOR TORGERSON said this would only affect them if they step outside of their statutory authority.

MR. LOHR replied, "That's correct. It's only if they stray into the area of regulating activity outside of the bounds of the JAI organizing statute."

SENATOR TORGERSON moved to pass SCSHB 246(L&C) from committee with individual recommendations and the \$0 fiscal note. There were no objections and it was so ordered.

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#HB393

HB 393-SALES OF BUSINESS OPPORTUNITIES

CHAIRMAN STEVENS announced HB 393 to be up for consideration.

REPRESENTATIVE GARY STEVENS, sponsor, said that this is not intended to hurt legitimate businesses at all and Avon ladies are exempted.

MR. GENE DAU, AARP, supported HB 393. He said a lot of senior citizens are trying to supplement their income and adds in a paper could be scams catch their eyes real fast. Passing HB 393 would help seniors be less vulnerable to this type of scam.

MS. CINDY DRINKWATER, Assistant Attorney General, said this is a good consumer protection piece of legislation. From an enforcement perspective this bill is important because it requires registration similar to how other states deal with business opportunities and allows the department to find something out about these businesses ahead of time. They anticipate that there would be a lot of sellers of business opportunities who would not register. She said that this is important legislation.

SENATOR AUSTERMAN said there was an indeterminate fiscal note with the bill and he raised the question about what the actual cost would be. He asked if the legislature was going to find out how much it was going to cost next year when the department requests new employees.

MS. DRINKWATER replied that it is possible that they will be

asking for additional funds, but at this point they don't have a sense of how many enforcement actions they would have to take and how many registrations there might be. At this point, they are anticipating they will be able to afford this because it is the kind of work they do.

SENATOR AUSTERMAN said he appreciated the fact that they are anticipating absorbing all the cost on this.

CHAIRMAN STEVENS said he anticipated the discussion about the \$250 - \$500 threshold would continue because Senator Leman still has concerns about it. He suspected it would be raised again and asked her to reiterate why they chose \$250 instead of \$500.

MS. DRINKWATER replied that initially the department proposed a \$200 threshold because they wanted to protect as many consumers as possible. Other states use a range of \$200 - \$500. They know there are a number of fraudulent "busops" out there that have payment requirements far less than even \$200. When the House added "an aggregate of \$10,000" there was the concern that there are scam artists bilking hundreds of people out of a relatively small amount of money hoping they would sneak through law enforcement radar and people wouldn't feel like they wouldn't have to vigorously protect their investment. They felt at some point that a line has to be drawn somewhere, so they drew one that other states had drawn.

The department did an informal survey to find if other states found the \$500 was reasonable or whether it should be lowered. The uniform response was that it's best to keep the threshold amount as low as possible for the reasons she already suggested. In state's where there is a \$500 threshold busops will sell their product for \$495 and that same package would be sold for \$199 in a state with a \$200 threshold.

The purpose of keeping it at the lower amount is to throw the net as widely as they could to include as many fraudulent sellers as possible. It seems like the real objection to the \$500 amount is from the direct callers association, but they would be exempt under our exemption #5. So, they wouldn't be affected by that provision anyway.

SENATOR AUSTERMAN asked how many complaints do they get a year.

MS. DRINKWATER replied that in 2001 there were six busop complaints. She said they average 6 - 8 complaints per year and they are aware of 8 - 12 additional complaints from Alaskan consumers that were filed with the Federal Trade Commission. That number might seem low, but it is viewed as only the tip of the iceberg. Also, people are often surprised to find that there is a

consumer protection unit in state government again. There are a variety of reasons that people may not file complaints currently.

SENAATOR AUTSERMAN moved to pass SCS HB 393(L&C) out of committee with individual recommendations. There were no objections and it was so ordered.

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#HB 499

HB 499-SUCCESSOR LIABILITY FOR PRODUCT LIABILITY

CHAIRMAN STEVENS announced HB 499 to be up for consideration.

REPRESENTATIVE ROKEBERG, sponsor, said this legislation in part overturns an Alaska Supreme Court case, at the invitation of the court that indicated they made their ruling because the Alaska Legislature never spoke on this issue - successor liability in tort cases of product liability, only. The issue before the legislature is, should the State of Alaska adopt the U.S. standard of "continuation of enterprise in successor liability tort cases," which has been dismissed by the overwhelming majority. Forty-six states expressly rejected in the current third restatement of torts which was the 1998 edition.

HB 499 answers that question with a resounding 'no' by adopting the four exceptions to the general rule of successor liability, which is set forth in the third restatement of torts. This would make Alaska's law conform with the rest of the country.

Section 2, (a)(4)(1),(2),(3) and (4) language are a direct quote out of the third restatement of tort, which provides that any time a successor should be liable for product liability is if you agreed to it, if there is a fraudulent conveyance, if there was a consolidation or merger and when the successor becomes a continuation of the predecessor or mirror continuation where ownership of the corporation is similar or the same as its succeeding business. The Supreme Court accepted the mirror continuation theory, but they also adopted the continuation of enterprise theory, which in his study of the issue, allows the court to do whatever they want to do in terms of applying liability.

Justice Eastaugh said that he believed that the minority view could be adopted by the State of Alaska because there weren't any economic studies justifying that position otherwise. Almost all the other states in the Union rejected that theory and it's no wonder there are no economic studies. He went on to say that he felt the accumulated good will in any kind of a transaction should be adequate to cover any unforeseen future liabilities. He thought that was extraordinary.

REPRESENTATIVE ROKEBERG said the retroactivity part of this bill is to an on-going court case.

A Kenai District Court ruling was appealed to the Supreme Court to find out basically what the real law was in the State of Alaska and the ruling in this particular case came in the middle of the Cole Case that has been remanded back to the Kenai Superior Court. So, it becomes an issue of should the legislature insert itself in an existing on-going court case. In fact, by the Supreme Court adopting a standard or a rule that doesn't conform to the rest of country and apply it to something already happened, the Supreme Court is retroactively applying the standard.

He submitted that the legislature has the same power and even the obligation to make sure the law of the land is the law of Alaska, also. Another aspect is that it's very clear that in a court case that hasn't reached its final conclusion going through the various levels of appeal, that there's no vested right to claim that there's a problem of the state getting involved with this.

The final determination has not already occurred. So, it's clear in the law that unless there's a judgment that's been fully vested, that that's a property right. Statements have been made and you'll hear it that what the state is doing is an inverse condemnation. By passing this law, we'd be making a taking of this judgment. That's not true. What I find interesting as an old law school dropout is, and a student of constitutional law, is that the basic principle of that was articulated by Chief Justice John Marshal in 1801 in the Schooner Peggy Case...which said unless you had a vested right, it wasn't a taking.

MR. TED PEASE of Burr, Pease and Kurtz, Counsel for Savage Arms, Inc., supported HB 499 in relation to their court case with Western Auto. This bill provides fairness and predictability [indisc.].

I think a recitation of [case between] Arms and Western Auto will make clear the unfairness of the Supreme Court's ruling and the devastating effect it has on companies like Savage Arms to purchase assets from another company and the find out they're subject to a code of liability for defective product manufactured by that other company, a liability that was unknown at the time of the sale.

MR. PEASE gave the committee an outline of the relevant facts.

On April 8, 1989 Kenai, a boy named Taylor was badly injured when a model 125, 22 caliber rifle malfunctioned. That gun was manufactured in 1982 by a company called Savage Industries, Inc. who had been making firearms for some time. Savage Industries sold the gun to Western Auto and sold it a purchaser in Maine in 1983 and then the gun went through a succession of owners and ended up in Kenai in the gun shop where it was purchased by the Taylor boy's father. On February 2, 1988, Savage Industries was in serious management trouble and filed for chapter 11 bankruptcy. This is before the accident ever happened. The accident occurred more than a year later. Savage Industries had gone bankrupt and had no insurance. In the meantime, following the chapter 11 filing, an international publicly traded corporation called Challenger became interested in purchasing a substantial portion of the assets of Savage and carrying on the gun manufacturing business. There is a subsidiary shop called Savage Arms, Inc. In the sale negotiated with Savage Industries and approved by the bankruptcy court, Savage Arms, Inc. purchased a large portion of the assets of Savage Industries. The assets purchase included the manufacturing plant in Massachusetts, the Savage name, the core product [indisc.], but not the model of the gun that injured the Taylor boy, and machinery. The sale concluded in November 1989 and Savage Arms thereafter manufactured and sold firearms under the Savage name and it continues to do so today.

Now, at the time of the sale, no lawsuit had been filed and neither Savage Industries nor Savage Arms knew of the accident in Kenai. Over a year after that [indisc.], in December 1990, the plaintiff, Taylor, sued Savage Industries from Kenai.

TAPE 02-28, SIDE B

[SOME TESTIMONY WAS MISSED IN TURNING THE TAPE OVER]

Western Auto is insured 100% by Allstate [indisc.] and Allstate defended Western Auto and ultimately settled with the plaintiff for \$5.4 million in June 1995. Now, Allstate has brought Savage Arms into the litigation, claiming its entitled to recover the amount of its settlement with Taylor plus interest and costs, which now we're told approach \$20 million and maybe more. They argue that Savage Arms was the successor in

liability to Savage Industries, which was a gun manufacturer under this [indisc.] doctrine that has been almost universally rejected by those states which have considered it and which is not the law of Alaska and which has been criticized and rejected by the American Law Institute in its third restatement of torts product liability in section 12.

The American Law Institute is a very prestigious group that's recognized by all the courts in the country as a leading authority on all kinds of laws. They do careful studies, collect data and come out with restatements, which the Alaska Supreme Court often sites and follows (usually). They didn't in this case. He said that none of the four generally accepted exceptions to the successor liability, which are adopted by the restatement really fit the case, making it difficult for Western Auto to recover indemnity from Savage Arms.

So, Allstate urged this other discredited successor liability, called continuity of enterprise, which could make Savage Arms liable to Western Auto as a successor in liability to Savage Industries.

Savage Arms was reviewed by the Alaska Supreme Court before it proceeded at Judge Link's, who stayed the proceedings, suggestion. The Supreme Court accepted the petition and on March 2001 handed down the decision that adopted the almost universally rejected and discredited doctrine of continuity enterprise and sent the case back to Judge Link for trial, which as set in Kenai for November 2002. HB 499 specifically disapproves and rejects the continuity of enterprise doctrine and makes it retroactive to apply to the pending case. There are two reasons. This is not accepted law in any state, including Alaska and it will make a more uniform standard for all companies who are in similar situations in the future. He cited a case in 1989 called Kichen v. United States that said:

No person has a vested right in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after the suit has been filed and continues to be true until final unreveivable judgment is obtained.

MR. JIM POWELL, Attorney, said he represented Western Auto in front of Judge Link and he continues representing Allstate and underwriters who are the carriers for Western Auto and who made the ultimate payment to resolve the Kevin Taylor injury claim. He opposed HB 499 because it is special interest legislation designed to protect a group of Texas investors called Servico Partners, who before this bankruptcy controlled all the stock

through their various corporations and have, since the bankruptcy, guaranteed the result to Savage Arms of any judgment, which is paying for this.

They are attempting by virtue of this legislation to use the Alaska Legislature to relieve them of their obligation to pay for any liability coming out of the litigation in Kenai where Kevin Taylor was injured.

He said the rifle was found, as a matter of law by Judge Link, to be defectively manufactured and fell apart in Kevin Taylor's hands, it spun like a baton and fell to the ground discharging a bullet into his temple causing him serious brain damage and substantial paralysis from the mid-chest down.

Western Auto was the innocent retailer that sold the firearm without inspection and under Alaska law, retailers can't be held liable for the manufacturer's faults. When Servico Partners sold their interest to the current president of Savage Arms they guaranteed if there was a judgment of claim arising out of this incident, they would stand good for it, but now they are attempting to use the legislature to make good on its promises. Also, he said it is very rare for the legislature to pass any law that is retroactive. He thought it would raise constitutional questions and there might be a question of whether there is a taking by the state of that cause of action.

10:12 am

SENATOR TORGERSON said the last statement in his memorandum states the potential liability on the part of the State of Alaska is \$14.5 million and asked how he got from \$5.4 to \$14.5.

MR. POWELL replied that it includes the cost of defense and the interest rate is 10.5% per annum. They have made settlement offers and offers of judgment to Savage for substantially less than the amount of the liability. "If we are successful in proving liability which exceeds those offers of judgment, the interest rate goes to 15.5% under the rules existing at that time."

REPRESENTATIVE ROKEBERG objected to Mr. Powell's statement that this is special interest legislation. "This applies to anybody, any manufacturer."

CHAIRMAN STEVENS said that the decision whether the legislature should be involved in a Supreme Court decision lies in the Judiciary Committee and it was his intent to move it there.

SENATOR DAVIS moved to pass CSHB 499(JUD) with attached \$0 fiscal note from committee with individual recommendations. There were

no objections and it was so ordered.

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CHAIRMAN STEVENS adjourned the meeting at 10:18 am.