ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 30, 2003
3:10 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 24
"An Act relating to intergovernmental agreements regarding management of fish or game."

- MOVED CSHB 24(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 225
"An Act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes; and providing for an effective date."

- MOVED HB 225 OUT OF COMMITTEE

HOUSE BILL NO. 245
"An Act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date."

- HEARD AND HELD

CS FOR SENATE BILL NO. 49(STA)

"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 36
"An Act relating to electronic mail activities and making certain electronic mail activities unfair methods of competition or unfair or deceptive acts or practices under the Act enumerating unfair trade practices and consumer protections."

- MOVED CSHB 36(L&C) OUT OF COMMITTEE

CONFIRMATION HEARING

Commission on Judicial Conduct

Richard Burton - Ketchikan

- CONFIRMATION HEARING POSTPONED

HOUSE JOINT RESOLUTION NO. 4
Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

- BILL HEARING POSTPONED TO 05/02/03

PREVIOUS ACTION

BILL: HB 24
SHORT TITLE:AGREEMENTS ON MANAGEMENT OF FISH AND GAME
SPONSOR(S): REPRESENTATIVE(S)WEYHRAUCH, WHITAKER

Jrn-Date	Jrn-Page		Action
01/21/03	0037	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0037	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0037	(H)	RES, JUD
03/05/03		(H)	RES AT 1:00 PM CAPITOL 124
03/05/03		(H)	Heard & Held
03/05/03		(H)	MINUTE(RES)
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124
03/07/03		(H)	Moved CSHB 24(RES) Out of Committee
03/07/03		(H)	MINUTE(RES)
03/10/03	0487	(H)	RES RPT CS(RES) NT 4DP 3NR

03/10/03	0487	(H)	DP: HEINZE, GATTO, LYNN, FATE;
03/10/03	0487	(H)	NR: KERTTULA, GUTTENBERG, MASEK
03/10/03	0488	(H)	FN1: ZERO (H.RES)
04/09/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/09/03		(H)	Scheduled But Not Heard
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/11/03		(H)	Heard & Held MINUTE(JUD)
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	Meeting Postponed to 4/28/03
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/28/03		(H)	Heard & Held -- Meeting Postponed to 2:00 PM --
04/28/03		(H)	MINUTE(JUD)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 225
SHORT TITLE:MONOPOLY AND RESTRAINT OF TRADE ACTIONS
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
03/28/03	0675	(H)	READ THE FIRST TIME - REFERRALS
03/28/03	0675	(H)	EDT, JUD
03/28/03	0675	(H)	FN1: INDETERMINATE(LAW)
03/28/03	0675	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/16/03		(H)	EDT AT 5:00 PM CAPITOL 124
04/16/03		(H)	Moved Out of Committee
04/16/03		(H)	MINUTE(EDT)
04/17/03	1024	(H)	EDT RPT 4DP 1NR
04/17/03	1024	(H)	DP: DAHLSTROM, KOTT, CISSNA, HEINZE;
04/17/03	1024	(H)	NR: CRAWFORD
04/17/03	1024	(H)	FN1: INDETERMINATE(LAW)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 245
SHORT TITLE:SUITS & CLAIMS: MILITARY/FIRE/DEFENSE
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
04/04/03	0777	(H)	READ THE FIRST TIME - REFERRALS
04/04/03	0777	(H)	MLV, JUD, FIN
04/04/03	0778	(H)	FN1: ZERO(LAW)

04/04/03	0778	(H)	FN2: ZERO(DNR)
04/04/03	0778	(H)	FN3: INDETERMINATE(ADM) FORTHCOMING
04/04/03	0778	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/08/03	0859	(H)	FN3: INDETERMINATE(ADM) RECEIVED
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/11/03		(H)	<Bill Hearing Postponed>
04/15/03		(H)	MLV AT 3:00 PM CAPITOL 124
04/15/03		(H)	Moved CSHB 245(MLV) Out of Committee MINUTE(MLV)
04/16/03	1007	(H)	MLV RPT CS(MLV) NT 1DP 2DNP 1NR 2AM
04/16/03	1007	(H)	DP: LYNN; DNP: GRUENBERG, CISSNA;
04/16/03	1007	(H)	NR: MASEK; AM: WEYHRAUCH, FATE
04/16/03	1008	(H)	FN1: ZERO(LAW)
04/16/03	1008	(H)	FN2: ZERO(DNR)
04/16/03	1008	(H)	FN3: INDETERMINATE(ADM)
04/16/03	1008	(H)	REFERRED TO JUDICIARY
04/16/03		(H)	JUD AT 8:00 AM CAPITOL 120
04/16/03		(H)	<Bill Hearing Postponed>
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/28/03		(H)	Heard & Held MINUTE(JUD)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: SB 49
SHORT TITLE:2003 REVISOR'S BILL
SPONSOR(S): RLS BY REQUEST OF LEGISLATIVE COUNCIL

Jrn-Date	Jrn-Page		Action
01/31/03	0087	(S)	READ THE FIRST TIME - REFERRALS
01/31/03	0087	(S)	STA, JUD
02/20/03		(S)	STA AT 3:30 PM BELTZ 211
02/20/03		(S)	Moved CSSB 49(STA) Out of Committee
02/20/03		(S)	MINUTE(STA)
02/24/03	0256	(S)	STA RPT CS 5DP SAME TITLE
02/24/03	0256	(S)	DP: TAYLOR, HOFFMAN, COWDERY,
02/24/03	0256	(S)	DYSON, GUESS
02/24/03	0257	(S)	FN1: ZERO(S.STA)
03/17/03		(S)	JUD AT 1:30 PM BELTZ 211
03/17/03		(S)	Heard & Held

			MINUTE(JUD)
04/07/03		(S)	JUD AT 1:30 PM BELTZ 211
04/07/03		(S)	Moved CSSB 49(STA) Out of Committee
			MINUTE(JUD)
04/08/03	0745	(S)	JUD RPT CS(STA) 2DP 2NR
04/08/03	0745	(S)	DP: SEEKINS, THERRIAULT;
04/08/03	0745	(S)	NR: ELLIS, FRENCH
04/08/03	0745	(S)	FN1: ZERO(S.STA)
04/09/03	0783	(S)	RULES TO CALENDAR 4/10/2003
04/10/03	0783	(S)	READ THE SECOND TIME
04/10/03	0783	(S)	STA CS ADOPTED UNAN CONSENT
04/10/03	0783	(S)	ADVANCED TO THIRD READING UNAN CONSENT
04/10/03	0784	(S)	READ THE THIRD TIME CSSB 49(STA)
04/10/03	0784	(S)	PASSED Y19 N- E1
04/10/03	0784	(S)	EFFECTIVE DATE(S) SAME AS PASSAGE
04/10/03	0794	(S)	TRANSMITTED TO (H)
04/10/03	0794	(S)	VERSION: CSSB 49(STA)
04/11/03	0925	(H)	READ THE FIRST TIME - REFERRALS
04/11/03	0925	(H)	STA, JUD
04/22/03		(H)	STA AT 8:00 AM CAPITOL 102
04/22/03		(H)	Heard & Held
			MINUTE(STA)
04/24/03	1109	(H)	STA REFERRAL WAIVED
04/24/03		(H)	STA AT 8:00 AM CAPITOL 102
04/24/03		(H)	Waived out of Committee to JUD
04/24/03		(H)	MINUTE(STA)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 36
SHORT TITLE:ELECTRONIC MAIL
SPONSOR(S): REPRESENTATIVE(S)GARA

Jrn-Date	Jrn-Page		Action
01/21/03	0041	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0041	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0041	(H)	L&C, JUD
01/27/03	0079	(H)	COSPONSOR(S): FOSTER
02/12/03	0201	(H)	COSPONSOR(S): HEINZE, MEYER, MOSES,
02/12/03	0201	(H)	KOOKESH, CROFT, CRAWFORD,

			GUTTENBERG,
02/12/03	0201	(H)	STEVENS, CISSNA, MCGUIRE, KAPSNER,
02/12/03	0201	(H)	GRUENBERG, WILSON, LYNN, WEYHRAUCH
02/18/03	0232	(H)	COSPONSOR(S): DAHLSTROM
02/19/03		(H)	L&C AT 3:15 PM CAPITOL 17
02/19/03		(H)	Heard & Held
02/19/03		(H)	MINUTE(L&C)
03/10/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/10/03		(H)	Moved CSHB 36(L&C) Out of Committee
			MINUTE(L&C)
03/12/03	0506	(H)	L&C RPT CS(L&C) NT 6DP
03/12/03	0506	(H)	DP: LYNN, GATTO, CRAWFORD, GUTTENBERG,
03/12/03	0506	(H)	DAHLSTROM, ANDERSON
03/12/03	0507	(H)	FN1: ZERO(LAW)
04/30/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 24.

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General
Fair Business Practices Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Presented HB 225 on behalf of the administration; provided comments on HB 36.

GAIL VOIGTLANDER, Assistant Attorney General
Special Litigation Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 245, presented information and responded to questions on behalf of the administration.

DEAN BROWN, Deputy Director
Central Office
Division of Forestry

Department of Natural Resources
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 245, testified in support of immunity for state firefighters.

WILLIAM TANDESKE, Commissioner
Department of Public Safety (DPS)
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 245, commented on immunity for search and rescue operations, and responded to questions.

PAM FINLEY, Revisor of Statutes
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: During discussion of SB 49, spoke as the revisor of statutes and responded to questions.

ACTION NARRATIVE

TAPE 03-47, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 3:10 p.m. Representatives McGuire, Anderson, Holm, Ogg, and Samuels were present at the call to order. Representatives Gruenberg and Gara arrived as the meeting was in progress.

HB 24 - AGREEMENTS ON MANAGEMENT OF FISH AND GAME

Number 0026

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 24, "An Act relating to intergovernmental agreements regarding management of fish or game." [Adopted as a work draft for HB 24 and amended on 4/28/03 was the document titled "Suggested Language for CS for House Bill No. 24(RES).]

Number 0046

REPRESENTATIVE SAMUELS moved to adopt the proposed committee substitute (CS) for HB 24, Version 23-LS0135\V, Utermohle, 4/29/03, as the work draft. There being no objection, Version V was before the committee.

Number 0068

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, joint sponsor of HB 24, explained that Version V incorporates both the intent of the sponsors and the sentiment expressed by the committee at the bill's last hearing, to make HB 24 as broad as possible to include all agreements between federal and state agencies regarding management of fish or game. He noted that in Section 1, by using the phrase "Nothing in this title authorizes", the drafter conformed proposed AS 16.20.010(c) to existing statute via a parallel sentence structure. He also noted that the language in Section 2 was suggested by [Legislative Legal and Research Services] to allow for transitions from any existing agreements and to remove any argument that HB 24 creates an impairment of a contract. In conclusion, he urged the committee's support.

Number 0272

REPRESENTATIVE SAMUELS moved to report the proposed (CS) for HB 24, Version 23-LS0135\V, Utermohle, 4/29/03, out of committee with individual recommendations and the accompanying zero fiscal notes. There being no objection, CSHB 24(JUD) was reported from the House Judiciary Standing Committee.

HB 225 - MONOPOLY AND RESTRAINT OF TRADE ACTIONS

Number 0335

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 225, "An Act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes; and providing for an effective date."

Number 0359

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General, Fair Business Practices Section, Civil Division (Anchorage), Department of Law (DOL), said that HB 225 is actually a very simple bill that asks for a change in Alaska's antitrust law to allow the attorney general to bring actions for indirect damages on behalf of consumers. He referred to a chart, which was provided to members, and said that under current state and federal antitrust law, if there is an "illegal antitrust

conspiracy" or other antitrust conduct occurring between a couple of suppliers of a product that results in the price of that product staying artificially inflated, those prices are generally passed on down through "the chain" - shown in the chart - to the consumer, who is an indirect purchaser. He noted that this is what is meant by the term indirect purchaser.

MR. SNIFFEN explained that under current law, in "this" scenario, the only person who could actually bring an antitrust claim would be the importer, because the importer actually purchased the product directly from "the bad people" - the people who engaged in the wrongful conduct; the importer is the direct purchaser. Referring again to the chart, he noted that as a practical matter, not all of the people outlined in the chain shown in the chart may be participating in a given situation. For example, there may a conspiracy between a couple of distributors, and consumers would still be without a remedy to sue those people for antitrust damages.

MR. SNIFFEN said that the reason [the attorney general] can't represent consumers against people upstream "in this kind of scenario" is because of a 1977 U.S. Supreme Court case called Illinois Brick Co. v. Illinois. Since that decision, he noted, many states have adopted their own antitrust statutes that "fix this" and allow state antitrust law to reach upstream antitrust violators by representing consumers who are indirect purchasers. Specifically, 30 states have adopted such a law, although Alaska is not yet one of them. He remarked that "it's" made a fairly big impact, recently, in some cases the state has been dealing with. He elaborated:

> Two years ago, we were involved in a multistate case with a bunch of other states that sued a bunch of vitamin manufactures for conspiring to keep the price of vitamins high. You might have heard of that case. And that case actually resolved itself, and states that had "Illinois Brick repealer statutes" like this recovered $1 million [each] in penalties and other damages because they had claims for consumers who buy these vitamins. States that did not have this kind of a law got zero, so Alaska was cut out of that settlement for a little while. We argued tooth and nail with the settlement committee that our law actually allowed us to recover at least some of these damages, and we ended up getting $100,000. But as a direct result of not having an amendment to our antitrust statute, we lost out on about $900,000.

Number 0550

MR. SNIFFEN noted that there have been other cases as well in which this lack has come back to haunt the state. The "Nine West" case in which shoe manufactures conspired to keep the prices of shoes high; the state was unable to recover as much as it might have, had it had this type of legislation in place. There was also a case that recently settled, involving "CD music," in which several record companies conspired to keep the prices of CDs high; Alaska was unable to make "these claims" in that case. Another case, that the state decided not to join, involved "sorbates," which are chemicals used as preservatives in things like yogurts and cheeses; the U.S. Department of Justice fined a couple of international companies "hundreds of millions of dollars" for engaging in illegal antitrust behavior, and states with "this kind of a law" were able to bring state claims for damages on behalf of consumers who pay an extra "half a cent" on every container of yogurt they buy. Currently, Alaska can not bring such claims because it lacks the appropriate laws.

MR. SNIFFEN remarked that the lack of legislation such as HB 225 has had a serious impact on the state's ability to represent consumers and recover damages and penalties. He stated that the DOL is not aware of any opposition to HB 225, and he urged the committee's support.

REPRESENTATIVE HOLM asked whether any monies recovered from such a suit would simply go into the general fund (GF).

MR. SNIFFEN explained that there is a provision in HB 225 that requires a court-approved process in order to distribute money recovered from an action. This will ensure that the consumers are made whole; those actually harmed would get their money back, though if the amount recovered per person was de minimis, the monies would go into a cy-pres fund so that it could be distributed to organizations that represent the affected consumers. For example, in the vitamin case the monies were distributed to Food Bank of Alaska and some other "food groups." Thus, depending on how the settlement is structured and how the damages are actually awarded, monies earmarked for consumer restitution would be gotten back to the consumer some way; damages in the form of penalties, however, would go into the general fund or be earmarked for further antitrust enforcement or consumer protection endeavors.

Number 0783

REPRESENTATIVE HOLM asked, "Does that tie in with ... the tobacco settlement?"

MR. SNIFFEN said that the state has become more active in multistate cases because of the tobacco litigation. "That was sort of a case that woke up a lot of states, that collectively there's a lot of power among the states' attorneys general to stop this kind of conduct," he added. In that case, there was a master settlement agreement that required money to be set aside for educational purposes, advertising purposes, and other purposes. He noted that in future cases, were the state to receive settlements of that nature, similar things could be accomplished.

REPRESENTATIVE OGG asked how HB 225 relates to "the processors' suit - or fishermen's suit," which he mentioned he'd heard about through the news.

MR. SNIFFEN surmised that HB 225 would not affect "that case" at all because the fishermen have direct claims against the processors - "they actually suffered harm from the people engaging in the allegedly illegal conduct." In addition, he noted that HB 225 is not retroactive. In response to a question, he said:

> This kind of law ... is aimed at trying to recover damages for ordinary consumers, like all of us, who might have very small out-of-pocket losses that you would never hire a lawyer to go recover on your own but, collectively, it's a lot of money for the state, and it gives the attorney general the authority to actually bring those kinds of claims. These bigger claims where fishermen were out ... hundreds of thousands or millions of dollars for alleged price fixing, those kinds of things would not really be the target of this kind of legislation.

REPRESENTATIVE SAMUELS remarked that there seems to be the assumption that all of the excess costs [generated by the antitrust conduct] just get passed through [to the consumer]; the importer, the distributor, the wholesaler, and the retailer are "out of the picture" completely and the consumer is the true victim.

MR. SNIFFEN said that in most cases, the overcharges are passed on [to the consumer] in one form or another. In cases where the direct purchaser actually files a suit against "the antitrust people" and money is recovered, those recoveries, not surprisingly, are rarely passed on to the consumer in the form of savings; thus consumers really are without a remedy even if they try to rely on the legal actions of those "upstream." He noted that any costs passed down to the consumer would be considered by the courts when they determine what the damages really are.

Number 0965

REPRESENTATIVE GRUENBERG, after mentioning that he'd considered introducing this type of legislation, turned attention to page 3, subsection (i), which read: "Only the attorney general, in a suit brought under this section, may seek monetary relief for injury indirectly sustained for a violation of AS 45.50.562 - 45.50.570". He asked whether this provision would preclude a private party from bringing suit, either as an individual or in a class action or "under a little attorney general theory."

MR. SNIFFEN said that HB 225 would allow only the attorney general to bring "these kinds of claims" on behalf of consumers; it would preclude consumers from participating in a private class action suit for the same damages. The bill does not take away consumers' ability to bring claims for direct damages, however, or any other claims "that they would currently have."

REPRESENTATIVE GRUENBERG remarked upon the possibility of, for one reason or another, the attorney general not doing its job. He asked whether the administration would be amenable to striking subsection (i). He indicated he would prefer not to leave [the ability to bring suit] solely in the hand of the attorney general.

MR. SNIFFEN replied:

> It's our position that by only allowing the attorney general to bring these kinds of claims, you accomplish a lot of things. One is, you don't have a multiplicity of suits out there against these wrongdoers, for the same damages, over a long period of time. If we were to allow either individual consumers or class action suits to proceed along with the attorney general in pursuing bad actors for these kinds of damages, it would create a judicial quagmire

that might be difficult to reconcile because you might have different judges hearing the same claims against the same people.

REPRESENTATIVE GRUENBERG asked, "Couldn't you, just under the normal civil rules, either move for consolidation or abatement?" He opined that there is no difference between "this kind of a class action and any other."

Number 1103

MR. SNIFFEN acknowledged that the aforementioned would be possible if "they" were brought at a time when consolidation might be appropriate. Consolidation would be left to the discretion of the people bringing the suits, however. He added, "You'd have to know that all the suits were out there, and, again, this may happen over a period of years, where consolidation may not be possible." He offered that one of reasons the Illinois Brick case was decided as it was, was to address "this exact issue"; it was to avoid [the multiple number] of suits that could possibly arise when allowing everybody to bring actions against upstream antitrust violators.

MR. SNIFFEN surmised that calculating the damages and trying to figure out who was owed what and where the loses were actually sustained could get very unmanageable, adding, "if you keep that authority with one person, like in this case the attorney general, it makes it much cleaner and much easier." He said that according to the DOL's experience, "we just do not have an active class-action bar in Alaska, and our population up here is such that those types of actions just aren't very common."

REPRESENTATIVE GRUENBERG mentioned that he is somewhat mollified by Mr. Sniffen's comments. However, he indicated that he would like to have some kind of a safeguard built in, so that in case an attorney general fails or refuses to act, somebody could apply to the court for permission to bring suit. He asked whether any other states have raised this issue.

MR. SNIFFEN said, "I think that has come up, and our [proposed] statute is patterned after Idaho's statute, which was one that was fairly recently enacted, and theirs actually was a culmination of about 20 other states' statutes, and that issue, I believe, did come up when Idaho was testifying on [its] law." Idaho statute has "this exact provision" for some of the reasons currently under discussion, to keep that authority within the attorney general's purview. In response to a question, he said

that he is not aware of any other [jurisdiction's] adopting an exemption in statute that would allow either an individual or a group to bring suit under certain circumstances.

REPRESENTATIVE GRUENBERG said he would like the attorney general to consider such an exemption - a safeguard that would prevent stonewalling by an attorney general - an exemption that would perhaps require court approval or require a clear showing of an abuse of discretion. He remarked that in territorial days, Alaska had terrific antitrust problems.

Number 1335

MR. SNIFFEN said he understands Representative Gruenberg's concern. He went on to say that under the provisions of HB 225, the attorney general is required to publish notice of potential actions, thereby giving consumers the choice to "opt out" of those lawsuits so they won't be bound by the result of the attorney general. So, to the extent that any individual currently has any rights to bring any of those types of actions, HB 225 affects none of those rights.

REPRESENTATIVE GRUENBERG asked, "Would you be willing to have something similar for the opposite?"

MR. SNIFFEN said that [the DOL] hasn't really given that issue much thought because "this has been the prevailing view in most of the statutes that we've looked at, for the reasons I've suggested." He said that it is the DOL's hope that all cases will be pursued, and remarked that he did not know that it would advance the intent of HB 255 to have an exemption such as Representative Gruenberg is suggesting.

REPRESENTATIVE GARA, after mentioning that he, too, had considered introducing similar legislation, opined that [in addition] to the consumer protection aspect, HB 225 will provide a way for the state to be included in recoveries. He then turned attention to subsection (i) on page 3, and pondered whether the bill provides an exemption to the indirect purchaser of "big-ticket" items to bring suit for antitrust conduct. He mentioned that other states have statutory provisions requiring someone seeking to bring such a suit to first give notice to the attorney general, in order to determine whether the attorney general intends to pursue the action instead.

MR. SNIFFEN said that in the multistate suits that the attorney general has been involved in, big-ticket purchases are not the

subject. He remarked that the intent of HB 225 is to "get to the $5-$10 losses by the mass of consumers," rather than the "$100,000 fishing boat by the single purchaser" even if he/she is an indirect purchaser. He surmised that there are other remedies - contract remedies, tort remedies, or warranty remedies - that would protect the indirect purchaser of big-ticket items more than the antitrust law. In response to a question, he said that when the attorney general brings an antitrust claim, nothing in HB 225 precludes individuals from bringing some other type of claim.

Number 1594

MR. SNIFFEN remarked that under current law, no one can bring suit for antitrust violations; under subsection (i), if the attorney general brings suit for an antitrust violation, individuals may opt out of that suit in order to preserve other actions of theirs. This provision allowing only the attorney general to bring an antitrust suit will streamline procedures, he opined.

REPRESENTATIVE GARA asked what would be the harm in rewriting the bill to allow indirect purchasers of big-ticket items to bring antitrust suits if either they opt out of the attorney general's action or the attorney general decides not to pursue any action. Perhaps a one-line change that says consumers do have the right to bring antitrust suits but in order to exercise it, they have to opt out if the attorney general brings an antitrust suit, he suggested.

MR. SNIFFEN said that the department did not want to "open up the floodgate" by allowing a thousand consumers to bring a thousand individual suits, should the attorney general not bring suit. In the interest of judicial economy and efficiency, it might not be the wisest decision to allow a lot of "these suits" to proceed, he surmised.

REPRESENTATIVE GRUENBERG noted that if a particular attorney general did not pursue an antitrust claim and consumers were to try to wait for a new attorney general that would be more inclined to pursue a claim, there might be statute of limitation problems. He then turned to subsection (g) on page 3, and asked what "notice ... by publication" would entail.

MR. SNIFFEN said that the intent is for "notice ... by publication" to be very broad and include notice, not only in newspapers, but also via direct mail and publication in national

magazines. He mentioned that the language in the bill conforms with language in federal law that allows direct notice by publication to be provided to consumers who might be identified as being directly affected, for example, giving notice through the Internet, through the "Parade" section in the Sunday edition of major newspapers, and through a variety of different ways. In response to a question, he said that this language is what is seen in the majority of similar statutes from other states.

REPRESENTATIVE GRUENBERG said he would like HB 225 to be held over so that he would have time to fashion language that would provide some sort of safety net addressing his concern regarding subsection (i).

Number 1945

CHAIR McGUIRE pointed out, however, that from her interpretation of Mr. Sniffen's testimony, any such change in language would not be in keeping with the bill's intent and, thus, would not be acceptable to the administration. She remarked, "We have to have some trust in the attorney general's office, ... and ... [we] have to let them do their job and hope they do it the best [they can]." House Bill 225 will be giving consumers an efficient, orderly remedy, via the attorney general, that they don't currently have. She indicated that it is her intention to report HB 225 from committee today, and suggested that members could work with the DOL on changes to the bill before it reaches the House floor.

REPRESENTATIVE GARA agreed to do so. He said he is concerned that due to budget constraints, the attorney general's office will find itself too short of staff to be able to pursue all the claims that ought to be pursued and yet individuals will be precluded from doing it themselves. Currently, he pointed out, the attorney general's office is understaffed, and has been understaffed in every administration in recent history. He then relayed that Legislative Legal and Research Services is of the opinion that HB 225, as currently written, does involve a court-rule change. He suggested that since the bill does not yet include language to accommodate such a change, the DOL should consider altering the bill so that it does.

MR. SNIFFEN said he would look into that issue.

Number 2221

REPRESENTATIVE SAMUELS moved to report HB 225 out of committee with individual recommendations and the accompanying fiscal note. There being no objection, HB 225 was reported from the House Judiciary Standing Committee.

HB 245 - SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

Number 2253

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 245, "An Act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date." [Before the committee was CSHB 245(MLV).]

Number 2281

GAIL VOIGTLANDER, Assistant Attorney General, Special Litigation Section, Civil Division (Anchorage), Department of Law (DOL), after noting that she'd given a brief overview of HB 245 at its last hearing, suggested that the immunity granted in the bill regarding search and rescue operations would be consistent with four different Alaska Supreme Court cases that immunize police investigations. In the [Hawks v. State, Department of Public Safety, Waskey v. Municipality of Anchorage, Wongittilin v. State, and Dore v. City of Fairbanks] cases, it has been held that the courts would not recognize a tort for negligent investigation; she opined that search and rescue operations are just another form of investigation.

Number 2346

DEAN BROWN, Deputy Director, Central Office, Division of Forestry, Department of Natural Resources, said that a major responsibility of the division is "wildland firefighting." She explained that "wildland-urban interface concerns" are increasing as more and more of the population, as it grows, moves into wooded areas. Currently, 86 percent of Alaskan fires annually are human-caused, adding that in the spring season, virtually 100 percent are human-caused, primarily along "the road mapped on these populated areas." The Division of Forestry fights between 500-700 fires annually, with May 1 being the beginning of fire season, although this year it began two weeks early.

TAPE 03-47, SIDE B
Number 2380

MS. BROWN said that to date there have been 89 fires, which, she opined, is an indication of both the increasing problem and the fact that it was a dry year. She remarked that HB 245 will have a significant impact on the division, particularly for individual firefighters. The state's firefighters are mostly seasonal workers whose positions are funded three and a half to five months a year. The firefighter's job is fighting fires and each fire has the potential of putting his/her life on the line; therefore, for safety reasons, a firefighter's mind should be 100 percent on the job. For this reason HB 245 is critical, so that firefighters don't end up being brought into court to defend "Monday-morning quarterback" analysis by attorneys for any of the 500-700 fires fought annually.

MS. BROWN noted that the 1996 "Miller's Reach" fire is presently in litigation, that it was the first major "wildland-urban inter-fighted fire," and that it burned approximately 442 structures. She mentioned that [that litigation] is not affected by HB 245. Offering the following as an example of the impact immunity could have on firefighters, she said:

> During the big windstorm that we had this year in the Mat-Su and Anchorage area, we had individual firefighters out working until 5:30 a.m. ... and they had to be in court at 8:00 a.m. As I said before, when managing the program and in looking at the responsibility, the real job here is fighting those fires.

MS. BROWN posited that the immunity granted under HB 245 is not only for the state; it is also for individual "state firefighters." She said that currently, under federal law, federal firefighters are immune from litigation, and that this has been reaffirmed by the [9th Circuit Court of Appeals]; on the federal level, there has been longstanding precedent upholding this [immunity]. In addition, local and municipal firefighters are currently immune. As a result, in situations where local, state, and federal firefighters are working together on a fire, they have different liability exposure. She offered that HB 245 is critical to the division because it will fill the gap that currently exists between local and federal liability-and-immunity issues and state liability-and-immunity

issues. House Bill 245 is critical for the future of Alaska's firefighters, she said, and urged passage of the bill.

Number 2224

REPRESENTATIVE SAMUELS moved to adopt CSHB 245(MLV) as the working document. There being no objection, it was so ordered.

Number 2214

WILLIAM TANDESKE, Commissioner, Department of Public Safety (DPS), offered comments regarding immunity for search and rescue operations. He said:

> My concern is that - given that my department is responsible for search and rescue in Alaska, that we do "search and rescues" based on the totality of the circumstances, which, as with a lot of investigations we do, are based on imperfect information, cryptic information, third-party reports - things are not always as they seem. And, in a state this size, it makes for a daunting task sometimes. I think it's important, given the conditions that we operate in around the state - so many of our "search and rescues" are in inclement weather, harsh conditions, from the air, on the water, on the rivers - that we don't unnecessarily expose volunteers or our own personnel to unnecessary risk to try to avoid the perceptions of things that might end up in litigation. There's always pressure from loved ones, and certainly understandably so, but I think it's really important that whatever we do is based on good search and rescue principles - good investigative principles.

COMMISSIONER TANDESKE said that although it may be impossible, and perhaps inappropriate, to avoid a "Monday-morning quarterback" analysis of a search and rescue situation, it is important to consider the question of whether the state should be exposed to litigation and whether the DOL should be expending its limited resources to sort through such an analysis. He offered, however, that holding departments accountable through questioning to ensure that it is doing the right thing in a given circumstance is appropriate.

COMMISSIONER TANDESKE noted that this time of year, for example, in rural Alaska, "overdue snow machines" are a daily event - sometimes many in the same day. Therefore, the question arises,

"Do we want to always err on the side of caution - let's launch every resource we have every time somebody's overdue - or do we take [a] measured approach based on good search policy and tactics, and reserve precious resources?" In other words, if out looking for one individual, make sure that it doesn't turn into a search for those conducting the search simply because conditions were not taken into account correctly. "I think it's important, ... in a state where we routinely end up doing the 'needle in a haystack' search routine, that we do it based on the totality of the circumstances, and not based on whether we think litigation will follow," he reiterated.

Number 2101

REPRESENTATIVE GARA said that the only case he can recall in which the [Division of the Alaska State] Troopers (AST) has been held liable pertained to an incident on the Denali Highway. He asked if there have been other search and rescue situations over which the AST has been sued and, if so, been held liable.

COMMISSIONER TANDESKE said that in addition to the [Kiokun v. State] case pertaining to a search and rescue operation on the Denali Highway, he is aware of one other case from the Nome area in which an individual who'd been drinking subsequently died after going out on a snow machine in bad weather, despite being warned not to. He suggested that the DOL would be better able to provide statistics regarding litigation of such cases. He offered his belief that the DOL expends more resources than it should on such cases.

MS. VOIGTLANDER said that in terms of "actually filed litigation," she is aware of two cases: the [Kiokun case] pertaining to the situation on the Denali Highway, which is currently being appealed and which has a potential judgment in excess of $7 million; and a case that was filed and subsequently settled for $175,000. In response to a question, she relayed that in the latter case - in which the plaintiff's name was Okbaok - the issue that was raised during the "Monday-morning quarterback" analysis revolved around "what end of the possible route that the snow machiner would take should the search be initiated at." In other words, should the search have started at the village of Teller, or at the other end of the "loop?"

REPRESENTATIVE GARA asked for a summary of the conduct that was at issue in the [Kiokun case]. He indicated that he wants to know what sort of conduct they are being asked to immunize.

Number 1911

MS. VOIGTLANDER indicated that there were two lines of information that came to the AST. One line of information came from family members saying that they thought the missing persons were on the Kenai peninsula somewhere, and so search efforts were made in that area; later, there was a representation that the missing persons might be at a different location - not on the Denali Highway - and so search efforts were made at that other location. Meanwhile, there was a thread of information regarding a stranded Subaru on the Denali Highway; that information was left with the AST in Cantwell by some hunters and eventually relayed to the "Fairbanks dispatch in Glennallen." In terms of the jury verdict, the outcome was that the AST were negligent and that their negligence was a cause of the damages; the allocation of fault in the case was 51 percent to the AST and 49 percent to the deceased. She noted that she was unable to comment further in terms of the liability part of the case as opposed to the damages part of the case. In response to a question, she relayed that that jury trial occurred in Bethel.

REPRESENTATIVE OGG turned attention to the provisions regarding immunity for homeland security workers. He asked what the duties of such workers would entail, and if those duties were different than for other workers in the "safety or civilian defense field."

MS. VOIGTLANDER relayed that homeland security activities would be in line with those of emergency management and civil defense. Such workers would secure public facilities that are at risk of terrorist-type actions, such as airports, harbors, and pipeline.

REPRESENTATIVE OGG asked how HB 245 changes a citizen's ability to collect damages if he/she suffers harm physically or sustains damage to property because of homeland security activities.

MS. VOIGTLANDER said that under Title 26, which is being amended by HB 245, certain activities related to civil defense are already immunized. House Bill 245 carries over into an expanded role of state government in civil defense, which is the area of homeland security, and would bar claims related to those activities, with the exception of claims that pertain to behavior or conduct that is especially bad. This exception currently exists in Title 26. Therefore, under HB 245, a plaintiff would be allowed to recover damages if he/she can

demonstrate, under a clear and convincing standard of evidence, especially bad conduct on the part of homeland security workers.

MS. VOIGTLANDER said that there are existing remedies that HB 245 would not affect. Generally speaking, if someone's federally guaranteed constitutional rights are violated by someone "acting under color of law" - that is, a state or federal employee - the plaintiff can file a "Section 1983" claim and have a choice of venue - either federal court or state court. And because the aforementioned is a federal law, HB 245 cannot affect it or the remedy it provides to citizens.

Number 1557

REPRESENTATIVE OGG noted that current language removes liability except in cases of wilful misconduct, gross negligence, or bad faith, but the proposed language instead removes liability except when malice or reckless indifference to the interest, rights, or safety of others is shown by clear and convincing evidence. He asked whether this change shifts the burden to the plaintiff.

MS. VOIGTLANDER explained that in any civil tort action for damages, the plaintiff always bears the burden of proof. The standard changes, however, from a preponderance of the evidence, which is simply a 51 percent/49 percent formulation, to the next higher standard of clear and convincing evidence. She went on to say:

> Under Alaska law, it is incredibly difficult to be able to have a court decide issues summarily, without them going to a jury, if there are any factual issues whatsoever. Or, in fact, even if the facts are not contested but someone believes that reasonable jurors could disagree as to the inference that could be drawn from those facts, then it goes to jury trial under State of Alaska summary judgment rules. This is different from summary judgment in federal court. ...
>
> With this difficulty of having claims which are arguably immune tested by this higher standard, then it is anticipated that the policy of immunity will be better fulfilled because then the judge will be able to make that threshold decision. ... The policy for immunity is not only immunity from liability, but also immunity from suit, because of the disruption and cost to the government, disrupting people from their jobs,

in participating in litigation, as well as, ultimately, having a liability.

REPRESENTATIVE OGG said he questions whether it is really necessary to have this "double gate" of not only moving up to behavior done with "malice or reckless indifference", but also making the standard of proof be "clear and convincing". He suggested that doing both may be a step too high.

Number 1411

REPRESENTATIVE OGG then turned attention to page 5, Section 9, and noted that it adds "vaccination and other actions to protect public health" to the list of items that would be considered civil defense activities. He asked whether, in order for family members to seek remedy if someone dies because he/she was forced to get vaccinated in the name of civil defense, they would have to prove, by clear and convincing evidence, that the vaccination was given with malice or reckless indifference.

MS. VOIGTLANDER said that while it is correct that the family would be barred from a tort claim for damages - absent being able to fit into the exception - if the individual receiving the vaccination as part of his/her job has a bad reaction - up to and including death - the individual or family would be entitled to worker's compensation, which includes death benefits and benefits to the spouse and minor children. She noted that members of the U.S. Coast Guard are covered by a variety of federal benefits including federal worker's compensation benefits. She then mentioned that Congress is in the process of setting up a fund that would be available to people who have a bad reaction to the small pox vaccination.

REPRESENTATIVE HOLM asked of Commissioner Tandeske: Currently, does the fear of litigation waste state resources?

COMMISSIONER TANDESKE offered that such would be very hard to document via pie chart or bar graph. He mentioned, however, that he does believe there are some costs driven by "that," given that searches could be kept going longer than they should be, or that more resources could be devoted to a particular situation than is supported by the information available. He noted that in a recent search effort, there was a lot of pressure from the family to put more resources into that effort and "get up there" even though hazardous weather conditions were in effect and avalanches were occurring. He stated that although there is clearly a certain amount of risk associated

with search and rescue operations, personnel should not be put in harm's way unnecessarily. Putting personnel in harm's way unnecessarily, or expending more resources than are warranted by the available information - simply because a "Monday-morning quarterback" analysis might engender litigation - does happen, although it is not something that can be easily documented.

REPRESENTATIVE HOLM suggested that someone who chooses to engage in potentially risky activities should not expect the state to "drop everything it's doing to go rescue somebody."

Number 1092

REPRESENTATIVE GARA asked whether the AST has changed its search and rescue practices or policies in response to the [Kiokun case].

COMMISSIONER TANDESKE said no.

REPRESENTATIVE GARA then asked whether the threat of a "Monday-morning quarterback" analysis is really causing the AST to act in a different fashion.

COMMISSIONER TANDESKE said that if any such differences in action are occurring, they consist of those previously stated. With regard to AST's search and rescue policies, however, no changes have been made. He offered his belief that a certain amount of "Monday-morning quarterback" analysis is healthy, but pointed out that it is up to the legislature to decide whether the state should be subject to litigation if things don't turn out well in situations such as occurred in the Nome area when an intoxicated individual went out on a snow machine in bad weather.

REPRESENTATIVE GARA asked whether expending more resources or searching longer than is warranted by the information available is a result of the existing tort system.

COMMISSIONER TANDESKE acknowledged that the notoriety of litigation drives "some of that but not all of that." He noted that the AST is certainly sensitive to the public relations aspects and to the needs of family and loved ones of missing individuals. So, for those reasons as well, he added, it is not unusual for search and rescue personnel to "go that extra mile." In conclusion, he said, it is very important that decisions which ultimately risk other people's lives are made only for the

reasons of good public policy and good investigative and decision-making purposes, and nothing else.

REPRESENTATIVE GARA asked Ms. Voigtlander to fax him the factual discussions from the appeal briefs in the [Kiokun case].

MS. VOIGTLANDER agreed to do so.

CHAIR McGUIRE announced that HB 245 would be held over.

SB 49 - 2003 REVISOR'S BILL

Number 0683

CHAIR McGUIRE announced that the next order of business would be CS FOR SENATE BILL NO. 49(STA), "An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

Number 0612

PAM FINLEY, Revisor of Statutes, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, explained that revisor's bills are prepared pursuant to statute, and that while most of the changes come from Legislative Legal and Research Services' periodic review of the statutes, sometimes corrections come from the executive branch or members of the public. The purpose of a revisor's bill is to clean up the statutes for which policy decisions have already been made. This is not to say that a revisor's bill won't have any substantive effect, however, but when the legislature has already decided on policy, the revisor's bill simply attempts to make the statutes fit that policy. For example, SB 49 provides short titles for a couple of provisions of law for which "everyone" appears to want them; this change in no way affects the intent of those statutory provisions.

Number 0524

REPRESENTATIVE SAMUELS moved to adopt CSSB 49(STA) as the working document. There being no objection, it was so ordered.

MS. FINLEY, in response to a question, said she designs revisor's bills so as not to make policy changes, and that she gives the executive branch an opportunity to review revisor's bills. She also mentioned that generally, the sectional analysis details where the proposed changes originated.

CHAIR McGUIRE indicated that SB 49 would be held over.

HB 36 - ELECTRONIC MAIL

Number 0382

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 36, "An Act relating to electronic mail activities and making certain electronic mail activities unfair methods of competition or unfair or deceptive acts or practices under the Act enumerating unfair trade practices and consumer protections." [Before the committee was CSHB 36(L&C).]

Number 0327

REPRESENTATIVE GARA, speaking as the sponsor, explained that HB 36 attempts to regulate junk electronic mail ("e-mail"), commonly referred to as "spam." Roughly 27 other states have attempted to ban junk e-mail in somewhat consistent manners, for example, by stating that fraudulent e-mail is illegal. In addition, many states require people who spam others to give recipients a fair way to get off of a sender's e-mail list. He posited that these efforts are having some effect, because now most people who send junk e-mail provide a link by which to unsubscribe from the sender's e-mail list.

REPRESENTATIVE GARA said that HB 36 gives either the state or an individual the right to seek modest damages under Alaska's unfair trade practices Act. The damages that a private consumer can get are either $500 or triple damages; however, a consumer most likely won't have damages unless he/she contracts a computer virus from a spam. House Bill 36 makes it illegal for someone to send spam without also providing a method to unsubscribe. He mentioned that one of the concerns of the Federal Trade Commission (FTC) and some consumer organizations is that some people who send junk e-mail, although appearing to provide a way to unsubscribe, are really just taking one's e-mail address and using it again or selling it to someone else. To address this concern, HB 36 makes it a violation either to not take someone off of a mailing list when asked to do so, or to use that e-mail address in any way that goes against the wishes of the recipient, for example, selling the recipient's address to another after removing or being asked to remove the address from that particular mailing list.

REPRESENTATIVE GARA predicted that the attorney general's office will take high-impact cases to try to send a message, but acknowledged that the attorney general's office is understaffed and so might not take very many unlawful e-mail cases. For this reason, private individuals have been left with the right to file an action. He mentioned that there are ways, if someone sends junk e-mail but does not provide a way to unsubscribe, to find out who that person/entity is and then bring an action against that person/entity. He suggested that by joining with the 27 other states in this effort, Alaska can perhaps make an impact and start rolling back the growth of spam.

REPRESENTATIVE GARA offered that HB 36, via a provision patterned after Washington statute, is also designed to prevent people from using misleading subject headers, for example, something implying it is a message from a friend. He noted that California takes a different approach by requiring commercial e-mail to include in its subject header either "ADV" or "ADV:ADLT."

TAPE 03-48, SIDE A
Number 0001

REPRESENTATIVE GARA surmised that the problem with taking that approach, if each state has different, specific words required in the subject header, is that "spammers" will complain that they can't comply with such complexity. Hence, HB 36 requires only that the subject header cannot be misleading. He mentioned also that HB 36 only applies to commercial bulk e-mail, not political or personal e-mail.

REPRESENTATIVE GARA observed that HB 36 has the support of the AARP, of the Anchorage Society for Human Resource Management (ASHRM), and of the Alaska Public Interest Research Group (AkPIRG), all of which testified in the House Labor and Commerce Standing Committee. He relayed that businesses have said that junk e-mail costs their companies approximately $9 billion annually in lost work time. It is estimated that individuals get upwards of 260 billion spams annually and that that figure will triple in the next few years, to about 4,000 junk e-mails per person per year. He acknowledged that HB 36 will not stop junk e-mail, but said he hoped that it will have some impact. In conclusion, he pointed out that not only individuals can file an action. Employers, who end up paying for lost work time, can also file an action on behalf their employees.

CHAIR McGUIRE mentioned that according to information obtainable on CNN's web site, Virginia is threatening spammers with jail time and with loss of assets earned from "spamming." She noted that HB 36 contains some of what the article purports Virginia is doing [legislatively]. She asked Representative Gara whether he has looked into those aspects of Virginia law that are different from HB 36.

REPRESENTATIVE GARA said he had, and although he'd been tempted to add a criminal penalty, he'd also wanted to be careful about overreaching. He surmised that Alaska's unfair trade practices Act will let angered consumers fight back on this issue of junk e-mail and perhaps have some impact. He suggested that if a criminal penalty were added to HB 36, it would have to be carefully thought out, which he has not yet done. He noted that HB 36 does stipulate that someone sending junk e-mail cannot try to hide where the e-mail is coming from by misrepresenting its originating point.

CHAIR McGUIRE asked Representative Gara to consider adding a provision that would allow for the seizure of assets earned from spamming.

REPRESENTATIVE SAMUELS asked whether requesting to be removed from an e-mail list would ensure permanent removal from that list.

Number 0663

REPRESENTATIVE GARA said that if someone requests that his/her e-mail address be taken off a list but then that person's e-mail address is later bought from another source, that should not entitle the sender to again start sending the same junk e-mail to that person. If such happens, then "they've messed up," he remarked, "they should keep a list of all the [e-mail addresses] of people who want to be taken off their list." He surmised that that sender could then be subject to a $500 fine as provided for in HB 36.

REPRESENTATIVE HOLM argued that because the attorney general's office does not have enough staff, HB 36 will be totally unenforceable.

REPRESENTATIVE GARA reiterated that that is why private consumers, including employers acting on behalf of their employees, have been given the right to take these claims themselves; this is in recognition of the fact that people are

probably going to have to help themselves a bit because staff in attorney general's office are overworked. He also noted that Alaska has a very strong unfair trade practices Act, which allows people to find private attorneys to assist in such cases. He again predicted that the attorney general's office will take high-impact cases to try to send a message, adding that it will be up to that agency to rank these types of cases along with its other priorities.

REPRESENTATIVE HOLM opined that the activities proscribed by HB 36 do not rise to a level warranting seizure of assets. He also surmised that many junk e-mails do not originate in Alaska, and pondered how HB 36 will be enforced with regard to those entities.

REPRESENTATIVE GARA pointed out that HB 36 does not currently include seizure of assets. He posited that a $500 fine is warranted if one asks to be taken off a junk e-mail list but still continues to receive that junk e-mail. As to how the provisions of HB 36 will be enforced with regard to entities out of state, he suggested that enforcement will occur in the same fashion as any other claim currently being brought against any business outside of Alaska: the consumer will have to file a claim, send the entity a copy of that complaint, and the entity will then have to hire an attorney and respond in court in Alaska. The courts allow one to bring in others from out of state to sue them. Consumers may have to get awfully mad to be willing to go through this process, he acknowledged, but posited that there are a number of consumers who are awfully mad about junk e-mail.

Number 1179

REPRESENTATIVE GARA, in response to further questions, reiterated that HB 36 does not proscribe the sending of junk e-mail; it merely stipulates that recipients must be given a way to unsubscribe to a mailing list. If such a way is not provided - or if it only has the appearance of taking someone off of a mailing list without really doing so, or if the sender refuses to take someone off of a mailing list after being requested to do so - and the recipient continues to get that junk e-mail, then that is when the provisions of HB 36 can be applied.

CHAIR McGUIRE said she would submit not only that junk e-mails are annoying, but also that they do cause harm. For example, at her personal e-mail address, she has a megabyte limit, and so if

her e-mail mailbox fills up with spam, her legitimate e-mails cannot get through.

REPRESENTATIVE OGG, after acknowledging that he, too, would like to see junk e-mails curtailed, opined that HB 36 is merely feel-good legislation and will not actually accomplish anything. He said he didn't think that senders of junk e-mail even know what jurisdictions their e-mail goes to, much less what the laws of those jurisdictions are. He asked why they should spin their wheels on something that won't be utilized. He also opined that recovering $500 is hardly worth the consumer's efforts, particularly given what it would cost to hire an attorney to help pursue the issue.

REPRESENTATIVE GARA pointed out, however, that in addition to the $500 fine, under Alaska's unfair trade practices Act, the consumer who pursued such an action would also be compensated for attorney fees. Thus it will prove to be a bit of a burden to violate this proposed law. How do entities know which jurisdiction they are sending junk e-mails to? He offered that when entities use huge e-mail lists to send out junk e-mail, they have assume that people in all states will be receiving that e-mail; therefore, those entities should make themselves familiar with every state's laws regarding junk e-mail. "That's what we do in commerce cases generally," he added.

CHAIR McGUIRE surmised that one of the things HB 36 will accomplish is that it will raise the awareness of those sending junk e-mail. She offered her hope that if more than half of the states start instituting laws governing junk e-mail, then the federal government will step in and do something at the federal level.

Number 1532

REPRESENTATIVE GARA opined that having a federal solution would be great. In conclusion, he said that HB 36 is not asking anything more than that businesses who engage in sending junk e-mail act in a reasonable and honest manner: when asked to take someone off their mailing list, they should do so regardless of the laws in the recipient's state and regardless of whether they know what those laws entail. Those who send junk e-mail can't expect to be able to just ignore reasonable requests by recipients to be removed from mailing lists, he remarked.

CHAIR McGUIRE suggested that most legitimate businesses that conduct business out of state do make the effort to become

familiar with the laws of the states whose citizens they might be doing business with. Of senders of junk e-mail, she said: "If these companies want to sell you something, they're making billions of dollars off selling things on the Internet. I ... support it; I think they ought to research it, and I don't think it's too much to ask."

REPRESENTATIVE GARA mentioned that he'd tried to draft HB 36 in such a way so as not to violate the "constitutional ... rules on interstate commerce"; therefore, he predicted, HB 36 will be upheld even if attacked on constitutional grounds.

Number 1661

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General, Fair Business Practices Section, Civil Division (Anchorage), Department of Law (DOL), on the enforceability of HB 36, said:

> Let me tell you how we deal with consumer protection violations now. I'm charged with enforcing Alaska's antitrust statutes and our consumer protection laws, and we get complaints daily from people who've been the victims of telemarketing scams, from e-mail scams, from Nigerian scams, and they're coming in all types of forms. Alaska is a "victim state" in that there aren't many people ... inside the borders of Alaska who are really doing this. It's people Outside who are preying on people in Alaska because [for example] we have this PFD [permanent fund dividend] up here - people have this perception there's money up here - we have oil, whatever it is. And the Internet is a great way to get at people - from Outside - to prey on people here.
>
> And we have the tools, in our current consumer protection Act, to go after these people if we want to, and we get more than just $500. Our consumer protection Act allows us to penalize these people up to $5,000 for every violation. So, for every e-mail spam that comes in that that would be in violation of [HB 36], for example, we could tag them with up to $5,000 for every e-mail.
>
> So you get into some significant money there, and if we saw a widespread abuse by some national spammer that ... was targeting Alaska for one reason or another, we could take enforcement action and make a

significant impact, to the tune of millions of dollars. I know Oregon has been very successful in doing this, reaching outside the borders of Oregon and prosecuting e-mail spammers and telemarketers - they have a new telemarketing law that operates very similar to this, that gives them the authority to do that - and they do recover significant judgments against these people.

Number 1751

MR. SNIFFEN continued:

... People who want to commit fraud are going to commit fraud, and you're just not going to stop them. This law, and no other law, is ever going to stop that conduct. That's been our experience, anyway. Having it on the books, though, will deter legitimate spammers or folks who want to use the Internet for commercial purposes. They're going to see this law and say, "Well, I want to be a good guy - I'm going to comply," and just by having this law on the books, with absolutely no enforcement, ... we're hoping will deter people from engaging in this conduct just to begin with.

So, ... I think it will have some positive benefit just in that alone. For the people out there who really want to be the good guys, "Well, shoot, I got to really be careful who I'm sending my mail to, because if I send it to Alaska and the [attorney general] gets wind of it, heck, I'm looking at a $5 million lawsuit just like that." For the people who are just going to thumb their nose at our law, ... what do you do? Well, as Representative Gara suggested, we have to prioritize how bad we think the conduct is. Do we want to go after these people or not? ... Do we want to chase down ... "eBay" fraud guys first before we go after some other guys?

We have an endless variety of consumer fraud [cases] in our office that we are juggling every day and trying to decide who we want to chase and who we don't want to chase. But those decisions we make, and we hope they have some effect. And this bill just gives us another tool essentially. It does ... allow us to go after spammers that now we can't go after, and I

> think Representative Gara explained very well that it would only be those spammers who are just thumbing [their] nose at you. You know, you tell them, "Hey, I don't want this stuff any more, don't send it to me."

MR. SNIFFEN opined that junk mail in a mailbox, while annoying, is not as intrusive as junk e-mail because one can receive junk e-mail 24 hours a day, 7 days a week. He posited that there are times when senders of junk e-mail know that they are sending spam to Alaska, particularly if they are sending it to "gci.net" accounts or [acsalaska.com] accounts. Regardless of whether people know where they are sending spam, if they are going to engage in that kind of interstate commerce, it is their responsibility, and the burden is on them to know that. The law is very clear that they have an obligation to know the laws of the state they're doing business in. "So we don't have sympathy for them," he remarked, "if they violate our law, whether they know it or not, we still have the right to pursue them."

MR. SNIFFEN concluded by saying, "We see this bill as a good enforcement tool for the attorney general's office; as far as private consumers actually taking advantage of this to do any real good, ... that's a tougher call." As a package, however, HB 36 will make an impact, he predicted.

Number 1906

REPRESENTATIVE SAMUELS moved to report CSHB 36(L&C) out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 36(L&C) was reported from House Judiciary Standing Committee.

ADJOURNMENT

Number 1915

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:24 p.m.