ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE
March 1, 2004
3:20 p.m.

MEMBERS PRESENT

Representative Tom Anderson, Chair
Representative Carl Gatto, Vice Chair
Representative Nancy Dahlstrom
Representative Bob Lynn
Representative Norman Rokeberg
Representative Harry Crawford
Representative David Guttenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 488
"An Act relating to actionable claims against state employees; relating to the state's defense and indemnification of its employees and former employees with respect to claims arising out of conduct that is within the scope of employment; amending the Public Employment Relations Act regarding claims against the state or state employees; and providing for an effective date."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

HOUSE BILL NO. 517
"An Act relating to registration in beneficiary form of certain security accounts, including certain reinvestment, investment management, and custody accounts."

- MOVED HB 517 OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 488
SHORT TITLE: CLAIMS AGAINST STATE EMPLOYEES
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	L&C, JUD
03/01/04	(H)	L&C AT 3:15 PM CAPITOL 17

BILL: HB 517
SHORT TITLE: SECURITY ACCOUNT BENEFICIARY DESIGNATION
SPONSOR(S): LABOR & COMMERCE

02/23/04	(H)	READ THE FIRST TIME - REFERRALS
02/23/04	(H)	L&C, JUD
03/01/04	(H)	L&C AT 3:15 PM CAPITOL 17

WITNESS REGISTER

GAIL VOIGTLANDER, Chief Assistant Attorney General -
Statewide Section Supervisor
Torts and Worker's Compensation Section
Civil Division (Anchorage)
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Introduced HB 488 and answered questions.

KATHLEEN STRASBAUGH, Assistant Attorney General
Labor and State Affairs Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska
POSITION STATEMENT: Answered questions on HB 488.

BRAD THOMPSON, Director
Division of Risk Management
Department of Administration
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 488.

JIM GASPER, Counsel
Public Safety Employees Association
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns about HB 488.

JOE D'AMICO, Business Manager
Public Safety Employees Association
Anchorage, Alaska
POSITION STATEMENT: Voiced concern about the effects of HB 488 on law enforcement personnel and said it is bad public policy.

JOSH APPLEBEE, Staff
to Representative Tom Anderson
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: As committee aide, introduced HB 517, sponsored by the House Labor and Commerce Standing Committee.

LORIE HOVANEC, Senior Trust Administrator
Wells Fargo Bank
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 517.

ACTION NARRATIVE

TAPE 04-22, SIDE A
Number 0001

CHAIR TOM ANDERSON called the House Labor and Commerce Standing Committee meeting to order at 3:20 p.m. Representatives Anderson, Gatto, Dahlstrom, and Guttenberg were present at the call to order. Representatives Lynn, Rokeberg, and Crawford arrived as the meeting was in progress.

HB 488-CLAIMS AGAINST STATE EMPLOYEES

CHAIR ANDERSON announced that the first order of business would be HOUSE BILL NO. 488, "An Act relating to actionable claims against state employees; relating to the state's defense and indemnification of its employees and former employees with respect to claims arising out of conduct that is within the scope of employment; amending the Public Employment Relations Act regarding claims against the state or state employees; and providing for an effective date." [HB 488 was sponsored by the House Rules Standing Committee by request of the governor.]

Number 0118

GAIL VOIGTLANDER, Chief Assistant Attorney General - Statewide Section Supervisor, Torts and Worker's Compensation Section, Civil Division (Anchorage), Department of Law, noted that she supervises and practices in defense of the state and state employees in court actions. She explained that HB 488 provides a process by which claims filed against individual state employees are subject to the scrutiny of the attorney general (AG); if the AG finds that the actions complained of arose in the course and scope of the employee's work, the claim is converted into a claim against the state. The state employee would be dismissed from the case, and the state would be substituted in as the defendant in the action.

MS. VOIGTLANDER said the language is taken from AS 09.50.250, which was taken directly from the Federal Tort Claims Act; she noted that the certification process, another part of the Federal Tort Claims Act, is missing.

MS. VOIGTLANDER discussed why she believes the certification process is a positive one. In lawsuits where several state employees are sued in addition to the state, the AG's office is involved either for the state or for the state employee. When several state employees are sued individually, the process takes them off the job and they are distracted by the litigation; reviewing documents, preparing depositions, and staying informed about litigation requires the employee to be absent from work. She provided an example, saying this bill would enable state employees to continue to do their jobs; the litigation would be handled by the Office of the Attorney General, and the state would be the named defendant. She said this process parallels how the Federal Tort Claims Act works.

MS. VOIGTLANDER pointed out that the second part of the bill sets forth in one place, in one statute, the state's obligations to its employees when they are sued, including the state's defense and indemnification obligations. It sets rules for the state employees' obligations when they are sued, in terms of giving notice to the AG and cooperating in the defense of the action.

MS. VOIGTLANDER explained that many collective bargaining agreements have provisions dealing with defense and indemnity, and several labor agreements don't have sections on defense and indemnity. There is no unifying law regarding suits that the AG's office can point an employee towards that includes collective bargaining agreements, labor agreements, and partially exempt and exempt employees.

Number 0456

MS. VOIGTLANDER said this bill would put in statute the answers to a state employee's questions. All state employees would be handled the same way and would have the same obligations. The state would also have the same obligations to defend and indemnify them in the action. She admitted the bill is somewhat ponderous, but said she felt a state employee could read the language and know his or her obligations and those of the state.

Number 0516

KATHLEEN STRASBAUGH, Assistant Attorney General, Labor and State Affairs Section, Civil Division (Juneau), Department of Law, testified to share the source of the language in this bill and identify the circumstances under which it would arise. The AG's office used some of the language in HB 110, introduced by then-Representative Porter, and also borrowed from virtually all of the collective bargaining agreements that have an indemnification provision in them. She said they took the basic principles and exact language, for the most part, and applied them to everybody. These provisions, starting at proposed Sec. 09.50.254, would apply in cases where [Sec. 09.50].253, the first section of the bill, does not.

MS. STRASBAUGH noted that 43 U.S.C. Sec. 1983, the federal statute under which people sue for constitutional violations, authorizes and compels a plaintiff to sue individual officials. There are a few other statutes, possibly the whistleblower section, that authorize relief against individual state employees. She continued:

> For those cases, we must have a process, and we have had a process in place which covered all of these types of cases. It will now cover only a small number because the quitclaims will take virtually all of the court cases out of the process and have those cases pursued only with the state.
>
> For those, everyone gets a defense unless they acted willfully or negligently or outside the scope of their employment. These are the standards that are now applied to those, both in and out of court, the binding agreements. One of the aims is to enshrine it in statute, rather than continuing to leave it to collective bargaining. [One of the aims] is the uniform treatment of state employees. ...
>
> This type of decision must be left to the attorney general, and it is not suitable for arbitration. However, there has been some litigation filed by the correctional office of the Public Safety Employees Association that is now before the supreme court, and we are concerned, as we've indicated elsewhere, that the result of the litigation might be that they have to arbitrate defense decisions.

Number 0733

MS. STRASBAUGH pointed out that this bill also provides a remedy for the rather small group of employees that the AG declines to defend on the basis that they generally are being disciplined for misconduct. She said she felt uniformity and a predictable procedure were appropriate, and operating under court rules for disagreeing about the defense decision was best.

REPRESENTATIVE CRAWFORD asked what the practical application of this bill was. He gave the example of a state employee who is driving to a meeting and inadvertently hits another vehicle. He asked how this bill would limit a lawsuit, and whether the state would be held accountable for the actions of the individual in some cases.

MS. VOIGTLANDER responded that if the plaintiff in that action had sued both the state and the individual state employee driver, then, if the driver had merely been negligent, the AG would determine that the employee was acting within the scope of employment. That employee would be dismissed from the case as an individually sued defendant, and the claim would simply proceed against the State of Alaska. The defenses that might then be asserted would be those found in AS 09.50.250, which has a list of excluded torts, the same as the Federal Tort Claim Act. She opined that in Representative Crawford's scenario, none of those excluded torts would be implicated.

Number 0943

REPRESENTATIVE CRAWFORD asked what the outcome would be if the scenario included that the employee had been drinking.

MS. VOIGTLANDER replied if the state employee had been drinking at the time of the accident, the AG would probably find that the person wasn't acting within the scope of employment, and wouldn't certify that state employee in this process. That employee would continue to be an individually sued defendant in the action, and would have to provide for his/her own representation because, if drinking on the job, the person would clearly not be acting within the course of employment.

MS. VOIGTLANDER said the only scenario she could think of that gets to the core of the question would occur if a state employee were to assault someone on the job. Assault is an excluded tort under AS 09.50.250(3). If the AG under the circumstances somehow found that, despite the assault, the employee was acting within the course and scope of the job, then it would convert into a claim against the state, and the state cannot be sued for

an assault. If, however, the individual employee had actually committed an assault, he or she might well be outside the parameters of state-paid defense and indemnity, in which case there wouldn't be that certification process.

REPRESENTATIVE CRAWFORD asked if that was the only instance that Ms. Strasbaugh could think of where this bill would actually change the outcome. He noted that this bill isn't very broad in scope.

Number 1077

MS. VOIGTLANDER reiterated that HB 488 mirrors the way the Federal Tort Claims Act handles claims against state employees. She opined that it would be the rare case that would get a certification and yet trip into an area where the state would have an exclusion under AS 09.50.250. Civil rights claims founded upon the U.S. Constitution are excluded from that certification process.

REPRESENTATIVE CRAWFORD surmised that this bill wouldn't have a practical effect on anyone's life.

MS. VOIGTLANDER answered that she felt it would have a great effect on state employees' lives because many state employees are distracted when they have their name listed as a defendant in a civil action for damages where the claim may be made for several hundreds of thousands or millions of dollars, whether they're defended and indemnified by the state or not. They worry about the litigation and they're taken off the job to have to work on the litigation. She said she thought there'd be few circumstances in which this proposed law would substantively affect a claimant's ability to pursue a claim, however.

Number 1173

REPRESENTATIVE GATTO referred to the phrase "within the scope of employment" and said:

> Let's say we hire somebody to go and change the light right up there in the corner. You put the ladder there; while we're here, he doesn't secure the door, somebody walks in, knocks him off the ladder, he falls on the Representative from Fairbanks. The Representative from Fairbanks now has a claim against that individual. Was he operating within the scope of his employment by not making the area safe, even

> though he's operating within the scope that he was asked to go and change the light?

MS. VOIGTLANDER replied that the state employee's malfeasance would probably be simply in the nature of negligence, and so would still be within the course and scope. The definitional section under Section 3 defines acting within the scope of the employee's office or employment and is basically looking to those services that the employer authorized to perform. The employee is performing within the authorized time and space limit, activated by purpose to serve the state, and this doesn't constitute acting or failing to act with willful, reckless, or intentional misconduct, gross negligence, or malice.

Number 1241

REPRESENTATIVE GATTO asked whether the outcome would be the same if the employee had had a previous warning, or several previous warnings, about a similar action.

MS. VOIGTLANDER replied that even with a previous warning, it is still the nature of the employee's acts that are at issue. In the case of several previous warnings, it's still the point, if that conduct on this one occasion is what is going to be the test for purposes of the lawsuit. If that conduct on that occasion was no longer merely negligent, but rose to the level to those excluded areas, then the employee wouldn't be operating within the course and scope.

Number 1292

CHAIR ANDERSON said:

> Let's say an employee is accused of misconduct and receives discipline; then the alleged misconduct results in a lawsuit, and that's filed against the state and the employee. Your office determines that the employee is not entitled to be indemnified and defended at state expense. Then, under this hypothetical, let's say the union files a grievance challenging the state's misconduct decision and it wins. So, now, the union's won. The employee's discipline for misconduct under this scenario is reversed in arbitration. How will that arbitration award affect the attorney general's indemnification decision?

MS. STRASBAUGH replied that the outcome depends on timing. She said she hadn't encountered this particular scenario; she'd rarely encountered the scenario where the AG wouldn't defend an employee, since discipline had occurred and a grievance was pending. Describing this situation as a "horserace" between the arbitration and the tort suit, she elaborated:

> The problem is that if arbitration results in a finding that they tolerate mistakes in law, mistakes, in fact, lessening mediation of penalty, and whether or not that finding would ... prevent the state from going forward with its initial decision, really depends on the circumstances of each arbitration. Arbitrations are binding on the parties for many purposes, but possibly not for causes of action in court. This is an area that varies from case to case. ... I don't mean ... to be vague, but it's very difficult to answer your question.

Number 1423

CHAIR ANDERSON asked how many grievances were pending arbitration as a challenge to the AG's decision not to indemnify a state employee.

MS. STRASBAUGH replied that perhaps two or three cases were pending.

MS. VOIGTLANDER added that based on her knowledge of the court, it is rare that the state doesn't provide defense to a state employee.

REPRESENTATIVE GUTTENBERG asked what other states' legislation had been used to model this bill.

MS. VOIGTLANDER replied that several states had adopted the Federal Tort Claim Act, but she didn't have the names of those states at this time.

Number 1573

REPRESENTATIVE ROKEBERG asked if this bill would be able to screen the state and the employee because the state can claim sovereign immunity in certain instances. He also asked whether this bill would decrease vexatious litigation.

MS. VOIGTLANDER replied that sovereign immunity for the State of Alaska is covered in the area of excluded torts under AS 09.50.250(3): assault, battery, false imprisonment, interference with a contract, misrepresentation, and other excluded torts. Once the lawsuit was converted to a lawsuit only against the state, if any of those excluded torts were a basis for the claim, they'd fall out under the sovereign immunity that the state has retained in AS 09.50.250.

REPRESENTATIVE ROKEBERG asked, "So our assertion of sovereign immunity is based on our statutory scheme right now; is that correct?"

MS. VOIGTLANDER affirmed that.

Number 1591

REPRESENTATIVE ROKEBERG wondered if the impact of this legislation was to standardize collective bargaining activities. He asked if the intention was to remove this as a bargaining point within contract negotiations or was simply to make the effect of this type of legislation consistent.

MS. STRASBAUGH acknowledged that HB 488 has a provision that would take the issue out of collective bargaining while preserving existing collective bargaining agreements.

Number 1648

REPRESENTATIVE ROKEBERG asked if this was a point of contention in the past in bargaining agreements.

MS. STRASBAUGH replied that traditionally the collective bargaining agreements between the state and those unions that bargain about it have a provision that says this defense provision of the contract is not subject to arbitration, although one unit that does have such language has brought a suit forward asking the administrative appeal to the Alaska Labor Relations Agency (ALRA). Subsequently, the court is asking that the state be forced to arbitrate the decision because it's a mandatory subject of bargaining. She noted that ALRA said it was waived, but Judge Reese said under previous case law of the Alaska Supreme Court it had to be arbitrated under [AS] 23.10; that issue is before the Alaska Supreme Court.

REPRESENTATIVE ROKEBERG observed that this bill would settle this issue prospectively, but not retrospectively.

MS. STRASBAUGH agreed.

REPRESENTATIVE ROKEBERG asked if Judge Reese's opinion was a surprise to the state.

Number 1734

MS. STRASBAUGH replied, "There is an old case that made a holding similar to this. The supreme court will be asked to consider its ruling."

REPRESENTATIVE ROKEBERG asked if the administration's position was that this bill was not intended to affect collective bargaining activities.

MS. STRASBAUGH said the intent of the bill was to make the process uniform and "take it off the table" so that in future years it would not be subject to bargaining.

REPRESENTATIVE ROKEBERG asked if it was a problem in the recent past in the collective bargaining process.

MS. STRASBAUGH answered that she wasn't aware that other bargaining units had argued about the scope of this particular clause.

Number 1783

REPRESENTATIVE GUTTENBERG referred to page 7, line 5, "does not include an employee of (i) the University of Alaska; (ii) the Alaska Railroad Corporation". He asked why Alaska Housing [Finance Corporation] or other state agencies weren't included.

MS. VOIGTLANDER explained that the University of Alaska has a separate existence from the state. Claims against it aren't claims against the state, but must be made directly against the university, and only university assets may be used to satisfy a judgment. Statutes governing the University of Alaska also have their own defense and indemnity language, and the university isn't defended by the AG, but has its own counsel, risk-management program, and insurance. Similarly, the Alaska Railroad Corporation (ARRC), by its statute, has a legal existence as a corporation and has to be sued in its own name. Again, state assets may not be used to satisfy a judgment against ARRC, it isn't represented by the AG's office, and it isn't part of the state's risk-management arrangements.

MS. VOIGTLANDER pointed out, however, that the Alaska Industrial Development and Export Authority (AIDEA) is within the risk-management system. A claim against AIDEA is a claim against the state.

Number 1880

BRAD THOMPSON, Director, Division of Risk Management, Department of Administration, testified that his division administers the self-insurance program for the State of Alaska and its agencies and employees. He spoke in strong support of this legislation because of the belief it will provide the same, consistent protection from tort liability for all state employees, whether they are in a classified position or are not within the defense provisions. The bill basically codifies the existing practice. He said the intention wasn't to leave anybody "out in the cold" that wouldn't have been prior to this bill.

MR. THOMPSON explained that the process would be different because actions against the individual would be treated now as against the state only. He said the attorney general would defend these actions, as well as the Department of Corrections or the Department of Public Safety (DPS). He felt this bill would simplify the process and make employees much more secure. He commented that then-Representative Porter was still dealing with suits from his former days with the Municipality of Anchorage and the police department; he was still being named in litigation many years after his service to the Municipality of Anchorage, and this was his motive for putting forth legislation. He also felt it would bring consistency and conformity to union agreements and the state's practice in defending its employees.

Number 1950

REPRESENTATIVE ROKEBERG asked Mr. Thompson to analyze the incidence and source of these types of cases. He surmised that the Department of Corrections and DPS might have the largest percentage.

MR. THOMPSON replied that each agency, due to it operations, has unique exposures and activities. The commissioner of the Department of Transportation [& Public Facilities] often is named solely as the executive of that agency, even though that person really doesn't have any involvement with that activity. Corrections is a very active environment for litigation by the

inmates, and he said healthcare and family-and-youth services are two more areas in which liability claims are brought.

Number 2005

REPRESENTATIVE ROKEBERG asked if the incidence of these claims was rising.

MR. THOMPSON surmised that detailed statistics are kept on each agency's claims history, costs incurred, and outcomes. However, identification isn't kept with regard to individually named employees or officers. He offered to provide detailed information for every fiscal year's activity claim for each agency.

REPRESENTATIVE ROKEBERG asked about the supplemental budget.

MR. THOMPSON said the request would be for far less than last year, partly because the state is totally self-insured. He reported that the state had had excess liability insurance that it no longer has. Thus the state is much more exposed than formerly. The difficulty with large, significant court cases is that it takes years to go through all the process. For example, last year funding was requested for the resolution of one case involving five wrongful deaths from an air crash that happened over 10 years ago. The state had excess coverage for that incident, he noted.

Number 2100

REPRESENTATIVE ROKEBERG asked if Mr. Thompson recalled the annual premium for the insurance that was excessive, and also wanted to know the number of annual cases.

MR. THOMPSON replied that he'd provide that information.

REPRESENTATIVE GUTTENBERG asked where the law had been "broken" to the extent it needed to be fixed with this bill.

MR. THOMPSON said he believes this bill would codify an existing practice, except for the transition of the individually named employees that would be converted as against the state only. He said the state, as the employer, is in most instances responsible for the acts of its employees. Other than the conversion of the individually named officers or state employees, the purpose of the rest of the bill is to move through the process consistently and make it uniform to all,

rather than for just those select few in certain classified units that have negotiated different terms and conditions.

Number 2187

JIM GASPER, Counsel, Public Safety Employees Association (PSEA), informed members that he was the attorney who took the case before the Alaska Labor Relations Agency now pending before the Alaska Supreme Court; he offered to answer questions about that litigation. Addressing the exclusion of this process from collective bargaining, he spoke on behalf of the correctional officers and police officers represented by PSEA. He explained that it is typical that someone in law enforcement is exposed to a greater probability of being sued by someone for his or her official conduct than the average public employee is.

MR. GASPER said aspects to this legislation place those individuals - who already are in a position of making immediate, snap decisions that come back to haunt them in litigation later on - in a position of being victimized by this process. These employees are constantly involved in litigation of one sort or another; either they are prosecuting someone or answering to some agency that would review their conduct, say, in a correctional institution. Litigation is part of their lives, and they are less concerned with time away from their jobs than with protecting their legal rights.

MR. GASPER said the average public employee who doesn't cross into the court's threshold doesn't have the same level of concern that someone in public safety might have. He noted that PSEA has had in its trooper-airport police contract, for almost 20 years, a provision that says the state will indemnify, very similar to what the legislation intends to accomplish. But it doesn't have an exclusion if the decisions are being challenged through the grievance-arbitration process.

TAPE 04-22, SIDE B
Number 2272

MR. GASPER explained that the law says all grievances will be subject to final and binding arbitration. As a matter of policy, decisions about employee conduct have to go through this informal dispute-resolution process. On the other hand, the state, through this legislation, wants to take the decision making out of that realm of scrutiny. He said, in a sense, when an employee is told, "You've committed gross negligence, willful, or intentional, or reckless misconduct," that employee

is being told he or she has acted improperly by an agency that doesn't expect to be reviewed unless the employee goes to court. If this bill becomes law, this employee, who through the union had some level of protection, would have to defend himself or herself. This person most likely lost his or her job or faces a significant suspension. The person has to find an attorney and litigate the issue of whether or not he/she committed gross misconduct or some other willful act.

Number 2245

MR. GASPER explained that under a collective bargaining agreement, a history of the meaning of the terms is developed that is useful in analyzing one employee's conduct against another's. Furthermore, employees' actions that may lead to independent litigation against them - and whether they've acted outside the scope of their official authority or duties - create a history if that issue has been challenged. If someone has to go to court each time to ask the court whether or not he/she is eligible for indemnification, that will create an opportunity for inconsistency: one superior court, one judicial district versus a superior court in another judicial district, every case turning on its own facts in separate forums. Mr. Gasper suggested this process gives the state the upper hand when it decides not to represent the individual, and that individual has to then undertake a significant expense to change that decision.

MR. GASPER agreed this bill was patterned, to some extent, after federal law. In his experience, however, he said federal law significantly circumscribed the collective bargaining rights of federal employees; many rights and obligations that employees have under state law are absent because it is so highly regulated. He didn't think it a good parallel to use the federal practice, in this level of detail, to take this issue of indemnification out of collective bargaining. Similarly, he noted, there had been no testimony telling the committee that states which have adopted the federal equivalent have collective bargaining like Alaska does. That representation hadn't been made, so he wondered how those states, in adopting the federal equivalent, would apply it in the collective bargaining scenario.

MR. GASPER pointed out that PSEA hasn't in its history challenged an AG's decision to go to the court and provide representation to a member that "we" represent under this long-standing contractual clause. It has not been a problem, he said. He added that he thinks this bill is particularly

suspicious in that it wants to take it out of the realm of collective bargaining for a group of employees for whom it's very important to have union representation.

MR. GASPER mentioned a provision that gives a short timeframe, 30 days, for the employee to give notice; thus the employee has to find an attorney to bring a challenge within this timeframe or lose the right to bring a challenge. This forecloses the opportunity to effectively defend oneself under circumstances that would be viewed as very negative for the individual.

Number 2117

MR. GASPER pointed out that this legislation wouldn't indemnify an employee in a civil rights action. He said police and correctional officers typically are sued under the federal civil rights statute, since people who make allegations against their use of official power sue under that statute. He said, "Yet we view our indemnification clause in the contract to have broad sweep to encompass that type of representation, so if a member defends himself, he's going to be repaid the cost of doing that, of performing his official job."

Number 2086

CHAIR ANDERSON posed a situation:

> Let's suppose that the attorney general refuses to indemnify an employee and then the employee challenges the AG's determination in the court system, and the court favors, ultimately, the employee. What's the cost of litigating these issues, including the state's obligation to indemnify an employee who is then denied the representation?

MR. GASPER responded:

> The employee, of course, has to find an attorney who will represent the litigants in these seemingly hopeless situations where they have been accused of some level of conduct that did not justify indemnifications. That's the first hurdle.
>
> The second is that, most likely, they've suffered some type of economic calamity - lost their job or whatever - and are not able to underwrite the cost of potential litigation. Since we're dealing in situations that

... may be remote, but we want to completely change the law in the State of Alaska to reflect something that might happen someday, if we're going to speculate about this, the cost of getting independent, private litigation is going to be significant compared with the cost of being represented by the attorney general's office.

In that particular situation that you mentioned in Anchorage, the typical insurance-litigation attorney charges between $175 and $325 an hour. This individual is going to proceed against the state and, if successful, be entitled to an award of attorney fees against the state for having that issue resolved against the state.

In fact, the state has a provision in here that they may reserve rights against the employee. This appears at [Sec.] 09.50.257. So basically what they're doing is telling you, "We'll defend you, but we want to protect ourselves." So they created this dual status. Under Alaska case law, in insurance defense law, when an insurance company tells a covered individual that we're going to accept your tender of defense but we're going to reserve these rights against you, the employee doesn't have to accept the attorney that's provided by the insurance company. They can go out and get somebody else, and then the insurance company is obligated to pay that individual.

Is it the AG's intent that if they reserve rights against somebody in this situation, ... the individual is going to select outside counsel to do the representation and the AG's office is going to fund that? In that sense, this statute raises a significant question that's going to provoke some level of judicial interpretation, and that question is not answered.

Number 2017

CHAIR ANDERSON said it seemed less expensive to have an assistant AG represent the employee than to hire a private attorney.

MR. GASPER noted that state attorneys general are paid as state employees, and thus there are substantial savings.

Number 1930

REPRESENTATIVE ROKEBERG asked Mr. Gasper to repeat the citation he had referred to earlier and to tell the committee if it was different from the current status.

MR. GASPER stated it to be [Sec.] 09.50.257. He said he didn't know what the present practice is. In his union contract, he said, typically a member would advise the AG. He explained:

> The departments that our members work under have procedures that govern these practices. You will have a certain period of time to notify us and let us know. They do not cover this particular instance here. But what this does is, it gives them the right to decide, if we have a reservation, we may provide a legal defense. But the term "may" is discretionary. They may not. Then the individual is going to be right where they started. It is typical that people who accept (indisc.) defense raise reservations. I'm not aware that any members have had to defend themselves if the attorney general's office creates a reservation that needs to be addressed by individuals.

Number 1856

REPRESENTATIVE ROKEBERG asked:

> Isn't that permissive word there because many times there are issues whether or not, inside or outside the scope of work, and the attorney general, by default, would take the case and in the trial of fact ... that would come out. The case itself would determine ultimately, in the judgment of the court, to where the facts and the judgment of the court might militate towards a - I'm trying to find what the proper term for that would be - to be based on the reservation of rights. You're suggesting that's not included in your contract currently.

MR. GASPER replied:

> That is not presently included in our contract because the term "indemnification" is broadly drawn, so it would have a greater scope in trying to detail it. If you were going to draft a clause that was as extensive

as this statute, it would be a significant negotiating challenge.

Number 1815

REPRESENTATIVE ROKEBERG asked if the current status of civil rights actions is that the cause of action would be directed towards the individual under federal statute and the constitutional claim.

MR. GASPER replied, "That is the status. And typically, however, our members, when they successfully defend themselves in these actions, expect to be reimbursed, since their actions would come within the scope of their regular employment."

REPRESENTATIVE ROKEBERG asked if their contract called for the AG to make the primary defense. If that didn't happen, would the membership make the primary defense and then seek indemnification from the state?

MR. GASPER said the contract didn't call for the AG to make the primary defense. He continued:

> I can tell you that we had a trooper that was accused of excessive force, and he retained an attorney to defend him. He was not ultimately sued by the person who complained, because they raised the complaint through the [U.S.] Department of Justice, which commissioned the FBI [Federal Bureau of Investigation] to investigate. He did need representation. The position of the state was, "We can't provide you with legal representation at this phase." So he would have to take that up on his own. When he successfully defeated the claim and the investigation resulted in no further prosecution by the U.S. Attorney's office, he was reimbursed for his cost of defense.

Number 1743

REPRESENTATIVE ROKEBERG asked if this example is similar to the status quo, and if this proposed statutory change would affect that particular area of contracts. He asked Mr. Gasper if, under this statute, the state would be obligated to reimburse an employee for the defense.

MR. GASPER replied:

I would have to speculate about the motives of the state in excluding that from the realm of indemnified conduct, but there is not even the supposition that the employee would be successful in defending themselves. Under our collective bargaining agreement the state has provided coverage.

Number 1707

REPRESENTATIVE ROKEBERG stated:

You indicated the case at bar right now is one that this bill would affect how you believe the current status is of arbitration. I don't understand those regulations and rules. Is that because of Judge Reese's decision or because of the current contract that you made that statement, that would change the current status quo?

MR. GASPER responded:

There is currently case law from the Alaska Supreme Court saying that because the Public Employment Relations Act has mandatory grievance arbitration in every collective bargaining agreement, ... possibly anything within a contract has to go through the grievance arbitration process if there's a dispute. The language in the correctional officers' bargaining agreement that is the subject of this challenge was borrowed from the General Government Unit collective bargaining agreement; at the time, the correctional officers left the General Government Unit and became part of PSEA. In the interim, there was acceptance of what had been the standing General Government Unit agreement.

We had several members who were sued by individuals who claimed that they engaged in certain conduct, and there was a determination by the attorney general's office that they were involved in misconduct that disqualified them. We wanted to challenge those determinations, saying they were punitive. The state refused to proceed to arbitration. What we did was, we presented the issue to the Alaska Labor Relations Agency.

Number 1672

> The Alaska Labor Relations Agency made two findings. The first was that under federal private-sector labor law, and those states that have collective bargaining who have addressed the issue, indemnification is a mandatory subject of bargaining. However, the agency said there was no opportunity or obligation on the part of PSEA to insist that this piece of the contract and disputes over that piece of the contract go through grievance arbitration.
>
> We appealed that decision to the superior court. Judge Reese ruled, "Well, you have this previous decision of the supreme court saying that, as a matter of public policy, contracts have to have a grievance arbitration provision. So if they do, then, if it's in the contract, it has to be subject to that procedure. Now, if that issue is decided by the supreme court -- and I can tell you that the supreme court's case-management page says there is a draft circulating on this appeal, meaning there's an opinion due to come out.

Number 1591

REPRESENTATIVE ROKEBERG asked if his position was that it was a case of second review or second impression and therefore he was "served against the law." He also asked the timeframe of this case.

MR. GASPER replied that was correct and said:

> We are trying to apply existing precedent to this particular practice, saying that the contract can't exclude indemnification decisions from the grievance-arbitration process. The agency decided the case in 2001. Judge Reese decided the case in 2002. The supreme court had oral argument last May on this issue.

Number 1552

JOE D'AMICO, Business Manager, Public Safety Employees Association, testified that he was also a retired Alaska State Trooper, having served twenty years with the troopers and then two years with the U.S. Marshals. He said the troopers were very concerned about the proposed fundamental change in that

state troopers are currently indemnified. He had been sued as a state trooper, he noted, and said the current system worked quite well, in his experience.

MR. D'AMICO reviewed the current process, saying he thought the troopers, when notified of a lawsuit, had a period of 10 days to notify the AG's office of that suit. At that time, the AG steps in to defend, since the contract requires that the state indemnify the AG unless a court decides that the trooper acted outside the scope of his or her duties. The third-party court is the entity that decides whether or not this trooper did the wrong thing or didn't operate correctly.

MR. D'AMICO pointed out that the proposed system removes that level of third-party neutrality to other state employees. He said the problem with this bill, from the law-enforcement standpoint, is that most decisions made by troopers and other law enforcement officers that result in litigation happen in the blink of an eye. For example, he was shot at a few years ago and had to decide instantly whether to shoot back; he didn't shoot, he noted, which was the right decision because there was a hostage involved whom he was unaware of.

MR. D'AMICO pointed out that under this bill, however, the decision of whether his conduct was just would be made by someone who gets to sit in an office and refer to law books. He said, "It's just not right. We have a system. The system works. It's not broken with regard to the troopers or airport police. It is broken with regard to correctional officers."

Number 1455

MR. D'AMICO informed the committee that when the correctional officers came into the PSEA, the language in their contract that was written by the General Government Union came with them. This language, he believed, was inadequate to protect them, since correctional officers work with very litigious people who have a lot of time on their hands. Inmates bring many lawsuits against the state and state employees, many of which he believed were unjust. He cited examples where the state had chosen not to indemnify an employee and said:

> This new bill may work well for employees who aren't faced with life-and-death decisions in the blink of an eye or working with people who have nothing but time on their hands and want to sue the state. I can't speak for those. But I can tell you, from the law

enforcement standpoint, this bill is bad public policy. It scares the death out of state troopers and the other employees I represent.

We have a 20-year contract with the troopers, and we have a system that works quite well. To go backwards on that now is robbing these employees. There's not enough troopers out there already. It puts a big fear over their head. They're not distracted now because the state indemnifies them. They're going to be distracted because they don't know if the state's going to indemnify them. And it's no longer going to be up to a judge; it's going to be up to someone who isn't a neutral third party. That's what we believe is the problem with this bill.

REPRESENTATIVE DAHLSTROM thanked Mr. D'Amico for his years of service to the State of Alaska.

Number 1314

MS. VOIGTLANDER responded to previous testimony, stating her understanding that the current contract allows defense with "reservational" rights. She said the AG oftentimes defends with a reservation of rights and that this is included in the PSEA contract under Article 29, subsection (e). Generally, a letter is sent to the state employees being sued, saying the state will defend and indemnify the employee with the reservation of punitive damages, because in the contract the state doesn't cover punitive damages. She said this bill doesn't change the way the state defends employees in terms of reservation of rights.

MS. VOIGTLANDER said she believed the case where a trooper paid his costs of defense involved a federal criminal investigation, and the state doesn't defend individuals for criminal investigations. Under this particular agreement, if there is a criminal investigation and the trooper is absolved of misconduct, then he or she can come back and ask for defense. But the state, which is oftentimes the prosecutor of actions, cannot prosecute with one hand and defend a state trooper who is alleged to have committed a criminal act with the other. She said the contract is different from other collective bargaining agreements that allow defendants who are found to not have committed the criminal conduct to ask for reimbursement for defense costs in the action.

MS. VOIGTLANDER said she routinely defends state employees when they are sued for civil rights actions. In this bill, the AG can certify that an employee was within the course and scope, and can convert the suit to a claim against the state for the reason that the state cannot be sued for a violation of federal constitutional rights, since the state is not a person under that law. If civil rights actions were included in this bill, it would create a "dead end" for that plaintiff.

Number 1130

REPRESENTATIVE ROKEBERG said Ms. Voigtlander had previously testified that the right to defend was already in the contract and that the state is currently defending in those cases.

MS. VOIGTLANDER reiterated that the state is defending, but this bill could not convert a civil rights claim against an individual into a claim against the state because, under federal law, the state is not a person who is subject to a civil rights claim for damages.

REPRESENTATIVE ROKEBERG asked if this bill excludes PSEA from negotiating with the administration to have an exception for that particular ability to defend. He suggested that many times the civil rights statutes are used as a tool to try to attack law enforcement people.

MS. VOIGTLANDER responded that the state defends troopers when they are sued in their own names for those actions, and would continue to defend them when they're sued. The first part of the bill speaks to this conversion whereby a claim against a state employee is converted into a claim against the state. The second part talks about when that mechanism is not available, for example, in a civil rights case; it says the state will defend and indemnify an employee who is individually sued, as long as it's within the scope of employment. Directing attention to page 3, line 13, Sec. 09.50.254, she said this would be the operative provision for a state employee who is individually sued for violation of federal constitutional right under 42 U.S.C. Sec. 1983.

Number 1026

REPRESENTATIVE GUTTENBERG cited an example of a trooper doing what his supervisor says and following procedures, but something happens to someone who then sues, saying his civil and constitutional rights were violated. Representative Guttenberg

offered his understanding that the trooper wouldn't be indemnified under this bill.

MS. VOIGTLANDER replied that the state would indemnify unless it didn't provide state-paid defense, and except for punitive damages. If the finding stated the employee did violate constitutional rights, but the facts showed he didn't act, there would actually be no violation because in order to violate someone's civil rights, clearly established law must be violated. If the officer didn't violate clearly established law, he has a qualified-immunity defense to the constitutional rights violation and cannot be held liable for a constitutional rights violation. A constitutional rights violation always requires something more than negligence, she pointed out.

Number 0827

CHAIR ANDERSON assigned a subcommittee chaired by Representative Dahlstrom, with Representatives Guttenberg, Crawford, and Rokeberg as the other members. He requested that they assess the indemnification aspect of the bill.

REPRESENTATIVE ROKEBERG suggested the Department [of Law] should be involved because of the different approaches, the exceptions for law enforcement officers, and the issue of civil rights. [HB 488 was held over.]

HB 517-SECURITY ACCOUNT BENEFICIARY DESIGNATION

CHAIR ANDERSON announced that the final order of business would be HOUSE BILL NO. 517, "An Act relating to registration in beneficiary form of certain security accounts, including certain reinvestment, investment management, and custody accounts."

[Chair Anderson turned the gavel over to Vice Chair Gatto.]

Number 0725

JOSH APPLEBEE, Staff to Representative Tom Anderson, Alaska State Legislature, speaking as the committee aide, introduced HB 517, which was sponsored by the House Labor and Commerce Standing Committee. He said HB 517 will permit an investment management or custody account with a trust company or a trust division of a bank with trust powers to have a beneficiary designation take effect upon death of the owner. Under current law, securities and brokerage accounts may have beneficiary

designations take effect upon the death of the owner pursuant to the Uniform Transfer on Death Security Registration Act.

MR. APPLEBEE explained that the current definition of "security account" in the uniform Act isn't broad enough to include investment management or custody accounts, which are generally used by trust departments. The legislation will allow all of these products - and thus bank customers - to avoid probate by providing a statutory authorization to use a beneficiary designation. It will also put bank trust departments on an equal footing with brokerage firms. Mr. Applebee said the problem cannot be solved other than by statute. Several states, including California, Idaho, Iowa, Minnesota, and Washington, have enacted similar legislation in the last three years.

Number 0584

LORIE HOVANEC, Senior Trust Administrator, Wells Fargo Bank, Anchorage, noting that she is an attorney, reinforced Mr. Applebee's explanation. She said under current law whereby securities and brokerage accounts may have beneficiary designations that take effect upon the death of the account's owner, the assets of the account pass automatically to designated beneficiaries upon the death of the owner without having to go through probate. The definition of security accounts in this transfer-on-death statute wasn't broad enough to include investment management for custody accounts, products generally offered by bank trust departments. Alaska's transfer-on-death statute is similar to that in other states. It was initially drafted as a uniform state law and subsequently was adopted in most states.

MS. HOVANEC said custody and investment management accounts are similar to brokerage accounts except they are accounts at banks or trust companies, not at brokerages. These accounts may contain stocks and bonds, just like brokerage accounts. A custody account is customer-directed: the bank or trust company holds or "custodies" assets and then the customer manages and directs the investment by picking the stocks, bonds, and other assets. In contrast, in an investment management account the bank or trust company manages the assets.

Number 0410

MS. HOVANEC provided her understanding that when the model transfer-on-death statute was drafted and adopted in Alaska, the drafters were focused on accounts offered by brokerages, since

it was generally assumed that bank accounts would fall under another statute. She said HB 517 would simply make it possible to meet customer expectations. The proposal would benefit customers directly by avoiding probate in the same way that other pay-on-death and transfer-on-death accounts may avoid probate through use of these beneficiary forms. She said she didn't think this change was controversial, and said in other states in which this law had been enacted there haven't been any problems with customers, to her knowledge.

VICE CHAIR GATTO asked if the probate process is difficult in Alaska.

MS. HOVANEC replied that probate "isn't too bad" in Alaska. She said Alaska adopted the Uniform Probate Code, which helped the process. In response to a question from Representative Lynn, she said the avoidance of probate is the main reason she supports this bill.

REPRESENTATIVE ROKEBERG said sometimes trusts provide ongoing income on a periodic basis to recipients of the trust. He asked if this bill would help prevent interrupting the cash flow from these trusts. He gave the example of a child as a sole survivor after the death of his only parent and asked if the transfer by avoiding probate would be faster.

MS. HOVANEC affirmed that.

REPRESENTATIVE ROKEBERG asked if this bill would only affect those security accounts within the trust situation or affects checking accounts or other types of accounts.

MS. HOVANEC replied, "The language in the amendment specified investment management account or custody accounts, which are with the trust division of a bank with trust powers."

TAPE 04-23, SIDE A
Number 0010

REPRESENTATIVE DAHLSTROM moved to report HB 517 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 517 was reported from the House Labor and Commerce Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 4:57 p.m.