

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 25, 2003

1:10 p.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 8

"An Act relating to tampering with public records."

HEARD AND HELD

SENATE BILL NO. 55

"An Act relating to tampering with public records."

HEARD AND HELD

SENATE BILL NO. 161

"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 SB 161 OUT OF COMMITTEE

SENATE BILL NO. 171

"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

SENATE BILL NO. 98

"An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

MOVED CSSB 98(TRA) OUT OF COMMITTEE

PREVIOUS ACTION

SB 8 - See HESS minutes dated 3/5/03, 3/10/03 and 3/24/03.
SB 55 - See HESS minutes dated 3/5/03, 3/10/03 and 3/24/03.
SB 161 - No previous action to record.
SB 171 - No previous action to record.
SB 98 - See Transportation minutes dated 4/8/03 and Judiciary
minutes dated 4/23/03

WITNESS REGISTER

Ms. Karen McCarthy
Staff to Senator Bunde
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 98

Mr. Richard Benavidas
Staff to Senator Davis
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Commented on SB 8

Senator Fred Dyson
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SB 55

Mr. Ed Sniffen, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on SB 161

Ms. Gail Voigtlander, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on SB 171

Commissioner Bill Tandeske
Department of Public Safety
PO Box 111200
Juneau, AK 99811-1200
POSITION STATEMENT: Commented on SB 171

Mr. Jeff Jahnke, State Forester
Division of Forestry
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724
POSITION STATEMENT: Supported SB 171

ACTION NARRATIVE

TAPE 03-30, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 1:10 p.m. Senators Ogan, French and Chair Seekins were present. Senator Therriault arrived as the meeting was in progress.

SB 98-LIABILITY: PLANE AND BOAT PASSENGERS

CHAIR RALPH SEEKINS announced SB 98 to be up for consideration. He noted that Section 2 deals with the definition of commercial purposes and asked if that means not for hire.

MS. KAREN MCCARTHY, staff to Senator Bunde, sponsor, replied yes, given federal strictures with regard to the cost of flights and non-commercial boat owners.

CHAIR SEEKINS asked if there is a definition in statute anywhere of commercial purposes or are they relying on the FAA.

MS. MCCARTHY replied that she didn't know if there is any other definition in statute.

SENATOR OGAN said page 2, line 30 of the bill says,

The owner of the watercraft is liable for injury or damage caused by negligent operation of the owner's watercraft where the negligence consists of violation of state statute or neglecting to observe ordinary care.

He was concerned that someone could argue that bootlegging was a commercial purpose and, therefore, is not illegal.

SENATOR FRENCH responded that that would be either gross negligence or reckless or intentional misconduct under section 9.65.112(b)(1)(a).

CHAIR SEEKINS said he didn't think it was the intent of the sponsor to allow wrong doers to be covered by limitations of liability.

1:15 - 1:16 p.m. - at ease

SENATOR OGAN moved CSSB 98(TRA), version \H, from committee with individual recommendations. There was no objection and it was so ordered.

SB 8-TAMPERING WITH PUBLIC RECORDS

CHAIR SEEKINS announced SB 8 to be up for consideration.

MR. RICHARD BENAVIDAS, staff to Senator Davis, sponsor, said that tampering with records involving a child under the age of 18 in the care of the state can be very grave. Accurate record keeping is important in light of the case of a five-year-old Miami girl who disappeared while in the care of the State of Florida. SB 8 is designed as a disincentive for those who would falsify those kinds of records.

SENATOR OGAN asked whom they are targeting with this bill.

SENATOR DAVIS replied that the case in Florida raised the awareness of this issue, but tampering with records has always been around. She worked in the Department of Health and Social Services as a social worker and a nurse for 17 years and has seen times recordings were not being made because of heavy case loads. After a long time, you forget some things that need to go in the records. It's not always intentional when people tamper with records. In Alaska, there is no recourse and this bill makes it a felony to do that.

SENATOR OGAN said he doesn't want to snare people who weren't culpable.

SENATOR FRENCH said that AS 56.820 says you have to knowingly make a false entry or alter a public record. This bill adds, "who are in the care of the state" to children under 18 - foster children, etc.

SENATOR DAVIS explained that she was targeting all children that fall under Title 47.

CHAIR SEEKINS said he thought the first section means that there had to be an intent to benefit from the alteration or for a child under the age of 18, etc.

SENATOR THERRIAULT arrived at 1:22 p.m.

MR. BENAVIDAS responded why should someone get the same treatment for falsifying a child's record and possibly causing harm, as someone that put down that he graduated from a university when he didn't.

SENATOR OGAN said he didn't know how a child could be harmed by tampering with records and wondered if there should be a felony charge if a kid doesn't get hurt.

SENATOR DAVIS responded that a child does not have to be physically harmed in order to be hurt. If a caseworker says they have visited a home and that the child is fine and they actually never went to the home, things might not be going well. "A kid could very well come up dead.... We have from time to time [heard] where children have died in foster care or in other treatment homes...."

She informed them that the Office of Children's Services is under scrutiny because they haven't been able to pass the federal audit. "I think sometimes other things need to happen other than just a reprimand or saying you can't do that."

SENATOR OGAN agreed with her that some situations are very dangerous and that there is a high burnout rate for workers. However, if you're not a very good record keeper, and something bad happens to the kid and you're accused of something, "It's just additional pressure on that group of professionals... to all of a sudden be a felon."

He asked if that might be a deterrent to getting and keeping good people, because they don't want to be liable for criminal activity if they make a mistake.

SENATOR DAVIS replied that she didn't think it would be and filing of information is not the problem. "We're talking about falsifying records, not poor filing."

SENATOR ELLIS arrived at 1:26 p.m.

SENATOR ELLIS asked if a child at school is considered to be in the care and custody of the state.

SENATOR DAVIS replied no, it doesn't have anything to do with keeping school records.

SENATOR FRENCH asked if this could be applied to a foster parent who is not the person who is charged by law to gather information.

SENATOR DAVIS replied that there are already laws on the books that would cover foster parents who were falsifying pay vouchers or whatever.

SENATOR THERRIAULT said he feels there was a better way to draft AS 8.15(a)(1) and (2).

SENATOR DAVIS responded that she asked the drafter if there was some other way to do it, but he felt it was the best way. She offered to let the Department of Law look at it.

SENATOR FRENCH asked if she heard any rumors to the effect that this is currently a problem here in the state.

SENATOR DAVIS replied she has heard some horror stories and emphasized, "There are cases where this is needed."

1:39 - 1:40 p.m. - at ease

CHAIR SEEKINS noted that both SB 8 and SB 55 amend the same section of statute and said that they would take up Senator Dyson's bill. He said they would hold SB 8.

SB 55-TAMPERING WITH PUBLIC RECORDS

CHAIR SEEKINS announced SB 55 to be up for consideration.

SENATOR DYSON, sponsor of SB 55, said that he and Senator Davis often think along the same lines. His bill doesn't limit the same issues to just children. He thought deliberately falsifying records of adults could be a real problem, as well. Instances of rape are of particular concern to him. He reported that 35 percent to 40 percent of the rapes that go on in North America happen in prisons and are same sex. However, Alaska's Department of Corrections has had very little of that. "If that's true, that's something we can be really proud of. I can tell you in other jurisdictions it's a horrendous problem..."

He wants to make sure that if we have a less enlightened Department of Corrections, the message is clear that falsifying records and protecting the administration and bureaucracy from having to deal with being irresponsible is a problem.

He also has received calls from adult children of parents who are in a care facility for one reason or another and are really concerned about how their parents are being treated. "Some of it's ugly. I want it clear with those vulnerable adults that somebody that's covering up the abuse of those adults is also subject to the penalties."

The difference between his bill and Senator Davis' is that SB 55 allows for the state to go after people who knowingly and deliberately change the records to cover up or protect abusing adults. Language on line 9 makes it clear that it's with the intent to conceal a fact material to an investigation or the provision of services.

CHAIR SEEKINS said that SB 55 deals with children's proceedings, delinquent minors, child protection or protection of vulnerable adults.

SENATOR ELLIS asked him to elaborate on how organized crime could be involved and if there is some suspicion that it is involved in the Alaska Child Protection System.

SENATOR DYSON replied that he doesn't know of anyone who is allowing organized crime to go on involving vulnerable adults or children, but he said his first foster son was prostituted to Asian flight crews at the Captain Cook and the Westwood where a significant ring of that was going on. A small town in Southeast also had a large ring of pedophiles that were providing young children to tour ship people. He said that was organized crime and it was with the permission of the parents and there was a distinct monetary advantage to the parents. He has no knowledge that any state officials knew of it or were covering it up.

1:50 - 1:54 p.m. - at ease

CHAIR SEEKINS said he wanted to roll SB 55 into SB 8 and to have Senator French, who was concerned that a child wouldn't be committing a felony if they falsified their age on their driver's license, work together with the sponsors on a single vehicle.

CHAIR SEEKINS held SB 55 in committee.

SB 161-MONOPOLY AND RESTRAINT OF TRADE ACTIONS

CHAIR SEEKINS announced SB 161 to be up for consideration.

MR. ED SNIFFEN, Assistant Attorney General, said that SB 161 amends the existing anti-trust laws that give the attorney general the right to recover indirect damages on behalf of consumers who otherwise do not have such a remedy.

Under current federal and state anti-trust law, if there is a conspiracy between two suppliers of a product, that results in that product's price being overly inflated and that price is passed on to an importer, and maybe a distributor and finally to us as the consumer. The consumer right now has no right of action to sue the upstream violator. That rule of law was laid out in a 1977 U.S. Supreme Court case called Illinois Brick Company v. State of Illinois. The court thought it would be very difficult to determine how much profit was actually passed on and it would be cumbersome to litigate. Only the importer could sue, because they were the ones that purchased the product directly from the anti-trust violators.

In that same case, the Supreme Court said states were free to enact their own anti-trust laws to provide for this remedy and 30 states have already done that. Alaska hasn't and that's what SB 161 does.

He said that these are not just theoretical things that are happening; they are happening within the state and have cost us a lot of money.

We are involved in multi-state litigation all the time along with other states to sue large manufacturers of products, pharmaceutical products, contact lenses, and a variety of different consumer products.

In one case two years ago called the Vitamins Case, there were two vitamin manufacturers who conspired with each other to keep the price of vitamins high. We joined in with 30 other states in that suit and we reached a settlement with the vitamin companies along with the other states. States who had these Illinois Brick repealer statutes got \$1 million a piece in the settlement. States who did not have the statute got zero. We argued with the settlement committee in that case that we had other laws that would entitle us to

recovery and we in fact were able to get \$100,000 that we distributed to relevant organizations. But, had we had a law like this in place, we would have seen a much larger recovery. We're involved in several cases now that involve these same kinds of claims.

SENATOR THERRIAULT asked for examples of other cases.

MR. SNIFFEN responded that two others come to him immediately. One involves a conspiracy among a bunch of contact lens manufacturers to artificially keep the price high. Another one is the Nine West case that involved the sales of women's shoes that resulted in a lot of money going to the states with Illinois Brick repealer statutes and less money going to the states without it. He just resolved a case recently involving compact music discs where a lot of distributors and manufacturers of music set minimum prices on CDs. They did not present claims on behalf of injured consumers in that case, because they didn't have this kind of statute. Currently, there are three other pharmaceutical cases involving conspiracies up a chain to artificially inflate the price of certain prescription drugs. Another case they decided not to get involved in because they didn't have this law involves sorbates, which are preservatives that are used in all kinds of foods. "As a whole, we could make big claims on behalf of consumers to recover those types of damages."

TAPE 03-30, SIDE B

2:01 p.m.

SENATOR OGAN wanted to know how our state laws would reach across oceans to reach suppliers like OPEC that conspires to set oil prices.

MR. SNIFFEN replied that is a good question, but in most cases, the issues don't involve foreign suppliers. Under state law, ordinary consumers don't have the right to challenge the price of gas, for example, if the conspiracy to keep the price of gas high occurred upstream. However, it's not unheard of for some states to get together and bring causative action against foreign suppliers of materials.

SENATOR OGAN asked how they reach foreign countries.

MR. SNIFFEN replied:

There is a way states can reach international boundaries through a lot of mechanisms.... We can extend our jurisdiction to companies who have a presence in Alaska and are doing business here. There are international rules that allow us to do that.

He said it probably wouldn't happen very often in Alaska unless we join with other states that are considering doing the same thing, but it can be done.

CHAIR SEEKINS asked if having subsidiaries in the U.S. makes that possible.

MR. SNIFFEN answered that is correct.

SENATOR THERRIAULT said he doesn't think it would work with OPEC because they conspire to manipulate supply to influence price; they don't set the price.

CHAIR SEEKINS wanted to clarify that the retailer bears no responsibility in this law, just the persons who are involved in the conspiracy.

MR. SNIFFEN replied that is correct. The retailer is just passing prices on.

SENATOR THERRIAULT asked why language on page 2 would be deleted.

MR. SNIFFEN replied that is a good question and there is a second portion to the bill that removes from the current anti-trust that you have to find conduct on behalf of an anti-trust violator is willful before you can recover treble damages. Right now, a federal law does not have that requirement and you can recover three times your damages; state law has a much higher standard.

SENATOR THERRIAULT asked how they would go about proving a conspiracy that is not willful.

MR. SNIFFEN replied conspiracy is almost always willful, but there are also times when you can violate the anti-trust law negligently and recklessly, like in the current Bristol Bay case.

SENATOR THERRIAULT noted that the bill would not drop the finding down to knowingly, it would just drop the willingly.

MR. SNIFFEN responded that would bring this law in line with how federal anti-trust laws are structured.

SENATOR OGAN asked how this law would change the way the Bristol Bay case is litigated.

MR. SNIFFEN said if this law had been in place, it probably wouldn't have changed a thing. In that case, all the fishermen had direct damages; they purchased or sold fish directly to the processors and there wasn't an intermediary that prevented them from bringing their claims.

SENATOR OGAN asked if this would allow the attorney general to bring a case against a retailer.

MR. SNIFFEN replied the retailer that is passing on the inflated price from upstream anti-trust behavior would not be affected. In this instance, the attorney general might represent the thousands of consumers who might have bought that product at \$10 when it should have been \$5.

SENATOR THERRIault commented the fiscal note doesn't indicate how much this will cost the state.

MR. SNIFFEN explained that the fiscal note is indeterminate, because the department doesn't know how much revenue the bill will generate. "It's unlikely to cost the state any money; it's more likely to increase revenue, because we're involved in these cases anyway..."

SENATOR THERRIault motioned to pass SB 161 from committee with individual recommendations and attached indeterminate fiscal note. There was no objection and it was so ordered.

SB 171-SUITS & CLAIMS: MILITARY/FIRE/DEFENSE

CHAIR SEEKINS announced SB 171 to be up for consideration.

MS. GAIL VOIGTLANDER, Assistant Attorney General, said this bill covers four areas of governmental emergency operations. The first area is search and rescue. The Alaska State Troopers conduct about 400 of them each year and they decide when and how to initiate a search or rescue and often call on the National Guard and community resources to assist. This bill would provide immunity from tort lawsuits for state and local government and

their employees when they participate in the rescue activities (Section 2).

The next topic is about intra-military court claims in response to an Alaska Supreme Court case, *Himsel v. State* 2001. In that case the court departed from the generally held intra-military tort immunity known as the "Feres Doctrine" that provides that if you are a member of a military service, you cannot sue other members of the military service for torts if you are injured. As an employee, your remedies are: if you are acting under federal orders, getting federal workers' compensation and other benefits and, if you are under state orders, getting the state's workers' compensation benefits.

Most military operations in Alaska are with people carrying out federal orders. This says you cannot sue in addition to workers' compensation remedies; it does not change your entitlement to those benefits nor does it change the amount of benefits (Sections 4 -6).

Section 3 provides that tort claims are barred against the state for acts of the organized militia (the Alaska National Guard and the state militia) unless the governor calls them out under Title 26.050.70.

The third topic of the bill is civil defense and homeland security. Civil defense is already provided for in Title 26. Since the events of 9-11, the civil defense roll has expanded into homeland security issues, as well. The federal government has expanded and thrown back to the state governments more activity in this area than they used to have. This portion of the bill seeks to continue an immunity that is already in statute for civil defense activities and extend it to the homeland security area. It bars tort claims against government employees and authorizes volunteers if a homeland security worker sustains damages. It does not affect entitlement to the extent of homeland security benefits.

The second portion of that area is that it bars third party tort claims against government employees and authorized volunteers for damages unless the person who is injured can demonstrate malice or reckless indifference by clear and convincing evidence. In existing Title 26 there is an exception that has to do with one area where immunity is not extended. This bill tracks that in terms of incorporating exclusion where third party claims can be asserted in the area of civil defense and homeland security (sections 7-11).

Finally, the fourth topic is that of fire management and firefighting activities. Two statutory sections are amended to bar tort claims by third parties against state, local government or other firefighting groups and their employees. This is in response to two Alaska Supreme Court cases that were decided in 2001, Angaboognuk and Bartek cases, which arose out of the Miller's Reach Fire. The court diverged from ninth circuit precedent for other western states that provide immunity for firefighting activities either through common law or through specific statutes. This portion of the bill would have Alaska in keeping with the other western states that have wild land fire exposure. After-the-fact litigation is costly to the state to defend and costly to the state's resources to have people review every step that is taken and decision that is made during an emergency operation. This bill would immunize the state and local government employees that participate in emergency activities (sections 12-13).

SENATOR THERRIAULT asked if Section 9 relates to giving vaccinations.

MS. VOIGTLANDER said yes, adding there are a number of federal benefits that would provide remedies to people if they receive vaccinations because of homeland security concerns.

SENATOR OGAN asked if there is a case law record of precedents that the court deviated from.

MS. VOIGTLANDER replied there are ninth circuit cases that affected fires out of Oregon, California and Wyoming that immunized those activities. There are state statutes or case law in the jurisdictions of California, Kansas, Oklahoma, Montana, Idaho, Delaware, Florida, Indiana, New York and Kentucky.

SENATOR OGAN asked if the Alaska Supreme Court is supposed to interpret based on Alaska's constitution and statutes. He asked if there are any cases in Alaska that have been ruled as having sovereign immunity and that precedence was departed from.

MS. VOIGTLANDER replied there simply has not been that type of litigation in the state until the Miller's Reach fire. It's possible that people were under the impression that there could not be such a claim made against the state for fire fighting activity. In the Agnaboognuk case the Alaska Supreme Court addressed that and simply looked at the existing statute, AS

9.50.250, on waiver of immunity and said they didn't see it in that statute.

This bill would put into statute that the state had not waived its immunity for those types of claims and so the case law would then be overruled by the statute as an annunciation of a public policy in the state of Alaska.

SENATOR FRENCH asked if the TSA employees who work at the airport are considered state homeland security workers.

MS. VOIGTLANDER said she understands that all TSA employees are employed through the Federal Homeland Security Office.

COMMISSIONER BILL TANDESKE, Department of Public Safety, said he thinks it is appropriate that his department is responsible for search and rescue, but there are a lot of variables involved in an effort in a state this size. They have an obligation to those folks for their safety.

I think it's important that we make search and rescue decisions based on sound search principles and doing the right thing for the right reasons.... One of the guiding principles of any law enforcement operation is don't let a bad situation get worse. If you're missing one, don't end up missing three.

COMMISSIONER TANDESKE said there are a lot of notices of snow mobilers over due and volunteers find the vast majority of them. He questioned the validity of the families that lost loved ones using litigation as a way to find answers about why the system didn't work.

SENATOR OGAN asked how many planes are listed as missing in Alaska.

COMMISSIONER TANDESKE replied that he didn't know for sure.

SENATOR OGAN said he had heard around 40 to 50. He asked if they are in any litigation now over search and rescue issues.

COMMISSIONER TANDESKE replied that he didn't know, since he had been with the department just three months.

MS. VOIGTLANDER informed members that the Denali Highway case is on appeal to the supreme court.

SENATOR OGAN asked if there had been some disciplinary action associated with that case. He asked what assurances Alaskans have that these things will be taken care of if they are held harmless in such situations.

COMMISSIONER TANDESKE clarified that he was aware of the appeal on the Denali case; he thought the question pertained to new litigation. Without getting into specifics, he said that there was disciplinary action in that case and he would hold his employees accountable just as they are in any situation.

CHAIR SEEKINS asked how this bill would have affected the Olrum case specifically.

COMMISSIONER TANDESKE replied there is a fair amount of misinformation about that case and he isn't sure how to answer since he is not an attorney.

CHAIR SEEKINS recalled that temperatures were around -50 degrees when that happened.

COMMISSIONER TANDESKE replied that is correct.

CHAIR SEEKINS asked if the troopers would normally send out the snow machines to find someone at -50 temperatures.

COMMISSIONER TANDESKE said not necessarily on a snow machine, but they would take all circumstances into account before making a decision.

2:45 p.m.

CHAIR SEEKINS asked if this bill would hold him harmless when he makes a judgment call about a search or rescue.

COMMISSIONER TANDESKE replied he would have to refer to a legal mind to answer that question, but this bill does not change the statutory responsibility for search and rescue within his department.

CHAIR SEEKINS asked if it would insulate the department somewhat from acts or omissions.

MS. VOIGTLANDER responded that this would immunize the actions arising out of the search and rescue. "It would mean that there

could not be a civil law suit for damages, a tort liability claim."

She explained that the proposed amendment cleans up language in the civil and homeland defense sections.

SENATOR FRENCH said he reads the bill as being an absolute bar to any claim that arises out of the troopers handling a search and rescue.

TAPE 03-31, SIDE A

2:48 p.m.

SENATOR FRENCH said it's possible to imagine a situation where there is just outright negligence.

COMMISSIONER TANDESKE said he would have to defer to legal minds.

SENATOR OGAN asked how many cases there are for fire fighting.

MS. VOIGTLANDER replied the Miller's Reach fire was consolidated into one class action case and there is one other claim and one other lawsuit. She didn't know of a dollar value for either one of them. She is hesitant to comment on Miller's Reach because it is in trial right now.

CHAIR SEEKINS asked if this statute would act as a bar to protect the state from these types of actions in the fire fighting area.

MS. VOIGTLANDER replied yes, but she noted that this legislation is not retroactive.

MR. JEFF JAHNKE, State Forester, said that there are about 150 million acres to protect and they get between 500 and 600 forest fires per year. Their success depends on a safe and effective initial attack to prevent small fires from becoming big fires. SB 171 would provide immunity for firefighters fighting wild land fires. This is important for two major reasons. One, it would allow the firefighters to focus on safe and effective firefighting rather than having to weigh the potential for a lawsuit in every decision they make during their initial attack. Second, it would reassure the state firefighters that they have the same protection and immunity that their local and federal

counterparts, who are often fighting with them, have. It would reduce reluctance to becoming a leader.

SENATOR THERRIAULT motioned to adopt amendment #1, sponsored by the attorney general's office.

MS. VOIGTLANDER explained that the recitations referring to the federal agencies are not germane to immunizing state and local employees. The proposed amendment makes clear that the bill pertains to officers who are members of the state's organized militia on state active duty.

CHAIR SEEKINS announced there is no objection to the amendment and it is adopted. He said he would hold the bill because a number of other people indicated intent to testify. There being no further business to come before the committee, he adjourned the meeting at 3:00 p.m.