

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

May 6, 2003

8:06 a.m.

**MEMBERS PRESENT**

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

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 8

"An Act relating to tampering with public records."

MOVED CSSB 8(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 224

"An Act relating to a tobacco product manufacturer's compliance with certain statutory requirements regarding cigarette sales; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 93

"An Act relating to limitations on actions to quiet title to, eject a person from, or recover real property or the possession of it; and providing for an effective date."

MOVED CSSB 93(JUD) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 214(JUD)

"An Act relating to the recovery of punitive damages against an employer who is determined to be vicariously liable for the act or omission of an employee; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 13

"An Act prohibiting discrimination in insurance rates based on credit rating or credit scoring; and providing for an effective date."

ITEM REMOVED FROM AGENDA

**PREVIOUS ACTION**

SB 8 - See HESS minutes dated 3/5/03, 3/10/03, 3/24/03 and  
Judiciary minutes dated 4/25/03.  
HB 224 - No previous action to record.  
SB 93 - See Labor and Commerce minutes dated 3/11/03 and 4/1/03.  
See Judiciary minutes dated 4/16/03, 4/30/03 and 5/2/03.  
HB 214 - See Labor and Commerce minutes dated 4/29/03 and  
5/1/03.

**WITNESS REGISTER**

Mr. Mike Barnhill, Assistant Attorney General  
Department of Law  
PO Box 110300  
Juneau, AK 99811-0300  
**POSITION STATEMENT:** Supported HB 224.

Senator Wagoner  
Alaska State Capitol  
Juneau, AK 99801-1182  
**POSITION STATEMENT:** Sponsor of SB 93.

Mr. John Tillinghast  
Sealaska Corporation  
One Sealaska Plaza  
Juneau AK 99801  
**POSITION STATEMENT:** Commented on SB 93.

Representative Ralph Samuels  
Alaska State Capitol  
Juneau, AK 99801-1182  
**POSITION STATEMENT:** Sponsor of HB 214.

Ms. Sarah Nelson  
Staff to Representative Samuels  
Alaska State Capitol  
Juneau, AK 99801-1182  
**POSITION STATEMENT:** Commented on HB 214.

Ms. Marsh Davis, General Counsel  
Era Aviation  
**POSITION STATEMENT:** Supported HB 214.

Mr. Jim Wilson  
Chairman, Legislative Committee

Alaska Air Carriers  
Juneau, AK 99801  
**POSITION STATEMENT:** Supported HB 214.

Ms. Pam LaBolle, President  
Alaska State Chamber of Commerce  
217 2nd Street  
Juneau, AK 99801  
**POSITION STATEMENT:** Supported HB 214.

**ACTION NARRATIVE**

**TAPE 03-38, SIDE A**

**SB 8-TAMPERING WITH PUBLIC RECORDS**

**CHAIR RALPH SEEKINS** called the Senate Judiciary Standing Committee meeting to order at 8:06 a.m. Present were Senators Ogan, Therriault and French. The first order of business to come before the committee was SB 8.

**SENATOR THERRIAULT** moved to adopt committee substitute, \D version, SB 8. There was no objection and it was so ordered.

**CHAIR SEEKINS** said that the Department of Law did not expect the number of new felony prosecutions to rise and didn't anticipate a fiscal impact with passage of the legislation.

**SENATOR OGAN** moved to pass CSSB 8(JUD), version \D, from committee with individual recommendations and zero fiscal note. There was no objection and it was so ordered.

**SENATOR ELLIS** arrived at 8:13 a.m.

**HB 224-CIGARETTE SALES REQUIREMENTS**

**CHAIR SEEKINS** announced HB 224 to be up for consideration.

**MR. MIKE BARNHILL**, Assistant Attorney General, supported HB 224, which is the companion to SB 162. This bill relates to the Master Settlement Agreement, which is the settlement between Alaska, 45 other states and the major tobacco companies. Litigation was settled in 1998 in exchange for a permanent revenue stream and a few weeks ago, Alaska got our first annual payment of about \$17.5 million.

The agreement has provisions for reducing the revenue stream in certain circumstances. One of them is a non-participating manufacturer adjustment (NPM) (manufacturers who haven't signed on to the Master Settlement agreement with the states). The way to avoid that is to do two things: first, the state has to enact a NPM statute, which we did in 1999. It requires all NPMS to deposit a certain amount of money into escrow for every cigarette they sell in the State of Alaska. For the past two years, they have had to deposit about 1.5 cents per cigarette.

The other thing they have to do to avoid the downward revenue adjustment is to diligently enforce that statute. Alaska has been doing that since it's enactment in 1999. However, they have found in certain circumstances, enforcement can be difficult, because many of the NPMS are small tobacco manufacturers that are located in far flung parts of the world like India, China and the Philippines. As an example, a company in India makes hand rolled candy flavored cigarettes and was selling a substantial amount of them into the state, but weren't depositing the escrow. The Department of Revenue (DOR) sent several letters advising them of our laws and they refused to comply. Finally, the case was referred to him and he decided to sue. They had to hire a process server to hand carry the complaint and summons that was filed in Juneau to India and they ultimately got a default judgment.

Other states have had similar experiences with this company and others and decided there has to be another way to deal with them. In 2001, legislation that is designed to enhance our ability to enforce our laws was enacted. It created a contra-band list of companies that did not comply with our escrow laws. By last summer, about 15 other states followed suit. However, the problem was that each of the statutes was different. Then, the National Association of Attorneys General got involved and with the help of the states a uniform law was drafted. It creates a directory of cigarette companies that are permitted to sell cigarettes in Alaska. To get on the list, the manufacturer has to certify annually either that they are a participating manufacturer under the Master Settlement Agreement or that they are a NPM, but in compliance with our laws. Local distributors look up the web page on the Department of Revenue's web site and import cigarettes accordingly.

Other provisions in the bill concern monitoring compliance with information supplied to the DOR and the penalties for non-compliance. There is a tax credit for cigarettes a distributor brings into the state relying on the DOR list and then finds

that the company is out of compliance. There is also a provision for service of process, which allows him to serve the commissioner of the Department of Community and Economic Development.

SENATOR OGAN asked if other states were enacting this legislation verbatim.

MR. BARNHILL replied the 12 states that have enacted it have done so nearly verbatim. Our tax credit provision is a variance, but the DOR thought it important to do that.

SENATOR OGAN said he thought it didn't look like streamlining, but more like adding more regulations and hoops to jump through.

SENATOR THERRIAULT said the escrow was set up as a source of paying possible future judgments. He didn't understand how this prevents them from becoming judgment proof.

MR. BARNHILL explained that the context of this is the Master Settlement Agreement. The states sued the major tobacco companies, not the hundreds of small ones. To fund the revenue stream the tobacco companies raised the price of cigarettes. The concern was that only the major companies were raising the price of cigarettes and the smaller companies could come in and grab market share. That would essentially undermine the agreement. This provision was put in to level the economic playing field for those smaller companies. The money sits in escrow for 25 years. In Alaska, the total amount of escrow that has been required to be deposited over the 3.5 years this program has been in effect is about \$40,000. So, there's not much point in suing the companies, because there's not much to recover from the escrow accounts.

SENATOR THERRIAULT asked how they get to be judgment proof before liability arises.

MR. BARNHILL replied if they are a small company and they go bankrupt in 10 years, there's no money to recover from them unless there is money sitting in the escrow account. The tax provision is on page 5, line 16, and is paid at the point of importation, not at the point of sale to the consumer.

SENATOR FRENCH asked if this legislation works in conjunction with tax stamps and pricing floors in other legislation they are discussing this year.

MR. BARNHILL replied he is aware of that legislation and although HB 224 doesn't work in conjunction with it, it's not inconsistent with it, either.

SENATOR FRENCH said that he needed more time to consider the bill.

CHAIR SEEKINS said they would hold the bill for further work.

### SB 93-ADVERSE POSSESSION

CHAIR SEEKINS announced SB 93 to be up for consideration.

SENATOR WAGONER, sponsor of SB 93, explained that version X creates two subsections - one for utilities and one for the state. Subsection (c), line 14, will allow public utilities to get rights to an easement for utility purposes after 10 years. Subsection (d) was made for DOT with slightly different language, but accomplishes the same goal.

SENATOR FRENCH said the coastal trail runs along the coast in his district and about 100 yards behind it, homes have been developed for 40 years. There are lots between the trail and the homes that will go up for sale pending soil testing. Folks have been accessing the coastal trail with a little by way through the woods since the trail was built (20 years ago). It looks like there's going to be a fight now between the developers and the homeowners over access to the coastal trail. They haven't recorded title of any kind or easement or taken any legal action. He wanted to know if this bill would alter their right to litigate access they have been using.

SENATOR WAGONER replied he couldn't answer that, but Mr. Tillinghast could.

MR. TILLINGHAST, Sealaska Corporation, said the answer is no. "Whatever rights the public acquired by virtue of that past usage wouldn't be affected by this bill."

SENATOR FRENCH asked if it would from this time forward.

SENATOR THERRIault interrupted to move to adopt CSSB 93(JUD), version \X. There was no objection and it was so ordered.

MR. TILLINGHAST replied page 2, line 19 says, "the continued ability to perfect access to public trails" so access is

preserved in the bill to the extent of DOT's ability to preserve access for a paved road.

SENATOR OGAN asked if anyone remembers the Hillside park access case.

SENATOR FRENCH said that he remembers it was about access to Rabbit Lake - from a trailhead across private land to state park land. The trail had been used for perhaps 30 years. Through a series of state bungles, that access was lost and the litigants ended up buying access from the owner.

CHAIR SEEKINS asked what caused Sealaska to bring this issue before the Legislature and how this might address it.

MR. TILLINGHAST replied that Sealaska has had to expend significant attorney's fees and time evicting squatters from their property, who squatted in reliance on the law, as it exists today. The fact that they were successful in getting them off is almost beside the point, because they had to spend a lot of money to do that and they continue to have to patrol the property. The philosophical reason is that as private property owners, they do not feel they should have obligations placed on them to consistently patrol their property to chase off "thieves" any more than the government should have that obligation. It may have had social value in the past when we didn't want to take land from the railroads, but those days are over.

CHAIR SEEKINS asked if there are regulations that protect Native lands from notorious adverse possession.

MR. TILLINGHAST replied there are. The doctrine of adverse possession protects any land a corporation received under ANGSA until that land is developed. Unfortunately, the courts have developed a very low threshold for the meaning of developed saying that lands are developed as soon as they are subdivided. There is no question that logging would be considered developing.

CHAIR SEEKINS asked why some of the other large corporations weren't sitting here with him because they surely had the same problem.

MR. TILLINGHAST responded that he assumed they did, but he couldn't speak for them.

SENATOR OGAN asked why section 1 was divided into two paragraphs.

SENATOR WAGONER explained the original bill had a section that pertained to DOT. Chugach Electric and Homer Electric expressed concern and they tried to combine them with the DOT section, but it didn't work out. So, they were separated.

CHAIR SEEKINS said this bill in effect eliminates squatters' rights and if there's a good faith mistake about someone's property line, that's not affected by this.

SENATOR WAGONER concurred.

SENATOR THERRIAULT moved to pass CSSB 93(JUD) from committee with zero fiscal note and individual recommendations. There was no objection and it was so ordered.

8:40 - 8:45 a.m. - at ease

#### **HB 214-PUNITIVE DAMAGES AGAINST EMPLOYERS**

CHAIR SEEKINS announced HB 214 to be up for consideration.

REPRESENTATIVE RALPH SAMUELS, sponsor of HB 214, said the bill creates new guidelines for damages against an employer under vicarious liability. It stipulates that an employer shall not be responsible for paying damages unless he okayed the act. The point is if a company did nothing wrong, it should not be punished, which is what punitive damages are for.

The bill does not have anything to do with direct damages or compensatory damages. Language comes from restatements of National Standards. The Alaska Supreme Court found in the Laidlaw case, that if it had come up in trial, they would have leaned toward the National Standards.

SENATOR FRENCH said he thought the purpose of this bill was to overturn the result of the Laidlaw case.

REPRESENTATIVE SAMUELS said he didn't know how the case ended, but he knows what the court said.

SENATOR FRENCH said the one place this bill differs from the restatement of National Standard has to do with the employee working in a managerial capacity for the employer.

REPRESENTATIVE SAMUELS said they wanted to make sure they had someone who had control over the policies of the company.

SENATOR FRENCH said he noticed that the restatement was careful to add to the managerial reference "who was acting in the scope of employment." This bill says you can only award punitive damages if the employee was a manager of the employer, not that they were acting within the scope of employment.

MS. SARAH NELSON, Staff to Representative Samuels, responded that there are two different kinds of this law, the narrower complicity of rule and the one that is acting within the scope of employment. They were aiming at a narrower construction.

MS. MARSHA DAVIS, General Counsel, Era Aviation, said she thought that language was left out because it resulted in a tighter definition than the restatement, but it broadens the number of people it would affect.

**TAPE 03-38, SIDE B**

SENATOR FRENCH asked if this would penalize the lead on a night shift for Exxon or BP.

MS. DAVIS replied that you would have to ask yourself whether that individual has sufficient authority and control to make decisions for the alter ego - the employer. They are looking for someone who can create and alter company policies.

SENATOR OGAN said the most infamous case of vicarious liability he could think of was Joe Hazelwood on the Exxon Valdez. Exxon has a policy that you don't drink and drive their ships. So, are they suddenly not liable because he violated their policy?

MS. DAVIS replied that the \$5 million in punitive damages were assessed against Exxon directly. Mr. Hazelwood had punitive damages for \$5,000. This bill wouldn't touch anything that has to do with maritime law, but it would make Exxon or BP liable for Mr. Hazelwood's punitive damage assessment.

SENATOR FRENCH asked if she thought this bill would have produced a different result in the Laidlaw case.

MS. DAVIS replied she didn't think it would, but it would be a very close question. The question was did Laidlaw know the individual had a drug/alcohol problem and yet allow him to drive the van. The jury could conclude that was reckless behavior on

the part of Laidlaw and that would have the same result, that Laidlaw was responsible for the punitive damages.

MS. DAVIS said one reason the vicarious liability should stay with the employee is that lawyers go after the deep pockets. In this case Laidlaw was liable to pay the \$100,000 that was assessed and the employee got off scot-free.

It's appropriate if you're going to punish someone for the wrong doing that they actually be punished rather than sliding that punishment to what is essentially an innocent party in the transaction and allows the bad behavior to proceed on because they [don't have the deepest pocket.]

SENATOR FRENCH asked why they wouldn't include the phrase "held in the course and scope of employment" since that's the test they used in Laidlaw.

MS. DAVIS replied that under Alaska law, you couldn't be determined to be vicariously liable without an initial finding that the conduct of the employee was within the scope of employment. It's a bit duplicative to have a precondition that presumes the action was within the scope of employment. It wouldn't hurt anything to put it back in, but it would be duplicative.

SENATOR THERRIAULT asked if is he acting as an employee if he lets an employee use one of his mobile rigs over the weekend.

MS. DAVIS said the question would be whether his business receives any compensation for that use.

SENATOR THERRIAULT said no.

MS. DAVIS said she would question whether any conduct by that employee could be tied back to his business.

MR. JIM WILSON, Alaska Air Carriers, supported HB 214 saying it would reduce the cost of their insurance. They have an extensive training program, but one pilot didn't follow procedure and use the mirror to observe external loads carried under the aircraft when landing in a confined area. His blades hit a stump and the aircraft was totaled. Fortunately, there were no injuries or deaths, but had there been, they could have seen punitive damage suits. The pilot put the company at risk and those are the kind of things he is concerned about.

SENATOR FRENCH asked if he was sued or whether any money changed hands.

MR. WILSON replied it was an expensive accident; they lost a helicopter and the pilot lost his job.

SENATOR ELLIS asked if he thought his insurance rate would go down with this legislation.

MR. WILSON replied his insurance underwriter told him it would be one of the tools that would help it go down.

SENATOR ELLIS asked Mr. Wilson if the insurance underwriter said he would reduce his insurance premium if he got this bill passed.

MR. WILSON repeated he just said it would be one of the tools that would make it go down.

SENATOR ELLIS said after the bill has been signed into law, he wanted Mr. Wilson to tell him how much his insurance went down. "I'll be really excited if that, in fact, ever happens."

MR. WILSON said he believed it would.

MS. PAM LABOLLE, President, Alaska State Chamber of Commerce, supported HB 214. Prior to the passage of tort reform in 1996 or 97, the insurance rates in this state were escalating at an astonishing rate. A great deal of it was because of the punitive damage assessments, because you can't insure against punitive damages because they are used to punish a wrongdoer.

If you go to court, however, you run the risk of getting a punitive assessment and that causes many businesses and their insurance companies to settle out of court rather than take that chance. She said the insurance rate might not go down, but it could level out or rise slightly versus the astronomical increases that happened before passage of the tort reform legislation and the punitive damages definition.

CHAIR SEEKINS said that negotiating an insurance rate is a long process, especially with a business. He agreed that rates could fall or at least not rise as fast as they find ways to keep the truly responsible parties liable for their actions.

SENATOR FRENCH said he thought this bill restricts the doctrine too far.

Reading the Laidlaw is kind of an eye-opener for anybody with a child who goes to school, because in the Laidlaw case this bus driver was, as far as I can tell, smoking marijuana every single day and showing up to work after having smoked marijuana and, in the course of her job, rolled the bus with a bunch of kids in it and hurt the kids. The trial jury, as they sometimes do, kind of lays down a big heavy punitive award, which the trial court reduced substantially - because contrary to popular opinion, there is some oversight of punitive damage awards. Frankly, I think a bus company that employs a bus driver that is smoking marijuana every single day should tighten down the screws a little bit to make sure that isn't happening. If it takes a punitive damage award to make them tighten down the screws, I'm okay with that. I think this bill needs to be amended to make sure that employees acting within the scope of their employment are included within the definition of those individuals who put the company on the hook.

He would be much more comfortable if the bill mirrored the language of the restatement, which is the national standard.

SENATOR THERRIAULT said he needed more time to go through the issues.

SENATOR SEEKINS said they would hold HB 214 for further consideration. There being no further business to come before the committee, he adjourned the meeting at 9:20 a.m.