

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

March 17, 2004

8:02 a.m.

TAPE(S) 04-21

MEMBERS PRESENT

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

MEMBERS ABSENT

Senator Johnny Ellis

COMMITTEE CALENDAR

SENATE BILL NO. 344

"An Act relating to the Uniform Probate Code and trusts, including pleadings, orders, nonprobate assets, estates of decedents, minors, protected persons, incapacitated persons, guardians, conservators, trustees, foreign trusts, principal and income, and transfer restrictions; relating to corporate voting trusts; and providing for an effective date."

MOVED SB 344 OUT OF COMMITTEE

SENATE BILL NO. 319

"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 323

"An Act relating to a project owner's liability for workers' compensation and the exclusiveness of liability for workers' compensation."

HEARD AND HELD

SENATE BILL NO. 309

"An Act relating to testing the blood of prisoners and those in custody for bloodborne pathogens."

MOVED CSSB 309(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 344

SHORT TITLE: TRUSTS/ESTATES/PROPERTY TRANSFERS

SPONSOR(s): SENATOR(s) SEEKINS

02/16/04 (S) READ THE FIRST TIME - REFERRALS
02/16/04 (S) L&C, JUD
03/11/04 (S) L&C AT 1:30 PM BELTZ 211
03/11/04 (S) Moved SB 344 Out of Committee
03/11/04 (S) MINUTE(L&C)
03/12/04 (S) L&C RPT 3DP 1NR
03/12/04 (S) DP: BUNDE, DAVIS, SEEKINS; NR: FRENCH
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 319

SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS

SPONSOR(s): SENATOR(s) SEEKINS

02/11/04 (S) READ THE FIRST TIME - REFERRALS
02/11/04 (S) L&C, JUD
03/02/04 (S) L&C AT 1:30 PM BELTZ 211
03/02/04 (S) Heard & Held
03/02/04 (S) MINUTE(L&C)
03/11/04 (S) L&C AT 1:30 PM BELTZ 211
03/11/04 (S) Moved SB 319 Out of Committee
03/11/04 (S) MINUTE(L&C)
03/12/04 (S) L&C RPT 2DNP 3NR
03/12/04 (S) NR: BUNDE, SEEKINS, STEVENS G;
03/12/04 (S) DNP: FRENCH, DAVIS
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 323

SHORT TITLE: WORKERS COMPENSATION AND CONTRACTORS

SPONSOR(s): SENATOR(s) SEEKINS

02/13/04 (S) READ THE FIRST TIME - REFERRALS
02/13/04 (S) L&C, JUD
03/04/04 (S) L&C AT 1:30 PM BELTZ 211
03/04/04 (S) Heard & Held
03/04/04 (S) MINUTE(L&C)
03/09/04 (S) L&C AT 1:30 PM BELTZ 211
03/09/04 (S) Moved SB 323 Out of Committee
03/09/04 (S) MINUTE(L&C)

03/10/04 (S) L&C RPT 2DP 2NR 1AM
03/10/04 (S) DP: BUNDE, SEEKINS; NR: DAVIS,
03/10/04 (S) STEVENS G; AM: FRENCH
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205

BILL: SB 309

SHORT TITLE: BLOOD PATHOGENS TESTING OF PRISONERS

SPONSOR(S): SENATOR(S) WAGONER

02/09/04 (S) READ THE FIRST TIME - REFERRALS
02/09/04 (S) STA, JUD
03/04/04 (S) STA AT 3:30 PM BELTZ 211
03/04/04 (S) Moved SB 309 Out of Committee
03/04/04 (S) MINUTE(STA)
03/05/04 (S) STA RPT 3DP
03/05/04 (S) DP: STEVENS G, COWDERY, STEDMAN
03/17/04 (S) JUD AT 8:00 AM BUTROVICH 205

WITNESS REGISTER

Mr. Brian Hove
Staff to Senator Seekins
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Presented SB 344, SB 323 and SB 319 for the sponsor

Mr. Doug Blattmacher
Anchorage, AK

POSITION STATEMENT: Supports SB 344

Mr. Steve Greer
Box 242903
Anchorage, AK

POSITION STATEMENT: Supports SB 344

Ms. Beth Chapman
Faulkner Banfield
Juneau, AK 99801

POSITION STATEMENT: Supports SB 344 and answered questions

Mr. Kurt Olson
Staff to Senator Wagoner
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Presented SB 309 for the sponsor

Ms. Portia Parker
Deputy Commissioner
Department of Corrections
431 N. Franklin, Suite 400
Juneau, AK 99801

POSITION STATEMENT: Answered questions about SB 309

Dr. George Rhyneer
3340 Providence Dr.
Anchorage, AK

POSITION STATEMENT: Supports SB 319

ACTION NARRATIVE

TAPE 04-21, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:02 a.m. Senators French, Ogan and Chair Seekins were present. Chair Seekins announced that due to a commitment to the Governor on financial issues, members would be attending Senate Finance hearing at 9:00 a.m., so the Judiciary Committee would not have a substantive discussion on SB 323 and SB 309 today. The committee took up SB 344.

^#SB344

TRUSTS/ESTATES/PROPERTY TRANSFERS

MR. BRIAN HOVE, staff to Senator Seekins, sponsor of SB 344, read the following sponsor statement.

A vital characteristic of our highly developed economy is the ease with which financial resources flow from one market to another. In fact the magnet-like attraction between and the market that offers the most advantageous terms is, perhaps, best demonstrated within the financial services industry itself.

Over the years the Alaskan banking industry has attracted funds to our state as the result of a particular niche we have successfully developed in an obscure corner of the industry known as trust and estate services. Much of this success can be attributed to the foresight demonstrated by the Alaska State Legislature.

Since 1997, the legislature has passed numerous bills effectively making Alaska a premier jurisdiction for this financial specialty. Just last year, SB 87 adopted a more recent version of the Uniform Principal & Income Act. And HB 212 updated other portions of Alaska's trust laws. Both were signed into law last summer.

While SB 344 may not be as far reaching, it accomplishes the same purpose. It does this by making a host of small technical revisions to current statutes. It updates provisions relating to virtual representation. It clarifies when a trustee can be relieved of its liability. And it adds provisions, which other jurisdictions have already adopted.

Keeping our trust statutes current has had a direct positive impact on our state's economy. Over the years, these periodic revisions have helped to bring hundreds of millions of dollars of trust assets into the state and added tens of millions of dollars to local bank deposits. Furthermore, it has increased business activity for attorneys, accountants, life insurance agents and brokerage firms. This, in turn, creates jobs.

Necessity, ingenuity and routine advances in technology collaborate on a daily basis to reinvent the world of financial products and services. To date, Alaska has successfully staked out a place in this world through our contemporary set of trust and estate laws. SB 344 seeks to preserve our position in what amounts to a highly fluid marketplace unrestricted by geographical boundaries. It seems reasonable to keep that money flowing this direction.

He noted that Beth Chapman and Doug Blattmacher were available to speak to the technical portions of the bill.

SENATOR FRENCH commented that legislators have been told that the growth of this industry has had a net positive effect on the general fund. He asked if the Department of Revenue (DOR) has any documentation to back that up.

MR. HOVE said he has not seen any documentation but believes it is reasonable that bringing that money to this jurisdiction would have a net positive impact on Alaska's economy.

CHAIR SEEKINS pointed out that last year, when considering another trust bill, he saw that premium taxes alone on insurance policies were significant.

MR. DOUG BLATTMACHER added:

We know that from the insurance premiums that we had - of the premium payments that we had made, we estimate that we've spent about a million and a half dollars additional premium taxes in the state over the last couple of years and that continues to - we continue to get these large insurance policies, which generate additional premium dollars in the state.

MR. STEVE GREER, an estate-planning attorney in Anchorage, said he and a group of other estate planning attorneys have approached the legislature each year with legislation to improve existing legislation. He noted that Ms. Chapman was the principal drafter of SB 344.

MS. BETH CHAPMAN, an attorney with Faulkner Banfield, told members she has practiced primarily in the area of trusts and estates for the past 16 years. She stated support for SB 344 as it will update Alaska law so that Alaska will continue to have prominence as the state in which individuals will want to deposit their trust assets and a place where residents want to retain their assets. She explained SB 344 has four main parts. The first part contains technical corrections to the Uniform Income Act, which was adopted last year. The second part adds additional trusts to the types of trusts recognized under the spendthrift provisions. These trusts are commonly used and recognized under the Internal Revenue Code. The third part expands the Doctrine of Subsequent Notice found under current Alaska law so that trustees and trust beneficiaries have easier access to the courts. Last, it establishes a statute of limitations for claims against trustees. Current law contains no statute of limitations against a trustee until the trust relationship is terminated. Alaska law now allows perpetual trusts, so that relationship could last for a very long time and stale claims could be brought at any time in the future. Enacting a statute of limitations will allow claims to be brought when necessary soon after they occur or when notice of a claim has been made known to a beneficiary. It also adds a provision to notify beneficiaries of their limitation period, which she believes will be more helpful to beneficiaries. If no notification occurs, the statute of limitation will not run.

SENATOR THERRIAULT asked how long the statute of limitations is.

MS. CHAPMAN told members under current law, a claim must be brought within six months after the final account. The six month period will continue to be used, but it will run from any report that discloses the nature of the claim so long as the beneficiary is notified of the six-month time limit.

SENATOR FRENCH referred to page 2 of the sectional analysis, which addresses changing the trust situs to Alaska. He asked how one locates a trust in Alaska and whether the money must be physically present in an Alaska bank.

MS. CHAPMAN said some of the funds do have to be deposited within the state of Alaska in an Alaska bank. Also, the trust must have an Alaska trustee and the trust must be registered with the Alaska Court System.

SENATOR FRENCH asked how small of a sum would qualify for a deposit.

MS. CHAPMAN thought the amount is not defined in the statute. She noted, however, in her experience deposits have been of a significant amount.

SENATOR THERRIAULT stated, for the record, that his wife is a trust attorney and participates in the Alaska Trust Council. He then moved SB 344 from committee with individual recommendations and the attached zero fiscal notes.

CHAIR SEEKINS announced that without objection, the motion carried.

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^#SB309

SB 309-BLOOD PATHOGENS TESTING OF PRISONERS

MR. KURT OLSON, staff to Senator Tom Wagoner, sponsor of SB 309, told members that Alaska law currently allows testing of prisoners for blood borne pathogens at the request of rape victims. SB 309 would allow correctional officers who have been exposed to blood or other bodily fluids to request that the prisoner responsible for the potential contamination be tested. He explained that Alaska statute 18.15 would be amended to include five new provisions.

- AS 18.15.400 authorizes the testing process
- AS 18.15.410 provides consent provisions
- AS 18.15.420 addresses situations for which testing occurs without consent
- AS 18.15.440 addresses confidentiality issues and provides penalties for disclosure
- AS 18.15.450 contains definitions

MR. OLSON informed members that 41 correctional officers were potentially exposed to blood borne pathogens last year. Those pathogens can be HIV, Hepatitis B, or Hepatitis C. In most of the cases, the exposure was intentional. Current treatment for exposure consists of a daily treatment for about two weeks of what is called a "cocktail." The cocktail contains numerous drugs to counteract several diseases. The side effects can be severe, and prevents most correctional officers from working. The Department of Corrections (DOC) supports SB 309 and he is aware of no opposition to the bill.

SENATOR OGAN said he is aware that correctional officers are not allowed to discuss their medical histories and exposures to blood borne pathogens. He asked, if the exposure is intentional, the carrier could be charged with assault if the officer contracted an infectious disease, and whether anyone has ever been charged.

MR. OLSON deferred to Ms. Parker for an answer.

DEPUTY COMMISSIONER PORTIA PARKER, DOC, said she was not sure how many assault charges have been filed. She explained that DOC's standard procedure, when an officer is assaulted by an inmate, whether any blood is exchanged or not, is to call the Alaska State Troopers (AST). She added that very few instances have occurred.

SENATOR FRENCH asked if blood borne pathogens can be transmitted by spitting.

SENATOR OGAN nodded affirmatively.

MR. OLSON thought hepatitis can be transmitted by spitting, as well as biting.

SENATOR FRENCH asked if a fluid-to-fluid transfer must occur.

MR. OLSON replied, "I believe it can be fluid to mucous membranes - eyes."

SENATOR FRENCH referred to the language that begins on line 30 of page 4 and remarked that paragraph (2) on page 5 should not be included in the list of things the court finds.

SENATOR OGAN asked, excluding paragraph (2), if the sponsor intends that paragraphs (1), (3), and (4) all be met.

MR. OLSON said it is Senator Wagoner's intent that all three criteria be met and that it also must be at the request of the potentially infected correctional officer.

SENATOR FRENCH commented that SB 309 is well crafted and well balanced.

CHAIR SEEKINS announced a recess at 8:25 a.m. and reconvened the meeting at 8:30 a.m. He then announced that he consulted with the sponsor, who would like to amend SB 309 to make paragraph (2) on page 5, subsection (d), rename the current subsection (d) subsection (e), and rename paragraphs (3) and (4) to (2) and (3) [Amendment 1].

SENATOR OGAN so moved.

CHAIR SEEKINS announced that without objection, the motion carried.

SENATOR OGAN asked why Hepatitis A was not included on page 6 as it is easily transmittable, and suggested saying "including but not limited to."

SENATOR THERRIault thought the current wording does not limit the blood borne pathogens to those listed.

CHAIR SEEKINS suggested clarifying that section by saying "not limited to."

SENATOR OGAN moved to insert ", but are not limited to" on page 6, line 1 [Amendment 2].

CHAIR SEEKINS announced that without objection, Amendment 2 was adopted. He then closed public testimony due to lack of participants.

SENATOR OGAN moved CSSB 309(JUD) from committee with individual recommendations and its attached fiscal note. Without objection, the motion carried.

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The committee took an at-ease.

^#SB319

SB 319-CLAIMS AGAINST HEALTH CARE PROVIDERS

MR. BRIAN HOVE, staff to Senator Seekins, sponsor of SB 319, provided the following explanation of the measure.

SB 319 amends AS 09.55.548 and .556. The proposed legislation intends to alleviate a growing crisis in Alaska's health care industry with respect to the availability of liability insurance. It places a hard cap on damage awards, clarifies informed consent language, and limits liability with respect to health care advice communicated through electronic means.

The fact is Alaska's medical system is breaking down. Alaska ranks near the bottom in the number of physicians per capita. What's more, over half of Alaska's physicians exceed the age of 50. Many will be retiring within the next 10 years. Attracting and keeping adequate numbers of high quality physicians in Alaska is of utmost importance. The availability of liability insurance plays a critical role in solving this crisis. Half of the insurers have ceased doing business in Alaska in the last 12 months. Other professional liability insurance carriers have not shown an interest in doing business in the state, due to the volatile medical liability environment.

This is a complex issue. However, one solution that has proven particularly effective in other states is capping non-economic damages. SB 319 intends to help establish a predictable risk assessment environment by placing a \$250,000 cap on this type of award. It does not change awards for quantifiable economic damages, such as lost wages and past and future medical expenses. The bill also makes revisions, which limit liability in cases where a patient elects not to follow advice that was communicated by a health care provider through electronic means. Lastly, qualifying language is added relating to informed consent, along with a sprinkling of punctuation marks. But the bottom

line is this - instituting a \$250,000 cap on non-economic damages will help stabilize the professional medical liability insurance market here in Alaska, thereby reinforcing efforts to attract the next generation of doctors to replace those who are nearing retirement age.

SENATOR OGAN asked whether the \$250,000 damage award limit includes the attorney's fees.

MR. HOVE said they would.

SENATOR OGAN asked what the typical contingency cost is for tort attorneys.

MR. HOVE said that is determined on a case-by-case basis but the amount is not insignificant.

SENATOR OGAN noted if the attorney gets half, and the jury finds the doctor was negligent because he was drinking the night before and did irreparable harm, the patient would only get \$125,000.

MR. HOVE said a doctor who was drinking the night before would be in a different class and that case would not be subject to this legislation.

CHAIR SEEKINS noted that doctor would be guilty of reckless behavior, not negligence, and the bill is not intended to cover any cap for reckless behavior.

SENATOR FRENCH said since the committee last heard the bill, the committee has received a report entitled, "Physicians Practicing in Alaska," by the Legislative Research Agency. That report contains one point that runs contrary to Mr. Hove's statement that the system is breaking down; it says the number of physicians is steadily increasing in Alaska every few years. He asked Mr. Hove to reconcile the two statements.

MR. HOVE replied, "What I see is state-licensed physicians and I don't know, somebody can tell me if I'm wrong but it seems that licensed is different from actually practicing."

CHAIR SEEKINS said he asked whether there is a difference between practicing and licensed physicians in the Senate Labor and Commerce Committee. He noted that he noticed in a chart of physicians with awards against them that many of them had non-

resident addresses and he intends to look into why that is. He asked Mr. Hove to find out how many of the physicians who are licensed in Alaska actually practice here.

SENATOR FRENCH pointed out the report shows the number of active, state licensed physicians by year since 1985. That suggests to him that they are not retired.

CHAIR SEEKINS agreed to follow up on that question and on Senator Ogan's question about whether Rule 82 applies on top of the damage award.

SENATOR FRENCH commented that California adopted a \$250,000 damage award limit in 1979. He questioned what that amount would be worth in 2004 if adjusted for inflation. He suggested that amount could be the current \$400,000 cap in Alaska law now.

CHAIR SEEKINS noted the \$400,000 cap is a moveable cap with a multiplier effect - it is not a hard cap. He added that California has kept the amount at \$250,000. He said he would accommodate one person who flew from Anchorage to testify today and called Mr. Rhyneer.

DR. GEORGE RHYNEER, an Anchorage cardiologist, told members he has been practicing in Anchorage for over 30 years. He was instrumental in getting a cardiac program started in Alaska. He explained that the reason he is attending today's hearing is so that he can continue to practice cardiology in Alaska. A number of years ago, insurance companies were "beating down the door" to sell him medical malpractice insurance. Four years ago, only four companies were selling that insurance in Alaska. Last year, his insurance company cancelled his insurance because it was unable to make a go of it in Alaska anymore. That was a mutual insurance company based in Oregon, which is physician owned and passes on the cost of doing business to the physicians. The commercial insurance company, CNA, also left Alaska last year so it left him looking for new insurance and was able to find only one insurance company that could provide him with the insurance company he needed. He said one can anticipate, by looking South, what will happen to medicine in Alaska. He anticipates that things will continue to get worse in this regard as the insurance crises in the Lower 48 will move north to Alaska. Alaska does not have a medical malpractice insurance crisis right now. However, the same problems that led to the loss of insurance companies in Alaska will continue with the current legal atmosphere in the state. Physicians desperately fear they will lose the ability to buy malpractice insurance in the

foreseeable future at all. If that does occur, he would be forced into involuntary retirement, as will probably 30 percent of the practicing physicians in Alaska. He cautioned that if suddenly there are minimal medical services, the state will have a real problem, and it could happen abruptly.

DR. RHYNEER said that other solutions may be out there, but the legislature needs to come up with a solution because the problem is a legal one.

SENATOR OGAN personally thanked Dr. Rhyneer and his crew for their good work. He then said that Alaska's small population is the size of a small city in the Lower 48 and that insurance is a problem in every sector of the economy. He noted that when the legislature last dealt with tort reform legislation, there was a lot of gnashing of teeth and yet those efforts did not stabilize the insurance industry in Alaska. He expressed concern that the problem may be the small market rather than exposure to lawsuits.

DR. RHYNEER indicated the insurance companies have assured him that [limiting damage awards] is the single most effective attribute to malpractice legislation that makes a more predictable environment to do business in. He said the insurance companies cannot be forced to do business here. The state has to create a climate that is attractive to insurance companies. If it is not attractive, they will leave.

CHAIR SEEKINS thanked Dr. Rhyneer and closed public testimony due to time constraints. He announced the committee would hear an introduction to SB 323 and then reschedule it.

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^#SB323

SB 323-WORKERS COMPENSATION AND CONTRACTORS

MR. BRIAN HOVE, staff to Senator Seekins, sponsor, presented the following description of SB 323.

SB 323 revises the Workers' Compensation Act as it applies to contractors and subcontractors. The two principal modifications are as follows. First, responsibility for payment of workers' compensation is extended up the chain of contracts to include project owners. Secondly, injured parties in receipt of benefits under the Workers' Compensation Act would be barred from 'double dipping' via a tort liability claim.

Under AS 23.30.045(a), an injured employee only has recourse for workers' compensation benefits against his immediate employer and if the employer is a subcontractor against the contractor who retained the subcontractor. The proposed legislation allows recourse for the payment of compensation benefits against project owners, as well as contractors and subcontractors.

This extension of the rights of injured employees is sensible inasmuch as the project owner is the beneficial user of the work performed by the injured employee. It should be noted that a project owner does not include individuals who have engaged the services of contractors to build or renovate a residential home.

Finally, the proposed legislation extends the exclusivity protection set forth in AS 23.30.055 to all parties in the contracting chain relating to a project. This includes the employer of the injured employee, and those parties, which are upstream in the chain of contracts from the employer of the injured employee.

In other words, if an injured employee works for a subcontractor, then the subcontractor, the contractor and the project owner would be free of tort liability so long as the injured employee...[END OF SIDE A]

TAPE 04-21, SIDE B

...receives the benefits set forth in the Alaska Workers' Compensation Act.

SB 323 will encourage all parties participating in a project to identify and enforce strict safety standards for the benefit of all workers rather than deflecting responsibility through the use of indemnity agreements, as is common practice currently. At the same time, it ensures that injured workers will receive all benefits available under the Workers' Compensation Act.

CHAIR SEEKINS announced that he would hold SB 323 for a further hearing and adjourned the meeting at 8:57 p.m.

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