ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE
March 23, 2006
8:14 a.m.

MEMBERS PRESENT

Representative Paul Seaton, Chair
Representative Bob Lynn
Representative Jay Ramras
Representative Berta Gardner
Representative Max Gruenberg

MEMBERS ABSENT

Representative Carl Gatto, Vice Chair
Representative Jim Elkins

COMMITTEE CALENDAR

HOUSE BILL NO. 383
"An Act limiting motor vehicle dealer charges for fees and costs; relating to the disclosures required for certain motor vehicle transactions; and requiring consumers to be informed of finance charges paid to a motor vehicle dealer by a financing institution on the sale of a used motor vehicle."

- MOVED CSHB 383(STA) OUT OF COMMITTEE

CS FOR SENATE BILL NO. 86(CRA)(efd fld)
"An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals."

- HEARD AND HELD

HOUSE BILL NO. 354
"An Act relating to qualifications of the adjutant general; and providing for an effective date."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: HB 383
SHORT TITLE: MOTOR VEHICLE TRANSACTIONS
SPONSOR(s): REPRESENTATIVE(s) GARA

01/20/06	(H)	READ THE FIRST TIME - REFERRALS
01/20/06	(H)	TRA, STA
02/07/06	(H)	TRA AT 1:30 PM CAPITOL 17
02/07/06	(H)	-- Meeting Canceled --
02/09/06	(H)	TRA AT 1:30 PM CAPITOL 17
02/09/06	(H)	Moved CSHB 383(TRA) Out of Committee
02/09/06	(H)	MINUTE(TRA)
02/13/06	(H)	TRA RPT CS(TRA) NT 1DP 4NR
02/13/06	(H)	DP: KAPSNER;
02/13/06	(H)	NR: SALMON, NEUMAN, GATTO, ELKINS
03/07/06	(H)	STA AT 8:00 AM CAPITOL 106
03/07/06	(H)	Heard & Held
03/07/06	(H)	MINUTE(STA)
03/23/06	(H)	STA AT 8:00 AM CAPITOL 106

BILL: SB 86
SHORT TITLE: STATE/MUNI LIABILITY FOR ATTORNEY FEES
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/31/05	(S)	READ THE FIRST TIME - REFERRALS
01/31/05	(S)	CRA, JUD
02/09/05	(S)	CRA AT 1:30 PM BELTZ 211
02/09/05	(S)	Heard & Held
02/09/05	(S)	MINUTE(CRA)
04/04/05	(S)	CRA AT 1:30 PM BELTZ 211
04/04/05	(S)	Moved CSSB 86(CRA) Out of Committee
04/04/05	(S)	MINUTE(CRA)
04/05/05	(S)	CRA RPT CS 1DP 2DNP 2NR SAME TITLE
04/05/05	(S)	NR: STEVENS G, STEDMAN
04/05/05	(S)	DP: WAGONER
04/05/05	(S)	DNP: ELLIS, KOOKESH
04/15/05	(S)	JUD AT 8:00 AM BUTROVICH 205
04/15/05	(S)	Heard & Held
04/15/05	(S)	MINUTE(JUD)
04/18/05	(S)	JUD RPT CS(CRA) 3DP 2DNP
04/18/05	(S)	DP: SEEKINS, THERRIAULT, HUGGINS
04/18/05	(S)	DNP: FRENCH, GUESS
04/18/05	(S)	JUD AT 8:30 AM BUTROVICH 205
04/18/05	(S)	Moved CSSB 86(CRA) Out of Committee
04/18/05	(S)	MINUTE(JUD)
05/06/05	(S)	TRANSMITTED TO (H)
05/06/05	(S)	VERSION: CSSB 86(CRA)(EFD FLD)
05/07/05	(H)	READ THE FIRST TIME - REFERRALS
05/07/05	(H)	STA, JUD
03/23/06	(H)	STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

REPRESENTATIVE LES GARA
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Reviewed HB 383 as sponsor.

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General
Commercial/Fair Business Section
Civil Division (Anchorage)
Department of Law

JOHN COOK, Legislative Director
Alaska Automobile Association
(No address provided)
POSITION STATEMENT: Testified on behalf of the association in opposition to HB 383.

CRAIG TILLERY, Deputy Attorney General
Civil Division
Office of the Attorney General
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Introduced SB 86 on behalf of the Senate Rules Committee, sponsor by request of the governor.

RANDY RUARO, Assistant Attorney General & Legislative Liaison
Legislation & Regulations Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska
POSITION STATEMENT: Responded to a question during the hearing on SB 86.

SCOTT A. BRANDT-ERICHSEN, Attorney at Law
Ketchikan Gateway Borough
Ketchikan, Alaska
POSITION STATEMENT: Testified on behalf of himself during the hearing on SB 86.

ACTION NARRATIVE

CHAIR PAUL SEATON called the House State Affairs Standing Committee meeting to order at 8:14:32 AM. Representatives Lynn, Ramras, Gardner, Gruenberg, and Seaton were present at the call to order.

HB 383-MOTOR VEHICLE TRANSACTIONS

8:15:09 AM

CHAIR SEATON announced that the first order of business was HOUSE BILL NO. 383, "An Act limiting motor vehicle dealer charges for fees and costs; relating to the disclosures required for certain motor vehicle transactions; and requiring consumers to be informed of finance charges paid to a motor vehicle dealer by a financing institution on the sale of a used motor vehicle."

[Before the committee was CSHB 383(TRA).]

The committee took an at-ease from 8:15:49 AM to 8:16:15 AM.

8:16:28 AM

REPRESENTATIVE LES GARA, Alaska State Legislature, reviewed the committee substitute, CSHB 383(TRA), as sponsor. He said there had been concern raised during the previous meeting's discussion of the CS [held on 3/7/2006] as to whether the term "**negotiated price**" needs to be better defined. He said Mr. Sniffen, who runs the [Commercial/Fair Business] Section of the Office of the Attorney General has responded to that question in a letter saying he does not feel the phrase needs further clarification or definition. Another question was in regard to the practice of some car dealers to imply to the consumer that the bank loan they offer reflects only the interest rate the bank is charging, when in fact the dealer is keeping part of the total percentage. He said the dealer can keep whatever it wants; the bill just asks that the dealer informs the consumer that it will be keeping a portion of it. He indicated that is more obvious when the loan comes from the car dealer that the markup will be there than it is when the loan comes from a bank that is unaffiliated with the car dealership. He said there is a possible amendment that would say that the dealer reserve part of the bill will only apply when the offer in the contract is only coming from a bank or credit union.

8:19:49 AM

CLYDE (ED) SNIFFEN, JR., Assistant Attorney General, Commercial/Fair Business Section, Civil Division (Anchorage), Department of Law, said he spoke with Representative Gara's office in regard to the term, "**negotiated price**", and he said all the attempts at clarifying the definition made the phrase

more complicated than it presently is. He said he thinks most people in the [car] industry know what that phrase means and it is clear enough for enforcement purposes.

8:21:12 AM

MR. SNIFFEN, in response to a query from Representative Ramras, highlighted what his thought process had been in trying to come up with a better definition of "**negotiated price**".

8:22:30 AM

REPRESENTATIVE RAMRAS indicated that Mr. Sniffen's trouble in [finding the right words] parallels the trouble that the committee is having.

8:23:18 AM

REPRESENTATIVE GRUENBERG said he is less concerned with the language, "**in addition to the advertised or negotiated price**", than with the words, "**Additional fees and costs**", [on page 1, line 6]. He directed attention to [page 1, lines 11-13, which read as follows]:

> (b) In this section, "[DEALER] fees or costs" includes dealer preparation fees, document preparation fees, surcharges, and other [DEALER-IMPOSED] fees and costs.

REPRESENTATIVE GRUENBERG opined that car dealers are "sharp, both in the intellectual sense and the bargaining sense of the connotation of that word." He asked, "How can we be sure that they won't impose additional sums in addition to 'fees and costs.'"

8:24:29 AM

MR. SNIFFEN replied that he doesn't know that it is possible to predict what car dealers will try to do with the language of bill, but typically, fees and costs are what consumers are required to pay as part of the automobile transaction. He said the bill "gets us 95 percent there" and will take care of "the majority of all the transactions."

8:25:38 AM

CHAIR SEATON asked if Mr. Sniffen is saying that the fees and costs should include any additional charges that would be added on by a dealer at the time [of the transaction], except for those that are specifically exempted fees paid to a state agency for licensing, registration, and title transfer.

8:26:22 AM

MR. SNIFFEN answered that's correct. He said:

> It's our position that consumers are best served when they understand the price they have to pay for a car, absent those fees and costs that a dealer actually pays to the State of Alaska for a title and registration. And that's because some of these other fees and costs ... can be confusing and misleading to a consumer as being costs actually paid to someone else, when in fact they're just cost and fees that the dealers keep.

8:27:06 AM

REPRESENTATIVE GARA said he doesn't think the language needs to be changed, but if the committee wants a change, he suggested that adding the word "charges" would be all-encompassing.

8:27:25 AM

REPRESENTATIVE GRUENBERG suggested changing the language starting on page 1, line 13, to read, "and any other fees, costs, and charges of any kind."

8:27:49 AM

REPRESENTATIVE GARA recommended the change should be [on page 1, line 12], to add "charges" after "surcharges".

8:27:58 AM

MR. SNIFFEN said he thinks any language that would make it clear that fees, costs, and charges include everything other than fees and costs paid to the for title and registration would be good.

8:28:26 AM

REPRESENTATIVE RAMRAS said, "Do you think we could insert the word[s] 'and profit' in there also, so that we could let the

consumers know that the car dealers are there to try to generate a profit?"

CHAIR SEATON asked Representative Ramras if that is a rhetorical question.

REPRESENTATIVE RAMRAS said no. He stated, "We're going over everything that seems to be involved. Don't we want to make the consumer aware that we're going to let the dealership generate a profit in this transaction?"

8:29:09 AM

MR. SNIFFEN said he thinks it is understood by most consumers that car dealers generate a profit.

REPRESENTATIVE RAMRAS said he disagrees and he restated his question.

MR. SNIFFEN said the intent of the bill is not to "let the car dealers not make a profit," but rather to disclose all the types of charges that are added on to a transaction that potentially could be misleading. He said, "I don't know that profit falls into that category."

8:30:01 AM

CHAIR SEATON offered his understanding that "this" wouldn't eliminate profit; it would just mean that the profit is also included in the negotiated price.

8:30:32 AM

MR. SNIFFEN said he believes that is correct.

8:30:42 AM

REPRESENTATIVE GRUENBERG asked if the industry has come up with anything else that it feels it might want to or should legitimately charge that may still be excluded by the language. He stated that he does not want to be unreasonable to the industry; he just wants to ensure that the law is drafted as accurately as possible.

8:31:40 AM

MR. SNIFFEN responded that he is not aware of anything else that needs to be included at this time. He talked about the original intent of the bill and said, "I don't know that we want to get this portion of the bill headed in a direction it wasn't intended to head ...."

8:33:17 AM

CHAIR SEATON asked Mr. Sniffen, "Does this bill require them to line item out everything they're charging, or does it only require them to include in the price that they negotiate ... all the fees that they're going to charge?"

MR. SNIFFEN answered it's the latter. He indicated that the goal is to have the amount the dealer wants to charge - however that dealer wants to line item those charges - equal the amount the consumer agreed to pay.

8:34:11 AM

CHAIR SEATON said the committee was talking about "profit" and he thinks the word could be added possibly elsewhere in the bill, but not on [page 1], line 11, because "that's the definition of 'fees' and 'costs'."

8:34:35 AM

REPRESENTATIVE RAMRAS asked Mr. Sniffen if he could provide a definition for the words "advertised" and "negotiated" as they relate to the bill.

8:34:53 AM

MR. SNIFFEN replied as follows:

> "Advertised price" is in the statute currently and there is no definition for that term in the statute, and "negotiated price" does not have a separate definition as well. The way I understand those terms to mean: an advertised price is the price that you advertise for the vehicle. That can include advertisement in the newspaper, on the radio, [and] on your dealership lot, if it's a big postcard or placard in the window of the vehicle. It's any price you advertise to the public in any way .... And then negotiated price is the price that the consumer agrees with the dealer to purchase a vehicle for.

8:35:38 AM

REPRESENTATIVE RAMRAS asked for Mr. Sniffen's interpretation of the phrase "**advertised or negotiated**".

8:36:04 AM

MR. SNIFFEN offered his interpretation that if a car dealer advertises a vehicle for a specific price, that price needs to include "all the fees discussed in this bill." He continued:

> If I go into your dealership and I start negotiating with you for the purchase of a vehicle and we no longer are looking at the advertised price of the sales price, but another price, and it's [the] price that I discussed with you as the dealer that I'm willing to purchase the vehicle for - that is the negotiated price, and it is no longer the advertised price.

8:36:40 AM

REPRESENTATIVE RAMRAS asked at what point the transaction takes place. He reminded the committee that he recently bought a car in Juneau and paid a $200 doc fee. He said he knows what the advertised price and negotiated price were - and they were different prices. However, he said it didn't seem like the transaction took place until after that.

8:38:07 AM

MR. SNIFFEN responded that in that situation it sounds like Representative Ramras negotiated a price for the vehicle and, during the negotiation, the dealership told him that price would include a doc fee. He said HB 383 would not prevent that from happening. He said if the dealer wants to include a doc fee in the price of the car, then he needs to negotiate that with the consumer at the time of negotiation. He said, "If you see a car for $3,000 on the lot, ... that $3,000 would be the advertised price if it was advertised on the car, if it was in the paper, [or] if you knew it was $3,000 for some reason - ... the advertised price before you started negotiation."

8:39:04 AM

CHAIR SEATON asked, "At that point in time, that $3,000 has to include the documentation fee. Is that correct?"

8:39:25 AM

MR. SNIFFEN answered yes, under current law. He continued with his example:

> And then, when you start negotiating perhaps a lower price, you say, "Well, I'm not going to give you $3,000 - I'll give you $2,500 though," and the dealer says, "Well, I'll take $2,500 but I have to add a $199 doc fee in there," and you say, "Okay." Your consent to that charge is now part of a negotiated price, because that was included in the negotiations between you and the dealer.
>
> What this bill would not allow the dealer to do is to say, "Okay, $2,500, you've got a deal Mr. Ramras. Let's go do up the paperwork." And then you sit down there and start eating the free little mints on the table and the dealership comes back with the paperwork, and as you said, now you're confused because the paperwork shows a final price of $2,700. And you say, "Well, what's this $2,700? I thought we agreed on $2,500." And the dealer says, "Oh, that's a doc prep fee. I'm sorry, we have to add that to the cost of the car."
>
> That's the practice that we're trying to prevent here. We want the dealers to tell you everything that you're going to have to pay for the car during those negotiations, so when you get to signing the documents there aren't these additional fees that are added that really are nothing more than just profit.

8:40:56 AM

REPRESENTATIVE RAMRAS said that scenario is what happened to him. He said he bought a car for $3,000, he "went in to close," and "there was the doc fee." He said, "But I thought we were still negotiating; nobody was holding a gun to my head to buy that car." He said he had the option to get up and leave or to refuse to pay the doc fee.

8:41:10 AM

CHAIR SEATON said the point of the bill is that many consumers are led to believe that [the doc fee] is a separate charge that is necessary to complete the deal other than the negotiation with the dealer. He said nobody is saying the doc fee can't be charged; the bill would just require that there be no hidden charge that is added later after there has been an agreement made on the price of the car.

8:41:55 AM

REPRESENTATIVE RAMRAS responded, "I think that's precisely the axle that I'm getting wrapped around, which is: What does this word 'hidden' mean?" He said finding out about the doc fee happened during his transaction with the car dealer before the moment that he wrote the check. He said until the moment he wrote the check, he had the opportunity to leave the dealership.

CHAIR SEATON asked Representative Ramras:

> Your feeling is that the current ... law that we have - that those document fees have to be in the advertised price - should not be there as well, ... because that forces us to include that in the advertised price as well. I mean, is that where we're really coming through here?

REPRESENTATIVE RAMRAS replied, "I didn't follow you Mr. Chairman, but I think so."

8:42:57 AM

REPRESENTATIVE LYNN said he doesn't care if [the doc fee] "comes before or after," he just wants it clear to the consumer that it is pure profit. He stated that he is not opposed to pure profit; he just wants to see fair and honest practices. He concluded, "I think many of us in this room, perhaps, have fallen victim to this practice. I know I have in the past, and I don't like it."

8:43:56 AM

REPRESENTATIVE GRUENBERG mentioned an amendment to a past bill that required car repair staff to post a sign if they work on commission. He asked Mr. Sniffen if that requirement is being observed.

8:45:02 AM

MR. SNIFFEN said he assumes dealers are complying, but he has not heard any complaints and, thus, has not investigated the issue.

8:45:34 AM

MR. SNIFFEN shifted focus to the issue of the dealer's reserve, and he said he wanted to address some comments made during the last hearing of HB 383, relating to requiring car dealers to disclose when they mark up financing, when "in virtually every other kind of transaction that takes place on the planet you don't have to do this." He said he doesn't want the committee to be misled "by some of that information." He stated that the car buying experience is unique; it's one of the only times that a person can negotiate a price for a product. He continued:

> You've got a situation where you go into a dealership and there are a bunch of people who sort of ascend on you right away, and they do this sort of dance with you about how you have to go through these hoops to buy a car. It's ... a very unique transaction that really isn't comparable to a lot of other kinds of transactions, which is why I think the disclosure of the marked up interest rates in the dealer reserve is important for this kind of transaction that distinguishes it from a lot of other transactions.

MR. SNIFFEN, in response to a question from Representative Ramras, said he works for the State of Alaska.

8:47:32 AM

REPRESENTATIVE RAMRAS stated that transactions in a variety of services are unique. He said he thinks Mr. Sniffen's comments show a pretty clear bias against the automobile industry. He stated, "I appreciate the specific nature of your opinion, but I could do without the editorializing of the industry."

8:48:41 AM

CHAIR SEATON stated that he understands where Representative Ramras is coming from "as far as the State of Alaska," but said people can offer their opinions through testimony. He initiated a question for Mr. Sniffen.

8:49:21 AM

REPRESENTATIVE GRUENBERG interjected to call a point of order. He said he has known Mr. Sniffen professionally for a long time and he has the highest reputation. He stated, "It is most important that witnesses before this committee be allowed to testify freely. He is a professional, and he should be treated with the appropriate courtesy by the members of this committee."

8:49:56 AM

REPRESENTATIVE RAMRAS apologized for possibly stepping over the line. Nevertheless, he said he would like people to be careful how they characterize industries in Alaska that contribute to the state's economy.

8:50:09 AM

CHAIR SEATON asked Mr. Sniffen if additional interest is "allowable for real estate agents or other such sales."

8:50:32 AM

MR. SNIFFEN offered his understanding that it is not. He said real estate agents, brokers, and lenders are free to charge whatever interest rate they choose, but he said he thinks that when a person consummates a transaction, the interest rate he/she pays is up front.

MR. SNIFFEN expressed his appreciation for Representative Ramras' comments. He apologized for seeming to pick on the auto industry. He said he works closely with that industry and has a good relationship with it and respect for it. He stated, "I just wanted to make sure we were comparing apples to apples, and oranges to oranges, and some of the comments in the last meeting seem to indicate that that wasn't the case."

8:51:35 AM

CHAIR SEATON told Mr. Sniffen that he may add anything else that he deems appropriate, and he said the committee is not taking [umbrage] at his testimony.

8:52:09 AM

REPRESENTATIVE LYNN remarked that anyone who speaks probably expresses his/her bias, because everyone is unique. He said he is a licensed real estate agent. He said there are only two

things that are really negotiated in the United States: automobiles and houses. He asked if the bill would require that the doc fee be indicated as pure profit whether it comes before or after the negotiated price and, if not, whether it should.

8:53:20 AM

REPRESENTATIVE GARA said he doesn't think that should be done, because he doesn't think it could be done accurately. He offered further details. He said he runs a restaurant, and if the price of a burger is $3.99, that isn't $3.99 plus a document fee. He said, "We don't charge a buck for the credit card slip, even though that only costs us 10 cents." He continued:

> You don't want to do some sort of accounting thing where you're trying to determine how much of the doc fee is profit and how much of it is out of pocket cost. I suspect almost all of it is profit, and that's, truthfully, what the car dealer said, but we don't know if it's 100 percent, or 99 percent, or 97 percent.

8:54:36 AM

CHAIR SEATON said if that was included in the bill he would probably vote against it, because it is not appropriate to make a business say what is profit and what is not.

8:55:38 AM

REPRESENTATIVE LYNN reiterated that he believes in full and honest disclosure.

8:56:14 AM

REPRESENTATIVE GRUENBERG directed attention to an amendment that had not been offered but was in the committee packet, [labeled 24-LS1287\X.1, Bannister, 3/15/06.] He noted that line 15 [as numbered on Amendment X.1], read "from a bank or credit union". He said that excludes other types of financing, such as through [General Motors Acceptance Corporation (GMAC)], and he said he is not sure why.

8:57:48 AM

REPRESENTATIVE GARA explained that when a loan is coming from the car company, the argument can be made that the consumer

expects that somebody is making some money and there is probably some relationship between the car dealer and the loan company.

9:00:17 AM

REPRESENTATIVE GRUENBERG said he doesn't think that he or his constituents would know that.

REPRESENTATIVE LYNN concurred.

REPRESENTATIVE GRUENBERG said he would like to get away from saying who the lending institution is, but having the amendment apply to any lender. He asked Representative Gara if he has any objection to that.

9:01:40 AM

REPRESENTATIVE GARA responded that Representative Gruenberg's proposal is exactly what the bill does now. He said he sees no problem in giving consumers information, which is all the bill proposes. In response to a question from Representative Gruenberg, he said he doesn't have strong feelings one way or the other regarding whether the aforementioned amendment should be offered. He added that he thinks Mr. Sniffen has communicated that it is not necessary.

9:03:21 AM

JOHN COOK, Legislative Director, Alaska Automobile Association, testified on behalf of the association in opposition to HB 383. He stated that there is no difference between GMAC and a bank. He revealed that the Alaska Automobile Association is comprised of 70 new and used car dealerships, 2,400 employees in the new car dealerships alone, and an annual payroll in excess of $120 million, plus benefits. He noted that much of the testimony has been centered on unfair practices. He said, "I can tell you we wouldn't be in business for 60 years if we operated in that manner, nor if any of our members consistently operated in that manner. The legal community would have us out of business ...."

MR. COOK stated that the association has a close and positive working relationship with Mr. Sniffen; however, he said he respectfully disagrees with Mr. Sniffen on a couple points. He said he does not agree that the term "**negotiated price**" is clear. He said if statute is passed without a clear definition, the car dealer's will have to live with the consequences and the legal community will have to hash it out. Mr. Cook said

deceptive practices are currently prohibited in statute under the Unfair Trade Practices Act. The Act carries severe fines and penalties, including possible civil penalties from the state. Regarding doc fees, he stated that not all dealerships charge them. He said in his dealership the doc fee is disclosed and delineated separately. He said that is the standard practice of all the major dealerships. He stated that everything in regard to a vehicle transaction other than the Division of Motor Vehicle (DMV) fees is negotiable and "we can do away with all this language." However, he stated, "If a consumer comes to us and has an objection with a doc fee, we will reduce the ... selling price of the vehicles before we will reduce a doc fee." He explained the reason for doing that is that charging a different doc fee from person to person could be considered a discriminatory lending practice, which is prohibited under a federal regulation: Regulation Z.

9:08:52 AM

CHAIR SEATON said the committee had heard testimony from other car dealers [at the last hearing] stating that the doc fee was really just profit, and he offered his understanding that Mr. Cook is indicating that the doc fee is a flat fee that is something other than just another portion of profit.

9:09:16 AM

MR. COOK prefaced his clarification by revealing that he is also a certified public accountant (CPA). He said the doc fee is not pure profit; it is revenue. He continued:

> Our practice and most dealers' practice is to charge a consistent doc fee. ... All dealerships charge, generally, the same fee to everyone. It is delineated. It is revenue.

9:09:59 AM

CHAIR SEATON said some dealers have told the committee that the doc fee is negotiable and that seems different from what Mr. Cook is saying.

9:10:24 AM

MR. COOK explained that it is not different, because where the negotiation would take place would be within the vehicle price. In other words, if the customer says he/she refuses to pay, for

example, a $189 doc fee, the dealer would most likely keep the doc fee the same, but reduce the selling price of the vehicle by $189. He said the majority of the association's membership treats the situation exactly the way that he just described.

9:11:39 AM

MR. COOK, regarding the dealer reserve, said although he would term himself a sophisticated borrower, he has never had anyone disclose to him that he may be able to get a better rate somewhere else. Furthermore, he said he has never seen any industry be required to tell a person that he/she may be able to get a better rate somewhere else; therefore, that proposed provision in the bill seems to be specifically looking at the car industry. He continued:

> I can tell you that mortgage brokers ... are not originators of paper; they receive fees for selling mortgages. Of course, ... that industry is not regulated by the State of Alaska - federal lending is not. So, Mr. Sniffen is correct in that in House transactions you have the right of rescission and other things, but federal law supersedes state statute. That doesn't make it right, but that is the reason that that's different.

MR. COOK pointed out that dealers of recreational vehicles (RVs), boats, and snowmobiles have the same dealer agreements with banks that car dealers do. He added, "But we're sitting here as the only people that are being discussed ... in this bill." He said the car dealers in Alaska are competing against dealerships all across the country and are held to one of the highest standards of any industry in the country.

9:14:48 AM

MR. COOK said this bill hearing makes it sound like foul play related to doc fees and dealer reserves is common practice, but he has never received a complaint from a consumer regarding either of those issues, nor has he ever received a consumer complaint through Mr. Sniffen's office regarding these two issues. He noted that there are seven dealers in Juneau with him today, and none of them have received such complaints. He said at the last hearing [Representative Lynn] had asked why it's necessary to fix all industries before the car industry can be fixed. Mr. Cook said he is trying to figure out where the problem is. He said there is one case of a dealer who was new

to the market from out of state, and that story was publicized in the Anchorage Daily News. He asked why the legislature feels the need to fix what isn't broken.

9:16:28 AM

REPRESENTATIVE GRUENBERG suggested that since all parties interested in the bill are present, perhaps a definition of "**negotiated price**" could be formulated.

9:17:38 AM

MR. COOK said he is not an attorney and does not have the ability to come up with a legal definition of the term. He reported that his legal council has told him that he thinks the term is too vague. He said he would rather something come from the other parties and then the he would be willing to look at it.

9:18:35 AM

REPRESENTATIVE GRUENBERG suggested that if Mr. Cook thinks there should be a definition, he should take the issue up in the next committee of referral, because the House State Affairs Standing Committee can't [address the issue] "on the fly."

REPRESENTATIVE GRUENBERG said he would like to know if a violation of the bill would be a violation of the Unfair Trade Practices Act.

9:20:21 AM

MR. SNIFFEN answered yes. He said AS 45.25.400 addresses the regulation of dealer practices. He stated, "Any violation of that 400 section of this statute is also a consumer protection violation."

9:20:41 AM

REPRESENTATIVE GRUENBERG said his constituents may not be the most sophisticated, and he noted that many of them are not high wage earners and English is their second language. He said, "Maybe they do need to be told up front that the deal really is negotiable." He asked Mr. Cook, "Would your industry support such a disclosure?"

9:21:57 AM

MR. COOK said he thinks "it's something that's already there." He said that he would have no problem putting up a sign telling customers that they can negotiate, but said he thinks they do that already.

9:22:47 AM

REPRESENTATIVE GRUENBERG said he would like to ask Representative Gara the same question.

9:23:11 AM

REPRESENTATIVE LYNN, in response to a statement previously made by Mr. Cook, said the legislature is not picking on one industry; it is simply focusing on one issue at a time. He said he understands that negotiating is done when people buy vehicles, but he wants to know "what is truly negotiable." He said he didn't previously know that a doc fee was negotiable, whether by being lowered, or buy having the vehicle price lowered instead. He asked, "What is the problem with full and public disclosure on what is and is not the actual thing we're trying to buy, which in your case is an automobile?"

9:24:57 AM

MR. COOK reiterated that he believes in full disclosure and provides it. He reemphasized the lack of problems that the car dealerships have experienced in this regard, which is the reason that the association does not support the bill.

9:25:58 AM

CHAIR SEATON asked Mr. Sniffen how often he gets complaints on the issues raised in the bill.

9:26:21 AM

MR. SNIFFEN responded that although he cannot discuss the complaints in any detail because of confidentiality statutes, in a broad sense, Mr. Cook is right that there are not a lot of written complaints about the doc fee issue. He stated his belief that the reason there are not a lot of complaints is specifically because consumers don't understand that it's something that they could complain about. He said he is currently involved in a case where the department has audited some files of dealerships and, in nearly every transaction

looked at so far, has found a doc fee that was charged inappropriately. He added, "We had no complaints about those transactions either." In response to a question from Chair Seaton, he confirmed that [regarding these cases], the doc fees charged were added on above the advertised price.

9:27:45 AM

REPRESENTATIVE GARDNER seconded Mr. Sniffen's comment that the reason people don't make the complaints is that they are unaware.

9:28:33 AM

MR. COOK noted that the case to which Mr. Sniffen referred relates to advertised price. He reminded the committee that advertised prices are policed by Mr. Sniffen's office vigorously. He reiterated that the definition of negotiated price is unknown. He asked, "If you do not have a doc fee in one place and you try to put it in another or disclose it as being a mandatory fee, ... wouldn't that already be considered a deceptive practice, and isn't that covered under statutes currently on the books?"

9:29:39 AM

CHAIR SEATON stated:

> I want to make sure we don't get anybody into hot water anywhere here; ... everybody realize what they're putting on the record. I mean, if we're into a situation where we're saying that we're going to be putting these uniformly across all cars because we might run into federal law prohibitions, it's almost as if we're saying those charges are a separate charge that must be maintained. And if what we're saying under state law - ... there is no true separate charge - we want to make sure we don't get -- I just want to put everybody under awareness that we don't want to have people commit themselves to statements that they don't want in the future.

9:30:26 AM

MR. SNIFFEN said Mr. Cook raises a good point; a lot of practices that are being discussed in the bill could already be illegal under Alaska's Consumer Protection Act. He said it is

not illegal for car dealers to have a "holdback"; it is illegal for them to engage in any kind of deception that would have mislead the consumer into believing he/she was getting financing from the bank, when in fact that wasn't the true financing from the bank. He illustrated that point as follows:

> Let's say you go to a dealer and you say, "What can you do for me on this car?" And the dealer says, "Well, the best I can do for you is 5 percent." The dealer doesn't say, "The best the bank can give you is 5 percent"; the dealer says, "The best I can give you is 5 percent." [It's a] very subtle difference, but very important. If the dealer said, "Well the best the bank will do for us is 5 percent," when in fact the bank is giving the dealer a 4 percent rate and [the dealer is] holding back that 1 percent, well that's just fraud - that is deception - and it is illegal under our Consumer Protection Act.

MR. SNIFFEN said a lot of consumers may not understand that distinction when they are negotiating for the purchase of a new vehicle, which Mr. Sniffen said is a significant event for most people. He said, "So, it really is a matter of trying to prove what the dealer said, what the consumer thought, and you get in front of a court and it's a he said/she said kind of thing." Mr. Sniffen expressed his wish that all dealers were as upfront and honest as Mr. Cook so that these problems would not exist at all, but he said that is not the case. He concluded:

> So, yes they could be unlawful under our Act. It's difficult to prove that they are. And it would remove that uncertainty if we had our statute that said ... you can do it, but if you do it you have to disclose it ... clearly.

9:33:45 AM

REPRESENTATIVE GRUENBERG referred to a handwritten amendment in the committee packet, which would change the bill as follows:

> On page 1, line 8:
>
> Between "**price**" and ","
> Insert "**, including the price stated at any point during the negotiation or transaction**"

REPRESENTATIVE GRUENBERG asked Mr. Cook and Mr. Sniffen if "that would at least put some kind of a definition on the record."

9:35:05 AM

MR. COOK said he cannot speak on behalf of the association on this matter, but he personally does not like the wording and would still be opposed to the bill.

9:35:41 AM

CHAIR SEATON closed public testimony.

9:36:06 AM

REPRESENTATIVE GARDNER suggested the previously stated amendment should say, "including the price stated at any point and agreed or accepted", because she indicated that the transaction is not complete until the dealer accepts the amount offered by the consumer.

9:36:15 AM

REPRESENTATIVE GRUENBERG said he shares that concern.

9:36:24 AM

REPRESENTATIVE GARA stated that "negotiated price" never became an issue until the legislature passed a bill in 2002 banning doc fees. He said as a response to that bill, the car industry said, "Oh, you used the advertised price, so we're going to charge the doc fee in the negotiated price." He said the industry well knew what the negotiated price was; "they were the ones that created the issue." He stated, "What we're trying to do is say at no point during the process may you insert a doc fee - in your advertisement, when you negotiate with the consumer - never." Representative Gara said there are only two kinds of prices: the advertised price and the negotiated price.

9:37:56 AM

CHAIR SEATON agreed that the wording in the bill is sufficient. He said:

> The only question is, "Can you add in additional fees that aren't in the advertised price after you go to negotiations?" And that's what this bill says is that you

are working from an advertised price, and anything that's included in the advertised price is included in negotiations.

9:38:59 AM

REPRESENTATIVE GRUENBERG said he would not offer the amendment. Regarding additional charges, he asked Representative Gara where language addressing them would go in the bill.

9:39:27 AM

REPRESENTATIVE GARA suggested inserting "charges," between "surcharges," and "and other" on page 1, line 12. In response to a follow-up question from Representative Gruenberg, he said he would support such an amendment.

9:39:51 AM

REPRESENTATIVE GRUENBERG moved Conceptual Amendment 1, as follows:

On page 1, line 8:

Between "surcharges," and "and other"
Insert "charges,"

CHAIR SEATON asked if there was any objection to Conceptual Amendment 1. There being none, it was so ordered.

9:40:49 AM

REPRESENTATIVE GRUENBERG explained that he is trying to cut down on "wiggle room" in the bill. He directed attention to page 2, line 24, and expressed concern about the word "arranges". [Page 2, lines 23-25 read as follows:

(f) In addition to the other requirements of this section, if a motor vehicle dealer arranges financing for a proposed buyer, the dealer shall disclose in writing and before the sale is finalized

9:41:50 AM

REPRESENTATIVE GARA, in response to Representative Gruenberg, suggested inserting "or offers financing to a proposed buyer" in that language. In response to a follow-up question, he said he

would support such an amendment and would run it by Mr. Sniffen before the bill reaches the House floor.

9:43:06 AM

REPRESENTATIVE GRUENBERG moved Conceptual Amendment 2, as follows:

> On page 2, line 24:
> Following "proposed buyer,"
> Insert "or offers financing to a proposed buyer,"

CHAIR SEATON asked if there was any objection to Conceptual Amendment 2. There being none, it was so ordered.

9:44:08 AM

REPRESENTATIVE LYNN said he thinks the fact that the bill has been heard in two lengthy meetings by the committee and is still unclear shows that the plight of the new car buyer is remarkable and speaks to the necessity of the bill.

9:46:14 AM

MR. SNIFFEN, in response to a question from Chair Seaton, said he has no objection to the adopted Conceptual Amendment 2.

9:46:24 AM

REPRESENTATIVE GARDNER opined that although there may be elements that can be improved upon, the committee has done its best on what is a good bill. She said she views the bill as addressing consumer protection and in no way would interfere with a dealer's right to be in business and earn a profit; it is about obligations for disclosure that would allow consumers to make informed decisions.

9:46:54 AM

REPRESENTATIVE GARDNER moved to report CSHB 383(TRA), as amended, out of committee with individual recommendations.

9:47:22 AM

REPRESENTATIVE RAMRAS objected. He opined that HB 383 is a bad bill that hampers commerce.

9:47:45 AM

A roll call vote was taken. Representatives Gardner, Gruenberg, Lynn, and Seaton voted in favor of moving CSHB 383(TRA), as amended, out of committee with individual recommendations. Representative Ramras voted against it. Therefore, CSHB 383(STA) was reported out of the House State Affairs Standing Committee by a vote of 4-1.

SB 86-STATE/MUNI LIABILITY FOR ATTORNEY FEES

9:48:36 AM

CHAIR SEATON announced that the last order of business was CS FOR SENATE BILL NO. 86(CRA)(efd fld), "An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals."

9:49:45 AM

CRAIG TILLERY, Deputy Attorney General, Civil Division, Office of the Attorney General, Department of Law, introduced SB 86 on behalf of the Senate Rules Committee, sponsor by request of the governor. He paraphrased his written testimony, as follows:

> Since territorial days, Alaska has had a statutory policy of requiring a losing party in most civil cases to pay a portion of the prevailing party's attorney fees. Soon after statehood, this policy was embodied in Civil Rule 82 by the Alaska Supreme Court pursuant to a legislative delegation. ...
>
> SB 86 addresses the use of state and municipal funds to subsidize certain types of litigation through awards of attorney fees to prevailing parties that are higher than the partial fees that are the norm in Alaska. The legislation would limit those enhanced awards to instances in which the legislature has made the policy judgment to provide for them by statute.
>
> Enhanced fee awards against state and municipal governments, which [are] the amount above normal compensation, represent a significant impact on the state treasury and, on a more irregular basis, on municipal funds. Ordinarily, the basis for these enhanced awards has been the judicially created public interest litigant policy, whereby selected litigants,

suing to advance ends deemed by the court to reflect strong public policies, are granted full fees as a subsidy from the state treasury.

For the state alone, over last 10 or so years, this has averaged about $600,000 per year above normal compensation.

SB 86 would address this by creating a new provision in a chapter of title 9 that is devoted to immunities. It relies on the legislature's constitutional authorities to regulate suits against the state and to confer immunities on the state and municipalities, as well as on the doctrine of sovereign immunity. It sets limits on liability that are similar and essentially identical to those limits found in Civil Rule 82 that courts have found for years to represent fair partial compensation to a prevailing party.

The limits do not apply to condemnation proceedings - and that's because payment of full attorney fees in a condemnation proceeding is a constitutional requirement - or in instances where the legislature has provided for the enhanced fee awards, for example, in a fair business practices-type case. There is also an exception allowing courts to enhance attorney fees as a sanction for misconduct by a party or by counsel.

The immunity created by SB 86 is intended to do two things: One, it will save the state significant money each year, but, most importantly what it does, is to reassert legislative control over state expenditures to encourage litigation on public concerns, based on policy priorities that are determined by the legislature.

MR. TILLERY said the proposed legislation was introduced in 2005 and has come across to the House from the Senate. He noted that there is also a companion House bill that is in the House State Affairs Standing Committee.

9:53:09 AM

MR. TILLERY said since the bill was introduced, a couple cases of relevance have occurred: the ACLU case and the Bachner case. He said what these cases tend to demonstrate is "the creeping nature of the court's award of attorney fees against

governments, essentially headed towards what appears to be full liability any time that the government would lose." Initially, he said, public interest litigant doctrine came about as a shield to prevent public interest litigants from having to pay attorney fees under Civil Rule 82. Later, however, the idea of a public interest litigant doctrine as a sword - where "they were entitled to enhanced fees" - was put into the court's doctrine, he said. Subsequently, the court expanded that doctrine to say, "You not only get fees for ... those items that you win, but if you win on anything, you get full fees ... for ... all of your work on the case." Mr. Tillery indicated that was the [Dansereau v. Ulmer 955 P.2d 916] decision. He said the court then expanded that decision to say, "Well, you don't actually have to win if you bring the case and the state or the government reacts in such a way that suggests that you were the catalyst for that action, then you can get your full fee."

MR. TILLERY said one of the factors that has been the most effective in making any public litigant make sense is the fact that "you had to show that it was not an independent, sufficient, economic incentive to bring the case." He said the ACLU case dealt with benefits for state employees, and the court was faced with the request that "they be accorded public interest litigant status." He continued:

> There the court stated that certainly "the plaintiffs below contended that they were denied valuable benefits. We have implicitly recognized the benefits to which they're entitled are economically valuable." Nonetheless, the court went on to find that it was not a sufficient economic incentive, for the reason that the plaintiffs might change their domestic status in the future, before they actually got a benefit, or they might cease to work for the state. In essence, the court has said, "If you can imagine a contingency by which you will not get this benefit, then you don't have a sufficient economic incentive." In effect, that means that public interest litigant status would be accorded in all prospective litigation against the state and municipalities. That concern was heightened for us shortly after that in procurement case, where the losing bidder in a procurement sued and was afforded public interest litigant status, again, on the assumption, "Well, maybe [we'll] get the bid next time if ... it is tossed out."

9:56:15 AM

CHAIR SEATON surmised, "The procurement case was then basically challenging the procedures that were used to go through a bidding process but didn't actually change the award of the bid. Is that the rationale behind that, or not?"

9:56:26 AM

MR. TILLERY answered, "It challenged a procurement ... for an office building, and it tossed out the procurement and said you have to go back and rebid."

9:56:40 AM

CHAIR SEATON concluded, "So, ... the court found faulty procedures that were followed by the state or a municipality, but it didn't actually award a bid to the prevailing party."

9:57:07 AM

MR. TILLERY responded, "No, they have to go back and go through it." He added, "And by the way, ... that was a superior court case; the first one I mentioned was a supreme court decision."

9:57:24 AM

REPRESENTATIVE GRUENBERG asked if the superior court opinion was appealed.

9:57:34 AM

MR. TILLERY said it will be appealed. In response to a follow-up question from Representative Gruenberg, he said he would provide the "slip opinion number." Mr. Tillery summarized that the bill attempts to do two things: control the fiscal impact on the state and municipalities, and return to the legislature the right to set the policies as to when litigation will be subsidized. He said it is the view of the administration that it is the legislature that should do that, not the court system.

9:59:05 AM

CHAIR SEATON asked, "Did we put an exemption exception in so that if there was a constitutional challenge - if the basis of the challenge was based on constitutional grounds - then those fees would be awarded?"

9:59:34 AM

MR. TILLERY answered that four or five years ago, the legislature introduced House Bill 145, which included a provision that "a party would be entitled to full fees in a constitutional case if they didn't have independent economic incentive." He said House Bill 145 would be "an exception to this bill." He noted that [House Bill 145] was struck down by the [Alaska] Superior Court and is currently being considered by the [Alaska] Supreme Court.

10:00:13 AM

CHAIR SEATON spoke of a case in 2002 that challenged reapportionment under constitutional grounds and resulted in one of the two largest attorney fees paid by the state in a public interest litigant case. He mentioned an amount of $2 million. He asked if any analysis has been done related to how many public interest litigant fees have been granted in the past based on constitutional grounds and whether there would be a reduction in attorney fees paid by the state in public interest litigant cases should the bill pass.

10:01:37 AM

MR. TILLERY said he has not. He said to do so would involve going back and reading the decisions, which would be difficult. He explained, "Because the other thing that the bill does is it deals with the Dansereau problem by providing that you'd only get them on the actual claims that you raise that were on constitutional grounds. ... That's what [House Bill] 145 did also." He offered an example as follows:

> If you were to have ... an apportionment, or whatever, and you raised four grounds - two of them constitutional [and] two of them statutory - and you only won on the constitutional ground, then you would only get your fees for that portion.

10:02:23 AM

CHAIR SEATON suggested that the year 2002 would readily show that "almost all of it was based on the challenge by a ... political party to the redistricting based on a constitutional challenge." He asked if that is correct.

10:02:47 AM

MR. TILLERY replied that he is not familiar with that case; however, he offered his believe that redistricting has some statutory elements to it.

10:02:57 AM

RANDY RUARO, Assistant Attorney General & Legislative Liaison, Legislation & Regulations Section, Civil Division (Juneau), Department of Law, confirmed, "There are statutes on it."

10:03:19 AM

REPRESENTATIVE GRUENBERG directed attention to page [6] of 8 on the handout entitled, "Legislative Research Report February 17, 2006, Report Number 06.097" [included in the committee packet]. He pointed out the O'Callaghan v. Coghill case listed on the page and revealed that that was his case, which he won. He stated, "I do have a conflict of interest, having from time to time taken these cases, and I guess I should ask to be excused from participating ...."

10:03:48 AM

REPRESENTATIVE LYNN stated his objection.

10:03:58 AM

REPRESENTATIVE GRUENBERG, in response to a question from Chair Seaton, confirmed that the O'Callaghan v. Coghill case was on constitutional grounds. He added that subsequently the U.S. Supreme Court reversed that decision.

REPRESENTATIVE GRUENBERG said if a public interest litigant loses, attorney fees cannot be awarded against that litigant. He offered his understanding that that is the current state of the law.

MR. TILLERY responded that actually the legislature essentially abolished the public interest doctrine, "as the court had done," through House Bill 145. In response to a follow-up question from Representative Gruenberg, he confirmed that that doctrine was ruled unconstitutional by the superior court, but is the current state of law until the supreme court rules on it.

10:06:29 AM

REPRESENTATIVE GRUENBERG said, "If you win, you get full attorney's fees under the current state of the law." He added that that is both at the trial court level and on appeal. He offered further details.

10:07:00 AM

MR. TILLERY confirmed that Representative Gruenberg's statements were correct.

10:07:08 AM

REPRESENTATIVE GRUENBERG said cases where there is a money judgment are not public interest cases, but are just run of the mill civil lawsuits.

MR. TILLERY said that's correct.

REPRESENTATIVE GRUENBERG proffered that normally under Rule 82, if it is a nonmoney judgment, the attorney gets a percentage of his/her actual attorney fees. He offered his understanding that the amount is 20 percent if the case does not go to trial and 30 percent if the case goes to trial and is won.

REPRESENTATIVE GRUENBERG said on appeal the situation is quite different. He continued:

> The supreme court, on an appeal, is under an appellate rule, not Rule 82, and the appellate rule gives total discretion to the supreme court. ... They award very few attorney fees to anybody in a nonpublic interest case; ... it's generally somewhere between $500 and $1,000 .... So, it's almost a token, because it's a lot more expenses to take an appeal .... They determine whether you win an appeal as an appellate. Generally, if you prevail on a single issue, they would hold you as a prevailing party. They might not award you the full $1,000 - you might only get half of it, or something like that.

REPRESENTATIVE GRUENBERG directed attention to page 2, lines 22-24, which read as follows:

> (3) in an appeal in which the prevailing party does not recover a money judgment, 20 percent of the prevailing party's reasonable actual

attorney fees that were necessarily incurred in litigating issues upon which the party prevailed.

REPRESENTATIVE GRUENBERG explained:

> In an appeal now, if you're a prevailing party - even against the state - in an injunction or a declaratory judgment action, you'd only get something less than $1,000, which is far less than 20 percent. So, this, I believe, Mr. Tillery, ... might significantly increase the amount a prevailing party would get in a run-of-the-mill declaratory judgment appeal against the state. ...
>
> A typical appeal might cost $8-10,000 in attorney fees [for] actual time. ... Let's say there's a mine and they've closed the road, and you want an injunction to require the state to change their administrative decision so the road to the mine goes open. [You] pay $10,000 [and] you win on the appeal. Now you would only get $1,000 against the state, but you've spent ten grand in your ... successful appeal. Under this, you double the amount you'd get against the state, ... which I would support, by the way. You might actually find prevailing appellate in ... nonmoney judgment cases getting a higher amount against the state than you do under the current appellate rule.

10:11:17 AM

MR. TILLERY responded to Representative Gruenberg's statements by saying, "This wouldn't affect that; this is only ... a cap on what the state will pay." He added that in cases where it would have given a thousand dollars, the supreme court presumably will continue to give a thousand dollars. He said, "What this would deal with was the situation where they ... might provide for full fees."

10:11:45 AM

REPRESENTATIVE GRUENBERG asked Mr. Tillery if the intent of the bill is not to change court rules.

10:12:10 AM

MR. TILLERY responded:

> [What] it basically finds is a matter of sovereign immunity - that the state will not be liable for more than this amount. Then the amounts that it has in here, as I'm sure you've noted, mirror Civil Rule 82.

REPRESENTATIVE GRUENBERG said, "Except it doesn't mirror the appellate rule in the case I'm talking about."

MR. TILLERY mentioned Appellate Rule 508. He said, "Courts have been ... a little bit all over the board, but the normal practice is to, by analogy, apply Civil Rule 82 standards ... to administrative appeals." He added, "And 508 applies to both of those."

10:13:07 AM

REPRESENTATIVE GRUENBERG asked, "So, you're saying that in administrative appeals they apply Rule 82 both at the superior court and the supreme [court]?"

10:13:20 AM

MR. TILLERY answered not on the supreme court; it would more typically give the $1,000, except in the case of public interest litigants. He explained, "This would simply set a cap on liability; it wouldn't change the court's normal practice."

10:13:40 AM

CHAIR SEATON asked Representative Gruenberg to meet with the Office of the Attorney General on "these points that are really somewhat off the bill." He asked Mr. Tillery if public interest litigants have to win on the main issue, or if they can win on some small subsidiary issue and receive full attorney fees as if having won the main issue. He mentioned Hillman v. Nationwide.

10:14:59 AM

MR. TILLERY replied that under Dansereau "you don't have to be the primary prevailing party." He said in that case, the court awarded full fees, even though the party won on only one of its three claims. He offered a couple other examples in: State v. Alaska Civil Liberties Union - a 1999 case, and another 1999 case involving the Cook Inlet areawide lease sale.

10:17:49 AM

SCOTT A. BRANDT-ERICHSEN, Attorney at Law, Ketchikan Gateway Borough, said he is testifying on behalf of himself, using his 18-year experience in litigation and advice giving. He indicated that although it would make his job more frustrating if SB 86 "did away with the shield presented by the public interest litigant status," he thinks the way the bill is structured in "just doing away with the sword aspect" is a reasonable compromise. He told the committee that in his experience representing municipalities he has had six to seven cases over the years that have involved public interest litigant issues.

MR. BRANDT-ERICHSEN described one case involving a two-way lawsuit. He said, "We were sitting in the middle with public interest litigants on both sides, assured that we would lose to at least one of them and have to pay full attorney fees with no prospect of getting our fees covered." He stated, "While that's an unusual case, the situation of facing litigation over an issue which may be of minor importance to the entity, but of significant concern in terms of the financial risk to the community involved, ...is a concern that I would like to see addressed." Mr. Brandt-Erichsen opined that SB 86 addresses this concern. He continued:

> The public interest attorney [fee] is not a court rule as it is now, and so it doesn't require an amendment to a court rule to achieve the things that this bill is seeking to achieve. The changes in this bill I don't believe would create a sufficient disincentive to public interest litigants to keep them from challenging governmental actions which they believe were taken improperly. I think we'll see a comparable number of challenges in the future if this bill is adopted, but the stakes for those challenges, for municipalities and for the state, will not be as lopsided.

10:23:03 AM

MR. BRANDT-ERICHSEN, in response to a question from Chair Seaton, stated:

> There are occasionally issues where ... you realize there's a significant risk of litigation over the validity of the provision because there is a party that is either philosophically or economically motivated to challenge it. ... There's always a

certain level of care, but the level of care that you take to try to ensure that you have covered all possibilities to avoid successful litigation by someone challenging the legislation or regulation is probably higher in those instances.

These public interest litigant cases however - ... only about half of the ones that I've had have come up in the context of political issues, regulatory type, or law changes. Half of the ones that I have encountered have arisen out of administrative discharge of statutory duties, for example, the municipal clerk being charged with processing recall petitions. There are specific duties that the clerk is charged with carrying out, and someone challenging how those duties were carried out isn't really challenging legislation so much as that the action was not taken consistent with what the rules are.

10:24:59 AM

CHAIR SEATON asked if there has been any heightened awareness or execution of those duties knowing that there could be public interest litigant challenges if the duties are not properly executed.

10:25:46 AM

MR. BRANDT-ERICHSEN answered yes. He relayed that in most of the instances where public interest litigation develops, it tends to be in areas where there is certain controversy, for example, timber sales, recall issues, election contests, or certain legislation. He said the people who are not pleased with the way a particular policy issue was handled or with the decision that was made by an administrative official will look for anything they can find to try to get that decision reversed. He concluded, "And so, regardless of how careful you are, it will not prevent them from going to court to try and get it overturned anyway."

10:27:15 AM

REPRESENTATIVE GRUENBERG recalled that Mr. Brandt-Erichsen had testified that SB 86 is designed to change certain court interpretations, thus, the court rule does not need to be amended. He said, "We find that quite often what we're dealing with is legislation designed to modify or reverse

interpretations, say, of statutes. And the way the legislature works, if you're doing that, you amend the statute. And it's the same with a court rule; I don't see any difference." He asked Mr. Brandt-Erichsen what basis he had for the aforementioned statement.

10:28:16 AM

MR. BRANDT-ERICHSEN clarified that he had meant that SB 86 would change a court interpretation; however, that interpretation "has not been reduced to a rule in one of the court rules." He explained, "The concept of public interest litigants and the way fees are awarded in public interest litigant cases is a construction of court decisions, rather than a rule, such as Rule 82. And so, while this legislation would have an interaction with prior court decisions, it does not change the court rules themselves."

10:29:07 AM

REPRESENTATIVE GRUENBERG said he thinks that is an issue that should be examined, because normally the attorney fee provisions are an interpretation of the court rules.

10:30:43 AM

REPRESENTATIVE GRUENBERG said he would like to know if Mr. Tillery and Mr. Brandt-Erichsen have opinions regarding whether a two-thirds vote or only a majority vote under the court's interpretive power would be necessary should the court rules be modified.

10:31:05 AM

[SB 86 was heard and held.]

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:31:37 AM.