ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 17, 2008
2:05 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Ralph Samuels
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Bob Lynn

COMMITTEE CALENDAR

HOUSE BILL NO. 103
"An Act amending Rule 62, Alaska Rules of Civil Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal or review; and amending Rules 204 and 205, Alaska Rules of Appellate Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal."

- HEARD AND HELD

HOUSE BILL NO. 278
"An Act relating to sex offenders and child kidnappers."

- MOVED CSHB 278(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 355
"An Act requiring the disclosure of the identity of certain persons, groups, and nongroup entities that expend money in support of or in opposition to ballot initiatives and the aggregate amounts of significant contributions or expenditures made by those persons, groups, and nongroup entities."

- SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

BILL: HB 103

SHORT TITLE: BOND REQUIREMENT ON APPEAL
SPONSOR(S): REPRESENTATIVE(S) COGHILL

01/22/07	(H)	READ THE FIRST TIME - REFERRALS
01/22/07	(H)	JUD
03/12/08	(H)	JUD AT 1:00 PM CAPITOL 120
03/12/08	(H)	Heard & Held
03/12/08	(H)	MINUTE(JUD)
03/17/08	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 278
SHORT TITLE: SEX OFFENDER/CHILD KIDNAPPER REGISTRATION
SPONSOR(S): REPRESENTATIVE(S) BUCH, DOLL, GRUENBERG

01/04/08	(H)	PREFILE RELEASED 1/4/08
01/15/08	(H)	READ THE FIRST TIME - REFERRALS
01/15/08	(H)	JUD, FIN
03/13/08	(H)	JUD AT 1:00 PM CAPITOL 120
03/13/08	(H)	Heard & Held
03/13/08	(H)	MINUTE(JUD)
03/17/08	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

MARGARET R. SIMONIAN, Attorney
Friedman Rubin & White Trial Lawyers
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 103.

DYLAN C. BUCHHOLDT, Attorney
Pentlarge Law Group
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 103.

MICHAEL J. SCHNEIDER, Attorney
Law Offices of Michael Schneider, P.C.
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 103.

VICTOR SCHWARTZ, Attorney; Private Sector Co-Chair
Civil Justice Task Force
American Legislative Exchange Council (ALEC)
Washington, D.C.
POSITION STATEMENT: Testified during the hearing on HB 103.

EMILY NENON, Director
Alaska Government Relations

American Cancer Society (ACS)
Anchorage, Alaska
POSITION STATEMENT: Answered a question during the hearing on HB 103.

REPRESENTATIVE BOB BUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as one of the joint prime sponsors of HB 278.

ACTION NARRATIVE

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 2:05:20 PM. Representatives Samuels, Dahlstrom, Coghill, and Ramras were present at the call to order. Representatives Holmes and Gruenberg arrived as the meeting was in progress.

HB 103 - BOND REQUIREMENT ON APPEAL

2:05:33 PM

CHAIR RAMRAS announced that the first order of business would be HOUSE BILL NO. 103, "An Act amending Rule 62, Alaska Rules of Civil Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal or review; and amending Rules 204 and 205, Alaska Rules of Appellate Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal." [Before the committee was the proposed committee substitute (CS) for HB 103, Version 25-LS0401\E, Bailey, 5/2/08, which had been adopted as the work draft on 3/12/08.]

2:06:09 PM

MARGARET R. SIMONIAN, Attorney, Friedman Rubin & White Trial Lawyers, stated that she was a life long Alaskan, practicing law in Anchorage. She noted that she works for a firm that specializes in insurance cases and contract disputes. She stated that she wished to speak in opposition to HB 103, and opined that this body, other legislatures around the country, and Congress have spent time attempting to curb the incidence of frivolous lawsuits. However, this bill, unwittingly, sets up a system of frivolous appeals, and is a dangerous precedent to set. She said that she read through the materials that were available from the sponsor and noted that the focus seems to be

that this bill would only generate appeals from plaintiffs who have won, and defendants who have lost. She argued that HB 103 would affect any losing party in a dispute, because it sets up a system in which the person who loses gets to appeal, without having to post a bond in an amount equal to the amount of the judgment.

MS. SIMONIAN pointed out that this problem was recognized in the fiscal note, in which the Department of Law (DOL) stated that the fiscal note is indeterminate but likely significant. The reason the fiscal note can not be calculated is that a great deal of post trial litigation would ensue, she opined. She reported that the sponsor, and those who support the bill, seem to believe that HB 103 would protect the party that won at trial, in that it offers protection if the loser attempts to hide assets or dissipate assets in order to avoid paying the judgment. However, nothing in this bill provides a mechanism for ensuring that the assets are not hidden. She explained that the reality of an appeal is that it lasts for many years. Since the bill does not create a mechanism to figure out if a company is hiding assets, the burden is on the person who won at trial to keep track of the losing party's assets. She opined that the bill was not necessary since the trial court has the discretion to lessen the amount of an appeal bond, as well as to increase it; however, this fact is not recognized by the sponsor in any of the supporting documents. Ms. Simonian stated that if a company did not have the assets to post a bond on appeal and could potentially face bankruptcy in order to do so, the company could go to the trial court and request a lessor bond amount.

MS. SIMONIAN further explained that HB 103 would apply with equal force to business disputes. She referred to three examples in the committee materials in which businesses who lost were forced into bankruptcy. However, none of those cases involved personal injury or an individual plaintiff versus a company situation. Instead, the cases involved businesses against businesses. She opined that, in cases in which a business has a contract dispute with another business, the bill would encourage the losing party to appeal, even if the losing party does not have a meritorious reason for appealing. She warned that the business community may not understand that this bill might end up hurting the business community since [businesses] would be tied up in the appellate process, even in instances in which an appeal does not have any merit.

2:11:01 PM

REPRESENTATIVE GRUENBERG referred to page [2], line 6, in the proposed CS, Version E, that contains the phrase "dissipating assets". He explained that "dissipating" implies an action on the part of the appellant and offered a hypothetical example in which a company is falling into hard times, but the company is not taking action to dissipate assets. He opined that HB 103 would apply rather than having the exception apply. Thus, the judgment could become worthless even though the appellant is not intentionally or negligently "dissipating assets."

MS. SIMONIAN argued that is always the case. She cautioned the body against the claim that, without this bill, people who have a judgment against them would sometimes go into bankruptcy because they can not afford the appeal bond. She said, "The bottom line is that sometimes companies go into bankruptcy because they can't afford to pay the judgment that a jury has said they owe, whether that's to an individual or to another company." Ms. Simonian advised that the claim that this aspect of the bill somehow protects the party that won at trial is illusory; in fact, if a party can prove by a preponderance of the evidence that a company is intentionally dissipating assets, the party can force that company to post a bond just by saying it, and not providing a practical method to do so, does not provide any protection at all.

MS. SIMONIAN then asked:

> How is a person who has ... won at trial, whatever the dispute may be, whether it is a contract dispute or a real estate dispute, ... supposed to prove by a preponderance of the evidence that the party that lost is now trying to hide or dissipate its assets? ... There's no way to prove that.

2:14:49 PM

REPRESENTATIVE GRUENBERG remarked:

> If there is a litigable issue of "intentional dissipation" and if the appellee bears the burden of proof by a preponderance of the evidence, isn't that, in essence, an action for fraud within the main action? Aren't those basically the elements you have to prove to show a fraudulent transfer?

REPRESENTATIVE GRUENBERG then indicated the difficulty in litigating a fraudulent transfer.

MS. SIMONIAN agreed. In fact, in order to protect the judgment, the person would have to litigate a separate case and by passing this bill, the committee would impose a whole new level of litigation on both parties, which is essentially a fraudulent transfer case with the same standard of proof, which is a preponderance of the evidence. She also pointed out that, in order to access this sort of information, which is not public information, the information would have to be in the context of litigation.

2:16:41 PM

CHAIR RAMRAS referred to the many letters of support in members' files and asked whether she could explain their support for the bill.

MS. SIMONIAN surmised that HB 103 was sold to supporters as a bill of tort reform. Thus, the business community is in support of tort reform, and the bill does make it easier for a business, that has lost at trial, to appeal a case. However, the other part of that equation is that this would also make it easier for a business that has lost to another business in a contract dispute to make a frivolous appeal. Ms. Simonian dismissed the idea of multi-million dollar judgments driving businesses into bankruptcy as unsubstantiated. In fact, the biggest judgment issued in the state of Alaska after trial was the John Ellsworth v. Cook Inlet Region, Incorporated (CIRI) case, in which the jury awarded each side millions of dollars. Furthermore, had HB 103 been in effect at that time, one of the parties would have been able to appeal the jury's decision without posting a bond that was the amount of the judgment against them.

MS. SIMONIAN presented a scenario in which a hotel owner sues another party for defaulting on a contract and wins, then that the company, regardless of the merits of the appeal, would be allowed to appeal without posting a bond in the amount of the judgment. The hotel owner would not only need to litigate the appeal, but would need to litigate whether the company is trying to hide its assets to avoid paying the money that they owe you since they defaulted on their contract. She surmised that the letters of support came from people who may not have understood the implications of the bill. She stated that she read some of the letters, which seemed to have the misconception that someone's right to trial was somehow infringed and that this bill would make it easier for a person to exercise his or her right to trial.

CHAIR RAMRAS said, "With all due respect, Ms. Simonian, as a person in the private sector, than I fundamentally misunderstand this bill, because that's precisely the way I get it."

REPRESENTATIVE GRUENBERG pointed out that the language states that the amount of the bond may not exceed the lesser amount of $5 million, or 10 percent of the appellant's net worth. He asked, in a case in which punitive damages are not at issue, but the net worth of the company may be an issue, at the point of trial, up to the time of judgment, whether the bill would add a layer of post trial discovery.

MS. SIMONIAN confirmed that post trial discovery would be added since the party would never know a company's net worth unless a jury has decided that punitive damages are appropriate. She opined that if punitive damages were not an issue, that HB 103 would require another layer of litigation in order to determine whether $5 million, or 10 percent of the company's net worth, is less.

2:22:10 PM

REPRESENTATIVE GRUENBERG then inquired as to whether Ms. Simonian was aware of cases in which an insurance company has decided to appeal, not for the benefit of the insured, but because an important point of insurance law is involved.

MS. SIMONIAN said yes.

REPRESENTATIVE GRUENBERG then remarked:

> And does this then measure who the real appellant is because ... in an auto accident, and you've got person A versus person B, who maybe is simply, doesn't even have anything except for a $50,000 policy ... but the real issue is something that Allstate or State Farm or Geico ... has a real interest in.

MS. SIMONIAN said that she was unsure. She opined that the insurance company would argue to "look at the person and not the insurance company." She said that she thought that the intent of the bill was to protect the idea that a business should not go into bankruptcy in order to appeal a decision; therefore, looking at the insurer would undermine the intent.

REPRESENTATIVE GRUENBERG observed that the insurance company is not a named appellant or a named appellee.

MS. SIMONIAN concurred, adding that the judgment would be against the assets of the insured, not of the insurance company.

REPRESENTATIVE COGHILL, speaking as the sponsor of HB 103, expressed his understanding that "the insurance is the set for the bond, but the strict liability is on the appellant."

MS. SIMONIAN said, "That is true if they're insured, typically ... the judgment would only be the amount they're insured ...."

REPRESENTATIVE COGHILL then asked whether a company has ever had to fight its insurance company to maintain the agreed bonding requirement.

MS. SIMONIAN indicated that she had not handled a case like that.

2:26:05 PM

REPRESENTATIVE COGHILL, referring to the matter of fairness, asked whether it is appropriate for an appellant to dissipate his or her assets.

MS. SIMONIAN said no.

REPRESENTATIVE COGHILL then inquired as to whether the amount, or the language in the bill, was disturbing in this rule change.

MS. SIMONIAN responded that the amount is disturbing, and while the language is intended to ensure that there is not an abuse of the appellant process, she still has concerns about the bill.

REPRESENTATIVE COGHILL questioned whether, during the appellant process, the judgment is in the hands of the court, and whether there would be a separate trial or [the proceedings would be] a part of the appeal process.

MS. SIMONIAN explained that, when a judgment is entered, the trial court is done and responsibility transfers to the appellate court. However, the bill requires the parties to continue to litigate before the trial court and simultaneously litigate the appeal.

REPRESENTATIVE COGHILL surmised that the issues of "state and other governmental entity," "intentionally dissipating assets," and "environmental disaster" become problematic because they are in a very different discovery mode.

MS. SIMONIAN concurred, adding that an appellant is not allowed to dissipate assets and so if there were no exception there would be issues of fraud. She also stressed that an appellant would be required to reveal its financial records to the other party throughout the years of the appeal process.

REPRESENTATIVE COGHILL stated that the purpose is [to prevent] an appeal that would immediately drive a company into bankruptcy, yet maintain sympathy for the prevailing party. There is also the attempt to lower the limit of appeal and establish safeguards.

MS. SIMONIAN warned that the safeguards are intrusive and are nearly impossible to be effective in the realm of litigation, because whoever won would have to become a watchdog over the party that lost.

2:32:59 PM

REPRESENTATIVE COGHILL described his interest in lessening bond requirements, and explained that the bill is modeled on legislation in other states. He asked whether the establishment of a cap on the amount of bonds and the addition of performance requirements would still create problems. He then asked, "Do you think that it should always be the value of the judgment or is there some place for a cap?"

MS. SIMONIAN explained that [the existing] rule has a built-in mechanism to ensure that an unfair result does not occur. She reminded the committee that the amount of the bond is at the discretion of the court and does not have to be equal to the amount of the judgment; in fact, a company could present information to the court and request a lower amount. She acknowledged that unfair situations have occurred. Furthermore, a low cap on bonds would encourage frivolous appeals. Ms. Simonian said that the situation involving the Exxon Valdez is an example of "playing the appellant game," at the expense of the parties who should have been compensated, for 20 years.

REPRESENTATIVE GRUENBERG noted that normally the federal bankruptcy law protects a debtor, and a person who has a judgment is just another type of creditor. He opined that the

sponsors of the bill are seeking protection for debtors against creditors. Recently, the federal government has sought to limit the protection that debtors have under the bankruptcy Act, and the bill is counter to that.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

MS. SIMONIAN agreed.

REPRESENTATIVE GRUENBERG also pointed out that those with judgments against them often delay [payment], because the amount of interest is far less than the value of the use of the money. He gave an illustrative example.

MS. SIMONIAN strongly agreed, and described the financial advantages to a party that holds up a judgment for several years.

REPRESENTATIVE GRUENBERG then referred to Alaska Rules of Civil Procedure, Rule 80, Bonds and Undertakings, and asked for its effect in this circumstance.

MS. SIMONIAN said she had not considered its effect.

2:43:15 PM

DYLAN C. BUCHHOLDT, Attorney, Pentlarge Law Group, stated that he represents plaintiffs in personal injury claims. He said that he echoed many of Ms. Simonian's comments and added that the protections the bill was seeking are built-in the current process. In addition, he pointed out that 97 percent of civil cases are settled before trial and the remaining cases do not warrant a change in the rules. Furthermore, he opined that the present bond requirement is the only "rock solid" way to protect the judgment because the other party would not have a way to determine whether a dissipation of funds has occurred; in fact, enactment of the bill would force every appellee to immediately file suit to protect their assets.

MR. BUCHHOLDT then spoke of the "environmental disaster" exception. Although this exception is the direct result of the litigation involving the Exxon Valdez, there remains the question of whether other cases, such as those involving catastrophic injuries to families, should also be excepted. Mr. Buchholdt concluded that the bill was really written for the benefit of big business, such as insurance companies, and he encouraged the committee to table the bill.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

2:48:08 PM

MICHAEL J. SCHNEIDER, Attorney, Law Offices of Michael Schneider, P.C., informed the committee that he has practiced law in Anchorage for 33 years. He referred to his letter of March 15, 2007, to Senator Huggins that addressed an identical bill, SB 48. He joined with the comments of the two previous witnesses and added that there would always be extremely rare instances, in the current system, where outcomes prove to be unfair. However, HB 103 would change a system that works well for everyone and have the system address "cases that are a few standard deviations away from the main." Mr. Schneider also stressed to the committee that the bill is terrible public policy due to the fact that anyone, or any business, can be drawn into litigation, and HB 103 would afford the loser "another bite at the apple" paid for by the public. Mr. Schneider re-stated the avenues of relief that are already afforded a party assessed a judgment. He then concluded that there was no reason for changes to a system that was fair to all.

REPRESENTATIVE GRUENBERG pointed out that the bill is inconsistent in its use of the terms "intentionally dissipating assets" and "dissipating assets."

MR. SCHNEIDER said, "That would be a bad idea." He then described the difficulty and the cost, after a judgment is issued and the discovery period is over, to determine whether a company is dissipating assets.

REPRESENTATIVE GRUENBERG stated that under existing rules, the amount of the supersedeas bond is the amount of the judgment, plus the costs on appeal, plus interest. However, the amount required by HB 103 would only be the amount of the judgment. He then asked for an estimate of the difference in the amounts.

MR. SCHNEIDER estimated that there would be a difference of 15-20 percent.

REPRESENTATIVE GRUENBERG further asked how one would know whether costs were "outside the ordinary course of business."

MR. SCHNEIDER compared the statement to "How many legal fairies can dance on the head of a pin?"

2:58:57 PM

VICTOR SCHWARTZ, Attorney, Private Sector Co-Chair, Civil Justice Task Force, American Legislative Exchange Council (ALEC), disagreed with previous testimony that an appellant has nothing to lose, considering the amount of the bond that could be forfeited. Furthermore, 37 states already have a similar law, and no problems have been reported. He then stressed that the right to appeal is an important right and the bill intends to address cases in which a judge has made a significant error.

CHAIR RAMRAS closed public testimony on HB 103.

REPRESENTATIVE SAMUELS referred to page 3, lines 6 and 7, of the bill that read:

> (A) to awards in actions or proceedings in which the state or another governmental entity is a party;

REPRESENTATIVE SAMUELS than asked the representative for the American Cancer Society the following:

> When I read that it seemed that that was the way to get away from the issue of big tobacco and their appeal bonds, which was an issue three or four years ago, and I'm just wondering if you have an opinion on that.

EMILY NENON, Director, Alaska Government Relations, American Cancer Society (ACS), stated that she has not seen that version of the bill.

3:03:25 PM

CHAIR RAMRAS announced that HB 103, Version E, would be held over.

HB 278 - SEX OFFENDER/CHILD KIDNAPPER REGISTRATION

3:03:53 PM

CHAIR RAMRAS announced that the final order of business would be HOUSE BILL NO. 278, "An Act relating to sex offenders and child kidnappers." [Before the committee was the proposed committee substitute (CS) for HB 278, Version 25-LS1104\E, Luckhaupt, 2/21/08, which had been adopted as the work draft on 3/13/08.]

CHAIR RAMRAS recalled that previous discussion raised the questions of whether people could be identified by their "handles" and whether clarification of the definition of "Internet communication identifier" would be provided.

3:05:19 PM

REPRESENTATIVE BOB BUCH, Alaska State Legislature, speaking as one of the joint prime sponsors of HB 278, concurred and asked Representative Holmes to present Amendment 1, an amendment labeled 25-LS1104\E.2, Luckhaupt, 3/17.08, which read:

Page 1, line 10, following "address;":
Insert "or"

Page 1, lines 11 - 14:
Delete all material and insert:
"(C) establishment of an online identifier or any change to an online identifier; in this subparagraph, "online identifier" has the meaning given in AS 12.63.010;"

Page 3, lines 4 - 6:
Delete all material and insert:
"**(I) each online identifier used by the sex offender or child kidnapper;**"

Page 3, lines 16 - 17:
Delete "**electronic mail address, instant messaging address, or other Internet communication**"
Insert "**online**"

Page 3, line 19:
Delete "**address or**"

Page 3, following line 19:
Insert a new bill section to read:
"*** Sec. 4.** AS 12.63.010(f) is amended to read:
"(f) In this section,
(1) "correctional facility" has the meaning given in AS 33.30.901**;**
(2) "online identifier" means any electronic mail address information or instant message, chat, social networking, or other similar Internet communication name, but does not a include social security number, date of birth, or pin number."

Renumber the following bill sections accordingly.

Page 3, line 20:
Delete "a new subsection"
Insert "new subsections"

Page 3, lines 23 - 24:
Delete "electronic or messaging address or Internet"
Insert "online"

Page 3, line 24:
Delete "address or"

Page 3, lines 26 - 27:
Delete "electronic or messaging addresses and Internet communication"
Insert "online"

Page 3, line 30:
Delete "addresses or"

Page 3, following line 31:
Insert a new subsection to read:
"(j) In this section, "online identifier" has the meaning given in AS 12.63.010."

Page 4, line 11:
Delete "electronic or messaging addresses or Internet communication"
Insert "online"

Page 4, line 13:
Delete "addresses and"

Page 4, lines 14 - 16:
Delete "electronic or messaging address, or any changes to those addresses, or the establishment of an Internet communication identifier,"
Insert "online identifier"

Page 4, lines, 18 - 19:
Delete "electronic or messaging addresses or Internet communication"
Insert "online"

Page 4, line 19:
Delete "addresses and"

3:05:40 PM

REPRESENTATIVE HOLMES explained that Amendment 1 is aimed at defining "online identifier" and adding conforming language.

REPRESENTATIVE BUCH stated that Amendment 1 answered Representative Coghill's questions and was patterned after Arizona's registration law.

CHAIR RAMRAS closed public testimony on HB 278.

REPRESENTATIVE HOLMES made a motion to adopt Amendment 1. There being no objection, Amendment 1 was adopted.

3:07:15 PM

REPRESENTATIVE DAHLSTROM moved to report the proposed committee substitute (CS) for HB 278, Version 25-LS1104\E, Luckhaupt, 2/21/08, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 278(JUD) was reported from the House Judiciary Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:07 p.m.