

SB

448

ALASKA ACADEMY OF TRIAL LAWYERS

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April 15, 1988

for SB-4108
Rec'd 4-21-88

Representative John Sund
Chairman
House Judiciary Committee
P. O. Box V
Juneau, AK 99811

Re: HB 517

Dear Representative Sund:

House Bill 517, pending before your Committee, grants immunity to certain volunteers in connection with their volunteer functions and duties. The bill, however, makes certain exceptions. First, persons guilty of gross negligence, recklessness or intentional misconduct are not immune. Second, persons who have insurance which covers their activities as a volunteer are liable, but only to the extent of such insurance coverage. It is the second of these exceptions that I would like to address.

The exception is founded on sound public policy. First, public policy favors compensating people who have been injured through the fault of others, and immunity from this liability is generally disfavored. Secondly, if insurance has been purchased to cover the risk and the risk is declared immune, the result is a windfall to the insurance carrier. The exception contained in (b)(2), as written, satisfies public policy respecting both of these issues; while extending immunity to the volunteer to the extent that his liability exceeds his insurance coverage.

I am advised that the constitutionality of subsection (b)(2) has been questioned by someone during the course of pendency of this bill. Specifically, someone has suggested there is an "equal protection" question raised by subsection (b)(2). I respectfully submit that there is no serious constitutional question introduced by the concept embodied in subsection (b)(2).

Historically, a very close parallel to the provisions of subsection (b)(2) developed with regard to charitable immunity. Several decades ago, charitable immunity was still alive and well in many states. Since then, of course, many states have abolished charitable immunity. However, when that immunity

Representative John Sund
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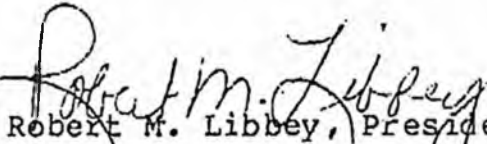
doctrine was still broadly recognized, a great many states carved out an exception to immunity for those charitable institutions which had liability insurance. The exception was justified on the basis of implied waiver of immunity, and the fact that to hold otherwise would simply grant a windfall to insurance companies. At least two states, Arkansas and Maryland, made the same exception to charitable immunity by the statutory process. Whether created by statute or court ruling, this exception to the immunity rule has never been challenged on a constitutional basis.

Given the history of judicial treatment of this closely similar concept, it is extremely unlikely that the provisions of subsection (b)(2) would be held to be constitutionally flawed.

If you desire further information, do not hesitate to contact me.

Respectfully and sincerely,

ALASKA ACADEMY OF TRIAL LAWYERS


Robert M. Libbey, President

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3600

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 21, 1988

SUBJECT: Constitutionality of CSSB 448(Judiciary)
 (4/20/88 draft)

TO: Senator Jay Kerttula, Chairman
 Senate Judiciary Committee

FROM: Edward H. Hein *EHS*
 Legislative Counsel

Enclosed is a draft committee substitute for SB 448 requested by your assistant, Beth Kerttula.

The bill provides immunity from civil liability for damages resulting from the negligence of volunteers of the state, a municipality, or a nonprofit entity. The immunity does not extend to gross negligence, recklessness, or intentional misconduct, or to simple negligence if and to the extent that the defendant is insured. This last feature makes the bill unconstitutional as a violation of equal protection and due process.

Under Article I, section 1, of the Alaska Constitution, "all persons are equal and entitled to equal rights, opportunities, and protection under the law." The test of constitutionality under this section is whether the means chosen by the legislature substantially furthers a legitimate state interest, which the court then weighs against the interest of the person or group discriminated against. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978).

It is not clear that the provision in proposed Sec. 09.65.098(b)(2) furthers any legitimate state interest. That paragraph discriminates between similarly situated negligent volunteers on the basis of whether they are insured. If the state's interest is to encourage persons to perform volunteer work for state, municipal, or nonprofit entities, by immunizing them from some civil liability, the provision works to defeat, rather than further, that interest. More

Senator Jay Kerttula
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important, predicating liability on the existence of insurance is an irrational basis for discrimination. It is not rationally related to a legitimate state interest, and therefore fails even the lowest level of constitutional scrutiny. See also Turner Construction Company, Inc. v. Scales and Clapper, file No. 5-1429. (Alaska, April 1, 1988).

Likewise, because the discrimination would deprive a defendant of property in an arbitrary, irrational manner, the bill also violates Article I, section 7, of the Alaska Constitution, which requires due process.

Finally, it is a long established rule that liability insurance is not to be considered in determining whether anyone is liable in the first instance. See Prosser, Law of Torts (1971), p. 553; McCormick on Evidence, (1972), pp. 479 - 483.

Enclosure

EHH:gc
WKG3:020

5-1484X✓
Hein
4/20/88

Original sponsor: Duncan

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 448 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to civil liability of certain volun-
7 teers."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 09.65 is amended by adding a new section to read:

10 Sec. 09.65.098. CIVIL LIABILITY OF CERTAIN VOLUNTEERS. (a) A
11 person working as a volunteer for the state, for a municipality, or
12 for a nonprofit entity is not liable for civil damages as a result of
13 an act or omission while acting in good faith and within the person's
14 official functions and duties.

15 (b) This section does not preclude liability for civil damages
16 as a result of

17 (1) gross negligence, recklessness, or intentional miscon-
18 duct; or

19 (2) negligence, to the extent that the negligent person is
20 insured against liability for the negligence.

21 (c) This section does not affect

22 (1) a civil action brought by the state, a municipality, or
23 a nonprofit entity against, respectively, a volunteer of the state,
24 the municipality, or the entity;

25 (2) the liability of the state, a municipality, or a non-
26 profit entity with respect to injury caused to a person.

27 (d) In this section,

28 (1) "municipality" has the meaning given in AS 01.10.060
29 and includes a public corporation established by a municipality;

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(2) "nonprofit entity" means an entity
(A) incorporated under AS 10.20; or
(B) exempt from taxation under 26 U.S.C. 501(c)(3)
(Internal Revenue Code of 1954);

(3) "volunteer" means a person who receives financial
consideration of not more than \$500 a year, not including reimburse-
ment for expenses actually incurred, for services performed for the
state, a municipality, or a nonprofit entity.

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STATE OF ALASKA
1988 LEGISLATIVE SESSION

Bill Version: CS SB 448 (C+RA) (a)
Publish Date: Senate 3/21/88

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Department of Administration
Title: An act relating to civil liability of certain volunteers BRU: Risk Management
Sponsor: Duncan Components: _____
Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)


GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

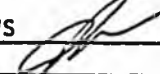
POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

While no immediate fiscal relief is shown, this legislation could help control possible future liabilities; thereby generating possible future claims savings (including defense costs) for the State.

Prepared By: Donald J. Hitchcock, Director  Phone: 465-2180
Division: Risk Management Date: 03-01-88

Approved by Commissioner: John M. Andrews  Date: 3/4/88
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSs B 448 (C+RA)
PUBLISH DATE: Senate 3/21/88

(b)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: SB 448 An Act Relating to
Civil Liability of Certain Volunteers
Sponsor: Duncan
Requestor: Senate C&RA

Agency Affected: NATURAL RESOURCES
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The Department will not incur cost to implement this bill. There is no way to project the cost of any liability the Department may incur as a result of this bill.

Prepared by: Richard LeFebvre Phone: 465-2400
Division: Land and Water Management Date: February 25, 1988
Approved by Commissioner: Tom Hawkins Date: February 25, 1988
Agency: Department of Natural Resources

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSSB 448 (C+RA)
PUBLISH DATE: Senati. 3/21/88

FISCAL NOTE

REQUEST:

Revision Date: 2/16/88
Title: An Act relating to civil liability of certain . . .
Sponsor: Duncan
Requestor: _____

Agency Affected: Health & Social Services
BRU: State Health Services
Components: EMS Certification and Licensing

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The enactment of SB 448 would have no direct fiscal impact on the Department of Health and Social Services.

Prepared by: Elizabeth Ward, Director Phone: 465-3090
Division: Public Health Date: 2-19-88

Approved by Commissioner: Mary M. Munson Date: 2 23-88
Agency: Department of Health & Social Services

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)