

H B

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HOUSE COMMITTEE REPORT

3/30

(7)
Date Referred: February 22, 1990

FURTHER REFERRALS:

Date of Committee Action: _____

Rules
added 2/23 → Judiciary

The STATE AFFAIRS Committee considered:

HB 568

HOUSE BILL NO. 568 RETIREMENT BENEFITS NOT EXEMPT FROM QDRO

"An Act relating to the definition of qualified domestic relations orders for retirement plan interest and payment exemptions."

- RECOMMENDATIONS:
- [] be replaced with _____ [] the same title
 - [] have attached amendment(s) [] a new title
 - [] do pass
 - [] do not pass
 - [X] no recommendation
 - [] individual recommendations
 - [] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S): APPROVES PREVIOUS: (Date/Dept)

(Dept)

- [] fiscal impact _____ [] fiscal note(s) _____
- [X] zero fiscal note DOA [] zero fiscal note(s) _____
- [] zero with analysis _____ [] zero fn/analysis _____

SIGNING DO PASS:

SIGNING:
(Check approp. column)

Do Not
Pass No Rec Amend

<i>Jim Zawacki</i> ZAWACKI	<i>Byron HANLEY</i> HANLEY			✓
<i>W.A. Boucher</i> BOUCHER	<i>Paul Finkelstein</i> FINKELESTEIN			✓
_____	<i>Gilbert P. MacLean</i> MACLEAN			✓
_____	<i>Walter Donley</i> DONLEY			X

W.A. Boucher

Chairman's Signature

Alaska State Legislature



House of Representatives
House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

April 13, 1990

Mr. Joe Caswell, Chair
Anchorage Police and Fire
Retirement Board
P.O. Box 196650
Anchorage, AK 99519-6650

Dear Mr. Caswell:

Thank you for your letter of April 10 regarding HB 568. That bill has not yet been scheduled for a hearing before the Judiciary Committee. When it is scheduled, I will make sure that you are notified.

In the meantime, I have included a copy of your letter and the enclosures in the committee members' files.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter Goll".

Peter Goll

**Municipality
of
Anchorage**



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4295

TOM FINK,
MAYOR

POLICE AND FIRE RETIREMENT BOARD

RECEIVED
APR 2 1990

April 10, 1990

The Honorable Peter Goll, Co-Chairman
House of Representatives
Judiciary Committee
P. O. Box V, Capitol, Room 122
Juneau, AK 99811

Dear Representative Goll:

On April 2, 1990, we sent you correspondence on House Bill (HB) 568, which has been referred to the House Judiciary Committee. It is our understanding that this bill is on the calendar for the House Judiciary Committee during the week of April 16, 1990.

The members of the Anchorage Police and Fire Retirement Board would like to testify, via teleconference, at the time the bill is discussed by the Judiciary Committee. Please contact us at 343-4399.

As you are aware, HB 568 was sponsored by Representative Boucher and a similar bill (Senate Bill 252) has been drafted by the Senate Judiciary Committee and is sponsored by Senator Faiks. The Police and Fire Retirement System is not asking for a change to practical application of AS 09.38.017(c) but only clarification that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c), and have the right to establish the meaning given QDRO by the Plan.

Under AS 09.38.017(c), certain pension benefits are arguably subject to attachment as this statute states pension plans in Alaska must comply with a Qualified Domestic Relations Order (QDRO) as defined by ERISA (U.S.C. 414). This Federal legislation allows for payment of benefits to an alternate payee (i.e. spouse) at the time members are first eligible to retire, not when they actually retire. At 26 U.S.C., 401(c), all governmental retirement plans are specifically exempt from ERISA and U.S.C. 414 allows governmental retirement plans to draft local legislation for the administration of QDRO's.

The Honorable Peter Goll, Co-Chairman
House of Representatives
Judiciary Committee
April 10, 1990
Page 2

AS 39.35.370(e), for Public Employees Retirement System (PERS) and AS 14.25.110 for the Teachers Retirement System (TRS), do not allow for payment of QDRO's until a member actually retires.

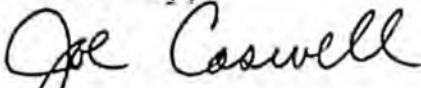
Anchorage Municipal Code (AMC) 3.85.075, which passed in June 1988, allows the Police and Fire Retirement System to make payments to an alternate payee only from the date the member actually retires.

The Alaska State Attorney General provided an opinion to Governor Cowper, dated June 6, 1988, on AS 09.38.017(c) prior to it being signed into law by the Governor. It is the Alaska State Attorney General's opinion that AS 09.38.017(c) does not apply to governmental plans, such as PERS, TRS and municipal retirement plans as the definition of a QDRO under 26 U.S.C. 414(P)(9) does not apply to governmental plans.

With this confusion in Federal, State and Local statutes, the Police and Fire Retirement System is asking only that AS 09.38.017(c) be clarified to reflect that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c). The Police and Fire Retirement Board feels the clarification of the State Statute would stop any costly litigation in the courts as to which statute is applicable to the Police and Fire Retirement System.

We have attached a copy of the State Attorney General's opinion and HB 568, as well as a fact sheet which outlines the problems as we see them. If you have any questions, please call me or the Police and Fire Retirement Board Staff at 343-6440.

Sincerely,



Joe Caswell
Chairman

JC/lhk
Attachments

cc: Representative Boucher

(D.78/PGoll2.Ltr)

BY THE STATE AFFAIRS COMMITTEE

1 IN THE HOUSE

2

HOUSE BILL NO. 568

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the definition of qualified
7 domestic relations orders for retirement plan inter-
8 est and payment exemptions."

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

10 * Section 1. AS 09.38.017(c) is amended to read:

11 (c) The exemptions provided by (a) of this section do not pre-
12 vent the payment of benefits under a retirement plan to an alternate
13 payee under a qualified domestic relations order. In this subsection,
14 "qualified domestic relations order" has the meaning given in 26
15 U.S.C. 414(p), except as applied to "governmental plans" as defined
16 under 29 U.S.C. 1002 in which case "qualified domestic relations
17 order" has the meaning given by the plan or by the law governing the
18 plan.

ALASKA

STEVE COWPER, GOVERNOR

 FAX TRANSMITTAL MEMO
 TO: LEE WENTWORTH
 DEPT: _____ FAX #: 343-4752
 FROM: C. CHRISTENSEN PHONE: 465-4523
 CO: _____ FAX #: _____
 Post-it brand fax transmittal memo 7671

NO. OF PAGES
7

DEPT OF LAW
 ATTORNEY GENERAL
 June 6, 1988

P.O. BOX K—STATE CAPITOL
 JUNEAU, ALASKA 99811-0330
 PHONE: (907) 465-3600

Honorable Steve Cowper
 Governor
 State of Alaska
 P.O. Box A
 Juneau, AK 99811

Re: CSSB 508(Fin) -- property ex-
 emptions for homesteads, re-
 tirement plan interests, etc.
 Our file: 883-88-0108

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have re-
 viewed CSSB 508(Fin), relating to property exemptions for home-
 steads, retirement plan interests and payments, and other proper-
 ty. The bill raises policy and legal questions, and you might
 want to consider vetoing it. There are two basic categories of
 concern: (1) the retirement provisors, and (2) the increases
 in the exemption values.

This bill was introduced by the Senate Judiciary Com-
 mittee on April 14, 1988. The Senate Finance Committee Substi-
 tute was offered May 3, 1988 and passed by the Senate on May 5,
 1988, and the House passed it on May 9, 1988.

We are concerned that the retirement plan provisions in
 sec. 3 of the bill could be interpreted as requiring the federal
 definition of "qualified domestic relations order" (QDRO) to ap-
 ply to the public employees' (PERS) and teachers' (TRS) retire-
 ment systems. The statutes for both of those systems include a
 definition of "QDRO" that differs from the federal definition.
 The bill also would allow bankruptcy creditors to reach TRS and
 PERS contributions made by a member within 120 days before the
 member files for bankruptcy. These are serious and, we believe,
 unintended effects of the bill.

The Senate Finance Committee's substitute bill (offered
 six days before the end of the session) doubles the dollar amount
 of exemptions from claims of creditors. That raises important
 policy questions. We are concerned about the full effects of
 that doubling, including the effect on the state's own collection
 efforts and on the state's private lending institutions. In
 light of its importance, we believe that the subject merits more

extended consideration than was possible during the extremely brief period that the committee substitute was pending at the hectic end of the legislative session.

As originally introduced, SB 508 related only to exemptions for certain retirement plan interests and payments (i.e., secs. 3, 8, 10, and part of 5 of this final version). The purpose of this part of the bill is not at all clear from the language of the bill itself. However, we have ascertained from documents provided by the Legislative Affairs Agency that, although the only reference to bankruptcy in the proposed AS 09.38.017 is in its subsec. (b), and the basic subsec. (a) is worded in general terms, the purpose is to exclude or exempt from the property of a bankruptcy debtor's estate that is subject to the reach of the debtor's creditors ^{1/} the bankruptcy debtor's interest in or payments to be received from a pension plan. An understanding of this purpose and the manner in which it is accomplished requires analysis of provisions of federal law, including the U.S. Bankruptcy Code, the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as the relationship between federal bankruptcy law and state exemption statutes.

This analysis is fairly succinctly provided by the case of Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983). That case explains that, upon filing of bankruptcy, an estate is created that includes all property in which the bankruptcy debtor has a legal or equitable interest. 11 U.S.C. 541(a)(1). An exception for this is that a debtor's interest in a trust that is subject to a restriction under an "applicable nonbankruptcy law" is excluded from the bankruptcy estate. 11 U.S.C. 541(c)(2). The interest in the trust never enters the estate.

After a bankruptcy estate is created, certain property is then exempted from the estate. 11 U.S.C. 522. (Exclusions are different from exemptions.) A bankruptcy debtor may choose whether to take exemptions provided by the Bankruptcy Code (listed at 11 U.S.C. 522(d)) or to take exemptions provided by state law. State law exemptions may be more favorable than the

^{1/} Notwithstanding that apparently intended purpose, this section also has the effect of providing an exemption in situations other than bankruptcy, for interests in certain governmental pension plans that are not currently protected under the Alaska Exemptions Act or any federal law.

law. State law exemptions may be more favorable than the Bankruptcy Code exemptions, or vice versa, depending on the type of property the bankruptcy debtor owns and depending on the specific provisions of state exemption statutes. In Goff, the bankruptcy debtors had chosen state law exemptions which, unlike the Bankruptcy Code, did not provide a limited exemption for Keogh plans. Nevertheless, the debtors argued that ERISA was an "applicable nonbankruptcy law," and that restrictions on assignment and alienation of interests in the Keogh plan under ERISA prevented their interest in the plan from entering the estate.

The court rejected this argument. It found that Congress did not intend to include ERISA plan restrictions in the reference to "applicable nonbankruptcy law." Rather, it found that Congress only intended "spendthrift trusts" to be excluded from the property of the estate. The Keogh plan was found not to be a spendthrift trust, because of the availability of the assets of the plan to the debtors, with only a 10 percent penalty, at any time before reaching retirement age. Under Goff, if a plan is not a spendthrift trust that is afforded protection under state nonbankruptcy law, a debtor's interest in the plan is not excluded from the bankruptcy estate. If the bankruptcy debtor chooses state law exemptions that do not include an exemption for the debtor's interest in a pension plan, the interest is not exempted from the estate. The result is that bankruptcy debtors may be forced to forego favorable exemptions under state law (such as the Texas homestead exemption discussed later in this bill-review letter) in order to gain at least partial protection of their pension plan interests provided by the federal bankruptcy exemptions.

Current provisions of the Alaska Exemptions Act (AS 09.38) do not provide an exemption for interests in retirement plans which is applicable in bankruptcy proceedings. See existing AS 09.38.055. Both the original and final versions of this bill add a new section, AS 09.38.017 (in sec. 3 of the CS), to the Alaska Exemptions Act, which provides an exemption for interests in certain "retirement plans." That exemption will be applicable in bankruptcy proceedings by virtue of the amendment of AS 09.38.055 in sec. 10 of the CS. By the definition of "retirement plan" in the bill, the new exemption is for interests in qualified plans under 26 U.S.C. 401(a), individual employee annuity plans under 26 U.S.C. 403(a), tax sheltered annuity plans under 26 U.S.C. 403(b), individual retirement accounts and annuities and simplified employee pension plans under 26 U.S.C. 408,

and employee stock ownership plans under 26 U.S.C. 409. 2/ No exemption is provided for interests in pension plans that do not qualify for favorable tax treatment under the specified provisions of the Internal Revenue Code.

The definition of "retirement plan" in the bill includes PERS and TRS, since those plans are qualified plans under 26 U.S.C. 401(a). Two problems arise from application of this bill to PERS and TRS. First, the bill provides that the exemptions do not apply to contributions "made by an individual under a retirement plan within 120 days before the individual files for bankruptcy." We believe that the purpose of this provision is to prevent individuals from increasing their contributions to retirement plans shortly before filing bankruptcy in order to shelter additional assets from creditors. However, PERS and TRS member contributions are statutorily fixed and involuntary, thus preventing the kind of abuse addressed by this provision. 3/ Administration of this provision would require changes in the PERS and TRS statutes, since there is currently no way for the systems to make available to creditors an employee's contributions that are made within 120 days before filing bankruptcy. There are no provisions in either PERS or TRS allowing a partial refund of a member's contribution account to pay creditors (either while the member is still employed or after termination of employment), allowing an adjustment of service credit to reflect a reduction in the contribution account, or allowing a member to repay contributions that have been paid to creditors.

Second, the bill provides that the exemptions do not prevent payment of retirement plan benefits to an alternate payee under a qualified domestic relations order (QDRO) as defined by 26 U.S.C. 414(p). Proposed AS 09.38.017(c). The potential problem with this is that the statutes providing for both PERS and TRS include a definition of "QDRO" that is different in a significant respect from the definition of "QDRO" in 26 U.S.C. 414(p). Existing AS 14.25.220(31) and AS 39.35.680(34). Under the federal definition, a QDRO can order payment of a benefit to an

2/ The federal Bankruptcy Code exemptions provide an exemption for payments under these plans only "to the extent reasonably necessary for the support of the debtor and any dependant of the debtor." 11 U.S.C. 522(d)(10)(E).

3/ This might also be true of some private pension plans that will be affected by this bill.

alternate payee as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement. Unlike the federal definition, the PERS and TRS definition does not allow payment of benefits to an alternate payee before the member begins to receive a benefit. There is no system in place to allow either PERS or TRS to apply the federal QDRO requirements.

We characterize this second problem as a "potential" problem because we believe that, despite the language of the bill, the better argument is that the federal definition of QDRO would not be applicable to PERS and TRS. This is so because 26 U.S.C. 414(p)(9) provides that the federal definition does not apply to any plan to which 26 U.S.C. 401(a)(13) does not apply. 26 U.S.C. 401(a)(13) does not apply to governmental plans, such as PERS, TRS, and municipal plans. Thus, under federal law, the federal definition of "QDRO," by its own terms, does not apply to PERS and TRS or the other governmental plans. Moreover, this proposed state statute says, in subsec. (c), that the exemptions in (a) "do not prevent" payment under a federally defined QDRO. Payment under such an order is not required by the proposed statute. In other words, if a creditor (spouse) has a domestic relations order that is a qualified one under the federal definition, then the exemptions in proposed AS 09.38.017(a) do not bar the creditor from reaching the pension money. But some other statute might do so -- e.g., our PERS and TRS statutes. This raises questions as to what right a person has to enforce a QDRO against a governmental plan other than PERS or TRS if the exemption is enacted.

The bill states a conclusive presumption that a retirement plan that is exempt from claims under the bill is a spendthrift trust. Proposed AS 09.38.017(d). We seriously doubt that this provision provides a bankruptcy debtor with any additional protection. If the debtor chooses state law exemptions, the provisions of the bill already exempt the debtor's interests in or payments from the specified retirement plans. If the debtor chooses federal Bankruptcy Code exemptions, it is unlikely that a bankruptcy court would give any credence to this presumption in considering whether a plan that is clearly not a spendthrift trust is excludable from the bankruptcy estate under 11 U.S.C. 541(c)(2). (PERS and TRS would not appear to qualify as spendthrift trusts, since, although access to their benefits is, by statute, strictly controlled, the portion of the trust money that is the employee's contribution account may be obtained by the employee upon termination of employment before eligibility for retirement benefits.)

The provisions of the bill that were added in the committee substitute amend the dollar amounts of the value of exemptions which may be claimed under the Alaska Exemptions Act. The statutory amounts were doubled. However, the practical effect is less than double because, as required by statute, the amounts had already been adjusted up by regulation, approximately 10 percent, in accordance with the consumer price index. (These amounts may be adjusted upward again by the Department of Labor by operation of AS 09.38.115, which provides for such changes each even-numbered year.) There are no obvious legal problems with these portions of the bill.

There is a significant policy decision to be made, however, with regard to approving the increases. The effect of the increases will be to allow debtors to keep more of their property while restricting the property available to nonsecured or undersecured creditors trying to recover on loans in default. In approving loans, some creditors may have counted on the availability of property or income that would be exempt under this bill.

It is very difficult to predict what economic effect will result if this bill becomes law. Some suggest that greater exemption amounts will encourage more creditor negotiations with debtors and thus reduce bankruptcy filings. Some suggest that debtors will be more encouraged to file bankruptcy because they will be able to keep more property. Another possibility is that increased exemptions will decrease the availability of credit.

It is worth noting that the Alaska Exemptions Act was based on the Uniform Exemptions Act, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Alaska is the only state to date that has enacted the uniform Act, and Alaska enacted exemptions in higher amounts than were proposed in the uniform Act. We spoke with John McCabe, legal director for the NCCUSL. He informs us that there is no consistent answer on how any state has approached the exemption situation. For instance, several states exempt the homestead completely, but differ in the definition of the "homestead."

Mr. McCabe reported that Texas is noted for having the most liberal homestead provision. The definition requires that the debtor live on the property and then includes all property to the debtor boundaries. Thus, a debtor could be in bankruptcy, have an urban home worth hundreds of thousands of dollars sitting on millions of dollars worth of oil and the entire property would be exempt from creditors. Mr. McCabe reported that the Texas homestead provision has been criticized as being an imposition on

the credit system and unfairly restrictive for creditors.

When drafting the Uniform Exemptions Act, the drafters first determined what kinds of property should be reasonably included. Next, the drafters tried to ascertain reasonable values that would fairly serve the debtor's interests and not unfairly limit creditors. Mr. McCabe stated that the purpose of an exemptions Act is to preserve some assets for the debtor to make a fresh start without making the exemptions so great as to abuse the credit system. He felt that the actual amounts were derived by almost an intuitive consideration of what was fair and reasonable.

We note that only the new exemption of interests in retirement plans does not apply to assets of a bankruptcy estate in a bankruptcy proceeding filed before the effective date of the bill. Section 11 of the bill. Apparently, the legislature intended the increased exemptions added by the committee substitute to apply to pending bankruptcy proceedings.

We make no recommendation as to the resolution of the policy issue raised by the increased exemption amounts, but only bring the issue to your attention. Although there are no obvious legal problems with adopting the increased exemption amounts, the legal problems identified concerning the retirement plan exemption and the significant policy questions raised by the increased exemptions warrant serious consideration of veto. A veto would allow a bill to be drafted during the interim that would clarify the effects on the state's retirement systems and also allow more studied consideration of the policy issues. We would be happy to assist in drafting an appropriate veto message, if you wish.

Sincerely yours,



for Grace Berg Schaible
Attorney General

GBS:VBR:JJ:pjg

HOUSE COMMITTEE ON STATE AFFAIRS

RECAP OF
HB 568

Retirement Benefits Not Exempt from ODRO

Received February 22, 1990
by the State Affairs Committee

Heard March 28, 1990
Heard March 29, 1990

Passed Out of Committee March 29, 1990
2 Do Pass
4 No Recommendation

TABLE OF CONTENTS

HB 568: Retirement Benefits Not Exempt from QDRO

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- Item 4:** Letter from Police and Fire Retirement Board,
November 20, 1990
- Item 5:** Letter from Police and Fire Retirement Board,
March 5, 1990
- Item 6:** Memorandum from Staff re: Background
Information

b. Example / Checklist Contact Sheet

LEGISLATIVE SPONSOR: HS State Affairs

TC DATE/DAY: Wed, Mar 28 ^{# Thurs, Mar 29}

Pub. Hear Work Ses. Inv. Hear

TIME: Cap 102 8:30-10:0

LEGISLATIVE REFERENCE: HB 568

JUNEAU ROOM: Cap 102

SUBJECT: Retiro. Bene. Not

BRIDGE: _____

Exempt from QDPO

OF PORTS: _____

CONTACT: Ann PH: 4963

DATE TAKEN/BY: 3/23 Becky / 3/28

TELECONFERENCE SITES:

LIO'S

LTC'S

VTS'S

- Anchorage
- Barrow *
- Bethel
- Delta Junction *
- Dillingham *
- Fairbanks
- Glennallen *
- Juneau
- Ketchikan
- Kodiak
- Kotzebue
- Mat-Su
- Nome
- Petersburg *
- Sitka
- Soldotna
- Valdez *

- Homer
- Wrangell

See List on Reverse Side

ALL LIO'S

OTHER SITES WELCOME WITH PRIOR NOTIFICATION

Touch please call when tape arr.
 Lee Wentworth
 OFFNETS: 343-4399
 Mun. Fire & Police Bd.
 P.O. Box 196650
 99519

Anch Police & Fire Retirement Board

CHAIRING SITE: Juneau

CHAIRPERSON: Bracher

[] CONFORMS TO LEGISLATIVE COUNCIL POLICY 4/85

SIGNATURE OF SPONSOR/CONTACT PERSON

DATE

W/ HB 338 -
TC mod w/c

SPECIAL INSTRUCTIONS

Item 2

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Administration
 Title: An Act relating to qualified BRU: Retirement and Benefits
domestic relations orders
 Sponsor: House State Affairs Components: Retirement and Benefits
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
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)

There will be no fiscal impact to the retirement systems with passage of this bill.

Prepared by: Sally Smith, Director *Sally Smith* Phone: 465-4470
 Division: Retirement and Benefits Date: 2/28/90
 Approved by Commissioner: Frank S. Baxter *Frank S. Baxter* Date: 3/1/90
 Agency: Department of Administration

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

STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99801
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 13, 1990

SUBJECT: Sectional Analysis of HB 568
(Definition of certain qualified domestic relations orders)

TO: Representative H.A. "Red" Boucher
Chair, House State Affairs Committee

FROM: Teresa B. Cramer *TBC*
Legislative Counsel

You have requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 of the bill amends the exemption from the claims of creditors of an individual's interest in a retirement plan. The law already provides that the exemption does not prevent the payment of benefits to an alternate payee if the payment is required by a qualified domestic relations order as that term is defined in the Internal Revenue Code. The bill adds that for a governmental plan as defined in the Employees Retirement Income Security Act (ERISA), "qualified domestic relations order" has the meaning given by the plan or by the law governing the plan. Under ERISA, a "governmental plan" means

a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act.

If I may be of further assistance, please advise.

TC:mi
wkmi6/055

Item 4

Municipality of Anchorage



P.O. BOX 198650
ANCHORAGE, ALASKA 99519-8650
(907) 343-4295

TOM FINK
MAYOR

POLICE AND FIRE RETIREMENT BOARD

November 20, 1989

The Honorable H. A. "Red" Boucher
P. O. Box 111038
Anchorage, AK 99511

Dear Representative Boucher:

On behalf of the over seven hundred members and retirees covered by the Anchorage Police and Fire Retirement System (APFRS), I would like to solicit your assistance in helping to solve a problem of considerable concern to both the APFRS Board and membership. Under current Alaska law, certain pension benefits are subject to attachment under APFRS, while those under PERS and other state retirement plans are not. The APFRS Board is urging the Legislature to correct this discrepancy.

In 1988, the Alaska Legislature adopted, without much debate or controversy, a statute which protects both public and private pension benefits from assignment except under a "qualified domestic relations order", or "QDRO". Under the statute, codified at AS 09.38.017, a QDRO is defined by reference to federal law, at 26 U.S.C. 414. Under the federal definition, a QDRO may assign a member's pension benefits to satisfy a child or spousal support judgement or property settlement, if the order meets certain statutory requirements. Of particular concern to us is a provision in the federal law that allows a member's benefits to be assigned, at the election of the assignee, at any time following the date a member is first eligible to retire, regardless of when or whether the member has actually retired. This requirement can create considerable difficulties for plan administrators, at substantial cost to the plan.

Fortunately, governmental pension plans, including PERS and other State plans, as well as our own, have never had to contend with this difficulty. Under the Employee Retirement Income Security Act (29 U.S.C 1001 et seq.), public retirement plans are specifically exempt from federal pension regulation; a governmental plan may define or restrict application of QDRO's as its regulators see fit. Thus, the Legislature has adopt statutes -- and the Anchorage Assembly

ordinances -- that allow assignment of governmental plan benefits only from the date the member actually retires. See e.g. AS 39.35.680 (34); AMC 3.85.075.

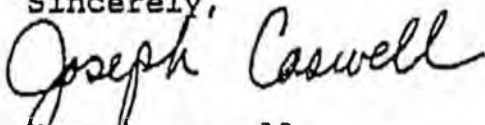
AS 09.38.017 could be interpreted as superseding existing law and thereby jeopardizing the federally-mandated independence of governmental pension plans. The new statute clearly conflicts with existing state pension laws. And if the statute is applied only to municipal pension plans, it clearly denies members of the municipal plan the equal protection of law, treating them differently from members of state governmental plans, without apparent justification.

These problems can be easily solved, however, merely by exempting governmental pension and retirement plans from the definition incorporated in AS 09.38.017 (c). The change is fully consistent with the intent of the federal laws incorporated by reference in the statute. Our attorneys have drafted a bill that should accomplish this purpose.

Please be assured that your efforts on our behalf will be greatly appreciated by the members of the Anchorage Police and Fire Retirement System and their families. I look forward to meeting with you and your staff, if at all possible, before the opening of the next legislative session. If you have any questions, please call me at 343-6440 or Board counsel, Scott Sidell, at 258-6599.

Thank you again for your assistance in this matter.

Sincerely,



Joseph Caswell
Chairman
Police and Fire Retirement Board

JC:lhk

Municipality
of
Anchorage



P.O. BOX 196650
ANCHORAGE, ALASKA 99506
(907) 343-4295

TOM FINK,
MAYOR

RECEIVED
MAR 12 1990

Item 5

POLICE AND FIRE RETIREMENT BOARD

March 5, 1990

The Honorable H. A. "Red" Boucher
House of Representatives
State Capitol
P. O. Box 111038
Anchorage, AK 99511

Dear Mr. Boucher:

Thank you for taking the time to visit with John Cowdery and I during our visit to Juneau on February 20, 1990. The issue we discussed regarding when an alternate payee (i.e. ex-spouse) may receive payments on a Qualified Domestic Relations Orders (QDRO) is of concern to the Police and Fire Retirement Board, the Retirement System members and retirees.

As discussed with you and your staff, the problems are listed below:

1. All government pension plans are specifically exempted by ERISA from federal pension regulations. ERISA allows for government plans to define or restrict application of QDRO's as its regulations see fit. Thus, Alaska State Legislation for PERS and TRS has been adopted which states payment may only be made to an alternate payee at the time the member actually retires.
2. Alaska Statute 09.38.017, passed in 1988, it allows for the alternate payee to elect to receive their payments from other government plans at the time the member is first eligible to retire, not when they actually retire. As stated above, PERS and TRS legislation does not allow for payment to an alternate payee until the retiree actually retires.

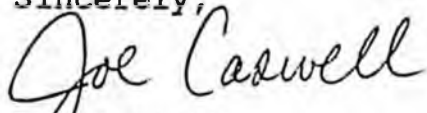
The Honorable H. A. "Red" Boucher
March 5, 1990
Page 2

3. Subsequently, in June 1989, Anchorage Municipal Code (AMC) 3.85.075 was passed which allows the Anchorage Police and Fire Retirement System to make payment to an alternate payee only from the date the member actually retires.
4. AS 09.38.017 may jeopardize the Police and Fire Retirement Board's and the Anchorage Assembly's ability to define or restrict application of QDRO's as allowed under ERISA. AS 09.38.017 clearly denies members of the Anchorage Police and Fire Retirement pension plan the equal protection of law by treating them differently from members of state governmental plans, without apparent justification.
5. The problem can be easily solved by merely clarifying AS 09.38.017 to exempt governmental pension and retirement plans from the definition incorporated in AS 09.38.017(c). The change is fully consistent with the intent of the federal laws incorporated by reference in AS 09.38.017(c).

As you are aware, the proposed change to State Statute AS 09.38.017 (c) has been reviewed by the State Attorney General's office and has support of the Public Employee Retirement System administration, as well as all the Police and Fire Retirement System members.

If you have any further questions, please call me or the Police and Fire Retirement Board Staff at (907) 343-6440.

Sincerely,



Joe Caswell
Chairman
Police and Fire Retirement Board

JC/lhk
Attachments

Item 4

MEMORANDUM

TO: Representative H.A. "Red" Boucher, Chair
House State Affairs Committee

FROM: Dennis J. Burns, Aide
House State Affairs

DATE: March 28, 1990

RE: HB 568

The following is in response to your request for background information:

Senator Rodey introduced SB 508 on 4/14/88 as a Senate Judiciary Committee bill. This bill was signed into law on 7/12/88 (Chapter 135 SLA 88).

The language in Section 1. AS 09.38.017(c) of HB 568 originated in SB 508.

The purpose of SB 508 was to prevent the attachment of retirement benefits (PERS and TRS) and IRAs in bankruptcy proceedings. During that time, there were a number of Alaskans who were experiencing financial reverses, and it seemed unfair to allow for the total depletion of their financial assets.

The language in Section 1. AS 09.38.017(c) was recommended by Legal Services. The intent was to recognize that there were some situations (QDRO) which should not be exempt. As I understand the intent of this section, however, the QDRO was to fit under the existing state PERS and TERS definition of QDRO, and if no definition existed then the federal definition would apply.

According to an opinion by the former Attorney General Grace Berg Schaible, there are two definitions of QDRO:

Under the federal definition, a QDRO can order payment of a benefit to a spouse as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement.

According to Ms. Schaible, the PERS and TRS definition of QDRO does not allow payment of benefits to a spouse before the member begins to receive the benefit.

However, it is unclear reading the statutes - AS 14.25.220(31) and AS 39.35.680(24) - whether the QDRO definition as defined by Mr. Schaible is implicit.

Ms. Schaible also noted that the federal definition of QDRO would not be applicable to PERS and TRS because 26 U.S.C. 414(p) provides that the federal definition does not apply to PERS or TRS.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

June 6, 1988

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 485-3800

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, AK 99811

Re: CSSB 508(Fin) -- property ex-
emptions for homesteads, re-
tirement plan interests, etc.
Our file: 883-88-0108

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have reviewed CSSB 508(Fin), relating to property exemptions for homesteads, retirement plan interests and payments, and other property. The bill raises policy and legal questions, and you might want to consider vetoing it. There are two basic categories of concern: (1) the retirement provisions, and (2) the increases in the exemption values.

This bill was introduced by the Senate Judiciary Committee on April 14, 1988. The Senate Finance Committee Substitute was offered May 3, 1988 and passed by the Senate on May 5, 1988, and the House passed it on May 9, 1988.

We are concerned that the retirement plan provisions in sec. 3 of the bill could be interpreted as requiring the federal definition of "qualified domestic relations order" (QDRO) to apply to the public employees' (PERS) and teachers' (TRS) retirement systems. The statutes for both of those systems include a definition of "QDRO" that differs from the federal definition. The bill also would allow bankruptcy creditors to reach TRS and PERS contributions made by a member within 120 days before the member files for bankruptcy. These are serious and, we believe, unintended effects of the bill.

The Senate Finance Committee's substitute bill (offered six days before the end of the session) doubles the dollar amount of exemptions from claims of creditors. That raises important policy questions. We are concerned about the full effects of that doubling, including the effect on the state's own collection efforts and on the state's private lending institutions. In light of its importance, we believe that the subject merits more

extended consideration than was possible during the extremely brief period that the committee substitute was pending at the hectic end of the legislative session.

As originally introduced, SB 508 related only to exemptions for certain retirement plan interests and payments (i.e., secs. 3, 8, 10, and part of 5 of this final version). The purpose of this part of the bill is not at all clear from the language of the bill itself. However, we have ascertained from documents provided by the Legislative Affairs Agency that, although the only reference to bankruptcy in the proposed AS 09.38.017 is in its subsec. (b), and the basic subsec. (a) is worded in general terms, the purpose is to exclude or exempt from the property of a bankruptcy debtor's estate that is subject to the reach of the debtor's creditors 1/ the bankruptcy debtor's interest in or payments to be received from a pension plan. An understanding of this purpose and the manner in which it is accomplished requires analysis of provisions of federal law, including the U.S. Bankruptcy Code, the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as the relationship between federal bankruptcy law and state exemption statutes.

This analysis is fairly succinctly provided by the case of Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983). That case explains that, upon filing of bankruptcy, an estate is created that includes all property in which the bankruptcy debtor has a legal or equitable interest. 11 U.S.C. 541(a)(1). An exception for this is that a debtor's interest in a trust that is subject to a restriction under an "applicable nonbankruptcy law" is excluded from the bankruptcy estate. 11 U.S.C. 541(c)(2). The interest in the trust never enters the estate.

After a bankruptcy estate is created, certain property is then exempted from the estate. 11 U.S.C. 522. (Exclusions are different from exemptions.) A bankruptcy debtor may choose whether to take exemptions provided by the Bankruptcy Code (listed at 11 U.S.C. 522(d)) or to take exemptions provided by state law. State law exemptions may be more favorable than the

1/ Notwithstanding that apparently intended purpose, this section also has the effect of providing an exemption in situations other than bankruptcy, for interests in certain governmental pension plans that are not currently protected under the Alaska Exemptions Act or any federal law.

law. State law exemptions may be more favorable than the Bankruptcy Code exemptions, or vice versa, depending on the type of property the bankruptcy debtor owns and depending on the specific provisions of state exemption statutes. In Goff, the bankruptcy debtors had chosen state law exemptions which, unlike the Bankruptcy Code, did not provide a limited exemption for Keogh plans. Nevertheless, the debtors argued that ERISA was an "applicable nonbankruptcy law," and that restrictions on assignment and alienation of interests in the Keogh plan under ERISA prevented their interest in the plan from entering the estate.

The court rejected this argument. It found that Congress did not intend to include ERISA plan restrictions in the reference to "applicable nonbankruptcy law." Rather, it found that Congress only intended "spendthrift trusts" to be excluded from the property of the estate. The Keogh plan was found not to be a spendthrift trust, because of the availability of the assets of the plan to the debtors, with only a 10 percent penalty, at any time before reaching retirement age. Under Goff, if a plan is not a spendthrift trust that is afforded protection under state nonbankruptcy law, a debtor's interest in the plan is not excluded from the bankruptcy estate. If the bankruptcy debtor chooses state law exemptions that do not include an exemption for the debtor's interest in a pension plan, the interest is not exempted from the estate. The result is that bankruptcy debtors may be forced to forego favorable exemptions under state law (such as the Texas homestead exemption discussed later in this bill-review letter) in order to gain at least partial protection of their pension plan interests provided by the federal bankruptcy exemptions.

Current provisions of the Alaska Exemptions Act (AS 09.38) do not provide an exemption for interests in retirement plans which is applicable in bankruptcy proceedings. See existing AS 09.38.055. Both the original and final versions of this bill add a new section, AS 09.38.017 (in sec. 3 of the CS), to the Alaska Exemptions Act, which provides an exemption for interests in certain "retirement plans." That exemption will be applicable in bankruptcy proceedings by virtue of the amendment of AS 09.38.055 in sec. 10 of the CS. By the definition of "retirement plan" in the bill, the new exemption is for interests in qualified plans under 26 U.S.C. 401(a), individual employee annuity plans under 26 U.S.C. 403(a), tax sheltered annuity plans under 26 U.S.C. 403(b), individual retirement accounts and annuities and simplified employee pension plans under 26 U.S.C. 408,

and employee stock ownership plans under 26 U.S.C. 409. 2/ No exemption is provided for interests in pension plans that do not qualify for favorable tax treatment under the specified provisions of the Internal Revenue Code.

The definition of "retirement plan" in the bill includes PERS and TRS, since those plans are qualified plans under 26 U.S.C. 401(a). Two problems arise from application of this bill to PERS and TRS. First, the bill provides that the exemptions do not apply to contributions "made by an individual under a retirement plan within 120 days before the individual files for bankruptcy." We believe that the purpose of this provision is to prevent individuals from increasing their contributions to retirement plans shortly before filing bankruptcy in order to shelter additional assets from creditors. However, PERS and TRS member contributions are statutorily fixed and involuntary, thus preventing the kind of abuse addressed by this provision. 3/ Administration of this provision would require changes in the PERS and TRS statutes, since there is currently no way for the systems to make available to creditors an employee's contributions that are made within 120 days before filing bankruptcy. There are no provisions in either PERS or TRS allowing a partial refund of a member's contribution account to pay creditors (either while the member is still employed or after termination of employment), allowing an adjustment of service credit to reflect a reduction in the contribution account, or allowing a member to repay contributions that have been paid to creditors.

Second, the bill provides that the exemptions do not prevent payment of retirement plan benefits to an alternate payee under a qualified domestic relations order (QDRO) as defined by 26 U.S.C. 414(p). Proposed AS 09.38.017(c). The potential problem with this is that the statutes providing for both PERS and TRS include a definition of "QDRO" that is different in a significant respect from the definition of "QDRO" in 26 U.S.C. 414(p). Existing AS 14.25.220(31) and AS 39.35.680(34). Under the federal definition, a QDRO can order payment of a benefit to an

2/ The federal Bankruptcy Code exemptions provide an exemption for payments under these plans only "to the extent reasonably necessary for the support of the debtor and any dependant of the debtor." 11 U.S.C. 522(d)(10)(E).

3/ This might also be true of some private pension plans that will be affected by this bill.

alternate payee as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement. Unlike the federal definition, the PERS and TRS definition does not allow payment of benefits to an alternate payee before the member begins to receive a benefit. There is no system in place to allow either PERS or TRS to apply the federal QDRO requirements.

We characterize this second problem as a "potential" problem because we believe that, despite the language of the bill, the better argument is that the federal definition of QDRO would not be applicable to PERS and TRS. This is so because 26 U.S.C. 414(p)(9) provides that the federal definition does not apply to any plan to which 26 U.S.C. 401(a)(13) does not apply. 26 U.S.C. 401(a)(13) does not apply to governmental plans, such as PERS, TRS, and municipal plans. Thus, under federal law, the federal definition of "QDRO," by its own terms, does not apply to PERS and TRS or the other governmental plans. Moreover, this proposed state statute says, in subsec. (c), that the exemptions in (a) "do not prevent" payment under a federally defined QDRO. Payment under such an order is not required by the proposed statute. In other words, if a creditor (spouse) has a domestic relations order that is a qualified one under the federal definition, then the exemptions in proposed AS 09.38.017(a) do not bar the creditor from reaching the pension money. But some other statute might do so -- e.g., our PERS and TRS statutes. This raises questions as to what right a person has to enforce a QDRO against a governmental plan other than PERS or TRS if the exemption is enacted.

The bill states a conclusive presumption that a retirement plan that is exempt from claims under the bill is a spendthrift trust. Proposed AS 09.38.017(d). We seriously doubt that this provision provides a bankruptcy debtor with any additional protection. If the debtor chooses state law exemptions, the provisions of the bill already exempt the debtor's interests in or payments from the specified retirement plans. If the debtor chooses federal Bankruptcy Code exemptions, it is unlikely that a bankruptcy court would give any credence to this presumption in considering whether a plan that is clearly not a spendthrift trust is excludable from the bankruptcy estate under 11 U.S.C. 541(c)(2). (PERS and TRS would not appear to qualify as spendthrift trusts, since, although access to their benefits is, by statute, strictly controlled, the portion of the trust money that is the employee's contribution account may be obtained by the employee upon termination of employment before eligibility for retirement benefits.)

The provisions of the bill that were added in the committee substitute amend the dollar amounts of the value of exemptions which may be claimed under the Alaska Exemptions Act. The statutory amounts were doubled. However, the practical effect is less than double because, as required by statute, the amounts had already been adjusted up by regulation, approximately 10 percent, in accordance with the consumer price index. (These amounts may be adjusted upward again by the Department of Labor by operation of AS 09.38.115, which provides for such changes each even-numbered year.) There are no obvious legal problems with these portions of the bill.

There is a significant policy decision to be made, however, with regard to approving the increases. The effect of the increases will be to allow debtors to keep more of their property while restricting the property available to nonsecured or undersecured creditors trying to recover on loans in default. In approving loans, some creditors may have counted on the availability of property or income that would be exempt under this bill.

It is very difficult to predict what economic effect will result if this bill becomes law. Some suggest that greater exemption amounts will encourage more creditor negotiations with debtors and thus reduce bankruptcy filings. Some suggest that debtors will be more encouraged to file bankruptcy because they will be able to keep more property. Another possibility is that increased exemptions will decrease the availability of credit.

It is worth noting that the Alaska Exemptions Act was based on the Uniform Exemptions Act, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Alaska is the only state to date that has enacted the uniform Act, and Alaska enacted exemptions in higher amounts than were proposed in the uniform Act. We spoke with John McCabe, legal director for the NCCUSL. He informs us that there is no consistent answer on how any state has approached the exemption situation. For instance, several states exempt the homestead completely, but differ in the definition of the "homestead."

Mr. McCabe reported that Texas is noted for having the most liberal homestead provision. The definition requires that the debtor live on the property and then includes all property to the outer boundaries. Thus, a debtor could be in bankruptcy, have an urban home worth hundreds of thousands of dollars sitting on millions of dollars worth of oil and the entire property would be exempt from creditors. Mr. McCabe reported that the Texas homestead provision has been criticized as being an imposition on

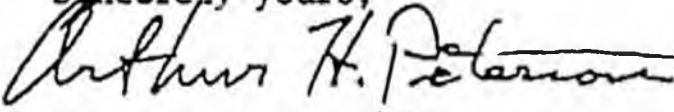
the credit system and unfairly restrictive for creditors.

When drafting the Uniform Exemptions Act, the drafters first determined what kinds of property should be reasonably included. Next, the drafters tried to ascertain reasonable values that would fairly serve the debtor's interests and not unfairly limit creditors. Mr. McCabe stated that the purpose of an exemptions Act is to preserve some assets for the debtor to make a fresh start without making the exemptions so great as to abuse the credit system. He felt that the actual amounts were derived by almost an intuitive consideration of what was fair and reasonable.

We note that only the new exemption of interests in retirement plans does not apply to assets of a bankruptcy estate in a bankruptcy proceeding filed before the effective date of the bill. Section 11 of the bill. Apparently, the legislature intended the increased exemptions added by the committee substitute to apply to pending bankruptcy proceedings.

We make no recommendation as to the resolution of the policy issue raised by the increased exemption amounts, but only bring the issue to your attention. Although there are no obvious legal problems with adopting the increased exemption amounts, the legal problems identified concerning the retirement plan exemption and the significant policy questions raised by the increased exemptions warrant serious consideration of veto. A veto would allow a bill to be drafted during the interim that would clarify the effects on the state's retirement systems and also allow more studied consideration of the policy issues. We would be happy to assist in drafting an appropriate veto message, if you wish.

Sincerely yours,


for Grace Berg Schaible
Attorney General

GBS:VER:JJ:pjg

(27) "part-time teacher" means a teacher occupying a position requiring teaching on a regular basis for at least 50 percent of the normal workweek at a teaching assignment, excluding teaching as an assistant or graduate assistant, or teaching on a substitute, temporary, or per diem basis;

(28) "permanent disability" means a physical or mental condition which, in the judgment of the administrator, based upon medical reports and other evidence satisfactory to the administrator, presumably prevents a member from satisfactorily performing the member's usual duties for the member's employer or the duties of another position or job which an employer makes available for which the member is qualified by training or education;

(29) "prescribed rate of interest" means the rate of interest used for computing employer contributions, for preparing actuarial tables used by the system, for crediting interest to members' contributions, and for charging interest on members' indebtedness accounts;

(30) "public school" means a school operated by publicly elected or appointed school officials in which the program and activities are under the control of those officials and which is supported by public funds;

(31) "qualified domestic relations order" means a divorce or dissolution judgment under AS 25.24, including an order approving a property settlement, that

(A) creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a member;

(B) sets out the name and last known mailing address, if any, of the member and of each alternate payee covered by the order;

(C) sets out the amount or percentage of the member's benefit, or of any survivor's benefit, to be paid to the alternate payee, or sets out the manner in which that amount or percentage is to be determined;

(D) sets out the number of payments or period to which the order applies;

(E) does not require any type or form of benefit or any option not otherwise provided by this chapter;

(F) does not require an increase of benefits in excess of the amount provided by this chapter, determined on the basis of actuarial value; and

(G) does not require the payment, to an alternate payee, of benefits that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order;

(32) "retired teacher or member" means a member who is terminated, who has not received a refund from the system, and who is receiving a benefit, other than disability, from the system;

(33) "retirement" means that period of time from the first day of the month following

CURRENT STATUS: (S) STA

STATUS DATE: 04/11/88

JRN-DATE	JRN-PG		ACTION
04/11/88	2959	(S)	READ THE FIRST TIME - REFERRAL(S)
04/11/88	2959	(S)	STA, THEN FIN

SB 504

"An Act relating to contributions from permanent fund dividends to Yukon Quest International, Ltd.; and providing for an effective date."

PRIME SPONSOR: FINANCE COMMITTEE

CURRENT STATUS: (S) STA

STATUS DATE: 04/11/88

JRN-DATE	JRN-PG		ACTION
04/11/88	2959	(S)	READ THE FIRST TIME - REFERRAL(S)
04/11/88	2960	(S)	STA, THEN FINANCE

SB 505

"An Act establishing the Alaska Children's Commission; and providing for an effective date."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: (S) CALENDAR 5/9

STATUS DATE: 05/09/88

JRN-DATE	JRN-PG		ACTION
04/12/88	2984	(S)	READ THE FIRST TIME - REFERRAL(S)
04/12/88	2984	(S)	STA, THEN HES, FIN
04/28/88	3244	(S)	STA RPT CS JDP SAME TITLE
04/28/88	3244	(S)	FISCAL NOTE PUBLISHED
05/06/88	3524	(S)	HES REFERRAL WAIVED
05/09/88	3751	(S)	FIN REFERRAL WAIVED
05/09/88	3758	(S)	RULES TO 2ND SUPPLEMENTAL CALENDAR
05/09/88	3758	(S)	NOT TAKEN UP

SB 506

"An Act providing for the issuance of general obligation bonds in the amount of \$64,000,000 for the purpose of paying the cost of highway, road, and trail projects; and providing for an effective date."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: (S) TRA

STATUS DATE: 04/12/88

JRN-DATE	JRN-PG		ACTION
04/12/88	2984	(S)	READ THE FIRST TIME - REFERRAL(S)
04/12/88	2984	(S)	TRA, THEN FIN

SB 507

"An Act relating to bonds of contractors for public buildings and works; and providing for an effective date."

PRIME SPONSOR: RULES COMMITTEE
BY REQUEST OF THE GOVERNOR

CURRENT STATUS: (S) TRA

STATUS DATE: 04/13/88

JRN-DATE	JRN-PG		ACTION
04/13/88	3006	(S)	READ THE FIRST TIME - REFERRAL(S)
04/13/88	3006	(S)	TRA, THEN L&C, FINANCE
04/13/88	3006	(S)	ZERO FISCAL NOTE PUBLISHED
04/13/88	3007	(S)	GOVERNOR'S TRANSMITTAL LETTER

SB 508

CSSB 508(FIN)

"An Act relating to property exemptions for homesteads, for certain retirement plan interests and payments, and for other property."

PRIME SPONSOR: JUDICIARY COMMITTEE

CURRENT STATUS: CHAPTER 135 SLA 88

STATUS DATE: 06/08/88

JRN-DATE	JRN-PG		ACTION
04/14/88	3030	(S)	READ THE FIRST TIME - REFERRAL(S)
04/14/88	3030	(S)	JUD, THEN FINANCE
04/21/88	3148	(S)	JUD WAIVED FIVE-DAY NOTIFICATION RULE
04/25/88	3182	(S)	JUD RPT 4DP
04/25/88	3182	(S)	ZERO FISCAL NOTE PUBLISHED
05/03/88	3393	(S)	FIN RPT CS 4DP 2NR NEW TITLE
05/03/88	3394	(S)	ZERO FISCAL NOTE PUBLISHED
05/03/88	3459	(S)	RULES TO CALENDAR
05/05/88	3461	(S)	READ THE SECOND TIME
05/05/88	3461	(S)	FIN CS ADOPTED UNAM CONSENT
05/05/88	3461	(S)	ADVANCED TO THIRD READING UNAM CONSENT
05/05/88	3461	(S)	READ THE THIRD TIME CSSB 508(FIN)
05/05/88	3461	(S)	PASSED Y20 N-
05/05/88	3485	(S)	TRANSMITTED TO (H)
05/06/88	3515	(H)	READ THE FIRST TIME - REFERRAL(S)
05/06/88	3515	(H)	LABOR & COMMERCE THEN JUDICIARY
05/07/88	3607	(H)	L&C REFERRAL WAIVED
05/08/88	3639	(H)	JUD RPT 4DP
05/09/88		(H)	RULES TO CALENDAR 5/9/88
05/09/88	3685	(H)	READ THE SECOND TIME
05/09/88	3685	(H)	ADVANCED TO THIRD READING UNAM CONSENT
05/09/88	3685	(H)	READ THE THIRD TIME CSSB 508(FIN)
05/09/88	3685	(H)	PASSED Y35 N- AS
05/09/88	3685	(H)	RETURN TO (S), TRANSMIT TO GOVERNOR NEXT
05/27/88	3812	(S)	1:15 PM 5/17/88 TRANSMITTED TO GOVERNOR
07/12/88	3851	(S)	SIGNED INTO LAW 6/8 CHAPTER 135 SLA 88
07/12/88	3852	(S)	EFFECTIVE DATE OF LAW 9/6/88

Chapter 135

AN ACT

Relating to property exemptions for homesteads, for certain retirement plan interests and payments, and for other property.

Section 1. AS 09.38.010(a) is amended to read:

09.38.010(a)

(a) An individual is entitled to an exemption as a homestead of the individual's interest in property in this state used as the principal residence of the [THAT] individual or the dependents of the [THAT] individual, but the value of the homestead exemption may not exceed \$34,000 [\$27,000].

Sec. 2. AS 09.38.010(b) is amended to read:

09.38.010(b)

(b) If property owned by the entirety or in common is used by one or more individual owners or their dependents as their principal residence, each owner is entitled to a homestead exemption of that owner's interest in the property as provided in (a) of this section. The aggregate value of multiple homestead exemptions allowable with respect to a single living unit may not exceed \$34,000 [\$27,000]. If there are multiple owners of property exempt as a homestead, the value of the exemption of each individual owner may not exceed the [THAT] individual owner's pro rata portion of \$34,000 [\$27,000].

Sec. 3. AS 09.38 is amended by adding a new section to read:

09.38.017

Sec. 09.38.017. EXEMPTION OF RETIREMENT PLAN INTERESTS AND PAYMENTS. (a) In addition to the exemption under AS 09.38.010(b), the following are exempt from a claim of an individual's creditor:

-1-

CSSR 108(Fin)

Chapter 135

(1) the interest of the individual in a retirement plan, and

(2) the money or other assets payable to the individual from a retirement plan.

(b) The exemptions provided by (a) of this section do not apply to a contribution made by an individual to a retirement plan within 120 days before the individual files for bankruptcy.

(c) The exemptions provided by (a) of this section do not prevent the payment of benefits under a retirement plan to an alternate payee under a qualified domestic relations order. In this subsection, "qualified domestic relations order" has the meaning given in 26 U.S.C. 414(p).

(d) A retirement plan, exempt from claims under (a) of this section is conclusively presumed to be a spendthrift trust under this section.

(e) In this section,

(1) "alternate payee" has the meaning given in 26 U.S.C. 414(p)(8);

(2) "individual" means an individual who is a participant in, a beneficiary of, or an alternate payee of a retirement plan;

(3) "retirement plan" means a retirement plan that is qualified under 26 U.S.C. 401(a), 26 U.S.C. 403(a), 26 U.S.C. 403(b), 26 U.S.C. 408, or 26 U.S.C. 409 (Internal Revenue Code).

Sec. 4. AS 09.38.020 is amended to read:

09.38.020

Sec. 09.38.020. EXEMPTIONS OF PERSONAL PROPERTY SUBJECT TO VALUE LIMITATIONS. (a) An individual is entitled to an exemption in property not to exceed an aggregate value of \$3,000 [\$1,000] chosen by the individual from the following categories of property:

(1) household goods and wearing apparel reasonably

CSSR 508(Fin)

-2-

Chapter 135

necessary for one household;

(2) if reasonably held for the personal use of the individual or a dependent, books and musical instruments; and

(3) family portraits and heirlooms of particular sentimental value to the individual.

(b) An individual is entitled to exemption of jewelry, not exceeding \$1,000 [\$500] in aggregate value, if held for the personal use of the individual or a dependent.

(c) An individual is entitled to exemption, not exceeding \$2,800 [\$1,400] in aggregate value, of implements, professional books, and tools of the trade.

(d) An individual is entitled to the exemption of pats to the extent of a value not exceeding \$1,000 [\$500].

(e) An individual is entitled to an exemption of one motor vehicle to the extent of a value not exceeding \$3,000 [*\$1,500] if the full value of the motor vehicle does not exceed \$20,000 [\$10,000].

* Sec. 5. AS 09.38.025(a) is amended to read:

(a) Except as provided in this section or AS 09.38.017, an individual is entitled to exemption of unexpired life insurance and annuity contracts owned by the individual. If the contracts have accrued dividends and loan values available to the individual aggregating more than \$10,000 [\$5,000], a creditor may obtain a court order requiring the individual debtor to pay the creditor, and authorizing the creditor on the debtor's behalf to obtain payment of, the amount of the accrued dividends and loan values in excess of \$10,000 [\$5,000] or the amount of the creditor's claim, whichever is less.

* Sec. 6. AS 09.38.030(a) is amended to read:

(a) Except as provided in (b) and (c) of this section and AS 09.38.030, an individual debtor is entitled to an exemption of the

-3-

CSSB 508(Fin)

09.38.025(u)

09.38.030(a)

Chapter 135

individual debtor's weekly net earnings not to exceed \$350 .5175]. The weekly net earnings of an individual are determined by subtracting from the weekly gross earnings all sums required by law or court order to be withheld. The weekly net earnings of an individual paid on a monthly basis are determined by subtracting from the monthly gross earnings of the individual all sums required by law or court order to be withheld and dividing the remainder by 4.3. The weekly net earnings of an individual paid on a semi-monthly basis are determined by subtracting from the semi-monthly gross earnings all sums required by law or court order to be withheld and dividing the remainder by 2.17.

* Sec. 7. AS 09.38.030(b) is amended to read:

(b) An individual who does not receive earnings either weekly, semi-monthly or monthly is entitled to a maximum exemption for the aggregate value of cash and other liquid assets available in any month of \$3,400 [\$700], except as provided in AS 09.38.050. The term "liquid assets" includes deposits, securities, notes, drafts, accrued vacation pay, refunds, prepayments, and receivables.

* Sec. 8. AS 09.38.030(c) is amended to read:

(c) The following property, unless exempt without limitation under AS 09.38.015 or 09.38.017, upon receipt by and while it is in the possession of the individual, shall be treated as earnings, income, cash, or other liquid assets under this section:

(1) benefits paid by reason of disability, illness, or unemployment;

(2) money or property received for alimony or separate maintenance;

(3) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of

CSSB 508(Fin)

-4-

09.38.030(b)

09.38.030(c)

Chapter 135

whom the individual was or is a dependent;

(4) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and

(5) amounts paid under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service.

* Sec. 9. AS 09.38.030(b) is amended to read:

(b) The exemption amounts under AS 09.38.030 may be increased when the individual submits an affidavit, under penalty of perjury, stating that the individual's earnings alone support the individual's household; by so doing, the maximum part of the individual's aggregate disposable earnings for any week subject to execution may not exceed the amount by which the individual's disposable earnings for that week exceed \$500 [\$275], or, if the individual is claiming an exemption for cash or other liquid assets under AS 09.38.030(b), a maximum amount of \$2,200 [\$1,100] available in a [ANY] month is exempt.

* Sec. 10. AS 09.38.055 is amended to read:

Sec. 09.38.055. **BANKRUPTCY PROCEEDINGS.** In a proceeding under 11 U.S.C. (Bankruptcy) [THE BANKRUPTCY ACT (11 U.S.C.)] only the exemptions under AS 09.38.010, 09.38.015(a), 09.38.017, 09.38.020, 09.38.025 and 09.38.030 apply.

* Sec. 11. AS 09.38.017, added by sec. 3 of this Act, does not apply to the assets of a bankruptcy estate in a proceeding filed under 11 U.S.C. (Bankruptcy) before the effective date of this Act.

09.38.050(b)

09.38.055

Eff. 9/6/88

Chapter 136

AN ACT

Providing for the establishment of the Institute for Circumpolar Health Studies within the University of Alaska; and providing for an effective date.

* Section 1. **FINDINGS.** The legislature finds that

(1) the severe health problems of depression, alcoholism, and suicide are endemic to Alaska;

(2) millions of dollars and countless expenditures of energy and time have been spent attempting to solve or at least adequately address these problems in the state, but that major successes have not been achieved and that a new approach to these problems is needed;

(3) other circumpolar areas and nations, including Canada, Siberia, Greenland, and Scandinavia, also suffer from these problems, but that Alaska has failed to exchange research and information with these countries;

(4) the establishment of an Institute for Circumpolar Health Studies within the University of Alaska would be a major new step toward addressing and finding solutions to the health problems of Alaskans and inhabitants of other circumpolar regions;

(5) establishment of the Institute is a concept strongly supported by the International Union for Circumpolar Health and the American Public Health Association's national Arctic health science policy;

(6) Alaska is an especially appropriate location for such an

**Municipality
of
Anchorage**



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4295

TOM FINK,
MAYOR

POLICE AND FIRE RETIREMENT BOARD

RECEIVED
APR 2 1990

April 10, 1990

The Honorable Peter Goll, Co-Chairman
House of Representatives
Judiciary Committee
P. O. Box V, Capitol, Room 122
Juneau, AK 99811

Dear Representative Goll:

On April 10, 1990, we sent you correspondence on House Bill (HB) 568, which has been referred to the House Judiciary Committee. It is our understanding that this bill is on the calendar for the House Judiciary Committee during the week of April 16, 1990.

The members of the Anchorage Police and Fire Retirement Board would like to testify, via teleconference, at the time the bill is discussed by the Judiciary Committee. Please contact us at 343-4399.

As you are aware, HB 568 was sponsored by Representative Boucher and a similar bill (Senate Bill 252) has been drafted by the Senate Judiciary Committee and is sponsored by Senator Faiks. The Police and Fire Retirement System is not asking for a change to practical application of AS 09.38.017(c) but only clarification that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c), and have the right to establish the meaning given QDRO by the Plan.

Under AS 09.38.017(c), certain pension benefits are arguably subject to attachment as this statute states pension plans in Alaska must comply with a Qualified Domestic Relations Order (QDRO) as defined by ERISA (U.S.C. 414). This Federal legislation allows for payment of benefits to an alternate payee (i.e. spouse) at the time members are first eligible to retire, not when they actually retire. At 26 U.S.C., 401(c), all governmental retirement plans are specifically exempt from ERISA and U.S.C. 414 allows governmental retirement plans to draft local legislation for the administration of QDRO's.

The Honorable Peter Goll, Co-Chairman
House of Representatives
Judiciary Committee
April 10, 1990
Page 2

AS 39.35.370(e), for Public Employees Retirement System (PERS) and AS 14.25.110 for the Teachers Retirement System (TRS), do not allow for payment of QDRO's until a member actually retires.

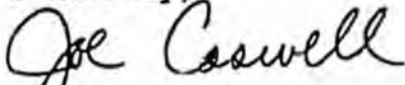
Anchorage Municipal Code (AMC) 3.85.075, which passed in June 1988, allows the Police and Fire Retirement System to make payments to an alternate payee only from the date the member actually retires.

The Alaska State Attorney General provided an opinion to Governor Cowper, dated June 6, 1988, on AS 09.38.017(c) prior to it being signed into law by the Governor. It is the Alaska State Attorney General's opinion that AS 09.38.017(c) does not apply to governmental plans, such as PERS, TRS and municipal retirement plans as the definition of a QDRO under 26 U.S.C. 414(P)(9) does not apply to governmental plans.

With this confusion in Federal, State and Local statutes, the Police and Fire Retirement System is asking only that AS 09.38.017(c) be clarified to reflect that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c). The Police and Fire Retirement Board feels the clarification of the State Statute would stop any costly litigation in the courts as to which statute is applicable to the Police and Fire Retirement System.

We have attached a copy of the State Attorney General's opinion and HB 568, as well as a fact sheet which outlines the problems as we see them. If you have any questions, please call me or the Police and Fire Retirement Board Staff at 343-6440.

Sincerely,



Joe Caswell
Chairman

JC/lhk
Attachments

cc: Representative Boucher

(D.78/PGoll2.Ltr)

BY THE STATE AFFAIRS COMMITTEE

1 IN THE HOUSE

2

HOUSE BILL NO. 568

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the definition of qualified

7

domestic relations orders for retirement plan inter-

8

est and payment exemptions."

9

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

10

* Section 1. AS 09.38.017(c) is amended to read:

11

(c) The exemptions provided by (a) of this section do not pre-

12

vent the payment of benefits under a retirement plan to an alternate

13

payee under a qualified domestic relations order. In this subsection,

14

"qualified domestic relations order" has the meaning given in 26

15

U.S.C. 414(p), except as applied to "governmental plans" as defined

16

under 29 U.S.C. 1002 in which case "qualified domestic relations

17

order" has the meaning given by the plan or by the law governing the

18

plan.

ALASKA

STEVE COWPER, GOVERNOR

F A X T R A N S M I T T A L M E M O

TO: LEE WENTWORTH

DEPT: _____ FAX #: 343-4450

FROM: C.S. CHRISTENSEN PHONE: 465-4523

CO: _____ FAX #: _____

Post-it brand fax transmittal memo 7871

NO. OF PAGES
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DEPT OF LAW

TORNEY GENERAL

June 6, 1988

P.O. BOX K—STATE CAPITOL
 JUNEAU, ALASKA 99811-0330
 PHONE: (907) 485-3600

Honorable Steve Cowper
 Governor
 State of Alaska
 P.O. Box A
 Juneau, AK 99811

Re: CSSB 508(Fin) -- property ex-
 emptions for homesteads, re-
 tirement plan interests, etc.
 Our file: 883-88-0108

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have re-
 viewed CSSB 508(Fin), relating to property exemptions for home-
 steads, retirement plan interests and payments, and other proper-
 ty. The bill raises policy and legal questions, and you might
 want to consider vetoing it. There are two basic categories of
 concern: (1) the retirement provisions, and (2) the increases
 in the exemption values.

This bill was introduced by the Senate Judiciary Com-
 mittee on April 14, 1988. The Senate Finance Committee Substi-
 tute was offered May 3, 1988 and passed by the Senate on May 5,
 1988, and the House passed it on May 9, 1988.

We are concerned that the retirement plan provisions in
 sec. 3 of the bill could be interpreted as requiring the federal
 definition of "qualified domestic relations order" (QDRO) to ap-
 ply to the public employees' (PERS) and teachers' (TRS) retire-
 ment systems. The statutes for both of those systems include a
 definition of "QDRO" that differs from the federal definition.
 The bill would allow bankruptcy creditors to reach TRS and
 PERS contributions made by a member within 120 days before the
 member files for bankruptcy. These are serious and, we believe,
 unintended effects of the bill.

The Senate Finance Committee's substitute bill (offered
 six days before the end of the session) doubles the dollar amount
 of exemptions from claims of creditors. That raises important
 policy questions. We are concerned about the full effects of
 that doubling, including the effect on the state's own collection
 efforts and on the state's private lending institutions. In
 light of its importance, we believe that the subject merits more

extended consideration than was possible during the extremely brief period that the committee substitute was pending at the hectic end of the legislative session.

As originally introduced, SB 508 related only to exemptions for certain retirement plan interests and payments (i.e., secs. 3, 8, 10, and part of 5 of this final version). The purpose of this part of the bill is not at all clear from the language of the bill itself. However, we have ascertained from documents provided by the Legislative Affairs Agency that, although the only reference to bankruptcy in the proposed AS 09.38.017 is in its subsec. (b), and the basic subsec. (a) is worded in general terms, the purpose is to exclude or exempt from the property of a bankruptcy debtor's estate that is subject to the reach of the debtor's creditors 1/ the bankruptcy debtor's interest in or payments to be received from a pension plan. An understanding of this purpose and the manner in which it is accomplished requires analysis of provisions of federal law, including the U.S. Bankruptcy Code, the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as the relationship between federal bankruptcy law and state exemption statutes.

This analysis is fairly succinctly provided by the case of Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983). That case explains that, upon filing of bankruptcy, an estate is created that includes all property in which the bankruptcy debtor has a legal or equitable interest. 11 U.S.C. 541(a)(1). An exception for this is that a debtor's interest in a trust that is subject to a restriction under an "applicable nonbankruptcy law" is excluded from the bankruptcy estate. 11 U.S.C. 541(c)(2). The interest in the trust never enters the estate.

After a bankruptcy estate is created, certain property is then exempted from the estate. 11 U.S.C. 522. (Exclusions are different from exemptions.) A bankruptcy debtor may choose whether to take exemptions provided by the Bankruptcy Code (listed at 11 U.S.C. 522(d)) or to take exemptions provided by state law. State law exemptions may be more favorable than the

1/ Notwithstanding that apparently intended purpose, this section also has the effect of providing an exemption in situations other than bankruptcy, for interests in certain governmental pension plans that are not currently protected under the Alaska Exemptions Act or any federal law.

law. State law exemptions may be more favorable than the Bankruptcy Code exemptions, or vice versa, depending on the type of property the bankruptcy debtor owns and depending on the specific provisions of state exemption statutes. In Goff, the bankruptcy debtors had chosen state law exemptions which, unlike the Bankruptcy Code, did not provide a limited exemption for Keogh plans. Nevertheless, the debtors argued that ERISA was an "applicable nonbankruptcy law," and that restrictions on assignment and alienation of interests in the Keogh plan under ERISA prevented their interest in the plan from entering the estate.

The court rejected this argument. It found that Congress did not intend to include ERISA plan restrictions in the reference to "applicable nonbankruptcy law." Rather, it found that Congress only intended "spendthrift trusts" to be excluded from the property of the estate. The Keogh plan was found not to be a spendthrift trust, because of the availability of the assets of the plan to the debtors, with only a 10 percent penalty, at any time before reaching retirement age. Under Goff, if a plan is not a spendthrift trust that is afforded protection under state nonbankruptcy law, a debtor's interest in the plan is not excluded from the bankruptcy estate. If the bankruptcy debtor chooses state law exemptions that do not include an exemption for the debtor's interest in a pension plan, the interest is not exempted from the estate. The result is that bankruptcy debtors may be forced to forego favorable exemptions under state law (such as the Texas homestead exemption discussed later in this bill-review letter) in order to gain at least partial protection of their pension plan interests provided by the federal bankruptcy exemptions.

Current provisions of the Alaska Exemptions Act (AS 09.38) do not provide an exemption for interests in retirement plans which is applicable in bankruptcy proceedings. See existing AS 09.38.055. Both the original and final versions of this bill add a new section, AS 09.38.017 (in sec. 3 of the CS), to the Alaska Exemptions Act, which provides an exemption for interests in certain "retirement plans." That exemption will be applicable in bankruptcy proceedings by virtue of the amendment of AS 09.38.055 in sec. 10 of the CS. By the definition of "retirement plan" in the bill, the new exemption is for interests in qualified plans under 26 U.S.C. 401(a), individual employee annuity plans under 26 U.S.C. 403(a), tax sheltered annuity plans under 26 U.S.C. 403(b), individual retirement accounts and annuities and simplified employee pension plans under 26 U.S.C. 408,

and employee stock ownership plans under 26 U.S.C. 409. 2/ No exemption is provided for interests in pension plans that do not qualify for favorable tax treatment under the specified provisions of the Internal Revenue Code.

The definition of "retirement plan" in the bill includes PERS and TRS, since those plans are qualified plans under 26 U.S.C. 401(a). Two problems arise from application of this bill to PERS and TRS. First, the bill provides that the exemptions do not apply to contributions "made by an individual under a retirement plan within 120 days before the individual files for bankruptcy." We believe that the purpose of this provision is to prevent individuals from increasing their contributions to retirement plans shortly before filing bankruptcy in order to shelter additional assets from creditors. However, PERS and TRS member contributions are statutorily fixed and involuntary, thus preventing the kind of abuse addressed by this provision. 3/ Administration of this provision would require changes in the PERS and TRS statutes, since there is currently no way for the systems to make available to creditors an employee's contributions that are made within 120 days before filing bankruptcy. There are no provisions in either PERS or TRS allowing a partial refund of a member's contribution account to pay creditors (either while the member is still employed or after termination of employment), allowing an adjustment of service credit to reflect a reduction in the contribution account, or allowing a member to repay contributions that have been paid to creditors.

Second, the bill provides that the exemptions do not prevent payment of retirement plan benefits to an alternate payee under a qualified domestic relations order (QDRO) as defined by 26 U.S.C. 414(p). Proposed AS 09.38.017(c). The potential problem with this is that the statutes providing for both PERS and TRS include a definition of "QDRO" that is different in a significant respect from the definition of "QDRO" in 26 U.S.C. 414(p). Existing AS 14.25.220(31) and AS 39.35.680(34). Under the federal definition, a QDRO can order payment of a benefit to an

2/ The federal Bankruptcy Code exemptions provide an exemption for payments under these plans only "to the extent reasonably necessary for the support of the debtor and any dependant of the debtor." 11 U.S.C. 522(d)(10)(E).

3/ This might also be true of some private pension plans that will be affected by this bill.

alternate payee as soon as a member is both vested and old enough to take early retirement, regardless of whether the member has terminated employment or chooses to take early retirement. Unlike the federal definition, the PERS and TRS definition does not allow payment of benefits to an alternate payee before the member begins to receive a benefit. There is no system in place to allow either PERS or TRS to apply the federal QDRO requirements.

We characterize this second problem as a "potential" problem because we believe that, despite the language of the bill, the better argument is that the federal definition of QDRO would not be applicable to PERS and TRS. This is so because 26 U.S.C. 414(p)(9) provides that the federal definition does not apply to any plan to which 26 U.S.C. 401(a)(13) does not apply. 26 U.S.C. 401(a)(13) does not apply to governmental plans, such as PERS, TRS, and municipal plans. Thus, under federal law, the federal definition of "QDRO," by its own terms, does not apply to PERS and TRS or the other governmental plans. Moreover, this proposed state statute says, in subsec. (c), that the exemptions in (a) "do not prevent" payment under a federally defined QDRO. Payment under such an order is not required by the proposed statute. In other words, if a creditor (spouse) has a domestic relations order that is a qualified one under the federal definition, then the exemptions in proposed AS 09.38.017(a) do not bar the creditor from reaching the pension money. But some other statute might do so -- e.g., our PERS and TRS statutes. This raises questions as to what right a person has to enforce a QDRO against a governmental plan other than PERS or TRS if the exemption is enacted.

The bill states a conclusive presumption that a retirement plan that is exempt from claims under the bill is a spendthrift trust. Proposed AS 09.38.017(d). We seriously doubt that this provision provides a bankruptcy debtor with any additional protection. If the debtor chooses state law exemptions, the provisions of the bill already exempt the debtor's interests in or payments from the specified retirement plans. If the debtor chooses federal Bankruptcy Code exemptions, it is unlikely that a bankruptcy court would give any credence to this presumption in considering whether a plan that is clearly not a spendthrift trust is excludable from the bankruptcy estate under 11 U.S.C. 541(c)(2). (PERS and TRS would not appear to qualify as spendthrift trusts, since, although access to their benefits is, by statute, strictly controlled, the portion of the trust money that is the employee's contribution account may be obtained by the employee upon termination of employment before eligibility for retirement benefits.)

The provisions of the bill that were added in the committee substitute amend the dollar amounts of the value of exemptions which may be claimed under the Alaska Exemptions Act. The statutory amounts were doubled. However, the practical effect is less than double because, as required by statute, the amounts had already been adjusted up by regulation, approximately 10 percent, in accordance with the consumer price index. (These amounts may be adjusted upward again by the Department of Labor by operation of AS 09.38.115, which provides for such changes each even-numbered year.) There are no obvious legal problems with these portions of the bill.

There is a significant policy decision to be made, however, with regard to approving the increases. The effect of the increases will be to allow debtors to keep more of their property while restricting the property available to nonsecured or undersecured creditors trying to recover on loans in default. In approving loans, some creditors may have counted on the availability of property or income that would be exempt under this bill.

It is very difficult to predict what economic effect will result if this bill becomes law. Some suggest that greater exemption amounts will encourage more creditor negotiations with debtors and thus reduce bankruptcy filings. Some suggest that debtors will be more encouraged to file bankruptcy because they will be able to keep more property. Another possibility is that increased exemptions will decrease the availability of credit.

It is worth noting that the Alaska Exemptions Act was based on the Uniform Exemptions Act, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Alaska is the only state to date that has enacted the uniform Act, and Alaska enacted exemptions in higher amounts than were proposed in the uniform Act. We spoke with John McCabe, legal director for the NCCUSL. He informs us that there is no consistent answer on how any state has approached the exemption situation. For instance, several states exempt the homestead completely, but differ in the definition of the "homestead."

Mr. McCabe reported that Texas is noted for having the most liberal homestead provision. The definition requires that the debtor live on the property and then includes all property to the outer boundaries. Thus, a debtor could be in bankruptcy, have an urban home worth hundreds of thousands of dollars sitting on millions of dollars worth of oil and the entire property would be exempt from creditors. Mr. McCabe reported that the Texas homestead provision has been criticized as being an imposition on

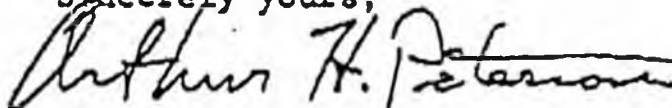
the credit system and unfairly restrictive for creditors.

When drafting the Uniform Exemptions Act, the drafters first determined what kinds of property should be reasonably included. Next, the drafters tried to ascertain reasonable values that would fairly serve the debtor's interests and not unfairly limit creditors. Mr. McCabe stated that the purpose of an exemptions Act is to preserve some assets for the debtor to make a fresh start without making the exemptions so great as to abuse the credit system. He felt that the actual amounts were derived by almost an intuitive consideration of what was fair and reasonable.

We note that only the new exemption of interests in retirement plans does not apply to assets of a bankruptcy estate in a bankruptcy proceeding filed before the effective date of the bill. Section 11 of the bill. Apparently, the legislature intended the increased exemptions added by the committee substitute to apply to pending bankruptcy proceedings.

We make no recommendation as to the resolution of the policy issue raised by the increased exemption amounts, but only bring the issue to your attention. Although there are no obvious legal problems with adopting the increased exemption amounts, the legal problems identified concerning the retirement plan exemption and the significant policy questions raised by the increased exemptions warrant serious consideration of veto. A veto would allow a bill to be drafted during the interim that would clarify the effects on the state's retirement systems and also allow more studied consideration of the policy issues. We would be happy to assist in drafting an appropriate veto message, if you wish.

Sincerely yours,



for Grace Berg Schaible
Attorney General

GBS:VBR:JJ:pjg