

SB

176

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: May 6, 2001

FURTHER REFERRALS:

Date of Committee Action: 5-6-01

The JUDICIARY Committee considered:

CSSB 176(L&C) am

CS FOR SENATE BILL NO. 176(L&C) am

DISTRIBUTORSHIPS

"An Act prohibiting certain coercive activity by distributors; relating to certain required distributor payments and purchases; prohibiting distributors from requiring certain contract terms as a condition for certain acts related to distributorship and ancillary agreements; allowing dealers to bring certain court actions against distributors for certain relief; and exempting from the provisions of the Act franchises regulated by the federal Petroleum Marketing Practices Act, situations regulated by the Alaska gasoline products leasing act, and distributorship agreements relating to motor vehicles required to be registered under AS 28.10."


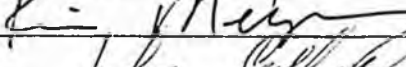
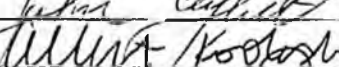
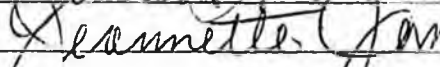

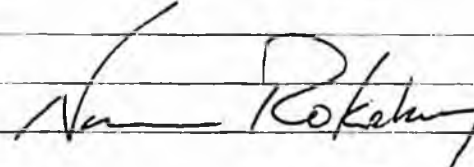

Recommends it be replaced with H CS for CS HB 176 JUD Same Title New Title
 For Senate Bills with new title: Technical Title New Title: HCR _____

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

- List of Abbrev. For Depts.:
- ADM
 - CED
 - COR
 - CRT
 - EED
 - DEC
 - DFG
 - GOV
 - HSS
 - LAA
 - LAW
 - LWF
 - MVA
 - DNR
 - DPS
 - REV
 - DOT
 - UA

<u>NEW FISCAL NOTES</u>				
*For Chief Clerk's Office Use Only				
FN#	List by Dept(s):	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN #	Fiscal	Indet.	Zero
<u>CED</u>	<u>1.</u>			<input checked="" type="checkbox"/>

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Berkautz			<input checked="" type="checkbox"/>	
	Meyer	<input checked="" type="checkbox"/>			
	Coghill	<input checked="" type="checkbox"/>			
	Kodwin			<input checked="" type="checkbox"/>	
	JAMES	<input checked="" type="checkbox"/>			
Chair: 	Rokberg	<input checked="" type="checkbox"/>			
Chair: 	Rokberg	<input checked="" type="checkbox"/>			

All conceptual -

PROPOSED AMENDMENTS TO CS FOR SENATE BILL NO. 176 (L&C) am

Amendment #1

Page 3, Line 18 22

Withdrawn

Insert the words "without cause" following "terminates a distributorship agreement..."

(see Note 1)

Amendment #2

Page 3, Line 20 26

not offered

Insert the words "good will," following "including"

Amendment #3 -

Page 6, Line 2 11

Adopted

Delete the words "a written agreement"

Insert the words "an agreement, whether express, implied, oral, or written,"

valid agreements enforceable under the law

(see Note 2)

NOTE 1: There is plenty of case law which defines "without cause" so that term should not require a definition. It would also place the responsibility for deciding a contested issue in a court of law.

NOTE 2: In regard to the implied, express or oral agreement section, many dealers operate with written contracts that are modified to varying degrees by oral agreements. In some cases, the manufacturer asks the dealer to build a new structure to showcase or house the product. In others, they demand that the dealer merge with a competitor in order to remove the competition. Other requirements are asked for, which seem innocuous to begin with. One stark example involves Alaska Rubber, which contracted with a manufacturer many years ago to distribute its product. That manufacturer advised that if Alaska Rubber purchased a particular product from them rather than from a less expensive competitor, Alaska Rubber would receive a rebate for the difference. Specific procedures were laid out in the agreement as to what documentation was required and what steps were necessary to obtain the rebate. After the first month, the manufacturer's representative called to complain about the extensive quantity of paperwork that had arrived. Alaska Rubber was asked verbally to provide the information on a single sheet of paper from then on. This practice was followed for the next fifteen or so years. When the manufacturer decided to yank the agreement because another entity had promised them better performance (even though nationally, Alaska Rubber ranked in the top twelve), they filed criminal charges (using the RICO statute since the reports were filed by U.S. mail) against Alaska Rubber in an attempt to intimidate them into caving in. Alaska Rubber has fought successfully in court ever since, but each decision granted in their favor is appealed. The case is currently in federal court, and has cost Alaska Rubber in excess of \$1.2 million dollars.

*Provided by Deborah Luper
a witness to SB 176*

ALASKA STATE LEGISLATURE

House of Representatives

Committee Assignments:

Judiciary Committee, Chairman
Labor & Commerce Committee, Member
Legislative Council, Member
Special Committees:
Economic Development, Member



Interim:

716 West 4th Avenue, Suite 350
Anchorage, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:

State Capitol
PHONE: (907) 465-4968
FAX: (907) 465-2040

REPRESENTATIVE NORMAN ROKEBERG

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

FAX COVERSHEET

DATE: 5.6.01

TO: Terri Banister

FAX: 2029 VOICE: _____

RE: Final CS for SB 174 (JWS)

MESSAGE: Please create a Judiciary CS for

SB 174 with the following amendment.

Page 6, Line 11

Delete: "a written agreement"

Insert: "an agreement, whether express,
implied, oral or written"

TOTAL NUMBER OF PAGES SENT, INCLUDING COVER SHEET: 1

This is a conceptual amendment to
put it back the way originally drafted.

Heather
X4990

PROPOSED SPONSOR STATEMENT
Alaska Small Business Protection Act

The proposed Alaska Small Business Protection Act bill is necessary to level the playing field between large, well-financed manufacturers and distributors, and small businesses in Alaska. Passage of this legislation will protect Alaska's small businesses from unreasonable manipulation by manufacturers and distributors, foster economic growth and development, and keep capital in Alaska.

Alaska is one of the few states without a law addressing distributorship agreements. This bill fixes gross inequities that occur as Alaskan businesses develop markets for products and services based upon specific product lines under distributorship agreements.

As small businesses invest capital and commit to growth and infrastructure based on distributorship agreements, they inherently become dependent upon those product lines. In many cases, this dependency allows manufacturers to unilaterally force changes in distribution contracts to the detriment of Alaskan businesses, and ultimately, the employees and other entities with whom they have committed in order to fulfill obligations under the original contract.

In many cases, if Alaska's businesses do not agree with new contract terms demanded by the manufacturer/distributor, they are terminated and left with inventory they are unable to sell and which typically, manufacturers/distributors refuse to buy back. This loss of capital ranges from \$500 to \$500,000 or more, depending upon the business and the amount of inventory required to fulfill the terms of the original agreement. Additionally, many of these contracts make it possible to unilaterally terminate the distributorship agreement if a small business owner wishes to sell his or her business, thereby eliminating much or all of the goodwill value established over years of service.

While businesses are free to sue to recover losses, making claims in civil court is extremely cost prohibitive, especially for a business that may have had its entire income stream cut off. In one prominent 1995 Anchorage case, the small business was selling approximately \$2.0 million per year in product. It had \$700,000 invested in inventory at the time of termination that the manufacturer/distributor refused to repurchase. However, after the Alaskan business successfully won its case in court, the manufacturer/distributor appealed the outcome. The case continues to date, with legal fees and court costs in excess of one million, and climbing. Many Alaskan small business distributors cannot afford the massive legal costs to pursue these claims through the courts, and still remain in business.

SECTIONAL ANALYSIS Alaska Small Business Protection Act

An Act relating to distributorships; and amending Rule 65(b), Alaska Rules of Civil Procedure.

The proposed Alaska Small Business Protection Act bill is necessary to level the playing field between large, well-financed manufacturers and distributors, and small businesses in Alaska. Passage of this legislation will protect Alaska's small businesses from unreasonable manipulation by manufacturers and distributors, foster economic growth and development, and keep capital in Alaska.

Section 1. Amends AS 45.45 by adding new sections dealing with distributorships, and agreements between distributors and dealers. It evens out the playing field between large, well-financed distributors/manufacturers and Alaska's small businesses, requiring fair play in regard to distributorship agreement relationships through specified rules and courses of action.

Alaska is one of the few states without a law specifically addressing distributorship agreements. This bill fixes gross inequities that occur as Alaskan businesses develop markets for products and services based upon specific product lines under distributorship agreements.

As small businesses invest capital and commit to growth and infrastructure based on distributorship agreements, they inherently become dependent upon those product lines. In many cases, this dependency allows manufacturers to unilaterally force changes in distribution contracts to the detriment of Alaskan businesses, and ultimately, the employees and other entities with whom they have committed in order to fulfill obligations under the original contract.

In many cases, an Alaskan business serves a particular field, such as the oil or fishing industry, and is "locked in" to specific product or service lines dictated by industry need. Arbitrary loss of a product line or right to provide goods or services can spell the end for many of these businesses, with economic upheaval suffered by employees and other businesses entities dependent upon the dealer.

Sec. 45.45.700. Prevents coercion of a dealer to perform certain acts by using duress or threats to terminate distributorship agreement or another agreement between the distributor or the dealer. Defines "certain acts" as (1) the purchase or delivery of merchandise that has not been ordered by the dealer; (2) the assignment, sale or disposal of a contract or property; or (3) the expenditure of money.

Sec. 45.45.710. Defines actions constituting unfair termination of a distributorship as (1) termination without due regard to the value of the dealer's business, or without just provocation; or (2) by making or causing substantial change to the economic position of the dealer in a way that is detrimental to that dealer.

While businesses are free to sue to recover losses, making claims in civil court can be extremely cost prohibitive, especially for a business that may have had its entire income stream cut off. In one prominent 1995 Anchorage case, the small business was selling approximately \$2.0 million per year in product under a distributorship agreement. It had \$700,000 invested in inventory at the time of termination that the distributor refused to repurchase. However, after the Alaskan business successfully won its case in court, the distributor appealed the outcome. The case continues to date, with legal fees and court costs in excess of one million, and climbing. Many Alaskan small business distributors cannot afford the massive legal costs to pursue these claims through the courts, and still remain in business.

Sec. 45.45.715. Provides for civil action in court by the dealer if a distributor violates Sections 700 or 710 above. (1) Allows the dealer to recover damages suffered as a result of the termination; (2) enjoins the distributor from terminating the distributorship agreement; (3) enjoins the distributor from making or causing a substantial change in the economic position of the dealer that is detrimental to the dealer; and (4) provides that an injunction may be obtained by the dealer provided the dealer demonstrates there is a reasonable likelihood that the termination will result in a loss of goodwill for the dealer's business or a decline in the value of that business.

In many cases, if Alaska's businesses do not agree with new contract terms demanded by the manufacturer/distributor, they are terminated and left with inventory they are unable to sell and which typically, manufacturers/distributors refuse to buy back. This loss of capital ranges from \$500 to \$500,000 or more, depending upon the business and the amount of inventory required to fulfill the terms of the original agreement.

This bill also provides legal protections in the case of the dealer's death. The loss of life is always traumatic – in the very least, financially, and emotionally. By setting out specific rules in Alaska law, the settling of the estate in regard to the distributorship agreement and the financial disposition of the dealer's business is less likely to result in expensive legal battles and additional strain to the deceased's heirs.

Additionally, many of these contracts make it possible to unilaterally terminate the distributorship agreement if a small business owner wishes to sell his or her business, thereby eliminating much or all of the goodwill value established over years of service.

Sec. 45.45.720. Provides for disposition of merchandise purchased from the distributor, and remaining in dealer's inventory upon contract termination. Requires the distributor to pay the dealer for merchandise held as of the date of contract termination if the dealer does not wish to keep said merchandise. This section also provides that the distributor will pay 100 percent of original cost of current and unused merchandise, and return transportation charges; or 85 percent of the current net price for repair parts, including superceded parts; and 5 percent of the current net price of repair parts to cover the handling, packing and transportation of those repair parts back to the distributor. If a repair part is not listed, then the current net price is the higher of the original purchase price or the latest price published by the

distributor for the repair part, if the dealer has actual proof of purchase of the repair part from the distributor, and if the repair part was purchased within ten years before the termination.

Once payment has been made, title to merchandise passes to the distributor making the payment, and the distributor is entitled to possession of said merchandise.

Sec. 45.45.725. Requires distributor to make payment to dealer no later than three months following termination of agreement. Also requires a final, detailed statement of account for the merchandise.

Sec. 45.45.730. Provides remedy if distributor fails or refuses to make payment for merchandise as provided in above sections. The dealer is entitled to bring action in court for the amount of the payments.

Sec. 45.45.735. Provides, upon death of the dealer, for repurchase of merchandise by the distributor if the distributorship agreement is not continued from the personal representative, heirs, or devisees of the dealer. The same repurchase terms apply as noted in Sections 720(a) and (c), 725 and 730.

Sec. 45.45.740. Prohibits termination of existing agreement by the distributor if the termination is based upon (1) a change of management or ownership of the dealership, unless the distributor can show that said change would be detrimental to the representation or reputation of the distributor's products; (2) refusal by the existing dealer to purchase or accept delivery of merchandise or a service, unless necessary for the operation of the distributor's merchandise that is sold by the dealer; (3) the fact that the existing dealer owns, has an interest in, participates in the management of, or holds another distributor agreement for the sale or lease of line-make merchandise in the same facilities where the dealer sells or leases the distributor's merchandise; or (4) refusal by the existing dealer to participate in a national advertising campaign or contest, to purchase promotional products or display devices, or to display decoration or materials at the expense of the existing dealer.

Sec. 45.45.745. Requires the distributor to purchase that portion of the dealer's business adversely affected if the distributor wants to terminate the distributorship agreement, or wants to substantially change or actually changes the competitive situation of the distributor's dealer. Purchase would include good will, assets, and machinery, at commercially reasonable business valuations.

The following sections prohibit a distributor from requiring a dealer "sign away his or her rights" in the distributorship agreement, obligate him or herself to pay the distributor's legal fees, or from otherwise circumventing Alaska law in regard to distributorship agreements. It allows a common sense approach to dispute resolution, as long as the distributor does not dictate the terms of conflict resolution via binding arbitration in the agreement before a conflict arises.

Sec. 45.45.750. Prohibits a distributor from requiring a dealer to agree to any of the following terms in a distributorship agreement, or in another agreement that is ancillary to a distributor agreement, as a condition of an offer, grant, or renewal of a distributorship or ancillary agreement: (1) a requirement that the dealer waive a trial by jury in court cases involving the distributor; (2) a requirement that disputes between the distributor and the dealer be submitted to binding arbitration or to any other binding alternative dispute resolution procedure, unless agreed to by both parties at the time of the dispute; (3) a requirement that the dealer pay the attorney fees of the distributor; (4) a requirement that prohibits a firearms dealer from selling legal firearms merchandise not manufactured or distributed by the distributor, or (5) a requirement that the agreement be subject to the laws of any state other than Alaska.

This section also provides that the provisions of this section do not apply to an agreement where a lease or sale of real property is the main purpose of the agreement.

Sec. 45.45.750. Provides exemptions where these sections do not apply – specifically, (1) a distributor agreement that would be considered a franchise regulated by 15 USC 2801-2841 (Petroleum Marketing Practices Act); and (2) a situation regulated by AS 45.50.800 – 45.50.850; or (3) a distributor agreement for the sale, repair, or servicing of motor vehicles that are required to be registered under AS 29.10.

Sec. 45.45.790. Defines "dealer" to mean a person who enters into a distributorship agreement, and who, under the agreement, receives (purchases) merchandise or services from a distributor.

"Distributor" is defined as a person who enters into a distributorship agreement, and who, under the agreement, provides (sells) merchandise or services to a dealer. The term "distributor" also includes a wholesaler, a manufacturer, a person that is a parent corporation or an affiliated corporation of a person identified as a wholesaler or manufacturer, or a field representative, an officer, and agent, or another direct or indirect representative of a person identified as a "distributor."

A "distributor agreement" means an agreement, whether express, implied, oral or written, between two persons by which a person receives the right to (1) sell or lease merchandise or services at retail or wholesale; or (2) use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and (3) in which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the merchandise or services.

"Merchandise" includes parts and accessories.

"Terminate" means failing to renew.

Section 2. This section adds a new section to the uncodified law of the State of Alaska, and amends Rule 65(b), Alaska Rules of Civil Procedure, by specifying the type of damages that must be shown in order to receive an injunction, which may be interpreted to include a temporary restraining order.

Section 3. Provides for an effective date for applicability of this Act – on or after the effective date of this Act, or on or after January 1, 2001, if the distributorship agreement is still in effect on the effective date of this Act. Provides that AS 45.45.715 and AS 45.45.745 only apply to a distributorship agreement entered into on or after the effective date of this Act.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 176
(S) Publish Date: 4/25/01

Revision Date/Time (Note if correction): 04/16/2001 2:35p.m. Dept. Affected: DCED
Title: An act relating to Distributorships BRU: Banking, Securities & Corporations
Sponsor: Senate Labor & Commerce By Request Component: Corporations
Requester: Senate Labor and Commerce Component Number: 1233

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL						

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This Legislation has no fiscal impact on this Department.

Prepared by: Franklin Terry Elder, Director Phone 907-465-2521
Division: Banking, Securities & Corporations Date/Time 04/16/2001 2:35p.m.
Approved by: Commissioner Deborah B. Sedwick Date 4/16/2001
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

Subject: Amendments (SB176)

Date: Sun, 6 May 2001 05:16:52 EDT

From: DeborahLuper@aol.com

To: Heather_Nobrega@legis.state.ak.us, john@acfm.com

CC: Annette_Kreitzer@legis.state.ak.us

Hello,

Here are the proposed amendments to SB 176 for the Judiciary hearing. I wanted to fax them down to you, but my fax machine is not working properly.

The proposed amendments are below, and are also attached as a Word document. Please note that I had to use the version that was amended in L&C since the amended version is not available just yet. Therefore, the page and line numbers will have changed.

Thank you!

Deborah

PROPOSED AMENDMENTS TO CS FOR SENATE BILL NO. 176 (L&C) am

Page 3, Line 16

Insert the words "without cause" following "terminates a distributorship agreementâ"!"

(see Note 1)

Page 3, Line 20

Insert the words "good will," following "including"

Page 6, Line 2

Delete the words "a written agreement"


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(see Note 2)

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 AMENDMENTS~SB176.doc	Name: AMENDMENTS~SB176.doc Type: Winword File (application/msword) Encoding: base64 Download Status: Not downloaded with message
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