ALASKA LEGISLATURE 1289

HOUSE and SENATE FINANCE COMMITTEE FILES, 1995-1996

HB
65

SFIN

FILE

No. 1
Bill Version: HB 65
(H) Publish Date: 2/23/95

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date: March 17, 1995
Title: An Act establishing a loan guarantee and interest rate subsidy program for Assistive Technology.
Sponsor: Representative Porter
Requestor: Representative Porter

Department Affected: Education
BRU: Vocational Rehabilitation
Component: Assistive Technology

COMPONENT SERIAL NO. 1202

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS	100.0	100.0	100.0	0	0	0
TOTAL OPERATING	100.0	100.0	100.0	0	0	0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	100.0	100.0	100.0	0	0	0
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	100.0	100.0	100.0	0	0	0

POSITIONS:

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY95) impact: $ 0

ANALYSIS: (Attach a separate page if necessary.)
The fund would be capitalized with $100,000 per year for three years. Banking institutions are in agreement with this legislation and have given their support. These loans would benefit individuals who are working but do not qualify for a loan without an interest subsidy or loan guarantee.

Prepared by: Stan Ridgeway, Deputy Director Phone: 465-6932
Division: Vocational Rehabilitation Date: March 17, 1995
Approved by Commissioner: Shirley Holloway, Ph.D
Agency: Education Date: March 17, 1995

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Rev 1/95

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SENATE COMMITTEE REPORT

DATE: 4/22/95

FURTHER: Finance

DATE TURNED INTO OFFICE: 4-28-95

HESS Committee considered CS FOR HOUSE BILL NO. 65(HES) am

"An Act establishing a loan guarantee and interest rate subsidy program for assistive technology."

For

and recommends:

| | be replaced with ____ CS ____________________(______)

| | adopt previous ____ CS ____________________(______)

| | attached amendment(s)

| | adopt Letter of Intent by ______________ Committee

| | further referral to the ______________ Committee

Senate Bill:
| | same title
| | new title

House Bill:
| | same title
| | technical change
| | new: SCR* ____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Loren D Leman	✓	Mike Miller	✓		
CHAIR: Lyda Green	✓				

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
DOE	3/17/95		100.

| | **APPROPRIATION -- no fiscal note**

***include fiscal notes accompanying Governor's bill**

ORDERED.

HB 65
CSHB 65(HES) AM WAS READ THE THIRD TIME.

THE QUESTION BEING: "SHALL CSHB 65(HES) AM PASS THE HOUSE?" THE ROLL WAS TAKEN WITH THE FOLLOWING RESULT:

CSHB 65(HES) AM
THIRD READING
FINAL PASSAGE

YEAS: 37 NAYS: 0 EXCUSED: 3 ABSENT: 0

YEAS: AUSTERMAN, BARNES, BRICE, BROWN, BUNDE, DAVIES, G.DAVIS, ELTON, FINKELSTEIN, FOSTER, GREEN, GRUSSENDORF, HANLEY, IVAN, JAMES, KELLY, KOHRING, KOTT, KUBINA, MACLEAN, MARTIN, MASEK, MOSES, MULDER, NAVARRE, NICHOLIA, OGAN, PHILLIPS, PORTER, ROBINSON, ROKEBERG, SANDERS, THERRIAULT, TOOHEY, VEZEY, WILLIAMS, WILLIS

EXCUSED: B.DAVIS, MACKIE, PARNELL

AND SO, CSHB 65(HES) AM PASSED THE HOUSE AND WAS REFERRED TO THE CHIEF CLERK FOR ENGROSSMENT.

04/21/95 HOUSE JOURNAL PAGE 1428

ORDERED.

04/21/95 HOUSE JOURNAL PAGE 1429

HB 65

CSHB 65(HES) AM WAS READ THE THIRD TIME.

THE QUESTION BEING: "SHALL CSHB 65(HES) AM PASS THE HOUSE?" THE ROLL WAS TAKEN WITH THE FOLLOWING RESULT:

CSHB 65(HES) AM
THIRD READING
FINAL PASSAGE

YEAS: 37 NAYS: 0 EXCUSED: 3 ABSENT: 0

YEAS: AUSTERMAN, BARNES, BRICE, BROWN, BUNDE, DAVIES, G.DAVIS, ELTON, FINKELSTEIN, FOSTER, GREEN, GRUSSENDORF, HANLEY, IVAN, JAMES, KELLY, KOHRING, KOTT, KUBINA, MACLEAN, MARTIN, MASEK, MOSES, MULDER, NAVARRE, NICHOLIA, OGAN, PHILLIPS, PORTER, ROBINSON, ROKEBERG, SANDERS, THERRIAULT, TOOHEY, VEZEY, WILLIAMS, WILLIS

EXCUSED: B.DAVIS, MACKIE, PARNELL

AND SO, CSHB 65(HES) AM PASSED THE HOUSE AND WAS REFERRED TO THE CHIEF CLERK FOR ENGROSSMENT.

HB

70

HFIN FILE

HOUSE COMMITTEE REPORT

(11)
Date Referred: February 15, 1995

FURTHER REFERRALS:

Date of Committee Action: __________

The FINANCE Committee considered: HB 70

HOUSE BILL NO. 70 END PERMANENT FUND DIVIDEND HOLD HARMLESS

"An Act relating to treatment of permanent fund dividends for purposes of determining eligibility for certain benefits; and providing for an effective date."

recommends it be replaced with the following committee substitute ______________________________ [ ] the same title [ ] a new title

[ ] additional referral to ____________________ Committee
[ ] attached amendment(s)

ADOPTS: ________________________ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) ____________________

[ ] zero fiscal note(s) ____________________

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) ____________________

[ ] zero fiscal note(s) ____________________

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Died in Committee				

CHAIR'S SIGNATURE ______________________ ______________________

FISCAL NOTE

9

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless
Sponsor: Rep. Kott
Requestor: House State Affairs

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Permanent Fund Hold-Harmless
COMPONENT SERIAL NO. 966

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
TOTAL	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)

Estimate of current year (FY95) impact: 0.0

POSITIONS:

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Agency: Department of Health and Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal notes for Medicaid Facility and Medicaid Non-facility to show this increase.

This fiscal note shows the elimination of the FY 95 budget request of 1.1 million. The reduction in expenditures shown reflects what would be an 10% growth in future years in the cost of PFD-HH benefits to replace Medicaid funds.

COMMITTEE COPY

STATE OF ALASKA
1995 LEGISLATIVE SESSION

FISCAL NOTE

No. 8
Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: An Act relating to permanent fund dividends
Sponsor: Kott
Requestor: House STA

Dept Affected: Health and Social Services
BRU: Assistance Payments
Component: Adult Public Assistance
COMPONENT SERIAL NO. 222

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
MISCELLANEOUS						
TOTAL OPERATING	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY96	FY97	FY98	FY99	FY00	FY01
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
TOTAL	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Dividend payments must be treated as unearned income for Adult Public Assistance (APA) purposes because the APA program operates as the state supplement to the federal Supplemental Security Income (SSI) program and the SSI program treats dividends as income. Medicaid services are available to APA recipients only if the APA program follows SSI income-counting rules. PFD-HH funds for the replacement of APA benefits are transferred as Interagency Receipts to the Adult Public Assistance component.

The FY 96 Governor's budget plans for expenditure of $ 2,562,100 in PFD-HH funds to replace APA benefits which would otherwise be denied to 7,932 individuals. The cost of PFD-HH benefits in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the APA program. This fiscal note assumes the APA maximum payment levels will not change.

The typical FY96 PFD-HH payment to an APA recipient is expected to be $323 to replace one month's benefit.

PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most APA cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments. Recipients who retain enough dividend money in the month after they receive it to exceed the APA program limit of $2000 ($3000 for a couple) will remain ineligible until they have spent the money.

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FISCAL NOTE

N 7

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: An Act relating to permanent fund dividends
Sponsor: Kott
Requestor: House STA

Dept. Affected: Health and Social Services
BRU: PFD Hold Harmless
Component: PFD Hold Harmless
COMPONENT SERIAL NO. 225

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	(472.7)	(486.9)	(501.5)	(516.5)	(532.0)	(548.0)
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(21,843.4)	(22,935.6)	(24,082.4)	(25,286.5)	(26,550.8)	(27,878.3)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY96	FY97	FY98	FY99	FY00	FY01
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1050 PFD Fund	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)
TOTAL	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)

POSITIONS:	FY96	FY97	FY98	FY99	FY00	FY01
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

House Bill No. 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date:

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ANALYSIS (cont.):

Repeal of the PFD Hold Harmless program will impact both the amount of assistance paid to individuals and families and the administrative effort required for the Division of Public Assistance to provide timely, accurate delivery of benefits. The Department of Health and Social Services has established interagency agreements with the federal agencies responsible for the AFDC and SSI programs. These agreements, which substantially reduce the amount of case processing required when recipients receive dividends, would be nullified by HB 70. The administrative effort to process PFD Hold Harmless entitlements would be supplanted by the additional case processing effort required to suspend public assistance entitlements when dividend payments are distributed.

Technical Analysis

Sections 1 and 2 of the bill repeal the express authority at AS 43.23.025(a)(1)(E) and AS 43.23.028(a)(3) to fund the PFD-HH program with appropriations from the dividend fund.

Section 3 of the bill repeals the language at AS 43.23.075 that established the PFD-HH program in 1982.

Section 4 establishes an effective date of January 1, 1996. The Department of Health and Social Services contacted the sponsor's office to ascertain the sponsor's intent regarding the effect of this legislation on the calendar year 1995 dividend distribution. The sponsor's staff indicated that the intent is to end the PFD Hold Harmless program prior to the 1995 dividend season. This analysis therefore assumes an effective date of July 1, 1995.

Program Impacts

PFD-HH is paid to replace public assistance benefits in the following programs:

Aid to Families with Dependent Children (AFDC)

Food Stamp Program (FSP)

Medicaid

Adult Public Assistance (APA)

Supplemental Security Income (SSI)

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Revision Date: ____________ / ____________ B(NO. HB 70

ANALYSIS (cont.):

The FY 96 Governor's budget plans expenditures to replace benefits with PFD-HH funds according to the following schedule:

Program	Cases	Persons Impacted	Formula Budget
AFDC	12987	39639	12875.5
FSP	11373	36384	3688.1
Medicaid	NA	2000	1100.0
APA	7932	7932	2562.1
SSI	5630	5630	1617.7
		Total FY 96 Grants	21843.4

PFD-HH funds for replacement of Food Stamp benefits are paid directly to recipients as cash in lieu of food coupons. In FY 96, a typical Food Stamp household is expected to receive one $324 PFD-HH payment to replace a month's worth of food coupons.

PFD-HH funds for replacement of AFDC benefits are transferred as Interagency Receipts to the AFDC component of the Assistance Payments BRU.

In the AFDC program, PFD-HH benefits replace federally-matched AFDC payments which would otherwise not be paid because of dividend receipt. The benefits replaced include AFDC grants which would be denied because of the dividend payments themselves as well as grants that would be reduced because federal AFDC policy requires that cash PFD-HH payments made in lieu of food stamps be treated as income for AFDC purposes. A typical AFDC family is expected to receive $780 in PFD-HH during FY 96 to replace one month's AFDC grant, and an additional $272 in PFD-HH to restore AFDC grant reductions that result from receiving cash in lieu of food coupons.

Under an interagency operating agreement with the federal Department of Health and Human Services, claims for AFDC federal matching funds are reduced to reflect the amount of benefits which would be paid if AFDC grants were denied because of dividend and food stamp hold harmless payments. This agreement saves substantial administrative effort because individual AFDC cases do not have to be suspended during the dividend season.

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ANALYSIS (cont.):

PFD-HH funds for replacement of Medicaid benefits are transferred as Interagency Receipts to the Medicaid PFD Hold Harmless component of the Medical Assistance BRU. Most Medicaid PFD Hold Harmless benefits are paid on behalf of individuals who retain dividend money beyond the month they receive it, causing their household's resources to exceed program limits.

PFD-HH funds for replacement of APA benefits are transferred as Interagency Receipts to the Adult Public Assistance component of the Assistance Payments BRU. The typical PFD-HH benefit to an APA recipient is $323 to replace one month's benefit.

PFD-HH funds for replacement of SSI benefits are paid under an interagency agreement to the federal Social Security Administration, which applies them as reimbursement for the cost of SSI benefits paid to individuals who receive dividends. PFD-HH benefits to replace SSI are expected to average $287 per person in FY 96.

PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most AFDC, Food Stamp, APA, and SSI cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments.

The cost of PFD-HH benefits in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the AFDC and APA programs. This fiscal note assumes the AFDC and APA maximum payment levels will not change.

Administrative Impacts

The administrative cost of the PFD Hold Harmless program is based on estimates of the proportion of time used by Eligibility Determination staff to process case actions related to dividend payments and PFD-HH benefits. In FY 96, 472.7 in PFD-HH Contractual funds is planned to be transferred as Interagency Receipts to the Eligibility Determination component of the Public Assistance Administration BRU.

This analysis presumes that the intent of HB 70 is to preclude the appropriation of money from the Dividend Fund to administer public assistance. The cost of processing case changes resulting from the receipt of dividends is, therefore, shifted to General Fund.

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ANALYSIS (cont.):

The administration of the PFD-HH program and the processing of case changes related to the receipt of dividend payments is funded through the transfer of 472.7 in PFD-HH Contractual funds as Interagency Receipts to the Eligibility Determination component. The repeal of the PFD-HH program proposed in HB 70 results in a small increase in the administrative effort required to take the dividend payments into account and process changes in the affected public assistance cases. The cost of processing is shifted to General Fund.

The time required to process Food Stamp cases would decrease because it would no longer be necessary to convert assistance to cash in lieu of food coupons and back again. The time to process AFDC, APA, and Medicaid cases in the absence of the PFD-HH program would increase substantially; under the Hold Harmless program, benefit authorization for these programs consists of the one-time entry of a few special computer codes. Without the PFD-HH program, action will have to be taken to suspend the benefits of each affected AFDC, APA, and Medicaid case, and to reinstate benefits after the month of suspension.

The need for staff is also expected to increase because of a substantial increase in General Relief applications from recipients who are unable to pay for rent or food when they lose their cash and food benefits two months **after** they receive their dividend checks. The Division of Public Assistance would make every effort to apprise recipients in advance that they will be retrospectively ineligible, but some recipients would inevitably fail to conserve enough dividend money to meet their future needs.

The offsetting effects of HB 70 result in a small increase in staffing needs in the Eligibility Determination component.

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 6
Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: An Act relating to permanent fund dividends
Sponsor: Kott
Requestor: House STA

Dept. Affected: Health and Social Services
BRU: Assistance Payments
Component: AFDC
COMPONENT SERIAL NO. 220

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY96	FY97	FY98	FY99	FY00	FY01
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
TOTAL	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Federal AFDC law requires that Permanent Fund dividends be treated as income for AFDC purposes. Dividend money retained beyond the month it is received must be treated as a resource. The dividend payments are unearned income, which reduces AFDC benefits by about 92 cents for each dollar of income. Families which retain dividend money lose AFDC eligibility if their total resources exceed $1000.

The AFDC budget component includes PFD-HH funds transferred as Interagency Receipts to make payments to replace federally-matched AFDC benefits which would otherwise not be paid because of dividend receipt. The benefits replaced include AFDC grants which would be denied because of the dividend payments themselves as well as grants that would be reduced because federal AFDC policy requires that cash PFD-HH payments made in lieu of food stamps be treated as income for AFDC purposes.

The FY96 Governor's budget plans $12,875,500.00 in PFD-HH expenditures to replace the AFDC benefits of 12,987 families including 39,639 individuals. The cost of PFD-HH benefits to replace AFDC in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the AFDC program. This fiscal note assumes the AFDC maximum payment levels will not change.

Under current law, a typical AFDC family is expected to receive $780 in PFD-HH during FY 96 to replace one month's AFDC grant, and an additional $272 in PFD-HH to restore AFDC grant reductions that result from receiving cash in lieu of food coupons. PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most AFDC cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments. Recipients who save enough of their dividend money to place them over the $1000 resource limit will be ineligible until they have spent the money.

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 5
Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless

Sponsor: Rep. Kott
Requestor: House State Affairs

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Medicaid Facility

COMPONENT SERIAL NO. 230

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	488.4	527.5	569.7	615.2	664.5	717.6
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	488.4	527.5	569.7	615.2	664.5	717.6
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	244.2	263.8	284.9	307.6	332.3	358.8
1003 GF Match	244.2	263.7	284.8	307.6	332.2	358.8
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	488.4	527.5	569.7	615.2	664.5	717.6

Estimate of current year (FY95) impact: 0.0

POSITIONS:

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Date: 1/26/95
Agency: Department of Health and Social Services

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ANALYSIS (cont.):

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal note for Medicaid Non-facility to show related increase.

The Medicaid expenditures shown reflect what would be a 10% growth (inflation and client growth) in future years in the cost of benefits.

MEDICAID FACILITY CALCULATION

Current FY 95 PFD-HH funding:	$1,100,000
% of PFD-HH costs shifted to Medicaid	60%
Medicaid cost of those retaining Medicaid	$660,000
Less Medicaid Non-facility share of cost (26%)	$171,600
Medicaid Facility expenditures born by Medicaid	$488,400

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FISCAL NOTE

No. 4

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless
Sponsor: Rep. Kott
Requestor: House State Affairs

Dept. Affected Health and Social Services
BRU: Medical Assistance
Component: Medicaid Non-facility

COMPONENT SERIAL NO. 229

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	171.6	188.8	207.6	228.4	251.2	276.4
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	171.6	188.8	207.6	228.4	251.2	276.4

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	85.8	94.4	103.8	114.2	125.6	138.2
1003 GF Match	85.8	94.4	103.8	114.2	125.6	138.2
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	171.6	188.8	207.6	228.4	251.2	276.4

Estimate of current year (FY95) impact: 0.0

POSITIONS:

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Agency: Department of Health and Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal note for Medicaid Facility to show related increase.

The Medicaid expenditures shown reflect what would be a 10% growth (inflation and client growth) in future years in the cost of benefits.

MEDICAID NON-FACILITY CALCULATION

Current FY 95 PFD-HH funding:	$1,100,000
% of PFD-HH costs shifted to Medicaid	60%
Medicaid cost of those retaining Medicaid	$660,000
Less Medicaid Facility share of cost (74%)	$488,400
Medicaid Non-facility expenditures born by Medicaid	$171,600

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No. 3
FISCAL NOTE
Bill Version: HB 70
(H) Publish Date: 2/1/95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date
Title: An Act relating to treatment of permanent fund dividends
Sponsor: Kott
Requester: House STA
Dept Affected: Health and Social Services
BRU: Public Assistance Administration
Component: Eligibility Determination
COMPONENT SERIAL NO. 236

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	86.0	88.6	91.2	94.0	96.8	99.8
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	86.0	88.6	91.2	94.0	96.8	99.8
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY96	FY97	FY98	FY99	FY00	FY01
1002 Federal Receipts	43.0	44.3	45.6	47.0	48.4	49.9
1003 GF Match	43.0	44.3	45.6	47.0	48.4	49.9
1004 GF	472.7	486.9	501.5	516.5	532.0	548.0
1005 GF Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(472.7)	(486.9)	(501.5)	(516.5)	(532.0)	(548.0)
TOTAL	86.0	88.6	91.2	94.0	96.8	99.8

POSITIONS:	FY96	FY97	FY98	FY99	FY00	FY01
FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Repeal of the PFD Hold Harmless program will impact both the amount of assistance paid to individuals and families and the administrative effort required for the Division of Public Assistance to provide timely, accurate delivery of benefits. The Department of Health and Social Services has established interagency agreements with the federal agencies responsible for the AFDC and SSI programs. These agreements, which reduce the amount of case processing required when recipients receive dividends, would be nullified by HB 70. The administrative effort to process PFD Hold Harmless entitlements would be supplanted by the additional case processing effort required to suspend public assistance entitlements when dividend payments are distributed.

Administrative Impacts

The administrative cost of the PFD Hold Harmless program is based on estimates of the proportion of time used by Eligibility Determination staff to process case actions related to dividend payments and PFD-HH benefits. In FY 96 472.7 in PFD-HH Contractual funds is planned to be transferred as Interagency Receipts to the Eligibility Determination component of the Public Assistance Administration BRU.

This analysis presumes that the intent of HB 70 is to preclude the appropriation of money from the Dividend Fund to administer public assistance. The cost of processing case changes resulting from the receipt of dividends is, therefore, shifted to General Fund.

The administration of the PFD-HH program and the processing of case changes related to the receipt of dividend payments require the equivalent of 10 permanent, full-time positions. The repeal of the PFD-HH program proposed in HB 70 results in an increase in the amount of administrative effort to take the dividend payments into account and process changes in the affected public assistance cases. We estimate that 11.8 permanent full-time equivalent positions would be needed to process dividend-related work.

The time required to process Food Stamp cases would decrease because it would no longer be necessary to convert assistance to cash in lieu of food coupons and back again. The time to process AFDC, APA, and Medicaid cases in the absence of the PFD-HH program would increase substantially: under the Hold Harmless program, benefit authorization for these programs consists of the one-time entry of a few special computer codes. Without the PFD-HH program, action will have to be taken to suspend the benefits of each affected AFDC, APA, and Medicaid case, and to reinstate benefits after the month of suspension. The need for staff is also expected to increase because of a substantial increase in General Relief applications from recipients who are unable to pay for rent or food when they lose their cash and food benefits two months after they receive their dividend checks.

The offsetting effects of HB 70 result in a small increase in staffing needs in the Eligibility Determination Component.

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Position Title			No. of Positions	Range/Step	Bargaining Unit
Eligibility Technician II			2	R14B	GGU
Time Status: FT	Staff Months: 12		Location: Anchorage		Election District

TYPE of EXPENDITURE	AMOUNT
Salary	60.4
Benefits	25.6
Premium Pay	
Other	
Total Personal Services	86.0
Travel	
Contractual	
Commodities	
Equipment	
Other	
Total Cost	86.0

FUNDING SOURCE for TOTAL COST		
1002	Federal Receipts	43.0
1003	GF Match	43.0
1004	General Fund	
1005	GF/Program Receipts	
1006	GF/Mental Health Trust	
1007	I/A Receipts	
1061	CIP Receipts	
Other		

Justification

HB 70 repeals the PFD Hold Harmless program and requires that individual AFDC, Food Stamp, Adult Public Assistance, and Medicaid cases be suspended for at least one month when dividends are received. The reduction in administrative need that results from the repeal of the PFD Hold Harmless program is more than offset by the increased time needed to process dividend payments as individual case changes and to handle an increased number of General Relief Assistance cases.

Two additional Eligibility Technician case worker positions are needed to administer this additional workload.

REQUEST for NEW POSITION

AGENCY: Health and Social Services
BRU: Public Assistance Administration
COMPONENT: Eligibility Determination (0236)

FY96

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No. 2
FISCAL NOTE
Bill Version: HB 70
(H) Publish Date: 2/1/95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date:
Title: An Act relating to permanent fund dividends
Sponsor: Kott
Requestor: House STA

Dept. Affected: Health and Social Services
BRU: Assistance Payments
Component: General Relief Assistance
COMPONENT SERIAL NO. 221

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
MISCELLANEOUS						
TOTAL OPERATING	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY96	FY97	FY98	FY99	FY00	FY01
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7

POSITIONS:

POSITIONS	FY96	FY97	FY98	FY99	FY00	FY01
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. Without the protection of the PFD-HH program, most households receiving AFDC, Food Stamp, and Adult Public Assistance (APA) program benefits will become ineligible for assistance for one month each year. Because of the retrospective budgeting methodology in place for the AFDC, Food Stamp, and APA programs, the month of ineligibility will usually occur two months after the month the dividend is received. For example, if a family on public assistance gets its PFD checks in October, they will be ineligible for AFDC and food stamps in December.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The General Relief Assistance (GRA) program provides vendor payments of up to $120 per person per month for emergency needs such as food, clothing, and shelter when no other resource is available to pay for them. AFDC and APA recipients are not generally eligible for GRA services because their cash grant meets their basic needs. Food Stamp recipients are not eligible for GRA for food purchases because their needs have already been covered.

The repeal of PFD-Hold Harmless imposed by HB 70 will substantially increase the number of people who are entitled to GRA. Recipients who do not conserve enough of their dividend money to meet their needs two months later when they lose their public assistance can be expected to apply for General Relief when they are confronted with eviction, lack of food, lack of heating fuel, or lack of adequate winter clothing.

Under HB 70, the following unduplicated numbers of individuals and cases are expected to be denied at least one month's benefits in FY96 as a result of receiving dividend payments:

Program	Households	Persons Impacted
AFDC	12987	39639
FSP*	3867	9668
APA	7932	7932
Total	24786	57239

* 66 percent of the Food Stamp caseload also receives AFDC and APA benefits. This unduplicated count represents 34 percent of the Food Stamp PFD-HH caseload.

We estimate that 15 percent of the affected cases, with an average household size of 2.6 persons, will be entitled to GRA benefits for one month as a result of the repeal of PFD Hold Harmless coverage imposed by HB 70.

24786 cases x 15% = 3720 x $ 283 average payment = 1052.8

The result will be an increase of 1052.8 in need for FY 96 General Fund appropriations to pay General Relief benefits for food, shelter, and clothing costs.

We assume a 5 percent annual rate of caseload growth for FY 97 through FY 01.

COMMITTEE COPY

No. [illegible]
Bill Version: HB 70
(H) Publish Date: 2/1/95

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date: 1/25/95
Title: End Permanent Fund Dividend Hold Harmless
Sponsor: Representative KOTT
Requester: House State Affairs

Dept. Affected: Department of Revenue
BRU: Permanent Fund Dividend Division
Component: Permanent Fund Dividend Division
COMPONENT SERIAL NO. 981

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Page 2.

Prepared by: Thomas C. Williams, Director
Division: Permanent Fund Dividend Division
Phone: 465-2323
Date: 1/25/95

Approved by Commissioner:
Agency: Department of Revenue
Date: 1/25/95

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ALASKA DEPARTMENT OF REVENUE
PERMANENT FUND DIVIDEND DIVISION

HB 70 ANALYSIS

As of January 25, 1995

Section 3 of this bill repeals AS 43.23.075, the section of the Alaska Statutes that requires the state to hold public and medical assistance recipients harmless from the effects that receipt of a Permanent Fund Dividend (PFD) would have on their federal benefits and requires the Department of Health & Social Services to ***not*** consider a PFD as income or resources for benefit program purposes unless required to do so by federal law or regulation. However, AS 43.23.085 still requires other state and municipal agencies to ***not*** consider a PFD as income or resources for benefit program purposes unless required to do so by federal law or regulation. In addition, Sections 1 and 2 of this bill remove references to the hold harmless program cost reductions from the dividend calculation formula and the disclosure requirements.

The amended language does not preclude the legislature from appropriating dividend fund monies for state hold harmless costs. However, the legislation implies that any such future program costs will not be taken from the dividend fund. As a result, the deduction from each Alaskan's dividend would be eliminated. See the attached table entitled ***Hold Harmless Program Deductions From 1985-1994 Dividends***, as of September 29, 1994.

Attachment

COMMITTEE COPY

ALASKA DEPARTMENT OF REVENUE
PERMANENT FUND DIVIDEND DIVISION

HOLD HARMLESS PROGRAM DEDUCTIONS FROM 1985-1994 DIVIDENDS

As of September 29, 1994

The legislature first funded the Hold Harmless program from the Dividend Fund in FY86. Prior to that time, the program was funded by the General Fund. The following table reflects the amounts appropriated and the corresponding reduction to each eligible applicant's dividend that resulted from the use of Dividend Fund monies for this program.

Fiscal Year	Dividend Fund Hold Harmless Appropriations	Dividend Year	Reductions To Each Dividend		Reductions Reported
1986	$3,644,300	1985	$6.94	(a)	
1987	4,211,700	1986	7.75	(a)	
1988	8,581,200	1987	16.05		$16.05
1989	9,850,700	1988	18.61		18.61
1990	11,305,100	1989	22.72		22.72
1991	12,217,300	1990	24.12	(b)	24.12
1992	14,704,500	1991	28.63		28.63
1992	1,494,700	1992	2.89	(c)	
1993	18,540,900	1992	35.85		38.74
1994	19,252,100	1993	36.45		36.45
1994	244,400	1994	0.46	(d)	
1995	21,955,000	1994	40.99		41.45
Total	***$126,001,900***		***$241.46***		***$226.77***

Notes

(a) These amounts were not reported on the 1985 or 1986 dividend check stubs. The Department first reported the effect of this appropriation on the dividend amount on the 1987 dividend check stub. In 1990 the legislature passed AS 43.23.028 requiring the reporting of all deductions from dividends.

(b) In FY91, there was a General Fund supplemental of $1,092,200 to the Hold Harmless program bringing the total FY91 Hold Harmless program appropriations to $13,309,500. Since the supplemental appropriation was from the General Fund, it did not reduce the amount of the 1991 dividend.

(c) This FY92 supplemental appropriation brought the total FY92 Hold Harmless program appropriation to $16,199,200. Since the supplemental appropriation was made after the calculation of the 1991 dividend, its effect was to reduce the 1992 dividend. The total 1992 dividend reduction as reported on the check stub was $38.74.

(d) This FY94 supplemental appropriation brought the total FY94 Hold Harmless program appropriation to $19,496,500. Since the supplemental appropriation was made after the calculation of the 1993 dividend, its effect was to reduce the 1994 dividend. The total 1994 dividend reduction as reported on the check stub was $41.45.

HB
72

HFIN

FILE

HOUSE COMMITTEE REPORT

(1)
Date Referred: February 22, 1995

FURTHER REFERRALS:

Date of Committee Action: __________

The FINANCE Committee considered: HB 72

HOUSE BILL NO. 72 UNIFORM FRAUDULENT TRANSFER ACT

"An Act enacting the Uniform Fraudulent Transfer Act."

recommends it be replaced with the following committee substitute ______________________ [ ] the same title [ ] a new title

[ ] additional referral to ________________ Committee
[ ] attached amendment(s)

ADOPTS: ______________________ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) ______________

[ ] zero fiscal note(s) ______________

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) ______________

[ ] zero fiscal note(s) ______________

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Died in Committee				

CHAIR'S SIGNATURE ______________________ ______________________

03/10/95 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

13:39:28 PARTICIPANT LIST (ALL PARTICIPANTS) BY:ANC

TCN:50369 SCHEDULED FOR:03/10/95 13:30 TO 16:00 FOR:ANC

PUBLIC HEARING HOUSE FINANCE

LOCATION:ANCHORAGE

HB 20	TIM	TROLL	TESTIFY
HB 20	JIM	BARNETT	TESTIFY
HB 72	ROBERT	MANLEY	TESTIFY
HB 72	DAVID	SHAFTEL	TESTIFY
HB 72	JERRY	WEAVER	TESTIFY
HB 72	RICHARD	THWAITES	TESTIFY
HB 72	RUSSELL	NOGY	TESTIFY

03/10/95 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150

13:29:31 PARTICIPANT LIST (ALL PARTICIPANTS) BY:SIT

TCN:50369 SCHEDULED FOR:03/10/95 13:30 TO 16:00 FOR:SIT

PUBLIC HEARING HOUSE FINANCE

LOCATION:SITKA

HB 20	WELLS	WILLIAMS	CITY OF SITKA	TESTIFY

Rick Elliott HB 20 Anch

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF PUBLIC SAFETY
COURTS

DISTRICT 20

SESSION
STATE CAPITOL, ROOM 118
JUNEAU, ALASKA 99801-1182
PHONE: (907) 465-4930
FAX: (907) 465-3834

INTERIM
716 W. 4TH AVE., SUITE 640
ANCHORAGE, AK 99501-2133
PHONE: (907) 258-8197
FAX: (907) 258-5510

SPONSOR STATEMENT

HB 72 UNIFORM FRAUDULENT TRANSFER ACT

The Uniform Fraudulent Transfer Act (**UFTA**) provides **creditors** with a **remedy** when **debtors transfer or hide assets** that would otherwise be available to satisfy legitimate debts. HB 72 is modeled after the uniform law adopted by the National Conference of Commissioners on Uniform State Laws. The Attorney General of the State of Alaska is in support of this needed legislation.

Alaska law in this area was adopted in 1949 from the state of Oregon and has received little legislative attention. Yet, many changes in both state and federal law, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex.

At this time, Alaska law provides that a conveyance of real or personal property will be void if it was made "with the **intent** to hinder, delay or defraud creditors." AS34.40.010. The existence of this fraudulent intent is a question of fact and the burden of proof is upon the creditor (Summers v. Hagen _ P.2d_, No.3961, May 28, 1993). This burden of proof can be extremely hard to prove. **UFTA would eliminate the present Alaskan necessity of finding actual intent** by a property transferor to hinder, delay or defraud a creditor in many situations where the transferor is obviously transferring assets solely to keep them out of the reach of transferor's creditors. UFTA sets out numerous **non-exclusive factors** to be considered by the court when determining if the debtor had "**actual intent**."

Thirty-two (32) states have adopted UFTA into their laws. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. The Uniform Fraudulent Transfer Act takes into account the current development in both law and practice in creditor-debtor relationships.

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
SELECT COMMITTEE ON LEGISLATIVE ETHICS

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PHONE: (907) 258-8197
FAX: (907) 258-5510

Representative Pete Kott, Chair
House Labor and Commerce Committee
State Capitol, Room 432
Juneau, Alaska 99801-1182

January 25, 1995

Dear Representative ~~Kott~~ Pete:

I respectfully submit this request for hearing on HB72, an act enacting the Uniform Fraudulent Transfer Act. The purpose of this act provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

Your consideration of this request is appreciated.

Sincerely,

Brian

Representative Brian S. Porter, Chair
House Judiciary Committee

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 72

Revision Date:
Title: Uniform Fraudulent Transfer Act
Sponsor: Representative Porter
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities & Corporations
Component:
COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 95) cost: $ 0

POSITIONS

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities & Corporations
Phone: 465-2521
Date:

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 1/23/95

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FISCAL NOTE

No. 1
Bill Version: HB 72
(H) Publish Date: 2/3/95

STA[illegible] ALASKA [illegible] SESSION
199[illegible] LEGISLATI[illegible]

Revision Date: [illegible]
Title: U[illegible] Fraudulent Transfer Act
Sponsor: Representative Porter
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities & Corporations
Component:

COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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 EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	[illegible]	[illegible]

Estimate of current year (FY 95) cost: $ 0

POSITIONS

POSITIONS	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities & Corporations
Phone: 465-2521
Date:

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 1/23/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

No. 2
Bill Version: HB 72
(H) Publish Date: 2/3/95

Revision Date:
Title: "An Act enacting the Uniform Fraudulent Transfer Act."
Sponsor: Representative Porter
Requester: Representative Porter

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1008 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 34 to adopt the Uniform Fraudulent Transfer Act for Alaska. The uniform act is recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Its purpose is to protect creditors against the fraudulent transfer of assets and fraudulent obligations that would otherwise work to defeat a creditor's interests. The proposed act includes personal as well as real property. Current law, which was adopted in the 1940's and is based on even older law, only addresses real property. Because the bill is a Uniform Act based on the NCCUSL model, it will conform to the requirements of most of the other states thus making its provisions (and protections) available for many interstate transactions. The bill deals primarily with private transactions. It will not have a fiscal impact for the Department of Law.

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 1/19/95

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/19/95
Agency: Department of Law

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405 West 36th Street, Suite 200
Anchorage, Alaska 99503
(907)561-4420

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DATE: March 13, 1995

TIME: 3:52 pm

DELIVER TO: Honorable Mark Hanley

YOUR FAX NO: 465-2418

SENT BY: Trigg T. Davis

NO. OF PAGES: 3 (including cover sheet)

MESSAGE: Re: House Bill 72

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Melinda Swihart
TELECOPY OPERATOR
OUR TELECOPY NO: (907) 562-7888

TO: WHOM IT MAY CONCERN

FROM: MEMBERS OF AMDA

RE: HOUSE BILL 72

Saturday evening was the 11th Annual Award Banquet and Meeting of the Alaskan Marine Dealers Association. Over 60 persons were in attendance representing at least two dozen Alaskan companies. We (see attachment) are hard working Alaskan business owners that work every day to provide a payroll and make an honest profit.

During the program House Bill 72 was brought to our attention. A robust discussion followed, and we want to inform you that the provisions in the Bill were opposed by every person at the meeting. It appears to us that this measure is being passed through the Legislative process without adequate input from Alaskans. It also appears to us that this measure is being championed by individuals from outside of the State whose only interest is to overturn a sensible statute that has already been upheld by the Alaska Supreme Court.

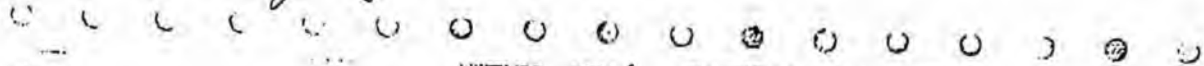
We understand that important action could be taken on House Bill 72 by Tuesday, March 14, 1995. We urge postponement of any action if at all possible.

In the meantime, specific list of amendments that we believe will improve House Bill 72 will be prepared and submitted by our Executive Director, Steve Morgheim.

Thank you in advance for diligently looking out for the well being of us and our families rather than the narrow interests of individuals and groups seem to have little concern for the damage that House Bill 72 could cause.

Suite 792, 2440 E. Tudor Road • Anchorage, Alaska 99507 • (907) 561-4554

I OPPOSE HOUSE BILL # 72



EGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

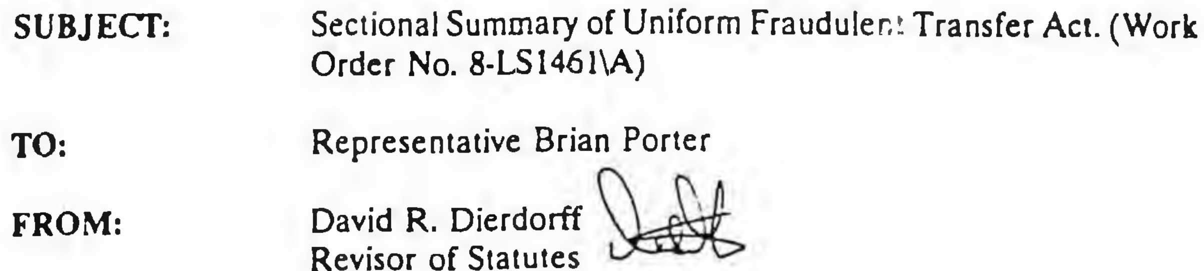
130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 21, 1994

SUBJECT: Sectional Summary of Uniform Fraudulent Transfer Act. (Work Order No. 8-LS1461\A)

TO: Representative Brian Porter

FROM: David R. Dierdorff
Revisor of Statutes



You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional 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. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

This summary relies heavily on the prefatory notes and comments to the Uniform Act that were prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In most instances, the text will be that of the NCCUSL, with modifications only as necessary to correct section references and the like.

INTRODUCTION AND OVERVIEW

The Uniform Fraudulent Transfer Act was approved by the National Conference of Commissioners on Uniform State Laws in 1984 and by the American Bar Association on February 18, 1985. This Act was preceded by the Uniform Fraudulent Conveyance Act, promulgated by the Conference of Commissioners on Uniform State Laws in 1918 and adopted in 25 jurisdictions, including the Virgin Islands. The 1918 Act has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

Alaska did not adopt the earlier Act. Current Alaska law, found at AS 34.40, derives from late 19th century Oregon law, and has received little legislative attention. Even though Alaska did not enact the 1918 Act, the official commentary's references to it and to differences between the new Uniform Act and it, are helpful in understanding

the substantive effect of the bill. Consequently, this memorandum retains those references.

The 1918 Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of a fraudulent transfer was part of the law of every American jurisdiction (*c.f.* AS 34.40.010). Because the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on "badges of fraud." The weight given these badges varied greatly between jurisdictions, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the 1918 Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The NCCUSL was persuaded in 1979 to appoint a committee to undertake a study of the 1918 Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

(1) The Bankruptcy Reform Act of 1978 made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The drafting committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. This Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the 1918 Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) (Sec. 34.41.030(a)) is an adaptation of three sections of the 1918 Act; § 5(a) (Sec. 34.41.040(a)) is an adaptation of another section of that Act and § 5(b) (Sec. 34.41.040(b)) is new. One section of the 1918 Act (§ 8) is not carried forward into the new Act because it was believed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent -- *ie.*, without regard to the actual intent of the parties -- under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which the debtor was engaged;

(2) the debtor intended to incur, or believed that the debtor would incur, more debts than the debtor would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the 1918 Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in Sec. 34.41.030(a)(2)(A) or the mental state specified in Sec. 34.41.030(a)(2)(B).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus, a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in a liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the 1918 Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to the debtor before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the 1918 Act, any transfer made or obligation incurred by an insolvent partnership to a partner was deemed fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the 1918 Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 34.41.060 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the 1918 Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the 1918 Act, the United States Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. Paragraph (a)(2) is included in Sec. 34.41.060 to make such a remedy available.

Section 34.41.070 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under Sec. 34.41.040(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 34.41.070 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (AS 45.09).

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from § 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

SECTIONAL ANALYSIS AND COMMENTARY

Section 1. Enacts the Uniform Fraudulent Transfer Act as a new chapter, AS 34.41. The chapter consists of the following provisions:

Sec. 34.41.010. This section sets out the circumstances under which a debtor is deemed to be insolvent.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from the definition of "insolvent" in § 101 (29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the 1918 Act, exempt property is excluded from the computation of the value of the assets. See Sec. 34.41.110(2). For similar reasons, interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the comment to Sec. 34.41.110(2), *infra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See Sec. 34.41.110(2) and subsection (e) of this section.

(2) Subsection (b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also AS 45.01.201(24) (Uniform Commercial Code), which, in part, declares a person to be "insolvent" who "has ceased to pay the person's debts in the ordinary course of business or cannot pay the person's debts as they become due." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subsection (a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 310(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J. Weinstein & M. Berger, Evidence (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan,

Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of the person's debts in order to prove general nonpayment of debts as they become due. See, *e.g.*, Hill v. Cargill, Inc. (*In re* Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn.1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); *In re* All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex.1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); *In re* Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. *Cf.* 11 U.S.C. 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the 1918 Act.

(4) Subsection (d) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also comments to subsection (a), *supra*, and Sec. 34.41.110(2), *infra*.

Sec. 34.41.020. This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following provisions:

Sec. 34.41.030(a)(2) ("reasonably equivalent value");
Sec. 34.41.030(b)(8) ("value ... reasonably equivalent");
Sec. 34.41.040(a) ("reasonably equivalent value");
Sec. 34.41.040(b) ("present, reasonably equivalent value");
Sec. 34.41.070(a) ("reasonably equivalent value");
Sec. 34.41.070(b), (c), (d), and (e) ("value");
Sec. 34.41.070(f)(1) ("new value"); and
Sec. 34.41.070(f)(3) ("present value").

OFFICIAL COMMENTARY

(1) Subsection (a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the 1918 Act. The definition in the section is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act -- *e.g.*, love and affection. See, *e.g.*, United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(2) Subsection (a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, *e.g.*, Peoples-Pittsburgh Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See *e.g.*, *In re* Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be fraudulent when the debt secured was only $2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Sec. 34.41.040(b).

(3) Section 3(a) of the 1918 Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, *e.g.*, Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, *e.g.*, Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.I. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(4) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir.1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value), and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (*In re* Madrid), 21 B.R. 424 (B.A.P. 9th Cir.1982), aff'd on another ground, 725 F.2d 1197 (9th Cir.1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal

consequence of default ... [is] the safest way of establishing the fair value of the collateral ...." 2 G. Gilmore, Security Interests in Personal Property 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Sec. 34.41.040(b), *infra*. Subsection (b) does not apply to an action under Sec. 34.41.030(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(5) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under Sec. 34.41.-040(b), *infra*.

Sec. 34.41.030. This section describes the transfers that are fraudulent as to present and future creditors and sets out factors that may be given consideration in determining whether the requisite intent to defraud was present.

OFFICIAL COMMENTARY

(1) Paragraph (a)(1) is derived from § 7 of the 1918 Act. Factors appropriate for consideration in determining actual intent under paragraph (a)(1) are specified in subsection (b).

(2) Paragraph (a)(2) is derived from §§ 5 and 6 of the 1918 Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the 1918 Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of that Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under the new Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under Sec. 34.41.070, *infra*.

(3) Unlike the 1918 Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute

an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* AS 45.09.311 (Uniform Commercial Code).

(4) Subparagraph (a)(2)(A) of this section is an adaptation of § 5 of the 1918 Act, but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the 1918 Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent, but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the 1918 Act. Proof of the presence of certain badges in combination establishes fraud conclusively -- *i.e.*, without regard to the actual intent of the parties -- when they concur as provided in (a)(2) of this section or in Sec. 34.41.040. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in subsection (b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (*In re* Kaiser), 722 F.2d 1574, 1582-83 (2d Cir.1983) (insolvent debtor's

purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); Pergrem v. Smith, 255 S.W.2d 42 (Ky.App.1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by

insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: *In re* Thomas, 199 F. 214 (N.D.N.Y.1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y.1914), aff'd, 223 F. 536 (2d Cir.1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App.1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex.1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963)

(although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W.2d 288, 292 (Mo.App.1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(7) The effect of the two transfers described in paragraph (b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va.L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir.1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa.1964); and see *In re* Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md.1933).

(8) Nothing in subsection (b) is intended to affect the application of AS 45.02.402(b), AS 45.09.205, or 45.09.301, or former AS 45.06.105 (Uniform Commercial Code). AS 45.02.402(b) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent, but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification." AS 45.09.205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements

for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of AS 45.09.301(a)(2) that a nonpossessory security interest in personal property must be perfected to be effective against a levying creditor. Finally, like the 1918 Act, this Act does not pre-empt the statutes governing bulk transfers, such as former AS 45.06 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

Sec. 34.41.040. This section describes the transfers that are fraudulent as to creditors whose claims arose before the transfer was made or obligation was incurred by the debtor.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from § 4 of the 1918 Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying Sec. 34.41.030, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer -- *i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt -- to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); *In re* Lamie Chemical Co., 296 F. 24 (4th Cir 1924)(corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (Rev. ed 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the 1918 Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under subsection (b) unless the

transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the 1918 Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

Sec. 34.41.050. This section defines the moments in time at which when a claim for relief or cause of action to avoid a transfer or obligation arises.

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the claim for relief or cause of action arises. This section clarifies this point in time. For transfers of real estate, paragraph (1) fixes the time as the date of perfection against a good faith purchaser from the transferor. For transfers of fixtures and assets constituting personalty, the time is fixed under paragraph (1) as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See AS 45.09.302, 45.09.304, and 45.09.305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers -- *e.g.*, an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement -- may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in AS 45.41.110(12), *infra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); AS 45.09.203(a)(3).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir.1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in AS 34.41.030(a) or 34.41.040(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

Sec. 34.41.060. This section sets out the remedies available to creditors. The listing is not exclusive.

OFFICIAL COMMENTARY

(1) This section is derived from §§ 9 and 10 of the 1918 Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until the claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the United States Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, *e.g.*, Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir.1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Paragraph (a)(2) continues the authorization for the use of attachment contained in § 9(b) of the 1918 Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the 1918 Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from

disposing of the defendant's property, to appoint a receiver to take charge of the property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, *e.g.*, Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05(1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages, whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tort feasor's disposition of property).

(4) As under the 1918 Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See Sec. 34.41.110(3) & (4), *infra*; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the 1918 Act. See *e.g.*, Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 441-42 (1933).

(6) The remedies specified in this section, like those enumerated in §§ 9 and 10 of the 1918 Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev.ed. 1940).

Sec. 34.41.070. This section sets out the defenses available to, the potential liability of, and protections available for, a transferee.

OFFICIAL COMMENTARY

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Sec. 34.41.030(a)(1). The subsection is an adaptation of the exception stated in § 9 of the 1918 Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F.Supp. 276, 280 (D.N.J. 1948), affd 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the leviable interest of the transferor, exclusive of any interest encumbered by a valid lien. See Sec. 34.41.-110(2), *infra*.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, *e.g.*, United States v. Fetnon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); *cf.* Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of subsection (c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the 1918 Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159,1160 (N.H. 1977), Anno. 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee

has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaption of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Paragraph (e)(1) rejects the rule adopted in Darby v. Atkinson *(In re* Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976) that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Paragraph (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code (AS 45.09.501 - 45.09.507). *Cf.* Calaiaro v. Pittsburgh Nat'l Bank *(In re* Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under AS 45.09.502 or 45.09.505, the creditor must proceed in good faith (AS 45.09.103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in AS 45.09.502(b) and is implicit in AS 45.09.505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under Sec. 34.41.040(b).

Paragraph (f)(1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See *e.g.*, *In re* Ira Haupt & Co., 424 F.2d 722, 124 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. *(In re* Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); *In re* John Morrow & Co., 134 F. 686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also

takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (f)(2) is derived from § 547(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under Sec. 34.41.040(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (f)(2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (f)(3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508-09 (8th Cir. 1935); Olive v. Tyler (*In re* Chelan Land Co.), 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re* Robin Bros. Bakeries, Inc., 22 F.S. 662, 663-64 (N.D.Ill. 1937); see Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

Sec. 34.41.080. This section makes it clear that failure to take action within the statutory time limits bars the right of action.

OFFICIAL COMMENTARY

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) & (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to

uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with Sec. 34.41.050, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations of actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to Sec. 34.41.060(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See Sec. 34.41.090 and the accompanying comment, *infra*.

Sec. 34.41.090. This section provides that other applicable principles of law supplement the provisions of this chapter.

OFFICIAL COMMENTARY

This section is derived from § 11 of the 1918 Act and § 1-103 of the Uniform Commercial Code (AS 45.01.103). The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

Sec. 34.41.100. This section is the standard statement of the purpose of a uniform law and serves as a guide to courts that may be interpreting the law.

Sec. 34.41.110. This section sets out the definitions for the chapter.

OFFICIAL COMMENTARY

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the 1918 Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal

injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under Sec. 34.41.010, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf.* Manufacturers & Traders Trust Co. v. Goldman (*In re* Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir.1978).

Subparagraphs (2)(A) - (C) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting leviability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 98 Am.Bankr. L.J. 255, 258-59 (1974). The leviable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the 1918 Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with the debtor's cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in subparagraph (2)(B) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to

PAGE 24 OF LAA SECTIONAL ANALYSIS

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differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. 102 (3)), the word "includes" is not limiting, however. See also AS 01.10.040(b). Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code (AS 45.01.201(29) and (31) in the Alaska Statutes), defining "organization" and "person" respectively, and has been modified to incorporate by reference those items already provided for in AS 01.10.060.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code (AS 13.06.050(33) in the Alaska Statutes). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of the 1918 Act was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the 1918 Act. While the definition in the 1918 Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, *e.g.* Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, *e.g.*, Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

Sec. 34.41.120. The short title by which the chapter may be cited.

Sec. 2. Repeals the existing Alaska law on fraudulent conveyances generally (AS 34.40).

If I may be of further assistance, please advise.

DRD:pl
94-052.plm

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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AUG 30 1993

BURR, PEASE & KURTZ

August 26, 1993

Lloyd S. Kurtz, Jr., Esq.
Burr, Pease & Kurtz
810 N Street
Anchorage, Alaska 99501

NO DOCKET DATE
DOCKETED

Dear Jerry:

At my request, Assistant Attorney General Mary Ellen Beardsley reviewed the Uniform Fraudulent Transfer Act (UFTA). Ms. Beardsley has a background in tax and bankruptcy law. She concludes that UFTA would be an improvement over existing Alaska law.

I thought that all of the Alaska Uniform Law Commissioners might want to review her memorandum in advance of our September teleconference.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

DEB:cl

03-C5LH

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AUG 30 1993
BURR, PEASE & KURTZ

MEMORANDUM

State of Alaska
Department of Law

TO Deborah Behr
Assistant Attorney General
Legislation/Regulation Section

DATE August 24, 1993

FILE NO

TEL NO 269-5201

SUBJECT UFTA

RECEIVED
Department of Law
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FROM Mary Ellen Beardsley MEB
Assistant Attorney General
Commercial Section-Anchorage

You have asked me to comment on the Uniform Fraudulent Transfer Act ("UFTA"), and whether it might be beneficial for Alaska to adopt the UFTA. After reviewing the material you provided as well as AS 34.40.010 - .130, Alaska's fraudulent conveyances statute, and the headnotes of cases dealing with fraudulent conveyances in Alaska, I conclude that the UFTA would be an improvement over Alaska's existing law.

As noted in Summers v. Hagen, ____ P.2d ____, No. 3961, May 28, 1993, at fn. 5 pg. 8, Alaska has not adopted the predecessor to the UFTA, the Uniform Fraudulent Conveyance Act ("UFCA"). Alaska's law was adopted in 1949, and has seen very little change since its adoption. However, since 1949, many changes in both state and federal law have occurred, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex. Debtors, in particular, have found new and more imaginative ways of hiding assets from their creditors.

The Alaska law provides in general that a conveyance, whether in writing or otherwise, of real or personal property will be void if it was made "with the intent to hinder, delay or defraud creditors." (Emphasis added) AS 34.40.010. The cases cited under this statute (as well as AS 34.40.090) indicate that the existence of this fraudulent intent is a question of fact, that the court will never presume fraud and that the burden of proof is upon the plaintiff. This burden of proof can be extremely hard to prove. The only exception to this is found in AS 09.25.060 which creates a prima facia presumption of fraud when personal property is sold and the vendee does not take immediate delivery and does not have continued possession.

The UFTA, on the other hand, not only considers a transfer fraudulent if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor (whether present or future), but, in certain cases, it mandates that the intent exists if the facts are as stated in the UFTA. The UFTA also sets out numerous non-exclusive factors to be considered by the court when

determining if the debtor had "actual intent." Proof of several of these factors will be strong evidence of the debtor's intent. The Court in Summers requires the plaintiff to establish "the specific intent of each participant in the scheme to hinder, delay or defraud." (Emphasis added) Id., at 8. Under the UFTA, the transferee's intent does not appear to be a factor in determining whether the transfer was fraudulent. In addition, when determining if adequate consideration was exchanged, the transferee's good faith is irrelevant. Finally, another important distinction is that under the UFTA a transfer to an "insider" will be considered per se fraudulent if the debtor was insolvent at the time and the "insider" had reason to believe that the debtor was insolvent.

Cases under the Alaska law also hold that an insolvent debtor may convey all or some of his property to one creditor and the conveyance will not be considered fraudulent. It is not improper nor unlawful to give preference to one creditor.

The UFTA differs substantially from the Alaska law for it considers as one of the badges of fraud the fact that the debtor was insolvent at the time of the transfer or that he became insolvent as a result of the transfer. The UFTA defines insolvency and even establishes a rebuttable presumption of insolvency if the debtor is not paying his debts as they become due.

The UFTA clearly outlines the remedies available to creditors, including attachment, injunctive relief, appointment of a receiver, or even execution against the property if the creditor's claim has been reduced to a judgment. The UFTA makes no distinction between whether the creditors' claims have matured or not. On the hand, the Court in Summers, Id., at fn. 6, pg. 9, indicated that general creditors will have a cause of action but they "must reduce their claims to judgments before asserting this cause of action. Prior to judgment, general creditors have no legal right to the property fraudulently conveyed."

Finally, Alaska law does not address the statute of limitations as to when a fraudulent conveyance action will be precluded. AS 09.10.070 establishes a two year statute of limitations for all tort actions, which is what a fraudulent conveyance would fall under. The UFTA specifically establishes statutes of limitations and sets out when the time period begins to run depending on which section of the UFTA the action is being brought under.

I have attempted to outline some of the differences between the UFTA and Alaska law. In conclusion, the UFTA is a modernization of the UFCA and incorporates the many changes which

have occurred over time in the area of fraudulent transfers. It conforms state law with applicable federal law (in particular, bankruptcy law) and overcomes potential problems that could arise because of the 5th Circuit case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). It also eases the burden of proof upon the plaintiff slightly and places some responsibility upon the debtor to show why the transfer should not be voided. It may also make it more difficult for debtors to successfully hide or transfer their assets as a means of becoming judgment proof.

I hope this memo regarding the UFTA is of some assistance to you. If I can be of further assistance, please do not hesitate to contact me.

MEB:amh

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TAX ID NO. 92-0037399

September 17, 1993

Representative Brian Porter
716 West Fourth Avenue, #640
Anchorage, AK 99501

HAND DELIVERED

Re: Uniform Fraudulent Transfer Act

Dear Representative Porter:

As promised in our telephone conversation today, I am forwarding two copies of the 1984 Uniform Fraudulent Transfer Act (UFTA) drafted by the National Conference of Commissioners on Uniform State Laws, two copies of Alaska's present law concerning fraudulent transfers, and a copy of a Department of Law Memorandum concerning the UFTA. Also enclosed are copies of a map and a chart from the Uniform Law Commission showing the 30 states which already have adopted the UFTA.

The heart of the UFTA is in section 4, which covers and augments the ground covered by existing Alaska Statutes 34.40.010. Section 4(a)(2) of the UFTA would eliminate the present Alaskan necessity of finding actual intent by a property transferor to hinder, delay or defraud a creditor in many situations where the transferor is obviously transferring assets solely to keep them out of the reach of the transferor's creditors.

Several Uniform Law Commissioners from Alaska agree with me that you are an ideal person to sponsor enactment of the UFTA in Alaska because of your related law enforcement and business background and because the legislation is desirable from the standpoint of legitimate business people and will cost the State of Alaska nothing. In fact, it is certain to help the State of Alaska loan programs in dealing with unscrupulous borrowers. When you return to Anchorage, I would appreciate having the opportunity to review the UFTA further with you.

In closing, the only parties I am representing in connection with this matter are the commissioners appointed by the State of Alaska to the Uniform Law Commission and myself. I have represented numerous parties (both debtors and creditors) in situations involving fraudulent or allegedly fraudulent transfers, and I am convinced the UFTA should be enacted in Alaska. Our present law technically was adopted in 1949 as noted in the Department of Law Memorandum, but the substance of it goes back to May 17, 1884, when the civil laws of Oregon were put in place in the State of Alaska. Looking back at Alaska Compiled Laws of 1949, 1933, and 1913, and Carter's Annotated Alaska Codes of 1900, I find no substantive changes in this area of law since the Oregon laws were installed here.

Please call me when you have had a chance to review these materials. Thank you for your time on the telephone today.

Sincerely,

BURR, PEASE & KURTZ

L. S. Kurtz, Jr.

dms
Enclosures as noted.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO

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☒ P.O. BOX 110300-DIMOND COURTHOUSE
JUNEAU, ALASKA 99811-0300
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January 23, 1995

Hon. Brian Porter, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: Material on Uniform Fraudulent Transfer Bill (HB 72)

Dear Representative Porter:

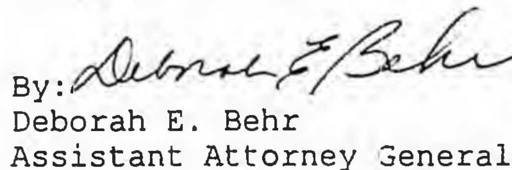
Per your staff's request, enclosed are informational materials on HB 72 concerning the Uniform Fraudulent Transfer Act. The bill is modeled after the uniform law adopted by the National Conference of Commissioners on Uniform State Laws.

As you know, this bill would bring Alaska's law into conformity with 33 other states that have enacted these provisions of the uniform Act. Also, since Alaska law has not been updated for many years, this bill would update our state law to handle significant problems with our existing statutes concerning the sale or exchange of personal property done fraudulently to avoid payment to creditors.

If you need additional information, please let me know.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL



By: Deborah E. Behr
Assistant Attorney General

RECEIVED
JAN 23 1994
Rep. Brian Porter

DEB:cl

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

MAR 2 1995

February 21, 1995

The Honorable Mark Hanley
Co-Chairman, Finance Committee
Alaska State Legislature
State Capital
Juneau, Alaska 99801

Re: **House Bill 72 - Opposition to the Proposed Uniform Fraudulent Transfer Act**

Dear Chairman Hanley:

The undersigned members of the Alaska Bar Association, Estate Planning Section and Business Section, individually recommend that House Bill 72, as presently drafted, **not** be enacted into law. This bill, as presently drafted, would substantially change the fraudulent transfer law in Alaska. The primary defect of the proposed Act is that it applies to claims of future creditors, as well as to those of present creditors.

For example, a typical family planning approach would be for parents to annually gift $10,000 to an irrevocable trust for their children. Over a number of years enough funds would accumulate to pay for the children's college educations. The trust would be irrevocable, that is, after the parents contributed the funds to the trust the parents could not get the funds back. Assume that years after these contributions had been made to the trust, the parents suffered a business failure and a large judgment was obtained against them. Under the proposed Act, this future creditor, whose claim did not exist at the time the gifts were made to the trust, could void the transfers and obtain the trust funds in order to satisfy his judgment. This proposed power of a future creditor to set aside irrevocable past gifts is not the present law in Alaska nor in many other states.

If this proposed legislation is enacted, then Alaska families will be denied the family planning certainty and protection which is enjoyed by families in many other states. Families will not be able to set aside funds for children, grandchildren, or elderly parents, with the certainty that the funds will be there when needed. In addition, this proposed "future creditor" provision will substantially increase litigation in this area.

This "future creditor" provision should be clearly differentiated from a present creditor who has a claim at the time the transfer was made. The undersigned have no objection to a present creditor being able to set aside transfers, whether to family trusts or otherwise, which are made with an intention of evading satisfaction of the present creditor's claim. For example, if the business failure had already occurred in the example discussed above, and then the parents transferred the funds to the trust for their children with an intent to evade collection of the claim from the business failure, the present creditor should be able to set aside such transfers. This is our understanding of present Alaska law (A.S. 34.40), and the law in most other states.

Several alternatives are available with respect to this proposed legislation:

1. The legislature may choose not to pass this legislation at all. Alaska already has a detailed statute (which contains 13 sections) which invalidates transfers with an intent to defraud present creditors. (A.S. 34.40.)

2. Alternatively, this proposed legislation should be amended to eliminate its application to future creditors. We have attached to this letter changes which would limit and clarify that this Act only applies to present creditors.

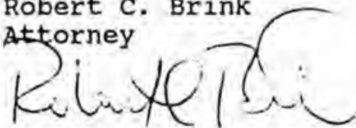
Either of the above alternatives would assure that Alaskans are allowed the family planning certainty that is enjoyed by families in many other states. At the same time, present creditors' claims would be protected.

Thank you very much for your consideration of this request.

Sincerely,

Peter B. Brautigam
Hartig, Rhodes, Norman,
Mahoney & Edwards

Robert C. Brink
Attorney



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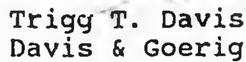

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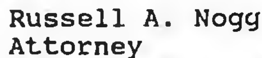

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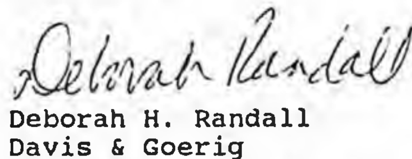

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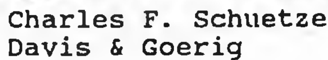

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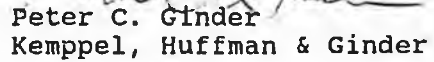

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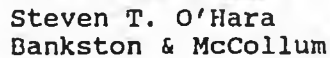

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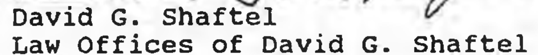

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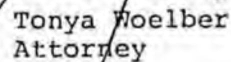
Law Offices of David G. Shaftel



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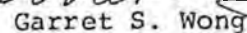

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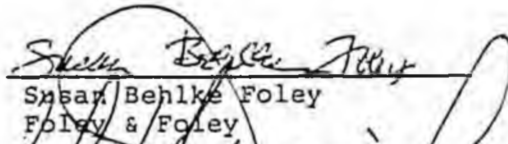

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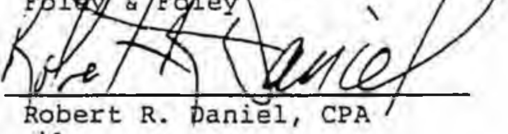

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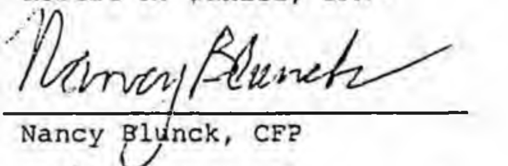

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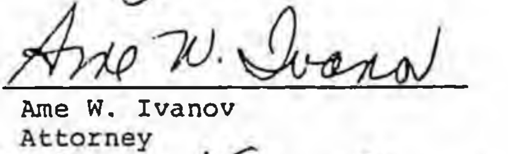

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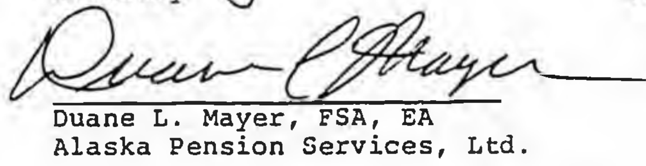

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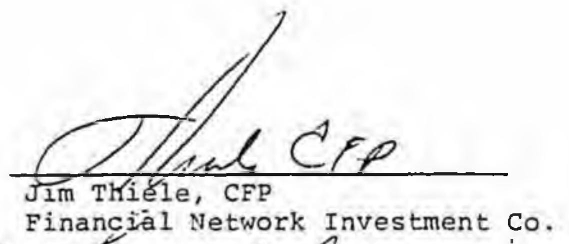

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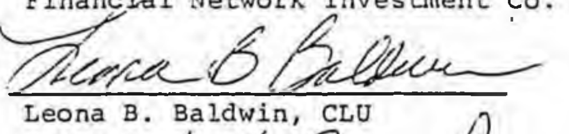
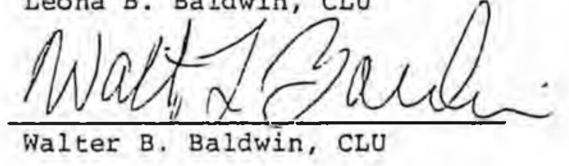
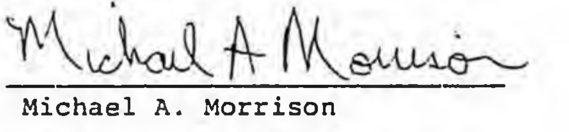
Financial Network Investment Co.



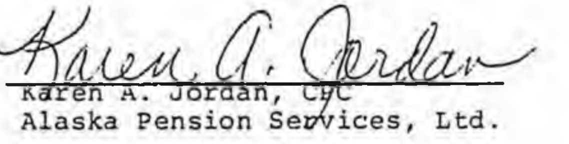
Leona B. Baldwin, CLU



Walter B. Baldwin, CLU



Michael A. Morrison



Karen A. Jordan, CPC
Alaska Pension Services, Ltd.

1 or that has been transferred in a manner making the transfer voidable under this
2 chapter.
3 (e) Debts under this section do not include an obligation to the extent it is
4 secured by a valid lien on property of the debtor not included as an asset.
5 Sec. 34.41.020. VALUE. (a) Value is given for a transfer or an obligation
6 if, in exchange for the transfer or obligation, property is transferred or an
7 antecedent debt is secured or satisfied, but value does not include an unperformed
8 promise made otherwise than in the ordinary course of the promisor's business to
9 furnish support to the debtor or another person.
10 (b) For the purposes of AS 34.41.030(a)(2) and 34.41.040, a person gives a
11 reasonably equivalent value if the person acquires an interest of the debtor in an
12 asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution
13 of a power of sale for the acquisition or disposition of the interest of the debtor
14 upon default under a mortgage, deed of trust, or security agreement.
15 (c) A transfer is made for present value if the exchange between the debtor
16 and the transferee is intended by them to be contemporaneous and is in fact
17 substantially contemporaneous.
18 Sec. 34.41.030. TRANSFERS FRAUDULENT AS TO PRESENT ~~AND~~
19 Amend ~~FUTURE~~ CREDITORS. (a) A transfer made or obligation incurred by a debtor is
20 fraudulent as to a present creditor~~, whether the creditor's claim arose before or after the~~
21 ~~transfer was made or the obligation was incurred,~~ if the debtor made the transfer or
22 incurred the obligation
23 (1) with actual intent to hinder, delay, or defraud a creditor of the
24 debtor~~; or~~
25 Amend ~~(2) without receiving a reasonably equivalent value in exchange for~~
26 ~~the transfer or obligation, and the debtor~~
27 ~~(A) was engaged or was about to engage in a business or a~~
28 ~~transaction for which the remaining assets of the debtor were unreasonably~~
29 ~~small in relation to the business or transaction; or~~
30 ~~(B) intended to incur, or believed or reasonably should have~~
31 ~~believed that the debtor would incur, debts beyond the debtor's ability to~~

1 ~~pay as they became due.~~

2 (b) In determining actual intent under (a)(1) of this section, consideration

3 may be given, among other factors, to whether

4 (1) the transfer or obligation was to an insider;

5 (2) the debtor retained possession or control of the property

6 transferred after the transfer;

7 (3) the transfer or obligation was disclosed or concealed;

8 (4) before the transfer was made or obligation was incurred, the

9 debtor had been sued or threatened with suit;

10 (5) the transfer was of substantially all the debtor's assets;

11 (6) the debtor absconded;

12 (7) the debtor removed or concealed assets;

13 (8) the value of the consideration received by the debtor was

14 reasonably equivalent to the value of the asset transferred or the amount of the

15 obligation incurred;

16 (9) the debtor was insolvent or became insolvent shortly after the

17 transfer was made or the obligation was incurred;

18 (10) the transfer occurred shortly before or shortly after a substantial

19 debt was incurred; and

20 (11) the debtor transferred the essential assets of the business to a

21 lienor who transferred the assets to an insider of the debtor.

All sections should be renumbered.

22 Amend [Sec. ~~34.41.040. TRANSFERS FRAUDULENT AS TO PRESENT~~

23 ~~CREDITORS. (a)~~ (c)] A transfer made or obligation incurred by a debtor is fraudulent

24 as to a creditor whose claim arose before the transfer was made or the obligation

25 was incurred if the debtor made the transfer or incurred the obligation without

26 receiving a reasonably equivalent value in exchange for the transfer or obligation

27 and the debtor was insolvent at that time or the debtor became insolvent as a result

28 of the transfer or obligation.

29 Amend [~~(b)~~ (d)] A transfer made by a debtor is fraudulent as to a creditor whose claim

30 arose before the transfer was made if the transfer was made to an insider for an

31 antecedent debt, the debtor was insolvent at that time, and the insider had

ALASKA CREDIT UNION LEAGUE

SUITE 650, 4000 CREDIT UNION DRIVE
ANCHORAGE, ALASKA 99503-6647
(907) 562-1255

February 17, 1995

Representative Brian Porter
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Porter:

Alaska's credit unions would like to go on record supporting House Bill 72, the Uniform Fraudulent Transfer Act.

During the recession in the 1980's, there was a significant increase in the number of bankruptcies as shown by the attached graph. It became evident that a number of these insolvent debtors had, in effect, transferred assets based on a comparison of the loan applications on file and the bankruptcy financial statements that were filed with the Court. Unless a creditor was very aggressive in attending the hearings and persuading the Trustees that this was a fraudulent filing, the creditors were forced to write-off these debts.

Passage of this legislation will allow creditors to obtain satisfaction of unsecured debts where the debtor has in fact transferred assets fraudulently.

Sincerely,

Sharon Kelly, Chair
Bankruptcy Committee

LAW OFFICES
DILLON & FINDLEY
A PROFESSIONAL CORPORATION

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HORACE
R. Brown

D - For bill files - BP

January 31, 1995

Hon. Pete Kott, Chair
House Labor & Commerce Committee
Alaska State Legislature
Room 432, State Capitol
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 72 (Uniform Fraudulent Transfer Act)

Dear Representative Kott:

I understand that HB 72, proposing the Uniform Fraudulent Transfer Act, is scheduled for a hearing in your committee tomorrow, and I wanted to express my strong support for this bill. I urge your committee's favorable action on it.

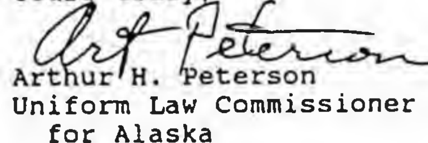
HB 72 updates Alaska law that was borrowed from Oregon for Alaska back in the 1800's. We did not even enact the 1918 predecessor to this Uniform Act (the Uniform Fraudulent Conveyance Act).

By enacting HB 72, Alaska will finally update its law, making significant improvements in the process, and will join at least 33 other states in enacting this modern version. The bill's handling of fraudulent transfers will help assure the smooth flow of business transactions in the state and between this state and other states.

If you have any question about it, please let me know. I should mention that, among Alaska's uniform law commissioners, Jerry Kurtz (276-6100) is the most knowledgeable about HB 72.

Thank you.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

cc: Hon. Brian Porter, Chair
House Judiciary Committee

Rest of Alaska's ULC Delegation