15 HJ: FILE NO. 2

NO.2

SB

1-27-79

JUDICIARY COMMITTEE REPORT

ON

CS FOR SENATE BILL NO. 269

This bill seeks to clarify the law regarding the simplified distribution of small estates. By inserting the words "in Alaska", it becomes clear that in determining what statutory procedure to follow as to a decedent's estate, only the value of the estate within Alaska is to be considered. Thus, it is unnecessary to have an ancillary probate proceeding in Alaska when a person with an estate under $2,000 in Alaska dies with a larger estate elsewhere. The original bill applied this language only to real property; the committee substitute adds personal property.

Barry W. Jackson, Chairman

SB-271

ALASKA CARRIERS ASSOCIATION, INC.
327 Barrow Street
Anchorage, Alaska 99501

April 14, 1970

TO: HONORABLE BARRY JACKSON, CHAIRMAN, HOUSE JUDICIARY COMMITTEE
MEMBERS, HOUSE JUDICIARY COMMITTEE

FROM: EDWARD R. SANDERS, MANAGING DIRECTOR, ALASKA CARRIERS ASSOCIATION

CSSB 271 has probably been given closer and more searching attention than most other bills before the legislature. The work being done on it by your committee at this time is an example. This attention has caused very material improvements and changes to be made in the bill as originally submitted by the Governor.

Recent consultation with additional people, including some attorneys practicing transportation law and other groups heavily affected by surface transportation activity, has convinced my Association's governing body that this bill is now in excellent condition for passage - except for the following changes, which should definitely be incorporated. Making these changes in a Judiciary Committee substitute would probably be the most expeditious way of handling them. The suggested changes are as follows:

Line 11, Page 1, change "AS08.18" to "Section 420(12)

Line 16, Page 1, strike the underlined matter and remove the brackets from "The"

Line 20, Page 1, after "and" strike the remainder of that line and insert "every exempt carrier except as provided in Section 20(4) to wit"

Line 22, Page 4, strike all language and insert "carrier, private carrier and exempt carrier as described in Section 20(4) including those operating motor vehicles"

Line 27, Page 4, add after "carriers" the words "and exempt carriers as described in Section 20(4)"

Insert before Line 17, Page 12 the following:

(12) "Construction contractor" means a contractor licensed by the State of Alaska to and actively engaged in the work of constructing, repairing or removing any kind of private or public facility or structure and does not include "contract carriers" authorized to transport commodities in bulk in dump type equipment unless such "contract carrier" is also actively engaged in the work of constructing, repairing or removing private or public facilities or structures as a licensed contractor.

I would like to express our strongest opposition to any change being made in Section 3 of the bill. This identical method of handling is in use throughout the other states and is used by the Interstate Commerce Commission.

It has proven to be an efficient and equitable method of properly evaluating whether or not a specific additional operating authority should be granted. Ill advised changes in this provision could well weaken the trucking industry in this state to the point of destruction. You are urged to make no change in Section 3.

The Committee has our deep and sincere appreciation for the searching and objective work it has done and is doing on this most important legislation.

Thank you.

Edward R. Sanders
Managing Director

scj

Original sponsor: Rules Committee by request of the Governor

Offered: 3/12/70
Referred: Rules

IN THE SENATE

BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 271

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of motor freight carriers."

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

* Section 1. AS 42.10.020 is amended by adding a new paragraph to read:

(4) vehicles operated by a construction contractor while performing such a business as defined in Section 420(12) ~~AS 08.18~~ except that weight fees in an amount as provided by sec. 240 of this chapter shall be paid for each vehicle designed to be operated on a public highway.

* Sec. 2. AS 42.10.090 is amended to read:

Sec. 42.10.090. REGULATION OF PRIVATE AND EXEMPT CARRIERS. ~~Except as provided in sec. 20(4) of this chapter, the~~ [THE] commission shall

(1) supervise and regulate every private carrier and exempt carrier as to its safety of operation;

(2) require every private carrier and every exempt carrier ~~exempt carrier to file~~ except as provided in Section 20(4) to file information required by the commission to carry out this chapter, and supervise and regulate each private carrier in all other matters affecting its relationship with shipping and the general public.

* Sec. 3. AS 42.10.130(c) is repealed and re-enacted to read:

(c) Except as provided in (a) and (b) of this section a permit shall be issued to any qualified applicant, authorizing the whole or a part of the operations covered by the application, if the proposed service is or will be required by the present or future public convenience or necessity; otherwise the application shall be denied.

public convenience and necessity require the service to be resumed, it may order the carrier to reinstate the operation.

* Sec. 7. AS 42.10.230 is repealed and re-enacted to read:

Sec. 42.10.230. MODIFICATION, SUSPENSION OR REVOCATION OF PERMITS Upon complaint or upon its own initiative the commission, after notice and opportunity for hearing and for good cause shown, may amend, modify, suspend, or revoke a permit, in whole or in part. Good cause for amendment, modification, suspension or revocation of a permit includes but is not limited to any of the following:

(1) as the public convenience and necessity may require;

(2) misrepresentation of a material fact in obtaining the permit;

(3) unauthorized discontinuance or abandonment of all or part of the carrier's operation;

(4) failure to comply with the provisions of this chapter, the rules, regulations or orders of the commission, the motor vehicle laws of the state or the laws or regulations of the United States;

(5) failure to comply with a term, condition, or limitation of the permit.

* Sec. 8. AS 42.10.240 is repealed and re-enacted to read:

Sec. 42.10.240. WEIGHT FEES. (a) Every common carrier, contract carrier, private carrier and exempt carrier as described in Section 20(4) ~~carrier and private carrier including those operating motor vehicles~~ including those operating motor vehicles not otherwise registered or licensed in the state, and every person that rents or leases motor vehicles to common, contract or private carriers, shall pay the following weight fees each year for each motor vehicle owned or operated by it on the public highways of the state:

(1) motor vehicles of private carriers, and exempt carriers as described in Section 20(4) except those of persons who rent, lease or otherwise provide a motor vehicle for use of motor carriers, weighing over 4,000 pounds..... $25

carrier or contract carrier or by a construction contractor as defined in AS 08.18 to another construction contractor as so defined, under rules and regulations to be prescribed by the commission;

* Sec. 18. AS 42.10.420(6) is amended to read:

(6) "motor vehicle" means a truck, trailer, semi-trailer, tractor, wrecker, tow car, hearse, ambulance or other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting property;

* Sec. 19. AS 42.10.420 is amended by adding new subsections to read:

(10) "rate" includes every rate, toll, fare, rental charge, or other form of compensation demanded, observed, charged or collected by a carrier for its services;

(11) "property" means all commodities, articles and cargo, of whatever nature or value, including but not limited to refuse, garbage, trash and other waste or nonwaste material.

* Sec. 20. AS 42.10.300, 42.10.360, 42.10.390 and 42.10.410 are repealed.

(12) "construction contractor" means a contractor licensed by the State of Alaska to and actively engaged in the ~~work~~ business of constructing, repairing or removing any kind of private or public facility or structure and does not include "contract carriers" authorized to transport commodities in bulk in dump type equipment unless such "contract carrier" is also actively engaged in the ~~work~~ business of constructing, repairing or removing private or public facilities or structures as a licensed contractor.

SB 271

ALASKA CARRIERS ASSOCIATION
327 Barrow Street
Anchorage, Alaska 99501

RE: Changes made under CSSB 271

CSSB 271 updates the Motor Freight Carrier Act to reflect changes made necessary by changes in conditions that have occurred since its passage and last amendment AND corrects deficiencies in the original act that have been discovered through application of its provisions throughout recent years.

The bill also contains changes in the original bill made necessary by mutual need of the Associated General Contractors and the Alaska Carriers Association members. All of which are either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska.

Specifically, the individual sections accomplish the following:

Section 1 - Liberalizes the conditions under which construction contractors may perform needed services for themselves with equipment operated by themselves.

Section 2 - Simply makes the section AS 42.10.090 tie in with Section 1.

Section 3 - Establishes for the first time a "public convenience and necessity" provision that guarantees that the Commission will authorize such additional service to the public as it needs from time to time, but prevents them from issuing unneeded operating authorities that would undermine the operational stability of existing carriers.

Section 4 - Makes all filing fees the same since the work effort on such matters is of comparable nature and cost. Some fees are now $25 and would be raised to $50.

Section 5 - Establishes simplified and explicit rules governing the transfer of permits. Provides clearly that permits may be transferred if certain required conditions exist, whereas presently there is no certainty that they may be transferred and this injects instability and lack of incentive to carriers to build better facilities and do other things that would increase their ability to better serve the public. Also, it provides that incorporated carriers must transfer operating authorities in the same manner and under the same conditions as sole proprietorships and partnerships. It further gives to the Commission increased authority to eliminate dormant operating authorities so that the level of service to sparsely

populated areas will meet the needs of those areas. It provides that all claims for loss or damage and all COD money collected will be remitted to the proper parties before transfer will be permitted.

Section 6 - Establishes for the first time a requirement that no common carrier may discontinue or abandon service in areas where operations do not produce a profit unless a showing of fact convinces the Commission that the public interest will be served by such action. It establishes working rules to accomplish proper results in such instances.

Section 7 - Goes further into the matter of adjusting the scope of a carrier's operations so as to cause such scope to coincide with the need of the public for common carrier service. This section implements and assists Section 6.

Section 8 - Establishes increased weight fees to be paid by for-hire carriers and establishes a lower weight fee on private carriers so that such monies will be sufficient to defray the cost of augmenting the staff of the Commission to the point where it will be efficiently operational. It is not now so efficient and the public benefit and stability of the industry urgently requires it. It is anticipated that these increased weight fee taxes will result in considerably more than $100,000.00 more revenue per year being collected to support the operation of the Commission. Recent acquisitions of additional equipment will produce still additional new revenue.

During the First Legislature the air and surface transportation industry agreed to pay these taxes in order to fund the budgets of the Commission even though most states take those monies from their general fund. It is felt that some portion of the budget needs should be borne by the general fund even in view of this special tax because the general public desperately needs an effective ongoing regulatory commission of this nature.

For example, the Commission needs and the regulated industries urge that the following minimal increased staffing be provided the Commission:

(a) At least two (2) hearing officers;

(b) An Executive Director;

(c) A branch office in Fairbanks and in Juneau to more effectively carry out the purposes of this Act.

(d) A second attorney experienced in trying cases;

(e) Support staff.

Section 9 - Establishes the legal ability of the Commission to determine just and reasonable classifications of property (they now only have this authority as to classification of carriers).

Section 10 - Establishes needed clarification as to contract carrier (dump truck) rates being minimum rates.

Section 11 - Establishes procedures under which the Commission may suspend rates, charges, or other provisions it feels may not be justified or in the public interest while it conducts the necessary investigation to determine the facts in the matter. It states the maximum period of suspensions and places the burden of proof of lawfulness and reasonableness on the carrier making the suspended changes.

Section 12 - Provides more clearly that new changes in carriers' tariffs must be placed on public file for at least 30 days unless a proper showing can be made to the Commission justifying a shorter filing period.

Section 13 - Provides that a carrier must abide by the effective provisions of its tariffs and that it is unlawful to charge or collect more or less than the stated tariff charges. This ensures equal treatment to every member of the public.

Section 14 - Provides that all contract carriers shall observe similar rules and conditions placed on common carriers and dump truck carriers by Section 13 hereof.

Section 15 - Gives to the Commission the authority to fix rates at a level it finds to be reasonably compensatory. This section further provides procedures to be followed in arriving at a needed action of this type.

Section 16 - Establishes the right of the Commission to promulgate rules and regulations necessary to carry out the intent of the Act and provides that all acts of the Commission are subject to judicial review. It provides, for the first time, that a violation is a misdemeanor which, upon conviction, is subject to a fine of up to $500.00 plus the costs of prosecution.

This section further provides, for the first time, a civil penalties provision that is to be administered by the Commission itself, with determination of guilt, amount of penalty and the levying thereof by the Commission. It provides that the attorney general will bring action in the courts to collect such penalties as are not promptly paid by the guilty party.

Necessary provisions as to cumulative effect and joinder of action are provided.

Section 17 - Provides liberalized vehicle leasing provisions for the use of construction contractors in leasing vehicles between themselves and further carries out the intent of Section 1 hereof.

Section 18 - Makes a necessary revision to the definition of a "motor vehicle," "rate," and "property" in order to bring needed clarification to the Act so as to enable the Commission to act in clearly defined areas as compared to the vague areas now existing and which cause unnecessarily lengthy and expensive litigation without in fact resulting in clear-cut legal decisions.

In general, I wish to certify that the trucking industry and the Associated General Contractors take the following position regarding this bill:

1. It urges its passage without further change because:

2. The increased taxes are needed to offset needed Commission staff increases;

3. The hearing officer and executive director are needed for effective functioning of the Commission;

4. It is imperative - urgently imperative - that branch offices of the Commission be established in Fairbanks and Juneau due to geographic, population, and existing transportation needs;

5. The technical and legal clarifications and changes are positively needed to permit the Commission to finally commence doing effective regulatory work required under this statute (AS 42.10).

Very sincerely,

Edward R. Sanders
Managing Director

SB-271

Alaska Carriers Association, Inc.

REPLY VIA AIR MAIL

327 BARROW STREET
ANCHORAGE, ALASKA 99501

REFER TO FILE: 4.25

TO: HONORABLE TOM FINK, ET. AL.

FROM: RALPH SANDERS, MANAGING DIRECTOR

RE: CSSB 271

This bill, in the form reported out by the House Judiciary Committee, represents almost two years of intensive effort to overhaul the Motor Freight Carrier Act, AS 42.10, in order that it can more efficiently serve the needs of the people of Alaska. The Act was a good act initially, but not perfect; and many conditions have changed during the recent years of rapid growth of population and economic development. These factors have made some existing provisions outmoded and inadequate and have necessitated the inclusion of additional provisions designed to cover the new methods of shipping, changed traffic flows and different needs of the shipping public and the trucking industry -- both private and for-hire.

Many legislative committees, carrier groups and the Associated General Contractors have worked on this proposed legislation; and all parties are now satisfied that it will answer known problems and will materially increase the ability of the Transportation Commission to do more effectively the work they were intended to do when the legislature first enacted AS 42.10.

Among other things, this bill adds a public convenience and necessity provision for the first time which specifically provides that additional operating authorities will be granted whenever it can be shown that the public convenience and necessity requires it.

The bill clarifies and simplifies the relationship of trucks operated by construction contractors and removes some restrictive provisions that have been objectionable to them.

Under this bill private carriers will pay a $25.00 per year weight fee tax, and the for-hire carriers will pay increased weight fees, increased in amount from 37½ per cent to 50 per cent according to the weight of the vehicle. These increases are agreed to by industry in order to pay for additional staffing of the Commission and branch offices in Fairbanks and Juneau.

The bill establishes clear and greatly improved conditions controlling the transfer of permits from one party to another.

Many other vitally important changes are proposed. For explanation, see attached.

Very sincerely,

Edward R. Sanders
Managing Director

scj

Attachment

ALASKA CARRIERS ASSOCIATION
327 Barrow Street
Anchorage, Alaska 99501

RE: Changes made under CSSB 271

CSSB 271 updates the Motor Freight Carrier Act to reflect changes made necessary by changes in conditions that have occurred since its passage and last amendment AND corrects deficiencies in the original act that have been discovered through application of its provisions throughout recent years.

The bill also contains changes in the original bill made necessary by mutual need of the Associated General Contractors and the Alaska Carriers Association members. All of which are either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska.

Specifically, the individual sections accomplish the following:

Section 1 - Liberalizes the conditions under which construction contractors may perform needed services for themselves with equipment operated by themselves.

Section 2 - Simply makes the section AS 42.10.090 tie in with Section 1.

Section 3 - Establishes for the first time a "public convenience and necessity" provision that guarantees that the Commission will authorize such additional service to the public as it needs from time to time, but prevents them from issuing unneeded operating authorities that would undermine the operational stability of existing carriers.

Section 4 - Makes all filing fees the same since the work effort on such matters is of comparable nature and cost. Some fees are now $25 and would be raised to $50.

Section 5 - Establishes simplified and explicit rules governing the transfer of permits. Provides clearly that permits may be transferred if certain required conditions exist, whereas presently there is no certainty that they may be transferred and this injects instability and lack of incentive to carriers to build better facilities and do other things that would increase their ability to better serve the public. Also, it provides that incorporated carriers must transfer operating authorities in the same manner and under the same conditions as sole proprietorships and partnerships. It further gives to the Commission increased authority to eliminate dormant operating authorities so that the level of service to sparsely

populated areas will meet the needs of those areas. It provides that all claims for loss or damage and all COD money collected will be remitted to the proper parties before transfer will be permitted.

Section 6 - Establishes for the first time a requirement that no common carrier may discontinue or abandon service in areas where operations do not produce a profit unless a showing of fact convinces the Commission that the public interest will be served by such action. It establishes working rules to accomplish proper results in such instances.

Section 7 - Goes further into the matter of adjusting the scope of a carrier's operations so as to cause such scope to coincide with the need of the public for common carrier service. This section implements and assists Section 6.

Section 8 - Establishes increased weight fees to be paid by for-hire carriers and establishes a lower weight fee on private carriers so that such monies will be sufficient to defray the cost of augmenting the staff of the Commission to the point where it will be efficiently operational. It is not now so efficient and the public benefit and stability of the industry urgently requires it. It is anticipated that these increased weight fee taxes will result in considerably more than $100,000.00 more revenue per year being collected to support the operation of the Commission. Recent acquisitions of additional equipment will produce still additional new revenue.

During the First Legislature the air and surface transportation industry agreed to pay these taxes in order to fund the budgets of the Commission even though most states take those monies from their general fund. It is felt that some portion of the budget needs should be borne by the general fund even in view of this special tax because the general public desperately needs an effective ongoing regulatory commission of this nature.

For example, the Commission needs and the regulated industries urge that the following minimal increased staffing be provided the Commission:

(a) At least two (2) hearing officers;

(b) An Executive Director;

(c) A branch office in Fairbanks and in Juneau to more effectively carry out the purposes of this Act.

(d) A second attorney experienced in trying cases;

(e) Support staff.

Section 9 - Establishes the legal ability of the Commission to determine just and reasonable classifications of property (they now only have this authority as to classification of carriers).

Section 10 - Establishes needed clarification as to contract carrier (dump truck) rates being minimum rates.

Section 11 - Establishes procedures under which the Commission may suspend rates, charges, or other provisions it feels may not be justified or in the public interest while it conducts the necessary investigation to determine the facts in the matter. It states the maximum period of suspensions and places the burden of proof of lawfulness and reasonableness on the carrier making the suspended changes.

Section 12 - Provides more clearly that new changes in carriers' tariffs must be placed on public file for at least 30 days unless a proper showing can be made to the Commission justifying a shorter filing period.

Section 13 - Provides that a carrier must abide by the effective provisions of its tariffs and that it is unlawful to charge or collect more or less than the stated tariff charges. This ensures equal treatment to every member of the public.

Section 14 - Provides that all contract carriers shall observe similar rules and conditions placed on common carriers and dump truck carriers by Section 13 hereof.

Section 15 - Gives to the Commission the authority to fix rates at a level it finds to be reasonably compensatory. This section further provides procedures to be followed in arriving at a needed action of this type.

Section 16 - Establishes the right of the Commission to promulgate rules and regulations necessary to carry out the intent of the Act and provides that all acts of the Commission are subject to judicial review. It provides, for the first time, that a violation is a misdemeanor which, upon conviction, is subject to a fine of up to $500.00 plus the costs of prosecution.

This section further provides, for the first time, a civil penalties provision that is to be administered by the Commission itself, with determination of guilt, amount of penalty and the levying thereof by the Commission. It provides that the attorney general will bring action in the courts to collect such penalties as are not promptly paid by the guilty party.

Necessary provisions as to cumulative effect and joinder of action are provided.

Section 17 - Provides liberalized vehicle leasing provisions for the use of construction contractors in leasing vehicles between themselves and further carries out the intent of Section 1 hereof.

Section 18 - Makes a necessary revision to the definition of a "motor vehicle," "rate," and "property" and "construction contractor" in order to bring needed clarification to the Act so as to enable the Commission to act in clearly defined areas as compared to the vague areas now existing and which cause unnecessarily lengthy and expensive litigation without in fact resulting in clear-cut legal decisions.

In general, I wish to certify that the trucking industry and the Associated General Contractors take the following position regarding this bill:

1. It urges its passage without further change because:

2. The increased taxes are needed to offset needed Commission staff increases;

3. The hearing officer and executive director are needed for effective functioning of the Commission;

4. It is imperative - urgently imperative - that branch offices of the Commission be established in Fairbanks and Juneau due to geographic, population, and existing transportation needs;

5. The technical and legal clarifications and changes are positively needed to permit the Commission to finally commence doing effective regulatory work required under this statute (AS 42.10).

Very sincerely,

Edward R. Sanders
Managing Director

sb-271

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
338 DENALI STREET—ANCHORAGE 99501

April 13, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Dear Chairman Jackson:

I regret that I am unable to appear before the House Judiciary Committee to give further testimony on CSSB 271. We still have a number of things to be accomplished in completing the preparation of our Direct Exhibits for the CAB ALASKA SERVICE INVESTIGATION. I want you to know, however, that I certainly appreciate the invitation to discuss this Bill with your Committee.

Perhaps it will suffice this time if I offer my comments in writing on Section 3 of the Bill which Section, I understand, is the subject of a proposed amendment.

In essence, Section 3 would require that an applicant for new operating authority must show to the satisfaction of the Commission that the public convenience and necessity require such new authority. This provision is roughly the same as that presently in the Air Commerce Act of 1960 (AS 02.05.080(a)(2)), and in the Bus ACT (Sec. 42.15.061(b)). This is also the standard type of provision found in nearly every other State and Federal Statute providing for certification in transportation and utilities.

I know of no regulatory act in the United States which places the burden of proof in certification on the regulatory agency. To do so in this instance would place an unworkable burden on the Alaska Transportation Commission.

It is my understanding that there is a proposal to make such an amendment to Section 3 of the Bill. If my understanding of the amendment is correct it would, in effect, automatically grant an operating permit to every applicant unless the Commission were able to prove that the public convenience and necessity would not support another operating authority. This approach would completely subvert the primary objectives of transportation regulation. Apparently there is a misconception as to what those objectives are.

It is my guess that the proposed amendment is offered with the idea that transportation regulation is analogous to the regulation of a profession such as licensing Doctors, Optometrists, et cetera. The two types of licensing however are not analogous. The basic purpose for licensing Doctors, Optometrists, et cetera, is for the protection of the health and welfare of the public who must use those services. However, with the regulation of transportation, the basic objective is to establish an adequate, strong, and economically healthy transportation industry which is available to serve the public needs at all times (winter as well as summer) and at a reasonable price.

It was proven over half a century ago that unrestricted entry into the field of transportation is the best possible way to create a complete monoply with resultant high prices and poor service to the public.

If the public convenience and necessity does require a new operator for adequate service, this factor is not too difficult for the applicant to prove. However, if the Statute in effect gives the applicant the right to have a permit, unless the Commission can prove that the public convenience and necessity does not require it, it would mean that the Commission would have to show that every single demand by every single shipper and every single consignee for motor freight service was being reasonably and expeditiously handled by existing carriers. The Commission could not do this even if it had 10 times the staff and 10 times the budget that it now has. The end result would be unrestricted entry by every applicant for whatever authority he may choose to apply.

I apologize for the haste in which these comments were prepared. I hope that they answer some of the questions concerning Sec. 3 of the Bill.

Again I wish to express the appreciation of the Commission for the opportunity to communicate with your Committee on this Bill.

Sincerely yours,

George Benesch

George Benesch
Commissioner

4/16/70

HOUSE JOURNAL

Judiciary Committee Report

on

HCS for CS for SENATE BILL NO. 271

This bill, originally introduced at the request of the governor, proposes several changes in the Alaska Motor Freight Carrier Act which Ralph Sanders, lobbyist for the Alaska Carriers Association, states are all "either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska." The Judiciary Committee amendments are intended to make clear that motor vehicles operated by a construction contractor are exempt from regulation by the Alaska Transportation Commission and that the contractor may rent out his motor vehicles when he is not actually "working" on a construction job, but is still actively engaged in the construction business. It is also the understanding of the committee that dump trucks which are used to haul their owner's material either for his own purposes or under a sales contract are exempt from ATC regulation.

Barry W. Jackson
Chairman
House Judiciary Committee

SB 297

Comments Of
Alaska Legal Services Corporation
In Support of S.B. 297

This proposal was originally drafted by Alaska Legal Services attorneys and jointly introduced by Senators Josephson, Begich, Miller, Brad Phillips, and Rader. (S.B. 297) It passed the Senate April 7, 1969, with one dissenting vote, and has been referred to the State Affairs and Judiciary Committees of the House.

The State Commission for Human Rights exercises jurisdiction over all violations of existing State anti-discrimination laws. Specifically, its jurisdiction relates to discrimination in employment, whether by an employer, labor organization or employment agency; places of public accomodation; housing; financial practices; and state operations. (A.S. 18.80.210-255). Primary enforcement responsibility is vested in the State Commission for Human Rights. (A.S. 18.80.010 et seq.) The Commission, upon the receipt of a complaint from an aggrieved individual or upon its own motion (A.S. 18.80.100) may initiate informal proceedings to achieve conciliation (A.S. 18.80.110) and, if appropriate, issue a cease and desist order against the action and individual or firm as to whose action the hearing was conducted. (A.S. 18.80.120-130). In such proceedings

the Commission, and not the complainant, would exercise control of the presentation. The complainant or the respondent may seek judicial review of the Commission's action (A.S. 18.80.135(a)). Enforcement of the cease and desist order may be judicially obtained, but only at the instance of the Commission (A.S. 18.80.135(b)). In addition to the above, enforcement may be had through criminal prosecution of a person who engages in action prohibited by the substantive provisions of the anti-discrimination laws. (A.S. 18.80.270).

As provisions are now written, it is unclear whether an individual is required to resort to the Commission for Human Rights for relief from discriminatory conduct, or if he is free to seek redress directly through the courts. A second problem is that the terms of the present act do not indicate that relief may be sought as a member of a class, or that the Commission may act against a pattern of discrimination within an industry, labor union, etc., rather than merely dealing with individual instances of discrimination.

The proposed addition specifically states that the Superior Courts of Alaska shall have jurisdiction over causes of action arising under the Alaska discrimination laws, including any collateral issues which are a part of the discriminatory conduct complained of. This would include a pattern of discrimination which might otherwise not be cured if the issues were limited to specific discriminatory acts. For example, an individual who instituted an action against a company to redress racial discrimination would be able to maintain a class action and obtain relief as to all members

of his class, including those who work in a different department.

It further provides for notification to the Commission whenever such a suit is filed, and that the Commission may either intervene in the suit as a party, or inform the Court that it is already acting on the discriminatory act giving rise to the lawsuit. In case of the latter, the court will defer action on the suit until the Commission has determined the issues before it. A limitation of forty-five days in this case is included to ensure the prompt settlement of these issues. The act empowers the Court to enter a preliminary injunction pending Commission action.

If the plaintiff's lawsuit is deferred to Commission action, the plaintiff is given the status of an "aggrieved" party in the event of an adverse decision so as to authorize his participation in or prosecution of an appeal from the Commission's order.

These amendments will serve three basic functions:

(1) an individual will be free to pursue his own remedies rather than rely upon Commission action in cases where the Commission is unable to give his problem prompt attention;

(2) class actions directed at patterns or practices will be permitted, rather than requiring enforcement to focus on individual or isolated acts; and

(3) the Commission's enforcement powers will be strengthened by the power to intervene in broad scale attacks upon discrimination.

We believe these amendments to be doubly important because of the limited staff and budget with which the Commission is currently required to operate.

This proposal was unanimously endorsed by the Board of Directors of Alaska Legal Services Corporation with the stipulation that a provision be added setting a nominal damage figure at $250. This could be accomplished by adding a sentence at the end of Section 18.80.340 as follows:

> Upon a judgment for the plaintiff in a case brought under this chapter, the court shall award nominal damages of $250.00 unless actual damages exceeding that amount have been established.

Dlvr. to Jackson

A M E N D M E N T

IN THE HOUSE BY

TO: CSSB 303 am

Page 3, Line 18:

Change "the" to "and".

Page 4, Line 13:

Add: ~~[illegible]~~

"(e) No person or public agency may undertake a project as described in (a)(5) of this section without the approval of the commission.

"Sec. 44.29.180. INJUNCTION. If it appears that a person or public agency is violating or threatening to violate a provision of sec~~s~~. ~~180~~ 170 of this chapter or a regulation or order of the commission, the commission shall bring an action against that person or agency in the superior court in the judicial district where the violation occurs or is threatened, to restrain the person or agency from continuing the violation or from carrying out the threat of violation. In the action, the court has jurisdiction to grant to the commission, without bond or other undertaking, such prohibitory ~~and~~ and mandatory injunctions as the facts warrant.

"Sec. 44.29.190. PENALTIES. (a) A person who violates a provision of sec. 170 of this chapter or a regulation or order of the commission is, upon conviction, punishable by a fine of not more than $10,000 or by imprisonment for not more than one year or by both.

(b) In an action brought under sec. 180 of this chapter, if the court finds that a person/or agency has violated a provision of sec. 170 of this chapter or a regulation or order of the commission, the commission, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than $10,000 per violation. Each day of a continuing violation is considered a separate violation.

(c) A person/who or agency which violates the terms of an injunction or restraining order issued under sec. 180 of this chapter

shall forfeit and pay to the general fund of the state a civil penalty of not more than $25,000 per violation. Each day of a continuing violation is considered a separate violation. ~~Except as provided in subsection (c) of this section, the~~ The commission may petition for the recovery of the penalties.

(d) The penalties in this section are cumulative, not exclusive. The payment of a penalty does not relieve a person on whom the penalty is imposed from liability to any other person for damages arising out of the violation."

Page 2, Line 13; Page 3, Lines 17, 19, & 20: Change "170" to read "190".

SB 311

Judiciary Committee Report

on

House Committee Substitute for Senate Bill 311

The bill limits the basis upon which an insurance company may cancel an automobile insurance contract. The limitation applies between the sixty-first day and the end of the twelve-month policy period. An insurance company would be allowed to cancel within the first sixty days for any reason at all.

Between the sixtieth day and the end of the twelve months, the insurance company could cancel only for non-payment of premium or for suspension of a driver's license.

The limitation of cancellation of an insurance policy under this bill does not apply to renewal of an auto insurance policy unless the renewal comes within the twelve-month period of original issuance. If the insurance company does not wish to renew beyond the twelfth month, it has the obligation of giving notice of its intention not to renew.

The bill further provides that background and character information given on an insured has limited protection from libel; i.e., that a libel action could not be successful unless the source intentionally gave false information or was grossly negligent in determining the veracity of the information.

Barry Jackson
Chairman
House Judiciary Committee

TF:deh

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB-336

File
Judges salary
bill

Supreme Court
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR
941 4TH AVENUE, ROOM 309
ANCHORAGE, ALASKA

February 13, 1970

The Honorable Barry W. Jackson
Alaska House of Representatives
Pouch V, State Capitol
Juneau, Alaska 99801

Dear Representative Jackson:

On January 29, 1970, I accompanied the Alaska Judicial Council on its appearance before the joint meeting of the Senate and House Judiciary and Finance Committees. The meeting was not too well attended, and while most of the programs were well received, the meeting was marked by criticisms and obvious misunderstandings by some of the membership. Since that time, I have come to the conclusion that the most important points of that program may well be in jeopardy.

We would all agree that the Alaska Court System is not perfect, and should never be immune from criticism. However, I do feel that most of the criticism of the Judges made during the presentation for increased salaries was not only unjustified, but irrelevant. I say this, not in defense of our Judges. If we do have Judges who do not measure up, they will no doubt come before the Judicial Qualifications Commission. This Commission has not been in existence long enough to make its impact felt. However, every indication is that it stands ready, willing and <u>able</u> to do its job.

The point I wish to stress in this letter is as follows:

Currently there are four vacancies among the tenure judge positions of the District Court which badly need filling.

In November the Judicial Council failed to receive enough applications to nominate a single one to the Governor.

In the Superior Court there must be added four additional Judges if we are to avoid a chaotic condition resulting from the tremendous increase in the caseload. In this respect, it now takes over two years to get a personal injury case to trial in Anchorage, despite all of the streamlining of the process which we have been able to do.

In addition, the Chief Justice has heretofore indicated his intent to retire sometime this year.

It therefore appears that during this calendar year there may be nine new Judges added to the Courts. It is in this vein that I feel the question of salary increases is critical.

During the joint meeting on January 29, certain members of the Committees pointed out some of the low salaries of Judges in states such as Texas. Regardless of the accuracy of the figures presented, they wholly missed the point. The relevant point is: "What are good Alaska lawyers, who would make good Judges in Alaska, making?" I do not have to ask this question of you, as you know the answer. I do feel that we need your assistance in convincing the non-lawyer members of the Legislature of the urgent necessity of a general and substantial salary increase for all levels of the Court in this session.

If there was ever a time, since Statehood, that a single legislative session had a greater opportunity to improve the caliber of Judges in Alaska Courts, it is this session, at this time. I cannot conceive of a time in the future when more new Judges will or should be going on the bench.

Not to act will no doubt result in lesser qualified applicants for these positions, which, if not provided, could well create a "log jam" from which it would take years to clear.

Both the Judicial Council and the Alaska Court System unanimously support the idea of a salary commission. It will, no doubt, eliminate what has been an annual fight for money. However, the idea of a salary commission is to keep salaries at a fair and just level, in keeping with the times and the change in the economy. It is ill suited as an instrumentality to bring

about adequate salaries from the present low level. In my opinion, it is the responsibility of the Legislature to start this commission out with adequate salaries, leaving only future adjustments to the commission.

I have written this letter to you and other lawyer members of the Legislature in an attempt to convey to you what I feel to be a critical issue -- one which always seems to "lose its way" in committee meetings.

Your help in this matter would be sincerely appreciated, and I sincerely believe that the State of Alaska will profit from any progress in this area.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR/grg

District Court

State of Alaska

FOURTH JUDICIAL DISTRICT
604 BARNETTE STREET, ROOM 313
FAIRBANKS, ALASKA
99701

January 16, 1970

The Honorable Barry W. Jackson, Chairman,
and Members of the House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Jackson:

Enclosed for your information is a copy of a story which appeared in the Fairbanks Daily News-Miner on January 13, 1970, concerning district court judges' salaries. Your committee is to be commended for having called for the bill so early in the session, but the proposed $24,000 salary for district court judges is not adequate, and someone's suggested "compromise" at $22,000 will not produce any more qualified applicants for the vacant district judgeships than the present $19,000 did.

This will be a rather long letter. I suspect that few legislators have enough contact with the district court to know why there is great disenchantment among the district judges, and inability of the court system to obtain applicants for vacancies. Salaries are only one of many reasons.

The district court at this moment is neither fish, flesh, nor fowl. There are sixteen positions on the court. Four are vacant, four are held by persons unable to pass the state bar examination (but having "grandfather rights"), and eight are held by lawyers of varying ability and experience.

There are two schools of thought on inferior courts: one, that justice of the peace courts, staffed by persons having no legal training or experience but hopefully possessed of good common sense, are adequate; the other, that the inferior court must really be a court, staffed by professionally competent and experienced people.

I thought that Alaska had chosen to establish a real court, not a justice of the peace system. Professional qualifications were established, the state's careful selection process was made applicable, the judges were given tenure, and for a time salaries seemed to be moving toward respectability. Promises were made that other steps would be taken to lend prestige to the office.

But in the two years I have held office, the purchasing power of my salary has declined despite a dollar increase of $1,500 (from $17,500 to $19,000). A superior court law clerk, wet behind the ears but admitted to the Alaska bar, earns $22 more in his first six months than a district court judge who has held office since the court was established. The gap increases as the law clerk goes through the steps and ranges of the state employees' pay schedule. A young man, not even admitted to the Alaska bar has started work as a district attorney at $21,000 a year in Fairbanks. He too will receive regular step and range increases. The salaries of the young attorneys who are public defenders are somewhat higher than those of the assistant district attorneys. All of this public employment for attorneys is compensated on the statutory schedule which makes allowance for the higher cost of living in the northern part of the State, and provides for regular increases. Even at these salaries there is a constant turnover in the district attorney's office. The man having the greatest seniority in the Fairbanks office has been here six or seven months and is not yet admitted to the Bar, although he soon will be. District court judges receive lower pay, have no periodic increases in their salaries, and cost of living differentials are ignored.

Twenty-one states pay their inferior court judges more dollars than Alaska does; ten additional states pay more in purchasing power, computed at the Anchorage, nct Fairbanks, cost of living index. Their retirement programs are comparable to Alaska's.

Assorted non-judicial functions are dumped on us, largely because they were dumped on the old U. S. Commissioner, ex-officio justice of the peace, and what-have-you. We are coroners, recorders, and warehousemen of the effects of the dead (you should see our collection of lynx pelts, old rusty guns, and useless clothing). I thought Alaska long since recognized that its Territorial judiciary was grossly unsatisfactory, but many of the evils of the U. S. Commissioner persist.

District court judges do not receive transportation or per diem to attend state bar meetings, but all other Alaska judges do. We have no libraries, our clerical staffs are limited for the tremendous volume of paper work that must be done (compare the number of cases disposed of by the district court with those disposed of in the superior court, and remember that a judgment must be typed and signed in each case). Our equipment is limited- -I mean typewriters, dictating equipment, and other basic office tools. We have no secretaries. The judges have no telephone lines, and those in the clerks' office are overloaded. Our clerks' quarters are arranged as inefficiently as is conceivalbe- -the architect had no notion of what a district court does. Our jury room is loaded with old closed files in disintegrating file cabinets, and we have no other place to put them. Our state clerks transfer to other state offices, where they are given pay ranges one, two, or three grades higher than we are permitted to give them.

We are nominally part of an integrated court system, but some of our clerks are directly employed by the City of Fairbanks, and owe their loyalty not to the court system, or the State, but the City. There is inter-office jealousy and resentment about differences in salaries, leave policies, insurance and the like between "city" and "state" clerks. These girls, with spearate employers, work in the same room, doing identical work.

We are forbidden, as no other Alaska judge is, to engage in any profit making venture of any sort. (Compare 22.10.180, AS to 22.15.219, AS.) At the same time, we are commanded by Supreme Court Rule, and authorized by statute to act as U. S. Commissioners. One judge here receives fees for this work, and the State subsidizes the federal government through free use of State court facilities, clerks, and the time of the judges who, although not Commissioners themselves, cover for those who are. (See 22.10.180 AS, and Rule 42, Rules of Administration. This was a sensible transition measure, but transition days are over.)

Probate and juvenile jurisdiction have been taken away from us. Forcible entry and detainer jurisdiction has been reduced to cases in which the value of the property is $3,000 or less (there is no such rental property in Alaska). We have no greater dollar jurisdiction than the non-professional U. S. Commissioner had.

District court is in session every day of the year. In Fairbanks, this means that for each judge every third weekend is lost. We must stay close to the telephone all weekend for search warrants and this is true 24 hours of every third week, when each judge is "on duty". There should be some compensating attractions in the position, but there are none.

The result of all this is that the professionally qualified district court judges are bitterly dissatisfied. The lack of applicants for the four empty seats shows that the Bar shares our feeling. There must be changes- -either a very substantial improvement in the status of the court, or a retreat to the old, nationally discredited justice of the peace system. While there have always been some good J. P.s, there has always been a heavy preponderance of terrible ones.

If we are to resort to J.P. "justice", it is my belief that the J.P. criminal jurisdiction should be limited to cases where only a fine can be imposed, and the civil jurisdiction should be held to the present $500 small claims limit. More serious criminal and civil cases should be filed in the superior court, which already has jurisdiction, and the superior court would have, of course, to be substantially enlarged. The people of this state are entitled to a

competent judiciary on all levels, and there is no question now of the State's ability to provide it. The Legislature must decide which route to take. Until now, it has not quite made up its mind.

The question immediately before you is that of salaries. Remember that the American Bar Association recommends that the salaries of the district and superior courts be identical, recognizing that the nature of the work of the two is quite different but the legal skills and general ability of the judges of both court levels must be equal if a state is to have a good judiciary.

The Alaska Judicial Council has recommended district court salaries of $29,000 or $30,000. The Alaska Bar Association has approved the recommendation.

Two professionally qualified district court judges quit last year. One professionally qualified acting judge quit. More resignations will occur unless salaries are very substantially increased and other frustrating and insulting aspects of the position changed. No superior court judge has resigned. No supreme court justice has resigned for reasons such as those outlined in this letter. There has never been a scarcity of applicants for either superior court or supreme court positions. District court positions are now going begging, and the same was true in the fall of 1968, when the judges went through selection process of the Judicial Council and gubernatorial appointment. It is time for the Legislature to be seriously concerned about the district courts.

This letter seems unreasonably long, but I believe a recital of some of the specifics will help you understand, as nothing else can, why it is imperative that salaries be very substantially increased.

Yours very truly,

Mary Alice Miller

Mary Alice Miller
District Court Judge

MAM/ms
encl.
cc: Tom Fink, Vice Chairman
Eugene V. Miller
Earl D. Hillstrand
Wendell P. Kay
Irwin L. Metcalf
Stanley P. Cornelius
Mildred H. Banfield
Jess Harris

JUDICIARY COMMITTEE REPORT

ON

CS SENATE BILL NO. 336

This bill would increase the maximum salary payable to a judge of the district court from $19,000 to $24,000.

The committee feels that immediate action is necessary to bring the district court more in line with the salaries now paid to judges of the supreme and superior courts. The district court, in view of the qualifications required and the extensive duties, is drastically underpaid. Great difficulty ensues in obtaining qualified applicants for the court; there are now four vacancies which have existed for a long time. As it is now, the court is unattractive, as a young lawyer can do better financially in the district attorney's office, office of public defender, in private practice, or in municipal legal work.

Twenty-one states now pay their inferior court judges more than Alaska; ten additional states pay more in terms of dollar purchasing power. The American Bar Association recommends that the salaries of district and superior courts be identical, recognizing that considerable legal skill and general ability is required at the inferior court level where the public most often meets the law. Both the Alaska Judicial Council and the Alaska Bar Association have recommended district court salaries of $29,000.

Barry W. Jackson, Chairman

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

3/31/70

Prepared by Bill Spear in A.N.'s office

HOUSE JOURNAL

Judiciary Committee Report

on

HCSCS for SENATE BILL NO. 352 am

This bill, based on legislation developed in large part by the Federal Trade Commission, is designed to meet the increasing need in Alaska for the protection of consumers as well as honest businessmen from the depredations of those persons employing unfair or deceptive trade practices. Similar legislation has been recently enacted in many states and is being considered in many more because of the recognition that mass advertising, distribution, merchandising, and other modern business techniques have rendered the present law, where it exists at all, ineffective to afford any real protection to the consumers. In addition to these modern developments, which make fraud so much easier to perpetrate, the consuming public itself has changed radically since the common law principles were developed that are at the base of the substantive law of the marketplace today. This bill recognizes that, in addition to providing a remedy for individual damage, that consumers, to some extent, must be protected as a group against injury by fraud, since it is often extremely impractical from a financial standpoint for most injured consumers to protect themselves as individuals.

Thirteen specific types of deceptive trade practices are enumerated. In addition, the attorney general is granted the power to promulgate regulations to further define and specify their scope. Together these features provide an extensive range of protection to the consumer while clearly defining for the businessman, who must operate under them, what conduct is or is not prohibited. Thus, the bill avoids much of the vagueness that has plagued earlier attempts at trade regulation. In addition to the enumerated prohibitions, the bill would make certain consumer paper nonnegotiable within the meaning of the Uniform Commercial Code. The purpose of this provision is to correct the present injustice of permitting the transferee of consumer paper to cut off the defenses of the consumer when the paper is taken from the original seller. This section corrects the abuses of the holder-in-due-course doctrine by requiring the financial institutions who are in the practice of purchasing such paper to examine more closely the persons who are seeking to negotiate the paper.

One of the outstanding features of the bill is the inclusion of a range of remedies, both public and private, civil and criminal, which lend the essential flexibility of enforcement to the bill which is required where violations may range from very minor transgressions to large scale, calculated swindles. The attorney general is established as the primary enforcement officer and is granted investigatory and subpoena powers, limited by certain procedural protections, to deal quickly and effectively with fraudulent practitioners. These powers were included by the committee in this version of the bill because of the feeling of some members that the additional investigatory power would be essential in

cases where fly-by-night operations were involved and that in other cases a thorough preliminary investigation would lead to fewer actual litigations. Provision is made for the enforcement officer to seek an injunction against unlawful practices, the violation of which could incur a civil penalty, and to accept an assurance of voluntary compliance with respect to any unlawful practice; he is empowered in a proper case to bring a criminal action with fines up to $10,000 or imprisonment for not more than one year. The bill also provides for a civil action on behalf of the state with a civil penalty of $5,000.

In addition to the public remedies, the bill provides for private remedies as well. Private remedies have the advantage not only of providing additional discovery of unfair trade practices since they are often more visible to the consumer than to an enforcement agent, but they also seek to reimburse the parties actually damaged rather than merely putting an end to the practice. The most controversial issue in the area of private remedies was the inclusion of the class action. It was felt by witnesses and some committee members that provision for the class action would tend to subject legitimate businessmen to undue harassment from unscrupulous plaintiffs and their attorneys who could use the threat of a class action as a club for a favorable settlement of an unjust claim. Others considered that the inclusion of the class action was necessary to the effective operation of any consumer protection law and noted its near unanimous acceptance by other state statutes and proposed drafts of similar legislation. A compromise was reached in which the class action was included in the bill, but in order for the action to be filed it must first be investigated and approved by the attorney general. It was felt that by placing a public official between the filing of an action and the alleged act, many or all of the actions lacking in merit would be weeded out.

Two features which have been found very successful in other state laws of this nature have been included here: a provision for treble damages and a $200 minimum recovery in individual actions. These features recognize that the average transaction involving a consumer fraud are generally so small as to prevent all but the most outraged consumer who can afford the expense of a law suit, from bringing an action. These provisions, though originally applicable to all private actions, were amended to be unavailable in the class action. The provision for treble damages is one of long standing in consumer matters and operates to deter fraudulent practices, encourage injured parties to come forward and bring suit, and to reasonably compensate those individuals for their trouble in bringing the suit. The $200 minimum recovery has the same effect. The bill was amended, however, to limit a treble damage recovery only to cases where the plaintiff could prove willful violation of the prohibitions, thus putting the plaintiff on a standard of proof similar to a criminal action. Provision is also made for the award of reasonable attorney fees to a successful plaintiff.

It is felt that adoption of this bill will provide Alaska with a consumer protection law which can adequately deal with the many and complex problems involved in a rapidly expanding economy and insure the preservation of business decency in the state and equity for our consumer citizens of whatever economic status.

Barry W. Jackson

Barry W. Jackson
Chairman
House Judiciary Committee

6/4/70

FREE CONFERENCE COMMITTEE REPORT
ON
FCCS 2d HCS CSSB 352

The need for and the application of this bill are discussed in the House Judiciary Committee report in House Journal Supplement No. 10 (March 31, 1970). The major differences between 2d HCS CSSB 352 am H and the Free Conference Committee substitute are that the following sections, as designated in 2d HCS CSSB 352 am H, are deleted:

AS 45.50.471(b) -- evidence of unlawful act as prima facie evidence of intent to injure competitors;

AS 45.50.501. POWER OF ATTORNEY GENERAL. -- investigatory power;

AS 45.50.511. SUBPOENAS; HEARING. -- attorney general;

AS 45.50.521. REMEDIES. -- failure to cooperate with attorney general investigation;

AS 45.50.531(b) -- temporary restraining orders without bond;

AS 45.50.571. POWERS OF RECEIVER;

AS 45.50.591. LIABILITY FOR ACTIONS OF EMPLOYEE;

AS 45.50.621. FORFEITURE OF CORPORATE FRANCHISE.

In addition, the second sentence of AS 45.50.561, ADDITIONAL PUBLIC RELIEF, (as designated in 2d HCS CSSB 352 am H) was deleted, and its first sentence was made (b) of AS 45.50.501 (as designated in the FCCS). The following sections (as designated in the FCCS) were changed as indicated:

AS 45.50.491. REGULATIONS. -- instead of the attorney general, the commissioner of commerce is given regulation-adopting authority;

AS 45.50.501. RESTRAINING PROHIBITED ACTS. -- In (a) the venue is broadened for bringing actions to enjoin prohibited acts;

AS 45.50.511. ASSURANCES OF VOLUNTARY COMPLIANCE. -- the number of proper judicial districts where such an assurance is to be filed is increased;

AS 45.50.531. PRIVATE AND CLASS ACTIONS. -- in (a) a provision is added allowing the jury to decide the award of treble damages; in (b) a provision is added requiring the plaintiff in a class action to post bond; in (f) the time limitation in which an action is to be commenced

is amended by adding a "reasonably should have discovered" clause;

AS 45.50.551(c) -- the criminal penalty of imprisonment is deleted, leaving only a fine.

It is the understanding of the committee that the phrase "installment sale" in AS 45.50.471(13) in the bill refers to installment sales contracts and transactions as defined in AS 45.10.220(9) + (10), respectively.

4/27/70

A M E N D M E N T

TO: 2d HCS CSSB 352 am H

Page 8, Line 26:

After the period, add: "Also, in an action brought under this subsection, the court may in its discretion require the plaintiff to post bond sufficient to cover costs and attorney fees which may be awarded under (g) of this section."

SB352

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

March 19, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: HCSCSSB 352 (consumer protection)

In preparing this committee substitute, H.B. 446 (the governor's consumer protection bill) was used as the basic bill. In addition to correcting citations throughout, and making minor style changes (e.g., page 1, line 9), the following changes were made:

(1) Sections 501 - 521 (investigatory powers of the attorney general) and 551 (confidentiality of information) were taken from HB 444 (the Legislative Council's consumer protection bill);

(2) Section 581(f) adds a time limitation provision applicable only to the private and class actions; such a limitation doesn't seem appropriate to the injunction section (531), or to the civil penalties relating to injunctions (section 611(a) and (b)), and the criminal action (under section 611(c)) would seem to be adequately covered by AS 12.10.010 and 12.10.020(a); a careful reading of this time limitation is suggested;

(3) Section 481(a)(13), 481(b) and 481(c) are relatively minor but possibly helpful provisions taken from HB 444;

(4) Section 591 (liability for actions of employee) was taken from CSSB 352 am; perhaps it should be limited to civil liability.

The committee may also wish to consider the following matters:

(A) In section 471(a)(5), "seconds" as defined in section 631(4) doesn't seem to fit; "seconds" can be "original" or "new";

(B) In section 631(5) "trade" and "commerce" are defined; however, I believe that the only place that "trade" is used is on page 1, line 11 and page 3, line 7, and it's used in a way that probably doesn't require a definition; I don't find "commerce" used anywhere in the bill;

in addition, the meaning of the last clause of that definition is unclear;

(C) Existing AS 45.75.220 and AS 45.80 deal, respectively, with misleading packaging and the deceptive advertising and sale of civil defense aids; amendment or repeal of these provisions may be appropriate;

(D) It may or may not be appropriate to include the following provisions which appear in HB 444: proposed AS 45.-90.020(a)(3) (exemption of actions or appeals pending on the effective date of this Act); proposed AS 45.90.-020(b) (exemption of certain trademarks, etc.);

(E) It may be appropriate to include proposed AS 45.50.530(b) and (c) (regarding the effect of violating an injunction or voluntary assurance) which appear in SB 352;

(F) In the phrase "methods, acts or practices" which appears many places in the bill, "methods" probably should be deleted because it doesn't add anything to the phrase and in many other places in the bill, including the basic AS 45.50.471, the phrase does not include it;

(G) On page 5, line 22 1/2, after the "of" the following should be inserted: "secs. 471 - 631 of".

AP:ic

File
Xerox copies
for all members
for 12 Mar

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 10, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Representative Jackson:

This is in response to the request of the Vice-Chairman of your committee, Mr. Fink, for clarification of certain issues raised with regard to the sections of HB 446 and CSSB 352 which would have the effect of suspending the holder-in-due-course doctrine, now provided for in the Uniform Commercial Code, where consumer paper is sought to be negotiated.

Section 45.50.550 of proposed House Bill 446 makes any instrument entered into between a retail buyer and seller a non-negotiable instrument within the meaning of the UCC (AS 45.05). Paragraph (b) provides that an assignee of the seller is subject to all claims and defenses of the buyer and the buyer may not agree to limit his rights.

This section is intended to modify AS 45.05.726 which provides:

> Subject to a statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee a claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith, and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under §§ 246 - 402 of this chapter. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

Under the current practice, when a negotiable instrument and a security agreement are executed by a retail buyer, under the provisions of AS 45.05.726, the buyer by executing the negotiable instrument agrees not to assert any defenses against an assignee of the paper except defenses which could be asserted against a holder in due course. In effect, the assignee becomes a holder in due course and the buyer may not assert against the assignee defenses which he would have available in an action by the seller. Proposed AS 45.50.550 removes the holder in due course protection of the assignee thus allowing the buyer to assert any defenses against an assignee which he could assert against the seller of the merchandise.

Under trade practices an assignee among others could consist of finance companies, small loan companies and state and national banks. There is no statutory conflict under state law which proposed AS 45.50.550 would affect as to any of the various types of assignees. Nor is there any statutory conflict under Federal Law, which would adversely affect national banks in the event proposed House Bill 446 was adopted.

National banks are authorized to purchase installment consumer paper. 12 U.S.C.A. § 84 sets forth the limits of liability of any person to a national bank. Paragraph 13 provides that as to full recourse negotiable or non-negotiable installment consumer paper the bank is subject to a limitation of 25% of its capital and surplus. However, this section goes on to provide if the bank certifies it has evaluated the responsibility of the purchaser of merchandise and is relying primarily on him for payment the 25% limitation is transferred from the seller of the paper to the maker.

For example, if a bank were purchasing negotiable or non-negotiable recourse consumer paper from an automobile dealer it would be limited in the amount that it could purchase to 25% of its capital and surplus. However, if the bank evaluates the responsibility of the buyer of the automobile and certifies that it is relying primarily upon him for payment that paper is not considered in the 25% limitation applicable to the dealer.

The section refers to both negotiable and non-negotiable consumer paper. The provision for certification is not limited to negotiable paper but also includes non-negotiable paper. Therefore, a statute which made all such paper non-negotiable would not change the authorization or the practice which national banks have been following.

It does, of course, because it removes a bank from the protection of a holder in due course, requires it to be a little more circumspect in purchasing paper because of the requirement of evaluating the responsibility of the buyer and certifying that the bank is relying primarily on him for payment. Or in the words of the comptroller of national banks: "What is required essentially is the responsible exercise of prudent banking judgment supported by a reasonably adequate record." (Comptroller's Manual for National Banks, May 1968, Sec. 1620(e).

Several states including California and Massachusetts have adopted legislation such as HB 446 without any noticeable effect on banks. Congress in 1959 when considering 12 U.S.C.A. § 84(13) acknowledged the necessity of including non-negotiable paper in paragraph (13) because various state laws had been enacted limiting the negotiability of consumer paper. Thus it was stated in Senate Report (No. 731) on the amendment:

> Furthermore, there has been a trend in recent years for the various States to protect consumers by adopting retail installment sales acts which specify the form which obligations covering consumer installment purchases shall take. The form prescribed is almost always nonnegotiable, and in at least some of these States the law prevents the seller of goods from taking a negotiable note in addition to the form of obligation prescribed by statute. In these States banks engaged in this type of financing must take nonnegotiable paper. (U.S. Code Congressional and Administrative News, Vol. 2, 86 Congress, First Session, page 2305.)

For the foregoing reasons, it is the opinion of this office that enactment of the sections on non-negotiability of consumer paper will not have any noticeable effect upon legitimate and good faith commercial transactions. On the other hand, passage of the measure will accomplish a substantial benefit to Alaska's consumers as was explained in our previous memorandum, (See letter to Hon. Tom Fink, Feb. 9, 1970 pp. 3-6) by requiring the purchasers of consumer paper to be more selective in choosing businesses from whom they purchase paper and in policing the activities of the businesses with whom they do choose to deal.

It may be appropriate here to discuss one further point concerning the various approaches to the provision in question. The language of the provisions in HB 446 and CSSB 352 are quite similar to the draft developed by the Committee on State Legislation. (See Suggested State Legislation 1970, The Council of State Governments.) In drafting the provisions both alternatives of the UCCC (SB 211) on the subject were considered but found to be less acceptable than the language of the present bills. SB 211 chose alternative "A" of the UCCC which provides that the rights of the consumer can only be asserted as a matter of defense to or set-off against a claim by the holder of the paper. Under that provision then the consumer has no rights unless the holder sues the consumer. In the commentary on the language here it was stated:

> This would allow continuation of threats to, and impairment of, a consumer's credit rating which result from harassing collection tactics sometimes used without any actual litigation being undertaken against the consumer. (p. 5 of Reprint)

Thus it is felt that though the effect of either approach is aimed at the same problem the legislation under consideration here is superior to that of the UCCC.

I hope these remarks have been of help to you in your study of this provision.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By
Donald J. Beighle
Assistant Attorney General

GKE:DJB:agm

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 9, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Mr. Jackson:

On March 7, 1970 I was honored to attend a session of your committee in which the various consumer fraud bills were being considered.

At the time of that meeting I indicated that this office had been accumulating a large volume of material dealing with consumer matters and laws on both the state and federal level. You asked if I would forward some of that material to you for your perusal.

In response to that request I am enclosing a small sampling of the material in our files. Much of the material would not be particularly useful to your committee in its study of these bills, but I would be delighted to forward all such files if you wish.

I hope this information will be helpful to you.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

GKE:WES:agm
Enclosures

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 17, 1970

The Honorable Tom Fink
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Fink:

On February 9, 1970 you were sent a letter in which the three consumer fraud bills now pending before the legislature were compared in some detail. Since that time one of the bills, SB 352, has been altered in several important points and this letter is to insure that you understand that the previous letter from this office was concerned with the original bill and not the substitute CSSB 352.

Though the substitute bill incorporates some of the features of the governor's bill (HB 446) it now appears to bear more relation to the Legislative Council proposal (HB 444) than to the former bill. Like HB 446, the substantial investigatory powers of the Attorney General are deleted. However, CSSB 352 goes even further in that it also has removed the power of the Attorney General to make regulations. The importance of this feature was expressed in our previous letter and its absence in a final law would be detrimental to the enforcement branch and the legitimate businessman as well.

The signal change in the substitute bill is the removal of any criminal sanctions from the bill which places it in the same category with HB 444 and leaves the governor's proposal the only bill providing for criminal actions. It is felt that the effectiveness of a consumer fraud law not containing provisions for criminal proceedings would be drastically reduced and would be far out of line with other state provisions and practices. In addition to removal of criminal penalties, it must be noted that the substitute reduces the civil sanctions and no longer provides for punitive damages. In short the substituted bill has had its teeth almost entirely drawn.

CSSB 352, you will note, has added the sections with which your subcommittee was most interested, dealing with consumer paper. This addition, identical to the governor's bill, seems to be a recognition of the importance of taking consumer paper out of the holder-in-due-course doctrine presently provided by the UCC.

Thank you for your patience in this matter. I hope that these supplemental comments will be of help to you.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

GKE:WES:em

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 9, 1970

The Honorable Tom Fink, Chairman
Subcommittee on Consumer Fraud
House Commerce Committee
Sixth State Legislature
Juneau, Alaska 99801

Dear Representative Fink:

This is in response to your request for a comparison of HB 444, the proposed consumer fraud bill of the Legislative Council, and HB 446, the Governor's bill on the same subject.

For your information, also included in the analysis is SB 352, the only other comprehensive consumer fraud bill now pending before the legislature, and which was introduced by Senator Terry Miller.

For convenience, the bills have been broken down into several particular areas so that the parallel features of the bills may be scrutinized separately.

I. Prohibited Acts.

(HB 446, pages 1 and 2 to line 22, page 6, lines 7-26)
(HB 444, pages 1, 2 and 3 to line 19)
(SB 352, pages 1 and 2 to line 28)

All of the bills in question are quite similar in their coverage of consumer fraud down to the ninth and tenth subsections, though there are a few minor changes. Subsection (1) of HB 446 contains language which was felt to be more specific than the term "pass off" used in the other bills, though all the subsections (1) contain language which specifically outlaws the age-old fraud of passing off consumer goods. Subsection (3) of the Governor's bill is essentially a combination of subsections (2) and (3) of the other two bills. [Note: The "of" in line 21 is a typographical error and should have been "or". This subsection must be amended accordingly in order to make sense.] Subsections 2, 4, 5, 6, 7, 8,

9 and 10 of HB 446 are all included in HB 444 and SB 352. The latter two bills contain a subsection (11) which is not included in the Governor's bill. This section sets out a specific fraud which, though not covered specifically in HB 446 would be actionable under its subsections (11) and (12).

Subsections (11) and (12) of HB 446 are not included in either of the other bills nor are there similar provisions in the other proposals. Subsection (11) requires that one be damaged by the fraud but does not require intent while subsection (12) states that the deception would be actionable "whether or not" damage has occurred but requires intent. Combined with the power to make regulations (see below) these sections are potentially very valuable and would enable the enforcement official (the Attorney General in all bills) to reach all forms of practice which are unfair or deceptive to consumers. As such, it is felt these subsections provide more complete and comprehensive protection to the public against all of the various trade practices which unfairly injure or are calculated to injure consumers.

An important difference between the prohibitions in the Governor's bill and those in the other bills is the lack, in most sections, of an intent, or knowledge requirement to constitute a violation. It would appear that a few of the prohibitive acts in the other two bills do not require the element of intent either. For an instance, subsection (4) of both HB 444 and SB 352 does not refer to intent or knowledge. Likewise, subsection (12) of both bills appears not to require the element of scienter. The position that the element of intent not be required to constitute a violation in the Governor's bill is similar to that taken by several states (for instance Texas) and recognizes the essential nature of the activity sought to be prohibited as a fact accomplished, i.e. that someone has been damaged. This is especially true in any civil action where intent or knowledge has no part in such litigation for the salient point here is whether or not a person has been damaged. It is the position of this office, therefore, that the element of intent should not be included in the prohibited acts but if it is so included in the final bill intent should not be required in any civil action and that in a criminal action there should be an evidentiary presumption, rebuttable by the defendant, that the act was done with intent.

HB 444 contains several subsections which are not in either the Governor's bill or the Senate bill. To-wit, subsections (13), (14) and (15) are unique to the council proposal. In inverse order, (15) would appear to be covered at least by (6) of the same section, (6) of SB 352 and (5), (11) and (12) of the Governor's bill. Likewise, the prohibition against 'bait and switch' advertising in (14) of HB 444 would probably be covered by (9) of the same section, (9) of the Senate bill and (8), (11) and (12) of the Governor's bill. This section includes the advantage of clear, specific prohibitions but may prove to contain loopholes or allow their creation by the imaginative and ever alert mind of the swindler. Subsection (13) of HB 444 again sets out a specific prohibition which is not included in either of the other bills. It is not precisely clear on the face of the subsection as to what transactions it might cover but may prove to be a useful addition to the prohibited acts section.

Both HB 444 and SB 352 contain identical subsections (b) and (c) which are not included in HB 446. It is not apparent what the specific purpose of subsection (b) is. It is probable that this subsection is aimed at giving an evidentiary advantage where there has been consumer fraud, to one either prosecuting or seeking damages in an anti-trust action, as it refers to injuring competition and competitors. Since, at the time the bill was drafted Alaska had no anti-trust provisions or proposed bills, it was not included in HB 446. However, the intent of the subsection may have been to aid in litigation begun under the several federal anti-trust laws, and may have value as such in the final bill. Subsection (c) was not considered necessary in HB 446 in light of AS 01.10.010 which makes the common law applicable in Alaska where it is not contrary to the State or Federal Constitutions.

A major provision which appears in the Governor's bill, but which does not appear in either of the other proposed bills, is the section on the non-negotiability of certain consumer paper found on page 6, line 7 of HB 446. A similar provision is still pending before the legislature in HB 362, though the technical statutory approach is somewhat different because that bill actually amends the Uniform Commercial Code. The Uniform Commercial Code presently permits a waiver of defense clauses in commercial transactions and the execution of a negotiable instrument is made equivalent thereto, but, in

effect, cedes to each state the power to set its own policies with respect to their use. Thus, in AS 45.05.726(a) the code permits the waiver of defenses "Subject to a statute or decision. . . . " The section of HB 446 presently under discussion would constitute the statute to which this section would refer. This section is intended to reach only paper which is described as negotiable for the purposes of AS 45.05.726(a) for it is this section that automatically forces a waiver of defenses agreement on a buyer signing a negotiable instrument. Thus, it is clear that many types of paper transactions in the consumer market would not be covered by this provision.

Present Alaskan law works a genuine hardship and great injustice on consumers in the state when it permits the transferee of consumer paper to cut off the consumer's defenses. When one buys goods it is his reasonable expectation that if the vendor does not live up to his end of the bargain, he, the consumer, may refuse to pay. In actual fact, however, he very often finds that the note has been assigned away to a third party with whom he has not dealt and of whom he may have never heard, and he is left only with a cause of action against the seller which, assuming the presence and solvency of the seller, means an expensive and time consuming law suit.

There is a considerable and increasing use of the holder of the due-course-doctrine in Alaska for fraudulent purposes. Very often a group moves in, makes a fantastic offer to consumers which is never intended to be fulfilled, takes a note for the products or services, negotiates it, and skips the jurisdiction before anyone even realizes they have been taken. As a practical matter, the consumer has no recourse, least of all against the holder of his note to whom he is legally liable. Very often it is impossible for law enforcement officers to stop the dishonest or sharp dealer before the damage is done. However, an essential part of any such scheme is the sale of the paper taken. If the institutions who close their eyes to the people with whom they are dealing realize that it is they, not the consumer, who will be left holding the bag, the incidence of consumer fraud of this nature will decrease markedly.

It may be noted that the Uniform Consumer Credit Code (U3C) also takes a dim view of negotiable consumer paper, and offers the legislature another alternative in accomplishing the objective sought in the present section, as the U3C has been introduced as SB 211. One of the stated aims of the

U3C in deciding what credit or practices to prohibit or limit, was to insure that there were very real and corresponding benefits to the consumer because of the recognition that restrictions on rights of creditors could lead to higher credit costs and interest rates (see N. Butler, Summary of the Uniform Consumer Credit Code 3, 1968). One of the very first practices outlawed by the U3C was the use of negotiable promissory notes and consumer sales (see 4.850 UCC4, in SB 211, page 46, line 29). The code also contains two alternative proposales as to the question of defenses and their waiver by the buyer as to an assignee of a consumer contract.

Obviously, the thrust of all these proposals is to curtail the abuse of the holder-in-due-course doctrine presently provided under the UCC, as noted above. The purpose of this doctrine is, of course, to insure, as far as it can, the free flow of commercial paper and to encourage investment. The supposition of the typical holder-in-due-course incident is that there are two innocent parties: the obligor who has been wronged by the obligee, and the assignee who took the note from the obligee without notice of the defense. The law, by favoring the holder of the note, seeks to keep the paper moving and relieve the anxieties of prospective transferors. However, the code, as noted, recognizes the difference between consumer paper and other loans, though it allows the local law to determine what the consequences of the distinction, if any, shall be. (It is interesting to note that the UCC originally sought to deny third party freedom from defenses in the case of consumer goods [Uniform Commercial Code § 9-2061 (1952 version)] which version was originally adopted in Pennsylvania.)

One question to be asked and answered, therefore, is whether the holder in due-course-doctrine, as applied to consumer paper, is really having this classic effect on the money market. It is submitted that it does not. Consumer paper passes from dealer to financer as readily in states that subject the assignee to defenses as in states that do not. The possibility of consumer defenses is merely one of several risks taken by the assignee and the price he pays for the paper and the recourse or reserve arrangement he makes with the dealer are considered at the time the paper is negotiated. Consumer paper is not typically sold between financial institutions (saving perhaps some bulk transfers in which the

second assignee is probably indifferent to the defenses of individual consumers) but if bought directly from the dealers, and it is here that the crux of the situation may be seen most clearly.

Without question the financial institution who is in the consistent practice of buying paper from particular dealers is in the best position to police his retail activities; presently, however, he has no reason to do so. By making the financial institution subject to the defenses of buyers, however, the effect will be to make those institutions put pressure on retailers to improve shoddy or dishonest dealings and force them to examine more carefully the paper sought to be sold by fly-by-night businesses. Moreover, what is the social or economic policy of allowing a financial institution to deal with a disreputable dealer and then stand free of liability while the consumer bears the loss?

There is the possibility that the increased protection afforded by requiring buyers of paper to be a bit more selective in their purchases and by making them subject to the defenses of consumer notes will result in some increased credit costs. However, the small increase, if any, is justified by the amount of lost consumer dollars in personal financial difficulties that may be avoided by this legislation. Moreover, there are aspects of this section which may actually decrease the cost of credit which cannot be ignored; notably the reduction in personal bankruptcies and increased percentages of collections from satisfied customers.

II. Exemptions and Exceptions.

(HB 446, page 2, line 24 to page 3, line 5)
(HB 444, page 3, line 20 to page 4, line 6)
(SB 352, page 2, line 29 to page 3, line 12)

All three bills contain common exceptions and exemptions in subsections (1) and (2), HB 446 and SB 352 being almost identical. These two exceptions are almost always provided in the similar state laws regarding consumer fraud and are considered necessary to protect the parties concerned. It must be noted that HB 444 does not repeal, as do the other two bills, the present sections on false or misleading advertising which contain a provision (AS 45.50.490(b)) similar to all the subsections (2). The retention of this exception in HB 444 presumably is to insure that it will apply to both the civil actions it provides and the criminal actions in the present law.

HB 444 also contains a third exception dealing with a pending action and appeals, and a fourth dealing with trademarks and tradenames used prior to the effective date of the statute.

III. Investigatory, Regulatory, and Subpoena Powers of the Attorney General.

(HB 446, page 3, lines 6 and 7)
(HB 444, page 4, lines 7 to page 5, line 24)
(SB 352, page 3, line 13 to page 5, line 1)

One of the most marked differences between the Governor's bill and the other bills is the inclusion in the latter of very broad powers of investigation centering in the office of the Attorney General. Most of the states enacting this type of legislation have included these powers and they have apparently proven to be a useful enforcement aid primarily in states where court calendars are very crowded and immediate judicial action is difficult or impossible to obtain. It was felt, at the time 446 was drafted, that these extraordinary powers were not necessary to the enforcement of the act for several reasons. At this time, court calendars are not generally so overcrowded in Alaska as to make it difficult to hear motions for restraining orders or injunctions nor are the offices of the Attorney General so far distant from the court rooms that it would be impossible or inconvenient to act quickly in the necessary case. In addition, the relative isolation of the state combined with the relatively small population tends to discourage the fly-by-night or fast moving operator for whom most of these extraordinary powers are required from using Alaskans as his 'dupes'.

It must be noted that the powers granted by these two bills are both exceptional and substantial. The Attorney General, if these provisions are understood correctly, may upon his belief that some deceptive practice is or has taken place, (1) make the person in question file a detailed report in writing and under oath, (2) examine and cross-examine the person, (3) examine the property, records, books, and documents, (4) make copies of any of the above. The only investigation over which a court has any authority apparently is where the Attorney General wants to impound a sample of the property. In addition to these powers the Attorney General may issue subpoenas on his own power. These powers are reinforced by remedies against those refusing to cooperate in the investigation.

Should the legislature decide to include these powers in the final bill, the following general comments are offered for your consideration. SB 352 has identical powers to HB 444. However, it does not contain the safeguards against their abuse as does the latter bill (see HB 444, page 7, lines 5 to line 28). HB 444 recognizes the constitutional problems of self-incrimination which would be inherent in using material directly or indirectly uncovered as a result of an investigation conducted with these powers in any criminal action. (Though it must be noted that HB 444 provides for no criminal sanction.) The powers would, of course, be invaluable in opening up a violator to civil damages or injunction but their aid in convicting a person of a crime is doubtful. This distinction should be made where the broad investigatory powers are provided.

Likewise, HB 444 recognizes the possible abuse of the powers in question by requiring discovered material to be kept confidential. This protection will prevent persons from being pilloried in newspapers, stigmatized, or otherwise attacked unless the Attorney General, in his investigation has found evidence substantial enough to justify litigation. In this line of thought, some consideration might be given to the protection of trade secrets, secret trade information, or other privileged matter. Some states (Massachusetts notably) require that the demand for information shall not contain any requirements which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court. Further court control could be obtained by providing for a motion by the person of whom the information is requested to extend the period of time or even satisfy the demand for good cause. In addition, some consideration should be given to the time and place that such information could be demanded (regular business hours, regular place of business, etc.).

It should be noted here that all three bills allow for regulatory power in the office of the Attorney General. This provision will enable the Attorney General to pinpoint specific schemes and rackets by regulation so that there can be no mistake as to what acts are prohibited. It is an important and useful tool in insuring that comprehensive and effective protection is afforded the public in consumer matters and the provision which will allow in the long run greater fairness to the business man by outlining prescribed conduct with precision.

IV. Restraining Orders, Injunctions, Voluntary Compliance.

(HB 446, page 3, line 8 to page 5, line 3)
(HB 444, page 5, line 25 to page 7, line 28)
(SB 352, page 5, line 2 to page 6, line 12)

Any law seeking to regulate such a sensitive area as consumer fraud requires that a broad spectrum of ways to deal with violators, whose activities may range from borderline to flagrant, be available to the authority charged with enforcement. Though the development of a body of effective regulations as to what specific acts are prohibited will go a long way toward putting the business man on notice as to what activity is prohibited, the use of assurances of discontinuance or voluntary compliances are particularly useful in cases where an honest business man unwittingly may have used a practice that could be considered deceptive. As a practical matter, long standing usages by businesses or industry which would be illegal under a new law may continue unnoticed and such cases should not necessarily be brought into court though something beyond a specific warning may be needed. Also, the use of this device will aid the enforcement officers and courts by giving an alternative to actual litigation for every use of deception. The provisions for voluntary compliance in HB 444 and SB 352 are substantially the same except that the latter adds a subsection (c) (page 6, line 8) which would seek to make a violation of the assurance prima facie (rebuttable) evidence of the violation of the law in civil actions by the Attorney General. This provision attempts to overcome the shortcoming of the voluntary assurance that if it is violated the Attorney General must proceed as if it had never been made.

The Governor's bill does not include it, as do the other bills, the provision for the voluntary payment by the alleged violator of investigative costs or damages on a stipulation to the assurance. This section does not appear to add a great deal to the bill because unless such an agreement were specifically prohibited by statute it could always be entered into regardless of its mention in the consumer fraud bill. Moreover, the Governor's bill does contain substantial provisions for private recourse, and in no way would prohibit this payment which is stated to be voluntary.

The power of the Attorney General to seek injunctions, whether permanent or temporary is common to all three bills and

is a valuable and traditional tool of enforcement and one which we believe is essential to effective enforcement of a deceptive trade practice act.

V. Penalties.

(HB 446, page 6, line 27 to page 7, line 20)
(HB 444, page 7, line 29 to page 8, line 13)
(SB 352, page 6, line 13 to page 7, line 9)

SB 352 and the Governor's bill both provide for criminal sanctions for a violation of the act. HB 444 in marked contrast does not provide for any criminal sanctions. It is submitted that criminal sanctions are often the only way to deal with the purveyors of consumer fraud and that any bill without them would be of little help in actually curbing the incidents of consumer fraud in Alaska. A bill providing only civil penalties seems to assume that the victims of fraud are intelligent middle class individuals who are all aware of their rights, are familiar with and at ease in the courts, and are willing to bring actions to enforce their rights. Many times the persons hardest hit by these frauds are the poor, the illiterate, the feeble, the old, immigrants, the unaware, the unintelligent, and others who need to be protected from the unscrupulous. We are rarely concerned in these laws with the brilliant confidence artist who executes a multi-million dollar stock swindle against the financial wizards of Wall Street; we are talking here about individuals who take advantage of people who are already disadvantaged and prey upon the weakest members of our society. This is criminal activity and should be treated as such.

It is the apparent theory of HB 444 that the present criminal law is sufficient to protect the general public. The only additional public protection afforded by this proposal is the ability of the Attorney General to seek an injunction, which, if broken, could result in a civil penalty of up to $10,000. In other words, the purveyor of fraud has nothing to lose by engaging in fraudulent acts. Even if the Attorney General identifies him, seeks and obtains an injunction, (or assurance of discontinuance) the defrauder has lost nothing. He is free then to find another racket in which to engage so long as the court's order is not violated. The only fear under HB 444 would be from civil suits of those who are aware of the fraud, can prove damage, and are willing to prosecute

their cases. However, as noted below, these civil claimants are given no evidentiary advantage and no specific provision for punitive or treble damages. Moreover, it is difficult to imagine a defrauder entering into an assurance of discontinuance with the Attorney General if the most than can be done is to get an injunction against him. The lack of criminal sanctions negates the use of this manpower saving tool. In short, the bill contains no real deterrent to fraudulent practices and next to no way to punish those who do engage in fraud. HB 444, despite its extensive and carefully drawn provisions prohibiting acts, providing for investigations, etc., will, in fact, change very little the present law which is inadequate to deal with the mounting incidence of consumer fraud in Alaska.

In comparing HB 446 and SB 352, it is notable that upper limit of the fine in the latter is $1,000, while in the former it is $10,000. Both provide for one year imprisonment. It is submitted that the fine will be used much more extensively by the courts than the jail sentence and that a $1,000 fine is an insufficient deterrent to the crimes set out in these bills. Consumer fraud is big business and $1,000 to many of these organizations would be a mere slap on the wrist, and easily written off as a 'business expense'. In addition the civil penalty limit for violation of a court order in SB 352 is only $10,000 as compared with $25,000 in the Governor's bill. Obviously these upper limits are not aimed at small operators but at the large, nation-wide organizations who may be well heeled and may retain 'house counsel' or other advantages.

All of the bills provide for private civil actions but again HB 444 is considerably less helpful than the other two bills. It provides only for actual damages where, in the proper case, the other bills would allow punitive damages (SB 352) or treble damages (HB 446). It does not specifically provide for class actions; nor does it give the evidentiary edge (prima facie) to private litigants where there has been a permanent injunction or final judgment as does the Governor's bill in subsection (e) of 45.50.540 (page 6, line 2). This point is not a minor one for in consumer fraud cases the main difficulty in getting a judgment is the investigation and accumulation of evidence which can be prohibitively expensive. Neither HB 444 or SB 352 provide for this feature. The deletion of this evidentiary advantage is particularly damaging to HB 444 which relies only on the Attorney General's ability to get an injunction and the possibility of private civil recovery for sanctions.

Allowing for private civil actions in a consumer fraud law is extremely helpful to the enforcement agent because it has the effect of making the law 'self-enforcing' to a degree, and especially with regard to the smaller or occasional claims. As a general rule, every such case which is brought by a private party means one less that must be prosecuted by the state. The enforcement officer is thus freer to investigate the professional or organized operations which are of important public concern and which may be prevented before they begin. In addition, it must be noted that the civil action gives the injured party a chance to recover his damages.

In our opinion the Governor's bill and, to the extent applicable, SB 352 are more sensitive than HB 444 to the need for a wide range of alternatives for enforcement. It includes higher limits for violation of orders or injunctions; it provides for a civil action by the state and class actions by injured groups; it provides for revocation of a corporate franchise as a proper case; it provides for a receivership where the court deems such extreme action necessary; and it recognizes the ability of private actions to aid in enforcement.

VI. Definitions.

(HB 446, page 7, line 21 to end)
(HB 444, page 8, line 15 to end)
(SB 352, page 7, line 10 to end)

In HB 444 "person" seems unnecessary in light of AS 01.10.060(7).

I hope these observations have been of help to you in your study of this important legislation. If you have questions concerning it, please do not hesitate to contact this office.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

GKE:WES:agm

AMERICAN RETAIL FEDERATION

1616 H STREET N.W., WASHINGTON, D.C. 20006

Basis of HB446

August 20, 1969

TO: STATE ASSOCIATION EXECUTIVES

FTC URGES STATES TO ENACT "UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW"

The Federal Trade Commission has renewed its recommendation originally made in 1966 that the states enact laws to protect the public from deceptive and unfair trade practices. The recommended legislation which is similar to language contained in Section 5 of the Federal Trade Commission Act, would enable the Attorney General or some other designated state official to investigate and obtain court injunctions with respect to unfair methods of competition and unfair or deceptive acts or practices in trade or commerce.

This year's draft, contains a provision authorizing the court to decree restitution of money or property to anyone who suffers damage from unlawful acts or practices, to appoint a receiver or revoke a license or certificate for doing business. Provision is also made for injured parties to initiate suits for the recovery of their own damages as well as losses sustained by others who have been similarly damaged and for payment of attorney fees and court costs. FTC chairman, Paul Rand Dixon, in discussing the current proposal, stated that ordinarily the amount involved in the consumer transaction is not sufficient to warrant bringing private suit, with result that thousands of consumers suffer small losses without any remedy being available. Under the new proposal, minimum relief of $200 is authorized and the court may, in its discretion, award up to three times the actual damage.

Another new section added to the model law this year, is designed to eliminate the holder-in-due-course doctrine for

consumer installment transactions. The section provides that a consumer's promisory note or other evidence of debt is different from ordinary commercial paper and if it is transfered to a finance company or other third party, the consumer may assert all the defences against the note holder that he would have asserted against the original seller or lessor of the goods or services. The Commission feels that eliminating the holder-in-due-course doctrine for consumer installment transactions will help to eliminate consumer deception and the hardships which consumers suffer as a result of high pressure selling methods.

The Council of State Governments has endorsed the draft recommended by the Commission with three changes:

1- in the prefatory explanation regarding the limitation of the holder-in-due-course doctrine, the Council added a footnote reminding state legislatures to consider this change in conjunction with the Uniform Consumer Credit Code;
2- in the civil damage section, the Council changed treble damages to punitive damages; and
3- the Council deleted the section which would have provided criminal penalties. This was done on the motion of a member who expressed the view that their inclusion would unduly complicate and delay investigation under the law, and that state criminal fraud laws are already more or less adequate, the great need being for a law which provides civil procedure and remedies.

Douglas R. Gordon
Manager, Government Affairs Division

Suggested Legislation

(Title should conform to state requirements. The following are some suggestions: "An Act to prohibit unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"; "Unfair Trade Practices and Consumer Protection Law"; or "Buyer Protection Act".)

(Be it enacted, etc.)

Section 1. Definitions.

As used in this Act,

(a) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(c) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.

Section 2. Unlawful acts or practices.

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 3:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

(1) passing off goods or services as those of another;
(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) using deceptive representations or designations of geographic origin in connection with goods or services;
(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparaging the goods, services, or business of another by false or misleading representation of fact;
(9) advertising goods or services with intent not to sell them as advertised:
(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or
(13) engaging in any act or practice which is unfair or deceptive to the consumer.

Section 3. Interpretation.

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the

Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended; and

(b) The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1)), as from time to time amended.

Section 4. Exemptions.

Nothing in this Act shall apply to:

(a) Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this State or the United States (or the state fair trade law).

(b) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

Section 5. Restraining prohibited acts.

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice, upon the giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 13 of this Act and at least three (3) days before the hearing of the action. The action may be brought in the (trial court of general jurisdiction of the county or judicial district) in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

Section 6. Additional public relief.

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Section 7. Powers of receiver.

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 8. Private and class actions.

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200 whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a) of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section five of this Act shall be prima facie evidence in an action brought under Section eight of this Act that the respondent used or employed a method, act or practice declared unlawful by Section two of this Act.

Section 9. Non-negotiability of consumer paper.

(a) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument or evidence of indebtedness shall have printed on the face thereof the

words "consumer paper," and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code -- Commercial Paper.

(b) Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this Section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall subject the seller or other responsible person to appropriate civil and criminal sanctions as provided in this Act.

Section 10. Assurances of voluntary compliance.

In the administration of this Act, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of (trial court of general jurisdiction of the county or judicial district) in which the alleged violator resides or

has his principal place of business, or the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to Section 5.

Section 11. Investigation.

(a) When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the (trial court of general jurisdiction of the county or judicial district) where the person served with the demand resides or has his principal place of business or in the (trial court of general jurisdiction of the county or judicial district) where the State Capitol is located.

Section 12. Subpoenas, hearings, rules and regulations.

To accomplish the objectives and to carry out the duties prescribed by this Act, the attorney general, in addition to other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to

any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the attorney general or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 13. Service of notice, demand or subpoena.

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(a) Personal service thereof without this State; or

(b) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(c) As to any person other than a natural person, in the manner provided in the (rules of civil procedure) as if a (complaint or other pleading which institutes a civil proceeding) had been filed; or

(d) Such service as a (trial court of general jurisdiction of the county or judicial district) may direct in lieu of personal service within this State.

Section 14. Enforcement of investigative demands.

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a (trial court of general jurisdiction of the county or judicial district) and, after hearing thereon, request an order:

(a) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(b) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(c) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 15. Civil and criminal penalties.

(a) Any person who violates the terms of an injunction issued under Section 5 of this Act shall forfeit and pay to the State a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the (trial court of general jurisdiction of a county or judicial district) issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the State may petition for recovery of civil penalties.

(b) In any action brought under Section 5 of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 2 of this Act, the attorney general, upon petition to the court, may recover, on behalf of the State, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation.

(c) Any person who engages in a fraudulent course of conduct declared unlawful by Section 2 of this Act shall, upon conviction, be fined not more than five thousand dollars ($5,000.00), imprisoned for not more than one year, or both, in the discretion of the court; provided that nothing in this subsection shall limit any other provision of this Act.

(d) For purposes of this Section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 2 of this Act.

Section 16. Forfeiture of corporate franchise.

Upon petition by the attorney general, the (trial court of general jurisdiction of a county or judicial district) may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under Section 5 of this Act.

Section 17. Duties of County and City attorneys.

It shall be the duty of the County and City attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions pursuant to this Act, or, the County or City attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general; provided that if an action is prosecuted by a County or City attorney alone, he shall make a full report thereon to the attorney general, including the final disposition of the matter.

Section 18. Severability.

If any provision of this Act is declared unconstitutional, or the application thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

Section 19. Effective date.

(Insert effective date.)

PROPOSALS FOR STIMULATING COMPETITION AS AN AID TO LOW-INCOME CONSUMERS IN THE INNER CITIES

Studies conducted by the Federal Trade Commission indicate that low-income consumers in the inner cities pay more for food, furniture, clothing and other necessaries, due in large part to lack of competition among retailers in those areas.[1/] The Commission is convinced that to break the cycle of poverty and despair in these areas, one important corrective action needed is the restoration of competition which would give these consumers opportunity to purchase quality goods at fair prices.

Competition in the low-income market areas of the inner cities can and must be revived by encouraging new entry of business firms and by improving the efficiency of firms now there.

The Federal Trade Commission accordingly recommends that the appropriate agencies of Federal, State and local government take action designed to stimulate competition in low-income areas of the inner cities. The following specific proposals are made:

(1) That subsidies, low-cost loans, insurance guarantees or tax incentives be granted to firms entering the low-income market, including special incentives for the local resident who wishes to start a business in the low-income market;

(2) That existing management and clerical training programs for residents of low-income areas be expanded and new ones established;

(3) That educational programs for low-income market retailers be established to enable them to run their

1/ F.T.C. Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (March 1968), F.T.C. Report on District of Columbia Consumer Protection Program (June 1968), and Record of F.T.C. National Consumer Protection Hearing (November-December 1968). An F.T.C. report to be published in 1969 on food chain selling practices in the District of Columbia and San Francisco areas is expected to contain similar findings.

businesses more economically and efficiently and to pass the savings on to consumers;

(4) That improved and expanded educational programs be designed to stimulate the low-income consumer to comparison shop, to seek reasonable credit terms, and generally to allocate his scant resources more wisely, and to look for assistance instead of remaining silent when he is bilked;

(5) That the feasibility of federally financed (or private) insurance programs to protect from undue losses retailers extending low-cost credit to residents of low-income areas be investigated.

The Commission believes that immediate and dramatic steps like these are necessary if vigor is to be restored to the low-income market and if low-income consumers are to be assured the same benefits of competition that their affluent neighbors take for granted.

SEPA.. E STATEMENT OF COMMISSIONER MACINTYRE

Subject: Council of State Governments -- Federal Trade Commission's Suggestions for State Legislation Regarding Holder-in-Due-Course Doctrine.

It is my view that the Commission, before making a recommendation on this particular subject, should await its analysis, review, and consideration of the record of its National Consumer Protection Hearing.

Therefore, I am reserving my judgment and decision on this subject until the consideration of it is completed as I have indicated and the Commission makes a report on its Consumer Protection Hearing.