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is not carried forward here. It is possible to form a corporation in Alaska which is every bit as straightlaced as a corporation mandated under California law. That is a value judgment that citizens can make. It is not a value judgment that the legislature would be making for you. Now with regard to Article 4 on corporate finance, Here Alaska law was deemed to be flawed in a manner that is true of virtually every state. Lawyers, at least in my experience of being one and teaching others for a longer period of time than I like to recollect, generally make a career decision to go into law sometime after they learn that they have no aptitude whatsoever for arithmetic, let alone mathematics. The consequence is that most lawyers cannot, including myself, balance a checkbook. And lawyers are horrified by concepts of accounting. Therefore, over the years we have sort of developed our own accounting techniques. Because over the years we have had perhaps a bigger voice than we should have whispering in the ears of elected representatives and people, our versions of the myths of accounting rather than the accounting profession have begun to creep into the law. Alaska's current corporation law suffers from perhaps a terminal case of lawyer-accounting terms. One of the major things which corporations must worry about if they are to behave in a socially responsible manner, since they are given the presumption of limited liability. If I form a corporation, my creditors and even victims of calamaties such as torts must look only to the assets of the corporation, not to my own personal assets. Circumstances are important to the state, all people who come into contact with corporations. Well, then what assets must I leave with the corporate entity? What accounting principles must I observe in keeping the books of the corporation? The law has always been interested in this question. But the problem is that we allowed a gulf to grow between what the law seemed to be suggesting and what accountants were telling people are the intelligent way to parse through matters and to resolve them on the books and records of a corporate entity. California broke new ground in 1977 when it said that it would abolish all concepts of legal accounting. It would substitute some straight, common sense ideas as to when a corporation could pay a dividend. A corporation could pay a dividend within the discretion of the board of directors at any time so long as the assets of the corporation equal the liabilities of the corporation with the protective ratio of $5.00 in assets to every $4.00 in liabilities. A very simple concept to understand. There are no longer reduction surplus, earned surplus, all of the notions which lawyers have invented over the years. It's a very simple idea. If we are going to make distribution, whether we make it in money, whether we make it in corporate property to shareholders, we have what is called the ratio of assets to liabilities which must be maintained. This bill adopts what is turning out to be one of the most successful decomplications of corporate life which was done in California. It also follows both

California and now New York in saying that in complying with the law, that so long as a corporation keeps its books and records in a manner which reflects generally accepted accounting principles, he has complied with the law. So we leave to the accounting profession and not to my brothers and sisters-in-law the determination as to what is the best way for that craft and science to proceed to advise. So accounting is left to accountants, but we make a simple value judgment to protect people. It's this ratio of liabilities to assets. Five dollars in assets to four dollars. You can make any distribution you want so long as you do not go below that floor. That, I think, will make it much easier for people determined to comply with the law to do so and make the detection of those few people who are determined to evade the law much easier. Now with regard to Article 5, a major question has been in existence for many years. What are the proper prerogatives of shareholders as opposed to the directors and officers of the corporations? Is it to be an Athenian democracy, or is the better model that you elect the directors and you vest control and management of the corporate entity during the period of tenure of their terms in the individuals? Article 5 has a default provision that the powers of control and management of the corporation are vested in the board. However, a corporation may by the terms of its articles modify this presumption and confer greater prerogatives upon shareholders. If it is going to do that, however, it must do it by an affirmative provision in the articles of incorporation. The thrust of Article 5 is to ensure that shareholders have acess to reliable and up-to-date information as to the condition and record of accomplishment or failure of the people they have elected to be the directors of the corporation. You will notice that for the first time we would standardize notice requirements. Under current law, one of the defects is that we have no standardization of notice requirements. For certain matters, 30 days' notice is sufficient. For others, 40 days is required. Under this bill, notice requirements are standardized, and it should make people who are determined to evade it much easier to ferret out. So again the act reflects the commission's value judgment that the basic policy or power between shareholders on the one hand and directors on the other that the act should specify what should be that ratio or relationship if the parties don't wish to change it. But if they do wish to make a different arrangement, if they put it in the articles they are free to do so. Article 6 deals with the prerogatives and responsibilities of officers and directors. Here I think you'll be very pleased to see that for the very first time we have a statutory definition of the duties of care and duties of loyalty which directors and officers are expected to obey. At the present time in Alaska, it would be a matter of conjecture what the Alaska Supreme Court would eventually say with the content of those important duties. This makes it difficult for an individual who is embarking upon the career of

being a corporate director, perhaps out of accommodation to friends, and many small corporations know exactly what it is I am expected to do, a peril of later on being held accountable for not having done it. Another important feature of this bill which has received wide support by those people who have read it, is Section 435. Section 435 for the first time in Alaska subjects shareholder derivative causes of action to statutory regulation. Alaska presently has the dubious distinction of being one of two American jurisdictions which has no statutory regulation of the derivative suit. This is a suit in which a shareholder comes forward and brings a cause of action that alleges that not I, the shareholder, have been injured but that the corporation has been injured. And I as a shareholder appoint myself to litigate this matter on behalf of the corporation. The tension between the prerogatives of the incumbent directors of the corporation to make that decision and to control that litigation and the rights of a shareholder to say that I am going to elbow my way into the pilot's seat in this plane for the next several years, is a very important one because it may be that there is corruption at the board level. Maybe there is not. I urge your very careful attention to Section 435 to point out that I believe you would find that you would go from having no statutory regulation on this important subject to having one of the most balanced, comprehensive regulations of the subject in this country. Section 435, therefore, is an important innovation. Article 7 is rather technical in nature. It deals with the question of how we go about making amendments and changes to the articles of incorporation. Again, it standardizes procedures and forces the attention of those who wish to change the basic format of a corporation into doing it by way of amending the articles so that there is regularity. And again so that potential investors interested in the corporate entity can look at the articles of incorporation and have not only an historical impression of what the corporation was like in yesteryear, but an accurate, modern impression of where the power within this corporation is currently being distributed. Article 8 is going to be a matter of great interest to your constituents. It deals with what are called organic changes. In essence, mergers; consolidations; share exchanges; sale of all the corporate assets other than in the usual course of business. As each of us is aware, the United States right now is going through what is called a merger craze. Corporations are appearing to be attractive takeover candidates by individuals who may or may not have legitimate desires or desires which would advance the interest of shareholders should they be in a position to seize control of the board of directors. At the present time, Alaska law is very unclear as to the respective roles of incumbent boards as opposed to shareholders. And, therefore, Alaska corporations look vulnerable to individuals who are determined to launch a takeover bid. Article 8 clearly defines the prerogatives of existing management and the shareholders of a corporation with respect to

framing the content of one of these organic changes and taking it through the shareholder approval level. Essentially, what Article 8 does is vest with the existing board the power to frame the terms of a merger, a consolidation, a share exchange, or sale of assets in an extraordinary transaction. And then require two-thirds approval by the shareholders of the corporation in order to approve. This should bring Alaska corporations into line with California and New York and other major states which have moved to protect the integrity of their corporations from being the victims of an easy takeover in which the will of the shareholders and existing management would simply be subverted and brushed aside. Reform needs to be taken in Alaska in this area. I would hope that you would be satisfied with the commission's recommendations which are embodied in Article 8. Article 9, dealing with dissolution, is very important because of the changes that have been made in the federal bankruptcy law. It coordinates with modern federal bankruptcy law and creates for the Alaska judiciary a far more sensible approach to protecting the rights of creditors as well as the rights of senior shareholders in the event that a corporation goes to either voluntary or involuntary dissolution. It also contains some very innovative, and I think, useful provisions that deal with giving shareholders who are being oppressed or frozen out of the role of management or income where other shareholders are being afforded such prerogativees a right in the final analysis to petition for involuntary dissolution in order that the grievance which would have to rise to the level of a very serious grievance to get the attention of Alaska courts. Again, these are not new ideas. They might be the final decision of the Alaska Supreme Court if someone were to spend $100,000 litigating that. But if you enact this bill, all Alaskans with only the expense of supporting their government will have presumptive answers to these important questions. Those are the basic provisions and value judgments which underlie this bill. Both myself and the law students who have assisted me in working with the technicians in this area will be available to any member of either body and staff members. I am prepared now to answer any questions which any members of the committee may have.

RODEY: Mr. Pestinger.

PESTINGER: Thank you, Senator Rodey. Professor Pessler, to me this is a really excellent articulation of the rights and duties and obligations so that it gives our larger corporate participants a clearer understanding of where they stand, which is so essential to doing business. But what I am wondering about, though, is what burden this approach may place upon the smaller mom and pop family corporation. To me, if I had such a business I could not engage in corporate law comfortably without the assistance of counsel. Do you think that this packet necessitates the assistance of counsel as almost a mandate now

for anyone that does business in the corporate form? In other words, I am wondering, I see the need for this in California and New york, and I see the need for this in Alaska with that level of corporations that we deal with. But how about that other level that are just kind of, they get their articles punched out and they ask their lawyer to help them with the minutes, and they look at the Supreme Court that says that the only way you pierce the corporate veil is with an indicia of fraud. So they are using a whole different standard of operation. I mean this is really substantial. Do you think it might have a negative effect on that small family business?

FESSLER: In terms of cost of doing business in the corporate form, I think it will have the opposite effect. Right now, many small businesses probably are coming into corporate existence without the assistance of counsel at all. People are going out and buying little kits for $49.95 that contain forms that they fill in and send to the state. They are oblivious to the legislature's requirement that they file biannual reports to the legislature. They are not doing so. They are in danger of having their articles and their corporate status dissolved by the commission because the legislature has prescribed that as the penalty for not filing reports. And one of the basic difficulties with this situation will always be people who, to use your example, a two-person corporation, decides for one reason or another that they should do business in the corporate form, and then having done that they forget about it. They don't observe any of the formalities of corporate existence. They don't keep separate books and records. They don't segregate their assets from the assets of their corporation. And they don't file reports. Now they would be in trouble under existing Alaska law, sir. They will be in trouble under this bill. In the sense that when the State of Alaska confers a corporate charter on someone, whether or not they have sent $49.95 off to somebody who advertises in every airline magazine, that you don't need a lawyer and you, too, can be a corporation and somehow you will pay no income tax and like me you will turn out being rich. The only person that's probably ever done that is the individual who wrote that book, because he is getting rich by all of the people who write in and send their $50. I think this is the problem you'll want to keep in mind. What I am saying to all of you is that this bill is designed in such a manner that, although it is a complicated subject and I wouldn't suggest anyone could write a corporation code that could be so obvious that an individual could make casual reference to it and never need an attorney so they could guide themselves through the world of maintaining a corporation, this bill does organize the law. It does restate the law. It does have comments which are designed to assist people in understanding the law. Not one of those features can be said about current Alaska law. So there will be a problem of people who incorporate and thereafter regard it as a

little flag of convenience which they'll fly so long as it's useful and which, on the day that it isn't, they'll just forget about it. That will continue to be a problem not only in Alaska, but in Califo .. It's true in Nevada. It's true in Wyoming where I was reared. It's a major social problem we have. People who incorporate with no idea that there are responsibilities as well as privileges for taking on that status. Now, fortunately, the federal tax law which in years gone by caused people to believe that they could pay less income tax by somehow becoming a corporation, have because of movements undertaken first by the administration of President Carter and now of greater emphasis during the administration of President Reagan. As you know, the marginal income tax on individual income has now been reduced from a maximum of 70% now to where it is very close to the top corporate, there is only a two percent spread. But I still find that many people believe that they are going to get some tremendous tax benefit by becoming a corporation. What they do, of course, is eventually wind up in a hellacious tax audit. They find and the individual who wrote the $49 book and gave you the form never accompanies you to that audit because he is living in Bimini.

RODEY: Representative Koponen.

KOPONEN: I was interested in Section 488 which does create a liability for the officers of the corporation, and I'm not up on contract law and one of your notes, in terms of any written contract to modify or eliminate the liability created by this section, what happens to that liability, is it transferred or . . .

FESSLER: Let me explain to all of the members. Section 488, gentlemen, appears at page 67 of the draft in front of you. Section 488 relates also to Rep. Pestinger's question. One of the reasons that people incorporate is to achieve from the State of Alaska a presumption of limited liability. Now this presumption of limited liability means that to all individuals who do business with the entity which is incorporated, they are to look only to the assets which the individuals who incorporated have left with the corporation to satisfy their claim. This is true whether those individuals have made contractual relationships with the corporation or whether they have entered into an accidental injury situation, a tort. Section 488 is called secondary liability of directors and officers. It was reflected after lengthy discussions among members of the commission, a feeling that for small creditors of corporations, employees, tradesmen, materialmen, suppliers, individuals who generally have a credit relationship to a corporation which is not reduced to writing, that these individuals are the year in and year out, these are the individuals who pay the price for corporate existence. When corporations are run so long as it is

convenient to the individuals who find they are the owners and then when they are not, they are simply abandoned. Large institutional lenders, bankers, insurance companies, large contracting creditors, will get a lawyer and go out and they will quote, attempt to pierce the corporate veil. Alaska's common law on the circumstances in which it will disregard limited liability is found in only three cases since statehood. Those cases do not hold out great hope that in the absence of fraud in a transaction that the court would do. But if you have a claim for $1,000 in wages owed to you, there is no lawyer who is going to be able to successfully launch that lawsuit. If you are an individual who sold fish to a restaurant which has now gone out of business, and the owner has marched off leaving you unpaid and it's a $43,000 account receivable, you cannot get any modern recourse at all. Section 488 for the first time to a very limited extent shifts that presumption. It says that the officers and directors of a corporation to the extent that its assets prove insufficient to cover its liabilities, have a liability to a class of individuals who are defined as employees of the corporation as materialmen, tradesmen, etc., people who have extended credit on open account for up to $25,000. Now this liability, sir, is not inevitable. The statute clearly says that if I have a corporation and you have a fishing fleet, and you are supplying my incorporated restaurant with fresh salmon, that you can be approached by me saying I would like you to agree in writing that in the event that this business folds, my restaurant, you won't look to me for the liability which exists under the law. It would be a liability of up to $25,000. That's all you could ever recover under this. So for the first time there would be an incentive in dealing with the smallest people in the marketplace who are the recurrent little mules on which this business of limited liability is ridden out, year in and year out, that these people would have some relief and that there would be an incentive to talk about this question of limited liability. And then if I can convince you that you should give me a relaxation, a waiver of that, that's fine. But in the absence of a contractual modification, I would have the right to this.

KOPONEN: The contract then is between the creditor and the corporation, not between the corporation and its directors.

FESSLER: That's absolutely right. It's between the corporate debtor and its employees, between the corporate debtor and its materialmen or suppliers.

KOPONEN: It's a very useful section. I know there is a major business problem in the Fairbanks area, these collapsible corporations.

FESSLER: Mr. Chairman.

COWDERY: Would the effect of this, would it discourage say qualified managers from getting into taking over a trouble corporation that was having some problems, maybe through a lack of expertise in the past, would this discourage someone from coming in . . .

FESSLER: Well, it would certainly give me pause. Now there are two things relevant, sir, in the bill. First, if the corporation is in a process of dissolution, one of the ways to avoid dissolution under the provisions of this bill is for a court to appoint interim directors in order to resolve deadlocks. Those directors are not subjected to this type of liability. So the director who is brought on board to try and straighten things out by court order is the director who is exempted by the reference in the bill to other than the directors who are appointed pursuant to. Now that is one protection. Another factor, of course, would be that if a corporation is in trouble, and I am going to step in and attempt to save it, one of the things I'd want to do is be aware of Section 488 and go to the creditors and say, I am willing to come into this picture only if you are willing to contract to exempt me from any personal liability that I would incur. Yes, sir, it would be something that in the hypothetical you advance an individual would want to take into consideration.

RODEY: If I might interject, that would apply to directors but not to employees of the corporation?

FESSLER: It has no application to employees at all. In fact, I should tell you that this appears to be very novel, and I want you to understand that it has a great quality of being novel. But New York has never given total limited liability to anyone. And if anybody tries to come to you and say, my God, if we adopt this the wheels of commerce will grind to a halt. Since 1843 when New York adopted the first general incorporation statute, the ten largest shareholders in a New York corporation are subjected to liability in the event the corporate assets prove insufficient to the claims of all employees. New York has never stricken that from the books, and it has not prevented the development of the State of New York as a center of commerce. What we did here, was to say that in many Alaskan corporations we didn't want to have the liability on the ten largest shareholders because that might include many very passive people who really have nothing to do with the way in which the business was run. So put the liability on the people who are being paid, the officers, the president, and the secretary and the treasurer. They are the defined officers and the directors. They are not passive, or they oughtn't to be. So that is how we would differ from New York law. And we have broadened the exposure, because in New York the exposure is limited to claims of employees, and we broadened it to include the claims of materialmen and

suppliers.

COWDERY: In the past we have had some of the Native corporations who have had financial troubles and hired two people to direct them and turn it around. And this is an area I was wondering about, if that would be . . .

FESSLER: I appreciate the question. It is an important matter. The AFN subcommittee has looked into this question. I think that at that level, or at the level of any large corporation that is involved in an attempted turn around, that there would be awareness of the provisions of Section 488 and that there would be appropriate advice from counsel to deal with the subject. That would be my hope.

BROWN: Mr. Chairman, may I suggest . . .

RODEY: Mr. Brown.

BROWN: I am Fred Brown. It's nice to know that Labor and Commerce [garbled] . . . The one example you might think of is what would really happen . . . the example might be one of the most prosperous, currently most prosperous Alaska corporation is Alaska International Air. Originally, that was Interior Airways based out of Fairbanks. They expanded too fast for the building of the pipeline, which didn't get built fast enough as many Alaskans remember. What happened then was, and this sort of thing is really what happens when a corporation gets into trouble in most cases, and that's why I'm raising this as an example. What happened then was they went into reorganization and the creditors and shareholders hired Mr. Duncan McClaren, a legend in the Canadian air industry, a great manager and a legendary worker [TAPE CHANGE] . . . Section 488 to take care of that problem.

RODEY: Thank you, Mr. Brown. This is a problem currently in Alaska. It is possible for individuals who incorporate to run up all sorts of bills, not pay its creditors, and then just move away from that corporation, will eventually be resolved by the state, set up another corporation and then bilk a lot of small tradesmen who work for the corporation, creditors, what have you, move on. You can do it in serial fashion. It is currently being abused presently in the state. Mr. Abbott has kept an eye on this, has had a practice in that area of the law for 15 years. But it is currently a problem. There are a lot of honest Alaskans who lose money because of this problem.

FESSLER: And I think the problem is also that it has a broader ramification. To the extent that citizens get the impression that there are tricks out there for people who are in with lawyers, if you will. It demeans my profession of which I am very proud. We were never the source of this value judgment,

that people could pull this type of thing. But to the extent that people believe that if you quote, know the law, you can do bad things and get away with it. You can do hurtful things and have no accountability. It creates an impression of the law which none of us have an interest in seeing furthered in the minds of citizens. Because the minute one law becomes suspect like this, the cloud falls over all law. And so this is probably the most important value judgment about corporations. They have done great things for us. But the idea of a one-person corporation, and the only person that probably has pulled off that role real well in history, was Louis the Fourteenth and a tremendous price was paid for that notion.

UEHLING: If we can kind of go back to the section regarding the foreign corporations, maybe you could explain what the Alaska Code Revision Commission took as far as an approach as a comparison of what occurred in California regarding the foreign corporation situation there.

FESSLER: Because California has this basic social problem that in order to evade the restrictions on long-term director terms or in order to have a board classify itself, most important California business, most corporate business at the moment in my state, is foreign incorporated. Runs to a different jurisdiction and comes back home and says we've been gone 20 minutes, and we are now a foreign corporation, we're a Delaware corporation. The basic social problem we had in California when we approached the revision of the legislation was to say, well, will we give up these value judgments which we've had for many years. And the bar association, frankly, and the banking industry thought that's what was going to happen. That we were going to get a corporation law that looked more like that of other states. What the legislature did, interestingly enough, and I think it remains to be seen because it's costing us a lot of money in litigation in front of the federal supreme court, was to say, no, if a corporation has a certain percentage of its employees in California, does a certain volume of business in California, has a certain amount of its ownership owned by shareholders in California, then even though it purports to be an Alaska corporation or a Delaware corporation, we're going to say that it's merely a pseudo foreign corporation, and we're going to apply California's laws to it. Now the Arden-Mayfair litigation is pending in the California Supreme Court where it has been on hold for nearly three years. Delaware's courts have already litigated the Arden-Mayfair case and come to the conclusion that California was attempting to deny full faith and credit to the public acts of a sister state. Ultimately, the federal supreme court will have to decide whether California's notion of pseudo foreign corporations is an idea whose time has come. The judgment of the commission was that there are no pseudo foreign corporation concepts in this bill. Instead, we increased the

reporting obligations on foreign corporations to keep us informed of the nature of their activities. We greatly increased the circumstances under which it's clear that they must seek a certificate to do business in the State of Alaska. But we have not attempted to interfere with their internal control and management such as California has done, because we haven't done it to our own people. We haven't said you have to have a board with one-year terms, that you can't classify the board, that you have to have cumulative voting. Our default mode if you don't say is, you do have one-year terms, if you do have cumulative voting and you don't have b[illegible]ssification. But we didn't feel that it was necessary to [illegible]olved in that position. But later on in what may be five [illegible]ears as you see the outcome of the Arden-Mayfair matter, [illegible]a if you decide you want to adopt certain similar rules, t[illegible]ld be an appropriate time to do that. But there is nothing n[illegible] now that contains that.

BROWN: At least some of the members of the commission think the Delaware view is going to prevail in the state supreme court, and that's one of the reasons why the provision is written that way.

RODEY: Thank you, Mr. Brown.

UEHLING: This is a follow up question. And in just sort of reading through this I got the feeling what would be the situation like if you took a state like Delaware where we had a situation where companies are going to incorporate ther because it's a very pro-management kind of situation, where in California it's very pro-shareholder, the shareholder is a completely different situation, how does Alaska rate on that spectrum? Would they be considered a very pro-management situation?

FESSLER: No. The default provisions, ever since I learned to use the personal computer, I've picked up the jargon, excuse me. The provisions that are in place if you don't say otherwise of the Alaska statute today, because it's a version of the early '50's model act would today be called a pro-shareholder jurisdiction. And the provisions which would lock into place in the absence of agreement that they be otherwise under this bill are also pro-shareholder provisions. But so that Alaska would in the default mode line up looking very much more like California than Delaware. But it would be possible for people to make an intelligent and informed decision to form a very, very management oriented, reduced role for shareholder corporation, not going as far as Delaware has gone. For instance, a good example in Delaware, it is possible that the board of directors would have the exclusive power to amend the articles and bylaws, and the shareholders could be ousted from any role at all. That would not be possible in Alaska. It isn't possible under current law with regard to the articles. It would not be possible with

regard to the bylaws should the legislature enact this bill. So it continues to leave Alaska law with most other western jurisdictions as having a pro-shareholder bias, but not going nearly as far as California.

RODEY: Are there other questions from members of the committee? If there are . . .

FESSLER: I'll remain in the room, Mr. Chairman, in case anyone does have any questions for me, but there are other witnesses desiring to appear.

RODEY: The next witness is Willis Kirkpatrick, the director of the division of banking and securities.

KIRKPATRICK: Mr. Chairman and committee members. My name is Willis Kirkpatrick. I am director of banking and securities for the State of Alaska. I'd first like to say that we have appreciated the opportunity to join with the commission as a participant in discussion in their work. I believe that any of the concerns the state has had as far as the administration of this new code, the commission has known up front as to what the problems we've had. One of the things I'd like to point out is that what I am excited about in their work is that in a present situation where we have an old Oregon law, in a situation where we have very little, if any, state common law court cases the administration of the provisions of the Alaska Business Corporations Code as it stands today is somewhat suspect in some of its legislative intent. And to determine legislative intent, we go back to Oregon law, we go back to Oregon cases, we go back to the sparse official comments under the model code. With the passage of this bill, I think that our work as far as working with the corporations in maintaining their files is going to be a whole lot easier because of the official comments alone. Everything has been addressed. I would suggest that in considering the passage of this bill, that they make part of the record the official comments as to the new law. There is only one particular area that I have a problem with, and that is in Section 733 on page 127, in the filing of foreign corporations to do business in the State of Alaska. On line 7, beginning on line 7, it requires that together with a certified copy of its articles of incorporation all amendments to the articles . . . In other words, what they are saying here is that one of the provisions for a foreign corporation to qualify to do business in the State of Alaska, is that it would have to file its articles with the state and any amendments to those articles. In a hearing last session, we brought this up and I believe, you'd have to check with the code revision commission on this, but I believe it was agreed upon that they would reconsider that requirement to file articles. At the present time articles of foreign corporations are not filed with the state. We find that

some of our sister states, those that do have this provision, are looking at dropping them, I think the last one we've heard from is Texas. Now I don't believe that it is going to create any hardship to anybody in the State of Alaska that wishes to find out the substance of the articles of a foreign corporation. First of all, if they are looking for the officers and directors of the foreign corporation, we can look at the application they file with us giving us that particular information. If they do want a copy of the articles of incorporation or the amendments to the articles of incorporation of a foreign corporation, the place that would have the most current filing would be the state of domicile so that they are available. We would be more than happy to assist anybody that wanted that to find out the proper procedures to obtain those records. With my understanding that this provision, that the code revision commission had no particular problem with that being dropped, the fiscal note that I prepared was zeroed out. If this provision stays in, I am going to ask for a revision of the fiscal note because one of the problems we have now is just file maintenance. The biggest problem in file maintenance is amendments to articles. We receive a great number of amendments to articles every day, and one of the things we have to do is that we just don't file the amendments. A lot of times we have to look back through the files to see what the prior articles contain to see amendments are consistent. If nothing more than article order. That is the only comment that I have as far as any changes are concerned, and I am sorry I don't have an amendment prepared, but I would be most happy to. I would replace that word with a certificate of compliance executed by the officer of domicile, or the official of domicile. I am open to any questions.

RODEY: If I might ask either Chairman Abbott or Professor Fessler to respond.

ABBOTT: Yes, Mr. Chairman. We had previously agreed with Mr. Kirkpatrick that we would make that change. Unfortunately, consideration of this matter came up after the bill was printed. So it is the position of the commission that this requirement should be deleted when it was brought to our attention that it would serve no useful purpose and would impose an additional fiscal burden on the commissioner of commerce. We are in complete agreement that the provision should be deleted, and there should be no requirement to file foreign articles or amendments.

RODEY: Thank you, Chairman Abbott. Mr. Brown.

BROWN: On behalf of the commission, I am sure they would agree, it would be very nice if Professor Fessler were involved in structuring the amendment that the committee might be interested . . .

RODEY: That's a very good suggestion, Mr. Brown. Professor, would it be possible for you to prepare that amendment?

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

KIRKPATRICK: One other item that my notes show. On page 138 and 139, on line 28 of page 138 it refers to the misdemeanor, and my staff says that it should be either a rated misdemeanor A or B to be consistent with Title 9. And the same with line 9 on page 139. That also relates to a misdemeanor.

RODEY: If I might address Chairman Abbott or Professor Fessler, are we in that case talking about a Class A misdemeanor?

ABBOTT: That's our understanding, Mr. Chairman. Yes.

RODEY: If again I could request you, Professor Fessler, to prepare the appropriate amendment based on current Alaska criminal law.

FESSLER: The question has been asked, has been prepared, is one of the amendments that Chairman Abbott was referring to is being transmitted . . .

RODEY: Thanks, Professor. Obviously we can't take any official action here. If there are any questions, we'll have this prepared and delivered to committees on both sides for their consideration and Senator Hulcahy and myself will explain it on our side and . . .

COWDERY: Could I, I was wondering what financial burden would this, if we adopt this to the existing corporation for the state, would it be to conform, is there any grandfathering situations . . .

KIRKPATRICK: If I understand your question, Mr. Chairman, as to what this is going to do to existing corporations. I think the last two sections of the bill pretty well cover a timely transfer of the act, and I think we are gong to have some problems just as far as educating the corporations in switching them over. I don't see that a lasting problem. I don't see it as much more of a problem than we have now with the new corporation that is coming on board. I don't think there will be an financial, I think the problem is going to be basically on the state's side as far as getting the information out and getting the transition going. I don't envision any

economic problem on the corporation. I am wondering about correspondence fees, but . . . I don't see it as a major problem.

RODEY: I just might add that the proposed draft was written to reduce legal fees by putting a great element of certainty in there so that a layman would have a much greater understanding of the law just by reading the law without having to consult a lawyer. So I think there will be actually a reduction of attorney's fees. Are there any other questions for Mr. Kirkpatrick? If none, thank you very much Mr. Kirkpatrick. We do have floor session now at 10:00 a.m. We don't go in until 11:00 o'clock on Mondays, as a convenience to the Anchorage legislators. Would you like me to stay?

ABBOTT: Mr. Chairman, if I might, there are only two other people that intend to offer brief testimony. That's Liz Johnston and Irv Bertram.

RODEY: In consultation with House chairman, I will stay here if Senator Mulcahy is agreeable and listen to the comments of Elizabeth Johnston and Irv Bertram and then report to you, sir. Thank you, gentlemen. Next, I'd like to call Elizabeth Johnston. It's always disconcerting to be testifying and have everybody leaving. But, Senator Mulcahy and I will make up for any absence of numbers. You have the floor, madam.

JOHNSTON: Gentlemen. My name is Elizabeth Johnston. I'm general counsel to Bristol Bay Native Corporation. Today I am here speaking on behalf of the Alaska Federation of Natives concerning the bill on the revision of the corporate statutes, the profit corporate statutes. You will be delighted to know my comments will be brief. This is because we have had extensive opportunity to present our concerns before the code revision commission. By way of background, I can tell you that in the summer of 1982, the Alaska Federation of Natives created a subcommittee. And the member of the subcommittee had both regional and village corporation backgrounds, and the committee was created to review and testify on the proposed revision. We met with the code revision commission on three separate occasions and made extensive comments. Based on the receptivity of the commission to our comments, and the way they were able to meet our concerns, in April of 1983 Janie Leask, who is the president of the federation, wrote in support of the proposed revision. And she commented specifically on the quality of the new legislative scheme, on the technical commentary which has already been brought up by some of the other people. But the fact there there is technical commentary to back up the new code which should help all of us in the absence of court cases to understand the legislative history. The fact there there is this kind of backup, we feel will mean it will reduce the legal expenses for

the Native corporations. We also articulated, commented on the finance section, that it was an important reform. Unlike Professor Fessler I can read numbers, and I still feel that it is a significant accomplishment. I was forced to. So finally the only final comment is that this is a bill which does strengthen the rights of shareholders and does strengthen the requirements of periodic reporting by corporations to their shareholders. It is a pro-shareholder document, and the federation supports the revision.

RODEY: Senator Mulcahy, do you have any questions for Miss Johnston? Thank you, appreciate your coming. Next I'd like to call Irv Bertram.

BERTRAM: I'm Irv Bertram, and I am assistant counsel to Alaska Airlines. We have looked at the bill and discussed it with the commission to raise some of the concerns we have. Our bylaws and articles go back to 1938, at least the articles do. The bylaws have been changed on numerous occasions. And we did have some concerns, but we found that the commission has made some changes that will assist us in going forward. We think that the bill is very well drafted and very good and will be of benefit to the state as well as being helpful to us. In my current position as house counsel, I have an opportunity to advise management or answer questions about Alaska law. I have practiced in Alaska for a number of years before joining the airlines, and you don't feel so foolish when you have something layed out in front of you in the law. You can look at it and say, well, this is how it's done. Currently Alaska law on corporations has a number of areas where simply there is no law. And so you really have to say, gee, I don't know, maybe we can do it and maybe we can't. It's . . . you're not sure how to do something. But I think the bill answers that. It does provide a very well layed out road map, so to speak, which I think will be very helpful not only to large corporations such as ourselves, but I also believe this will be helpful to the small mom and pop operations. There is that old trite saying that ignorance of the law is no excuse. However, when the law is a body of common law with very few statutory references, it makes it fairly difficult to know what's going on. On the other hand, once things have been layed out in a fairly succinct form that can be followed, it's true a lawyer may still be required and should be used. But I think most people will have a better understanding of what corporate governess should be once they have this body of law in front of them. So we think it would be good for the state. Alaska Airlines will have to make one change in its bylaws as a result of this. It doesn't address everything we wanted. But on the other hand, we think on the whole it is very good and we do support it and would recommend it. Thank you.

RODEY: Thank you very much, Mr. Bertram. Senator

Mulcahy, do you have any questions? I am aware of the . . . if there are no other comments, Mr. Brown.

BROWN: One comment, Mr. Chairman. There have been much comment about the comments, and the people who are supporting the bill who are now part of the commission, are finding that the comments are very important. I would hope an admission to the members of the Senate and the House in the event this bill is considered, that an action be taken similar to what was taken when the criminal code revision was passed. And that is there be specifically an affirmative vote on the floor of each house approving the comments or the comments as you may have amended in concert with the commission to make a clear and unambiguous legislative history. To really make sure those are available and that they are important legislative history, since they will be relied on by people in the private sector as well as scholars.

RODEY: Thank you, Mr. Brown. That's a very good suggestion. Obviously it's wise. It's an area of law we don't know much about in terms of importance, and whether a separate vote on that really means much or not.

BROWN: Take it from Alaska's only published legal historian.

RODEY: And a distinguished member of the Fairbanks bar. I think it is a wise suggestion to incorporate in the journal and to vote separately and affirmatively on the commentary. I think it is a good and desirable method of annotating Alaska laws. It is certainly preferable to allowing Michie Company to do it back east. If there are no other comments, the committee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 3, 1984

RE: Amendments to HB 343/SB 246 on for profit corporations

The subcommittee appointed by the Alaska Federation of Natives to work on the corporations bill has proposed these changes in the proposed amendments I transmitted to you on January 31, 1984: Those members of the code revision commission that could be polled by telephone have agreed that the changes are acceptable.

(1) CHANGE:

Page 12, line 27-29: In the previously proposed amendment change "January 1, 1983" to "March 24, 1982".

EXPLANATION: A relatively recent date is needed, but the specific date chosen is not of importance. The date of first introduction of the Alaska Corporations Code as a bill in the legislature is a date used elsewhere in the bill. Using it here is simply to avoid using many different dates in the bill.

(2) CHANGE:

Page 56, following line 28: In the previously proposed amendment, change "January 1, 1971" to "March 24, 1982".

EXPLANATION: The bill provides that staggered terms of directors must be provided for in the articles of incorporation. The effect of the change is that a provision in a corporation's bylaws providing for staggered terms of its directors would be valid if the provision was in the bylaws before a recent date--the date of first introduction of the Alaska Corporations Code bill in the legislature, March 24, 1982.

In other words, the amendment would make this provision of the bill prospective, keeping in effect valid bylaws on staggered terms; however, no corporation would be able to hurriedly enact bylaws now, simply in anticipation of passage of this bill.

(3) CHANGE:

Page 149, line 12, following the period: In the previously proposed amendment, following "section" insert "prior to December 19, 1991,".

EXPLANATION: The amendment as previously proposed was overbroad. Its only purpose was to conform to a requirement of Section 30 of the Alaska Native Claims Settlement Act, a copy of which is attached. The reason for the change will be clear by reference to the attached Section 30 of ANCSA.

Retyped with these three changes, the proposed amendments are attached.

- -

An identical text to the foregoing with the same attachments was sent to Senator Eliason, chairman of the Senate Labor and Commerce Committee. A hearing was held by Senate Labor and Commerce on the bill February 2, 1984, and the revised amendments were adopted in the form attached to the memorandum.

The committee voted the bill out as a committee substitute and adopted a statement of intent containing the two small changes in the commentary on the bill, as previously provided you. The statement of intent is also attached as it was adopted in the Senate committee.

Please note that the attached amendments are a retyping of the amendments previously provided you, with the changes explained in this February 3 memorandum.

DR:chw
Attachments

A M E N D M E N T

Offered in the HOUSE LABOR AND COMMERCE COMMITTEE BY:

TO: HB 343

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after March 24, 1982, the address of it initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to March 24, 1982."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section prior to December 19, 1991, shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

SAVING CLAUSE

SEC. 26. To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

SEPARABILITY

SEC. 27. If any provision of this Act or the applicability thereof is held invalid the remainder of this Act shall not be affected thereby.

TEMPORARY EXEMPTION FROM CERTAIN SECURITIES LAWS

SEC. 28. Any corporation organized pursuant to this Act shall be exempt from the provisions of the Investment Company Act of 1940 (54 Stat. 789), the Securities Act of 1933 (48 Stat. 74), and the Securities Exchange Act of 1934 (48 Stat. 881), as amended, through December 31, 1991. Nothing in this section, however, shall be construed to mean that any such corporation shall or shall not, after such date, be subject to the provisions of such Acts. Any such corporation which, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 shall transmit to its stockholders each year a report containing substantially all the information required to be included in an annual report to stockholders by a corporation which is subject to the provisions of such Act. (Added January 2 1976, P.L. 94-204 §§ 3, 18, 89 Stat. 1147, 1156)

RELATION TO OTHER PROGRAMS

SEC. 29. (a) The payments and grants authorized under this Act constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska.

(b) Notwithstanding section 5(a) and any other provision of the Food Stamp Act of 1964 (78 Stat. 703), as amended, in determining the eligibility of any household to participate in the food stamp program, any compensation, remuneration, revenue, or other benefit received by any member of such household under the Settlement Act shall be disregarded. (Added January 2 1976, P.L. 94-204 § 4, 89 Stat. 1147)

MERGER OF NATIVE CORPORATIONS

SEC. 30. (a) Notwithstanding any provision of this Act, any corporation created pursuant to section 7(d), 8(a), 14(h)(2), or 14(h)(3) within any of the twelve regions of Alaska, as established by section 7(a), may, at any time, merge or consolidate, pursuant to the applicable provi-

sions of the laws of the State of Alaska, with any other of such corporation or corporations created within or for the same region. Any corporations resulting from mergers or consolidations further may merge or consolidate with other such merged or consolidated corporations within the same region or with other of the corporations created in said region pursuant to section 7(d), 8(a), 14(h)(2), or 14(h)(3).

(b) Such mergers or consolidations shall be on such terms and conditions as are approved by vote of the shareholders of the corporations participating therein, including, where appropriate, terms providing for the issuance of additional shares of Regional Corporation stock to persons already owning such stock, and may take place pursuant to votes of shareholders held either before or after the enactment of this section: *Provided,* That the rights accorded under Alaska law to dissenting shareholders in a merger or consolidation may not be exercised in any merger or consolidation pursuant to this Act effected prior to December 19, 1991. Upon the effectiveness of any such mergers or consolidations the corporations resulting therefrom and the shareholders thereof shall succeed and be entitled to all the rights, privileges, and benefits of this Act, including but not limited to the receipt of lands and moneys and exemptions from various forms of Federal, State, and local taxation, and shall be subject to all the restrictions and obligations of this Act as are applicable to the corporations and shareholders which and who participated in said mergers or consolidations or as would have been applicable if the mergers or consolidations and transfers of rights and titles thereto had not taken place: *Provided,* That, where a Village Corporation organized pursuant to section 19(b) of this Act merges or consolidates with the Regional Corporation of the region in which such village is located or with another Village Corporation of that region, no provision of such merger or consolidation shall be construed as increasing or otherwise changing regional enrollments for purposes of distribution of the Alaska Native Fund; land selection eligibility; or revenue sharing pursuant to sections 6(c), 7(m), 12(b), 14(h)(8), and 7(i) of this Act.

(c) Notwithstanding the provisions of section 7 (j) or (m), in any merger or consolidation in which the class of stockholders of a Regional Corporation who are not residents of any of the villages in the region are entitled under Alaska law to vote as a class, the terms of the merger or consolidation may provide for the alteration or elimination of the right of said class to receive dividends pursuant to said section 7 (j) or (m). In the event that such dividend right is not expressly altered or eliminated by the terms of the merger or consolidation, such class of stockholders shall continue to receive such dividends pursuant to section 7 (j) or (m) as would have been applicable if the merger or consolidation had not taken place and all Village Corporations within the affected region continued to exist separately.

(d) Notwithstanding any other provision of this section or of any other law, no corporation referred to in this section may merge or consolidate with any other such corporations unless that corporation's shareholders have approved such merger or consolidation.

(e) The plan of merger or consolidation shall provide that the right of any affected Village Corporation pursuant to section 14(f) to withhold consent to mineral exploration, development, or removal within the boundaries of the Native village shall be conveyed, as part of the merger or consolidation, to a separate entity composed of the Native residents of such Native village. (Added January 2 1976, P.L. 94-204 § 6, 89 Stat. 1148)

ASSIGNMENTS OF RIGHTS BY REGIONAL CORPORATIONS

SEC. 31. (a) Notwithstanding the provisions of section 3477 of the Revised Statutes, as amended (31 U.S.C. 203), the Secretary is authorized to recognize validly executed assignments made by Regional Corporations of their rights to receive payments from the Alaska Native Fund. Such assignments shall only be recognized to the extent that the Regional Corporation involved is not required to distribute funds pursuant to subsection (j) or (m) of section 7 of this Act.

(b) The Secretary shall not recognize any assignment under this section which does not provide that the United States reserves the right to assert against the assignee and successors of the assignee, any setoff or counterclaim which the United States has against the assignor Corporation.

(c) No stockholder of any Regional or Village Corporation shall have any claim against the Secretary or the United States as the result of any assignment duly recognized by the Secretary pursuant to this section. (Added November 15 1977, P.L. 95-178 § 4, 91 Stat. 1370)

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811
(907) 465-3844

OFFICIAL BUSINESS

LETTER OF INTENT

It is the intent of the Senate Labor and Commerce Committee that the detailed commentary accompanying S.B. 246, House and Senate Joint Journal Supplement No. 11, be considered a comprehensive guide to the proposed new Alaska Corporation Code and as such should be amended and revised accordingly if any changes are made to S.B. 246.

The following narrative changes reflect the amendments adopted in CSSB 246 (L&C).

(At page 89 of the House and Senate Joint Journal Supplemental for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision on the bylaws rather than the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to March 24, 1982 with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

Alaska Court System
State of Alaska

KARLA L. FORSYTHE
General Counsel

OFFICE OF ADMINISTRATIVE DIRECTOR

303 K Street
Anchorage, AK 99501

Feburary 7, 1984

Representative Walt Furnace
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Furnace:

You had asked Arthur Snowden to provide comments about the anticipated impact on the courts of HB 343, revising the Alaska Corporations Code.

Carole Baekey, Judicial Education Coordinator for the court system, has extensive background in corporate litigation. Ms. Baekey reviewed the proposed bill in detail; her comments are attached. Based upon her comments, the court system concludes that the superior court will not be substantially burdened by passage of this bill.

Thank you for the opportunity to submit comments. If you have any questions or concerns, please let me know.

Sincerely,

Karla L. Forsythe

Karla L. Forsythe
General Counsel

KLF:smh

cc: Arthur H. Snowden, II
Carole Baekey
Judge Stewart

Memorandum

Alaska Court System

TO: Karla Forsythe
General Counsel

DATE : February 1, 1984

FROM: Carole A. Baekey
Judicial Education Coordinator

SUBJECT: House Bill No. 343, Revisions of the Alaska Corporation Code

You requested that I review House Bill No. 343 and its commentary, with a view to any increased burden on the court system.

Generally, House Bill No. 343 strives for greater clarity and flexibility with respect to corporate organization and operation. The bill contains several new legal concepts which could give rise to interpretation in superior court. Historically, when a statute containing new standards or legal concepts is developed, cases are brought to interpret the statute. I have briefly outlined the provisions of the proposed Alaska Corporation Code which could conceivably alter the court's burden. Only issues which might affect court caseloads have been addressed. From this overview, it does not appear that the superior court would be substantially burdened by enactment of the proposed Alaska Corporation Code.

The proposed provisions which have the potential to affect causes of action filed in superior court are highlighted below:

1. Proposed A.S. 10.06.358-365, inclusive:

These proposed sections address a corporation's distribution of corporate assets, usually in the form of dividends, and imposition of restrictions to prevent the dissipation of corporate assets by an insolvent corporation. The specific problem addressed is the distribution of dividends by a corporation to shareholders, after which the corporation is unable to meet its obligations to creditors or to meet its contractual preferences to holders of senior share of stock.

Existing A.S. 10.05.201 imposes an "equitable insolvency test" upon distribution of dividends. This test is the "inability of the corporation to pay its debts as they become due in the regular course of business." This test is also imposed upon existing A.S. 10.05.309 setting forth the restrictions on the redemption or purchase of redeemable shares. (It should be noted that page 76 of the March, 1983 commentary of the Alaska Code Review Commission refers to this

restriction in A.S. 10.05.012, which section does not exist in the present corporation code. Perhaps this is a typographical transposition referring to either existing A.S. 10.05.201 or A.S. 10.05.210.)

Existing A.S. 10.05.369 imposes a second accounting method, "use of capital surplus to reduce losses," upon distribution of dividends. As the commentary notes, existing A.S. 10.05.369 permits the board of directors to eliminate an operating deficit by simply writing down or reducing capital surplus. Any subsequent net profits could then be charged against stated capital or capital surplus and distributed as earned surplus notwithstanding the former deficit. The danger here is that dividends to common or junior shareholders might be distributed by a corporation so as to prejudice the ability of the corporation to meet its debts or dividend obligations to senior shareholders in subsequent accounting periods.

Each of the equitable insolvency tests and the use of capital surplus to reduce losses is reflected in existing A.S. 10.05.204 - payment of dividends, A.S. 10.05.207 - distribution in partial liquidation and A.S. 10.05.210 - payment of accumulated dividends out of capital surplus.

The commentary covers these issues in depth and this brief sketch is to frame the major change in accounting methods in the proposed law. Assuming a corporation is equitably solvent as defined in proposed A.S. 10.06.360, proposed A.S. 10.06.358 permits licit distribution of dividends if: (i) the distribution is made to the extent of retained earnings, or (ii) the distribution is in satisfaction of (a) the "ratio/assets surplus test" which requires that the assets of the corporation are equal to one and one-fourth of its current liabilities and (b) current liquidity requirements are met. Unlike the existing law, there are no exceptions to the stated requirements.

Proposed A.S. 10.06.360 would give limited protection to preferences of senior shares by forbidding any corporate distribution which would raid corporate assets. Proposed A.S. 10.06.365 restricts the board's authority under proposed A.S. 10.06.358 to make a distribution on junior shares unless certain requirements are met; the goal is to impose restrictions designed to protect shares with a dividend preference.

In short, proposed A.S. 10.06.358-365, inclusive, is a change in accounting procedures to clarify and strengthen standards for distribution of assets, namely dividends. If the proposed legislation becomes law, undoubtedly cases will be brought to test the law. That is the function of the court. However, it should be noted that proposed A.S. 10.06.358-365, inclusive, is an attempt to protect shareholders by simplifying accounting procedures and getting rid of numerous exceptions enabling corporations to dissipate assets. This simplification could conceivably reduce complex corporate litigation.

The only apparent lack of clarity I perceive is in proposed A.S. 10.06.363 which does not protect liquidation preferences when a distribution is made to either shares of the same class or series or to a class with superior preferences upon liqudation. Inequities could easily be remedied by proper corporate planning done by counsel. In any event, this provision is not likely to result in a flood of litigation.

2. Proposed A.S. 10.06.378.

This proposed section addresses shareholders who receive any distribution of corporate assets with knowledge of facts indicating the impropriety of the distribution. The commentary notes a shareholder would be liable "if a reasonable person in like circumstances exhibiting reasonable effort would have recognized an indication of impropriety in the distribution." Any suit would be brought in the name of the corporation and a shareholder's liability under this section would be brought for the amount received by the shareholder with interest at the legal rate on judgments until paid.

This proposed section, new to Alaska law and a new cause of action, is an extension of liability in existing A.S. 10.06.225(a). Present law provides that a director against whom a claim is asserted for the payment of distribution of assets is entitled to contribution from shareholders who knowing a payment to be illicit took it. Existing A.S. 10.05.225(a) is in the proposed code as A.S. 10.06.480(b).

3. Proposed A.S. 10.06.405.

This proposed section would require that shareholders of a corporation meet annually. If management defaults in the calling of an annual meeting, under proposed A.S. 10.06.405(b), on the application of a shareholder, the superior court may order a meeting held.

This is a new remedy for an aggrieved shareholder, giving rise to a new statutory cause of action in superior court.

4. Proposed A.S. 10.06.425.

This proposed section which would explicitly permit the formation of voting trusts and agreements among shareholders has its genesis in existing A.S. 10.05.171. As the commentary notes, A.S. 10.06.425(b), by not being more specific, leaves to common law development the development of limitations upon agreements between or among shareholders which fall short of a voting trust.

Clearly, under this proposed section courts could be called upon to determine what, short of a voting trust, constitutes a valid agreement of shareholders. Irrespective of the proposed changes, this issue historically has been and would remain a proper cause for determination in superior court. Therefore, no measurable change would seem to be wrought.

5. Proposed A.S. 10.06.430.

This proposed section has its origins in existing A.S. 10.05.237-249, inclusive, addressing inspection of books and records. Proposed A.S. 10.06.430 strengthens the penalties for restricting and refusing inspection, but creates no new cause of action.

Irrespective of the increased penalties for restricting or refusing inspection of books and records, this issue is presently within the domain of the superior court. Therefore, no measurable change would be wrought by the increased penalties.

6. Proposed A.S. 10.06.433.

This proposed section would establish a corporation's obligation to prepare and send an annual report to shareholders. No similar requirement exists in the present law Therefore, this proposed section would create a new obligation of domestic and foreign corporations to shareholders. This obligation would be enforceable by superior courts.

While this section gives rise to a new corporate obligation and thus a new cause of action, it is inconceivable that this would create a flood of litigation.

7. Proposed A.S. 10.06.435.

This proposed section would be Alaska's first statutory attempt to regulate shareholders' derivative actions. Presently, shareholders' derivative actions are regulated by the Supreme Court's adoption of Rule 23.1 of the Federal Rules of Civil Procedure.

Since this cause of action already exists in fact, the proposed statute should create no major changes.

8. Proposed A.S. 10.06.460.

This proposed section would permit the removal, by shareholders of a corporation, of a director without cause. This would be a new provision since existing A.S. 10.05.177-192, inclusive, provides only for removal of directors at the time of the annual meeting. The proposed section gives shareholders of a corporation more latitude in choosing and terminating directors and sets out restrictions on this right of shareholders.

This proposed section would seem to create no new causes of action, save the validity of an election, which, if challenged, would come under the court's scrutiny. A deluge of cases is unlikely.

9. Proposed A.S. 10.06.463.

If there would be insufficient votes to remove a director under proposed A.S. 10.06.460, proposed A.S. 10.06.463 provides for judicial removal of a director for specific types of acts. The corporation could be made a party to the action.

This section creates a new cause of action. Generally, corporations should be able to handle these matters internally with recourse to the court only in extreme cases. A deluge of such cases is unlikely.

10. Proposed A.S. 10.06.488.

This proposed section would provide for secondary liability of directors and officers personally, the cost of doing business, if the assets of the corporation should provide insufficient. This is an attempt to get at thinly capitalized or mismanaged corporations. The total secondary liability of an officer or director could not exceed $25,000 and contribution is authorized. A written contract could be competent to modify or eliminate liabilty.

This section is without precedent in Alaska and is an attempt to pierce the corporate veil and address ultra vires acts of directors and officers. Settling disputed claims is an obligation of the court and this proposed section falls within that obligation. This specific cause of action could give creditors additional parties to pursue in satisfaction of claims. Whether this would increase cases is not clear since, conceivably, directors and officers could be impleaded or otherwise joined as defendants.

11. Dissolution of Corporation.

Proposed A.S. 10.05.465-10.05.594, inclusive, addresses the dissolution and winding up of affairs of a corporation. Dissolution is noted herein because it is a major area of court intervention. Since this is usually a contentious area among corporate management, shareholders and creditors, courts have a long history of intervening in the affairs of a dissolving corporation. Proposed A.S. 10.06.605-675, inclusive, appears to create no substantial new duties for the court.

12. Proposed A.S. 10.06.818.

This proposed section has its origins in existing A.S. 10.05.777 which permits interrogatories by the commissioner if interrogatories are necessary to ascertain whether a corporation has complied with the state's corporation code.

Proposed A.S. 10.06.818(d), unlike existing law, provides that a petition from the corporation to extend the date for answer, to modify or set aside the interrogatories may be filed by the corporation with the commissioner.

Proposed A.S. 10.06.818(d) gives a corporation an unprecedented recourse to superior court. The use of this tool in superior court would largely depend on the extent to which the commissioner propounded unwelcome interrogatories to corporations. Lacking an abuse of discretion in the commissioner, it is unlikely this tool would create a deluge of superior court cases.

Please see me if you have any questions.

CB:tr

TESTIMONY OF ARCO ALASKA, INC.
JOINT HEARING OF HOUSE LABOR
AND COMMERCE COMMITTEE AND
HOUSE JUDICIARY COMMITTEE
PROPOSED HB 343
"AN ACT REVISING THE CORPORATION CODE"

Good morning. My name is Bruce Frenzel. I am an attorney with ARCO Alaska, Inc. here in Anchorage. I am also a member of the Corporation Code Revision Task Force of the Business Law Committee of the Alaska Bar Association. I am speaking today on behalf of ARCO Alaska, Inc., a wholly owned subsidiary of Atlantic Richfield Company.

Proposed House Bill 343 envisions a completely new Corporate Code. As noted in the House and Senate Joint Journal Supplement, No. 11, dated April 8, 1983, major portions of this bill "are without precedent in Alaska law." Any such major changes deserve adequate time for persons affected by the bill to review and comment. We recognize that the bill was introduced last April, but has laid dormant until now.

We especially appreciate the hard work by the Alaska Code Revision Committee which has gone into the preparation of this bill, but we are strongly opposed to certain portions of it, and are uncomfortable with others.

ARCO respectfully requests that consideration of this bill be deferred for 30 days so that specific, constructive comments on the precedent-setting portions of this bill can be made. With constructive changes to the bill, ARCO may be able to support it.

As currently drafted, one specific objectionable provision allows individual liability for corporate officers, which destroys a basic purpose of incorporation, which is to limit liability

for corporate officers and shareholders. For a large corporation such as ours, the proposed provision combined with the large number of creditors would amount to completely unlimited liability for a few of our highest-level employees. Such a provision is also likely to be even more onerous for small or closely-held corporations.

We will commit ourselves to recommend specific language changes to make the bill acceptable. Unless consideration is deferred, however, we must oppose this bill as currently drafted.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

Dick Regan

DATE: February 8, 1984

RE: Amendments to HB 343/SB 246 on
for profit corporations

At the joint hearing of the Labor and Commerce Committees January 23, 1984, reference was made to certain proposed amendments that would be forthcoming.

It was agreed that the amendments would be prepared by Professor Dan Fessler and would be provided to the committees after a final review of the form by the parties who had initiated them--the Division of Banking, Securities and Corporations, the spokesperson for the Alaska Federation of Natives subcommittee appointed to work on the bill, and counsel for Alaska Airlines.

Those steps were followed.

The amendments were provided to committee staff of the House and Senate Labor and Commerce Committees, both before and after the final review.

On February 1st, Senate Labor and Commerce approved the amendments as submitted, together with a Letter of Intent that two changes in the commentary on the bill be approved as submitted. The committee voted the bill out as CSSB 246(L&C), incorporating the agreed amendments.

Except for one date, the substance, and in some instances the form of the amendments had been agreed upon by the code revision commission many months ago, with the understanding that they would be offered to the legislative committees at the appropriate time.

The proposed amendments and proposed form of the Letter of Intent are attached, as previously provided on February 3.

Also attached are a few words of explanation keyed to the page and line of each proposed amendment.

DR:chw

EXPLANATION OF PROPOSED AMENDMENTS TO HB 343

Page 12, lines 27-29:

Section 5(b) at page 160 of the bill requires existing coorporations to restate their articles of incorporation within five years after the effective date of the new code. It was pointed out that in some instances a corporation cannot provide the name and address of its initial registered agent because the information has been lost. This amendment would take care of the problem.

A relatively recent date in the section is needed, but the specific date chosen is not of importance. The date of first introduction of the Alaska Corporations Code as a bill in the legislature is a date used elsewhere in the bill. Using it here is simply to avoid using many different dates in the bill.

Page 12, line 29:

The amendment is subsumed in the above amendment.

Page 16, line 5:

This corrects an erroneous cross reference. There is no section 10.06.873 in the bill.

Page 56, following line 28:

The bill provides that staggered terms of directors are invalid unless provided for in the articles of incorporation. The effect of the change is that a provision in a corporation's bylaws providing for certain staggered terms of its directors would be valid if the provision was in the bylaws before a recent date--the date of first introduction of the Alaska Corporations Code bill in the legislature, March 24, 1982.

In other words, the amendment would make this provision of the bill prospective, keeping in effect valid bylaws on staggered terms; however, no corporation would be able to hurriedly enact bylaws now, simply in anticipation of passage of this bill.

Page 127, lines 7-9:

The commission agreed with Director Kirkpatrick that requiring a corporation from another state to file its articles and all amendments to its articles in Alaska would be costly to administer and that the ready availability of those articles and amendments from the parent state of the corporation adequately serves the needs of Alaskans. The change was agreed upon in the committee hearing May 17, 1983, and again in the hearing January 23, 1984.

Page 138, line 28; Page 139, line 9:

These are only changes to preferred drafting style. A misdemeanor is a "Class A" misdemeanor if no class is designated in the statute. (Reference existing AS 11.81.250(c)).

Page 147, lines 28-29

This is a deletion of unnecessary and possibly confusing verbiage.

Page 148, line 8:

The deleted phrase is obsolete. Originally the articles of incorporation of an ANCSA corporation had to be approved by the Secretary of the Interior (ANCSA, Section 7(d)). However, after five years the articles could be freely amended. Because many such amendments have been made, articles that are "approved by the Secretary of the Interior" are a thing oof the past in some of the ANCSA corporations.

Page 149, line 18:

The change is to conform to a decision made by the legislature in existing law, AS 10.05.005(a)(2)(B)(ii), that ANCSA Section 7(i) money is not included in "capital". Section 7(i) income is from the poolled 70% of revenue from the subsurface estate and timber.

Page 148, lines 25-26:

This is a change in form only, to conform to language elsewhere in the Act.

Page 149, line 12, following the period:

The section of the bill amended here deals only with ANCSA corporations. The only purpose of the amendment is to conform to Section 30 of the Alaska Native Claims Settlement Act.

Page 149, line 15:

Surplus and confusing language is deleted.

Page 161, line 13:

An update of the effective date clause.

A M E N D M E N T

Offered in the HOUSE LABOR AND COMMERCE COMMITTEE BY:

TO: HB 343

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after March 24, 1982, the address of its initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to March 24, 1982."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section prior to December 19, 1991, shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811
(907) 465-3844

OFFICIAL BUSINESS

LETTER OF INTENT

It is the intent of the Senate Labor and Commerce Committee that the detailed commentary accompanying S.B. 246, House and Senate Joint Journal Supplement No. 11, be considered a comprehensive guide to the proposed new Alaska Corporation Code and as such should be amended and revised accordingly if any changes are made to S.B. 246.

The following narrative changes reflect the amendments adopted in CSSB 246 (L&C).

(At page 89 of the House and Senate Joint Journal Supplemental for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision on the bylaws rather than the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to March 24, 1982 with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

HB 343 TITLE & SPONSOR SUMMARY 14:39 1/30/84 PAGE 1 OF 2
AMENDED TITLE:
AN ACT REVISING THE CORPORATIONS CODE; AND PROVIDING FOR
AN EFFECTIVE DATE

PRIME SPONSOR: HOUSE RULES COMMITTEE.
CO-SPONSORS:
CURRENT STATUS: 4/08/83 IN (H) LABOR & COM REFERRAL: JUDICIARY

HB 343 HOUSE ACTION 14:39 1/30/84 PAGE 2 OF 2

DATE	SEQ	PAGE	LEGISLATIVE ACTION
04/08/83	01	0791	FIRST READING -- COMMITTEE REPORTS
04/08/83	02	0792	COMMENTARY HSE JOINT SUPPL #11
			LABOR & COMMERCE
			JUDICIARY
			RULES
****	**	**	*** *** ***

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard I. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 1, 1984

RE: Transcript of joint hearing on
HB 343/SB 246 on profit corporations

Enclosed is a transcript made from the House Labor and Commerce Committee's tape of the joint hearing on HB 343/SB 246 held Monday, January 23, 1984. Catherine Walsh of this office typed it at the request of the code revision commission.

Any members of the House or Senate Labor and Commerce Committees who were absent from the January 23rd meeting may be especially interested in the transcript.

Since the House members had to leave for a floor session before the meeting was concluded, they may be interested in the testimony at the last of the transcript--testimony of Elizabeth Johnston of the Alaska Federation of Natives subcommittee on the bill and Irv Bertram, legal counsel for Alaska Airlines.

DR:chw

Enclosure

JOINT HOUSE /SENATE LABOR AND COMMERCE COMMITTEE
HEARING ON HB 343/SB 246--FOR PROFIT CORPORATIONS
JANUARY 23, 1984
8:30 a.m.

COWDERY: I'd like to call the Labor and Commerce meeting to order. It's January 23, 1984, at 9:50 a.m. (sic) 8:50 a.m. I'd like to note those present: Rep. Ueling, Rep. Pestinger, Rep. Koponen and James Cowdery. And I'd also like to note present Senator Mulcahy. The purpose of this morning's meeting is to have testimony on an act revising the corporate code. At this time I think that we would like to call on John Abbott and anyone that would like to testify sign in. The first one to testify that I believe I'd like to have is John Abbott. State your name and affiliation.

ABBOTT: Thank you, Rep. Cowdery. My name is John Abbott and I am the chairman of the Alaska Code Revision Commission. The code revision commission, for those of you who are unaware of this, was a Title 24 commission created by the legislature in 1976. It is comprised of individuals representing the Alaska Court System, the Attorney General's office representing the Governor, the Alaska Bar Association representative, representatives from both the House and the Senate, at this time, Rep. Charlie Bussell and Senator Patrick Rodey. Myself as an appointment of the Governor, as a layperson and Fred Brown as a representative of Governor Sheffield. We have one vacancy on the commission at the present time. Generally, the purpose of the commission is to entertain requests by the legislature, by any branch of government for that matter, to look into areas of statutory law of a technical nature that are in need of revision for any number of reasons including the fact that they no longer comport with the Alaska life, because we are a more sophisticated state, because they haven't provided for a number of years, that they are out of sync with the present needs of the law. The commission also entertains its own projects and has at any given point in time two major projects at least, plus a number of minor projects for consideration by the legislature. We have at the present time five major bills, some of which will be considered by the legislature this session, others will die and not get consideration. The bill in front of you today has been introduced by the Rules Committee in both the House and the Senate as HB 343 and SB 246. The two bills are identical in what they do and were introduced simultaneously for the purpose of consideration by both the House and Senate without the necessity of going through one and then going through the other. This is the practice the code revision commission has used for the past several years to expedite consideration of the bill. Myself, as chairman, and Jerry Kurtz who represents the Alaska Bar Association have been present on the commission during the entire

period of time the corporations bill has been considered and worked on, and we along with with other members of our staff and other commissioners are most anxious to meet with you or your staff to further explain the bill itself. It's a very large bill; it's complicated; it is a sophisticated bill. It determines all of the areas of responsibility which are taken on when a company seeks a corporate charter and seeks a privilege conferred by the State of Alaska. We have with us today Professor Daniel Fessler. He is a professor of law at the University of Davis, California, who has been the consultant on this bill since its inception and is one of the recognized authorities on corporate law in the United States. He will give you a thumbnail sketch of this bill and attempt to answer any questions that you may have concerning the specific technical aspects of the bill. The bill was the result of concern on the part of members of the code commission, both in private practice and in the other areas represented by the code commission, that some work needed to be done because the basic bill had been, as it were, an off-the-rack bill adopted from Oregon statutes at the time of statehood. Whether or not it was appropriate to Alaska even at the time it was adopted leaves some question. Certainly the existing law does not in any respect really meet the needs of Alaskans for incorporation. The new bill attempts to set out and define all the relationships between the various principals or players in the corporate status. So that one need only look at this bill to determine how you become a corporation; how you act as a corporation; how you terminate as a corporation. The bill that's presently before this committee was introduced, I believe, on April 9, 1983. Since that time, some changes have been made as a result of public hearings held by the code revision commission and input from various different organizations concerning some of the specific features of the bill. And as a result, the code commission will be making some recommendations for changes to the committees considering this bill. The work on sections, written comments to the bill and requests that certain changes be made. These changes address concerns raised by Alaska Airlines, one of probably the state's largest corporations, a special subcommittee of the Alaska Federation of Natives that has worked for quite some time with the code commission, has graciously, generously provided its own time and expertise and its legal staff in various of the corporations and has provided us with some good and needed amendments to the bill. Those, too, will be entertained. We also have worked very closely with Mr. Willis Kirkpatrick, deputy director of corporations in the Commissioner of Commerce office. And he, too, has recommended some changes that if made will reduce any financial impact on his office. So that it was the intent of the commission to draft a bill that would have no financial impact on the Commissioner of Commerce office or the director of corporations. So you will be getting some recommendations for amendments pursuant to our discussions and the exchange of ideas of Alaska Airlines, the Commissioner of

Commerce and the Alaska Federation of Native's subcommittee. I think without further ado I'll ask Professor Daniel Fessler to come up and give you a brief summary, an overview of what the bill does. If there are any questions, we also have signed up as witnesses, Commissioner Jerry Kurtz, Fred Brown to provide additional testimony or comments or, in the event you have some questions, we'll do our best to answer them for you. Thank you.

COWDERY: Thank you. I'd like to note that Senator is present. And at this time, I'd like to have John Abbott . . . then the next one up is . . .

RODEY: Rather than invite any comments, I think that Professor Fessler can do a better job of explaining the material than anybody else I know. Mr. Chairman, I'm the Senate member of the code revision commission, and the code has labored long and hard, particularly Professor Fessler and Chairman Abbott on this particular legislation. And I think it is worthy of the committee's very serious consideration. It is in final form, but it is very near passage.

FESSLER: Gentlemen, I am a school teacher at the University of California at Davis. And the subjects that I teach are contracts and corporations. Four years ago I was approached by the commission and asked if I would be interested in serving as a consultant to first survey the content of existing Alaska statutory law in the business field, and then work with the commission should it determine that there was need for revision. The survey of existing Alaska law was undertaken, and the conclusion was arrived at that the existing Alaska law was not the law that the state would most like to have its citizens functioning under. The law that we currently have in Alaska was adopted by the legislature, the first legislature after statehood, by adopting the then Alaska, excuse me, the then content of the Oregon corporation law. The Oregon corporations law in turn was taken from something called the Model Business Corporation Act, which act was put out by the Business Law Section of the American Bar Assocation in the early 1950's. By the time Alaska adopted the Oregon law, the Oregon legislature was on the verge of changing it. And, subsequently, the Oregon legislature has changed much of the content of the law. So, and this is because the model act, which was the basis of the Oregon law and then became the basis of our sort of stepchild has been in the process of evolution. The commission also noted that in the intervening near quarter of a century, that there have been significant changes in corporate law in three of the most critical jurisdictions to which other states generally look for guidance. And that is that New York had rewritten its corporations laws in the late 1960's; California undertook a similar project in which I was involved on the working committee with the legislature in the mid-1970's. And finally the model

act itself has been recalled and is in the process of a three-year study in which a couple of years from now will result in further recommendations. So there have been changes with regard to the theoretical basis of the law. Further, there are changes in Alaska in a quarter of a century. Changes which suggested that it might be time for the State of Alaska to have a corporation law that is a product of its own deliberate creation, rather than something borrowed from elsewhere. The result of this four-year effort is the bill which you have in front of you. And with the exception of some minor amendments which resulted in final meetings with representatives of the Alaska Federation of Natives subcommittee and various other private parties who have testified before the commission that the bill which the commission is seeking your legislative approval and enactment is now in final form. In addition to the bill, the commission has prepared very lengthy commentaries. These commentaries, hopefully, are designed to explain to members of both the House and Senate the origin of each and every provision of the act, to share the value judgments which caused the members of the code revision commission to recommend that particular content, to disclose to you to the extent that the statute is borrowed or modified from statutory law in other jurisdictions the specific genesis of the law, and then to state what change would be made in existing Alaska law were the legislature to adopt this bill. In addition, your staffs will be furnished, and the members will be invited, to work with another document. I apologize for the prodigious size of these documents, but this document is useful in that if an individual is familiar with the provision of existing Alaska law, this works backwards from existing Alaska law, section by section, and shows how that provision would fare should this particular bill be adopted. So those study aids hopefully will be useful to staffs and will be useful to the various committees of the legislature. What I had hoped to do this morning was to share with you some of the value judgments which the commission has made and which are embodied in the multiple provisions of this act. One of the major disadvantages of existing Alaska law is that if an individual were to pick it up seeking to know the content of the law the individual might follow, existing Alaska corporate law is totally disorganized. Provisions which may relate or surround the problem are scattered throughout the bill. One of the initial impressions that you will gain from looking at this bill is that it is very tightly organized. it is organized by major topical sections with the hope that if an individual has a problem with the formation of a corporation, all provisions of the act that deal with corporate formation will be found in Article 3. If the issue relates to corporate finance, Article 4 contains all the relevant law. So that, in essence, the commission directed me to draft the value judgments which it had made very much in the form of a cookbook, but hopefully getting the ingredients in the right order so that it should be something which an individual, whether

a layperson or a practitioner desirous of knowing the content of the law, will be able to find it. And once in the right area, will find all of the related provisions of the statute rather than have them lying around in land mines some 25 to 30 credit pages later, which is the rather dubious distinction of the current provisions of chapter 5, Title 10. Now the areas wherein significant value judgments are found would be Article 3 which deals with the formation of a corporation. Some states like California have attempted to say that if you are going to form a corporation in California, certain major value judgments have been made by the legislature. And the price for forming a corporation in California is that you comply with the value judgments. They would include such things as the requirement that there be cumulative voting for shareholders; that the board cannot be classified; that the directors can only serve one-year terms. California is a statute which is very pregnant with value judgments that sort of tell citizens this is the only way we are going to permit it to be done. Now the reason that this statute does not do that is first there was a fundamental philosophical disagreement that the State of Alaska should be in the business of making value judgments about how people who enter in the corporate form ought to behave. The value judgment which took precedence over that was that people should be informed by reading the statute what the possibilities are. And that they should be allowed, knowing what the possibilities are, to make their own decisions as to whether there will be cumulative voting; how large a board they will have; whether they will classify the board; whether the board will have terms that exceed one year. But that those value judgments should be layed out, and they are layed out in Article 3 in a manner which an individual determining to form a corporation can quickly see that these are the basic things with which the individuals desirous of entering this association should come to some agreement. Further, there is the advantage that we say that if you are going to make these fundamental decisions, you must put them in the articles of incorporation. So that if a person who is a potential investor desiring to know what the lay of the land is for XYZ corporation need only obtain a copy of the articles of XYZ corporation, and that individual will have a definitive statement of the basic value judgments which citizens forming that corporation have made. And there is a further problem, while California has attempted to make value judgments and impose them on citizens, the scandal is that people then simply leave the state and foreign incorporate. They come back as Oregon corporations. They come back across the state line as Nevada corporations. And so it was deemed that this was probably not the best thing to attempt, and that the attempt in the state that's pursuing it isn't working. So in that respect, although you'll see the California corporation code has had a significant impact on many of the provisions of this recommended legislation, the basic thing that the California corporation code is known for

is not carried forward here. It is possible to form a corporation in Alaska which is every bit as straightlaced as a corporation mandated under California law. That is a value judgment that citizens can make. It is not a value judgment that the legislature would be making for you. Now with regard to Article 4 on corporate finance. Here Alaska law was deemed to be flawed in a manner that is true of virtually every state. Lawyers, at least in my experience of being one and teaching others for a longer period of time than I like to recollect, generally make a career decision to go into law sometime after they learn that they have no aptitude whatsoever for arithmetic, let alone mathematics. The consequence is that most lawyers cannot, including myself, balance a checkbook. And lawyers are horrified by concepts of accounting. Therefore, over the years we have sort of developed our own accounting techniques. Because over the years we have had perhaps a bigger voice than we should have whispering in the ears of elected representatives and people, our versions of the myths of accounting rather than the accounting profession have begun to creep into the law. Alaska's current corporation law suffers from perhaps a terminal case of lawyer-accounting terms. One of the major things which corporations must worry about if they are to behave in a socially responsible manner, since they are given the presumption of limited liability. If I form a corporation, my creditors and even victims of calamaties such as torts must look only to the assets of the corporation, not to my own personal assets. Circumstances are important to the state, all people who come into contact with corporations. Well, then what assets must I leave with the corporate entity? What accounting principles must I observe in keeping the books of the corporation? The law has always been interested in this question. But the problem is that we allowed a gulf to grow between what the law seemed to be suggesting and what accountants were telling people are the intelligent way to parse through matters and to resolve them on the books and records of a corporate entity. California broke new ground in 1977 when it said that it would abolish all concepts of legal accounting. It would substitute some straight, common sense ideas as to when a corporation could pay a dividend. A corporation could pay a dividend within the discretion of the board of directors at any time so long as the assets of the corporation equal the liabilities of the corporation with the protective ratio of $5.00 in assets to every $4.00 in liabilities. A very simple concept to understand. There are no longer reduction surplus, earned surplus, all of the notions which lawyers have invented over the years. It's a very simple idea. If we are going to make a distribution, whether we make it in money, whether we make it in corporate property to shareholders, we have what is called the ratio of assets to liabilities which must be maintained. This bill adopts what is turning out to be one of the most successful decomplications of corporate life which was done in California. It also follows both

California and now New York in saying that in complying with the law, that so long as a corporation keeps its books and records in a manner which reflects generally accepted accounting principles, he has complied with the law. So we leave to the accounting profession and not to my brothers and sisters-in-law the determination as to what is the best way for that craft and science to proceed to advise. So accounting is left to accountants, but we make a simple value judgment to protect people. It's this ratio of liabilities to assets. Five dollars in assets to four dollars. You can make any distribution you want so long as you do not go below that floor. That, I think, will make it much easier for people determined to comply with the law to do so and make the detection of those few people who are determined to evade the law much easier. Now with regard to Article 5, a major question has been in existence for many years. What are the proper prerogatives of shareholders as opposed to the directors and officers of the corporations? Is it to be an Athenian democracy, or is the better model that you elect the directors and you vest control and management of the corporate entity during the period of tenure of their terms in the individuals? Article 5 has a default provision that the powers of control and management of the corporation are vested in the board. However, a corporation may by the terms of its articles modify this presumption and confer greater prerogatives upon shareholders. If it is going to do that, however, it must do it by an affirmative provision in the articles of incorporation. The thrust of Article 5 is to ensure that shareholders have acess to reliable and up-to-date information as to the condition and record of accomplishment or failure of the people they have elected to be the directors of the corporation. You will notice that for the first time we would standardize notice requirements. Under current law, one of the defects is that we have no standardization of notice requirements. For certain matters, 30 days' notice is sufficient. For others, 40 days is required. Under this bill, notice requirements are standardized, and it should make people who are determined to evade it much easier to ferret out. So again the act reflects the commission's value judgment that the basic policy or power between shareholders on the one hand and directors on the other that the act should specify what should be that ratio or relationship if the parties don't wish to change it. But if they do wish to make a different arrangement, if they put it in the articles they are free to do so. Article 6 deals with the prerogatives and responsibilities of officers and directors. Here I think you'll be very pleased to see that for the very first time we have a statutory definition of the duties of care and duties of loyalty which directors and officers are expected to obey. At the present time in Alaska, it would be a matter of conjecture what the Alaska Supreme Court would eventually say with the content of those important duties. This makes it difficult for an individual who is embarking upon the career of

being a corporate director, perhaps out of accommodation to friends, and many small corporations know exactly what it is I am expected to do, a peril of later on being held accountable for not having done it. Another important feature of this bill which has received wide support by those people who have read it, is Section 435. Section 435 for the first time in Alaska subjects shareholder derivative causes of action to statutory regulation. Alaska presently has the dubious distinction of being one of two American jurisdictions which has no statutory regulation of the derivative suit. This is a suit in which a shareholder comes forward and brings a cause of action that alleges that not I, the shareholder, have been injured but that the corporation has been injured. And I as a shareholder appoint myself to litigate this matter on behalf of the corporation. The tension between the prerogatives of the incumbent directors of the corporation to make that decision and to control that litigation and the rights of a shareholder to say that I am going to elbow my way into the pilot's seat in this plane for the next several years, is a very important one because it may be that there is corruption at the board level. Maybe there is not. I urge your very careful attention to Section 435 to point out that I believe you would find that you would go from having no statutory regulation on this important subject to having one of the most balanced, comprehensive regulations of the subject in this country. Section 435, therefore, is an important innovation. Article 7 is rather technical in nature. It deals with the question of how we go about making amendments and changes to the articles of incorporation. Again, it standardizes procedures and forces the attention of those who wish to change the basic format of a corporation into doing it by way of amending the articles so that there is regularity. And again so that potential investors interested in the corporate entity can look at the articles of incorporation and have not only an historical impression of what the corporation was like in yesteryear, but an accurate, modern impression of where the power within this corporation is currently being distributed. Article 8 is going to be a matter of great interest to your constituents. It deals with what are called organic changes. In essence, mergers; consolidations; share exchanges; sale of all the corporate assets other than in the usual course of business. As each of us is aware, the United States right now is going through what is called a merger craze. Corporations are appearing to be attractive takeover candidates by individuals who may or may not have legitimate desires or desires which would advance the interest of shareholders should they be in a position to seize control of the board of directors. At the present time, Alaska law is very unclear as to the respective roles of incumbent boards as opposed to shareholders. And, therefore, Alaska corporations look vulnerable to individuals who are determined to launch a takeover bid. Article 8 clearly defines the prerogatives of existing management and the shareholders of a corporation with respect to

framing the content of one of these organic changes and taking it through the shareholder approval level. Essentially, what Article 8 does is vest with the existing board the power to frame the terms of a merger, a consolidation, a share exchange, or sale of assets in an extraordinary transaction. And then require two-thirds approval by the shareholders of the corporation in order to approve. This should bring Alaska corporations into line with California and New York and other major states which have moved to protect the integrity of their corporations from being the victims of an easy takeover in which the will of the shareholders and existing management would simply be subverted and brushed aside. Reform needs to be taken in Alaska in this area. I would hope that you would be satisfied with the commission's recommendations which are embodied in Article 8. Article 9, dealing with dissolution, is very important because of the changes that have been made in the federal bankruptcy law. It coordinates with modern federal bankruptcy law and creates for the Alaska judiciary a far more sensible approach to protecting the rights of creditors as well as the rights of senior shareholders in the event that a corporation goes to either voluntary or involuntary dissolution. It also contains some very innovative, and I think, useful provisions that deal with giving shareholders who are being oppressed or frozen out of the role of management or income where other shareholders are being afforded such prerogativees a right in the final analysis to petition for involuntary dissolution in order that the grievance which would have to rise to the level of a very serious grievance to get the attention of Alaska courts. Again, these are not new ideas. They might be the final decision of the Alaska Supreme Court if someone were to spend $100,000 litigating that. But if you enact this bill, all Alaskans with only the expense of supporting their government will have presumptive answers to these important questions. Those are the basic provisions and value judgments which underlie this bill. Both myself and the law students who have assisted me in working with the technicians in this area will be available to any member of either body and staff members. I am prepared now to answer any questions which any members of the committee may have.

RODEY: Mr. Pestinger.

PESTINGER: Thank you, Senator Rodey. Professor Fessler, to me this is a really excellent articulation of the rights and duties and obligations so that it gives our larger corporate participants a clearer understanding of where they stand, which is so essential to doing business. But what I am wondering about, though, is what burden this approach may place upon the smaller mom and pop family corporation. To me, if I had such a business I could not engage in corporate law comfortably without the assistance of counsel. Do you think that this packet necessitates the assistance of counsel as almost a mandate now

for anyone that does business in the corporate form? In other words, I am wondering, I see the need for this in California and New york, and I see the need for this in Alaska with that level of corporations that we deal with. But how about that other level that are just kind of, they get their articles punched out and they ask their lawyer to help them with the minutes, and they look at the Supreme Court that says that the only way you pierce the corporate veil is with an indicia of fraud. So they are using a whole different standard of operation. I mean this is really substantial. Do you think it might have a negative effect on that small family business?

FESSLER: In terms of cost of doing business in the corporate form, I think it will have the opposite effect. Right now, many small businesses probably are coming into corporate existence without the assistance of counsel at all. People are going out and buying little kits for $49.95 that contain forms that they fill in and send to the state. They are oblivious to the legislature's requirement that they file biannual reports to the legislature. They are not doing so. They are in danger of having their articles and their corporate status dissolved by the commission because the legislature has prescribed that as the penalty for not filing reports. And one of the basic difficulties with this situation will always be people who, to use your example, a two-person corporation, decides for one reason or another that they should do business in the corporate form, and then having done that they forget about it. They don't observe any of the formalities of corporate existence. They don't keep separate books and records. They don't segregate their assets from the assets of their corporation. And they don't file reports. Now they would be in trouble under existing Alaska law, sir. They will be in trouble under this bill. In the sense that when the State of Alaska confers a corporate charter on someone, whether or not they have sent $49.95 off to somebody who advertises in every airline magazine, that you don't need a lawyer and you, too, can be a corporation and somehow you will pay no income tax and like me you will turn out being rich. The only person that's probably ever done that is the individual who wrote that book, because he is getting rich by all of the people who write in and send their $50. I think this is the problem you'll want to keep in mind. What I am saying to all of you is that this bill is designed in such a manner that, although it is a complicated subject and I wouldn't suggest anyone could write a corporation code that could be so obvious that an individual could make casual reference to it and never need an attorney so they could guide themselves through the world of maintaining a corporation, this bill does organize the law. It does restate the law. It does have comments which are designed to assist people in understanding the law. Not one of those features can be said about current Alaska law. So there will be a problem of people who incorporate and thereafter regard it as a

little flag of convenience which they'll fly so long as it's useful and which, on the day that it isn't, they'll just forget about it. That will continue to be a problem not only in Alaska, but in California. It's true in Nevada. It's true in Wyoming where I was reared. It's a major social problem we have. People who incorporate with no idea that there are responsibilities as well as privileges for taking on that status. Now, fortunately, the federal tax law which in years gone by caused people to believe that they could pay less income tax by somehow becoming a corporation, have because of movements undertaken first by the administration of President Carter and now of greater emphasis during the administration of President Reagan. As you know, the marginal income tax on individual income has now been reduced from a maximum of 70% now to where it is very close to the top corporate, there is only a two percent spread. But I still find that many people believe that they are going to get some tremendous tax benefit by becoming a corporation. What they do, of course, is eventually wind up in a hellacious tax audit. They find and the individual who wrote the $49 book and gave you the form never accompanies you to that audit because he is living in Bimini.

RODEY: Representative Koponen.

KOPONEN: I was interested in Section 488 which does create a liability for the officers of the corporation, and I'm not up on contract law and one of your notes, in terms of any written contract to modify or eliminate the liability created by this section, what happens to that liability, is it transferred or . . .

FESSLER: Let me explain to all of the members. Section 488, gentlemen, appears at page 67 of the draft in front of you. Section 488 relates also to Rep. Pestinger's question. One of the reasons that people incorporate is to achieve from the State of Alaska a presumption of limited liability. Now this presumption of limited liability means that to all individuals who do business with the entity which is incorporated, they are to look only to the assets which the individuals who incorporated have left with the corporation to satisfy their claim. This is true whether those individuals have made contractual relationships with the corporation or whether they have entered into an accidental injury situation, a tort. Section 488 is called secondary liability of directors and officers. It was reflected after lengthy discussions among members of the commission, a feeling that for small creditors of corporations, employees, tradesman, materialmen, suppliers, individuals who generally have a credit relationship to a corporation which is not reduced to writing, that these individuals are the year in and year out, these are the individuals who pay the price for corporate existence. When corporations are run so long as it is

convenient to the individuals who find they are the owners and then when they are not, they are simply abandoned. Large institutional lenders, bankers, insurance companies, large contracting creditors, will get a lawyer and go out and they will quote, attempt to pierce the corporate veil. Alaska's common law on the circumstances in which it will disregard limited liability is found in only three cases since statehood. Those cases do not hold out great hope that in the absence of fraud in a transaction that the court would do. But if you have a claim for $1,000 in wages owed to you, there is no lawyer who is going to be able to successfully launch that lawsuit. If you are an individual who sold fish to a restaurant which has now gone out of business, and the owner has marched off leaving you unpaid and it's a $43,000 account receivable, you cannot get any modern recourse at all. Section 488 for the first time to a very limited extent shifts that presumption. It says that the officers and directors of a corporation to the extent that its assets prove insufficient to cover its liabilities, have a liability to a class of individuals who are defined as employees of the corporation as materialmen, tradesmen, etc., people who have extended credit on open account for up to $25,000. Now this liability, sir, is not inevitable. The statute clearly says that if I have a corporation and you have a fishing fleet, and you are supplying my incorporated restaurant with fresh salmon, that you can be approached by me saying I would like you to agree in writing that in the event that this business folds, my restaurant, you won't look to me for the liability which exists under the law. It would be a liability of up to $25,000. That's all you could ever recover under this. So for the first time there would be an incentive in dealing with the smallest people in the marketplace who are the recurrent little mules on which this business of limited liability is ridden out, year in and year out, that these people would have some relief and that there would be an incentive to talk about this question of limited liability. And then if I can convince you that you should give me a relaxation, a waiver of that, that's fine. But in the absence of a contractual modification, I would have the right to this.

KOPONEN: The contract then is between the creditor and the corporation, not between the corporation and its directors.

FESSLER: That's absolutely right. It's between the corporate debtor and its employees, between the corporate debtor and its materialmen or suppliers.

KOPONEN: It's a very useful section. I know there is a major business problem in the Fairbanks area, these collapsible corporations.

FESSLER: Mr. Chairman.

COWDERY: Would the effect of this, would it discourage say qualified managers from getting into taking over a trouble corporation that was having some problems, maybe through a lack of expertise in the past, would this discourage someone from coming in . . .

FESSLER: Well, it would certainly give me pause. Now there are two things relevant, sir, in the bill. First, if the corporation is in a process of dissolution, one of the ways to avoid dissolution under the provisions of this bill is for a court to appoint interim directors in order to resolve deadlocks. Those directors are not subjected to this type of liability. So the director who is brought on board to try and straighten things out by court order is the director who is exempted by the reference in the bill to other than the directors who are appointed pursuant to. Now that is one protection. Another factor, of course, would be that if a corporation is in trouble, and I am going to step in and attempt to save it, one of the things I'd want to do is be aware of Section 488 and go to the creditors and say, I am willing to come into this picture only if you are willing to contract to exempt me from any personal liability that I would incur. Yes, sir, it would be something that in the hypothetical you advance an individual would want to take into consideration.

RODEY: If I might interject, that would apply to directors but not to employees of the corporation?

FESSLER: It has no application to employees at all. In fact, I should tell you that this appears to be very novel, and I want you to understand that it has a great quality of being novel. But New York has never given total limited liability to anyone. And if anybody tries to come to you and say, my God, if we adopt this the wheels of commerce will grind to a halt. Since 1843 when New York adopted the first general incorporation statute, the ten largest shareholders in a New York corporation are subjected to liability in the event the corporate assets prove insufficient to the claims of all employees. New York has never stricken that from the books, and it has not prevented the development of the State of New York as a center of commerce. What we did here, was to say that in many Alaskan corporations we didn't want to have the liability on the ten largest shareholders because that might include many very passive people who really have nothing to do with the way in which the business was run. So put the liability on the people who are being paid, the officers, the president, and the secretary and the treasurer. They are the defined officers and the directors. They are not passive, or they oughtn't to be. So that is how we would differ from New York law. And we have broadened the exposure, because in New York the exposure is limited to claims of employees, and we broadened it to include the claims of materialmen and

suppliers.

COWDERY: In the past we have had some of the Native corporations who have had financial troubles and hired two people to direct them and turn it around. And this is an area I was wondering about, if that would be . . .

FESSLER: I appreciate the question. It is an important matter. The AFN subcommittee has looked into this question. I think that at that level, or at the level of any large corporation that is involved in an attempted turn around, that there would be awareness of the provisions of Section 488 and that there would be appropriate advice from counsel to deal with the subject. That would be my hope.

BROWN: Mr. Chairman, may I suggest . . .

RODEY: Mr. Brown.

BROWN: I am Fred Brown. It's nice to know that Labor and Commerce [garbled] . . . The one example you might think of is what would really happen . . . the example might be one of the most prosperous, currently most prosperous Alaska corporation is Alaska International Air. Originally, that was Interior Airways based out of Fairbanks. They expanded too fast for the building of the pipeline, which didn't get built fast enough as many Alaskans remember. What happened then was, and this sort of thing is really what happens when a corporation gets into trouble in most cases, and that's why I'm raising this as an example. What happened then was they went into reorganization and the creditors and shareholders hired Mr. Duncan McClaren, a legend in the Canadian air industry, a great manager and a legendary worker [TAPE CHANGE] . . . Section 488 to take care of that problem.

RODEY: Thank you, Mr. Brown. This is a problem currently in Alaska. It is possible for individuals who incorporate to run up all sorts of bills, not pay its creditors, and then just move away from that corporation, will eventually be resolved by the state, set up another corporation and then bilk a lot of small tradesmen who work for the corporation, creditors, what have you, move on. You can do it in serial fashion. It is currently being abused presently in the state. Mr. Abbott has kept an eye on this, has had a practice in that area of the law for 15 years. But it is currently a problem. There are a lot of honest Alaskans who lose money because of this problem.

FESSLER: And I think the problem is also that it has a broader ramification. To the extent that citizens get the impression that there are tricks out there for people who are in with lawyers, if you will. It demeans my profession of which I am very proud. We were never the source of this value judgment,

that people could pull this type of thing. But to the extent that people believe that if you quote, know the law, you can do bad things and get away with it. You can do hurtful things and have no accountability. It creates an impression of the law which none of us have an interest in seeing furthered in the minds of citizens. Because the minute one law becomes suspect like this, the cloud falls over all law. And so this is probably the most important value judgment about corporations. They have done great things for us. But the idea of a one-person corporation, and the only person that probably has pulled off that role real well in history, was Louis the Fourteenth and a tremendous price was paid for that notion.

UEHLING: If we can kind of go back to the section regarding the foreign corporations, maybe you could explain what the Alaska Code Revision Commission took as far as an approach as a comparison of what occurred in California regarding the foreign corporation situation there.

FESSLER: Because California has this basic social problem that in order to evade the restrictions on long-term director terms or in order to have a board classify itself, most important California business, most corporate business at the moment in my state, is foreign incorporated. Runs to a different jurisdiction and comes back home and says we've been gone 20 minutes, and we are now a foreign corporation, we're a Delaware corporation. The basic social problem we had in California when we approached the revision of the legislation was to say, well, will we give up these value judgments which we've had for many years. And the bar association, frankly, and the banking industry thought that's what was going to happen. That we were going to get a corporation law that looked more like that of other states. What the legislature did, interestingly enough, and I think it remains to be seen because it's costing us a lot of money in litigation in front of the federal supreme court, was to say, no, if a corporation has a certain percentage of its employees in California, does a certain volume of business in California, has a certain amount of its ownership owned by shareholders in California, then even though it purports to be an Alaska corporation or a Delaware corporation, we're going to say that it's merely a pseudo foreign corporation, and we're going to apply California's laws to it. Now the Arden-Mayfair litigation is pending in the California Supreme Court where it has been on hold for nearly three years. Delaware's courts have already litigated the Arden-Mayfair case and come to the conclusion that California was attempting to deny full faith and credit to the public acts of a sister state. Ultimately, the federal supreme court will have to decide whether California's notion of pseudo foreign corporations is an idea whose time has come. The judgment of the commission was that there are no pseudo foreign corporation concepts in this bill. Instead, we increased the

reporting obligations on foreign corporations to keep us informed of the nature of their activities. We greatly increased the circumstances under which it's clear that they must seek a certificate to do business in the State of Alaska. But we have not attempted to interfere with their internal control and management such as California has done, because we haven't done it to our own people. We haven't said you have to have a board with one-year terms, that you can't classify the board, that you have to have cumulative voting. Our default mode if you don't say is, you do have one-year terms, if you do have cumulative voting and you don't have board classification. But we didn't feel that it was necessary to get involved in that position. But later on in what may be five or six years as you see the outcome of the Arden-Mayfair matter, and then if you decide you want to adopt certain similar rules, that would be an appropriate time to do that. But there is nothing here now that contains that.

BROWN: At least some of the members of the commission think the Delaware view is going to prevail in the state supreme court, and that's one of the reasons why the provision is written that way.

RODEY: Thank you, Mr. Brown.

UEHLING: This is a follow up question. And in just sort of reading through this I got the feeling what would be the situation like if you took a state like Delaware where we had a situation where companies are going to incorporate ther because it's a very pro-management kind of situation, where in California it's very pro-shareholder, the shareholder is a completely different situation, how does Alaska rate on that spectrum? Would they be considered a very pro-management situation?

FESSLER: No. The default provisions, ever since I learned to use the personal computer, I've picked up the jargon, excuse me. The provisions that are in place if you don't say otherwise of the Alaska statute today, because it's a version of the early '50's model act would today be called a pro-shareholder jurisdiction. And the provisions which would lock into place in the absence of agreement that they be otherwise under this bill are also pro-shareholder provisions. But so that Alaska would in the default mode line up looking very much more like California than Delaware. But it would be possible for people to make an intelligent and informed decision to form a very, very management oriented, reduced role fc shareholder corporation, not going as far as Delaware has gone. For instance, a good example in Delaware, it is possible that the board of directors would have the exclusive power to amend the articles and bylaws, and the shareholders could be ousted from any role at all. That would not be possible in Alaska. It isn't possible under current law with regard to the articles. It would not be possible with

regard to the bylaws should the legislature enact this bill. So it continues to leave Alaska law with most other western jurisdictions as having a pro-shareholder bias, but not going nearly as far as California.

RODEY: Are there other questions from members of the committee? If there are . . .

FESSLER: I'll remain in the room, Mr. Chairman, in case anyone does have any questions for me, but there are other witnesses desiring to appear.

RODEY: The next witness is Willis Kirkpatrick, the director of the division of banking and securities.

KIRKPATRICK: Mr. Chairman and committee members. My name is Willis Kirkpatrick. I am director of banking and securities for the State of Alaska. I'd first like to say that we have appreciated the opportunity to join with the commission as a participant in discussion in their work. I believe that any of the concerns the state has had as far as the administratio of this new code, the commission has known up front as to what the problems we've had. One of the things I'd like to point out is that what I am excited about in their work is that in a present situation where we have an old Oregon law, in a situation where we have very little, if any, state common law court cases the administration of the provisions of the Alaska Business Corporations Code as it stands today is somewhat suspect in some of its legislative intent. And to determine legislative intent, we go back to Oregon law, we go back to Oregon cases, we go back to the sparse official comments under the model code. With the passage of this bill, I think that our work as far as working with the corporations in maintaining their files is going to be a whole lot easier because of the official comments alone. Everything has been addressed. I would suggest that in considering the passage of this bill, that they make part of the record the official comments as to the new law. There is only one particular area that I have a problem with, and that is in Section 733 on page 127, in the filing of foreign corporations to do business in the State of Alaska. On line 7, beginning on line 7, it requires that together with a certified copy of its articles of incorporation all amendments to the articles . . . In other words, what they are saying here is that one of the provisions for a foreign corporation to qualify to do business in the State of Alaska, is that it would have to file its articles with the state and any amendments to those articles. In a hearing last session, we brought this up and I believe, you'd have to check with the code revision commission on this, but I believe it was agreed upon that they would reconsider that requirement to file articles. At the present time articles of foreign corporations are not filed with the state. We find that

some of our sister states, those that do have this provision, are looking at dropping them. I think the last one we've heard from is Texas. Now I don't believe that it is going to create any hardship to anybody in the State of Alaska that wishes to find out the substance of the articles of a foreign corporation. First of all, if they are looking for the officers and directors of the foreign corporation, we can look at the application they file with us giving us that particular information. If they do want a copy of the articles of incorporation or the amendments to the articles of incorporation of a foreign corporation, the place that would have the most current filing would be the state of domicile so that they are available. We would be more than happy to assist anybody that wanted that to find out the proper procedures to obtain those records. With my understanding that this provision, that the code revision commission had no particular problem with that being dropped, the fiscal note that I prepared was zeroed out. If this provision stays in, I am going to ask for a revision of the fiscal note because one of the problems we have now is just file maintenance. The biggest problem in file maintenance is amendments to articles. We receive a great number of amendments to articles every day, and one of the things we have to do is that we just don't file the amendments. A lot of times we have to look back through the files to see what the prior articles contain to see amendments are consistent. If nothing more than article order. That is the only comment that I have as far as any changes are concerned, and I am sorry I don't have an amendment prepared, but I would be most happy to. I would replace that word with a certificate of compliance executed by the officer of domicile, or the official of domicile. I am open to any questions.

RODEY: If I might ask either Chairman Abbott or Professor Fessler to respond.

ABBOTT: Yes, Mr. Chairman. We had previously agreed with Mr. Kirkpatrick that we would make that change. Unfortunately, consideration of this matter came up after the bill was printed. So it is the position of the commission that this requirement should be deleted when it was brought to our attention that it would serve no useful purpose and would impose an additional fiscal burden on the commissioner of commerce. We are in complete agreement that the provision should be deleted, and there should be no requirement to file foreign articles or amendments.

RODEY: Thank you, Chairman Abbott. Mr. Brown.

BROWN: On behalf of the commission, I am sure they would agree, it would be very nice if Professor Fessler were involved in structuring the amendment that the committee might be interested . . .

RODEY: That's a very good suggestion, Mr. Brown. Professor, would it be possible for you to prepare that amendment?

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

KIRKPATRICK: One other item that my notes show. On page 138 and 139, on line 28 of page 138 it refers to the misdemeanor, and my staff says that it should be either a rated misdemeanor A or B to be consistent with Title 9. And the same with line 9 on page 139. That also relates to a misdemeanor.

RODEY: If I might address Chairman Abbott or Professor Fessler, are we in that case talking about a Class A misdemeanor?

ABBOTT: That's our understanding, Mr. Chairman. Yes.

RODEY: If again I could request you, Professor Fessler, to prepare the appropriate amendment based on current Alaska criminal law.

FESSLER: The question has been asked, has been prepared, is one of the amendments that Chairman Abbott was referring to is being transmitted . . .

RODEY: Thanks, Professor. Obviously we can't take any official action here. If there are any questions, we'll have this prepared and delivered to committees on both sides for their consideration and Senator Hulcahy and myself will explain it on our side and . . .

COWDERY: Could I, I was wondering what financial burden would this, if we adopt this to the existing corporation for the state, would it be to conform, is there any grandfathering situations . . .

KIRKPATRICK: If I understand your question, Mr. Chairman, as to what this is going to do to existing corporations. I think the last two sections of the bill pretty well cover a timely transfer of the act, and I think we are gong to have some problems just as far as educating the corporations in switching them over. I don't see that a lasting problem. I don't see it as much more of a problem than we have now with the new corporation that is coming on board. I don't think there will be an financial, I think the problem is going to be basically on the state's side as far as getting the information out and getting the transition going. I don't envision any

economic problem on the corporation. I am wondering about correspondence fees, but . . . I don't see it as a major problem.

RODEY: I just might add that the proposed draft was written to reduce legal fees by putting a great element of certainty in there so that a layman would have a much greater understanding of the law just by reading the law without having to consult a lawyer. So I think there will be actually a reduction of attorney's fees. Are there any other questions for Mr. Kirkpatrick? If none, thank you very much Mr. Kirkpatrick. We do have floor session now at 10:00 a.m. We don't go in until 11:00 o'clock on Mondays, as a convenience to the Anchorage legislators. Would you like me to stay?

ABBOTT: Mr. Chairman, if I might, there are only two other people that intend to offer brief testimony. That's Liz Johnston and Irv Bertram.

RODEY: In consultation with House chairman, I will stay here if Senator Mulcahy is agreeable and listen to the comments of Elizabeth Johnston and Irv Bertram and then report to you, sir. Thank you, gentlemen. Next, I'd like to call Elizabeth Johnston. It's always disconcerting to be testifying and have everybody leaving. But, Senator Mulcahy and I will make up for any absence of numbers. You have the floor, madam.

JOHNSTON: Gentlemen. My name is Elizabeth Johnston. I'm general counsel to Bristol Bay Native Corporation. Today I am here speaking on behalf of the Alaska Federation of Natives concerning the bill on the revision of the corporate statutes, the profit corporate statutes. You will be delighted to know my comments will be brief. This is because we have had extensive opportunity to present our concerns before the code revision commission. By way of background, I can tell you that in the summer of 1982, the Alaska Federation of Natives created a subcommittee. And the member of the subcommittee had both regional and village corporation backgrounds, and the committee was created to review and testify on the proposed revision. We met with the code revision commission on three separate occasions and made extensive comments. Based on the receptivity of the commission to our comments, and the way they were able to meet our concerns, in April of 1983 Janie Leask, who is the president of the federation, wrote in support of the proposed revision. And she commented specifically on the quality of the new legislative scheme, on the technical commentary which has already been brought up by some of the other people. But the fact there there is technical commentary to back up the new code which should help all of us in the absence of court cases to understand the legislative history. The fact there there is this kind of backup, we feel will mean it will reduce the legal expenses for

the Native corporations. We also articulated, commented on the finance section, that it was an important reform. Unlike Professor Fessler I can read numbers, and I still feel that it is a significant accomplishment. I was forced to. So finally the only final comment is that this is a bill which does strengthen the rights of shareholders and does strengthen the requirements of periodic reporting by corporations to their shareholders. It is a pro-shareholder document, and the federation supports the revision.

RODEY: Senator Mulcahy, do you have any questions for Miss Johnston? Thank you, appreciate your coming. Next I'd like to call Irv Bertram.

BERTRAM: I'm Irv Bertram, and I am assistant counsel to Alaska Airlines. We have looked at the bill and discussed it with the commission to raise some of the concerns we have. Our bylaws and articles go back to 1938, at least the articles do. The bylaws have been changed on numerous occasions. And we did have some concerns, but we found that the commission has made some changes that will assist us in going forward. We think that the bill is very well drafted and very good and will be of benefit to the state as well as being helpful to us. In my current position as house counsel, I have an opportunity to advise management or answer questions about Alaska law. I have practiced in Alaska for a number of years before joining the airlines, and you don't feel so foolish when you have something layed out in front of you in the law. You can look at it and say, well, this is how it's done. Currently Alaska law on corporations has a number of areas where simply there is no law. And so you really have to say, gee, I don't know, maybe we can do it and maybe we can't. It's . . . you're not sure how to do something. But I think the bill answers that. It does provide a very well layed out road map, so to speak, which I think will be very helpful not only to large corporations such as ourselves, but I also believe this will be helpful to the small mom and pop operations. There is that old trite saying that ignorance of the law is no excuse. However, when the law is a body of common law with very few statutory references, it makes it fairly difficult to know what's going on. On the other hand, once things have been layed out in a fairly succinct form that can be followed, it's true a lawyer may still be required and should be used. But I think most people will have a better understanding of what corporate governess should be once they have this body of law in front of them. So we think it would be good for the state. Alaska Airlines will have to make one change in its bylaws as a result of this. It doesn't address everything we wanted. But on the other hand, we think on the whole it is very good and we do support it and would recommend it. Thank you.

RODEY: Thank you very much, Mr. Bertram. Senator

Mulcahy, do you have any questions? I am aware of the . . . if there are no other comments, Mr. Brown.

BROWN: One comment, Mr. Chairman. There have been much comment about the comments, and the people who are supporting the bill who are now part of the commission, are finding that the comments are very important. I would hope an admission to the members of the Senate and the House in the event this bill is considered, that an action be taken similar to what was taken when the criminal code revision was passed. And that is there be specifically an affirmative vote on the floor of each house approving the comments or the comments as you may have amended in concert with the commission to make a clear and unambiguous legislative history. To really make sure those are available and that they are important legislative history, since they will be relied on by people in the private sector as well as scholars.

RODEY: Thank you, Mr. Brown. That's a very good suggestion. Obviously it's wise. It's an area of law we don't know much about in terms of importance, and whether a separate vote on that really means much or not.

BROWN: Take it from Alaska's only published legal historian.

RODEY: And a distinguished member of the Fairbanks bar. I think it is a wise suggestion to incorporate in the journal and to vote separately and affirmatively on the commentary. I think it is a good and desirable method of annotating Alaska laws. It is certainly preferable to allowing Michie Company to do it back east. If there are no other comments, the committee meeting is adjourned.

alaska federation of natives, inc.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

PRESENTATION TO THE JOINT SENATE AND HOUSE
LABOR AND COMMERCE COMMITTEE HEARING ON
SENATE BILL NO. 246 AND HOUSE BILL NO. 343
January 23, 1984

Mr. Chairman:

My name is Elizabeth B. Johnston. I am Secretary and General Counsel of Bristol Bay Native Corporation. Today I am speaking on behalf of the Alaska Federation of Natives concerning Senate Bill No. 246 and House Bill No. 343.

My comments will be brief. This is because the Federation has already been given the opportunity to present its concerns to the Code Revision Commission.

In the summer of 1982, the Alaska Federation of Natives created a subcommittee, with both regional and village corporation experience represented, to review and testify on the proposed revision to the profit corporation code. The Code Revision Commission received testimony from the Federation subcommittee on three separate occasions and satisfied its major concerns.

In April, 1983, Janie Leask, President of the Federation, wrote in support of the proposed revision. Her letter is attached, but I would like to quote from the last paragraph. "The proposed corporations code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditor's security."

I would like to add that the proposed code strengthens the rights of shareholders and the requirements of periodic reporting. In other words, the proposed bill is a pro-shareholder document.

The Federation supports this revision.

Elizabeth B. Johnston

ELIZABETH B. JOHNSTON
Attorney at Law
For the Alaska Federation of
Natives Subcommittee

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

April 8, 1983

Mr. John W. Abbott, Chairman
Alaska Code Revision Commission
Pouch Y
State Capitol
Juneau, Alaska 99811

Dear Mr. Abbott:

I would like to take this opportunity to thank the Commission for fully providing the AFN with the opportunity to review and comment on the proposed Alaska Corporations Code. The AFN now supports the passage of Senate Bill No. 246 and House Bill No. 343.

The proposed Corporations Code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditors' security. If you need us to testify on behalf of the Bill, we will do so.

Sincerely,

Janie Leask

Janie Leask
President

cc: Honorable Joe L. Hayes
Honorable Jay M. Kerttula
Honorable Walter R. Furnace
Honorable Charlie Bussell
Honorable Richard I. Eliason
Honorable Bill Ray
Honorable Al Adams
Honorable Don Bennett
Honorable John C. Sackett

HB

344

opinion

Anchorage Daily News

Winner, 1976 Pulitzer Prize Gold Medal for Public Service

Katherine Fanning
Editor and Publisher

Howard Weaver
Managing Editor

Gerald E. Grilly
General Manager

Steve Lindbeck
Editorial Page Editor

Lawrence Fanning Editor and Publisher 1967 to 1971
Alaska's Only Morning Newspaper • Founded in 1946 by Norman C. Brown

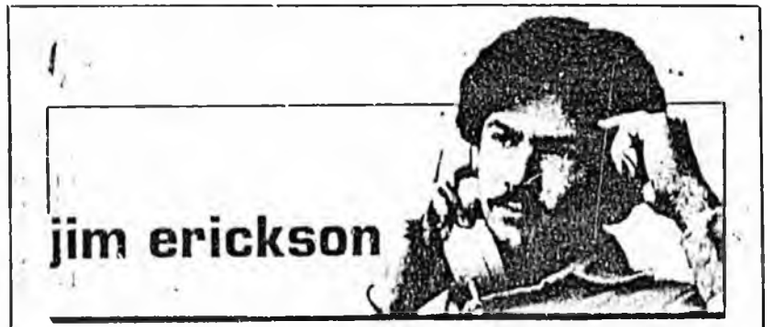
Dealing with 'lemons'

Public voices should ring clearly today at a teleconference hearing before the House Labor and Commerce Committee on a proposed state "lemon law" governing new automobile warranties. The hearing begins at 2 p.m. and deserves healthy public participation.

The law essentially would shift part of the burden of proof in dealing with defective automobiles from the consumer to the dealer and manufacturer. It provides that a consumer is entitled to either a new vehicle or a full refund if a manufacturer's defect renders it undriveable for 30 days or more during the first year of ownership.

The major effect would be to encourage dealers to stand up and pay heed to the products and warranties they offer. For the dealer who already performs warranty service promptly and efficiently, the impact of the law would be negligible, and in fact good for credibility. For the dealer who ducks or delays the demands of a good-faith warranty there would be new incentive to meet the obligations of doing business.

And for the consumer who has a right to expect automobiles under warranty to run properly, there would be an improved chance of gaining full value for a very expensive investment. That seems like a good deal for all concerned.



TROUBLESHOOTER

CONSUMER ADVISORY-ALASKA LEMON LAW: A statewide teleconference has been set for Wednesday on a proposed Alaska "lemon law," legislation that would give consumers substantially more leverage when wrangling with automobile dealers and manufacturers over warranty obligations.

Under the provisions of House Bill 344, automakers would be forced to replace or refund the purchase price of new cars that, due to manufacturing defects covered by the new-car warranty, cannot be satisfactorily repaired.

If the defect causes the car to be undriveable for 30 days or more during the first year of ownership, the car buyer would be entitled to either an identical new vehicle or a refund, including repair costs. Auto dealers would be given four chances to repair the defect.

Fred Marino, part-owner and general manager of Eero Volkswagen in Anchorage, said Monday that he felt the bill was unnecessary in light of the track record of Alaska dealers.

"If the customer has a legitimate complaint, most (dealers) really seemed to bend over backward" to help iron out difficulties, he said. "If there is a problem, none of us to our knowledge haven't got it fixed within a reasonable length of time."

Marino, who called the bill "heavy and cumbersome," added that the legislation would increase taxpayers' expense, despite legislative estimates to the contrary. "Just enacting it would cost a great deal," Marino said.

In written testimony submitted to the House Labor and Commerce Committee May 9, Assistant Attorney General Connie Sipe noted the bill gives vehicle owners the benefit of "a legal presumption that after a reasonable number of attempts to correct a deformity, that the vehicle is in fact defective or a lemon."

Sipe, head of the Consumer Protection Section of the Attorney General's Office, said under current common law warranty rights, it is up to the vehicle owner to prove a car is a lemon before the courts can compel automakers to replace a vehicle.

If HB 344 is passed, she said, that burden of proof would be shifted. If the manufacturer cannot prove a defect does not cause substantial impairment to the operation or value of the vehicle or prove the owner caused the failure by abuse or modification of the car, the car would be presumed to be a lemon and the buyer would be entitled to reimbursement.

"It is my opinion, after working in this area for seven years, that very few Alaskans, especially those who live outside the three major cities, receive full value of the warranty on their vehicles," Sipe said. "Since Alaskans pay not only the top manufacturers' suggested retail price, but usually amounts in addition to the suggested retail price, we can see that Alaskans do not get any break or allowance for their difficulty in obtaining warranty work."

Consumer Protection auto investigator Scotty Dawkins said before the House Labor and Commerce Committee May 9 that automakers routinely deliver vehicles to buyers with built-in problems.

"Often the manufacturer is aware of these defects but seldom is any voluntary action taken to correct the problems in cars that are already built," Dawkins said.

"Instead, the manufacturer relies on the predelivery inspection performed by the dealer to detect and correct these problems. What actually happens is that the buyer finds the problems after delivery and faces the hassle of attempting to have repairs completed by the dealer."

Dawkins added that new car warranties require the buyer to return to the dealer for warranty work, but "In Alaska, the fact that your new-car dealer may be hundreds of miles away somewhat complicates this requirement."

The Attorney General's Office is calling for an amendment to the bill that would require manufacturers to establish factory-authorized repair centers in towns where there are no dealers.

The public is invited to testify at Wednesday's public hearing before the House Labor and Commerce Committee. The hearing will be held via the Legislative Teleconference Network at 2 p.m. ADT. Anchorage residents who would like to participate can contact the Legislative Information Office, 1024 W. 6th Ave (278-9624).

Alaska's auto dealers protest 'lemon law' proposal

Dealers: Law unneeded Consumer rep: Yes it is

By DEBBIE REINWAND ROSE
Empire Staff Reporter

Alaska car dealers converged on teleconference sites throughout the state this morning to protest a bill its sponsors say will protect consumers who purchase autos.

Labeled the "lemon law," the legislation sponsored by local Reps. Jim Duncan and Mike Miller and Sen. Bill Ray would force car dealers to adhere strictly to the advertised warranty on a new car.

If a customer complained of a "substantial" problem not caused by owner abuse, the manufacturer or distributor would be given four chances to fix the vehicle. Failing that, the customer could receive a refund or a new car to replace the defective model.

Testimony at today's teleconference, organized at the request of car dealers in the state, ran heavily against the bill. Input came primarily from auto distributors.

Fairbanks car dealer James Masters said the consumer already has plenty of protection from defective autos.

"In case of a difference between the consumer and the dealership, they can go directly to the dealer, or the manufacturer," he said. "If that doesn't work, the (state) Consumer Protection Division is very good at following through on these complaints."

Consumer Protection officials, however, favored the legislation as offering the car buyer "some recourse" when dealing with faulty vehicles, according to Scotty Dawkins in the Anchorage Consumer Protection office.

"In Alaska, it often takes two weeks or more just to get the cars into the service department. Not one manufacturer has a service representative in the state, so the consumer has to wait six to eight weeks for that rep to come up here," he said. When dealing with many warranty problems, the defect often must be checked by the service representative.

Alaska has a booming automobile sales business, Dawkins said, and dealers should be responsive to the public's needs. Last year, 27,705 cars were sold in the state for an average of 1,148 sales per distributorship. In the rest of the nation, the average is 205 cars per year for each dealership, he added.

As an example of problems faced by Alaska car owners, Dawkins cited several complaints received over defective cars:

- One district court judge had his car worked on 10 times for, among other things, a defective horn. After all attempts to repair the car had failed, he was offered half the $9,000 sticker price on a trade-in, said Dawkins.
- An Alaska State Trooper had his station wagon worked on eight times, and ended up having the engine replaced after the protection agency intervened in the matter.
- After purchasing a car in Anchorage, complete with a $700 service contract, a Valdez resident had to pay towing fees between Anchorage and Valdez when the engine quit running. He had been assured by the dealership in Anchorage that his service contract would be honored in Valdez, Dawkins said.

Continued on Page 2

'Lemon'...

Continued from Page 1

Bill sponsor Miller said the crux of the testimony revolved around "people giving excuses for not conforming to the warranty."

"We are not trying to place the burden on the dealer. ... They are missing the point of the bill. If there is a major problem with a car, then it should be corrected. The manufacturer issues the warranty, and they are ultimately responsible for living up to that warranty," he said.

Extensive testimony from disgruntled car dealers continued until adjournment of the meeting. House Labor and Commerce Chairman Walt Furnace, R-Anchorage, has scheduled a statewide teleconference on the bill for May 18, from 4 to 6 p.m. in the Labor and Commerce room in the Behrends Building.

Photo by Danny Daniels

ual Walk for Hope, which was
e C-3.

Lemon law would force

dealers to replace cars

By JIM ERICKSON
Daily News reporter

Alaska auto dealers would be forced to buy back or replace automotive "lemons," defective new cars that defy all attempts at repair, if legislation introduced recently in the state Senate and House becomes law.

House Bill 344 calls for replacement of a new car or a refund of the purchase price when manufacturing defects make the car undriveable for 30 days or more during the first year of ownership.

The so-called "lemon law" is scheduled for a House Labor and Commerce Committee hearing Monday.

An identical bill introduced in the Senate by Sen. Bill Ray, D-Juneau, has not been scheduled for a hearing.

The House measure was introduced last month by Rep. Mike Miller, D-Juneau. Miller said Saturday the legislation would compel dealers and manufacturers to honor new-car warranties promptly.

"The legislation doesn't spell out the warranty," he cautioned. "That's up to the manufacturer. What it does do is put full force of the state law behind customer satisfaction of that warranty."

If the defect poses a safety hazard, the car must be repaired within 14 days, the measure states.

In all cases, dealers would be allowed four chances to fix the car, before the buyer could demand a refund or a replacement. The measure applies only to failures covered by new-car warranties, and only during the first year of ownership.

"What we are talking about is correcting major problems of the vehicle," Miller said. "This is not in regard to trivial repairs or problems that result due to owner abuse."

Similar legislation has been adopted in California, Connecticut, Montana and Wyoming, said legislative aide Denise Zachary. Ten other states are considering lemon laws, she said.

Monday's hearing will be linked to Anchorage, Fairbanks and Ketchikan via the state teleconference network.

Zachary said the public can comment on the bill by attending the teleconference, to be held in Anchorage at the Anchorage Legislative Information Office, 1024 W. 6th Ave.

The teleconference will begin at 7 a.m.

3/8/83 Daily News

s a phrase for every misdeed

(Not to mention the ultimate disaster: "If you eat that now, you won't be hungry for dinner!")

And then there is the chapter on Questions Without Answers. These generally come along during the teen-age years.

Questions like, "You're not going out dressed like that, are you?"

Or, "You know this goes against everything we've ever taught you, don't you?"

Not to mention the all-time winner, which spans most of the formative years: "Just what do you think you're doing?"

Experienced mothers know they can mix and match these phrases for special effect, as in: "Just where do you think you're going dressed like that?"

"When you're grown and have children of your own, that's when."

This last, especially, falls under the definition of all-purpose Motherese, touching as it does on the perpetually ripe arena of life after one has children of one's own.

Of course, it's not all conflict and threats in Motherese. There's the Broken Heart chapter, things mothers say to make you feel better. Things like, "Ten years from now this will all seem funny" and "Just think of it as good experience" — not to mention the all-time classic, "Well, just consider yourself lucky, a man will never marry a girl like that!"

I suppose with changing mores they'll be wanting to update the Mother's Phrase Book before long, make it a little more hip, but I

'Lemon law' deserves support

Sometimes it seems that all cars should be painted yellow just to warn buyers what they are getting themselves into. All too often nowadays, expensive cars transform themselves into "lemons" before their owners' very eyes.

Before a sale is made, salesmen point out all of the wonderful aspects of a new car. It's pretty, the doors slam with a solid "thunk" and it sounds good idling there in front of the dealer.

But a select few cars turn into "lemons," some the minute they are driven off the lot. Some don't start right; some don't stop right; some don't do anything right.

Any dealer is more than happy to provide buyers with a copy of the warranty manufacturers give for their cars. Some last for a year; some last for five years. But unless the dealer and manufacturer back up the claims of those warranties, they aren't worth the paper they are printed on.

Introduced in the Alaska Legislature last week was a bill aimed at taking the "lemon" out of the lives of Alaska car buyers. The bill, whose prime sponsors are Juneau Sen. Bill Ray in the Senate and Reps. Jim Duncan and Mike Miller in the House, does nothing more than make manufacturers and dealers live up the promises made in warranties.

For most people, buying an automobile is the second-largest purchase they will make in their lives. The largest purchase, of course, is a home, but it should be remembered that the price of some 1983 cars would buy a nice house 20 years ago.

Because of the tremendous expense of cars, no one should be stuck with a "lemon" — a car that doesn't work properly. Yet we all know people with horror stories about how their expensive new cars went to pot on them and they were unable to get satisfaction from the dealer.

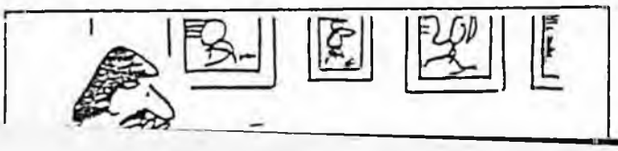
It is for those people that the "lemon law" before the Legislature is meant. A warranty is not written on paper that self-destructs once the sales agreement is signed. It is a document in which the manufacturer, through the dealer, promises to make a car run properly, no ifs, ands or buts.

Dealers should welcome the advent of a "lemon law" in Alaska. It means dealers that have been standing behind their products won't be affected in the slightest. Other dealers, who are unwilling to stand behind their products and the warranties that go with them, will — and should — find themselves having to shape up.

The "lemon law" bill deserves your support.

5/7 Juneau Empire

Berry's World



We went up some stairs to a glass-enclosed booth.

When Widget shut the door he said, "I want you to meet my Master Robot, Turnbill. He is programmed to program the robots on the floor."

Turnbill gave me a steely look and reluctantly put out his arm which I shook.

"How many sneakers did we make today, Turnbill?" Widget asked.

Turnbill's lights blinked, and a deep voice said, 12,890."

Widget rubbed his hands. "I used to make that many in a week.

Eyeing the ne

WASHINGTON (NEA) — "I can make a million through the union," Jackie Presser boasted several years ago to a magazine in his hometown of Cleveland. Indeed, the union has made him rich — and now it's about to make him famous as well.

The union is the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, arguably the country's most corrupt labor organization.

When the Teamsters' executive board met recently to select a new president for the union, it could have chosen a leader whose reputation had not been blackened by compelling evidence of regular affiliation with organized crime figures.

M.E. (Andy) Anderson, area director of the union's Western Conference, is hardly a candidate for sainthood but he surely would have been more suitable as president than Presser if the Teamsters were serious about restoring at last a semblance of integrity to their organization.

The same is true, although perhaps to a lesser extent, of the other two "dark horse" contenders for the presidency — Joseph W. Morgan, area director of the union's Southern Conference and Donald Peters, a Chicago Teamster leader.

But, in an election preordained as far back as the union's 1981 convention, all three of those men were summarily rejected in favor of Presser, a glib, portly 56-year-old veteran of more than three decades as a Teamster organizer.

A detailed affidavit filed by the FBI in connection with a criminal case in U.S. District Court in Los Angeles quoted FBI informants as stating that Presser was "controlled" by members of the Mafia.

In testimony before the New Jersey Commission of Investigation, a state police sergeant identified Presser as an intermediary for syndicate members seeking loans from the Teamsters' pension and welfare funds.

Some of the most disturbing allegations about Presser come from Aladena "Jimmy the Weasel" Fratianno, believed to be the first Mafia member to testify against another Mafioso in court. His testimony has aided federal prosecutors to convict approximately two dozen organized crime figures.

According to Fratianno, Presser's union activities generally have been conducted under the direction and control of James T. "Blackie" Licavoli, the reputed head of the Cleveland "family" of the nationwide crime syndicate. "Jackie Presser, he told me himself that 'I don't do nothing unless Blackie tells me,'" Fratianno said in sworn court testimony.

How does Presser respond to those allegations? He blithely denies any knowledge of La Cosa Nostra: "There's no organized crime that I know of as a person."

Presser offers a similar see-no-evil response to the documented examples of massive abuse of the union's Central States, Southeast and Southwest Areas Pension Fund: "Despite the many claims and accusations of various governmental agencies, the Central States (Fund) is a sound, well managed plan."

In 1976, Presser's father, William, was forced to resign as a trustee of the fund after he invoked his Fifth Amendment right against self-incrimination while being interrogated about trust fund abuses by federal investigators.

William Presser's position as a fund trustee was inherited by his son, Jackie, but he too was forced to resign only one year later and is one of numerous Teamster leaders being sued by the Justice Department for approving more than

Window of v

The New York Times

The basic assumption of arms control may be permanently

Juneau Empire 5/3

'Lemon' bill would put the squeeze

By DEBBIE REINWAND ROSE
Empire Staff Reporter

Hearings begin this week on a bill that should warm the hearts of everyone who has ever bought a "lemon" — a car that for some reason doesn't work right.

Commonly known as the "lemon law," this legislation, introduced by the Juneau delegation, would bind car dealers under state law to adhere strictly to the warranty they advertised when selling a car.

Under it, if a customer complains of a "substantial" malfunction during the warranty term, the dealer or manufacturer would have to repair it. The dealer would be given four chances to bring the car up to par, and failing that, would then have to refund the customer's money or provide a new car.

"It's not an overly restrictive law; if anything it's conservative and could be tighter," said Rep. Mike Miller, D-Juneau. "What we're talking about correcting are major problems with the vehicle. This is not in regard to trivial repairs or problems that result because of owner abuse."

Currently, 12 states have similar legislation on the books. Montana and Wyoming just passed lemon laws.

While the bill is aimed at protecting the consumer, it should not unnecessarily alarm car manufacturers.

"One feature is that the legislation doesn't spell out what the warranty is — that's up to the manufacturer. What it does is put the full force of state law behind customer satisfaction of that warranty," said Miller.

"The idea is if the distributor or parent company issues a warranty as a selling point for their vehicles, they should live up to it; no sloughing off," said Sen. Bill Ray, D-Juneau.

And Ray should know. Like a number of people who have contacted him about the bill, the senator once owned a "lemon."

"A lot of the time, the car wouldn't start. The dealer kept saying we didn't know how to operate it. ... The car ended up being recalled because of a problem with the starter," he said.

During that experience, Ray ran into delays getting the car fixed. He advocated the clause in the bill putting a limit on how long the car can be out of commission. That provision would allow the customer a refund or new car if the "lemon" has been out of service for 30 days during the warranty period or one year, or if repair services are not available to the owner for reasons beyond the owner's control.

Rep. Jim Duncan, D-Juneau, has also had a "couple of lemons," and backs the bill because it would benefit Alaskans.

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"You run into this every once in awhile and it should be cleared up so the consumer is adequately protected," he said.

The measure has been introduced in both houses, and while House passage is unclear, the co-sponsorship of several majority coalition members may help the bill.

The first hearing on the lemon law will be Thursday at 8:45 a.m. in the Labor and Commerce Committee, room 210 in the Behrends Building.

Buyer gets $85,000 for lemon

MEMPHIS, Tenn. (AP) — A man who complained about the treatment he got from an auto dealer after his new car burned too much oil has been awarded $85,000 by a Circuit Court jury.

Charles Pardue was awarded $10,000 for actual loss and $75,000 in punitive damages in the judgment reached Tuesday.

"As far as the repair of his car was concerned, it was poorly handled," said jury foreman James Reid Jr.

Reid said jurors discussed awards ranging from $20,000 to $500,000 but settled on the final figure as a "fair compromise."

Randall Noel, the lawyer for Lewis Ford Inc., where Pardue bought his 1976 Ford Grenada, said his client is considering an appeal.

Pardue, a resident of Oakland, Tenn., bought the car in 1977 for $5,178, but said it soon began using too much oil.

He said it took two years to get the car fixed and he was charged $1,600 for a new engine he never ordered.

Tennessee Reporter 4/4/83

AUTOMOBILE IMPORTERS OF AMERICA, INC.

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May 5, 1983

Mr. Walt Furnace, Chairman
House Labor and Commerce Committee
Alaska State Capitol
Juneau, Alaska 99801

Dear Mr. Furnace:

We have been informed that the House Labor and Commerce Committee is considering H-344 which would, in simplest terms, require a motor vehicle manufacturer or importer to replace or repurchase a vehicle if it suffered the "same nonconformity" four times or if the vehicle is out of service for warranty repairs thirty calendar days during the vehicle's first year.

Automobile Importers of America, Inc. (AIA) and its sixteen Members strongly oppose this "replace or repurchase" bill as counterproductive for consumers, car dealers, and car warrantors (i.e., manufacturers or importers). This bill is apparently based on two faulty premises. First, that a consumer is without an effective remedy if a vehicle repeatedly breaks down other than for the vehicle to be "fixed as best it can be". This is incorrect. The Uniform Commercial Code provides for revocation of acceptance of a product where the product has a defect or nonconformity which substantially impairs the product's value to the purchaser. Such revocation can result in a rescission of the purchase contract (i.e., purchaser gets his money back and returns the product) if the defect or nonconformity cannot be cured in a reasonable time and manner. There have been several cases - in both courts and private informal dispute resolution processes - where rescission has occurred in new motor vehicle cases.

The other faulty premise upon which the bill is based is that it is possible to set arbitrary figures for the motor vehicle industry representing "reasonable" number of attempts to cure the "same nonconformity". There are so many different models of motor vehicles with varying levels of mechanical sophistication, varying levels of product and parts distribution sophistication, and varying levels of reasonable consumer expectations, that it should be self evident that no one set of numbers could be reasonable for all vehicles. Moreover, even for a single, relatively simple vehicle model, favored with a comprehensive, sophisticated product service and replacement parts network, and with reasonably modest consumer expectations because of its low price, that vehicle will have some 17,000 parts and many different components and systems. No one number can possibly be used as a "reasonable" standard for repair attempts for all possible mechanical problems with that vehicle. Some defects are so obvious that two repair attempts are too many; some so subtle that five repair attempts are not unreasonable.

It is the great advantage of the existing UCC system that each case is decided on its own merits without the intervention of arbitrary standards.

In addition to unnecessarily complicating existing reasonable remedies, the bill would be counter-productive in several respects. Among them are:

(1) Unrealistic increased consumer expectations. As simple but little known as the UCC remedy - and its availability through the courts and informal dispute resolution process - is to consumers, this complex bill is sure to be misunderstood by them to guarantee them greater rights than it does. The inevitable result will be consumer disappointment with the motor vehicle industry and the law, including the way it is written, implemented and interpreted. Consumers will become ever more cynical about all of us, industry and government.

(2) Increased litigation. Experience teaches us that any "consumer" legislation leads to more litigation. Because of the increased consumer expectations discussed above, there will be more disputes than usual over vehicle service and warranties leading to more litigation.

(3) Reduced "goodwill" warranty work. Every manufacturer approves some "goodwill" warranty work, that is, payment for service not covered by the warranty but done in an effort to

maintain the consumer's goodwill. Typical are examinations and adjustments in response to consumer complaints that the fuel economy of the vehicle is not as great as expected. However, under this bill, such goodwill service might count as one of four repair attempts. Therefore, the warrantor will be less likely to go beyond the precise language of the warranty strictly as a matter of defense against possible future claims.

(4) Increased dealer disputes. Just as the bill will surely increase consumer disputes, so also will it cause more dealer disputes. Fewer "goodwill" warranty approvals will mean the dealer will have to charge the consumer - a sure source of conflict. On the other side of the dealer's business, consumer claims against the manufacturer are sure to bring the dealer into many of the disputes on a "claim over" basis (e.g., were the repeated repair attempts the result of inadequate dealer repairs?

(5) Increase costs - for everyone. The bill would necessitate the creation and maintenance of records not now kept, e.g., number of repair attempts, more detailed explanation of the nonconformity involved, numbers of days the vehicle is out of service for repair. This information is difficult to assemble from one dealer, but where multiple dealers are involved, as where the consumer goes to a second dealer when dissatisfied with the results from the first, the difficulties go up geometrically. Dealer and manufacturer litigation costs will also go up. All these costs eventually find their way into the price of the product to be borne by the consumer.

Finally, we submit that the bill, even if it were appropriate in basis and concept, is inartfully drafted creating ambiguous, unfair, and unintended results. For example, the provision on informal dispute resolution processes would seriously damage the utility of the dealer established AUTOCAP programs utilized by all sixteen AIA Members and American Motor Corporation to resolve consumer warranty disputes. The bill would apparently cull out AUTOCAPs from the "accepted" informal dispute resolution processes despite their proven worth and status as the most widely used such process in the motor vehicle industry. This is but one example of several such anomolies.

AIA stands ready to discuss with you or any member of your staff the specific problems posed by H-344. Please contact me or Diane DePould, Esq., AIA's General Counsel at your convenience.

Respectfully submitted,

AUTOMOBILE IMPORTERS OF AMERICA, INC.

George C. Nield

George C. Nield
President

GCN:ab

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May 3, 1983

Mr. Jeff Barry, Professional Aid
House Labor and Commerce Committee
Pouch V
Juneau AK 99810

Re: House Bill 344

Dear Jeff:

As a result of our conversation on Tuesday, April 26, I am sending you this letter outlining our concerns with HB 344, the lemon car bill, as it is presently drafted. As I indicated, one of the things we like to do if at all possible is to keep uniformity and consistency from one state to the other, if in fact the respective state legislature is desirous of passing such a bill.

On page 1, line 12 in Section 45.45.300, we would like to see the words "in writing" between "nonconformity" and "to the." In addition, on line 13 following the word "manufacturer" remove the language through line 14. The reason is that if the manufacturer has the responsibility of buying the vehicle back or refunding the consumer his money, it is important that we be aware of the fact there is a nonconformity of the vehicle. The only way we can achieve this is by having the consumer provide us in writing the fact that he is willing to pursue the third party settlement procedure as outlined in (h), page 3. If the consumer notifies the distributor, agent or dealer, the likelihood of the manufacturer receiving such communication is remote, plus the fact there could be a significant time lapse.

As far as including the terms "distributor, agent or dealer" in the rest of the language throughout the bill, that does not create a problem.

On page 1, line 26, we would like to see the word "comparable" inserted between "new" and "motor vehicle." This would allow for us to try to work out with the consumer a replacement vehicle as close as possible but perhaps not exactly like the one he previously had due to its unavailability. A problem in this area could occur particularly if the consumer buys the vehicle late in the model year.

On page 1, line 27, we would like to see the words "excluding interest" inserted after "collateral charges." We have no problem refunding the full purchase price plus any taxes or license or other fees, but we don't like to include interest, as that is the individual's choice as to how he purchases the vehicle and as to what interest rate he pays.

On page 2, line 15, include the word "business" between the words "more" and "days." The rationale behind this is that 30 or more business days in fact gives the dealer or manufacturer about one-third more time to find and correct the difficulty. Generally there are about 22 working days in a month and with "business" days it does allow us some additional time for a serious problem.

Sections (e) and (f) on page 2 are new sections which I have not seen in any other state's repair/replace bill. Section (e), relating to the unsafe defect, seems overly restrictive in reducing the repair/replace time to 14 days. Section i (3) talks about "substantially impairs use and value," which could in fact relate to the safety of the vehicle, but in addition to that, who would make the determination of whether or not it is unsafe? Regarding section (f), the remedy is already provided in section (b) of the bill which would require the manufacturer to comply with the decision of the third party mechanism, therefore making section (f) unnecessary. Also, there has been a general practice throughout the industry wherein the third party settlement procedure is binding on the manufacturer and he must comply with the decision, or the consumer can pursue his case in court.

On page 3, line 3, (h), we would like to have the word "substantially" inserted between "that" and "complies." The rationale is that the Federal Trade Commission regulations under Part 703 are voluminous and in fact the settlement procedure is not binding on either party, but in practice we consider it to be binding on us. Additionally, there are many paperwork procedures in those federal regulations which don't really add to the benefit of the consumer, but are "make work" for the informal dispute settlement procedure mechanism. Therefore, including the word "substantially" before "complies" means that the program must basically meet all the provisions but not to the letter.

The intent of this legislation in the other states is to try to prevent the problem from ending up in court where the consumer has to spend time and money in order to have his problem resolved. The industry in fact has voluntarily embarked on this type of program some four years ago and it appears to be working out pretty well on a voluntary basis. Again, this is designed to resolve the consumer's problem in a quick and expeditious way but still does not preclude them from going to court if in fact they are not satisfied with the third party dispute procedure's decision.

I will give you a call after you have had a chance to look this over and we can discuss it further at that time.

Thank you very much for your consideration.

Sincerely,

James W. Austin
Public Affairs Manager
Pacific Coast Region

JWA/eb

cc: Mr. Dugally, Ford Motor Company
Mr. Ridgeway, General Motors Corporation