ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8072

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enactment. Evaluation topics to be addressed include but are not limited to initiation of, extent of, or changes in:

(1) the number and type of server and manager training programs in the state;
(2) the curricula of such programs;
(3) the management policies, procedures and actions of licensees regarding the service of alcoholic beverages;
(4) the number of actions filed, settled, and litigated pursuant to the Act and the number and amounts of recoveries;
(5) the number of successful defenses based on Section 10 of this Act;
(6) the legal interpretations of the provisions of this Act, particularly as compared to other state court interpretations;
(7) the incidence of driving while intoxicated offenses, injuries and deaths;
(8) the incidence of other alcohol-related problems;
(9) the incidence of sales to minors and intoxicated persons.

Commentary

Perhaps the least recognized shortcoming of new legislation is its failure to evaluate its impact. Laws are enacted to address particular social problems, but without an evaluation, legislators and other social policymakers have no basis for determining whether the desired impact has been achieved. A carefully developed evaluation project is therefore vital to the legislative process generally and to the successful implementation of this Act.

This provision mandates the ABC agency of the state to conduct the evaluation, to be completed within two years of the Act's enactment. It is anticipated that the agency may need to contract with an organization that specializes in such studies, since most ABC agencies do not have the required expertise. The Act may need to be amended to establish the contracting process in such cases. In some jurisdictions, another state agency may have the resources and expertise to conduct an evaluation, and the Act should be modified to specify that agency, if one is available. A non-inclusive list of variables to be studied has been included to provide guidance.

In most circumstances, the evaluation study will require an appropriation of funds. Because of the current fiscal crisis in most states, this may create a barrier to passage. Strategies for funding can include imposing a special fee on all new license and renewal applications or imposing special court costs in all dram shop cases brought pursuant to the Act.

SECTION 16: OPTIONAL NOTICE PROVISION NOTICE TO DEFENDANT

Every plaintiff seeking damages under this Act shall give written notice to all defendants within 120 days of the date of entering an attorney-client relationship for the purpose of pursuing a claim under this Act. In the case of claims for contributions and indemnity, notice shall be given within 120 days of receiving written notice under this Act. The notice shall specify the time, place and circumstances of the defendant's conduct complained of, and the time, place and circumstance any resulting damages. No error or omission in the notice shall the effect of the notice, if otherwise valid, unless the error or omission is of substantially material nature. Failure to give written notice within the time specified shall be grounds for dismissal of a claim, and may only be waived by the court upon a showing of exceptional circumstances. Actual notice of sufficient facts to reasonably put a defendant on notice of a possible claim shall be construed to comply with the notice requirement herein.

Commentary

An optional notice provision is provided by the Model Act for use at the discretion of state legislatures. The provision is made optional due to the strong arguments that may be made for both the inclusion or exclusion of a notice requirement.

The principal argument in support of a notice provision is to allow a defendant to investigate a claim while the underlying facts are still fresh. Since dram shop cases often involve accidents occurring off premises, defendants often will have no knowledge of the accident until informed by the plaintiff. Absent a notice provision, a defendant may not learn of a claim until just prior to expiration of the applicable statute of limitations, which may be a period of several years. An additional argument in favor of a notice provision is that it will motivate plaintiff attorneys to act more promptly on their clients' behalf.

An argument against the optional provision is that notice provisions are an exception to the general rule in civil liability law. The law abounds with the imposition of civil liability for injuries occurring outside the presence of a defendant for which no notice is required. Arguably, it is unfair to make plaintiffs under the Model Act, who are generally innocent third parties, bear a burden not required of plaintiffs in other cases. A related argument, discussed in detail, *infra* is that notice provisions almost invariably involve uncertainty and litigation. Tradi-

tional notice provisions, which commence from the date of discovery of the injury, invariably involve litigation over incapacity, tolling periods and due diligence. The notice provision of the Model Act, which is based upon the beginning date of the lawyer-client relationship, may involve weighty questions regarding a plaintiff's ability to select counsel and the privacy of that relationship. These problems inherent in notice provisions may help explain why only three of the twenty-three existing dram shop statutes include notice provisions.

The purpose of the notice provision is primarily to give a defendant an opportunity to investigate while the facts underlying a claim are still fresh.[1] This will cure the defect inherent in most licensee liability statutes that allows plaintiffs to prepare their case while the facts are fresh, without having to inform defendants of their potential liability until the limitations period of one or more years is about to elapse.

The requirements of the notice provision are based primarily on the Minnesota statute.[2] As in the Minnesota statute, the notice requirement begins to run upon the initiation of the attorney-client relationship, rather than the date of the occurrence in question. This is based on the tendency of traumatically injured persons to delay legal considerations until after medical matters are attended to, and the fact that defendants will not be put in an unfair position, because they can begin their investigations within a reasonable time of initiation of the plaintiff's case. Stale cases are eliminated by the statute of limitations provision. This approach is found to be preferable to that under the Connecticut[3] and Iowa statutes,[4] which base their notice requirements on the date of injury and engender litigation over incapacity, tolling periods and diligence.[5]

The notice period of 120 days for plaintiffs is adopted directly from the Minnesota statute. A notice period for contribution and indemnity claims of 120 days is used, rather than the 60 day period of the Minnesota statute, on the basis that such claims may require considerable investigation, which may not be complete within 60 days of plaintiff's notice.

The form of the notice is calculated to adequately inform defendants as to both the injury suffered and the underlying circumstances complained of. This is considered to be an improvement over the Connecticut and Iowa statutes, which only require plaintiffs to inform defendants

1. *See, e.g.*, Zucker v. Vogt, 329 F.2d 426 (2nd Cir. 1964) (applying Connecticut law); Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981) (additional purposes cited).

2. MINN. STAT. ANN § 340, 951 (West Supp. 1984). The statute was amended in 1982 to cure latent defects revealed in *Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981).

3. CONN. GEN. STAT. ANN. § 30-102 (West 1975).

4. IOWA CODE ANN. § 123.93.

5. *See, e.g.*, Ehlinger v. Mardorf, 285 N.W.2d 27 (Iowa 1979); Shersteen v. Sojka, 260 N.W.2d 48 (Iowa 1977); Harrop v. Keller, 253 N.W.2d 588 (Iowa 1977).

of the circumstances of the injury and their intention to bring an action. The broader language of Iowa's form of notice is used, rather than Minnesota's more specific provision, to allow for cases where specifics such as the time of injury or service cannot be established prior to discovery.[6] This is in keeping with the Minnesota provision, adopted in full, which protects the validity of notice containing errors or omissions which are not material.[7]

Court discretion to waive timely notice is authorized only under exceptional circumstances. Although the Minnesota statute bars claims not in compliance with the notice provisions, Minnesota decisions have recognized exceptions to the rule under equitable principles.[8] Discretion should be exercised only under truly unusual and unforeseen circumstances, such as death or incapacity of counsel. It is anticipated that this provision will be interpreted consistently with similar provisions found in state law.[9]

As in the Minnesota statute, actual notice of facts informing a defendant of the circumstances of a claim satisfies the notice requirement.[10] Such actual notice serves the same purpose as written notice—to afford the defendant a timely opportunity to investigate a claim.

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6. *See, e.g.*, Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962); Shasteen v. Sojka, 260 N.W.2d 48 (Iowa 1977).

7. *Cf.*, Thompson v. Bristol Lodge No. 712, Loyal Order of Moose, Inc., 31 Conn. Supp. 405, 372 A.2d 985 (1974).

8. *See, e.g.*, Hammerschmidt v. Moore, 174 N.W.2d 79 (Minn. 1978).

9. *Id.*

10. *See, e.g.*, Donahue v. West Duluth Lodge No. 1478 of the Loyal Order of Moose, 1 Conn. Supp. 405, 372 A.2d 985 (1974), *cf.*, Lavier v. Ulysses, 149 Conn. 396, 180 A.2d 632 (1962); Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962).

APPENDIX B

An Act Regarding The Establishment of Alcohol Server Training Programs

SECTION 1. The Formation and Purpose of the Regulation Board. The Alcoholic Beverage Control Commission, hereinafter referred to as the Commission, shall establish a Regulation Board with representation from the Commission, the Department of Public Safety, the Attorney General, the Division of Alcoholism, the Massachusetts association of hotels, restaurants, bars, taverns and package stores, the association of insurance companies, and the directors of the regional offices as shall be described forthwith. This board shall regulate the development of training courses and materials, the examination procedures, the fee structure, enforcement procedures, penalties and fines.

The Regulation Board shall, as necessary, establish regional offices for the purpose of education and consultation, examination administration, and coordination of enforcement of the permit system as defined in this chapter.

SECTION 2. *Implementation.* Upon passage of this act, the Regulation Board shall be formed and shall, during the first two years of this act, work with the Commission in establishing training courses and materials, the examinations and examination procedures, the fee structure, enforcement procedures, penalties and fines, and certification procedures for instructors and schools. The Commission and Regulation Board shall also oversee the establishment and licensing of regional schools, for the purpose of providing training courses which shall be evaluated and modified to provide the most comprehensive and efficient training. Participation in these programs shall be voluntary, but shall fulfill the requirements of this act for the purpose of obtaining a permit as described forthwith. During the third and subsequent years of this act, the Commission shall require that all applicants for new licenses issued under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 sections 12, 12a, 13, 14 and 15 as described forthwith. Also, during the third and subsequent years of this act the Commission shall require that all applicants for renewed licenses issued

under Massachusetts General Law Chapter 138 Section 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 as described forthwith until such time that all persons employed by establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall have permits as described forthwith.

SECTION 3. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers, bartenders, waiters, waitresses or other such persons responsible for serving alcoholic beverages to be drunk on the premises of licensees under section 12, 12A, 13 and 14 permits which shall authorize such employees to serve alcoholic beverages, and the fee for each permit shall be determined annually by the Commission and the Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 4. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages Not to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers and sales clerks or other such persons responsible for serving alcoholic beverages not to be drunk on the premises for licensees under section 15 permits which shall authorize such employees to serve alcoholic beverages and the fee for each permit shall be determined annually by the Commission and Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 5. *Application and Issuance of Permits for Dispensing Alcoholic Beverages.* Application for a permit to serve alcoholic beverages as described in sections 3 and 4 may be made by any person except a person who has been issued a permit and whose permit is not in force because of revocation or suspension or whose permit is suspended by the Commission; but before such a permit is granted, the applicant shall pass such application as to his/her qualifications as the Commission and Regulation Board shall require, and no permit shall be issued until the Commission is satisfied that the applicant is a proper person to receive it and no permit shall be issued to any person who is not of the legal age to

serve or dispense alcoholic beverages as defined by Massachusetts General Law.

The applicant shall also be required to demonstrate he/she has successfully completed an alcohol education and training course approved by the Commission and Regulation Board. The aforesaid examination and alcohol education and training course shall be administered for each of three classifications of permit: 1) package store clerk 2) bartender, waitress/waiter or 3) manager. To each permittee shall be assigned some distinguishing number or mark; and the permits issued shall be in such form as the Commission shall determine provided, however, that a person issued a permit for each of the three classifications shall receive a permit of a different color. They may contain special restrictions and limitations. They shall contain a photograph of the permittee, the distinguishing number or mark assigned to the permittee, his/her name, his/her place of residence and address, and a brief description of him/her for purposes of identification and such other information as the Commission shall deem necessary. A person to whom a permit has been issued under this section shall not perform duties in a position other than that for which such permit has been made valid by the Commission. Every person issued a permit to perform in the job categories as aforesaid shall endorse his/her usual signature on the margin of the license in the space provided for the purpose immediately upon the receipt of said permit, and such permit shall not be valid until so endorsed. A permit or any renewal thereof issued to a server shall expire on the anniversary of the operator's date of birth occurring more than twelve months but not more than sixty months after the effective date of such permit. The permit issued to a person born on February twenty-ninth shall, for the purpose of this section, expire on March first. Every application for an original permit filed under this section shall be sworn to by the applicant before a justice of the peace or notary public. Any applicant shall be permitted, at his/her request, to take any written examination in connection with the issuances of such a license in a language other than English.

SECTION 6: *Forgery or Alteration of Servers Permit; Penalty; Suspension; and Reinstatement of Permit.* Whoever falsely makes, alters, forges or counterfeits, or procures or assists another to falsely make, alter, forge or counterfeit a permit to serve alcoholic beverages; or whoever forges or without authorization uses the signature, facsimile of the signature, or validating signature stamp of the Commissioner upon a genuine or falsely made, altered, forged or counterfeited permit to serve alcoholic beverages; or whoever has in his/her possession, or utters, or publishes as true, or in any way makes use of a falsely made, altered, forged or coun-

terfeited permit; and whoever has in his/her possession, or utters, or publishes as true or in any way makes use of a falsely made, altered, forged or counterfeit signature, facsimile of the signature or validating a signature stamp of the Commissioner, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in jail or house of correction for not more than two years.

A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the Commission who shall suspend immediately the permit to serve alcoholic beverages of the person so convicted; and no appeal, motion for new trial or exceptions shall operate to stay the suspension of the permit. The Commission, after having suspended the permit to serve in accordance with this paragraph, shall not terminate such suspension nor reinstate the right to serve alcoholic beverages until one year after the said conviction provided, however, that if the prosecution of such a person has terminated in his/her favor, the Commission shall forthwith reinstate his/her permit to serve alcoholic beverages.

SECTION 7: *Examinations.*

a. No person shall be issued a permit to serve alcoholic beverages unless he/she shall have passed an examination conducted by the Commission.

b. Examination shall be written in the English language unless a second language is required as determined by the needs of the candidate. Examinations may also be administered using word processing or video equipment in those locations where such equipment is available.

c. Examinations shall be held at least twelve times a year. Additional examinations may be scheduled at the discretion of the Regulation Board with at least sixty days public notice.

d. Time allowed for the examinations will be set forth in the instructions to examinees.

e. Applicants will be given written notice when and where to appear for the examination.

f. The following examination rules will prevail, and violation of any part will be considered grounds for disqualification of the applicant:

1. Examinees will not be permitted the use of books or memoranda during the examination.

2. The copying of questions or making of notes relative thereto is prohibited during the examination.

3. No one shall be permitted to remove from the examination

room copies of the examination prior to or subsequent to the examination.

4. Examinees shall not leave the examination room for any reason until they have returned in to the person conducting the examination the complete examination papers and any other material relating thereto.

g. The results of the examination shall be mailed to the applicant.

h. The examination papers written by the applicant will not be returned to the applicant, and the applicant will not be permitted the examination papers except by making a written appeal to the Regulation Board.

i. Any appeal of the results of the examination must be filed in writing with the Regulation Board within fifteen days of notification of the results of the examination.

j. Applicants who fail to pass an examination may reapply for examination in no less than sixty days of notification of the results of the examination.

k. Reissuing of a permit by examination will be required for the initial permit and again every five years. In considering applicants for a renewed permit, the Regulation Board shall take into account every five years each candidate's continuing experience, education, training and maintenance of professional skills. Candidates not showing evidence of maintaining standards satisfactory to the Regulation Board shall be required to pass a written examination to sustain their present status.

The Commission and Regulation Board shall prescribe such reasonable rules and regulations as may be deemed necessary to carry out the provisions of this section.

Every licensee shall keep such records as the Commission and Regulation Board may by regulation require. The records of the licensee shall be open to the inspection of the Commission or Regulation Board or his representatives at all times during reasonable business hours.

No persons shall be employed by a licensee as an instructor, nor shall any person give instruction for hire in the serving of alcoholic beverages unless such a person is the holder of a certificate issued by the Regulation Board. Such certificate shall be issued only to persons qualified as described forthwith.

SECTION 8. *Application for License to Give Instruction for Hire in Alcohol Server School: Fee: Qualifications of Applicant: Suspension or Revocation of License or Instructor's Certificate.* No person shall engage in the business, hereinafter called Alcohol Server School, of giving instruction for hire in serving alcoholic beverages without being licensed by

the Commission and the Regulation Board. A separate license shall be secured for each place of business where a person operates an Alcohol Server School. Application for a license under this section may be filed with the Commissioner and shall contain such information as required by the Commission and Regulation Board. Every such application shall be accompanied by an application fee of fifty dollars, which shall in no event be refunded. If an application is approved by the Commissioner and Regulation Board, the applicant upon the payment of an additional fee the amount of which shall be determined annually by the Commission and Regulation Board shall be granted a license, which shall be valid for a period of one year from the date of its issuance. The annual fee for renewal of such license shall be determined annually by the Commission and Regulation Board. The Commissioner shall issue a license certificate to each licenses, which certificate shall be conspicuously displayed in the place of business of the licensee. In case of the loss, mutilation or destruction of a license certificate, the Commissioner shall issue a duplicate certificate upon proper proof thereof and payment of a fee of twenty-five dollars.

No license shall be issued to a person to conduct an Alcohol Server School as an individual unless he/she shall have been the holder of an instructor's certificate issued by the Commissioner under this section for at least two years, nor shall such a license be issued to a partnership unless at least one of the partners shall have held such a certificate for at least two years, nor to a corporation unless at least one of the directors shall have held a certificate for at least two years. The provisions of this paragraph shall not apply during the first two years of this act during which time the Commission and Regulation Board shall determine the necessary requirements for issuance of a license.

The Commission may deny the application of any person for a license, if, in his/her discretion, s/he determines that:

a. Such applicant has made a material false statement or concealed a material fact in connection with his/her application.

b. Such applicant, any officer, director, stockholder or partner, or any other person directly or indirectly interested in the business was the former holder, or was an officer, director, stockholder or partner, in a corporation or partnership which was the former holder of an Alcohol Server School license which was revoked or suspended by the Commissioner.

c. Such applicant or any officer, director, stockholder, partner, employee, or any other person directly or indirectly interested in the busi-

ness, has been convicted of a felony, or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

d. Such applicant has failed to furnish satisfactory evidence of good character, reputation and fitness.

e. Such applicant is not the true owner of the Alcohol Server School.

f. Such applicant or any officer, director, stockholder, partner, employee, or any person directly or indirectly interested in the business is the holder of a current license to serve alcoholic beverages for on or off premises consumption in the Commonwealth.

The Commissioner may suspend or revoke a license or refuse to issue a renewal thereof for any of the following causes:

a. The conviction of the licensee or any partner, officer, agent or employee of such licensee of a felony or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

b. Where the licensee has made a material false statement or concealed a material fact in connection with his/her application for the license or renewal thereof.

c. Where the licensee has failed to comply with any of the provisions of this section or any of the rules and regulations of the Commissioner made pursuant thereto.

d. Where the licensee or any partner, officer, agent or employee of such licensee has been guilty of fraud or fraudulent practices in relation to the business conducted under the license, or guilty of inducing another to resort to fraud or fraudulent practices in relation to securing for him/herself or another a permit to serve alcoholic beverages.

e. For any other good cause.

The term "fraudulent practices" as used in this section shall include but shall not be limited to any conduct or representation on the part of the licensee or any partner, officer, agent or employee of a licensee tending to induce another or to give the impression that a permit to serve alcoholic beverages may be obtained by any other means other than those prescribed by law or furnishing or obtaining the same by illegal or improper means or requesting, accepting, exaction or collecting money for such purpose.

Notwithstanding the renewal of a license, the Commissioner may revoke or suspend such license for causes and violations as prescribed by this section and occurring during the two license periods immediately preceding the renewal of such license.

Except where a refusal to issue a license or renewal or revocation or

suspension is based solely on a court conviction or convictions, a licensee or applicant shall have an opportunity to be heard, such hearing to be held at such time and place as the Commissioner shall prescribe.

A licensee or applicant entitled to a hearing shall be given due notice thereof. The sending of a notice of a hearing by mail to the last known address of a licensee or applicant ten days prior to the date of the hearing shall be deemed due notice.

SECTION 9. *Certification of Instructors for Alcohol Server Schools.* The Regulation Board shall have authority to grant upon application provisional and permanent certificates, as provided in this section, to instructors of Alcohol Server Schools licensed under this chapter. Each application shall be accompanied by a fee to be determined annually by the Regulation Board.

Any applicant shall be eligible for a provisional or a permanent certificate who satisfied the requirements of this section and who furnishes the Regulation Board with satisfactory proof that he/she 1) is an American citizen, 2) is of sound moral character, 3) possesses a bachelor's degree or an earned higher academic degree or is a graduate of a four year normal school approved by the Regulation Board and 4) meets such requirements as to courses of study, semester hours therein, experience, advanced degrees and such other requirements as may be established and put into effect by the Regulation Board; provided, however, that no requirements as to courses of study, semester hours therein, experience, advanced degrees and other such requirements shall take effect prior to one year subsequent to the promulgation of such requirements by the Regulation Board.

The first certificate which the board may grant to any eligible applicant shall be a provisional certificate for two years from the date thereof. Before the Regulation Board grants any other certificate, the applicant shall be evaluated by an evaluation committee in the manner hereinafter provided.

Each evaluation committee shall be selected by and under the auspices of the Regulation Board and shall consist of persons who hold a permanent certificate. Each evaluation committee shall consist of three persons, one of whom shall be appointed by the Regulation Board, one nominated by the applicant and the third shall be appointed by the other two members of the evaluating committee from professionals in the same field as the applicant or as closely allied thereto as possible.

Before an applicant completes a second year of service under his/her provisional certificate, he/she shall be evaluated by the evaluation committee described in the preceeding paragraph as to his/her readiness

to obtain a permanent certificate in terms of his/her professional growth and performance. Any evaluation made by the evaluation committee shall be based on criteria determined by the Regulation Board.

The evaluation committee may recommend to the Regulation Board that the applicant be granted a permanent certificate; and if the applicant has met all the other requirements established by the board, the board shall grant the applicant a permanent certificate.

The evaluation committee may, as one of its alternatives, recommend that the applicant's provisional certificate be renewed for an additional two years; and if the applicant has met all the other requirements established by the Regulation Board, the board shall grant the applicant a renewal of his/her second year of service under a renewed provisional certificate, the applicant shall be reevaluated in accordance with the provisions that govern the evaluation of an applicant under an initial provisional certificate.

If the evaluation committee recommends that a renewal of the original provisional certificate shall not be granted to an applicant, or if the evaluation committee recommends that a permanent certificate shall not be granted to an applicant, or if the board denies a renewal of a provisional certificate or of a permanent certificate to an applicant because he/she has not met all the requirements for eligibility as provided in this section, the Regulation Board shall notify the applicant of the adverse recommendation of the evaluation committee or the denial for certification by the Regulation Board; and such notice shall be accompanied by a report of the evaluation committee or a report of the reasons for the denial of certification by the Regulation Board, as the case may be, and a description of the procedures by which the applicant may initiate an appeal before a hearing officer; and such notice shall be mailed to the applicant by registered or certified mail not later than thirty days from the date of the meeting of the evaluation committee.

Notwithstanding any provisions of this section to the contrary, a person whose application for a renewal of a provisional certificate or whose application for a permanent certificate has been denied by the Regulation Board may submit a new application for certification in accordance with the provisions of this section at any time subsequent to two years after the expiration date of his/her last certificate. A person whose provisional certificate has expired, provided the Regulation Board has not denied the issuance of a provisional or permanent certificate, may reapply for a provisional certificate immediately.

For the purpose of certifying provisional instructors, the Regulation Board may approve programs at colleges or universities devoted to the

preparation of instructors for Alcohol Server Schools. A college or university offering such an approved program shall certify to the Regulation Board that a student has completed the program approved and shall provide the Regulation Board with a transcript of the person's record.

Any certificate issued by the Regulation Board may be revoked for cause, pursuant to standards and procedures established by rules and regulations of the Regulation Board.

The Regulation Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this section.

SECTION 10. *Curriculum of Alcohol Server Training Schools.* The curriculum of Alcohol Server Schools shall be determined by the Regulation Board and shall include, but not be limited to, the following:

Level 1: Package Store Clerks (9 hour minimum)

Alcohol as a drug and its effects on the body and behavior, especially driving ability. Blood alcohol content (BAC).

Effects of alcohol in combination with commonly used drugs, legal, illegal, prescription and nonprescription.

Recognizing the problem drinker and community treatment programs and agencies.

Massachusetts General Law for package stores, especially the alcoholic beverage laws such as sale to minors, sale to intoxicated persons, sale for on/off premise consumption, hours of operation and penalties for violation of these laws. The drunken driving laws and third party liability.

Level 2: Bartenders, waitresses and waiters (15 hour minimum)

Same as Level 1 plus—

Intervention with the problem customer. Communication skills for intervening with the intoxicated customer. Ways to cut off service and protect the customer. Alternative means of transportation to get the customer home safely. Ways to deal with the belligerent customer.

More comprehensive understanding of the Massachusetts General Laws pertaining to sale of alcoholic beverages.

Knowledge of mixology. Storage and servics of various alcoholic and non-alcoholic beverages.

Sanitation procedures, refrigeration and public health policies.

Level 3: Managers (30 hour minimum)

Same as Levels 1 and 2 plus—

Legal responsibilities of licensees.

Recognition of signs and symptoms of problems with employees. Development of Assistance Programs.

Advertising and marketing for safe and responsible drinking patterns. Standard operating procedures for dealing with problem customers.

Record keeping for fulfilling statutory obligations.

Understanding of management practices and their relation to safe and responsible drinking patterns including the number of employees on the job, the number of patrons allowed on the premises, the interior design, hours of operation, and the use of promotional techinques.

SECTION 11. *Penalties for Violation of this Chapter.* The Commission and Regulation Board shall establish guidelines for fines and penalties of violations in this chapter. These shall include, but not be limited to, the following violations:

Establishments employing workers without the proper permits.

Employees working without proper permits.

Employees working with permit suspended or revoked.

Employees not having permit available for inspection by Commission or Regulation Board.

Employees with permit convicted of violating a statute related to sale of alcoholic beverages, such as sale to minor, sale to intoxicated person, sale after hours, etc.

SECTION 12. *Funding for Administration, Implementation and Enforcement of this Chapter.* Fees collected under this chapter shall be used for the administration and enforcement of this system. These funds shall also be used for the development of educational programs and materials. Additional funding shall come from licensing fees, fines from drunken drivers, fines and penalties from violations of this chapter, and private sources such as restaurant and package store associations, insurance companies, brewers and distillers.

There shall be a scholarship fund established for those applicants with a demonstrated need who have to attend an education course. Money awarded from this fund shall be reimbursed by the individuals after employment has been obtained.

SECTION 13. *Employee Manual.* All establishments licensed under this act will be required to have a manual prepared by the Regulation Board on the premises at all times and available to all employees. The manual will detail all the information required for the passage of the permit examination as described in this chapter. In addition, the manual will describe specific situations encountered by bartenders, waiters and

waitresses and package store clerks with alternative methods of dealing with these situations so as to avoid liability. There will also be specific suggestions for marketing safe, responsible drinking patterns in customers.

**APPENDIX C: TABLE 1.

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Alabama	yes 6-5-71	yes 6-5-70 6-5-71		only parent or guardian may bring suit under 6-5-70		
Alaska	yes (drunken) 04.21.020:2	yes, if no id 04.21.020:1		licensees only	Nazareno v. Urie 638 P2d 671 (1981)* negligence per se	
Arizona					Brannigan v. Raybuck 667 P2d 213 (1983)* negligence	Ontiveros v. Borak 667 P2d 200 (1983)* negligence
California		yes, if obviously intoxicated B&P 25602.1				
Colorado			yes, prior notice required 13-21-103		Kerby v. Flamingo Club 532 P2d 975 (1974)# negligence	
Connecticut	yes 30-102			$50000 limit, written notice within 60 days, 1 year S of L		
D.C.					Marusa v Dist of Columbia 484 F2d 828 (1973)#	
Florida		yes, if willful and unlawful 768.125	yes, if knowingly 768.12[illegible]			

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* State Supreme Court Case

\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Ono v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Algeria v. Payonk 619 P2d 135 (1980)* negligence
Illinois	yes 43-135		yes 43-135	$15000 limit for injury; $20000 limit loss of support, lessor also liable; 1 year S of L		
Indiana						Elder v. Fisher 217 NE2d 847 (1966)* negligence per se
Iowa	yes 123.92 123.93			written notice to server in 6 months		Haafke v. Mitchell 347 NW2d 381 (1984)* negligence per se
Kentucky						Pike v. George 434 SW2d 626 (1968)# negligence per se
Louisiana						Chausse v. Southland 400 So2d 1199 (1981)# negligence

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Maine	yes 2002	yes 2002		actual and exemplary damages, lessor also liable		
Massachusetts					Adamian v Three Sons Inc. 233 NE2d 18 (1967)* negligence per se	
Michigan	yes (visibly intoxicated) 436.22			min = $50, 2 yr S of L	Jones v Bourrie 120 NW2d 236 (1963)* negligence per se	Longstreth v. Fitzgibbon 335 NW2d 677 (1983)# negligence
Minnesota	yes 340.95, 340.951			written notice within 120 days, 2 yr S of L		Holmquist v. Miller 352 NW2d 47 (1984)# negligence
Mississippi						Munford Inc v. Peterson 368 So2d 213 (1979)* negligence per se
Missouri					Carver v. Schafer 647 SW2d 570 (1983)# negligence	Sampson v. W.F. Enterprises 611 SW2d 333 (1981)# negligence per se
New Hampshire					Ramsey v. Anctil 211 A2d 900 (1965)* negligence	
New Jersey					Kelly v. Gwinnell 476 A2d 1219 (1984)* negligence	Rappaport v. Nichols 156 A2d 1 (1959)* negligence per se

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
New Mexico	yes, if reasonably apparent 41-11-1	yes 41-11-1-E			Lopez v. Maez 651 P2d 1269 (1982)* negligence	MRC Prop. v. Gries 652 P2d 732 (1982)* negligence
New York	yes Gen Obl 11-101	yes Gen Obl 11-101			Berkeley v Park 262 NYS2d 290 (1965)# negligence	
North Carolina		yes, if driving negligently 18B-120 etc.		$500,000 limit to recovery	Hutchens v. Hankins 303 SE2d 584 (1983)# negligence	
North Dakota	yes 5-01-06	yes 5-01-06				
Ohio	yes, notice required 4399.01		yes, notice required 4399.01	owner and lessee liable	Mason v Roberts 294 NE2d 884 (1973)* negligence	
Oregon	yes (visibly intoxicated) 30.950				Campbell v. Carpenter 566 P2d 893 (1977)* negligence	
Pennsylvania	yes (visibly intoxicated) 47-4-497				Jardine v Upper Darby Lodge 198 A2d 550 (1964)* negligence per se	
Rhode Island	yes 3-11-1	yes 3-11-1	yes, notice required 3-11-2			
South Dakota					Walz v City of Hudson 372 NW2d 120 (1982)* negligence per se	

\# Appellate Level Case
* State Supreme Court Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Tennessee					Mitchell v. Ketner 393 SW2d 755 (1964)# negligence per se	
Utah	yes 32-11-1	yes 32-11-1	yes 32-11-1	state immune from liability		
Vermont	yes 7-501	yes 7-501				
Virginia						Corrigan v. United States 595 FSupp 1047 (1984)** negligence
Washington						Young v Caravan Corp 663 P2d 834 (1983)* negligence per se
Wisconsin						Sorenson v. Jarvis 350 NW2d 108 (1984)* negligence per se
Wyoming		yes 12-5-502	yes 12-5-502	written notice required		

* State Supreme Case
\# Appellate Level Case
** Trial Court Case

APPENDIX C: TABLE 2

STATES WITHOUT ESTABLISHED DRAM SHOP LIABILITY

	CASE LAW DENYING LIABILITY		NO APPELLATE
STATE	STATE SUPREME COURT DECISIONS AGAINST	STATE LOWER COURT DECISIONS AGAINST	CASES DECIDING ISSUE
Arkansas	Carr v. Turner 385 SW2d 656 (1965) no negl per se/intoxicated person		
Delaware	Wright v. Moffitt 437 A2d 554 (1981) no negl or negl per se intoxicated person		
Kansas			no cases
Maryland	Felder v. Butler 438 A2d 494 (1981) no negligence intoxicated person		
Montana	Runge v. Watts 589 P2d 145 (1979) no negligence for social host/ intoxicated person		
Nebraska	Holmes v. Circo 244 NW2d 65 (1976) no negl per se/intoxicated person		
Nevada	Hamm v. Carson City Nugget 450 P2d 358 (1969) no negl per se/intoxicated person Yoscovitch v. Wasson 645 P2d 975 (1982) no negl per se/minor		
Oklahoma			no cases
South Carolina			no cases
Texas			no cases
West Virginia			no cases

APPENDIX C: TABLE 3

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
ALABAMA (28-3A-25)	19	misdemeanor	0-6 months	$100-1000	3-6 months	$100-1000	6-12 months	$100-1000
ALASKA (04.16.180)	21	Class A misdemeanor	1 year	$5000				
ARIZONA (4-241)	19	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-524, 48-901,2,3)	21	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25658)	21	misdemeanor	< 6 months	< $500				
COLORADO (12-46-114)	21/18•	misdemeanor	—	$100-$500 ($100 fine is	—	$100-$500 mandatory)	—	$100-$500
CONNECTICUT (30-113)	20	misdemeanor	< 1 year	< $1000				
DELAWARE (4-713,904)	21	misdemeanor	30 days	< $100				
D.C. (25-121,132)	21/18#	unspecified	< 1 year	< $1000				
FLORIDA (562.11)	19	misdemeanor	< 60 days	< $500				
GEORGIA (Act 1980, 1573, 1649)	19	misdemeanor	< 1 year	< $1000				

Key to Symbols:

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
HAWAII (281-78,102)	18	misdemeanor	< 6 months	< $500				
IDAHO (23-603)	19	misdemeanor 1 year	3 months-$1000	$300-(felony)	5 years	$5000 (felony)	5 years	$5000
ILLINOIS (43.149)	21	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-7-7)	21	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.50)	19	misdemeanor	< 30 days	< $100				
KANSAS (21-3610)	21/18•	Class B misdemeanor	< 6 months	< $1000				
KENTUCKY (244.080)	21	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (14.91)	18	misdemeanor	0-6 months	$0-$300				
MAINE (28-155,303 28-1058)	20	violation	no criminal	action				
MARYLAND (28-69,118)	21	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-34)	20	??	< 6 months	< $1000				

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
MICHIGAN (18.1004, 18.1021)	21	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	19	gross misdemeanor	30 days-90 days	$50-$100				
MISSISSIPPI (67-1-71,81)	21/18*	misdemeanor (liquor)	—	$500-$1000	< 1 year	$100-$2000		
(67-3-53)		misdemeanor (wine and beer)	< 6 months	< $500				
MISSOURI (311.310)	21	misdemeanor	< 1 year	$50-$1000				
MONTANA (16-3-301,314)	19	misdemeanor	< 6 months (Civil fine	< $500 of $1500	also	possible)		
NEBRASKA (53-180, 53-180.05)	20	Class III misdemeanor	0-3 months	$0-$500				
NEVADA (202.055)	21	misdemeanor	< 6 months	< $1000				
NEW HAMPSHIRE (175:6)	20	misdemeanor	< 1 year	< $1000				
NEW JERSEY (2:1-4, 2C:43-8, 33:1-77)	21	petty offense	< 6 months	< $1000				
NEW MEXICO (60-7A-25, 7B-1)	21	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, Penal 260.20)	19	misdemeanor	30 days-1 year	$200-$1200				

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
NORTH CAROLINA (18B-104, 18B-302)	21/19*	none	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-02-06, 12.1-32-01)	21	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(A), 4301.69,99)	21/19*	misdemeanor	—	$100-$500	—	$200-$500	—	
OKLAHOMA (37-538f)	21	felony (for 3.2% and above)	5 years maximum	$0-$5000				
		none (for .5% to 3.2%)	none	none				
OREGON (471.410)	21	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	21	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1, 3-8-5)	21	misdemeanor	up to 1 year	$250	up to 1 year	$500	up to 1 year	$750
SOUTH CAROLINA (61-3-990, 61-13,290)	21/18#	misdemeanor	< 5 years	< $5000				
SOUTH DAKOTA (35-4-78, 22-6-2)	21/18*	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	19	misdemeanor	30 days-6 months	$25-$1000	1-3 years (felony)	$500-$3000	1-3 years	$500-$3000
TEXAS (106.06)	19	misdemeanor	—	$100-$500				

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
UTAH (32-7-15, 32-8-59(	21	misdemeanor	30 days-1 year	$100-$1000				
VERMONT (7-658)	18	misdemeanor	2 years	$200-$1000				
VIRGINIA (4-37,62,92)	21/19•	misdemeanor	< 1 year	< $500				
WASHINGTON (66.44.180,310)	21	individuals: corporations:	2 months no term	$500 $5000	6 months —	— $10000	1 year —	— $1000
WEST VIRGINIA (60-3-22a1)	21	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:1)	19	forfeiture	—	< $500	—	$200-$500	—	$200 $500
WYOMING (12-6-101,102)	19	misdemeanor	< 6 months	< $100				

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Sources:
Commerce Clearing House, Liquor Control Law Reporter, 1983.
National Highway Safety Traffic Administration, A Digest of State Alcohol-Highway Safety Related Legislation, 1983.

APPENDIX C: TABLE 4

CRIMINAL LIABILITIES FOR SERVING INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
ALABAMA	xx	none	none	none				
ALASKA (04.16.030, 04.16.180)	drunken	Class A misdemeanor	< 1 year	< $5000				
ARIZONA (4-244, r-246)	intoxicated or disorderly	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-529, 48-901,2,3)	intoxicated condition	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25602)	obviously intoxicated	misdemeanor	< 6 months	< $500				
COLORDAO (12-46-112, 12-46-114)	visibly intoxicated	misdemeanor	—	$100-$500 ($100 fine	—	$100-$500 is mandatory)	—	$100-$500
CONNECTICUT (30-102, 30-113)	intoxicated	misdemeanor	< 1 year	< $1000				
DELAWARE (4-711, 4-903)	intoxicated or appears to be intoxicated	not specified	30 days	< $100				
D.C. (25-121,132)	intoxicated or appears to be intoxicated	not specified	< 1 year	< $1000				
FLORIDA	xx	none	none	none				
GEORGIA (5A-509)	noticeable intoxication	misdemeanor	< 1 year	< $1000				
HAWAII (281-78, 281 102)	under the influence	misdemeanor	< 6 months	< $500				

Key to Symbols:

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CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
IDAHO (23-605)	intoxicated or apparently intoxicated	misdemeanor 1 year	3 months-$1000	$300-				
ILLINOIS (43.131, 43-148)	intoxicated	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-10-15)	state of intoxication if person knows the other is intoxicated	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.49, 123.50(1))	intoxicated or simulating intoxication	misdemeanor	< 30 days	< $100				
KANSAS (21-4501, 41-715)	physically or mentally incapacitated by liquor consumption	misdemeanor	< 30 days	< $200				
KENTUCKY (244.080)	actually or apparently under influence	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (26:88:2, 26:191)	intoxicated	misdemeanor 6% or more	1-6 months	$100-$500				
(26:285:2	intoxicated	.5% to 6%	1-6 months	$100-$500	2-12 months	$200-$1000	2-12 months	$200-$1000

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
MAINE (28-155,303, 28-1058)	under the influence of liquor	violation	none	none				
MARYLAND (2B-69,118)	visibly under influence of any alc bev	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-69)	intoxicated or known to have been intox within 6 months preceding	??	1-12 months	$50-$500				
MICHIGAN (18.993&1021) (436.29&50)	intoxicated condition	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	obviously intoxicated	gross misdemeanor	30-90 days	$50-$100				
MISSISSIPPI (67-1-71, 67-3-53, 69)	visibly or noticeably intoxicated	misdemeanor	< 6 months	$500				
MISSOURI (311.310)	intoxicated or appearing to be intoxicated	misdemeanor	<1 year	$50-$1000				
MONTANA (16-3-301, 16-6-4)	intoxicated or actually, apparently, or obviously intoxicated	misdemeanor	< 6 months (Civil fine	< $500 of $1500	also	possible)		

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
OKLAHOMA (37-538g)	intoxicated	felony	1 year maximum	$0-$1000				
OREGON (471.410)	visibly intoxicated	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	visibly intoxicated	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1;3-11-5)	intoxicated	misdemeanor	3 months	$200	6 months	$300	< 1 year	< $500
SOUTH CAROLINA (61-3-990, 61-5-30)	intoxicated condition	misdemeanor	< 1 month	< $100				
SOUTH DAKOTA (22-6-2, 35-4-78)	intoxicated at the time	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	visibly intoxicated	misdemeanor	30 days-6 months	$500-$1000				
TEXAS (101.63)	intoxicated	misdemeanor	< 1 year	$100-$500	< 1 year	$500-$1000		
UTAH (32-7-14, 32-8-59)	under or apparently under influence of liquor	misdemeanor	30 days-1 year	$100-$1000				
VERMONT	xx	none	none	none				
VIRGINIA (4-37,62,92)	intoxicated	misdemeanor	< 1 year	< $500				

Key to Symbols:

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Key to Symbols:

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CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
NEBRASKA (53-180, 53-180.05)	physically or mentally incapacitated	Class III misdemeanor	0-3 months	$0-$500				
NEVADA	xx	none	none (Local laws	none may	control)			
NEW HAMPSHIRE (175:6)	under the influence of liquor	misdemeanor	< 1 year	< $1000				
NEW JERSEY	xx	none	none (Local laws	none may	control)			
NEW MEXICO (60-7A-16,25)	intoxicated with knowledge recipient is intoxicated	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, 130)	intoxicated, or actually or apparently under influence of liquor	misdemeanor	30 days-1 year	$200-$1200				
NORTH CAROLINA (18B-104, 18B-305)	intoxicated	administrative	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-01-09, 12.1-32-01)	intoxicated	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(B), 4399.09,99)	intoxicated	misdemeanor	—	$100-$500	—	$200-$500	—	$200-$500

Key to Symbols:

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CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
WASHINGTON (66.44.180,200)	apparently under influence of liquor	individuals: corporations:	2 months —	$500 $5000	6 months —	— $10000	1 year —	— $1000
WEST VIRGINIA (60-3-22a3, 60-7-13)	intoxicated	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:2)	intoxicated	misdemeanor	< 60 days	$100-$500				
WYOMING	xx	none	none	none				

Sources:
Commerce Clearing House, Liquor Control Law Reporter, 1983.
National Highway Safety Traffic Administration, Digest of State Alcohol-Highway Safety Related Legislation, 1983.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)

HB

3479

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary 3-13-86 1:30 pm

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

DRAFT

HB 349

DEC 12 1983

U. S. Small Business Administration
Office of the Chief Counsel for Advocacy
Model State Small Business Equal Access to Justice Act

Section One: Findings and Purposes

The Legislature finds that small businesses are deterred from challenging or defending against unreasonable state actions by the expense of vindicating their rights. The Legislature further finds that because of the greater legal and financial resources of this state, the standard for the award of attorneys fees and expenses against this state should be different from the standard otherwise applicable to a private litigant. The purpose of this Act is to allow eligible small businesses, in situations specified herein, to recover reasonable litigation expenses from this state in civil court actions and certain agency proceedings. Concomitantly, the purpose of this Act is to promote reasonable regulatory and enforcement activities in this state.

Section Two: For the purposes of this Act --

(a) "small business" means any commercial or business entity, including a sole proprietorship or a partnership, with a net worth of less than $2 million and fewer than 250 employees at the time of the civil judicial action or agency adjudication, but does not include an entity which is a subsidiary or affiliate of another entity which is not a small business.

(b) "this state" means the state of _____ , its agencies, commissions, boards or departments and its officers acting in their official capacity.

(c) "prevailing" means obtaining a favorable judgment in a civil judicial action or agency adjudication, or reaching a settlement of a civil judicial action or agency adjudication on terms favorable to the small business.

(d) "fees and expenses" includes the reasonable expenses

of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, project or discovery expense which is found by the adjudicative officer or court to be necessary for the preparation of the small business' case, and reasonable attorney fees. (The amount of fees awarded shall be set according to the prevailing market rate for legal services of like quality, but shall not exceed a rate of $75 per hour in the absence of a showing either that an increase in the cost of living justifies a higher rate, or that special circumstances justifies a higher rate. Fees for witnesses under this Act shall not be awarded at a rate higher than the maximum rate paid by this state for such witnesses. The total amount of fees and expenses awarded under this Act shall not exceed $25,000 in any single case).

(e) "position of this state" means both the litigation stance taken by this state in a civil action or agency adjudication as defined in this Act, and the action or policy of this state which gave rise to the agency adjudication or civil action.

(f) "substantially justified" means reasonable in both law and fact.

(g) "agency adjudication" means any adversary proceeding in which this state is represented by counsel, but does not include:

(i) proceedings not involving the business regulatory function of this state;

(ii) proceedings to establish or fix a rate;

(iii) proceedings involving eminent domain, condemnation, or proceedings in which this state is only a nominal party.

(h) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer, examiner, referee or otherwise, who presided at the adversary adjudication.

Section Three: Award of fees and expenses in court cases

(a) In addition to any costs which are awarded as prescribed by statute, a court shall award to a prevailing small business reasonable fees and expenses incurred by the small business in either of the following:

(1) a civil judicial action brought by or against this state where the action involves the business regulatory function of this state, unless this state shows and the court finds that the position of this state was substantially justified;

(2) a judicial proceeding to review an agency adjudication of this state unless this state shows and the court finds that during such agency adjudication, the position of this state was substantially justified.

(b) In awarding reasonable fees and expenses pursuant to Subsection (a)(2) of this Section, the court shall include in that award reasonable fees and expenses incurred during such agency adjudication unless this state shows and the court finds that during such agency adjudication the position of this state was substantially justified.

Section Four: Award of fees and expenses in agency adjudications

(a) When this state initiates an agency adjudication it shall award to a prevailing small business reasonable fees and expenses incurred by the small business in connection with that proceeding, unless this state shows and the adjudicative officer of the agency finds that the position of this state was substantially justified.

(b) A prevailing small business dissatisfied with the fee determination made by the adjudicative officer pursuant to Subsection (a) of this Section may appeal such fee determination to the court having jurisdiction to review a final decision of this state's agencies, notwithstanding the fact that the small business prevailed on the merits of the adjudication.

(c) Each agency of this state shall by rule establish specific procedures for the submission and consideration of applications for an award of reasonable fees and expenses pursuant to Subsection (a) of this Section.

Section Five: Discretion to reduce or deny an award

The judge in a court action pursuant to Section Three of this Act or the adjudicative officer in an agency adjudication pursuant to Section Four of this Act, in their discretion, may deny or reduce the award upon finding:

(a) that during the course of either the court action or the agency adjudication, the prevailing small business unduly and unreasonably protracted the final resolution of the matter, or

(b) that the prevailing small business refused an offer of settlement by this state which was at least as favorable to the prevailing small business as the relief ultimately obtained.

Section Six: Payment of awards; report to the Legislature

(a) An award of reasonable fees and expenses under this Act shall be payable by the state agency, commission, board or department over which the small business prevailed, out of its regular operating budget. In the event sufficient funds are not available to pay an award, the award shall be paid from any subsequent appropriation made to the agency, commission, board or department.

(b) Each agency, commission, board or department that pays an award under this Act shall report annually to the Legislature at the end of the fiscal year on the number, nature and amount of the awards, the claim involved in the action and such other relevant information which may aid the Legislature in evaluating the scope and impact of this Act.

Section Seven: Effective date and sunset provision

This Act shall apply to court action and adversary adjudications initiated after (date).

This Act shall expire on (date) unless reauthorized before that time by the Legislature of this state.

proved for safety and effectiveness under this section may include on its label the statement 'FDA Approved' followed by the number assigned to the application by the Secretary and, upon the expiration of eighteen months from the date of the enactment of this subsection, such a drug which is manufactured after the expiration of such months shall include such statement and number. Such a drug may also include, in accordance with regulations of the Secretary, such statement and number in its advertising and in any labeling (other than the label).".

SEC. 3. REGULATIONS.

The Secretary of Health and Human Services shall, not later than one year from the date of the enactment of this Act, promulgate regulations under the last sentence of section 505(k) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b) of section 1).

The SPEAKER pro tempore. Pursuant to the rule, a second is not required on this motion.

The gentleman from California [Mr. WAXMAN] will be recognized for 20 minutes and the gentleman from Utah [Mr. NIELSON] will be recognized for 20 minutes.

The Chair recognizes the gentleman from California [Mr. WAXMAN].

GENERAL LEAVE

Mr. WAXMAN. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on this legislation, H.R. 2244.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

Mr. WAXMAN. Mr. Speaker, I yield myself such time as I may consume.

(Mr. WAXMAN asked and was given permission to revise and extend his remarks.)

Mr. WAXMAN. Mr. Speaker, H.R. 2244 permits the manufacturers of prescription drugs to state "FDA approved" followed by the approval number in their drug labeling and advertising. This is the same bill that passed the House last year by voice vote.

Currently, section 301(L) of the Federal Food, Drug, and Cosmetic Act prohibits drug manufacturers from making any representation regarding FDA approval in their labeling or advertising. During hearings conducted by the Subcommittee on Health and the Environment, there were numerous complaints about section 301(L) because of the difficulty of determining whether a drug has been approved by FDA.

The FDA Approval Labeling Act carves out an exception to section 301(L). During the 18-month period after enactment of the bill, any drug manufacturer would be allowed to state in its drug labeling or advertising that the drug is FDA approved. After the 18-month period, all manufacturers would be required to use the statement regarding FDA approval in their drug labels.

This bill protects the public by giving pharmacists and physicians the ability to determine that their patients are only getting drugs approved by the FDA.

I urge my colleagues to support this bill.

Mr. Speaker, I reserve the balance of my time.

Mr. NIELSON of Utah. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 2244, the FDA Approval Labeling Act. As the chairman of the Subcommittee on Health and the Environment, the gentleman from California [Mr. WAXMAN] has stated, the bill would permit the manufacturers of prescription drugs to state "FDA approved," followed by their approval number on the drug label on their advertising. It is currently not allowed under section 301(L) of the Food, Drug, and Cosmetic Act.

The bill is in response to numerous complaints from pharmacists about the difficulty of determining whether a drug has been approved by the FDA.

Mr. Speaker, I believe this bill is noncontroversial. It passed the subcommittee and the full committee without dissent and, as Mr. WAXMAN has indicated, passed the House last year by a voice vote. Unfortunately, it was not taken up by the Senate. It has the support of the administration and it also has the support of pharmacists and at least the acquiescence of the Proprietary and Pharmaceutical Association.

Mr. Speaker, I urge adoption and everyone's support of the bill.

Mr. WAXMAN. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from California [Mr. WAXMAN] that the House suspend the rules and pass the bill, H.R. 2244.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

Mr. KASTENMEIER. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 2378) to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code with respect to awards of expenses of certain agency and court proceedings, and for other purposes, as amended.

The Clerk read as follows:

H.R. 2378

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENTS TO SECTION 504 OF TITLE 5.

(a) AWARDING OF FEES IN ADVERSARY ADJUDICATIONS.—

(1) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Subsection (a)(1) of section 504 of title 5, United States Code, is amended by adding at the end thereof the following: "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.".

(2) CLARIFYING AMENDMENT.—Subsection (a)(1) of such section is amended by striking out "as a party to the proceeding".

(3) DECISION OF AGENCY TO BE FINAL ADMINISTRATIVE DECISION.—Subsection (a)(3) of such section is amended by adding at the end thereof the following: "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.".

(b) DETERMINATION OF FEES DELAYED IN CASE OF APPEAL.—Subsection (a)(2) of section 504 of title 5, United States Code, is amended by adding at the end thereof the following: "When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.".

(c) DEFINITIONS.—

(1) PARTY.—Paragraph (1)(B) of section 504(b) of title 5, United States Code, is amended to read as follows:

"(B) 'party' means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;".

(2) ADVERSARY ADJUDICATION.—Paragraph (1)(C) of such section is amended—

(A) by inserting "(i)" before "an adjudication under";

(B) by inserting before the semicolon at the end thereof the following: ", and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607)"; and

(C) by striking out "and" at the end thereof.

(3) POSITION OF THE AGENCY.—Paragraph (1) of such section is amended—

(A) by striking out the period at the end of subparagraph (D) and inserting in lieu thereof "; and"; and

(B) by adding at the end thereof the following:

"(E) 'position of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary

adjudication in which the party has unreasonably protracted the proceedings.".

(d) APPEALS OF FEE DETERMINATIONS.—Subsection (c)(2) of section 504 of title 5, United States Code, is amended to read as follows:

"(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.".

(e) AWARDS PAID FROM AGENCY FUNDS.—Subsection (d) of section 504 of title 5, United States Code, is amended to read as follows:

"(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.".

SEC. 2. AMENDMENTS TO SECTION 2412 OF TITLE 28.

(a) CLARIFYING AMENDMENTS.—Section 2412 of title 28, United States Code, (relating to costs and fees) is amended—

(1) in subsections (a) and (b) by striking out "or any agency and any official of the United States" each place it appears and inserting in lieu thereof "or any agency or any official of the United States"; and

(2) in subsection (d)(1)(A) by inserting ", including proceedings for judicial review of agency action," after "in tort)".

(b) DETERMINATION OF "SUBSTANTIALLY JUSTIFIED".—Section 2412(d)(1)(B) of title 28, United States Code, is amended by adding at the end thereof the following: "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.".

(c) DEFINITIONS.—

(1) Subparagraph (B) of section 2412(d)(2) of title 28, United States Code, is amended—

(A) in clause (i) by striking out "$1,000,000" and inserting in lieu thereof "$2,000,000", and

(B) by striking out "(ii)" and all that follows through the end of the subparagraph and inserting in lieu thereof the following: "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;".

(2) ADDITIONAL DEFINITIONS.—Subsection (d)(2) of such section is amended—

(A) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof a semicolon; and

(B) by adding at the end thereof the following:

"(C) 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

"(E) 'civil action brought by or against the United States' includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

"(F) 'court' includes the United States Claims Court;

"(G) 'final judgment' means a judgment that is final and not appealable, and includes an order of settlement; and

"(H) 'prevailing party', in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.".

(d) PAYMENT OF AWARDS.—Paragraph (4) of section 2412(d) of title 28, United States Code, is amended to read as follows:

"(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.".

(e) INTEREST.—Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following:

"(c) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.".

SEC. 3. AWARDS IN CERTAIN SOCIAL SECURITY PROCEEDINGS.

Section 206 of the Equal Access to Justice Act is amended—

(1) by striking out "Nothing" and inserting in lieu thereof "(a) Except as provided in subsection (b), nothing"; and

(2) by adding at the end thereof the following:

"(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of that Act and section 2412(d) of title 28, United States Code, the claimant's attorney refunds to the claimant the amount of the smaller fee.".

SEC. 4. REPEAL OF LIMITATION ON PAYMENT OF AWARDS.

Section 207 of the Equal Access to Justice Act (P.L. 96-481) is hereby repealed.

SEC. 5. AWARDS FOR CERTAIN FEES AND OTHER EXPENSES.

Section 508 of the Equal Access to Justice Act is amended by adding at the end thereof the following: "Awards may be made for fees and other expenses incurred before October 1, 1981, in any such adversary adjudication or civil action.".

SEC. 6. TREATMENT OF EXPIRED PROVISIONS OF LAW.

(a) REVIVAL OF CERTAIN EXPIRED PROVISIONS.—Section 504 of title 5, United States Code, and the item relating to that section in the table of sections of chapter 5 of title 5, United States Code, and subsection (d) of section 2412 of title 28, United States Code, shall be effective on or after the date of the enactment of this Act as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act.

(b) REPEALS.—

(1) Section 203(c) of the Equal Access to Justice Act is hereby repealed.

(2) Section 204(c) of the Equal Access to Justice Act is hereby repealed.

SEC. 7. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this section, the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act.

(b) APPLICABILITY OF AMENDMENTS TO CERTAIN PRIOR CASES.—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act, except that in any such case, the 30-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of the enactment of this Act.

(c) APPLICABILITY OF AMENDMENTS TO PRIOR BOARD OF CONTRACTS APPEALS CASES.—Section 504(b)(1)(C)(ii) of title 5, United States Code, as added by section 1(c)(2) of this Act, and section 2412(d)(2)(E) of title 28, United States Code, as added by section 2(c)(2) of this Act, shall apply to any adversary adjudication pending on or commenced on or after October 1, 1981, in which applications for fees and other expenses were timely fixed and were dismissed for lack of jurisdiction.

The SPEAKER pro tempore. Pursuant to the rule, a second is not required on this motion.

The gentleman from Wisconsin [Mr. KASTENMEIER] will be recognized for 20 minutes and the gentleman from California [Mr. MOORHEAD] will be recognized for 20 minutes.

The Chair recognizes the gentleman from Wisconsin [Mr. KASTENMEIER].

GENERAL LEAVE

Mr. KASTENMEIER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on H.R. 2378, the bill about to be considered.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. KASTENMEIER. Mr. Speaker, I yield myself such time as I may consume.

(Mr. KASTENMEIER asked and was given permission to revise and extend his remarks.)

Mr. KASTENMEIER. Mr. Speaker, I rise in support of H.R. 2378, legislation expanding the liability of the Federal Government for attorneys' fees and related expenses. H.R. 2378 extends and clarifies the Equal Access to Justice Act [EAJA] (title II, Public Law 96-481), which had amended title 5

United States Code, section 504 and title 28 United States Code, section 2412. The main purpose of the legislation is to ensure access to justice for individuals and small businesses and organizations who are involved in civil disputes with the Federal Government.

The original act modified 5 U.S.C. 504 and 28 U.S.C. 2412(d) to make the United States liable for attorneys' fees and other expenses of a prevailing party in an adversary adjudication or civil action brought by or against the United States unless the agency or court could find that the position of the agency or the United States was substantially justified or that special circumstances would make an award unjust. Eligible parties under the original act have been individuals with a net worth of not more than $1 million or small businesses or organizations with a net worth of not more than $5 million.

H.R. 2378 is a revised version of H.R. 5479 (98th Congress) which passed both Houses unanimously on October 11, 1984. The final version of H.R. 5479 was a compromise between H.R. 5479 as reported by this committee and S. 919 as reported by the Senate Judiciary Committee. H.R. 5479 was vetoed by the President on November 9, 1984. In his veto message, the President expressed objections to the broadness of the definition "position of the United States," explaining that it could lead to lengthier proceedings than if only the litigation position were at issue and could lead to extensive discovery on how the position was formulated. He also expressed concern about the interest provision and disparate treatment of litigants under that provision.

During the 99th Congress, several Members and I have made efforts to fashion a bill which would address concerns which the administration raised in the President's veto message on H.R. 5479 and in later meetings.

On April 25, 1985, H.R. 2223, a revision of H.R. 5479, was introduced by Messrs. MOORHEAD, FISH, KINDNESS and myself. On April 30, the Subcommittee on Courts, Civil Liberties and the Administration of Justice—which I chair—conducted a hearing on H.R. 2223. Witnesses included representatives of the U.S. Department of Justice, Small Business United, Small Business Legal Defense Committee, the National Federation of Independent Business, and the Alliance for Justice. All witnesses supported H.R. 2223.

On May 2, 1985, the subcommittee conducted a markup of H.R. 2223, and with two minor amendments recommended that a clean bill be introduced and sent to the committee. On May 15, that bill with a minor amendment was ordered reported favorably by the committee, with a quorum present, by voice vote no objection being heard. (H. Rept. 99-120, and Part 2.) H.R. 2378 has the unanimous support of the members of the Committee on the Judiciary. The bill also has the support of the administration, as well as the Office of Advocacy of the Small Business Administration.

The legislation has wide support from such groups as Small Business United, the Small Business Legal Defense Committee, the Small Business Legislative Council, the Independent Business Association of Wisconsin, the National Federation of Independent Business, the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Tire Dealers and Retreaders Association, the Menswear Retailers of America, the National Small Business Association, the American Bar Association, the ACLU, and the Alliance for Justice.

H.R. 2378 clarifies that the United States will be liable for attorneys' fees and related expenses unless the position of the Government—the action or failure to act by the Government upon which the administrative proceeding or civil action is based, as well as the litigation position—is substantially justified, or unless special circumstances would make an award unjust. Courts have been divided on whether the "position of the agency/United States" referred to the agency action which was the subject of the lawsuit or only the Government's litigation position.

The bill would limit the determination of whether the position of the United States was substantially justified to the record—including the record with respect to the action or failure to act by the agency upon which the adversary adjudication or civil action is based—which is made in the adversary adjudication or civil action for which fees and other expenses are sought. The effect of this amendment, which is designed to respond to concerns raised by the President's veto message, will be to limit discovery in EAJA fee proceedings.

In H.R. 2378 eligibility under the act would be expanded to included individuals with a net worth of $2 million or less or businesses and other organizations with $7 million or less net worth.

The legislation allows the agency rather than the adjudicative officer to make the final decision on fee awards at the agency level. A fee claimant dissatisfied with the awards may appeal the denial of or measure of the award. The legislation makes other improvements in the act, including revising the interest payment provision, defining "final judgment," and clarifying other provisions.

The bill revives certain portions of the original act which were repealed on October 1, 1984, and modifies the original legislation.

I would like to clarify the effective date provisions of H.R. 2378 and the relationship of these provisions with the original act. Cases which were pending on October 1, 1984, including fee application proceedings would be governed by the original act, provided that the time to file the fee application expired before the date of enactment of this bill. This bill would apply to any case pending on October 1, 1984, and finally disposed of before the date of enactment of this bill, if the time for filing an application for fees and other expenses had not expired as of such date of enactment. This bill would also apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this bill, and in that case the 30-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of enactment of this bill. If a fee case is complete and a fee petition has been fully adjudicated before the date of enactment, with no further appeal pending on the date of enactment, the case may not, or course, be reopened except as explicitly allowed in certain proceedings before boards of contract appeals.

I should note before closing that since the committee report was filed, the District Court of the Northern District of California has decided *Miller* v. *Hotel and Restaurant Employees and Bartenders Union*, C84-6382, (N.D. Calif., May 24, 1985) relating to eligibility for fees. This case agrees with the position taken in the committee report at page 17, finding a local union eligible for EAJA fees. This decision makes clear that even before these amendments the financial condition of a local union would be considered separately from its international affiliate.

The original act has resulted in approximately $4 million in fees and expenses. CBO has estimated a cost of $3.1 million in fiscal year 1986 to $7 million in fiscal year 1990. The legislation is a high priority for the small business community and is a valuable vehicle for improving access to justice. I urge my colleagues to support it.

□ 1320

Mr. MOORHEAD. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong support of H.R. 2378, a bill to authorize and make permanent the Equal Access to Justice Act. From its effective date of October 1, 1981, until it was sunsetted on October 1, 1984, the Equal Access to Justice Act has provided an important avenue of redress for small businessmen and individuals against unjustifiable Government action.

Last year, Congress unanimously passed legislation to make the act permanent. That bill, H.R. 5479, was vetoed by the President on November 9, 1984. In the wake of the veto, negotiations were commenced between representatives of the administration, the small business community, the public

interest groups and members and staffs of the House and Senate Judiciary Committees, in an effort to address the issues detailed in the President's veto message. These negotiations produced H.R. 2378, which I am happy to note is without opposition and is strongly supported by the administration, the American Bar Association, the Office of Advocacy of the Small Business Administration, the U.S. Chamber of Commerce, Small Business United, the National Small Business Association, the ACLU, and the Alliance for Justice.

I would like to commend my colleagues on the Subcommittee on Courts, Civil Liberties and the Administration of Justice for their work on this important legislation. I would especially like to commend and thank the chairman of the Courts Subcommittee, the gentleman from Wisconsin [Mr. KASTENMEIER], the gentleman from New York [Mr. FISH], and the gentleman from Ohio [Mr. KINDNESS] for their leadership and hard work in developing H.R. 2378. Also Senators GRASSLEY and THURMOND are to be commended for their leadership on this issue in the other body.

Mr. Speaker, small businessmen and individuals with limited assets have been without the important protection afforded by the Equal Access to Justice Act for the last 7½ months. In H.R. 2378, we have legislation with which we can quickly restore that protection. I urge my colleagues to do so by adopting H.R. 2378.

Mr. Speaker, I yield such time as he may consume to the gentleman from Ohio [Mr. KINDNESS].

Mr. KINDNESS. Mr. Speaker, I thank the gentleman for yielding this time to me.

Mr. Speaker, I urge support for H.R. 2378, which would make permanent law of the successful experiment known as the Equal Access to Justice Act. It has been gratifying to work with others and to see this matter coming together after the disappointment of last year's veto of a similar bill passed in the 98th Congress.

We believe that the objections and concerns of the administration have been fully considered and thoughtfully dealt with, that the Members of the other body who have worked on this matter are committed to proceeding with this legislation in a compatible manner, and that the Equal Access to Justice Act should become law without encountering any last-minute roadblocks from the Office of Management and Budget. In fact, we are informed today that the administration supports the passage of H.R. 2378, for which I am duly grateful.

It does seem necessary, however, to bring attention to a portion of the committee's report which would tend to mislead those uninitiated in the lore of the substantial evidence rule. At the bottom of page 9 of the report of the committee, the following statement appears:

> Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.

This gratuitously authoritarian overstatement appears to be the only error I found in the report. I wish I could have known about it or that it could have been discovered sooner than it was, but the filing deadline for the report was approaching within the hour, practically speaking, when the error was discovered. At least, however Mr. Speaker, we can clarify the point in the record of these proceedings.

The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe and should not be interpreted to suggest that a finding of an agency action that was not supported by substantial evidence would automatically entitle a prevailing party to fees or would establish a presumption of entitlement to fees. Of course, the Government has the burden of demonstrating substantial justification under the Equal Access to Justice Act. Substantial justification is a different and a lesser standard than the substantial evidence standard applied in a review of administrative proceedings. The Government may still prove that its position was substantially justified even if the court does not believe that the case on the merits was supported by "substantial evidence on the record as a whole."

The committee recognizes the close relationship between the concepts, and the fact that a finding by the Government was not supported by substantial evidence should be accorded careful scrutiny. But indeed the quoted two sentences from the bottom of page 9 and the top of page 10 of the report do not represent a clear or a appropriately explanatory statement of the intent of the committee in the reporting of H.R. 2378.

I would, of course, welcome the comments of others with respect to the point involved, but certainly I urge that there not be confusion between the substantial evidence rule and the substantial justification measurement that is really novel to the Equal Access to Justice Act.

Mr. Speaker, I urge my colleagues to support H.R. 2378.

Mr. MOORHEAD. Mr. Speaker, if the gentleman will yield, I would just like to state that I concur in the remarks of the gentleman from Ohio [Mr. KINDNESS], especially as they relate to his clarification of the relationship between the standards of substantial evidence and substantial justification.

Mr. KASTENMEIER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, reference has been made to the report. In its report (H. Rept. 99-120) the committee discusses the relationship between a finding by a court that Government action was not supported by substantial evidence and a finding that the Government's position was not substantially justified. Now, I do not understand the committee report to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees.

□ 1330

The committee recognizes the close relationship between the concepts and the fact that a finding that Government action was not supported by substantial evidence should be accorded significant weight.

Of course, the government has the burden of proof of demonstrating substantial justification. Substantial justification is a different standard than the substantial evidence standard. The Government may still prove that the position it took was substantially justified. Saying it is not intended to be so difficult that the Government may only avoid fees by prevailing in the litigation.

Mr. Speaker, I believe this bill is in excellent shape and ought to be overwhelmingly approved by the House.

● Mr. FISH. Mr. Speaker, as one who was an original cosponsor of the Equal Access to Justice Act when it was first approved by Congress in 1980 (Public Law 96-481), I would like to indicate my strong support for H.R. 2378. This legislation, of which I am also an original cosponsor, will reauthorize and make permanent this important regulatory reform measure.

Last year, based primarily on the 3 years of experimentation that were provided by the original act, which expired on October 1, 1984, Congress approved reauthorizing legislation (H.R. 5479). However, President Reagan saw fit to veto that legislation on November 9, 1984. Since the veto I have cooperated with the administration, the small business community, the public interest groups, as well as members and staffs of the House and Senate Judiciary Committees in an effort to produce an acceptable bill. I believe that our collective efforts have produced a bill in H.R. 2378 that will prove to be workable in a manner that ensures fairness to both sides in regulatory proceedings and court actions.

I am happy to note that H.R. 2378 includes the language of an amendment which I offered in the full Judiciary Committee last Congress to expand the definition of eligible "party" under the statute. As originally enacted, the definition of party contained the words "corporation" and "organization." The issue as to whether or not units of local government were eligible to be reimbursed for attorney's fees and court costs was left

ambiguous. The unfortunate result has been that, for the most part, smaller governmental bodies have not been considered to be eligible parties under the act.

In my estimation, the Equal Access to Justice Act should assist any small organization, whether private or governmental, that is involved in a regulatory or litigation dispute with the United States and where the position of the United States is determined to be not "substantially justified." Units of local government are frequently involved in adjudications or litigation regarding grant eligibility and grant reductions under a variety of Federal assistance programs. Smaller governmental entities face the same cost deterrents and other disadvantages that small businesses do in such proceedings. They should be eligible for reimbursement for their fees and expenses where appropriate.

This extension of the Equal Access to Justice Act has received broad support from the administration, the Chamber of Commerce of the United States, the National Federation of Independent Business, the American Bar Association, the National Small Business Association, the Administrative Conference of the United States, the Office of Advocacy of the Small Business Administration, the ACLU and the Alliance for Justice.

In summary, this legislation permanently codifies a remedial statute that has proven that it can work well and, in addition, makes numerous clarifications in the language of the law to correct existing ambiguities. I strongly urge my colleagues to support the passage of H.R. 2378.●

Mr. KASTENMEIER. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. MOORHEAD. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin [Mr. KASTENMEIER] that the House suspend the rules and pass the bill, H.R. 2378, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

STATUE OF LIBERTY-ELLIS ISLAND COMMEMORATIVE COIN ACT

Mr. ANNUNZIO. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 47) entitled "An Act to provide for the minting of coins in commemoration of the centennial of the Statue of Liberty," with Senate amendments thereto, and concur in the Senate amendments.

The Clerk read the title of the bill.

The Clerk read the Senate amendments, as follows:

Strike out all after the enacting clause and insert:

TITLE I—STATUE OF LIBERTY-ELLIS ISLAND COMMEMORATIVE COINS

SHORT TITLE

SEC. 101. This Act may be cited as the "Statue of Liberty-Ellis Island Commemorative Coin Act".

COIN SPECIFICATIONS

SEC. 102. (a)(1) The Secretary of the Treasury (hereafter in this title referred to as the "Secretary") shall issue not more than 500,000 five dollar coins which shall weight 8.359 grams, have a diameter of 0.850 inches, and shall contain 90 percent gold and 10 percent alloy.

(2) The design of such five dollar coins shall be emblematic of the centennial of the Statue of Liberty. On each such five dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(b)(1) The Secretary shall issue not more than ten million one dollar coins which shall weigh 26.73 grams, have a diameter of 1.500 inches, and shall contain 90 percent silver and 10 percent copper.

(2) The design of such dollar coins shall be emblematic of the use of Ellis Island as a gateway for immigrants to America. On each such dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(c)(1) The Secretary shall issue not more than twenty-five million half dollar coins which shall weigh 11.34 grams, have a diameter of 1.205 inches, and shall be minted to the specifications for half dollar coins contained in section 5112(b) of title 31, United States Code.

(2) The design of such half dollar coins shall be emblematic of the contributions of immigrants to America. On each such half dollar coin there shall be a designation of the value of the coin, an inscription of the year "1986", and inscriptions of the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum".

(d) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code.

SOURCES OF BULLION

SEC. 103. (a) The Secretary shall obtain silver for the coins minted under this title only from stockpiles established under the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 et seq.).

(b) The Secretary shall obtain gold for the coins minted under this title pursuant to the authority of the Secretary under existing law.

DESIGN OF THE COINS

SEC. 104. The design for each coin authorized by this title shall be selected by the Secretary after consultation with the Chairman of the Statue of Liberty-Ellis Island Foundation, Inc. and the Chairman of the Commission of Fine Arts.

SALE OF THE COINS

SEC. 105. (a) Notwithstanding any other provision of law, the coins issued under this title shall be sold by the Secretary at a price equal to the face value, plus the cost of designing and issuing such coins (including labor, materials, dies, use of machinery, and overhead expenses).

(b) The Secretary shall make bulk sales at a reasonable discount to reflect the lower costs of such sales.

(c) The Secretary shall accept prepaid orders for the coins prior to the issuance of such coins. Sales under this subsection shall be at a reasonable discount to reflect the benefit of prepayment.

(d) All sales shall include a surcharge of $35 per coin for the five dollar coins, $7 per coin for the one dollar coins, and $2 for the half dollar coins.

ISSUANCE OF THE COINS

SEC. 106. (a) The gold coins authorized by this title shall be issued in uncirculated and proof qualities and shall be struck at no more than one facility of the United States Mint.

(b) The one dollar and half dollar coins authorized under this title may be issued in uncirculated and proof qualities, except that not more than one facility of the United States Mint may be used to strike any particular combination of denomination and quality.

(c) Notwithstanding any other provision of law, the Secretary may issue the coins minted under this title beginning October 1, 1985.

(d) No coins shall be minted under this title after December 31, 1986.

GENERAL WAIVER OF PROCUREMENT REGULATIONS

SEC. 107. No provision of law governing procurement or public contracts shall be applicable to the procurement of goods or services necessary for carrying out the provisions of this title. Nothing in this section shall relieve any person entering into a contract under the authority of this title from complying with any law relating to equal employment opportunity.

DISTRIBUTION OF SURCHARGES

SEC. 108. All surcharges which are received by the Secretary from the sale of coins issued under this title shall be promptly paid by the Secretary to the Statue of Liberty-Ellis Island Foundation, Inc. (hereinafter in this title referred to as the "Foundation"). Such amounts shall be used to restore and renovate the Statue of Liberty and the facilities used for immigration at Ellis Island and to establish an endowment in an amount deemed sufficient by the Foundation, in consultation with the Secretary of the Interior, to ensure the continued upkeep and maintenance of these monuments.

AUDITS

SEC. 109. The Comptroller General shall have the right to examine such books, records, documents, and other data of the Foundation as may be related to the expenditure of amounts paid, and the management and expenditures of the endowment established, under section 108.

COINAGE PROFIT FUND

SEC. 110. Notwithstanding any other provision of law—

(1) all amounts received from the sale of coins issued under this title shall be deposited in the coinage profit fund;

(2) the Secretary shall pay the amounts authorized under this title from the coinage profit fund; and

(3) the Secretary shall charge the coinage profit fund with all expenditures under this title.

FINANCIAL ASSURANCES

SEC. 111. (a) The Secretary shall take all actions necessary to ensure that the issuance of the coins authorized by this title shall result in no net cost to the United States Government.

(b) No coin shall be issued under this title unless the Secretary has received—

(1) full payment therefor;

BACKGROUND OF HB 349

MANY SMALL BUSINESSES HAVE BEEN ADVERSELY EFFECTED BY UNREASONABLE ENFORCEMENT OF ALASKA LAWS AND REGULATIONS INITIATED BY A GOVERNMENTAL AGENCY. MANY OF THESE ENFORCEMENT ACTIONS ARE REALLY A FORM OF HARASSMENT. THE SMALL BUSINESSMAN HAS BEEN UNABLE TO DEFEND HIMSELF AGAINST THIS UNREASONABLE ACTION BY STATE AGENCIES DUE TO THE UNLIMITED RESOURCES OF THE STATE AND THE VERY HIGH ATTORNEY FEES AND COURT COSTS ENTAILED IN A SUIT.

THIS BILL ALLOWS THE SMALL BUSINESSMAN TO GO TO COURT--WIN HIS CASE--AND BE REIMBURSED IN FULL FOR HIS EFFORTS. THE BILL WILL GIVE THE SMALL BUSINESSMAN A FIGHTING CHANCE TO VINDICATE HIS POSITION ON TAX MATTERS OR REGULATORY MATTERS WITH ANY PUBLIC AGENCY OF THE STATE AND STILL RECOVER HIS ATTORNEY AND COURT COSTS IN FULL IF HE PREVAILS.

THIS BILL HAS BEEN REQUESTED BY HUNDREDS OF SMALL BUSINESSMEN IN THE STATE OF ALASKA.

THE BILL WILL ALSO SERVE AS A VERY STRONG DETERRENT FOR ANY STATE AGENCY TO USE THEIR POWERS IN ENACTING UNREASONABLE REGULATIONS OR PROCEEDING WITH IRRATIONAL ENFORCEMENT ACTIVITIES.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 25, 1985

SUBJECT: Legal opinion on proposed "equal access to justice" bill (Work Order No. 14-0905)

TO: Representative Richard Shultz

FROM: George W. Edwards GWE
Legislative Counsel

This memo accompanies a bill drafted in response to your request.

A possible constitutional problem with the bill is that the selection of a particular group of persons to receive special reimbursements for costs may deny other persons due process and equal protection of law. Under the bill's initial premise that expense deters litigation, it might be argued that individual Alaskans are as detered in confronting the state in court as are small businesses. Under Article 1 of the Alaska Constitution all persons are entitled to equal rights, opportunities and protection under the law. Unless you can show that the classification of small businesses in this area has a fair and substantial relation to a legitimate governmental objective, the law proposed is probably unconstitutional.

A second possible problem that I see is that the bill may be interpreted by the court to have a chilling effect on the state's right to litigate. The state, as a representative of the people, is analogous to any other litigant in this regard. The United State Supreme Court has considered the question in Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct 780, 787, 28 L.Ed. 2d 113, 120 (1971) and held:

> . . . a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.

The Alaska Supreme Court has rejected the policy of awarding full attorney fees to a prevailing party in all but extreme cases on similar grounds (Malvo v. J.C. Penny Company, Inc., 512 P2d 575, 587 (Ak, 1973).

Finally, section six of the bill may violate article IX, section 13 of the Alaska Constitution in providing for the expenditure of state money without an appropriation for the purpose for which the expenditure is made.

GWE:csh
c3/063

Enclosure

Sec.1. Explains the purpose of the Act.

Sec.2. AS 09.60.050 is amended to include costs awarded against State or other public Agencies except as noted under (b) in this section.

Sec.3. AS 09.60.050 is amended by adding new subsection:

(b) Except as provided under (c) of this section a court shall award costs and attorney's fees to prevailing party in

(1) a civil action against State including regulatory or tax function

(2) an appeal of a regula tory order or tax funcion of the State

(c) Allows the court to deny or reduce an award of costs or attorney's fees under (b) if it finds

(1) the position of State was reasonable and in law

(2) if the prevailing party delayed the final resolution of the matter or

(3) if the State was joined in action in the matter only because action would be procedurally defective if it was not joined.

(d) If the State is sharing liability with other parties, State will pay its fair share of litigation costs

(e) (1) thru (5) gives definitions of terms used in this bill.

Sec.4. Amends AS 44.80 (a) if a small business prevails in an adjudication related to a business regulatory or tax function except decision concerning fixed rates, emminent domain or condemnation, the decision shall include attorney's fees and court costs except

(1) when the litigation position of the State was reasonable in law

(2) when prevailing party delays final resolution of the matter

(3) when it was found action would be procedually defective if the State did not join in the action.

(b) Explains that an entitlement appeal may be made under AS 44.62.560.

(c) Provides for payment of entitlement from State agencies budget. If the Agency doesn't have sufficient funds, payments will be made from subsequent appropriations to the Agency with interest.

(d) If an agency is found liable for an award payable under (c) of this section and has not paid all awards due then they must file a written report with the Legislature before Jan. 31 of succeedi vear that includes

(1) nature and amount of award

(2) nature nd amount of award remaining unpaid

(3) any other info to aid legislation in evaluating awards effecting the agency.

(e) (1) thru (6) provides definitions of terms used in this bill.

Sec. 5. Rule 82(a) Alaska Rules of Civil Procedure is amended by adding

(5) if a motion for attorney's fees is brought under 09.60.050 that section is controlling

Sec. 6. Section 5 amends Rule 82 (a) of Alaska Rules of Civil Procedure by including statutory requirements for the award of attorney's fees against the State under certain circumstances.

Sec.7. Describes effective date.

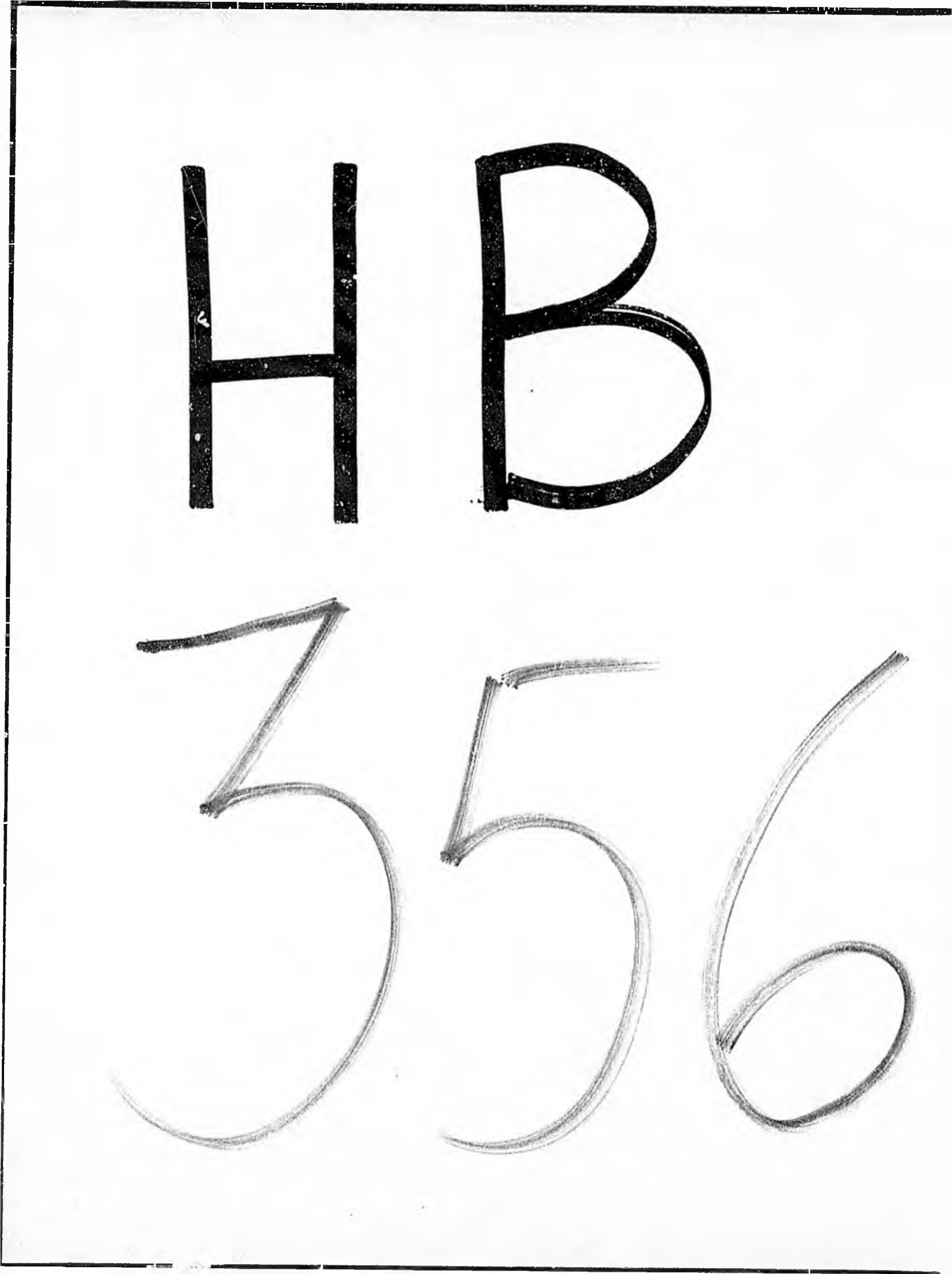
RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)


HB
356

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	10/25/85	10 Am
" "	1/17/86	2pm

Alaska State Legislature

House of Representatives

House Judiciary Committee

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

House Bill 356 was heard by the House Judiciary Committee during an interim work session on October 25, 1985. See tapes I & J dated October 25.

COMMITTEE REPORT

HOUSE

1/20 Rules

(7)

FURTHER:

4/26/85

Date: _____

The Committee on JUDICIARY has had HB 356

"An Act relating to assignment of group life policies of insurance."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note [ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS

MEMBERS HAVING OTHER RECOMMENDATIONS:

CHAIRMAN

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date

REQUEST
Bill/Resolution No: HB 356
Title: Assignment of Group Life Insurance Policies
Sponsor: Gruenberg, Taylor, Pettyjohn
Requestor: House Judiciary
Date of Request: 11/27/85

FISCAL DETAIL
Agency Affected: Department of Revenue
BRU: Audit
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

		FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
	OPERATING						
100	PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
200	TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
300	CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
400	SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
500	EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
600	LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
700	GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
800	MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
	TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
	CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
	REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

	GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
	FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
	OTHER	-0-	-0-	-0-	-0-	-0-	-0-
	TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
	PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
	TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: The bill will have no impact on this agency, nor on any of the tax revenues this agency administers..

Prepared By: for Martin J. Richard Steve E. Kelley Phone: 465-2320
Division: Audit Division Date: 12/9/85

Approved by Commissioner: for Date: 12/10/85
Agency: Revenue

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

State of Alaska

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
(Co-Chairman)
HOUSE JUDICIARY
HOUSE COMMUNITY AND
REGIONAL AFFAIRS

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4968

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

October 30, 1985

The Honorable Mike M. Miller
Chairman
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

Re: HB 356, Assignment of Group Life Insurance Policies

Dear Mr. Chairman:

Thank you very much for holding a hearing on this bill on Friday, October 25, 1985. I believe it is sufficiently non-controversial and important that we can get it passed this year.

I would like to request that it be scheduled for a hearing as soon as possible during the second legislative session, hopefully within the first ten days of the session if that is possible.

I understand that Hayden is requesting a fiscal note from the Department of Revenue and hopefully that can be forthcoming even before the expedited hearing.

I will appreciate any assistance you can provide in getting the House Finance Committee either to waive it or provide an expedited hearing.

Thark you very much.

Cordially,

Max F. Gruenberg, Jr.

Introduced: 4/8/85
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY GRUENBERG, TAYLOR AND PETTYJOHN

HOUSE BILL NO. 356

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to assignment of group life policies of insurance."

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

* Section 1. AS 21.42.270 is amended to read:

Sec. 21.42.270. ASSIGNMENT OF POLICIES. A policy may be assignable or nonassignable, depending upon its terms. Subject to its terms relating to its assignability, a life, group life or disability policy, whether issued before or after July 1, 1966, under the terms of which the beneficiary may be changed upon the sole request of the insured, may be assigned either by pledge or transfer of title by an assignment executed by the insured alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. The assignment entitles the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming an interest in the policy which is in conflict with the assignment.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM October 4, 1985

SUBJECT: HB 356

TO: Representative M.M. Miller
House Judiciary Committee

FROM: Michael F. Ford
Legislative Counsel

You have requested an analysis of HB 356. This bill would specify that an individual could assign a group life insurance policy. Although no state law at present prohibits such assignment, this would clearly establish the right to make such a transfer.

MFF:mkr
M1:033

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 356

Title: An assignment of group life policies of insurance

Sponsor: Gruenburg et al.

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: Commerce & Econ. Dev.

Program Category Affected: Consumer Protection

BRU, Program or Subprogram(s) Affected: Insurance

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: John George, Director Phone: 465-2515

Division: Insurance Date: 4/05/85

Approved by Commissioner: Loren R. Lounsbury Date: 4/25/85

Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

2219WB42585a

Alaska State Legislature
House

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Representative Gruenberg

FROM: Dave Donley

RE: April 24, 1985

DATE: HB 356, "Assignment of Group Life Policies of Insurance"

Under current estate tax law, if an insured owns a life insurance policy, upon the insured's death the proceeds of that policy will pass through his estate and be subject to estate tax prior to receipt by the named beneficiary.

If a person other than the insured owns a policy, the proceeds do not pass through the insured's estate and thus are not subject to estate tax.

At common law, it is questionable whether group life policies can be assigned, and the IRS has held that without statutory authorization, assignments are not effective for tax purposes. Accordingly, some 48 states have made group life policies assignable by statute.

Considering that 48 states have already passed similar laws, enactment of HB 356 by the state of Alaska would result in an insignificant reduction in federal revenues. The advantages in estate planning for Alaskans to be provided by this legislation are substantial and fair. Failure to pass this legislation will result in continuance of an inequitable federal tax situation that discriminates against Alaskans.

LAW OFFICES
DAVIS & GOERIG
A PROFESSIONAL CORPORATION
405 WEST 36TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99503

TRIGG T. DAVIS
GEORGE E. GOERIG, JR.

TELEPHONE 561-4420
AREA CODE 907

February 25, 1985

Richard S. Thwaites, Jr.
Chairman of the Alaska Bar Association
Probate Law Section
1031 West 4th Ave., Suite 500
Anchorage, AK 99501

Re: Proposed Statutes Regarding Assignment of Group Term Life Insurance Policies

Dear Dick:

Enclosed is a proposed statute relating to the assignability of group life insurance policies. This statute shall affirmly establish the right of an individual to transfer his ownership of any group life insurance policy to any individual he wishes. Although at the present time there is no law in effect which specifically prohibits such an assignment, the United States Treasury Department may contest such a person's right unless the state of residency has a statute authorizing such an assignment. The Alaska Bar Association taxation law section supports inactment of this proposed statute.

Very truly yours,

George E. Goerig, Jr.
Attorney At Law

GEG/dvs

Enclosure

Sec. 13.___.____. Assignment of group policies. A group policy may be assignable or not assignable as provided by its terms. Subject to its terms relating to assignability, any group life or group health insurance policy, under the terms of which the beneficiary may be changed upon the sole request of the insured or owner, may be assigned either by pledge or transfer of title, by an assignment executed by the insured or owner alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle the insurere to deal the with assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 356

Title: An assignment of group life policies of insurance

Sponsor: Gruenburg et al

Requestor:

Date of Request:

FISCAL DETAIL

Agency Affected: Commerce & Econ. Dev.

Program Category Affected: Consumer Protection

BRU, Program or Subprogram(s) Affected: Insurance

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: John George, Director Phone: 465-2515

Division: Insurance Date: 7/05/85

Approved by Commissioner: Loren N. Lounsbury Date: 4/25/85

Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

2219WB42585a

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James A. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)

HB

358

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1986

Copies of minutes listed below we ~ originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary 10-25-85 10:00 AM

Alaska State Legislature

House of Representatives

House Judiciary Committee

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

House Bill 358 was heard by the House Judiciary Committee during an interim work session on October 25, 1985. See tapes I & J dated October 25.

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date

REQUEST
Bill/Resolution No: HB 358
Title: Non Probate Transfers

Sponsor: Gruenberg
Requestor: House Judiciary
Date of Request: 11/27/85

FISCAL DETAIL
Agency Affected: Department of Revenue
BRU: Audit

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
OPERATING						
100 PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
200 TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
300 CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
400 SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
500 EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
600 LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
700 GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
800 MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: The bill will have no impact on this agency, nor on any of the tax revenues this agency administers..

Prepared By: for Martin J. Richard Steven E. Kittel Phone: 465-2320
Division: Audit Division Date: 12/9/85

Approved by Commissioner: Joyce Wilson for Date: 12/10/85
Agency: Revenue

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM October 4, 1985

SUBJECT: HB 358

TO: Representative M.M. Miller
House Judiciary Committee

FROM: Michael F. Ford M. F.
Legislative Counsel

The following is an analysis of HB 358:

13.31.070 - Subsection (a) broadens the scope of existing law regarding the nontestamentary transfer of certain property. This property may be transferred outside of the probate code. The numbered paragraphs of subsection (a) concern the types of provisions that are nontestamentary at death, and are unchanged from existing law. Subsection (b) provides that payments and transfers designated by subsection (a) remain nontestamentary regardless of ownership rights otherwise reserved to the settlor, whether they are payable directly to the beneficiary or through a trust, and whether the trust is funded, unfunded, amendable, or revokable. Subsection (c) provides that the proceeds of the nontestamentary transfer or payment are not subject to the debts, inheritance taxes, or estate taxes of the decedent to any greater extent than if the proceeds were payable to a named beneficiary other than the estate of the decedent. Subsection (d) provides that creditor rights under other laws are not limited by this section. This last provision is identical to existing law.

MFF:mkr
M1:032

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM July 1, 1985

SUBJECT: HB 358 and HB 408

TO: Representative Gruenberg
Chair, HESS Committee
Attn: Nancy Bennett

FROM: Michael F. Ford M. F.
Legislative Counsel

This is in response to your inquiries regarding HB 358 and HB 408.

HB 358 by repealing and reenacting AS 13.31.070 substantially changes the existing law concerning providing for payment or transfer of certain property upon a person's death. The current law, AS 13.31.070, provides in subsection (a) that a transfer of money, property or other benefits by certain written instruments will be considered nontestamentary and therefore be transferred outside of the probate code. Subsection (a) of HB 358 broadens the scope of the existing law, by providing that "bonus, profit- sharing," and "retirement annuity" instruments as well as an "employee-benefit plan" may also be considered a nontestamentary transfer and need not pass through a decedent's estate.

The existing numbered subparagraphs of subsection (a) of AS 13.31.070 concerning the types of provisions that are nontestamentary at death, are not changed by HB 358, however two new subsections are added to existing law. Subsection (b) provides that the payments and transfers designated by subsection (a) remain nontestamentary regardless of ownership rights otherwise reserved to the settlor and whether they are payable to directly to the beneficiary or through a trust. Further, the trust can be funded or unfunded and amendable or revokable.

Subsection (c) provides that the proceeds of the nontestamentary transfer or payments are not subject to the debts, inheritance taxes, or estate taxes of the decedent to any greater extent than if the proceeds were payable to a named beneficiary other than the estate of the decedent.

Subsection (d) of HB 358 is identical to subsection (b) in existing law.

HB 408 provides for adoption of the Uniform Simultaneous Death Act. Prior to 1972, an abbreviated version of the Uniform Simultaneous Death Act was in place in AS 13.13.010-13.13.070 (ch. 80 SLA 1949). In 1972 Title 13 was repealed and the Uniform Probate Code was adopted, which also caused the repeal of the Uniform Simultaneous Death Act (ch 78 SLA 1972). This enactment treated the issue of simultaneous death as an question of evidence to be resolved by the courts. See AS 13.06.035. As a result of these changes, Alaska was deleted from the table of jurisdictions in which the Uniform Simultaneous Death Act was in effect. (See commentary at page 559, vol. 81, Uniform Law Annotated)

Your question concerning the 120-hour survival requirement of AS 13.11.220, raises a matter that will require a change to HB 408. Regarding testate succession, AS 13.11.220 requires that the heir survive by at least 120 hours the death of the testator. Although this statute and HB 408 are not in conflict, in order to clearly indicate when AS 13.11.220 will apply in situations of simultaneous death, it will be necessary to revise AS 13.43.020 in HB 408.

I have taken the liberty of drafting a sponsor substitute that makes the necessary changes. If you prefer to change HB 408 in a different manner please let me know.

MFF:ojb
J15/055

ALASKA BAR ASSOCIATION

P.O. BOX 279, ANCHORAGE, ALASKA 99510, (907) 272-7469

Februray 13, 1985

TAXATION LAW SECTION

Richard S. Thwaites, Jr., Esq,
Chairman of the Alaska Bar Association
Probate Law Section
1031 West 4th Ave., Suite 500
Anchorage, Alaska 99501

Re: Proposed Statute

Dear Mr. Thwaites:

Enclosed is a proposed statute relating to the designation of beneficiaries of life insurance and employee benefits. The statute places those items outside the probate estate of the deceased and generally exempts them from claims of creditors although payable to a trustee instead of to an individual. The taxation law section supports enactment of this proposed statute.

Very truly yours,

David G. Shaftel, Esq.,
Chairman of the Alaska Bar
Association Taxation Law Section

G. Rodney Kleedehn, Esq.,
Member of the Alaska Bar
Association Taxation Law
Section Executive Committee

GRK:mmh

Enclosure

Sec. 13.__. ___. Designation of beneficiaries of insurance and employee benefits not testamentary. (a) The designation of beneficiaries of life insurance, annuity or endowment contracts, or of any agreement entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, and the designation of beneficiaries of benefits payable upon or after the death of a participant under any pension, bonus, profit-sharing, retirement annuity, or other employee-benefit plan, shall not be considered testamentary and the proceeds shall not be subject to debts of the insured and inheritance or estate tax to any greater extent than if such proceeds were payable to any other named beneficiary other than the estate of the insured. This section shall apply regardless of whether the insurance contract or the employee-benefit plan designates the ultimate beneficiaries or makes the proceeds payable, directly or indirectly, to a trustee of a trust under a will or under a separate trust instrument which designates the ultimate beneficiaries, and regardless of whether any such trust is amendable or revocable, or both, or is funded or unfunded, and notwithstanding a reservation to the settlor of all rights of ownership in the insurance contracts or under the employee-benefit plans. Unless otherwise expressly provided in the conveyance, funds or other property so passing to a trust under a will shall become and be a part of the testamentary trust to be administered and disposed of in accordance with the provisions thereof, without forming any part of the testator's estate for administration by his personal representative.

(b) The provisions of subsection (a) of this section shall apply to designations made prior or subsequent to the date of enactment of this section.

This section should be included in the probate code.