

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4704 HJUD HB 310 - HB 322

276

HB

310

REPRESENTATIVE
BEN GRUSSENDORF

P. O. Box 928
SITKA, ALASKA 99835
(907) 747-8458

RULES COMMITTEE
LEGISLATIVE COUNCIL

DISTRICT 3
ELFIN COVE
PELICAN
PORT ALEXANDER
SITKA
TENAKEE

Alaska State Legislature



House of Representatives
SPEAKER OF THE HOUSE

WHILE IN JUNEAU
P.O. Box V
JUNEAU, ALASKA 99811
(907) 485-3824
(907) 485-3720

MEMORANDUM

To: Rep. Dave Donley
Chairman
House Labor & Commerce Committee

From: Rep. Ben Grussendorf
Speaker of the House

Date: February 17, 1988

Subject: House Bill 310

The purpose of House Bill 310 is to make it easier for subcontractors to collect money owed them for work on public construction projects. A number of subcontractors around the state have had great difficulty in this area, either receiving payments in an untimely manner or having payments wrongfully withheld. House Bill 310 would simply require that, prior to the receipt of a second or subsequent progress payment on a public construction project, the prime contractor submit a sworn statement that all subcontractors on the project have been paid what was due them from the previous progress payment.

Although House Bill 310 in its present form does take a step toward solving the problem, I believe the bill can be strengthened. Attached to this memorandum is a proposed substitute for House Bill 310 which I hope will be given consideration for adoption by the Labor & Commerce Committee. The proposed substitute does basically three things:

1. Section 1 amends the "Little Miller Act", the law which allows those who have contributed labor and materials to a public construction project and who have not been paid to sue against the payment bond posted by the prime contractor. The amendment would make clear that any person who furnishes such labor or materials may sue against the bond. All that is required is that the person have a direct contractual relationship with any subcontractor on the project.

2. Sections 2, 3 and 4 amend certain parts of the "Miscellaneous Provisions" section of Title 36 (Public Contracts). These amendments relate to sworn statements which must be furnished before prime contractors may receive progress payments on a public construction project, and are more particularly described in the first paragraph of this memorandum. Sections 2, 3 and 4 are basically the same as sections 1, 2 and 3 of HB 310 as introduced.

3. Section 5 requires that any subcontractor on a public construction or public works project give written notice to the prime contractor that the subcontractor has been so engaged. This requirement will make the prime contractor aware of any potential "Little Miller Act" claimants and should help the prime contractor comply with the requirement that he submit sworn statements of payment to subcontractors prior to the receipt of the prime contractor's second or subsequent progress payment.

One of the reasons I introduced House Bill 310 was to put the subject of payments to subcontractors "on the table" for discussion and debate. I am not claiming that the bill or its proposed substitute are the perfect solution, and I expect amendments to be proposed as this bill makes its way through the committee. I will not oppose such amendments if they serve the main purposes of the legislation: the prompt payment of subcontractors for work performed on public construction projects.

STATE OF ALASKA THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465.3800

LEGISLATIVE AFFAIRS AGENCY LEGISLATIVE REFERENCE LIBRARY

May, 1988

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

Mary Van Nimwegen

H. JUD.	3-17-88	1:30p.m.
H. JUD.	3-16-88	1:30p.m.

Date referred: 3/9/88

FURTHER REFERRALS: Finance

DATE: March 17, 1988

The Judiciary Committee has considered HB 310

"An Act relating to payment under public construction contracts."

RECOMMENDS:

- replace with CS HB 310 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

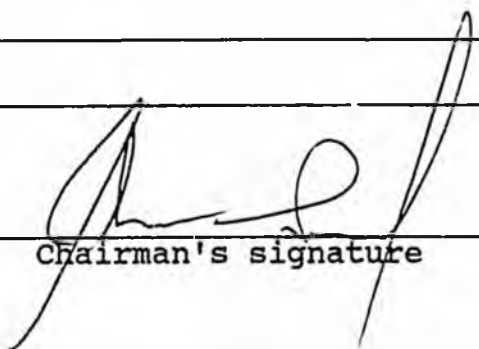
ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published 3/9/88
- zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature



Original sponsor: Grussendorf

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 310 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to public construction and public
7 works contracts."

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

9 * Section 1. AS 36.25.020(b) is amended to read:

10 (b) However, a person having direct contractual relationships
11 with a subcontractor but no contractual relationship express or im-
12 plied with the contractor furnishing the payment bond has a right of
13 action on the payment bond upon giving written notice to the contrac-
14 tor within 90 days from the last date on which the person performed
15 labor or furnished material for which the claim is made. The notice
16 must state with substantial accuracy the amount claimed and the name
17 of the person to whom the material was furnished or for whom the labor
18 was performed. The notice shall be served by mailing it by registered
19 mail, postage prepaid, in an envelope addressed to the contractor at a
20 [ANY] place where the contractor maintains an office or conducts
21 business, or the contractor's residence, or in a [ANY] manner in which
22 a peace officer is authorized to serve summons. In this subsection,
23 "subcontractor" includes a subcontractor of another subcontractor,
24 whether or not the other subcontractor has a direct contractual rela-
25 tionship with the contractor.

26 * Sec. 2. AS 36.25 is amended by adding a new section to read:

27 Sec. 36.25.023. NOTICE BY CERTAIN PERSONS. (a) A person who
28 contracts other than as an employee to furnish labor or material in
29 the prosecution of a project for which the prime contractor is

1 required to furnish a payment bond under AS 36.25.010 and who does not
2 have a direct contractual relationship with the prime contractor shall
3 give the prime contractor written notice of the contract within 10
4 days of entering into the contract.

5 (b) If a person fails to provide the notice required by (a) of
6 this section and if, in a court action on the payment bond of the
7 prime contractor, the person is subsequently determined to be entitled
8 to a judgment for payment of all or part of the labor or material
9 furnished by the person, the court shall reduce the amount to be
10 awarded to the person by 10 percent. In this subsection, "amount"
11 does not include court costs and attorney fees.

12 (c) In this section, "prime contractor" means the person who has
13 contracted with the state or political subdivision of the state to
14 perform the project.

15 * Sec. 3. This Act applies to contracts that are entered into on or
16 after the effective date of this Act.

5-1199X
Bannister
3/16/88

Adopted

Original sponsor: Grussendorf

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 310 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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13 action on the payment bond upon giving written notice to the contrac-
14 tor within 90 days from the last date on which the person performed
15 labor or furnished material for which the claim is made. The notice
16 must state with substantial accuracy the amount claimed and the name
17 of the person to whom the material was furnished or for whom the labor
18 was performed. The notice shall be served by mailing it by registered
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20 [ANY] place where the contractor maintains an office or conducts
21 business, or the contractor's residence, or in a [ANY] manner in which
22 a peace officer is authorized to serve summons. In this subsection,
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24 whether or not the other subcontractor has a direct contractual rela-
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29 the prosecution of a project for which the prime contractor is

1 required to furnish a payment bond under AS 36.25.010 and who does not
2 have a direct contractual relationship with the prime contractor shall
3 give the prime contractor written notice of the contract within 10
4 days of entering into the contract.

5 (b) If a person fails to provide the notice required by (a) of
6 this section and if, in a court action on the payment bond of the
7 prime contractor, the person is subsequently determined to be entitled
8 to a judgment for payment of all or part of the labor or material
9 furnished by the person, the court shall reduce the amount to be
10 awarded to the person by 10 percent. In this subsection, "amount"
11 does not include court costs and attorney fees.

12 (c) In this section, "prime contractor" means the person who has
13 contracted with the state or political subdivision of the state to
14 perform the project.

15 * Sec. 3. This Act applies to contracts that are entered into on or
16 after the effective date of this Act.

5-1199L ✓
Bannister
2/26/88

Original sponsor: Grussendorf

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 310 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to public construction and public
7 works contracts."

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

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11 with a subcontractor but no contractual relationship express or im-
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13 action on the payment bond upon giving written notice to the contrac-
14 tor within 90 days from the last date on which the person performed
15 labor or furnished material for which the claim is made. The notice
16 must state with substantial accuracy the amount claimed and the name
17 of the person to whom the material was furnished or for whom the labor
18 was performed. The notice shall be served by mailing it by registered
19 mail, postage prepaid, in an envelope addressed to the contractor at a
20 [ANY] place where the contractor maintains an office or conducts
21 business, or the contractor's residence, or in a [ANY] manner in which
22 a peace officer is authorized to serve summons. In this subsection,
23 "subcontractor" includes a subcontractor of another subcontractor,
24 whether or not the other subcontractor has a direct contractual rela-
25 tionship with the contractor.

26 * Sec. 2. AS 36.90 is amended by adding a new section to read:

27 Sec. 36.90.020. NOTICE BY SUBCONTRACTOR. A person who contracts
28 other than as an employee to furnish services, materials, or equipment
29 for a public construction or public works project shall give the prime

1 contractor on the project written notice of the contract within 10
2 days of entering into the contract. In this section, "prime contrac-
3 tor" means the person who has contracted with the state to perform the
4 project.

5 * Sec. 3. This Act applies to contracts that are entered into on or
6 after the effective date of this Act.
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RESA JERREL
DIRECTOR OF GOVERNMENT RELATIONS

ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS

134 N FRANKLIN ST, STE A
JUNEAU, ALASKA 99501
586-1740

HOUSE ~~SENATE~~ AMENDMENT

By _____

To: _____ SENATE BILL No. CSHB 310 (L&C)

To: _____ HOUSE BILL No. _____

PAGE: 2 LINE: 4

After the word "project" add the following:
Failure to give notice under this section shall
constitute a legal basis for invalidation of an
action under AS 36.25.020 (b),

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 310 (L&C)

Page 1, line 26, through page 2, line 4:

Delete all material.

Insert a new bill section to read:

"* Sec. 2. AS 36.25 is amended by adding a new section to read:

Sec. 36.25.023. NOTICE BY CERTAIN PERSONS. (a) A person who contracts other than as an employee to furnish labor or material in the prosecution of a project for which the prime contractor is required to furnish a payment bond under AS 36.25.010 and who does not have a direct contractual relationship with the prime contractor shall give the prime contractor written notice of the contract within 10 days of entering into the contract.

(b) If a person fails to provide the notice required by (a) of this section and if, in a court action on the payment bond of the prime contractor, the person is subsequently determined to be entitled to a judgment for payment of all or part of the labor or material furnished by the person, the court shall reduce the amount to be awarded to the person by 10 percent. In this subsection, "amount" does not include court costs and attorney fees.

(c) In this section, "prime contractor" means the person who has contracted with the state or political subdivision of the state to perform the project."

provisions in contract as to care to be exercised or precautions to be taken for protection of third persons. 89 ALR 622.

Effect of payment to subcontractors or materialmen by owner or contractor, or by sureties on contractor's bond, within four months of principal contractor's bankruptcy, as a voidable preference. 70 ALR 983.

Construction of paving contract or contractor's bond in respect of the contractor's obligation as to repairs. 72 ALR 644.

Right as between surety on contractor's bond and assignee of money to become due on contract. 76 ALR 917.

Effect of recitals or provisions of bond to secure performance of contract as an interpretation of the terms of the contract. 76 ALR 941.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety. 77 ALR 229.

Claim for medical or hospital services to employees as within coverage of contractor's bond. 81 ALR 1051.

Statutory conditions prescribed for public contractor's bond as part of bond which does not in terms include them. 89 ALR 446.

Necessity of giving obligee notice of claim or action or making it a party to action by laborer, materialman or subcontractor upon bond of contractor for public work. 96 ALR 1185.

Workmen's compensation insurance premiums as within coverage of contractor's bond. 102 ALR 135; 164 ALR 1468.

Loss of profit of subcontractor, laborer, or materialman as within coverage of contractor's bond. 119 ALR 1281.

Money loaned or advanced to contractor as within coverage of bond of building or construction contractor. 127 ALR 974; 164 ALR 782.

Contractor's bond as covering insurance premiums other than workmen's compensation insurance. 129 ALR 1087.

Who is contractor or subcontractor, as distinguished from materialmen, for purposes of mechanic's lien, contractor's bond, or other provision or securing compensation under construction contract. 141 ALR 321.

Liability on bid bond for public works. 70 ALR 24 1370.

Responsibility of construction contractor or his bond to contractee for defects or insufficiency of work attributable to plans and specifications furnished by letter, his engineer or architect. 6 ALR 3d 1394.

Construction of attorney's fees provision in contractor's bond. 8 ALR 3d 1438.

Building contractor's liability, upon bond or other agreement to indemnify owner, for injury to death of third persons resulting from owner's negligence. 27 ALR 3d 663.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used. 61 ALR 3d 792.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property. 68 ALR 3d 7.

Validity and construction of "no damage" clause with respect to delay in building or construction contract. 74 ALR 3d 187.

Construction contract provision excusing delay caused by "severe weather". 85 ALR 3d 1085.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR 4th 682.

What constitutes "public work" within statute relating to contractor's bond. 48 ALR 4th 1170.

Sec. 36.25.020. Rights of persons furnishing labor or material.

(a) A person who furnishes labor or material in the prosecution of the work provided for in the contract for which a payment bond is furnished under AS 36.25.010 and who is not paid in full before the expiration of 90 days after the last day on which the labor is performed or material is furnished for which the claim is made, may sue on the payment bond for the amount unpaid at the time of the suit.

(b) However, a person having direct contractual relationships with a subcontractor but no contractual relationship express or implied with the contractor furnishing the payment bond has a right of action on the payment bond upon giving written notice to the contractor

within 90 days from the last date on which the person performed labor or furnished material for which the claim is made. The notice must state with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or for whom the labor was performed. The notice shall be served by mailing it by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where the contractor maintains an office or conducts business, or the contractor's residence, or in any manner in which a peace officer is authorized to serve summons.

(c) A suit brought under this section shall be brought in the name of the state or the political subdivision of the state for the use of the person suing in the court with jurisdiction. A suit under this section is subject to AS 08.18.151. A suit may not be started after the expiration of one year after the date of final settlement of the contract. The state or political subdivision of the state is not liable for costs or expenses of the suit. (§ 2 ch 49 SLA 1953; am § 15 ch 142 SLA 1972; am § 58 ch 14 SLA 1987)

Effect of amendments. — The 1987 amendment in subsection (c) substituted "court with jurisdiction" for "superior court" at the end of the first sentence,

added the present second sentence, and substituted "A suit may not" for "No suit may" at the beginning of the third sentence.

NOTES TO DECISIONS

Purpose. — The purpose of this section and AS 36.25.010 is to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. In exchange for providing such protection, the state is assured that material and labor will be readily furnished for its projects. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1564), 489 P.2d 1016 (1971).

Like its federal counterpart, Alaska's statute is designed to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1683 (File No. 2816), 575 P.2d 1213 (1978).

This section is substantially similar to 40 U.S.C. § 270a et seq., the "Miller Act." Hyundai Constr. Co. v. Kalmbach, Inc., Sup. Ct. Op. No. 845 (File No. 1604), 502 P.2d 856 (1972).

The purpose of the Little Miller Act is the protection of all persons who supply labor and material in the prosecution of the work provided for in the contract. McGee Steel Co. v. State ex rel. McDonald Indus. Alaska, Inc., Sup. Ct. Op. No. 3091 (File No. S-865), P.2d (1986).

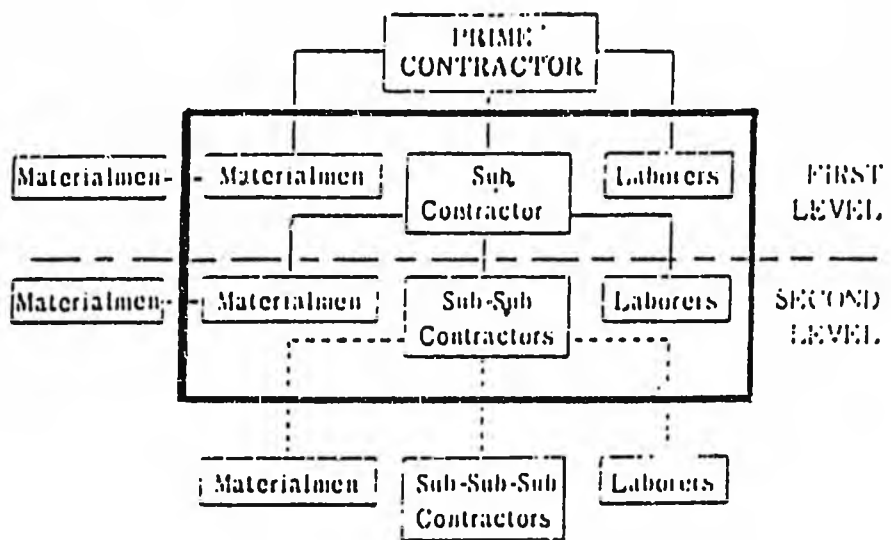
"Final settlement" means that the contract has been completed and that there has been a specific administrative act authorizing payment. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No. 2460 (File Nos. 5112, 5127), 639 P.2d 998 (1982).

It is appropriate to look at federal case law interpreting the previously similar Miller Act, (40 U.S.C. § 270a et seq.) ch. 642, § 2, 49 Stat. 703 when interpreting the phrase "final settlement" as used in subsection (c) of this section. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No. 2460 (File Nos. 5112, 5127), 639 P.2d 998 (1982).

Bonds of contractors for public buildings or works. — See notes under AS 36.25.010.

Reliance on valid payment bond. — Persons who furnish labor and materials for the state's projects do so in reliance on the existence of a valid payment bond. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Evidence raising presumption that bond was executed. — See State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).



AS 36.25.220

EXHIBIT E-9

[434 US 586]

J. W. BATESON COMPANY, INC., et al., Petitioners,

v

UNITED STATES ex rel. BOARD OF TRUSTEES OF THE NATIONAL
AUTOMATIC SPRINKLER INDUSTRY PENSION FUND et al.

434 US 586, 55 L Ed 2d 50, 98 S Ct 873

[No. 76-1476]

Argued November 30, 1977. Decided February 22, 1978.

SUMMARY

After a sub-subcontractor on a federal construction project had failed to pay over certain amounts withheld from employees' wages for certain purposes, including payments to certain union trust funds as required by a collective bargaining agreement, the employees' union and the trustees of the funds instituted an action against the prime contractor in the United States District Court for the District of Columbia, seeking recovery under the prime contractor's payment bond that had been posted as required by the Miller Act (40 USCS §§ 270a et seq.). Section 2(a) of the Miller Act (40 USCS § 270b(a)) provides that a person having a direct contractual relationship with a "subcontractor" has a right of action on the prime contractor's payment bond even though he has no contractual relationship with the prime contractor. The District Court granted summary judgment for the plaintiffs, and the United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the sub-subcontractor should be considered to be a "subcontractor" for purposes of payment bond recovery by its employees or their representatives (551 F2d 1284).

On certiorari, the United States Supreme Court reversed. In an opinion by MARSHALL, J., joined by BURGER, Ch. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., it was held that (1) under § 2(a) of the Miller Act, the scope of protection of the prime contractor's payment bond extended no further than to sub-subcontractors, (2) the term "subcontractor," as used in the Act, did not encompass a firm that was technically a sub-subcontractor, and (3) thus, while a sub-subcontractor could claim against the prime contractor's payment bond if the subcontractor defaulted in its obligations to the sub-subcontractor, nevertheless, employees of a sub-subcontractor

Briefs of Counsel, p 821, *infra*.

J. W. BATESON CO. v BOARD OF TRUSTEES

434 US 586, 55 L Ed 2d 50, 98 S Ct 873

were not protected under the prime contractor's bond if the sub-subcontractor defaulted in its obligations to its employees, since the employees did not have a contractual relationship with a "subcontractor."

STEVENS, J., joined by BRENNAN, J., dissented, expressing the view that the Miller Act should be construed as protecting every person who supplied labor or material in the prosecution of the work provided for in the prime contract.

BLACKMUN, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Bonds § 10 — Miller Act — employees of sub-subcontractor — right to recover of the prime contractor's payment bond extends no further than to sub-subcontractors; the term "subcontractor," as used in the Act, does not encompass a firm that is technically a sub-subcontractor, and thus, while a sub-subcontractor may claim against the prime contractor's payment bond if the subcontractor defaults in its obligations to the sub-subcontractor, nevertheless employees of a sub-subcontractor are not protected un-

1a, 1b. Under § 2(a) of the Miller Act (40 USCS § 270b(a)), which provides that a person having a direct contractual relationship with a "subcontractor" has a right of action on the prime contractor's payment bond even though he has no contractual relationship with the prime contractor, the scope of protection

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17 Am Jur 2d, Contractors' Bonds §§ 77-92
 10 Federal Procedural Forms L Ed, Government Contracts §§ 34:41 et seq.
 7 Am Jur Trials 283, Miller Act Litigation
 40 USCS §§ 270a et seq.
 US L Ed Digest, Bonds § 10
 ALR Digests, Bonds §§ 33.5, 35
 L Ed Index to Annos, Contractor's Bond
 ALR Quick Index, Miller Act
 Federal Quick Index, Contractor's Bond

ANNOTATION REFERENCES

Protection under bond given under Miller Act (40 USCS §§ 270a-270e) of one supplying labor or material to one other than the prime contractor or his immediate subcontractor. 79 ALR2d 855.

What constitutes supplying labor and material "in the prosecution of the work" provided for in the primary contract under Miller Act (40 USCS § 270b(a)). 79 ALR2d 843.

der the prime contractor's bond if the sub-contractor defaults in its obligations to its employees, since the employees do not have a contractual relationship with a "subcontractor." (Stevens and Brennan, JJ., dissented from this holding.)

Liens § 6 — government property

2. A lien cannot attach to government property.

Bonds § 10 — Miller Act — persons entitled to protection

3. The provision of the Miller Act (40 USCS § 270b(a)) that any person having a direct contractual relationship with a subcontractor, but no contractual relationship with the prime contractor, shall have a right of action upon the prime contractor's payment bond, has the effect of requiring that persons who lack a contractual relationship express or implied with the prime contractor must show a direct contractual relationship with a subcontractor in order to recover on the bond.

Bonds § 10 — Miller Act — subcontractors

4. For purposes of the Miller Act's

provisions (40 USCS § 270b(a)) requiring that persons who lack a contractual relationship with the prime contractor must show a direct contractual relationship with a "subcontractor" in order to recover on the prime contractor's bond, a contract with a prime contractor is a prerequisite to being a "subcontractor."

Bonds § 9; Courts § 129 — Miller Act — liberal construction — power of Congress

5. The United States Supreme Court must construe the highly remedial Miller Act (40 USCS §§ 270a et seq.)— which requires government contractors to furnish a payment bond to protect persons supplying labor and materials— liberally in order properly to effectuate the congressional intent to protect those whose labor and materials go into public projects; but this does not justify ignoring plain words of limitation and imposing wholesale liability on such bonds; if the scope of protection afforded by a Miller Act payment bond is to be extended, it is Congress that must make the change.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner prime contractor (Bateson) entered into a Government contract for construction of a hospital addition and posted a payment bond as required by the Miller Act to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." Bateson then subcontracted a portion of the work to a firm (Pierce) which in turn subcontracted with another firm (Colquitt) for installation of a sprinkler system. When Colquitt failed to pay over amounts withheld from its employees' wages for union dues, vacation savings, and various union trust funds, as required by a collective-bargaining agreement with respondent union, the union and respondent trustees filed suit against Bateson in the name of the United States for the amount claimed due under the payment bond.

The District Court granted summary judgment for respondents, and the Court of Appeals affirmed, holding that although Colquitt was "technically a sub-subcontractor," nevertheless it should be considered a "subcontractor" for purposes of payment bond recovery by its employees or their representatives, since it was performing "an integral and significant part of [Bateson's] contract" with the Government. *Held*: Colquitt's employees were not protected by the Miller Act payment bond, since they did not have a contractual relationship either with Bateson or with Pierce or any other "subcontractor" and since Colquitt cannot be considered a "subcontractor." *Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co.* 322 US 102, 88 L Ed 1163, 64 S Ct 890, and *F. D. Rich Co. v United States ex rel. Indus-*

J. W. BATESON CO. v BOARD OF TRUSTEES

434 US 586, 55 L Ed 2d 50, 98 S Ct 873

) requiring actual relationship order to reor's bond, a ractor is a ontractor."

Miller Act — power

reme Court y remedial a et seq.)— contractors d to protect l materials— to effectuate protect those go into public justify ignor- n and impos- uch bonds; if forded by a is to be ex- t must make

ted summary and the Court ding that al- nically a sub- ss it should be :tor" for pur- ecovery by its ntatives, since egral and sig- n's] contract" eld: Colquitt's tected by the since they did elationship ei- a Pierce or any l since Colquitt subcontractor." 7 United States o. 322 US 102, 890, and F. D. 3 ex rel. Indus-

trial Lumber Co. 417 US 116, 40 L Ed 2d 703, 94 S Ct 2157, distinguished. As confirmed by the Miller Act's legislative history, the word "subcontractor" as used in the Act must be construed as being limited to meaning one who contracts with a prime contractor. 179 US App DC 325, 551 F2d 1284,

reversed.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Powell, and Rehnquist, JJ., joined. Stevens, J., filed a dissenting opinion, in which Brennan, J., joined. Blackmun, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Jack Rephan argued the cause for petitioners. Donald J. Capuano argued the cause for respondents. Briefs of Counsel, p 821, infra.

OPINION OF THE COURT

[434 US 587]

[1a] Mr. Justice Marshall delivered the opinion of the Court

Under the Miller Act, 49 Stat 793, as amended, 80 Stat 1139, 40 USC §§ 270a et seq. [40 USCS §§ 270a et seq.], a prime contractor on a federal construction project involving over \$2,000 must post a payment bond to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." The issue in this case is whether the term "subcontractor," as used in the Act, encompasses a firm that is technically a "sub-subcontractor."

The material facts are not in dispute. Petitioner J. W. Bateson Co. entered into a contract with the United States for construction of an addition to a hospital and provided a payment bond signed by Bateson's president and by representatives of petitioner sureties. Bateson, the prime contractor, subcontracted with Pierce Associates for a portion of the original work, and Pierce in turn subcontracted with Colquitt Sprinkler Co. for the installation of a sprinkler system, one of the items specified in the contract between Bateson and the United States. Un-

der a collective-bargaining agreement with respondent Road Sprinkler Fitters Local Union No. 669, Colquitt was obligated to pay over amounts withheld from employees' wages for union dues and vacation savings, and to contribute to the union's welfare, pension, and educational trust funds. When Colquitt failed to make any of these payments

[434 US 588]

by the end of the union members' employment with the firm, the union and respondent trustees notified Bateson of the amount that they claimed was due them under the payment bond and then filed suit against Bateson in the name of the United States.

The District Court granted summary judgment for respondents, and the Court of Appeals for the District of Columbia Circuit affirmed, 179 US App DC 325, 551 F2d 1284 (1977). The appellate court recognized that Colquitt, which had a contractual relationship with Pierce but not with Bateson, was "technically a sub-subcontractor," but it concluded nevertheless that Colquitt should be considered a "subcontractor" for purposes of payment bond recovery by its employees

or their representatives. *Id.*, at 327, 551 F2d, at 1286.¹ Applying a functional test based on the "substantial[ity] and importan[ce]" of the relationship between Bateson and Colquitt, the court noted that Colquitt was performing on the jobsite "an integral and significant part of [Bateson's] contract" with the Government, that the work "was performed over a substantial period of time," that Bateson had access to Colquitt's payroll records, and that Bateson could have protected itself "through bond or otherwise" against Colquitt's default. *Ibid.*

We granted certiorari, 433 US 907, 53 L Ed 2d 1990, 97 S Ct 2971 (1977), to resolve a conflict between the decision below and the holdings of at least three other Circuits.² We now reverse.

[434 US 589]

[2, 3] Like the predecessor Heard Act, Act of Aug. 13, 1894, ch 280, 28 Stat 278, as amended, Act of Feb. 24, 1905, 33 Stat 811, the Miller Act

was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects. *F. D. Rich Co. v United States ex rel. Industrial Lumber Co.* 417 US 116, 122, 40 L Ed 2d 703, 94 S Ct 2157 (1974). Because "a lien cannot attach to Government property," persons supplying labor or materials on a federal construction project were to be protected by a payment bond. *Id.*, at 121-122, 40 L Ed 2d 703, 94 S Ct 2157. The scope of the Miller Act's protection is limited, however, by a proviso in § 2(a) of the Act that "had no counterpart in the Heard Act." *Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co.* 322 US 102, 107, 88 L Ed 1163, 64 S Ct 890 (1944). This proviso has the effect of requiring that persons who lack a "contractual relationship express or implied with the [prime] contractor" show a "direct contractual relationship with a subcontractor" in order to recover on the bond. 40 USC § 270b(a) [40 USCS § 270b(a)];³ see *F. D. Rich Co. v*

1. The right of trustees of union trust funds to assert a claim against a Miller Act payment bond on behalf of employees was established in *United States ex rel. Sherman v Carter*, 353 US 210, 218-220, 1 L Ed 2d 776, 77 S Ct 793 (1957). That case also held that amounts which the employer agreed to contribute to union trust funds could be recovered by the employees or their representatives under the payment bond. See *id.*, at 217-218, 1 L Ed 2d 776, 77 S Ct 793.

2. *United States ex rel. Powers Regulator Co. v Hartford Accident & Indemnity Co.* 376 F2d 811 (CA1 1967); *United States ex rel. W. J. Halloran Steel Erection Co. v Frederick Raff Co.* 271 F2d 415 (CA1 1959); *Fidelity & Deposit Co. v Harris*, 360 F2d 402, 407-409 (CA9 1966); *Elmer v United States Fidelity & Guaranty Co.* 275 F2d 89 (CA5), cert denied, 363 US 843, 4 L Ed 2d 1727, 80 S Ct 1612 (1960). See also *United States ex rel. DuKane Corp. v United States Fidelity & Guaranty Co.* 422 F2d 597, 599-600, and n 4 (CA4 1970).

3. Section 2(a) of the Miller Act, as set forth

in 40 USC § 270b(a) [40 USCS § 270b(a)], provides in full:

"Every person who has furnished labor or material in the prosecution of the work provided for in [the] contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such

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434 US 586, 55 L Ed 2d 50, 98 S Ct 873

United States ex rel.
[434 US 590]

Industrial Lumber Co., supra, at 122, 40 L Ed 2d 703, 94 S Ct 2157; Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co., supra, at 107-108, 88 L Ed 1163, 64 S Ct 890. In the instant case it is conceded that Colquitt's employees enjoyed no contractual relationship, "express or implied," with Bateson, and that they did have a "direct contractual relationship" with Colquitt. The question before us, then, is whether Colquitt can be considered a "subcontractor."

[4] As we observed in Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co., supra, Congress used the word "subcontractor" in the Miller Act in accordance with "usage in the building trades." 322 US, at 108-109, 88 L Ed 1163, 64 S Ct 890; see id., at 110, 88 L Ed 1163, 64 S Ct 890. In the building trades,

person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

4. The structure of the § 2(a) proviso as it relates to notice lends further support to this view. Under the proviso, those having a claim against a "subcontractor" must give written notice to the prime contractor within 90 days of completing work on the job in order to recover against the payment bond. 40 USC § 270b(a) [40 USCS § 270b(a)]; see n 3, supra. This requirement "permits the prime contractor, after waiting ninety days, safely to pay his subcontractors without fear of additional liability to sub-subcontractors or materialmen." United States ex rel. Munroe-Langstroth, Inc. v Praught, 270 F2d 235, 238 (CA1

"a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . ." Id., at 109, 88 L Ed 1163, 64 S Ct 890 (emphasis added).

It thus appears that a contract with a prime contractor is a prerequisite to being a "subcontractor."

[434 US 591]

[1b] This interpretation of the Act's language is confirmed by the legislative history, which leaves no room for doubt about Congress' intent. While relatively brief, the authoritative committee reports of both the House of Representatives and the Senate squarely focus on the question at issue here:

"A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far

1959). The notice provision thus prevents both "double payments" by prime contractors and the alternative of "interminable delay in settlements between contractors and subcontractors." United States ex rel. J. A. Edwards & Co. v Thompson Construction Corp. 273 F2d 873, 875-876 (CA2 1959), cert denied, 362 US 951, 4 L Ed 2d 869, 80 S Ct 864 (1960).

If the term "subcontractor" in the proviso had been meant to include sub-subcontractors like Colquitt, it seems likely that notice would have been required, not only to the prime contractor, but also to intermediate subcontractors like Pierce. The prime contractor or his surety, while having initial responsibility for payment of the claimant, would probably in turn either withhold that amount from, or file a claim against, a bond or indemnity furnished by, the intermediate subcontractor. (Here, for example, it appears that Pierce had agreed to indemnify Bateson against such losses. Brief for Petitioners 18 n 15.) Hence notice to the intermediate subcontractor would serve the same purpose as does notice to the prime contractor: prevention of double payments (e.g., Pierce making full payment to Colquitt, then having to indemnify Bateson for amounts owed by Colquitt to its employees) or delayed settlements.

as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." HR Rep No. 1263, 74th Cong, 1st Sess, 3 (1935); S Rep No. 1238, 74th Cong, 1st Sess, 2 (1935).

This passage indicates both that Congress understood the difference between "sub-subcontractors" like Colquitt and "subcontractors" like Pierce, and that it intended the scope of protection of a payment bond to extend no further than to sub-subcontractors. See MacEvoy, 322 US, at 107-108, and n 5, 88 L Ed 1163, 64 S Ct 890. There is nothing to the contrary anywhere in the legislative history. Thus, while Colquitt could have claimed

[434 US 592]

against the payment bond had Pierce defaulted in its obligations, the employees of Colquitt were not similarly protected against Colquitt's default, because

they did not have a contractual relationship with Pierce or any other "subcontractor."

This view of what was intended in the Miller Act is reinforced by the fact that all reported decisions that have considered the question, except that of the court below and one early District Court decision, have reached the same conclusion.⁶ Presumably aware of this well-settled body of law

[434 US 593]

dating back almost 20 years, Congress has never moved to modify the Act's coverage. As a result, all of those concerned with Government projects—prime contractors, sureties, various levels of sub-contractors and their employees—have been led to assume that the employees of a sub-subcontractor would not be protected by the Miller Act payment bond and to order their affairs accordingly.⁷ In the absence

5. We note that Colquitt's employees also would not have been protected under the mechanic's lien statutes of many States. See supra, at 589, 55 L Ed 2d, at 54. While these statutes have always varied widely, it appears that a large number of States, including some of the most commercially significant States, have restricted mechanics' liens to persons dealing directly with the prime contractor or with a subcontractor who dealt with the prime contractor. See, e.g., *Battista v Horton, Myers & Raymond*, 76 US App DC 1, 128 F2d 29, 31 (CA DC 1942) (District of Columbia mechanic's lien statute); *Wynkoop v People*, 1 App Div 2d 620, 153 NYS2d 836 (1956), summarily aff'd, 4 NY2d 892, 150 NE2d 771 (1958) (New York statute restricting mechanics' liens to those "performing labor for or furnishing materials to a contractor [or] his subcontractor"). See generally Note, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 Yale LJ 138, 147-148 (1958).

6. See cases cited in n 2, supra; *Aetna Ins. Co. v Southern, Waldrip & Harvick*, 198 F Supp 505 (ND Cal 1961); *United States ex rel. Whitmore Oxygen Co. v Idaho Crane & Rigging Co.* 193 F Supp 802 (Idaho 1961); *United States ex rel. Jonathan Handy Co. v Deschenes Construction Co.* 188 F Supp 270

(Mass 1930); *United States ex rel. Newport News Shipbuilding & Dry Dock Co. v Blount Bros. Construction Co.* 168 F Supp 407 (Md 1958). Contra, *McGregor Architectural Iron Co. v Merritt-Chapman & Scott Corp.* 150 F Supp 323 (MD Pa 1957). See also H. Cohen, *Public Construction Contracts and the Law* § 7.9, p 208 (1961); 8 J. McBride & I. Wachtel, *Government Contracts* § 49.320[2] (1977); R. Shealey, *Law of Government Contracts* § 143A, p 187 (3d ed 1938); Forster & DeBenedictis, *Construction Contracts in Government Contracts Practice* § 14.13, pp 683-684 (1964); Stickells, *Bonds of Contractors on Federal Public Works: The Miller Act*, 36 BUL Rev 499, 512-516 (1956); Note, supra, n 5, at 164.

7. In the instant case, it appears that all of the affected parties arranged their affairs on the assumption that Colquitt's employees would not be covered by the payment bond. Bateson required an indemnity agreement from Pierce, Brief for Petitioners 18 n 15, doubtless in part to protect Bateson from claims against the payment bond made by those contracting with Pierce. But Pierce did not require a similar agreement from Colquitt, *ibid.*, presumably because Pierce did not think that Colquitt's employees, on Colquitt's

bond is to be extended, it is Congress that must make the change.

[434 US 595]

The judgment of the Court of Ap-

peals is reversed.

Mr. Justice Blackmun took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice Stevens, with whom Mr. Justice Brennan joins, dissenting.

believe the excerpt from the Committee Reports does not compel a contrary conclusion.

The Court's narrow reading of the word "subcontractor" creates a system of protection for construction workers that I cannot believe Congress intended. It drives a wedge between employees working side by side on tasks equally vital to "the prosecution of the work." 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Under the Court's reading, those who work for the general contractor or for a "first-tier" subcontractor are protected by the bond; those who work for other subcontractors are unprotected.

The Court's construction of the statute derives strong support from the statement in the Committee Reports distinguishing between "sub-subcontractors" and "more remote relationships." Nevertheless, I am persuaded that contrary evidence of congressional intent outweighs the isolated statement upon which the Court's decision primarily rests. I shall therefore first explain why I think the Act protects every person who has supplied labor or material in the prosecution of the work provided for in the prime contract. Thereafter, I shall explain why I

I

The Miller Act, like the Heard Act which preceded it, covers "all persons supplying labor and material in the prosecution of the work provided for in [a federal construction] contract."¹

[434 US 596]

Unless this language were to be narrowly read to cover only persons supplying labor or materials directly to the general contractor—and no one suggests that such a narrow reading is proper—it plainly identifies "the prosecution of the work" as the proper test of coverage. This Court so read the comparable language in the Heard Act in *United States ex rel. Hill v American Surety Co.* 200 US 197, 50 L Ed 437, 26 S Ct 168.

In that case the Court recognized that a "liberal interpretation" was needed to further "the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end." *Id.*, at 203, 50 L Ed 437, 26 S Ct 168.²

1. 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Almost identical language in the Heard Act covered "all persons supplying [a contractor or contractors] labor and materials in the prosecution of the work provided for in [a federal construction] contract." Act of Aug. 13, 1894, ch 280, 28 Stat 278, as amended, 40 USC § 270 (1926 ed) [40 USCS § 270].

2. The purpose of the Act had been ex-

plained in the House Report:

"Your committee has fully considered the above bill, and find that there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary to allow mechanics' or material-men's liens on public buildings or public works, and in many cases person or persons entering into contracts with the United States for the building of public buildings are wholly

The Hill Court therefore allowed a study of the entire legislative history of the Miller Act.
recovery to all who supplied labor
[434 US 597]

to
the contractor, whether directly or indirectly through a subcontractor.¹

The question at the heart of this case is whether Congress intended the Miller Act to cut back the coverage of the Heard Act. The fact that there was no significant change in the statutory language identifying the persons protected by the Act is a sufficient reason for concluding that no change in coverage was intended.⁴ This conclusion is confirmed by

The Miller Act was primarily designed to speed workmen's recoveries under the Heard Act by correcting procedural flaws in the old Act. Not a word in the legislative history hinted that the coverage of the Heard Act was too broad. To the contrary, the proposed revision was consistently presented as a
[434 US 598]

measure
to strengthen the existing rights of laborers on public works.⁵ "The most

insolvent at the time or at the completion of such work, and thereby persons furnishing material or labor are without remedy.

"In all such cases the United States requires the usual penal bond from the contractor or contractors of public buildings or works with good and sufficient security for the protection of the Government, and it seems to the committee that it is nothing more than just that the persons furnishing material or labor for the construction of such work should also be protected in the premises, and that there should be an additional obligation in all such bonds to the effect that the persons furnishing material and labor for the construction of public building or work should have the right to bring suit on said bond" HR Rep No. 97, 53d Cong, 1st Sess 1 (1893).

This excerpt is significant, not only because it explains the origin of the legislation, but also because the first sentence illustrates the care with which committee reports are sometimes edited. Cf. n 16, infra.

3. "In considering the statute and determining the scope of the bond divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed and a recovery limited to those who have furnished material or labor directly to the contractor, and upon the other that a more liberal construction be given and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

"The courts of this country have generally

given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. . . .

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same Congressional purpose to require payment for material and labor which have been furnished for the construction of public works." 200 US, at 202-204, 50 L Ed 437, 26 S Ct 168.

4. In general, the principles that governed the Heard Act also control the Miller Act. See *Fleisher Eng. & Constr. Co. v United States ex rel. Hallenbeck*, 311 US 15, 18, 65 L Ed 12, 61 S Ct 81.

5. "The purpose sought to be accomplished" by the Act was stated by the Treasury Department, and the statement was adopted by the House Report:

"The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law." HR Rep No. 1263, 74th Cong, 1st Sess, 1-2 (1935) (quoting a letter from the Treasury Department).

radical changes made in the existing law by these bills." Congressman Miller, the proponent of the Act, explained, "is that we provide in this bill for two bonds; one a performance bond to the Government, and the other a payment bond."⁶

While Congress intended to speed the recoveries of protected workers, it sought to do so within the framework of existing law. Witnesses testifying in support of the Act urged Congress to preserve as much language from the Heard Act as possible, in order that past judicial interpretations would continue to apply under the new Act.⁷ Congressman Miller

[434 US 599]

himself noted that the committee was "rather loath to disturb existing law and existing court decisions where we can correct the difficulty without doing so."⁸ Thus it is especially significant that the drafters lifted bodily from the Heard Act the coverage provision that had already been construed in Hill.

The historical context in which the statute was enacted confirms

this analysis. The Miller Act was passed during the depression of the 1930's. Few construction laborers could then find work except on Government projects. Reform of the Heard Act drew urgency from the ironic discovery that precious construction jobs too often proved worthless when an irresponsible subcontractor was unable to pay his workers. An exchange between Senators Walsh and McCarran about the Miller Act shows the sentiments of the day:

"Mr. WALSH. Mr. President, . . . the investigation conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and any measure that will tend to strengthen their rights and help them to secure their compensation is justified.

"Mr. McCARRAN. That is the object of the pending bill . . ."
79 Cong Rec 13383 (1935).

The language of the Miller Act is

An identical passage appears in the Senate Report, which merely reprints the House Report. S Rep No. 1238, 74th Cong, 1st Sess, 1 (1935). Because there are no substantial differences between them, I shall refer only to the House Report.

6. Hearings on Bonds of Contractors on Public Works before the House Committee on the Judiciary, 74th Cong, 1st Sess, 67 (1935) (hereafter cited as Hearings).

7. One witness told the Committee: "The Heard Act has been on the statute books since 1905. Its predecessor had been in effect since August 1894. Now, in that forty-odd years the surety companies and the public generally have spent hundreds of thousands of dollars in finding out just what that act means. As I say, it has been called to the attention of courts hundreds of times and the

decisions rendered have cost us lots of money and I do not think there is any other statute on the books that has been so thoroughly analyzed and construed. You might say every clause or every word has been examined by some court, some place, some time. We all know it and it is unusual now for any controversy to arise over the fundamental part of the law. The only controversy in the Heard Act suit is whether the claimant has a good claim or whether he has not." *Id.*, at 49-50.

Another witness concurred in this statement. *Id.*, at 59.

8. *Id.*, at 102. Congressman Miller went on to state that he would have preferred simply to amend the Heard Act, but that he was eventually persuaded that a more thorough revision was necessary. *Ibid.*

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434 US 586, 55 L Ed 2d 50, 98 S Ct 873

Miller Act was expression of the protection of the construction laborers except on Government reform of the industry from the precious construction often proved responsible. Subsequent to pay his attention between Senator Carran about the sentiments

Mr. President, attention conducted by the Commission of the Commerce and Labor to the able condition of the way embankments were created of their measure that will secure their rights in their rights to secure their property.

N. That is the meaning of the bill" (1935).

The Miller Act is

most of us lots of money is any other statute been so thoroughly examined. You might say every bill has been examined by some time. We all know now for any controverted fundamental part of the diversity in the Heard claimant has a good right." Id., at 49-50. I stand in this statement.

Human Miller went on to have preferred simply that, but that he was not at a more thorough reading.

entirely consistent with the obvious legislative intent to preserve the substantive protections of the Heard Act. The Miller Act extends coverage

[434 US 600]

to "all persons supplying labor and material in the prosecution of the work provided for in [the] contract" This coverage is comparable to that afforded by many state mechanic's lien statutes. See generally Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale LJ 138 (1958). The purpose of both the Heard Act and the Miller Act was to protect persons supplying labor or materials for federal construction projects, which are not subject to state mechanic's liens.¹⁰ Giving an ordinary meaning to the language used by both Acts will achieve that purpose.

The proviso to § 2(a) of the Miller Act, which requires persons having a

9. 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Cf. United States ex rel. Hill v American Surety Co. 200 US 197, 204, 50 L Ed 437, 26 S Ct 168:

"[A]ll persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated."

10. "As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained

direct relationship with a subcontractor to give written notice of his claim to the prime contractor, does not narrow the coverage of the statute. It merely requires persons covered by the bond to give the required notice in order to preserve their protection."¹¹

[434 US 601]

It is true, of course, that it would be anomalous to require that notice be given by employees of first-tier subcontractors but not by employees of second-tier subcontractors.¹² Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 107, 108, 88 L Ed 1163, 64 S Ct 890. But that anomaly is entirely avoided if the term "subcontractor" is read to refer to any person or firm that has contracted to do any part of the work provided for in the prime contract, whether that person has dealt directly with the prime contractor or

by attaching a lien to the property of an individual." Id., at 203, 50 L Ed 437, 26 S Ct 168.

11. The proviso states:

"Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made" 40 USC § 270b(a) [40 USCS § 270b(a)].

12. Such an anomaly is produced by a narrow reading of the proviso to encompass only persons dealing with "first-tier" subcontractors. Under the narrow reading, those dealing with first-tier subcontractors must give notice, while those dealing with second-tier subcontractors need not. The Court avoids this anomaly by cutting back on the coverage provision. Rather than letting the tail wag the dog, it is more sensible to read the notice provision broadly, to match the breadth of the coverage provision.

with another subcontractor. In the common usage of the construction trades, the term "subcontractor" does not include ordinary laborers or materialmen. *Id.*, at 109, 88 L Ed 1163, 64 S Ct 890. But the term is often used to describe subordinate contractors who have accepted contractual responsibility for a portion of the work covered by the basic contract, no matter how many subcontractors lie between the general contractor and the subcontractor who actually does the work.¹³

[434 US 602]

State courts, which have more occasion to deal with construction contracts than we do, recognize that a generic use of the term subcontractor is entirely proper. For example, Colorado's construction bond law protects persons furnishing labor or materials to a "contractor, or his subcontractor." Despite the personal pronoun, the Colorado Supreme Court has held that the bond covers those who deal with a "second-tier" subcontractor, saying:

"To construe the term 'sub-contractor' so as to exclude a 'sub-subcontractor' from the protection granted by the contractor's bond statute would require us to ignore the purpose of the statute. Since the benefits of our mechanic's lien act do not apply to projects constructed by governmental agencies, a remedy similar to our me-

13. The Court relies on a quotation from *Clifford F. MacEvoy Co. v United States ex rel Calvin Tomkins Co.* 322 US 102, 88 L Ed 1163, 64 S Ct 890, declaring that "a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." *Id.*, at 109, 88 L Ed 1163, 64 S Ct 890. The Court italicizes the dictum and omits the holding. *Ante*, at 590, 55 L Ed 2d, at 55. I agree with the holding;

chanic's lien statute was provided by the legislature for the protection of those furnishing supplies or material for such projects. . . . The statute stands in lieu of the mechanic's lien statute, and is designed to protect those who supply labor and materials for public works." *South-Way Constr. Co. v Adams City Serv.* 169 Colo 513, 516-517, 458 P2d 250, 251 (1969).

Other courts have taken a similar approach. See, e.g., *Nash Eng. Co. v Marcy Realty Corp.* 222 Ind. 396, 54 NE2d 263 (1944); *Bumb v Petersmith Controls, Inc.* 377 F2d 817 (CA9 1967) (remote subcontractor is protected "subcontractor" under California law); *Hey Kiley Man, Inc. v Azalea Gardens Apts.* 333 So 2d 48, 50-51 (Fla App 1976). See also Note, 45 Harv L Rev 1236, 1238-1239 (1932) (using "subcontractor" generically in noting a trend favoring bond coverage for "remote subcontractors").

Thus, if we consider the language of the statute, its broad purpose to provide protection comparable to that afforded by state mechanic's lien laws on private contracts, and its specific

[434 US 603]

purpose to provide protection for laborers performing work on federal projects, we must conclude that employees of a "sub-subcontractor" who

ordinary laborers and materialmen who do not deal with the prime contractor or a subcontractor do not supply labor or materials "in the prosecution of the work." Cf. *MacEvoy*, supra, at 107, 88 L Ed 1163, 64 S Ct 890 (leaving question open). The dictum is unfortunately worded, but it does not contradict my view. Ultimately, a second-tier subcontractor who takes a portion of the contract takes it "from the prime contractor," although he takes it indirectly.

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When a similar case Eng. Co. v Ind 396, 54 v Petersmith 2d 817 (CA9) contractor is pro- under Cali- Man, Inc. v 333 So 2d 48, See also Note, 6, 1238-1239 "actor" gener- end favoring mote subcon-

the language had purpose to comparable to the mechanic's contracts, and

provide protec- ming work on must conclude sub-subcontrac-

erialmen who do ractor or a sub- bor or materials work." Cf. Mac- 1163, 64 S Ct 890 dictum is unfor- es not contradict d-tier subcontrac- he contract takes or," although he

tor" who actually perform work on the job are protected.

II

The contrary argument rests almost entirely¹⁴ on a statement in the Committee Reports that draws a distinction

[434 US 604]

between a "sub-subcontractor" and "more remote relationships."¹⁵ I believe the significance of that statement has been overemphasized.

Those who have participated in the making of legislative history know that congressional reports

sometimes contain statements that are merely intended to summarize portions of the hearings or to answer testimony expressing specific concerns about a bill. For this reason, the hearings should be examined in order to understand the excerpt on which the Court relies. In three days of testimony, the coverage of the Act was mentioned only briefly. A witness for a surety company raised the specter of remote materialmen seeking to recover as "subcontractors," an idea Congressman Miller quickly rejected:

"Colonel PROCTOR. . . . [If] it will cover everybody all the way down the line *whether the work goes into the job or not* you have

14. It has been argued that Congress was unwilling to impose liability on sureties for a long chain of relationships. But this argument ignores the control that sureties and general contractors have over their subcontractors. They may refuse to deal with subcontractors who do not indemnify them against remote claims. They may even require a bond from each subcontractor. In fact, because the general contractor is liable, even under the Court's view, for claims against subcontractors in the first tier, indemnity agreements between general contractors and their subcontractors are common today. One was required in the present case. Ante, at 593 n 7, 55 L Ed 2d, at 56-57. My reading of the statute would simply lead cautious subcontractors to demand similar guarantees from their subcontractors.

There is no reason to fear that sureties' liability will grow beyond their control or their ability to estimate. The cost of the entire project provides a basis for estimating the aggregate contingent liability.

In addition, the Court suggests that the Miller Act would have required laborers to give notice to intermediate subcontractors as well as the general contractor if a more generous reading of the statute had been contemplated. Ante, at 590-591, n 4, 55 L Ed 2d, at 55. But the drafters were understandably worried that many unwary workers would forfeit their protection if complicated notice requirements were imposed. Indeed, the Treasury Department opposed any notice requirement for just this reason:

"[O]ver nine-tenths of your laborers and the

material men doing business on a small scale that were not in constant touch with their lawyers would not know of the requirement, and they would wake up to find that their period had expired within which to give such notice, and they would be barred." Hearings 99-100. See also id., at 103, 30-31, and 36-37. Requiring notice to the surety as well as to the general contractor would have protected sureties from deceitful general contractors, and a requirement of this nature was suggested to the Committee. Id., at 63. The Committee rejected that suggestion. Forcing the laborer to notify several parties is an added burden that increases the danger of lost claims. Congress could have concluded that a single notice requirement was all that should be imposed on workers and small businessmen.

As a practical matter, no prejudice is likely to flow from this omission. If the bond is held to cover claims against remote subcontractors, proximate subcontractors will no doubt be required to indemnify the general contractor. In return for the indemnity, these subcontractors will no doubt demand that the general contractor promptly transmit any statutory notice he receives.

15. "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." HR Rep No. 1263, 74th Cong, 1st Sess, 3 (1935).

an insurance policy and not a surety. For example, if it will cover the labor of the quarryman that strips the quarry, that he is a subcontractor to the man that cuts the stone, that he is a subcontractor with the man that lays the stone and he is a subcontractor with the general contractor, you have a situation there that is an insurance policy and not a bond.

[434 US 605]

"Mr. MILLER. We are not figuring in going into all the subcontractors." Hearings 61-62 (emphasis added).

This colloquy was concerned with the danger that the term "subcontractor" might be used loosely to describe the suppliers or employees of materialmen. It was that danger that I believe the Committee Report was intended to forestall. Obviously, suppliers or employees of materialmen do not provide "work [that] goes into the job." They are not considered "subcontractors" under the most common usage in the construction trades, as this Court recognized when it construed the Miller Act to bar the claims of remote materialmen and their employees. *Clifford F. MacEvoy Co. v United States ex rel.*

16. As is demonstrated by the legislative history of the Heard Act, see n 2, *supra*, a committee report is not edited as carefully as the bill itself.

17. Unlike the Court, I would not put great weight on the industry's longstanding "assumption" about the law. *Ante*, at 592-593, and n 7, 55 L Ed 2d, at 56-57. For many years after passage of the Miller Act, no court ratified this assumption, and the cases since the mid-1950's have been divided. The Court

Calvin Tomkins Co. 322 US 102, 88 L Ed 1163, 64 S Ct 890.

It is the "remote relationship" of persons like the quarryman and the stonecutter mentioned in the hearings that I believe the author of the Committee Report intended to exclude from the statute. Since the wording of the statute is itself adequate to effectuate this intent, there is no reason to give further effect to the unnecessarily broad language used by the author of the Committee Report to allay the narrow concern identified in the Committee hearings.¹⁶ If Congress had intended to do more than allay that concern—if it had intended to cut back on the coverage of the Heard Act—I am convinced that it would have used *statutory* language to accomplish its purpose.¹⁷

[434 US 606]

In sum, while I cannot unequivocally assert that my explanation of the statement in the Committee Report is correct, the apparent genesis of the statement casts sufficient doubt on its intended purpose to prevent it from overriding what I regard as compelling evidence of a contrary congressional intent.

I respectfully dissent.

notes three Circuits that have supported the industry's view and one that has attacked it. *Ante*, at 583-589, n 2, 55 L Ed 2d, at 54. It finds a similar pattern among the District Courts: four in favor and one opposed. *Ante*, at 592 n 6, 55 L Ed 2d, at 56. The preponderance of authority supports the industry, but the cases hardly justify a claim that the law was "well-settled" or certain before today. The fact that this case is before us argues to the contrary, for this Court seldom grants certiorari to decide "well-settled" questions.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 310
PUBLISH DATE: 5/12/87

REQUEST: FISCAL NOTE

Revision Date:
Title: An Act relating to payment under public construction contracts.
Sponsor: Grussendorf
Requestor:

Agency Affected: DOT&PF
BRU: Engineering & Operations
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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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:

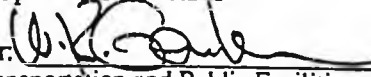
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Current construction contract language used by DOT&PF requires payment by the (prime) contractor to all subcontractors within 7 days following receipt of payment. As this bill is currently written no additional fiscal impacts during construction administration are anticipated except where a fraudulent statement is made under paragraph (f). Should the department be involved in litigation surrounding fraudulent statements that may be made, litigation and damage costs may arise. As these costs are both speculative and not subject to accurate estimation no fiscal impact is portrayed.

Prepared by: Rod Wilson, Design Manager II
Division: Engineering and Operations Standards

Phone: 465-2951
Date: February 16, 1988

Approved by Commissioner: 
Agency: Department of Transportation and Public Facilities

Date: 2/17/88

Distribution (by preparer):

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

Fiscal Analysis for HB 310
5/16/87
Prepared by DOT&PF
2/16/88

page 2 of 2

The department recommends that paragraph (f) be reworded as follows: "...until the contractor provides a sworn statement that the subcontractors of the contractor have been paid for the subcontractors' work under the contract and that work performed by the contractor under the contract has been inspected and approved for compliance completed in accordance with the contract."

The rationale for this change is that in nearly every instance the responsibility for inspection and approval lies with the Contracting Agency and not with the contractor. We believe it is in the best interest of the state that the sworn statement include acknowledgement that the work for which payment is requested is in conformity with the contract.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/12/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 3/8/88

The Labor & Commerce Committee has considered HB 310

"An Act relating to payment under public construction contracts."

RECOMMENDS:

- replace with CSHB 310 (L+C) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

[Signature]

[Signature]

[Signature]

[Signature]

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W. Furnace Home Bill need work

[Signature]

[Signature]
Chairman's signature

HB

312

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

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

May, 1988

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

Mary Van Nimwegen

H. JUD. 3-28-88 1:30p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/15/88

FURTHER REFERRALS:

DATE: March 28, 1988

The Judiciary Committee has considered HB 312

"An Act relating to standards of conduct for members of the legislature and employees of the legislature; and providing for an effective date."

RECOMMENDS:

- replace with CS HB 312 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published 3/15/88
- zero with analysis

SIGNING DO PASS:

[Signature]

Max Stuenkel

Sen. Ott

SIGNING OTHER RECOMMENDATIONS:

[Signature] (No Rec)

[Signature]

[Signature]

Chairman's signature

Original sponsor: Pourchot

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 312 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to standards of conduct for members
7 of the legislature and employees of the legislature;
8 and providing for an effective date."

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

10 * Section 1. AS 24.60.020(a) is amended to read:

11 (a) Except as otherwise provided in this subsection, this chap-
12 ter applies to a member of the legislature and to a person employed by
13 the legislative branch of government. This chapter does not apply to

14 (1) a former member of the legislature or to a person
15 formerly employed by the legislative branch of government unless the
16 provision specifically states that it so applies;

17 (2) a person elected to the legislature who at the time of
18 election is not a member of the legislature;

19 (3) a person employed by the legislative branch of govern-
20 ment whose position [COMPENSATION] is established below [STEP A,]
21 Range 18 of the state salary schedule established in AS 39.27.011(a)
22 [;

23 (4) A PERSON EMPLOYED PRIVATELY BY A LEGISLATOR IF THE
24 PERSON DOES NOT PERFORM LEGISLATIVE DUTIES].

25 * Sec. 2. AS 24.60.050 is repealed and reenacted to read:

26 Sec. 24.60.050. STATE PROGRAMS AND LOANS. (a) It is not a
27 conflict of interest for a person to whom this chapter applies to
28 participate in a state program or to receive a loan from the state if
29 the program or loan

1 (1) is generally available to members of the public;
2 (2) is subject to fixed eligibility standards; and
3 (3) requires minimal discretion in determining qualifica-
4 tion.

5 (b) The committee shall annually review state programs and state
6 loans and publish a list of programs and loans that, in the view of
7 the committee,

- 8 (1) meet the standards of (a) of this section;
9 (2) do not meet the standards of (a) of this section.

10 (c) Each February 1, each person to whom this chapter applies
11 shall deliver to the division of legislative audit a report of each
12 participation by the person in a state program or receipt of a state
13 loan as of January 15 of that year for a program or loan listed in
14 (b)(2) of this section. The division of legislative audit shall
15 prepare an appropriate report for the presiding officer of each house
16 that lists the name of the person and kind of program participation or
17 loan. The lists shall be published in the supplemental journals
18 before February 15.

19 (d) Each person to whom this chapter applies who begins par-
20 ticipation in a state program or who receives a loan listed under
21 (b)(2) of this section after January 15 of each year shall deliver a
22 report of the program or loan to the committee within 30 days after
23 the participation in the state program or receipt of a state loan
24 begins. The report shall be published in the appropriate supplemental
25 journal if received by the committee during the regular session of the
26 legislature. Each report filed with the committee under this subsec-
27 tion is open to the public.

28 (e) Each record of a state agency relating to participation in a
29 state program or receipt of a state loan by a person to whom this

1 chapter applies may be disclosed to the committee and to the division
2 of legislative audit.

3 (f) The committee shall annually identify the programs and loans
4 to be audited by the division of legislative audit during the follow-
5 ing year, including the scope of the audit. The division of legisla-
6 tive audit shall prepare a report to the committee on the audit of the
7 participation in state programs and the receipt of loans from the
8 state by persons to whom this chapter applies. The report to the
9 committee is confidential until it is released by the committee.

10 (g) In this section "state program" means a program in which
11 tangible assets of the state or a right to use tangible assets of the
12 state are transferred from the state to a person to whom this chapter
13 applies.

14 * Sec. 3. AS 24.60.130(d) is amended to read:

15 (d) The members of each subcommittee shall elect a chair who
16 must be a member of the legislature. The chair selected by the senate
17 subcommittee shall chair the full committee beginning the first day of
18 the regular session in odd-numbered years and the chair selected by
19 the house subcommittee shall chair the full committee beginning the
20 first day of the regular session in even-numbered years.

21 * Sec. 4. AS 24.60.130(e) is amended to read:

22 (e) Except as provided in this subsection, a [A] vacancy on the
23 committee shall be filled under (b) of this section. An individual
24 who is appointed to fill a vacancy that occurs during the last 10 days
25 of the first regular session of a legislature or during the interim
26 between regular sessions of that legislature serves without concur-
27 rence or ratification through the 10th day of the second regular
28 session of the legislature. An individual who is appointed to fill a
29 vacancy that occurs during the last 10 days of the second regular

1 session of a legislature or during the interim after the second regu-
2 lar session serves without concurrence or ratification through the
3 convening of the first regular session of the next legislature.

4 * Sec. 5. AS 24.60.130 is amended by adding a new subsection to read:

5 (i) A quorum of a committee established under this section
6 consists of a majority of the members of the committee. A quorum of a
7 subcommittee established under this section consists of a majority of
8 the members of the subcommittee. Notwithstanding the provisions of
9 this subsection, a committee does not have a quorum unless three
10 legislative members are present and a subcommittee does not have a
11 quorum unless two legislative members are present..

12 * Sec. 6. AS 24.60.170(d) is amended to read:

13 (d) A proceeding is commenced by the filing of a complaint with
14 the committee. A complaint may be initiated by any person. A com-
15 plaint shall be in writing and signed under oath by the person making
16 the complaint. A [NO] complaint, other than a complaint initiated by
17 at least two-thirds of the members of the committee, may not be filed
18 within a period of 60 days preceding a state primary or general elec-
19 tion. Each proceeding [ALL PROCEEDINGS] pending before the committee
20 on the 60th day preceding a state primary or general election is [ARE]
21 stayed until certification of the election unless the proceeding is
22 [PROCEEDINGS ARE] based on a complaint initiated by at least two-
23 thirds of the members of the committee or, on a complaint initiated by
24 a person who is not a member of the committee, if two-thirds of the
25 members of the committee direct the continuation of the proceeding.
26 The committee shall notify in writing a person against whom a com-
27 plaint has been filed of a stay of the proceeding. If the person
28 objects in writing to the stay the proceedings shall continue.

29 * Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

Adopted
w/o
Sec 2 + 8

Original sponsor: Pourchot

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 312 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to standards of conduct for members
7 of the legislature and employees of the legislature;
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15 formerly employed by the legislative branch of government unless the
16 provision specifically states that it so applies;

17 (2) a person elected to the legislature who at the time of
18 election is not a member of the legislature;

19 (3) a person employed by the legislative branch of govern-
20 ment whose position [COMPENSATION] is established below [STEP A,]
21 Range 18 of the state salary schedule established in AS 39.27.011(a)
22 [;

23 (4) A PERSON EMPLOYED PRIVATELY BY A LEGISLATOR (IF THE
24 PERSON DOES NOT PERFORM LEGISLATIVE DUTIES].

25 * Sec. 2. AS 24.60.030(f) is amended to read:

26 (f) It is a conflict of interest for a member of the legislature
27 to accept money (raised) [FROM AN EVENT HELD WITHIN THE CAPITAL CITY]
28 during the session [IF A SUBSTANTIAL PURPOSE OF THE EVENT IS TO RAISE
29 MONEY ON BEHALF OF THE MEMBER] for political [STATE LEGISLATIVE]

1 campaign purposes or for other state legislative political purposes.

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7 (1) is generally available to members of the public;

8 (2) is subject to fixed eligibility standards; and

9 (3) requires minimal discretion in determining qualifica-
10 tion.

11 (b) The committee shall annually review state programs and state
12 loans and publish a list of programs and loans that, in the view of
13 the committee,

14 (1) meet the standards of (a) of this section;

15 (2) do not meet the standards of (a) of this section.

16 (c) Each February 1, each person to whom this chapter applies
17 shall deliver to the division of legislative audit a report of each
18 participation by the person in a state program or receipt of a state
19 loan as of January 15 of that year for a program or loan listed in
20 (b)(2) of this section. The division of legislative audit shall
21 prepare an appropriate report for the presiding officer of each house
22 that lists the name of the person and kind of program participation or
23 loan. The lists shall be published in the supplemental journals
24 before February 15.

25 (d) Each person to whom this chapter applies who begins par-
26 ticipation in a state program or who receives a loan listed under
27 (b)(2) of this section after January 15 of each year shall deliver a
28 report of the program or loan to the committee within 30 days after
29 the participation in the state program or receipt of a state loan

1 begins. The report shall be published in the appropriate supplemental
2 journal if received by the committee during the regular session of the
3 legislature. Each report filed with the committee under this subsec-
4 tion is open to the public.

5 (e) Each record of a state agency relating to participation in a
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9 (f) The committee shall annually identify the programs and loans
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25 tion. Each proceeding [ALL PROCEEDINGS] pending before the committee
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27 stayed until certification of the election unless the proceeding is
28 [PROCEEDINGS ARE] based on a complaint initiated by at least two-
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1 a person who is not a member of the committee, if two-thirds of the
2 members of the committee direct the continuation of the proceeding.

3 The committee shall notify in writing a person against whom a com-
4 plaint has been filed of a stay of the proceeding. If the person
5 objects in writing to the stay the proceedings shall continue.

6 * Sec. 8. AS 24.60.030(g) is repealed.

7 * Sec. 9. This Act takes effect immediately under AS 01.10.070(c).
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Original sponsor: Pourchot

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 312 ()
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FIFTEENTH LEGISLATURE - SECOND SESSION
5 A BILL

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24 PERSON DOES NOT PERFORM LEGISLATIVE DUTIES].

25 * Sec. 2. AS 24.60.030(f) is amended to read:

26 (f) It is a conflict of interest for a member of the legislature
27 to accept money raised [FROM AN EVENT HELD WITHIN THE CAPITAL CITY]
28 during the session [IF A SUBSTANTIAL PURPOSE OF THE EVENT IS TO RAISE
29 MONEY ON BEHALF OF THE MEMBER] for political [STATE LEGISLATIVE]

see repealer:

1 campaign purposes or for other state legislative political purposes.

2 * Sec. 3. AS 24.60.050 is repealed and reenacted to read:

3 Sec. 24.60.050. STATE PROGRAMS AND LOANS. (a) It is not a
4 conflict of interest for a person to whom this chapter applies to
5 participate in a state program or to receive a loan from the state if
6 the program or loan

7 (1) is generally available to members of the public;

8 (2) is subject to fixed eligibility standards; and

9 (3) requires minimal discretion in determining qualifica-
10 tion.

11 (b) The committee shall annually review state programs and state
12 loans and publish a list of programs and loans that, in the view of
13 the committee,

14 (1) meet the standards of (a) of this section;

15 (2) do not meet the standards of (a) of this section.

16 (c) Each February 1, each person to whom this chapter applies
17 shall deliver to the division of legislative audit a report of each
18 participation by the person in a state program or receipt of a state
19 loan as of January 15 of that year for a program or loan listed in
20 (b)(2) of this section. The division of legislative audit shall
21 prepare an appropriate report for the presiding officer of each house
22 that lists the name of the person and kind of program participation or
23 loan. The lists shall be published in the supplemental journals
24 before February 15.

25 (d) Each person to whom this chapter applies who begins par-
26 ticipation in a state program or who receives a loan listed under
27 (b)(2) of this section after January 15 of each year shall deliver a
28 report of the program or loan to the committee within 30 days after
29 the participation in the state program or receipt of a state loan

1 begins. The report shall be published in the appropriate supplemental
2 journal if received by the committee during the regular session of the
3 legislature. Each report filed with the committee under this subsec-
4 tion is open to the public.

5 (e) Each record of a state agency relating to participation in a
6 state program or receipt of a state loan by a person to whom this
7 chapter applies may be disclosed to the committee and to the division
8 of legislative audit.

9 (f) The committee shall annually identify the programs and loans
10 to be audited by the division of legislative audit during the follow-
11 ing year, including the scope of the audit. The division of legisla-
12 tive audit shall prepare a report to the committee on the audit of the
13 participation in state programs and the receipt of loans from the
14 state by persons to whom this chapter applies. The report to the
15 committee is confidential until it is released by the committee.

16 (g) In this section "state program" means a program in which
17 tangible assets of the state or a right to use tangible assets of the
18 state are transferred from the state to a person to whom this chapter
19 applies.

20 * Sec. 4. AS 24.60.130(d) is amended to read:

21 (d) The members of each subcommittee shall elect a chair who
22 must be a member of the legislature. The chair selected by the senate
23 subcommittee shall chair the full committee beginning the first day of
24 the regular session in odd-numbered years and the chair selected by
25 the house subcommittee shall chair the full committee beginning the
26 first day of the regular session in even-numbered years.

27 * Sec. 5. AS 24.60.130(e) is amended to read:

28 (e) Except as provided in this subsection, a [A] vacancy on the
29 committee shall be filled under (b) of this section. An individual

1 who is appointed to fill a vacancy that occurs during the last 10 days
2 of the first regular session of a legislature or during the interim
3 between regular sessions of that legislature serves without concur-
4 rence or ratification through the 10th day of the second regular
5 session of the legislature. An individual who is appointed to fill a
6 vacancy that occurs during the last 10 days of the second regular
7 session of a legislature or during the interim after the second regu-
8 lar session serves without concurrence or ratification through the
9 convening of the first regular session of the next legislature.

10 * Sec. 6. AS 24.60.130 is amended by adding a new subsection to read:

11 (i) A quorum on a committee established under this section
12 consists of a majority of the members of the committee. A quorum on a
13 subcommittee established under this section consists of a majority of
14 the members of the subcommittee. Notwithstanding the provisions of
15 this subsection, a committee does not have a quorum unless three
16 legislative members are present and a subcommittee does not have a
17 quorum unless two legislative members are present.

18 * Sec. 7. AS 24.60.170(d) is amended to read:

19 (d) A proceeding is commenced by the filing of a complaint with
20 the committee. A complaint may be initiated by any person. A com-
21 plaint shall be in writing and signed under oath by the person making
22 the complaint. A [NO] complaint, other than a complaint initiated by
23 at least two-thirds of the members of the committee, may not be filed
24 within a period of 60 days preceding a state primary or general elec-
25 tion. Each proceeding [ALL PROCEEDINGS] pending before the committee
26 on the 60th day preceding a state primary or general election is [ARE]
27 stayed until certification of the election unless the proceeding is
28 [PROCEEDINGS ARE] based on a complaint initiated by at least two-
29 thirds of the members of the committee or, on a complaint initiated by

1 a person who is not a member of the committee, if two-thirds of the
2 members of the committee direct the continuation of the proceeding.

3 The committee shall notify in writing a person against whom a com-
4 plaint has been filed of a stay of the proceeding. If the person
5 objects in writing to the stay the proceedings shall continue.

6 * Sec. 8. AS 24.60.030(g) is repealed.

7 * Sec. 9. This Act takes effect immediately under AS 01.10.07C(c).
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relates to Sec 2.

Alaska State Legislature

REPRESENTATIVE
PAT POURCHOT

HOUSE FINANCE COMMITTEE,
VICE CHAIR

HOUSE ETHICS COMMITTEE, CHAIR

LEGISLATIVE BUDGET & AUDIT
COMMITTEE



House of Representatives

HB 312 MEMORANDUM
For House Floor, April 12, 1988

ANCHORAGE
P.O. BOX 104838
ANCHORAGE, AK 99510
(W) (907) 276-6818
(H) (907) 338-2425

JUNEAU
P.O. BOX V
STATE CAPITOL
JUNEAU, AK 99811
(907) 465-3712

Section 1 AS 24.60.020 (APPLICABILITY)--Changed to reflect that covered employees are only those employees hired at 18A or above, not those compensated at the level of 18A or above (for example, a 16F). This also eliminates private employees of members from coverage.

Section 2 AS 24.60.050 (STATE PROGRAMS AND LOANS)--Repealed and re-enacted to allow spot audits of loans and programs so that auditors do not need to audit all 350+ state loans and programs as now required. Members and covered employees will check off their participation in the discretionary loans and programs and report their participation to Legislative Audit by February 1. The committee will establish the scope of the audits of discretionary and non-discretionary programs and loans each year.

Section 3 AS 24.60.130(d) (SELECT COMMITTEE ON LEGISLATIVE ETHICS)--Ensures that the chair of the House and Senate subcommittees are members of the legislature, not a public member. It also eliminates confusion by making clear that the chair of the full committee changes on the first day of the regular session yearly.

Section 4 AS 24.60.130(e) (SELECT COMMITTEE ON LEGISLATIVE ETHICS)--Amends the method of appointment to a vacancy that occurs at the very end of the session or during the interim. It allows that a member may serve without ratification until the next session of the legislature.

Section 5 AS 24.60.130 (SELECT COMMITTEE ON LEGISLATIVE ETHICS)--Adds a new subsection that establishes that a subcommittee quorum does not exist unless at least two members are members of the legislature and a quorum of the full committee does not exist unless at least three members of the legislature are present.

Section 6 AS 24.60.170(d) (PROCEEDINGS BEFORE THE COMMITTEE)--Allows committee action on a complaint during the 60-day period preceding an election if two-thirds of the members of the committee so vote. Now, the only action allowed is that on complaints initiated by the committee, not complaints initiated by an individual.

Section 7 An immediate effective date.

MEMORANDUM

TO: Rep. Pat Pourchot, Chair

FROM: Kim Elton

RE: HB 312, amendments to the Ethics Code

DATE: March 28, 1988

HB 312 is in the House Judiciary Committee after passing out of the State Affairs Committee March 13. The Judiciary Committee has scheduled its first hearing of the bill for Monday, March 28. This analysis is of the proposed committee substitute.

Section 1 removes an ambiguity in the code. The code covers legislative employees and legislators (as established in AS 24.60.010) yet AS 24.60.020(a)(4) does not allow an exemption from provisions of the code for private employees of a legislator (unless that private employee does no legislative work). By deleting AS 24.60.020(a)(4), all individuals hired privately by a legislator will be exempt from the provisions of the act.

This section also clarifies that only legislative employees employed at or above the level of Step A, Range 18, are covered by the provisions of the ethics statute. Present language can be interpreted to mean that those who earn the equivalent of an 18A or above (i.e. a 17F or even a 14L) are covered by the provisions of the ethics statute. [This section amends AS 24.60.020(a)(3)]

Section 2 establishes a blanket prohibition of fundraising during the legislative session. Previously, fundraising activities outside the Capital were allowed while the legislature was in session. This amendment also makes clear that all political fundraising is banned. Previous language provided a loophole that allowed fundraising activity for an office other than a state legislative office. [This section amends AS 24.60.030(f)]

Section 3 changes the mandated loan and program audit procedures in the existing statute. The new provisions require members and covered employees to report by Feb. 1 their participation in state loan programs or other state programs that are not

generally available to members of the public, that are not subject to fixed eligibility standards and in which there is more than minimal discretion exercised in determining qualifications. Legislative Audit annually will prepare two lists of loans and programs that do and do not meet these standards and the ethics committee annually will certify both lists.

Legislative Audit also will collect the disclosures by covered persons of participation in the discretionary programs and submit the disclosures for publication in the appropriate House or Senate Journal by February 15. Legislative Audit will audit annually a certain number of loan programs and other state programs as directed by the ethics committee.

Presently, Legislative Audit is required to audit all state programs and loans (of which there are more than 350) to check compliance with program and loan provisions. This is an impossible chore. The provisions of this section reduce that responsibility and give the ethics committee the flexibility of directing audits of important discretionary loans and programs and spot checking other loans and programs. Also, there presently are no requirements that covered persons disclose their participation in the discretionary loans and programs and participation is instead discovered through the cumbersome process of having many state agencies review their files against a list of covered persons. [This section repeals and replaces AS 24.60.050]

Section 4 amends the present ethics code to ensure that the chair of the Senate or House subcommittees is a member of the legislature. The way the statute is now drafted, the chair of either subcommittee could be one of the public members.

This section also clarifies the date at which the Senate subcommittee chair and the House subcommittee chair begin their tenure as chair of the full committee. Present language seems to imply that the new chair of the full committee assumes duty on the first day of each year and the new language clarifies that the new chair assumes the duty on the first day of the legislative session each year. [This section amends AS 24.60.130(d)]

Section 5 amends the method of appointment to a vacancy on the committee so that a vacancy occurring at the very end of a session or during the interim can be filled and the new appointee can serve pending confirmation or ratification. This means that the newly-appointed member of the legislature can serve without concurrence of the appropriate body and a newly-appointed public member can serve without ratification until the new legislature convenes or the tenth day of the second session, depending upon when the vacancy occurred. [This section amends AS 24.60.130(e)]

Section 6 establishes that a subcommittee quorum does not exist unless at least two members are members of the legislature. A quorum of the full committee does not exist unless three members present are members of the legislature. This means that public members cannot 'outvote' legislative members in either the


subcommittees or the full committee. [This section adds a new subsection, AS 24.60.130(i)]

Section 7 allows committee action on a complaint during the 60 days preceding a primary or general election (and until certification of the election) if two-thirds of the members of the committee vote to direct the continuation of the proceedings. Previously, the only complaints that could proceed in the 60-day-until-certification time frame were complaints that were initiated by a two-thirds vote of the committee--not complaints initiated by an individual. [This section amends AS 24.60.170(d)]

Section 8 repeals the subsection that exempts Juneau legislators from the ban on fundraising in the Capital City during the legislative session. Section 2 of this package of amendments to the ethics code bans fundraising activities during the legislative session. The effect of adopting Section 2 without repealing AS 24.60.030(g), would mean that Juneau legislators could have fundraisers in Juneau during sessions while all other legislators would be banned from holding fundraisers, anywhere, during sessions.

Section 9 establishes an immediate effective date.

MEMORANDUM

TO: Rep. Pat Pourchot
FROM: Kim Elten 
RE: Loans and programs in the code of ethics
DATE: March 25, 1988

Below is a capsulized version of the approach to loans and programs that will be reflected in the CS for HB312. Participating with me in outlining the approach was Randy Welker, Merle Jensen and Dick Bradley.

DUTIES OF COVERED EMPLOYEES AND MEMBERS:

1) report by Feb. 1 their participation in 'D' loans and programs (the list of current 'D' programs can be included in the hiring packet for new employees and a memo of reminder of the obligation to report should be sent the first day of the session to members and current employees).

DUTIES OF THE COMMITTEE:

1) annually certify the 'D' and 'A' loan and program list;
2) annually establish* which 'A' and 'D' loans and programs will be audited and the depth of the audit.

DUTIES OF LEGISLATIVE AUDIT:

1) annually review and update the loans and programs for certification by the committee;
2) receive the Feb. 1 disclosures of participation in 'D' loans and programs from covered employees and members;
3) submit to the Senate Secretary and House Clerk a list of the disclosures** for publication in the appropriate journal on Feb. 15;

Annually develop an audit plan which

4) ~~audit the loans and programs selected from the 'A' and 'D' list by the committee.~~

insures compliance with the provisions of this section

There also was discussion of the APOC loan disclosure provisions in the current statute (24.60.050[c]). This statutory provision requires only that current members and covered employees send notice of an application. There is no provision for annually disclosing the continuing loan obligation. There is, of course, a potential for abuse in awarding a loan but there is also a potential for abuse in the servicing of the loans.

Our discussion this morning concluded that the only purpose for the present APOC requirement is because a member of the public assumes that type of disclosure would be filed with APOC. We can easily remove the provision and the committee can administratively direct legislative audit to copy APOC with the annual list submitted for the journals so that APOC can maintain a disclosure file in their offices.

*To avoid an appearance of bias by the committee, it is probably advisable for the committee to receive and certify the updated list of 'A' and 'D' loans and programs and establish the parameters of the audits before names are associated with 'D' programs on Feb. 1. If the audit parameters are established soon after Feb. 1, some may accuse the committee of avoiding an audit in a loan or a program because Senator X or Representative Y is in that program. If, on the other hand, the 'A' and 'D' lists are certified and the audit parameters are established in November, months before the new disclosures, the appearance of bias is lessened.

**Loan disclosures in the journals now reflect participation and the status (current or delinquent). Under this scenario, participation would be disclosed but status, which is just one of several elements to be reviewed in a full audit, would not be disclosed until the committee releases the audits. To include status, Legislative Audit would need to circulate the 'D' disclosures received Feb. 1 to appropriate state agencies, allow time for the agencies to check the status and report back to the committee. This would require additional time and public disclosure of potential conflicts would be pushed back to mid-session.

PROPOSED AMENDMENTS TO HB 312
By REPRESENTATIVE PAT POURCHOT

March 11, 1988

1) To clarify that only legislative employees employed at or above the level of Step A, Range 18 are covered by the code of ethics.

AS 24.60.020(a)(3) is amended to read:

(3) a person employed by the legislative branch of government who [whose compensation] is below Step A, Range 18 of the state salary schedule established in AS 39.27.011(a);

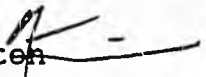
2) To clarify the date at which the Senate subcommittee chair and the House subcommittee chair begin their tenure as chair of the full committee.

AS 24.60.130(d) is amended to read:

(d) The members of each subcommittee shall elect a chair. The chair selected by the senate subcommittee shall chair the full committee beginning the first day of the session in odd-numbered years and the chair selected by the house subcommittee shall chair the full committee beginning the first day of the session in even-numbered years.

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FROM: Kim Elter 

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DATE: March 25, 1988

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DUTIES OF THE COMMITTEE:

- 1) annually certify the 'D' and 'A' loan and program list;
- 2) annually establish* which 'A' and 'D' loans and programs will be audited and the depth of the audit.

DUTIES OF LEGISLATIVE AUDIT:

- 1) annually review and update the loans and programs for certification by the committee;
- 2) receive the Feb. 1 disclosures of participation in 'D' loans and programs from covered employees and members;
- 3) submit to the Senate Secretary and House Clerk a list of the disclosures** for publication in the appropriate journal on Feb. 15;

Annually develop an audit plan which
4) ~~audit the loans and programs selected from the 'A' and 'D'~~
~~list by the committee.~~

*insures compliance with
the provisions of this
section*

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Our discussion this morning concluded that the only purpose for the present APOC requirement is because a member of the public assumes that type of disclosure would be filed with APOC. We can easily remove the provision and the committee can administrative-ly direct legislative audit to copy APOC with the annual list submitted for the journals so that APOC can maintain a disclosure file in their offices.

*To avoid an appearance of bias by the committee, it is probably advisable for the committee to receive and certify the updated list of 'A' and 'D' loans and programs and establish the parameters of the audits before names are associated with 'D' programs on Feb. 1. If the audit parameters are established soon after Feb. 1, some may accuse the committee of avoiding an audit in a loan or a program because Senator X or Representative Y is in that program. If, on the other hand, the 'A' and 'D' lists are certified and the audit parameters are established in November, months before the new disclosures, the appearance of bias is lessened.

**Loan disclosures in the journals now reflect participation and the status (current or delinquent). Under this scenario, participation would be disclosed but status, which is just one of several elements to be reviewed in a full audit, would not be disclosed until the committee releases the audits. To include status, Legislative Audit would need to circulate the 'D' disclosures received Feb. 1 to appropriate state agencies, allow time for the agencies to check the status and report back to the committee. This would require additional time and public disclosure of potential conflicts would be pushed back to mid-session.

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Standards of Conduct for Members
of the Legislature and Employees
Sponsor: Rep. Pourchot
Requestor: Rep. Ulmer, State Affairs

Agency Affected: Div. of Legislative Audit
BRU: Legislative Budget and
Audit Committee
Components: Legislative Audit

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
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	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

The requirements of the proposed legislation could be accomplished within the Division's existing budget.

Prepared by: Randy S. Welker
Division: Division of Legislative Audit

Phone: 465-3830
Date: 3/9/88

Approved ~~BY COMMISSIONER~~: Randy S. Welker
Agency: Division of Legislative Audit

Date: 3/9/88

Distribution (by preparer):

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

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/13/87

FURTHER REFERRALS: Judiciary

DATE: 3-14-88

The State Affairs Committee has considered HB 312

"An Act relating to standards of conduct for members of the legislature and employees of the legislature; and providing for an effective date."

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

Tom Ulmer

Frank Wenzel

Cliff Davidson

SIGNING OTHER RECOMMENDATIONS:

Terry Martin - nonrec.

Sydney Hoffman No Rec.

Tom Ulmer
Chairman's signature

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Standards of Conduct for Members
of the Legislature and Employees
Sponsor: Rep. Pourchot
Requestor: Rep. Ulmer, State Affairs

Agency Affected: Div. of Legislative Audit
BRU: Legislative Budget and
Audit Committee
Components: Legislative Audit

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
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	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

The requirements of the proposed legislation could be accomplished within the Division's existing budget.

Prepared by: Randy S. Welker Phone: 465-3830
Division: Division of Legislative Audit Date: 3/9/88

Approved ~~BY COMMISSIONER~~: Randy S. Welker Date: 3/9/88
Agency: Division of Legislative Audit

Distribution (by preparer):

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

M E M O R A N D U M

February 24, 1988

SUBJECT: Standards of conducts under AS 24.60
[HB 312]

TO: Representative Pat Pourchot

FROM: Richard A. Bradley
Legislative Counsel

Kim Elton has requested a sectional analysis of the above described bill.

As a preliminary matter, please note that a sectional analysis of the bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 24.60.030(f). The section broadens the scope of the existing provision of law that prohibits fundraisers during the legislative session in Juneau; the existing provision permits fund-raising events outside of Juneau. The amendment prevents the acceptance of funds raised during the session. The amendment also broadens the prohibited purposes; existing law seems to prohibit only fundraisers for legislative campaign or legislative political purposes. The deletion of "state legislative" and addition of "political" means that a legislator cannot hold fund-raising events for a campaign for other offices.

Note also that AS 24.60.030(g)-- the exception for members of the legislature elected from Juneau-- is repealed in section 8 of this bill.

Section 2 of the bill amends AS 24.60.050(b). The amendment delays until March 10 of each year (from existing law's February 1) the time for the reports from state agencies that have a loan to a person to whom this chapter applies. The amendment requires that the report go to the division of legislative audit rather than the presiding officer of each

house. The amendment requires the division of legislative audit to assemble the list by March 15 for delivery to the presiding officers and the publication on the journal.

Section 3 of the bill amends AS 24.60.050(e). The amendment requires the division of legislative audit to report to the legislature by April 15 (in place of April 1) on its review of the procedures used by executive branch agencies in granting or reviewing loan conditions imposed by the agencies. Apart from the change in the time of the report, the amendment provides that the findings reported to the committee are confidential until released by the committee.

Section 4 of the bill amends AS 24.60.130(d). The amendment requires that the chairman of the senate and the house subcommittee of the Select Committee must be a member of the legislature.

Section 5 of the bill amends AS 24.60.130(e) to deal with the situation where a vacancy in the membership of the Select Committee occurs at a time when it is awkward for the regular procedures on the filling of the vacancy to be followed. An individual appointed in this situation serves without confirmation or ratification.

Section 6 of the bill adds a new subsection (i) to AS 24.60.130. It makes explicit the requirements of a quorum for both the committee and its subcommittees.

Section 7 of the bill amends AS 24.60.170(d). The amendment amends that portion of the section that stays all proceedings that are pending before the committee on the 60th day preceding a state primary or general election until the certification of the election "unless the proceedings are based on a complaint initiated by two-thirds of the members of the committee". The amendment permits the continuation of a complaint initiated by a nonmember of the committee if two thirds of the members of the committee direct the continuation of the proceeding.

Section 8 of the bill repeals AS 24.60.020(a)(4) and AS 24.60.030(g). AS 24.60.020(a)(4) provides, in context:

Sec. 24.60.020. APPLICABILITY. (a) Except as otherwise provided in this subsection, this chapter applies to a member of the legislature and to a person employed

Representative Pat Pourchot
Page 3
February 24, 1988

by the legislative branch of government. This chapter does not apply to

* * *

(4) a person employed privately by a legislator if the person does not perform legislative duties.

AS 24.60.030(g) provides:

(g) Members of the legislature elected to represent the capital city are exempt from the requirements of (f) of this section.

The provision of AS 24.60.030(f) are amended in Section 1 of this bill.

Section 9 of the bill establishes an immediate effective date.

If I may be of further assistance, please advise.

RAB:gc
WKG2:03

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/13/87

FURTHER REFERRALS: Judiciary

DATE: 3-14-88

The State Affairs Committee has considered HB 312

"An Act relating to standards of conduct for members of the legislature and employees of the legislature; and providing for an effective date."

RECOMMENDS:

- replace with _____ the same title
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- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

Tom Ulmer
Frank McManus
Cliff Davidson

SIGNING OTHER RECOMMENDATIONS:

Terry Martin - no rec.
Suzanne Hoffman No Rec.

Tom Ulmer
 Chairman's signature

HB

322

HOUSE AND SENATE JOINT
JOURNAL SUPPLEMENT

May 15, 1987

No. 9

April 10, 1987

Bill on the Alaska Corporations Code
HB 322/SB 306

"An Act revising the corporations code; amending Alaska Rules of Civil Procedure 4, 10, 11, 19, 20, 23.1, 24, 65, 73, and 82, Alaska Rules of Appellate Procedure 204 and 609, and Alaska Rule of Evidence 803(8); and providing for an effective date."

Identical text in both bills

Letter to Senator Bettye Fahrenkamp: Pages 1 - 9

Sectional Analysis: Pages 1 - 203

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

FORM 1547 (REV. 11/77)
UNIFORM ALASKA FORMS
707 003 2030

April 10, 1987

The Honorable Bettye Fahrenkamp
Chair, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

RE: Bill on the Alaska Corporations Code

Dear Senator Fahrenkamp:

Pursuant to the authority granted in AS 24.20.075(c), the Alaska Code Revision Commission has prepared the attached bill on the Alaska Corporations Code and requests its introduction.

For more than six years the Commission has labored to review the content of existing Alaska statutory law on profit corporations. Comment has been invited and received from numerous Alaskans including a special subcommittee set up by the Alaska Federation of Natives. An ad hoc committee of the business law section of the Alaska Bar Association examined a draft of the Commission's recommendation to the Thirteenth Legislature and made numerous formal and informal suggestions and comments. While there remain differences of opinion among some commentators, there appeared at that time to be widespread agreement that existing legislation on this subject is in serious need of revision. Let me comment first upon the general need for revision, then describe the approach taken by the Commission, and conclude by pointing out some of the more important features of the recommendation that I am forwarding with this letter.

The need for reform of Alaska's statutory law respecting profit-seeking corporations: Existing legislation on this subject, currently found as Chapter 5 of Title 10 of the Alaska Statutes, was adopted in 1957 and was predicated upon the then existing content of Oregon law. At that time, the State of Oregon had adopted a 1953 version of the Model Business Corporation Act, which was formulated by a committee of the American Bar Association. From the date of that enactment until the present time, this model has served

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The Commission's approach to a recommended revision: In undertaking a revision of the Alaska profit-seeking corporations code the Commission found philosophical as well as technical differences in the corporate legislation of sister states. Delaware is widely regarded as a "pro management" jurisdiction with an approach to corporate regulation that places emphasis upon a strong board of directors calculated to be in a dominant position relative to the interests of shareholders. Standing at the opposite extreme is California, long regarded as a "pro shareholder" jurisdiction with statutes designed to enhance the protection of shareholders at the expense of incumbent management.

A basic enabling statute that leaves the major decisions respecting the power of shareholders and management to the individuals framing the articles of incorporation: An initial decision of the Commission was to avoid mandating either the Delaware or California extreme. Instead, the Commission sought to design a statute that was first and foremost understandable to the average individual desiring to do business in the corporate form. Both the organization and content of the new act are designed to clearly impart the minimum requirements established by the state as a price tag for the privilege of doing business in the corporate form; to set forth the choices which ought to be made by each group seeking incorporation with respect to the division of powers between shareholders and directors; and to standardize the methods of essential reporting on corporate activities made to shareholders and the state.

Finally, the proposed statute has gone to substantial length to replace complex and frequently misunderstood accounting concepts with clearly defined guidelines as to the circumstances in which it is permissible to pay a dividend to shareholders. Few areas have presented greater opportunity for abuse in the past. The potentially adverse interests of corporate creditors, shareholders, and directors require that all concerned be readily able to apply the minimum standards for socially responsible behavior that are mandated by the statute.

No attempt to subject foreign corporations to the organizational framework of this recommended statute: The status of "foreign corporations" in Alaska came under close scrutiny. A foreign corporation is organized under the laws of another state or nation and thereafter seeks permission

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exemptions and special provisions in federal law relating to Native corporations expire, those vital entities will be governed by statutory law developed after an extensive survey of their needs. The Commission has adopted the strongly felt sentiment of the Alaska Federation of Natives Task Force that Native corporations should not be governed by a separate code. If they are to play a vital social and economic role in advancing the interests of their shareholders, it was felt that these corporations cannot be hobbled by some unique statutory scheme causing doubt and encouraging litigation as to their powers and responsibilities.

Specific features: Two specific features of the proposed legislation are worthy of special mention. They relate to shareholder litigation and an abuse of limited liability.

Shareholder actions brought in the name of the corporation (derivative suits) were previously unregulated by statute in Alaska. In other jurisdictions few areas of corporate law have proven a greater source of conflict. On the one hand, the ability of a single shareholder to bring an action against a director or officer of that corporation and to recover for a breach of the duty of loyalty or care owed to the entity has been hailed as an essential weapon in the fight for social responsibility. Yet it cannot be denied that such litigation is both time-consuming and costly. Further, there is an unhappy history of shareholders commencing an action on the most tenuous of grounds in the hope that the defendants would buy their peace with an out-of-court settlement rather than stand and defend their records. Money paid in this fashion was usually pocketed by the shareholder even though the alleged injury had been to the corporation. This obvious abuse has been termed a "strike suit". The challenge is to draft a statute that facilitates the legitimate derivative action while at the same time removing the financial incentives from the strike suit.

Section 10.06.436 of the proposed Code is the most balanced and specific derivative suit statute in the United States. It combines the best features of federal, California, New York, and Delaware approaches to this previously unregulated area. In a June, 1984 address before a section of the Alaska Bar Association, Professor Robert Hamilton, who acted as the reporter in framing the recommended content of the

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creditors of businesses that are incorporated with insubstantial assets and thereafter operated for the convenience of owners for as long as this proves advantageous. Thereafter, the corporation is simply abandoned, usually without any effort to comply with the statutory procedures for corporate dissolution. When this happens, suppliers, materialmen, employees, and others who have extended informal credit to the business are left without practical recourse. Because their business relationships have been informal, it is rarely the case that they will have contracted for the personal liability of those operating behind the corporate veil. Because their unpaid claims rarely exceed a few thousand dollars, the cost of litigation makes legal remedies impractical. The net result is that these creditors absorb a loss that they then pass on to the general public in the form of higher prices for their goods and services. In the worst case, they simply go out of business, depriving the public of their presence as competitors, employers, and taxpayers in the community.

To date, the only jurisdiction that has consistently attempted to address this problem has been New York. As early as 1848, that state imposed personal liability on shareholders for any unpaid claims of corporate servants or employees. While that liability has been modified, it remains a feature of New York's Business Corporation Law. After lengthy debate, which included consultation with immediate past and present officials in the Department of Commerce and Economic Development, the Commission decided to confront the problem in a different manner. Placing liability on the shareholders was rejected because it would frequently expose individuals who may have had no active part in running the business along with those who should be held accountable. Instead, the Commission proposed a secondary liability on the part of the designated directors and officers, on the theory that these individuals have either made all of the business decisions or have had it within their immediate power to discipline those who have run the corporation.

As initially proposed, their liability was both secondary and limited. It was secondary in that all creditors must first exhaust the assets of the defunct corporation before any claim against directors or officers may arise. It was also limited in that Section 488 made no effort to bargain for greater liability, such as banks and other institutional

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

PHONE STATE CAPITAL
UNIFORM ALASKA P.O.
707 463 2828

April 10, 1987

The Honorable Bettye Fahrenkamp
Chair, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

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as the foundation of all Alaska legislation in the corporate field.

The interest of the Alaska Code Revision Commission in reviewing the current legislation was prompted by several factors. First was a recognition that the level and diversity of business operations in our state has expanded to the point that many of the basic assumptions valid in the 1950's may have produced a statute no longer serviceable as Alaska approaches the 1990's. We were aware that corporations formed in response to the Alaska Native Claims Settlement Act found themselves under the provisions of a statutory scheme adopted long before Congress conceived the scheme of forcing the corporate organization upon substantial segments of our population and economy. Within less than five years the stock of these corporations will become freely transferable, special federal law provisions will expire, and Native corporations will be subject to state corporations law for all purposes. These developments and challenges convinced the Commission that no legislation enacted or recommended in other states could be blindly relied upon to best function in the conditions encountered by Alaskans.

In particular, the Commission became convinced that the 1953 version of the Model Act, which represented an "off the rack" wholesale adoption of a statute never intended for the needs of any particular state, represented a poor choice for current Alaska law and an even poorer vehicle for our future. Other states have reached similar conclusions. Both New York and California have undertaken systematic revision of their corporate statutes in the past decade, and their work products differ significantly from the Model Act. Even as the Commission was making these determinations, the Business Law Section of the American Bar Association concluded that the original Model Act was in serious need of revision. In 1983, a tentative draft of that Section's recommended content of a Revised Model Business Corporation Act was brought to our attention by our consultant. In July, 1984, a final draft form for this recommended statute was agreed upon by the American Bar Association Committee. The Commission has reviewed both drafts of the Revised Model Act, as well as the current content of corporate statutes in California, New York, Oregon, Washington, and Delaware. In each instance our goal has been to determine the most useful approaches to the enabling of corporate activity in Alaska and securing accountability for such conduct.

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The Commission's approach to a recommended revision: In undertaking a revision of the Alaska profit-seeking corporations code the Commission found philosophical as well as technical differences in the corporate legislation of sister states. Delaware is widely regarded as a "pro management" jurisdiction with an approach to corporate regulation that places emphasis upon a strong board of directors calculated to be in a dominant position relative to the interests of shareholders. Standing at the opposite extreme is California, long regarded as a "pro shareholder" jurisdiction with statutes designed to enhance the protection of shareholders at the expense of incumbent management.

A basic enabling statute that leaves the major decisions respecting the power of shareholders and management to the individuals framing the articles of incorporation: An initial decision of the Commission was to avoid mandating either the Delaware or California extreme. Instead, the Commission sought to design a statute that was first and foremost understandable to the average individual desiring to do business in the corporate form. Both the organization and content of the new act are designed to clearly impart the minimum requirements established by the state as a price tag for the privilege of doing business in the corporate form; to set forth the choices which ought to be made by each group seeking incorporation with respect to the division of powers between shareholders and directors; and to standardize the methods of essential reporting on corporate activities made to shareholders and the state.

Finally, the proposed statute has gone to substantial length to replace complex and frequently misunderstood accounting concepts with clearly defined guidelines as to the circumstances in which it is permissible to pay a dividend to shareholders. Few areas have presented greater opportunity for abuse in the past. The potentially adverse interests of corporate creditors, shareholders, and directors require that all concerned be readily able to apply the minimum standards for socially responsible behavior that are mandated by the statute.

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to transact business in Alaska. The degree to which these corporations ought to conform to the structure and practices mandated for entities organized under the laws of Alaska was debated in view of the recent experience in California. California legislators felt that foreign incorporation was frequently used by businesses intending to conduct the bulk of their affairs in California and intending to have as the majority of their employees and shareholders Californians, and yet organized under the laws of other jurisdictions (frequently Delaware) for the sole purpose of avoiding the public policy judgments expressed in the California General Corporations Law. To counter this perceived abuse, the 1977 California Act developed the concept of "pseudo foreign corporations" and as to these entities attempted to apply California law regarding internal management and financial operations. This bill does not attempt to subject foreign corporations to the organizational framework of this statute.

Foreign and domestic corporations treated alike for purposes of disclosure and reporting. After substantial discussion, it was concluded that Alaska should not, for the present, follow the California approach. As noted, the proposed Alaska Corporations Code is a middle-of-the-road statute that does not attempt to force upon domestic corporations a particular bias toward shareholder status. Under the proposed Code, it is possible to create a corporation that features rights for shareholders that go beyond even the California model. However, this is not mandatory. Because the proposed Code has left these matters up to the Alaskans forming the corporation, it was felt that the idea of foreign incorporation was less objectionable. However, the Commission is interested in making foreign corporations that elect the privilege of doing business in Alaska as responsible for their activities as are domestic (Alaska) corporations. To that end, the proposed Code has made uniform the basic reporting and disclosure requirements and has applied them to both domestic and foreign entities. The organizational framework of the Code is designed to make it easy for a non-Alaskan to determine the scope of these responsibilities, since they are gathered together in a single article rather than being intermixed throughout the text, as in the existing statute.

Evolving needs of Alaska Native Corporations anticipated and accommodated within a unitary statute: The proposed Code will enable the Legislature to ensure that when the

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exemptions and special provisions in federal law relating to Native corporations expire, those vital entities will be governed by statutory law developed after an extensive survey of their needs. The Commission has adopted the strongly felt sentiment of the Alaska Federation of Natives Task Force that Native corporations should not be governed by a separate code. If they are to play a vital social and economic role in advancing the interests of their shareholders, it was felt that these corporations cannot be hobbled by some unique statutory scheme causing doubt and encouraging litigation as to their powers and responsibilities.

Specific features: Two specific features of the proposed legislation are worthy of special mention. They relate to shareholder litigation and an abuse of limited liability.

Shareholder actions brought in the name of the corporation (derivative suits) were previously unregulated by statute in Alaska. In other jurisdictions few areas of corporate law have proven a greater source of conflict. On the one hand, the ability of a single shareholder to bring an action against a director or officer of that corporation and to recover for a breach of the duty of loyalty or care owed to the entity has been hailed as an essential weapon in the fight for social responsibility. Yet it cannot be denied that such litigation is both time-consuming and costly. Further, there is an unhappy history of shareholders commencing an action on the most tenuous of grounds in the hope that the defendants would buy their peace with an out-of-court settlement rather than stand and defend their records. Money paid in this fashion was usually pocketed by the shareholder even though the alleged injury had been to the corporation. This obvious abuse has been termed a "strike suit". The challenge is to draft a statute that facilitates the legitimate derivative action while at the same time removing the financial incentives from the strike suit.

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Revised Model Act, praised the Commission's efforts and work product in this important regard.

Limited liability is an extraordinary advantage afforded to those citizens who elect to do business in the corporate form. In undertaking its study, the Commission has been concerned with the balance between the legitimate interest of enterprisers against the not infrequent fact of and constant potential for abuse of other citizens who must deal, voluntarily or involuntarily, with a corporate entity. No provision of the proposed Code has drawn more interest, comment, and criticism than Section 488 of the draft introduced by Legislative Council as HB 343 and SB 246 in the Thirteenth Legislature. (The section number is the same in this bill) Because of this interest and the variety of strongly held beliefs advanced by a number of attorneys who have testified in hearings before the Legislature, I would like to explain the Commission's perception of a social problem, recount how the Commission originally proposed to resolve that problem, and explain the changes now suggested by the Commission in that approach.

It is an assumption on the part of those doing business in the corporate form that their personal assets are insulated from creditor claims against the corporation. This insulation from personal responsibility is a privilege conferred by the state upon some citizens that works to the substantial economic injury of others. The Commission suggests that such an extraordinary privilege is not, and should not be, without limits. In the marketplace, large institutional lenders and suppliers are protected by the presence of market leverage, the advice of counsel, and significant experience. This strength allows them to insist that participants in a corporate venture considered a poor risk pledge their personal liability as guarantors of the corporate obligation. If a tort claim arises, and the victim's injury or loss exceeds the corporation's assets, there are common law doctrines to "pierce the corporate veil" and obtain the personal assets of shareholders. Contingent fee arrangements, whereby the tort victim's lawyer is paid only if there is a recovery from the defendant, offer a reasonable probability that the tort victim can find legal representation.

However, this combination of economic and legal self-help for third parties has failed to protect the class of individuals most frequently victimized. These are the

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creditors of businesses that are incorporated with insubstantial assets and thereafter operated for the convenience of owners for as long as this proves advantageous. Thereafter, the corporation is simply abandoned, usually without any effort to comply with the statutory procedures for corporate dissolution. When this happens, suppliers, materialmen, employees, and others who have extended informal credit to the business are left without practical recourse. Because their business relationships have been informal, it is rarely the case that they will have contracted for the personal liability of those operating behind the corporate veil. Because their unpaid claims rarely exceed a few thousand dollars, the cost of litigation makes legal remedies impractical. The net result is that these creditors absorb a loss that they then pass on to the general public in the form of higher prices for their goods and services. In the worst case, they simply go out of business, depriving the public of their presence as competitors, employers, and taxpayers in the community.

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lenders. Liability arose only in favor of contract indebtedness for materials, supplies, inventory, or services furnished within Alaska. Further, that liability was limited to twenty-five thousand dollars on any contract indebtedness. Finally, individuals were free to preclude the liability created by Section 488 by the terms of a written contract.

Critical comment directed at Section 488 has been reviewed and given serious consideration by the Commission. While some persons felt that there should be no discipline of the limited liability privilege beyond that suggested at common law, others objected to two features of the Commission's suggestion: the very large potential for liability when the limitation was \$25,000 per creditor; and the potential that a court could interpret the original language to fix liability on an assistant secretary or some other subordinate officer. Upon reconsideration, these criticisms have been deemed valid and accordingly the Commission now recommends a significantly altered provision on secondary liability for incorporators, directors and certain officers.

As currently revised, the recommended provision on secondary liability differs in three important particulars from the one submitted to the Thirteenth Legislature. First, subsection (a) has been amended to make clear that the only persons potentially liable are incorporators, directors (or their delegates) and three specific officers in any Alaska corporation. In the instance of a foreign corporation doing business in Alaska, if the law of its state of incorporation permits substitutes for the officers who would otherwise have liability, such persons are liable to Alaskans for debts arising from transactions in our state. The objection that any employee performing at the command of the corporate president might be liable is thus expressly precluded. Second, the period of liability for an incorporator is now clearly defined by the new subsection (b). Third, the maximum exposure has been reduced by 90% to \$2,500 per claimant, rather than \$25,000, by the amended content of subsection (d). As redrafted, the liability preserved by this provision will work only in favor of the smallest creditors for whom the cost of litigation would be totally out of proportion to any vindication of their just claims.

As the Council is doubtless aware, prior versions of this proposed Alaska Corporations Code were introduced in March, 1982 and March, 1983, and in February, 1985. The press of

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business precluded its consideration in the first session of the Thirteenth Legislature. In the second session, the recommended Code was reported with a "do pass" recommendation out of the Senate Labor and Commerce Committee. It had not moved further at the expiration of the Thirteenth Legislature. The Commission has attempted to find in such circumstances further opportunity to refine the proposed Code and to expose its contents to interested segments of the community. The bill was not acted upon in the Fourteenth Legislature as HB 246 and SB 199.

In addition to the activities summarized in my letter of March 3, 1983, members of the Commission appeared as witnesses before both House and Senate Committees. Representatives of the Alaska Federation of Natives also appeared expressing orally their support for passage of this Code, which they have asserted in writing to members of the leadership in both bodies. The initial and final drafts of the proposed Revised Model Business Corporation Act were carefully reviewed, as well as the comments of its reporter who appeared in Anchorage during the June, 1983, convention of the Alaska Bar association. Many positive suggestions were found in the comments received from numerous quarters. The original recommended content of the Alaska Corporations Code continued the strong influence of the original Model Act. In a much simplified and more understandable organizational scheme, that influence continues, but is now heavily augmented by the work product of the drafters of the Revised Model Act.

The Commission recommends that the organization scheme of the new Code be adapted from that of the New York Business Corporation Law. In contrast to the more elaborate organization adopted for the Revised Model Act, the attached proposal draws related provisions of the statute together into twelve substantive articles creating a comprehensive and easily understandable organization.

Respectfully submitted,

John W. Abbott
John W. Abbott, Chairman
Alaska Code Revision Commission

JWA:mkz
09/006

cc: Hon. Steve Cowper
Hon. Jay Rabinowitz, Chief Justice
Executive Director, Legislative Affairs Agency .

STATE OF ALASKA
THE LEGISLATURE

ALASKA STATE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY
1987 003 1000

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 7, 1987

SUBJECT: Sectional Analysis of proposed Code Revision
Bills revising the Corporations Code
(Work Orders 5-0482 and 5-1076)

TO: Senator Bettye Fahrenkamp
Chair, Legislative Council

FROM: Theresa L. Hannister
Legislative Counsel

This is the revised sectional analysis that you requested for the proposed Code Revision Commission bills (House and Senate) on the revised corporations code. It accompanies the latest version of the bills. The bulk of the analysis and language is taken directly from House and Senate Joint Journal Supplement No. 8 of February 27, 1985; I have merely brought it up to date for the proposed bills.

ABBREVIATIONS USED

In this commentary the following abbreviations are used:

ACC--Alaska Corporations code (the short title of the comprehensive revision of corporation law to be made by this bill).

MBCA or "the Model Act"--Model Business Corporation Act as revised through July 1, 1969 (A product of a committee of the American Bar Association first published in 1950 and carried forward with changes until generally revised in 1984. The 1953 version became the basis of the existing Alaska Business Corporation Act, ch. 126, SLA 1957, now AS 10.05.003 -- 10.05.828).

RMBCA or Revised Model Act--Revised Model Business Corporation Act (1984) (the 1984 comprehensive revision by a committee of the American Bar Association of its earlier Model Business Corporation Act).

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CGCL or GCL--California General Corporation Law (the 1977 omnibus revision of California's for-profit corporations code, one of the two principal sources for the ACC).

NYBCL or BCL--New York Business Corporation Law (the second of the two principal sources for the ACC).

ANCSA--Alaska Native Claims Settlement Act (Public Law 92-203, as amended, 43 U.S.C. sec. 1601, et seq., the Federal Act of December 18, 1971, and its amendments settling land claims and providing for the formation of regional and village corporations. The Act and its amendments are reprinted in Volume 1 of Alaska Statutes).

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CHAPTER 06. ALASKA CORPORATIONS CODE

ARTICLE 1. CORPORATE PURPOSES AND POWERS

- Sec. 10.06.005. Purposes
- Sec. 10.06.010. General Powers
- Sec. 10.06.015. Defense of Ultra Vires
- Sec. 10.06.020. Limitations on Authority of Corporate Agents
- Sec. 10.06.025. Contracts or Conveyances Binding Domestic and Foreign Corporations

ARTICLE 2. NAME AND SERVICE OF PROCESS

- Sec. 10.06.105. Corporate Name
- Sec. 10.06.110. Reservation of Corporate Name
- Sec. 10.06.115. Application to Reserve Corporate Name
- Sec. 10.06.120. Transfer of Reserved Name
- Sec. 10.06.125. Registration of Corporate Name
- Sec. 10.06.130. Use of Same or Deceptively Similar Name
- Sec. 10.06.135. Procedure for Registration of Corporate Name
- Sec. 10.06.140. Fee for and Duration of Registered Name
- Sec. 10.06.145. Renewal of Registered Name
- Sec. 10.06.150. Registered Office and Registered Agent
- Sec. 10.06.155. Registration of Agent by Nonresident With Controlling Interest
- Sec. 10.06.160. Filing List of Registered Corporations With Superior Court; Updating and Publishing
- Sec. 10.06.165. Change of Registered Office or Agent
- Sec. 10.06.170. Change or Resignation of Registered Agent
- Sec. 10.06.175. Service of Process on Corporation

ARTICLE 3. FORMATION OF CORPORATIONS

- Sec. 10.06.205. Incorporators
- Sec. 10.06.208. Articles of Incorporation
- Sec. 10.06.210. Articles of Incorporation: Optional Provisions
- Sec. 10.06.213. Filing of Articles of Incorporation

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- Sec. 10.06.215. Disclosure of Corporate Purposes
- Sec. 10.06.218. Effect of Issuance of Certificate of Incorporation
- Sec. 10.06.220. Assumption of Purported Powers of Nonexistent Corporation: Liability
- Sec. 10.06.223. Organization Meeting
- Sec. 10.06.225. Power of Incorporators Before Directors' Election
- Sec. 10.06.228. Bylaws: Adoption, Amendment, or Repeal
- Sec. 10.06.230. Bylaws: Number of Directors and other Content
- Sec. 10.06.233. Bylaws to be Kept at Office: Inspection by Shareholders

ARTICLE 4. CORPORATE FINANCE

- Sec. 10.06.305. Creation, Classes, and Issuance of Shares
- Sec. 10.06.308. Issuance of Preferred or Special Classes of Shares
- Sec. 10.06.310. Issuance of Shares in Series
- Sec. 10.06.313. Variations in Rights and Preferences of Shares
- Sec. 10.06.315. Series Rights and Preferences Established by Board
- Sec. 10.06.318. Manner of Establishing Series
- Sec. 10.06.320. Filing of Statement Before Issuance of Series
- Sec. 10.06.323. Effect of Filing Statement
- Sec. 10.06.325. Redemption of Shares; Creation of Sinking Fund; Repurchase Agreements
- Sec. 10.06.328. Irrevocability of Subscriptions for Shares
- Sec. 10.06.330. Payment of Subscription for Shares
- Sec. 10.06.333. Forfeiture of Shares for Default in Payment
- Sec. 10.06.335. Consideration for Shares
- Sec. 10.06.338. Payment for Shares
- Sec. 10.06.340. Judgment of Board or Shareholders as to Value of Consideration Conclusive
- Sec. 10.06.343. Stock Rights and Options
- Sec. 10.06.345. Expenses of Organization, Reorganization, and Financing
- Sec. 10.06.348. Certificates Representing Shares
- Sec. 10.06.350. Information Required to be Stated on Certificate
- Sec. 10.06.353. Full Payment Required for Certificate
- Sec. 10.06.355. Issuance of Fractional Shares or Scrip
- Sec. 10.06.358. Distributions; Conditions