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authority under this chapter; and

(2) member, acting solely in the capacity of a member, is not evidence against the company.

Sec. 10.50.260. LIMITED LIABILITY COMPANY CHARGED WITH KNOWLEDGE OF OR NOTICE TO MEMBER OR MANAGER. (a) Except as provided in (b) and (c) of this section, and except for a fraud on the company committed by or with the consent of the member who has the knowledge or receives the notice, the following operate as notice to or knowledge of a limited liability company:

(1) notice given to a company member of a matter relating to the affairs of the company;

(2) the knowledge of a company member acting in the particular matter, whether acquired while a member or known at the time of becoming a member; and

(3) the knowledge of a company member who reasonably could and should have communicated the knowledge to a member acting in the particular matter.

(b) If the company is managed by a manager, the following operate as notice to or knowledge of a limited liability company, except for a fraud on the company committed by or with the consent of the manager who has the knowledge or receives the notice:

(1) notice given to a manager of a matter relating to the affairs of the limited liability company;

(2) the knowledge of the manager acting in the particular matter, acquired while a manager or known at the time of becoming a manager; and

(3) the knowledge of a company manager who reasonably could and should have communicated the knowledge to the manager acting in the particular matter.

(c) If the company is managed by a manager, notice to, or the knowledge of, a member of a limited liability company while the member is acting solely in the capacity of a member does not operate as notice to or knowledge of the company.

Sec. 10.50.265. LIABILITY OF MEMBERS TO THIRD PARTIES. A person who is a member of a limited liability company is not liable, solely by reason of being

a member, under a judgment, decree, or order of a court, or in another manner, for a liability of the company, whether the liability arises in contract, tort, or another form, or for the acts or omissions of another member, manager, agent, or employee of the company.

ARTICLE 8. CONTRIBUTIONS.

Sec. 10.50.275. CONSIDERATION FOR COMPANY INTERESTS. An interest in a limited liability company may be issued for property or services rendered. A member who has contributed property or services rendered may also contribute a promissory note or other obligation to contribute property or services.

Sec. 10.50.280. LIABILITY FOR CONTRIBUTIONS. (a) Notwithstanding AS 09.25.010 - 09.25.020, a promise by a member of a limited liability company to contribute property or services to the company is not enforceable unless the promise is stated in a writing signed by the member.

(b) Unless otherwise provided in an operating agreement of the company, a member of a limited liability company is liable for performing an enforceable promise made to the company to contribute property or services, even if the member is unable to perform because of death, disability, or another reason.

(c) If a member of a limited liability company does not make the member's required contribution of property or services, the member shall, at the option of the company, contribute cash equal to that portion of value of the required contribution that has not been made.

(d) Unless otherwise provided in an operating agreement of the company, an assignor of a limited liability company interest is not released from the assignor's liability to the company under this section, even if the assignee becomes a member with respect to the assigned interest.

Sec. 10.50.285. COMPROMISE OF CONTRIBUTION. Unless otherwise provided in an operating agreement of the company, the obligation of a member to make a contribution to a limited liability company may not be compromised, unless all of the other members consent to the compromise.

ARTICLE 9. DISTRIBUTIONS.

Sec. 10.50.290. SHARING OF PROFITS. Subject to AS 10.50.305 -

10.50.320, and unless otherwise provided in an operating agreement of the company, a member of a limited liability company shall be repaid the member's contribution to capital and shares equally in the profits and other assets of the company remaining after all liabilities, including liabilities to members, are satisfied.

Sec. 10.50.295. INTERIM DISTRIBUTIONS UNDER OPERATING AGREEMENT. Subject to AS 10.50.305 - 10.50.320, if a limited liability company makes an interim distribution of its assets to its members, the company shall make the distribution to the members in the manner provided in an operating agreement of the company. The operating agreement of the company may authorize different interim distributions for different classes of members.

Sec. 10.50.300. INTERIM DISTRIBUTIONS WITHOUT OPERATING AGREEMENT. Subject to AS 10.50.305 - 10.50.320, if an operating agreement of the company does not provide for the interim distribution of the assets of the company, when a limited liability company makes an interim distribution of its assets, the interim distributions to each member of the company shall be equal.

Sec. 10.50.305. RESTRICTIONS ON DISTRIBUTIONS. (a) A distribution may not be made by a limited liability company if, after giving effect to the distribution,

(1) the company would not be able to pay its debts as they become due in the usual course of conducting its affairs; or

(2) the limited liability company's assets would be less than the sum of its liabilities plus, unless otherwise provided in an operating agreement, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other members upon dissolution that are superior to the rights of the member receiving the distribution.

(b) A limited liability company may base a determination that a distribution is not prohibited under (a) of this section on

(1) financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances; or

(2) a fair valuation or other method that is reasonable under the circumstances.

(c) Except as provided in (e) of this section, the effect of a distribution in accordance with (a) of this section is measured as of the date

(1) the distribution is authorized if the payment occurs within 120 days after the date of authorization; or

(2) payment is made if the payment occurs more than 120 days after the date of authorization.

(d) If the terms of an indebtedness provide that payment of principal and interest is to be made only if and to the extent that payment of a distribution to members could then be made under this section, indebtedness of a limited liability company, including indebtedness issued as a distribution, is not a liability for purposes of determinations made under (b) of this section.

(e) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, and the effect of the distribution is measured on the date the payment is actually made.

Sec. 10.50.315. ADDITIONAL RESTRICTIONS IN ARTICLES OR OPERATING AGREEMENT. Nothing in this chapter prohibits additional restrictions upon the purchase or redemption of a company's own limited liability company interests by provision in the articles of organization or operating agreement of the limited liability company or in another agreement entered into by the company.

Sec. 10.50.320. LIABILITY OF MEMBERS RECEIVING PROHIBITED DISTRIBUTIONS; SUIT AGAINST MEMBERS. (a) A member of a limited liability company who receives a distribution prohibited by this chapter with knowledge of facts indicating the impropriety of the distribution is liable to the company for the benefit of all of the creditors or members entitled to institute an action under (b) of this section for the amount received by the member with interest at the legal rate on judgments until paid. The liability of the member under this subsection may not exceed the liabilities of the company owed to nonconsenting creditors at the time of the violation and the injury suffered by nonconsenting members.

(b) Suit may be brought in the name of the company to enforce the liability to

(1) creditors arising under (a) of this section for a violation of

AS 10.50.305 against any or all members liable by any one or more creditors of the company whose debts or claims arose before the time of the distribution to members and who have not consented to the distribution, whether or not they have reduced their claims to judgment; or

(2) members arising under (a) of this section for a violation of AS 10.50.305 against any or all members liable by any one or more members holding preferred limited liability company interests outstanding at the time of the distribution who have not consented to the distribution, without regard to the provisions of AS 10.50.735.

(c) A member sued under this section may compel contribution from all other members liable under this section.

(d) This section does not affect the liability that a member may have under other applicable law.

Sec. 10.50.330. TIME FOR INTERIM DISTRIBUTIONS. A member of a limited liability company is entitled to receive interim distributions under AS 10.50.295 - 10.50.300 at the times or upon the happening of the events specified in an operating agreement of the company, or at the times determined by the members or managers under AS 10.50.150.

Sec. 10.50.335. DISTRIBUTIONS WHEN A PERSON CEASES TO BE A MEMBER. (a) Except for termination under AS 10.50.205, when the limited liability company membership of a person terminates and the termination does not cause dissolution of the company, the company shall distribute to the person any distribution that the person was entitled to receive before the person's membership terminated.

(b) In addition to a distribution made under (a) of this section, a limited liability company shall distribute to a terminating member the amount of the member's limited liability company interest. If an operating agreement of the company does not provide the amount of the distribution or a method for determining the amount of the distribution, the company shall make the distribution within a reasonable time after termination and the amount of the distribution is the fair value of the member's limited liability company interest as of the date of termination based on the member's right to share in distributions from the company.

(c) If an election to continue a limited liability company until a certain date or event is in effect under AS 10.50.085, then (a) and (b) of this section do not apply to the termination of the membership of a member unless the member is also a manager of the company.

Sec. 10.50.340. DISTRIBUTION IN KIND. (a) Unless otherwise provided in an operating agreement of the company, a member, regardless of the nature of the member's contribution, may not demand and receive a distribution from a limited liability company in a form other than cash.

(b) Unless otherwise provided in an operating agreement of the company, a limited liability company may not compel a member of the company to accept from the company a distribution of a company asset in a form other than cash to the extent that the percentage of the asset distributed to the member exceeds the percentage that the member would have shared in a cash distribution equal to the value of the asset at the time of distribution.

Sec. 10.50.345. RIGHT TO DISTRIBUTION. When a member of a limited liability company is entitled to receive a distribution from the company, the member is a creditor of the company with respect to the distribution, and is entitled to all remedies available to a creditor of the company.

Sec. 10.50.348. INAPPLICABILITY TO WINDING UP AND INVOLUNTARY OR VOLUNTARY DISSOLUTION. AS 10.50.290 - 10.50.340 do not apply in a proceeding for winding up and dissolution of a limited liability company.

ARTICLE 10. OWNERSHIP AND TRANSFER OF PROPERTY.

Sec. 10.50.350. OWNERSHIP OF COMPANY PROPERTY. (a) Property transferred to or otherwise acquired by a limited liability company is the property of the company and is not the property of the members individually.

(b) A limited liability company shall acquire, hold, and convey property, including real property, in the name of the company. If a limited liability company acquires an interest in property, the company holds the title to the interest and not the members individually.

Sec. 10.50.355. TRANSFER OF PROPERTY. (a) Except as provided in (b)

of this section, a limited liability company may transfer the property of the company if the company uses an instrument of transfer signed by a member of the company in the name of the company.

(b) If the company is managed by a manager,

(1) title to limited liability company property may be transferred by an instrument of transfer signed by a manager of the company in the name of the company; and

(2) a member, solely by reason of being a member, does not have the authority to transfer the property of the company.

Sec. 10.50.360. RECOVERY OF PROPERTY. A limited liability company may recover property transferred under AS 10.50.355 if the company proves that the execution of the instrument of transfer did not bind the company under AS 10.50.250, unless the property has been transferred by the initial transferee, or by a person claiming through the initial transferee, to a subsequent transferee who gives value without having notice that the person who signed the instrument of initial transfer lacked authority to bind the company.

Sec. 10.50.370. NATURE OF INTEREST IN COMPANY. A limited liability company interest is personal property.

Sec. 10.50.375. ASSIGNMENT OF INTEREST IN COMPANY. (a) A person may assign a limited liability company interest in whole or in part.

(b) The assignment of a limited liability company interest entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor is entitled.

(c) The assignment of a limited liability company interest does not dissolve the company or entitle the assignee to participate in the management and affairs of the company, to become a member, or to exercise the rights of a member. Unless the assignee of the interest becomes a member with respect to the interest, the assignor continues to be a member and may exercise the rights of a member, subject to the members' right to remove the assignor under AS 10.50.205.

(d) Unless the assignee becomes a member, an assignee of a limited liability company interest is not liable as a member solely as a result of the assignment.

(e) The assignor of a limited liability company interest is not released, solely as a result of the assignment, from the assignor's liability as a member.

(f) An operating agreement may establish terms different from those in (a) - (e) of this section.

(g) Unless otherwise provided in an operating agreement of the company, the pledge of, or granting of a security interest, lien, or other encumbrance in or against, a part or all of a member's limited liability company interest is not an assignment under this section and does not terminate the membership or the rights and powers of the member.

Sec. 10.50.380. RIGHTS OF JUDGMENT CREDITORS. (a) If a judgment creditor of a limited liability company member applies to a court of competent jurisdiction, the court may charge the member's limited liability company interest for payment of the unsatisfied amount of the judgment.

(b) To the extent a limited liability company interest is charged under (a) of this section, the judgment creditor has only the rights of an assignee of the member's interest.

Sec. 10.50.385. POWERS OF ESTATE OF A DECEASED OR INCOMPETENT MEMBER. If a member who is an individual dies or if a court of competent jurisdiction determines the member to be incompetent to manage the member's person or property, the member's executor, administrator, guardian, conservator, or other legal representative has the rights of an assignee of the member's interest, if the member's interest has not been terminated.

Sec. 10.50.390. POWERS OF DISSOLVED OR TERMINATED ENTITY. If a member who is not an individual terminates or is dissolved, the member's legal representative or successor has the rights of an assignee of the member's interest.

ARTICLE 11. DISSOLUTION.

Sec. 10.50.400. DISSOLUTION. A limited liability company is dissolved and its affairs shall be wound up if

(1) an event occurs that is identified in the articles of organization or an operating agreement as causing dissolution; if an election under AS 10.50.085(a) is in effect, the event does not cause dissolution unless the event is identified in the

articles or operating agreement before or at the same time the election is stated in the articles;

(2) all of the members of the company consent in writing unless an election under AS 10.50.085(a) is in effect;

(3) a person's membership in the company terminates, unless

(A) the affairs of the company are continued by the consent of all of the remaining members on or before the 90th day following the termination of the membership;

(B) an operating agreement provides otherwise; or

(C) an election under AS 10.50.085(a) is in effect and

(i) the election provides that the termination does not cause the company to dissolve; or

(ii) the person whose membership terminates is not a manager of the company; or

(4) the superior court enters a decree for judicial dissolution of the company under AS 10.50.405.

Sec. 10.50.405. DISSOLUTION BY COURT. On application by or for a member of a limited liability company, the superior court may order the company dissolved if the court determines that it is not reasonably practicable for the company to conduct its affairs in conformity with an operating agreement of the company.

Sec. 10.50.408. INVOLUNTARY DISSOLUTION. (a) A limited liability company may be dissolved involuntarily by the commissioner if

(1) the company is delinquent six months in filing its biennial report or in paying a fee or a penalty;

(2) the company has failed for 30 days to appoint and maintain a registered agent in the state;

(3) the company has failed for 30 days after change of its registered office or registered agent to file in the office of the commissioner a statement of the change; or

(4) a misrepresentation of material facts has been made in the application, report, affidavit, or other document submitted under this chapter.

(b) A limited liability company may not be dissolved under this section unless the commissioner has given the company written notice of its delinquency, failure, or misrepresentation by certified mail addressed to its registered agent, registered office, manager, or members at the last known address as shown by the records of the commissioner. If the company fails, within 60 days after the notice is sent by certified mail, to contest the alleged delinquency, failure, or misrepresentation, it may be dissolved under (d) of this section.

(c) If, following a hearing, the commissioner determines the presence of the delinquency, failure, or misrepresentation providing grounds for involuntary dissolution under this section, the company may appeal to the superior court. The court shall either sustain the commissioner or direct the commissioner to take action the court considers proper.

(d) If a limited liability company has given cause for involuntary dissolution and has failed to correct the neglect, omission, delinquency, or noncompliance as provided in this section, and there has not been a controlling order of the superior court, the commissioner shall dissolve the company by issuing a certificate of involuntary dissolution containing a statement that the company has been dissolved, the date, and the reason for which it was dissolved. The original certificate of dissolution shall be placed in the department files and a copy of it mailed to the company at its registered office or in care of its registered agent, manager, or members at the last known address, as shown by the records of the commissioner. Upon the issuance of the certificate of involuntary dissolution, the existence of the company ceases, except as otherwise provided in this chapter, and its name shall be available to use and may be adopted by another company on a date that is six months or later after the dissolution.

(e) A company dissolved under this section may be reinstated within two years from the date of the certificate of involuntary dissolution if it is established to the satisfaction of the commissioner that in fact there was no cause for the dissolution, or if the delinquency, failure, or misrepresentation resulting in dissolution has been corrected and payment made of double the amount delinquent along with the amount the company would have paid had it not been dissolved during the two-year period.

Reinstatement may not be authorized if the name of the company is not distinguishable upon the records of the department, unless the company being reinstated amends its articles of organization to change its name to conform with the provisions of this chapter.

Sec. 10.50.410. AUTHORITY TO WIND UP. Unless otherwise provided in an operating agreement, the affairs of a limited liability company may be wound up by the

(1) members or managers who have authority under AS 10.50.110 to manage the company before dissolution; or

(2) superior court on the application of a member of the company or the member's legal representative or assignee if

(A) a member or manager identified in (1) of this subsection has engaged in wrongful conduct; or

(B) other cause is shown.

Sec. 10.50.415. ACTS OF WINDING UP. Unless otherwise provided in an operating agreement of the company, a person winding up the affairs of a limited liability company may, in the name of, and for and on behalf of, the company,

(1) prosecute and defend court actions;

(2) settle and close the affairs of the company;

(3) dispose of and transfer the property of the company;

(4) discharge the liabilities of the company; and

(5) distribute to the members the assets of the company.

Sec. 10.50.420. AGENCY POWER OF MANAGER OR MEMBER AFTER DISSOLUTION. (a) Except as provided in (b) - (d) of this section, after dissolution of a limited liability company, a member having authority to wind up the company's affairs can bind the company by an act that

(1) is appropriate for winding up the company's affairs or completing transactions unfinished at dissolution; or

(2) would have bound the company if the company had not been dissolved, if the other party to the transaction does not have notice of the dissolution; in this paragraph, filing the articles of dissolution is presumed to constitute notice of

the dissolution.

(b) A member's act that is not binding on the limited liability company under (a) of this section binds the company if the act is otherwise authorized by the company.

(c) A member's act that violates a restriction on the member's authority does not bind the member's limited liability company with regard to a person who knows about the restriction, even if the member's act would otherwise be binding under (a) of this section or is otherwise authorized.

(d) If the company is managed by a manager, a member does not have the authority to bind the company if the member is acting solely in the capacity of a member, and a manager of the company can bind the company by an act that

(1) is appropriate for winding up the company's affairs or completing transactions unfinished at dissolution; or

(2) would have bound the company if the company had not been dissolved if the other party to the transaction does not have notice of the dissolution; in this paragraph, filing the articles of dissolution is presumed to constitute notice of the dissolution.

Sec. 10.50.425. DISTRIBUTION OF ASSETS. Upon the winding up of a limited liability company, the assets of the company shall be distributed in the following manner and order of priority:

(1) payment, or adequate provision for payment, to creditors, including, to the extent permitted by law, members who are creditors and not covered by (2) of this section, in satisfaction of the liabilities of the company;

(2) unless otherwise provided in an operating agreement of the company, payment to members or former members in satisfaction of the company's liabilities for distributions under AS 10.50.295 - 10.50.335;

(3) unless otherwise provided in an operating agreement of the company, to members and former members in the following order of priority:

(A) for the return of their contributions; and

(B) in proportion to the members' respective rights to share in distributions from the company before dissolution.

Sec. 10.50.430. ARTICLES OF DISSOLUTION. After the dissolution of a limited liability company under AS 10.50.400, the limited liability company may file articles of dissolution with the department. The articles must state

(1) the name of the company;

(2) the date of filing of the company's articles of organization and of any amendments to the articles of organization;

(3) the reason for filing the articles of dissolution;

(4) the effective date, which must be a specific date, of the articles of dissolution if the articles of dissolution are not to be effective when filed; and

(5) other information determined appropriate by the members or managers filing the articles.

Sec. 10.50.435. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY. (a) Upon dissolution, a limited liability company may dispose of the known claims against it by filing articles of dissolution under AS 10.50.430 and following the procedures described in this section.

(b) A dissolved limited liability company shall notify its known claimants in writing of the dissolution at any time after the effective date of dissolution. The written notice must

(1) describe the information that must be included in the claim;

(2) provide a mailing address where the claim may be sent;

(3) state the deadline, which may not be fewer than 120 days after the later of the date of the written notice or the filing of articles of dissolution under AS 10.50.430, for the company to receive the claim; and

(4) state that the claim is barred if it is not received by the company by the deadline.

(c) A claim against a limited liability company is barred if a claimant

(1) who was given written notice under (b) of this section does not deliver the claim to the company by the deadline; or

(2) whose claim is rejected by the company does not begin a proceeding to enforce the claim within 90 days after the date of the rejection notice.

(d) In this section, "claim" does not include a contingent liability or a claim

based on an event occurring after the effective date of dissolution.

Sec. 10.50.440. UNKNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY COMPANY. (a) If a limited liability company publishes a newspaper notice in accordance with (b) of this section and files articles of dissolution under AS 10.50.430, the following claims are barred unless the claimant commences a proceeding to enforce the claim against the company within three years after the later of the publication date of the newspaper notice or the filing of the articles of dissolution:

(1) a claim by a claimant who did not receive written notice under AS 10.50.435;

(2) a claim sent within the time allowed if the company does not act on the claim;

(3) a claim that is contingent or based on an event occurring after the effective date of dissolution.

(b) The notice published under (a) of this section shall be published once in a newspaper of general circulation in the judicial district where the company's principal office, or its registered office if it does not have a principal office in this state, is located in this state, and must

(1) describe the information that must be included in a claim;

(2) provide a mailing address where the claim may be sent;

(3) state that a claim against the company is barred unless a proceeding to enforce the claim is begun within three years after the publication of the notice; and

(4) request that persons with claims against the company present them in writing to the company as provided in the notice.

(c) A claim may be enforced under this section

(1) against the company to the extent of the company's undistributed assets; or

(2) if the company's assets have been distributed in liquidation, against a member of the company to the extent of the member's pro rata share of the claim or of the assets of the company distributed to the member in liquidation, whichever is less; a member's total liability for all claims under this section may not exceed the

total amount of assets of the company that are distributed to the member.

ARTICLE 12. MERGER AND CONSOLIDATION.

Sec. 10.50.500. AUTHORITY FOR MERGER OR CONSOLIDATION. Unless otherwise provided in an operating agreement of the company, and subject to the law applicable to the other limited liability company, a limited liability company may merge or consolidate with or into a limited liability company or a foreign limited liability company.

Sec. 10.50.505. CONVERSION OF RIGHTS AND INTERESTS. The rights of or interests in a limited liability company that is a party to a merger or consolidation may be exchanged for or converted into cash, property, obligations, rights or interests in the surviving or resulting limited liability company.

Sec. 10.50.510. APPROVAL OF MERGER OR CONSOLIDATION. (a) Unless otherwise provided in an operating agreement of the company, a limited liability company may not approve a proposed merger or consolidation unless the merger or consolidation is approved by all of the members of the company.

(b) A foreign limited liability company that is a party to a proposed merger or consolidation may not approve the merger or consolidation unless the merger or consolidation is approved in the manner and by the vote required by the law applicable to the foreign limited liability company.

(c) A party to a merger or consolidation under this chapter may abandon the merger or consolidation as provided in the merger or consolidation agreement.

Sec. 10.50.515. DELIVERY OF ARTICLES OF MERGER OR CONSOLIDATION. The limited liability company that survives or results from a merger or consolidation under this chapter shall file with the department articles of merger or consolidation signed by each limited liability company that is a party to the merger or consolidation.

Sec. 10.50.520. CONTENTS OF ARTICLES OF MERGER OR CONSOLIDATION. The articles of merger or consolidation required by AS 10.50.515 must state

(1) the name of each limited liability company that is a party to the merger or consolidation;

(2) the jurisdiction where each limited liability company that is a party to the merger or consolidation was organized;

(3) that an agreement of merger or consolidation has been approved and signed by each limited liability company that is a party to the merger or consolidation;

(4) the name of the surviving or resulting limited liability company;

(5) the future effective date, which must be a specific date, of the merger or consolidation if the merger or consolidation is not effective when the articles are filed;

(6) that the agreement of merger or consolidation is on file at an office of the surviving or resulting limited liability company and the address of the office;

(7) that a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting limited liability company on request and without cost to a person holding an interest in a limited liability company that is a party to the merger or consolidation;

(8) if the surviving or resulting limited liability company is not organized under the laws of this state, a statement that the surviving or resulting limited liability company

(A) agrees that it may be served with process in this state in a proceeding to enforce an obligation of a company that is a party to the merger or consolidation and that was organized under the laws of this state, and to enforce an obligation of the surviving or resulting company;

(B) appoints the department as its agent for service of process in an enforcement proceeding under (A) of this paragraph; and

(C) the address to which a copy of the process may be mailed to the surviving or resulting company by the department.

Sec. 10.50.525. EXECUTION OF ARTICLES OF MERGER OR CONSOLIDATION. Articles of merger or consolidation shall be signed by a limited liability company that is a party to the merger or consolidation.

Sec. 10.50.530. EQUIVALENT TO ARTICLES OF DISSOLUTION. Articles of merger or consolidation constitute articles of dissolution for a limited liability company that is not the surviving or resulting limited liability company in the merger

or consolidation.

Sec. 10.50.535. EFFECTIVE DATE OF MERGER OR CONSOLIDATION. A merger or consolidation under AS 10.50.500 - 10.50.565 takes effect upon the later of the effective date of the filing of the articles of merger or consolidation or an effective date stated in the articles of merger or consolidation.

Sec. 10.50.540. USE OF MERGER OR CONSOLIDATION AGREEMENT TO AMEND OR ADOPT OPERATING AGREEMENT. (a) An agreement of merger or consolidation approved under AS 10.50.510 may amend an operating agreement of a limited liability company or adopt a new operating agreement for the company if the company is the surviving or resulting limited liability company in the merger or consolidation.

(b) An approved agreement of merger or consolidation may provide that the operating agreement of a limited liability company that is a party to the merger or consolidation, including a limited liability company organized for the purpose of consummating a merger or consolidation, is the operating agreement of a limited liability company that is the surviving or resulting limited liability company.

(c) An amendment to an operating agreement or the adoption of a new operating agreement under this section is effective when the merger or consolidation is effective.

(d) This subsection is not intended to limit the accomplishment of a merger or of a matter referred to in this section by other means provided for in an operating agreement or in another agreement or as otherwise permitted by law.

Sec. 10.50.545. GENERAL EFFECTS OF MERGER OR CONSOLIDATION. (a) When a merger or consolidation becomes effective, the limited liability companies that are parties to a merger or consolidation agreement become a single limited liability company that, in the case of a merger, is the limited liability company named in the plan of merger as the surviving limited liability company, and, in the case of a consolidation, is the limited liability company named in the plan of consolidation as the resulting limited liability company.

(b) When a merger or consolidation becomes effective, a limited liability company that is a party to the merger or consolidation agreement and that is not the

surviving or resulting limited liability company ceases to exist.

(c) The surviving limited liability company of a merger or the limited liability company resulting from a consolidation possesses all the rights, privileges, immunities, and powers of each limited liability company that is a party to the merger or consolidation agreement and is subject to all the restrictions, disabilities, and duties of each limited liability company that is a party to the merger or consolidation to the extent the rights, privileges, immunities, powers, franchises, restrictions, disabilities, and duties apply to the type of limited liability company that is the surviving limited liability company or the resulting limited liability company.

Sec. 10.50.550. EFFECT OF MERGER OR CONSOLIDATION ON PROPERTY OF COMPANIES. The real and personal property, the debts due, including promises to make capital contributions, other choses in action, and the other interests of the limited liability companies that are parties to a merger or consolidation belong to the surviving or resulting limited liability company without further action by the companies.

Sec. 10.50.555. EFFECT OF MERGER OR CONSOLIDATION ON LIABILITIES. (a) The surviving or resulting limited liability company in a merger or consolidation is liable for the liabilities of the limited liability companies that are parties to the merger or consolidation.

(b) A claim, action, or other proceeding that exists at the time of the merger or consolidation and that is pending by or against a limited liability company that is a party to a merger or consolidation may be pursued as if the merger or consolidation had not taken place, or the surviving or resulting limited liability company may be substituted in the claim, action, or other proceeding.

Sec. 10.50.560. RIGHTS OF CREDITORS. The rights of creditors and liens on the property of a limited liability company that is a party to a merger or consolidation are not impaired by the merger or consolidation.

Sec. 10.50.565. CONVERSION AT MERGER OR CONSOLIDATION. (a) Upon a merger or consolidation, the limited liability company interests that are to be converted or exchanged into interests, cash, obligations, or other property under the terms of a merger or consolidation agreement are converted as provided by the merger

or consolidation agreement.

(b) Upon a merger or consolidation, the former holders of interests converted under (a) of this section have the rights provided in the merger or consolidation agreement or otherwise provided by law.

Sec. 10.50.590. DEFINITION. In AS 10.50.500 - 10.50.590, "limited liability company" means a limited liability company organized under this chapter or a foreign limited liability company.

ARTICLE 13. FOREIGN LIMITED LIABILITY COMPANIES.

Sec. 10.50.600. GOVERNING LAW. (a) Subject to the constitution of this state, the law of the state or other jurisdiction under which a foreign limited liability company is organized governs the organization and internal affairs of the company.

(b) The department may not deny registration to a foreign limited liability company because of differences between the law of this state and the law of the state or other jurisdiction under which the foreign limited liability company is organized.

Sec. 10.50.605. REGISTRATION REQUIRED. Before conducting affairs in this state, a foreign limited liability company shall register with the department. To register, the company shall deliver to the department an application for registration as a foreign limited liability company.

Sec. 10.50.610. EXECUTION OF REGISTRATION APPLICATION. An application for registration filed by a foreign limited liability company under AS 10.50.605 shall be signed by a person who is authorized by the law of the state or other jurisdiction where the company was organized to sign the application.

Sec. 10.50.615. CONTENTS OF REGISTRATION APPLICATION. (a) An application for the registration of a foreign limited liability company must state

(1) the name of the foreign limited liability company and, if different, the name the company proposes to use in this state;

(2) the state or other jurisdiction where the company was organized, and date of its organization;

(3) the name and address of the company's registered agent;

(4) that the department is appointed the agent of the company for service of process if the foreign limited liability company fails to appoint or maintain

a registered agent under AS 10.50.635;

(5) the address of the office required by the state or other jurisdiction of the company's organization to be maintained in that state or other jurisdiction, or, if the state or other jurisdiction does not require an office to be maintained in that state or other jurisdiction, the principal office of the company;

(6) the purpose the company proposes to pursue in the conduct of its affairs in this state and the codes from the identification code established under AS 10.06.870 that most closely describe the activities in which the company will engage in this state;

(7) the names and addresses of the managers of the company, or, if the company is not managed by a manager, the names and addresses of the members of the company;

(8) the name and address of each person owning at least a five percent interest in the company and the percentage of interest owned by that person in the company; and

(9) that the company is a foreign limited liability company.

(b) In addition to the information required by (a) of this section, an application must include proof from the jurisdiction where the company was organized that indicates that the company was organized in that jurisdiction.

Sec. 10.50.620. NAME. The department may not file the application for registration of a foreign limited liability company unless the name of the company satisfies the requirements of AS 10.50.020 - 10.50.025. If the name under which a foreign limited liability is organized in the state or other jurisdiction of its organization does not satisfy the requirements of AS 10.50.020 - 10.50.025, the company may register under AS 10.50.605 if the company uses an assumed name that is available to the company under this chapter and that satisfies the requirements of AS 10.50.020 - 10.50.025.

Sec. 10.50.623. CHANGE OF NAME. If a foreign limited liability company that is registered under this chapter changes its name to one under which it may not register under this chapter, the registration of the company is suspended and the company may not conduct affairs in this state until it has changed its name to a name

available to it under the laws of this state.

Sec. 10.50.625. AMENDMENT OF REGISTRATION. A foreign limited liability company may amend its registration by filing an amendment of registration with the department that is signed by a person who has the authority to sign it under the law of the state or other jurisdiction of the company's organization.

Sec. 10.50.630. CONTENTS OF AMENDMENT OF REGISTRATION. (a) The amendment of registration filed by a foreign limited liability company must state the

(1) name of the company;

(2) date the original application for registration was filed; and

(3) amendment.

(b) The application for registration may be amended in any way if the application for registration as amended contains only provisions that this chapter allows to be contained in an application for registration at the time of amendment.

Sec. 10.50.635. REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN COMPANY. A foreign limited liability company registered under this chapter shall have and continuously maintain in the state a registered

(1) office that may be, but need not be, the same as its office in this state; and

(2) agent, who may be either an individual resident in this state whose business office is identical to the registered office, a corporation organized under AS 10.06, or a foreign corporation authorized to transact business in this state, that has a business office identical to the registered office.

Sec. 10.50.637. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN COMPANY. A foreign limited liability company registered under this chapter may change its registered office or change its registered agent, or both, upon filing with the department a signed statement setting out

(1) the name of the company;

(2) the address of its registered office;

(3) the address of the new registered office if the address of its registered office is to be changed;

(4) the name of its registered agent;

(5) the name of its new registered agent if its registered agent is to be changed;

(6) that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical; and

(7) that the change is authorized by the company.

Sec. 10.50.638. FILING OF STATEMENT OF CHANGE. If the department finds that the statement conforms to the provisions of this chapter, the department shall file the statement, and upon the filing, the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, becomes effective.

Sec. 10.50.640. SERVICE OF PROCESS ON FOREIGN COMPANY. The registered agent appointed by a foreign limited liability company registered under this chapter shall be an agent of the company upon whom process, notice, or demand required or permitted by law to be served upon the company may be served.

Sec. 10.50.645. SERVICE ON COMMISSIONER. When a foreign limited liability company that is registered under this chapter, or that conducts affairs in this state without being registered under this chapter, fails to appoint or maintain a registered agent in this state, when a registered agent cannot with reasonable diligence be found at the registered office, or when the registration of a foreign company is suspended or revoked, the commissioner is an agent upon whom process, notice, or demand may be served. Service is made upon the commissioner as provided in AS 10.50.065(b).

Sec. 10.50.650. REVOCATION OF REGISTRATION. (a) The registration of a foreign limited liability company authorizing the company to conduct affairs in this state may be revoked by the commissioner if

(1) the company fails to file its biennial report within the time established by this chapter, or fails to pay fees or penalties established by this chapter when they are due and payable;

(2) the company fails to appoint and maintain a registered agent in this state;

(3) the company fails, after change of its registered office or registered agent, to file with the commissioner a statement of the change as required by this chapter; or

(4) a misrepresentation of a material matter has been made in an application, report, affidavit, or other document submitted under this chapter.

(b) The commissioner may not revoke the registration of a foreign limited liability company unless the

(1) commissioner has given the company at least 60 days notice by certified mail addressed to its registered agent at its registered office; and

(2) company fails before revocation to file the report, pay the fees or penalties, file the required statement of change of registered agent or registered office, or correct the misrepresentation.

(c) Upon revoking a registration, the commissioner shall

(1) issue a certificate of revocation in duplicate;

(2) file one of the certificates in the commissioner's office; and

(3) mail one of the certificates of revocation to the limited liability company at its registered office.

(d) Upon the issuance of the certificate of revocation, the authority of the limited liability company to conduct affairs in this state ceases.

Sec. 10.50.653. APPEAL FROM REVOCATION OF REGISTRATION. If the commissioner revokes the registration of a foreign limited liability company to conduct affairs in this state under this chapter, the company may appeal to the superior court. The court shall either sustain the action of the commissioner or direct the commissioner to take action the court considers proper.

Sec. 10.50.655. AUTHORITY TO CANCEL REGISTRATION. A foreign limited liability company registered in this state may cancel its registration by filing an application for cancellation with the department.

Sec. 10.50.660. CONTENTS OF APPLICATION FOR CANCELLATION. An application for cancellation filed by a foreign limited liability company must state

(1) the name of the company and the state or other jurisdiction where the company was organized;

(2) that the company is not conducting affairs in this state;

(3) that the company cancels its registration in this state;

(4) that the company revokes the authority of its registered agent for service of process in this state and consents that service of process may subsequently be made on the company by service on the commissioner for a cause of action arising in this state during the time the company was registered in this state; and

(5) an address for mailing a copy of a process to the company.

Sec. 10.50.665. FORM, MANNER, AND EXECUTION OF APPLICATION FOR CANCELLATION. The application for cancellation must be in the form and manner designated by the department and shall be signed on behalf of the foreign limited liability company by

(1) a person with authority to sign the application under the law of the state or other jurisdiction of its organization; or

(2) if the company is controlled by a receiver, trustee, or other court-appointed fiduciary, by the receiver, trustee, or other fiduciary.

Sec. 10.50.670. EFFECT OF CANCELLATION OF REGISTRATION. The cancellation of a registration under this chapter does not terminate the authority of the commissioner to accept service of process on the foreign limited liability company with respect to causes of action arising out of the company's conduct of affairs in this state.

Sec. 10.50.675. CONDUCTING AFFAIRS WITHOUT REGISTRATION. (a) A foreign limited liability company conducting affairs in this state may not maintain an action or other proceeding in a court of this state until it has registered in this state.

(b) The failure of a foreign limited liability company to register in this state does not

(1) impair the validity of a contract or act of the company;

(2) affect the right of another party to a contract of the company to maintain an action or proceeding on the contract; or

(3) prevent the company from defending an action or other proceeding in a court of this state.

Sec. 10.50.690. LIABILITY FOR FEES AND PENALTIES. A foreign limited

liability company that conducts affairs in this state without registration is liable to the department for the following fees and penalties for the full or partial years when it conducts affairs in this state without registration:

(1) the fees that would have been imposed by this chapter on the company if the company had been registered under this chapter; or

(2) the penalties imposed by this chapter.

Sec. 10.50.700. CIVIL PENALTY. (a) A foreign limited liability company that conducts affairs in this state without registration is subject to a civil penalty payable to the state not to exceed $10,000 for each calendar year, including a partial year, the company conducts affairs in this state without being registered under this chapter.

(b) The civil penalty imposed in (a) of this section may be recovered in an action brought in the superior court by the attorney general.

Sec. 10.50.710. INJUNCTIVE RELIEF. (a) Upon application to the court, if a court finds that a foreign limited liability company has conducted affairs in this state in violation of this chapter, the court may issue, in addition to imposing a civil penalty, an injunction restraining the company from conducting further affairs in this state and from further exercising the company's rights and privileges in this state.

(b) An injunction issued under (a) of this section may continue until the civil penalties, interest, and court costs assessed by the court have been paid and until the foreign limited liability company otherwise complies with this chapter.

Sec. 10.50.715. NONLIABILITY OF MEMBER OR MANAGER. A member or manager of a foreign limited liability company is not liable for the debts and obligations of the company solely because the company conducts affairs in this state without registration.

Sec. 10.50.720. TRANSACTIONS NOT CONSTITUTING CONDUCTING AFFAIRS. The activities of a foreign limited liability company that are not considered to be conducting affairs in this state for the purposes of AS 10.50.600 - 10.50.720 include

(1) maintaining, defending, or settling a court action or other proceeding or a claim;

(2) holding meetings of the members or managers of the company;

(3) maintaining bank accounts;

(4) selling through independent contractors;

(5) soliciting or procuring orders by mail, through employees, agents, or otherwise, if the orders require acceptance outside the state before becoming binding contracts;

(6) creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interests in real or personal property;

(7) securing or collecting debts, or enforcing rights in property securing debts;

(8) conducting an isolated transaction that is completed within 30 days and that is not part of a course of repeated transactions of a similar nature; or

(9) conducting affairs in interstate commerce.

ARTICLE 14. SUITS BY AND AGAINST LIMITED LIABILITY COMPANIES.

Sec. 10.50.730. ACTIONS AGAINST COMPANIES. A court action may be brought by or against a limited liability company. The court action may be brought in the name of the company.

Sec. 10.50.735. AUTHORITY TO SUE ON BEHALF OF COMPANY. (a) Except as provided in AS 10.50.320, and unless otherwise provided in an operating agreement of the company, a person may not bring a court action on behalf of a limited liability company in the name of the company unless the person is authorized under (b) or (c) or this section to bring the action.

(b) Whether or not the company is managed by a manager, a member of a limited liability company may bring a court action on behalf of the company in the name of the company if the member is authorized to bring the action by more than one-half of all of the members of the company who are eligible to consent to the authorization, unless a larger number of the members are required under AS 10.50.150(c) for the authorization. When determining whether the required number of members consent under AS 10.50.150, the total number of all members does not include a member who has an interest in the outcome of the action that is adverse to

the interest of the company and the member with the adverse interest is excluded from determining the authorization.

(c) A manager of a limited liability company may bring a court action on behalf of the company in the name of the company if the manager is authorized to bring the action by the consent required under AS 10.50.150 of the members eligible to consent to the authorization. When determining the number of managers required to consent under AS 10.50.150, the number does not include a manager who has an interest in the outcome of the action that is adverse to the interest of the company and the manager with the adverse interest is excluded from determining the authorization.

ARTICLE 15. BIENNIAL REPORT.

Sec. 10.50.750. BIENNIAL REPORT REQUIRED. A limited liability company and a foreign limited liability company conducting affairs in this state shall file a biennial report within the time established by this chapter.

Sec. 10.50.755. CONTENTS OF BIENNIAL REPORT. A biennial report must set out

(1) the name of the company and the state or country where it is organized;

(2) the address of the registered office of the company in this state, and the name of its registered agent in this state at that address, and, in the case of a foreign limited liability company, the address of its principal office in the state or country where it is organized;

(3) the names and addresses of the managers of the company, or, if the company is not managed by a manager, the names and addresses of the members of the company;

(4) the name and address of each person owning at least a five percent interest in the company and the percentage of interest owned by that person in the company.

Sec. 10.50.760. FILING OF BIENNIAL REPORT. (a) A biennial report required by AS 10.50.750 shall be filed with the department and is due before January 2 of the filing year. A limited liability company filing articles of organization and a foreign limited liability company registering during an even-numbered year shall

file the biennial report each even-numbered year. A limited liability company filing articles of organization and a foreign limited liability company registering during an odd-numbered year shall file the biennial report each odd-numbered year. The biennial report is delinquent if not filed before February 1 of each odd- or even-numbered year as provided in this section.

(b) Proof to the satisfaction of the department that on or before February 1 the report was deposited in the United States mail in a sealed envelope, properly addressed with postage prepaid, is compliance with (a) of this section.

(c) The department shall file the report if it conforms to the requirements of this chapter. If the department finds that the report does not conform to the requirements of this chapter, the report shall promptly be returned to the company for necessary corrections.

(d) Upon receipt of a form from the department, a limited liability company shall file a biennial report within six months after original organization.

Sec. 10.50.765. FILING NOTICE OF CHANGE OF MANAGERS OR MANAGING MEMBERS. (a) In the event of a change of the manager of a limited liability company or of a foreign limited liability company registered under this chapter, or of a member of the company, if the members manage the company, during the first year of the biennial reporting period, the company shall file a notice of change amending the biennial report of the company before the following January 2.

(b) The notice shall be filed with the department and shall state the name and current mailing address of the manager or member not included in the company's last filed biennial report, and the name of the person replaced and the office held.

ARTICLE 16. MISCELLANEOUS PROVISIONS.

Sec. 10.50.800. COMPANY CERTIFICATES. An operating agreement of a limited liability company may authorize the company to issue a certificate as evidence of a limited liability company interest. An operating agreement may also authorize and provide for the assignment or transfer of the interest represented by the certificate.

Sec. 10.50.810. SUBMISSION OF DOCUMENTS TO DEPARTMENT. When a document is required or allowed to be delivered to or filed with the department under this chapter, the person delivering the document shall deliver to the

department the required fee, the original signed document, and an exact copy of the document.

Sec. 10.50.820. FILING OF DOCUMENTS BY DEPARTMENT. (a) If the department determines that a document filed under this chapter conforms to the filing requirements of this chapter, the department shall

(1) mark on the original signed document and on the exact copy the word "filed" and the date and time of the document's acceptance for filing;

(2) retain the original signed document in the department's files; and

(3) return the exact copy to the person who filed the document or to the person's representative.

(b) The department may not file a document if the requirements of this section are not met.

Sec. 10.50.830. DISAPPROVAL OF WRITING BY DEPARTMENT; APPEAL. If the department fails to approve articles of organization, amendment, merger, consolidation, or dissolution, or any other document required by this chapter to be approved by the department, the department shall, within 10 days after the delivery of the document to the department, give written notice of disapproval to the person, limited liability company, or foreign limited liability company, delivering the document, and specifying the reasons for disapproval. The person or company may appeal the disapproval to the superior court.

Sec. 10.50.840. EXECUTION OF DOCUMENTS. (a) Unless otherwise provided in this chapter, a document required by this chapter to be filed with the department by or for a limited liability company shall be signed by

(1) a manager of the company if the company is managed by a manager;

(2) a member of the company if the articles of organization do not provide that the company is managed by a manager;

(3) a person organizing the company if the company is not organized;

(4) the fiduciary if the company is controlled by a receiver, trustee, or other court-appointed fiduciary.

(b) A person signing a document filed with the department under this chapter

shall state beneath or opposite the signature the person's name and the capacity in which the person signs.

(c) A person signing a document filed with the department under this chapter may sign as an attorney-in-fact, but is not required to provide or file with the department a document authorizing the person to act as attorney-in-fact for the signing of a document.

Sec. 10.50.850. FILING AND OTHER FEES. The department shall charge fees established by the department by regulation adopted under AS 44.62 (Administrative Procedure Act) for

(1) filing the original articles of organization;

(2) filing an amendment of registration;

(3) filing articles of merger or consolidation;

(4) filing articles of dissolution;

(5) issuing a document not otherwise covered by this section;

(6) furnishing a copy of a document;

(7) accepting an application for reservation of a name, or filing a notice of the transfer or cancellation of a name reservation;

(8) filing a statement of change of address for a registered office or registered agent;

(9) accepting service of a notice, demand, or process upon the department;

(10) filing the application for registration of a foreign limited liability company;

(11) registering a name, reserving a name, or renewing a name registration under this chapter; or

(12) filing another document allowed or required under this chapter.

Sec. 10.50.860. MAINTENANCE OF RECORDS. Unless otherwise provided in an operating agreement, a limited liability company shall keep at its main office

(1) current and past lists that state in alphabetical order the full name and last known mailing address of every member and manager of the company;

(2) a copy of the company's articles of organization and amendments

to the articles, including a signed copy of a power of attorney used by a person who signed articles of amendment for the company;

(3) a copy of the company's federal, state, and local income tax returns and financial statements, if any, for the three most recent years or, if the returns and statements are not prepared, a copy of the information and statements provided to, or that should have been provided to, the members to enable the members to prepare their federal, state, and local tax returns for the three-year period;

(4) a copy of any effective operating agreement of the company, amendments to the agreement, and former operating agreements;

(5) unless contained in an operating agreement,

(A) a document stating the amount of cash contributed by a member of the company, the agreed value of other property or services contributed by a member, and when a member is to make additional contributions;

(B) a document stating the events, if any, that cause the company to be dissolved and its affairs wound up; and

(C) other documents that an operating agreement requires the [illegible] prepare.

Sec. [illegible].870. INSPECTION OF RECORDS. (a) A limited liability company shall make its books and records of account, or certified copies of them, reasonably available for inspection and copying at its registered office or principal office in the state by a member of the company. Member inspection shall be upon written demand stating with reasonable particularity the purpose of the inspection. The inspection may be in person or by agent or attorney, at a reasonable time and for a proper purpose. Only books and records of account, minutes, and the record of members directly connected to the stated purpose of the inspection may be inspected or copied.

(b) A manager, or, if the company is not managed by a manager, a member, who, or a limited liability company that, refuses to allow a member, or the agent or attorney of the member, to examine and make copies from its books and records of account, minutes, and record of members, for a proper purpose, is liable to the member

for a penalty in the amount of 10 percent of the value of the limited liability company interests owned by the member or $5,000, whichever is greater, in addition to other damages or remedy given the member by law. It is a defense to an action for penalties under this section that the person suing has within two years sold or offered for sale a list of members of the company or any other limited liability company or has aided or abetted a person in procuring a list of members for this purpose, or has improperly used information secured through a prior examination of the books and records of account, minutes, or record of members of the company or any other limited liability company, or was not acting in good faith or for a proper purpose in making the person's demand.

(c) Nothing in this chapter impairs the power of a court, upon proof by a member of a demand properly made and for a proper purpose, to compel the production for examination by the member of the books and records of account, minutes, and record of members of a limited liability company.

Sec. 10.50.880. DISCLOSURE OF INFORMATION. The members of a limited liability company, if the articles of organization do not provide that the company is managed by a manager, or the manager of the company, if the articles of organization provide that the company is managed by a manager, shall provide, to the extent just and reasonable under the circumstances, true and full information of all matters that affect the members of a company to a member or to the legal representative of a deceased member or a member under a legal disability.

Sec. 10.50.890. WAIVER OF NOTICE. If notice is required to be given to a member or manager of a limited liability company under the provisions of this chapter or under the provisions of the articles of organization or an operating agreement of the company, a waiver of the notice in writing signed by the person entitled to notice, whether before or after the time stated for notice, is equivalent to the giving of notice.

ARTICLE 17. GENERAL PROVISIONS.

Sec. 10.50.900. REGULATIONS. In addition to the regulations the department is required to adopt under this chapter, the department may adopt other regulations under AS 44.62 (Administrative Procedure Act) to implement this chapter.

Sec. 10.50.910. INTERSTATE APPLICATION. A limited liability company that is organized and existing under this chapter may conduct its affairs and exercise the powers granted by this chapter in another jurisdiction, subject to the laws of that jurisdiction.

Sec. 10.50.990. DEFINITIONS. In this chapter, unless the context indicates otherwise,

(1) "articles of organization" means the articles of organization filed under AS 10.50.070 and the articles as amended or restated;

(2) "commissioner" means the commissioner of commerce and economic development;

(3) "corporation" means a corporation organized under the laws of this or another state, or of this or another country;

(4) "department" means the Department of Commerce and Economic Development;

(5) "filed," unless expressly provided otherwise, means filed with the department;

(6) "foreign limited liability company" means an organization that is

(A) not incorporated;

(B) organized under the law of a state other than this state, or under the law of a foreign country;

(C) organized under a statute that affords to each of its members limited liability regarding the liabilities of the organization; and

(D) not required to be registered under a statute of this state other than this chapter;

(7) "interim distribution" means a distribution of the assets of a limited liability company to the company's members, except as provided under AS 10.50.335 and 10.50.425;

(8) "know" means to have actual knowledge or to know other facts that demonstrate bad faith in the circumstances; this definition applies also to the derivatives of "know," including "known," "unknown," and "knowledge";

(9) "limited liability company" or "domestic limited liability company"

means an organization organized under this chapter;

(10) "limited liability company interest" means an interest in a limited liability company issued under AS 10.50.275;

(11) "limited partnership" means a limited partnership organized under AS 32.11 or under the law of another state or a foreign country;

(12) "manager" means a person who manages a limited liability company, if the articles of organization provide that the company is managed by a manager;

(13) "managing member" means a member of a limited liability company if the company's articles of organization do not provide that the company is managed by a manager;

(14) "member" means a person who has been admitted to membership in a limited liability company under AS 10.50.155 - 10.50.160 and whose membership has not terminated under AS 10.50.180 - 10.50.185 or 10.50.205 - 10.50.225;

(15) "operating agreement" means a written agreement among all of the members of a limited liability company about conducting the affairs of the company;

(16) "property" includes cash;

(17) "state" means a state, territory, or possession of the United States, and includes the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.

Sec. 10.50.995. SHORT TITLE. This chapter may be cited as the Alaska Limited Liability Act.

* **Sec. 2.** AS 10.06.105(c) is amended to read:

(c) A person may not adopt a name that contains the word "corporation", "incorporated", or "limited", or an abbreviation of one of these words, unless the person has been issued a certificate of incorporation, or, in the case of a foreign corporation, a certificate of authority, by the commissioner. This subsection does not prohibit **a limited liability company or** a limited partnership from using the word "limited" or an abbreviation of "limited" in its name.

* **Sec. 3.** AS 45.55.130(12) is amended to read:

(12) "security" means a note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; **a limited liability company interest under AS 10.50;** collateral-trust certificates; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under the title or lease or in any sale of or indenture or bond or contract for the conveyance of land or any interest in land; an option on a contract for the future delivery of agricultural or mineral commodities or any other commodity offered or sold to the public and not regulated by the Commodity Futures Trading Commission; however, the contract or option is not subject to the provisions of AS 45.55.070 if it is sold or purchased on the floor of a bona fide exchange or board of trade and offered or sold to the public by a broker-dealer or agent registered under this chapter; investment of money or money's worth including goods furnished or services performed in the risk capital of a venture with the expectation of some benefit to the investor where the investor has no direct control over the investment or policy decision of the venture; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing; "security" does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or for some other specified period;

* **Sec. 4.** REGULATIONS. Notwithstanding sec. 6 of this Act, the Department of Commerce and Economic Development may proceed to adopt regulations to implement or interpret the provisions of secs. 1 - 3 of this Act. Regulations adopted under this section take effect under AS 44.62 (Administrative Procedure Act), but not before July 1, 1995.

* **Sec. 5.** Section 4 of this Act takes effect immediately under AS 01.10.070(c).

* **Sec. 6.** Sections 1 - 3 of this Act take effect July 1, 1995.

HB 439

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 439

Revision Date: February 1, 1994
Title: "An Act enacting the Uniform Fraudulent Transfer Act."
Sponsor: Representative Porter
Requestor: Representative Porter

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: February 1, 1994

Richard L. Pegues /FOR/

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 1, 1994

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'S LEGISLATIVE OFFICE
islative Office

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. _____

ANALYSIS CONTINUATION:

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

Alaska State Legislature

House of Representatives
House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

SPONSOR STATEMENT

HB 439 UNIFORM FAUDULENT TRANSFER ACT

Obligation to a financial debt is reinforced by law. Or is it? If a person acquired debt, should (s)he be able to manipulate the assets so that creditors will be deprived of their value when (s)he defaults on the debt? The Uniform Fraudulent Transfer Act (UFTA) works as a *deterrent*, preventing such transgressions against obligations incurred. This Act provides creditors with a *remedy* when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

Current Alaska law in this area was adopted in 1949 from the state of Oregon and has received little legislative attention. Nevertheless, many changes in both state and federal law, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex. In fact, Alaska law provides that a conveyance of real or personal property will be void if it was made "with the *intent* to hinder, delay or defraud creditors." AS 34.40.010. The existence of this fraudulent intent is a question of fact and the burden of proof is upon the plaintiff (Summers v. Hagen __ P.2d __, No. 3961, May 28, 1993). This burden of proof can be extremely hard to prove.

UFTA would eliminate the present Alaskan necessity of finding actual intent by a property transferor to hinder, delay or defraud a creditor in many situtations where the transferor is obviously transferring assets solely to keep them out of the reach of the transferor's creditors. This Act renders a transfer made or obligation incurred without *adequate consideration* to be constructively fraudulent. UFTA sets out numerous non-exclusive factors to be considered by the court when determining if the debtor had "actual intent." The transferee's "good faith" defense is irrelevant. Consequently, UFTA defines insolvency and establishes a new category of fraudulent transfers, namely, a preferential transfer by an insolvent "insider" (i.e., relative or a person in control of the debtor) to a creditor who had reasonable cause to believe the debtor to be insolvent.

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

A Few Facts About

THE UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE: Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN: The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY: American Bar Association

STATE ADOPTIONS: 30

Alabama	Maine	Ohio
Arizona	Minnesota	Oklahoma
Arkansas	Missouri	Oregon
California	Montana	Rhode Island
Colorado	Nebraska	South Dakota
Connecticut	Nevada	Texas
Florida	New Hampshire	Utah
Hawaii	New Jersey	Washington
Idaho	New Mexico	West Virginia
Illinois	North Dakota	Wisconsin

1993 INTRODUCTIONS: Virginia

For any further information regarding the Uniform Fraudulent Transfer Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(4/15/93)

FACTS:
ABOUT THE UNIFORM
FRAUDULENT TRANSFER
ACT

WHY STATES SHOULD ADOPT
THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section 1 contains definitions. Section 2 also contains the definition of "insolvent," and Section 3 the definition of "value." The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section 4 Subsection a(1) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section 5 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

D ISION OF LEGAL SERVIC.
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

MEMORANDUM January 21, 1994

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

TO: Representative Brian Porter

FROM: David R. Dierdorff
Revisor of Statutes

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

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

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

INTRODUCTION AND OVERVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTIONAL ANALYSIS AND COMMENTARY

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

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

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

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

OFFICIAL COMMENTARY

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

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

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

OFFICIAL COMMENTARY

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

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

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

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

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

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

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

judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see comment (8) to Sec. 34.41.030, *supra*), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of "claim" is derived from § 101(4) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, *e.g.* paragraphs (1)(A)(ii) and (8) of this section.

(4) The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under § 1 of the 1918 Act. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.

(5) The definition of "debt" is derived from § 101(11) of the Bankruptcy Code.

(6) The definition of "debtor" is new.

(7) The definition of "insider" is derived from § 101(28) of the Bankruptcy Code. The definition has been restricted in clauses (A)(iii), (B)(v), and (C)(iv) to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of "insider" in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of "insider" in this Act also

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

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

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

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

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

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

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

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

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

If I may be of further assistance, please advise.

DRD:pl
94-052.plm

HB

445

GOVERNOR HICKEL'S
DWI LAWS
(SB 279 & HB 445)

Governor Hickel has introduced legislation to remove the impaired driver from the Alaska's highways. The main objective of this legislation is to provide "implied consent" for, and administration of, chemical tests to detect the presence of drugs in drivers of motor vehicles or commercial motor vehicles involved in accidents that cause death or serious physical injury.

Impaired driving, and crashes related to it account for more than half of all traffic deaths in Alaska and is among the nation's leading problems. Despite a rising tide of public indignation, the wide variety of drugs, their use in combination with alcohol or other drugs, and their availability combine to produce a major public safety problem to Alaska's highways.

The Governor's legislation amends the implied consent statutes to specify that a person who operates a motor vehicle or commercial motor vehicle in this state is considered to have given consent to submit to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of both alcohol and drugs if the person is involved in an accident that causes death or serious physical injury to another person, even if the person is not under arrest. The tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating a motor vehicle or commercial vehicle that was involved in an accident that caused death or serious physical injury to another person

The penalty for refusal to submit to a chemical test under the provision of the legislation is a Class A misdemeanor and will result in revocation of the driver's license, privilege to drive, or privilege to obtain a license, in addition to other criminal penalties. If a person has been notified of the penalties that will result from refusal to submit to a chemical test, and the person refuses to submit, the chemical test may not be given unless the person has been arrested and the arrest resulted from an accident that causes death or serious physical injury to another person.

Driving is a privilege granted by the state that can be conditioned upon consent to reasonable terms. This legislation will provide law enforcement and prosecutors with the tools they need to combat the significant highway safety problems presented by those drivers who use drugs and then cause fatal or serious injury accidents.

SPONSOR STATEMENT

8-GH2019\J
Ford
4/28/94

SENATE CS FOR HOUSE BILL NO. 445(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to operating or driving a motor vehicle, commercial motor vehicle, aircraft, or watercraft; to classifying certain driving while intoxicated offenses as felonies; to motor vehicle forfeiture; and providing for an effective date."

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

* Section 1. AS 12.55.102(d) is amended to read:

(d) The court may include the cost of the ignition interlock device as a part of the fine required to be imposed against the defendant under AS 28.35.030(b) or (n) or 28.35.032(g) or (q).

* Sec. 2. AS 28.15.165(a) is amended to read:

(a) A law enforcement officer shall read a notice, and deliver a copy of it, to a person operating a motor vehicle, commercial motor vehicle, or aircraft, if a chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) or (g) produces a result described in AS 28.35.030(a)(2); a chemical test administered under

AS 28.33.031(a) produces a result described in AS 28.33.030(a)(2); or the person refuses to submit to a chemical test **authorized** under **AS 28.33.031(a)** [AS 28.33.031] or **AS 28.35.031(a) or (g)** [AS 28.35.032]. The notice must advise that

(1) the department intends to revoke the person's driver's license, privilege to drive, or privilege to obtain a license, refuse to issue an original license to the person, or disqualify the person;

(2) the person has the right to administrative review of the action taken against the person's license or determination not to issue an original license;

(3) if the person has a driver's license or a nonresident privilege to drive, the notice itself is a temporary driver's license that expires seven days after it is delivered to the person, except that if the person was operating a commercial motor vehicle the person will be ordered out of service for 24 hours under AS 28.33.130;

(4) revocation of the person's driver's license, privilege to drive, or privilege to obtain a license, a determination not to issue an original license, or a disqualification of the person, takes effect seven days after delivery of the notice to the person unless the person, within seven days, requests an administrative review.

* Sec. 3. AS 28.15.165(c) is amended to read:

(c) Unless the person has obtained a temporary permit or stay of a departmental action under AS 28.15.166, if the chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) **or (g)** produced a result described in AS 28.35.030(a)(2) or the person refused to submit to a **chemical** test **authorized** under **AS 28.33.031(a)** [AS 28.33.031] or **AS 28.35.031(a) or (g)** [AS 28.35.032], the department shall revoke the person's license, privilege to drive, or privilege to obtain a license, shall refuse to issue an original license, and, if the chemical test administered under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2) or the person refused to submit to a **chemical** test **authorized** under **AS 28.33.031(a)** [AS 28.33.031], shall disqualify the person. The department's action takes effect seven days after delivery to the person of the notice required under (a) of this section, and after receipt of a sworn report of a law enforcement officer

(1) that a chemical test **administered** under AS 28.33.031(a) or AS 28.35.031(a) **or (g)** produced a result described in AS 28.35.030(a)(2), that a

chemical test **administered** under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2), or that a person refused to submit to a chemical test **authorized** under **AS 28.33.031(a)** [AS 28.33.031] or **AS 28.35.031(a) or (g)** [AS 28.35.032];

(2) that notice under (a) of this section was provided to the person; and

(3) describing the

(A) circumstances surrounding the arrest and the grounds for the officer's belief that the person operated a motor vehicle, commercial motor vehicle, or aircraft while intoxicated in violation of AS 28.33.030 or AS 28.35.030**; or**

(B) grounds for the officer's belief that the person operated a motor vehicle that was involved in an accident causing death or serious physical injury to another person.

* **Sec. 4.** AS 28.15.166(g) is amended to read:

(g) The hearing for review of action by the department under AS 28.15.165 shall be limited to the issues of whether the **law enforcement** [ARRESTING] officer had reasonable grounds to believe that the person was operating a motor vehicle **that was involved in an accident causing death or serious physical injury to another person, or that the person was operating a motor vehicle**, commercial motor vehicle, or aircraft while intoxicated in violation of AS 28.33.030 or AS 28.35.030 and whether

(1) the person refused to submit to a chemical test **authorized** under **AS 28.33.031(a)** [AS 28.33.031] or **AS 28.35.031(a) or (g)** [AS 28.35.032] after being advised that refusal would result in disqualification or the suspension, revocation, or denial of the person's license, privilege to drive, or privilege to obtain a license, and that the refusal is a misdemeanor;

(2) the chemical test **administered** [AUTHORIZED] under AS 28.33.031(a) or AS 28.35.031(a) **or (g)** produced a result described in AS 28.35.030(a)(2); or

(3) the chemical test **administered** [AUTHORIZED] under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2).

* **Sec. 5.** AS 28.15.181(a) is amended to read:

(a) Conviction of any of the following offenses is grounds for the immediate revocation of a driver's license, privilege to drive, or privilege to obtain a license:

(1) manslaughter or negligent homicide resulting from driving a motor vehicle;

(2) a felony in the commission of which a motor vehicle is used;

(3) failure to stop and give aid as required by law when a motor vehicle accident results in the death or personal injury of another;

(4) perjury or making a false affidavit or statement under oath to the department under a law relating to motor vehicles;

(5) operating a motor vehicle or aircraft while intoxicated;

(6) reckless driving;

(7) using a motor vehicle in unlawful flight to avoid arrest by a peace officer;

(8) refusal to submit to a chemical test **authorized** under AS 28.33.031(a) [AS 28.33.031] or AS 28.35.031(a) or (g) [AS 28.35.032 WHILE UNDER ARREST FOR OPERATING A MOTOR VEHICLE, COMMERCIAL MOTOR VEHICLE, OR AIRCRAFT WHILE INTOXICATED];

(9) driving while license, privilege to drive, or privilege to obtain a license, canceled, suspended, or revoked, or in violation of a limitation.

* Sec. 6. AS 28.33.031(a) is amended to read:

(a) A person who operates a commercial motor vehicle in this state is considered to have given consent to a chemical test or tests

(1) of the person's breath if **the person is** lawfully arrested for an offense arising out of acts alleged to have been committed when the person was operating the commercial motor vehicle while intoxicated**: the** [. THE] test or tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating a commercial motor vehicle while intoxicated in violation of AS 28.33.030 or AS 28.35.030;

(2) of the person's breath and blood for the purpose of determining the alcoholic content of the person's breath and blood, and of the person's blood and urine, for the purpose of determining the presence of controlled substances

in the person's blood and urine, if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person; the test or tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating a commercial motor vehicle that was involved in an accident causing death or serious physical injury to another person.

* **Sec. 7.** AS 28.33.190 is amended to read:

Sec. 28.33.190. DEFINITIONS. In this chapter [AS 28.33.100 - 28.33.190],

(1) "alcoholic beverage" has the meaning given in AS 04.21.080(b);

(2) "commercial motor vehicle" has the meaning given in AS 28.40.100;

(3) "controlled substance" means any substance listed as being controlled under AS 11.71 or 21 U.S.C. 812 - 813, or determined under federal regulations to be controlled for purposes of 21 U.S.C. 801 - 813 (Controlled Substances Act);

(4) "disqualification" means a withdrawal of the privilege to drive a commercial motor vehicle;

(5) "disqualified" means that a person's privilege to drive a commercial motor vehicle has been withdrawn;

(6) "drive a commercial motor vehicle" means to affect the movement, attempt to affect the movement, or to be in actual physical control, of a commercial motor vehicle in motion, excluding slight motion incidental to loading, unloading, servicing, or inspecting the vehicle;

(7) "employer" means a person who

(A) provides compensation to a person who operates a commercial motor vehicle, including wages or other remuneration, whether through an employment relationship or by contract; or

(B) acts as an agent of someone who provides compensation to a person who operates a commercial motor vehicle, with authority to allow, require, permit, assign, or authorize the person being compensated to operate a commercial motor vehicle;

(8) "hazardous substance" means a substance found by the United States Secretary of Transportation to be hazardous for purposes of 49 U.S.C. 1801 - 1813 (Hazardous Materials Transportation Act);

(9) "operating a commercial motor vehicle" means

(A) to drive a commercial motor vehicle; or

(B) whether or not the vehicle is in motion, or is capable of being moved, to be in actual physical control, or to attempt to affect the movement, of a commercial motor vehicle; and

(10) "serious traffic violation" means

(A) speeding 15 miles per hour or more above the posted limit;

(B) reckless or negligent driving, in violation of AS 28.35.040 or 28.35.045 or an ordinance with substantially similar elements;

(C) violation of a provision of this title, or a regulation adopted under this title, relating to improper lane changes or following too closely, or an ordinance with substantially similar elements; or

(D) violation of a law or ordinance relating to traffic control, which was determined by the court by a preponderance of the evidence to have been a factor in causing physical injury to a person.

* Sec. 8. AS 28.35.030(b) is amended to read:

(b) <u>Except as provided under (n) of this section, driving</u> [DRIVING] while intoxicated is a class A misdemeanor. Upon conviction

(1) the court shall impose a minimum sentence of imprisonment of

(A) not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted;

(B) not less than 20 days and a fine of not less than $500 if the person has been previously convicted once [;

(C) NOT LESS THAN 60 DAYS AND A FINE OF NOT LESS THAN $1,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED TWICE;

(D) NOT LESS THAN 120 DAYS AND A FINE OF NOT LESS THAN $2,000 IF THE PERSON HAS BEEN PREVIOUSLY

CONVICTED THREE TIMES;

(E) NOT LESS THAN 240 DAYS AND A FINE OF NOT LESS THAN $3,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED FOUR TIMES;

(F) NOT LESS THAN 360 DAYS AND A FINE OF NOT LESS THAN $4,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED MORE THAN FOUR TIMES];

(2) the court may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection;

(B) suspend imposition of sentence;

(3) the court shall revoke the person's driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181 [, AND MAY ORDER THE MOTOR VEHICLE OR AIRCRAFT THAT WAS USED IN COMMISSION OF THE OFFENSE TO BE FORFEITED UNDER AS 28.35.036].

* Sec. 9. AS 28.35.030 is amended by adding new subsections to read:

(n) A person is guilty of a class C felony if the person is convicted of driving while intoxicated and has been previously convicted two or more times. Upon conviction the court

(1) shall impose a minimum sentence of imprisonment of 360 days and a fine of not less than $1,000;

(2) may not

(A) suspend execution of sentence or grant probation except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) shall revoke the person's driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181; and

(4) may order as a condition of probation that the person take antabuse or a similar drug intended to prevent the consumption of an alcoholic beverage; a

condition of probation imposed under this paragraph is in addition to any other condition authorized under another provision of law.

(o) If the court imposes a sentence of imprisonment under (b) or (n) of this section, the court shall also order forfeiture of the vehicle used in the commission of the offense, subject to remission under AS 28.35.037.

* **Sec. 10.** AS 28.35.031 is amended by adding a new subsection to read:

(g) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a chemical test or tests of the person's breath and blood for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle in this state that was involved in an accident causing death or serious physical injury to another person.

* **Sec. 11.** AS 28.35.032(a) is amended to read:

(a) If a person under arrest **for operating a motor vehicle or aircraft while intoxicated** refuses the request of a law enforcement officer to submit to a chemical test **authorized** under **AS 28.33.031(a)(1)** [AS 28.33.031(a)] or AS 28.35.031(a), **or if a person involved in a motor vehicle accident that causes death or serious physical injury to another person refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.33.031(a)(2) or AS 28.35.031(g),** after being advised by the officer that the refusal will [, IF THAT PERSON WAS ARRESTED WHILE OPERATING A MOTOR VEHICLE OR AIRCRAFT,] result in the denial or revocation of the driver's license, privilege to drive, or privilege to obtain a license, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a motor vehicle **or** [, AN] aircraft [, OR A WATERCRAFT] while intoxicated, and that the refusal is a crime, a chemical test may

not be given, except as provided by AS 28.35.035. If a person under arrest for operating a watercraft while intoxicated refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.35.031(a), after being advised by the officer that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a watercraft while intoxicated, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035.

* Sec. 12. AS 28.35.032(e) is amended to read:

(e) The refusal of a person to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g) [OF BREATH UNDER (a) OF THIS SECTION] is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

* Sec. 13. AS 28.35.032(f) is amended to read:

(f) Except as provided under (g) of this section, refusal [REFUSAL] to submit to a [THE] chemical test [OF BREATH] authorized by AS 28.33.031(a) or AS 28.35.031(a) or (g) is a class A misdemeanor.

* Sec. 14. AS 28.35.032(g) is amended to read:

(g) Upon conviction under this section

(1) the court shall impose a minimum sentence of imprisonment of

(A) not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted;

(B) not less than 20 days and a fine of not less than $500 if the person has been previously convicted once [;

(C) NOT LESS THAN 60 DAYS AND A FINE OF NOT LESS THAN $1,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED TWICE;

(D) NOT LESS THAN 120 DAYS AND A FINE OF NOT LESS THAN $2,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED THREE TIMES [;

(E) NOT LESS THAN 240 DAYS AND A FINE OF NOT LESS THAN $3,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED FOUR TIMES;

(F) NOT LESS THAN 360 DAYS AND A FINE OF NOT LESS THAN $4,000 IF THE PERSON HAS BEEN PREVIOUSLY CONVICTED MORE THAN FOUR TIMES];

(2) the court may not

(A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) the court shall revoke the person's driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181 [, AND MAY ORDER THE MOTOR VEHICLE OR AIRCRAFT THAT WAS USED IN COMMISSION OF THE OFFENSE BE FORFEITED UNDER AS 28.35.036]; and

(4) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person.

* **Sec. 15.** AS 28.35.032(j) is amended to read:

(j) For purposes of this section, convictions for operating or driving while intoxicated under AS 28.33.030 or AS 28.35.030 and for refusal to submit to a chemical test [OF BREATH] under this section, if arising out of a single transaction and a single arrest, are considered one previous conviction.

* **Sec. 16.** AS 28.35.032 is amended by adding new subsections to read:

(q) A person is guilty of a class C felony if the person is convicted under this section and has been previously convicted two or more times. Upon conviction,

(1) the court shall impose a minimum sentence of imprisonment of 360 days and a fine of not less than $1,000;

(2) the court may not

(A) suspend execution of the sentence required by (1) of this subsection or grant probation, except on condition that the person serve the minimum imprisonment under (1) of this subsection; or

(B) suspend imposition of sentence;

(3) the court shall revoke the person's driver's license, privilege to drive, or privilege to obtain a license under AS 28.15.181;

(4) the court may order as a condition of probation that the person take antabuse or a similar drug intended to prevent consumption of an alcoholic beverage; a condition of probation imposed under this paragraph is in addition to any other condition authorized under another provision of law; and

(5) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person.

(r) If the court imposes a sentence of imprisonment under (g) or (q) of this section, the court shall also order forfeiture of the vehicle used in the commission of the offense, subject to remission under AS 28.35.037.

* Sec. 17. AS 28.35.035(a) is amended to read:

(a) If a person is under arrest for an offense arising out of acts alleged to have been committed while the person was operating a motor vehicle, aircraft, or watercraft while intoxicated, and that arrest results from an accident that causes death or physical injury to another person, a chemical test may be administered without the consent of the person arrested to determine the amount of alcohol in that person's breath or blood **or to determine the presence of controlled substances in that person's blood and urine**.

* Sec. 18. AS 28.35.035(b) is amended to read:

(b) A person who is unconscious or otherwise in a condition rendering that person incapable of refusal is considered not to have withdrawn the consent provided under AS 28.33.031(a) or AS 28.35.031(a) **or (g)** and a chemical test may be administered to determine the amount of alcohol in that person's breath or blood **or to determine the presence of controlled substances in that person's blood and urine**. A person who is unconscious or otherwise incapable of refusal need not be placed under arrest before a chemical test may be administered.

* Sec. 19. AS 28.35.036 is repealed and reenacted to read:

Sec. 28.35.036. FORFEITURE OF MOTOR VEHICLE OR AIRCRAFT. (a) Upon forfeiture of a motor vehicle or aircraft under AS 28.35.030(o) or 28.35.032(r),

the court shall require the surrender of the registration and certificate of title of that motor vehicle or aircraft. The registration and certificate of title shall be delivered to the department.

(b) Forfeiture of a motor vehicle or aircraft under AS 28.35.030(o) or 28.35.032(r) extinguishes the rights or claims of a person with an ascertainable interest in the motor vehicle or aircraft, unless the person seeks remission of the forfeiture under AS 28.35.037 within 90 days after the person receives notice of the right of remission under AS 28.35.037. Remission of forfeiture does not apply to a person convicted under AS 28.35.030(o) or 28.35.032(r) whose vehicle or aircraft is forfeited.

(c) If not released under AS 28.35.037, a motor vehicle or aircraft forfeited under AS 28.35.030(o) or 28.35.032(r) may be disposed of by the department by

(1) selling the motor vehicle or aircraft; proceeds from the sale shall be deposited into the general fund;

(2) taking custody of the property and authorizing its use by the state or another political subdivision of the state; or

(3) destroying property that is harmful to the public.

* **Sec. 20.** AS 28.35.037(a) is repealed and reenacted to read:

(a) Upon forfeiture of a motor vehicle or aircraft under AS 28.35.030(o) or 28.35.032(r), the state shall provide written notice within 30 days to each person with an ascertainable ownership or security interest in the motor vehicle or aircraft, other than the person convicted of the offense resulting in forfeiture, that

(1) the vehicle or aircraft has been forfeited;

(2) the person has a right to intervene to protect an interest in the motor vehicle or aircraft under (b) of this section; and

(3) failure to seek remission of forfeiture within 90 days will extinguish the rights of the person to the vehicle or aircraft.

* **Sec. 21.** AS 28.35.037(b) is amended to read:

(b) **At the request of a person with an ownership or security interest in a vehicle or aircraft forfeited under AS 28.35.030(o) or 28.35.032(r), other than the person convicted of the offense resulting in forfeiture, the court shall schedule a hearing in a timely manner to determine if remission of forfeiture shall be**