ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672

8589 HOUSE JUDICIARY

FACT SHEET

September 1994

STATE LEGISLATIVE

Graduated Driver Licensing System

The U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) encourages states to implement a graduated driver licensing system to ease young drivers into the driving environment through more controlled exposure to progressively more difficult driving experiences or driver licensing stages, prior to full licensure.

A significant percentage of young drivers are involved in traffic crashes and are twice as likely to be in a fatal crash as adult drivers. The problems contributing to their high crash rates include driving inexperience and lack of adequate driving skills, excessive driving during nighttime high risk hours, risk-taking, and poor driving judgment and decision-making.

To address these problems, NHTSA and the American Association of Motor Vehicle Administrators (AAMVA) developed an entry level driver licensing system. It consists of three distinct stages, named by the type of license possessed at each stage: learner's permit, intermediate (provisional) license, and full license. Young drivers are required to demonstrate responsible driving behavior in each stage of licensing before advancing to the next.

U.S. Department of Transportation

National Highway Traffic Safety Administration

Key Facts

- The crash rate per mile for drivers 15-20 years of age is about 4 times as high as adults.
- In 1992, approximately 40 percent of all deaths for people ages 15-20 were from motor vehicle crashes.
- These young drivers represent seven percent of the total driving population, but represent 13 percent of the alcohol-involved drivers involved in fatal crashes.
- States with nighttime driving restrictions or curfews for young novice drivers experience lower crash rates than comparison states.

How Does Graduated Licensing Work?

The three stages of a graduated licensing system include specific components and restrictions to introduce driving privileges gradually to beginning drivers. Young drivers are required to demonstrate responsible driving behavior in each stage of licensing before advancing to the next stage.

Each stage has recommended components and restrictions for States to consider when implementing a graduated licensing system. Example components and restrictions of each stage include:

Stage 1: Learner's Permit

- Minimum age for a permit is 15 1/2.
- Pass vision and knowledge tests, including rules of the road and signs and signals.
- Licensed adult (at least age 21) required in the vehicle at all times.
- All occupants must wear safety belts.
- Zero alcohol while driving (usually 0 02 BAC).
- Permit is distinctive from other driver licenses.

- ☐ Must remain crash-and conviction-free for six months to move to the next stage.

Stage 2: Intermediate (Provisional)

- ☐ Minimum age for an intermediate license is age 16.
- ☐ Pass a behind-the-wheel, on-road test.
- ☐ All occupants must wear safety belts.
- ☐ Zero alcohol while driving (usually 0.02 BAC).
- ☐ A licensed adult required in the vehicle during late night hours (e.g., nighttime curfew).
- ☐ Driver improvement actions are initiated at lower point level than for regular drivers.
- ☐ Provisional license is distinctive from a regular license.
- ☐ Must remain crash-and conviction-free for 12 consecutive months to move to the next stage.

Stage 3: Full Licensure

- ☐ Minimum age for a full license is 18.

How Many States Have a Graduated License System?

Sixeen states have implemented graduated licensing systems with some of the recommended components: California, Colorado, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania, Utah, Vermont, West Virginia, and Wisconsin. Ontario, Canada; New Zealand; and Victoria, Australia also have graduated driver licensing systems.

Evaluations in three states show the benefits of a graduated licensing system:

- ☐ California reported a 5 percent reduction in crashes for drivers ages 15-17.
- ☐ Maryland reported a 5 percent reduction in crashes, and a 10 percent reduction in convictions for drivers age 16-17.
- ☐ Oregon reported a 16 percent reduction in crashes for male drivers age 16-17.

An evaluation in New Zealand reported an 8 percent reduction in crashes for drivers ages 15-19.

Who Supports Graduated Licensing?

The following organizations have publicly supported a graduated licensing system:

- American Association of Motor Vehicle Administrators (AAMVA)
- Insurance Institute for Highway Safety (IIHS)
- International Association of Chiefs of Police (IACP)
- Mothers Against Drunk Driving (MADD)
- National Association of Governors' Highway Safety Representatives (NAGHSR)
- National Association of Independent Insurers (NAII)
- National Safety Council (NSC)

Additional Sources of Information

American Association of Motor Vehicle Administrators (AAMVA)
4200 Wilson Blvd., Suite 1100
Arlington, VA 22203
Mike Calvin - Director of Driver Services
703-522-4200 (Fax: 703-522-1553)

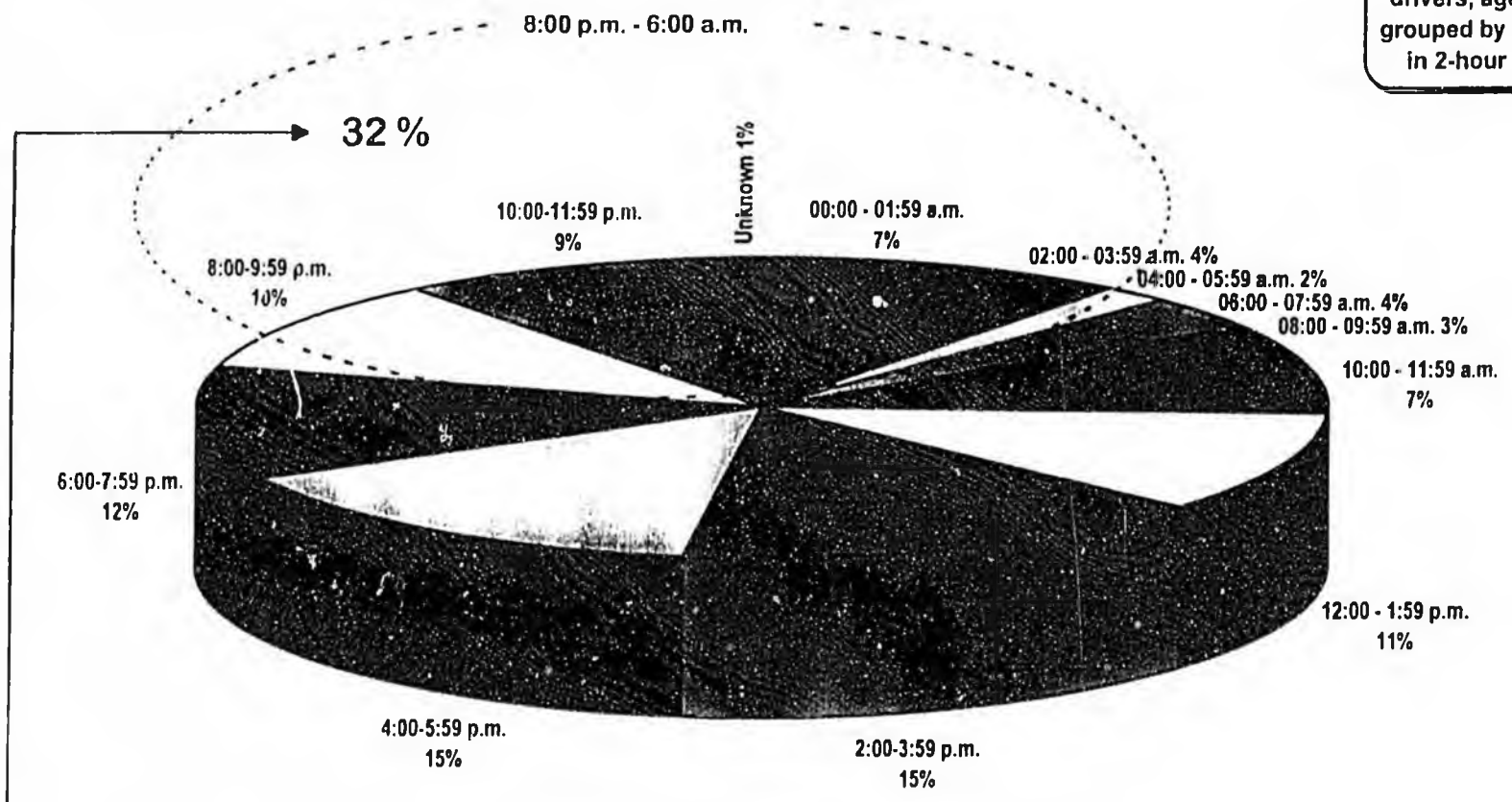
National Association of Independent Insurers (NAII)
2600 River Road
Des Plaines, IL 60018-3286
Joe Anotti
208-297-7800 (Fax: 708-297-5064)

All reports and additional information are available through your State Office of Highway Safety, the NHTSA Regional Office serving your state, or from NHTSA Headquarters, Traffic Safety Programs, NTS-21, 400 Seventh St., S.W., Washington, D.C. 20590, 202-366-9588.

1993 YOUTH DRIVERS INVOLVED IN INJURY AND FATAL CRASHES {AGES: 16 - 20}

DATA REPRESENTED

Percentage of 1,138 injury and fatal crash drivers, ages 16 to 20, grouped by time of day, in 2-hour intervals.

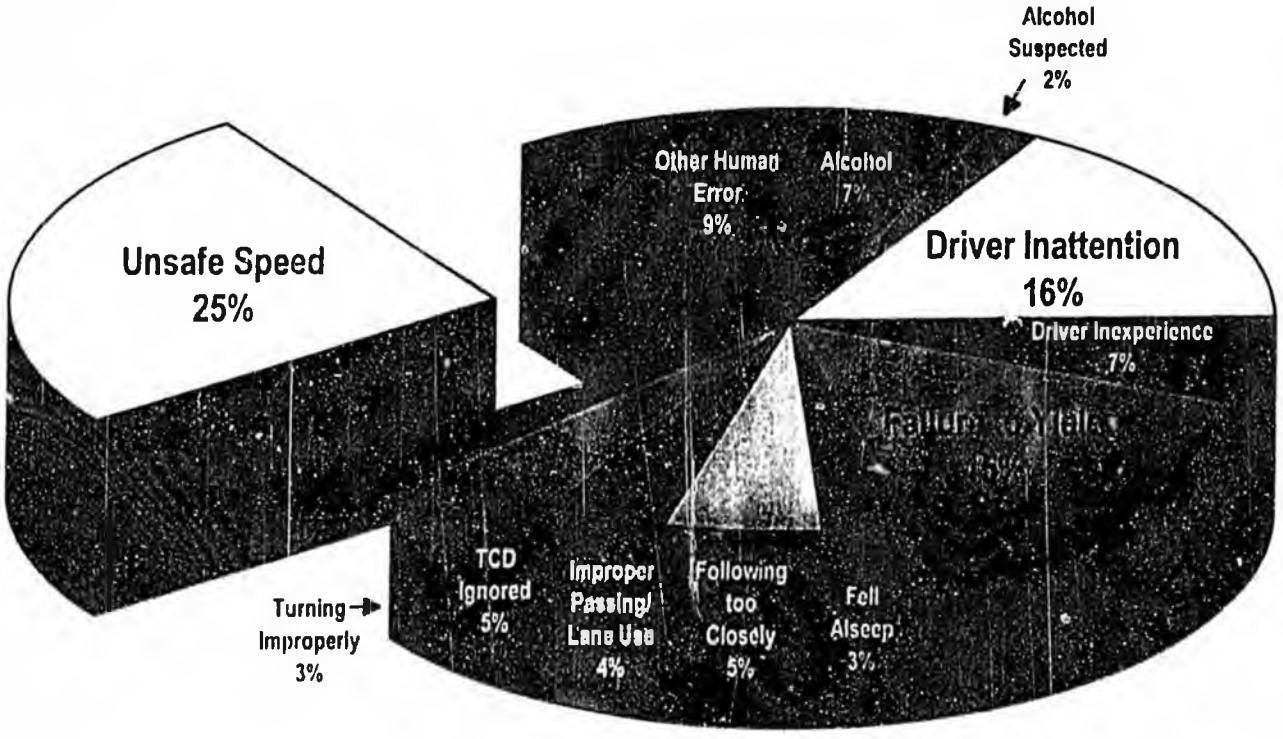


32 percent of youth crash drivers were involved in crashes which resulted in injuries and/or fatalities between the hours of 8:00 p.m. and 6:00 a.m.

1993 HUMAN ERRORS KNOWN TO HAVE CONTRIBUTED TO INJURY AND FATAL TRAFFIC CRASHES INVOLVING YOUTH DRIVERS {AGES 16-20}

DATA REPRESENTED

Percentage of 814 known human errors contributing to injury and fatal crashes which involved a youth driver, age 16-20.



Other Known Factors

There were an additional 145 contributing factors other than human error. Of those other factors, 83 involved roadway conditions. 'Slippery pavement' was cited in 71% (59 of 83) of roadway factors. SPECIAL NOTE: *'unsafe speed' was cited in combination with 'slippery pavement' 68% of the time (40 of 59 occurrences).*

Year	YOUTH DEATHS				ALCOHOL-RELATED					
	Total Deaths	Youth Deaths	< Diff >	% Total Deaths	Total Alcohol Deaths	Youth Alcohol Deaths	Alcohol < Diff >	Youth % of Total Alcohol Deaths	Youth Death < Diff >	Alcohol % of Youth Deaths
1979	91	32	59	35.2%	69	23	46	33.3%	9	71.9%
1980	88	18	70	20.5%	64	8	56	12.5%	10	44.4%
1981	100	25	75	25.0%	76	23	53	30.3%	2	92.0%
1982	107	9	98	8.4%	54	9	45	16.7%	0	100.0%
1983	150	45	105	30.0%	64	15	49	23.4%	30	33.3%
1984	137	37	100	27.0%	70	14	56	20.0%	23	37.8%
1985	127	30	97	23.6%	69	14	55	20.3%	16	46.7%
1986	101	14	87	13.9%	50	6	44	12.0%	8	42.9%
1987	76	17	59	22.4%	44	7	37	15.9%	10	41.2%
1988	97	22	75	22.7%	48	6	42	12.5%	16	27.3%
1989	84	12	72	14.3%	46	8	38	17.4%	4	66.7%
1990	98	8	90	8.2%	48	3	45	6.3%	5	37.5%
1991	101	16	85	15.8%	50	9	41	18.0%	7	56.3%
1992	108	25	83	23.1%	61	10	51	16.4%	15	40.0%
1993	118	34	84	28.8%	49	10	39	20.4%	24	29.4%
Total	**1583**	**344**	**1,239**	**21.7%**	**862**	**165**	**697**	**19.1%**	**179**	**48.0%**

	FATAL YOUTH CRASHES				ALCOHOL-RELATED					
Year	Total Crashes	Youth Crashes	< Diff >	% Total Crashes	Total Alcohol Crashes	Youth Alcohol Crashes	Alcohol < Diff >	Youth % of Total Alcohol Crashes	Youth Crash < Diff >	Alcohol % of Youth Crashes
1979	81	28	53	34.6%	45	19	26	42.2%	9	67.9%
1980	79	15	64	19.0%	43	7	36	16.3%	8	46.7%
1981	90	19	71	21.1%	50	17	33	34.0%	2	89.5%
1982	98	9	89	9.2%	54	9	45	16.7%	0	100.0%
1983	135	40	95	29.6%	53	13	40	24.5%	27	32.5%
1984	123	37	86	30.1%	61	14	47	23.0%	23	37.8%
1985	107	27	80	25.2%	58	12	46	20.7%	15	44.4%
1986	89	14	75	15.7%	46	5	41	10.9%	9	35.7%
1987	70	15	55	21.4%	40	6	34	15.0%	9	40.0%
1988	86	20	66	23.3%	43	6	37	14.0%	14	30.0%
1989	79	11	68	13.9%	44	7	37	15.9%	4	63.6%
1990	92	8	84	8.7%	47	3	44	6.4%	5	37.5%
1991	90	13	77	14.4%	45	7	38	15.6%	6	53.8%
1992	89	21	68	23.6%	50	9	41	18.0%	12	42.9%
1993	88	28	60	31.8%	37	9	28	24.3%	19	32.1%
Total	1,396	305	1,091	21.8%	716	143	573	20.0%	162	46.9%

1993 DRIVERS IN TRAFFIC CRASHES

Age Group	1993 Licensed Drivers	% Of Licensed Drivers	1993 Crash Drivers	% Represented in Total Crashes
< 16	1	0.0%	75	0.3%
16-20	24,310	6.2%	3,257	12.8%
21-25	41,861	10.6%	3,195	12.6%
26-30	48,780	12.4%	2,919	11.5%
31-35	57,756	14.7%	3,123	12.3%
36-40	58,506	14.9%	2,902	11.4%
41-45	50,586	12.8%	2,416	9.5%
46-50	37,471	9.5%	1,622	6.4%
51-55	25,819	6.6%	1,094	4.3%
56-60	17,226	4.4%	733	2.9%
61-65	12,396	3.1%	490	1.9%
66-70	8,979	2.3%	370	1.5%
71 +	10,236	2.6%	439	1.7%
Unknown	4	0.0%	2,740	10.8%
Totals	393,931	100.0%	25,375	100.0%

HB

70

Alaska State Legislature
House of Representatives

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February 7, 1995

Larry Persily, Editor
Juneau Empire
3100 Channel Drive
Juneau, AK 99801

Dear Editor:

Enclosed is a My Turn article that I have written in response to an article and editorial which appeared in recent Juneau Empires. They concerned a bill that I have sponsored, House Bill 70 which deals with the Permanent Fund Dividend Hold Harmless Program.

Timely printing of this My Turn would be greatly appreciated

Sincerely,

Pete Kott
Representative

MY TURN

Permanent Fund Dividend Hold Harmless or Involuntary Taxation

Reading the front page article by Empire reporter Ed Schoenfeld in Wednesday's Juneau Empire and the editorial in the following Sunday's edition, I had to check to make sure I wasn't reading the Anchorage Daily News.

The article in the February 1st Juneau Empire describing House Bill 70, which eliminates the involuntary deduction for payment of the hold harmless from all Permanent Fund Dividends, was a presentation of misinformation. While the reporter and I had a brief moment that morning to discuss the legislation prior to the hearing in the House State Affairs Committee, he did not speak with me or my staff following the hearing, even though we were available and actually were standing in plain view near by. Instead, he chose to interview staff and lobbyists opposing the legislation and quote me out of context. My comments concerning "People are lazy" and "You have to put a carrot and a stick out there" were offered to illustrate that people respond to motivators and incentives. Receiving additional income, the Permanent Fund Dividend, without it impacting the amount of welfare benefits received, offers no incentive to an individual to go to work to earn income and to get off of welfare. These comments were not "mean-spirited".

The editorial in the February 5th Empire offered the same disservice. That editorial claims HB 70 "takes money away from the poor" and further claims "Alaska has become a mean-spirited place." Neither comment could be further from the truth. Unlike the Juneau Empire, I do not believe that "Alaska has become a mean-spirited place."

What HB 70 does do is eliminate an involuntary deduction from Permanent Fund Dividends(PFD). This deduction has grown from $6.94 in 1985 to $41.45 in 1994 and is taken from EVERYONE'S PFD; children, adults, rich, welfare recipients and even the working poor, who are too proud to be on welfare and yet must give up $41.45 of their dividends to others who are capable of working and choose not to.

During hearings in the House State Affairs Committee it was pointed out that welfare recipients may receive other bonuses during the year which do not have a hold harmless provision; including regional native corporation dividends and bonuses. Likewise it was pointed out that there is no hold harmless for the effect of PFD's on an individual's federal income tax liability.

I know that not all welfare recipients are physically or mentally capable of working. If the people of Alaska want to hold those individuals harmless from the effect that receiving a PFD would have on their welfare benefits, the Legislature could fund the program from another source; such as, the State's

General Fund, the Constitutional Budget Reserve Fund or the Earnings Reserve Account of the Permanent Fund. This is always an option. Nothing in HB 70 prevents the Legislature from appropriating funding. It only stops the involuntary taxation now imposed on Permanent Fund Dividends.

The Permanent Fund Dividend Hold Harmless program amounts to an unfunded mandate imposed on the recipients of a PFD without them having any say so in the matter. In fact, little or no consideration is given in writing the State's budget to how much of the H&SS budget is charged against the PFD Hold Harmless.

Using the Department of Health & Social Services's own statistics, 61% of currently active Aid to Families with Dependent Children(AFDC) families have been in the program for over two years. That translates to 7,267 families or 18,894 individuals currently on AFDC. Again using H&SS statistics, over 10% of all Alaskans are on some type of welfare program; either AFDC, food stamps or Adult Public Assistance. Something must be done to allow people to regain responsibility for and control of their own life. Forcing them to make a decision concerning their family's budget is one small step in that process.

HB 70 is just a small portion of what should be a dynamic new direction for welfare reform in Alaska. Self sufficiency is the ultimate goal. It means a stronger individual, a stronger family, a stronger Alaska, and a stronger America.

Cecilia Kleinkauf, M.S.W., J.D.
Attorney at Law
P.O. Box 243-963
Anchorage, Alaska 99524

February 13, 1995

Representative Brian Porter, Chair
House Judiciary Committee
Room 118 State Capitol
Juneau, Alaska 99801

Dear Representative Porter and Members of the Judiciary Committee:

I am writing to oppose HB70, which would eliminate the Hold Harmless program, and which is before you today. Under this program recipients of public assistance are able to continue to receive their benefits rather than being discontinued because of receipt of their Permanent Fund Dividend check.

The Hold Harmless program has been in effect since the inception of the Permanent Fund Dividend. The program was created in the belief that the Dividend was to be a benefit for all who qualified and that public assistance recipients' right to the Dividend was the same as all other Alaskans. Please keep in mind that the Dividend Program, as voted on by the people of Alaska, has no income guidelines for eligibility. Passage of HB 70 will have the effect of the legislature imposing such guidelines statutorily.

The effect of eliminating the Hold Harmless program will be to force people who are poor to choose between their public assistance and Medicaid, and their Permanent Fund check. None of the rest of us have to make such a choice, no matter what the source of our income may be. Forcing such a choice only on poor people is the worst kind of discrimination.

In addition to discrimination against poor people, eliminating the Hold Harmless will result in significant general fund expenditures by the Division of Public Assistance which will have to stop public assistance payments when the Dividend is received and then to re-determine eligibility a month or two later.

I urge you to vote against HB70 based on both its punitive approach and its cost to the State.

Sincerely,

Cecilia Kleinkauf

JOHN W. HENDRICKSON
ATTORNEY AT LAW

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February 6, 1995 FAX TO 465-2819

Representative Pete Kott
State Capitol
Juneau, AK 99801-1182

RE: HB 70

Dear Representative Kott:

When reading the Alaska Star I noted that you introduced HB 70 which would eliminate the Permanent Fund as a funding source for public assistance programs. Hooray for Pete Kott! My wife, Mona, and I strongly support your bill. Thank you for introducing this legislation. You can be sure that we will support HB 70.

Very truly yours,

John W. Hendrickson

John W. Hendrickson

kmp

cc: Rep. Ramona Barnes via fax 465-4565
Rep. Con Bunde via fax 465-3871
Rep. Cynthia Toohey via fax 465-2137
Rep. Mark Hanley via fax 465-2418
Sen. Drue Pearce via fax 465-3872
Sen. Rick Halford via fax 465-4928
Sen. Tim Kelly via fax 465-3756

No Hard Copy Sent!

Alaska State Legislature
House of Representatives

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EAGLE RIVER, AK 99577
PHONE (907) 694-7943

DURING SESSION:
STATE CAPITOL
JUNEAU, AK 99811
PHONE (907) 465-3777

Representative Pete Kott

SPONSOR STATEMENT

HB 70 - An Act relating to treatment of permanent fund dividends...

This legislation would eliminate the hold harmless provision relating to receipt of a Permanent Fund Dividend (PFD) by a welfare recipient.

At the present time, a recipient of welfare who receives a PFD fails to qualify for continued welfare benefits. Depending on their personal circumstance the disqualification from welfare benefits may last up to four months. Welfare benefits are then made to the individual under the "hold harmless" program. This program is funded by deducting the amount necessary for welfare benefits and administrative costs of the program from the PFD for all eligible recipients. When the program first started in dividend year 1985 the amount deducted from each dividend was $6.94. In dividend year 1994 the "hold harmless" program cost each PFD recipient $41.45. The Department of Health & Social Services now has eight permanent full-time employees to administer the program.

HB 70 would eliminate the "hold harmless" program. It would mean that Permanent Fund Dividends would be treated as ordinary income for the purposes of determining welfare benefit eligibility. This is the same manner in which the Internal Revenue Service treats dividends. It also means that Permanent Fund Dividend recipients would not continue to fund a program that allows individuals to receive a PFD and still remain on welfare.

I firmly believe that this legislation is a necessary step in the "self-sufficiency process" of accomplishing welfare reform. That is, that all money received is income and should be handled in the same responsible manner. Welfare recipients will learn that there are no bonuses for remaining on welfare.

I urge your support for this legislation.

Alaska State Legislature
House of Representatives

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DURING SESSION:
STATE CAPITOL
JUNEAU, AK 99811
PHONE (907) 465-3777

Representative Pete Kott

Bill Analysis

HB 70 - An Act relating to treatment of permanent fund dividends...
Draft 9-LS0332\A

This legislation would eliminate the hold harmless provisions for general relief assistance relating to the receipt of a Permanent Fund Dividend.

Section 1 - Would eliminate the cost of the hold harmless provision as an allowable deduction from a Permanent Fund Dividend.

Section 2 - Eliminates the need to include the amount of the hold harmless deduction from the public notice requirement since there would be no deduction.

Section 3 - Repeals the provision of not including a Permanent Fund Dividend in the calculation of public assistance program eligibility.

Section 4 - Makes this act effective with the 1996 dividend.

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 70

HISTORY IN THE HOUSE

1995

Read first time and referred to:

1/16 STA JUD FIN

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

Read second time
CS( ) Adopted

Amended

Advanced

Read third time

Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Intent adopted

Reported correctly engrossed
Signed by Speaker, to the Senate

Chief Clerk of the House

HISTORY IN THE SENATE

19

Read first time and referred to:

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

Rules Calendar( ) CS AM Other
New Title Same Title Previous FN
FN 0FN

Read second time

CS Adopted ( ) New Title
Amended Advanced

Read third time

Letter of Intent adopted
Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB

HOPE COTTAGES

Stephen P. Lesko
Executive Director

January 30, 1995

Representative Ed Willis
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Willis,

I want to thank you again for bringing HB70 and its provision to delete the hold harmless provision for permanent fund dividends to our attention. We believe that the deletion of this provision will create numerous problems for individuals who receive supports, providers, and the state of Alaska.

The Permanent Fund Dividend program was originally devised as one which would benefit all Alaskans equally. The elimination of the hold harmless provision will require a dollar-for-dollar offset of benefits, in effect denying the PFD benefit to all Alaskans who receive public assistance. These individuals are determined to be eligible for benefits by a strict income-based criteria and are precisely the individuals who would likely benefit most from the PFD program. The public assistance roll include numerous individuals who experience disabilities. They are, by general standards, under-employed as a result of their disability and should not be effectively denied the right to share in a program enjoyed by all other Alaskans.

Testimony at last week's hearing was contradictory. We believe that, in some cases, individuals may also lose medical benefits provided through the Medicaid program. If this occurs, individuals and families would be unable to access needed medical services. The possibility of this should be fully understood prior to any discussion concerning HB70. The effect of such a determination on the provider community should also be fully understood. Many individuals receive Medicaid funded services through nursing homes, intermediate care facilities, APH, and Harborview, to name a few. The State has also moved into the new Medicaid Waiver program and continued eligibility for services it provides should be considered.

We also believe that the administrative cost of "stopping benefits" and "reinstating benefits" will be significant. Several state departments agreed with this as well. Costs would effectively shift the cost of the "hold harmless provision" to the general fund.

In summary, we believe that deletion of the "hold harmless" provision for PFD's is not desirable or cost effective. It will penalize Alaskans who have been determined to be in need of public assistance, increase the work load of numerous state and private agencies, and unnecessarily add costs to the general fund budget.

Again, thank you for your assistance concerning HB70, and please feel free to contact us at your convenience if we can be of further assistance.

Sincerely,

Michael A. Saville
Administrator
HOPE COTTAGES, INC.

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January 25, 1995

Rep. James -

Re: HB 70

You asked what the affect would be of this legislation on minors or unemancipated individuals.

If a dividend application is filed by the child and they are eligible, their dividend would be included in the calculation of household income to determine eligibility for AFDC, APA and food stamps.

If the minor's application is not filed for any reason, even in order for the household to maintain eligibility for assistance benefits, the minor can file when reaching majority or attaining emancipation.

This information was provided by Tom Williams, the director of the Permanent Fund Dividend Division.

HOUSE COMMITTEE REPORT

2/1/95

(7)
Date Referred: January 16, 1995

FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: _____

The STATE AFFAIRS Committee considered: HB 70

HOUSE BILL NO. 70 END PERMANENT FUND DIVIDEND HOLD HARMLESS

"An Act relating to treatment of permanent fund dividends for purposes of determining eligibility for certain benefits; and providing for an effective date."

recommends it be replaced with the following committee substitute _____

[ ] the same title
[ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

8) [1] fiscal note(s) HESS

[1] zero fiscal note(s) REV

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
Jeannette James	James			✓	
Bryan S. Porter	Porter			✓	
Joe Green	Green			✓	✓
Gene Ivan	Ivan			✓	
Loren Robinson	Robinson		✓		
Ed Willis	Willis		✓		
Scott Ogan	Ogan	✓			
		(1)	(2)	(3)	(1)

CHAIR'S SIGNATURE Jeannette James _____

Security Act, Title XIX) had there been no permanent fund dividend program.

(c) An individual who is denied assistance solely because permanent fund dividends received by the individual or by a member of the individual's household are counted as income or resources under federal law or regulation is eligible for cash assistance under AS 47.25.120 — 47.25.300 (general relief assistance program). Notwithstanding the limit in AS 47.25.130, the individual is entitled to receive, for a period not to exceed four months, the same amount as the individual would have received under other public assistance programs had there been no permanent fund dividend program. (§ 1 ch 102 SLA 1982)

Revisor's notes. — Section 14, ch. 99, SLA 1985, amends this section. The amendment is effective if § 1, ch. 99, SLA 1985 is repealed (see § 25, ch. 99, SLA 1985). If the amendment becomes law, the section will read: "(a) In determining the eligibility of an individual under a public assistance program administered by the Department of Health and Social Services in which eligibility for assistance is based on financial need the Department of Health and Social Services may not consider a permanent fund dividend as income or resources received by the recipient of public assistance or by a member of the recipient's household unless required to do so by federal law or regulation. The Department of Health and Social Services shall notify all recipients of public assistance of the effects of a permanent fund dividend credit or cash payment.

"(b) An individual who is denied medical assistance under 42 U.S.C. 1396 — 1396p (Social Security Act, Title XIX) solely because of the credit or receipt of a permanent fund dividend by the individual or by a member of the individual's household is eligible for state-funded medical assistance under the general relief assistance program (AS 47.25.120 — 47.25.300). The individual is entitled to receive, for a period not to exceed four months, the same level of medical assistance as the individual would have received under 42 U.S.C. 1396 — 1396p (Social Security Act, Title XIX) had there been no permanent fund dividend program.

"(c) An individual who is denied assistance solely because permanent fund dividends credited to or received by the individual or by a member of the individual's household are counted as income or resources under federal law or regulation is eligible for cash assistance under the general relief assistance program (AS 47.25.120 — 47.25.300). Notwithstanding the limit in AS 47.25.130, the individual is entitled to receive, for a period not to exceed four months, the same amount as the individual would have received under other public assistance programs had there been no permanent fund dividend program."

Sec. 43.23.080. Eligibility for state public assistance payments. [Repealed, § 22 ch 102 SLA 1982.]

Sec. 43.23.085. Eligibility for state programs. A program administered by the state or any of its instrumentalities or municipalities, the eligibility for which is based on financial need, may not consider a permanent fund dividend as income or resources unless required to do so by federal law or regulation. (§ 1 ch 102 SLA 1982)

ANALYSIS (cont.):

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal note for Medicaid Non-facility to show related increase.

The Medicaid expenditures shown reflect what would be a 10% growth (inflation and client growth) in future years in the cost of benefits.

MEDICAID FACILITY CALCULATION

Current FY 95 PFD-HH funding:	$1,100,000
% of PFD-HH costs shifted to Medicaid	60%
Medicaid cost of those retaining Medicaid	$660,000
Less Medicaid Non-facility share of cost (26%)	$171,600
Medicaid Facility expenditures born by Medicaid	$488,400

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FISCAL NOTE N 4

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Medicaid Non-facility

Sponsor: Rep. Kott
Requestor: House State Affairs

COMPONENT SERIAL NO. 229

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	171.6	188.8	207.6	228.4	251.2	276.4
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**171.6**	**188.8**	**207.6**	**228.4**	**251.2**	**276.4**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGES IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	85.8	94.4	103.8	114.2	125.6	138.2
1003 GF Match	85.8	94.4	103.8	114.2	125.6	138.2
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**171.6**	**188.8**	**207.6**	**228.4**	**251.2**	**276.4**

Estimate of current year (FY95) impact: 0.0

POSITIONS:

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

ANALYSIS (attach a separate page in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Agency: Department of Health and Social Services
Date: 1/26/95

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ANALYSIS (cont.).

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal note for Medicaid Facility to show related increase.

The Medicaid expenditures shown reflect what would be a 10% growth (inflation and client growth) in future years in the cost of benefits.

MEDICAID NON-FACILITY CALCULATION

Current FY 95 PFD-HH funding:	$1,100,000
% of PFD-HH costs shifted to Medicaid	60%
Medicaid cost of those retaining Medicaid	$660,000
Less Medicaid Facility share of cost (74%)	$488,400
Medicaid Non-facility expenditures born by Medicaid	$171,600

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FISCAL NOTE

Bill Version: HB 70
(H) Publish Date: 2/1/95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date
Title: An Act relating to treatment of permanent fund dividends
Dept Affected: Health and Social Services
BRU: Public Assistance Administration
Component: Eligibility Determination
Sponsor: Kott
Requester: House STA
COMPONENT SERIAL NO. 236

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	86.0	88.6	91.2	94.0	96.8	99.8
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	86.0	88.6	91.2	94.0	96.8	99.8
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	43.0	44.3	45.6	47.0	48.4	49.9
1003 GF Match	43.0	44.3	45.6	47.0	48.4	49.9
1004 GF	472.7	486.9	501.5	516.5	532.0	548.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF MHTAA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(472.7)	(486.9)	(501.5)	(516.5)	(532.0)	(548.0)
TOTAL	86.0	88.6	91.2	94.0	96.8	99.8

POSITIONS:						
FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-3680
Date: 1/26/95

Approved by: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Repeal of the PFD Hold Harmless program will impact both the amount of assistance paid to individuals and families and the administrative effort required for the Division of Public Assistance to provide timely, accurate delivery of benefits. The Department of Health and Social Services has established interagency agreements with the federal agencies responsible for the AFDC and SSI programs. These agreements, which reduce the amount of case processing required when recipients receive dividends, would be nullified by HB 70. The administrative effort to process PFD Hold Harmless entitlements would be supplanted by the additional case processing effort required to suspend public assistance entitlements when dividend payments are distributed.

Administrative Impacts

The administrative cost of the PFD Hold Harmless program is based on estimates of the proportion of time used by Eligibility Determination staff to process case actions related to dividend payments and PFD-HH benefits. In FY 96 472.7 in PFD-HH Contractual funds is planned to be transferred as Interagency Receipts to the Eligibility Determination component of the Public Assistance Administration BRU.

This analysis presumes that the intent of HB 70 is to preclude the appropriation of money from the Dividend Fund to administer public assistance. The cost of processing case changes resulting from the receipt of dividends is, therefore, shifted to General Fund.

The administration of the PFD-HH program and the processing of case changes related to the receipt of dividend payments require the equivalent of 10 permanent, full-time positions. The repeal of the PFD-HH program proposed in HB 70 results in an increase in the amount of administrative effort to take the dividend payments into account and process changes in the affected public assistance cases. We estimate that 11.8 permanent full-time equivalent positions would be needed to process dividend-related work.

The time required to process Food Stamp cases would decrease because it would no longer be necessary to convert assistance to cash in lieu of food coupons and back again. The time to process AFDC, APA, and Medicaid cases in the absence of the PFD-HH program would increase substantially: under the Hold Harmless program, benefit authorization for these programs consists of the one-time entry of a few special computer codes. Without the PFD-HH program, action will have to be taken to suspend the benefits of each affected AFDC, APA, and Medicaid case, and to reinstate benefits after the month of suspension. The need for staff is also expected to increase because of a substantial increase in General Relief applications from recipients who are unable to pay for rent or food when they lose their cash and food benefits two months **after** they receive their dividend checks.

The offsetting effects of HB 70 result in a small increase in staffing needs in the Eligibility Determination Component.

Position Title	No. of Positions	Range/Step	Bargaining Unit
Eligibility Technician II	2	R14B	GGU
Time Status	**Staff Months**	**Location**	**Election District**
FT	12	Anchorage	

TYPE of EXPENDITURE	AMOUNT
Salary	60.4
Benefits	25.6
Premium Pay	
Other	
Total Personal Services	86.0
vel	
Contractual	
Commodities	
Equipment	
Other	
Total Cost	86.0

FUNDING SOURCE for TOTAL COST		
1002	Federal Receipts	43.0
1003	GF Match	43.0
1004	General Fund	
1005	GF/Program Receipts	
1006	GF/Mental Health Trust	
1007	I/A Receipts	
1061	CIP Receipts	
Other		

Justification

HB 70 repeals the PFD Hold Harmless program and requires that individual AFDC, Food Stamp, Adult Public Assistance, and Medicaid cases be suspended for at least one month when dividends are received. The reduction in administrative need that results from the repeal of the PFD Hold Harmless program is more than offset by the increased time needed to process dividend payments as individual case changes and to handle an increased number of General Relief Assistance cases.

Two additional Eligibility Technician case worker positions are needed to administer this additional workload.

REQUEST for NEW POSITION

AGENCY: Health and Social Services

BRU: Public Assistance Administration

COMPONENT: Eligibility Determination (0236)

Revised Date:

FY96

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FISCAL NOTE Bill Version: HB 70

STATE OF ALASKA
1995 LEGISLATIVE SESSION

(H) Publish Date: 2/1/95

Revision Date
Title: An Act relating to permanent fund dividends
Dept. Affected: Health and Social Services
BRU: Assistance Payments
Component: General Relief Assistance
Sponsor: Kott
Requestor: House STA
COMPONENT SERIAL NO.: 221

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
MISCELLANEOUS						
TOTAL OPERATING	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	1,052.8	1,105.4	1,160.7	1,218.7	1,279.7	1,343.7

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. Without the protection of the PFD-HH program, most households receiving AFDC, Food Stamp, and Adult Public Assistance (APA) program benefits will become ineligible for assistance for one month each year. Because of the retrospective budgeting methodology in place for the AFDC, Food Stamp, and APA programs, the month of ineligibility will usually occur two months after the month the dividend is received. For example, if a family on public assistance gets its PFD checks in October, they will be ineligible for AFDC and food stamps in December.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-2680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The General Relief Assistance (GRA) program provides vendor payments of up to $120 per person per month for emergency needs such as food, clothing, and shelter when no other resource is available to pay for them. AFDC and APA recipients are not generally eligible for GRA services because their cash grant meets their basic needs. Food Stamp recipients are not eligible for GRA for food purchases because their needs have already been covered.

The repeal of PFD-Hold Harmless imposed by HB 70 will substantially increase the number of people who are entitled to GRA. Recipients who do not conserve enough of their dividend money to meet their needs two months later when they lose their public assistance can be expected to apply for General Relief when they are confronted with eviction, lack of food, lack of heating fuel, or lack of adequate winter clothing.

Under HB 70, the following unduplicated numbers of individuals and cases are expected to be denied at least one month's benefits in FY96 as a result of receiving dividend payments:

Program	Households	Persons Impacted
AFDC	12987	39639
FSP*	3867	9668
APA	7932	7932
Total	24786	57239

* 66 percent of the Food Stamp caseload also receives AFDC and APA benefits. This unduplicated count represents 34 percent of the Food Stamp PFD-HH caseload.

We estimate that 15 percent of the affected cases, with an average household size of 2.6 persons, will be entitled to GRA benefits for one month as a result of the repeal of PFD Hold Harmless coverage imposed by HB 70.

24786 cases x 15% = 3720 x $ 283 average payment = 1052.8

The result will be an increase of 1052.8 in need for FY 96 General Fund appropriations to pay General Relief benefits for food, shelter, and clothing costs.

We assume a 5 percent annual rate of caseload growth for FY 97 through FY 01.

FISCAL NOTE

No. _ _
Bill Version: HB 70
(H) Publish Date: 2/1/95

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Revision Date: 1/25 95
Title: End Permanent Fund Dividend Hold Harmless
Dept. Affected: Department of Revenue
BRU: Permanent Fund Dividend Division
Component: Permanent Fund Dividend Division
Sponsor: Representative KOTT
Requester: House State Affairs
COMPONENT SERIAL NO. 981

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Page 2.

Prepared by: Thomas C. Williams, Director
Division: Permanent Fund Dividend Division
Phone: 465-2323
Date: 1/25/95

Approved by Commissioner:
Agency: Department of Revenue
Date: 1/25/95

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Section 3 of this bill repeals AS 43.23.075, the section of the Alaska Statutes that requires the state to hold public and medical assistance recipients harmless from the effects that receipt of a Permanent Fund Dividend (PFD) would have on their federal benefits and requires the Department of Health & Social Services to ***not*** consider a PFD as income or resources for benefit program purposes unless required to do so by federal law or regulation. However, AS 43.23.085 still requires other state and municipal agencies to ***not*** consider a PFD as income or resources for benefit program purposes unless required to do so by federal law or regulation. In addition, Sections 1 and 2 of this bill remove references to the hold harmless program cost reductions from the dividend calculation formula and the disclosure requirements.

The amended language does not preclude the legislature from appropriating dividend fund monies for state hold harmless costs. However, the legislation implies that any such future program costs will not be taken from the dividend fund. As a result, the deduction from each Alaskan's dividend would be eliminated. See the attached table entitled ***Hold Harmless Program Deductions From 1985-1994 Dividends***, as of September 29, 1994.

Attachment

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

N. 9
Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Permanent Fund Hold-Harmless

Sponsor: Rep. Kott
Requestor: House State Affairs

COMPONENT SERIAL NO. 966

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)
TOTAL	(1,100.0)	(1,210.0)	(1,331.0)	(1,464.1)	(1,610.5)	(1,771.6)

Estimate of current year (FY95) impact: 0.0

POSITIONS:

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

ANALYSIS (attach a separate page in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Agency: Department of Health and Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal notes for Medicaid Facility and Medicaid Non-facility to show this increase.

This fiscal note shows the elimination of the FY 95 budget request of 1.1 million. The reduction in expenditures shown reflects what would be an 10% growth in future years in the cost of PFD-HH benefits to replace Medicaid funds.

FISCAL NOTE

No. 8

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date
Title: An Act relating to permanent fund dividends
Dept Affected: Health and Social Services
BRU: Assistance Payments
Component: Adult Public Assistance
Sponsor: Kott
Requestor: House STA
COMPONENT SERIAL NO. 222

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
MISCELLANEOUS						
TOTAL OPERATING	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)
TOTAL	(2,562.1)	(2,690.2)	(2,824.7)	(2,965.9)	(3,114.2)	(3,269.9)

POSITIONS:

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

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director
Division: Division of Public Assistance
Phone: 465-3680
Date: 1/26/95

Approved by Com: Karen Perdue
Agency: Department of Health & Social Services
Date: 1/26/95

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Dividend payments must be treated as unearned income for Adult Public Assistance (APA) purposes because the APA program operates as the state supplement to the federal Supplemental Security Income (SSI) program and the SSI program treats dividends as income. Medicaid services are available to APA recipients only if the APA program follows SSI income-counting rules. PFD-HH funds for the replacement of APA benefits are transferred as Interagency Receipts to the Adult Public Assistance component.

The FY 96 Governor's budget plans for expenditure of $ 2,562,100 in PFD-HH funds to replace APA benefits which would otherwise be denied to 7,932 individuals. The cost of PFD-HH benefits in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the APA program. This fiscal note assumes the APA maximum payment levels will not change.

The typical FY96 PFD-HH payment to an APA recipient is expected to be $323 to replace one month's benefit.

PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most APA cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments. Recipients who retain enough dividend money in the month after they receive it to exceed the APA program limit of $2000 ($3000 for a couple) will remain ineligible until they have spent the money.

FISCAL NOTE

N 7

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date
Title: An Act relating to permanent fund dividends
Dept Affected: Health and Social Services
BRU: PFD Hold Harmless
Component: PFD Hold Harmless
Sponsor: Kott
Requestor: House STA
COMPONENT SERIAL NO. 225

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	(472.7)	(486.9)	(501.5)	(516.5)	(532.0)	(548.0)
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(21,843.4)	(22,935.6)	(24,082.4)	(25,286.5)	(26,550.8)	(27,878.3)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1050 PFD Fund	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)
TOTAL	(22,316.1)	(23,422.5)	(24,583.9)	(25,803.0)	(27,082.8)	(28,426.3)

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

House Bill No. 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Prepared by: Jim Dalman, Acting Director — Phone: 465-3680
Division: Division of Public Assistance — Date: 1/26/95

Approved by: Com Karen Perdue — Date:
Agency: Department of Health & Social Services

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ANALYSIS (cont.):

Repeal of the PFD Hold Harmless program will impact both the amount of assistance paid to individuals and families and the administrative effort required for the Division of Public Assistance to provide timely, accurate delivery of benefits. The Department of Health and Social Services has established interagency agreements with the federal agencies responsible for the AFDC and SSI programs. These agreements, which substantially reduce the amount of case processing required when recipients receive dividends, would be nullified by HB 70. The administrative effort to process PFD Hold Harmless entitlements would be supplanted by the additional case processing effort required to suspend public assistance entitlements when dividend payments are distributed.

Technical Analysis

Sections 1 and 2 of the bill repeal the express authority at AS 43.23.025(a)(1)(E) and AS 43.23.028(a)(3) to fund the PFD-HH program with appropriations from the dividend fund.

Section 3 of the bill repeals the language at AS 43.23.075 that established the PFD-HH program in 1982.

Section 4 establishes an effective date of January 1, 1996. The Department of Health and Social Services contacted the sponsor's office to ascertain the sponsor's intent regarding the effect of this legislation on the calendar year 1995 dividend distribution. The sponsor's staff indicated that the intent is to end the PFD Hold Harmless program prior to the 1995 dividend season. This analysis therefore assumes an effective date of July 1, 1995.

Program Impacts

PFD-HH is paid to replace public assistance benefits in the following programs:

Aid to Families with Dependent Children (AFDC)

Food Stamp Program (FSP)

Medicaid

Adult Public Assistance (APA)

Supplemental Security Income (SSI)

ANALYSIS (cont.):

The FY 96 Governor's budget plans expenditures to replace benefits with PFD-HH funds according to the following schedule:

Program	Cases	Persons Impacted	Formula Budget
AFDC	12987	39639	12875.5
FSP	11373	36384	3688.1
Medicaid	NA	2000	1100.0
APA	7932	7932	2562.1
SSI	5630	5630	1617.7
		Total FY 96 Grants	21843.4

PFD-HH funds for replacement of Food Stamp benefits are paid directly to recipients as cash in lieu of food coupons. In FY 96, a typical Food Stamp household is expected to receive one $324 PFD-HH payment to replace a month's worth of food coupons.

PFD-HH funds for replacement of AFDC benefits are transferred as Interagency Receipts to the AFDC component of the Assistance Payments BRU.

In the AFDC program, PFD-HH benefits replace federally-matched AFDC payments which would otherwise not be paid because of dividend receipt. The benefits replaced include AFDC grants which would be denied because of the dividend payments themselves as well as grants that would be reduced because federal AFDC policy requires that cash PFD-HH payments made in lieu of food stamps be treated as income for AFDC purposes. A typical AFDC family is expected to receive $780 in PFD-HH during FY 96 to replace one month's AFDC grant, and an additional $272 in PFD-HH to restore AFDC grant reductions that result from receiving cash in lieu of food coupons.

Under an interagency operating agreement with the federal Department of Health and Human Services, claims for AFDC federal matching funds are reduced to reflect the amount of benefits which would be paid if AFDC grants were denied because of dividend and food stamp hold harmless payments. This agreement saves substantial administrative effort because individual AFDC cases do not have to be suspended during the dividend season.

ANALYSIS (cont.):

PFD-HH funds for replacement of Medicaid benefits are transferred as Interagency Receipts to the Medicaid PFD Hold Harmless component of the Medical Assistance BRU. Most Medicaid PFD Hold Harmless benefits are paid on behalf of individuals who retain dividend money beyond the month they receive it, causing their household's resources to exceed program limits.

PFD-HH funds for replacement of APA benefits are transferred as Interagency Receipts to the Adult Public Assistance component of the Assistance Payments BRU. The typical PFD-HH benefit to an APA recipient is $323 to replace one month's benefit.

PFD-HH funds for replacement of SSI benefits are paid under an interagency agreement to the federal Social Security Administration, which applies them as reimbursement for the cost of SSI benefits paid to individuals who receive dividends. PFD-HH benefits to replace SSI are expected to average $287 per person in FY 96.

PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most AFDC, Food Stamp, APA, and SSI cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments.

The cost of PFD-HH benefits in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the AFDC and APA programs. This fiscal note assumes the AFDC and APA maximum payment levels will not change.

Administrative Impacts

The administrative cost of the PFD Hold Harmless program is based on estimates of the proportion of time used by Eligibility Determination staff to process case actions related to dividend payments and PFD-HH benefits. In FY 96, 472.7 in PFD-HH Contractual funds is planned to be transferred as Interagency Receipts to the Eligibility Determination component of the Public Assistance Administration BRU.

This analysis presumes that the intent of HB 70 is to preclude the appropriation of money from the Dividend Fund to administer public assistance. The cost of processing case changes resulting from the receipt of dividends is, therefore, shifted to General Fund.

ANALYSIS (cont.):

The administration of the PFD-HH program and the processing of case changes related to the receipt of dividend payments is funded through the transfer of 472.7 in PFD-HH Contractual funds as Interagency Receipts to the Eligibility Determination component. The repeal of the PFD-HH program proposed in HB 70 results in a small increase in the administrative effort required to take the dividend payments into account and process changes in the affected public assistance cases. The cost of processing is shifted to General Fund.

The time required to process Food Stamp cases would decrease because it would no longer be necessary to convert assistance to cash in lieu of food coupons and back again. The time to process AFDC, APA, and Medicaid cases in the absence of the PFD-HH program would increase substantially: under the Hold Harmless program, benefit authorization for these programs consists of the one-time entry of a few special computer codes. Without the PFD-HH program, action will have to be taken to suspend the benefits of each affected AFDC, APA, and Medicaid case, and to reinstate benefits after the month of suspension.

The need for staff is also expected to increase because of a substantial increase in General Relief applications from recipients who are unable to pay for rent or food when they lose their cash and food benefits two months after they receive their dividend checks. The Division of Public Assistance would make every effort to apprise recipients in advance that they will be retrospectively ineligible, but some recipients would inevitably fail to conserve enough dividend money to meet their future needs.

The offsetting effects of HB 70 result in a small increase in staffing needs in the Eligibility Determination component.

FISCAL NOTE

NO 0

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 70
(H) Publish Date: 2/1/95

Revision Date
Title: An Act relating to permanent fund dividends

Dept Affected: Health and Social Services
BRU: Assistance Payments
Component: AFDC

Sponsor: Kott
Requestor: House STA

COMPONENT SERIAL NO. 220

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTAA	0.0	0.0	0.0	0.0	0.0	0.0
Other 1007 I/A Receipts	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)
TOTAL	(12,875.5)	(13,519.3)	(14,195.3)	(14,905.1)	(15,650.4)	(16,432.9)

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of any current year (FY95) cost: $ NONE

ANALYSIS: (Attach a separate page if necessary)

HB 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the public assistance benefits of individuals who are denied benefits because federal law or regulation requires that their Permanent Fund dividend payments be treated as income or a resource (asset) in determining their eligibility for public assistance benefits. AS 43.23.075 holds public assistance benefits harmless for up to four months each year from the effects of receiving dividend payments.

Prepared by: Jim Dalman, Acting Director — Phone: 465-2680
Division: Division of Public Assistance — Date: 1/26/95

Approved by Com: Karen Perdue — Date: 1/26/95
Agency: Department of Health & Social Services

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ANALYSIS (cont.):

The PFD Hold Harmless program was established at the same time as the original, $1000 PFD distribution in 1982. The legislature established the program to assure that low-income Alaskans could enjoy the benefit of the dividend program on the same basis as other Alaskans, without losing their eligibility for needs-based assistance.

Federal AFDC law requires that Permanent Fund dividends be treated as income for AFDC purposes. Dividend money retained beyond the month it is received must be treated as a resource. The dividend payments are unearned income, which reduces AFDC benefits by about 92 cents for each dollar of income. Families which retain dividend money lose AFDC eligibility if their total resources exceed $1000.

The AFDC budget component includes PFD-HH funds transferred as Interagency Receipts to make payments to replace federally-matched AFDC benefits which would otherwise not be paid because of dividend receipt. The benefits replaced include AFDC grants which would be denied because of the dividend payments themselves as well as grants that would be reduced because federal AFDC policy requires that cash PFD-HH payments made in lieu of food stamps be treated as income for AFDC purposes.

The FY96 Governor's budget plans $12,875,500.00 in PFD-HH expenditures to replace the AFDC benefits of 12,987 families including 39,639 individuals. The cost of PFD-HH benefits to replace AFDC in future years is projected to grow at 5 percent per year, based on anticipated annual caseload growth of 5 percent. The legislature has set maximum payment levels in the AFDC program. This fiscal note assumes the AFDC maximum payment levels will not change.

Under current law, a typical AFDC family is expected to receive $780 in PFD-HH during FY 96 to replace one month's AFDC grant, and an additional $272 in PFD-HH to restore AFDC grant reductions that result from receiving cash in lieu of food coupons. PFD-Hold Harmless benefits will not be paid to recipients if HB 70 becomes law. In most AFDC cases, recipients who receive dividends will become ineligible for benefits for one month, usually falling two months after the month they receive their dividend payments. Recipients who save enough of their dividend money to place them over the $1000 resource limit will be ineligible until they have spent the money.

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STATE OF ALASKA
1995 LEGISLATIVE SESSION

Version: HB 70
(H) Publish Date: 2/1/95

Revision Date:
Title: Repeal PFD Hold-Harmless

Dept. Affected: Health and Social Services
BRU: Medical Assistance
Component: Medicaid Facility

Sponsor: Rep. Kott
Requestor: House State Affairs

COMPONENT SERIAL NO. 230

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	488.4	527.5	569.7	615.2	664.5	717.6
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	488.4	527.5	569.7	615.2	664.5	717.6
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGES IN REVENUES	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	244.2	263.8	284.9	307.6	332.3	358.8
1003 GF Match	244.2	263.7	284.8	307.6	332.2	358.8
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other (Interagency Receipt	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	488.4	527.5	569.7	615.2	664.5	717.6

Estimate of current year (FY95) impact: 0.0

POSITIONS:

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

ANALYSIS (attach a separate page in necessary)

House Bill 70 repeals the Permanent Fund Dividend Hold Harmless (PFD-HH) program. The PFD-HH program replaces the Medicaid benefits of individuals who are denied benefits because federal law or regulation requires that their PFD payment be treated as income or a resource (asset) in determining their eligibility for medical assistance benefits. The legislature established the program in 1981 to assure that low-income Alaskans could receive their PFD on an equal basis with all other Alaskans, without the loss of eligibility for needs-based medical assistance.

Prepared by: Jon Sherwood, MAA IV
Division: Medical Assistance
Phone: 465-3355
Date: 1/26/95

Approved by Commissioner: Karen Perdue
Agency: Department of Health and Social Services
Date: 1/26/95

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ANALYSIS (cont).

The PFD-HH program allows Medicaid recipients to receive and retain PFD money for up to four months and still receive Medicaid services.

If the PFD-HH program is eliminated, most Medicaid recipients will continue to remain eligible in the month they receive the check. They could become ineligible for Medicaid if they chose to retain their PFD check and it puts them over the Medicaid resource limit in the following month.

Many individuals, however, will elect to spend their PFD check in the month of receipt to prevent that money from being considered a resource, these individuals will retain Medicaid eligibility. In absense of PFD-HH funds, the regular Medicaid funding will be necessary to cover these individuals, both in Medicaid Facilities and Nonfacilities. We anticipate that those individuals who receive Medicaid services in an amount equal to or greater that the amount of a permament fund dividend are the individuals who will dispose of their PFD check and remain Medicaid eligible. Currently, 60% of annual Medicaid expenditures are for receipients who receive on average $967 or more in Medicaid benefits each month. We anticipate the regular Medicaid budget will see a commenserate increase equal to 60% of the amount currently budgeted for the PFD-HH program (1.1 million) See companion fiscal note for Medicaid Non-facility to show related increase.

The Medicaid expenditures shown reflect what would be a 10% growth (inflation and client growth) in future years in the cost of benefits.

MEDICAID FACILITY CALCULATION

Current FY 95 PFD-HH funding.	$1,100,000
% of PFD-HH costs shifted to Medicaid	60%
Medicaid cost of those retaining Medicaid	$660,000
Less Medicaid Non-facility share of cost (26%)	$171,600
Medicaid Facility expenditures born by Medicaid	$488,400

ALASKA DEPARTMENT OF REVENUE
PERMANENT FUND DIVIDEND DIVISION

HOLD HARMLESS PROGRAM DEDUCTIONS FROM 1985-1994 DIVIDENDS

As of September 29, 1994

The legislature first funded the Hold Harmless program from the Dividend Fund in FY86. Prior to that time, the program was funded by the General Fund. The following table reflects the amounts appropriated and the corresponding reduction to each eligible applicant's dividend that resulted from the use of Dividend Fund monies for this program.

Fiscal Year	Dividend Fund Hold Harmless Appropriations	Dividend Year	Reductions To Each Dividend		Reductions Reported
1986	$3,644,300	1985	$6.94	(a)	
1987	4,211,700	1986	7.75	(a)	
1988	8,581,200	1987	16.05		$16.05
1989	9,850,700	1988	18.61		18.61
1990	11,305,100	1989	22.72		22.72
1991	12,217,300	1990	24.12	(b)	24.12
1992	14,704,500	1991	28.63		28.63
1992	1,494,700	1992	2.89	(c)	
1993	18,540,900	1992	35.85		38.74
1994	19,252,100	1993	36.45		36.45
1994	244,400	1994	0.46	(d)	
1995	21,955,000	1994	40.99		41.45
Total	*$126,001,900*		*$241.46*		*$226.77*

Notes:

(a) These amounts were not reported on the 1985 or 1986 dividend check stubs. The Department first reported the effect of this appropriation on the dividend amount on the 1987 dividend check stub. In 1990 the legislature passed AS 43.23.028 requiring the reporting of all deductions from dividends.

(b) In FY91, there was a General Fund supplemental of $1,092,200 to the Hold Harmless program bringing the total FY91 Hold Harmless program appropriations to $13,309,500. Since the supplemental appropriation was from the General Fund, it did not reduce the amount of the 1991 dividend.

(c) This FY92 supplemental appropriation brought the total FY92 Hold Harmless program appropriation to $16,199,200. Since the supplemental appropriation was made after the calculation of the 1991 dividend, its effect was to reduce the 1992 dividend. The total 1992 dividend reduction as reported on the check stub was $38.74.

(d) This FY94 supplemental appropriation brought the total FY94 Hold Harmless program appropriation to $19,496,500. Since the supplemental appropriation was made after the calculation of the 1993 dividend, its effect was to reduce the 1994 dividend. The total 1994 dividend reduction as reported on the check stub was $41.45.

HB

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EGISLATIVE AFFAIRS AGENCY
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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:

these are fraudulent w/o intent

(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) (nonpayment 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.

I should hope so!

(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); Hatheway 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

This Act does not automatically void transfer to partners

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).

Remedies are cumulative

(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.Ill. 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

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

HOUSE COMMITTEE REPORT

2/3/95

(7)
Date Referred: January 16, 1995

FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: 2-1-95

The LABOR AND COMMERCE Committee considered: HB 72

HOUSE BILL NO. 72 UNIFORM FRAUDULENT TRANSFER ACT

"An Act enacting the Uniform Fraudulent Transfer Act."

recommends it be replaced with the following committee substitute _____

[ ] the same title
[ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal note(s) _____

_____

2) [X] zero fiscal note(s) Dept of Law; Commerce/Eco. Dev.

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

_____

[ ] zero fiscal note(s) _____

_____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Rokeberg	✓			
Elton			✓	
Kubina	✓			
Porter	✓			
Masek			✓	
Sanders			✓	
Kott	✓			
	(4)		(3)	

CHAIR'S SIGNATURE Pete Kott
Kott

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Bill Version: HB 72
(H) Publish Date: 2/3/95

Revision Date:
Title: "An Act enacting the Uniform Fraudulent Transfer Act."
Sponsor: Representative Porter
Requester: Representative Porter

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1005 GF/AHTA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

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 states 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.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 1/19/95

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 1/19/95

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

No. 1
Bill Version: HB 72
(H) Publish Date: 2/3/95

Revision Date:
Title: Uniform Fraudulent Transfer Act
Sponsor: Representative Porter
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities & Corporations
Component:

COMPONENT SERIAL NO. 1233

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 95) cost: $ 0

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities & Corporations
Phone: 465-2521
Date:

Approved by Commissioner: William L. Hensley
Agency: Commerce and Economic Development
Date: 1/23/95

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Alaska State Legislature

Representative Brian S. Porter

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HOUSE JUDICIARY COMMITTEE

MEMBER
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SPONSOR STATEMENT

HB 72 UNIFORM FRAUDULENT TRANSFER ACT

The Uniform Fraudulent Transfer Act (**UFTA**) provides **creditors** with a **remedy** when **debtors transfer or hide assets** that would otherwise be available to satisfy legitimate debts. HB 72 is modeled after the uniform law adopted by the National Conference of Commissioners on Uniform State Laws. The Attorney General of the State of Alaska is in support of this needed legislation.

Alaska law in this area was adopted in 1949 from the state of Oregon and has received little legislative attention. Yet, many changes in both state and federal law, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex.

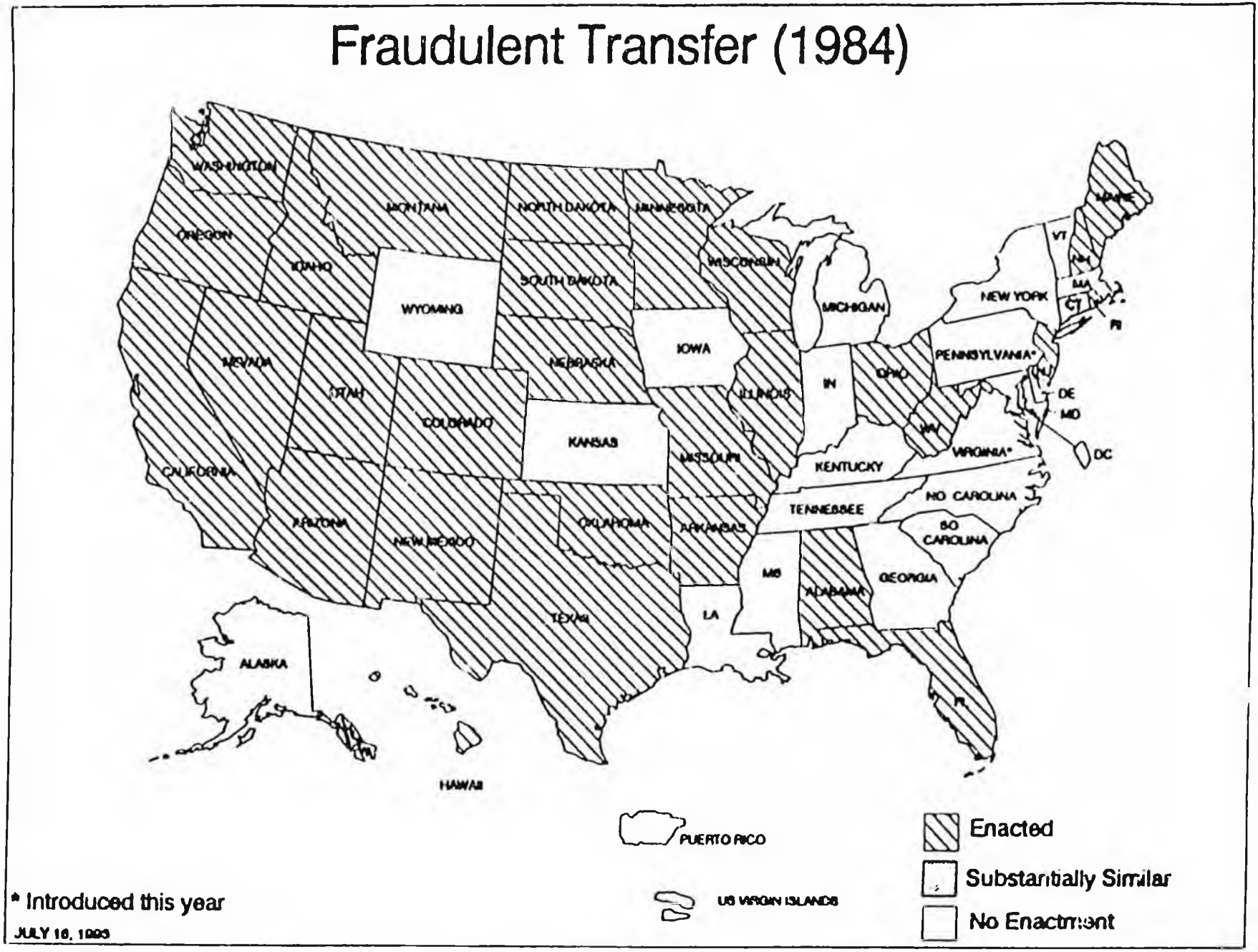
At this time, Alaska law provides that a conveyance of real or personal property will be void if it was made "with the **intent** to hinder, delay or defraud creditors." AS34.40.010. The existence of this fraudulent intent is a question of fact and the burden of proof is upon the creditor (Summers v. 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 situations where the transferor is obviously transferring assets solely to keep them out of the reach of transferor's creditors. UFTA sets out numerous **non-exclusive factors** to be considered by the court when determining if the debtor had "**actual intent.**"

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 current development in both law and practice in creditor-debtor relationships.

THE UNIFORM FRAUDULENT TRANSFER ACT

CONTENTS

Fraudulent Transfer (1984)



* Introduced this year

JULY 16, 1993

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:

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)

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 [illegible] 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

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.

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.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. 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. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

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.

Section 8, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (e) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (f) allows "workouts" and the like to occur.

Section 9 prescribes statutes of limitation specifically for the act.

Section 10 states the act is supplemented by other law and Section 11 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section 12 provides the title.

Section 13 repeals the current statutes on the subject, including any old predecessor versions of this act.

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,