

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9841 HOUSE JUDICIARY

This bill revises the rules that set up how letters of credit work and the relationships between all of the various parties involved.

Section 1. AS 09.30.070(b). Makes an amendment conforming this subsection to proposed AS 45.05.111(d). This bill section deals with interest on a court judgment and establishes when interest starts accruing before the judgment is handed down. Under AS 45.05.111(d), interest on money owed for a liability found under AS 45.05.111(a) - (c) starts when the letter of credit is wrongfully dishonored or on another appropriate date.

Section 2. AS 45.01.105(b). Makes an amendment conforming this subsection to the proposed AS 45.05 changes. AS 45.01.105 identifies which state or nation's law governs in certain cases involving more than one state or nation. The amendment states that AS 45.05.116 establishes what law governs for letters of credit.

Section 3. AS 45.02.512(a). Makes an amendment conforming this subsection to proposed AS 45.05.109(b). Excuses a buyer from making payment, even if the contract requires payment before inspection and the required documents are tendered, if the circumstances would justify an injunction under AS 45.05.109(b).

Section 4. AS 45.05.102. Defines the terms used in the revised chapter on letters of credit (AS 45.05). See the introductory comments to this memo for more simple definitions of the most important terms.

Section 5. AS 45.05.103. Defines the scope of AS 45.05.

AS 45.05.103(a). States that the chapter applies to letters of credit and transactions involving letters of credit.

AS 45.05.103(b). States that this chapter, by itself, does not govern how to treat another situation or person not covered by this chapter.

AS 45.05.103(c). States that you can change the provisions of this chapter by an agreement, except as provided by certain listed statutes. States that a general provision to excuse liability or limit remedies won't work to change the obligations imposed by this chapter.

AS 45.05.103(d). States that the rights and obligations of an issuer to a beneficiary, or to a nominated person, are independent of the contracts and arrangements underlying the letter of credit. In other words, the existence, performance, and nonperformance of the underlying contract or arrangement don't affect the rights and obligations under the letter of credit. Includes under this subsection contracts between the issuer and the applicant and between the applicant and the beneficiary.

Section 6. AS 45.05.104. Sets out just what a letter of credit and certain related documents must consist of. They must be in a form that can provide a record and must be authenticated

by a signature or authenticated as required under the parties' agreement or by the standard practice referred to in AS 45.05.108(e).

Section 7. AS 45.05.105. States that you don't need consideration (something of value to be received by a party) in order to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation. Contracts usually require that each party receive something as consideration (not necessarily money or other property, but something of value to the party).

Section 8. AS 45.05.106(a). States that a letter of credit becomes enforceable against the issuer when the issuer sends it to the beneficiary or adviser. States that you can't revoke a letter of credit unless the letter says so.

AS 45.05.106(b). States that an amendment or cancellation of a letter of credit does not affect the rights and obligations of certain listed persons (e.g., beneficiary and applicant) unless they consent to the amendment or cancellation, or unless the letter of credit says it is revocable or that the issuer can amend or cancel it without the consent.

AS 45.05.106(c). States when a letter of credit expires if it does not state the date or does not have a provision that determines when it expires. The letter of credit expires one year after its stated date of issuance or, if not stated, one year after the date it is issued.

AS 45.05.106(d). States that a perpetual letter of credit expires five years after its stated date of issuance or, if not stated, five years after the date it is issued.

Section 9. AS 45.05.107(a). States that a confirmer is directly obligated on the letter of credit and has the rights and obligations of the issuer (as far as the letter of confirmation says it does). Also states that the confirmer has rights against, and obligations to, the issuer as if the issuer were the applicant and the confirmer had issued the letter of credit at the request of the issuer.

AS 45.05.107(b). States that a nominated person does not have to honor or give value when the necessary documents are presented to collect under a letter of credit, unless the person is also a confirmer.

AS 45.05.107(c). States that a person requested to advise may decline to act as an adviser. States that an adviser is not required to honor or give value when the necessary documents are presented to collect under a letter of credit, unless the adviser is also a confirmer. States that an adviser's job is to advise accurately about the terms of the letter of credit and related documents, and, with regard to the beneficiary, to check if the request to advise is authentic. States that a letter of credit, confirmation, or amendment is enforceable as issued even if the advice is not accurate.

AS 45.05.107(d). States that a person who notifies a transferee beneficiary (a person to whom the beneficiary has transferred the beneficiary's interest under the letter of credit)

about the terms of a letter of credit or related document has the rights and obligations of an adviser under (c) of this section. States that the terms of the notice to the transferee beneficiary and transferor beneficiary (the beneficiary who transferred the interest in the letter of credit) may be different, as allowed by the letter of credit or related document that is received by the person who notifies the transferee beneficiary.

Section 10. AS 45.05.108(a). Except as provided in the section on fraud and forgery, requires an issuer to honor a presentation that appears on its face to comply strictly with the letter of credit. The standard practice of financial institutions determines whether the presentation complies as required. Requires an issuer to dishonor a presentation that does not appear to comply, except as provided in AS 45.05.113 and otherwise agreed with the applicant.

AS 45.05.108(b). States that upon presentation an issuer has a reasonable time to perform certain acts. The reasonable time may not exceed seven business days after the day of receipt. These acts are to honor the presentation, to notify the presenter that there are problems, or, if the letter of credit provides for honor after seven business days after presentation, to accept a draft (check) or incur a deferred obligation.

AS 45.05.108(c). States that in two situations an issuer is prevented from asserting that a problem causes the issuer to dishonor the letter of credit. The first situation is when the issuer does not give timely notice of the problem. The second situation is if the issuer gives notice but the problem is not stated in the notice. This subsection is subject to the fraud, forgery, and expiration assertions under (d).

AS 45.05.108(d). States that an issuer can still assert that there has been fraud or forgery (under AS 45.05.109(a)) or that the letter of credit has expired before presentation in order to dishonor a presentation, even if the issuer failed to give the required notice or to mention the fraud, forgery, or expiration in the notice.

AS 45.05.108(e). Requires an issuer of a letter of credit to comply with the standard practice of financial institutions that regularly issue letters of credit when the issuer handles letters of credit. States that a court is the determiner of whether the issuer has complied with the standard practice. Directs a court to allow the parties to present evidence of what is the standard practice.

AS 45.05.108(f). States what an issuer is not responsible for. An issuer is not responsible for the performance or nonperformance of the contract, arrangement, or transaction underlying the letter of credit. An issuer is not responsible for another person's acts or omissions. An issuer is not responsible for knowing the usage of a particular trade, except for the standard practice of financial institutions issuing letters of credit.

AS 45.05.108(g). Directs an issuer to ignore certain nondocumentary conditions contained in a letter of credit.

AS 45.05.108(h). Requires an issuer who does not honor a presentation under a letter of credit to return the documents presented, or to hold them for the presenter and notify the presenter.

AS 45.05.108(i). Establishes certain rights and limitations for an issuer when the issuer honors a presentation under a letter of credit. The issuer is entitled to be reimbursed by the applicant; the reimbursement must be made in funds that are available immediately to the issuer not later than the date of payment. The issuer takes the documents presented without any claims by the beneficiary or presenter. The issuer may not claim a right of recourse under AS 45.03.414 - 45.03.415 on a draft (check). Except as provided in two other sections, the issuer may not get the money or another valuable back if there was a mistake, if the mistake involves obvious problems in the documents or tender that are apparent on the face of the presentation. The issuer is discharged unless a required signature of the beneficiary was forged.

Section 11. AS 45.05.109(a). Gives an issuer directions on what to do if presentation documents appear to meet the requirements of the letter of credit, but a document is either forged or materially fraudulent, and honoring the documents would result in a material fraud by the beneficiary on the issuer or applicant.

Directs the issuer to honor the presentation of the documents if honor is demanded by certain persons under certain circumstances. The first is a nominated person that has given value in good faith and without notice of the forgery or fraud. The second is a confirmer that has honored its confirmation in good faith. The third is a holder in due course of a draft (check) that was drawn up under the letter of credit and taken by the holder in due course after acceptance by the issuer or nominated person. The fourth is the person who has had the issuer's or nominated person's deferred (doesn't have to be paid immediately) obligation transferred (assigned) to the person, if before the obligation was incurred by the issuer or nominated person, the person gave value to get the assignment and did not have notice of the forgery or fraud.

Allows the issuer to honor or dishonor the request for payment if the issuer acts in good faith and if the situation does not fall under categories (1) - (4) above.

AS 45.05.109(b). Authorizes a court to enjoin an issuer from honoring a request for payment (or grant similar relief against the issuer or other persons) when an applicant claims forgery or fraud, but only if four listed conditions are met. The first is that the relief must not be prohibited under the law governing drafts that have been accepted by the issuer, or governing a deferred obligation incurred by the issuer. The second is that a beneficiary, issuer, or nominated person who may be adversely affected must be adequately protected against loss resulting from the court giving the relief. The third is that all of the conditions for obtaining the court relief in this state must be satisfied. The fourth is that applicant is likely to succeed on the claim of forgery or fraud and the person demanding that the presentation be honored does not qualify for protection under (a)(1).

Section 12. AS 45.05.110(a). Establishes certain things that the beneficiary warrants when the presentation is honored. The beneficiary warrants to the issuer, to another person to whom the presentation is made, and to the applicant that there is no fraud or forgery as those terms are described in AS 45.05.109(a). The beneficiary warrants to the applicant that the payment (or transfer of value) does not violate an agreement between the beneficiary and the applicant or another agreement connected to the letter of credit.

AS 45.05.110(b). States that the warranties in (a) are in addition to other warranties under AS 45.03 (UCC: negotiable instruments), AS 45.04 (UCC: bank deposits and collections), AS 45.07 (UCC: warehouse receipts, bills of lading, and other documents of title), and AS 45.08 (UCC: investment securities) that are related to the presentation or transfer of the documents.

Section 13. AS 45.05.111(a). Allows a beneficiary, successor beneficiary, or a nominated person to recover from the issuer of a letter of credit the amount in dispute if the issuer wrongfully dishonors or states that the issuer will not honor its obligation. If the issuer's obligation is not to pay money, this subsection allows the claimant to make the issuer perform what the issuer was supposed to perform, or, if the claimant elects, to recover an amount of money that equals the value of the performance. Allows the claimant to also recover damages that flow directly and immediately from the dishonor but not more remote damages. States that the claimant does not have to take action to avoid the damages that might result. However, reduces the awarded damages to the extent the claimant does avoid the damages. Requires the issuer to prove the amount of the damages that the claimant avoided. If the claim is based on the issuer repudiating the obligation before presentation of the documents, states that the claimant does not have to present the documents normally required to require the issuer to pay or deliver the value required.

AS 45.05.111(b). Allows the applicant to recover damages from the issuer if the issuer wrongfully dishonors a draft or demand presented under a letter of credit, or if the issuer wrongfully honors a draft or demand under the letter of credit. Allows the claimant to recover damages that flow directly and immediately from the wrongful act, but not the more remote "consequential" damages. Reduces the amount of awarded damages by any amount saved due to the wrongful act.

AS 45.05.111(c). Allows a person to recover from an adviser or nominated person, other than a confirmer, the person's damages resulting from the adviser's or nominated person's breach of an obligation under this chapter or from an issuer's breach of an obligation not covered by (a) or (b). Allows the person to recover only damages that flow directly and immediately from the breach, but not the more remote consequential damages, less any amount the person saves due to the breach. States that a confirmer has the liability of an issuer under (a), (b), and this subsection, to the extent of the confirmation.

AS 45.05.111(d). States that an issuer, a nominated person, or an adviser who is liable under (a) - (c) must pay interest on the amount owed from the date of the wrongful dishonor, or from another appropriate date.

AS 45.05.111(e). Directs the court to award attorney fees and costs to the party who wins a court action for a remedy under this chapter.

AS 45.05.111(f). Allows parties to establish ahead of time by agreement the amount of damages that would result from a breach of an obligation under this chapter. However, the amount or formula for calculating the amount must be reasonable.

Section 14. AS 45.05.112(a). Prohibits transferring the right of a beneficiary to payment or performance under a letter of credit, except when the transfer occurs by operation of law as provided under AS 45.05.113, or unless the letter of credit says the right is transferable.

AS 45.05.112(b). Allows in two circumstances an issuer to refuse to carry out or recognize a transfer, even if allowed under the letter of credit. The first circumstance is that the transfer would violate the law that applies to the situation. The second circumstance is that the transferor or the transferee has failed to comply with the letter of credit, or with another requirement that relates to the transfer, and that is within the standard practice of financial institutions regularly dealing with letters of credit or that is otherwise reasonable under the circumstances.

Section 15. AS 45.05.113(a). Allows a person who succeeds another person as the beneficiary under a letter of credit to perform certain listed acts without having to disclose that it is a successor of the beneficiary. The successor may consent to amendments. The successor may sign and present documents. The successor may receive payment or other items of value in the name of the beneficiary.

AS 45.05.113(b). Allows the successor of a beneficiary to perform certain listed acts in its own name as the disclosed successor to the beneficiary. The disclosed successor may consent to amendments. The disclosed successor may sign and present documents. The disclosed successor may receive payment or other items of value. Except as provided by (c), directs an issuer to recognize a person who is disclosed to be a successor beneficiary as a full beneficiary if the successor beneficiary complies with the standard practice for financial institutions regularly dealing in letters of credit, or, in the absence of the standard practice, with other reasonable procedures that will protect the issuer.

AS 45.05.113(c). States that an issuer does not need to determine whether a person alleging to be a successor beneficiary is actually such a beneficiary or whether the purported successor's signature is genuine or authorized.

AS 45.05.113(d) States that honoring a purported successor's presentation under (a) or (b) that appears to be in compliance has the consequences identified in AS 45.05.108(i) even if

the person is not really the successor of the beneficiary. States that documents signed in the name of the beneficiary or a disclosed successor by a person who is not really the beneficiary or the successor beneficiary are considered to be forged documents when applying AS 45.05.109.

AS 45.05.113(c). Allows an issuer (if the issuer's rights of reimbursement are not covered by (d) or by similar law), any confirmer, and any nominated person to decline a presentation as provided in (b).

AS 45.05.113(f). States that if a beneficiary changes its name after a letter of credit is issued, the beneficiary has the same rights and obligations as a successor beneficiary under this section.

Section 16. AS 45.05.114(a). Defines "proceeds of a letter of credit" for the section.

AS 45.05.114(b). Allows a beneficiary to assign (transfer to another person) its right to the proceeds of a letter of credit. Allows the beneficiary to do this before presentation, by assigning the right to receive proceeds when the conditions are satisfied in the letter of credit.

AS 45.05.114(c). Allows the issuer or nominated person to refuse to recognize an assignment of the proceeds of a letter of credit until the issuer or nominated person agrees to the assignment.

AS 45.05.114(d). States that an issuer or nominated person is not required to give or withhold its consent to an assignment (transfer to another person) of the proceeds of a letter of credit. Prohibits the issuer or nominated person from withholding the consent unreasonably if the assignee has and shows the letter of credit and if presentation of the letter of credit is required before honor.

AS 45.05.114(e). States that the rights of a transferee beneficiary (a subsequent beneficiary to whom a beneficiary's rights have been transferred) or of a nominated person do not depend on the beneficiary's assignment (transfer) of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

AS 45.05.114(f). States that the rights under this section between an assignee and an issuer, a transferee beneficiary, or a nominated person, and the issuer's or nominated person's payment of proceeds to an assignee or a third person, do not affect the rights between the assignee and a person other than the issuer, transferee beneficiary, or nominated person. States that the creation and perfecting (making effective) of a security interest (an interest taken to secure a payment) in (or granting) a beneficiary's rights to proceeds, and assignment of (transferring) those rights, are governed by AS 45.09 (UCC: secured transactions) or other law. States that the rights and obligations arising on the creation and perfection of a security interest or arising on another assignment (transfer) of a beneficiary's rights to

proceeds, are governed by AS 45.09 or other law, as against a person other than the issuer, transferee beneficiary, or nominated person.

Section 17. AS 45.05.115. Limits how long a person has to bring an action in court to enforce a right or obligation under this chapter. Limits the time to the later of (1) one year after the expiration date of the letter of credit, or (2) one year after the basis for the action occurs. States that a basis for the action arises when there is a breach (of an obligation) under this chapter, even if the injured party does not know about the breach.

Section 18. AS 45.05.116(a). States that the liability of an issuer, a nominated person, or an adviser is governed by the jurisdiction that the parties choose by agreement if the agreement is in the form of a record signed or otherwise shown to be authentic by the parties under AS 45.05.104 or by a provision in the letter of credit, confirmation, or other undertaking. States that the selected jurisdiction is not required to be related to the transaction involved.

AS 45.05.116(b). States which jurisdiction governs the liability of certain listed persons for their acts or failure to act, unless (a) applies. States that the jurisdiction is the jurisdiction where the person is located. Considers the person to be located at the address stated in the person's promise. States that if more than one address is indicated, the person is considered to be located at the address from which the promise of the person was issued. When dealing with jurisdiction, selection of whose law to apply, and recognition of letters of credit between bank branches, but not a court judgment, the branches of a bank are considered to be separate juridical entities, and a bank is considered to be located where the bank's branch that is related to the matter is considered to be located under this subsection.

AS 45.05.116(c). States that, except as provided otherwise in this subsection, the liability of certain listed persons is governed by rules of custom or practice that the parties expressly select for the letter of credit or confirmation, or undertaking. Gives as an example the Uniform Customs and Practice for Documentary Credits. States that if both this chapter and the rules of custom or practice apply to the liability, the rules govern, unless they conflict with a provision of this chapter that cannot be changed (see AS 45.05.103(c)).

AS 45.05.116(d). States that this chapter governs if a conflict occurs between this chapter and AS 45.03 (UCC: negotiable instruments), AS 45.04 (UCC: bank deposits and collections), AS 45.09 (UCC: secured transactions), and AS 45.14 (UCC: funds transfers).

AS 45.05.116(e). States that the location for settling disputes under this chapter may be chosen in the same manner as the governing law is chosen under (a), and that the selection has the same binding effect.

Section 19. AS 45.05.117(a). States that an issuer who honors a letter of credit is subrogated to the rights of (is substituted for and can claim the rights of) certain listed

persons. The first person is the beneficiary, and the substitution is the same as if the issuer were a back-up debtor on the underlying obligation owed to the beneficiary. The second person is the person who requested the issuer to issue a letter of credit and the subrogation is to the same extent as if the issuer were the back-up debtor on the obligation owed to the applicant.

AS 45.05.117(b). States that an applicant that reimburses an issuer is subrogated to the rights of (is substituted for and can claim the rights of) certain listed persons. The subrogation is to the same extent as if the applicant were the secondary debtor on the obligation owed to the issuer, and the applicant has the subrogation rights of the issuer to the rights of the beneficiary stated in (a).

AS 45.05.117(c). States that a nominated person who pays or gives value against a draft (check) or demand presented under a letter of credit is subrogated to the rights of (is substituted for and can claim the rights of) certain listed parties.

AS 45.05.117(d). States that the right of subrogation in (a) and (b) don't arise until the issuer honors the letter of credit or otherwise pays under the letter of credit. States that the rights of subrogation in (c) don't arise until the nominated person pays or otherwise gives value under the letter of credit. These provisions apply even if there is an agreement that states otherwise. Until the events occur, the persons do not obtain under this section any present or future rights that would form the basis for a claim, defense, or excuse.

Section 20. AS 45.09.103(a). This amendment adds "rights to proceeds of written letters of credit" to the items that are covered by this subsection. The subsection deals with determining which jurisdiction's law applies when perfecting (making effective) secured transactions (agreements where one party transfers an interest in property to secure a contract), and what happens when collateral that is subject to a perfected security interest in another jurisdiction is brought into and kept in this state.

Section 21. AS 45.09.104. States that AS 45.09 (UCC: secured transactions) does not apply to the transfer of an interest in a letter of credit, except for the rights to proceeds of a written letter of credit.

Section 22. AS 45.09.105(c). Adds two definitions to the definitions that apply in AS 45.09 (UCC: secured transactions): "letter of credit" and "proceeds of a letter of credit."

Section 23. AS 45.09.106. Adds "rights to proceeds of written letters of credit" to the definition of "general intangibles" that is used in AS 45.09 (UCC: secured transactions).

Section 24. AS 45.09.304(a). States that to perfect (make effective) a security interest (interest given to a person to secure performance of a contract) in the rights to proceeds of a written letter of credit, the party that is secured must take possession of the letter of credit.

Representative Norman Rokeberg, Chair
House Labor and Commerce Committee
February 18, 1999
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Section 25. AS 45.09.305. Allows a person to obtain an interest that secures performance of an obligation in the "rights to proceeds of a written letter of credit" by taking possession of the letter of credit.

Section 26. Subsection (a) states that this Act applies to a letter of credit that is issued on or after the effective date of this Act. States that this Act does not apply to a transaction, event, obligation, or duty that is associated with a letter of credit issued before the effective date of this Act.

Subsection (b) states that a transaction associated with a letter of credit issued before the effective date of this Act, and the accompanying rights, obligations, and interests are governed by current law as if this Act had not occurred.

Section 27. Makes the Act effective January 1, 2000.

TLB:glc
99-066.glc

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January 27, 1999

JAN 27 1999

The Honorable Norman Rokeberg, Chair
House Labor and Commerce Committee
Alaska State Legislature
Room 24, State Capitol
Juneau, Alaska 99801-1182

HAND DELIVERED

Re: Uniform Commercial Code, Revision of Article 5 -- Letters of Credit
(Last Legislature's HB 178)

Dear Representative Rokeberg:

As I discussed with your assistant, Janet Seitz, yesterday, last legislature's HB 178 appears ready for re-introduction this session. At her request, you will find attached a "sponsor statement" for the bill. I will not go into the bill here, other than to say that it is basically an update of the law governing the \$200 billion U.S. letter-of-credit industry.

Also attached are three information sheets (one of which is two-sided) provided by the NCCUSL. As usual, I would be happy to provide any additional information that you may need. As you know, however, in Alaska's Uniform Laws delegation, Jerry Kurtz is the one with the most expertise in this area. He can be reached in Anchorage at 276-6100.

Since the bill passed the House unanimously last year, and, despite the lack of opposition, inexplicably got stuck in the Senate Judiciary Committee, I trust that it will pass this year. Thanks again for your support and your work on it.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

The Honorable Norman Rokeberg, Chair
January 27, 1999

Page 2

AHP:dv

Enclosures (4)

cc w/encl: Rest of Alaska's ULC Delegation:
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Tamara Brandt Cook, Esq.
L. S. Kurtz, Jr., Esq.
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February 22, 1999

Hon. Norman Rokeberg, Chair
House Labor & Commerce Committee
Alaska State Legislature
ATTN: Janet Seitz
Room 24, State Capitol
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 79, Revision of UCC, Article 5 (Letters of Credit)
-- support

Dear Rep. Rokeberg:

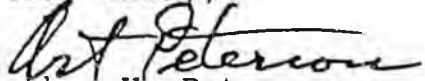
I understand that HB 79 is scheduled for a hearing before your committee this Friday, February 26. Unfortunately, I will be in Anchorage on business that day and cannot attend your hearing.

However, I wanted to repeat my strong SUPPORT for this bill, and I urge your committee to act on it favorably, with a "Do Pass" recommendation.

This bill presents a necessary piece in the ongoing efforts of the National Conference of Commissioners on Uniform State Laws to keep the Uniform Commercial Code up to date. It resolves issues pertaining to modern technology, current business practices, and the interpretation of the decades-old existing law. It is described more specifically in the sponsor statement and attached materials that I provided you with my January 27, 1999 letter.

Thank you.

Yours truly,


Arthur H. Peterson
Uniform Law Commissioner
for Alaska

cc: Rest of Alaska's ULC Delegation:
Jay A. Rabinowitz
W. Grant Callow
Tamara Brandt Cook
L. S. (Jerry) Kurtz, Jr.
Deborah E. Behr

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 19, 1999

TONY KNOWLES, GOVERNOR

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Honorable Norman Rokeberg
Chair
House Labor & Commerce Committee
State Capitol, Rm 24
Juneau, AK 99801-1182

FEB 19 1999

Re: HB 79 - UCC: Letters of Credit

Dear Representative Rokeberg:

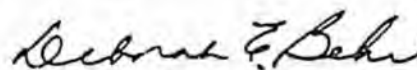
HB 79 (UCC: Letters of Credit) is presently before the House Labor and Commerce Committee. The bill was developed by the National Conference of Commissioners on Uniform State Laws after many years of study and consideration. The bill is important to provide a good business climate for interstate business transactions concerning letters of credit.

If you have questions, please contact me at 465-2122.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Deborah E. Behr
Assistant Attorney General

DEB:jf

cc: Pat Pourchot, Legislative Dir.
Office of the Governor

Chrystal Smith, Legislative Contact
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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 8, 1999

Honorable Pete Kott
Chair
House Judiciary Committee
State Capitol, Rm 118
Juneau, AK 99801-1182

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

P.O. BOX 110300-DIMOND COURT HOUSE
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

MAR 08 1999

Re: HB 79 - UCC: Letters of Credit

Dear Representative Kott:

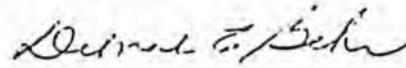
HB 79 (UCC: Letters of Credit) is presently before the House Judiciary Committee. The bill was developed by the National Conference of Commissioners on Uniform State Laws after many years of study and consideration. The bill is important to provide a good business climate for interstate business transactions concerning letters of credit.

If you have questions, please contact me at 465-2122.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Deborah E. Behr
Assistant Attorney General

DEB:jf

cc: Hon. Norman Rokeberg, Chair
House Labor & Commerce Committee

Pat Pourchot, Legislative Dir.
Office of the Governor

Chrystal Smith, Legislative Contact
Dept. of Law

All Alaska Uniform Law Commissioners

Vince Usera
Mary Ellen Beardsley
Assistant Attorneys General
Juneau/Anchorage

HB

81

Kodiak Electric Association, Inc.

(907) 488-7700

Box 787
KODIAK, ALASKA 99615

To UNS
Committee
for their
files!
A

April 27, 1999

The Honorable Alan Austerman
Alaska State Legislature
State Capitol, Room 434
Juneau, AK 99801-1182

Re: HB 81, HB 174, and IIB 169

Dear Representative Austerman:

You have asked for comments on IIB 81 and its potential effect on Kodiak Electric Association, Inc. I would also like to provide comments on IIB 174 and IIB 169 for your reference.

HB 81. This bill proposes a new section in AS 42.05 (the Alaska Public Utilities Commission Act) which would be entitled "Electric Consumer Protections," but is in fact legislation setting up the outline of a restructured competitive electric utility industry. Several sections in this legislation are already incorporated within the existing AS 42.05. For instance, Section (c), requiring deferred payment plans for electric customers unable to pay their bills, is already fully dealt with by the APUC in its regulation 3 AAC 52.445. The remainder of this legislation is premature in that it deals with issues raised by a restructured electric utility industry in a competitive environment before the legislature has fully studied the problems associated with such a restructuring. This is not to say that some type of legislation such as this may not be an integral part of such a restructuring, but only that it is premature at this time.

HB 174. This bill would amend the Electric and Telephone Non-Profit Cooperative Act to restrict the right of electric cooperatives only to enter into personal services contracts of a term of greater than one year. This legislation could have a devastating effect upon non-profit electric cooperatives such as KEA. Electric cooperatives employ CFOs, lawyers, engineers, and other consultants using personal services contracts, many of which extend beyond one year in duration. It is especially critical, in an era when the electric utility industry may be transitioning toward a more competitive environment, that electric cooperatives, such as KEA, have the ability to attract and retain key professional employees. This proposed legislation would make it very difficult for boards of directors to make employment offers to qualified candidates. It is ironic that this legislation is being proposed only for electric cooperatives where the board of directors is elected by the members/consumers to conduct the business and affairs of the cooperative. If the cooperative's

Representative Alan Austerman
April 27, 1999
Page 2

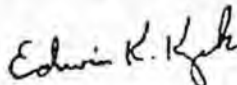
members are unhappy with the board of directors' decisions, they are, of course, free to elect new board members. Once elected, however, the board should be free to carry out its fiduciary duty to act in the best interest of the cooperative, and the cooperative's membership should not be involved in day-to-day decision making.

HB 169. This bill again attempts to regulate only electric cooperatives and specifically does not deal with other types of utilities such as investor-owned and municipally owned utilities which might be in competition with cooperatives. This would have the impact of putting electric cooperatives such as KEA at a competitive disadvantage in a restructured electric industry environment. In fact, this bill goes even further and attempts to "re-regulate" electric cooperatives whose members have chosen to become exempt from regulation by the APUC through a process earlier enacted by the legislature of the State of Alaska. If this bill is enacted, electric cooperatives whose members have voted to remove the electric cooperative from APUC regulation will again become subject to the APUC's review of the cooperative's rates. For electric cooperatives such as KEA which continue to be regulated by the APUC, this legislation is unnecessary because the APUC already has in place regulations dealing with lobbying and promotional expenses. If passed, this legislation would put KEA at a severe disadvantage in a competitive environment. Experience in the telephone industry has shown that privately owned utilities are perfectly willing to spend tremendous amounts of money in lobbying the legislature for legislation which they feel is to their competitive advantage, amounts of money which cooperatives in all likelihood will never be able to match. It is important, however, that cooperatives such as KEA be allowed to get their and their members' story before the legislature early in any move to restructure the electric utility industry toward a more competitive environment.

I would be happy to meet with you at your convenience to discuss this or any other legislation in more depth. If you have any questions or would like more specific examples of how the above proposed legislation would affect KEA, please feel free to give me a call.

Sincerely yours,

KODIAK ELECTRIC ASSOCIATION, INC.



Edwin K. Kozak, P.E.
General Manager

EKK:lka

cc: Board of Directors
Kodiak Electric Association, Inc.

COPPER VALLEY ELECTRIC ASSOCIATION, INC.

P.O. BOX 45, GLENNALLEN, ALASKA 99588
(907) 822-3211 FAX 822-5586 VALDEZ (907) 835-4301 FAX 835-4328

May 4, 1999

Representative Bill Hudson, Chairman
House Special Committee on Industry Restructuring
State Capitol
Juneau, Alaska 99801-1182

Recd
5/5/99

SUBJECT: Committee Substitute for House Bill 81

Dear Representative Hudson:

First, I want to thank you and the other committee members for your receptiveness to my input on HB 81. I am very appreciative of your diligence in attempting to protect the public interest, and I am certainly aware of the complexity of electric utility restructuring. This knowledge leads me to conclude just how difficult an issue this is in rural Alaska and, to a large degree, accounts for my caution when approaching restructuring. I believe I have some idea how much damage could be effected in the rural utility service areas by opening up those areas to competition while rural utilities are still in the process of attempting to build infrastructure and deliver electricity to some customers for the first time.

At your invitation, I have reviewed the bill and the committee substitute again. I have marked up the committee substitute in a manner that I hope reflects my concerns. The following brief discussion further summarizes my concerns:

1. This bill creates new categories of suppliers called electric service providers, aggregators, distributors, and suppliers. Those terms are not defined in this bill nor are they defined in the Alaska Public Utilities Commission Act. I believe it would be appropriate to define these terms somewhere in the proposed legislation.

2. These new categories of suppliers appear to be subject to a different type of restriction called licensing. The meaning of licensing is undefined and would appear to be implicitly something less than being required to provide a Certificate of Public Convenience and Necessity as are public utilities. I believe that if the intent is to permit some form of electric supplier to provide electricity within a service area, that supplier should be subject to the same certification requirements as any other utility, and further, there should be a determination of public need prior to granting such a certificate. At the risk of belaboring the point, anyone selling

Committee Substitute for House Bill 81

May 4, 1999

Page 2

electricity should be subject to all of the requirements of the APUC Act (AS 42.05) that apply to electric utilities.

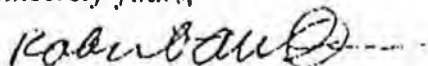
3. The terms "technically feasible" and "reasonable costs" are sufficiently vague to create the potential for future disagreement. Regulated electric utilities are required to file tariffs outlining their service rules and policies with the Commission. These tariffs necessarily include standards as well as line extension policies regarding the provision of electric service. Following the comments in paragraph 2 above, it would stand to reason all electric service providers should be required to have these same tariffs on file with the Commission. Making all electric service providers subject to the requirements of AS 42.05 would accomplish this.

4. Every effort should be made to shore up the exemption of rural utility service areas from the invasion of new providers. I cannot over emphasize the impact on a small, rural utility if an outside entity comes in and provides service only to its larger load customers. In CVEA's recent experience with Alaska Power Systems' efforts to serve our largest customer, Petro Star Valdez Refinery, the results would have been devastating. Our study showed the loss of this customer would have necessitated a 13.8% increase to remaining customers. This practice, which has been referred to as cream skimming or cherry picking, is the beginning of the end for the remaining customers and can only result in higher rates for those remaining customers. Consequently, I propose that you insert a limitation on the size of service area in which a competitive electric service market could exist or, alternatively, firmly protect those cooperatively owned utilities who have gained exemption from APUC regulation under AS 42.05.711. I am sure there are other approaches. I do not presume to speak for other utilities, but in my view, only the larger urban service areas could withstand the impact of losing large loads and suitably engaging in a competitive marketing process in a restructured environment.

I am aware that a very substantial study has been undertaken by CH2M Hill in behalf of the APUC and the Legislature on the whole issue of restructuring. I genuinely believe that is the only proper approach to addressing the numerous and complex issues of restructuring. To my knowledge, state after state within the contiguous United States have undertaken the issue of restructuring only after comprehensive study. I am concerned that this bill and others like it may introduce the subject of restructuring in a piecemeal fashion before adequate study has been undertaken.

In closing, I want to thank you again for your close attention to this thorny and complex issue. Should the committee choose to move the bill forward this session I could certainly support it with proposed changes. I would be more than pleased to respond to questions you may have if you feel it appropriate.

Sincerely yours,



Robert A. Wilkinson
Chief Executive Officer

moved 5/5/99

1-LS0181U
Cramer/
5/3/99

CS FOR HOUSE BILL NO. 81(URS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON UTILITY RESTRUCTURING

Offered:
Referred:

Sponsor(s): **REPRESENTATIVES ROKEBERG, Dyson**

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring the Alaska Public Utilities Commission to adopt regulations to
2 provide standards of operation and consumer protection in a competitive electric
3 service market; and providing for an effective date."

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

5 * Section 1. AS 42.05 is amended by adding a new section to read:

6 **Sec. 42.05.226. Electric consumer protections.** (a) As part of any general
7 proceeding to investigate electric industry restructuring, the commission shall establish
8 by regulation, for those utilities subject to economic regulation by the commission,

9 (1) consumer protection standards to protect consumers in a competitive
10 electric service market;

11 (2) licensing requirements for electric service providers operating in a
12 competitive electric service market;

13 (3) procedures for the prompt, effective, and low-cost resolution of
14 consumer complaints against electric service providers operating in a competitive

1 electric service market;

2 (4) minimum safety standards and service criteria for electric service
3 providers operating in a competitive electric service market; and

4 (5) penalties for electric service providers operating in a competitive
5 electric service market who fail to comply with the requirements of this chapter.

6 (b) The consumer protection standards adopted under (a) of this section must
7 require electric service providers operating in a competitive electric service market to

8 (1) provide consumers with free basic information and free or
9 reasonably priced educational materials to enable consumers to compare the price,
10 quality, supplier service record, and terms of service offered by the electric service
11 provider with the offerings of other providers in the market; the commission shall
12 establish by regulation the information that must be provided without charge; that
13 information must include

14 (A) the name of the provider and information about how to
15 communicate with the provider, including emergency contact numbers;

16 (B) the type of service plans available and the cost of each type
17 of service plan;

18 (C) the procedure to change electric service providers;

19 (D) the area in which a provider sells its product;

20 (E) basic information on the provider itself, including the
21 number of years it has been in business and the number of customers it serves;

22 (2) offer electric service to any consumer in the area served by the
23 electric service provider so long as providing the service is technically feasible at a
24 reasonable cost to the provider;

25 (3) provide the same electric service choices and pricing options to all
26 consumers;

27 (4) maintain information and records, including records concerning
28 individual electric use patterns, about the electric service provider's consumers as
29 confidential records; if the electric service provider has both a regulated component
30 and an unregulated component, the provider shall keep the records of customers of one
31 component confidential from the provider's other component; however,

1 (A) an electric service provider may report information to the
2 commission so long as the information does not identify directly or indirectly
3 an individual consumer;

4 (B) information may be released to an alternate electric service
5 provider at the written request of the customer; for purposes of this
6 subparagraph, an alternate electric service provider includes a regulated or
7 unregulated component of an electric service provider that is otherwise not
8 entitled to have access to the information;

9 (5) meet the minimum safety standards and service criteria established
10 by the commission;

11 (6) meet its advertised terms and conditions;

12 (7) refrain from imposing unreasonable terms and conditions, including
13 service connect or disconnect fees, as a precondition to providing service that meets
14 generally accepted industry standards to a consumer in a competitive electric service
15 market.

16 (c) The commission shall adopt regulations to require electric service providers
17 operating in a competitive electric service market to continue to provide electric
18 service to residential consumers who demonstrate that economic hardship has
19 prevented payment in full of a delinquent bill. The regulations may require the
20 consumer to agree to a reasonable deferred payment plan and to comply with the plan.

21 (d) The commission shall adopt regulations to require a supplier or an
22 aggregator operating in a competitive electric service market to meet minimum
23 standards for certification as a condition of market entry. The commission shall, by
24 regulation, adopt the standards for certification; these standards must explicitly provide
25 for reliable and safe electrical power.

26 (e) The commission shall, by regulation, provide that an electric service
27 consumer in a competitive electric service market may receive only one periodic
28 billing for the provision of electric service to a location. The bill must set out
29 information in a clear and concise manner so that the consumer is informed about the
30 components of the bill, including charges associated with generation, transmission,
31 distribution, stranded cost allocation, universal service, and customer service. An

1 electric service provider that handles the billing for a customer shall permit other
2 electric service providers that supply, aggregate, or distribute electric power to the
3 customer to include information in the bill at nondiscriminatory rates.

4 (f) The commission shall, by regulation, require that, in a competitive electric
5 service market, a customer's electric service provider may only be changed with the
6 written authorization of the customer.

7 (g) The commission shall, by regulation, require reports from electric service
8 providers who are participating in a competitive electric service market and establish
9 the contents of the reports.

10 (h) In this section,

11 (1) "competitive electric service market" means a market or program
12 in which retail electricity customers are offered a choice of electric service provider,
13 whether on a permanent or limited basis or under a pilot program;

14 (2) "electric service provider" means a person or entity, including a
15 utility, a broker, a marketer, a wholesaler, or an aggregator, seeking to provide or
16 providing electric service to the public, or a portion of the public, whether or not for
17 compensation.

18 (i) This section may not be applied to result in a utility that is not otherwise
19 subject to economic regulation by the commission becoming subject to economic
20 regulation by the commission.

21 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

4/28/99
I-LS0181G
Cramer/
4/26/99

CS FOR HOUSE BILL NO. 81()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Dyson

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring the Alaska Public Utilities Commission to adopt regulations to
2 provide standards of operation and consumer protection in a competitive electric
3 service market; and providing for an effective date."

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

5 * Section 1. AS 42.05 is amended by adding a new section to read:

6 Sec. 42.05.226. Electric consumer protections. (a) The commission shall
7 establish by regulation

8 (1) consumer protection standards to protect consumers in a competitive
9 electric service market;

10 (2) licensing requirements for electric service providers operating in a
11 competitive electric service market;

12 (3) procedures for the prompt, effective, and low-cost resolution of
13 consumer complaints against electric suppliers, aggregators, and distributors operating
14 in a competitive electric service market;

1 (4) minimum safety standards and service criteria for electric service
2 providers operating in a competitive electric service market; and

3 (5) penalties for electric service providers operating in a competitive
4 electric service market who fail to comply with the requirements of this chapter.

5 (b) The consumer protection standards adopted under (a) of this section must
6 require electric service providers operating in a competitive electric service market to

7 (1) provide consumers with free basic information and free or
8 reasonably priced educational materials to enable consumers to compare the price,
9 quality, supplier service record, and terms of service offered by the electric service
10 provider with the offerings of other providers in the market; the commission shall
11 establish by regulation the information that must be provided without charge; that
12 information must include

13 (A) the name of the provider and information about how to
14 communicate with the provider, including emergency contact numbers;

15 (B) the type of service plans available and the cost of each type
16 of service plan;

17 (C) the procedure to change service providers;

18 (D) the area in which a provider sells its product;

19 (E) basic information on the provider itself, including the
20 number of years it has been in business and the number of customers it serves;

21 (2) offer electric service to any consumer in the area served by the
22 electric service provider so long as providing the service is technically feasible at a
23 reasonable cost to the provider;

24 (3) provide the same electric service choices and pricing options to all
25 consumers;

26 (4) maintain information and records, including records concerning
27 individual electric use patterns, about the electric service provider's consumers as
28 confidential records; if the electric service provider has both a regulated component
29 and an unregulated component, the provider shall keep the records of customers of one
30 component confidential from the provider's other component; however,

31 (A) an electric service provider may report information to the

1 commission so long as the information does not identify directly or indirectly
2 an individual consumer;

3 (B) information may be released to an alternate service provider
4 at the written request of the customer; for purposes of this subparagraph, an
5 alternate service provider includes a regulated or unregulated component of an
6 electric service provider that is otherwise not entitled to have access to the
7 information;

8 (5) meet the minimum safety standards and service criteria established
9 by the commission;

10 (6) meet its advertised terms and conditions;

11 (7) refrain from imposing unreasonable terms and conditions as a
12 precondition to providing service to a consumer in a competitive electric service
13 market.

14 (c) The commission shall adopt regulations to require electric service providers
15 operating in a competitive electric service market to continue to provide electric
16 service to residential consumers who demonstrate that economic hardship has
17 prevented payment in full of a delinquent bill. The regulations may require the
18 consumer to agree to a reasonable deferred payment plan and to comply with the plan.

19 (d) The commission shall adopt regulations to require a supplier or an
20 aggregator operating in a competitive electric service market to meet minimum
21 standards for certification as a condition of market entry. The commission shall, by
22 regulation, adopt the standards for certification; these standards must explicitly provide
23 for reliable and safe electrical power.

24 (e) The commission shall, by regulation, provide that an electric service
25 consumer in a competitive electric service market may receive only one periodic
26 billing for the provision of electric service to a location. The bill must set out
27 information in a clear and concise manner so that the consumer is informed about the
28 components of the bill, including charges associated with generation, transmission,
29 distribution, stranded cost allocation, universal service, and customer service. An
30 electric service provider that handles the billing for a customer shall permit other
31 electric service providers that supply, aggregate, or distribute electric power to the

1 customer to include information in the bill at nondiscriminatory rates.

2 (f) The commission shall, by regulation, require that, in a competitive electric
3 service market, a customer's electric service provider may only be changed with the
4 written authorization of the customer.

5 (g) The commission shall, by regulation, require reports from electric service
6 providers who are participating in a competitive electric service market and establish
7 the contents of the reports.

8 (h) In this section, "competitive electric service market" means a market or
9 program in which retail electricity customers are offered a choice of electric service
10 provider, whether on a permanent or limited basis or under a pilot program.

11 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).



Municipal Light & Power

April 27, 1999

Chairman Bill Hudson
 Vice-Chairman John Cowdery
 Members of the House Committee on Utility Restructuring

GENERAL MANAGER

1200 East First Avenue

Anchorage

Alaska

907-561-1665

☉

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e-mail

mlp@mlp.alaska.gov

Re: Testimony of Municipal Light & Power on HB 81- Consumer Bill of Rights

Honorable Representatives:

Municipal Light and Power supports the intent and purpose of HB No. 81 and believes that consumer protection is a matter of central and critical importance in any effort to restructure electric service markets. As the current draft of the CH2M Hill "Study of Electric Utility Restructuring in Alaska" notes, misdirected restructuring efforts can impact consumers adversely in terms of the availability, cost, and reliability of electric power:

The concept of equitable sharing is not the focal point of a competitive market. Those with the most information and the greatest ability to interpret and react to that information tend to win... Since the most likely time for generation shortages would be on the coldest days in the winter or the hottest days in the summer, low income residential customers who heat or cool with electricity could face a dilemma.[Study at 7.7]

The proposed bill begins the process of insuring that as restructuring moves forward, consumers' interests are not left behind, to the inequities of the marketplace.

In that spirit, ML&P notes the following considerations and recommendations in connection with HB 81. These observations are intended to enhance the scope or effectiveness of the proposed legislation, in furtherance of the public interest concerns motivating its sponsorship.

1. Though critical components in the restructuring equation, the provisions of HB 81 do not (and do not purport to) address all elements which the Commission must address to successfully investigate electric restructuring. This fact is made clear by the CH2M Hill Study, which outlines the broad array of matters

- including those in HB 81 - which require examination. Accordingly, ML&P recommends that proposed Sec. 42.05.226(a) be amended to read:

***Sec. 42.05.226. Electric consumer protections.** (a) As part of any general proceeding or proceedings to investigate electric industry restructuring, the Commission shall establish by regulation [etc.]

2. At least one would-be electric service provider has already asserted that it is not subject to the jurisdictional powers of the Commission concerning utility service provisioning. The proposed legislation, HB 81, uses various terms at various points, e.g., "electric service providers" [(a)(2)], "electric suppliers, aggregators, and distributors" [(a)(3)], and "supplier or an aggregator" [(d)]. To ensure full protection for consumers, ML&P recommends that the phrase "electric service supplier" be uniformly utilized throughout the proposed legislation and that the following amendment be adopted:

*(f) For purposes of this section, "electric service provider" shall mean any person or entity, including but not limited to a utility, a broker, a marketer, a wholesaler, or an aggregator, seeking to provide or providing electric service to the public or any portion thereof, whether for compensation or otherwise.

3. The experience in telecommunications restructuring, as well as in those few jurisdictions which have undertaken electric restructuring, clearly demonstrates that more consumer data is not the same thing as more consumer information. As CH2M Hill notes,

Equipping all customers with the education and technological capacity to fully participate in markets characterized by changing hourly electricity costs could easily overwhelm any savings likely to result from the introduction of competition into the industry. [Study at 7.7]

While not disagreeing with the direction of the draft provisions, ML&P believes that any legislative intent accompanying HB 81 should make clear that the goal of the legislation here is clarity, not volume, of information, and that the costs of such information are recoverable from the rates charged to consumers.

4. ML&P has received CH2M Hill's written comments on HB 81, addressing five numbered items. ML&P believes that items 4 and 5 in those comments deal more with competition and competitive structures than with consumer protection, and are neither properly nor effectively addressed here by minor amendments to HB 81.

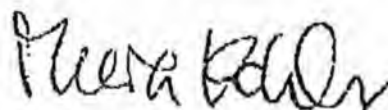
Competition produces benefits where it promotes reduced costs of service. In seeking to inject issues concerning "customer proprietary network information" (as the 1996 Telecommunications Act describes it) and access to billing and other "back office" support systems, CH2M Hill's comments open very broad topics with implications far beyond consumer protection. ML&P believes CH2M Hill's Study fully supports this view when it asserts:

But the path from the traditional electric power business to the more competitive industry of the future is strewn with issues and obstacles, some of which may resist resolution and movement more stubbornly than is commonly assumed today. The issues may include disagreements over the rules and procedures that should govern access to transmission and distribution facilities; the division of regulatory authority between federal, state, and local government agencies; protection of all customer classes; new demands for more stringent environmental protection; and a number of questions related to cost allocation, cost recovery, and system reliability. How these issues are resolved will control the pace and scope of change in the industry and, in turn, will answer the overarching question of increasing concern: "What are the potential risks, benefits, and impacts of electric utility industry restructuring on all Alaskan consumers and the economy of the State as a whole?" [Study at 1.1-1.2; emphasis added].

As can be seen, consumer protection is an important piece, but only one piece, of the total puzzle. The other parts, requiring 15 pages of summarized "Recommendations" in the Study, also require thoughtful attention, in the manner proposed by the Study. ML&P supports the CH2M Hill Study's concept of methodical investigation and implementation of the issues. That approach, here, suggests that competitive issues be reserved for separate commission and legislative actions, and not be lightly and superficially injected into an otherwise sound piece of legislation on a different subject.

ML&P appreciates the opportunity to provide these comments and recommendations and stands ready to further support the work of the Special Committee and the sponsors of HB 81.

Respectfully submitted,



Maera Kohler
General Manager

HB

82

1-LS0398K
Ford
4/1/99

THOMPSON

CS FOR HOUSE BILL NO. 82()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, Dyson, Halcro

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to certain claims arising out of or in connection with the year
2 2000 date change; amending Rule 23, Alaska Rules of Civil Procedure; and
3 providing for an effective date."

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

5 * Section 1. FINDINGS AND INTENT. (a) The legislature finds that

6 (1) the majority of responsible business enterprises in Alaska are committed
7 to working in cooperation with their contracting partners towards the timely and cost-effective
8 resolution of the many technological, business, and legal issues associated with the year 2000
9 date change;

10 (2) it is important to encourage businesses to concentrate their attention and
11 resources in the short time remaining before January 1, 2000, on addressing, assessing,
12 remediating, and testing their year 2000 date change problems, and to minimize any possible
13 business disruptions associated with year 2000 date change issues;

14 (3) it is appropriate for the legislature to enact legislation to ensure that year

1 2000 date change problems do not unnecessarily disrupt state commerce or create unnecessary
2 caseloads in the courts and to provide initiatives to help businesses prepare and be in a
3 position to withstand the potentially devastating economic affect of the year 2000 date change;

4 (4) year 2000 date change issues potentially affect practically all business
5 enterprises to at least some degree, possibly giving rise to a large number of disputes;

6 (5) resorting to the legal system for resolution of year 2000 date change
7 problems is not feasible for many businesses, particularly small businesses, because of the
8 complexity and expense of pursuing resolution through the legal system;

9 (6) the delays, expense, uncertainties, loss of control, adverse publicity, and
10 animosities that frequently accompany litigation of business disputes can only exacerbate the
11 difficulties associated with the year 2000 date change and work against the successful
12 resolution of those difficulties.

13 (b) It is the intent of the legislature that

14 (1) this Act encourage businesses to approach their year 2000 date change
15 disputes responsibly and to avoid unnecessary, time-consuming, and costly litigation about
16 year 2000 date change related failures, particularly those that are not material;

17 (2) good faith negotiations occur between parties when there is a dispute over
18 a year 2000 date change problem, and that, if necessary, the parties enter into voluntary,
19 nonbinding mediation rather than litigation;

20 (3) in resolving year 2000 date change related disputes, the parties rely on a
21 valid and enforceable contract, and that the provisions of this Act are inapplicable when a
22 provision would supersede, intervene, or change a contractual obligation or provision;

23 (4) if a party is unsuccessful in asserting the year 2000 date change defenses
24 created in this Act, nothing in this Act would preclude a court or jury from awarding
25 compensatory or punitive damages as provided by law;

26 (5) if a party uses reasonable care to prevent or remedy year 2000 date change
27 damages, the party not be liable for civil damages resulting from the year 2000 date change.

28 * Sec. 2. AS 09.65 is amended by adding a new section to read:

29 Sec. 09.65.260. Claims against persons engaged in business arising out of
30 or in connection with the year 2000 date change. (a) A business or a member of
31 the board of directors of a business is not liable for damages arising from the year

1 2000 date change and caused directly or indirectly by a failure of an electronic
2 computing device used in the business if the business shows by a preponderance of the
3 evidence that

4 (1) the business made substantial efforts to avoid the damages claimed
5 in the civil action, such as

6 (A) inventorying the electronic computing devices used by the
7 business that may experience year 2000 date change failures;

8 (B) identifying critical electronic computing devices necessary
9 to conduct the operations of the business;

10 (C) identifying the potential for year 2000 date change failures
11 associated with electronic computing devices used by the business;

12 (D) preparing a plan to reprogram, fix, repair, replace, or
13 otherwise remedy the electronic computing devices necessary to avert failure
14 resulting from the year 2000 date change;

15 (E) complying with generally accepted practices of a business
16 sector related to the year 2000 date change, including testing information
17 systems for compliance with the year 2000 date change; and

18 (F) developing contingency plans in the event of an electronic
19 computing device failure; or

20 (2) the business used reasonable care to prevent or remedy damages
21 arising from the year 2000 date change and caused directly or indirectly by a failure
22 of an electronic computing device.

23 (b) The defense in (a) of this section may not be asserted by a business that
24 develops or manufactures software, firmware, microcode, hardware, or embedded
25 microchips that create, read, write, calculate, compare, sequence, or otherwise process
26 data that consists of dates, times, or both dates and time if the business represented
27 that the software, firmware, microcode, hardware, or microchips were year 2000 date
28 change compliant. This subsection does not apply to a business that only sells, rents,
29 or leases software, firmware, microcode, or hardware that is developed or
30 manufactured by another person.

31 (c) A civil action against a business, or member of the board of directors of

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a business, for damages arising from the year 2000 date change and caused directly or indirectly by a failure of an electronic computing device used in the business may not be brought as a class action unless each member of the class has a claim for economic loss that exceeds \$50,000.

(d) In a civil action against a business, or member of the board of directors of a business, for damages arising from the year 2000 date change and caused directly or indirectly by a failure of an electronic computing device used in the business,

(1) damages may not be awarded for noneconomic losses if the party

(A) defending against the claim proves by a preponderance of the evidence that it acted in good faith and took measures that were reasonable under the circumstances to prevent the failure of the electronic computing device from occurring or from causing the damages upon which the claim is based; or

(B) bringing the claim is unable to prove by clear and convincing evidence that the party defending the claim knew, or should have known, that the failure of the electronic computing device would cause the damages claimed in the civil action;

(2) the civil action may not proceed to trial until the person bringing the action

(A) provides written notice to the business that describes the failure of the electronic computing device arising from the year 2000 date change; and

(B) gives the business the opportunity to fix the problem, including reasonable access to electronic computing devices or software affected by the failure described under (A) of this paragraph;

(3) the civil action must be submitted to mediation conducted under the Alaska Rules of Civil Procedure, unless all the parties agree to waive mediation;

(4) a provision of this section that conflicts with a provision contained in a valid and enforceable contract between the parties to the civil action may not be applied in that civil action.

(e) In this section,

1 (1) "business" means a person or a for profit or a nonprofit entity
2 engaged in a trade, service, profession, or activity with the goal of receiving a financial
3 benefit in exchange for the provision of services, goods, or other property;

4 (2) "electronic computing device" includes any computer hardware or
5 software, a computer chip, an embedded chip, process control equipment, or other
6 information system that is used to capture, store, manipulate, or process data;

7 (3) "year 2000 date change" includes processing date or time data from,
8 into, and between the Twentieth and Twenty-First Centuries, and leap-year
9 calculations; in this paragraph, "processing" includes calculating, comparing,
10 sequencing, displaying, and storing.

11 * Sec. 3. AS 09.65.260 is repealed January 1, 2006.

12 * Sec. 4. AS 09.65.260(c), enacted by sec. 2 of this Act, has the effect of amending
13 Rule 23, Alaska Rules of Civil Procedure, by requiring, in a class action relating to the year
14 2000 date change, that each member of the class have a claim for economic loss that exceeds
15 \$50,000.

16 * Sec. 5. APPLICABILITY. This Act applies to a cause of action arising from any failure
17 described in AS 09.65.260, enacted by sec. 2 of this Act, that accrues on or after the effective
18 date of this Act but before January 1, 2006.

19 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

Amendment #6

OFFERED IN THE HOUSE

BY REPRESENTATIVE CROFT
3/24/99

TO: CS FOR HOUSE BILL NO. 82 (L&C)

1. Page 3, lines 5 & 6 delete "(1) damages may be awarded for economic losses only unless the business against whom the action is brought committed fraud;"

3/24

w/ drawn

AMENDMENT #1

Offered in House Judiciary

By: Rep. Rokeberg

TO: CHSB 82 (L&C)

3/24
adopted

Page 3:

Delete lines 24-27

Insert: (3) "year 2000 date change" includes processing date or time data from, into and between calendar year 1999 and calendar year 2000, and leap year calculations; in this paragraph, "processing" includes calculating, comparing, sequencing, displaying and storing.

AMENDMENT #2

OFFERED IN THE HOUSE

BY REPRESENTATIVE ROKEBERG

TO: CSHB 82(L&C)

- 1 Page 2, line 27:
- 2 Delete "a contract"
- 3 Insert "an express warranty"

3/24

laid aside

3/24

AMENDMENT #3, as amend

OFFERED IN THE HOUSE
TO: CSHB 82(L&C)

BY REPRESENTATIVE ROKEBERG

1 Page 1, lines 12 - 13:

2 Delete "the following efforts to avoid the damages claimed in the civil action:"

3 Insert "substantial efforts to avoid the damages claimed in the civil action, such as"

4 Page 1, line 14:

5 Delete "inventory"

6 Insert "inventorying"

7 Page 2, line 2:

8 Delete "identify"

9 Insert "identifying"

adopted

10 Page 2, line 4:

11 Delete "identify"

12 Insert "identifying"

13 Page 2, line 6:

14 Delete "prepare"

15 Insert "preparing"

16 Page 2, line 9:

17 Delete "comply with industry regulations or requirements"

18 Insert "complying with generally accepted practices of a business sector"

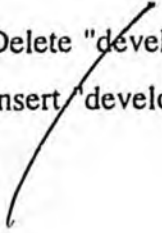
19 Page 2, line 12:

1

Delete "develop"

2

Insert "developing"



3/24

1-LS0398V.5 ✓
Ford
3/23/99

AMENDMENT #4

OFFERED IN THE HOUSE

BY REPRESENTATIVE ROKEBERG

TO: CSHB 82(L&C)

- 1 Page 2, lines 14 - 16:
- 2 Delete ", by following generally accepted standards of care and effort in the business
- 3 activity in which the business was engaged, exercised due diligence and"
- 4 Insert "used"

adopted

Amendment # 5

OFFERED IN THE HOUSE

BY REPRESENTATIVE CROFT
3/24/99

TO: CS FOR HOUSE BILL NO. 82 (L&C)

1. Page 2, delete lines 28-31 (c) "A civil action against a business, or member of the board of directors of a business, for damages arising from the year 2000 date change and caused directly or indirectly by a failure of an electronic computing device used in the business may not be brought as a class action unless each member of the class has a claim for"
2. Page 3, delete line 1, "economic loss that exceeds \$50,000."

3/24

w/ drawn

Calendar No. 34

106TH CONGRESS
1ST SESSION

S. 96

[Report No. 106-10]

A BILL

To regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date.

MARCH 10, 1999

Reported with an amendment

Calendar No. 34106TH CONGRESS
1ST SESSION**S. 96****[Report No. 106-10]**

To regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. McCAIN (for himself and Mr. FRUST) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

MARCH 10, 1999

Reported by Mr. McCAIN, with an amendment

[Strike all after the enacting clause and insert the part printed in italics]

A BILL

To regulate commerce between and among the several States by providing for the orderly resolution of disputes arising out of computer-based problems related to processing data that includes a 2-digit expression of the year's date.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Y2K Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) ~~Y2K ACTION~~.—The term "~~Y2K action~~" means a civil action commenced in any Federal or State court for a cause of action arising out of a Y2K failure but does include an action to recover damages for personal injury (excluding emotional harm) or wrongful death.

(2) ~~Y2K FAILURE~~.—The term "~~Y2K failure~~" means a systems product failure caused by the inability of a computer system, program, or software's failure to accurately store, process, provide, or receive data containing the year-2000 date.

(3) ~~Y2K COMPLIANT~~.—The term "~~Y2K-compliant~~" means—

(A) with respect to an information technology product, that the product does not have a Y2K failure; and

(B) with respect to a business, that none of that business's information technology products that materially affects the business's capacity to deliver goods and services has a Y2K failure.

(1) INFORMATION TECHNOLOGY PRODUCT.—

The term “information technology product” means a computer, a computer program, or computer software, or product using a computer program, chip, or computer software.

SEG. 3. APPLICABILITY, PREEMPTION.

(a) APPLICABILITY TO Y2K ACTIONS.—This Act applies to any Y2K action, commenced after the date of enactment of this Act, brought in a Federal or State court.

(b) SCOPE OF PREEMPTION.—This Act supersedes any State law regarding recovery for harm caused by a Y2K failure only to the extent that this Act establishes a rule of law applicable to any such recovery which is inconsistent with State law. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State or Federal law.

(c) ACTIONS FOR PERSONAL INJURY.—This Act does not apply to a civil action brought for personal injury to the extent that the action is based on physical injury.

SEG. 4. EXCLUSIVE REMEDIES.

(a) IN GENERAL.—The remedies provided by this Act are the exclusive remedies available to a plaintiff in a Y2K action, except as may be otherwise provided in a contract to which the plaintiff and the defendant are parties.

(b) **DEFENDANT'S OPPORTUNITY TO FIX PROBLEM.**—A Y2K action may not proceed to trial until—

(1) the plaintiff has notified the defendant in writing, describing the Y2K failure with particularity, and

(2) the plaintiff has afforded the defendant the opportunity, including reasonable access to computers and computer software affected by the Y2K failure described in the notice, to fix the problem.

SEC. 5. DAMAGES.

(a) **ECONOMIC LOSS.**—Except as otherwise provided in this section, damages awarded in a Y2K action are limited to economic loss.

(b) **OTHER DAMAGES.**—

(1) **IN GENERAL.**—Damages in a Y2K action (including punitive damages) other than for economic loss may not exceed the greater of—

(A) 3 times the amount awarded for economic loss; or

(B) \$250,000.

(2) **SPECIAL RULE.**—In the case of a defendant—

(A) who—

(i) is sued in his or her capacity as a individual; and

(ii) whose net worth does not exceed \$500,000; or

(B) that is an unincorporated business, a partnership, corporation, association, unit of local government, or organization with fewer than 25 full-time employees;

paragraph (1) shall be applied by substituting "\$50,000" for "\$250,000" in subparagraph (B).

(c) PUNITIVE DAMAGES.—No amount shall be awarded a plaintiff in a Y2K action for punitive damages—

(1) except to the extent authorized by State law; and

(2) unless the plaintiff proves that the economic damages suffered resulted from conscious and flagrant disregard, rather than mere negligence, on the part of the defendant.

(d) GOOD FAITH LIMITATION.—Damages in a Y2K action may not be awarded, except for economic loss, against any defendant who demonstrates that the defendant exercised due diligence and reasonable care to prevent or remedy the Y2K failure according to generally accepted standards of care and effort in the business activity in which the defendant was engaged.

SEC. 6. SEVERAL LIABILITY.

The liability of more than 1 defendant in a Y2K action may be several but may not be joint.

SEC. 7. APPOINTMENT OF SPECIAL MASTERS FOR Y2K ACTIONS.

Any District Court of the United States in which a Y2K action is pending may appoint a special master to hear the matter and to make findings of fact and conclusions of law in accordance with Rule 53 of the Federal Rules of Civil Procedure.

SEC. 8. LIABILITY RULES APPLICABLE TO PRODUCT SELLERS, RENTERS, AND LESSORS.**(a) GENERAL RULE.—**

(1) ~~IN GENERAL.~~—In any Y2K action, an information technology product seller other than a manufacturer shall be liable to a claimant only if the claimant establishes—

(A) that—

(i) the information technology product that allegedly caused the harm that is the subject of the complaint was sold, rented, or leased by the information technology product seller;

(ii) the information technology product seller failed to exercise reasonable care

with respect to the information technology product; and

(iii) the failure to exercise reasonable care was a proximate cause of harm to the claimant;

(B) that—

(i) the information technology product seller made an express warranty applicable to the information technology product that allegedly caused the harm that is the subject of the complaint; independent of any express warranty made by a manufacturer as to the same information technology product;

(ii) the information technology product failed to conform to the warranty; and

(iii) the failure of the information technology product to conform to the warranty caused harm to the claimant; or

(C) that—

(i) the information technology product seller engaged in intentional wrongdoing; as determined under applicable State law; and

(ii) such intentional wrongdoing was a proximate cause of the harm that is the subject of the complaint.

(2) REASONABLE OPPORTUNITY FOR INSPECTION.—For purposes of paragraph (1)(A)(ii), an information technology product seller shall not be considered to have failed to exercise reasonable care with respect to an information technology product based upon an alleged failure to inspect the information technology product—

(A) if the failure occurred because there was no reasonable opportunity to inspect the information technology product; or

(B) if the inspection, in the exercise of reasonable care, would not have revealed the aspect of the information technology product which allegedly caused the claimant's harm.

(b) SPECIAL RULE.—

(1) IN GENERAL.—An information technology product seller shall be liable as a manufacturer of an information technology product for harm caused by the information technology product if—

(A) the manufacturer is not subject to service of process under the laws of any State in which the action may be brought; or

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21 **SECTION 1. SHORT TITLE; TABLE OF SECTIONS.**

22 (a) *SHORT TITLE.*—This Act may be cited as the “Y2K
23 Act”.

24 (b) *TABLE OF SECTIONS.*—The table of sections for this
25 Act is as follows:

Sec. 1. Short title; table of sections.

- Sec. 2. Findings and purposes.*
- Sec. 3. Definitions.*
- Sec. 4. Application of Act.*
- Sec. 5. Punitive damages limitations.*

TITLE I—OPPORTUNITY TO RESOLVE Y2K PROBLEMS.

- Sec. 101. Pre-filing notice.*
- Sec. 102. Pleading requirements.*
- Sec. 103. Duty to mitigate.*
- Sec. 104. Proportionate liability.*

TITLE II—Y2K ACTIONS INVOLVING CONTRACT-RELATED CLAIMS.

- Sec. 201. Contracts enforced.*
- Sec. 202. Defenses.*
- Sec. 203. Damages limitation .*
- Sec. 204. Mixed actions.*

TITLE III—Y2K ACTIONS INVOLVING TORT CLAIMS.

- Sec. 301. Damages in tort claims.*
- Sec. 302. Certain defenses.*
- Sec. 303. Liability of officers and directors.*

TITLE IV—Y2K CLASS ACTIONS.

- Sec. 401. Minimum injury requirement.*
- Sec. 402. Notification.*
- Sec. 403. Forum for Y2K class actions.*

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 *The Congress finds that:*

3 (1) *The majority of responsible business enter-*
4 *prises in the United States are committed to working*
5 *in cooperation with their contracting partners to-*
6 *wards the timely and cost-effective resolution of the*
7 *many technological, business, and legal issues associ-*
8 *ated with the Y2K date change.*

9 (2) *Congress seeks to encourage businesses to con-*
10 *centrate their attention and resources in short time*
11 *remaining before January 1, 2000, on addressing, as-*
12 *sessing, remediating, and testing their Y2K problems,*

1 *and to minimize any possible business disruptions as-*
2 *sociated with the Y2K issues.*

3 *(3) It is appropriate for the Congress to enact*
4 *legislation to assure that Y2K problems do not unnec-*
5 *essarily disrupt interstate commerce or create unnec-*
6 *essary caseloads in Federal courts and to provide ini-*
7 *tiatives to help businesses prepare and be in a posi-*
8 *tion to withstand the potentially devastating eco-*
9 *omic impact of Y2K.*

10 *(4) Y2K issues will potentially affect practically*
11 *all business enterprises to at least some degree, giving*
12 *rise possibly to a large number of disputes.*

13 *(5) Resorting to the legal system for resolution of*
14 *Y2K problems is not feasible for many businesses,*
15 *particularly small businesses, because of its complex-*
16 *ity and expense.*

17 *(6) The delays, expense, uncertainties, loss of*
18 *control, adverse publicity and animosities that fre-*
19 *quently accompany litigation of business disputes can*
20 *only exacerbate the difficulties associated with the*
21 *Y2K date change, and work against the successful res-*
22 *olution of those difficulties.*

23 *(7) Congress recognizes that every business in the*
24 *United States should be concerned that widespread*
25 *and protracted Y2K litigation may threaten the net-*

1 *work of valued and trusted business relationships that*
2 *are so important to the effective functioning of the*
3 *world economy, and which may put unbearable*
4 *strains on an overburdened and sometime ineffective*
5 *judicial system.*

6 (8) *A proliferation of frivolous Y2K lawsuits by*
7 *opportunistic parties may further limit access to*
8 *courts by straining the resources of the legal system*
9 *and depriving deserving parties of their legitimate*
10 *rights to relief.*

11 (9) *Congress encourages businesses to approach*
12 *their Y2K disputes responsibly, and to avoid unneces-*
13 *sary, time-consuming and costly litigation about Y2K*
14 *failures, particularly those that are not material.*
15 *Congress supports good faith negotiations between*
16 *parties when there is a dispute over a Y2K problem,*
17 *and, if necessary, urges the parties to enter into vol-*
18 *untary, non-binding mediation rather than litigation.*

19 **SEC. 3. DEFINITIONS.**

20 *In this Act:*

21 (1) **Y2K ACTION.**—*The term “Y2K action”*
22 *means a civil action commenced in any Federal or*
23 *State court in which the plaintiff’s alleged harm or*
24 *injury resulted directly or indirectly from an actual*
25 *or potential Y2K failure, or a claim or defense of a*

1 *defendant is related directly or indirectly to an actual*
2 *or potential Y2K failure.*

3 (2) *Y2K FAILURE.*—*The term “Y2K failure”*
4 *means failure by any device or system (including any*
5 *computer system and any microchip or integrated*
6 *circuit embedded in another device or product), or*
7 *any software, firmware, or other set or collection of*
8 *processing instructions to process, to calculate, to*
9 *compare, to sequence, to display, to store, to transmit,*
10 *or to receive date-related data, including failures—*

11 (A) *to deal with or account for transitions*
12 *or comparisons from, into, and between the years*
13 *1999 and 2000 accurately;*

14 (B) *to recognize or accurately process any*
15 *specific date in 1999, 2000, or 2001; or*

16 (C) *accurately to account for the year*
17 *2000’s status as a leap year, including recogni-*
18 *tion and processing of the correct date on Feb-*
19 *ruary 29, 2000.*

20 (3) *ACTUAL DAMAGES.*—*The term “actual dam-*
21 *ages” means direct damages for injury to tangible*
22 *property, and the cost of repairing or replacing prod-*
23 *ucts that have a material defect.*

24 (4) *ECONOMIC LOSS.*—*Except as otherwise spe-*
25 *cifically provided in a written contract between the*

1 *plaintiff and the defendant in a Y2K action (and sub-*
2 *ject to applicable State law), the term “economic*
3 *loss”—*

4 *(A) means amounts awarded to compensate*
5 *an injured party for any loss other than for per-*
6 *sonal injury or damage to tangible property*
7 *(other than property that is the subject of the*
8 *contract); and*

9 *(B) includes amounts awarded for—*

10 *(i) lost profits or sales;*

11 *(ii) business interruption;*

12 *(iii) losses indirectly suffered as a re-*
13 *sult of the defendant’s wrongful act or omis-*
14 *sion;*

15 *(iv) losses that arise because of the*
16 *claims of third parties;*

17 *(v) losses that must be pleaded as spe-*
18 *cial damages; and*

19 *(vi) consequential damages (as defined*
20 *in the Uniform Commercial Code or analo-*
21 *gous State commercial law); but*

22 *(C) does not include actual damages.*

23 *(5) MATERIAL DEFECT.—The term “material de-*
24 *fect” means a defect in any item, whether tangible or*
25 *intangible, or in the provision of a service, that sub-*

1 *stantially prevents the item or service from operating*
2 *or functioning as designed or intended. The term*
3 *“material defect” does not include a defect that—*

4 *(A) has an insignificant or de minimis ef-*
5 *fect on the operation or functioning of an item*
6 *or computer program;*

7 *(B) affects only on a component of an item*
8 *or program that, as a whole, substantially oper-*
9 *ates or functions as designed; or*

10 *(C) has an insignificant or de minimis ef-*
11 *fect on the efficacy of the service provided.*

12 *(6) PERSONAL INJURY.—The term “personal*
13 *injury”—*

14 *(A) means any physical injury to a natural*
15 *person, including death of the person; but*

16 *(B) does not include mental suffering, emo-*
17 *tional distress, or like elements of injury that do*
18 *not constitute physical harm to a natural per-*
19 *son.*

20 *(7) STATE.—The term “State” means any State*
21 *of the United States, the District of Columbia, Com-*
22 *monwealth of Puerto Rico, the Northern Mariana Is-*
23 *lands, the United States Virgin Islands, Guam, Amer-*
24 *ican Samoa, and any other territory or possession of*

1 *the United States, and any political subdivision*
2 *thereof.*

3 (8) *CONTRACT.*—*The term “contract” means a*
4 *contract, tariff, license, or warranty.*

5 (9) *PERSON.*—

6 (A) *IN GENERAL.*—*The term “person” has*
7 *the meaning given to that term by section 1 of*
8 *title 1, United States Code.*

9 (B) *GOVERNMENT ENTITIES.*—*The term*
10 *“person” includes an agency, instrumentality, or*
11 *other entity of Federal, State, or local govern-*
12 *ment (including multijurisdictional agencies, in-*
13 *strumentalities, and entities) when that agency,*
14 *instrumentality, or other entity is a plaintiff or*
15 *a defendant in a Y2K action.*

16 (10) *ALTERNATIVE DISPUTE RESOLUTION.*—*The*
17 *term “alternative dispute resolution” means any*
18 *process or proceeding, other than adjudication by a*
19 *court or in an administrative proceeding, in which a*
20 *neutral third party participates to assist in the reso-*
21 *lution of issues in controversy, through processes such*
22 *as early neutral evaluation, mediation, minitrial,*
23 *and arbitration.*

1 **SEC. 4. APPLICATION OF ACT.**

2 (a) *GENERAL RULE.*—This Act applies to any Y2K
3 action brought in a State or Federal court after February
4 22, 1999.

5 (b) *NO NEW CAUSE OF ACTION CREATED.*—Nothing
6 in this Act creates a new cause of action under Federal or
7 State law.

8 (c) *ACTIONS FOR PERSONAL INJURY OR WRONGFUL*
9 *DEATH EXCLUDED.*—This Act does not apply to a claim
10 for personal injury or for wrongful death.

11 (d) *WRITTEN CONTRACT CONTROLS.*—The provisions
12 of this Act do not supersede a valid, enforceable written con-
13 tract between a plaintiff and a defendant in a Y2K action.

14 (e) *PREEMPTION OF STATE LAW.*—This Act supersedes
15 State law to the extent that it establishes a rule of law ap-
16 plicable to a Y2K action that is inconsistent with State law.

17 **SEC. 5. PUNITIVE DAMAGES LIMITATIONS.**

18 (a) *IN GENERAL.*—In any Y2K action in which puni-
19 tive damages may be awarded under applicable State law,
20 the defendant shall not be liable for punitive damages unless
21 the plaintiff proves by clear and convincing evidence that
22 the defendant acted with conscious and flagrant disregard
23 for the rights and property of others.

24 (b) *CAPS ON PUNITIVE DAMAGES.*—

1 (1) *IN GENERAL.*—Punitive damages against a
2 defendant in such a Y2K action may not exceed the
3 larger of—

4 (A) 3 times the amount awarded for actual
5 damages; or

6 (B) \$250,000.

7 (2) *SPECIAL RULE.*—In the case of a
8 defendant—

9 (A) who—

10 (i) is sued in his or her capacity as a
11 individual; and

12 (ii) whose net worth does not exceed
13 \$500,000; or

14 (B) that is an unincorporated business, a
15 partnership, corporation, association, unit of
16 local government, or organization with fewer
17 than 25 full-time employees,

18 paragraph (1) shall be applied by substituting
19 “smaller” for “larger”.

20 (c) *GOVERNMENT ENTITIES.*—Punitive damages in
21 such a Y2K action may not be awarded against a person
22 described in section 3(8)(B).

1 **TITLE I—OPPORTUNITY TO**
2 **RESOLVE Y2K PROBLEMS**

3 **SEC. 101. PRE-FILING NOTICE.**

4 (a) *IN GENERAL.*—Before commencing a Y2K action,
5 except an action that seeks only injunctive relief, a prospec-
6 tive plaintiff with a Y2K claim shall serve on each prospec-
7 tive defendant in that action a written notice that identifies
8 with particularity—

9 (1) the manifestations of any material defect al-
10 leged to have caused harm or loss;

11 (2) the harm or loss allegedly suffered by the pro-
12 spective plaintiff;

13 (3) the remedy sought by the prospective plain-
14 tiff;

15 (4) the basis upon which the prospective plaintiff
16 seeks that remedy; and

17 (5) the name, title, address, and telephone num-
18 ber of any individual who has authority to negotiate
19 a resolution of the dispute on behalf of the prospective
20 plaintiff.

21 (b) *DELAY OF ACTION.*—Except as provided in sub-
22 section (d), a prospective plaintiff may not commence a
23 Y2K action in Federal or State court until the expiration
24 of 90 days from the date of service of the notice required
25 by subsection (a).

1 (c) *RESPONSE TO NOTICE.*—Within 30 days after re-
2 ceipt of the notice specified in subsection (a), each prospec-
3 tive defendant shall serve on each prospective plaintiff a
4 written statement acknowledging receipt of the notice, and
5 proposing the actions it has taken or will take to address
6 the problem identified by the prospective plaintiff. The writ-
7 ten statement shall state whether the prospective defendant
8 is willing to engage in alternative dispute resolution.

9 (d) *FAILURE TO RESPOND.*—If a prospective
10 defendant—

11 (1) fails to respond to a notice provided pursu-
12 ant to subsection (a) within the 30 days specified in
13 subsection (c); or

14 (2) does not describe the action, if any, the pro-
15 spective defendant will take to address the problem
16 identified by the prospective plaintiff,
17 then the 90-day period specified in subsection (a) will ter-
18minate at the end of the 30-day period as to that prospective
19 defendant and the prospective plaintiff may commence its
20 action against that prospective defendant.

21 (e) *FAILURE TO PROVIDE NOTICE.*—If a defendant de-
22 termines that a plaintiff has filed a Y2K action without
23 providing the notice specified in subsection (a) and without
24 awaiting the expiration of the 90-day period specified in
25 subsection (b), the defendant may treat the plaintiff's com-

1 *plaint as such a notice by so informing the court and the*
2 *plaintiff. If any defendant elects to treat the complaint as*
3 *such a notice—*

4 (1) *the court shall stay all discovery and all*
5 *other proceedings in the action for 90 days after filing*
6 *of the complaint; and*

7 (2) *the time for filing answers and all other*
8 *pleadings shall be tolled during this 90-day period.*

9 (f) *EFFECT OF CONTRACTUAL WAITING PERIODS.—In*
10 *cases in which a contract requires notice of nonperformance*
11 *and provides for a period of delay prior to the initiation*
12 *of suit for breach or repudiation of contract, the period of*
13 *delay provided in the contract is controlling over the wait-*
14 *ing period specified in subsection: (a) and (e).*

15 (g) *STATE LAW CONTROLS ALTERNATIVE METHODS.—*
16 *Nothing in this section supersedes or otherwise preempts*
17 *any State law or rule of civil procedure with respect to the*
18 *use of alternative dispute resolution for Y2K actions.*

19 **SEC. 102. PLEADING REQUIREMENTS.**

20 (a) *NATURE AND AMOUNT OF DAMAGES.—In all Y2K*
21 *actions in which damages are requested, the complaint shall*
22 *provide specific information as to the nature and amount*
23 *of each element of damages and the factual basis for the*
24 *damages calculation.*

1 (b) *MATERIAL DEFECTS.*—In any Y2K action in
2 which the plaintiff alleges that a product or service is defec-
3 tive, the complaint shall contain specific information re-
4 garding the manifestations of the material defects and the
5 facts supporting a conclusion that the defects are material.

6 (c) *REQUIRED STATE OF MIND.*—In any Y2K action
7 in which a claim is asserted on which the plaintiff may
8 prevail only on proof that the defendant acted with a par-
9 ticular state of mind, the complaint shall, with respect to
10 each element of that claim, state with particularity the facts
11 giving rise to a strong inference that the defendant acted
12 with the required state of mind.

13 **SEC. 103. DUTY TO MITIGATE.**

14 Damages awarded in any Y2K action shall exclude
15 compensation for damages the plaintiff could reasonably
16 have avoided in light of any disclosure or other information
17 of which the plaintiff was, or reasonably could have been,
18 aware, including reasonable efforts made by a defendant to
19 make information available to purchasers or users of the
20 defendant's product or services concerning means of rem-
21 edying or avoiding Y2K failure.

22 **SEC. 104. PROPORTIONATE LIABILITY.**

23 (a) *IN GENERAL.*—A person against whom a final
24 judgment is entered in a Y2K action shall be liable solely
25 for the portion of the judgment that corresponds to the rel-

1 *ative and proportional responsibility of that person. In de-*
2 *termining the percentage of responsibility of any defendant,*
3 *the trier of fact shall determine that percentage as a per-*
4 *centage of the total fault of all persons, including the plain-*
5 *tiff, who caused or contributed to the total loss incurred by*
6 *the plaintiff.*

7 (b) *SEVERAL LIABILITY.—Liability in a Y2K action*
8 *shall be several but not joint.*

9 **TITLE II—Y2K ACTIONS INVOLV-**
10 **ING CONTRACT-RELATED**
11 **CLAIMS**

12 **SEC. 201. CONTRACTS ENFORCED.**

13 *In any Y2K action, any written term or condition of*
14 *a valid and enforceable contract between the plaintiff and*
15 *the defendant, including limitations or exclusions of liabil-*
16 *ity and disclaimers of warranty, is fully enforceable, unless*
17 *the court determines that the contract as a whole is unen-*
18 *forceable. If the contract is silent with respect to any mat-*
19 *ter, the interpretation of the contract with respect to that*
20 *matter shall be determined by applicable law in force at*
21 *the time the contract was executed.*

22 **SEC. 202. DEFENSES.**

23 (a) *REASONABLE EFFORTS.—In any Y2K action in*
24 *which breach of contract is alleged, in addition to any other*
25 *rights provided by applicable law, the party against whom*

1 *the claim of breach is asserted shall be allowed to offer evi-*
2 *dence that its implementation of the contract, or its efforts*
3 *to implement the contract, were reasonable in light of the*
4 *circumstances for the purpose of limiting or eliminating the*
5 *defendant's liability.*

6 (b) *IMPOSSIBILITY OR COMMERCIAL IMPRACTICABIL-*
7 *ITY.—In any Y2K action in which breach of contract is*
8 *alleged, the applicability of the doctrines of impossibility*
9 *and commercial impracticability shall be determined by ap-*
10 *plicable law in existence on January 1, 1999, and nothing*
11 *in this Act shall be construed as limiting or impairing a*
12 *party's right to assert defenses based upon such doctrines.*

13 **SEC. 203. DAMAGES LIMITATION.**

14 *In any Y2K action for breach or repudiation of con-*
15 *tract, no party may claim, nor be awarded, consequential*
16 *or punitive damages unless such damages are allowed—*

17 (1) *by the express terms of the contract; or*

18 (2) *if the contract is silent on such damages, by*
19 *operation of State law at the time the contract was*
20 *executed or by operation of Federal law.*

21 **SEC. 204. MIXED ACTIONS.**

22 *If a Y2K action includes claims based on breach of*
23 *contract and tort or other noncontract claims, then this title*
24 *shall apply to the contract-related claims and title III shall*
25 *apply to the tort or other noncontract claims.*

1 **TITLE III—Y2K ACTIONS**
2 **INVOLVING TORT CLAIMS**

3 **SEC. 301. DAMAGES IN TORT CLAIMS.**

4 *A party to a Y2K action making a tort claim may*
5 *not recover damages for economic loss unless—*

6 *(1) the recovery of such losses is provided for in*
7 *a contract to which the party seeking to recover such*
8 *losses is a party;*

9 *(2) such losses result directly from a personal in-*
10 *jury claim resulting from the Y2K failure; or*

11 *(3) such losses result directly from damage to*
12 *tangible property caused by the Y2K failure (other*
13 *than damage to property that is the subject of the*
14 *contract),*

15 *and such damages are permitted under applicable Federal*
16 *or State law.*

17 **SEC. 302. CERTAIN DEFENSES.**

18 *(a) GOOD FAITH; REASONABLE EFFORTS.—In any*
19 *Y2K action except an action for breach or repudiation of*
20 *contract, the party against whom the claim is asserted shall*
21 *be entitled to establish, as a complete defense to any claim*
22 *for damages, that it acted in good faith and took measures*
23 *that were reasonable under the circumstances to prevent the*
24 *Y2K failure from occurring or from causing the damages*
25 *upon which the claim is based.*

1 (b) *DEFENDANT'S STATE OF MIND.*—In a Y2K action
2 making a claim for money damages in which the defend-
3 ant's actual or constructive awareness of an actual or po-
4 tential Y2K failure is an element of the claim, the defendant
5 is not liable unless the plaintiff, in addition to establishing
6 all other requisite elements of the claim, proves by clear and
7 convincing evidence that the defendant knew, or recklessly
8 disregarded a known and substantial risk, that the failure
9 would occur in the specific facts and circumstances of the
10 claim.

11 (c) *FORESEEABILITY.*—In a Y2K action making a
12 claim for money damages, the defendant is not liable unless
13 the plaintiff proves by clear and convincing evidence, in
14 addition to all other requisite elements of the claim, that
15 the defendant knew, or should have known, that the defend-
16 ant's action or failure to act would cause harm to the plain-
17 tiff in the specific facts and circumstances of the claim.

18 (d) *CONTROL NOT DETERMINATIVE OF LIABILITY.*—
19 The fact that a Y2K failure occurred in an entity, facility,
20 system, product, or component that was within the control
21 of the party against whom a claim for money damages is
22 asserted in a Y2K action shall not constitute the sole basis
23 for recovery of damages in that action.

24 (e) *PRESERVATION OF EXISTING LAW.*—The provi-
25 sions of this section are in addition to, and not in lieu of,

1 any requirement under applicable law as to burdens of
2 proof and elements necessary for prevailing in a claim for
3 money damages.

4 **SEC. 303. LIABILITY OF OFFICERS AND DIRECTORS.**

5 (a) *IN GENERAL.*—A director, officer, trustee, or em-
6 ployee of a business or other organization (including a cor-
7 poration, unincorporated association, partnership, or non-
8 profit organization) shall not be personally liable in any
9 Y2K action making a tort or other noncontract claim in
10 that person's capacity as a director, officer, trustee, or em-
11 ployee of the business or organization for more than the
12 greater of—

13 (1) \$100,000; or

14 (2) the amount of pre-tax compensation received
15 by the director, officer, trustee, or employee from the
16 business or organization during the 12 months imme-
17 diately preceding the act or omission for which liabil-
18 ity was imposed.

19 (b) *EXCEPTION.*—Subsection (a) does not apply in any
20 Y2K action in which it is found by clear and convincing
21 evidence that the director, officer, trustee, or employee—

22 (1) intentionally made misleading statements re-
23 garding any actual or potential year 2000 problem;
24 or

1 (2) intentionally withheld from the public sig-
2 nificant information there was a legal duty to disclose
3 to the public regarding any actual or potential year
4 2000 problem of that business or organization which
5 would likely result in actionable Y2K failure.

6 (c) STATE LAW, CHARTER, OR BYLAWS.—Nothing in
7 this section supersedes any provision of State law, charter,
8 or a bylaw authorized by State law, in existence on Janu-
9 ary 1, 1999, that establishes lower limits on the liability
10 of a director, officer, trustee, or employee of such a business
11 or organization.

12 **TITLE IV—Y2K CLASS ACTIONS**

13 **SEC. 401. MINIMUM INJURY REQUIREMENT.**

14 In any Y2K action involving a claim that a product
15 or service is defective, the action may be maintained as a
16 class action in Federal or State court as to that claim only
17 if—

18 (1) it satisfies all other prerequisites established
19 by applicable Federal or State law or applicable rules
20 of civil procedure; and

21 (2) the court finds that the alleged defect in a
22 product or service is material as to the majority of
23 the members of the class.

1 **SEC. 402. NOTIFICATION.**

2 (a) *NOTICE BY MAIL.*—*In any Y2K action that is*
3 *maintained as a class action, the court, in addition to any*
4 *other notice required by applicable Federal or State law,*
5 *shall direct notice of the action to each member of the class*
6 *by United States mail, return receipt requested. Persons*
7 *whose receipt of the notice is not verified by the court or*
8 *by counsel for one of the parties shall be excluded from the*
9 *class unless those persons inform the court in writing, on*
10 *a date no later than the commencement of trial or entry*
11 *of judgment, that they wish to join the class.*

12 (b) *CONTENTS OF NOTICE.*—*In addition to any infor-*
13 *mation required by applicable Federal or State law, the no-*
14 *tice described in this subsection shall—*

15 (1) *concisely and clearly describe the nature of*
16 *the action;*

17 (2) *identify the jurisdiction where the case is*
18 *pending; and*

19 (3) *describe the fee arrangement of class counsel.*

20 **SEC. 403. FORUM FOR Y2K CLASS ACTIONS.**

21 (a) *JURISDICTION.*—*The District Courts of the United*
22 *States have original jurisdiction of any Y2K action, with-*
23 *out regard to the sum or value of the matter in controversy*
24 *involved, that is brought as a class action if—*

1 (1) any member of the proposed plaintiff class is
2 a citizen of a State different from the State of which
3 any defendant is a citizen;

4 (2) any member of the proposed plaintiff class is
5 a foreign Nation or a citizen of a foreign Nation and
6 any defendant is a citizen or lawful permanent resi-
7 dent of the United States; or

8 (3) any member of the proposed plaintiff class is
9 a citizen or lawful permanent resident of the United
10 State; and any defendant is a citizen or lawful per-
11 manent resident of a foreign Nation.

12 (b) *PREDOMINANT STATE INTEREST*.—A United
13 States District Court in an action described in subsection
14 (a) may abstain from hearing the action if—

15 (1) a substantial majority of the members of all
16 proposed plaintiff classes are citizens of a single
17 State;

18 (2) the primary defendants are citizens of that
19 State; and

20 (3) the claims asserted will be governed pri-
21 marily by the laws of that State.

22 (c) *LIMITED CONTROVERSIES*.—A United States Dis-
23 trict Court in an action described in subsection (a) may
24 abstain from hearing the action if—

1 (1) *the value of all matters in controversy as-*
2 *serted by the individual members of all proposed*
3 *plaintiff classes in the aggregate does not exceed*
4 *\$1,000,000, exclusive of interest and costs;*

5 (2) *the number of members of all proposed plain-*
6 *tiff classes in the aggregate in less than 100; or*

7 (3) *the primary defendants are States, State offi-*
8 *cial, or other governmental entities against whom the*
9 *district court may be foreclosed from ordering relief.*

10 (d) *DIVERSITY DETERMINATION.—For purposes of ap-*
11 *plying section 1322(b) of title 28, United States Code, to*
12 *actions described in subsection (a) of this section, a member*
13 *of a proposed class is deemed to be a citizen of a State dif-*
14 *ferent from a corporation that is a defendant if that mem-*
15 *ber is a citizen of a State different from each State of which*
16 *that corporation is deemed a citizen.*

17 (e) *REMOVAL.—*

18 (1) *IN GENERAL.—A class action described in*
19 *subsection (a) may be removed to a district court of*
20 *the United States in accordance with chapter 89 of*
21 *title 28, United States Code, except that the action*
22 *may be removed—*

23 (1) *by any defendant without the consent of*
24 *all defendants; or*

1 (B) any plaintiff class member who is not
2 a named or representative class member of the
3 action for which removal is sought, without the
4 consent of all members of the class.

5 (2) *TIMING.*—This subsection applies to any
6 class before or after the entry of any order certifying
7 a class.

8 (3) *PROCEDURE.*—

9 (A) *IN GENERAL.*—Section 1446(a) of title
10 28, United States Code, shall be applied to a
11 plaintiff removing a case under this section by
12 treating the 30-day filing period as met if a
13 plaintiff class member who is not a named or
14 representative class member of the action for
15 which removal is sought files notice of removal
16 within 30 days after receipt by such class mem-
17 ber of the initial written notice of the class ac-
18 tion provided at the trial court's direction.

19 (B) *APPLICATION OF SECTION 1446.*—Sec-
20 tion 1446 of title 28, United States Code, shall
21 be applied—

22 (i) to the removal of a case by a plain-
23 tiff under this section by substituting the
24 term “plaintiff” for the term “defendant”
25 each place it appears; and

1 (ii) to the removal of a case by a
2 plaintiff or a defendant under this
3 section—

4 (I) by inserting the phrase “by ex-
5 ercising due diligence” after
6 “ascertained” in the second paragraph
7 of subsection (b); and

8 (II) by treating the reference to
9 “jurisdiction conferred by section 1332
10 of this title” as a reference to sub-
11 section (a) of this section.

12 (f) APPLICATION OF SUBSTANTIVE STATE LAW.—

13 Nothing in this section alters the substantive law applicable
14 to an action described in subsection (a).

15 (g) PROCEDURE AFTER REMOVAL.—If, after removal,

16 the court determines that no aspect of an action that is sub-
17 ject to its jurisdiction solely under the provisions of section
18 1332(b) of title 28, United States Code, may be maintained
19 as a class action under Rule 23 of the Federal Rules of
20 Civil Procedure, the court shall strike the class allegations
21 from the action and remand the action to the State court.
22 Upon remand of the action, the period of limitations for
23 any claim that was asserted in the action on behalf of any
24 named or unnamed member of any proposed class shall be
25 deemed tolled to the full extent provided under Federal law.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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Mail Stop 3101


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

MEMORANDUM

March 24, 1999

SUBJECT: Y2K civil actions - (CSHB 82(L&C))

TO: Representative Norman Rokeberg
Attn: Janet

FROM: Michael F. Ford 
Legislative Counsel

You asked for a short explanation of the changes made in amendment I.4. The change made to page 1, lines 12 - 13, would effectively make the listed paragraphs (A) - (F) into examples of efforts that could be made to avoid Y2K damages, and would impose a more flexible "substantial effort" standard in place of the efforts described in paragraphs (A) - (F). This would seem a more practical approach, given the difficulty of listing all efforts that could or should be made to avoid Y2K damages. The second part of the amendment (to page 2, line 9) also substitutes a more flexible standard given the fact that there may not be industry regulations or requirements to comply with.

Please contact me if you have further questions.

MFF:jdr
99-154.jdr

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CS FOR HOUSE BILL NO. 82(L&C)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES ROKZBERG, Dyson

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to certain claims arising out of or in connection with the year
2 2000 date change; amending Rule 23, Alaska Rules of Civil Procedure; and
3 providing for an effective date."

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

5 • Section 1. AS 09.65 is amended by adding a new section to read:

6 Sec. 09.65.260. Claims against persons engaged in business arising out of
7 or in connection with the year 2000 date change. (a) A business or a member of
8 the board of directors of a business is not liable for damages arising from the year
9 2000 date change and caused directly or indirectly by a failure of an electronic
10 computing device used in the business if the business shows by a preponderance of the
11 evidence that

12 (1) the business made the following efforts to avoid the damages
13 claimed in the civil action:

14 (A) inventory the electronic computing devices used by the

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business that may experience year 2000 date change failures;

(B) identify critical electronic computing devices necessary to conduct the operations of the business;

(C) identify the potential for year 2000 date change failures associated with electronic computing devices used by the business;

(D) prepare a plan to reprogram, fix, repair, replace, or otherwise remedy the electronic computing devices necessary to avert failure resulting from the year 2000 date change;

out { ~~(E) comply with industry regulations or requirements related to the year 2000 date change, including testing information systems for compliance with the year 2000 date change; and~~ }

(F) develop contingency plans in the event of an electronic computing device failure; or

(2) the business, by following generally accepted standards of care and effort in the business activity in which the business was engaged, ~~exercised due diligence and reasonable care~~ to prevent or remedy damages arising from the year 2000 date change and caused directly or indirectly by a failure of an electronic computing device. *out*

(b) The defense in (a) of this section may not be asserted,

it by a business that develops or manufactures software, firmware, microcode, hardware, or embedded microchips that create, read, write, calculate, compare, sequence, or otherwise process data that consists of dates, times, or both dates and time if the business represented that the software, firmware, microcode, hardware, or microchips were year 2000 date change compliant; this paragraph does not apply to a business that only sells, rents, or leases software, firmware, microcode, or hardware that is developed or manufactured by another person; ~~or~~

out { ~~(2) in an action based on a contract.~~ }

(c) A civil action against a business, or member of the board of directors of a business, for damages arising from the year 2000 date change and caused directly or indirectly by a failure of an electronic computing device used in the business may not be brought as a class action unless each member of the class has a claim for