

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 86 / 2

9863 HOUSE JUDICIARY

1 APPLICABILITY. This Act does not apply to an action, case, or proceeding
2 commenced before July 1, 2001.

3 * Sec. 35. Except as provided in sec. 36 of this Act, this Act takes effect July 1, 2001.

4 * Sec. 36. Section 33 of this Act takes effect immediately under AS 01.10.070(c).

UNIFORM COMMERCIAL CODE, ARTICLE 9, SECURED TRANSACTIONS
THE 1998 REVISIONS
AN INTRODUCTION

The Uniform Commercial Code has eleven substantive articles. Article 9, Secured Transactions may be the most important of the eleven. Article 9 provides the rules governing any transaction (other than a finance lease) that couples a debt with a creditor's interest in a debtor's personal property. If the debtor defaults, the creditor may repossess and sell the property (generally called collateral) to satisfy the debt. The creditor's interest is called a "security interest." Article 9 also covers certain kinds of sales that look like a grant of a security interest.

The operation of Article 9 appears deceptively simple. There are two key concepts: "attachment" and "perfection." These terms describe the two key events in the creation of a "security interest." Attachment generally occurs when the security interest is effective between the creditor and the debtor, and that usually happens when their agreement provides that it takes place. Perfection occurs when the creditor establishes his or her "priority" in relation to other creditors of the debtor in the same collateral. Perfection occurs usually when a "financing statement" is filed in the appropriate public record. Generally, the first to file has the first priority, and so on.

Article 9 relies on the public record because it provides the means for creditors to determine if there is any security interest that precedes theirs--a notice function. A subsequent secured creditor cannot complain that his or her grant of credit was made in ignorance of the prior security interests that the record displays, and cannot complain of the priority of the prior interests as a result. Every secured creditor has a priority over any unsecured creditor.

The somewhat simple description in the prior paragraphs should not mislead anyone. Article 9 is not simple. There are substantial exceptions to the above-stated perfection rule, for example. Filing is not the only method for perfection. Much depends upon the kind of property that is collateral. Possession of collateral by the secured party is an alternative method of perfection for many kinds of collateral. For some kinds of property, control (a defined term) either perfects the interest or provides a better priority than filing does. There are kinds of transactions for which attachment is perfection. Priority is, also, not always a matter of perfecting a security interest first in time.

The following chapters of this backgrounder are meant to suggest and highlight Article 9 as revised in 1998. They are not a treatise on revised Article 9, but are meant to be a schematic guide to it. Each chapter addresses a specific topic qua issue. What follows in this introduction is an introduction to each of those issues.

1. The Scope Issue. The 1998 revision expands the "scope" of Article 9. What this means literally is that the kinds of property in which a security interest can be taken by a creditor under Article 9 increases over those available in Article 9 before revision. Also, certain kinds of transactions that did not come under Article 9 before, now come under Article 9.

2. Perfection. Although filing a financing statement remains the dominant way to perfect a security interest in most kinds of property, there are expanded property types in which "control" is the operative method of perfection. Specific perfection rules are extended to property that comes under the scope of Article 9 for the first time in the 1998 revisions.

3. Choice of Law. In interstate secured transactions, it is necessary to determine which state's laws apply to perfection, the effect of perfection and the priority of security interests. It is particularly important to know where to file a financing statement. The 1998 revisions to Article 9 change the rules substantially.

4. The Filing System. Improvements in the filing system in the 1998 revisions to Article 9 include a full commitment to centralized filing--one place in every state in which financing statements are filed, and a filing system that escorts filing from the world of filed documents to the world of electronic communications and records.

5. Consumer Transactions. Revised Article 9 makes a clearer distinction between transactions in which the debtor is a consumer than prior Article 9 did. Enforcement of a security interest that is included in a consumer transaction is handled differently in certain respects in the 1998 revisions to Article 9 than it was pre-1998. Although it governs more than consumer transactions, the good faith standard becomes the objective standard of commercial reasonableness in the 1998 revisions to Article 9.

6. Default and Enforcement. Article 9 provisions on default and enforcement deal generally with the procedures for obtaining property in which a creditor has a security interest and selling it to satisfy the debt, when the debtor is in default. Normally, the creditor has the right to repossess the property. Revised Article 9 includes new rules dealing with "secondary" obligors (guarantors), new special rules for some of the new kinds of property subject to security interests, new rules for the interests of subordinate creditors with security interests in the same property, and new rules for aspects of enforcement when the debtor is a consumer debtor.

SCOPE OF UCC ARTICLE 9

What kinds of property may become collateral under Uniform Commercial Code, Article 9? This is the "scope" question. In the 1998 revision to Uniform Commercial Code, Article 9, scope expands. That is, more kinds of property may be used as collateral and more types of transactions are covered. Also, some kinds of property that may have fallen into a more general category of collateral under pre-1998 Article 9, become defined and subject to specific rules.

SCOPE OF UCC ARTICLE 9 BEFORE THE 1998 REVISIONS

These kinds of property were (and will continue to be in the 1998 revisions to Article 9) subject to Article 9:

1. Tangible personal property. Property that is not real estate, but is tangible in form. Subdivisions of "tangible personal property" include "consumer goods," "equipment," "farm products," and "inventory."
2. Fixtures. This category of tangible personal property is separated from other personal property. Fixtures are items of tangible personal property that become so attached to real property that they are treated as part of the real estate. Fixtures begin as personal property, become real estate, but become personal property again when removed from the real estate. Special rules apply to fixtures under Article 9.
3. Documents. These are "documents of title" which, in general, establish that the person in possession has the rights to the goods which are represented in the title document. Bills of lading, dock warrants, dock receipts and warehouse receipts are included.
4. Instruments. An instrument generally is a negotiable instrument that evidences a right to the payment of money. An instrument becomes negotiable when it meets the criteria for negotiability in Article 3 of the Uniform Commercial Code. A note or draft is an example.
5. General Intangibles. Any intangible (meaning not goods) property interest that is not specifically addressed in Article 9. This is a gap-filling concept. Investment property is intangible property, for

example, but because it is specifically addressed in Article 9, it is not a general intangible.

6. Chattel Paper. The writings that evidence a debt owed coupled with a security interest in goods or a lease of goods are chattel paper.

7. Accounts. An account is any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. A "deposit account" like a bank account is not included.

SPECIFIC EXCLUSIONS FROM UCC ARTICLE 9 BEFORE 1998

These kinds of property or transactions are specifically excluded in the pre-1998 Article 9:

1. Statutory or common law liens.
2. Tort claims.
3. Deposit accounts (except those represented by certificates of deposit).
4. Governmental transfers.
5. Insurance claims or interests.
6. A right represented by a judgment.
7. Creation or transfer of an interest in or a lien on real estate.
8. Federally preempted rights.
9. Set off.
10. Transfer of a claim for wages, salary or compensation.
11. Sale of accounts and chattel paper as part of a sale of the business from which they arose.
12. Assignment of accounts and chattel paper for collection only, and
13. Transfer for performance of a contract or transfer of a single account to satisfy a pre-existing indebtedness.
14. Transfer of interest in a letter of credit, except for proceeds of a written letter of credit.

CHANGES IN THE SCOPE OF UCC ARTICLE 9 IN 1998

The 1998 revision to Article 9 keeps many of the exclusions in pre-1998 Article 9 but makes some significant changes as well. This list of changes tend to fall (though not wholly) into two categories, interests that are no longer excluded and interests that were included under more general categories such as "general intangibles" or "accounts" but that need to be addressed with specific secured transaction rules:

1. Nonpossessory, statutory agricultural liens. These liens were excluded under Article 9 prior to 1998. They are included for purposes of perfection and priority in revised Article 9. *Note other nonpossessory*

statutory liens remain excluded.

2. Sales of payment intangibles and promissory notes. Payment intangibles were a kind of general intangible, now distinguished by the characteristic of a primary monetary obligation. Promissory notes are a kind of instrument. These interests are sold, securitized and pooled. The interests sold are so like security interests that distinguishing these sales transactions from secured transactions is virtually impossible. The 1998 revision to Article 9 includes these kinds of property.

3. Security interests created by governmental debtors. The general pre-1998 exclusion has been narrowed. Only those governmental transfers that are subject to another statute on establishing and enforcing security interests are excluded. Federal preemption would, also, apply.

4. Health insurance receivables. The general exclusion of insurance proceeds in pre-1998 Article 9 is curbed for these specific kinds of receivables.

5. Consignments. Consignments of goods are included within the scope of Article 9 in the 1998 revisions. A consignment is a delivery of goods by the owner to another person, who sells for the consignor. A consignor is deemed to hold a purchase money security interest as against the consignee's secured creditors in the 1998 revisions to Article 9. Failure to comply with the requirements for a purchase money security interest potentially subjects the goods to the consignee's secured creditors. Before the 1998 revisions, a consignor had to perfect by filing a financing statement even though consignments fell within the scope of Article 2.

6. Commercial tort claims. The general exclusion of tort claims is narrowed so that security interests may be taken in commercial tort claims.

7. Liens on property. Certain liens on real property are included to the extent the lien establishes a right to payment.

8. Deposit accounts. Security interests may be taken in deposit accounts (with some restrictions). A security interest can be taken, therefore, in an ordinary bank account.

9. Supporting obligations. An example is a guarantee of payment or a letter of credit supporting an obligation to pay money.

PERFECTION OF SECURITY INTERESTS

A security interest is perfected when the secured creditor has met the statutory requirements for notice to unsecured creditors, and most creditors who perfect their interests after the first secured creditor's perfection. There are four basic kinds of perfection: 1) perfection by filing; 2) perfection by possession; 3) perfection by control; and, 4) automatic perfection. All forms of perfection were available in Article 9 before 1998. However, Article 9 assigns a perfection method for each new kind of property within its scope in the 1998 revisions. "Control" as a method of perfection is expanded beyond the single kind of property, investment property, in which a security interest could be perfected by control in the pre-1998 Article 9. Thus "control" takes on new and larger significance after 1998 than it did before 1998.

Automatic perfection is specific to certain kinds of transactions. Purchase money security interests in consumer goods are a kind of security interest that perfects automatically. However, automatic perfection is usually temporary and extinguishes unless another appropriate form of perfection occurs during the temporary period of automatic perfection. There are more kinds of automatic perfection in the 1998 revisions than was the case before 1998.

Unless otherwise noted, conflicting security interests take priority in order of filing or other perfection in time. First in time usually wins, but note that purchase money security interests often provide a creditor priority notwithstanding the time perfection took place.

Each method of perfecting a security interest is discussed as follows:

1. Filing a financing statement. Filing a financing statement in the appropriate place of record maintained by a state will perfect almost every kind of security interest (There are some exceptions.). The 1998 revisions make it clearer that filing will perfect, even if there is another method of perfection available. The old maxim, "When in doubt, file," is even more appropriate after the 1998 revisions. This is the time-honored method of perfection.

2. Possession. A secured creditor may perfect a security interest in a broad range of collateral by taking possession of that collateral. Possession is the only way to perfect a security interest in money, except for proceeds from a sale of property subject to a security interest. The 1998 revisions to Article 9 clarify issues of possession as a method of perfection, but do not change the rules materially. For example, there is a method for a third-party bailee to acknowledge the creditor's interest. Such a method is not expressly provided pre-1998.

3. Control. Control as a method of perfection first applied to investment property in amendments to Article 9 that followed the 1994 revision of Uniform Commercial Code, Article 8. A creditor has control, and a perfected security interest, when the debtor's interest can be transferred by the secured creditor without the debtor's consent. For certain kinds of property, like certificated securities, possession is tantamount to control. The 1998 revisions of Article 9 allow a creditor to perfect a security interest in deposit accounts and letter-of-credit rights by control, as well as in investment property. Control is effectively the only way to perfect a security interest in deposit accounts and letter-of-credit rights. It is possible to perfect an interest in investment property by filing, but perfection by control always has priority over perfection by filing if there are conflicting security interests, no matter which kind of perfection occurs first in time.

4. Automatic perfection. In some kinds of secured transactions, attachment is perfection. The "purchase money security interest" (PMSI) in consumer goods is such a case of automatic perfection. It arises when credit is extended to purchase goods. Other types of security interests are automatically perfected but only temporarily. An example is a security interest in a certificated security perfected for 20 days even though there is no filing or possession when it is delivered for sale or the like. Generally, a purchase money security interest has priority over security interests perfected before it in time. There are new specific PMSI's in the 1998 revisions, such as a PMSI in computer software and livestock.

Examples of other kinds of security interests that perfect upon attachment are a sale of a payment intangible, a sale of a promissory note, a security interest in a healthcare insurance receivable (all new in 1998), and a broker's security interest in investment property created by the broker (from the 1994 Article 8 revisions). Most of these security interests will, also, have priority over other kinds of security interests that perfect earlier in time.

CHOICE OF LAW RULES

A transaction in which a creditor takes a "security interest" in the collateral of a debtor may involve more than one state. The creditor may be in one state, the debtor in another, and the collateral in another. Further, the collateral may move at some point in the transaction from one state to another. Both the creditor and the debtor may be able to claim more than one place as residence or domicile. Therefore, Article 9 has always had

rules that determine which state's law will apply to the perfection, the effect of perfection and the priority of creditors in collateral.

When perfection requires filing a "financing statement" it is important to identify with certainty the state in which to file the financing statement. It is also important that creditors know with certainty that same state is the state in which they must search the record for financing statements indicating the existence of prior security interests. The state which the "choice of law" rules identify as the state whose law governs perfection, effect of perfection and the priority of creditors in the collateral, is the state in which the financing statement must be filed.

The 1998 revisions to Article 9 both simplify and substantially change the "choice of law" rules, meaning that in some cases different states will be the states in which perfection, the effect of perfection and the priority of creditors will be established than is the case under pre-1998 Article 9. The ultimate result is greater certainty for those who file financing statements and those who search for filed financing statements about which state is the right state.

Major Changes

There are two major changes in the "choice of law" rules:

1. Pre-1998, the basic rule chooses the law of the state in which the collateral is found to govern perfection and the effect of perfection of a security interest. If perfection occurs when a financing statement is filed, then the filing must take place in the state where the collateral is found. In the 1998 revisions, the basic rule chooses the law of the state in which the debtor is located as the law governing perfection, effect of perfection and the priority of a security interest in collateral. If a filing of a financing statement is required, then the statement must be filed where the debtor is, without regard for the location of the collateral. The location of the debtor is less likely to change than the location of the collateral and reliance on the location of the debtor provides creditors with more certainty about where to file and where to search. (Exceptions to both these rules to be discussed later on.)
2. If the debtor is a registered organization (corporation, limited partnership, limited liability partnership, limited liability company, etc.), pre-1998 treated the state with the chief executive office as the debtor's state. In the 1998 revisions, the debtor's state is the state in which it is a registered organization. Again, the objective of certainty about the place to file and the place to search is better served by the new rule than by the old rule, but the change will probably result in very little change in the actual place of filing in the vast number of cases.

Exceptions and Continuity

There are prominent exceptions to the new general rule in the 1998 revisions to Article 9. In most instances these exceptions mean no practical change in the choice of law rules from pre-1998 Article 9:

1. All possessory (meaning that there is no filing of a financing statement) security interests are perfected under the law of the state in which the collateral is located (where the creditor has possession). The practical effect is to leave the law unchanged for possessory security interests in any kind of collateral.
2. For other kinds of collateral, there are also no effective changes in the "choice of law" rules. These other kinds of collateral include property subject to certificates of title, and minerals, letter of credit rights and investment property.

3. For deposit accounts, which were not in the scope of pre-1998 Article 9, the location of the bank determines the place for perfection, effect of perfection and non-perfection, and the priority of security interests.

4. For agricultural liens, which were not within the scope of pre-1998 Article 9, the location of the farm products determines the place for perfection, effect of perfection and non-perfection, and the priority of security interests.

5. There are security interests that perfect in the location of the debtor under pre-1998 Article 9. Since the location of the debtor is the fundamental rule in the 1998 revisions, perfection rules effectively do not change for these security interests under the 1998 revisions to Article 9. Included are security interests in accounts, general intangibles and mobile goods (no distinction between mobile and other goods in the 1998 revisions), automatic perfection of a broker in investment property, and automatic perfection of the security interest of a commodity broker in a commodity contract.

Important Differences for Some Collateral

Under the 1998 revisions, the law governing perfection may be different from the law governing effect of perfection and priority of security interests for some kinds of property. These kinds of property include negotiable documents, goods, instruments, money and tangible chattel paper. The effect of perfection and priority of nonpossessory security interests in these kinds of collateral will be determined by the location of the collateral. This means that the place to file or the place where automatic perfection takes place, is the location of the debtor, but the impact of filing may be determined under the law of the state where the collateral is.

THE FILING SYSTEM

The primary and principal method for perfecting a security interest under Uniform Commercial Code, Article 9 is to file a financing statement with the filing authority or authorities in the appropriate state. Before 1998, most states had centralized the filing of financing statements covering most collateral in one state office. A few states continued to have both general central and local filing for all collateral. Many of the states that have centralized filing for most collateral, still continue to have local filing for some kinds of collateral. The result is a very mixed array of filing and search requirements. For filing must facilitate the search of records by subsequent creditors who must be able to find prior security interests. The fundamental objective of uniformity has been substantially impaired by the lack of uniformity just in the filing systems.

The new filing system is designed to forge a uniform system that is simpler and more reasonable to use:

1. Medium neutral. The new system is designed to be medium neutral. This simply means that the filing systems are no longer to be required to file paper only. The systems can convert to any and all forms of electronic communications for filing purposes.

2. Centralized filing. Every state will have a central filing authority. One place to file and one place to search. The only exception is fixture filings, which must continue to be made (and searched) in the real estate records.

3. Simplified financing statement. The statement must name debtor, creditor and generally describe some collateral. No signature is required. Identity of filer is immaterial.

4. Filing office operations. No discretion resides in the filing office as to sufficiency of a filing. A file cannot be cleared until one year after a termination occurs, extending the availability of the record for

one year longer than pre-1998 Article 9.

5. Correction statement. A debtor can file a correction to an improper or falsely filed financing statement.

6. Extended effective dates. Most financing statements lapse after five years from the date of filing. Two kinds of financing statements, those for public-finance transactions and for manufactured-home transactions are initially effective for 30 years.

7. National forms and fees. There is an effort to establish the same forms for filing in every state and to nationalize filing fees. Uniformity, therefore, is intended to go to the administration of filing as well as to the basic law.

CONSUMER TRANSACTIONS

In the 1998 revisions to Uniform Commercial Code, Article 9, there are special provisions for secured transactions in which the debtor is a consumer. A "consumer transaction" is defined to be one in which an individual incurs an obligation primarily for personal, family, or household purposes, a security interest secures the obligation, and the collateral is held or acquired primarily for personal, family, or household purposes. Most consumer secured transactions are consumer-goods transactions, meaning that an individual purchases an item, i.e. a refrigerator, a couch, and finances the purchase. The item, i.e., the refrigerator, the couch, are the collateral. If the consumer debtor defaults on the debt, the item is repossessed. The 1998 revisions make a distinction between a consumer debtor and a consumer obligor. In Article 9, a "debtor" is defined in terms of an interest in the collateral. An "obligor" is a person obligated to pay the debt. Usually they are the same person, but there are obligors who are not debtors, i.e., a person who guarantees the payment of the debt for the debtor. Most of the special consumer transaction rules pertain to enforcement of a security interest after the debtor defaults on the basic obligation. Some of these rules are as follows:

1. Right to Redeem. A consumer-goods transaction debtor may not waive the right to redeem collateral taken to satisfy the debt, a right which all debtors have. Redemption is the right under Article 9 that collateral be returned to the debtor if the debt is satisfied after a default. Commercial and business debtors are able to waive that right as part of credit acquisition. Consumer debtors will not be able to waive their right.

2. Process Presumption. In an action against a secured creditor for errors in enforcement and collection process, the presumption is that the collateral is worth the debt. In order to establish a deficiency, a creditor must rebut the presumption. These rules do not apply to consumer transactions. The courts will determine the rule to apply in consumer transactions and could choose a different rule.

3. No Dual Status Rule. The 1998 revisions to UCC Article 9 provide that the same collateral may secure a purchase-money security interest and a non-purchase-money security interest. This "dual status" rule is adopted in the 1998 revisions to Article 9, rejecting the opposing "transformation" rule applied in some pre-1998 court cases. Because the "dual status" rule may limit the benefit of purchase money security interests, consumer-goods transactions are excepted from its application. In a consumer-goods transaction, the courts must determine the appropriate rule to apply.

4. Pre-Payment Rights. Amendments to Article 2 of the Uniform Commercial Code that accompany the 1998 revisions to Article 9 provide greater protection for a consumer buyer of goods who pays in whole or in part before delivery of the goods. The buyer has an enforceable interest under Article 2 that allows the buyer to obtain the goods.

5. FTC Rule 433. A consumer's rights under Federal Trade Commission Rule 433 on preservation of claims and defenses are specifically recognized in the 1998 revisions to Article 9, and will continue even if the required notification in the appropriate record is missing.

6. Deficiency Statement. A consumer-goods debtor or consumer obligor is entitled to a written statement which provides the amount of a deficiency (what is owed after collateral is sold to satisfy the debt) and the calculation which results in that amount.

7. No Partial Satisfaction. A secured party may not accept collateral as partial satisfaction of a consumer obligation.

8. Sufficient Description. A description of consumer goods, a security entitlement, a security account, or a commodity account that is by category only is not a sufficient description when there is a consumer transaction. A security entitlement, a security account and a commodity account are types of investment property under Article 8 of the Uniform Commercial Code.

GOOD FAITH

The 1998 revisions to Article 9 adopt the more "objective" good faith standard: "honesty in fact and observance of reasonable commercial standards of fair dealing."

DEFAULT AND ENFORCEMENT

When a debtor defaults on an obligation secured under Uniform Commercial Code, Article 9, a secured creditor has a right to take the collateral, sell that collateral, and apply the proceeds to pay off the debt. If the proceeds are insufficient to satisfy the debt, there may be a deficiency that the debtor will be obligated to pay. The creditor will be entitled to pursue the deficiency with the creditor's remedies available under other law. If there is a surplus after sale, that surplus will be the debtor's, unless other creditors act to obtain satisfaction of their debts, as well. Strict foreclosure is an alternative to sale. The creditor keeps the collateral in a strict foreclosure. The procedures under Article 9 are generally non-judicial procedures. (Although a creditor may seek enforcement in court.) Usually the secured creditor will repossess the collateral and pursue the available remedies without a court proceeding. Article 9 has its own procedural requirements for creditors. Not following them may mean that a creditor will not obtain a full remedy under Article 9.

The 1998 revisions do not fundamentally change the rules for enforcement of a security interest upon a debtor's default. The revisions provide for problems perceived in enforcement prior to 1998. Some of the important changes are as follows:

1. Secondary Obligors. A secured party owes duties to "secondary" obligors on the secured debt. A secondary obligor is liable for a debt only if the primary obligor does not satisfy the debt. A guarantor is an example. There are notifications that must be given to known secondary obligors by secured parties upon default. Contrary to the law of suretyship, the 1998 revisions generally prohibit waiver of rights by a secondary obligor. A secondary obligor can waive notification of disposition of the collateral, and (in a non-consumer transaction) the right to redeem, but only after the default has actually taken place.

2. Deposit Accounts. The enforcement rights of a depository bank holding a security interest in a deposit account are expressly provided for. Security interests in deposit accounts under Article 9 were not possible before the 1998 revision.

3. Warranties. A secured party is subject to warranties of title, quiet possession and the like, applicable under other law (usually Uniform Commercial Code, Article 2), including rules for their exclusion or

modification when disposing of collateral.

4. Notification of Junior Creditors. A secured party taking collateral and disposing of it upon default, has a broader obligation to notify other secured parties and lienholders who have filed financing statements against the debtor covering the same collateral than is the case under pre-1998 Article 9. There are specific notification requirements and a requirement for notification within a reasonable time (no less than 10 days after the earliest time of disposition of the collateral).

5. Transfer to a Secondary Obligor from Secured Party. A secondary obligor obtains the rights and assumes the duties of a secured party if it takes an assignment of the secured obligation, agrees to assume the secured party's obligations, or is subrogated to the rights of the secured party. This is not a disposition of the collateral by the secured party, but relieves the secured party of further duties and obligations.

6. Transfer of Title to Secured Party. The 1998 revisions make it clear that a transfer of record or legal title to a secured party in order to facilitate a disposition, is not of itself a disposition of the collateral.

7. Strict Foreclosure. A secured party may accept collateral in partial (except in consumer-goods transactions) or full satisfaction of a debt. Junior claimants rights are accounted for. Acceptance of collateral in satisfaction of a debt is not of itself an unreasonable delay of disposition. Strict foreclosure is permissible if it is commercially reasonable, and unreasonable delay can occur only if the foreclosure itself is not commercially reasonable.

8. Damages for Secured Party's Noncompliance. Secured parties are subject to a "rebuttable presumption" that the collateral value equals the debt if they do not comply with the enforcement procedures and requirements in Article 9 for non-consumer transactions. If there is breach on the part of the secured party, the obligor is credited with the difference between the actual disposition price and the price that would have been paid if the disposition had been conducted in a commercially reasonable manner. The "absolute bar" rule is not mentioned but should be unnecessary (except that it may be selected for consumer transactions).

9. Deficiency Calculation. If there is a procedurally regular disposition that nonetheless fetches a low price, and the disposition is to an insider transferee, the deficiency is calculated on the basis of what the price should have been in a commercially reasonable disposition.



JOHN KNOWLES, GOVERNOR

**DEPARTMENT OF NATURAL RESOURCES
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January 25, 2000

The Honorable Lisa Murkowski
House of Representatives
Alaska State Legislature
Alaska State Capitol
Juneau, AK 99801-1182

Re: HB 239 - Uniform Commercial Code Revision

Dear Representative Murkowski:

HB239 contains a number of significant revisions of the Uniform Commercial Code in Alaska, including the modernization of the filing system operated by the Recorder's/UCC component in the Department of Natural Resources. As State Recorder, my duties include administration of the state's recording system as well as the Uniform Commercial Code Central File System in Alaska. I strongly support passage of this bill as it would serve to streamline the state's UCC filing system in a number of ways that are important to our customers.

While the bill contains other substantive changes that are important to secured lenders (e.g. making perfection easier, strengthening the purchase money security interest, facilitating foreclosure, etc.), our concern here in the Recorder's/UCC section is primarily with the filing provisions found in proposed Article 5 of AS 45.09. My office, with assistance from the Attorney General's office, had earlier submitted some minor revisions necessary to more closely align the filing provisions of the bill with the national version and to accommodate the implementation of IIB239 under our present processing structure and indexing system. It is my understanding that these recommendations are being incorporated into the bill.

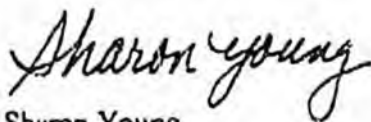
Since the objective of the national UCC revision process is to achieve uniformity in the handling of secured transactions among the states, it is critical that each state's legislation remain as close as possible to the recommended national version. While implementation of this bill would result in an increased workload in our UCC Central office, we anticipate handling this increase through lateral transfers from larger recording offices which would concurrently experience lower filing volumes.

"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans."

Rep. Murkowski
January 25, 2000
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Passage of this bill would afford many benefits to our UCC customers. Among other benefits, this bill would eliminate the confusion regarding place of filing by doing away with all local district filings other than fixtures, it would eliminate signature requirements on all filings, it would limit the number of reasons that could be used to reject filings, and it would pave the way for implementation of electronic filings in the future. This is a long overdue step toward bringing real uniformity to the Uniform Commercial Code!

Sincerely,



Sharon Young
State Recorder

Cc: Nico Bus
Admin Services Manager

Linda Kesterson
Assistant Attorney General



January 24, 2000

Representative Lisa Murkowski
State Capitol
Juneau, AK 99801-1182.

RE: House Bill 239
Article 9

Dear Representative Murkowski:

Thank you for the opportunity for our association to comment on HB239.

After careful review, we find this bill to be a benefit to our industry as it simplifies the filing process.

In centralizing the file system, our risk is greatly reduced in searching the system for existing liens on our clients' personal property. We currently search the recording district where the property is located as well as the Central File System. As you can see, there is a larger margin for error if a filing district is missed.

We feel that this bill enhances the uniformity necessary for the Uniform Commercial Code and we support its passage.

Respectfully,

LUCINDA M. ECKERT
Legislative Affairs Chairman
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January 24, 2000

Rep. Lisa Murkoswki
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RE: HB239 - Revision of Uniform Commercial Code

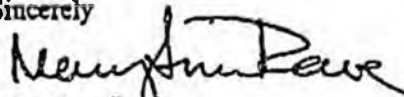
The Alaska Land Title Association represents more than 28 offices and over 400 employees statewide dealing in the title insurance industry.

We have reviewed SB239 and feel that this bill could help streamline the current UCC system in Alaska.

Our association is in full support of HB239 and urge the passage of said bill.

We appreciate your efforts on matters affecting our industry.

Sincerely



Mary Ann Rowe
Legislative Co-Chair



Jeff Blake
Legislative Co-Chair

BRIAN W. DURRELL P.C.
L A W O F F I C E

BRIAN W. DURRELL

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February 3, 2000

Representative Lisa Murkowski
Alaska State Legislature
Alaska State Capitol
Juneau, Alaska 99801-1182

Re: HB 239

Dear Representative Murkowski:

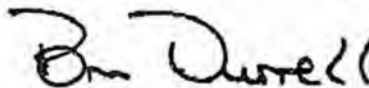
I send this letter to offer my support and endorsement of HB 239, which of course deals with the revisions to AS 45.09 (UCC Article 9). I have had substantial experience working with commercial law matters in Alaska. I spent the first fourteen years of my law career anchoring the commercial law practice at the Anchorage office of Bogle & Gates. Three years ago, I opened my own law office to continue my work in representing Alaska entrepreneurs, businesses and financial institutions in negotiating and documenting a wide variety of commercial transactions. I deal with issues controlled by AS 45.09 on a daily basis.

I believe that it is imperative that Alaska modernize its commercial code provisions to keep them up to date in light of changes in today's business world. I also believe that for Alaska to continue to develop of local, national and international commerce, we must have a set of commercial laws that follow as closely as possible the Uniform Commercial Code, deviating only when necessary to address matters peculiar to Alaska.

For these reasons, I urge the Alaska Legislature to act upon HB 239 so that it may be passed as swiftly as possible this session.

Very truly yours,

BRIAN W. DURRELL, P.C.



Brian W. Durrell

BWD:jk

AlaskaUSA

Federal Credit Union

Honorable Lisa Murkowski
Alaska State House of Representatives
Juneau, AK 99801

February 9, 2000

Dear Representative Murkowski:

Thank you for the opportunity to submit comment on HB 239 regarding proposed amendments to Article 9 of the Uniform Commercial Code (UCC). As you know, the revised Article 9 has been approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) with a target date for adoption in all 50 states by July 2001.

This legislation will not fundamentally alter the law of secured transactions; however, it will introduce numerous significant changes designed to clarify and modernize the current version. While we have not had an opportunity to review the sectional analysis directly associated with HB 239, we have reviewed the comparative information provided by the NCCUSL. We support the early adoption of this legislation and believe it is in the best interest of Alaska's lenders to maintain conformity with other states with respect to the rules associated with secured transactions.

Of particular interest is the introduction in this proposal to the concept of "electronic chattel paper," which refers to chattel paper in the form of a record or records consisting of information stored in an electronic medium. We believe this provision will significantly benefit the efficient and timely execution of secured transaction agreements and filings.

At your request, we have read the amendments being offered by the State Recorder's Office and find no areas of disagreement with their proposals. For the most part, they appear to be "housekeeping" in nature for the purposes of bringing the provisions of the UCC into line with State operational considerations.

This proposal can be somewhat intimidating due to its volume and complexity. It has been twelve years in the making. The benefits associated with Alaska's adoption of these provisions will provide certainty for lenders and with early adoption, the opportunity to transition to the new rules in a comprehensive and sensible manner.

Thank you again for the opportunity to comment. Should you be interested in a more specific discussion of these issues, I invite you to contact Mr. Tom Greene, Alaska USA's Senior Vice President, Consumer Lending, who will be pleased to discuss the implications of this proposal with you in greater detail. He may be reached in Anchorage at (907) 786-2733.

Sincerely,



Nancy Bear Usara
Senior Vice President,
Corporate Development

HB

244

HOUSE BILL NO. 244

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES CROFT, Dyson

Introduced: 5/16/99

Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to disclosure of information by the attorney general about
2 possible unfair trade practices; and relating to liability for allegations relating to
3 unfair trade practices."

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

5 * Section 1. FINDINGS. The legislature finds that

6 (1) violations of AS 45.50.471 - 45.50.561 (unfair trade practices and consumer
7 protection) are a matter of public concern;

8 (2) dissemination of information about violations of AS 45.50.471 - 45.50.561
9 would be beneficial to the public by warning the public about unfair trade practices;

10 (3) persons should not be discouraged from writing or speaking about
11 violations by the threat of litigation; and

12 (4) persons who file complaints about unfair trade practices with the attorney
13 general should be able to find out ~~information about the~~ ^{status of the} investigation of their complaints.

14 * Sec. 2. AS 45.50.521 is amended by adding a new subsection to read:

1 (c) Notwithstanding (b) of this section, the attorney general may communicate
2 freely about the investigation of an act or practice that may be unlawful under
3 AS 45.50.471 to the person, if any, who filed a complaint about the act or practice
4 with the attorney general.

5 * Sec. 3. AS 45.50 is amended by adding a new section to read:

6 **Sec. 45.50.525. Limits on cause of action for statements.** A person may not
7 bring an action for defamation of character, libel, slander, or damage to reputation
8 against a person who makes an allegation that an act or practice is or may be unlawful
9 under AS 45.50.471 unless the person who made the statement knew that the statement
10 was not true, made the statement with reckless disregard for the truth of the statement,
11 or made the statement to obtain a competitive business advantage.

12 * Sec. 4. APPLICABILITY. AS 45.50.525, enacted by sec. 1 of this Act, does not apply
13 to statements made before the effective date of this Act.

sec 5 doesn't extinguish any existing defenses
under law

Amendment

OFFERED IN THE HOUSE
TO: HB 244

BY REPRESENTATIVE

1. Page 1, line 13 after "about the", insert "status of the"

Thomas G. Johnson was first licensed in June of 1994. But he had advertised his company J & B Roofing in the 1993 yellow pages of the phone book as "Licensed, Bonded and Insured." This was fraudulent advertising as records from the Dept. of Occupational Licensing in Juneau show the first date of licensing to be June 1994 and there is no record of any J & B Roofing by any owner before June of 1994.

In several of the lawsuits on the database, work was done by Thomas G. Johnson d.b.a J & B Services, Roofing and Paving prior to his obtaining a license, bonding and insurance.

From Sept. 1, 1994 to October 2, 1998 25 lawsuits have been filed by Thomas G. Johnson's victims in the District Court House here in Anchorage, Alaska.

Charlie and Barbara Johnson who are also listed as defendant's thruout this database are the parents of Thomas G. Johnson. The Johnson's have been roofing in the State of Alaska since the 1970's under various names.

Court records and those on micro-fiche in the Anchorage District Court House and in the Dept. of Occupational Licensing in Juneau show only too clear the past business practices of Charlie and Barbara Johnson have continued on in their sons business practices of which they are a large part.

A review of Thomas G. Johnson's bankruptcy fiasco Case NO. A97-1006-DMD filed October 20, 1997 reveals hundreds and hundreds of additional victims. Despite the fact that Motions to Convert from Chapter 13 to Chapter 7 was part of the record, Judge Donald MacDonald IV, allowed Thomas G. Johnson to withdraw from bankruptcy per his request without even holding a creditors meeting first.

This action along with the company name change from J & B Services, Roofing and Paving to JBS, Inc. have left all of his hundreds of victims with no recourse at all to pursue any means of compensation for the crimes this company has committed against them.

There is another lawsuit filed by the Salvation Army against Thomas G. Johnson d.b.a J & B Roofing. It involves a replacement roof J & B Roofing put on the Salvation Army's warehouse.

James Rerko of the State of Alaska, Division of Insurance told me "the work was pure fraud that J & B Roofing did here." The attorney representing the Salvation Army is Susan West 793-2200.

THOMAS G. JOHNSON dba J & B SERVICES, ROOFING and PAVING

Written: Sept. 22, 1997
Revised: Jan. 16, 1999

DATE	CASE NUMBER	TYPE	PLAINTIFF	DEFENDANT(s)
01 Sep 1 94	3AN-94-03562SC	SMC	Smirnoff, Steve	Thomas Johnson J & B Services
02 Nov 8 94	3AN-94-10374CI	PDO	Enstar Nat. Gas Co.	Thomas & Charlie Johnson J & B Services
03 Jan 12 95	3AN-95-00332CI	PDO	Smith, Howard	Thomas & Charlie Johnson J & B Services
04 Sep 12 95	3AN-95-07757CI	PDO	Graves, Tracey	Thomas & Charlie Johnson, C. Schmidt J & B Paving/Roofing
05 Nov 17 95	3AN-95-09749CI	OCI	Thomas Johnson	Lim. Dong dba Black Angus Inn
06 Mar 15 96	3AN-96-00853SC	SMC	J & B Serv/Roofing	Jernstrom, Robert
07 Mar 18 96	3AN-96-00866SC	SMC	J & B Serv/Roof/Pav	Whitters Excavating and Landscaping
08 Apr 16 96	3AN-96-01295SC	SMC	Larry Calls Repair	Thomas Johnson J & B Services
09 May 17 96	3AN-96-03833CI	FOR	Thomas Johnson/J&B	M-Molina, Norma Arctic Builders Source
10 May 31 96	3AN-96-01898SC	SMC	Allen Levy	Thomas Johnson J & B Roofing/Services
11 Jul 25 96	3AN-96-02583SC	SMC	Taylor, David & Peg	Thomas Johnson J&B Roofing/Star InsBund
12 Aug 9 96	3AN-96-06342CI	OCI	Regina Levy	Thomas Johnson J & B Roofing Ins. Bond
13 Nov 12 96	3AN-96-08813CI	DEB	Ak. Financial Services	Thomas Johnson J & B Serv.Pav. Ins. Bond
14 Dec 9 96	3AN-96-04523SC	SMC	Schneibel Enterprises	Thomas & Charlie Johnson J & B Services
15 Dec 16 96	3AN-96-04649SC	SMC	AIC Foam & Coating	Thomas Johnson J & B Services
16 Jan 29 97	3AN-97-00268SC	SMC	Northland Credit	Thomas Johnson
17 Feb 26 97	3AN-97-01495CI	DEB	Uresco Construction	Tom & Charli Johnson J&B Serv/Pav/Roof
18 Mar 4 97	3AN-97-01612CI	DEB	Spenard Builder Supply	J & B Services, Roofing, Paving Thomas Johnson Dan Bourassa
19 Apr 2 97	3AN-97-02521CI	DEB	Anch. Sand & Gravel	Thomas Johnson J & B Serv. Star Ins Bond
20 Jul 8 97	3AN-97- 5433CI	DEB	Wilder Construction Co.	Thomas Johnson dba J & B Roofing,Paving Star Insurance Bond
21 Aug 11 97	3AN-97- 5554CI	DEB	Municip. of Anchorage	Barbara E. Johnson Charlie Johnson Thomas Johnson J & B Services, Paving
22 Aug 12 97	3AN-97-6602CI	DEB	Polar Supply Company	Thomas G. Johnson J&B Roofing, Paving
23 Aug 21 97	3AN-97- 6881CI	DEB	Combs Steel Metal Inc.	Thomas & Charlie Johnson, Star Ins. Bond J & B Roofing, Paving
24 Sep 9 98	3AN-98-09664CI	DEB	Clark, Gruening Dba CD Enterprises	Thomas G. Johnson dba J & B Roofing
25 Oct 2 98	3AN-98-03609SC	SMC	National Bank of AK.	Thomas G. Johnson
26 Jan 27 99	3AN-99-4106CI	DEB	Salvation Army	Thomas G. Johnson, J&BRoofing, JBS, Inc et el



Representative Eric Croft

Sponsor Statement for HB 244
"Consumer Protection Act of 2000"

HB 244 addresses two aspects of Alaska's consumer protection laws.

Free access to information about the types of scams and the identity of the scam artists operating in the community can prevent future crimes. Some victims of fraud are reluctant to speak about it because of shame. Others are willing to speak publicly, but are deterred by the threat of slander lawsuits by the scam artists themselves. HB 244 provides for protection for victims against slander lawsuits by requiring a showing that the victim spoke knowing that the statement was false. A victim that speaks without this requisite malice would have a defense in court. To protect against the use of this law by potential market competitors, HB 244 specifically provides that the statement cannot be made for a competitive business advantage.

Some victims of consumer fraud who file a consumer protection complaint have been frustrated with the amount of information available to them from the attorney general's office. Current law requires the attorney general's office keep the status of consumer complaints confidential to protect against possible frivolous complaints. However, the current law does not make clear that the victims themselves should have free access to the status of the complaint. HB 244 makes this clear for victims.

I urge you to support these two simple steps to increase access to information about consumer protection issues.

HB

253

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

ADVISORY BOARD ON ALCOHOLISM AND DRUG ABUSE
February 2, 2000

P.O. BOX 110608
JUNEAU, ALASKA 99811-0608
PHONE: (907) 465-8920
FAX: (907) 465-4410
TOLL FREE: 1-800-420-8920

Representative Pete Kott, Chairman
House Judiciary Committee
Alaska State Capitol
Juneau, Alaska 99811

Dear Representative Kott:

The Advisory Board on Alcoholism and Drug Abuse (ABADA) is interested in CS for HB 253, relating to school disciplinary and safety programs. Although the ABADA is supportive of concerns for school safety and disciplinary programs, we believe that the omission of any provisions for screening and referral for substance abuse problems and mental illness of students in violation of school policies is counterproductive to achieving the goals of school safety programs.

Clear links have been identified between school vandalism, truancy, and violence and alcohol or drug use. Research done by the Johnson Institute in 1993 compared two groups of students; students reporting no use of drugs vs. students who report experiencing problems as a result of alcohol and other drug use. The survey revealed that those "problem" users are:

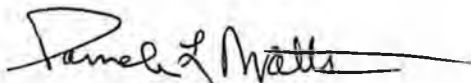
- More than twice as likely to get into physical fights—50% of those users admitted initiating violence, compared to 21% of non-users.
- Three times more likely to be truant from school—33% of those users say they've been truant, compared to 11 % of non-users. In the "dependence risk" category, 52% of the students reported being truant.
- Twice as likely to have trouble concentrating in class—44% of those users confessed to problems concentrating, compared to 22% of non-users.
- Four times more likely to commit vandalism—fully 54% of "users with problems" said they destroy things for fun, compared to just 14 % of non-users. Among male students in the "dependence risk" category, an astonishing 83% admitted to vandalism in the past year.

These figures point to the fact that in terms of violence prevention, a school disciplinary and safety program that does not address the role that alcohol and other drugs plays in negative student behaviors is likely to be less effective than a program that includes screening, assessment, and referral of students with substance abuse problems. In the long run, identifying and addressing these problems is likely to increase school safety and reduce violence.

On behalf of the ABADA, I request that CS for HB 253 be amended to include provision for such screening, assessment, and referral for substance abuse problems. I would also encourage you to consider strategies that identify and assist students with serious emotional disorders or developmental problems that may be contributing factors to violations of school policy.

Thank you for the opportunity to provide testimony on this very important issue.

Sincerely,



Pamela Watts
Executive Director

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

February 7, 2000

ALASKA CIVIL LIBERTIES UNION STATEMENT IN OPPOSITION TO HOUSE BILL NO. 253

The Alaska Civil Liberties Union strongly opposes House Bill 253 because it raises serious constitutional concerns regarding due process and free speech, it creates unnecessary bureaucracy, and it is bad public policy. We can appreciate the sponsors' intentions to provide for quality learning environments and to protect teachers who implement school district policies. Nevertheless, we must bring to your attention numerous problems with the bill and urge you to oppose its passage. Thank you for your consideration.

ISSUE:

HB 253 states that a "teacher, a teacher's assistant, a principal, or another person responsible for students is not liable for civil damage resulting from an act or omission arising out of enforcement of an approved school disciplinary and safety program..."

Analysis: HB253 creates redundancy with existing law. Under laws already on the books an employee could not be held liable for civil damages for implementing a policy at the direction of his or her employer. Further, the bill creates a dangerous confusion concerning liability for injuries which a teacher or administrator might inflict on a student through the application of excessive force during corporal punishment. The bill appears to condone corporal punishment by teachers provided an approved plan allows for it. The unintended consequence of this language would be that a teacher or administrator who seriously injured a child could claim to be "just following orders" as a means to avoid liability. We do not believe it should be state policy to give teachers and administrators a free pass if they injure students through negligent or intentional application of excessive force. The bill also conflicts with existing criminal laws, which would hold a teacher liable for assault or similar crimes in such a situation. The current law should prevail on these issues.

ISSUE:

HB 253 suffers from vagueness when it requires school districts to "implement and maintain community-based standards of school behavior that are understood, accepted, and upheld by students, parents, teachers, school administrators, and the community."

Page 2 of 4

Analysis: HB 253 does not give the public ample description of its intent. It could be argued that *no* set of standards would be understood, accepted, and upheld by *all* of the above entities. A group holding a dissenting opinion regarding a given district's policy will be able to argue (by virtue of their dissent) that the given policy is unacceptable to all elements of the community. School districts will be faced with the cumbersome and bureaucratic task of holding public meetings to craft policies that will be exceptionally vulnerable to challenge under this bill's language.

ISSUE:

HB 253 is contrary to the free expression and due process clauses of the US Bill of Rights and the Alaska Constitution. Under HB 253, programs must include "standards for student behavior and safety that reflect community standards and, at a minimum, basic requirements for respect and honesty."

Analysis: School districts cannot restrict students' rights to free thought and speech without showing a compelling governmental interest at stake and demonstrating that the restrictions at issue are narrowly tailored to serve that interest. Some 30 years ago, it was considered disrespectful for male students to wear their hair long in school in Alaska. A boy was disciplined in Fairbanks for having long hair, and he fought the school all the way to the Alaska Supreme Court. The Court ruled in the boy's favor, finding that students have a First Amendment right to express their individuality, even if this violates community standards of decency or respect. *Breese v. Smith*, 501 P.2d 159 (Alaska 1972).

Respect cannot be effectively or legally demanded; it must be earned, and it goes both ways. Students earn it from their teachers, and teachers earn it from their students. Time and time again, when students are asked why their favorite teachers *are* their favorite teachers, their answer is that their teacher respects them. A teacher has the right -- indeed, the duty -- to maintain order in the classroom and ensure that all students have an opportunity to receive an education. However, HB 253 appears to confuse blind obedience with respect.

In September of this past year, the AkCLU held a public forum in Fairbanks. The forum was open to all in the community, and the topic was "Civil Liberties in the Classroom." Over a dozen high school students attended this forum, along with parents, teachers, and other concerned citizens. Every single student articulated their sense that well-intentioned adults are over-reacting to the tragedy at Columbine by turning their schools into virtual prisons. Rather than address the underlying root causes of alienation and intolerance in the schools, which contributed to the violence at Columbine and a few other schools, school administrators have actually reinforced intolerance and alienation among students by cracking down on students' constitutional rights. Examples of this include violations of free expression such as arcane dress codes, banning black clothing, profiling students who express beliefs outside the mainstream or listen to Goth music, and banning any expression/speech protesting the school's policies. The AkCLU heard from a student in Alaska (who wishes to remain anonymous, for fear of further alienation) who was labeled a devil-worshiper by the faculty at her school because she

Page 3 of 4

merely questioned Christianity in the classroom, and this was confirmed by the student's mother who encountered these faculty members in a local grocery store.

Furthermore, more and more Alaskan schools are eliminating any semblance of due process for students and adopting a "one-strike-and-you're-out" policy for even minor infractions. Approximately 20 parents filled the AkCLU office in November 1999, complaining of over-reactions by school administrators in Anchorage, violation of the school's own policies regarding due process, and violation of their children's legal rights. The incident underlying this wave of suspensions involved only minor horseplay on a football team, and the parents of the alleged victim were at the meeting in the AkCLU office, complaining that their son was *forced* to claim that he was a "victim" and swear out a statement against his teammates, despite his repeated protestations that it was all in good fun, he wasn't hurt, and he thought it was just a big joke.

By imposing vague standards of behavior and not allowing due process for students deemed to be violating these standards, HB 253 exacerbates the growing sense among students – the future leaders of our country – that they are prisoners in their own schools.

ISSUE:

HB 253 would require that all teachers in the State of Alaska be trained in criminal law. A teacher who "observes a student committing a crime shall report the crime to the local law enforcement agency; in this paragraph, "crime" has the meaning given in AS 11.81.900." School districts would be required to implement "policies authorizing a teacher, teacher's assistant, or other person responsible for students to use reasonable and appropriate force to maintain classroom safety and discipline as described under AS 11.81.430(a)(2)."

Analysis: Teachers are not trained in the recognition of criminal acts, nor are they considered law enforcement agents. This bill would require that teachers obtain further training at either their own or their school district's expense. This would effectively reduce funds available for actual education purposes, reduce time spent in the classroom, and/or cause the teaching profession to become less attractive.

Teachers traditionally maintain a bond of trust with students to cultivate a healthful learning environment. Forcing teachers to assume law enforcement duties, including reporting, would weaken the trust, and damage the educational system. These duties are best left to appropriate law enforcement agents, and school district administrative personnel.

ISSUE:

A zero fiscal note is attached to HB 253. This narrative is intended to respectfully challenge the assertion that implementation of HB 253 would incur no costs to the State of Alaska.

Analysis: If implemented, the Department of Education and Early Development will have to review each school district's disciplinary and safety program for compliance

Page 4 of 4

with law. Upon completion of review, DOE&E will then be forced to use the threat of withholding State of Alaska funding to force non-compliant districts into meeting the law. Under this proposed law, DOE&E would be tasked with ensuring **“that all schools and school districts receiving state funds, that may not have already done so, implement and maintain an effective school disciplinary and safety program.”**

Since the bill fails to define acceptable standards for behavior and honesty (or respect and honesty), DOE&E will be placed in the untenable position of having to subjectively accept and reject the disciplinary and safety programs. DOE&E could face substantial legal challenges for withholding funding.

The State of Alaska currently has more than fifty school districts. Review of each community's plan could take one staff day per plan (based upon a careful review of the Anchorage School District's Statement of Rights and Responsibilities), for a total of more than fifty staff days.

STATE OF ALASKA

Department of Education & Early Development

Office of the Commissioner

TONY KNOWLES, GOVERNOR

*Goldbell Place
801 West 10th Street, Suite 200
Juneau, Alaska 99801-1894
(907) 465-2800
(907) 465-4156 Fax*

January 12, 2000

The Honorable Fred Dyson
Alaska State Legislature
State Capitol, Room 104
Juneau, AK 99801-1182

Dear Representative Dyson:

The Alaska Department of Education & Early Development has had an opportunity to review the recent draft of HB 253, "An Act establishing a school disciplinary and safety program; and providing for an effective date."

We would like to thank you for continuing to champion the issue of school safety and violence prevention efforts within the State of Alaska. We agree that the issue of safe and respectful school environments should continue to be a primary focus.

With increased attention to this issue given, we believe, the end result will be higher academic success for all students and an improved working environment for all school staff.

Given the enormity of this issue, we realize the efforts to change the current conditions in our nation's school systems will take many years and require several steps to success. The added protection for teachers and other school staff that this bill will ensure is another move in that direction. Of course, within the research-based model of prevention, this step will be one of many in order to ensure safer environments. As our staff highlighted for you in October, strong leadership, comprehensive programs, consistent enforcement and research-based curricula are also essential components to the success of school safety efforts.

It is certainly the hope of the Alaska Department of Education & Early Development, that continued discussions will take place at the state level to determine other resources and collaborative working partnerships necessary to advocate for coordinated school health programs, that encompass school safety and behavior management issues, as well as addressing the barriers to learning. In an effort to this end, the health program staff within our department is in the process of developing a competitive request for

The Honorable Fred Dyson

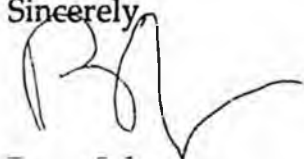
January 12, 2000

Page 2 of 2

application that will provide Title IV federal funds to districts who can demonstrate readiness to address some of the school safety issues within this broader prevention focus. We feel strongly that this effort is in line with current research and presents the best opportunity for schools to develop quality programs.

We will continue to keep your office informed of our progress and new research in this area of interest. If there is any further assistance our offices can provide you and your staff, please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to be "BJ", with a long horizontal stroke extending to the right.

Bruce Johnson
Deputy Commissioner

cc: Richard S. Cross, Commissioner

**ANCHORAGE
SCHOOL
DISTRICT****Anchorage School Board**

P.O. Box 196614, Anchorage, Alaska 99519-6614 • (907) 333-9561

Kathi Gillespie
2741 Seafarer Loop, Anchorage, Alaska 99516
(907) 345-5335; Fax (907) 345-9891
E-mail: Gillespie_Kathi@msmail.asd.k12.ak.us

DATE: FEBRUARY 2, 2000
TO: HOUSE JUDICIARY COMMITTEE
FROM: KATHI GILLESPIE, LEGISLATIVE CO-CHAIR,
ANCHORAGE SCHOOL BOARD

RE: TESTIMONY ON CSHB253

Chairman Kott and Members of the Committee:

While the purpose of this bill is admirable, the Anchorage School District has serious legal and procedural questions and cannot support this bill as it is currently written. We all agree that schools have a pronounced interest in developing and enforcing school disciplinary policies. Courts and education experts have repeatedly recognized that a strong instructional program is dependent upon effective student discipline.

However, courts have also recognized that an indispensable element of effective student discipline is allowing school officials discretion in matters of student discipline. Frankly, the fertile adolescent mind makes it impossible for school officials to anticipate every possible action that disrupts the educational environment. Consequently, student conduct codes cannot be effective when they are forced to comport with specific legislative mandates.

An example of this is the use of the term "understood" in HB 253, in the context of schools must adopt community-based standards which are "understood by students, parents, teachers, school administrators, and the community." At present, students are only required to be on "notice" of school disciplinary regulations - the regulations are available to students and if they choose to ignore them, they cannot argue that they were unaware that the conduct in question was prohibited. HB 253 changed that. The bill provides

that schools must draft community-based standards which are "understood" by "students, parents, teachers, school administrators, and the community." The term "understood" carries a specific meaning that implies comprehension, discernment, and mutual agreement. The Alaska Supreme Court has determined that words in statute will be interpreted in that form in which they occur in most common usage. In its common usage, the term "understood" implies comprehension, discernment, and mutual agreement (*Webster's New Twentieth Century Dictionary, unabridged, Second Edition 1994*). Requiring student "understanding" is far beyond simply placing a student on "notice" of school rules - the student must comprehend and accept the school rule. Consequently, this will result in every student who faces discipline having a new first bite at overturning discipline by arguing that they did not "understand" the rule in question.

Further, districts will be unable to discipline students for actions that are not specifically prohibited under the school disciplinary code, as one can scarcely "understand" a rule that is not specifically stated. While this may not sound unreasonable to grown adults accustomed to thinking of prohibited conduct in terms of criminal statutes, it takes on a completely different meaning in schools. As I mentioned earlier, courts have recognized that schools cannot anticipate every action students will take which is disruptive or dangerous. The requirement that students "understand" all school rules would result in the very real consequence that students would escape punishment due to the fact that there was not a preexisting rule on the books.

The use of "understood" is just one example. A similar case could be made for the terms "reasonable and appropriate force" and "maintaining school discipline." Advocates for students facing discipline will make much out of these legally ambiguous terms.

Another problem with this bill is the mandatory criminal sanctions for school board members who allow a teacher to be disciplined for actions taken under this bill. As a general matter, the people of the State of Alaska expect "efficient, unflinching leadership" from their governmental officials, including school board members. As long as officials are acting in good faith, the public has a right to expect decisive leadership. This bill would stifle that leadership.

An analogy can be drawn to the qualified tort immunity for public officials acting in their official capacity. The Alaska Supreme Court has declared that the only way the public can expect its officials to fulfill the requirements of their offices is if they have tort immunity for official actions as long as they are

acting in good faith and in a nonmalicious manner. Otherwise, officials will be reasonably afraid to act due to the specter of tort liability for their actions.

HB 253 would take it even a step further. Under this bill, it does not matter whether school officials act in good faith - they will be guilty of criminal misconduct if they allow a teacher to receive adverse personnel action for disciplining a student under this bill. This becomes even more unfortunate given the language interpretations and "judgement calls" required by this bill. Under the bill, teachers may use "reasonable and appropriate force" to maintain "classroom discipline." Should a teacher use force on a student in the name of preserving classroom discipline, and the board later sanction the teacher for this action, the board has exposed itself to criminal liability. If a court later determines that the teacher's action could have been defensible under the bill, the board is guilty - not charged with, but guilty - of committing a crime. This bill could easily result in boards "rubberstamping" teachers' disciplinary decisions, regardless of the egregiousness of the teacher's action.

In conclusion, schools do need support from parents and community members in ensuring effective discipline. However, this bill is not the way to ensure that support.

Cc: House Judiciary Committee
Representative Fred Dyson
Anchorage School Board
Bob Christal, Superintendent, Anchorage School District
Association of Alaska School Boards

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CS HB 253(HES)

Revision Date/Time (Note if correction) _____ Dept. Affected Education & Early Dev.
 Title School Disciplinary and Safety Program BRU Teaching & Learning Support
 Component Special & Supplemental Services
 Sponsor House HESS Committee
 Requester House HESS Committee Component No. 166

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

School disciplinary and safety programs are essential for school learning environments conducive to academic success. These programs are currently being implemented to some degree in all of Alaska's schools and school districts. This bill can be implemented within current school and district budgets, therefore the Department does not anticipate increased costs as a result of this bill.

Prepared by: Barbara Thompson, Deputy Director Phone 465-8727
 Division Teaching and Learning Support Date/Time _____
 Approved by Commissioner Date 1.20.2000
 Agency _____

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I-LS1337A
Utermohle
3/18/00

CS FOR HOUSE JOINT RESOLUTION NO. 53(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MASEK, Dyson, Harris

A RESOLUTION

1 **Proposing amendments to the Constitution of the State of Alaska relating to use**
2 **of fish and wildlife and to enhancement of replenishable resources.**

3 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** Article VIII, sec. 4, Constitution of the State of Alaska, is amended to read:

5 **Section 4. Sustained Yield.** (a) Fish, forests, wildlife, grasslands, and all
6 other replenishable resources belonging to the State shall be utilized, developed,
7 **enhanced**, and maintained on the sustained yield principle, subject to preferences
8 among beneficial uses.

9 *** Sec. 2.** Article VIII, sec. 4, Constitution of the State of Alaska, is amended by adding
10 a new subsection to read:

11 (b) Consistent with the sustained yield principle, the harvest of fish and
12 wildlife may not be diminished solely to provide for nonconsumptive use of fish or
13 wildlife.

14 *** Sec. 3.** The amendments proposed by this resolution shall be placed before the voters of
15 the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the
16 State of Alaska, and the election laws of the state.

L



750 W. 2nd Ave. #109, Anchorage AK 99501 / Ph. 907-258-6171 / Fax 907-258-6177

P.O. Box 22151, Juneau AK 99802 / Ph. 907-463-3366 / Fax 907-463-3312 / unite@akvoice.org

HJR 53 ~ Constitutional Amendment: Wild Food Resources

TO: House Judiciary Committee Members
FROM: Susan Schrader, Conservation Advocate
DATE: March 20, 2000

Alaska Conservation Alliance and Alaska Conservation Voters are sister nonprofit organizations dedicated to protecting Alaska's environment through public education and advocacy. Our 40 Alaskan organizations and business members represent over 22,000 registered Alaskan voters. Our members can be found in all user groups of Alaska's fish and wildlife, including subsistence users, recreational hunters, commercial and sport fishermen, wildlife viewers, and photographers. We respect and appreciate the long, rich tradition held by Alaskans, Native and non-Native alike, that surrounds our state's wildlife resources. We also acknowledge that opportunities to use and appreciate our wildlife belong to all Americans and to visitors to our state from other countries.

Alaska Conservation Voters supports fish and wildlife management actions that are based on unbiased scientific studies and that reflect the values of most Alaskans. We are greatly concerned by the continued positions taken by the State Legislature that fail to recognize the legislators' responsibilities under the Alaska constitution and the public trust doctrine to care for our fish and wildlife for the benefit of *all* Alaskans.

We are opposed to HJR 53 for the following reasons:

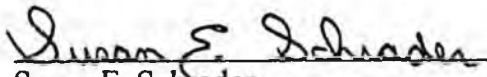
- In Section 1 of the CS of the resolution, the addition of the term "enhanced" appears to be an effort to enshrine the near-sighted principles of intensive game management into the Alaska constitution. Whereas the development of replenishable resources embodies a range of policies that address the long-term benefits of these resources for all user groups, the enhancement of them clearly mandates policies aimed, single-mindedly, at increasing the resources without consideration of other biologic principles. ACV questions whether including both directives, develop and enhance, does not create conflicting mandates.
- Section 2 creates a preferred use for fish and wildlife, and in turn, a preferred user group. Instead of facilitating a constructive public policy debate on the balanced use of our fish and wildlife resources, this language will only result in tremendous problems in its application in management decisions. The potential could exist that, as a result of this language, other groups would be essentially excluded from use of the resource, a situation that may run afoul of the "common use" safeguards of the constitution.

OVER

Conserve Alaska. It's Only Natural.

- If the Alaska Constitution is amended in the manner proposed by HJR 53, the definition of "human consumption" will await the adoption of enabling statutes. How will the definition be framed in respect to subsistence, commercial fishing or urban vs. rural issues? Should Alaskan Natives be concerned with more competition with urban, non-Native hunters for game? Should Alaskan commercial fishermen be concerned that their use of our fish resources "will take a back seat" to human consumption, an opinion expressed by Ted Popely to the House Resources Committee on February 28, 2000?

Clearly recognizing the volatile and divisive nature of issues surrounding fish and wildlife management, the members of Alaska Conservation Voters join with other Alaskans who are calling for balanced, fair and far-sighted policy decisions based upon the best, unbiased scientific data available and reflecting the values and interests of most Alaskans. The amendments to our constitution proposed in HJR 53 will do little to help resolve this difficult public policy debate.


Susan E. Schrader

MAR 20 2000

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHJR 53(RES)

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor
 Title Constitutional Amendment: wild food BRU Elective Operations
resources Component Elections
 Sponsor Representative Masek
 Requester House Judiciary Committee Component No. 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by \$22.0.

Prepared by: Gail Fenumai *Gail Fenumai* Phone 465-3935
 Division Division of Elections Date/Time 3/17/00 2:02 PM
 Approved by Lt. Governor Fran Ulmer *Fran Ulmer* Date 03/17/2000
 Agency Office of the Lieutenant Governor

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1-LS0599\K.4

Ford

2/7/00

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE KERTTULA

TO: CSHB 253(HES)

- 1 Page 3, line 4, following "AS 14.33.120":
- 2 Insert ", unless the governing body of the school district finds by clear and convincing
- 3 evidence that the enforcement violated the approved school disciplinary and safety program"

- 4 Page 3, lines 13 - 16:
- 5 Delete all material.

Janice Adair - most people don't comment
But for those who do,
we send out packets

◦ current law bars us from talking
to people after pub. comment period
is done. Only way is to open
period back up. Her concern
is that adding "non-value" activity
isn't productive

◦ she sees Lemano amendments
as contrary to extended pub policy
period provisions

→ not clear who we're required to notice
→ cost/benefit analysis - feels this would
be difficult for Dept.

→ tough to know what intent there is when
things go through conference comm.

→ POL reviews all regs - all go through Dept
Back

Kennedy. 1

Kertula → concern that you'd have to reintroduce,
re-notice etc. even though one change is

made.

→ Forest Practices Act Chris says diff b/c commission
is told not to adopt w/o pub
benefit

but standard is the same.

253 ① concern that authority is being transferred from principals to teachers

② How far does this extend? Subs? Volunteers

③ This is responsibility of Good School boards, superintendents, principals

Drug / Alcohol provisions — in the followup portion of discipline — teacher would be able to act & act quickly

86 schools in Anch. Carl

- Policy should come from administration
- problem is what is the appeals process
- when a decision is made
- problem w/ criminalization of school board members
- wants policies adopted in each school district

Repkoff → what are qualifications for school Bd. members.

Steps

- investigate
- validate
- take appropriate action

• Rural AK →



Alaska State Legislature

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FAX (907) 694-1015

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Alaska State Capitol
Juneau, Alaska 99801-1182
☎ (907) 465-2199
FAX (907) 465-4587

Toll free (800) 342-2199

REPRESENTATIVE FRED DYSON

HB 253 Sponsor Statement

"An Act establishing a school disciplinary and safety program"

School Teachers must be able to control their classrooms and enforce appropriate student behavior to keep classrooms civil and safe.

HB 253 Requires Schools to:

- Install community agreed-upon student behavior standards,
- Establish disciplinary procedures for students who are unwilling or unable to abide by school behavior standards, and
- Protect teachers against retribution when the teachers use the established disciplinary procedures to enforce the community agreed-upon behavior standards.

Many schools and school districts in Alaska are doing a good job of following the letter and intent of this legislation. However, there are also schools in our state where the school board and/or administration do not enforce behavior and safety standards and do not back up teachers who try. This legislation does not set behavior and safety standards. It merely requires that local standards be identified and established and that teachers be protected for adhering to and enforcing these standards.

- E-mail -
Representative_Fred_Dyson
@Legis.state.ak.us

- Internet -
<http://www.akrepublicans.org>

SPONSOR STATEMENT

Statutes referenced in CSHB 253 (HES)

1-LS0599\I

A. Referenced page 2, line 15:

Sec. 14.30.045. Grounds for suspension or denial of admission.

A school age child may be suspended from or denied admission to the public school that the child is otherwise entitled to attend only for the following causes:

(1) continued wilful disobedience or open and persistent defiance of reasonable school authority;

(2) behavior that is inimicable to the welfare, safety, or morals of other pupils or a person employed or volunteering at the school;

(3) a physical or mental condition that in the opinion of a competent medical authority will render the child unable to reasonably benefit from the programs available;

(4) a physical or mental condition that in the opinion of a competent medical authority will cause the attendance of the child to be inimicable to the welfare of other pupils;

(5) conviction of a felony that the governing body of the district determines will cause the attendance of the child to be inimicable to the welfare or education of other pupils.

B. Referenced page 2, line 17:

Sec. 47.12.310. Agency records.

(a) Except as specified in ..., and (b) - (g) of this section, all information and social records pertaining to a minor... are privileged and may not be disclosed directly or indirectly to anyone without a court order.

(b) A state or municipal agency or employee

(1) shall disclose information regarding a case to a federal, state, or municipal law enforcement agency for a specific investigation being conducted by that agency; and

(2) shall disclose appropriate information regarding a case to

(A) ...

(C) school officials as may be necessary to protect the safety of the minor who is the subject of the case and the safety of school students and staff or to enable the school to provide appropriate counseling and supportive services to meet the needs of a minor about whom information is disclosed;

C. Referenced page 2, line 20:

Sec. 11.81.430. Justification: Use of force, special relationships.

(a) The use of force upon another person that would otherwise constitute an offense is justified under any of the following circumstances:

(1) When and to the extent reasonably necessary and appropriate to promote the welfare of the child or incompetent person, a parent, guardian, or other person entrusted with the care and supervision of a child under 18 years of age or an incompetent person may use reasonable and appropriate nondeadly force upon that child or incompetent person.

(2) When and to the extent reasonably necessary and appropriate to maintain order and when the use of force is consistent with the welfare of the students, a teacher may, if authorized by school regulations and the principal of the school, use reasonable and appropriate nondeadly force upon a student. If authorized by school regulations and the principal of the school, a teacher may use nondeadly force under this paragraph in any situation in which the teacher is responsible for the supervision of students. A teacher employed by a school board, including a regional educational attendance area school board, may use nondeadly force under this paragraph only if the school regulations authorizing the use of force have been adopted by the school board.

HB 253: Sectional Analysis

Section 1:

New Section 14.33.110 describes, in broad terms, the goals and purposes of HB 253.

New Section 14.33.120 requires each school to produce a written school disciplinary and safety program. Schools should have most of the elements of this mandate in place so compliance will simply be a matter of documenting what exists and ensuring that the program reflects community values. Elements of the program are to include:

- 1) Behavior standards representative of the values of the community in which the school resides.
- 2) Policies and procedures for a teacher to follow to remove students who are a threat to safety from the classroom.
- 3) Procedures for notifying teachers of students who may be a threat to safety.
- 4) Policies authorizing a teacher to use appropriate force to maintain classroom discipline.

New Section 14.33.130 makes it a class A misdemeanor to terminate or discipline a teacher who is enforcing an established school disciplinary and safety program. It also requires a teacher, teacher's assistant, principal, or other school official who receives certain information about a student to report it to the student's teacher and to report student criminal activity to the local law enforcement agency.

Section 2:

Gives a deadline for school compliance

Section 3:

Sets an effective date.

HB

259

2/9/00

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM

January 28, 2000

SUBJECT: Public Defender representation at initial CINA hearing (HB 259;
Work Order No. 1-LS1099\D.1)

TO: Representative John Coghill, Jr.
Attn: Rynniva

FROM: Terri Lauterbach
Legislative Counsel

Terri Lauterbach

Enclosed is an amendment that would clarify that parents who are initially represented for free by the Public Defender Agency but who later do not meet the financial requirements for representation at public expense would need to pay the costs of the initial representation.

Please let me know if I can be of further assistance.

TML:jdr:glc
00-041.jdr

Enclosure

A M E N D M E N T 1

*adopted
2/9/00*

OFFERED IN THE HOUSE
TO: CSHB 259(STA)

1 Page 1, line 6:

2 Delete "A"

3 Insert "Subject to the other provisions of this subsection, a"

4 Page 1, lines 7 - 8:

5 Delete ", pending a determination of indigency,"

6 Page 1, line 10:

7 Delete "under this subsection"

8 Insert "in connection with the hearing"

9 Page 2, line 2, following "expense.":

10 Insert "If a person who was represented by the Public Defender Agency at public
11 expense without a court order in connection with a hearing held under AS 47.10.142(d) is not
12 later determined to be eligible for court-appointed counsel at public expense under applicable
13 laws and court rules, the court shall assess against the represented parent the cost to the
14 Public Defender Agency of providing the representation."

ALASKA STATE HOUSE OF REPRESENTATIVES

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Fairbanks, AK 99701
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Fax# (907)-456-8245



Session Contact:
(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 416

REPRESENTATIVE JOHN COGHILL

HB 259 PUBLIC DEFENDERS FOR 48 HOUR HEARING SPONSOR STATEMENT

Pursuant to AS 47.10.142 (4)(d) after DFYS takes physical custody of a child, the court must immediately hold a hearing at which the court shall determine whether probable cause exists to deem the child a "Child In Need of Assistance" (CINA). The public defender's office would welcome the statutory change to allow them to legally provide assistance in an area they feel is necessary.

When a child is removed from the family home, the effects can be traumatic; so much so that the parents are unaware of what has just happened, why it has happened, and what should be done next. The common situation is that the parents are distraught because their child has been removed by the state and feel intimidated by the judicial process for CINA determinations. They don't even know they can ask the judge for a continuance to seek legal advice.

Under current law a person does not qualify for assistance from the public defender's office until indigence is determined. Many parents go to court not knowing their rights or the process because they can not find legal assistance in time for the 48 hour hearing. This legislation allows any parent to get legal assistance from the Public Defender's office for the 48-hour CINA hearing regardless of whether or not they are indigent. The best case scenario in many cases will mean an end to the case and the child is returned to the parents. In other cases, a continuance would be issued to allow the parents to provide additional information to the court that the caseworker and the AG's office have not provided.

If, after the court has reviewed the evidence, it rules the child is a CINA during the 48 hour hearing, the parents would then apply for further assistance from the public defender's office and their qualification would be determined by whether or not they were indigent.

While some may argue this legislation will result in added expenses to the State, this legislation could actually reduce the cost of CINA cases in Alaska. By providing all the information in a professional manner at the first hearing of determination, the number of children in state custody for 90 days to six months then returned to their family will be reduced. This means a reduction in foster care, case worker, and health care costs, as well as, long-term public defender, guardian ad litem, and AG expenses.

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHB 259 (STA)

Revision Date: January 27, 2000
 Title: "An Act relating to a parent's eligibility to be represented by the public defender..."
 Sponsor: Representative Coghill
 Requestor: (H) STA

Department Affected: Administration
 BRU: Legal and Advocacy Services
 Component: Public Defender Agency
 COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2 003	FY 2004	FY 2005	FY 2006
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 99) cost: \$ _____

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: Barbara Brink, Director
 Division: Public Defender Agency

Phone: (907) 264-4414
 Date: January 27, 2000

Approved by Commissioner: Robert Poe, Jr.
 Agency: Department of Administration

Date: January 27, 2000

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FISCAL NOTE

STATE OF ALASKA

BILL NO. CSEB 259 (STA)

2000 LEGISLATIVE SESSION

ANALYSIS: (continued)

This bill would allow the Public Defender Agency to represent parents whose children have been taken into emergency custody by state social workers without the parents first having to go through a formal indigency screening process and appointment by the court.

The Public Defender Agency does not anticipate any fiscal impact from this legislation if it is amended so that we are not obligated to represent non-indigent parents. We have to do the same amount of work in these cases anyway. If we can get started a little earlier, so much the better.

However, in predicting the lack of any fiscal impact, we are making the following assumptions. First, we assume that the bill will be amended so we do not represent non-indigent people. Our lawyers can ask a few questions and get a pretty clear idea of whether someone is indigent or not. If people are able to hire their own lawyers, we can refer them to private attorneys.

Second, we assume the words "may be represented" give us leeway as to whom we represent and the scope of the representation. We must be able to turn down requests for this type of immediate representation if we have a conflict of interest or for other legitimate reasons. In addition to conflicts of interest, we have to be careful that the Public Defender Agency takes the most serious case. For example, if a mother calls saying her children have been taken because her husband is accused of sexual abuse, we should make sure that we end up representing the husband, not her. The husband may end up being a defendant in an expensive criminal case. If we can represent him in both the Child in Need of Aid and criminal cases, we can save the expense of having another lawyer appointed through the Office of Public Advocacy in the criminal case. Finally, we have limited resources and cannot promise an immediate response in every case. If all our lawyers are in court hearings, we may have to delay taking intake calls.

HB

273



Representative Beth Kerttula

Alaska State Legislature, District 3
State Capitol • Juneau, Alaska 99801-1182 • (907) 465-4766 • Fax (907) 465-4748
E-mail: Representative_Beth_Kerttula@legis.state.ak.us • <http://www.kerttula.net>

Memorandum

Date: April 11, 2000
To: Lesil McGuire, Aide
House Judiciary Committee
From: Gretchen Keiser *GK*
Re: **HB 273: Internet Privacy for Alaskan Consumers**

Attached is a bill packet for CSHB 273 (L&C):

- A blank CS for CSHB 273 (L&C) version "K" which cleans up the previous version and addresses some concerns raised by Internet service providers.
- Sponsor Statement.
- Sectional Analysis that accompanies version "K".
- March 2, 2000 legal analysis from the Department of Law.
- March 17, 2000 fiscal note from Department of Law.
- Letters from Chugach Electric Association, Inc. (3/24/00), GCI (3/28/00), and Alaska Civil Liberties Union (3/24/00).
- CS HB 273 (L&C) – version "I".
- March 20, 2000 cover article on Internet privacy.

CS FOR HOUSE BILL NO. 273()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES KERTTULA, Dyson

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the disclosure of subscriber information by Internet service
2 providers."

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

4 * Section 1. AS 45.50.471(b) is amended by adding a new paragraph to read:

5 (43) violating AS 45.50.479 (disclosure of information by Internet
6 service provider).

7 * Sec. 2. AS 45.50 is amended by adding a new section to read:

8 **Sec. 45.50.479. Disclosure of information by Internet service provider. (a)**

9 Except as provided in (b) or (c) of this section, an Internet service provider or an
10 employee of an Internet service provider may not disclose subscriber information about
11 a subscriber of the Internet service provider, or about another person who uses the
12 provided Internet access services, to a third party for any purpose, including marketing,
13 without the affirmative consent of the subscriber.

14 (b) An Internet service provider may disclose subscriber information without

1 the affirmative consent of the subscriber to an agency of the state, the federal
 2 government, or a municipality for the investigation of a criminal offense or an
 3 investigation related to a civil or administrative proceeding if, with regard to an
 4 investigation

5 (1) of a criminal offense, a court, upon application of the agency
 6 seeking information that is relevant to the investigation, has issued an order authorizing
 7 the disclosure of the subscriber information without the affirmative consent of the
 8 subscriber; or

9 (2) related to a civil or administrative proceeding, the agency makes
 10 a written request to the Internet service provider to disclose the subscriber information.

11 (c) An Internet service provider may exchange with other Internet service
 12 providers subscriber information necessary to maintain the proper functioning or
 13 integrity of the provider's network.

14 (d) When an Internet service provider activates a new account for a subscriber,
 15 the Internet service provider shall provide the subscriber by regular or electronic mail
 16 addressed to the subscriber's address and to the subscriber's personal attention with

17 (1) a description of the information on the subscriber that is generally
 18 available without restriction to users of the Internet;

19 (2) a statement indicating whether or not the subscriber has given
 20 affirmative consent to disclose subscriber information;

21 (3) a statement of the Internet service provider's policies that govern
 22 the subscriber information that may be disclosed with the subscriber's affirmative
 23 consent and a description of the subscriber information that will not be disclosed
 24 without the subscriber's affirmative consent;

25 (4) a statement that subscriber information will not be disclosed without
 26 the subscriber's affirmative consent except for

27 (A) exchange of subscriber information with another Internet
 28 service provider as necessary to maintain the proper functioning or integrity of
 29 the network of the subscriber's provider; or

30 (B) a disclosure of subscriber information to an agency of the
 31 state, the federal government, or a municipality for the investigation of a

1 criminal offense or an investigation related to a civil or administrative
2 proceeding under (b) of this section;

3 (5) a statement of the provider's policies governing disclosure under (4)
4 of this subsection; and

5 (6) a statement of the circumstances under which the network
6 administrator or network contractor of the Internet service provider is permitted to
7 review the contents of the subscriber's electronic mail or web site traffic; in this
8 paragraph, "network contractor" means the person or entity paid directly by the Internet
9 service provider to supply and maintain bandwidth, server space, and network support
10 software.

11 (e) Notwithstanding AS 45.50.531(a), if an Internet service provider or an
12 employee of the Internet service provider discloses subscriber information in violation
13 of this section, the subscriber, or the state on the subscriber's behalf, may bring a civil
14 action against the Internet service provider to recover \$500 as damages for each
15 disclosure. Each item of subscriber information that is disclosed is considered a
16 separate disclosure for which \$500 may be awarded as damages. The \$500 award
17 constitutes the value under this subsection of damages for the violation, and the
18 subscriber or the state is not required to prove actual damages. An action under this
19 subsection is in addition to any other remedy allowed under AS 45.50.471 - 45.50.561.

20 (f) This section does not apply to disclosure of subscriber information by an
21 Internet service provider if the application of it would violate 15 U.S.C. 6502(d)
22 (Children's Online Privacy Protection Act of 1998).

23 (g) In this section,

24 (1) "affirmative consent" means a statement in electronic form or a
25 written statement on paper from a subscriber authorizing an Internet service provider
26 to distribute personal subscriber information to third parties for marketing or other
27 purposes;

28 (2) "criminal offense" has the meaning given to "offense" in
29 AS 11.81.900(b);

30 (3) "direct Internet access services" means direct transmission control
31 protocol/Internet protocol (TCP/IP) services if the services

1 (A) include access to a domain name server and an electronic
2 mail server; and

3 (B) are provided by dial-up modem connections using a
4 telephone, the Integrated Services Digital Network, a digital subscriber line, or
5 a coaxial cable, or by other means;

6 (4) "Internet service provider" means a person that engages in the
7 business of providing direct Internet access services to other persons;

8 (5) "subscriber" means a person who contracts with an Internet service
9 provider to receive direct Internet access services if the person's address provided to
10 the Internet service provider is located in this state;

11 (6) "subscriber information" means information obtained from or as a
12 result of the contract between an Internet service provider and a subscriber; the term

13 (A) includes

14 (i) social security number, date of birth, occupation,
15 credit card information, debit card information, current address, prior
16 addresses, telephone number, mother's maiden name, and income
17 information; and

18 (ii) information gathered by means of tracking Internet
19 usage, Internet protocol connection history, Internet preferences,
20 computer equipment, computer software, or subscriber profiles;

21 (B) does not include the subscriber's name, the subscriber's
22 electronic mail address, and aggregated data that cannot be used to identify a
23 subscriber;

24 (7) "third party"

25 (A) means a person who is not the Internet service provider, an
26 employee of the Internet service provider, or the subscriber;

27 (B) includes an entity that controls, is controlled by, or is under
28 common control with the Internet service provider.

29 * Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section
30 to read:

31 APPLICABILITY. AS 45.50.479, enacted by sec. 2 of this Act, applies to contracts

1 between Internet service providers and subscribers if the contracts are in existence when this
2 Act takes effect or are entered into on or after the effective date of this Act. In this section,
3 "Internet service provider" and "subscriber" have the meanings given in AS 45.50.479(g).

4 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 TRANSITIONAL PROVISION. In addition to providing information under
7 AS 45.50.479(d), added by sec. 2 of this Act, to subscribers with new accounts, an Internet
8 service provider shall also, under AS 45.50.479(d), provide the information required by that
9 subsection in the manner required by that subsection to the provider's subscribers who entered
10 into contracts with the provider before the effective date of this Act and whose contracts are
11 in existence on the effective date of this Act. In this section, "Internet service provider" and
12 "subscriber" have the meanings given in AS 45.50.479(g), added by sec. 2 of this Act.



Representative Beth Kerttula

Sponsor Statement

CS HB 273

Internet Privacy for Alaskan Consumers

In the past few years, Alaskans have eagerly embraced Internet service into their homes and businesses. Access to the World Wide Web enables Alaskans to overcome geographic remoteness and time differences and to interact globally for ideas, information, and business. However, technological advances and business practices in the rapidly evolving electronic world have the potential for unprecedented access to Internet consumers' personal information and their on-line usage and preferences. Building upon the Alaska Constitution's strong foundation of Alaskans' right to privacy, CSHB 273 updates our consumer protection laws to address Internet activity.

CSHB 273 takes an important first step to protect Alaskan consumers' privacy at their entry point to the World Wide Web – their Internet service provider. CSHB 273 prevents an Internet service provider and its employees from disclosing a subscriber's personal identification information and any data that records a subscriber's Internet use or preferences *unless the subscriber agrees to the use of their information*. Family, friends, or employees using the subscriber's Internet account are also protected. CSHB 273 makes exceptions for disclosure of information in a law enforcement investigation or in order to maintain the proper functioning and integrity of the Internet service provider's network. As with other violations of Alaska consumer protection laws, CSHB 273 provides for civil penalties.

CSHB 273 protects a subscriber whose address is located in this state. It focuses solely on the subscriber's contractual relationship with an Internet service provider and does not address consumer privacy at the "other end" as Alaskans visit the virtually limitless web sites. The U.S. Federal Communications Commission and Federal Trade Commission, U.S. Congress, international organizations, and Internet business alliances are wrestling with these interstate and global privacy issues. CSHB 273 also does not legislate Internet content, minors' access to adult sites, or the collection of taxes on Internet sales.

CSHB 273 protects Alaskans' privacy by helping individuals maintain control over use of their personal information as they access the Internet.

Internet Privacy for Alaskan Consumers
CS House Bill 273
("K" Version)

Sectional Analysis
(Updated 4/11/00)

SECTION 1. Paragraph AS 45.50.471(b)(43) adds disclosure of information by an Internet service provider (ISP) to the list of unlawful acts and practices.

SECTION 2 Section AS 45.50.479 places limitations on an Internet service provider's use of a subscriber's personal information.

subsection (a) – prohibits an ISP or their employee from disclosing a subscriber's information unless the subscriber gives consent. The subscriber is protected without taking action; the burden is on the ISP to obtain consent. Other users of the subscriber's Internet account (such as a family members) are also protected.

The section may raise a legal issue since regulating Internet service providers who operate outside Alaska places some burden on interstate commerce. The attached March 2, 2000 Department of Law analysis of this issue concludes that

"Any burden proposed AS 45.50.479 may impose on interstate commerce is likely to be seen as incidental when balanced against the legitimate government interest in protecting consumers from unwarranted intrusions upon their privacy and insuring that consumers are protected against abusive and unwarranted disclosure practices."

Also, Theresa Bannister, Legislative Counsel, noted in her 11/15/99 memorandum accompanying a work draft of HB 273 that

"It is likely that individual privacy rights would be considered very valuable. The burdens on the interstate providers do not, at least on the surface, appear to be very onerous."

subsection (b) – permits an ISP to disclose subscriber information in a law enforcement investigation, and clarifies ISP disclosure for civil and criminal investigations.

New: subsection (c) – permits an ISP to exchange information with other ISPs to protect the integrity of the provider's network in the event of a hacker's attack. This responds to a concern raised by GCI, in its March 28, 2000 letter, regarding the ability of Internet service providers to work together to counter Internet abusers.

Amended:

subsection (d) – identifies information that the ISP must provide in a notice to a new subscriber. The ISP would be required to describe how the subscriber's information would or would not be disclosed. The notification language, which was added from HB 410 in (H) L&C Committee, is clarified and simplified in this version.

For example, a subscriber might agree that his or her information could be disclosed to an outside vendor providing filtering service for the ISP (e.g., a service purchased by parents to block certain adult sites for underage Internet users). In this case, the ISP notice would describe, under subsection (d)(3), what information would be disclosed. Similarly, GCI's March 28, 2000 letter describes the need to share subscriber information between a ISP wholesaler and ISP retailer. CS HB 273 allows this to happen once the ISP obtains subscriber consent and describes to the subscriber what information would be shared.

subsection (e) - establishes a civil penalty for disclosure of subscriber information. The penalty is set at \$500, similar to the other unlawful acts governed by this statute. However, the Internet subscriber is not required to prove actual damages as in AS 45.50.531, since it would be subjective and difficult, at best, to place a monetary value on the loss of personal information and one's privacy. Other legal remedies, such as action by the state attorney general, are also allowed.

subsection (f) – recognizes federal Children's Online Privacy Protection Act limitation on disclosure of information about or by children under 13.

subsection (g) – provides several definitions, including:

Amended: “affirmative consent” is a *statement in electronic form* or a written statement providing consent by the subscriber. Adding consent via an electronic format responds to a March 24, 2000 letter from Chugach Electric Assn., Inc.

”subscriber” is a person (i.e., individual or business) with an in-state address;

Amended: “subscriber information” is both personal identifying information *and* records of a subscriber's pattern of Internet use. Language is added to make clear that a subscriber's name and email address is *not* included under this definition. A subscriber's name and email address is generally available on the Internet.

Amended: “third party” is amended at (B) to substitute “entity” for “organization” and generally has the meaning of an affiliate of an ISP. This responds to a comment from Chugach Electric Assn. in its March 24, 2000 letter.

- SECTION 3** Applies AS 45.40.479 to new and existing contracts between Internet service providers and subscribers. The application of this bill to contracts entered into prior to the effective date of this Act may raise an issue under state and federal prohibitions against state impairment of existing contracts. The issue depends on:
- whether the subscriber information is an essential part of a contract with valuable results to the ISP;
 - whether the consumers have been aware that their information is being used; and
 - if the proposed restriction cures a significant privacy problem.

The attached Department of Law 3/2/00 analysis addresses this issue. At this point, there is no information that would lead to the conclusion that the bill would impair existing contracts. If ISPs consider subscriber information to be highly valuable and marketable, then the Alaskan consumers' personal data and Internet patterns are most likely being used and HB 273 would overcome a significant consumer privacy problem.

NEW: SECTION 4 – describes a transition so that an ISP provides notification under AS 45.50.479(d) to existing subscribers about the disclosure of each subscriber's information. The bill does not currently establish a deadline for this notification of existing subscribers.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-3697

March 2, 2000

The Honorable Beth Kerttula
House of Representatives
State Capitol
Juneau, AK 99801-1182

Re: HB 273
Internet Privacy for Alaskan Consumers

Dear Representative Kerttula:

Here is the analysis you recently requested regarding the Commerce Clause and Contract Impairment issues relating to HB 273, the Internet Privacy for Alaskan Consumers bill.

I. Commerce Clause Analysis

A. Question presented.

You have posed the following question to the Department of Law:

"The U.S. Constitution Commerce Clause and regulation of Internet service providers. Does HB create an issue by imposing an excessive burden on interstate commerce, compared with the likely valuable individual privacy benefits?"

B. Short Answer.

Any burden proposed AS 45.50.479 may impose on interstate commerce is likely to be seen as incidental when balanced against the legitimate government interest in protecting consumers from unwarranted intrusions upon their privacy and insuring that consumers are protected against abusive and unwarranted disclosure practices.

C. Analysis.

Proposed AS 45.50.479 raises the question of whether prohibiting out-of-state Internet service providers from disclosing subscriber information to a third party discriminates on the basis of interstate commerce, thereby violating the Commerce Clause of the United States Constitution. States retain authority to exercise police powers to control matters of local concern even though interstate commerce may be affected. Maine v. Taylor, 477 U.S. 131, 133, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). Courts apply a two-tiered analytical approach to Commerce Clause challenges. Brown-Forman Distillers Corp. v. New York Liquor Authority, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986); Dayhoff v. Temsco Helicopters, Inc., 848 P.2d 1367, 1370-71 (Alaska 1993). If the practical effect of the statute is to discriminate or directly regulate interstate commerce, courts typically strike down the statute as invalid without further inquiry. Id. at 1370, n. 1.

Conversely, if the statute only indirectly impacts on interstate commerce and does not discriminate, courts apply the balancing test articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), wherein the court must determine (a) whether the statute effectuates a legitimate local interest, and (b) "whether the burden on interstate commerce clearly exceeds the local benefits." Brown-Forman, 476 U.S. at 579; Pike, 397 U.S. at 142.

A court would likely apply the Pike balancing test in evaluating proposed AS 45.50.479's effect on interstate commerce, because proposed AS 45.50.479's terms apply equally to both in-state and out-of-state Internet service providers. In applying the Pike test, any burden proposed AS 45.50.479 may impose on interstate commerce is likely to be seen as incidental when balanced against the legitimate government interest in protecting consumers from unwarranted intrusions upon their privacy and insuring that consumers are protected against abusive and unwarranted disclosure practices. Therefore, proposed AS 45.50.479 does not "clearly exceed" the local interests promoted by the bill. Brown-Forman, 476 U.S. at 579; Pike, 397 U.S. at 142.

II. Contract Impairment analysis

A. Question presented.

You have also posed the following question to the Department of Law:

"Contract Impairment issue. HB 273 would apply the requirements to existing subscriber contracts. Does this provision raise an issue under the state and federal prohibitions against state impairment of contracts?"

B. Short Answer.

A court would likely determine that proposed AS 45.50.479 does not substantially impair an Internet service provider's rights under existing contracts, and would therefore uphold the validity of the legislation in the face of an Impairment of Contract challenge.

C. Analysis.

Proposed AS 45.50.479 raises the question of whether an Internet service provider's rights under existing contracts (as opposed to contracts not yet entered into) with subscribers would substantially be impaired in violation of the Contract Clause of the U.S. Constitution.

The Contract Clause prohibits states from enacting any law that retroactively impairs contract rights. (It does not affect contracts not yet entered into.) The Contract Clause prevents only substantial impairments of contract (i.e., destruction of most or all of a party's rights under a contract.) Moreover, not all substantial impairments are invalid.

In determining whether HB 273 is valid under the Contract Clause, a court would employ the following two-part test:

- (1) Does the legislation substantially impair an Internet service provider's (or subscriber's) rights under existing contracts? If it does not, the legislation is valid under the Contract Clause. I would argue that the legislation only incidentally affects an Internet Service Provider's rights under existing contracts with subscribers, since the main purpose of such contracts is to provide the subscriber with Internet access in return for a fee. The Internet service provider's right under existing contracts to disclose subscriber information to a third party is only ancillary to the main purpose of the contract with a subscriber, and therefore prohibiting such disclosure through state legislation does not constitute a substantial impairment under a Contract Clause analysis.
- (2) If the legislation were to be considered a substantial impairment of contract rights, the legislation would only be valid if it:
 - (a) serves an important and legitimate public interest; (I would argue that HB 273 certainly accomplishes an important and legitimate public interest in protecting subscribers from unwarranted intrusions upon their privacy and insuring that subscribers are protected against abusive and unwarranted disclosure practices.); and
 - (b) is a reasonable and narrowly tailored means of promoting that interest; (again, I would argue that HB 273 satisfies this test as well).

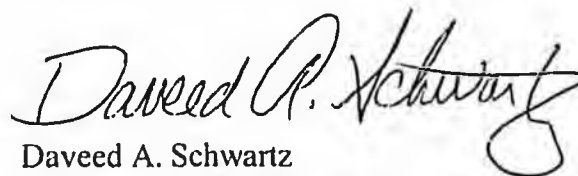
HB 273 should, in all likelihood, survive a Contract Clause challenge. Its restrictions on existing contract rights are minor compared to other instances in which Impairment of Contract challenges to state statutes failed. Here are three examples of cases in which state statutes survived Contract Clause challenges:

- (1) Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934): A Minnesota statute that imposed a moratorium on mortgage foreclosures during a severe depression did not violate the Contract Clause;
- (2) Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 815 (1983): A state statute placing a ceiling on price increases that a natural gas supplier could charge a public utility under the "escalator clause" of a preexisting contract did not violate the Contract Clause; and
- (3) Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987): A state statute that restricted underground coal mining to protect a variety of public and private uses of surface land (and buildings) and that left the owners of subsurface mining rights with some reasonable value in, and return from, their investment did not violate the Contract Clause.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Daveed A. Schwartz
Assistant Attorney General

DAS:jem

cc: Chrystal Smith
Legislative Liaison
Alaska Department of Law

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. HB 273

Revision Date/Time (Note if correction) _____ Dept. Affected Law
 Title "An Act relating to the disclosure of subscriber BRU Civil Division
information by Internet service providers." Component Fair Business Practices
 Sponsor Representative Kerttula
 Requester House Labor and Commerce Committee Component No. 2206

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 273 adds to the Unfair Trade Practices and Consumer Protection Act disclosure of information about a subscriber, or other user of provided Internet access services, by the Internet service provider to a third party without the subscriber's permission. This prohibition would not apply to disclosure of such information to law enforcement in the course of an investigation. The subscriber could bring a civil action against the Internet service provider for violation of this section.

This bill is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson *Joan M. Kasson* Phone 465-5370
 Division Attorney General's Office Date/Time 3/17/00, 3:08 PM
 Approved by Commissioner Kadjo for Bruce M. Botelho, Attorney General Date 3/17/00
 Agency Department of Law

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CHUGACH ELECTRIC ASSOCIATION, INC.

EUGENE N. BJORNSTAD, P.E.
General Manager

March 24, 2000

Representative Beth Kerttula
State Capitol, Room 430
Mail Stop 3101
Juneau, Alaska 99801-1182

Re: HB 273

Dear Representative Kerttula:

Chugach Electric Association, Inc. is sympathetic with the needs of its customers to have information safeguarded. Chugach has always taken care to use the information our members entrust to us responsibly. Nevertheless, Chugach opposes HB 273 as currently drafted.

Chugach provides its customers with both electric service and, as an optional service, dial-up internet access services. Increasingly, customers like to purchase services such as dial-up internet service bundled with other services in different ways to suit their individual needs. Indeed, because customers want it, this is a prominent marketing strategy for utility service providers at this time. This bill interposes a major impediment to meeting customer needs in this way by preventing organizations which jointly market services from sharing customer information easily and efficiently. The bill seems designed specifically to prevent essential information sharing among joint marketers, subsidiaries or affiliates. Chugach believes that any benefit to customers is outweighed by the impediment to meeting customer needs.

This bill unfairly targets internet service providers as businesses which are prevented from sharing information while leaving all the many other businesses which routinely share information free to do so. Note that most of the information ISP's are prevented from disclosing is the same information routinely kept by other businesses and shared without these restrictions. If the bill embodies good rules for protecting customer information, those rules should be equally good for all businesses.

Representative Beth Kerttula

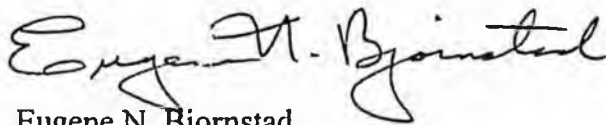
March 24, 2000

Page 2

The requirement that authorization to disclose information be written is particularly troublesome and anachronistic in this age of electronic communication and record keeping. Methods exist and are being developed which would allow customers to consent via electronic communication which would be adequate for demonstrating full consent but which would not involve the additional expense of maintaining written records.

The definition of "third party" is somewhat vague in part (B). It is not clear what would constitute an "organization" for these purposes.

Sincerely,



Eugene N. Bjornstad
General Manager

cc: House Labor and Commerce Committee



March 28, 2000

Representative Fred Dyson
State Capitol
Juneau, AK 99801-1182

Representative Beth Kertulla
State Capitol
Juneau, AK 99801-1182

RE: HB 273 relating to subscriber information

Dear Representatives Dyson and Kertulla:

As one of the largest Internet Service Providers in Alaska, GCI is extremely concerned about the security of the Internet and the privacy of our customers. For those reasons, we applaud your interest in these matters. However, as presently drafted, HB 273 would severely limit our ability to preserve system integrity and protect our system, and customers, for various sorts of "cyber-attacks."

We have 2 persons on staff devoted to protecting the security of our system. Other local ISPs have similar staff. Our collective ability to protect the system, and to protect the vast majority of users from a small number of abusers, requires ISPs to coordinate security efforts. Today, a "security council" of ISPs and law enforcement personnel meet regularly in Anchorage to discuss and address security issues. All of these efforts require ISPs to share information in a manner which would be precluded by the legislation as drafted.

As a simple example, GCI and its subscribers could experience a "spam attack". Our security staff would attempt to track the source of the attack, which could lead to another ISP, such as Internet Alaska. Our staff would then contact Internet Alaska and would need to disclose certain "subscriber information." Of course, it is possible that a hacker may have "hijacked" another computer to distribute the spam, requiring further research and sharing of user information. These activities would be precluded by the present draft of the legislation. There are also many other, and more complex, examples.

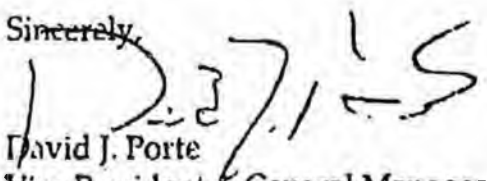
The bill also appears to cover, and preclude, certain necessary business relationships. GCI offers a filtering service for subscribers who wish to preclude access to certain websites; GCI obtains the filtering service by outsourcing to another vendor. GCI must provide that vendor with certain subscriber information, and that vendor can also collect subscriber information. Similarly, GCI provides "wholesale" Internet service to other retail ISPs, such as Chugach Electric Association. GCI and Chugach must share subscriber information simply to establish service and bill the account. The bill would even appear to forbid GCI from allowing customers to pay their bill by a credit card, because GCI would then have to disclose the credit card number to the bank, or from referring a delinquent account to a collection agency.

There is also a significant question of whether it is practical (or even legal) for the State of Alaska to regulate this important element of interstate commerce. Several national ISPs, such as AOL, provide service to subscribers in Alaska. We believe that it is highly unlikely that large, nationwide providers will be able to modify services for Alaska subscribers to conform, for example, with the notification requirements of the bill; such providers will likely argue that complying with different requirements in 50 different states is an impossible burden unlawfully interfering with interstate commerce. The result could be that in-state providers are burdened with requirements that do not apply to national providers.

Finally, the definition of "subscriber information" remains too broad. For the same reasons that "electronic mail address" was deleted from the list of subscriber information, the subscribers' address and telephone number should also be deleted.

For all of the foregoing reasons, GCI cannot support HB 273 at this time. We would be happy to work with you and your staff to try to resolve these issues.

Sincerely,


David J. Porte
Vice President & General Manager
Internet Services

cc: Carolyn Johnson, Chugach Electric
Reed Stoops
Internet Alaska

Alaska Civil Liberties Union
P.O. Box 201844
Anchorage, AK 99520-1844
phone (907) 258-0044
fax (907) 258-0288
e-mail: akclu@alaska.net

March 24, 1999

Testimony to the House Labor and Commerce Committee

Regarding House Bill 273 relating to disclosure of personal information by an internet service provider.

House Bill 273,

Comments of the Alaska Civil Liberties Union

The Alaska Civil Liberties Union wishes to thank Representative Kerttula for introducing House Bill 273, addressing the important issue of internet privacy, and thank the House Labor and Commerce Committee's hearing this bill.

This measure gives important statutory support to the goal of protecting individual rights and personal dignity in the new era of electronic communication.

The Alaska Civil Liberties Union supports the language of HB273, requiring that affirmative consent be obtained from a subscriber prior to the release of any personal information by an internet service provider about that subscriber.

The Alaska Constitution is clear about the right to privacy, and in the face of technological change this legislation is an important and necessary.

Requiring that an internet service provider obtain consent before disclosing personal information about a subscriber is a most basic provision in a computer-based environment where every purchase, any expression of interest or curiosity, all messages in or messages out can be tracked and monitored.

We urge the Committee to consider this bill and move its provisions forward.

(7)

HOUSE COMMITTEE REPORT

Date Referred to Committee: January 10, 2000

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 24 MAR 2000

The LABOR AND COMMERCE Committee considered:

HB 273

HOUSE BILL NO. 273

INTERNET SERVICE PROVIDERS

"An Act relating to the disclosure of subscriber information by Internet service providers."

recommends it be replaced

with the following committee substitute

CS HB 273(L+C)

[x] the same title
[] a new title

[] additional referral to _____ Committee

[] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[] fiscal note(s) _____

[] fiscal note(s) _____

[x] zero fiscal note(s) LAW 3/17/00

[] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i>	✓			
<i>John L. Harris</i>			✓	
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>Nancy Kately</i>			✓	

CHAIR'S SIGNATURE

[Signature]

3-24-2000

BusinessWeek

MARCH 20, 2000

A PUBLICATION OF THE MCGRAW-HILL COMPANIES

The Stock Market
Bargains in the Old Economy

Warren Buffett

 Why he's in a slump

The Disabled

 Enlisting a new workforce

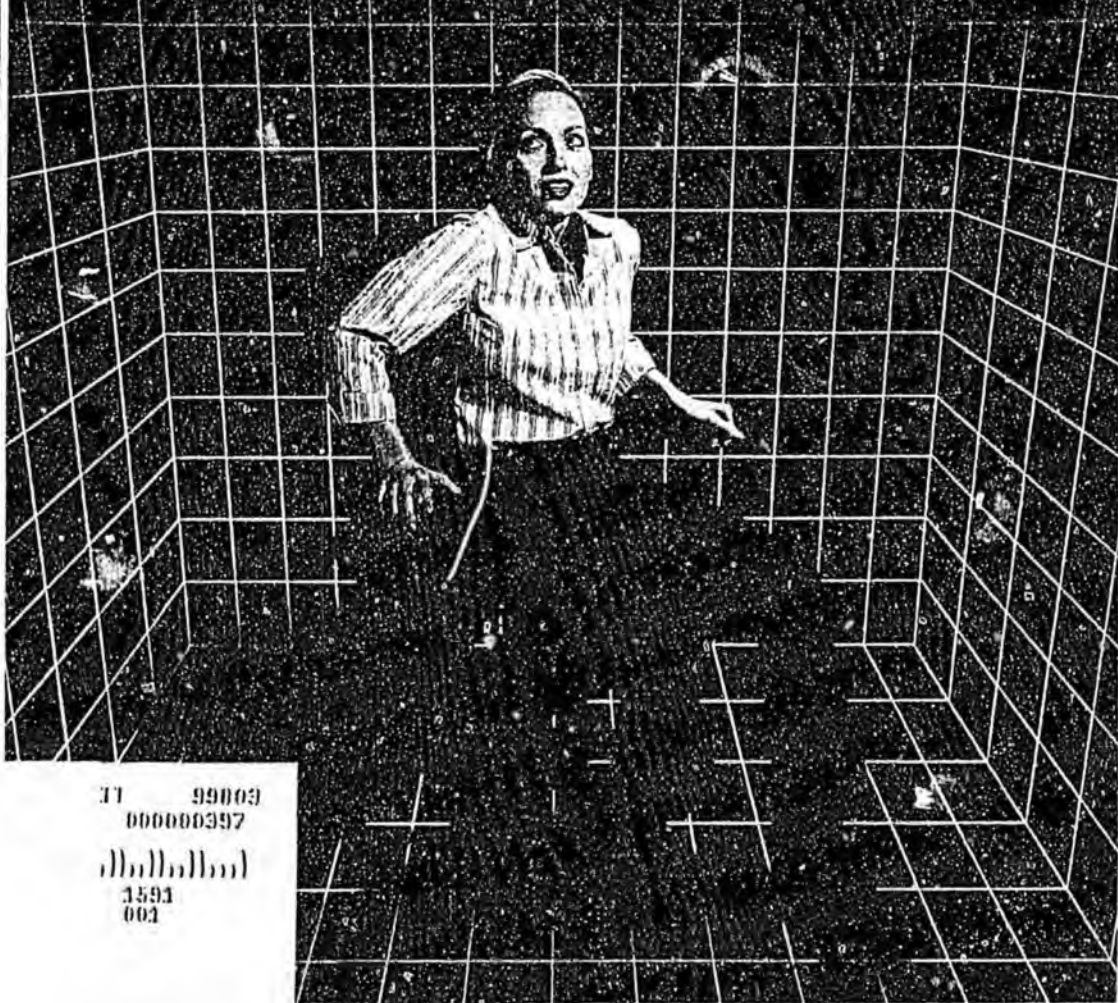
Web Auctions

Curse of the winner



PRIVACY ON THE NET

What Should Be Done PAGE 82



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ONLINE PRIVACY

IT'S TIME *for* RULES *in* WONDERLAND

❖ Cover Story ❖

Here's BUSINESS WEEK's four-point plan to solve the Internet privacy mess



IF LEWIS CARROLL HAD WRITTEN ABOUT ALICE'S ADVENTURES today, she would find herself passing through the looking glass and into cyberspace. She would meet up with dodos, duchesses, and eggheads, some of whom would spout the rough equivalent of "Twas brillig, and the slithy toves..." The journey also would be full of rude surprises. As in Carroll's books, she would eventually discover who she really was. But many others she had never met would learn about her, too. Indeed, with every click of the mouse, a bit more of her privacy would vanish down the rabbit hole.

These days, a lot of people are stumbling on similar unpleasant surprises. Thanks to a string of privacy

ILLUSTRATIONS BY BITTY WEEK

gaffes involving DoubleClick, RealNetworks, Amazon.com, and other major Web sites, consumers are learning that e-commerce companies have an intense interest in their private information. For about 9¢, some medical data sites will sell you your neighbor's history of urinary tract infections. Your speeding tickets, bounced checks, and delayed child-support payments are an open book. In the background, advertising services are building profiles of where people browse, what they buy, how they think, and who they are. Hundreds of sites already are stockpiling this type of information—some to use in targeted advertising, others to sell or trade with other sites.

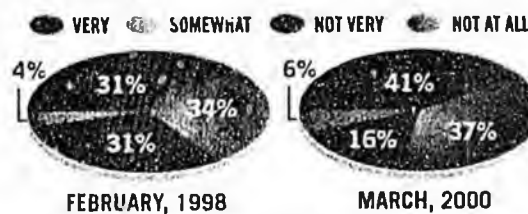
GOLD RUSH. It will get worse. The tricks being played today are child's play compared with what's coming. Web sites that want to know you better will soon be able to track your movements on Web phones, palm devices, and video games, and parse the data with more subtle software. Online services can be layered with mounds of data about each person. Interactive TVs, for instance, have the potential to correlate the Web sites you visit at work with the ads you see at home in the evening.

Web surfers don't need extra proof that this gold rush for personal data is alarming. In a new BUSINESS WEEK/Harris Poll (page 96), 92% of Net users expressed discomfort about Web sites sharing personal information with other sites. The public outcry has grown so loud that in February, search engine AltaVista Co. promised to ask explicit permission before sharing visitors' personal information with other companies. On Mar. 2, DoubleClick bowed to public pressure on a similar point: The company, which serves up ads on many Web sites, has created anonymous digital snapshots, or "profiles," of millions of cybersurfers, based on where they browse and what they do online. DoubleClick had planned to link profiles with much more specific information, including names and addresses culled from real-world databases that cover 90% of American households. The company dropped that controversial plan, and within days, smaller rival 24/7 Media Inc. abandoned a similar strategy.

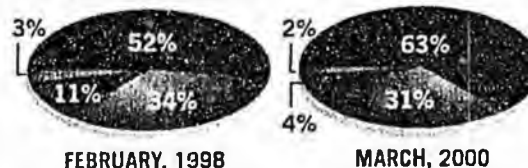
Soon cybersnoops will be able to track your use of Web phones, palm devices, and video games

A RISING TIDE OF CONCERN...

If you shop online, how concerned are you that the company will use your personal information to send you unwanted information?

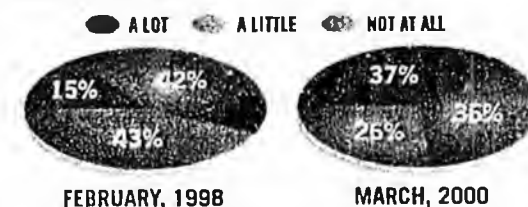


If you don't buy online, how concerned would you be that, if you did, a company would use personal information to send unwanted information?



...COULD BE ALLAYED BY GUARANTEES

If you use the Internet, to what extent would explicit guarantees of the security of personal information encourage you to buy online?



NOTE: "DON'T KNOW" AND "REFUSED" NOT INCLUDED. FULL RESULTS, PAGE 96
DATA: BUSINESS WEEK/HARRIS INTERACTIVE POLL OF 1,014 PEOPLE

Anonymous tracking and profiling by DoubleClick and 24/7 can be very subtle. But sometimes privacy violations hit you in the face. We have all heard the examples of sociopaths who stalk their victims online. We have seen the statistics on "identity theft," in which criminals suck enough personal data off the Net to impersonate other people. Perhaps these are extreme examples. Even without them, many cybersurfers are starting to feel that they have spent quite enough time at this particular Mad Tea Party. They are ready for privacy rules that set some plain and simple boundaries. In the March BUSINESS WEEK/Harris Poll, 57% of respondents said government should pass laws on how personal information is collected. "What's going on today is exponentially more threatening to those who want to protect privacy," says Eliot Spitzer, New York's state attorney general who has proposed privacy legislation. People can't make informed decisions on the Net because they lack the necessary information. "What we're confronting is a market failure," says Spitzer.

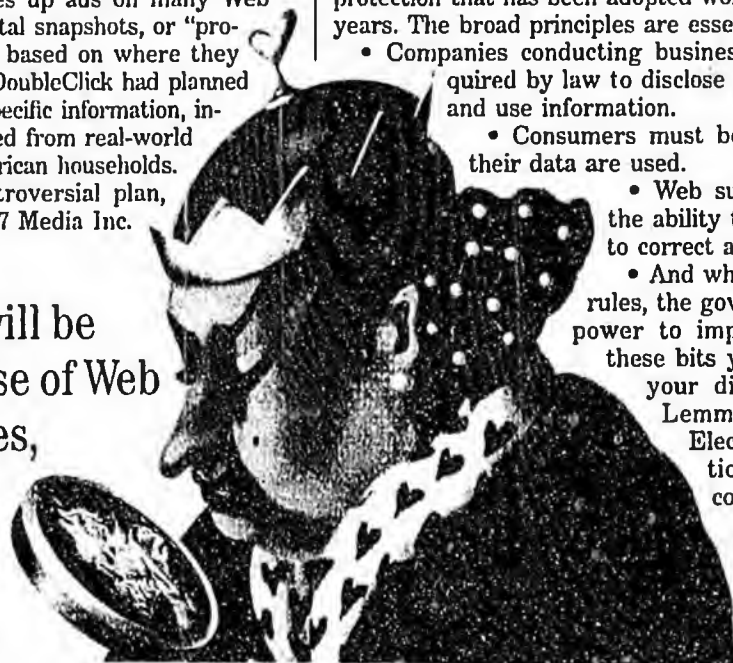
Responding to a growing chorus of privacy-related complaints, some states have drafted legislation ranging from curtailing the sale of personal information to the creation of a privacy ombudsman. But this piecemeal, state-by-state

approach is a muddle. Scattershot laws will only create more confusion. Over time, they will choke budding e-business in complex litigation and red tape.

BUSINESS WEEK believes there is a better way. Instead of a conflicting patchwork of state rules, the federal government should adopt clear privacy standards in the spirit of the Fair Information Practices—a philosophical framework for privacy protection that has been adopted worldwide over the past 25 years. The broad principles are essential:

- Companies conducting business online should be required by law to disclose clearly how they collect and use information.
- Consumers must be given control of how their data are used.
- Web surfers should also have the ability to inspect that data and to correct any errors they discover.
- And when companies break the rules, the government must have the power to impose penalties. "All of these bits you are sending out are your digital DNA," says Tara Lemmey, president of the Electronic Frontier Foundation. "You should have control of that."

Regulation flies in the face of the approach industry has been chum-



pioneering. For the past four years, Net companies have insisted that they can police themselves on privacy. "Industry initiatives and market forces are already doing a good job," says Daniel J. Jaye, co-founder of Engage Technologies Inc., which dishes up ads on the Web.

In other words, the market will punish companies that fall afoul of consumers. Bringing in the government, execs say, will pile bureaucratic layers on top of the Net. This could undercut the very promise of efficiency that many online businesses are counting on. The Internet, they say, is supposed to draw companies closer to their customers, allowing them to anticipate their desires. With profile data, they can target their ads, slash wasteful and random marketing costs, design products faster, and build higher profit margins. Profiling provides the underpinnings of a new way of doing business upon which the Net Economy is built.

Laws that require businesses to seek users' permission before they collect or use data about Web-surfing habits could kill this goose, they say. And why do that, industry execs ask, when they are making such fine strides in protecting consumer privacy? As a positive sign, Net businesses trumpet a May, 1999, Federal Trade Commission survey in which 66% of companies queried had privacy policies.

SELF-REGULATORY SHAM. We are not persuaded by these arguments. Few Web sites give consumers real choices over the data that get collected online. There is no proof that if given a choice—especially bolstered with financial incentives proffered by Web merchants—consumers won't willingly hand over some personal data. As for privacy policies, the same FTC survey showed that while more than 90% of companies polled collected personal information, fewer than 10% actually followed all of the established Fair Information Practices.

In short, self-regulation is a sham. The policies that companies have posted under pressure from the government are as vague and confusing as anything Lewis Carroll could have dreamed up. One simple example: When people register at Yahoo! Inc. for one of its services, such as My Yahoo, they are asked to provide their birth date and e-mail address—ostensibly as a safeguard if they forget their user name and need prompting. But Yahoo also uses that information for a service called the Birthday Club, sending product offers from three to five merchants to users via e-mail on their birthday.

Don't look for transparency here. Most sites don't limit how they or their partners use consumer information. And Web sites can transfer information to partners without telling their own customers. Many sites also change their practices at will and without warning.

Because privacy breaches are so corrosive to consumer trust, some Web execs actually welcome broad national standards. IBM and Walt Disney Co. have decided not to advertise on Web sites that don't have privacy policies. Privacy codes must be clearer, says Chris Larsen, CEO and founder of E-Loan Inc., an online loan service that has its privacy policies audited.

"I think the industry has squandered the opportunity to take care of this on its own." IBM Chairman Louis Gerstner doesn't go that far. But he has warned Net executives that they must get serious. "I am troubled, very troubled, by leaders who have failed to recognize our responsibility in the transformation of the new economy," he says.

We hope other Web execs are listening closely. The policies we propose are in the best interests of Web businesses. If more consumers can be assured that their personal informa-

Because privacy breaches are so corrosive to consumer trust, some Web executives welcome broad national standards

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❖ THE LANGUAGE of ONLINE PRIVACY ❖

COOKIES These tiny software programs keep a log of where people click, allowing sites to track customers' habits. Cookies are placed on consumers' computers when they first visit sites or use things like online calendars, personalized news services, or shopping carts.

ONLINE PROFILING By using cookies, sometimes combined with personal information, sites build profiles about what customers do or don't buy, what they look at, how much time they spend in different areas, and what ads they click on.

REFERERS Information that your Web browser passes along when you move from one site to another or use a search engine or even just send an e-mail. Referers can be collected and used to target advertising.

ADVERTISING NETWORKS The Net equivalent of ad agencies, the most famous being DoubleClick, Engage, and 24/7. They amass millions of profiles of Web surfers based on their online habits. Ads are then aimed at those most likely to buy what is being pitched.

REGISTRATIONS Anywhere you fill out personal information in order to download software, sign up for a free service, or buy something online. The data can be sold or shared with other Web sites or advertisers.

IP ADDRESS A number automatically assigned to your computer whenever you connect to the Net. The numbers are used by network computers to identify your PC so that data can be sent to you. But addresses can be used in profiling and ad targeting.

PRIVACY POLICIES Notices posted on a Web site that disclose how a company collects, uses, and shares data with partners or advertisers. These sometimes include opt-in and opt-out buttons.

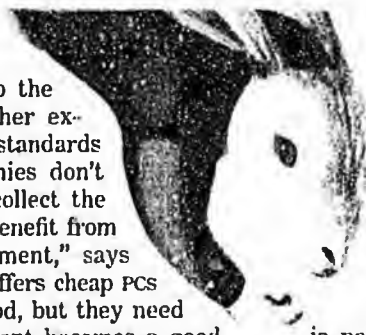
OPT-IN AND OPT-OUT Privacy choices that some Web sites offer to their visitors. In opt-out situations, the site is free to gather and sell information on you unless you specifically tell it not to by clicking on a button. With opt-in, gathering or selling your data is forbidden unless you click to give permission.

PERSONALLY IDENTIFIABLE INFORMATION Your name, address, or credit card number and other details linked to your real-world identity.

THIRD-PARTY DATABASES Companies like Acxiom and Experian stockpile information such as name, address, phone number, and income on most U.S. households. Increasingly, these companies are working with Web sites and software makers.

tion is safe, more of them will flock to the Net—and click, not exit. There are other explicit benefits for the industry. Privacy standards create a level playing field, so companies don't fall into an arms war, each trying to collect the most data—at any cost. "Business will benefit from the right level of government involvement," says Nick Grouf, founder of PeoplePC, which offers cheap PCs and Net connections. "Standards are good, but they need some teeth, and this is where government becomes a good partner."

FEDERAL STANDARD. In the long term, the privacy protection that BUSINESS WEEK espouses will make life simpler for businesses on the Net. More than 20 states already are moving to enact some kind of guarantees. A minimum federal standard of online privacy would decrease the cost and complexity for companies. It also would increase trust. If businesses really want to be close to their customers, trust



Some 20 states are moving to protect Net privacy. A federal effort would cut costs and complexity

is paramount. This approach also will shrink the gap that has arisen between the U.S. and Europe, where privacy already is recognized as a right. The Europeans have stood firm, putting American companies in the peculiar position of extending greater privacy protection in Germany or France than at home.

It's time to iron out the inconsistencies. Here are our prescriptions for protecting personal privacy without jeopardizing the promise of e-commerce:

OUR FOUR-POINT PLAN

E-privacy and e-commerce can coexist. Here's how to safeguard both

1 DISPLAY YOUR PRACTICES

Privacy policies seem like very simple things. Companies put up a notice online about how they gather and use information, and it's win-win from there. Consumers get the lay of the land, and Net companies pass on to consumers the responsibility for their online privacy.

If only it were that simple. These little postings have actually been the focus of rancorous debates for years. The tricky thing is that once policies are up there for all to see, companies are legally obligated to uphold them. That's one reason sites have dragged their feet in putting them up. Or should we say down? The statements are usually buried at the bottom of the page, and seem to be drafted by life-forms on a distant planet.

It's time that policies be written for mere mortals. Not many sites do a great job of explaining how information is tracked, used, and disclosed to partners. Consider the privacy policy of search engine Ask Jeeves. The company first says it

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always asks permission before providing information to partners. Yet on a registration form, the choice given to consumers is that information is shared unless you say otherwise. To confuse matters further, the policy later states that: "Ask Jeeves sometimes co-sponsors [sweepstakes and contests] with other companies, in which case the user's individual contact and demographic information is likely to be shared with participating sponsors. [The] information will not be released... without the user's consent." So which is it: Is your information automatically shared unless you go the extra step to object? Or is it kept private unless you pipe up and give the green light? When asked directly, Ask Jeeves says it depends. Depends on what? It's fine for companies to have different options, but too vague possibilities baffle consumers, rendering privacy notices useless.

One solution might be simple icons that help to navigate the policies. Like the "Information" sign that is recognized

around the world, these symbols could be standardized: a large "p" signifying "privacy policy" could be placed on the top right-hand side of the page, on a registration form, in an electronic shopping cart, or anywhere that information is collected on a site. Often it's not clear, upon registration, whether you need to locate an "opt-out" button and click on it to stop the site from sharing your information with others, or whether the site intends to ask your permission each time it wants to pass information to another site. Icons could help clarify this (page 88).

SECOND OPINION. Simple road signs on the Info Highway may seem trivial, but understanding the full measure of privacy policies is no joke. They resemble contracts. Indeed, they are generally the only privacy-related feature on sites that can actually trip a lawsuit. In January, New York District Attorney Spitzer used privacy policy violations by Chase Manhattan Bank and Sony Music Entertainment Inc.'s InfoBeat to curtail their sharing of data. "We have an obligation to define reasonable boundaries," he says. "We have to articulate what privacy rules should be and then how to enforce them."

It isn't enough to have just any old policy, though. The statements need to follow the Fair Information Practices, clearly laying out how each site addresses choice, access, and security. Policies should outline how a person's information is shared and how to limit its use. Contact numbers or e-mail addresses should be available. And the date on when the policy was last changed should be clearly stated. Web execs make a good argument when they say that it's hard to know how they will use data in the future. But they should alert consumers when the policy changes. Amazon.com, for example, says it doesn't sell or trade information now, but adds: "We may choose to do so in the future." The only notice the company says it will give is a change in its policy online.

The sharing of information is a white-hot button in the privacy debates. And for good reason. A Georgetown University survey of the privacy policies on health-care sites showed how common this is. Of 21 sites sampled, six offered assessments on health conditions that were actually run by other companies. Some companies shared names, ages, and e-mail addresses, which makes it hard for users to know who

has their personal data or which privacy policy to rely on.

In the best of all worlds, companies should bind partners with whom they share data to their privacy policies. At the very least, they should inform consumers that they plan to transfer personal information to a partner. That way, consumers can check out the partner's privacy policy and make an informed decision about whether they want to participate.

DEFINING TERMS. It's all too vague on Yahoo's Web site. That's partly because the No. 1 site on the Net has what's known as a "universal registration," where people sign up once and are entitled to a host of different services—from e-mail to auctions to private personal calendars. But the universal registration information also ties in with other services offered through partners, such as the reservation service Travelocity provides. While details about data-sharing practices are explained on Yahoo, they are buried many clicks deep in so-called terms of service agreements, which aren't marked as privacy policies.

Some companies, such as PeoplePC and eBay, have very clear policies that give descriptions of how information could be passed to partners and naming some partners as examples. They also try to provide some level of surety. For instance, eBay Inc. says that before it provides personal information to partners, it lets users see the data it has collected. That's a step forward, but still limiting. To prevent eBay from sharing your data, you must choose not to use the service. And for those who give the O.K.? Once the information is transferred in these co-branded services, eBay says it has no control over how partners use the data.

It's crucial that these partnerships, data-gathering techniques, and customer options are spelled out, especially for Net newbies. Companies must be clear about how they de-



fine "personally identifiable information," because that description can change from site to site. Just as vital, they need to spell out the technology used to track and profile consumers. RealNetworks, which overhauled its privacy policies this fall after being accused of compiling information about the musical tastes of users, has a straightforward approach. It breaks out every tracking technique it uses and explains them simply and effectively. In contrast, CBS SportsLine explains that it uses IP addresses to identify users and their shopping carts but doesn't bother to explain what an IP address is. For the record: This

DISCLOSURE

"This doesn't make any sense," she said. "You are obliged under law to spell this out more clearly"

is a trackable number assigned to your PC every time you connect to the Web.

Clearly, privacy policies are backbreakers to write. But it seems the hardest part about them for any company is coming up with a privacy philosophy that they will stick to. Once this hurdle is crossed, however, the positive impact might resonate into the brick-and-mortar world as well. Privacy policies governing credit reports, drug prescriptions, and more could follow the new model for the Internet.

❖ HOW TO DRAW *the* LINE ❖

DISPLAY YOUR PRACTICES Privacy policies should be mandatory, easy to find, and written in plain English. Companies should clearly state why they are collecting information and collect no more data than they need for that purpose. Data collected for one purpose shouldn't be used for another without consent. A simple set of icons should be developed to warn people about privacy threats.

GIVE PEOPLE A CHOICE If a business wants to collect information about a consumer's health, finances, or sexual orientation, it should ask them for permission first. This allows a Web surfer to opt-in. The same rule applies if the company wants to resell personal data or share it with advertising networks. In all other situations, users should be given the option to withhold their information by checking a prominently displayed, easy-to-understand box. This is called opt-out.

SHOW ME THE DATA Consumers must have the ability to look at and correct sensitive information, such as financial and medical data. There should also be a mechanism for double-checking a profile that combines personal information with online habits or is shared with another company. This is especially urgent when a profile triggers offensive or unwanted marketing solicitations. Web sites and marketers should share the responsibility for this.

PLAY FAIR OR PAY These rules won't enforce themselves. A broad law ensuring privacy online must be passed at a federal level. An agency, such as the FTC, would enforce and interpret the law according to the Fair Information Practices. Companies should also periodically disclose their practices in some kind of public record, such as SEC filings or trusted third-party audits.