ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9884 HOUSE JUDICIARY

This bill addresses and answers that challenge. There are other bills concerning trust and probate law which have been or will be introduced in this legislature which address the challenge of remaining a leader in the field of trusts. No attorney who has expressed a desire to participate in the formulation of these laws has been excluded, on the contrary all those who have been willing to contribute have been invited to participate. It can also be said none of these bills represents the exclusive position of the drafter but more often than not are a product of compromise and painstaking review.

II. History of our state law concerning the Rule Against Perpetuities and its importance to trusts.

The common law rule against perpetuities ("RAP") as it relates to trusts states every beneficial interest and the property subject to those beneficial interests, must vest within a period of time measured from the time the trust was originally created. The period of time is the lifetimes of all beneficiaries alive at the time the trust was created, plus 21 years. If it is determined at the time the trust was created that there exists a possibility an interest of a beneficiary might not vest within this period of time, then this interest is void. The Alaska legislature enacted the Uniform Statutory Rule Against Perpetuities ("USRAP") effective January 1, 1996. This Uniform Rule ameliorates the harshness of the common law rule and adopts a "wait and see" approach to determine whether a beneficial interest might vest and establishes a term of 90 years as an alternative within which time a beneficial interest can vest.

In April of 1997, our legislature amended AS 34.27.050(a) by including (3) which states the RAP is inapplicable to those trusts where a trustee has the ability to make a distribution to a person who is living at the time the trust is created. Because in almost every case a trustee can make the above described distribution, it was generally accepted we had abolished the RAP, if not explicitly, at least implicitly. Abolishing the RAP is a significant reason for the growth of our state's trust business since 1997. By rendering the RAP ineffective as applied to trusts, it became possible to create a trust which could continue forever. These trusts are frequently referred to as

"perpetual trusts " or "dynasty trusts" and the terms are used interchangeably here. By making a trust "perpetual" it is also possible to avoid the diminishing effect of estate tax as the trust property passes from one generation to the next. As a result trust assets can grow dramatically, resulting in Alaska becoming a very attractive place to create a trust. When we enacted this legislation in 1997, we were not the first state to abolish the RAP, although we were one of the few states to have done so. Unfortunately an increasing number of other states have seen the benefit of abolishing the RAP. Illinois, Idaho, South Dakota, Maryland, Wisconsin and Ohio are just a few of those states which have joined the parade. Many other states have legislation either pending or under consideration.

III. Why was it decided to abolish the RAP with the introduction of SB 162?

The manner in which we abolished the RAP left some uncertainty in the minds of outside practitioners whether or not we had in fact done so. As a result it was felt it would be better for us to just come out and say so by statute. This would have the practical effect of making our trust laws more understandable to outside observers and would naturally increase the marketing potential of our state. In addition it would also cure a technical glitch which was discovered after the 1997 law was passed, where it unclear whether a charitable lead dynasty trust could be created in our state or whether a trust funded exclusively with Crummey withdrawal rights would be considered perpetual. That was the frame of mind which existed when SB 162 was originally introduced.

IV. What was wrong with SB 162?

The intent of SB 162 was commendable. However after SB 162 was introduced it was discovered the manner in which we abolished the RAP in April of 1997 created a potential tax consequence. Passage of SB 162 would only perpetuate this problem. The tax problem is very difficult to understand but it exists with any perpetual trust in which a beneficiary is given a special power of appointment. This bill follows the intent of SB 162 in abolishing the RAP

except in the one limited circumstance where property is subject to the exercise of a special power of appointment which is exercised to create a successive power of appointment. Even then the perpetuity term is being extended for all practical purposes into perpetuity. This bill is distinguishable from SB 162 because this bill provides a legislative fix for perpetual trusts drafted after April 1, 1997 and also avoids the "Delaware Tax Trap" for perpetual trusts created after the date of enactment. As will be discussed, giving future beneficiaries special powers of appointment are an indispensable tool in the formulation of a perpetual trust. By giving beneficiaries the special power to appoint trust assets, it is possible to make this otherwise irrevocable trust, flexible so future events can be addressed.

V. Typical Perpetual Trust with Special Powers of Appointment.

In a trust it is quite common to give beneficiaries special powers of appointment. A beneficiary who has a special power of appointment can decide who can benefit from the trust property either at their death or during their life depending on whether the power is a testamentary or inter vivos special power of appointment. If a special power of appointment is not exercised then the trust document invariably provides for a disposition in some alternative manner.

> **Example 1.** A creates a trust for B and gives B a special power to appoint the trust property at B's death to any individual other than to B's estate or creditors of B's estate. The trust document further states if B fails to exercise the special power of appointment, the property will be distributed outright to B's 2 children, C and D. C turns into a drug addict and D is an anesthesiologist with a high exposure to liability. B could exercise the special power of appointment and appoint the trust property away from C and give it to D in trust for the benefit of D. The trust for D could be drafted to prevent the attachment of the trust assets by D's creditors. Furthermore D could be given a special power of appointment to further appoint the trust assets to those beneficiaries which D might choose and in the manner in which D might choose, whether as an outright distribution or in trust for those beneficiaries.

VI. Detailed explanation of tax problem.

The Internal Revenue Code ("Code") imposes estate tax on property owned by a person at the moment of death. Property subject to the exercise of a special power of appointment will not be included in the estate of a person who holds this special power of appointment. This is because the ownership rights attendant to a special power of appointment do rise to a level where the property subject to this power of appointment would be included in a person's estate for estate tax purposes. On the other hand property subject to a general power of appointment will be included in the holder's estate.

In 1951 virtually every state in the country had adopted the RAP. The federal government was satisfied with this rule because this rule states all trusts must eventually terminate. When trusts terminate and the assets are distributed to the beneficiaries, the property will be exposed to estate tax when the beneficiaries die. The RAP states whenever the holder of a special power of appointment exercises it to create other trusts which in turn give beneficiaries of those trusts the further ability to exercise special power of appointments, the time period within which these powers may be exercised and the time period in which the property interests subject to these successive special powers of appointment must vest, is measured by calculating the perpetuities period from the date of creation of the trust instrument granting the first special power of appointment. Sounds complicated but really not.

> **Example 2.** A creates a trust for B and gives B a special power of appointment. B exercises the special power of appointment to create trusts for C and D, and gives both C and D special powers of appointment. C and D can validly exercise their special power of appointments only if those special powers can be exercised within the applicable perpetuities period. This period is measured from the date of the instrument creating the first special power of appointment. Moreover the property subject to this power also must vest within this same time period.

Delaware modified its RAP to provide whenever a holder of a special power of appointment exercises a special power of appointment to create another trust which in turn gives the beneficiaries of those trusts the ability to exercise special power of appointments, a new beginning date for measuring the perpetuities period arises at the moment a special power of appointment is exercised to create a successive special power of appointment. Thus it was possible in Delaware to create a trust which gave holders of special powers of appointment the ability to exercise them to create successive special powers of appointment and these trusts could last forever. Furthermore if a beneficiary was given a special power of appointment as opposed to a general power of appointment, the trust property would not be included in the beneficiary's estate and would escape estate tax. The ability to have trusts go on forever and avoid the imposition of estate tax naturally promoted the trust industry in Delaware.

The federal government attempted to fix the Delaware problem by enacting the predecessor to now Internal Revenue Code section IRC 2041(a)(3) and its gift tax counterpart 2512(d). These sections provide property subject to special power of appointment will be included in the estate of the holder of a special power of appointment if the holder exercises the special power of appointment in a manner which creates successive special powers of appointment, but only if on the date in which the successive power of appointment was created, the determination of the perpetuity period did not relate back to the date of the instrument creating the first special power of appointment. As indicated in the example 2, above, in every other state, except Delaware, the date for determining the validity of the exercise of a special power of appointment and the determination of the vesting period of property subject to its exercise relates back to the date of the instrument creating the first special power of appointment. In Delaware successive special power of appointments did not relate back, instead a whole new perpetuities period is commenced when successive special power of appointments are exercised. Eventually Internal Revenue Code sections 2041(3) and 2512(d) became known as the "Delaware Tax Trap" because a Delaware practitioner could inadvertently "fall into the trap"and subject the trust property to either gift or estate tax if they created a trust which gave beneficiaries the ability to exercise special powers of appointment to create a successive special powers of appointment.

VII. How have other states avoided the Delaware Tax Trap when they abolished the RAP?

As previously indicated, other states have seen it in their interest to abolish the RAP. However in at least a few of those states, they have done so in a way which does not run afoul of the Delaware Tax Trap by coming under the holding of a Tax Court case, known as the Estate of Murphy v. Commissioner, 71 T.C. 671 (1979). These jurisdictions do not state their RAP as a time in which property interests must vest but rather as a time in which the power of alienation can not be suspended. A rule against the power of alienation states by implication that it is permissible to create a trust which prevents the trust property from being sold. At common law this would be considered a restraint on alienation and this direction would be considered void as against the public policy of promoting the free transferability of property. In those states which have stated their RAP as a time in which the power of alienation can not be suspended, they place a time period on the inalienability of property after which time the property must be capable of being sold. This period of time is invariably stated as a variation of the same time period found in the RAP pertaining to vesting of property interests.

Treasury regulations under 2041(a)(3) provide whether a state articulates its RAP as a rule against the remote vesting of property or as a rule against the suspension of the power of alienation, if a power of appointment is exercised to the create another power of appointment then the period of time in which the vesting of property is delayed (if local law states the rule as one against the remote vesting of property) or in which the power of alienation is suspended (if local law states the rule as one against the power of alienation) must be ascertainable by referring back to the date the first power of appointment was created. When one thinks about it this makes little sense. Even though a local law might state its rule as one against the suspension of power of alienation, having the power of alienation does not address the concern which Congress had in mind when it passed the predecessor of sections 2041(a)(3) and 2512(d). If a trust is created in a jurisdiction where a trust can continue forever but the only condition is the property of the trust must be capable of being sold at either the direction of the trustee or the beneficiaries, then it is still possible to have property continue in trust forever without the imposition of estate tax.

The only requirement is the property of the trust must be capable of being exchanged for other property within a stated period of time. The Tax Court in Estate of Murphy v. Commissioner, held 2041(a)(3) is to be read in the alternative, so, if Wisconsin had no RAP pertaining to the vesting of property, but instead had a rule limiting the time in which the power of alienation can be suspended, and furthermore provided that all special powers of appointment relate back, then 2041(a)(3) is not violated. Even though this interpretation does nothing to prevent the use of perpetual trusts to avoid estate tax, the Court found itself bound by Treasury's own regulations. Furthermore Treasury acquiesced in the Tax Court's decision which means the IRS will be bound by the Tax Court's interpretation in future cases. As a result some states which permit perpetual trusts simply provide that although the RAP is otherwise abolished they do have a rule against the suspension of the power of alienation. Furthermore they go on to state any exercise of a special power of appointment must relate back to the date the first special power of appointment was created. These states have a distinct competitive edge over Alaska because in these states a beneficiary can exercise a special power of appointment and exercise it to create successive special powers of appointment, without fear of IRC sections 2041(a)(3) and 2512(d) being violated. Although the vesting of property interests might be delayed, the power of alienation will not be suspended beyond the permissible period, provided the trustee or beneficiaries are given the ability to direct the sale or exchange of trust property for other property.

VIII. How does the Murphy case affect Alaska?

In our state the RAP has always been stated as a rule against the remote vesting of property and not as a rule against the suspension of the power of alienation. When we changed AS 34.27.050 in 1997 we continued to state the RAP as a rule against the remote vesting of property. As a result, any perpetual trust created after April 1, 1997 which gave a beneficiary a special power of appointment which could be exercised to create successive powers of appointment, has the potential for running afoul of Internal Revenue Code sections 2041(a)(3) and 2512 (d). This is because under present Alaska law when a special power of appointment is exercised to create a successive power of appointment, the property subject to these powers will have its vesting

delayed for a period of time that can not be ascertained by referring back to the date of the instrument creating the first power of appointment. In Alaska for trusts created after April 1, 1997, there is no stated period of time in which property interests must vest. As a result, the maximum length of time in which vesting can be delayed can not be determined by referring back to the date of the instrument creating the first power of appointment. Thus, all trust property subject to the exercise of a special power of appointment, which was exercised to create a further trust giving those beneficiaries special powers of appointment, renders that property subject to estate tax or gift tax. This creates a potential problem because it defeats the expectations of those individuals who created these trusts.

IX. Legislative Fix.

We in Alaska could fix this problem by abolishing the RAP and enacting a rule against the suspension of the power of alienation. In so doing we would fall squarely within the Murphy decision. This is what many other states have seen fit to do and this would protect all perpetual trusts drafted after the date of enactment of this bill. However this would do nothing to protect perpetual trusts created after April, 1997 which contain special power of appointments.

This legislation is meant to fix the potential tax problem in both scenarios. For all trusts created after the effective date, the RAP would be abolished except in those instances in which property interests are subject to a special power of appointment which in turn is exercised to create a successive special power of appointment. In this one limited circumstance, the period of time within which these property interests must vest will relate back to the date the first special power of appointment was created, thus avoiding 2041(a)(3). The period of time in which property interests must vest which are subject to a special power of appointment exercised to create a successive special power of appointment would be extended to 1000 years. Although this trust might not be perpetual, a 1000 year term is nonetheless a very large period of time for a trust to last. The 1000 year term is not unique to Alaska. In fact the idea of a 1000 year term was taken directly from legislation now pending in Florida.

Alaska's legislation further provides contingent special power of appointments are valid if exercised within a 1000 years from the date the trust was first created. This corrects an oversight in the 1997 legislation which left in tact a USRAP provision that contingent special power of appointments were valid only if exercised within a 90 year period from the date the trust was created. This oversight dramatically reduces the effectiveness of using special power of appointments in perpetual trusts created under our present law and thus makes Aiaska uncompetitive with other states which permit perpetual trusts.

The ability to make the provisions of this bill retroactive to April of 1997 is possible by the clear wording of the second sentence of AS 34.27.070(a) as it now exists in our law. This provision provides the law in effect at the time a power of appointment is exercised to create a successive power of appointment controls, even though for purposes of determining the vesting period the date of exercise relates back to the date of the instrument creating the first power of appointment, which of course predates the date of enactment of this bill. This provision would be removed from 34.27.070(a) and restated and added as a new subsection (d).

> **Example 3.** A created an inter-vivos trust for B on May 1, 1997 and gave B a special power of appointment which B exercised on January 1, 2001 (or any date after April 1, 1997) to create trusts for C and D, giving both C and D special powers of appointment. A's exercise of the special power of appointment on January 1, 2001 would take into account the law in effect on January 1, 2001. If this bill becomes law, it would provide the determination of the period of time in which the vesting of all property interests which are subject to the power of appointment exercised on January 1, 2001 relate back to May 1, 1997 (the date of the instrument creating the first special power of appointment). The period of time in which the property must vest is 1000 years computed from May 1, 1997. Because the period of time in which this property must vest can not be ascertained without regard to the date of the first power, there is no violation of IRC sections 2041(a)(3) or 2512(d).

FISCAL NOTE No. 1

STATE OF ALASKA
2000 LEGISLATIVE SESSION

Bill Version: CSSB 162 (JUD)
(S) Publish Date: 1-13-00

Revision Date/Time (Note if correction) 1/12/00, 5:14 PM
Dept. Affected Law
Title "... relating to the rule against perpetuities, non-vested property interests, and powers of appointment ..."
BRU Civil Division
Component Commercial
Sponsor Senate Judiciary Committee by Request
Requester Senate Rules Committee
Component No. 2211

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)*

CSSB 162 (JUD) permits certain situations where the Rule Against Perpetuities will be superceded, thereby permitting nonvested property interests and certain powers of appointment to be perpetual and never terminating unless otherwise provided for in the governing instrument creating the interest or power of appointment. Under current law, these interests are generally invalid unless, when created, they are to vest or become exercisable within 21 years after the death of an individual then alive or within 90 years of creation.

Passage of CSSB 162 (JUD) would have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Division Attorney General's Office
Phone 465-5370
Date/Time 1/12/00, 5:14 PM

Approved by Commissioner Bruce M. Botelho, Attorney General
Agency Department of Law
Date 1/12/00

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Sponsor Statement

SB 162

In April of 1997, our legislature amended AS 34.27.050(a) by including (3) which states the RAP is inapplicable to those trusts where a trustee has the ability to make a distribution to a person who is living at the time the trust is created. Because in almost every case a trustee can make the above-described distribution, it was generally accepted we had abolished the RAP, if not explicitly, at least implicitly. Abolishing the RAP is a significant reason for the growth of our state's trust business since 1997. By rendering the RAP ineffective as applied to trusts, it is possible to create a trust, which can continue forever. These trusts are frequently referred to as "perpetual trusts " or "dynasty trusts." With careful drafting and the proper allocation of generation skipping tax exemption "perpetual trusts" can avoid all federal estate tax and continue to grow and made available for the use of successive generations. As a result many states have seen it in their interest to abolish the Rule Against Perpetuities. Arizona, Delaware, Idaho, Illinois, Maine, Maryland, Ohio, Rhode Island, South Dakota, and Wisconsin have seen it in the interest to abolish the Rule Against Perpetuities. Colorado, Florida, Iowa, New Jersey, Nevada all have pending legislation to abolish the Rule Against Perpetuities.

However, after we "abolished" the RAP in April of 1997 it was discovered we had also inadvertently stumbled into a potential estate or gift tax problem under sections 2041(a)(3) or 2512(d) of the Internal Revenue Code, also known as the "Delaware Tax Trap." The tax problem is very difficult to understand but it exists with any perpetual trust in which a beneficiary is given a special power of appointment. Anyone who creates a perpetual trust usually wants to give the trust beneficiaries a power to direct the disposition of the trust assets at their deaths as a means of making the trust flexible and adaptable so the needs of future generations can be adequately served. This power to direct the disposition of trust assets at death is referred to as a special, limited or non-general power of appointment. Under our present law if a b neficiary exercises a special power of appointment by directing that the trust assets be continued in trust for the benefit of an individual and that individual is also given a special power of appointment then the trust assets will be subjected to either estate or gift tax liability. A large number of perpetual trusts created in Alaska since 1997 are vulnerable to this problem. It should

be noted that many other states that have abolished the Rule Against Perpetuities also stumbled into the Delaware Tax Trap. The technical nature of the problem makes it truly a trap.

Fortunately a relatively simple solution is at hand. The mechanics of the Delaware Tax Trap can be avoided by requiring that in the limited circumstance where a special power of appointment is exercised to create a successive power of appointment the trust property must eventually vest. This Bill states that in the limited circumstance described above, the date in which trust property must eventually vest is 1000 years from the date of creation of the original trust instrument. A trust, which can last 1000 years, is practically speaking akin to being perpetual. For all other purposes the Rule Against Perpetuities can be abolished and this Bill does exactly that.

Passage of this Bill is necessary if Alaska is to remain a suitable place for all individuals, resident and non-resident alike, who have or would want to create a perpetual trust. On the other hand, failure to pass this Bill not only puts existing perpetual trusts at risk but would eliminate Alaska as a suitable place to create perpetual trusts. This would prove harmful to not only our own citizens but also this legislature's effort to build a viable trust industry in this state. Lastly failure to pass this Bill could also have the unintended consequence of drawing Alaskan capital away from this state, as many wealthy Alaska citizens desiring to create perpetual trusts would invariably seek out other states where they are not exposed to the dangers of the Delaware Tax Trap.

SB

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Alaska State Legislature

Chairman,
Judiciary Committee
Administrative Regulations
Revenue Committee

Vice Chairman,
Resources Committee

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SPONSOR STATEMENT

SB 163

SB 163 makes two statutory changes; **1)** defines a current beneficiary as a person who receives a mandatory distribution of income or principal from a trust. Current law does not define "current beneficiary". Some trusts name dozens of discretionary beneficiaries; and **2)** provides the settlor (the creator of a trust) flexibility and privacy during their life to limit the notification to beneficiaries if they felt it was appropriate. This legislation would clarify that the trustee only has to notify a beneficiary who is entitled to a mandatory distribution of income or principal from the trust.

SB 163 allows a settlor in writing to exempt a trustee of the notification requirement only to a beneficiary who was not entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis. If a beneficiary is entitled to a distribution or does receive a distribution, then the trustee would still be required to provide notice and accountings. The exemption period may not exceed the shorter of the settlor's lifetime or a judicial determination of the settlor's incapacity.

This change will allow settlors the flexibility and privacy of not being required to inform their young children that they are a beneficiary of trust. Many settlors have expressed concern that they may not want the beneficiaries to know they have a future interest in a trust. For example, the settlor is afraid that knowledge of the trust by the beneficiary might prevent them from conducting a productive lifestyle. In addition this allows Alaska to provide the same flexibility as other states that are competing with Alaska for trust business.

Again it should be noted that this restriction only applies to beneficiaries who are not entitled to a mandatory distribution and can only last for the settlor's lifetime or when the settlor has become judicially incompetent. If the creator of the trust (settlor) sets forth the waiver of notification in writing, the trustee will not notify the beneficiary until the time set forth by the trustor above. This amendment is a default statute so if the settlor does not provide the written waiver, the current standard of notice to all current beneficiaries still applies.

CS FOR SENATE BILL NO. 163(RLS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE

Offered: 3/16/00
Referred: Today's Calendar

Sponsor(s): SENATE JUDICIARY COMMITTEE BY REQUEST

A BILL

FOR AN ACT ENTITLED

"An Act relating to trusts, to a trustee's duties to notify and inform beneficiaries, and to the revocation, modification, termination, reformation, construction, and trustees of trusts."

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

*** Section 1.** AS 13.36.080 is amended by adding new subsections to read:

(b) The settlor of a trust may exempt a trustee from the duties under (a) of this section to provide notification or information regarding the trust to a beneficiary who is not entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis. The settlor may provide the exemption by provision in the instrument creating the trust if the trust is created by a writing [by oral statement to the trustee at the time of the creation of the trust if the trust is created orally] by an amendment of the trust if the settlor reserved the power to amend the trust, or by a written document after the trust is created. The exemption may not exceed in duration the shorter of the settlor's lifetime or a judicial determination of the settlor's incapacity.

amend #1

(c) If a settlor provides for an exemption under (b) of this section and a beneficiary with a future interest

(1) who is not a beneficiary entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis receives a distribution, the trustee shall provide notification or information limited to the accounting period during which the distribution was made;

(2) becomes a beneficiary entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis, the trustee shall provide notification and information as required under AS 13.16 and (a) of this section.

* **Sec. 2.** AS 13.36 is amended by adding new sections to read:

Sec. 13.36.335. Presumption of revocability. (a) Unless a trust is expressly made irrevocable, a trust executed on or after the effective date of this Act is revocable by the settlor.

(b) Notwithstanding AS 13.36.035 - 13.36.050, this section applies only if the

(1) settlor is domiciled in this state when the trust is created;

(2) trust instrument is executed in this state; or

(3) trust provides that the law of this state governs the trust.

Sec. 13.36.340. Modification and revocation of revocable trusts. (a) A trust that is revocable by the settlor may be modified or revoked in whole or in part by

(1) substantial compliance with a method of modification or revocation provided in the trust instrument; or

(2) a writing, other than a will, signed by the settlor and delivered to the trustee during the lifetime of the settlor, except that, if the trust instrument expressly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked under this paragraph.

(b) Unless otherwise provided in the trust instrument, if a trust that is revocable by the settlor is created by or funded by more than one settlor,

(1) the trust may be modified or revoked as provided in AS 34.77.100

to the extent the trust consists of community property under AS 34.77 (Alaska Community Property Act);

(2) each settlor may modify or revoke the trust as to the portion of the trust property contributed by that settlor that is not community property under AS 34.77.

(c) A revocable trust may not be modified or revoked by an attorney-in-fact under a power of attorney unless the modification or revocation is expressly permitted by the trust instrument.

Sec. 13.36.345. Modification or termination of irrevocable trusts because of unanticipated circumstances. (a) On petition by a trustee, settlor, or beneficiary, a court may modify the administrative or dispositive terms of an irrevocable trust or terminate an irrevocable trust if, because of circumstances not anticipated by the settlor, modification or termination would substantially further the settlor's purposes in creating the trust.

(b) Upon termination of a trust under this section, the trust property shall be distributed in accordance with the settlor's probable intention.

Sec. 13.36.350. Reformation to correct mistakes in irrevocable trusts. (a) On petition by a trustee, settlor, or beneficiary, a court may reform the terms of an irrevocable trust, even if the trust instrument is not ambiguous, to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression in the trust or inducement to create the trust, and if the settlor's intent can be established by clear and convincing evidence.

(b) A court may consider evidence, including direct evidence contradicting the plain meaning of the text, when determining the settlor's intent or for any other purpose under this section.

Sec. 13.36.355. Construction of trust to achieve settlor's tax objectives. (a) The terms of a trust shall be construed to achieve the settlor's tax objectives.

(b) On petition by a trustee, settlor, or beneficiary, a court may modify the terms of an irrevocable trust to achieve the settlor's tax objectives in a manner that does not violate the settlor's probable intent. The court may order that the modification operate retroactively.

Sec. 13.36.360. Modification or termination of irrevocable trust by consent. (a) Except as otherwise provided by this section, on petition by a trustee, settlor, or beneficiary, a court may modify or terminate an irrevocable trust if all of the beneficiaries consent and if continuation of the trust on the existing terms of the trust is not necessary to further a material purpose of the trust. However, the court, in its discretion, may determine that the reason for modifying or terminating the trust under the circumstances outweighs the interest in accomplishing the material purposes of the trust. The inclusion of a restriction on the voluntary or involuntary transfer of trust interests under AS 34.40.110 may constitute a material purpose of the trust under this subsection, but is not presumed to constitute a material purpose of the trust under this subsection.

(b) Unless otherwise provided in the trust instrument, an irrevocable trust may not be modified or terminated under this section while a settlor is also a discretionary beneficiary of the trust.

(c) If a beneficiary other than a qualified beneficiary does not consent to a modification or termination of an irrevocable trust that is proposed by the trustee, settlor, or other beneficiaries, a court may approve the proposed modification or termination if the court determines

(1) if all the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the rights of a beneficiary who does not consent will be adequately protected or not significantly impaired.

(d) In (c) of this section, "qualified beneficiary" means a beneficiary who

(1) on the date the beneficiary's qualification is determined, is entitled or eligible to receive a distribution of trust income or principal; or

(2) would be entitled to receive a distribution of trust income or principal if the event causing the trust's termination occurs.

Sec. 13.36.365. Uneconomical irrevocable trust. (a) Notwithstanding the other provisions of AS 13.36.335 - 13.36.365, if the value of the property of an irrevocable trust is less than $50,000, the trustee may terminate the trust unless the trust instrument provides otherwise.

(b) Notwithstanding the other provisions of AS 13.36.335 - 13.36.365 and the terms of the trust, on petition to the superior court by a trustee, settlor, or beneficiary, the court may modify or terminate an irrevocable noncharitable trust, or remove the trustee and appoint a different trustee, if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the settlor's probable intent.

SB

177

Proposed language for CSSB 177 Sec. 5(7):

(7) compel an insured or third-party claimant in a case where liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in fact and law that is documented in the insurer's file.

FAX TRANSMISSION COVER SHEET

Office of
Representative Pete Kott
ALASKA STATE LEGISLATURE

Mike Ford
TO

3
number of pages, including cover

2029
FAX

ORGANIZATION
Legis House (JUD)

FROM 4990

DATE

INTERNET: http://www.akrepublicans.org/Kott.htm
E-MAIL: Representative_Pete _Kott@Legis.state.ak.us

MESSAGE: Please insert attached conceptual & technical amendments into new JUD CS for SB 177
--Thank you. Lisa

ALASKA STATE CAPITOL, ROOM 118 • JUNEAU, ALASKA 99801-1182
☎ (907)465-3777/(800)342-2199 • FAX: (907)465-4587

1-LS0902\M.1
Ford
4/14/00

AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HCS CSSB 177(L&C)

Page 4, line 7, following "loss":

Insert "**or harm**"

Page 4, lines 9 - 10:

~~Delete "whether the violation was a single act or a trade practice"~~ NO

Insert "**the promptness and completeness of remedial action**"

after violation.

Page 4, following line 10:

Insert a new bill section to read:

"* **Sec. 9.** AS 21.36.320 is amended by adding a new subsection to read:

(h) If the violation of this chapter is a single act, the director may not impose a penalty unless the violation results in loss or harm or is intentional."

Renumber the following bill section accordingly.

Note: only change to what is typed is that line 4 will not be included in the amendment and line 5 of the amendment should be included after the word violation.

Proposed language for CSSB 177 Sec. 5(7):

(B) ~~(8)~~ compel an insured or third-party claimant in a case where liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in fact and law that is documented in the insurer's file.

- Mike:

(1) Please insert the above language into a new CS for SB 177 as (7)(B), pg 3 currently lines 3 to 7. replacing current language in (7)(B) from version 902\M.

(2) Please amend (7)(A) by deleting word compelling from line 29 and making (7)(A) read "a pattern or practice of compelling insureds to litigate for recovery of amounts due under insurance policies by offering substantially less than the amounts ultimately recovered in actions brought by the insureds."

Note: It may be the case that 7(A) becomes simply (7) and 7(B) becomes 8 now that the two are no longer interconnected by word "compel." This amendment to 7(A) & (B) was conceptual. The next page w/ Amendment #1 is technical and should be incorporated in the new CS. -Leslie

SUMMARY OF SURVEY RESULTS

The Division of Insurance recently polled all the states on the following questions. The following states responded. This is a very brief paraphrase and summary of the results. Most state laws have some variations and unique features not mentioned here. The relevant statutes and regulations should be consulted.

	"Regarding unfair trade practices, unfair methods and deceptive acts, does your statute prohibit single incidents, or only ongoing patterns and practices?	**Regarding unfair claim settlement practices, does your statute protect insureds only, or does it also protect third-party claimants? Does your statute specifically mention insured and/or third party claimants, or simply refer to any person or any claimant?**	**Cite:**
California	Knowingly on one occasion or frequently enough to indicate a practice.	Some regulations protect insureds, others protect all claimants.	California Insurance Code section 790.03; 10 CCR 2695.1
Connecticut	Single acts, except claim settlement practices which must be committed or performed with such frequency to indicate a general business practice.	All claimants, except that "insureds" cannot be compelled to litigate claims.	CT. Gen. Stat. 38a-816(6), as amended 10/1/99 by Public Act 99-284 §30.
Florida	Isolated events and business practices, but some claim settlement practices must be done with such frequency to indicate a general practice.	Insureds and "other persons."	FS §626.9541(1)
Idaho	Single incident.	No reference to either 1st or 3rd party; insurer must perform reasonably and fairly.	
Indiana	Single incidents prohibited.	Different sections protect insureds, insureds and beneficiaries, and claimants. Insureds cannot be compelled to litigate.	Ind. Code §27-4-1-4.5, 6
Kentucky	Not specified. Commissioner has authority and discretion for all issues.	Commissioner authority and discretion	KRS 304.1, 304.12
Maryland	Single incidents and general business practices.		MD Code Ann., Ins. §§27.301-305; COMAR 31.15.07, 08.

Nebraska	Flagrantly and in conscious disregard, or a general business practice, with a statutory exception elsewhere in statutes for "victims of abuse" protection.	Claimants and insureds. May not compel "insureds and beneficiaries" to litigate.	Neb. Stat. 44-1539-1544.
Oregon	Single incidents prohibited. Unfair practices specified by administrative rule.	Acts are simply prohibited.. Any reference is to a "claimant."	ORS 746.075, 100, 110, 160, 240; OAR 836-080-0205 et seq.
Pennsylvania	Commissioner has some discretion in isolated incidents, but by precedent an ongoing practice is generally required for enforcement action. Claims practice must be frequent enough to indicate business practice.	Some generically without reference to "claimant" or "insured," others specifically reference claimants, insureds, and beneficiaries.	40 PS §1171.1-15.
Rhode Island	Flagrant disregard of law or committed with such frequency. Enforcement action usually taken for patterns.	All claimants, first and third party.	RI §27-9.1
Tennessee	Statute does not specify, except unfair settlement practices which must be a general business practice.	Various sections refer to insured, claimant, or both, or are silent.	TCA 56-8-101 et seq.
Wisconsin	Single incidents prohibited.	The rule specifically promotes fair and equitable treatment of policyholders, claimants, and insurers. Compelling "insureds and claimants" to litigate prohibited.	§628.34 Wis.Stat.; Ins 6.11, Wis. Adm. Code

1-LS0902\M.2
Ford
4/13/00

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HCS CSSB 177(L&C)

Page 2, line 29, through page 3, line 6:

Delete all material and insert:

"(7) compel **an insured or third-party claimant regarding a claim in which liability is not at issue to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have a reasonable basis in law and fact** [INSUREDS TO LITIGATE FOR RECOVERY OF AMOUNTS DUE UNDER INSURANCE POLICIES BY OFFERING SUBSTANTIALLY LESS THAN THE AMOUNTS ULTIMATELY RECOVERED IN ACTIONS BROUGHT BY THOSE INSUREDS];"

Here is suggested language for limiting the director's single act authority in SB 177. The amendment does this by adding a new section to AS 21.36.320, the penalty provision.

The current language of AS 21.36.320(g) states:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, and deterrence of the violator or others.

Here is suggested language that would add two elements to (g) and add a new subsection (h) to restrict enforcement dealing with single acts:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss or harm caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, the promptness and completeness of remedial action, and deterrence of the violator or others.

(h) If the violation is a single act, the director may not impose a fine unless the violation ~~caused loss or harm~~ or is willful. caused loss or harm (but wants removed)

(Best) but attached is a compromise. From Lodr at request of Rep. Rokeburg.

SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

MEMORANDUM

To: Representative Pete Kott
Chair, House Judiciary Committee

From: Senator Dave Donley DD

Re: Hearing Request for SB 177 - "The Alaska Insurance Consumers Protection Act"

Date: April 12, 2000

I request that you schedule House CS for Senate Bill 177 (L&C), "The Alaska Insurance Consumers Protection Act", for a hearing in your committee. SB 177 passed the Senate by a 19-1 vote.

House CS SB 177 (L&C) will give injured Alaskans and insurance consumers a fairer playing field when dealing with insurance companies by allowing the Division of Insurance to take corrective action on individual acts of unfair or deceptive insurance trade practices.

The Alaska Division of Insurance strongly supports this legislation.

I have included the sponsor statement for your review.

If you have any questions, please contact James Armstrong of my staff at 3887.

DD/jja

Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

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SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

Sponsor Statement
for
CS for SB 177 (L&C)
"The Alaska Insurance Consumers Protection Act"

Senate Bill 177 "The Alaska Insurance Consumers Protection Act" will give injured Alaskans and insurance consumers a fairer playing field when dealing with insurance companies. The Alaska Division of Insurance supports SB 177.

Section #3 of SB 177 makes a major step toward better consumer protection by allowing the Division of Insurance to take corrective action on individual acts of unfair or deceptive insurance trade practices. Amazingly, under existing law, the division does not have the jurisdiction to take action on individual acts of unfair insurance claims practices. The division is powerless to take action on an individual insurer until a pattern of deceptive trade practices has developed. Such a pattern is often very difficult to prove and can require staffing the division currently does not have. This lack of jurisdiction promotes bad claims practices by insurance companies since they know that there is little enforcement to protect individual injured victims and consumers.

Section #4 of Senate Bill 177 also protects consumers by protecting those who blow the whistle on iliegal insurance acts. Many consumers and even insurance agents are sometimes intimidated from pursuing a fair settlement because of fear of retaliation from the insurer. This discourages claimants ..om pursuing a fair settlement and hinders the consumer protection ability of the Division of Insurance, as they are unable to gain access to information needed to effectively protect consumers. SB 177 provides immunity from liability for defamation for those persons who provide the division with information regarding an unfair act or practice. This provision will better protect both agents and insurance consumers.

Section #5 of SB 177 increases protections against unfair claims practices against injured Alaskans. Under existing law, injured third party claimants are not entitled to the same statutory protections as first party claimants. Insurers know this and often will require an injured third party to pay the costs of arbitration or mediation before the process even begins. If the amount at issue is less than the cost of arbitration the insurer can unfairly "low ball" the injured party. Additionally, insurers often use the high cost of litigation, which also may exceed the value of the claim, as leverage in coercing legitimate third party claimants to accept settlements that do not adequately compensate them for their injuries. Under current law such practices are prohibited as to first party claims but not as to third party claims. SB 177 expands the

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prohibition against such bad faith actions to third party claimants and affords them a fair arbitration claims process while also curtailing unnecessary litigation. Affording and expanding insurance claims protections to both first and third party claimants is fair, equitable and good public policy.

Section #6 of SB 177 clearly states that the provisions of AS 21.36.125, which define unfair claims practices, do not create a private cause of action which is the current status quo.

Section #7 of SB 177, at the specific request of the Division of Insurance, prohibits insurers from denying a claim in which multiple causes caused the loss to occur and there is a secondary cause that is not covered by the policy. SB 177 ensures that a claim is covered when a loss has more than one cause and the dominant cause is covered by the policy.

Section #8 of SB 177 makes it clear that the Division of Insurance can take into account the fact that a potential violation was a single act or trade practice.

Injured Alaskans and insurance consumers deserve better protection from insurance company unfair claims practices. Senate Bill 177 will help provide the Division of Insurance with the necessary authority it needs to protect injured Alaskans and insurance consumers.

DD/jja

CS FOR SENATE BILL NO. 177(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 3/1/00
Referred: Rules

Sponsor(s): SENATOR DONLEY

A BILL

FOR AN ACT ENTITLED

"An Act relating to insurance trade practices; and providing for an effective date."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Insurance Consumers Protection Act.

*** Sec. 2.** AS 21.36.010 is amended to read:

Sec. 21.36.010. Purpose. The purpose of this chapter is to regulate **an act or a** trade **practice** [PRACTICES] in the business of insurance in accordance with the intent of Congress as expressed in **15 U.S.C. 1011 - 1015 (McCarran-Ferguson Act)** [THE ACT OF CONGRESS OF MARCH 9, 1945 (P.L. 79-15; CH. 20, 59 STAT. 33),] by defining or providing for determination of all the practices in this state that constitute **an** unfair **method** [METHODS] of competition or **an** unfair or deceptive **act**

or practice [ACTS OR PRACTICES] and by prohibiting them.

* **Sec. 3.** AS 21.36.020 is amended to read:

Sec. 21.36.020. Unfair methods, deceptive acts prohibited. A person may not engage in **an act or** a trade practice in this state or relative to a subject resident, located, or to be performed in this state that is defined in this chapter as, or determined under this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

* **Sec. 4.** AS 21.36.070(b) is amended to read:

(b) A person providing the director with information concerning the financial condition or **an act or a practice** [PRACTICES] of a licensee of the division is immune from liability for defamation.

* **Sec. 5.** AS 21.36.125 is amended to read:

Sec. 21.36.125. Unfair claim settlement practices. A person may not commit [OR ENGAGE IN WITH SUCH FREQUENCY AS TO INDICATE A PRACTICE] any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) compel **an insured or third-party claimant** [INSUREDS] to litigate for recovery of **an amount** [AMOUNTS] due under **an** insurance **policy** [POLICIES] by offering substantially less than **an amount** [THE AMOUNTS]

ultimately recovered in **an action** [ACTIONS] brought by **the insured or third-party claimant** [THOSE INSUREDS];

(8) attempt to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

(9) attempt to settle a claim on the basis of an application that has been altered without the consent of the insured;

(10) make a claims payment without including a statement of the coverage under which the payment is made;

(11) make known to **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] a policy of appealing from **an** arbitration **award** [AWARDS] in favor of **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] for the purpose of compelling **the insured or third-party claimant** [THEM] to accept **a settlement or compromise** [SETTLEMENTS OR COMPROMISES] less than the amount awarded in arbitration;

(12) delay investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

(13) fail to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

(15) offer a form of settlement or pay a judgment in any manner prohibited by AS 21.89.030.

* **Sec. 6.** AS 21.36.125 is amended by adding a new subsection to read:

(b) The provisions of this section do not create a private cause of action for a violation of this section.

* **Sec. 7.** AS 21.36 is amended by adding a new section to read:

Sec. 21.36.212. Prohibited denial of claim for causation. An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

INS. Work Adopted

* **Sec. 8.** AS 21.36.320(g) is amended to read:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, **whether the violation was a single act or a trade practice,** and deterrence of the violator or others.

* **Sec. 9.** This Act takes effect January 1, 2001.

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Division of Insurance
P.O. Box 110805, Juneau, AK 99811-0805
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March 20, 2000

The Honorable Dave Donley
Alaska State Senate
State Capitol, Room 508
Juneau, AK 99801-1182

Dear Senator Donley:

The Alaska Division of Insurance (ADOI) supports SB 177, the Alaska Insurance Consumer Protection Act, sponsored by Senator Dave Donley. The bill is now in the Senate Rules Committee.

Currently under AS 21.36.125 the ADOI cannot penalize a single unfair action of an insurance company in its handling of consumer claims, no matter how serious. Alaska Statute 21.36.125 gives authority to the director to take action against an insurance company only if a pattern of unfair trade practices acts amounting to a general business practice or multiple violations of the same claims standard is found. Individual consumers can be seriously harmed by a single unfair action of an insurance company. For example, in a recent complaint received at the division, a consumer was pre-certified for hospitalization by a health insurance company, but the insurance company unfairly delayed payment of the hospital's $186,000 bill for six months, threatening the consumer's credit rating. Had the provisions of SB 177 been in place, the division would have been able to take action against the insurance company to deter such actions in the future.

The Alaska Supreme Court stated in State Farm v. Nicholson, 777 P. 2d 1152 (Alaska 1989):

> Under AS 21.36.125, entitled "Unfair claims settlement practices," an insurance company only violates the chapter if it engages in certain proscribed acts "with such frequency as to indicate a practice. [emphasis added]."

The bill confirms that AS 21.36.125 does not create a private cause for legal action.

The bill also clarifies the meaning of causation for insurance policies in Alaska. This clarification will make sure that policy benefits are consistent with the reasonable expectations consumers have regarding their insurance coverage. Consumers should not have to make complex legal arguments relating to the cause of a loss in order for insurance companies to pay benefits for their losses under the insurance policy.

Sincerely,

Robert A. Lohr
Director

RAL/pb4408.2.doc

LAW OFFICES

Michael J. Schneider, P.C.

TELEPHONE (907) 277-9306 | 880 "N" STREET, SUITE 202 | FAX (907) 274-8201

ANCHORAGE, ALASKA 99501

February 16, 2000

The Honorable Dave Donley
Alaska State Legislature
Mail Stop: 3100/Room 508
Juneau, AK 99801-1182

RE: SB 177: "An Act Relating to Insurance Trade Practices; and Providing for an Effective Date"

Dear Senator Donley:

I write in support of SB 177.

The Bill makes a single, unlawful, and unreasonable act by insurance carriers subject to scrutiny by the Division of Insurance. It is about time. Alaska insurance consumers should not be subject to the "one free bite" rule. It should not be incumbent upon an insurance consumer to show some sort of pattern or practice before Alaska's regulatory agency takes action on that consumer's behalf. A carrier that does not engage in illegal or predatory practices should have nothing to fear from this change in the law.

I also want to make you aware of some common insurance company practices that I hear about every day as I interview potential clients in my office. Legislators need to be aware that constituents are being taken advantage of on a regular basis in a planned and orchestrated way by major insurance carriers who have defined an uneven playing field. If insurers cannot win on the law and the facts, they can win because of the practical circumstances of these cases.

Medical payments coverage, as you know, is coverage that pays for medical bills based on status. Typically, you have to have the status of riding in an insured automobile. If you are injured and you have medical bills, the medical payments coverage is supposed to pay for those medical bills no matter who caused the precipitating incident. No one likes to go to the doctor and no one likes to run up medical bills. Your constituents, when injured, obtain health care and follow the recommendations of their physicians. Unfortunately, this does not lead to the prompt payment of these medical bills that Alaska insurance consumers have a right to expect.

Instead, the insurance industry will slow pay the medical providers, obtain a "medical records review" from some nurse or physician (often from another state), find a basis therein to deny paying bills that have already been incurred in good faith by your constituents, and then refuse to resolve the matter with either the physician, whose bills are unpaid, or your constituent, whose medical bill is unpaid and whose credit worthiness is now at risk. This, of course, is aside from the frustration that these people feel because they cannot obtain needed medical care. There are certainly circumstances where

this practice may ultimately have adverse and serious long-term consequences for a claimant requiring time-sensitive care.

How do insurance carriers get away with it? It is really quite easy. Disputes over medical payments coverage in most auto policies are relegated to arbitration. There is nothing wrong with that. However, there is no award of attorney's fees and costs provided in these policies to the successful party. When one of your constituents appears in my office with $10,000.00 worth of controverted and unpaid medical bills, there is little encouragement I can offer. No matter how righteous their position, they will have to spend their own money to hire an attorney, bring their doctors into testify and pay for an arbitrator. Thus, using hypothetical figures, their problem grows from $10,000.00 to some number likely twice as large. Or, they can pay an attorney a percentage of their recovery plus litigation costs advanced by the attorney. The last approach is purely theoretical. Attorneys would have to spend more time and money than the claim is worth to get a good result. Most of us are, therefore, very disinterested in handling these cases for the same reason that your constituents who are homebuilders refuse to pay $300,000.00 to build houses only to sell them for half that much. We simply cannot stay in business fighting some of the largest economic forces in America on a *pro bono* basis. Even if we took these cases, your constituents would be left holding the bag. They need 100% of their medical bills paid, not some percentage left over after attorneys fees and costs. Anyway you shake it, regular, ordinary, everyday Alaskans are getting the short-end of the stick from an industry that seems perfectly willing to bully them to defeat and deny these reasonable claims.

Your Bill has the advantage of giving the Division of Insurance a bit more leverage when it comes to looking into these claims. The Bill could further be improved if legislation were introduced compelling carriers to pay costs, attorney's fees, and related arbitration expenses only when they lose a dispute over medical payments or some other coverage. This costs the industry nothing when its position is righteous: it will cost it plenty on a regular basis in light of practices that the industry currently engages in. It would make it possible for private attorneys to become involved in these cases, and it would make it possible for your constituents, who have medical payments coverage claims, to be, for the first time, treated with a measure of respect and to receive what they reasonably thought they had a right to receive under their medical payments coverage.

If you or other members of the Legislature have any questions about this letter or my opinions regarding these practices, I hope you will feel free to call me. Thanks again for your good work in proposing SB 177. I hope it receives the bi-partisan support that it deserves.

Yours very truly,

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.

Michael J. Schneider

cc: Robert Lohr, Director
Division of Insurance

MEMORANDUM

State of Alaska
Department of Law

TO: Robert A. Lohr
Director
Division of Insurance
Department of Community &
Economic Development

DATE: January 25, 2000

FILE NO.:

TEL. NO.: 269-5229

FROM: Virginia A. Rusch
Assistant Attorney General
Fair Business Practices Section
Anchorage

SUBJECT: AS 21.36.150

In connection with a pending bill that would modify AS 21.36.010, AS 21.36.020 and AS 21.36.125 to prohibit a single unfair and deceptive act (as well as repetitive acts constituting an unfair and deceptive practice), you have asked for an interpretation of AS 21.36.150.[1] Specifically, you asked

---

1 This statute provides:

Sec. 21.36.150. Procedures as to undefined practices.

(a) If the director believes that a person engaged in the insurance business is engaging in this state in an unfair method of competition or in an unfair or deceptive act or practice in the conduct of the business that is not defined as being unfair or deceptive under this chapter, the director shall hold a hearing on the matter, if the director believes it would be in the public interest to do so after giving notice of the hearing and of the charges. Upon conclusion of the hearing the director shall make a written report of the findings of fact relative to the charges and serve a copy upon the person and any intervenor at the hearing.

(b) If the report charges a violation of this chapter and if the method of competition, act, or practice has not been discontinued, the director may, through the attorney general of this state, at any time after the service of the report, cause an action to be instituted to enjoin and restrain the person from engaging in the method, act, or practice. In the action the court may grant a restraining order or injunction upon just terms, but the state may not be required to give security before the issuance of the order or injunction. If a record of the proceedings in the hearing before the director was made, a certified transcript, including all evidence taken and the report and findings, shall be received in evidence in the action.

(c) If the director's report made under (a) of this section, or order on hearing made under AS 21.36.320 does not charge a violation of this chapter, an intervenor in the proceedings may appeal from the order or report within the time and in the manner provided for appeals from the director generally.

whether this statute authorizes the director of the Alaska Division of Insurance to determine that a single act, rather than a pattern of repetitive acts, constitutes a violation of these provisions of the trade practices and frauds chapter of the Alaska Insurance Code.

Briefly, the answer to your question is that AS 21.36.150 authorizes and establishes a procedure for the state insurance regulator to examine whether an activity that is not otherwise prohibited in the trade practices and frauds chapter, AS 21.36, or by regulations adopted under it, is unfair and deceptive, and should therefore be forbidden. Nothing in the language of this statute suggests that is is intended to authorize the director to determine that a single act is a violation of statutory provisions that forbid a practice of, or repetitive acts of, a defined unfair or deceptive activity. Even if AS 21.36.150 can be interpreted to give the director this authority, the process described in AS 21.36.150 would be a cumbersome way to enforce the prohibitions against unfair or deceptive acts .

The discussion below explains this answer by reviewing commentary on the source from which this section was derived and some examples of past orders issued under it.

AS 21.36.150 was adopted in 1966 as part of a major revision of the Alaska Insurance Code. It is derived from the National Association of Insurance Commissioners (NAIC) Model Unfair Trade Practices Act initially approved in 1946. According to the legislative history (See NAIC Model Regulation Service, p.880-19), this model act was the result of one of the first efforts to develop state laws regulating insurance after Congress passed the McCarran –Ferguson Act of 1945 (P.L. 79-15) that provided for continued state regulation of insurance. P.L. 79-15 contained a moratorium from the application of federal law to permit the states time to develop laws, but provided for federal regulation if the states did not take on the responsibility.

Five years after the Alaska legislature adopted AS 21.36.150 in 1966, the NAIC substantially revised the model act provisions on which this statute was based. The historical commentary for sections 7 and 8 of this model act reports that the commissioners concluded that the procedure for dealing with "undefined" unfair trade practices was too cumbersome. (NAIC Model Regulation Service, p. 880-30). The NAIC revised these sections of the model act to authorize a state insurance commissioner to hold hearings, issue cease and desist orders and impose penalties. In 1976, the Alaska legislature added AS 21.36.320, which gave the director of the Alaska division of insurance authority similar to the NAIC's revised sections 7 and 8. But the Alaska legislature left AS 21.36.150 in place, making only slight changes in 1985 (substituting a reference in subsection (c) to AS 21.36.320 for AS 21.36.140, which was repealed), and in 1992 (adding subsection (d) with other stylistic changes). The addition of subsection (d) in 1992 made clear that the director can also use the regulation adoption process to define unfair and deceptive trade practices.

(d) In addition to the unfair methods and unfair or deceptive acts or practices expressly defined in this title, the director may adopt regulations to define other methods of competition and other acts and practices related to the business of insurance that are unfair or deceptive.

This history, as well as the language of AS 21.36.150, therefore shows the statute was intended to deal with "undefined" practices. It is a procedure to determine whether questioned practices are unfair and deceptive, rather than a procedure to determine whether a person is guilty of conduct that has previously been defined as unfair and deceptive. The statute incorporates due process protections, including requirements for notice of the issue to the person who is carrying on the activity, a hearing, and a written report with findings of fact. But this section gives the director no authority to order a cease and desist order or impose penalties for a violation. The director is required to apply to a court for enforcement orders. In contrast, under AS 21.36.320, the director is authorized to issue cease and desist orders and impose penalties for violations of the trade practice and frauds chapter, AS 21.36.

Among orders of the director of the division of insurance compiled in the National Insurance Law Service (NILS Publishing Company, Chatsworth, CA) are two examples issued under this statute in 1970. In Order R70-1, Workmen's Compensation Deposit Insurance Premium Unfair Practice (Dec 14, 1970), the director concluded that a practice of billing a voluntary expiration or termination payroll report and continuing to hold the deposit premium until a physical audit of the payroll records often resulted in substantial excess worker's compensation premiums being held by insurers. The director declared this an unfair practice and defined a practice to be used instead.

In Order R70-2, Trans-Alaska Pipeline Wrap-Up (April 17, 1970), the director held a hearing on a complaint from the Alaska Association of Insurance Agents that the proposed insurance program of the Trans-Alaska Pipeline System was an unfair practice in the insurance business. The director rejected the complaint finding that there was no evidence that the pipeline consortium "is or was at any time engaged in the insurance business or contemplates engaging the insurance business."

Conclusion. Based on the language of the statute, the historical commentary on the NAIC model on which it is based, and examples of how AS 21.36.150 has been used in the past, we conclude that its purpose is to establish a procedure for determining whether a particular activity in the insurance business should be prohibited as unfair or deceptive. More recent legislative enactments give the director other means to both define unfair and deceptive trade practices in the insurance business and enforce the prohibition against them. But we find nothing in AS 21.36.150 that authorizes the director to determine that a single act is a violation of a statute that prohibits a practice of certain defined conduct in the business of insurance.

VAR:jem

MEMORANDUM State of Alaska

TO: Bob Lohr DATE: March 9, 2000

FILE NO:

TELEPHONE NO:

FROM: Dale Whitney
Rate & Form Analyst

SUBJECT: Rate Impact of SB 177

You asked me yesterday whether there was a probable rating impact of the concurrent causation language in SB 177, and how we would handle a proposed rate increase from an insurance company based on this change to the law. The proposed language reads as follows:

> **Sec. 21.36.212. Prohibited denial of claim for causation.** An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

This language would, in very unusual cases, extend coverage where it does not currently exist. The coverage would be extended to the traditional level it had been at before insurers began including concurrent causation language in the mid to late '80s. While it is possible that an exhaustive actuarial study could quantify a rating impact from this change, I believe the impact would be so minor as to be of virtually no consequence as a matter of rate-making. I do not believe the encroachment of concurrent causation language into policy forms resulted in any significant downward trends in rates in the mid- to late 1980s. I would expect the converse would be true if this bill were adopted.

It is important to remember that this language would not extend coverage to all cases of concurrent causation, but only those cases where the covered peril, and not the excluded one, is the dominant cause of loss. In a major earthquake, for example, the majority of homeowners in this state would have no coverage. This would be true even for an insured suffering an earthquake loss in which a covered peril contributed, when the earthquake is the real cause of the loss. So the bill would not have that great of an impact. On the other hand, if a fire broke out in a home and the insurer could somehow establish some kind of a link to an excluded cause, such a minor tremor or a flood, the bill would prevent a denial of coverage on that basis. I see the rarity of such cases to be so great that the impact of this change would only be noticeable to the rare insured unlucky enough to suffer a loss caused by two different perils at once, and only then when the covered peril was the dominant one.

In making rates, insurers are required to consider "past and prospective loss experience inside and outside this state, to the conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors inside and outside this state." AS 21.39.030(2). Alaska is a very small market, and loss ratios can fluctuate dramatically from year to year. Some years insurers make a lot of money in Alaska, and others they lose a lot. Thus, Alaska loss ratios are usually credibility-weighted against nationwide data, which fluctuates less. These days, insurer profit is more often derived from investment earnings on reserve funds than on premium income, and these earnings are also considered in rate-making. Thus, fluctuations in the financial markets often affect rates more than losses, though losses are certainly still a contributing factor.

Any request for a rate increase must be submitted with data to justify the increase. Under AS 21.39.040 there is room for an insurer to include many different kinds of data, but it is the insurer's responsibility to justify its rates and to file data clearly demonstrating that its rates are not excessive. If we deem the data submitted to be insufficient to support a rate change, we would require additional information under AS 21.39.040(a). If the data then submitted was still not adequate to demonstrate that an increase is appropriate, the request would be disapproved under AS 21.39.050.

I am very skeptical that an insurer could make a case that this change in language would increase losses enough to significantly affect rates. To do so, an insurer would probably need to demonstrate statistics showing the number of claims denied because a covered loss occurred in combination with an excluded loss, and I don't believe any insurers are keeping such data. Because of the number of factors affecting losses, I would likewise be suspicious of a suggestion that an insurer could demonstrate that losses decreased in the '80s after the concurrent causation language was adopted by insurers, and that any such decrease was necessarily related to the change in policy forms.

When the insurance industry began adopting this kind of language in policy forms I do not believe it alone resulted in any significant reduction in rates. Likewise, I do not expect adoption of SB 177 alone would cause any material change the other way.

4/12/00 Hales a working document
Bruce out w/ind recs + fiscal note

1-LS0902\K
Ford
4/11/00

HOUSE CS FOR CS FOR SENATE BILL NO. 177( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR DONLEY

A BILL

FOR AN ACT ENTITLED

"An Act relating to insurance trade practices; and providing for an effective date."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Insurance Consumers Protection Act.

*** Sec. 2.** AS 21.36.010 is amended to read:

Sec. 21.36.010. Purpose. The purpose of this chapter is to regulate **an act or a** trade **practice** [PRACTICES] in the business of insurance in accordance with the intent of Congress as expressed in **15 U.S.C. 1011 - 1015 (McCarran-Ferguson Act)** [THE ACT OF CONGRESS OF MARCH 9, 1945 (P.L. 79-15; CH. 20, 59 STAT. 33),] by defining or providing for determination of all the practices in this state that constitute **an** unfair **method** [METHODS] of competition or **an** unfair or deceptive **act**

New Text Underlined [DELETED TEXT BRACKETED]

or practice [ACTS OR PRACTICES] and by prohibiting them.

* **Sec. 3.** AS 21.36.020 is amended to read:

Sec. 21.36.020. Unfair methods, deceptive acts prohibited. A person may not engage in an act or a trade practice in this state or relative to a subject resident, located, or to be performed in this state that is defined in this chapter as, or determined under this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

* **Sec. 4.** AS 21.36.070(b) is amended to read:

(b) A person providing the director with information concerning the financial condition or an act or a practice [PRACTICES] of a licensee of the division is immune from liability for defamation.

* Sec. 5. AS 21.36.125 is amended to read:

Sec. 21.36.125. Unfair claim settlement practices. A person may not commit [OR ENGAGE IN WITH SUCH FREQUENCY AS TO INDICATE A PRACTICE] any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) compel

(A) an insured [INSUREDS] to litigate for recovery of an amount [AMOUNTS] due under an insurance policy [POLICIES] by offering

substantially less than **an amount** [THE AMOUNTS] ultimately recovered in **an action** [ACTIONS] brought by **the insured; or**

(B) a third-party claimant regarding a claim in which liability is not at issue to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have a reasonable basis in law and fact [THOSE INSUREDS];

(8) attempt to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

(9) attempt to settle a claim on the basis of an application that has been altered without the consent of the insured;

(10) make a claims payment without including a statement of the coverage under which the payment is made;

(11) make known to **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] a policy of appealing from **an** arbitration **award** [AWARDS] in favor of **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] for the purpose of compelling **the insured or third-party claimant** [THEM] to accept **a settlement or compromise** [SETTLEMENTS OR COMPROMISES] less than the amount awarded in arbitration;

(12) delay investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

(13) fail to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

(15) offer a form of settlement or pay a judgment in any manner prohibited by AS 21.89.030.

* Sec. 6. AS 21.36.125 is amended by adding a new subsection to read:

(b) The provisions of this section do not create or imply a private cause of action for a violation of this section.

* Sec. 7. AS 21.36 is amended by adding a new section to read:

Sec. 21.36.212. Prohibited denial of claim for causation. An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

* Sec. 8. AS 21.36.320(g) is amended to read:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, **whether the violation was a single act or a trade practice,** and deterrence of the violator or others.

* Sec. 9. This Act takes effect January 1, 2001.

- Labor & Commerce → CS
- met w/ Donley
- goal authority if there's a single act

Subsection 7 - problem area
b/c regardless of our
want language from (B) to
move to Sec. 4
or attached language
If they lose they're violated
The act w/ a single act.

SB

193

1-LS1263\K
Cramer
4/7/00

HOUSE CS FOR CS FOR SENATE BILL NO. 193(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR PEARCE

A BILL

FOR AN ACT ENTITLED

"An Act relating to the payment of wages and claims for the payment of wages; and amending Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure."

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

*** Section 1.** AS 22.15.040(a) is amended to read:

(a) **Except as otherwise provided in this subsection, when** [WHEN] a claim for relief does not exceed $7,500, exclusive of costs, interest, and attorney fees, and request is so made, the district judge or magistrate shall hear the action as a small claim unless important or unusual points of law are involved or the state is a defendant. **The Department of Labor and Workforce Development may bring an action as a small claim under this subsection for the payment of wages under AS 23.05.220 in an amount not to exceed $20,000, exclusive of costs, interest, and attorney fees.** The supreme court shall prescribe the procedural rules and standard forms to assure simplicity and the expeditious handling of small claims.

* **Sec. 2.** AS 22.15.120(a) is amended to read:

(a) A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows:

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed $7,500;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $7,500;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding $7,500;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty or no contest by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors that are not minor offenses if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try, and enter judgments in all cases involving minor offenses and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70;

(9) to provide post-conviction relief under the Alaska Rules of Criminal Procedure for any of the cases specified in (5), (6), or (7) of this subsection if the conviction occurred in the district court**; or**

(10) **to hear, try, and enter judgments in actions for the payment of wages brought by the Department of Labor and Workforce Development as provided in AS 22.15.040(a)** [REPEALED].

* **Sec. 3.** AS 23.05.140(b) is amended to read:

(b) If the employment is terminated, [REGARDLESS OF THE CAUSE OF TERMINATION,] all wages, salaries, or other compensation for labor or services become due immediately and shall be paid within **the time required by this subsection** [THREE WORKING DAYS AFTER THE TERMINATION] at the place

where the employee is usually paid or at a location agreed upon by the employer and employee. **If the employment is terminated by the employer, regardless of the cause for the termination, payment is due within three working days after the termination. If the employment is terminated by the employee, payment is due at the next regular pay day that is at least three days after the employer received notice of the employee's termination of services.**

* **Sec. 4.** AS 23.05.140(d) is amended to read:

(d) If an employer violates (b) of this section by failing to pay within **the time required by that subsection** [THREE WORKING DAYS OF TERMINATION], the employer may be required to pay the employee a penalty in the amount of the employee's regular wage, salary, or other compensation from the time of demand to the time of payment, or for 90 working days, whichever is the lesser amount.

* **Sec. 5.** AS 23.05.140 is amended by adding new subsections to read:

(e) In an action brought by the department under this section, an employer found liable for failing to pay wages within the time required by (b) of this section shall be required to pay the penalty set out in (d) of this section. The amount of the penalty shall be calculated based on the employee's straight time rate of pay for an eight-hour day.

(f) In an action brought for unpaid overtime under AS 23.10.060 that results in an award of liquidated damages under AS 23.10.110, the provisions of (d) of this section do not apply unless the action was brought by the department under (e) of this section.

* **Sec. 6.** AS 23.05.220(c) is amended to read:

(c) The department may not accept an assignment of a claim in excess of the amount set out in AS 22.15.040 as the maximum amount, exclusive of costs, interest, and attorney fees, for the jurisdiction of the district court to hear an action **for the payment of wages** as a small claim.

* **Sec. 7.** AS 23.05 is amended by adding a new section to read:

Sec. 23.05.235. Attorney fee awards. (a) If the plaintiff prevails in an action for wages under AS 23.05.140 - 23.05.260, the court shall award reasonable attorney fees to the plaintiff unless the defendant shows by clear and convincing evidence that

the act or omission giving rise to the action was made in good faith and that the defendant had reasonable grounds for believing that the act or omission was not in violation of AS 23.05.140 - 23.05.260, in which case

(1) the court may award attorney fees to the plaintiff in accordance with court rules; or

(2) if the defendant would be entitled to attorney fees if the action were subject to the standards under court rule offers of judgment, the court may not award attorney fees to either the plaintiff or the defendant.

(b) Failure to inquire into Alaska law is not consistent with a claim of good faith under this section.

*** Sec. 8.** AS 24.05.235, added by sec. 7 of this Act, has the effect of changing Rule 82, Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by changing the circumstances under which the court may award attorney fees in certain cases.

SB 193

Subject: SB 193
Date: Thu, 09 Mar 2000 09:00:23 -0900
From: "J. R. (Randy) Carr" <Randy_Carr@labor.state.ak.us>
Organization: Alaska Department of Labor and Workforce Development
To: Dwight L Perkins <dwight_perkins@labor.state.ak.us>, Alan W Dwyer <alan_dwyer@labor.state.ak.us>

Under current law both penalties apply. AS23.05.240(d) waiting time penalties and 23.10.110 Liquidated damages for unpaid minimum wage or OT.

Defense attorneys requested some slack in cases where the only issue is an OT claim for an employee who was mistakenly misclassified as exempt from OT. Such cases involve only OT wages, no minimum wage or unpaid regular wages. As a compromise we agreed to the language in (f) which removes liability fo waiting time panalties in a case where the onlyissue is OT and liquidated damages are awarded by the court.

As a practacal matter, the courts generally waive the waiting time penalties in such cases now, but the defense attorney would like to see that codified. He has no problem with double penalties where the offense involves a minimum wage violation or a failure to pay regular wages.

ROBERT W. LANDAU
ATTORNEY AT LAW, ARBITRATOR & MEDIATOR
2525 BLUEBERRY ROAD, SUITE 108
ANCHORAGE, ALASKA 99503

(907) 272-2266
FAX (907) 272-1077

February 4, 2000

Senator Drue Pearce
State Capitol
Juneau, AK 99801

Representative Andrew Halcro
State Capitol
Juneau, AK 99801

Re: SB 193 / HB 276
Wage and Hour Claim Limit

Dear Senator Pearce and Representative Halcro:

I am actively involved in the area of labor and employment law as an attorney, arbitrator and mediator. I am writing in support of the above bills which would raise the jurisdictional amount limit for wage and hour claims brought by the Department of Labor in small claims court from $7,500 to $20,000. I believe that raising the wage claim limit would allow the Department to seek relief for a greater number of employees who otherwise would not be able to obtain legal representation because of the relatively small size of their claims. In addition, I believe that the Department should be provided with sufficient resources and staffing to adequately pursue the greater number of wage claims it is being asked to handle. Without adequate funding, the goal of these bills would be nothing more than an empty promise.

Thank you for your consideration of these comments.

Sincerely,

Robert W. Landau

RL:hs

ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE COMMITTEE

State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4954
Fax: (907) 465-2040

FOR YOUR SENATE BILL 193 FILE

From Wednesday's meeting

COVER SHEET

Anchorage Legislative Information Office

Office - (907) 269-0111 Fax - (907) 269-0229

To: (H) L & C

Atten: Rep Rokeberg Fax: Phone:

From: Phone:

Instructions: Written (T) on SB 193

Sent: Date: Time:

Disposal of Original: Discard: Hold for Pickup:

Number of Pages: (counting cover sheet)

Transmitted by:

Legislature - U.I

Margaret Bauman

SB. 193

I am here to testify in favor of legislation which would raise the amount of back wages for residents which the state can pursue through the court system. At present the Labor Department can only pursue amounts up to $7,500 and my former employer owes me in excess of $10,000. The employer, Business News Alaska, has refused to pay me any of the amount due since last July, although the company has acknowledged in writing that they owe me the money.

At the time I worked as the news editor for Business News Alaska, a monthly business publication in Anchorage, from October 1998 through June 1999, I was caring for an elderly parent at home. My mother was not in good health and required 24 hour care, so I needed a job I could do largely at home, except for hours when I had a caregiver or my mother was at day care. Business News Alaska hired everyone on a contract labor basis. I had no idea at the time that this practice was illegal, as the state Labor Department has twice since concluded. As the company became further and further behind in paying me the publisher, Kay Cashman, continued to hire other people and kept coming up with excuses for not paying up.

When we parted company last summer I asked for the money due to me in full within three working days. She said I was not an employee and she could pay me in the indefinite future. I inquired at the Labor Department, filed the proper paperwork for them to make a determination, as did Kay Cashman. The department spent a considerable amount of time studying the situation and concluded I was an employee. So did the Internal Revenue Service. Ms. Cashman and her publishing partner then appealed the Labor Department's decision. The hearing officer for the appeal also concluded I was an employee and the state is now studying all the records of Business News Alaska, because the company hired most people on a contract basis, with no benefits and no taxes paid.

Raylene Combs

Now Business News Alaska is appealing the matter to the commissioner level. It's a good thing the labor department took my case because even if I could afford an attorney to handle my side, I've been advised that given her track record, Cashman has no intention of paying me any of the money she acknowledges owing.

I have with me for the Legislature copies of records which I paid for myself from Motznik Computer Service, showing that Ms. Cashman

has numerous debts outstanding, including a $35,000 judgement against her through the state Superior Court. She has never paid a dime on that judgement either. To cover herself, she lists herself as publisher and her son and partner Raylene Combs as owners.

Changing state law to allow the Labor Department to pursue through the court system back wages would benefit Alaska residents like myself who have no other recourse. It would also put companies like Business News Alaska on notice that this state will not tolerate employers who think they can operate outside of the law.

SB193 ~~which~~ would make Alaska a much fairer playing field for employers who operate under the law & are at a disadvantage when other employers are allowed to operate outside of the law.

Thank you very much.

FAX COVER SHEET

DROP BOX
JUL 16 1999

TO: Margie

FAX: 522-4071 Pages (incl. Cover): 1

FROM: Kristin Southerland, Administrative Manager

Here's the printout you asked for. I hope all is good. If you have any questions call me. Do you want me to mail your reimbursement check or do you want to pick it up?

Thanks,
Kristin

ALASKA BUSINESS & INDUSTRY NEWSPAPERS (LLC)

05/19/99 Unpaid Bills by Vendor

As of May 19, 1999

Type	Date	Num	Open Balance
Bill	10/8/97	AUG/S...	1,868.00
Bill	12/9/97	OCT/N...	881.20
Bill	4/15/99	MAR 99	2,500.00
Bill	4/15/99	APR 99	3,000.00
Bill	5/19/99	MAY 99	3,000.00
Total MARGARET BAUMAN			11,249.20

Alaska Business and Industry Newspapers, LLC
PO Box 233101
Anchorage, Alaska 99523-3101
Phone (907) 274-3450 • Fax (907) 274-3451

EXHIBIT 18
Page 1 of 1

The following liens / judgements appear to still be open.

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 95-039827 OFFICE- ANCHORAGE DESCRIPT- JUDGEMENT 5672.87
DATE- 08-25-95 TIME- 01:13 PM INDEX- LI BOOK- 02825 PAGE- 0626 FOR 0002
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
CASHMAN KAY/ALASKA FLYING MAGAZINE/
GRANTEES
(AM)/

WITHIN THIS DOCUMENT - PF1 PAGES FORWARD PF2 PAGES BACKWARDS
ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 99-000291 OFFICE- ANCHORAGE DESCRIPT- NTC OF FEDERAL TAX LIEN
DATE- 01-04-99 TIME- 12:16 AM INDEX- TL BOOK- 03400 PAGE- 0931 FOR 0001
OF GRANTORS- 0001 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
CASHMAN KAY H
GRANTEES
INTERNAL REVENUE SERVICE
COMMENTS
AMOUNT: 10,902.80

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ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 91-024820 OFFICE- ANCHORAGE DESCRIPT- JUDGMENT 34548.74
DATE- 06-18-91 TIME- 12:13 PM INDEX- LI BOOK- 0216I PAGE- 0779 FOR 0002
OF GRANTORS- 0003 GRANTEES- 0003 PARCELS- 0000 ASSOC. S/N-
GRANTORS

CASHMAN KAY LASLAY/OCASAIN OF ALASKA/CASHMAN AND ASSOCIATES/

GRANTEES

GOLDEN DANIEL J JR/GOLDEN ENTERPRISES/GOLDEN INVESTMENTS/

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ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 89-032013 OFFICE- ANCHORAGE DESCRIPT- LIEN 3780.11
DATE- 05-15-89 TIME- 12:42 PM INDEX- TL BOOK- 01901 PAGE- 0524 FOR 0001
OF GRANTORS- 0001 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
CASHMAN KAY LASLEY/
GRANTEES
(IRS)/

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ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU
PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 91-017639 OFFICE- ANCHORAGE DESCRIPT- CORR LIEN 3780.11
DATE- 05-01-91 TIME- 09:42 AM INDEX- TL BOOK- 02146 PAGE- 0755 FOR 0001
OF GRANTORS- 0001 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 1901 524
GRANTORS
CASHMAN KAY LASLEY/
GRANTEES
(IRS)/

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ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 92-013380 OFFICE- ANCHORAGE DESCRIPT- JUDGEMENT 7500.00
DATE- 04-01-92 TIME- 09:56 AM INDEX- LI BOOK- 02255 PAGE- 0626 FOR 0002
OF GRANTORS- 0003 GRANTEES- 0003 PARCELS- 0000 ASSOC. S/N-
GRANTORS

CASHMAN KAY LASLEY/OCASAIN OF ALASKA/CASHMAN AND ASSOCIATES/

GRANTEES

GOLDEN DANIEL J JR/GOLDEN ENTERPRISES/GOLDEN INVESTMENTS/

WITHIN THIS DOCUMENT - PF1 PAGES FORWARD PF2 PAGES BACKWARDS
ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 88-034949 OFFICE- ANCHORAGE DESCRIPT- LIEN 10282.47
DATE- 06-17-88 TIME- 09:12 AM INDEX- TL BOOK- 00000 PAGE- 0000 FOR 0000
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 88-1065-F
GRANTORS
LASLEY KAY/PACIFIC NORTHWEST PUB/
GRANTEES
(IRS)/

WITHIN THIS DOCUMENT - PF1 PAGES FORWARD PF2 PAGES BACKWARDS
ENTER RETURNS TO PREVIOUS LEVEL PF9 RETURNS TO THE MENU

PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 89-022275 OFFICE- ANCHORAGE DESCRIPT- LIEN 9601.15
DATE- 04-03-89 TIME- 01:09 PM INDEX- TL BOOK- 01863 PAGE- 0479 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N--
GRANTORS
CASHMAN KAY/LASLEY KAY/
GRANTEES
(IRS)/

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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 90-035916 OFFICE- ANCHORAGE DESCRIPT- LIEN 17107.30
DATE- 07-23-90 TIME- 12:02 PM INDEX- TL BOOK- 02055 PAGE- 0975 FOR 0001
OF GRANTORS- 0001 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS

LASLEY KAY/

GRANTEES

(IRS)/

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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 91-033516 OFFICE- ANCHORAGE DESCRIPT- LIEN 4123.75
DATE- 08-12-91 TIME- 09:30 AM INDEX- TL BOOK- 0218Y PAGE- 0074 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
CASHMAN KAY H/LASLEY KAY/
GRANTEES
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SERIAL #- 92-034364 OFFICE- ANCHORAGE DESCRIPT- JUDGEMENT 30265.26
DATE- 08-06-92 TIME- 01:02 PM INDEX- LI BOOK- 02302 PAGE- 0252 FOR 0002
OF GRANTORS- 0003 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
LASLEY JIMMIE R/CASHMAN KAY/LASLEY KAY/
GRANTEES
(AS/DA)/

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SERIAL #- 89-022275 OFFICE- ANCHORAGE DESCRIPT- LIEN 9601.15
DATE- 04-03-89 TIME- 01:09 PM INDEX- TL BOOK- 01883 PAGE- 0479 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS
CASHMAN KAY/LASLEY KAY/
GRANTEES
(IRS)/

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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 94-004971 OFFICE- ANCHORAGE DESCRIPT- CORR LIEN 9601.15
DATE- 01-21-94 TIME- 01:44 PM INDEX- TL BOOK- 02581 PAGE- 0896 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 1883 479
GRANTORS
CASHMAN KAY/LASLEY KAY/
GRANTEES
(IRS)/

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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 88-034949 OFFICE- ANCHORAGE DESCRIPT- LIEN 10282.47
DATE- 06-17-88 TIME- 09:12 AM INDEX- TL BOOK- 00000 PAGE- 0000 FOR 0000
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 88-1065-F
GRANTORS
LASLEY KAY/PACIFIC NORTHWEST PUB/
GRANTEES
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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 94-004973 OFFICE- ANCHORAGE DESCRIPT- CORR LIEN 10282.47
DATE- 01-21-94 TIME- 01:45 PM INDEX- TL BOOK- 02581 PAGE- 0898 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 88-1065-F
GRANTORS
LASLEY KAY/PACIFIC NORTHWEST PUB/
GRANTEES
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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 96-010469 OFFICE- ANCHORAGE DESCRIPT- NOTICE OF FEDERAL TAX L
DATE- 03-06-96 TIME- 12:35 PM INDEX- TL BOOK- 02896 PAGE- 0206 FOR 0001
OF GRANTORS- 0001 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N- 2055975
GRANTORS
LASLEY KAY/
GRANTEES
(IRS)/
COMMENTS
LIEN AMOUNT $17107.30/

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PUBLIC INFORMATION ACCESS SYSTEM ---> STATEWIDE RECORDERS OFFICE FILE
SERIAL #- 98-069640 OFFICE- ANCHORAGE DESCRIPT- NTC OF FEDERAL TAX LIEN
DATE- 11-02-98 TIME- 11:22 AM INDEX- TL BOOK- 03356 PAGE- 0858 FOR 0001
OF GRANTORS- 0002 GRANTEES- 0001 PARCELS- 0000 ASSOC. S/N-
GRANTORS

CASHMAN KAY/LASLEY KAY/

GRANTEES

INTERNAL REVENUE SERVICE/

COMMENTS

$4204.07/

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Alaska State Legislature

During Interim: (June - Dec.)
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Anchorage, Alaska 99501-2133
(907) 269-0200
Fax (907) 269-0204

During Session: (Jan. - May)
State Capitol
Juneau, Alaska 99801-1182
(907) 465-4993
Fax (907) 465-3872

Drue Pearce
President of the Senate

Sponsor Statement

SB 193
"An Act relating to the payment of wages and claims for the payment of wages"

The Department of Labor and Workforce Development (DLWD) was established to serve the interests of the employee through fair business practice. SB 193 will address complaints from the public regarding unethical employers who illegally withhold final wages from employees.

SB 193 increases the amount of past wages that employees are allowed to retain from $7500 to $20,000. SB 193 will update the law making it possible for attorneys and the DLWD to pursue small wage claims. In current statute AS 23.05.220(c), it is not feasible for private attorneys to take such cases on a contingency fee basis when the maximum cap is $7500.

SB 193 would provide a source of assistance for this category of employee. It would serve the state's best interest to keep these cases in small claims rather than District or Superior Court in order to expedite resolution and lower costs to all parties.

This measure would serve as a tool to assist employees in their effort to acquire representation for wages not paid by their previous employer. SB 193 is a sensible bill that will strengthen Alaskan labor relations.

Senator_Drue_Pearce@legis.state.ak.us