

**ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672**

**10637 SENATE LABOR & COMMERCE**

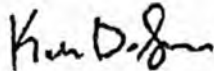
The Honorable Ben Stevens  
DSA Opposition to House Bill 393  
Page 4

threshold. In addition, the National Conference of Commissioners on Uniform State Laws has a Model Franchise and Business Opportunity Act. This Act has a \$500 threshold as well.

In summary, DSA opposes House Bill 393 in its current form, as it passed the House. We will only support an amendment to raise the threshold amount from \$200 to \$500, placing the threshold in the definitions section of the bill. This request is based upon the practices of the vast majority of states regulating the sales of business opportunities as well as the Federal Trade Commission. In addition, the two most widely referenced model acts in this area contain a \$500 threshold. Alaska's resources should be directed at fighting the fraud posed by large business opportunity scams. Any law in this area should not confuse Alaska's consumers with a convoluted definition of a business opportunity.

Thank you for your time and attention to DSA's concerns. Please do not hesitate to contact me or the DSA directly with questions or concerns. John Hesse of the DSA can be reached by telephone at (202) 220-9420 or by email to [jhesse@dsa.org](mailto:jhesse@dsa.org) and I can be reached at the address above or [kjones@dynamicessentials.com](mailto:kjones@dynamicessentials.com). Thank you for your time and attention to this request.

Sincerely,



Kevin D. Jones  
Vice President

**DIRECT SELLING ASSOCIATION**

1275 Pennsylvania Avenue, NW, Suite 800, Washington, DC 20004-2411  
202/347-8866 • Fax 202/347-0055

April 26, 2002

The Honorable Ben Stevens  
Alaska Senate  
State Capitol, Room  
Juneau, AK 99801-1182

**Re: DSA Opposition to House Bill 393 - a Proposal to Regulate the Sale of Business Opportunities**

Dear Senator Stevens:

I am writing on behalf of the Direct Selling Association (DSA) concerning House Bill 393, a proposal to regulate the sale of business opportunities in Alaska. Unfortunately, we were of the impression that we had an understanding with both the House sponsor as well as the three committees that considered the bill. We had agreed to put aside our concerns, which are detailed below, and compromise on the issue of most concern to us; the threshold dollar exemption for business opportunities originally set at \$200. We had agreed to a threshold of \$250, even though we requested a \$500 threshold. It now appears that we compromised more than we had bargained for. The bill was amended on the House floor to severely limit the application of this exemption. Consequently, I am writing to express our outright opposition to the bill and ask that you vote against it in committee.

**DSA's Opposition to House Bill 393**

Alaska's consumers need this proposal to be crystal clear on what exactly constitutes a business opportunity. **Our one concern was the exemption threshold of \$200 contained in the original bill and its placement in the proposal. Even as amended the \$250 exemption contained in the version that passed the House is atypical of other state business opportunity fraud statutes.**

The clear trend in the regulation of business opportunities is toward higher dollar thresholds stated in the definitions section of the law. A majority of the other twenty-three states that regulate business opportunities and the Federal Trade Commission use a \$500 threshold stated in the definitions section of their statutes and regulations. Twenty-seven states choose not to regulate the sale of business opportunities. If the state chooses to regulate the sale of business opportunities, Alaska should follow the trend and enact a bill with a \$500 threshold stated in the definition of a business opportunity

Page 2

**Business Opportunity Dollar Threshold Amounts Exist:**

- To focus limited, valuable state resources on situations where people can be seriously harmed;
- To reassure people involved in small income-earning programs that they would be protected from inadvertent coverage; and
- To require a strict compliance mode on those business opportunities where people invest a large amount of money up-front.

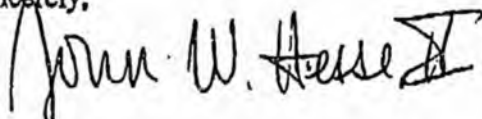
The lower threshold would subject many small income-earning opportunities to onerous registration and bonding requirements, which would hurt many of these very small businesses. It would also take the necessary focus of enforcement off the large business opportunities, where people can be seriously harmed, and spread limited state resources over a much wider field.

In 1980, the Iowa Attorney General's Office showed that the average business opportunity fraud victim lost on average \$5,400. In 1995, the Wall Street Journal ran a story entitled "Undercover Blitz Targets Business Opportunity Scams". This story noted that the victims were defrauded of between \$1,500 and \$6,000. We believe that Alaska should target the business opportunities that pose the most harm. For your information, in 1984 the North American Securities Administrators Association developed a model Business Opportunity Sales Act (NASAA Model), which contains a \$500 threshold. In addition, the National Conference of Commissioners on Uniform State Laws has a Model Franchise and Business Opportunity Act. This Act has a \$500 threshold as well.

For all of these reasons, we opposed the bill in its original form. We then agreed to compromise in the interests of consumer protection to leave the limit in its place within the exemptions section and to live with a dollar amount of \$250. We did not agree to any other language or limitation. The bill passed cleanly through its remaining committees, but was then amended on the House floor, inconsistently with our agreement.

Consequently, DSA opposes House Bill 393 in its current form, as it passed the House. Thank you for your time and attention to DSA's concerns. Please do not hesitate to contact me directly with questions or concerns. I can be reached by telephone at (202) 220-9420 or by email to [jhesse@dsa.org](mailto:jhesse@dsa.org). Thank you for your time and attention to this request.

Sincerely,



John W. Hesse, II  
Senior Attorney & Director, Government Relations



Honorable Ben Stevens, Chair  
Senate Labor and Commerce Committee  
Alaska Capitol Room, Room 119  
Juneau, AK 99801-1182

April 26, 2002

RE: HB 393 (Stevens) – Support

Dear Chair Stevens:

On behalf of the members of AARP in Alaska, we urge you and your colleagues on the Senate Labor and Commerce Committee to support HB 393, authored by Representative Gary Stevens, and co-sponsored by Representatives Kerttula, Dyson, and Murkowski.

HB 393 will address an issue that is often of concern to retirees. . . prepackaged "business opportunities" targeted at novice entrepreneurs and "work at home" schemes.

The bill would require that sellers of business opportunities register with the State and would require them to disclose specific information to the potential buyer before the sale. They would also be required to use an escrow account to assure delivery of promised goods and provide a 30-day right of cancellation to the buyer.

Representative Stevens has provided exceptions for some recognized direct selling operations. HB 393 would target those individuals and organizations that should not be allowed to operate in Alaska.

Government has a legitimate role in consumer protection. AARP believes HB 393 is an excellent example of appropriate oversight and regulation.

On behalf of all Alaskans who have been taken in by phony "business opportunities", AARP urges an "AYE" vote on HB 393.

Should you have any questions about our position, please feel free to contact Marie Darlin (586-3637), Coordinator of the AARP Capitol City Task Force; Patrick Luby (907-762-3314), AARP Legislative Representative; or me (907-245-5259).

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Marguerite Stetson".

Marguerite Stetson  
Executive Council Member for Advocacy

cc: Senator Austerman  
Senator Leman  
Senator Torgerson  
Senator Davis  
Representative Gary Stevens  
Representative Kerttula  
Representative Dyson  
Representative Murkowski



**VIA FACSIMILE**

April 29, 2002

The Honorable Ben Stevens, Chair  
Alaska Senate  
State Capitol  
Juneau, AK 99801-1182

**Re: DSA Opposition to House Bill 393 - a Proposal to Regulate the Sale of Business Opportunities**

Dear Senator Stevens:

I am writing to you concerning House Bill 393, a proposal to regulate the sale of business opportunities in Alaska. As a member of the Board of Directors of the DSA (Direct Selling Association) as well as being CEO of Mannatech, Incorporated, a member of the DSA that sells nutritional products, I have a great interest in expressing my opposition to this bill.

The version of HB 393 just recently passed by the House contains additional, damaging language. Although the \$250 threshold remains, the bill now reads "except that this exemption does not apply if the aggregate amount of the sales or offers to sell the business opportunity that were made in the previous one-year period by the seller or offeror of the business opportunity, or by the agent or seller, or by the agent, seller or offeror, exceeded \$10,000." This exact language or anything similar to it is completely unacceptable to me and a great many people within the direct selling industry. Our opposition is based on the fact that registration and bonding will be required for any company regardless of the threshold amount if that company exceeds the \$10,000 annual cap.

The lower threshold would subject many small income-earning opportunities to onerous registration and bonding requirements, which would hurt many of these very small businesses. It would also take the necessary focus of enforcement off the large business opportunities, where people can be seriously harmed, and spread limited state resources over a much wider field.

The clear trend in the regulation of business opportunities is toward higher dollar thresholds stated in the definitions section of the law. A majority of the other twenty-three states that regulate business opportunities and the Federal Trade Commission use a \$500 threshold stated in the definitions section of their statutes and regulations. Twenty-seven states choose not to regulate the sale of business opportunities. If the state chooses to regulate the sale of business opportunities, Alaska should follow the trend and enact a bill with a \$500 threshold stated in the definition of a business opportunity.

Senator Ben Stevens  
April 29, 2002  
Page Two

We would support the adoption of an amendment to the bill, replacing the \$200 threshold with a \$500 threshold. However, we cannot support the bill as it passed the House. We suggest that you modify the definition of business opportunity to fulfill our request as follows:

**Add the underlined text to Sec. 45.66.900, Definitions;**

... (2) "business opportunity" means an arrangement under which the seller or a person recommended by the seller will provide to the buyer products, equipment, supplies, or services enabling the buyer to start a business for which the buyer is required to pay an initial fee or sum of money in excess of \$500 to the seller and under which one or more of the following occurs or is to occur . . . ; and

**Strike Sec. 45.66.220. Exemptions, to conform as follows:**

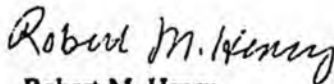
~~This chapter does not apply to a sale of or an offer to sell (1) a business opportunity if the total amount of the payments to be made by the buyer under the contract is less than \$200 . . .~~

This change and movement makes it clear to all - consumers and regulators alike - that the type of small income-earning opportunity represented by the DSA membership does not fall under this law.

In summary, DSA opposes House Bill 393 in its current form, as it passed the House. We will only support an amendment to raise the threshold amount from \$200 to \$500, placing the threshold in the definitions section of the bill. This request is based upon the practices of the vast majority of states regulating the sales of business opportunities as well as the Federal Trade Commission. In addition, the two most widely referenced model acts in this area contain a \$500 threshold. Alaska's resources should be directed a fighting the fraud posed by large business opportunity scams. Any law in this area should not confuse Alaska's consumers with a convoluted definition of a business opportunity.

Thank you for your time and attention to DSA's concerns. I can assure you that the vast majority of our membership agree with the feelings expressed in this letter. Please do not hesitate to contact me directly with questions or concerns. I can be reached by telephone at (972) 471-7278 or by email to [bhenry@mannotech.com](mailto:bhenry@mannotech.com). Thank you for your time and attention to this request.

Sincerely,



Robert M. Henry  
Chief Executive Officer

RMH/cds

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: HB 393  
(H) Publish Date: 3/1/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
Title "An Act relating to unfair and deceptive trade practices and to the sale of business opportunities; . . ." BRU Criminal Division; Civil Division  
Sponsor Representative Stevens Component Criminal Appeals/Special Litigation  
Requester House Labor and Commerce Committee Component No. 2279; 2206

### Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>
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### FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1108 Statutory Designated Prog Rcpts	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>
<b>TOTAL</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>	<b>*****</b>

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

### POSITIONS

Full-time						
Part-time						
Temporary						

### ANALYSIS: (Attach a separate page if necessary)

HB 393 would provide for the registration and regulation of sellers of business opportunities, which are prepackaged small business deals offered mainly to novice entrepreneurs over the Internet and through newspaper and radio advertisements, television "infomercials," and seminars. Typically, a business opportunity is an arrangement by which the seller provides products, equipment, supplies, or services to the buyer; assists the buyer in finding outlets or accounts for the buyer's products or services; purchases the products made, produced, or modified by the buyer; or provides the buyer with a marketing plan.

The bill would require that sellers of business opportunities register with the state, disclose specific information regarding the business to the buyer before sale, use an escrow account to assure delivery of business assets, and provide a 30-day right of cancellation for the buyer.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
Division: Attorney General's Office Date/Time 2/21/02 2:42 PM  
Approved by: Kathryn Daughhelee for Bruce M. Botelho, Attorney General Date 2/21/2002  
Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

BILL NO. HB 393 - FN#1

ANALYSIS CONTINUATION

A seller who recklessly violates the registration requirements would be guilty of a class C felony. A seller who recklessly violates the contract or cancellation provisions would be guilty of a class A misdemeanor. The bill would also amend AS 45.50.471(b) to specify that a violation of the sale of business opportunities statute constitutes an unfair or deceptive act or practice in the conduct of trade or commerce.

The Department of Law does not anticipate significant revenues or costs from passage of this legislation. However, because there is no regulatory scheme now in effect, we cannot say with certainty how much additional staff time will be required to implement this bill.

Given our experience with implementing the Telephone Solicitation Act, we would guess that no more than ten or twelve sellers of business opportunities will register in the first year. Assuming an initial registration fee of \$150, the revenue in the first year would be approximately \$1,500 to \$1,800. With an annual renewal fee of \$50, the revenue from these same sellers would be \$500 to \$600 in the second year, plus any new initial registrations.

Costs will be generated both by the time spent processing the registration applications, and by time spent on any enforcement actions against unscrupulous sellers of business opportunities, who are generally located out of state and who make exaggerated earnings claims to induce buyer participation, and who would be unlikely to register with the state. We expect that processing ten to twelve applications per year, while perhaps more time consuming than other registrations due to the relative complexity of the business opportunity registration requirements, can be handled within existing funding levels. We have no way of anticipating how many enforcement actions may be required. The Consumer Protection unit is aware of dozens of business opportunity scams around the country, and they know Alaskans are being targeted, but not to what extent. However, the department does not believe the cost of pursuing limited enforcement actions against a few sellers will entail significant amounts of staff time. If our assumptions prove to be inaccurate, the department may need to seek additional funding in the future.

**HB**

**418**

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: CS HB 418 (L&C)  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
 Title Electronic Proxy Voting & Notification BRU Banking, Securities & Corporation (115)  
 Component Banking, Securities & Corporation  
 Sponsor House Labor & Commerce by Request  
 Requester House Labor & Commerce Component No. 1233

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill amends AS 10.06 related to domestic and certain foreign corporations related to the delivery of annual reports, proxy and other information to share holders via most any electronic means. It also allows electronic proxy voting. This bill has no fiscal impact on the operations of the division.

Prepared by: Franklin T. Elder, Director  
 Division: Banking, Securities & Corporations  
 Approved by: Deborah B. Sedwick, Commissioner  
 Agency: Department of Community & Economic Development

Phone 907-465-2521  
 Date/Time 3/4/02 2:56 PM  
 Date 3/4/2002

# ALASKA STATE LEGISLATURE

Representative Lisa Murkowski Chair  
Representative Andrew Halcro Vice-Chair  
Representative Pete Kott  
Representative Kevin Meyer  
Representative Norman Rokeberg  
Representative Harry Crawford  
Representative Joe Hayes



Alaska State Capitol  
Juneau, AK 99801-1182  
Telephone: (907) 465-4954  
Fax: (907) 465-2293  
Representative\_Lisa\_Murkowski@legis.state.ak.us

## HOUSE LABOR AND COMMERCE COMMITTEE

### Sponsor Statement House Bill 418 Electronic Proxy Voting & Notification

House Bill 418 conforms the Alaska Corporations Code to the laws of many other states that recognize the emergence of electronic media as an important means of communication. This bill provides shareholders of Alaska corporations the option of electronic proxy voting and electronic delivery of notice and meeting materials. Approximately 25 states already allow electronic proxy voting.

House Bill 418 also includes provisions that permit corporations to send one copy of an annual report and proxy materials to a single address where multiple shareholders reside, known as householding, and to stop sending corporate materials to last-known addresses at which mail is undeliverable. These measures represent significant improvements in efficiency and communications with shareholders.

Electronic proxy voting will result in cost savings and added convenience for Alaska corporations. Reduction of paper, printing, and postage costs will be substantial—especially for larger corporations. Those electing to implement electronic voting will establish secure processes in which a PIN is issued to each shareholder. Electronic delivery would be at the option of the shareholder. Shareholders will continue to have the option of conventional paper or in-person voting.

**Sectional Analysis**  
**House Bill 418**  
**Electronic Proxy & Voting Notification**

**Section 1** allows notice of shareholders' meeting to be given by electronic transmission.

**Section 2** provides that notice of shareholders' meeting may be given by electronic transmission if the shareholder authorizes it. Describes how the authorization must be communicated. Indicates when notice by electronic transmission is considered given when using various type of electronic transmission.

**Section 3** 10.06.411 (a) allows a corporation to satisfy its delivery requirement for delivering information, including annual reports and proxy statements, to shareholders who share an address by delivering the information to the shared address. Lays out what requirements must be met, including shareholder consent.

10.06.411 (b) requires a corporation to begin sending individual copies of the information to a shareholder within 30 days after the corporation receives a shareholder's revocation of consent to delivery to a shared address or a notice from the shareholder that the shareholder wishes to receive an individual copy.

10.06.411 (c) provides that a corporation is not required to send certain notices or payments to a shareholder until the shareholder provides the corporation with written notice of the shareholder's current address if certain items have been sent by first class mail during the preceding year to the shareholder's address and have been returned undeliverable.

10.06.411 (d) defines "address" for the section. Includes an electronic mail address, a facsimile telephone number, and another electronic document destination

**Section 4** allows a shareholder to vote by proxy executed by the electronic transmission. Establishes certain requirements for a proxy executed by electronic transmission.

**Section 5** provides that corporations allowing electronic proxy voting must also provide for all legal proxies in the same manner.

**Section 6** lists how a corporation may deliver its annual report.

**Section 7** amends the definition of "proxy" to include an electronic transmission.

**Section 8** defines "electronic transmission" and "signed" for the chapter.

**Section 9** provides transition that the department may proceed to adopt regulations necessary to implement the changes in this act.

**Section 10** provides transitional effective date for regulations to begin implementation.

**Section 11** states effective date of January 1, 2003.

# SENATE COMMITTEE REPORT

DATE: 3/18/02

FURTHER: Judiciary

DATE TURNED IN TO OFFICE: 3/21/02

Labor and Commerce Committee considered

CS FOR HOUSE BILL NO. 418(L&C)

### HB 418 ELECTRONIC PROXY VOTING & NOTIFICATION

"An Act amending the Alaska Corporations Code as it relates to delivery of annual reports, notice of shareholders' meetings, proxy statements, and other information and items to shareholders, to voting, and to proxies, including electronic proxy voting and proxy signing; and providing for an effective date."

and recommends:

be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)

attached amendment(s)

adopt Letter of Intent by \_\_\_\_\_ Committee

further referral to \_\_\_\_\_ Committee

**Senate Bill:**

same title

new title

**House Bill:**

same title

technical title

new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	FN#
DCED	3/4/02		✓	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
CHAIR: <i>[Signature]</i>	✓			

**HB**

**443**

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: CSHB 443(L&C)  
(H) Publish Date: 4/3/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Environmental Conservation  
Title: Relating to tattooing and body piercing BRU: Environmental Health  
Component: Food Safety and Sanitation  
Sponsor: Rep Kohring  
Requester: House Labor and Commerce Committee Component No.: 2343

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	3.1	0.0	0.0	0.0	0.0	0.0
Supplies	0.2	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>3.3</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	2.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type—Do not abbreviate)	1.3	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>3.3</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

**ANALYSIS:** (Attach a separate page if necessary)

This bill will require public notice of a revised effective date for application and fees. A portion of this cost would be covered by interagency receipts from the Department of Commerce and Economic Development, Division of Occupational Licensing. General funds will be required to cover the remainder of the public notice cost.

Prepared by: Mary Siroky - Legislative Liaison  
Division: Statewide Public Services  
Approved by: Kurt Fredriksson - Deputy Commissioner  
Agency: Department of Environmental Conservation

Phone: (907) 465-5355  
Date/Time: 3/22/02 3:16 PM  
Date: 3/22/2002

# ALASKA STATE LEGISLATURE

*Interim:*

600 East Railroad Avenue  
Wasilla, Alaska 99654  
(907) 373-1842  
Fax - (907) 373-4729



*Session:*

State Capitol Building, Room 24  
Juneau, Alaska 99801-1182  
(907) 465-2186  
Fax - (907) 465-3818

REPRESENTATIVE VIC KOHRING  
DISTRICT 26

## SPONSOR STATEMENT

### HOUSE BILL 443

#### TATTOOING AND BODY PIERCING

In 2000, the Legislature passed SB 34 to bring tattoo and body piercing practitioners under the regulation and licensing requirement of AS 08.13, Barbers and Hairdressers. The legislation established qualification and training requirements for license applicants, regulations for shop licenses, and set application deadline and initial licensing dates.

The 2000 legislation did not allow for a grace period or appeal process for missing the license application deadline. Several established practitioners missed the deadline because they were unaware of the new regulations. Shops not meeting the new requirements will have to close or cease the effected part of their business. This will result in loss of income to shop owners, practitioners, shop support staff and vendors.

This bill will extend the application period and the initial licensing date.

# ALASKA STATE LEGISLATURE



*Interim:*  
600 East Railroad Avenue  
Wasilla, Alaska 99654  
(907) 373-1842  
Fax -(907) 373-4729

*Session:*  
State Capitol Building Room 421  
Juneau, Alaska 99801-1182  
(907) 465-2186  
Fax - (907) 465-3818

REPRESENTATIVE VIC KOHRING  
DISTRICT 26

## SECTIONAL ANALYSIS

### CS HOUSE BILL 443 (L&C)

#### TATTOOING AND BODY PIERCING

- ◆ **Section 1(a)(1)** extends the application deadline from July 1, 2001, to October 1, 2002.
  - This will allow practitioners who missed the original deadline additional time to file for transitional license.
- ◆ **Section 1(a)(2)** changes the wording for the qualifying experience period from 12 out of the 24 consecutive months immediately preceding the transitional application to 12 out of the 24 months beginning July 1, 1999, and June 30, 2001.
  - This, in effect, keeps the qualifying period the same as the current statute. An applicant must have been qualified to apply for the transitional license by July 1, 1999, the date of the original application deadline.
- ◆ **Section 2** changes the licensing requirement date for the initial member appointed to the Board from July 1, 2002, to December 1, 2002.
- ◆ **Section 3(a)** changes the effective date for licensing and, notification requirements, from July 1, 2002, to December 1, 2002.
  - The licensing requirement date has to be after the application deadline. Making the license and effective dates December 1, 2002, will give the department time to process the applications and administer the test before the application requirement date without unduly delaying regulations or the apprenticeship period for people wishing to enter the profession.

# ALASKA STATE LEGISLATURE

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*Session:*

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REPRESENTATIVE VIC KOHRING  
DISTRICT 26

## HB 443

### TATTOOING AND BODY PIERCING

#### Background Information

SB 34 was introduced in 1999 to regulate tattooing and body piercing practitioners by licensing them through the Division of Occupational Licensing under the Barbers and Hairdressers Board. The bill, amending AS 08.01.065 and 08.13 was signed into law May 31, 2000, with various effective dates:

- Section 31(a)(1), chapter 93, SLA 2000 set the transitional license application deadline as July 1, 2001.
- Section 32, chapter 93, SLA 2000 set the licensing requirement date for the initial member appointed to the Board as July 1, 2002.
- Section 35(a), chapter 93, SLA 2000 set the licensing requirement date for practitioners as July 1, 2002.

# ALASKA STATE LEGISLATURE

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REPRESENTATIVE VIC KOHRING  
DISTRICT 26

## HB 443

### TATTOOING AND BODY PIERCING

#### Issue Statement

Several practitioners missed the application deadline set by the passage of SB 34 because they did not know of its existence. No mechanism was provided for qualified practitioners who missed the July 1, 2001, deadline.

Notices were only sent out to "obvious" business names and to persons on DCED and DEC's interested party lists. Businesses without some catch word in their title were not notified. Newspaper notices are ineffectual because most people don't go looking for them unless they already know the regulation exists.

Under these new regulations, practitioners who missed the deadline:

- will have to close their own business. This would result in:
  - loss of income for practitioner;
  - loss of income for employees;
  - loss of income for support vendors, etc.
- practitioners with many years experience might be put in the position to have to "apprentice" under a competitor with far less experience in order to qualify for a license if:
  - the practitioner can find a licensed practitioner willing to hire him/her;
  - there is a licensed practitioner in the area.

If the practitioner is unable to find someone to "apprentice" under, he/she would have to:

- relocate to another area where a willing licensed practitioner is available, or
- find another line of employment.

**Subject: Tattooing Bill**

**Date: Mon, 08 Apr 2002 10:16:19 -0800**

**From: Judy Weske <judy\_weske@dced.state.ak.us>**

**To: Sharron Odell <Sharron\_Odell@legis.state.ak.us>**

Sharron, I wanted to let you know the Board of Barbers of Hairdressers is meeting today in Anchorage and they have gone on record to support the changes to HB 443. Do you need anything formal from them? I'm training a new employee today, so if you need to reach me to discuss this, please call our main desk at 465-2535 and ask the receptionist to track me down. (I tried calling you but didn't get an answer.)

March 8, 2002

To: Senator Vic Kohring  
State Capitol

Sir: I'd like to express my support  
for HB 443, moving the date for application  
of Transitional Licensure from  
July 2001<sup>§</sup> to ~~December~~ 2002.  
<sup>§</sup> October

Several Tattoo Artists, Body Piercers  
and Permanent Cosmetic Colorists  
did not receive notice that their  
profession was going to be  
licensed and they missed the first  
deadline to register for the  
Transitional license.

HB 443 will enable these  
individuals to continue working  
in the profession of their choice  
in Alaska.

I want to say this is my personal  
opinion and not a representation of  
the Board of Barber and Hairdressers.

Thank you. Cheryl Sutton  
205 Seward St  
T... AK 99801

March 7, 2002

Vic Kohring  
State Representative  
Alaska State Capitol, Rm. 24  
Juneau, Alaska 99801

To Whom It May Concern,

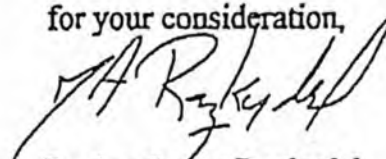
I received a package of material regarding House Bill 443 from Vic Kohring's office which addresses the need to extend the application period for Tattoo and Body Piercing.

I work at Muttley's Tattoo Clinic and am aware that we should have received the applications, but didn't. Shouldn't something of this importance have been sent "Registered Mail"?

I believe the need to regulate the industries is a valid one and perhaps even long in coming but at the same time I see no need to make sacrifices of the qualified tradesmen in our haste to implement them.

If these amendments are not excepted, what recourse do we artists and piercers who should have been notified but were not, have available to us?

Thank You  
for your consideration,



Rocky, James Rozkydal

March 7, 2002

Vic Kohring  
State Representative  
Alaska State Capitol, Rm 24  
Juneau Alaska 99801

Dear Sirs:

I have been tattooing in Alaska for over fifteen years and frankly we are well overdue to be regulated.

My personal complaint is that there were applications for transitional licensing sent out to all listed "Tattoo" Facilities. Unfortunately, we failed to receive an application at my establishment, and we were unaware that said application even existed for well over a month after it was due.

Sirs, you would think that a letter that would determine the fate of a career or livelihood would be serious enough to be registered mail. Myself and my employees more than meet the criteria set for the Transitional Licensing.

It is my belief that if a person meets the requirements for any job that requires an occupational license, they should be granted that license.

It is my understanding that the outcome of House Bill #443 will determine whether or not I may continue run a successful small business. Not only am I battling for myself, but also for my employees, who are counting on me to provide them with job security

I am also battling for our clients. We were recently voted "Best in the Valley" by a readers poll in the "Frontiersmen" our local editoria!.

I am one man struggling to keep my business flourishing and I would be, very dissapointed to see the "Best in the Valley" close their doors.

I am willing to give my testimony telephonically or in person if need be. Please, help me save my business and the careers of those working for me.

Sincerely,



JEFF MARTIN

Owner

Muttley's Tattoo Clinic



Lakeland Wintersun Luczak-Peck  
He33 Box 3050  
Wasilla, AK 99654  
(907) 357-4791

March 8, 2002

Vic Kohring,  
State Representative  
Alaska State Capitol, Room 24  
Juneau, Alaska 99801

To whom it may concern:

My name is Lakeland Wintersun Luczak-Peck, and I am an upcoming hopeful in the tattoo industry. I had recieved a package regarding House Bill #443 recently, and I noticed that if the bill does not pass, I may not begin my apprenticeship in the art of Tartoo. Currently I am employed by Jeff Martin of "Muttley's Tattoo Clinic" in Wasilla. It is my understanding that I need 12 to 24 consecutive months of training under a person with a valld practitioner's license. It is my concern that House Bill #443 is passed, so that my employer ( who did not recieve his license renewal forms, due to a technicality) may remain licensed for the duration of my apprenticeship. Personally I think it would be unfair to deny my training, especially after I have already put so much into this, thus far.

Sincerely,

*Lakeland Wintersun Luczak-Peck*

Lakeland Wintersun Luczak-Peck  
Muttley's Tattoo Clinic Employee

March 12, 2002

Vic Kohring  
State Representative  
State Capitol Building Rm 24  
Juneau, Alaska 99801-1182



Dear Honorable Sirs,

Hello, my name is April Smiloff. I am writing in regards to House Bill 443. I support Bill 443. I have multiple reasons on why Bill 443 should be passed. May I ask you to take a little of your time to read over my letter of recommendation?

Tattoo and Body Piercing Regulations are in dire need, there is no denying that fact. There does need to be certain guidelines to Tattocing and Body Piercing; if not every ignorant person would practice in a very unsterile, unsafe environment.

The complicated job of regulating and writing these guidelines was dumped on the Board of Barbers and Hairdressers. We all know what happens when you start rolling a large stone down a hill without looking before you shove. I believe this has happened with Tattoo and Body Piercing regulations. It all happened very quickly, not all things were thought over thoroughly. It would take me too long to explain all of them. My point is that if you pass House Bill 443 this will give you a second glance down the hill. Therefore, the Board of Barbers and Hairdressers will have more time to think out thouroughly their law making.

In the hastiness that the Regulations have been handled so far, some people have not been properly contacted, or even had known about the proposed regulations, let alone known of the deadline. I hope these other concerned peoples have also had taken the time to write their recomendation, so you know I am not the only one.

I am able to do a telephone conferance during the hearing. If you have any questions please contact me. I thank you for taking the time to read my letter of recomendation in SUPPORTING HOUSE BILL 443.

Sincerely,

April Smiloff

March 14, 2002  
Attention Vic Kohring  
State representative

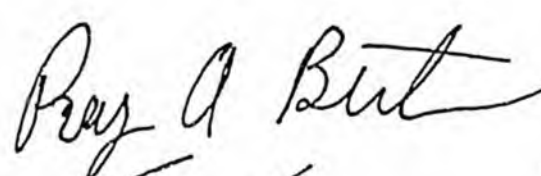
Bill #443

Dear committee,

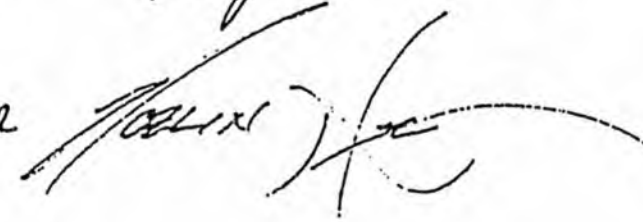
My name is Ray Bilodeau I am owner and operator of Dragon Ray's Tattoos in Anchorage, AK I also operate Dragon Ray's West of Boise, ID. I was unable to meet the July deadline due to working out of state, I would appreciate the opportunity to make application for licensing in AK, so I would support your bill #443 and would like to testify at the hearing. I also had to at high expense to myself relocate one of my Tattoo artist Noelin Wheeler to my shop in Boise because of the fast deadline that would not let him complete time apprenticeing if your bill works he would be able to return to Alaska where his family is and work in my shop. I also would be able to operate my own shop, and it would untie my hands to let me operate my business without limits and options. Please contact me for any further information at 1 208 887 7651 or 1 208 571 2447 we both would like the opportunity to testify at the committee.

3/14/02

Ray A BILODEAU



Noelin WHEELER



**HB**

**470**

# ALASKA STATE LEGISLATURE

## House of Representatives

### COMMITTEE ASSIGNMENTS:

JUDICIARY COMMITTEE, CHAIRMAN  
LABOR & COMMERCE COMMITTEE, MEMBER  
LEGISLATIVE COUNCIL, MEMBER  
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &  
TOURISM, MEMBER

website: <http://www.akrepublicans.org/Rokeberg.htm>



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SESSION:  
ALASKA STATE CAPITOL  
JUNEAU, AK 99801-1182  
PHONE: (907) 465-4968  
FAX: (907) 465-2040

## Representative Norman Rokeberg

e-mail: [Representative\\_Norman\\_Rokeberg@legis.state.ak.us](mailto:Representative_Norman_Rokeberg@legis.state.ak.us)

### SPONSOR STATEMENT

**COMMITTEE SUBSTITUTE HOUSE BILL 470 (LABOR & COMMERCE) (title amended)**

**AN ACT RELATING TO PUBLIC OFFERING STATEMENTS REQUIRED UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT; AND PROVIDING FOR AN EFFECTIVE DATE**

**CSHB 470 (L&C) (title amended) puts into statute what is currently the practice in regards to public offering statements (POS) for what are commonly referred to as condominium developments.**

**AS 34.08.580 currently provides that a purchaser, prior to conveyance of title, may cancel a purchase agreement within 15 days of receipt of a public offering statement. Such cancellation is made without penalty and each payment made by the purchaser before cancellation must be refunded promptly to the purchasers. The problem occurs because a POS with a final legal description cannot be issued until the unit is built and surveyed. This technical requirement of the law effectively inhibits the "pre-sale" of smaller projects. This is especially difficult when a custom unit is being built as the buyer can cancel the agreement without penalty 15 days after that unit is built and surveyed. What happens is that high-end units, e.g., a \$500,000 custom condominium, cannot get financing due to this rescission provision.**

**CSHB 470 (L&C) (title amended) indicates that a preliminary version of the POS that reasonably reflects the contents of the POS that is subsequently recorded may be used. It gives the customer 15 days after the receipt of the preliminary POS to cancel a contract.**

**Additionally CSHB 470 (L&C) (title amended) changes the current penalty for noncompliance with the POS statutes from a flat ten percent no matter what the "mistake" might be to "up to" ten percent. This way the error may be judged on its merit and penalties may be charged accordingly.**

**This legislation is needed in order to keep the business of building custom units available as an option for a purchaser.**

ED 03:03/25/02

# ALASKA STATE LEGISLATURE

## House of Representatives

### COMMITTEE ASSIGNMENTS:

JUDICIARY COMMITTEE, CHAIRMAN  
LABOR & COMMERCE COMMITTEE, MEMBER  
LEGISLATIVE COUNCIL, MEMBER  
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &  
TOURISM, MEMBER

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## Representative Norman Rokeberg

e-mail: [Representative\\_Norman\\_Rokeberg@legis.state.ak.us](mailto:Representative_Norman_Rokeberg@legis.state.ak.us)

### SECTIONAL ANALYSIS

**COMMITTEE SUBSTITUTE HOUSE BILL 470 (LABOR & COMMERCE)  
AN ACT RELATING TO PUBLIC OFFERING STATEMENTS REQUIRED  
UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT; AND  
PROVIDING FOR AN EFFECTIVE DATE**

**By Representative Norman Rokeberg**

- Section 1:** Amends AS 34.08.520 [Liability for public offering statement requirements] to include "or a preliminary version of the public offering statement that reasonable reflects the contents of the public offering statement that is subsequently recorded".
- Section 2:** Amends AS 34.08.530 [Public offering statements generally] to include "or a preliminary version of the public offering statement that reasonable reflects the contents of the public offering statement that is subsequently recorded". Amended subsection (11)(B) to provide that instead of a flat ten percent penalty, the penalty may be "up to" ten percent.
- Section 3:** Amends AS 34.08.580 [Purchaser's right to cancel] to include "or a preliminary version of the public offering statement that reasonable reflects the contents of the public offering statement that is subsequently recorded".
- Section 4:** Immediate effective date.

ED3:03/25/02

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 470(L&C)  
 (H) Publish Date: 3/13/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
 Title Common Interest Ownership BRU Banking, Securities, & Corporations (115)  
 Component Banking, Securities, & Corporations  
 Sponsor Representative Rokeberg  
 Requester House Labor & Commerce Component No. 1233

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 RSS						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The proposed legislation deals with common ownership property - condominiums, cooperatives, etc. - and would require certain disclosures to be made in writing 15 days before a consumer signs a contract or the consumer can cancel within 15 days after the disclosures are received. Any preliminary disclosure would only meet the bill's requirements if it "reasonably reflects" the disclosure subsequently filed for record.

The division does not anticipate any fiscal impact with the proposed legislation.

Prepared by: Franklin T. Elder, Division Director Phone 465-2521  
 Division Banking, Securities, and Corporations Date/Time 3/4/02 2:02 PM  
 Approved by: Deborah B. Sedwick, Commissioner Date 3/4/2002  
 Agency Department of Community & Economic Development

**Sec. 34.08.530. Public offering statements generally.**

(a) Except as provided in (b) of this section, a public offering statement must fully and accurately contain or disclose

(1) the name and principal address of the declarant and of the common interest community and indicate whether the common interest community is a condominium, cooperative, or planned community;

(2) a general description of the common interest community, including, in a building constructed for residential purposes with horizontal boundaries, the area of the interior surface of floors available for residential purposes and, to the extent possible, the types, number, and declarant's schedule for the commencement and completion of construction of buildings and amenities that the declarant anticipates including in the common interest community;

(3) the number of units in the common interest community;

(4) copies and a brief narrative description of the significant features of the declaration, other than plats and plans, and

(A) any recorded covenants, conditions, restrictions, and reservations affecting the common interest community;

(B) the bylaws and any rules or regulations of the association;

(C) copies of any contracts and leases to be signed by purchasers at closing; and

(D) a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under AS 34.08.360;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser, and the current budget of the association, the name of the person who prepared the budget, and a statement of the budget's assumptions concerning occupancy, assumptions concerning the calculation of the amount of reserves certified by a certified architect or engineer, and inflation factors, including, without limitation,

(A) a statement of the amount included in the budget as a reserve for repairs and replacement including the estimated cost of repair or replacement cost and the estimated useful life of the asset to be repaired or replaced;

(B) a statement of any other reserves;

(C) the projected common expense assessment by category of expenditures for the association; and

(D) the projected monthly common expense assessment for each type of unit;

(6) any services not reflected in the budget that the declarant provides, or expenses that the declarant pays and that the declarant expects may become a common expense of the association at a subsequent time and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of liens, defects, or encumbrances on or affecting the title to the common interest community;

(9) a description of financing offered or arranged by the declarant;

(10) the terms and significant limitations of warranties provided by the declarant, including statutory warranties and limitations on the enforcement of the warranties or on damages;

(11) a statement that

(A) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant;

(B) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, the purchaser may recover from the declarant 10 percent of the sales price of the unit plus 10 percent of the share, proportionate to the common expense liability of the unit, of any indebtedness of the association secured by security interests encumbering the common interest community; and

(C) a purchaser who receives the public offering statement more than 15 days before signing a contract cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the common interest community of which a declarant has actual knowledge;

(13) a statement that a deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract under AS 34.08.580, together with the name and address of the escrow agent;

(14) any restraints on alienation of any portion of the common interest community and any restrictions

(A) on use, occupancy, and alienation of the unit; and

(B) on the amount for which a unit may be sold or on the amount that may be received by a

unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) current or expected fees or charges to be paid by a unit owner for the use of the common elements and other facilities related to the common interest community;

(17) the extent to which financial arrangements have been provided for completion of improvements that the declarant is obligated to build under AS 34.08.690;

(18) a brief narrative description of zoning and other land use requirements affecting the common interest community;

(19) each unusual and material circumstance, feature, or characteristic of the common interest community and the units; and

(20) in a cooperative,

(A) whether each unit owner will be entitled, for federal, state, and local income tax purposes, to a pass-through of deductions for payments made by the association for real estate taxes and interest paid the holder of a security interest encumbering the cooperative; and

(B) a statement as to the effect on each unit owner if the association fails to pay real estate taxes or payments due the holder of a security interest encumbering the cooperative.

(b) If a common interest community composed of not more than 12 units is not subject to any development rights and power is not reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may but need not include the information required by (a)(9), (10) and (15) - (19) of this section and the narrative descriptions of documents required by (a)(4) of this section.

(c) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section.

(§ 1 ch 95 SLA 1985)

# Land's End Resort®

Representative Norm Rokeberg  
Alaska Legislature  
House of Representatives  
716 West 4th Ave. Suite 350  
Anchorage, AK. 99501

February 26, 2002

Dear Representative Rokeberg:

After three years of planning and permitting, Land's End Resort started development of luxury townhomes adjacent to Land's End Resort on the Homer Spit in spring 2000. We have a permit to build up to 21 units, with a total project value in excess of \$10 million. As condominiums, the project is controlled by the Uniform Common Interest Ownership Act (AS 34.08).

We completed and sold the first phase of three units in 2000, and the second phase of three units is under construction. We have employed all local labor and purchased materials locally, much of which has occurred in the shoulder months when jobs are scarce.

During the first phase, we learned of a glaring deficiency or lack of clarity in state statutes which threatens our project, indeed any project similar to ours. This uncertain language places an unforeseen and unreasonable level of risk on developers and lending institutions. Through simple clarification of language in the statute we can eliminate this uncertainty to everyone's benefit, while maintaining 100% of the consumer protection and standards of disclosure intended by existing statutes.

AS 34.08.580 provides that a purchaser of a condominium, prior to conveyance of title, may cancel a purchase agreement within 15 days of receipt of a Public Offering Statement (POS). Such cancellation is without penalty and each payment made by the purchaser before cancellation must be refunded promptly to the purchaser. This provision is designed to ensure full disclosure of all matters effecting title and finances and to allow a buyer 15 days to read and understand these facts before a purchase agreement becomes binding.

The deficiency in existing statutes is this: much of what statutes require to be disclosed within the POS cannot be precisely defined until after construction. Therefore, to be 100% compliant, a POS cannot technically be complete and delivered to a buyer until after their unit is built. Statutes give the buyer 15 days after delivery of the POS to cancel the agreement without penalty--clearly an unreasonable burden for the developer.

The law is not clear that a "draft" or preliminary POS which contains all the required disclosures, except those which cannot physically be concluded until after construction, is legally sufficient to meet the intent of AS 34.08.580. Developers deserve the security of a binding contract and cash deposit prior to constructing a \$500,000 custom home. Interim lenders require high levels of security prior to issuing construction loans. It makes sense that a POS can be issued prior to construction.

Representative Norm Rokeberg  
Page 2  
2/26/02

Existing statutes reflect the situation in the early 1980's, when large condominium complexes were pre-built with only a portion of the units pre-sold. Developers at that time were not increasing their risk with each additional purchase agreement, since the units were already constructed. Since the units were pre-designed and built, the POS could contain precise allocations based on as-built surveys.


With Land's End Lodges, each unit is custom built to owner's specifications. They must be pre-sold and financially guaranteed to avoid the risk to the developer of building something which the purchaser can cancel without penalty after construction.

AS 34.08.600 clearly contemplates that buyers will be executing purchase agreements prior to actual construction. However, the wording of the existing statute is sufficiently vague as to cast doubt over the legality of issuing a POS anytime prior to completion of the unit without the precise allocations, floor plans and final corresponding budget numbers which are derived from the final as-built survey. This casts uncertainty over the validity of the 15 day right of cancellation within the contract, which in turn casts doubt over the entire development.

The simple solution to this uncertainty is to clarify that developers may issue a POS prior to construction and final as-built survey, provided the disclosures are based on the most accurate data available and are substantially the same as those contained in the final recorded Declaration and as-built survey.

Thank you for your help on this matter. I am confident that this clarification will be welcome by any one familiar with condominium development, as well as by those who seek to promote fair and honest trade practices.

Sincerely,

  
Jon Faulkner  
Land's End Resort



ALASKA ASSOCIATION OF REALTORS, INC.  
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503  
Telephone 907-563-7133 • Fax 907-561-1779

March 4, 2002

MAR 04 2002

Representative Norm Rokeberg  
State Capitol  
Juneau, Alaska 99801-1182

RE: HB 470 – An Act relating to common interest ownership; and providing for an effective date

Dear Representative Rokeberg,

The Alaska Association of REALTORS with over 1,100 members statewide supports House Bill 470 which would currently put into practice in regards to public offering statements for condominium developments and would make is possible for high-end units to obtain financing.

The Association is in favor of the provisions provided in this bill to keep the business of building custom condominium units available as an option for a purchaser.

The Alaska Association of REALTORS encourages the passage of House Bill 470.

Sincerely,

Don McKenzie  
President





**ALASKA STATE  
HOMEBUILDERS ASSOCIATION**

March 12, 2002

**MAR 13 2002**

Norm Rokeberg

Dear Mr. Rokeberg;

The Alaska State Home Builders is made up of a diverse group of people statewide numbering over 800 members. March 5th our Board of Directors met in Juneau and unanimously agreed to support the two fast-track items in HB 470. During our hill visits March 6<sup>th</sup> to facilitate our viewpoint we handed out our position paper to your office and several others.

This is the official position of the Alaska State Home Builders Association. We appreciate all of your work on this important construction industry issue.

Sincerely,

**Jim Ward  
President  
Alaska State Home Builders Association**

**Alan Wilson  
Legislative Co-chair**

**Robin Ward  
Legislative Co-chair**



**HB**

**471**

# Alaska State Legislature

WHILE IN SESSION  
CAPITOL BUILDING  
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BUDGET SUBCOMMITTEES:  
ALASKA COURT SYSTEM  
DEPT. OF CORRECTIONS  
DEPT. OF LAW

## Representative Joe Green

District 10

### Sponsor Statement for House Bill 471

House Bill 471 proposes changes to the Alaska Industrial Development and Export Authority (AIDEA) statutes relating to the computation of the AIDEA dividend and the eligibility requirements for AIDEA's Rural Development Initiative Fund (RDIF) program. The House C&RA committee amended House Bill 471 to include a proposal to increase the maximum loan amount for the Alaska Energy Authority's (AEA) Bulk Fuel Revolving Loan Fund.

The change to the dividend statute results in a status quo dividend formula necessitated by accounting and reporting changes. Under current state law, AIDEA pays an annual dividend to the State of Alaska's General Fund, the amount of which is based on the agency's "net income" and "unrestricted net income." Alaska Statutes define these two terms as the "net income" and "unrestricted net income" included in AIDEA's audited financial statement.

New standards adopted by the Governmental Accounting Standards Board (GASB) provide that audited financial statements, such as the one produced by AIDEA, will no longer include the terms for either "net income" or "unrestricted net income." This eliminates the reference used by current statutes to define the two terms.

In addition, the new GASB standards also require that intergovernmental transfers, capital contributions and grants be included as either a revenue or expense of the governmental entity. AIDEA's dividend payments to the state will be included as an expense, causing a further reduction of the agency's "net income," and resulting in an automatic reduction of the potential dividend.

Since its inception, AIDEA has provided \$128 million in dividends, including the dividend that will be paid to the state for fiscal year 2003. In order to preserve this important source of general fund revenue, HB 471 makes the necessary changes in response to the new accounting requirements. The bill addresses both issues by defining "net income" and "unrestricted net income" using the terms to be found in future audited financial and excluding amounts attributable to intergovernmental transfers, capital contributions and grants.

AIDEA's RDIF program was designed to make commercial loans to rural businesses that did not have other financing options because of their location. HB 471 reinserts the definition of "community" and further clarifies the definition to ensure that the loans are going to the intended recipients, those who are in truly rural communities. The amended standards specify that qualifying participants must be in communities of less than 5,000 people if they are not connected to Anchorage or Fairbanks by road, rail or the Marine Highway, and less than 2,000 people if they are connected to Anchorage or Fairbanks by road or rail.

129611 to State G. R.

Finally, this legislation increases the maximum loan amount from the Bulk Fuel Revolving Loan Fund to \$200,000 per loan. In rural Alaska, communities purchase their fuel in bulk because it costs less to buy larger quantities of fuel than to buy in smaller increments, and the window for transporting fuel is seasonal. The 150 communities off the road system have to purchase their fuel to secure its delivery in a single shipment, working around Alaska's notorious cold weather and freezing conditions that drastically limit transportation options. This program is in high demand in rural communities. Petroleum price increases and increases in bulk fuel tank farm capacity in many communities have made the current limit of \$100,000, which was enacted in 1993, too low to accommodate the needs of many borrowers. AEA has received legislative authorization to capitalize the BFRLF with a \$5 million federal grant. This grant is expected to be finalized in April.

**HB 471**  
**AIDEA Bill**  
**Sectional Analysis**

**Sections 1 and 2 – AIDEA's Dividend Program.** Sections 1 and 2 of the bill amend definitions used in the statutory guidelines for the AIDEA dividend program to accommodate recent changes in governmental accounting and reporting standards. Section 1 amends the definition of "net income" and section 2 amends the definition of "unrestricted net income." Additionally, Section 4 of the bill is a transitional provision that clarifies that the amendments made in section 1 and 2 will become effective for the dividend calculated from AIDEA's audited financial statements for fiscal year 2002 - - the first audited financial statements after these changes in governmental accounting standards become effective.

**Background.** Since its inception, AIDEA has provided \$128 million in dividends, including the dividend AIDEA in December 2001 declared available to the state for fiscal year 2003. AS 44.88.088 provides statutory guidelines for AIDEA's dividend policy. AIDEA is to provide to the state a dividend of between 25 percent and 50 percent of AIDEA's net income for the base fiscal year, but in no event may the dividend exceed AIDEA's unrestricted net income for the base fiscal year.

AS 44.88.088(b) defines "net income" and "unrestricted net income" used in the statutory guidelines for AIDEA's dividend policy to be the amount of net income and unrestricted net income that are set out in the audited financial statements of AIDEA. AIDEA's audited financial statements comply with standards adopted by the Governmental Accounting Standards Board (GASB). Two recent changes to these governmental accounting and reporting standards alter or create ambiguity regarding how the statutory guidelines for AIDEA's dividend program would be implemented.

First, GASB Statement 34 provides that audited financial statements will no longer report any amount for either "net income" or "unrestricted net income." Without those amounts reported in AIDEA's audited financial statements, AS 44.88.088 will no longer provide clear instruction to the Board for determining the amount of the AIDEA dividend. This ambiguity will compel the Board either to attempt to calculate what

the "net income" and "unrestricted net income" would have been without GASB Statement 34, or to declare no dividend as the audited financial statements will include no amount for "net income."

Second, GASB Statement 33 requires that grants be included as either revenue or expense of the governmental entity. GASB Statement 34 requires that intergovernmental transfers be included as components of the Statement of Revenues, Expenses and Changes in Fund Net Assets. These accounting modifications will alter the calculation of AIDEA's future dividends. For example, the amount appropriated from any AIDEA dividend will be an intergovernmental transfer item that will reduce "net income" for that fiscal year. This reduction of "net income" will simultaneously reduce the amount of the AIDEA dividend that will be calculated from the audited financial statement for that fiscal year. For the first time, the payment of an AIDEA dividend will automatically reduce the amount of a future dividend.

The amendments proposed in sections 1 and 2 neutralize the impact the recent changes to governmental accounting and reporting standards in GASB Statements 33 and 34 would otherwise have on the AIDEA dividend program.

**Section 3 – Rural Development Initiative Fund Program.** Section 3 of the bill modifies AIDEA's rural development initiative fund program (RDIF) by making RDIF available to businesses located in communities with populations of less than 5,000 if not connected by road or rail to Anchorage or Fairbanks, or to businesses in communities with populations of less than 2,000 if connected by road or rail to Anchorage or Fairbanks. Section 3 of the bill also provides definitions for terms.

**Background.** The intent of the RDIF program is to provide commercial financing to businesses in the rural areas of Alaska that do have access to standard commercial financing because of their location. While the statutory language refers to businesses located in a community of 5,000 or less, the definition of community was dropped over the years. This definition more clearly sets forth the intent of the program and will allow users of the program to use established references for determining eligibility.

**Section 4 – AIDEA's Dividend Program.** Section 4 is a transitional provision that clarifies that the amendments to the statutory guidelines for AIDEA's dividend program under sections 1 and 2 of the bill will first be used for the dividend to be calculated from AIDEA's audited financial statement for fiscal year 2002.

**Background.** Sections 1 and 2 of the bill amend definitions of terms used in the statutory guidelines for the AIDEA dividend program in order to neutralize the impact of changes made in governmental accounting and reporting standards under GASB Statements 33 and 34. These provisions first become effective for the audited financial statements of AIDEA that will be prepared for fiscal year 2002. The transitional provision clarifies that the amendments will be effective for dividend to be calculated from that fiscal year 2002 audited financial statement.

**Section 5 – Effective Date.** Section 5 of the bill provides for an immediate effective date.

# Alaska State Legislature

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Representative Joe Green  
District 10

## MEMORANDUM

To: Senator Ben Stevens  
Chair, Senate Labor & Commerce  
From: Representative Joe Green  
Date: May 2, 2002  
RE: HB 471

House Bill 471 is scheduled to be heard tomorrow in Senate Community & Regional Affairs. I anticipate no problems with its passage and would ask if HB 471 can be tentatively scheduled pending referral. This is an important bill to get through this session – fiscally it gives \$20,149,500 to our general fund. Attached are:

1. HB 471
2. Sponsor Statement
3. Fiscal Note
4. Background information and summary

If you have any questions, please do not hesitate to contact my aide Jessica Menendez at ext. 4920

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: CSHB 471(CRA)  
(H) Publish Date: 3/27/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: DCED  
Title AIDEA Programs BRU AIDEA (125)  
Component AIDEA  
Sponsor Representative Green  
Requester House Community & Regional Affairs Component No. 1234

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

HB 471 modifies the Alaska Industrial Development and Export Authority dividend policy statutes to reflect recent changes in governmental accounting standards. The bill also clarifies eligibility for the Rural Development Initiative Fund.

HB 471 has no fiscal impact to AIDEA.

Prepared by: Sara Fisher-Goad, Financial Analyst Phone 907-269-4623  
Division Alaska Industrial Development & Export Authority Date/Time 3/22/02 2:33 PM  
Approved by: Deborah B. Sedwick, Commissioner Date 3/22/2002  
Agency Department of Community & Economic Development

**HB**

**472**

# Alaska State Legislature

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## Representative Joe Green

District 10

### **Sponsor statement for House Bill 472**

"An Act relating to persons who buy and sell secondhand articles and to certain persons who lend money on secondhand articles."

When property is stolen, one of the ways the thief can profit from the items they have taken is by selling them to a pawnshop or secondhand dealer. Dealers don't want stolen merchandise in their stores, but it is easy for a thief to appear to be the true and rightful owner of the item in question.

Alaska Statutes require that secondhand dealers, including pawnshops, keep records of the items that they receive and that these records be open to any law enforcement agency that asks to see them. When municipal police or state troopers receive reports of stolen goods they can then match them to the records, helping return stolen items to their rightful owners and identify the thief. Unfortunately, this system requires a lot of time on the part of the officers, and it is not unusual for the property to have been sold by the dealer or pawnshop before it has been identified as stolen.

House Bill 472 addresses this problem by requiring that secondhand dealers and pawnshops provide bi-weekly reports to their local police department or state troopers listing any items they have received that have a serial number, a resale value of \$75 or more, or are sold or pawned in a lot of ten or more, excluding books. This will make the process much more efficient because officers will not have to go to all the individual locations looking for stolen items.

The bill changes current statute to allow records to be kept by computer, and directs the Department of Public Safety to establish a form or format for the bi-weekly reports. The bill also requires that items that a pawnbroker buys from an individual or takes in pawn be held for 30 days to allow law enforcement agencies time to review the reports and identify stolen items.

STATE OFFICE  
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



**Business Manager**

Joseph Young  
Anchorage

**Board of Directors**

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Anchorage

Chuck Kopp, Vice President  
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Terry Games, Member  
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Angella Long, Member  
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Craig  
Pres. Prince of Wales Chapter

John Lucking, Jr., Member  
Unalaska  
Pres. Aleutian Islands Chapter

Thecla LaLonde, Member  
Wrangell  
Pres. Wrangell Chapter

March 29, 2002

Representative Joe Green  
State Capitol  
Juneau, AK 99801-1182

Dear Representative Green:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing House Bill 472 relating to persons who buy and sell secondhand articles and to certain persons who lend money on secondhand articles.

The Alaska Peace Officers Association fully supports HB 472. Requiring weekly reports from pawnshops will help law enforcement authorities identify stolen property on a timely basis before it is resold. The additional requirement of a physical description of the person pawning an item will enable prosecution of those persons who use fraudulent ID cards when conducting these transactions.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo Brandlen  
State President

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: CSHB 472(JUD)  
 (H) Publish Date: 4/22/02  
 Dept. Affected: DPS  
 BRU: Statewide Support  
 Component: APSIN

Revision Date/Time (Note if correction) \_\_\_\_\_  
 Title: Secondhand Articles  
 Sponsor: Representative Green  
 Requester: House Judiciary  
 Component No.: 528

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
O'her (Specify Type)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The bill requires pawnbrokers to make manual or automated records available to police or AST. Nothing in the bill requires DPS to create or maintain a statewide or centralized database, convert manual records into electronic data, process or produce reports based on pawnbroker data, or assist or evaluate pawnbrokers in selecting or using pawnbroker computer applications/systems. DPS' Information Systems is not required and does not plan to assign any resources to pawnbroker recordkeeping or information systems.

Prepared by: Diane Schenker Phone (907) 465-4336  
 Division: Administrative Services Date/Time 2/26/02 12:00 AM  
 Approved by: Commissioner Glenn G. Godfrey Date 4/12/02  
 Agency: Department of Public Safety

For distribution information, call the Governor's Legislative Office

**HB**

**480**

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 480(STA)  
 (H) Publish Date: 3/20/02

Revision Date/Time \_\_\_\_\_ Dept. Affected: Administration  
 Title "An Act providing the death of state employee killed BRU Centralized Administrative Services  
because of their job be occupational for pension purposes Component Retirement & Benefits  
 Sponsor Rep Dyson  
 Requester House State Affairs Component No. 64

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation allows the retirement system to pay an occupational death benefit to the survivor of an employee whose death was caused by an act of assault, assassination or terrorism directly related to the employee's status as a state employee - whether or not the death was on the job.

This legislation will have no impact on the retirement system.

Prepared by: Guy Bell  
 Division: Retirement & Benefits  
 Approved by: Jim Duncan, Commissioner  
 Agency: Department of Administration

Phone 465-2292  
 Date/Time March 4, 2002  
 Date 3/4/2002



Alaska State Legislature

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Alaska State Capitol  
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FAX (907) 465-4587

Toll free (800) 342-2199

## REPRESENTATIVE FRED DYSON

### HB 480 Sponsor Statement

#### "An Act relating Survivor Benefits"

Updated: March 18, 2002 (CSHB 480 (STA))

Contact: Representative Fred Dyson's office at (907) 465-2199

We have State of Alaska employees who are at varying levels of risk of assault because of the very nature of their work. Family caseworkers, investigators, building inspectors, and even teachers, have responsibilities that cause some citizens to have misdirected anger and resentment.

Our state laws allow for occupational death benefits for the families of Public Employees' Retirement System (PERS) and Teacher Retirement System (TRS) when employees are killed while in the performance, and within the scope of, their duties.

However, the family of an employee that is killed off their job site, or off duty, but because of their work, would only be eligible to receive lesser non-occupational death benefits.

HB 480 corrects this oversight by providing occupational death benefits for the families of these state employees.

- E-mail -  
Representative\_Fred\_Dyson  
@Legis.state.ak.us

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

**HB**

**499**

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: CSHB 499(JUD)  
(H) Publish Date: 4/22/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Community & Econ. Dev.  
Title: Disposition of Business Assets BRU: Banking, Securities & Corporations (115)  
Component: Banking, Securities & Corporations  
Sponsor: House Judiciary  
Requester: House Judiciary Component No. 1233

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1156 RSS						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill allows corporations and other types of business entities to dispose of all or substantially all of their property and assets without having the buyers assume responsibility for the sellers' liabilities, unless the buyers expressly assume those liabilities.

The division does not anticipate any fiscal impact with the proposed legislation.

Prepared by: Franklin T. Elder, Division Director Phone 465-2521  
Division: Banking, Securities and Corporations Date/Time 3/8/02 2:31 PM  
Approved by: Commissioner Deborah B. Sedwick Date 3/8/2002  
Agency: Department of Community & Economic Development

# ALASKA STATE LEGISLATURE

## HOUSE JUDICIARY COMMITTEE

Representative Norman Rokeberg, Chairman  
Representative Scott Ogan, Vice-Chairman  
Representative John Coghill  
Representative Jeannette James  
Representative Kevin Meyer  
Representative Ethan Berkowitz  
Representative Albert Kookesh



State Capitol  
Juneau, AK 99801-1182  
Telephone: (907) 465-4990  
Fax: (907) 465-2040

Heather M. Nobrega  
Counsel to Committee

### Sponsor Statement for HB 499 (JUD)

It is vitally important to Alaska commerce and business that a corporation, partnership or other entity that purchases assets from another company or business not be held legally responsible for the liabilities of the selling business, unless expressly agreed to by the purchasing company. However, the Alaska Supreme Court, in an interim ruling last year in *Savage Arms, Inc v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001), held otherwise under the doctrine of successor liability as it relates to products liability, and remanded the case to trial consistent with its opinion.

Generally, when one company sells all its assets to another, the acquiring corporation or company is not liable for the debts and liabilities of the selling company. Contrary to this rule, the Alaska Supreme Court adopted two theories of successor liability in cases of products liability, "mere continuation" and "continuity of enterprise." These theories are exceptions to the general rule, and allow a purchasing company to be held responsible for the product liabilities of the selling company, including those that may have been unknown at the time of the sale. While the "mere continuation" theory is a commonly recognized exception, the Supreme Court acknowledged that "continuity of enterprise" has been rejected by the *American Law Institute: Restatement (Third) of Torts*, and a vast majority of courts that have decided the issue.

The Supreme Court stated it was deciding the issue of successor liability because "...neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case..." The *Savage Arms* case is set for trial in November 2002, and before the Supreme Court's ruling becomes final following trial and appeal, we seek to respond to the invitation of the Supreme Court and fill the legislative void and declare the law of Alaska on this subject.

HB 499 specifically addresses successor liability as it relates to products liability. The bill expressly rejects the continuity of enterprise exception adopted by the Supreme Court and adopts the generally recognized exceptions to the doctrine of successor liability as listed in the Restatement of Torts. Those four exceptions are: (1) the successor expressly assumed the liability; (2) the transfer was a fraudulent conveyance; (3) the transfer constituted a consolidation or merger; or (4) the transfer was a mere continuation of the predecessor.

We believe this legislation will prevent inequities that will otherwise occur to the purchaser of assets who would be exposed to liabilities they did not anticipate and to sellers of assets who may receive less than fair market value if the purchaser must discount the purchase price to factor in unknown and unwanted liabilities.

This bill is expressly made retroactive so there will be uniformity of application.

The committee urges your support of this bill.

# ALASKA STATE LEGISLATURE

## HOUSE JUDICIARY COMMITTEE

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### Sectional Analysis for HB 499 (JUD)

- Section 1:** Legislative intent section indicating the intent of the bill is to reject the continuity of enterprise theory adopted by the Alaska Supreme Court.
- Section 2:** Creates a new provision in the Code of Civil Procedure listing the only exceptions to the general rule of successor liability.
- Section 3:** The provisions of the bill are applied retroactively.

*Savage Arms, Inc*  
*v.*  
*Western Auto Supply Co.*

statute of limitations has run, it is allowable if it "relates back" to the date of a timely original pleading.<sup>24</sup>

Civil Rule 15(c) sets out the circumstances under which an amended pleading will relate back to the original pleading:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.<sup>25</sup>

According to this standard, Hebert's second amended complaint will relate back to her timely November 1995 complaint against Honest Bingo if (1) the claim asserted against FDA arises out of the same transaction or occurrence set forth in the initial complaint; (2) FDA received sufficient notice such that it would not be prejudiced in maintaining its defense on the merits; (3) FDA knew or should have known that it would have been included as a party in the original complaint but for a mistake concerning its identity; and (4) FDA received notice and

24. See *Siemion v. Rumpfelt*, 825 P.2d 896, 898-99 (Alaska 1992).

25. Alaska R. Civ. P. 15(c).

26. See generally *West v. Buchanan*, 981 P.2d 1065, 1068-71 (Alaska 1999). Several federal courts have held that amendments in which a plaintiff replaces a "John Doe" defendant with a named defendant are considered amendments to add new parties and will relate back only when the conditions of Rule 15(c) are satisfied. See 6A Wright & Miller, *supra* § 1498, at 105-06; see also *Craig v. United States*, 413 F.2d 854 (9th Cir.1969).

knew or should have known that, but for a mistake concerning its identity, it would have been included as a party within "the period provided by law for commencing the action against" it.<sup>26</sup>

Given the fact-intensive nature of the Rule 15(c) "relation back" test, FDA can prevail on its Rule 12(c) motion only if the undisputed facts on the face of the pleadings clearly show that Hebert's second amended complaint cannot possibly relate back to her earlier timely complaint against Honest Bingo. But the relation back issue presents the following disputed fact questions, which prevent resolution on a motion for judgment on the pleadings: whether FDA received sufficient notice of Hebert's lawsuit within the limitations period and whether FDA knew or should have known that, but for a mistake concerning identity, it would have been included as a party within the applicable period.<sup>27</sup>

It is not clear from the pleadings whether FDA did or did not receive sufficient notice of Hebert's claim within the limitations period. Hebert's complaint asserted that the nature of the named business entities was unknown. It also included the permittee of the bingo game as a John Doe defendant. Hebert's amended complaint states that FDA "is one of the three permittees jointly operating Honest Bingo" and that FDA "was in fact receiving the benefits of the operation of the bingo game at the time and place in question." This statement alleges the existence of a close business relationship between Honest Bingo and FDA, or possibly a joint venture or partnership.<sup>28</sup> While admitting that

27. The parties do not dispute that the first requirement—that the claim against FDA arise out of the same basic claim in the complaint against Honest Bingo—is satisfied.

28. Hebert may have available to her a second avenue for relief. If she can demonstrate that Honest Bingo was a partnership or a joint venture of which Monroe Foundation and FDA were partners or joint venturers, it may not be necessary for the second amended complaint to relate back to the original complaint since service of the timely original complaint on Honest Bingo or the Monroe Foundation may be found sufficient to constitute service on FDA. See Alaska R. Civ. P. 4(d)(5); *Coleman v. Lofgren*, 593 P.2d 632, 634 (Alaska 1979).

Cite as 18 P.3d 49 (Alaska 2000)

it is a permittee for bingo games, FDA denied the allegations of jointly operating Honest Bingo and of receipt of benefits of the operation. Viewing the facts in the light most favorable to Hebert, as we must for the purposes of the motion, it is clear that the existence of some type of close business relationship is alleged.

A fact question also exists as to whether FDA knew or should have known that but for a mistake in identity, it would have been named as a party within the applicable limitations period. As an organization under whose permit the Honest Bingo game was run, FDA may have had notice of the complaint filed against Honest Bingo and the Monroe Foundation and consequently may or should have known that it was one of the "John Does" referred to in the initial complaint against Honest Bingo. Similarly, without further evidence, we are unable to determine whether FDA either knew or should have known that it was intended as a party in the suit prior to March 27, 1996, the one hundred twentieth day after filing of the original complaint.<sup>29</sup>

The pleadings on their face cannot reveal whether Hebert's second amended complaint relates back to the initial timely complaint filed against Honest Bingo. And determining whether FDA meets the standard for relation back involves a triable issue of fact. We therefore cannot affirm the granting of FDA's Rule 12(c) motion.<sup>30</sup>

[13] "The court either may consider a motion for judgment on the pleadings at a preliminary hearing as provided by Rule 12(d) or may postpone its determination until trial."<sup>31</sup> We conclude that where appropriate and when a motion for judgment on the pleadings is brought on the basis of the affirmative defense of statute of limitations,

29. See Alaska R. Civ. P. 4(j) (allowing 120 days after filing for service of process). The record shows that by October 31, 1996, FDA had refused to participate in settlement negotiations, but the record is silent as to how long before that time FDA was aware of Hebert's claims.

30. A Civil Rule 12(c) motion can be converted into a Rule 56 motion for summary judgment when the trial judge considers materials outside the pleadings. See Alaska R. Civ. P. 12(c). However, here the superior court explicitly stated that

the interests of justice are best served if the trial court considers the motion at a preliminary hearing instead of waiting until trial.

## V. CONCLUSION

Because fact questions exist as to whether Hebert's second amended complaint bringing FDA into the lawsuit related back to her initial complaint against Honest Bingo, FDA was not entitled to judgment on the pleadings under Rule 12(c). We therefore REVERSE the decision of the superior court and REMAND for proceedings consistent with this opinion.



SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY  
CO., Respondent.

Nos. 8612, 8721, 8611.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Father brought products liability action against manufacturer and distributor of allegedly defective rifle, seeking recovery for injuries sustained by his minor son when rifle misfired. Distributor filed third-party complaint seeking indemnification from manufacturer's successor. The Superior Court, Third Judicial District, Kenai, Jonathan H. Link, J., concluded that law of Alaska governed suc-

It did not consider matters outside the pleadings. Even if this court were to consider the additional materials contained in the record, it is still unclear whether FDA had notice of Hebert's lawsuit and knew or should have known that it would have been initially included as a defendant if Hebert had been aware of its identity.

31. 5A Wright & Miller § 1367, at 517. See *Pedersen v. Zielski*, 822 P.2d 903, 907 n. 4 (Alaska 1991).

cessor liability issue, entered judgment in favor of distributor on its third-party claim, and denied successor's motion to substitute distributor's insurers for distributor as real parties in interest. Successor petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) law of Alaska governed issue of liability of rifle manufacturer's successor; (2) genuine issues of material fact existed as to whether successor was liable for injuries caused by rifle; and (3) distributor's insurers were proper parties to prosecute third-party indemnity claim.

Reversed and remanded.

### 1. Appeal and Error $\S$ 842(1)

The appropriate choice of law is a legal question to which the Supreme Court applies its independent judgment.

### 2. Appeal and Error $\S$ 842(1)

The Supreme Court answers legal question of first impression by adopting the rule of law that is most persuasive in light of precedent, reason, and policy.

### 3. Appeal and Error $\S$ 863

The Supreme Court will affirm a grant of summary judgment only if the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

### 4. Appeal and Error $\S$ 893(1), 949

Generally the Supreme Court will review rulings on joinder and ratification for abuse of discretion, but will review de novo the underlying legal questions, such as whether a party is a real party in interest.

### 5. Action $\S$ 27(1)

In the context of a claim that a defective product has caused personal injury, successor liability is most appropriately characterized as a torts question.

### 6. Weapons $\S$ 18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alas-

ka, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

### 7. Corporations $\S$ 445.1

Generally, when one corporation sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.

### 8. Corporations $\S$ 445.1, 590(1)

There are four exceptions to the general rule of non-liability of successor corporations: (1) the purchaser has expressly or implicitly agreed to assume liability; (2) the asset purchase amounts to a consolidation or merger; (3) the purchasing corporation is a "mere continuation" of the selling corporation; or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.

### 9. Corporations $\S$ 445.1

Liability will be imposed on a successor corporation for the debts and liabilities of the selling company under the mere continuation exception where the successor continues to use the seller's name, location, and employees, and there exists a common identity of stockholders and directors.

### 10. Corporations $\S$ 445.1

The "mere continuation" exception to successor nonliability is available to claimants seeking to impose liability on a successor corporation for defective products manufactured by the predecessor.

### 11. Corporations $\S$ 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, a successor corporation may be held liable for injuries caused by its predecessor's defective products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.

### 12. Corporations $\S$ 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, the successor corporation may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.

### 13. Corporations $\S$ 445.1

The key factors under the "continuity of enterprise" exception are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity.

### 14. Judgment $\S$ 18(15.1)

Genuine issues of material fact existed as to whether rifle manufacturer's successor was liable for injuries caused by misfire of allegedly defective rifle, precluding summary judgment on third party indemnification claim filed against successor by distributor in connection with underlying products liability action.

### 15. Evidence $\S$ 244(7)

Statements attributed to successor corporation's chief executive officer that successor corporation held itself out to world as legal successor to rifle manufacturer whose assets it purchased were non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in connection with underlying products liability action against distributor and manufacturer. Rules of Evid., Rule 801(d)(2).

### 16. Evidence $\S$ 244(7), 318(1)

To extent journal articles were offered to prove truth of assertion that statements attributed to chief executive officer, that corporation held itself out to world as legal successor to rifle manufacturer, were in fact made by officer, authors of articles were the declarants, and such articles could not qualify as non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in underlying products liability; if articles were offered for their truth on remand, trial court would have to address author-as-declarant issue. Rules of Evid., Rule 801(d)(2).

### 17. Indemnity $\S$ 15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manu-

facturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

Theodore M. Pease, Jr., and Michael W. Sewright, Burr, Pease & Kurtz, Anchorage, for Petitioner.

James M. Powell and Kimberlee A. Colbo, Hughes, Thorsness, Powell, Huddleston & Bauman, LLC, Anchorage, for Respondent.

Before MATTHEWS, Chief Justice,  
EASTAUGH, FABLE, BRYNER, and  
CARPENETI, Justices.

### OPINION

EASTAUGH, Justice.

#### I. INTRODUCTION

Can a corporation that purchases assets of the manufacturer of a rifle sold in Alaska be held liable for personal injury caused in Alaska by a defect in the rifle? The superior court held that it could, and we agree. But we reverse and remand for application of the pertinent successor liability doctrines discussed below. We also hold that the indemnity claim brought by the rifle's distributor against the successor corporation must be prosecuted by the insurers which fully discharged the distributor's personal injury liability.

#### II. FACTS AND PROCEEDINGS

The relevant facts are few. Jack Taylor's minor son suffered personal injuries when a defective .22 caliber rifle discharged during target shooting near Nikiski. Savage Industries, Inc. manufactured the rifle, and Western Auto Supply Company, which claimed to have acquired the rifle from the manufacturer, sold it to a retail store in Maine; the rifle was eventually resold to Jack Taylor in Alaska. Taylor sued Savage Industries in 1990 for his son's injuries; in an amended complaint, he also sought recovery from Western Auto.

Western Auto filed a third-party complaint in its name seeking indemnity from Savage

Arms, Inc., which had purchased assets from Savage Industries in 1989. Western Auto settled with the Taylors in May 1995, and its insurers paid the entire settlement amount.

At issue here are three superior court orders. The first held that Alaska law governs the issue of successor liability. The second granted Western Auto summary judgment against Savage Arms, holding Savage Arms liable as "the legal successor to Savage Industries, Inc." The third denied Savage Arms' motion to substitute Western Auto's insurers for Western Auto as the real parties in interest, but required the insurers to ratify the litigation.

The superior court denied Savage Arms' motions for reconsideration. We granted Savage Arms' petitions for review and ordered full briefing. We review the three orders under AS 22.05.010 and Alaska Rule of Appellate Procedure 402.

### III. DISCUSSION

#### A. Standard of Review

[1-3] The appropriate choice of law is a legal question to which we apply our independent judgment.<sup>1</sup> The scope of successor liability in Alaska is a legal question of first impression, which we answer by adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."<sup>2</sup> In applying rules of successor liability to this case, we will affirm Western Auto's summary judgment only if the record presents no genuine issues of material fact and Western

Auto is entitled to judgment as a matter of law.<sup>3</sup>

[4] Although we generally review rulings on joinder and ratification for abuse of discretion,<sup>4</sup> we review de novo the underlying legal questions,<sup>5</sup> such as whether a party is a real party in interest under Alaska Civil Rule 17(a).

#### B. Choice of Law

Savage Arms challenges the superior court's ruling that Alaska law governs the issue of successor liability. It argues that Texas law should apply because all transactions relevant to its purchase of Savage Industries' assets occurred in Texas. In Savage Arms' view, the case before the court deals with the transaction between Savage Arms and Savage Industries, and the underlying tort does not bear on the choice of law question.<sup>6</sup>

Western Auto defends the superior court's decision, contending that Alaska law should apply because the underlying injury occurred in Alaska. Western Auto also reasons that successor liability is but an extension of products liability law, which is itself a tort doctrine.

Texas statutory and case law seems to disfavor both traditional and modern doctrines of successor liability,<sup>7</sup> but neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case.

tion of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. *See id.* at 700-01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. *See id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

7. See Tex. Bus. Corp. Act Ann. art. 5.10(B)(2) (Vernon 1997); *Mudrett v. Passan Mach. Co.*, 709 S.W.2d 755, 758-59 (Tex.App.1986); see also *McKee v. American Transfer & Storage*, 946 F.Supp. 485, 487 (N.D.Tex.1996). But see *Western Resources Life Ins. Co. v. Gerhardt*, 553 S.W.2d 783, 786 (Tex.Civ.App.1977) (making exceptions for merger, consolidation, and fraud).

We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.<sup>8</sup> The Second Restatement requires a separate choice-of-law analysis for each issue presented.<sup>9</sup> We likewise follow this rule of *dépeçage*,<sup>10</sup> and determine the proper choice of law on the issue of successor liability without regard to other issues in the case.

Before we can address which state's law should apply in this issue, we must first determine whether successor liability is better characterized in terms of contract or tort.<sup>11</sup> In one sense, successor liability derives from corporate and contract law, because it may require the interpretation of the contracts that governed the transfer of assets between corporations. But successor liability is also a creature of tort law when it is claimed that the successor is liable because a product defect has caused injury or death.

Other jurisdictions are split as to whether successor liability should be evaluated using the choice-of-law rules governing tort or contract and contract law. The Fifth Circuit, for example, has held that the law of the

state with the most significant corporate contacts should apply to successor liability questions.<sup>12</sup> The Seventh Circuit held similarly in *Ruiz v. Blentech Corp.*<sup>13</sup> But several federal district courts have explicitly applied the law of the state with the most significant tort contacts,<sup>14</sup> and state courts have split on the question.<sup>15</sup>

[5] We decline to follow the Fifth and Seventh Circuits, because we believe that when a defective product causes personal injury, successor liability is most appropriately characterized as a tort question. Successor liability is essentially an expansion of products liability law, which derives from tort principles of negligence and strict liability, and rejects contract-derived requirements such as privity. The purpose of the modern strict liability regime "is to insure that the cost of injuries resulting from defective products [is] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>16</sup> Treating a successor liability question solely as one of contract law would allow "the party who benefitted from

13. 8 F.3d 320, 326 (7th Cir.1994).

14. See, e.g., *Ede v. Atwater Pump Co.*, 652 F.Supp. 656, 658 n. 1 (D.Colo.1997), *discovered with an different grounds*, *Florum v. Ethos Mfg.*, 867 F.2d 570, 579-80 (11th Cir.1989), *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983); *Kovacs v. Amsted Indus.*, 472 F.Supp. 136, 141-42 (E.D.Mich.1979), *declined to follow on other grounds*, *Johnson v. Ventura Group, Inc.*, 191 F.3d 732, 746 (6th Cir.1999).

15. See, e.g., *In re Asbestos Litigation (Rehl)*, 517 A.2d 697, 699 (Del.Super.1986) (holding that corporate law should apply because key question was legal effect of contracts between corporations); *American Nonwovens, Inc. v. Non Wovens Eng'g. S.R.L.*, 648 So.2d 565, 570 (Ala.1994) (holding that conflict rule for tort cases should apply to corporate successor liability issue). See also David W. Pollak, *Successor Liability in Asset Acquisitions*, 1126 PLI/Corp 85, 107-12 (1999) (discussing different jurisdictions' approaches to choice-of-law issues for successor liability claims).

16. *Caterpillar Tractor Co. v. Buck*, 593 P.2d 871, 878 (Alaska 1979) (quoting *Clay v. Fifth Ave. Chrysler Co., Inc.*, 454 P.2d 244, 248 (Alaska 1969)); see also *Goweman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 900-01 (1963).

8. See, e.g., *Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1227 (Alaska 1995) ("When choice of law issues arise, we commonly refer to the Restatement (Second) of Conflicts for guidance.")

9. See Restatement (Second) of Conflict of Laws § 145 cmt. d (1971) ("The courts have long recognized that they are not bound to decide all issues under the local law of a single state."); *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir.1996) (holding that under the Second Restatement test, "[a] court therefore conducts a separate choice-of-law analysis for each issue in a case, attempting to determine which state has the most significant contacts with that issue.")

10. See Black's Law Dictionary 448 (7th ed.1997) (defining *dépeçage* as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); see also Bryan A. Garner, *A Dictionary of Modern Legal Usage* 2666 (2d ed.1995).

11. See, e.g., *Ruiz*, 89 F.3d at 326 ("[T]he courts of several states have struggled to decide whether [successor liability law] is a part of corporate law or tort law.")

12. See *Wahl v. Rodgers Mach. Mfg. Co.*, 750 F.2d 366, 374 (5th Cir.1985).

the bargain [to] escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated."<sup>17</sup> Such a result would undermine the principles that govern our products liability law. And although Savage Arms argues that the public policy behind products liability law is of "little interest" here because Western Auto purchased liability insurance that fully protected it, Western Auto's suit does not pursue a commercial cause of action. Because Western Auto's insurers settled the personal injury suit, Western Auto now stands in the tort plaintiff's shoes.

Thus, in context of a claim that a defective product has caused personal injury, we think successor liability is more aptly treated as a matter of tort law.

[6] Having determined that successor liability in a products liability context is best characterized as part of the law of tort, we must now decide which state's laws should apply to the case at hand. The Second Restatement states that "with respect to an issue in tort," courts should look to the local law of the state with the "most significant relationship" to the parties and the occurrence.<sup>18</sup> We conclude that Alaska has the most significant tort contacts with this legal issue. We look in particular to the underlying tort action that gave rise to this litigation. Jack Taylor and his son were both Alaska residents when the accident occurred. Taylor purchased the rifle in Alaska, and the rifle was being used here, where its defect injured his son. The defect that injured Taylor's son potentially endangered any person within a lethal vicinity while the rifle was being used in Alaska. Finally, Jack Taylor litigated his suit against Western Auto in Alaska's state courts. Because the relation-

17. *Korsetz*, 472 F.Supp. at 141.

18. See Restatement (Second) of Conflict of Laws § 145(1). To determine the place of most significant relationship, we look to:

- the place where the injury occurred,
- the place where the conduct causing the injury occurred,
- the domicil, residence, nationality, place of incorporation and place of business of the parties, and

ship between the tort litigants is centered in Alaska, Alaska law should govern.

We therefore conclude that the superior court did not err by concluding that Alaska law applies to the issue of successor tort liability.

### C. Successor Liability

Savage Arms challenges Western Auto's summary judgment on the issue of successor liability. It argues that it should not be held liable even if Alaska law applies. This argument raises issues of first impression in Alaska.

[7, 8] Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.<sup>19</sup> Courts have traditionally recognized four exceptions to this rule of non-liability, where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the asset purchase amounts to a consolidation or merger, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.<sup>20</sup> More recently, some courts have recognized three additional "modern" exceptions to the rule of non-liability: the "continuity of enterprise," "product line," and "duty-to-warn" exceptions.<sup>21</sup>

Western Auto argues that we should adopt any one of three different successor liability doctrines in this case: the traditional "mere continuation" exception and the modern "continuity of enterprise" and "product line" exceptions. We first identify which exceptions are available under Alaska law, and then remand for the factual analysis necessary to ascertain whether successor liability is proper in this case under any of the approved

(d) the place where the relationship, if any, between the parties is centered.

*Id.* § 145(2). We evaluate these factors and contacts in light of their "relative importance" to the particular issues in each case. *Id.*

19. See Pollak, *supra* note 15, at 99; see also Richard A. Epstein, *Torts* 400-02 (1999).

20. See Pollak, *supra* note 15, at 100-03.

21. See *id.* at 103-08.

exceptions. The superior court did not specify which exception justified its imposition of successor liability against Savage Arms.

#### 1. The traditional "mere continuation" exception

[9] Courts have traditionally imposed liability on successor corporations where the successor corporation is "merely a continuation" of the selling corporation.<sup>22</sup> The primary elements of the "mere continuation" exception include use by the buyer of the seller's name, location, and employees, and a common identity of stockholders and directors.<sup>23</sup> This well-established exception stems from judicial refusal to honor a transaction which is "little more than a shuffling of corporate forms, lacking any fundamental change with independent significance."<sup>24</sup>

[10] The "mere continuation" exception is available to claimants seeking to impose liability on a successor corporation for products manufactured by a predecessor. Although Savage Arms argues that we should not adopt this exception, we disagree, because this is a well-recognized exception, and we see no reason to reject its application here. We therefore hold that it is available under Alaska law.

#### 2. The modern "continuity of enterprise" exception

Western Auto also asks us to adopt the modern "continuity of enterprise" and "prod-

22. See *id.* at 101.

23. See *id.*; see also Phillip I. Blumberg, *The Community of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996) ("The doctrine ... is applicable only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names.")

24. Blumberg, *supra* note 23, at 371.

25. Under the "product line" exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products. See *Ray v. Alud Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 8-11 (1977); 63 Am.Jur.2d *Products Liability* § 133 (1997); Pollak, *supra* note 15, at 104-16. Be-

cause the facts in this case are ill-suited to the "product line" exception, and we therefore decline to consider it at this time.<sup>25</sup> We do, however, adopt the "continuity of enterprise" exception, for the reasons explained below.

[11, 12] The "continuity of enterprise" exception is an outgrowth of the traditional "mere continuation" theory of liability.<sup>26</sup> Under this exception, a successor corporation may be held liable for injuries caused by its predecessor's products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.<sup>27</sup> The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.<sup>28</sup>

[13] Thus, whereas the traditional "mere continuation" exception depends on the existence of identical shareholders, the "continuity of enterprise" looks beyond that formal requirement and considers the substance of the underlying transaction.<sup>29</sup> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*,<sup>30</sup> are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation

cause the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

26. See Richard L. Culp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 848 & n. 16 (1999).

27. See 63 Am.Jur.2d *Products Liability* § 129.

28. See *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873, 883-84 (1976); Culp, *supra* note 26, at 848-49.

29. See 63 Am.Jur.2d *Products Liability* § 130.

30. 397 Mich. 406, 244 N.W.2d 873 (1976).

of corporate identity.<sup>31</sup> This is a limited exception that looks past the identity of shareholders and directors, and focuses on whether the business itself has been transferred as an ongoing concern.

Only a minority of courts have thus far adopted the "continuity of enterprise" exception.<sup>32</sup> And the American Law Institute recently declined to adopt both this exception and the "product line" exception for the Restatement (Third) of Torts.<sup>33</sup> The Third Restatement's commentary indicates that the vast majority of courts considering these modern exceptions have rejected them.<sup>34</sup> Although there is some dispute about exactly how many jurisdictions have decided the issue,<sup>35</sup> it is clear that a majority of jurisdictions have not adopted the "continuity of enterprise" exception.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.<sup>36</sup> For example, they assert that a buyer interested in purchasing substantially all of the assets of a corporation will, in some cases, decline to make the purchase if it will be forced to assume liability for past product defects as well. As a result,

some corporations will be unable to find purchasers, and will instead be forced to sell off the corporate assets on a piecemeal basis, squandering any accumulated goodwill.<sup>37</sup> Such a piecemeal sale would give a corporation certain economic advantages: the seller's shareholders would be able to receive full value for the remaining assets, and successor liability would not flow to the purchasers under any of the traditional or modern theories.<sup>38</sup> But a piecemeal sale would cause an ongoing business to be lost to society, and potential claimants would be no better off.

This argument, although compelling in theory, seems to paint an incomplete picture of the economic realities. If successor liability is expanded to include the "continuity of enterprise" exception, some companies indeed might be unable to find buyers for their ongoing businesses. But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales.<sup>39</sup> And our research has not disclosed studies that have so concluded.

We also note that permitting successor liability under the "continuity of enterprise"

lessor Cupp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. See Cupp, *supra* note 26, at 854 n. 44.

31. See *id.* at 883-84; see also Pollak, *supra* note 15, at 103; 63 Am.Jur.2d *Products Liability* § 132.

32. See Restatement (Third) of Torts: *Products Liability* § 12, Reporters' Note at 215-19 (1998).

33. See *id.* § 12 cmt. b at 210 & Reporters' Note at 215-19.

34. See *id.* § 12, Reporters' Note at 217-18. The Restatement identifies only three states where courts have adopted the "continuity of enterprise" exception: Alabama, Michigan, and New Hampshire. See *id.* at 219.

35. The Third Restatement lists twenty-two states in which state courts or federal courts applying state law have rejected both the "continuity of enterprise" and "product line" exceptions. See *id.* § 12, Reporters' Note at 217-18. But one commentator estimates that only eighteen jurisdictions as of mid-1998 had actually rejected the modern exceptions, when considering those states whose highest courts had yet to rule on the issue. See Cupp, *supra* note 26, at 852-54. Pro-

36. See Restatement (Third) of Torts: *Products Liability* § 12 cmt. b, at 211; Epstein, *supra* note 19, at 400-01; Michael D. Green, *Fairness and Successor Liability: The Limits of the Common Law Process*, 8 Kan. J.L. & Pub. Pol'y 119, 121 (1998).

37. See Epstein, *supra* note 19, at 401; Restatement (Third) of Torts: *Products Liability* § 12 cmt. b, at 211.

38. See Epstein, *supra* note 19, at 401-02; Restatement (Third) of Torts: *Products Liability* § 12 cmt. b, at 211.

39. See, e.g., Restatement (Third) of Torts: *Products Liability* § 12 cmt. b at 211 & Reporters' Note at 215-21; Epstein, *supra* note 19, at 400-02; Green, *supra* note 36, at 121.

(Case 18 P.3d 49 (Alaska 2000))

exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.<sup>40</sup> When firms contract for an asset transfer where the basic enterprise is to be continued, they negotiate to a price that reflects the fair market value of the transfer, taking heed of the risk of future claims.<sup>41</sup> The purchasing firm will value any potential successor liability claims at least at the incremental cost of obtaining insurance coverage against successor liability for them.<sup>42</sup> Where that insurance is too expensive or is unavailable, negotiations could collapse, and the firm will either continue to exist (and be subject to liability claims) or liquidate (and future victims will receive no recovery). But in many cases, we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims. The posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects.<sup>43</sup>

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."<sup>44</sup> In many cases, a predecessor manufacturing company will be purchased by a larger, more financially-sound corporation. The rule we adopt here does not limit injured plaintiffs' recovery to the value of the assets

purchased by the successor corporation, so there could conceivably be situations in which product defect victims would receive a larger recovery than they conceivably could have received had the predecessor company remained an ongoing concern, and been bankrupted by the total claims. The Restatement authors view the added recovery potential as an "injustice" to the successor corporation.<sup>45</sup> But we think the Restatement analysis defeats the assumptions behind tort law. We assume that meritorious claims will be paid; that they are sometimes not paid due to insolvency does not change that underlying assumption. To characterize as a "windfall" full recovery for losses caused by product defects unjustly challenges the legitimacy of the injuries suffered. And once again, purchasing corporations can attempt to account for this risk of loss in the purchase price.

The other objections to expanded successor liability rules are also not dispositive. Successor liability potentially conflicts with maximizing the value received for bankrupt estates.<sup>46</sup> But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.<sup>47</sup> Also, some courts have argued that the modern exceptions impose liability on entities having no causal relationship with the harm.<sup>48</sup> But basic to the "continuity of enterprise" exception is the preservation of a substantial portion of the goodwill of the predecessor corporation; the successor is fundamentally the same enterprise as the predecessor. When a firm negotiates to purchase another corporation, keeping the

40. See Cupp, *supra* note 26, at 861-77.

41. See Michael D. Green, *Successor Liability: the Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 Cornell L.Rev. 17, 40 (1986).

42. See *id.* at 40; Cupp, *supra* note 26, at 862 n. 90.

43. See Epstein, *supra* note 19, at 402 (explaining that corporations are learning to navigate modern successor liability rules).

44. See Restatement (Third) of Torts: *Products Liability* § 12 cmt. b., at 210-11.

45. *Id.* at 210.

46. See Michelle M. Morgan, *The Denial of Future Tort Claims in In Re Piper Aircraft: Will the Court's Quick-Fix Solution Keep the Debris Flying High or Bring it Crashing Down?*, 27 Loy. U. Chi. L.J. 27, 36-37 (1995).

47. Nonetheless, federal bankruptcy law may govern whether potential claims for injuries not yet incurred may be discharged in a bankruptcy proceeding. In this case, the First Circuit has ruled that there is no discharge of Western Auto's claims. See *infra* note 56.

48. See, e.g., *Polius v. Clark Equip. Co.*, 802 F.2d 75, 82-83 (3d Cir.1986); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1144 (Colo.App.1992); see also Restatement (Third) of Torts: *Products Liability* § 12 cmt. b, at 210.

"enterprise" intact. It must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Finally, this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally.<sup>49</sup> Corporations are currently motivated to correct defects to reduce their own exposure to liability, but the traditional successor liability regime undermines that incentive by giving the manufacturing corporation another option: offering itself for sale to a new investor. Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations' market value in event of sale.<sup>50</sup>

Some commentators,<sup>51</sup> including the Restatement authors,<sup>52</sup> reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts.<sup>53</sup> For example, the four traditional exceptions were created by the courts.<sup>54</sup> There is also some suggestion that

legislation in other states has failed to address these problems.<sup>55</sup> We see no reason to await legislation before addressing this issue.

We therefore adopt the "continuity of enterprise" exception to the general rule of nonliability for corporate successors.

### 3. Propriety of the summary judgment order

[14] Although we here approve the "mere continuation" and "continuity of enterprise" exceptions, it is nonetheless necessary to reverse Western Auto's summary judgment order for two reasons. First, material factual disputes remain unresolved. Many key facts are uncontested, but certain important facts (such as the percentage of stock former shareholders in Savage Industries own in Savage Arms) are not established by the record. Second, the uncertainty regarding the proper legal standard governing successor liability appears to have prevented the parties from developing the record to address the applicable legal tests. We consequently remand for consideration of the "mere continuation" and "continuity of enterprise" exceptions in the context of this case.

We also note that Savage Arms is not shielded from liability by the fact that it purchased Savage Industries' assets through a bankruptcy proceeding. The First Circuit ruled in a related aspect of this case<sup>56</sup> that Western Auto and Taylor were not "afforded appropriate notice of the material terms of the all-asset transfer, nor of the chapter 11 plan" and therefore that the parties to the transfer, Savage Industries and Savage

Arms, "are not entitled to rely on the protective jurisdiction of the bankruptcy court."<sup>57</sup> The failure to give proper notice and to seek approval of the plan from the bankruptcy court "precluded a legitimate basis for joining the Alaska state court action."<sup>58</sup>

### D. Journal Articles as Inadmissible Hearsay

[15, 16] Savage Arms argues that the superior court abused its discretion by considering journal articles Western Auto submitted in support of its summary judgment motion. These articles included statements attributed to Savage Arms' chief executive officer supporting Western Auto's argument that Savage Arms holds itself out to the world as the legal successor to Savage Industries. Savage Arms asserts that the articles contain multiple levels of hearsay. Since we remand for other reasons, it is unnecessary to discuss this issue at length. But we address it briefly here because it may recur on remand. For purposes of our discussion, we assume that the CEO uttered the statements attributed to him.

In effect, the statements were uttered at least twice, first by Savage Arms' CEO and ultimately by the articles' authors upon publication. When the statements were first uttered, the declarant was Savage Arms' CEO and the statements were not hearsay, because they were admissions by a party-opponent.<sup>59</sup> But when the articles were offered to prove the truth of their assertions—that the CEO had made the statements the articles attributed to him—their authors became the declarants whose out-of-court statements were being offered into evidence. If the articles were offered for their truth, they normally would have been inadmissible hearsay.<sup>60</sup> The superior court rejected Savage

Arms' hearsay objection, but so far as we can tell from the record, did not address the author-as-declarant issue. Whether it must do so on remand depends on whether the articles are offered for the truth of the matters they assert.

### E. Real Parties in Interest

[17] Western Auto's liability insurers, Allstate Insurance Company and Certain Underwriters at Lloyd's of London (Underwriters), fully paid the expenses of defending and settling the Taylor lawsuit against Western Auto. Savage Arms moved to substitute the insurers as the plaintiffs in Western Auto's indemnity action. Savage Arms claimed that the insurers were the only real plaintiffs in interest under Alaska Civil Rule 17(a).<sup>61</sup> The superior court denied the motion, but at Western Auto's suggestion allowed the insurers to ratify the action or be subject to substitution.

We agree with Savage Arms that it was error not to substitute Western Auto's insurers as the real parties in interest. Western Auto admits that Allstate and the Underwriters are its fully subrogated insurers. Western Auto has identified no possible remaining interest it has in the indemnity claim. The superior court reasoned that Western Auto had an interest in the claim that was "difficult to define," and that joinder of the insurers might present an inaccurate picture to the jury. The court did not explain what Western Auto's interest was.

Although we have not previously addressed the proper procedural treatment of fully subrogated insurers, we held in *Municipality of Anchorage v. Rough Construction & Engineering Co.*<sup>62</sup> that ratification by partially subrogated insurers is an acceptable

whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.... [R]atification, joinder, or substitution of the real party in interest shall have the same effect as if the action had been commenced in the name of the real party in interest.

62. 722 P.2d 919 (Alaska 1986).

49. See *Cupp, supra* note 26, at 860-63 (arguing that greater successor liability will channel responsibility back to original product manufacturer).

50. See *id.* This incentive holds true until the firm knows that its liabilities will outstrip any goodwill available to be sold. But companies in that position would not be relevant to this successor liability issue, because no buyer would pay for an ongoing concern valued at less than its assets.

51. See, e.g., *Green, supra* note 41.

52. See Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 216-17.

53. See *Cupp, supra* note 26, at 877-78.

54. See *Cupp, supra* note 26, at 878.

55. See *Cupp, supra* note 26, at 879-83.

56. In April 1992 Western Auto filed a third-party complaint against Savage Arms for indemnification or apportionment of damages. Savage Arms contended that Western Auto's claims were barred by the terms of Savage Industries' bankruptcy. The First Circuit Court of Appeals ultimately resolved the issue in Western Auto's favor in December 1994. See *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 723 (1st Cir. 1994).

57. *Id.*

58. *Id.* at 722.

59. See Alaska R. Evid. 801(d)(2) (defining statements by party opponents as non-hearsay).

60. Alaska R. Evid. 802.

61. Alaska Civil Rule 17(a) provides in relevant part:

Every action shall be prosecuted in the name of the real party in interest.... [A] party with

substitute for joinder.<sup>63</sup> We there reasoned that Rule 17(a) did not require joinder of a partially subrogated insurer because ratification satisfied the policy concerns underlying that rule.<sup>64</sup> We explained that ratification is generally adequate in cases involving partially subrogated insurers because it protects against multiple lawsuits, ensures that the interested party makes a formal appearance in court, ensures that the party is subject to any court orders concerning discovery or attorney's fees, and assures that all interested parties bear the burdens of claims litigated on their behalf.<sup>65</sup> Implicitly acknowledging the key distinction between partially and fully subrogated insurers, we noted that the insured party was not a sham plaintiff because its claim had not been paid in full by the insurer:

We further note that [the insurer's] absence as a named party in this case does not mean that the action would be prosecuted by a sham plaintiff. The municipality was a real party in interest as the amount of its claim had not been paid in full by [the insurer].<sup>66</sup>

This language implies that where, as here, the insurer has paid the full amount, the insured would be a sham plaintiff.

We have relied before on a Montana Supreme Court case, *State ex rel. Naud's T.V. & Appliance Inc. v. District Court*,<sup>67</sup> in determining the proper procedural treatment of insurers.<sup>68</sup> The plaintiffs in *Naud's T.V.* had received varying levels of compensation from their partly and fully subrogated insurers.<sup>69</sup> Although the court held that partially subrogated insurers could opt for ratification rather than substitution or joinder, it effectively upheld a lower court's ruling requiring substitution of fully subrogated insurers.<sup>70</sup>

Critical commentary bears out the significance of this distinction:

63. See *id.* at 926.

64. See *id.* at 925-26.

65. See *id.*

66. *Id.* at 926.

67. 168 Mont. 456, 543 P.2d 1336 (1975).

68. See *Baugh*, 722 P.2d at 926.

The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest. This seems sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.<sup>71</sup>

We find this reasoning persuasive, and conclude that it was error not to require the insurers to substitute for their insured.

#### IV. CONCLUSION

We REVERSE the order denying Savage Arms' motion to require Western Auto's insurers to substitute for Western Auto, VACATE the orders imposing successor liability on Savage Arms, and REMAND for application of the doctrines adopted today and for further proceedings.



Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, An-

69. See *Naud's T.V.*, 543 P.2d at 1337.

70. See *id.* at 1338-39.

71. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1546, at 355-56 (2d ed.1990) (footnote omitted).

chorage, Eric T. Sanders, J., and wife appealed. The Supreme Court, Carpeneti, J., held that: (1) record supported finding that \$25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth \$10; (2) record supported assignment of 57% of marital property to wife; (3) wife was not entitled to have husband pay her future medical costs; (4) wife was not entitled to bifurcation of legal divorce; (5) wife was not entitled to travel and living expenses incurred by attending trial in Alaska; and (6) attorney fee award to wife of \$3,186 was sufficient.

Affirmed.

#### 1. Divorce Ⓢ252.1

The trial court has broad discretion in fashioning property divisions in divorce actions. AS 25.24.160(a)(4).

#### 2. Divorce Ⓢ286(8)

The valuation of marital property is a factual determination which will not be set aside on appeal unless it is clearly erroneous. AS 25.24.160(a)(4).

#### 3. Divorce Ⓢ286(8)

A valuation of marital property is clearly erroneous and should be set aside if the reviewing court is left with a definite and firm conviction on the entire record that a mistake has been made. AS 25.24.160(a)(4).

#### 4. Divorce Ⓢ286(5)

The superior court's equitable distribution of property is reviewable under the abuse of discretion standard, and will not be disturbed on appeal unless it is clearly unjust. AS 25.24.160(a)(4).

#### 5. Divorce Ⓢ223, 286(4)

The award of attorney's fees in divorce actions is within the broad discretion of the trial court, and the court's decision in that regard will not be reversed unless it is arbitrary, capricious, or manifestly unreasonable.

#### 6. Divorce Ⓢ253(3)

Record in divorce case supported finding that, for equitable distribution purposes, \$25,000 note that husband received from parties' son in connection with his purchase of

parties' business was worth \$10; husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

#### 7. Divorce Ⓢ253(2)

Record in divorce case supported assignment of 57% of marital property to wife, despite her claim that trial court did not sufficiently consider wife's age, i.e., 60; court did not find wife's age to be important because husband was of comparable age and both were approaching retirement. AS 25.24.160(a)(4).

#### 8. Divorce Ⓢ282, 283

Wife waived appellate of her claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's station in life during marriage; wife neither raised that issue before superior court nor presented evidence or argument in her briefs that would have made her station in life relevant to property distribution. AS 25.24.160(a)(4).

#### 9. Divorce Ⓢ253(2)

Record did not support claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's health; court simply was not convinced that wife needed any surgeries that she alleged, court also commented that wife's treatment might have been overly expensive, and court concluded that wife's health concerns were not so serious as to prevent her from continuing to work in future. AS 25.24.160(a)(4).

#### 10. Divorce Ⓢ286(9)

Even if trial court incorrectly concluded in divorce case that wife was capable of being gainfully employed, any such error was harmless with respect to marital property division, as court valued wife's future earnings at zero. AS 25.24.160(a)(4).

#### 11. Divorce Ⓢ233

Record in divorce case supported trial court's refusal to require husband to pay wife's future medical costs; superior court found that because wife received in excess of 50% of marital estate and because she was

## MEMORANDUM

RE: Procedural Status of Western Auto Supply Co. (now Allstate Insurance Company and Certain Underwriters at Lloyd's of London) pending in the Superior Court for the State of Alaska, Third Judicial District at Kenai, Case No. 2KN-90-922 CI

DATE: February 12, 2002

*Western Auto v. Savage Arms, Inc.* is still a pending case in the Kenai Superior Court. The decision of the Supreme Court in *Savage Arms, Petitioner v. Western Auto Supply Co., Respondent*, 18 P.3d 49 (Alaska 2001) was an interlocutory decision by the Supreme Court on a petition for review. Western Auto and Savage Arms, Inc. filed cross-motions for summary judgment on the question of whether Savage Arms was liable as the "legal successor to Savage Industries, Inc." Judge Link, the Superior Court judge in Kenai, ruled in favor of Western Auto. This was not a final judgment as there were other issues remaining unresolved which would have to be decided by trial if not disposed of by additional pretrial motions.

Only final judgments of the Superior Court can be appealed to the Alaska Supreme Court. However, Appellate Rule 610 provides for an interlocutory review by the Supreme Court, before there has been a final judgment, at the discretion of the Alaska Supreme Court for issues which meet the criteria set forth in Appellate Rule 610. One of the grounds is if the decision of the lower court: "... involves a controlling question of law on which there is a substantial ground

for difference of opinion and an immediate review of the order may materially advance the termination of the proceedings . . .”

Savage Arms petitioned the Supreme Court for a review of Judge Link’s decision under this procedure. The Supreme Court granted the petition and ordered full briefing. Proceedings in the Superior Court were stayed pending the decision by the Supreme Court on the petition for review. After the Supreme Court decision (first handed down on March 2, 2001, with rehearing denied on April 4, 2001) the case was remanded to Judge Link for further proceedings. Trial has been scheduled by Judge Link for November of 2002.

(In its decision, the Supreme Court also ruled that because all of Western Auto’s defense costs and attorney’s fees and the entire amount of the settlement by Western with the plaintiff, Taylor, had been paid by Western Auto’s insurers, Allstate and Certain Underwriters at Lloyd’s, those insuring entities were the proper parties plaintiff and in compliance with that ruling, Allstate and Certain Underwriters at Lloyd’s have been substituted in place of Western Auto as the plaintiff.)

Thus, *Allstate Insurance Company and Certain Underwriters of Lloyd’s v. Savage Arms, Inc.* is very much still a pending case and there has been no final judgment. If legislation past by the legislature is made specifically retroactive and/or curative, it could be expected that the Alaska courts would apply such new legislation to the pending case in spite of the Supreme Court’s prior ruling. See *Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980).

*Outline for HB 499*

## OUTLINE FOR CSHB 499

### **Origins of this Legislation**

In 1982, Savage Industries, Inc., ("Savage Industries") a company located in Massachusetts, manufactured a Stevens Model 125 .22 rimfire, single shot rifle. That rifle was sold in 1983 by Western Auto Supply Company ("Western Auto") at one of its retail locations in Maine. Eventually, the rifle made its way to Alaska and was owned by Jack Taylor, an Alaska resident.

During the 1980's, Savage Industries began suffering financial problems and on February 2, 1988 filed for Chapter 11 bankruptcy protection. Thereafter, as part of its bankruptcy reorganization, Savage Industries devised a plan regarding the sale of some of its assets. That plan included the sale of four of its gun product lines (not including the Model 125 involved in the Taylor accident) to Challenger International, Ltd.<sup>1</sup> ("Challenger"), a publicly traded company unrelated to Savage Industries. The agreement involved the sale of these assets to Challenger in exchange for \$1 million cash and other consideration, including the assumption of substantial debt. The plan was submitted to the bankruptcy court and approved on July 27, 1989. The plan was finally completed on November 1, 1989 and actually consisted of two agreements. The first agreement involved the purchase by Challenger of the stock in Savage Arms, Inc. ("Savage Arms"), a company that was set up as part of the asset sale. Once Savage Arms was acquired by Challenger, the second agreement provided for the sale of the specific assets from Savage Industries to Savage Arms, by then a subsidiary of Challenger. Thus, it was an asset sale from Savage Industries to Challenger.

On April 8, 1989, Jack's son, Kevin Taylor, was injured while attempting to shoot the gun. On December 3, 1990, one and one-half years later, Jack Taylor, individually and on behalf

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<sup>1</sup> Challenger denominated a wholly owned subsidiary, Merkin B.V., to be the actual purchaser.

From: Barry Reese & Kurtz

of his son, filed a personal injury action against Savage Industries, Inc. and a few other local defendants. Upon being notified in January 1991 that Savage Industries was in bankruptcy, the Taylors added Western Auto as the lead defendant.

Western Auto did not seek to pursue indemnification from Savage Industries in the bankruptcy court or otherwise. Instead, Western Auto sued Savage Arms claiming successor liability, even though it was undisputed that Savage Arms had nothing to do with the manufacture of the gun involved in the accident. Since the case against Western Auto was set for trial shortly thereafter, the court severed Savage Arms from the case and the case proceeded to trial against Western Auto only. Western Auto won the trial, however, largely due to certain conduct of defense counsel at the trial, the trial court ordered a new trial. Western Auto then settled the Taylor case for \$5.4 million and began pursuing its successor liability case against Savage Arms. Western Auto alleged three theories of successor liability: the "traditional" mere continuation theory and the non-traditional product line and continuity of enterprise exceptions. Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of Western Auto on the issue of successor liability, but did not designate the theory upon which it based its ruling. Savage Arms appealed that decision to the Alaska Supreme Court and in March 2001, the Alaska Supreme Court issued its decision reversing the summary judgment, remanding the case for trial and adopting a standard of successor liability. 18 P.3d 49. The Supreme Court adopted "mere continuation" and "continuity of enterprise" as grounds for successor liability and avoided a ruling on the product line exception because Savage Arms had not purchased the product line involved in the gun accident. The Supreme Court also made the decision retroactive. In announcing its decision, The Supreme Court stated that "neither this court nor the Alaska state legislature has resolved the successor liability questions presented in

this case." *Id.* at 52. CSHB 499 is intended to address the void identified by the Supreme Court and to define the scope of successor liability law in Alaska.

### Analysis of Theories

#### **Mere Continuation**

The Restatement (Third) of Torts, published by the American Law Institute, has adopted four "traditional" exceptions to the general rule that a purchaser of assets is not liable for the debts of the seller. Those four exceptions are:

1. Where the purchaser expressly assumes liabilities,
2. Where the sale of assets is a fraudulent conveyance,
3. Where the sale constitutes a merger or consolidation, or
4. Where the purchaser is a mere continuation of the seller.

The Restatement's exceptions, including the mere continuation theory, have been adopted in a substantial majority of states. In the *Savage Arms* opinion, the Alaska Supreme Court said that mere continuation is a "well recognized exception". 18 P.3d at 55. CSHB 499 adopts all four of the Restatement's traditional exceptions.

#### **Continuity of Enterprise**

Contrary to the "mere continuation" traditional exception, the Alaska Supreme Court acknowledged that only a *minority* of courts have thus far adopted the "continuity of enterprise" exception. *Id.* at 56. As the court said: "The Third Restatement's commentary indicates that the vast majority of courts considering the [continuity of enterprise theory] have rejected [it]. Although there is some dispute about exactly how many jurisdictions have decided the issue, it is clear that a majority of jurisdictions have not adopted the "continuity of enterprise" exception." *Id.* at 56. (emphasis added).

## The Two Theories Contrasted

"Mere continuation" is intended to address the situation where there is a continuation of the same ownership of a corporation rather than just a continuation of the business enterprise. In such cases, this exception seeks to prevent the owners of a selling business from selling assets to a new business, which they also own, without losing control over the assets. As the Alaska Supreme Court said in *Savage Arms*, the "mere continuation" exception depends on the existence of identical shareholders between the selling and purchasing entities. 18 P.3d at 55.

"Continuity of enterprise" on the other hand does not examine continuity of ownership, but rather whether there has been a continuation of the business as an on-going concern even if there is no common ownership. It is simply an imposition of liability on the purchasing business merely because it is in business and not because the responsible parties for the underlying tort are still in control of the assets.

The principal reason continuity of enterprise has been rejected is because it has been viewed as an ill-considered extension of liability to an entity having no causal relationship with the harm. 63 Am Jur. 2d §131. It ignores the valid arguments of the business world where predictability is vital and unforeseeable alterations and successor liability principles complicate transfers and necessarily increase transaction costs. *Id.* This exception defeats the legitimate expectations of parties held during the negotiations and sale, and it limits opportunities for a financially troubled company. *Id.*

### CSHB 499

This bill adopts the majority Restatement position on the four traditional exceptions, including mere continuation, and rejects the minority theory of continuity of enterprise. The bill is made retroactive because the Supreme Court's decision was made retroactive, and we are

attempting to set a single standard for all acquisitions regardless of date, rather than two standards. This Bill is made expressly retroactive pursuant to AS 01.10.090. We have examined whether the retroactive application of the Bill could constitute a "taking of property" to see if the state might be exposed to potential liability for compensation. Upon review and careful consideration, we are convinced that the State would not be at risk for liability. Successor liability is a tort cause of action and no person has a vested right in such "property" until there is a final unappealable judgment, which Western Auto does not now have. This is been the law of this country since the 1801 United States Supreme Court's decision in *The Schooner Peggy*, 5 U.S. 103, and has been widely cited in case law over the intervening 201 years. Moreover, and in any event, Western Auto settled its case with the Taylors in 1995, six years before the Alaska Supreme Court adopted continuity of enterprise, so Western Auto cannot contend it relied upon that opinion when settling the case.

#### Conclusion

CSHB 499 is an effort to define the law of Alaska regarding successor liability in products liability causes of action. It adopts the clear majority view around the country in including the four traditional exceptions to successor liability and in rejecting the non-traditional "continuity of enterprise" exception. It makes the new law retroactive to apply to all acquisitions regardless of date, because to do otherwise, would allow the Supreme Court's retroactive opinion to result in two standards on this issue depending on the date of the acquisition. The Legislature would like to enact a clear, definite and uniform standard on the issue.

*Alaska Bar Rage Article*

# Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tucker Bray

**O**n June 30, 2000, the Alaska Supreme Court significantly re-wrote the law of products liability as it affects a business that purchases the assets, but not the liabilities, of another. A business that purchases assets as an ongoing concern will be liable for the product liability claims of its seller, despite what the purchase documents may say.

In *Savage Arms, Inc. v. Western Auto Supply Co.*, Opinion No. 5293, (June 30, 2000) a minor was injured by an allegedly defective .22 rifle manufactured by Savage Industries, Inc. Savage Industries, Inc. sold its assets to Savage Arms, Inc. in 1990, apparently after the rifle in dispute had been manufactured. The court acknowledged that "[g]enerally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company," subject to four exceptions not relevant to the case. *Savage Arms*, No. 5293, slip op. at 9.

But the court elected to follow a minority rule, a rule that was rejected by the American Law Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. *Id.* at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. *Id.* at 12.

The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, as-

on whether the business itself has been transferred as an ongoing concern.

*Id.* at 12 (internal footnotes omitted).

Critics may argue that the court would be better off leaving significant expansions of product liability to the Legislature,<sup>1</sup> but this article focuses instead on what appears to be a seriously flawed analysis of the benefits and detriments of adopting such an expansion.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application, yet the court gives this new policy retroactive application.

The court first notes that the "continuity of enterprise" rationale has been criticized for its impact on the value of businesses which, for one reason or another, are attempting to sell the business as a whole or in substantial parts.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.

*Id.* at 14. The court's treatment of this concern is less than complete:

But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception for the marginally more popular "product line" exception has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies

is surprising, however, and could be criticized as conclusive.

The court next looks to the economic effects of imposing the "continuity of enterprise" rule:

We also note that permitting successor liability under the "continuity of enterprise" exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.

*Id.* at 15. The court's reasoning here is sound, but only provided the rule is given prospective and not retrospective application.

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In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state "we would ex-

for this risk of loss in the purchase price," is meaningless as to consummated transactions. *Id.* at 17.

The court acknowledges that this new rule will create complications in bankruptcy, where the goal is to maximize the value of assets for the creditors. *Id.* at 17. While the court is being a little presumptive in concluding federal law won't sell assets free and clear of all claims, including unknown tort claims, 11 U.S.C. § 365, the court's treatment of the issue borders on flippant.

But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.

*Id.* at 17. It does not seem to occur to the court that the "creditors" in bankruptcy can include tort claimants. In effect, the court proposes to diminish the bankruptcy recovery of known claimants for the benefit of potential future tort claimants. And, again, it is impossible to find justification for retrospective application in the court's arguments.

The court acknowledges that there may not be a causal relationship between the harm created and the purchaser, but argues that the "goodwill" it believes is inherent in an asset purchase justifies holding the purchaser liable. *Id.* at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of

Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. *Id.* at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. *Id.* at 12.

The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity. This is a limited exception that looks past the identity of shareholders and directors, and focuses

destroying the value of the ongoing business enterprise.

*Id.* at 14. The court's treatment of this concern is less than complete:

But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies that have so concluded.

*Id.* at 14-15 (internal footnote omitted). As the court acknowledged earlier, this doctrine has been recognized in only a few states, and only relatively recently. *Id.* at 13. It's hardly surprising that the court has not been able to find studies demonstrating its economic effects. For the court to rely upon the absence of data

In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state, "we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims" begs the question of how that is to be accomplished in a completed transaction. *Id.* at 16.

Put another way, a purchaser of assets that consist of a line of manufacturing or perhaps an entire company has presumably paid fair market value for those assets. The court in *Savage Arms* has changed the definition of "assets" to include a large class of "liabilities." As a result, the true fair market value of the "assets" necessarily changes. If the seller has subsequently distributed its assets to its shareholders, as is its right, and has subsequently dissolved itself, as is also its right, the purchaser has been deprived of the benefit of its bargain, and has no meaningful recourse.

If a purchaser is larger and wealthier than a seller, then the "pocket is deeper" for a tort plaintiff under the court's new rule. The court concludes that is only fair. *Id.* at 16-17. Without going into the justice of the situation, or whether or not this results in a "windfall" to a tort plaintiff, by giving this new rule retroactive application the new rule is made patently unfair. A large tort claim, unknown and perhaps unknowable to the purchaser, will simply deprive the purchaser of its bargain. The court's offhand comment in this regard, that "once again, purchasing corporations can attempt to account

will" it believes is inherent in an asset purchase justifies holding the purchaser liable. *Id.* at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

*Id.* at 18. The verb tenses are instructive: "must" and "would give;" again the court's justification speak to prospective application yet *Savage Arms* involves retrospective application.

Finally, the court concludes that the new doctrine will encourage the traditional purposes of products liability law: it will encourage manufacturers to create safer, defect-free products to maximize their business value for the future. *Id.* But in the cases of completed sales, the policy is preposterous.

For businesses that have already made asset purchases, the only option now is to purchase insurance or other suitable risk management solutions to take into account the new classes of claims that the court has created.<sup>1</sup> Those insurance premiums and similar costs are an unfair, unreasonable burden, but unless the court recognizes that its reasoning only justifies prospective and not retroactive application, the alternatives are even worse.

<sup>1</sup> An argument rejected by the court "because (successor liability) is directly related to products liability law, a doctrinal road long traveled by courts." *Savage Arms*, No. 8293, at 19.

<sup>2</sup> While the decision is limited to products liability, long-time observers of the court might anticipate the rule being given to services and well as products, and other kinds of claims besides torts.