

ALASKA LEGISLATIVE COMMITTEES, 2003-2004

10894 HOUSE JUDICIARY

LEGAL SERVICES

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

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 10, 2003

SUBJECT: Civil liability for plane/boat passengers - CSSB 98(TRA)

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford 
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040.

Section 2. Creates immunity from civil liability for negligence when an owner or operator of an aircraft or watercraft transports a passenger and the aircraft or watercraft is not being used for commercial purposes. Provides that accidents resulting from gross negligence or reckless or intentional misconduct, involving a common carrier, or occurring during a sales demonstration are not immune. Also when the owner or operator has certain insurance coverage or fails to tell passengers that no insurance exists, immunity does not apply.

Section 3. Amends a sunset provision of law to provide that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040. This section is necessary to avoid a conflict of law if AS 05.25.040 is repealed and reenacted as provided in the Boating Safety Act (Ch. 28, SLA 2000).

Section 4. Provides that the Act applies to accidents that occur after the effective date of the Act.

Section 5. Provides that sec. 3 of SB 98 only takes effect if the sunset provisions of Sec. 9, Chapter 28, SLA 2000, take effect.

Section 6. Effective date for all sections of SB 98, except for sec. 3.

MFF:lmb
03-148.lmb

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB 98
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to civil liability for guest BRU Civil Division
passengers on an aircraft or watercraft; . . ." Component Special Litigation
Sponsor Senator Bunde
Requester Senate Transportation Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
Under this bill, owners or operators of an aircraft or watercraft would not be liable for civil damages of a guest passenger if the owner or operator is not being compensated for the transportation, except under certain specified circumstances.

This bill concerns civil actions between private parties, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
Division Attorney General's Office Date/Time 4/7/03 2:24 PM
Approved by: Kathryn Daughhettee for Gregg D. Renkes, Attorney General Date 4/7/2003
Agency Department of Law

Potential Questions and Answers for SB 98

1. How many private plane crashes are there in Alaska?

According to the NTSB, there have been 338 crashes of private plane in Alaska since 1998. Only 85 of those have involved injuries or deaths. (Con - See the "Additional Information" in your folder for specifics.)

2. Does the Coast Guard have any interest in this bill?

No. Mike Folkerts, the Coast Guard's Boating Safety Officer, has reviewed SB 98 and told me that it does not affect the Coast Guard.

3. Who supports this bill?

In your packets, you will find letters of support from:

- The Alaska Boating Association,
- The Personal Watercraft Club of Alaska, and
- The Board of the Alaska Airmen's Association has not had time to meet and discuss the bill yet. However, many individual boat and plane owners have expressed their support.

You will see as you review the letters of support in your packets that they support for SB 98 because it will provide them with peace of mind, it will make it more financially reasonable to own a boat or plane, it will not compromise safety, and will increase the likelihood that more visitors and youth will be able to experience Alaska from boats and planes.

4. Who opposes this bill?

We have been contacted by only two people who oppose the bill.

- One was concerned that Alaskan private pilots are a bunch of reckless cowboys who wanted this bill so they could continue their reckless ways. That is not the case - SB 98 clearly states that, "gross negligence or reckless or intentional misconduct" disqualify a boat and plane owner from protection under this bill.
- Another person asked that we change the bill to passengers to sign a liability releases and recognize that "we are all responsible for our own". AS 05.45.120 (the Ski Safety Act) prohibits the use of liability releases. The bill drafter has advised me that the courts typically do not like liability releases and try to get around them if they can. Courts typically don't like it when people give up their rights prior to a situation. (Con - FYI, Mike Ford will research specifics in time for Judiciary.)
- I would anticipate that personal injury trial lawyers might not appreciate the possibility of limits to jury awards, but none have contacted my office.

5. What are the costs of insurance?

Cliff Judkins, President of the Alaska Boating Association, wrote that his insurance has increased from \$825 three years ago to over \$1,600 for the coming season.

It is now impossible for a private pilot to protect his personal assets through the purchase of liability insurance at any price. The cost of insurance coverage that is insufficient to protect one's assets has become exorbitant.

One pilot who contacted me said his insurance rates have risen from \$1,910 in 2000 for \$1 million of liability coverage to \$2,875 for \$250,000 of liability coverage per seat for his Piper Super Cub and

Cessna 180. He had to go to "per seat" coverage because coverage for \$1 million smooth" became unavailable.

The Division of Insurance provided the following:

For a Cessna 172 (a four seat plane):

- \$100,000 of liability insurance costs \$900 per year
- \$200,000 of liability insurance costs \$1,400 per year
- \$1 million of liability insurance costs \$3,400 per year.

The Division also reported that most insurance carriers encourage continuing education to keep rates "low." There are two major companies selling aviation insurance in Alaska – USAIG and Houston Insurance.

6. The original version of the bill allows private pilots and boat owners to accept token payment for trips. Does the CS still do that?

Yes. The language was changed to get away from having to define the word "substantial." Federal law prohibits private pilots from accepting compensation that exceeds the passenger's share for gas, oil, airport expenditures, or rental fees. The language in the CS conforms to that.

7. Why does the CS cover AS 05.25.040 twice?

The Alaska Boating Safety Bill, HB 108, has sunset dates for its provisions. In order to do that, HB 108 had to have the language twice. That technical necessity has affected SB 98.

8. Does SB 98 require pilots and boat owners to carry insurance? Should it?

No. It says that if the owner carries insurance, liability cannot exceed the applicable insurance. If the owner does not carry insurance, he must tell passengers before they get on the boat or plane so they can make an informed decision about whether to take the trip.

Should the Legislature mandate insurance coverage for plane and boat owners? That's a separate policy call. However, I think that was done when HB 108 was passed, as that legislation capped awards at the level of insurance, if any.

9. Why use the term "gross negligence" rather than just "negligence?"

According to the bill drafter, the phrase, "gross negligence or reckless or intentional misconduct" is consistent with other statutes that create immunity from civil liability. (AS 09.65) Also, the term, "gross negligence" is one that has been applied by the courts for some time. (Leavitt v. Gillespie).

10. Is it a good idea to try and remove liability from aircraft owners when Alaska has a high rate of crashes?

Of 338 private plane crashes in Alaska since 1998, only 61 have resulted in injuries and 24 have resulted in deaths. While even one injury or death is too many, SB 98 clearly states that if the injury or death was caused by the owner's "gross negligence, or reckless or intentional misconduct," the owner is liable. This is not blanket immunity.

10. One person wrote and asked, "What about motorcycles, snow machines, hang gliders, mushers, and bicyclists?"

Any on-road vehicle, like a motorcycle, is already covered under state law. I would not object to adding off-road vehicles, such as snow machines, mushers, and bicyclists to this bill. However, the bill covers liability for passenger injuries. Mushers and bicyclists tend not to have passengers. Snow machiners might. It would be up to the committee if you would like to add them to this bill.

Summary of Additional Information - See Following Packets of Backup

Private Pilots Cannot Be Compensated for Passengers or Property Beyond Pro-Rata Share:

Code of Federal Regulations prohibits a private pilot to be in command of an aircraft that carries persons or property for hire. The regulation also says that a private pilot may not pay less than the pro-rata share of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees.

Other Alaska Statutes Regarding Inherent Risk:

AS 09.65.093 Owner, volunteer maintenance person, or operator of a runway, airfield, or landing area.

AS 09.65.180 Owner or operator of a zoo.

AS 09.65.200 Owner of unimproved land.

05.45.10 Ski area operator.

Private Airplane Crash and Injury Statistics (1998 – 2002):

338 crashes

85 involved injury or death

24 deaths:

- 4 2002
- 3 2001
- 5 2000
- 6 1999 and 1998
-

24 serious injuries:

- 4 in 2002
- 12 in 2001
- 1 in 2000
- 7 in 1999
- 0 in 1998

37 minor injuries:

- 2 in 2002
- 2 in 2001
- 10 in 2000
- 8 in 1999
- 15 in 1998

Legal Issues:

The phrase "gross negligence or reckless or intentional misconduct" is consistent with other statutes that create immunity from civil liability. "Gross negligence" is a term that has been applied by the courts for some time. However, in Mike Ford's opinion, there will still be litigation over whether the accident was a matter of "negligence" or "gross negligence."

One person suggested we delete the section that says immunity does not apply to an owner/operator while demonstrating an aircraft or watercraft to a prospective buyer. Mike Ford says federal regulations prohibit private pilots from demonstrating an aircraft unless they're also salesmen. So, if we did delete that part from SB 98, someone who broke federal law would be immune from civil liability if an accident occurred.

March 20, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182



Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters but also to avoid the treacherous crags of a litigious society.

The cost of not passing this legislation can be measured in terms of lost opportunities for recreation and enjoyment. It is a boat owner's legitimate fear of potentially losing one's life savings in a world filled with frivolous lawsuits and unspecified civil damages. This legislation will relieve an unnecessary and unfair burden on recreational boaters while protecting passengers from negligent acts.

It seems obvious that boat owners should be able to take their friends fishing or sightseeing without the fear of an expensive lawsuit should their trip end in misfortune. Similarly, non-commercial passengers should not have their choice to ride in a boat made by a legal system more concerned with contingency awards than with personal freedoms.

Our club promotes the sport of watercraft riding, education, and boating safety. Several of our members belong to the Coast Guard Auxiliary. Annually, we contribute our time and equipment to help Alaskans with disabilities at the Challenge Alaska Summer Splash. We are staunch supporters of boating rights and are a member club of the Alaska Outdoor Council, the Alaska State Boaters Association, and ABATE. Because of our interest in recreational boating, the PWCA is particularly interested in the success of your legislation.

Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff. Please let me know how our club can assist you in reaching your vision for Alaska.



I know this is basically a copy of a letter you have received from our club president, but I share the same views.

Sincerely,

Thomas Byers
Club member

cc:

Cliff Judkins, Alaska State Boater Association

Subject: SB98

Date: Mon, 7 Apr 2003 09:43:19 -0800

From: "Robert Dreeszen" [REDACTED]

To: <Senator_Con_Bunde@Legis.state.ak.us>

We support SB98.

Robert & Carol Dreeszen
Outlet Lower Ugashik Lake AK

Subject: Re: [Fwd: SB 98 Scheduled for a Hearing]
Date: Sun, 06 Apr 2003 21:34:37 -0800
From: (deleted for privacy)
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Karen.

At our meeting last week, the KCK (Knik Canoers and Kayakers) Board of Directors voted unanimously to endorse this bill. I will be out of town for the rest of the week.

Thank you,
-Fran Hall

Subject: Re: SB 98

Date: Sun. 06 Apr 2003 14:35:35 -0800

From: Marilyn Warren [REDACTED]

To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Mr. Bunde:

As an aircraft and water craft owner I encourage you to support the passage of SB 98. As an aircraft owner I can not afford to purchase insurance and so am denied the pleasure of taking friends or acquaintances flying with me because of the substantial liability involved. This bill needs to be passed. Thank you, Charles Warren

Subject: SB 98

Date: Sun, 06 Apr 2003 16:33:19 -0800

From: Don & Nita Meierhoff <[REDACTED]>

To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Dear Senator Bunde:

Just a short note to let you know I support your bill SB 98 wholly. I am an owner of an aircraft and the liability prospect has stopped me from transporting friends out fishing and hunting with me a number of times.

Good luck and thanks for the hard work!

Don Meierhoff

3637 North Point Dr.

Anchorage, AK. 99502

907-243-1046

**Constituent Support for SB 98, "Recreational Liability"
Expressed as Replies to Legislative Update**

Thank you for sponsoring both pieces of legislation Con. We support them. As an aircraft owner, I particularly appreciate the liability legislation.

These sound like good Bills. Thanks for all your work.

Dear Con, I am a boat owner and applaud your new bill. Thanks

Con: I support your efforts on both bills.

Senate Bill 98 sounds like a great idea. As a private pilot this is something that I think of often. I support your endeavors with this bill.

Good Luck with SB 98!

I like the objective of SB98 and wish to compliment you on common sense legislation.

Thank you for both pieces. Especially logical and sensible is the Good Neighbor Bill. I hope for its passage.

As an owner of a small aircraft, we appreciate and support the intent of SB98.

I believe SB98 is a step in the right direction. Thanks

As for SB 98, I surely wish you well. As a pilot/owner that truly enjoys showing Alaska to others, it is very sobering to know what liable risk we take in so doing.

Dear Con. This is excellent and thank you for all your fine work.

ALASKA BOATING ASSOCIATION



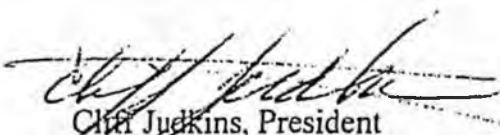
Senator Con Bunde
State Capital
Juneau Alaska 99801-1182

March 26, 2003

Re: Senate Bill 98

Dear Senator Bunde,

The Alaska Boating Association supports the passage of SB 98, "An act relating to civil liability for guest passengers on an aircraft or watercraft." The Alaska Boating Association is a statewide organization with a membership of more than 1200. The association is an organization dedicated to the enhancement and preservation of the boating experience in Alaskan waters. Our organization represents the boating public on all issues concerning boating activities. As a past member of the Governors Boating Safety Advisory Council I personally reviewed statistics depicting boating accidents and related personal injury. Alaskans are involved in a high rate of boating accidents with personal injury and death to both operators and passengers- one of the results is high insurance rates. Insurance rates for the group of boaters that I fall into has more than doubled in the past three years. My insurance has gone from \$825.00 three years ago to over \$1,600.00 for the coming season. Other boaters have experienced similar rate increases. Some folks have actually made the decision not to purchase a boat, or to sell the one they have due to high insurance rates. Passage of SB98 would surely help to buffer future rate increases. Again the Alaska Boating Association is a strong supporter of SB98 and we commend you for the time that you have spent drafting and introducing this legislation.


Cliff Judkins, President
Alaska Boating Association

Cliff Judkins - President • P.O. Box 874124 • Wasilla, Alaska 99687
(907) 373-3591 • Fax 373-3592 • E-Mail: cjudkins@customcpu.com

March 24, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182



Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters, but also to avoid the treacherous crags of a litigious society.

The cost of not passing SB 98 can be measured in terms of lost opportunities for recreation and enjoyment. Key to this is a boat owner's legitimate fear of potentially losing one's life savings in a world rife with frivolous lawsuits and unspecified civil damages. This legislation will relieve an unnecessary and unfair burden on recreational boaters while protecting passengers from negligent acts.

It seems obvious that boat owners should be able to take their friends fishing or sightseeing without the fear of an expensive lawsuit should their trip end in misfortune. Similarly, non-commercial passengers should not have their choice to ride in a boat made by a legal system more concerned with contingency awards than with personal freedoms.

Our club promotes the sport of watercraft riding, education, and boating safety. Several of our members belong to the Coast Guard Auxiliary. Annually, we contribute our time and equipment to help Alaskans with disabilities at the Challenge Alaska Summer Splash. We are staunch supporters of boating rights and are a member club of the Alaska Outdoor Council, the Alaska State Boaters Association, and ABATE. Because of our interest in recreational boating, the PWCA is particularly interested in the success of your legislation.

Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

PWCA

SENATOR CON BUNDE
SENATE BILL 98

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff and may be reached directly at 258-2420 (wk) or at davealaska@aol.com. Please let me know how we can assist you in reaching your vision for Alaska.

Sincerely,



David Ausman
PWCA President

Personal Watercraft Club of Alaska (PWCA)
P.O. Box 112984
Anchorage, AK 99511-2984
website: www.pwcalaska.org
email: akpwrdr@aol.com
phn: 907-345-6723

cc:

Cliff Judkins, Alaska State Boater Association



Ed & Inge Crane

*5260 Lupin Place
Anchorage, AK 99507*

Senator Con Bunde
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

March 18, 2003

Dear Senator Bunde,

Thank you for introducing SB 98. While I am not sufficiently knowledgeable to address the commercial aspects of the legislation, I would like to express wholehearted support for the potential effects on private aircraft owners and operators.

I am an instrument-rated private (i.e., non-commercial) pilot who owns a modest small airplane. I fly that airplane strictly for pleasure, under favorable conditions only, and I operate only from improved airports. I have some 1,400+ hours of flying experience, with no record of accidents, incidents, emergencies, regulatory violations, or insurance claims.

Despite the foregoing, it has for several years been increasingly difficult (as I believe it has been for most Alaska pilots) to obtain and/or afford adequate liability insurance. Because of my history, my carrier has "grandfathered" my personal injury liability coverage at a level which it no longer makes available in Alaska generally. Nevertheless, I no longer carry passengers other than my spouse. Within the context of today's society and the influence of personal injury lawyers, the risks of exposure for myself, my family, and my estate are more than I can rationally tolerate. On the other hand, I would have no problem assuming the totally controllable risks of "gross negligence or reckless or intentional misconduct" which would result in liability under SB 98.

So no longer can I share with friends, neighbors, or visitors the awesomeness and beauty of SouthCentral Alaska which can be reasonably and safely accessed by a simple and inexpensive flight. No longer can I experience the pleasure of implementing a youngster's "first flight", or of using my aircraft to pique a teenager's interest in an aviation career. If passed, SB 98 would make these things once again possible - not only for me, but for countless thousands of Alaskans and visitors!

Very truly yours,

From: Dr. Frost
To: senator.con.bunde.@legis.state.ak.us
Cc: (left blank for privacy purposes)
Sent: Monday, March 17, 2003 6:19 PM
Subject: Senate Bill 98

Dear Senator Bunde,

I have reviewed Senate Bill 98 and would like to express my strong support for it. As you know I own and fly my own piper cub here in Alaska. I have never flown commercially. I have always been concerned with my family's potential liability if I were to be involved in a serious aircraft accident and to have any passengers injured.

Clearly since I do all of my own flying I never place a passenger in a situation which I am personally not comfortable for myself. However as you know there are times when weather changes unexpectedly or other circumstances may create a hazardous situation. Since the passengers are enjoying the benefits of the flight for no cost they should be expected to shoulder some of the responsibility as well.

I will be out of town for the next week. I can not personally speak for the Alaska Bowhunters Association and Alaska Chapter of SCI but I would suspect that they would support the bill as well. By sending them a copy of this I will solicit their opinions.

Sincerely,
John D. Frost MD

Subject: Re: SB 98, Recreational Liability Bill
Date: Mon, 03 Feb 2003 18:45:10 -0900
From: "William G. Nelson"
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

I strongly support SB 98. As an owner of a small private aircraft, I do on occasion take visitors to our state for a "flight seeing" ride. They always indicate that it was the highlight of their trip. I would do so more often, but do not feel the need to shoulder the liability.

Certainly, visitors that see the real Alaska are less likely to be swayed by special interest groups supporting causes detrimental to the development of Alaska.

Thank you for your sponsorship of this bill.

William G. Nelson

March 26, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182

Dear Senator Bunde,

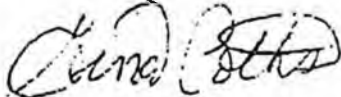
I am writing in support of Senate Bill 98, "an act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date".

As a responsible watercraft and boat owner I feel this is important legislation to provide a limit on civil liability for boaters (and aircraft owners). We live in a litigious society and it seems everyone wants to lay fault or blame on the other person and make them pay. This legislation will allow boat owners and aircraft owners a little more peace of mind when taking passengers on board for pleasure rides.

Thank you for writing a bill that promotes safety in recreational activities. I am a member of the Personal Watercraft Club of Alaska (PWCA) as well as Alaska Boating Association. I know the PWCA has given their support to this bill and I'm sure they have contacted the Boating Association and asked them to contact you with their support as well.

If there is anything else I can do to help promote and support this bill please do not hesitate to contact me. I can be reached at 345-6723 or email at akpwctdr@acsalaska.net.

Sincerely,



Gina Poths
11600 Trails End Rd.
Anchorage, AK 99507

March 26, 2003

Senator Bunde

REF: SB98 Recreational Liability

Senator Bunde, although I am writing this letter on my behalf to express support for SB 98 "Good Neighbor Bill" I am also President of the Alaskan Bowhunters Association one of the largest outdoor organizations in the state and I have asked that the entire executive board and general membership across the state show their support.

I moved to Alaska 29 years ago so that I may be involved in the out of doors in the most beautiful state in the union. I have always owned boats for recreation since moving to Alaska and have been fortunate to travel around the state with friends of mine that own small fixed wing planes.

I have discovered as has many of my friends that one of the greatest joys of living in Alaska is the ability to share the experience of the outdoors with friends in Alaska that may not have the ability or friends and business acquaintances from lower forty-eight. A concern that I have always had is the possibility of leaving my family liable for something that may have not been in my control to prevent. There is always a risk of potential life threatening accidents with any journey in to the outdoors in Alaska that is part of the mystique of Alaska. If I am operating my boat or plane in a safe manor and an accident does occur I do not believe that my family should be liable for something that they had no part in.

This bill is long over due and I encourage the Senate to fully support this bill. There is no disadvantage to this bill other than leaving the door open for frivolous lawsuits. Thank you for your time and consideration into this matter.

Sincerely
Phil Pringle
10086 Explorer Cr.
Anchorage AK. 99515
907-344-8812

Phillip H. Mabry, D.D.S.

2601 BONIFACE PARKWAY ANCHORAGE, ALASKA 99504

(907) 337-9448 FAX (907) 337-4123

March 20, 2003

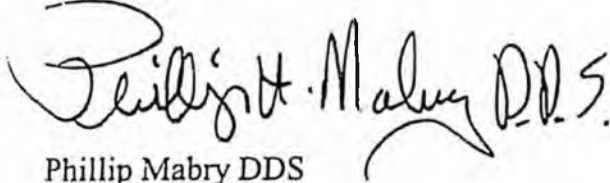
Senator Con Bunde
716 W. Fourth Avenue
Anchorage, Alaska 99501-2133

Dear Mr. Bunde,

I've just read your proposed S.B. 98. It's about time the legislature addressed this issue. You've done a remarkable job of covering all the bases. It protects the individual who is entertaining someone but doesn't eliminate the use of proper conduct and safety. Hopefully your fellow Senator's will agree and move this bill onward.

Thank you again for your good sense.

Sincerely,


Phillip Mabry DDS

Greg Remaklus, D.M.D.

Practice Limited to Periodontics

Suite 102

4200 Lake Otis Parkway

Anchorage, Alaska 99508

Office Phone (907) 561-1884

March 26, 2003

Senator Con Bunde
State Capital
Juneau, Alaska 99801-1182

Dear Senator Bunde:

Please accept my support and encouragement for Senate Bill 98. Existing liability concerns have for a long time discouraged me from transporting others and insurance is increasingly more difficult to afford. I hope your efforts can help change all that. Thank you.

Kindest personal regards,



Greg Remaklus, D.M.D.

Subject: SB 98

Date: Fri, 2 May 2003 07:31:36 -0800

From: "David Knapp" [REDACTED]

To: <senator_con_bunde@legis.state.ak.us>

Hello Senator Bunde,

I just received information relating to SB 98. I support the concepts in that bill and urge its passage.

Sincerely,

David Knapp

Subject: Re: SB 98 - Recreational Liability

Date: Fri, 02 May 2003 06:47:05 -0800

From: keith [REDACTED]

To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Dear Senator Bunde,

I have just reviewed SB 98 and am totally in agreement with the concept. As an outdoor enthusiast I annually take my friends on boating trips for halibut, salmon and sight seeing in Katchemak Bay. While the personal risk is low, there is an inherent risk in all outdoor activities. It is my feeling that this is part of the sense of adventure that people who participate in such activities recognize as normal. So, while the risk is minimal, it is still a viable part of the adventure. To place this burden of risk solely on one person is without merit. Obviously, if someone such as a boat operator, is doing something unlawful or reckless, that is totally a different matter for consideration.

I support your efforts and the intent of this bill in providing all of us with some peace of mind in the pursuit of our routine Alaskan lifestyle. It makes perfect sense!

Keith Appel

Con Bunde wrote:

> Mr. Appel,
>
> Senator Bunde asked me to contact you regarding his SB 98, "An Act
> relating to civil liability for guest passengers on an aircraft or
> watercraft, and providing for an effective date."
>
> The Sponsor Statement can be found on the internet at
> http://www.akrepublicans.org/bunde/23/pdfs/bund_sb098.pdf. A copy of
> the bill can be found at
> <http://www.legis.state.ak.us/pdf/23/Bills/SB0098A.PDF>. We have also
> sent copies to the Alaska Airmen's Association, the Alaska Boating
> Association, Knik Canoers and Kayakers, Fairbanks Paddlers, the Personal
> Watercraft Club of Alaska, and to others interested in this subject.
> Senator Bunde would appreciate receiving letters of support for SB 98.
>
> He intends to ask for a hearing in Senate Transportation as soon as
> letters of support arrive to fill out the bill packet.
>
> If you have any questions or comments about this bill, please contact
> either Senator Bunde or myself at 1-800-892-4843.
>
> Thank you,
> Karen

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MEMORANDUM

April 18, 2003

SUBJECT: Civil liability of boat/airplane owners to passengers
(CSSB 98(TRA))

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford 
Legislative Counsel

You have asked several questions regarding CSSB 98(TRA).

First, does the term "watercraft" that appears in Sec. 2 need to be defined. This is a judgment call, but I don't think that it does. There are several definitions in existing law, but they all apply to particular situations. See AS 28.35.030(r)(3). There is no general statutory definition of "watercraft." A definition is often helpful to clarify a meaning or to exclude some unintended meaning. But since "watercraft" has a generally accepted meaning defining the term seems unnecessary. Also, there is some risk in creating a definition, in that you may inadvertently exclude or include some category.

Second, you have asked about the validity of liability waivers. This issue was recently before the Alaska Supreme Court in Moore v. Hartley Motors, Inc., 36 P.3d 628 (Alaska 2001). In that case, a liability waiver for injuries resulting from a ATV class was held valid and did protect the defendant from claims of negligence. However, the court noted that not all liability waivers were valid. In some cases, public policy considerations preclude a waiver from being effective against civil claims. I have attached a copy of that decision for your information.

Please contact me if you have further questions.

MFF:med
03-416.med

Enclosure

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You can do a full-text search of the Alaska Supreme Court opinions or go to the recent opinions, or the chronological or subject indices. Moore v Hartley Motors, Inc. et al (09/14/2001) sp-5469

Moore v Hartley Motors, Inc. et al (09/14/2001) sp-5469

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

GAYLE W. MOORE,)	
)	Supreme Court No. S-9336
Appellant,)	
)	Superior Court No.
v.)	3PA-95-505 CI
)	
HARTLEY MOTORS, INC.; ATV)	O P I N I O N
SAFETY INSTITUTE; SPECIALTY)	
VEHICLE INSTITUTE OF AMERICA,)	[No. 5469 - September 14, 2001]
a corporation incorporated in)	
the District of Columbia; and)	
JIM CROAK,)	
)	
Appellees.)	

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Palmer,
Beverly W. Cutler, Judge.

Appearances: Thomas R. Wickwire, Fairbanks,
for Appellant. John B. Thorsness and Kimberlee A. Colbo, Hughes
Thorsness Powell Huddleston & Bauman, LLC, Anchorage, for Appellee
Hartley Motors, Inc. L. G. Berry, Robertson, Monagle & Eastaugh,

Anchorage, for Appellees ATV Safety Institute, Specialty Vehicle Institute of America, and Jim Croak.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Bryner, Justices. [Carpeneti, Justice, not participating.]

FABE, Chief Justice.

I. INTRODUCTION

Gayle Moore was injured during an all-terrain vehicle (ATV) safety class when she drove her ATV over a rock and the vehicle rolled over. Before participating in the class, Moore signed a release of liability. After her injury, however, she sued for damages the safety class instructor, the organizations that developed and offered the class, and the owner of the property on which the class took place. She alleged that the release was not valid because she received no consideration, the release was against public policy, and the course was inherently unsafe. The superior court granted summary judgment to the defendants. Because there is a factual dispute regarding whether the layout of the course was unnecessarily dangerous, we reverse and remand for trial on that issue.

II. FACTS AND PROCEEDINGS

Gayle Moore and her husband bought a Suzuki four-wheel ATV in May 1993 from Suzuki, Arctic Cat Motor Sports. At the time of the sale, the salesperson offered the Moores a \$50 rebate upon completion of an ATV rider safety class. On October 23, 1993, the Moores attended an ATV rider safety class held on the property of Hartley Motors, Inc. James Croak instructed the class using the curriculum of the ATV Safety Institute. Before starting instruction, Croak requested that all participants sign a consent form and release. Moore signed the consent form and release.

The driving portion of the class took place on a course marked with cones on unpaved ground. During the class, Moore drove her ATV through high grass beyond a cone marking the course. Her vehicle rolled up on a rock protruding from the ground in the high grass. Moore was thrown from her vehicle, suffering injuries as a result.

Moore brought suit in July 1995 against Hartley Motors, the dealer that sold the Moores their ATV, ATV Safety Institute, and Jim Croak. [Fn. 1] She alleged that the defendants negligently failed to provide a safe ATV rider training course and location, and negligently concealed the fact that the course was unsafe.

In 1996 the defendants [Fn. 2] sought summary judgment based on the release signed by Moore before the class. In opposition to summary judgment, Moore presented a transcript of a telephone conversation between an investigator hired by her attorney and Michael Swan, a former ATV Safety Institute instructor. In this telephone conversation, Swan indicated that he had chosen not to teach an ATV rider course at the Hartley Motors location because he found the location inappropriate.

Superior Court Judge Beverly W. Cutler initially denied the motion for summary judgment. She concluded that while the release was valid as a matter of law, genuine issues of material fact existed regarding the defendants' knowledge of the suitability of the course site and whether they informed Moore of its suitability before she signed the release. In denying summary judgment, the superior court relied upon a theory of material nondisclosure by the defendants. The court found that the allegations presented in the telephone conversation with Swan could be supported by admissible evidence at trial.

In 1999 ATV Safety Institute, Specialty Vehicle Institute of America, and Croak (collectively ATVSI) sought reconsideration of the 1997 summary judgment denial because Michael Swan had died and therefore could not testify at trial. The superior court denied the motion for reconsideration but granted Hartley Motors's motion in limine to exclude hearsay statements by or attributed to Swan.

ATVSI then filed a motion for summary judgment and Hartley Motors filed a renewed motion for summary judgment based on the release Moore had signed. The superior court granted summary judgment to the defendants. The superior court entered final judgment for \$32,817.56 fees and costs to Hartley Motors, and \$21,049.12 fees and costs to ATVSI. Moore appeals.

III. DISCUSSION

A. Standard of Review

This court reviews grants of summary judgment de novo. [Fn. 3] We will affirm a summary judgment if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. [Fn. 4] When making this determination, we draw all reasonable inferences in favor of the non-moving party. [Fn. 5] "We make no attempt to weigh the evidence or evaluate the credibility of witnesses, and we assume that all facts set forth in the nonmoving party's affidavits are true and capable of proof." [Fn. 6]

B. The Superior Court Did Not Err in Finding that the Release Was Valid.

The superior court determined in 1997 that "the release itself is valid as a matter of law against negligence claims brought by [Moore]." Moore asserts that the trial court erred in treating the release as valid because (1) there was no consideration for the release and (2) the release should have been declared void as against public policy.

1. There was consideration for the release.

Moore argues that she did not receive any consideration in return for her release. She contends that the \$50 rebate promised by the salesperson upon completion of the course [Fn. 7] was to have been the consideration for her release of liability. Because Moore did not complete the course, she did not receive the \$50 rebate. [Fn. 8] She asserts that since she did not receive any consideration for the release, it was not effective to protect the defendants from liability.

Moore misconstrues the role of consideration by equating inducement with consideration. Here ATVSI provided consideration for the release, not by offering a \$50 rebate, but by offering participation in the class. Thus, even if the \$50 rebate induced Moore to take the class, the only reasonable inference from the facts presented is that Moore exchanged the release of liability for participation in the program. Whether Moore considered the \$50 rebate her inducement is immaterial to the sufficiency of consideration. [Fn. 9] The trial court did not err in rejecting Moore's claim that the release was invalid for failure of consideration.

2. The release did not violate public policy.

Moore argues that the release should "be set aside as unconscionable and contrary to public policy." An otherwise valid release is ineffective when releasing a defendant from liability would violate public policy. [Fn. 10] Moore argues that public policy considerations should invalidate the release she signed.

In *Municipality of Anchorage v. Locker*, we evaluated whether an exculpatory release should be invalidated as against public policy. [Fn. 11] In *Locker*, we concluded that a limited liability clause in a contract for an advertisement in the yellow pages was unconscionable and void as against public policy. [Fn. 12] We relied upon *Tunkl v. Regents of the University of*

California [Fn. 13] in identifying the factors for review in invalidating an exculpatory provision on public policy grounds, noting that such a provision is likely invalid when

[i]t concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. [Fn. 14]

Of particular relevance to this case is the type of service performed and whether the party seeking exculpation has a decisive advantage in bargaining strength because of the essential nature of the service. [Fn. 15] Here, the ATV safety course, although perhaps providing a desirable opportunity for an ATV driver, is not an essential service, and therefore the class providers did not have a "decisive advantage of bargaining strength" in requiring the release for participation in the class. [Fn. 16] Moore had a choice whether to take the class or not, and chose to sign the release in order to participate. The release in this circumstance does not present a violation of public policy.

Other courts have upheld exculpatory releases for activities similar to ATV riding where the activities themselves were not regulated by statute. These releases precluded liability for injuries sustained while parachute jumping, [Fn. 17] riding a dirt bike motorcycle in a motorcycle-park facility, [Fn. 18] and scuba diving as a part of a scuba diving course. [Fn. 19] The Alaska legislature does not regulate ATV riding. By contrast, the legislature has acted to regulate the ski industry, and as part of this regulation has precluded ski facility operators from obtaining waivers of liability for negligence. [Fn. 20] Importantly, the Alaska Ski Safety Act of 1994 [Fn. 21] defines the duties of a ski operator [Fn. 22] and prevents actions against ski operators for injuries resulting from the inherent danger and risk of skiing. [Fn. 23] The legislature has not chosen to regulate ATV course operators in a similar way.

Moore also contends that because a consent decree issued in a consumer products safety lawsuit requires ATV manufacturers to carry liability insurance covering participants in training courses, [Fn. 24] it is therefore against public policy for an ATV safety program to require participants to waive and release any injury claims. Moore cites no authority to support this interpretation of the consent decree, and we have discovered no reported decisions that have addressed this issue. We decline to invalidate an otherwise valid release between participants and providers of ATV safety courses on this basis.

C. A Genuine Issue of Material Fact Exists as to Whether the Course Layout Was Inherently Dangerous.

The trial court's summary judgment analysis focused on alleged misrepresentations that could have invalidated the release. As with any contract, a release of liability is only valid to the extent that it reflects a "conspicuous and unequivocally expressed" intent to release from liability. [Fn. 25] The trial court granted

summary judgment after determining that no genuine issue of material fact existed as to whether ATVSI or Hartley Motors knew that the course was allegedly unsafe.

Even if there was no genuine issue of material fact regarding a misrepresentation, the trial court erred in failing to consider the scope of the release signed by Moore. [Fn. 26] Moore agreed to release the ATV Safety Institute and all other organizations and individuals affiliated with the ATV safety class from liability, loss, and damages "including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse." But the release does not discuss or even mention liability for general negligence. Its opening sentences refer only to unavoidable and inherent risks of ATV riding, and nothing in its ensuing language suggests an intent to release ATVSI or Hartley Motors from liability for acts of negligence unrelated to those inherent risks. Based on this language, we conclude that Moore released ATVSI and Hartley Motors only from liability arising from the inherent risks of ATV riding and ordinary negligence associated with those inherent risks. [Fn. 27] As we noted in *Kissick v. Schmierer*, an exculpatory release can be enforced if "the intent to release a party from liability for future negligence" is "conspicuously and unequivocally expressed." [Fn. 28] However, underlying the ATV course release signed by Moore was an implied and reasonable presumption that the course is not unreasonably dangerous.

Moore claims that she was injured when she fell off her ATV after riding over a rock obscured by tall grass. We assume the truth of this assertion for purposes of reviewing the superior court's summary judgment order. Moore asserts that the course on which the class operated was set up in such a way that she had to ride into the grass and that this posed an unnecessary danger.

The allegedly improper course layout may be actionable if the course posed a risk beyond ordinary negligence related to the inherent risks of off-road ATV riding assumed by the release. [Fn. 29] As we have explained in the context of skiing, "[i]f a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger" and is therefore not an inherent risk of the sport. [Fn. 30] We have described an "unreasonable risk" as one for which "the likelihood and gravity of the harm threatened outweighed the utility of the . . . conduct and the burden on the [defendant] for removing the danger." [Fn. 31] If the course was designed or maintained in such a manner that it increased the likelihood of a rider encountering a hidden rock, then the course layout may have presented an unnecessary danger; holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver. Holding a safety class on an unreasonably risky course may give rise to liability even if encountering rocks is generally an inherent risk of ATV riding. Moreover, the fact that the course was geared towards novice ATV riders may also affect the level of care required of ATVSI and Hartley Motors to reduce unnecessary dangers and unreasonable risk. [Fn. 32]

Whether the injury resulted from an unnecessarily dangerous course or a course placed perilously close to an obscured obstacle are questions of fact. Here, Moore presented facts that could support a finding that the ATV safety course was laid out in an unnecessarily dangerous manner that was not obvious to novice ATV riders and therefore not within the scope of the release. Thus, it was error to grant summary judgment.

IV. CONCLUSION

Moore agreed to release the defendants from liability for injuries sustained as a result of participation in the ATV riding and safety class. The trial court erred in granting summary judgment because genuine issues of material fact existed regarding whether the injury resulted from unreasonable dangers not within

the scope of the release. Therefore, we REVERSE the grant of summary judgment in favor of the defendants and REMAND the case to the trial court for further proceedings consistent with this opinion.

FOOTNOTES

Footnote 1:

Specialty Vehicle Institute of America was added as a defendant in the Second Amended Complaint in October 1995.

Footnote 2:

The ATV dealer was dismissed as a defendant in 1997.

Footnote 3:

See Ganz v. Alaska Airlines, Inc., 963 P.2d 1015, 1017 (Alaska 1998).

Footnote 4:

See Parson v. Marathon Oil Co., 960 P.2d 615, 618 (Alaska 1998).

Footnote 5:

See id.

Footnote 6:

Samaniego v. City of Kodiak, 2 P.3d 78, 83 (Alaska 2000).

Footnote 7:

Moore has not presented evidence that the parties to this case promised to provide the \$50 rebate.

Footnote 8:

Moore also asserts that the release was not valid because the instructor returned the signed release to her after the injury. She claims that by returning the slip of paper to her, Croak rejected the release, and therefore the release does not bind Moore. The physical location of the signed consent form -- in ATVSI's possession or Moore's -- has no effect on the bargained-for exchange that occurred before Moore began participation in the class.

Footnote 9:

A comment to the Restatement (Second) of Contracts states:

Even in the typical commercial bargain, the

promisor may have more than one motive, and the person furnishing the consideration need not inquire into the promisor's motives. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.

Restatement (Second) of Contracts sec. 81 cmt. b (1979).

Footnote 10:

See Municipality of Anchorage v. Locker, 723 P.2d 1261, 1264-67 (Alaska 1986).

Footnote 11:

Id.

Footnote 12:

Id. at 1264-65.

Footnote 13:

383 P.2d 441 (Cal. 1963).

Footnote 14:

Locker, 723 P.2d at 1265 (quoting Tunkl, 383 P.2d at 445-46).

Footnote 15:

See id.

Footnote 16:

Id. at 1265.

Footnote 17:

See Boucher v. Riner, 514 A.2d 485 (Md. App. 1986).

Footnote 18:

See Kurashige v. Indian Dunes, Inc., 200 Cal. App. 3d 606 (Cal. App. 1988).

Footnote 19:

See Mann v. Wetter, 785 P.2d 1064, 1066 (Or. App. 1990).

Footnote 20:

See AS 05.45.120.

Footnote 21:

See AS 05.45.010-.210.

Footnote 22:

See AS 05.45.040-.070.

Footnote 23:

See AS 05.45.010.

Footnote 24:

The United States government brought suit under the Consumer Product Safety Act, 15 U.S.C. sec. 2061 (1981), against the manufacturers of ATVs for "relief as may be necessary to protect the public from the risk of an imminently hazardous consumer product." The case settled and the court issued a consent decree requiring manufacturers to market ATVs within specified guidelines, "offer to all interested persons a nationwide hands-on training program," and offer incentives to consumers to take the classes.

Footnote 25:

Kissick v. Schmierer, 816 P.2d 188, 191 (Alaska 1991).

Footnote 26:

The release signed by Moore reads as follows:

IMPORTANT INFORMATION. YOU MUST READ AND SIGN THIS CONSENT FORM AND RELEASE: The Consumer Product Safety Commission ("CPSC") reports that over 1,186 people, including many children, have died in accidents associated with ATVs since March, 1986. You should also be aware that 70cc to 90cc ATVs should be used only by persons aged 16 and older. Having been advised of the above, the undersigned agrees to release the ATV Safety Institute, the Specialty Vehicle Institute of America, its members, Trustees, employees, agents, representatives and all other organizations affiliated with the ATV RiderCourse, from any and all liability, loss, damage claim or cause of action, known or unknown, including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse.

Footnote 27:

The inherent risks of an activity such as ATV riding are those risks that are obvious and necessary to the sport. These inherent risks, by the very nature of being "inherent," are beyond the control of instructors teaching the activity, the landowner on whose land the activity is conducted, or an organization conducting a program involving the activity.

Footnote 28:

816 P.2d at 191.

Footnote 29:

See Scott v. Pacific West Mountain Resort, 834 P.2d 6, 10 (Wash. 1992) (noting that an exculpatory clause should not be upheld where "the negligent act falls greatly below the standard established by law for protection of others").

Footnote 30:

Hiibschman ex rel. Welch v. City of Valdez, 821 P.2d 1354, 1360 n.12 (Alaska 1991) (quoting Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Liability Statute and Injured Skiers, 3 V. L. Rev. 129, 141-42 (1978)).

Footnote 31:

State v. Abbott, 498 P.2d 712, 725 (Alaska 1972).

Footnote 32:

See, e.g., Hiibschman, 821 P.2d at 1360 (citing as evidence of ski operator negligence evidence that a ski jump that caused injury was on a beginner's slope, and that an expert witness stated that there should not have been any jumps on a beginner's slope, especially if it was not clearly marked as only being for expert skiers); Scott, 834 P.2d at 15 (reversing summary judgment where "some of the evidence would support a conclusion that the race course was laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student").

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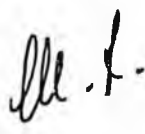
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MEMORANDUM

April 28, 2003

SUBJECT: Civil liability for plane/boat owners (CSSB 98(TRA))

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford 
Legislative Counsel

You have asked if CSSB 98(TRA) would provide civil immunity to someone who owns or operates a boat or plane while committing a crime. The bill would not of course affect any criminal liability for the owner, operator, or passengers. As to civil liability, under Sec. 09.65.112(b)(1)(A), immunity does not apply for "intentional misconduct." I believe that committing a crime would constitute the type of intentional act that would preclude immunity. You should also note that under AS 09.65.210, a person who suffers civil damages resulting from the commission of a felony or while operating a plane or boat while intoxicated by alcohol or drugs is precluded from recovering civil damages.

Please contact me if you have further questions.

MFF:med
03-451.med

SB

160

Alaska State Legislature



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SENATOR DONALD C. OLSON

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Ambler
Anaktuvuk Pass
Atkasuk
Barrow
Brevig Mission
Browerville
Buckland
Chevak
Deering
Diomedea
Elim
Emmonak
Gambell
Golovin
Hooper Bay
Kaktovik
Kiana
Kivalina
Kobuk
Kotlik
Kotzebue
Koyuk
Mountain Village
Noatak
Nome
Noorvik
Nuiqsut
Nunam Iqua
Pilot Station
Pitka's Point
Point Hope
Point Lay
Savoonga
Scammon Bay
Selawik
Shaktoolik
Shishmaref
Shungnak
St. Mary's
St. Michael
Stebbins
Teller
Unalakleet
Wainwright
Wales
White Mountain

May 5, 2003

MEMORANDUM

To: Representative Lesil McGuire
House Judiciary Committee

From: Senator Donald Olson

A handwritten signature in black ink, appearing to read "D Olson", written over the "From" line.

Re: Schedule hearing for SB 160, Civil Liability for Defibrillator Use

I respectfully request a House Judiciary Committee hearing of SB 160 at your earliest convenience. I have attached my sponsor statement, sectional analysis and support documentation. Please contact me if you need additional information.

Thank you for your attention to this request.

Alaska State Legislature



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SENATOR DONALD C. OLSON

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Elim
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Gambell
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Hooper Bay
Kaktovik
Kiana
Kivalina
Kobuk
Kotlik
Kotzebue
Koyuk
Mountain Village
Noatak
Nome
Noorvik
Nuiqsut
Nunam Iqua
Pilot Station
Pitka's Point
Point Hope
Point Lay
Savoonga
Scammon Bay
Selawik
Shaktolik
Shishmaref
Shungnak
St. Mary's
St. Michael
Stebbins
Teller
Unalakleet
Wainwright
Wales
White Mountain

SPONSOR STATEMENT SB 160, Civil Liability for Defibrillator Use

I introduced Senate Bill 160 to save Alaskan lives. This legislation would provide faster treatment to Alaskans who suffer a cardiac arrest by increasing the availability of automated external defibrillators (AEDs).

Each year, 250,000 people die in the United States as a result of sudden cardiac arrest. The most important treatment for more than half of these patients is immediate defibrillation; an electrical shock intended to restore a more normal cardiac rhythm. For each minute a person remains in cardiac arrest, their chances of survival decrease by approximately 7% to 10%.

AEDs have evolved significantly over the past years and the current generation of devices is much safer and easier to use. These new devices have the ability to discern between shockable and nonshockable rhythm; for that reason, it is literally impossible to shock a person who does not require it.

Businesses and municipalities are interested in making AEDs more accessible in the workplace and in locations where large groups gather for the life safety of their employees and the public.

Currently, the Good Samaritan provision in Alaska law (AS 09.65.090) gives immunity from civil liability for any trained individual who uses an AED. However, this immunity does not apply to those individuals and organizations that make the devices accessible in the workplace. As a result, these devices have not been made readily available for emergency use. SB 160 removes this impediment by extending the Good Samaritan immunity to owners and operators of public and private facilities.

With Senate Bill 160, I am encouraging the proliferation of this life saving technology in Alaska.

Alaska State Legislature



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SENATOR DONALD C. OLSON

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Kaktovik
Kiana
Kivalina
Kobuk
Kotlik
Kotzebue
Koyuk
Mountain Village
Noatak
Nome
Noorvik
Nuiqsut
Nunam Iqua
Pilot Station
Pitka's Point
Point Hope
Point Lay
Savoonga
Scammon Bay
Selawik
Shaktoolik
Shishmaref
Shungnak
St. Mary's
St. Michael
Stebbins
Teller
Unalakleet
Wainwright
Wales
White Mountain

Sectional Analysis SB 160, Civil Liability for Defibrillator Use

Section 1

Generally, Section 1 established a new section in regard to civil liability. This section replaces the current civil liability immunity deleted in Section 2.

AS 09.65.087(a)

This subsection broadens the civil liability immunity for those who use or attempt to use an automated external defibrillator (AED) device in a perceived medical emergency. However, this immunity requires that an appropriate emergency medical services agency is immediately notified.

AS 09.65.087(b)

This subsection also extends immunity to those who acquire or provide the AED under certain conditions.

These conditions are as follows:

- (1) Notification of the local emergency medical response authority within 30 days following placement of the device.
- (2) Proper maintenance and testing of the device.
- (3) Provision of a means of notifying the local emergency medical response authority that an emergency exists.
- (4) Provision of appropriate training to the employee or agent who used the device in a perceived medical emergency.

Further conditions A, B, C, and D in subsection 4 address other situations where the immunity is maintained.

AS 09.65.087(c)

This subsection maintains the current definition of "appropriate training" as having completed an AED training course from the American Heart Association, the American Red Cross, or another AED training course approved by the Department of Health and Social Services.

Section 2

Deletes AS 09.65.090(e) and (f)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 160
 (S) Publish Date: 4/14/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to civil liability for use or BRU Civil Division
attempted use of an automated external defibrillator; . . ." Component Special Litigation
 Sponsor Senator Olson
 Requester Senate HESS Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

CHANGE IN REVENUES ()						
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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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would protect from civil liability persons who use automated external defibrillators (AED), and persons who provide the AED for use, so long as certain specified responsibilities are fulfilled.

Passage of this legislation is not anticipated to have a fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division: Attorney General's Office Date/Time 4/9/03 1:13 PM
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 4/9/2003
 Agency: Department of Law

Every year more than three million volunteers contribute their time and talents to help our organization defeat heart and blood vessel disease- and save lives.

American Heart Association



Fighting Heart Disease and Stroke

Northwest Affiliate
1057 West Fireweed Lane, Suite 100
Anchorage, AK 99503
907.263.2044 888.276.0858
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www.americanheart.org

Your American Heart Association Supports Senate Bill 160

The American Heart Association supports Senators Olson, Therriault, Wilken, Dyson, Davis, Seekins, Bunde, Cowdery, Green, and Wagoner's Senate Bill 160, a bill that would amend Alaska's Good Samaritan Law to reduce the liability risk associated with both using and providing automated external defibrillators (known as "AEDs").

Each year, 250,000 people die in this country from sudden cardiac arrest. Cardiac arrest is the stopping of the regular heart rhythms, usually because of interference with the electrical signal that regulates the heartbeat. When cardiac arrest occurs, the heart starts to beat chaotically and cannot pump blood. Brain death and permanent death start to occur in just four to six minutes after someone experiences cardiac arrest. This means that when a person goes into cardiac arrest, every second counts. To increase the odds of a victim's survival, the American Heart Association has outlined a four-step plan called the "chain of survival."

Defibrillators play a critical part in this chain of survival. The four links in the chain are (1) early access, which means recognizing that a cardiovascular emergency exists and immediately calling Emergency Medical Services; (2) early CPR, which means giving CPR promptly and properly when necessary; (3) early defibrillation, which means having immediate access to a properly working AED, and; (4) early advanced care, which means having qualified paramedics with up-to-date Advanced Cardiac Life Support Training.

While all four links in the chain are important, early defibrillation is often called the critical link in the chain of survival because it is the only way to successfully treat most cardiac arrests. In fact, for every minute without defibrillation, the odds of survival drop seven to ten percent. A cardiac arrest victim who is not defibrillated within eight to ten minutes has virtually no chance of survival.

Senate Bill 160 will improve the chain of survival in Alaska in several ways. First, by eliminating the threat of civil liability for people and businesses that acquire or provide an AED, the bill will help increase strategic AED placement around Alaska. Because every second counts after a victim suffers cardiac arrest, the more AEDs that are placed in strategic areas in the community, the stronger the chain of survival.

Additionally, by requiring that a person who acquires or provides the AED follow some common sense safety requirements, the bill ensures the responsible placement of AEDs. These requirements include (1) the acquirer or provider of the AED notify

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the local emergency response agency of the location of the device; (2) that the device be properly maintained and tested – just as one would test, for example, a smoke or carbon monoxide detector; (3) that there is a way to notify local EMS within a reasonable proximity to the AED – for example, making sure that there is a phone reasonably close to the device, and; (4) that the acquirer or provider of the AED provide appropriate training for its employees, because trained rescuers can deliver the treatment more quickly than those who are totally unfamiliar with the device.

The bill also eliminates the threat of civil liability for individuals who use or attempt to use the AED on a victim in an emergency. The bill recognizes that while AED training is important, AEDs are easy to use, and the machine discerns between shockable and nonshockable heart rhythms. Because it is virtually impossible to shock a person that does not need it, the bill omits the current requirement that all users of the device be properly trained before they use or attempt to use the device in an emergency situation.

This proposed bill strengthens the American Heart Association's chain of survival by removing liability barriers to AED placement and use, and by ensuring that those persons who provide AEDs have followed basic, common sense protections. The American Heart Association commends these laudable goals, and fully supports Senate Bill 160.



National Center for Early Defibrillation
Community Resources to Help Save Lives



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New Virginia law strengthens immunity for AED users and purchasers

April 3, 2003

Virginia has joined a handful of states that specifically provide legal liability protection to purchasers of automated external defibrillators (AEDs) and untrained persons who use AEDs in good faith. The bill also encourages laypersons to seek formal training in cardiopulmonary resuscitation (CPR) and AED use. HB 1860, introduced by John M. O'Bannon, R-Henrico, received unanimous support from the Virginia General Assembly and was signed by Governor Mark Warner. On April 2, the Assembly supported the Governor's recommendation to confirm the law. It will take effect on July 1.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

All states now have Good Samaritan legislation designed to encourage use of AEDs by the public, and the federal Cardiac Arrest Survival Act provides additional protection, but Virginia's legislation provides an added measure of encouragement by specifically addressing immunity for those who have not received training. Other states with similar legislation include Pennsylvania and Rhode Island.

The Virginia law is designed to reduce barriers to bystander intervention in sudden cardiac emergencies. Sudden cardiac arrest is the leading cause of death among adults in the U.S. Of the 1,000 people who suffer SCA each day, fewer than 10% survive. With more rapid intervention, including the use of AEDs by untrained bystanders, many more lives could be saved.

For more information, click [here](#).

For a copy of the legislation, click [here](#).

For information on liability issues related to AED programs, click [here](#) and [here](#).



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News Stories

Middle school staff member saved by school's AED

March 15, 2003

When Dexter Grady, a janitor at East Hampton (Long Island) Middle School, volunteered to get trained to use the school's new Automated External Defibrillator (AED), he never imagined that he would be the recipient of the machine's life-saving capabilities.

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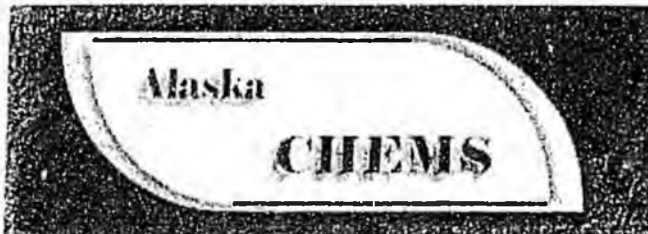
On his dinner break yesterday, Dexter, 37, joined some local men who regularly gather in the school gym for pick-up basketball games. Shortly after playing, Grady collapsed in sudden cardiac arrest. Thanks to the quick action of bystanders who called for help and used the AED to defibrillate his heart, Grady is expected to be released from the hospital sometime next week.

The legislation that prompted the middle school to have an AED on site was inspired by the efforts of Karen and John Acompora, of nearby Northport, parents of Louis Acompora, who died from sudden cardiac arrest three years ago, almost to the day. Louis, then 15, had been hit in the chest by a ball during a lacrosse game and an AED was not immediately available.. To prevent other such tragedies, Governor George Pataki signed "Louis's Law" last year, which mandates the placement of AEDs in New York schools.

Judging from Grady's experience, the law seems to be working.

For more information, click [here](#).

Text Links List || Health Social Services > Public Health > Community Health Emergency Medical Services



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Automated External Defibrillators in Alaska

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Revised 02/25/2003

Automated external defibrillators (AEDs) are an essential tool in the treatment of out-of-hospital cardiac arrest. Over the years, the devices have become safer, more reliable and more maintenance free. The new technologies used in these devices make them suitable for use by anyone who has had basic training in their use.

AEDs are most effective when implemented as part of an overall strategy which considers each link in the "Chain of Survival:"

- Early access to the emergency medical system (EMS and 9-1-1 system)
- Early cardiopulmonary resuscitation (CPR)
- Early defibrillation when indicated
- Early advanced emergency treatment

In 1998 legislation was passed that redefined the use of an automated external defibrillator as a basic life support skill and provided, through the Good Samaritan Law, some immunity from civil liability to properly trained personnel who use AEDs in a resuscitation attempt and who activate the EMS system. The text of the statute is available below.

Files of interest (click to download):

- [Civil Liability for Emergency Aid \(AS 09.65.090\)](#)
- [Regulations for Approving AED Training Programs \(7 AAC 26.585\)](#)
- [Federal Register - AED Requirements for Federal Buildings](#)
- [Answers to Frequently Asked Questions about the AEDs in Alaska](#)

Approved Training Programs

In Alaska's Good Samaritan Law (AS 09.65.090) "properly trained" to use an AED means " that the individual has completed an automated external defibrillator training course from the American Heart Association, the American Red Cross, or another automated external defibrillator training course approved by the Department

of Health and Social Services."

The following programs have been approved by the Department of Health and Social Services in accordance with 7 AAC 26.588

- BLS for Health Care Providers-American Heart Association
- CPR for the Professional Rescuer-American Red Cross
- The CPR component of Medic First Aid-Advanced
- Basic Life Support for Professionals (BLSPRO)-EMP America
- CPR for the Professional Rescuer-American Safety & Health Institute
- Respond Systems AED/CPR

AED Placement

It is important for emergency medical dispatchers to know the locations of AEDs so they can direct rescuers to the device when emergency medical services personnel are en route. The Section of Community Health and EMS has developed a simple form that can be completed and faxed to the Section at 465-4101. The Section will fax copies of the form to the appropriate Regional EMS Office, Emergency Medical Dispatch center, and the nearest emergency medical services agency.

[Model AED Placement Notification. pdf](#)

Rural AED Act Grant Program

On July 15th, the Section of Community Health and EMS submitted an application to the Health Resources and Services Administration for over \$2,100,000 in automated external defibrillators and related training. The grant was written and submitted in response to the announcement in the May 23rd Federal Register that 12.5 million dollars were available nationwide in federal fiscal year 2002 under the Rural Access to Emergency Devices Grant Program.

Following the program's announcement, the Section of Community Health and EMS notified all emergency medical services agencies and other agencies known to be interested, including the Alaska Department of Public Safety and the Alaska Department of Transportation and Public Facilities, that it would be submitting a statewide application on behalf of eligible agencies statewide. Twenty-one "Community Partnerships" encompassing 77 communities and over 175 agencies responded with information about AED needs and provided letters of commitment. The total number of AEDs requested was 637.

In October, the Section of Community Health and EMS received word from the Health Resources and Services Administration (HRSA) that Alaska had been awarded \$237,703 to implement the Rural Automated External Defibrillator (AED) Grant program.

The Section will solicit updated applications for funding from community partnerships included within the funded grant application and will distribute the available funds based on expert reviews of the applications.



Rural AED List Server

The Section of Community Health and Emergency Medical Services has developed an internet list server to facilitate communications regarding this important issue

[Join Alaska Rural AED List Server](#)

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full-function defibrillators are complicated and can kill if administered improperly.

Currently, state law tightly restricts access to both full-function defibrillators and a bill will lift the restrictions on AEDs, which are specifically designed for public-access

"Widespread access to AEDs will be a step in the right direction"
Virginia Del John M. O'Bannon (R)

Anyone who can find the big green "ON" button, and follow a few simple instructions can use a public-access AED. A recording in the machines begins providing clear verbal instructions as the power is turned on. They actually sound quite bossy, but the authoritative tone helps rescuers stay focused.

Instead of using bulky paddles, AEDs have self-adhesive, palm-size pads that attach to the chest unit by an electrical cord. The person attempting the rescue places the pads on the patient. After the pads are on, the operator does not need to touch the patient unless the machine tells them to do so.

Several scientific studies have tested the safety and effectiveness of AEDs.

A 1999 research project, for example, timed and evaluated two groups -- sixth-graders with no prior training, and emergency medical professionals -- as they used AEDs in simulated emergencies. All of the children understood and followed the instructions successfully.

When the study was published in *Circulation*, a medical journal for heart specialists, researchers made the following conclusion: "During mock cardiac arrest, the speed of response by untrained children is only modestly slower than that of professionals."

Many people compare modern public-access AEDs to fire extinguishers, which are used to save lives that they are found in almost every public place. In some ways, AEDs are safer than fire extinguishers.

Fire extinguishers are not idiot-proof. If operators point the nozzle at themselves or others, they will be hurt by the blast of chemicals. Fire extinguishers can also be used to cause malicious harm -- by bludgeoning someone, for instance.

AEDs are not idiot-proof, either. Before the unit delivers a shock, it sounds a caution alarm and issues emphatic orders, "Do NOT touch the patient!"

If operators disobey the defibrillator's orders, they can be hurt.

Unlike fire extinguishers, AEDs would be extremely difficult to use to cause malicious harm. Most units refuse to even charge up unless their sensors indicate that they are proper for use on a person who is not breathing and whose heart is in fibrillation.

In 1997, Florida became the first state to enact a law encouraging broad public access to AEDs by trained non-medical personnel such as police officers and firefighters. Currently, many states have taken similar steps.

What makes Virginia unusual is that its law will expand legal protection for purchasers of untrained AED users acting in good faith. Only a handful of states, such as Pennsylvania and Rhode Island, provide such protection from liability.

This protection will be important as AEDs become more prevalent in public places. In Pennsylvania, defibrillators were recently installed at all service plazas along the Pennsylvania Turnpike. The Illinois Legislature just passed a law requiring golf courses, school gymnasiums, and government-owned physical fitness facilities to have access to at least one AED for emergency operation.

Under current Virginia laws, public-access AEDs (which do not need trained operators)

much the same as full-function defibrillators (which definitely do need trained operators).

O'Bannon's bill will update these laws so that:

AED units can be placed in locations where untrained good Samaritans might use them.

Purchasers will not be required to complete registration paperwork and pay a state fee.

Purchasers will not be responsible for preventing use of the AEDs by untrained good Samaritans.

Anyone who makes a good-faith effort to use an AED in a life-threatening situation will be protected from liability.

O'Bannon said he would be thrilled with even a small increase in the number of people who receive emergency treatment in time to prevent irreversible brain damage.

He noted that his bill not only promotes the availability of AEDs but also urges people to get CPR and life support training.

"The AEDs are great -- no doubt about it," O'Bannon said. "But realistically, there are still many times when CPR and other skills that are taught in basic life support classes will be the difference between a patient who dies and a patient who survives. It is the best possible chance for a full recovery."

EMAIL THIS STORY

PRINT VERSION OF THIS STORY

Issues to Watch

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This section was written by Richard Lazar, Esq., a legal expert on emergency medical services topics, who serves as an advisor to the National Center for Early Defibrillation.

If you are like most people considering the implementation of an AED program, you probably have questions about laws and regulations affecting early defibrillation programs and whether or not there are any liability risks. Let's take a look at the federal and state law and regulatory framework within which early defibrillation programs operate, and review the nature and limited scope of any negligence liability risk associated with community-based early defibrillation programs¹.

Federal and state laws and regulations

The purchase and use of AEDs occurs within a complex maze of federal and state laws and regulations. At the federal level, the U.S. Food and Drug Administration (FDA) oversees the manufacture of AEDs because they are medical devices. At the state level, various regulatory agencies oversee the use of AEDs. Both the FDA and state regulatory agencies determine who can use AEDs and how they may be used.

Federal regulatory oversight

The FDA is the federal regulatory agency responsible for ensuring that medical devices like AEDs are safe and effective. To achieve this goal, the FDA imposes device labeling requirements on AED manufacturers. Labels must describe the indications and conditions for AED use. Currently, AEDs are viewed by the FDA as restricted, prescription devices. This means AED labeling must indicate that the device may only be used under certain conditions: the user must be trained and under the supervision of a physician. In addition, AEDs must come with directions so they can be used safely in the manner intended, that is, to resuscitate victims of sudden cardiac arrest. All AEDs sold in the marketplace today are evaluated and cleared by the FDA.

Certain aspects of current federal law are unclear. For example, FDA regulations do not detail the precise nature and scope of medical direction or training required to use AEDs. Of some help on the question of medical oversight is a statement contained in a consumer information document published by the FDA's Center for Devices and Radiological Health (CDRH) which states that "a physician who oversees the PAD (Public Access Defibrillation) program at a facility must write a prescription for the AED in order for the facility to purchase it."² This suggests an AED prescription is device specific rather than patient specific. On the issues of training this same document states:

[For direct links to individual state laws on AEDs, click here.](#)

PDF Documents:

[State Legislative Activity Related to AEDs](#)

[Characteristics of State AED Laws](#)

[Summary of AED Related Legislation in 107th Congress](#)

[Cardiac Arrest Survival Act of 2000](#)

[Airport Medical Assistance of 2000](#)

[FAA Final Rule](#)

[Rural AED Act](#)

Rural AED Act Summary

Public Health Improvement Act

Word Documents:
Cardiac Arrest Survival Act of 2000

public access, on the issue of training and some equipment states.

Public access refers to accessibility for trained users to use AEDs in public places. Public access does not mean that any member of the public witnessing a sudden cardiac arrest should be able to use the device. AEDs are to be used only by individuals with the proper training and certification in accordance with state and local laws.³

To the extent training is required--a question of debate in both legal and public policy circles--the CDRH document suggests training standards are governed by state and local laws rather than federal law.

The FDA is reviewing whether AEDs should remain prescription devices and whether more extensive use of these devices should be permitted. It is likely federal requirements affecting the sale and use of AEDs will change in the near future.

Federal law

Laws recently passed by the U.S. Congress could have a dramatic impact on the pace at which early defibrillation programs are adopted.

The Cardiac Arrest Survival Act (CASA)⁴ requires the U.S. Secretary of Health and Human Services to establish guidelines for placing AEDs in federal buildings. These guidelines are to include recommendations on the appropriate placement of AEDs including procedures for the following:

- Implementing appropriate training courses in the use of such devices, including the role of cardiopulmonary resuscitation;
- Proper maintenance and testing of the devices;
- Ensuring coordination with appropriate licensed professionals in the oversight of training of the devices;
- Ensuring coordination with local emergency medical systems regarding the placement and incidents of use of the devices⁵.

When published, these guidelines and recommendations may lead to community-based early defibrillation programs founded on more uniform state AED laws, regulations and training requirements.

An important provision of the CASA provides certain AED users with conditional Good Samaritan legal liability immunity for any harm resulting from the use or attempted use of the device⁶. AED acquirers receive similar immunity if certain requirements are met. AED trainers and medical oversight physicians do not receive immunity under this law. How CASA immunity and AED immunity under state law (see state Good Samaritan law section below) will apply in specific situations remains a complex and unanswered question.

The Rural Access to Emergency Devices Act⁷ (also called the Rural AED Act) was passed by Congress along with the CASA. This law authorizes the appropriation of \$25 million in grants to certain "community partnerships" for the purchase of AEDs and for AED training.

The Airline Passenger Safety Act⁸, enacted in April 1998, requires the Federal Aviation Administration (FAA) to review the contents of medical kits carried on commercial airplanes. Administrative rules proposed by the FAA as required by this law would mandate that every commercial aircraft be equipped with specified life-saving equipment and appropriately stocked first-aid and medical kits, including AEDs, and

that flight crew members be trained in their use. It is estimated that 1,000 persons die each year due to cardiac arrest suffered on international commercial airline carriers. More and more airlines are equipping their fleets with AEDs.

State regulatory oversight

User classes

State laws and regulations are not uniform. Some states do not oversee the use of AEDs. Other states do, but the scope of oversight varies widely. State laws and regulations affecting early defibrillation programs address two key elements. The first element relates to those individuals specifically permitted to use AEDs, known as "user classes." User classes may include the following groups:

- Emergency medical responders such as paramedics and emergency medical technicians (EMTs)
- Public safety emergency responders, such as firefighters and police officers
- Targeted emergency responders, such as security guards, industrial first aiders, flight attendants, ship crews, ski patrol, lifeguards, non-hospital healthcare facility workers, nursing home personnel, retirement community personnel, athletic trainers, etc.
- Trained citizen responders, such as friends, relatives and co-workers of people with identified heart problems

States vary in their approaches to authorizing AED use. Some allow a broad range of individuals to use the devices. For example, California allows anyone to use an AED if the individual meets certain training and competency requirements and if there is medical oversight. A Florida law says "an automatic external defibrillator may be used by any person for the purpose of saving the life of another person in cardiac arrest," if the individual is trained in CPR and proficient in AED use.

In contrast, some states restrict the scope of user classes allowed to use AEDs. For example, a shrinking number of states allow only emergency medical responders (e.g., EMTs and First Responders) to use AEDs. In these states, other user classes are not specifically permitted to use the devices. Whether the absence of express state authorization prohibits the use of AEDs by other user classes is an open legal question.

Efforts are underway to encourage states to expand the scope of user classes allowed to use AEDs. Overall, the trend at the state level is to expand groups of individuals allowed to use AEDs.

Conditions of use

Generally, the second element addressed by state AED laws and regulations describes the conditions under which AEDs may be used, known as "conditions of use." These conditions address training, medical oversight, quality assurance, record keeping, and reporting. States vary dramatically in their approach to specifying conditions of use. Some states require very little while a diminishing number specify lengthy and burdensome conditions of use.

Summary of government oversight

It is important that your early defibrillation program follow applicable federal and state laws and regulations. Therefore, your first task as you

begin the process of developing an early defibrillation program is to review the laws and regulations affecting AED use in your state. It is essential to contact your state EMS agency for information about state laws and regulations. A knowledgeable attorney can help you get your program up and running.

Legal liability risk

Individuals, agencies and companies considering the purchase and use of AEDs sometimes fear negligence liability suits. As noted by the AHA, "a potential disincentive to lay users of AEDs . . . is the threat of a personal injury claim."⁹ While the public's apprehension is understandable, any actual liability risk associated with early defibrillation programs appears quite small. Still, perceptions and fears must be addressed if widespread AED availability is to become reality.

The following sections provide an overview of negligence liability issues applied to the concept of early defibrillation. Armed with this background information, individuals, agencies and companies considering the purchase and use of AEDs should be reassured that any actual legal liability threat is both small and manageable. *Clearly, the benefits associated with widespread early defibrillation far outweigh liability risks.*

An overview of negligence

For a sudden cardiac arrest victim (or a relative) to successfully sue an AED purchaser or user for negligence, four essential legal elements must be proven. These include duty, breach of duty, causation of injury, and legally recognized damages. A negligence claim cannot succeed if any one of these elements is missing. Because an AED related claim is most likely to focus on the elements of duty and causation, these elements are discussed in detail.

The concept of legal duty

Duty in negligence law is defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."¹⁰

If a legal duty is found to exist, it is possible for liability to be imposed. In the absence of a legal duty, no liability can be imposed.

A bystander has no legal obligation to provide affirmative medical aid to an ill or injured person, even if the bystander has the ability to help. "[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life."¹¹

Courts recognize, however, that the existence of certain relationships between a victim and one in a position to render aid may create a duty to provide assistance. Generally, EMS providers, such as paramedics and EMTs, have a legal duty to respond to and treat victims of medical emergencies. Specific responsibilities imposed on these responders vary from state to state and are influenced by court cases, statutes and regulations.

For individuals other than EMS providers, the following section, from the leading statement of general negligence law, outlines the types of relationships which may give rise to a duty to render emergency medical assistance (See Figure 1.)¹² This statement of law is adopted

by many courts and may become more important as the concept of public access defibrillation evolves.

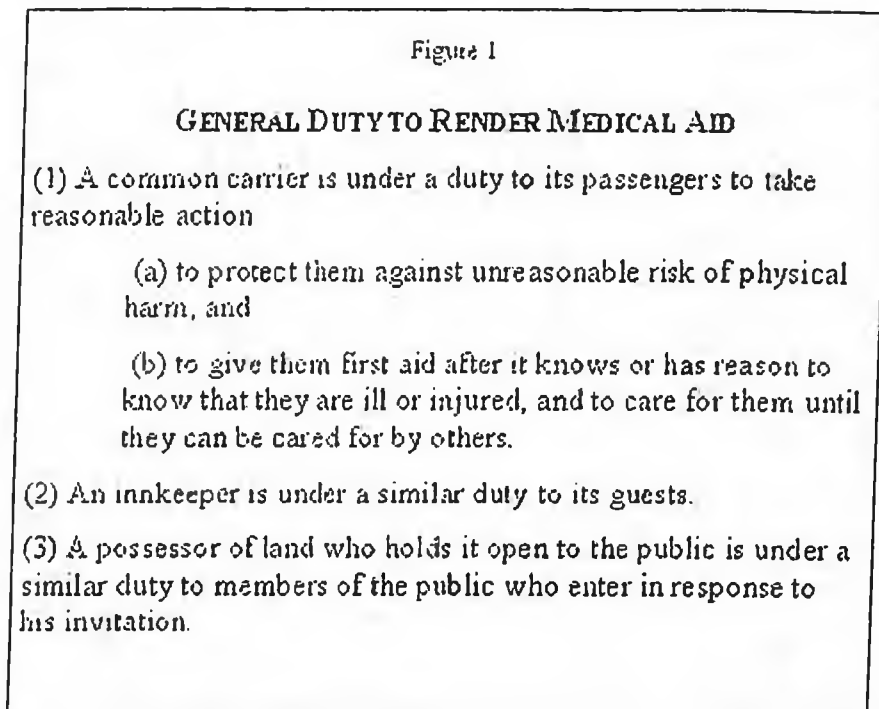


Figure 1

Thus, in contrast to the general rule imposing no such duty on bystanders, certain groups may be compelled by law to render a reasonable level of medical aid and to quickly summon outside emergency medical assistance (Figure 2). These groups include common carriers (such as airlines, cab companies, passenger railroads and cruise ship operators), innkeepers (such as hotel and motel operators) and virtually all other commercial business establishments.

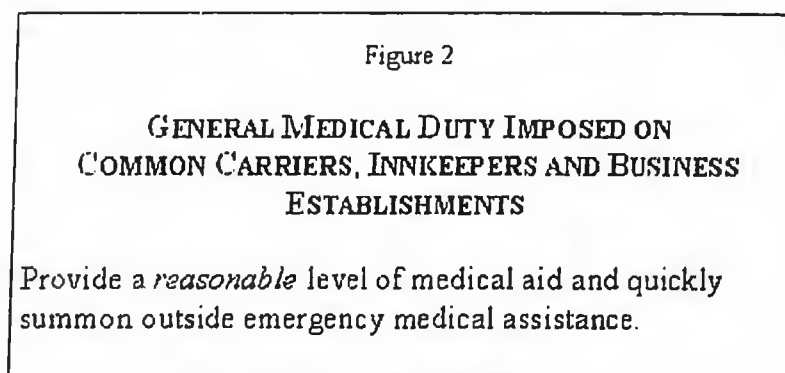


Figure 2

Appellate courts, trial court judges and juries define what is "reasonable," thus establishing the scope of a legal obligation or duty. The degree of reasonableness required under the facts and circumstances of a particular case evolves as society evolves. Action or inaction viewed as reasonable today may be viewed as unreasonable tomorrow.

While early defibrillation programs began to appear in the mid-1990s, only two appellate cases found to date directly address the issue of early defibrillation initiated by non-healthcare professionals and each of these deals with commercial airlines. In one case United Airlines was

sued by the widow of a man who suffered sudden cardiac death on a 1995 domestic flight¹³. The widow alleged that United was liable "because it failed to equip its aircraft with certain medical equipment, including an automatic external defibrillator, and because her husband would have survived if the in-flight emergency medical kit had contained such equipments." The case was recently settled after United unsuccessfully attempted to have the case dismissed on technical grounds.

In another case, Northwest Airlines was sued by a woman alleging her husband died from sudden cardiac arrest because the airline failed to have a defibrillator on board a 1995 flight¹⁴. The case was dismissed because the woman failed to produce an expert who would testify that the airline had a duty to carry a defibrillator at the time of the incident.

Because they were both dismissed on technical grounds, neither the United nor Northwest Airlines cases offer much guidance on how future appellate courts might address issues surrounding public access defibrillation. Appellate courts examining notions of reasonableness in other medical contexts have, historically, been generally resistant to requiring common carriers, innkeepers and commercial businesses faced with ill or injured patrons to do more than summon an ambulance. Two recent trial court verdicts, however, suggest an evolving trend toward higher standards requiring the protection of customer health and safety in certain business contexts.

Future trial court cases will likely offer insight into society's current view of reasonableness when businesses are faced with ill or injured patrons. Modern advances in AED technology, coupled with low cost and the proven ability of these devices to save lives, may persuade trial and appellate courts to sanction businesses that fail to adopt AED programs. While the likelihood of any type of AED related claim remains extremely small, it appears that common carriers, innkeepers and commercial businesses that adopt AED programs may face a lower legal liability risk than those that fail to adopt such programs.

The concept of causation

A successful negligence lawsuit also requires proof that alleged misconduct caused legally recognized damages such as death or injury. Three possible causation theories include allegations that a death directly resulted from: 1) the failure to purchase and make available an AED; 2) the failure to use an available AED; or 3) the improper use of an available AED.

In all cases involving sudden cardiac arrest leading to sudden cardiac death, the element of medical causation will be extremely difficult to prove. The causation question likely to be considered in early defibrillation cases is whether death could have been prevented with the availability and use of an AED.

Defibrillation delivered as quickly as possible after onset of sudden cardiac arrest has the capacity to greatly improve a victim's chances of survival. Thus, common carriers, innkeepers and commercial businesses that fail to purchase and use AEDs are at greatest risk in terms of proof of causation. However, this relative risk is quite small given the generally poor survival associated with sudden cardiac arrest. Next in order of risk are those situations in which an AED is available but improperly used. This scenario is unlikely because, with proper training, the modern generation of AEDs are both easy to use and difficult to misuse. Companies that purchase and properly use AEDs are at lowest causation risk.

Overall, the prospect of proving causation in early defibrillation cases, while theoretically possible in some circumstances, will be extremely difficult given the life-threatening nature of sudden cardiac arrest. Organizations that carefully adopt and implement AED programs may well be at lowest risk of liability.

Legal risk assessment: A summary

Legal liability risks associated with early defibrillation programs are quite remote. The following factors support this conclusion:

- Only two known appellate cases raise early defibrillation by non-healthcare professionals as an issue. A limited number of relevant trial court verdicts suggest that organizations that adopt AED programs face a lower liability risk than those that do not.
- If sudden cardiac arrest is untreated, the victim will die. As a general rule, an AED used properly can only help.
- Proving medical causation in an early defibrillation case will be extremely difficult.
- Many states possess laws that limit the types and scope of negligence lawsuits permissible against individuals rendering emergency medical care, including tort limitation, Good Samaritan laws and a variety of immunity laws.
- The modern generation of AEDs are both easy to use and difficult to misuse.
- For these reasons, legal liability fears should not deter organizations considering the purchase and use of AEDs.

Minimizing legal liability risk

There are a variety of ways to both manage and allocate even the small legal liability risks associated with early defibrillation programs.

1. Design a careful program

- **Implementation:** General rules governing negligence cases suggest that organizations that carefully adopt and implement early defibrillation programs face a lower legal liability risk than those that do not.
- **Device selection and maintenance:** All AEDs on the market have been cleared by the FDA. Because device price, performance, ease-of-use characteristics and recommended maintenance procedures differ by manufacturer, and because technology is advancing rapidly, it is worthwhile to carefully consider all AED options before purchase.
- **User identification and training:** Many state regulations currently require appropriate training of AED users. It is important that appropriate individuals be identified and trained.
- **Site selection:** AEDs should be placed in locations that can be reached quickly and easily. If an AED is placed in a locked or secure location, it is important that designated AED users possess keys or other means of accessing the device.

2. Promote Good Samaritan laws

Most states now have laws that protect individuals from legal liability flowing from the provision of emergency medical care. A growing number of states have Good Samaritan laws that specifically protect AED users from legal liability under certain circumstances.

A review of your state's laws will help you determine whether, and to what degree, liability immunity protection exists. For further information

on Good Samaritan laws, see the State AED Laws, the National Immunity/Good Samaritan Law Database, National EMS Info Exchange, NAEMT Online at <http://naemt.org/nemsie/immunity.htm>, and Emergency Medical Risk Management by Henry and Sullivan.

3. Explore insurance options

Negligence liability risk can be further minimized through the purchase of insurance. Private insurance companies and some AED manufacturers offer indemnification plans that protect AED purchasers from liability claims, except in cases of gross negligence, as long as certain conditions are met. Since these plans vary in scope and are continuously evolving, communities should take the time to investigate insurance options.

Summary

This section addresses laws and regulations affecting the use of AEDs. Both the FDA and state regulatory agencies determine who can use AEDs and how they may be used. State laws and regulations vary widely. Communities that implement AED programs must abide by federal and state laws and regulations and should check with state EMS agencies for information.

This section also addresses the nature and limited scope of any negligence liability risk associated with AED programs. Legal liability fears should not deter those considering the purchase and use of AEDs. Organizations that carefully adopt and implement AED programs will be at lowest risk of liability.

¹*Note: Information in this chapter is not intended as legal advice. While every effort is made to ensure the accuracy of information, the AED legal and regulatory landscape is evolving rapidly. Legal questions surrounding AED use can be complex. If your community needs specific advice, seek the services of a competent attorney.*

²http://www.fda.gov/cdrh/consumer/AED_PAD.html.

³*Ibid (emphasis added).*

⁴*Public Health Improvement Act, Sections 401-404.*

⁵*Ibid, Section 403.*

⁶*Ibid, Section 404.*

⁷*Public Health Improvement Act, Sections 411-413.*

⁸*Pub. L. 105-170, 49 USC 44701.*

⁹*Circulation. 1995;92:2740-2747*

¹⁰*W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984).*

¹¹*Ibid.*

¹²*Restatement (Second) of Torts § 314A.*

¹³*Somes v. United Airlines, Inc., 33 F.Supp.2d 78 (US District Court, D. Massachusetts 1999)*

¹⁴*Talit v. Northwest Airlines, Inc., 58 Conn. App. 102, 752 A.2d 1131 (2000).*

AED Legislation : State

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Senate bills are not listed on website.

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[Link to ORS 30.800 referred to in bill](#)

[Pennsylvania Good Samaritan Law](#)

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HB 1158 and HB 1218 are attached in a .pdf file along with the amendment.

[HB 2970](#)

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TOP

SB

1688

Whitney, Barbara

From: Grant, Ellen
Sent: Thursday, May 15, 2003 1:49 PM
To: Whitney, Barbara
Cc: Berlind, Mark
Subject: FW: Alaska Min Price legislation

DSS:

This info should be communicated to the AK lobbyists asap. I understand from Joanna there is a hearing at 1 pm AK time today.

—Original Message—

From: Grant, Ellen
Sent: Thursday, May 15, 2003 3:47 PM
To: Corwin, Ginny; Mitola, Michele
Cc: Berlind, Mark; Montgomery, Gays; Murphy, Virginia
Subject: Alaska Min Price legislation

I spoke to Joanna Bales of the AK Dept. of Revenue about our concerns, and the concerns AK faces in implementing min. price legislation. She requires, and after discussion I would not dispute, that for AK's purposes presumptive costs need to be based on list prices. But it is not AK's intent to determine actual cost on anything other than net invoice cost. Therefore, to eliminate any ambiguity about wholesalers or retailers being able to use invoice prices to establish cost, she will change Sec. 43.50.849 to eliminate the definition of basic wholesale cost (so "cigarette" becomes the first defined term), and will define "presumptive wholesale cost" as follows: ...means the manufacturer's list price less trade discounts, except discounts for cash, plus the full face value of any tax required by this chapter, plus four and one-half percent. She will also add the additional section we requested re: payments for display, advertising or promotion purposes.

NEW SECTION:

Payments made to wholesalers or retailers for display, advertising or promotion purposes shall not be considered in determining the cost of cigarettes to the wholesaler or retailer.

Amendment — to SB 168

Page 21, Line 13, insert a new subsection to read:

(d) Payments made to wholesalers or retailers for display, advertising or promotion purposes, or otherwise, shall not be considered in determining the cost of cigarettes to the wholesaler or retailer as the case may be.

Page 21, Line 14-16, delete definition of "basic wholesale cost" in its entirety.

Page 21, Line 17, renumber "(2)" to "(1)" and renumber all remaining definitions accordingly.

Page 21, Line 23, delete "basic wholesale cost" and insert "manufacturer's list price less trade discounts, except discounts for cash, plus the full face value of any tax required by this chapter"

Page 21, Line 24, delete "of the basic wholesale cost".

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB168(FIN)am
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
Title: Cigarette Sales / Distribution BRU: Revenue Operations
Component: Tax Division
Sponsor: Senate Labor and Commerce
Requester: House Finance Committee Component Number: 2476

Expenditures/Revenues (Thousands of Dollars)

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

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Personal Services | 297.7 | 297.7 | 297.7 | 297.7 | 297.7 | 297.7 |
| Travel | 15.0 | 15.0 | 15.0 | 15.0 | 15.0 | 15.0 |
| Contractual | 57.5 | 53.0 | 53.0 | 53.0 | 53.0 | 53.0 |
| Supplies | 5.0 | 5.0 | 5.0 | 5.0 | 5.0 | 5.0 |
| Equipment | 26.5 | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 401.7 | 370.7 | 370.7 | 370.7 | 370.7 | 370.7 |

| CAPITAL EXPENDITURES | | | | | | |
|-------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| | | | | | | |
| CHANGE IN REVENUES () | 1,740.0 | 3,480.0 | 3,480.0 | 3,480.0 | 3,480.0 | 3,480.0 |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 401.7 | 370.7 | 370.7 | 370.7 | 370.7 | 370.7 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 401.7 | 370.7 | 370.7 | 370.7 | 370.7 | 370.7 |

Estimate of any current year (FY2002) cost: 0.0

POSITIONS

| | | | | | | |
|-----------|---|---|---|---|---|---|
| Full-time | 5 | 5 | 5 | 5 | 5 | 5 |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This legislation would require that all packages of cigarettes sold in Alaska carry a state tobacco tax stamp on the package, verifying that the state tax has been paid. Alaska is one of only four states in the nation without a tobacco tax stamp program. The new program would take effect Jan. 1, 2004.

The department anticipates that a cigarette stamp program – along with strong enforcement efforts funded by this fiscal note – will result in increased compliance with the state's cigarette tax laws and therefore higher tax revenues to the state. The department estimates the new revenue at almost \$3.5 million per full fiscal year.

There will be a small decrease in revenues to the state due to the higher commission paid to licensees (as a discount on cigarette taxes) to compensate them for the cost of affixing the stamp to packages, collecting the tax and remitting it to the department.

(See second page for additional analysis)

Prepared by: Johanna Bales Phone 269-6628
Division: Tax Division Date/Time 5/16/2003 7 p.m.
Approved by: Larry Persly, Deputy Commissioner Date 5/16/2003
Agency: Department of Revenue

For distribution information, call the Governor's Legislative Office

Department of Revenue

CSSB168(L&C) - Bill Analysis (May 15, 2003)

Assumptions: This fiscal note assumes that 40 million to 50 million packs of cigarettes will be sold each year. This is consistent with annual sales in recent years.

Effect of Legislation: The program will consist of the annual purchase of tax stamps from a stamp manufacturer and the subsequent sale of those stamps by the state to cigarette licensees. The program will also include enforcement of the stamping requirements, as well as a ban on shipping cigarettes to certain persons in the state and prohibiting cigarette wholesalers and retailers from selling cigarettes below cost. The law would allow individuals and businesses to bring civil action in court to settle disputes over the so-called minimum pricing provision in this legislation.

Positions: The department expects that it will need five additional positions to handle the purchase, sale, administration and aggressive enforcement of the tax stamp program and cigarette shipping restrictions to prevent the importation and sale of untaxed cigarettes in Alaska. Enforcement includes conducting audits and other investigations to ensure that stamps are properly affixed to cigarettes, that cigarettes are not improperly shipped into or within the state, and that wholesalers and retailers do not sell cigarettes below cost (also a provision of this legislation). These positions will also be responsible for the seizure and security of unstamped product and its ultimate destruction. For this type of work, the department expects it will need a full-time Revenue Auditor III (Range 18), three Investigator IIIs, and a full-time Tax Technician III.

Other Operating Expenditures: In the first year, approximately \$10,000 will be needed for two fireproof safes; \$16,500 for three computers, software and work stations; \$7,000 for travel expenses; \$2,000 for supplies; \$3,000 for advertising costs and IT charges; and \$40,500 for stamp design and printing. Printing of stamps in all future years will cost approximately \$36,000; with supplies at \$2,000; travel at \$7,000; and IT and phone charges at \$3,000.

Revenue: Other states that recently adopted a cigarette tax stamp program have found that the stamps significantly increased their tax revenues. Michigan reported an 8.7% increase in cigarette taxes in the first year of its program in 1999. The most current reports from Hawaii indicate an amazing 50% increase in tax collections after the state hired almost a dozen legal staffers to prosecute more than 100 felonies as part of its large-scale enforcement effort. If we assume that Alaska sees even a similar revenue increase as Michigan, at 8.7%, when applied to Alaska's FY2002 cigarette tax revenue of \$40 million, Alaska would realize \$3.48 million a year in additional revenue. The 8.7% estimate is not unreasonable, when measured against the 13% drop in cigarette consumption that was predicted when Alaska raised its tax rate to \$1 per pack in 1997 compared to the more than 20% drop in taxable sales since then. The 8.7% estimate represents the difference between the expected drop in taxable sales six years ago and the actual decline since then.

Commission (discount to licensees): All other states, except Hawaii, allow licensees to purchase stamps at a discount. The current national average discount is approximately 3%. This bill allows for a discount of 3% on the first \$1 million in stamps purchased by each licensee and 2% on the second \$1 million in stamps purchased by each licensee. There is no discount on purchases in excess of \$2 million in stamp purchases. The current tobacco statute allows a commission of 0.4% to licensees as compensation for collecting the tax and remitting it to the department. This commission would be replaced by the stamp discount. Based on FY 2002 tax filings, we estimate that the inclusion of a stamp discount and removal of the commission as a result of this bill would decrease revenues by approximately \$251,000 annually.

Cost Increase to Licensees: Licensees will incur increased costs to place stamps on cigarette packages, and it is possible that those costs could be in excess of the compensation given to licensees by the discount on their purchase of tax stamps. Depending on whether a licensee leases or purchases a tax stamp machine, and depending on whether it is a manual or an automatic machine, and depending on the licensee's volume of sales, the Department estimates the net cost of compliance at approximately 1 cent to 1.3 cents per pack of cigarettes.

May 15, 2003

My name is Mike Elerding and I am the owner of Northern Sales Company of Alaska (NSC). NSC is an Alaskan based wholesale distribution company. Our company provides full time year round employment for 90 Alaska residents. Over 43% of our total sales are tobacco products.

On behalf of Alaska based distributors we support SB 168 and ask for a favorable recommendation from the Judiciary committee. Our position is that the tax stamp provision in SB 168 will provide new revenue of 3-4 million dollars to the state coffers each year without creating a new tax. And it will assist the state in prosecuting those who illegally import cigarettes into Alaska attempting to evade the state excise tax on cigarettes.

As an Alaska based distributor the cost of performing the stamping operation will be borne by our business. Placing an Alaska tobacco stamp on every carton of cigarettes we sell will create a financial burden on our company. The reimbursement provided in SB 168 will help to offset the cost of stamping, however it will not cover all of the costs. And the reimbursement offered in SB 168 supplants a payment we currently receive from the state for the performance of a number of administrative functions dealing with the collection of Alaska's excise tax on cigarettes.

Article 6 of SB 168 deals with Unfair Cigarette Sales Act and would insure a modest profit margin for tobacco distributors who are charged with executing the state's tax stamping program. In addition this measure would create a level playing field for Alaska based distributors by putting an end to predatory pricing practices employed by large multi-state operators.

The practice of selling cigarettes below cost and using cigarettes and tobacco products as a loss leader to attract store traffic creates a competitive disadvantage for Alaska Based distributors who only sell cigarettes and tobacco products and do not offer high end consumer goods for sale. In addition the practice of using cheap cigarettes as a loss leader runs counter to the philosophical stance of the state's efforts to restrict youth access to cigarettes and tobacco products.

It would be a mistake to characterize the sale and distribution of tobacco products as the free enterprise system at work. Government intervention and regulation is involved in every step of the tobacco distribution process. And as you know tobacco is an age restricted product with the state government setting age limits and restricting youth access to the consumption of these products. In Alaska Federal, State, and local government taxes on these products amounts to nearly 40% of the wholesale cost of a carton of cigarettes. Alaska also requires a special endorsement to your business license to be able to sell these products. And now, the legislation proposed under SB 168 would implement a unique taxation method specific to the distribution of tobacco products. Clearly, the rules regarding the sale and distribution tobacco products are not the same rules for the sale of other products.

In recognition of these different rules there are currently 25 other states in the union plus the District of Columbia that have Unfair Cigarette Sales laws on their books. We would like you to add Alaska to the growing list of states that acknowledge these differences.

We support the tax stamp measure and the unfair cigarette sales act provisions of SB 168 and respectfully request the judiciary committee to vote in favor of this bill. If the committee has any questions or requires additional information I will be available to answer questions.

Alaska State Legislature

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Senator.Con.Bunde@legis.state.ak.us

SENATOR CON BUNDE

District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

Request for Hearing

To: Representative McGuire
Chair, House Judiciary Committee

Subject: Senate Bill 168

Sponsor: Senator Con Bunde

Date: April 30, 2003

I respectfully request that SB 168 (Cigarette Sale/Distribution) be scheduled for a committee hearing at your earliest convenience.

This bill is designed to better regulate the collection of taxes on cigarettes with the creation of a tax stamp. SB 168 is being brought forward on behalf of those consumers who already pay legitimate taxes on their cigarettes. This is a fair tax issue in that it will enforce the payment of tax on all cigarettes that are brought into Alaska.

Attached you will find:

1. CS SB 168 (L&C)
2. Sponsor Statement
3. Fiscal Notes
4. Sectional Analysis (forthcoming)
5. Letters of Support
 - a. Alaskans for Tobacco-Free Kids
 - b. Johanna Bales, Auditor, Dept. of Revenue
 - c. Greg D. Renkes, Attorney General, Dept. of Law
 - d. Mike Elerding, Distributor, Northern Sales Co. of Alaska (forthcoming)
6. California Lawsuit against Internet Tobacco Sales
7. Internet Sales of Tobacco ~ Reaching Kids & Evading Taxes
8. Internet Tobacco Sales ~ Special Report
9. Internet Site Samples
10. Various Statistics/Rankings Statewide
11. Minnesota Unfair Cigarette Sales Act (reference to minimum pricing provision)
12. Meyercord Corporation/Stamping Machine

Alaska State Legislature

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SENATOR CON BUNDE

District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

Sponsor Statement for SB 168

“An Act relating to issuance and revocation of licenses for the importation, sale, distribution, or manufacture of cigarettes and tobacco products; relating to a tax refund or credit for unsaleable, returned, or destroyed tobacco products; relating to restrictions on shipping or transporting cigarettes; relating to records concerning the sale of cigarettes; amending and adding definitions relating to cigarette taxes; relating to the payment of cigarette taxes; relating to penalties applicable to cigarette taxes; relating to the definition of the wholesale price of tobacco products; relating to payment of cigarette taxes through the use of cigarette tax stamps; relating to provisions making certain cigarettes contraband and subject to seizure and forfeiture; relating to certain crimes, penalties, and interest concerning tobacco taxes and stamps; relating to cigarette sales; and providing for an effective date.”

This bill is designed to more adequately regulate the collection of taxes on cigarettes. There is an unknown quantity of untaxed cigarettes imported into the state of Alaska every year and existing laws make it difficult to track their numbers. All cigarette purchasers should be paying tax equally, whether purchasing over the counter or over the internet.

SB168 is being brought forward on behalf of those consumers who already pay legitimate taxes on their cigarettes. This is a **fair tax issue** in that the bill will enforce the payment of tax on all cigarettes that are brought into Alaska.

For this reason, this bill would require that a “tax stamp” be affixed on each package of cigarettes on which the tax has been paid. The stamp would be heat-applied so it could not easily be transferred to other untaxed packs and would be difficult to counterfeit. This colorful stamp would make it easy for law enforcement, the Dept. of Revenue and consumers to know if the tax has been paid on any pack of cigarettes and would give them the authority to seize and destroy the unstamped cigarettes. Violators of this law would be subject to civil penalties and criminal liability.

SB168 would require that the tax be paid before the cigarettes are imported into the state by wholesalers or be stamped by specific, licensed distributors in the state of Alaska before being available for sale.

Another aspect of this bill would be the requirement that anyone receiving a delivery of cigarettes must be licensed by the state of Alaska, which would severely limit the purchase of untaxed cigarettes by individual consumers over the internet. Upon delivery of the cigarettes, the carrier/delivery agent would require that the purchaser show his/her license from the state before the delivery could be made.

Forty-six other states currently require a tax stamp on cigarettes and this bill draws from the statutes and experience of those other states. These other states have shown significant tobacco tax revenue increases by use of the stamp. Hawaii has shown an amazing 25% increase in tax revenue; Michigan reported an increase of 8.7% in its first year of their tax stamp. These results are encouraging, but it still does not give us a reliable basis to predict the success of tobacco tax stamp usage here in Alaska. Cigarette tax revenue is currently about \$40 million a year, of which 76% goes into the School Fund and 24% goes toward the General Fund. But even a 1% increase in tax collected would amount to \$400,000 in new revenue.

It is also noteworthy that by adopting the tax stamp, it encourages Federal enforcement of Interstate Commerce Law regarding tax avoidance.

These stamps do not come free, of course, and distributors will indeed incur costs for the affixing of the stamps to individual packs of cigarettes and the cartons. The State of Alaska recognizes that cost and this bill does provide for a tax discount for distributors on a tiered basis to help them defer most of the cost involved.

SB 168 also provides a minimum price provision for wholesalers and retailers, set by the Dept. of Revenue, based on the wholesale list price provided by the tobacco manufacturers. This protects Alaskan distributors by creating a level playing field for competition.

SB168 will fairly tax all individuals who purchase cigarettes, increase tobacco tax revenues and allow for more uniform tracking of cigarette sales in the State of Alaska.

Last updated 5/1/03

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MEMORANDUM

May 1, 2003

SUBJECT: Importation and sale of cigarettes CSSB 168 (L&C)

TO: Senator Con Bunde
Attn: Jane

FROM: Michael F. Ford *M.F.*
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Short title for Secs. 43.50.710 - 43.50.849 in sec. 17 of the bill.

Section 2. Intent section for Secs. 43.50.710 - 43.50.849 in sec. 17 of the bill.

Section 3. Amends existing provisions of law relating to wholesaler-distributor licenses.

Section 4. Amends existing provisions of law relating to expiration of certain licenses for cigarette sales.

Section 5. Amends existing provisions of law relating to suspension or revocation or refusal to renew certain licenses for cigarette sales.

Section 6. Adds a definition of "licensee" for purposes of suspension or revocation or refusal to renew certain licenses for cigarette sales.

Section 7. Requires that the cigarette tax imposed under AS 43.50.090 be paid by the use of stamps as provided under AS 43.50.500 - 43.50.695.

Section 8. Amends existing provisions of law relevant to unlicensed possession or sale of cigarettes.

Section 9. Imposes restrictions and penalties on shipping or transporting cigarettes, applicable to both licensees and nonlicensed persons.

Section 10. Amends certain provisions of law relevant to cigarette sales records.

Section 11. Amends the definition of "person" to include a limited liability company" for purposes of AS 43.50.010 - 43.50.190.

Section 12. Adds certain definitions applicable to AS 43.50.010 - 43.50.190.

Section 13. Specifies that the penalties in AS 43.50 apply to the tax imposed under AS 43.50.190.

Section 14. Provides that for a license issued under AS 43.50.320, the department can refuse to renew the license as provided under AS 43.50.070.

Section 15. Provides for tax credits and refunds applicable to the tax imposed under AS 43.50.300.

Section 16. Adds certain definitions applicable to AS 43.50.010 - 43.50.190.

Section 17. Adds new sections relating to cigarette tax stamps and to unfair cigarette sales as follows:

Sec. 43.50.500 - Requires licensees to pay certain cigarette taxes by use of stamps.

Sec. 43.50.510 - Adds provisions relating to design and use of cigarette tax stamps.

Sec. 43.50.520 - Requires stamps be affixed before sale, distribution or consumption of cigarettes.

Sec. 43.50.530 - Requires the department to furnish stamps to licensees and allows agreements with financial institutions for sale of stamps.

Sec. 43.50.540 - Adds provisions relating to sale of stamps, including sales location, price, title of stamps, and loss, destruction, or theft of stamps.

Sec. 43.50.550 - Adds provisions relating to deferred payment of stamps.

Sec. 43.50.560 - Adds provisions relating to suspension of the privilege to purchase stamps on a deferred basis.

Sec. 43.50.570 - Specifies that a licensee who pays for stamps must also pay interest.

Sec. 43.50.580 - Adds provisions relating to possession of unstamped cigarettes.

Sec. 43.50.590 - Adds provisions relating to refunds or credits for unused stamps and for unsalable, destroyed, or certain returned cigarette packages.

Sec. 43.50.600 - Prohibits stamps on cigarette packages not in compliance with federal and state law.

Sec. 43.50.610 - Allows the state to seize certain unstamped cigarettes.

Sec. 43.50.620 - Provides for forfeiture and destruction of contraband cigarettes.

Sec. 43.50.630 - Adds provisions relating to importation, distribution, and sale of cigarettes, including monthly reports, and records inspection.

Sec. 43.50.640 - Creates a class C felony involving illegal sale or distribution of certain unstamped cigarettes or illegal use of stamps.

Sec. 43.50.650 - Creates a class A misdemeanor involving illegal sale or distribution of certain unstamped cigarettes or illegal use of stamps.

- Sec. 43.50.660 - Adds provisions concerning the application of certain other criminal provisions illegal sale or distribution of cigarettes.
- Sec. 43.50.670 - Prohibits unauthorized transfer of stamps and creates a civil penalty.
- Sec. 43.50.700 - Definitions.
- Sec. 43.50.710 - Imposes restrictions on wholesalers and retailers regarding sales of cigarettes.
- Sec. 43.50.720 - Imposes restrictions on the selling price of cigarettes by wholesalers and retailers.
- Sec. 43.50.730 - Imposes restrictions regarding the selling price of cigarettes by a wholesaler to another wholesaler.
- Sec. 43.50.740 - Allows a wholesaler or retailer to sell cigarettes at a price set by a competitor. Establishes a presumption regarding the actual cost of cigarettes. Requires manufacturers to provide current price lists.
- Sec. 43.50.750 - Provides that contracts in violation of Secs. 43.50.710 - 43.50.849 is illegal and void.
- Sec. 43.50.760 - Adds provisions regarding determination of the actual cost of cigarettes to a wholesaler or retailer and provisions regarding presumptive wholesale and retail cost of cigarettes.
- Sec. 43.50.770 - Provides that certain cigarettes purchased outside ordinary trade channels may not be used to determine the basic cost of cigarettes.
- Sec. 43.50.780 - Provides that the department or a person injured by a violation of Secs. 43.50.710 - 43.50.849 can seek relief in the courts.
- Sec. 43.50.790 - Provides that the Department of Revenue shall administer Secs. 43.50.710 - 43.50.849, including adoption of regulations, revocation or suspension of licenses, and determination of the basic cost of cigarettes.
- Sec. 43.50.800 - Establishes certain presumptions applicable to determination of the cost of cigarettes.
- Sec. 43.50.849 - Definitions.

Section 18. Repeals a provision of law relating to reports required of licensees who manufacture, sell, or distribute cigarettes.

Section 19. Transition provision relating to regulations of the Department of Revenue.

Section 20. Transition provision relating to use, import, sale, or distribution of unstamped cigarettes.

Section 21. Effective date for sec. 17.

Section 22. Effective date for all sections, except sec. 17.

DISCOUNTS

DISCOUNTS ON CIGARETTE TAX STAMP PURCHASES

| State and tax rate in ¢ | Percent ^(a) | Discounts Per case ^(b) | State and tax rate in ¢ | Percent ^(a) | Discounts Per case ^(b) |
|----------------------------------|------------------------|-----------------------------------|---------------------------------|------------------------|-----------------------------------|
| Alabama (16.5) | 7.50 | \$ 7.425 | Nebraska (64) | 3.40 | 13.056 |
| Alaska (\$1.00) ^(c) | .40 | 2.40 | Nevada (35) | 3.00 | 6.30 |
| Arizona (\$1.18) ^(j) | | | New Hampshire (52) | | |
| first \$36,000 | 4.00 | 13.92 | first \$500,000 | 2.750 | 8.58 |
| next \$36,000 | 3.00 | 10.44 | next 500,000 | 2.375 | 7.41 |
| over \$72,000 | 2.00 | 6.96 | over 1,000,000 | 2.000 | 6.24 |
| Arkansas (34) | 3.80 | 7.752 | New Jersey (\$1.50) | 1.125 | 10.125 |
| California (87) | 0.85 | 4.437 | New Mexico (21) | | |
| Colorado (20) | 4.00 | 4.80 | first \$30,000 | 4.00 | 5.04 |
| Connecticut (\$1.11) | 1.00 | 6.66 | next \$30,000 | 3.00 | 3.78 |
| Delaware (24) | 2.14 ^(d) | 3.08 | New York (\$1.50) | | |
| District of Col. (\$1.00) | 2.00 | 12.00 | first \$5,611,200 | 0.3696 | 3.56 |
| Florida (33.9) ^(l) | 2.00 | 2.88 | over \$5,611,200 | 0.2625 | 2.36 |
| Georgia (12) | 3.00 | 2.16 | No. Carolina (5) ^(c) | 4.00 ^(e) | 1.20 |
| Hawaii (\$1.20) ^(c) | 0.00 | 0.00 | No. Dakota (44) ^(c) | 1.00 | 2.64 ⁽ⁱ⁾ |
| Idaho (28) | 5.00 | 8.40 | max per month: | | \$100.00 |
| Illinois (98) | | | Ohio (55) | 1.80 | 5.94 |
| first \$3,000,000 | 1.75 | 6.09 | Oklahoma (23) | 4.00 | 5.52 |
| additional | 1.5 | 5.22 | Oregon (\$1.28) | 0.004 ^(m) | 2.40 |
| Indiana (55.5) | 1.20 | 3.996 | Pennsylvania (\$1.00) | 1.25 | 7.50 |
| Iowa (36) ^(g) | 2.00 | 4.32 | Rhode Island (\$1.32) | 1.25 | 9.90 |
| Kansas (79) | 0.80 | 3.792 | So. Carolina (7) | 3.50 | 1.47 |
| Kentucky (3) | 9.09 | 1.636 | So. Dakota (33) | 3.50 | 6.93 |
| Louisiana (36) | 6.00 | 12.96 | Tennessee (20) | | |
| Maine (\$1.00) | 2.50 | 15.00 | first 3,000 cases | 2.75 | 3.30 |
| Maryland (\$1.00) | 0.82 | 4.92 | next 3,000 cases | 2.50 | 3.00 |
| Massachusetts (\$1.51) | N/A ^(k) | 1.85 ^(h) | next 9,000 cases | 2.25 | 2.70 |
| Michigan (\$1.25) ^(c) | 1.5 | 11.25 | over 15,000 cases | 1.75 | 2.10 |
| Minnesota (48) | | | Texas (41) | 3.00 | 7.38 |
| first \$1.5 Million | 1.00 | 2.88 | Utah (69.5) | 4.00 | 16.68 |
| additional | 0.60 | 1.728 | Vermont (93) | 1.50 | 8.37 |
| Mississippi (18) | 6.4444 | 6.96 | Virginia (2-1/2) | 10.00 | 1.50 |
| Missouri (17) | 3.00 | 3.06 | Washington (\$1.425) | 0.0042 ^(f) | 3.60 |
| Montana (18) | | | West Virginia (17) | 4.00 | 4.08 |
| first 2,580 cart. | 6.00 | 6.48 | Wisconsin (77) | 1.60 | 7.39 |
| next 2,580 | 4.00 | 4.32 | Wyoming (12) | 6.00 | 4.32 |
| over 5,160 | 3.00 | 3.24 | | | |

Provided by Sen. Bunde

- (a) Of indicia par value.
- (b) Of 600 packs.
- (c) Return system of collection.
- (d) 0.003 per stamp.
- (e) Discount of 4% of total State tax imposed.
- (f) \$6.00 per 1,000 stamps.
- (g) Discount on a per case basis only.
- (h) For a case of cigarettes, the discount is set at \$1.85.
- (i) Maximum discount is \$100.00 per month.
- (j) Purchases over \$165,000 lose all discounts on the first \$72,000 worth of stamps per month.
- (k) Twenty-five and one-half mills per cigarette (permanent). Plus any amount by which the federal excise tax on cigarettes is less than 8 mills.
- (l) The tax division allow agents and wholesalers a discount of 2% on indicia purchases calculated on the basis of 24¢ per pack for any amount purchased.
- (m) Discount per stamp.

Testimony in Support of SB 168
Alaskans for Tobacco-Free Kids

Good afternoon Mr. Chairman and member of the committee. My name is Jennifer App, and I'm the Advocacy Director for the American Heart Association. I'm testifying today on behalf of Alaskans for Tobacco Free Kids, a youth tobacco policy coalition that included the Heart Association, the American Lung Association of Alaska, the American Cancer Society and the Alaska Native Health Board. We support Senate Bill 168 because the bill will do two important things:

- (1) It will decrease the ability of individuals and businesses to illegally avoid the current tobacco tax, and
- (2) It will help keep cigarettes out of the hands of youth.

The ongoing increase in internet and mail order sales of cigarettes is a major challenge to public health efforts to reduce smoking. Non-face-to-face sales will account for 14% of all tobacco sales by 2005. By failing to require adequate age verification, the sharply growing number of mail order and websites selling cigarettes makes it easier and cheaper for kids to buy cigarettes. The mail order offers and websites also offer smokers a way to avoid paying state tobacco taxes, thereby keeping cigarette prices down and smoking levels up, and depriving the state of a legitimate source of revenue. It is estimated that a state can lose millions annually in uncollected tobacco taxes through internet and mail order sales.

The changes proposed in SB 168 are changes that will help solve these problems. First, the bill requires entities that hold a tobacco license to pay tobacco taxes through a stamp program. This change makes it far more difficult for businesses to avoid paying the tobacco tax because compliance with the requirement and evidence of payment of the tax will be immediately visible on every pack of cigarettes. Alaska is just one of a couple of states that does not have a tax stamp requirement in place.

While the tax stamps would help solve the tobacco tax evasion issue, the stamps alone do not help solve the existing youth access or tax evasion problems through use of the internet or mail order purchasing. Right now, consumers in Alaska buy cigarettes through mail order and the internet without any legitimate age verification process. Although clearly obligated under current law to pay state tobacco taxes, many individuals are also