ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8072

10909 HOUSE LABOR & COMMERCE

193

STATE OF ALASKA

ADVISORY BOARD
ON
ALCOHOLISM AND DRUG ABUSE

Frank H. Murkowski, Governor

P.O. Box 110608
Juneau, Alaska 99811-0608
Phone: (907) 465-8920
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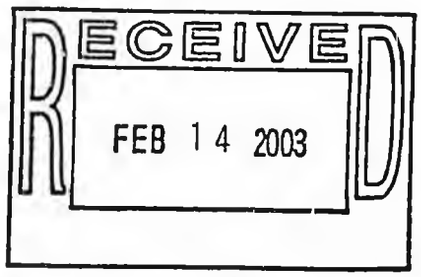
February 13, 2003



Representative Tom Anderson, Chair, and Members
House Labor and Commerce Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: HB 10 Group Health Insurance for Private Groups

Dear Representative Anderson:

Small businesses and non-profits are facing continually rising costs and decreasing availability of health insurance. This adds seriously to an already existing workforce recruitment and retention crisis in the chemical dependency treatment field.

Treatment programs that were already hanging on by a thread due to flat funding for over a decade, are taking a serious look at whether they can keep their doors open. Some have reduced health insurance benefits, increased rates to employees, dropped benefits altogether, cut staff, or cut services. Many of these programs have already lost staff to other disciplines that pay better and offer better benefits.

Alaska ranks at or near the top of all states in alcohol-related problems including Fetal Alcohol Syndrome, Child Abuse and Neglect, Domestic Violence, Sexual Assault, to name a few. Access to appropriate treatment is critical to lowering those ratings. We need well-trained, quality staff to provide needed services and effect successful outcomes for Alaskans, statewide.

HB10 could help provide the kind of relief needed by non-profits such as these treatment programs and other small businesses and non-profits that are unable to afford this benefit that is critical to recruiting and retaining a qualified, stable workforce.

Please give this legislation your full support. If you have any questions regarding this issue as it related to chemical dependency services, please contact me.

Sincerely,

Pamela L. Watts
Executive Director
Governor's Advisory Board on Alcoholism and Drug Abuse

AARP Alaska

Honorable Tom Anderson, Chair
House Labor and Commerce Committee
Alaska Capital, Room 432
Juneau, AK 99801-1182

February 15, 2003 RE: HB 10 (Heinze & Rokeberg)-Support

Dear Chair Anderson:

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House Labor and Commerce Committee to support HB 10, authored by Representatives Cheryll Heinze and Norman Rokeberg, one of your Committee members, and co-sponsored by nine of your other House colleagues.

Alaska has good reason to be concerned about it's uninsured. Almost one of every five Alaskans between the ages of 50 and 64 has no health insurance coverage. These same statistics hold true for younger Alaskans. HB 10 will offer some opportunity for coverage for employees of small businesses, non-profit organizations and agencies and organizations that band together to form a group pool. AARP is very supportive of such efforts. Indeed, AARP was founded by retired educators in the 1940's and 1950's who were unable to secure any form of health insurance once they left the workforce. This was several years before the enactment of Medicare and AARP pool coverage was often the only health insurance our members could find.

AARP believes that all Alaskans should have access to health insurance coverage. We know that the uninsured often postpone preventive care and end up in emergency rooms, receiving the most expensive and often most serious care. We are also well aware that the health care costs of the uninsured are often shifted to those who do have insurance. Obviously, state government often picks up some of the costs of the uninsured because the State does provide coverage to its employees and retirees. If we could reduce the number of uninsured, we would also reduce the health costs unfortunately being shifted to the State as well as other employers that cover their employees (including AARP).

3601 C Street, Suite 1420 | Anchorage, AK 99503 | 907-341-2277 | 907-341-2270 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

HB 10 will not solve all our problems with the uninsured. However, it has already focused attention in the media on this issue. These are most often our small businesses, farmers, college students, and workers in the non-profit sector. As the authors point out in the bill, expensive turnover for these organizations often eliminates the opportunity for them to retain an experienced workforce. Small business is the future of Alaska. Non-profit organizations, as the bill points out, often provide needed services that the State simply cannot afford to supply.

HB 10 is a very good first effort at addressing this serious problem. AARP encourages you and your colleagues on the House Labor and Commerce Committee to vote "AYE" when HB 10 is heard before you.

Should you have any questions about our position, please feel free to contact Marie Darlin (907.586.3637), Coordinator of the AARP Capitol City Task Force; Patrick Luby (907.762.3314), AARP Legislative Representative; or me (907.245.5259).

Thank you for your consideration.

Sincerely,

Marguerite Stetson

Marguerite Stetson
AARP Alaska
Executive Council Member for Advocacy
3009 Northwood Street
Anchorage, AK 99517-1871
907.245.5259 voice
907.245.5279 fax
ffmas@aurora.uaf.edu

cc: Vice Chair Bob Lynn
Representative Nancy Dahlstrom
Representative Carl Gatto
Representative Norman Rokeberg
Representative Harry Crawford
Representative David Guttenberg
Representative Cheryll Heinze
Marie Darlin
Patrick Luby
Representative Les Gara
Representative Lesil McGuire
Representative Mike Hawker
Representative Richard Foster
Representative Gary Stevens
Representative Peggy Wilson
Representative Paul Seaton
Representative Bruce Weyhrauch
Representative Carl Moses

AARP Alaska

← will testify

Health Issue Priorities for 2003 Session

AARP Alaska has over 71,000 members

In a 2002 research survey, AARP members in Alaska list health care as their top legislative concern:

- ✓ In 2001, pharmaceutical prices in Alaska rose over 25%, the highest increase in the nation.
- ✓ Alaska health care routinely costs 20% more than similar care in Seattle, Washington.
- ✓ 1 out of 5 Alaskans aged 50 – 64 has no health insurance.

For 2003, We Advocate the Following:

- ➢ A prescription drug assistance program for older persons without insurance. Drug regimen reviews to determine if a prescription is necessary and/or is there a less expensive therapeutic substitute available.
- ➢ Provide an insurance pool for small businesses and non-profit agencies so they will have access to less expensive coverage for their employees.
- ➢ Provide comprehensive regulations and oversight for adult day care centers.
- ➢ Provide funding for Pioneer and Veterans' Homes so they can be fully staffed and empty beds can be filled from existing waiting lists.
- ➢ Consolidate existing law on advanced directives and health care decision – making and create easy to use tools for Alaska citizens to communicate how they wish to be treated at the end of their lives.

HB10

Subject: Insurance
Date: Tue, 28 Jan 2003 09:11:54 -0900
From: "Mac & Linda" <maccarter@starband.net>
To: <Representative_Cheryll_Heinze@legis.state.ak.us>

Emailed return on 1/29

Representative Heinze

HB 10

I would like to thank you for your interest in providing Health Insurance availability for Small Business. Alaska has no provisions for Insurance. What is available is so expensive the average person cannot afford it. I believe there is a market in Alaska to provide the necessary and needed Health Insurance for many peop' that work and live here. With out Insurance the risk is for the lost of everything that a family has, this is something that should not happen. As a Small Business owner I worry about the risk that is out there for others that cannot provide the kind of Insurance that is needed. You have my support and if there is anything that I can do to promote this Bill please call on me.

Thank You

Mac Carter
P.O. Box 30009
Central, Alaska 99730
907-520-5999

maccarter@starband.net

Subject: RE: HB 10 - health insurance
Date: Tue, 18 Feb 2003 07:24:05 -0900
From: "Rainery,Richard L." <Richard_Rainery@health.state.ak.us>
To: 'Janet Seitz' <Janet_Seitz@legis.state.ak.us>

The Alaska Mental Health Board (AMHB) supports the concept of HB 10. The bill would provide an alternative to non-profits and other organizations that have been crippled by the constricting employee health coverage market. While some of the details of the bill, as I understand it, will continue to be worked on, the basic idea is one the AMHB and local mental health providers have supported for some time. Providers are faced with many fiscal and operational challenges and one is the ability to recruit and retain qualified staff. For example, Alaska's mental health non-profits have a difficult time competing with lower 48 salaries; problems with employee health insurance exacerbate the competitive imbalance. We don't expect HB 10 to change the world, but the pooling concept could be a useful tool to help grantees address fiscal problems.
Richard Rainery
Executive Director

-----Original Messag=-----
From: Janet Seitz [mailto:Janet_Seitz@legis.state.ak.us]
Sent: Thursday, February 13, 2003 11:12 AM
To: lhscjas+hb315@legis.state.ak.us
Subject: HB 10 - health insurance

We are getting ready to request a hearing on HB 10 (health insurance). Your written (e-mail, fax, etc.) comments and suggestions would be appreciated.

You may send these to me by replying to this message and I will see that Reps. Heinze & Rokeberg receive a copy of your message. You may fax your information to us at (907) 465-2040 and, again, I will see that Reps. Heinze & Rokeberg have a copy of your fax. Snail mail for all legislators is: Representative (last name), State Capitol, Juneau, AK 99801-1182.

If you have any questions, please let Dr. Helen Bedder of Rep. Heinze's staff (465-4930) or me (465-3764) know.

Thanks,

Janet
Rep. Rokeberg's Office

Alaska State Legislature

Rep. Tom Anderson, Chair
Rep. Bob Lynn, Vice - Chair
Rep. Nancy Dahlstrom, Member
Rep. Carl Gatto, Member
Rep. Norman Rokeberg, Member
Rep. Harry Crawford, Member
Rep. David Guttenberg, Member

House Labor & Commerce Committee

State Capitol
Juneau, Ak 99801-1182
(907) 465-4954
Fax: (907) 465-2418

MEMORANDUM

Date: February 19, 2003

To: Suzi Lowell, Chief Clerk

From: Representative Tom Anderson, Chairman T.A.
House Labor & Commerce Committee

Re: House Labor & Commerce Committee Schedule

The House Labor & Commerce Committee has scheduled to hear the following bills:

Monday, February 24th at 3:15 pm. Room 17

+ * HB 10 – Group Health Insurance for Private Groups

+ - Teleconferenced
* - First Hearing in First Committee of Referral
= - Bill was Previously Heard/Scheduled

HB

13

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 21, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: April 2, 2003

The LABOR AND COMMERCE Committee considered: **HB 13**

HOUSE BILL NO. 13 **SUCCESSOR LIABILITY FOR PRODUCT LIABILITY**

"An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc. v. Western Auto Supply, 18 P.3d 49 (Alaska 2001), as it relates to products liability; providing that a successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor only if the acquisition is accompanied by an agreement for the successor to assume the liability, results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor, constitutes a consolidation or merger with the predecessor, or results in the successor's becoming a continuation of the predecessor; defining 'business entity' that acquires assets to include a sole proprietorship; and applying this Act to the sale, lease, exchange, or other disposition of assets by a corporation, a limited liability company, a partnership, a limited liability partnership, a limited partnership, a sole proprietorship, or other business entity that occurs on or after the effective date of this Act."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____ _____(_____)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments

[ ] add new referral to _____Committee

[ ] Letter of Intent _____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	GATTO	X			
	CRAWFORD			X	
	GUTTENBERG			X	
	DAHLSTROM	X			
	ROKEBERG	X			
Chair:	ANDERSON	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 13
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Com & Econ Dev
Title: Product Liability for Successor Liability
BRU
Component
Sponsor: Representative Rokeberg
Requester: House Labor & Commerce
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation has no fiscal impact on state spending.

Prepared by: Representative Tom Anderson
Phone
Division: House Labor & Commerce
Date/Time: 4/12/03 1:49 PM
Approved by: Representative Tom Anderson
Date: 4/12/2003
Agency: House Labor & Commerce

(Revised 9/2001 OMB)

ALASKA STATE LEGISLATURE
House of Representatives

COMMITTEE ASSIGNMENTS:

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
LEGISLATIVE ETHICS COMMITTEE, MEMBER

website: http://www.akrepublicans.org/rokeberg/

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PHONE: (907) 269-0117
FAX: (907) 269-0119

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

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

MEMORANDUM

TO: Representative Tom Anderson
House Labor & Commerce Committee

FROM: Representative Norman Rokeberg

DATE: March 13, 2003

RE: Request to hear HB 13

I respectfully request that HB 13, Successor Liability for Product Liability, be scheduled for a hearing. I have attached the following for your information:

1. HB 13
2. Sponsor Statement
3. *Savage Arms, Inc. v. Western Auto Supply Co.*
4. Alaska Bar Rag article
5. Restatement 3rd of Torts

ALASKA STATE LEGISLATURE
House of Representatives

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LABOR & COMMERCE COMMITTEE, MEMBER
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SPECIAL COMMITTEE ON OIL & GAS, MEMBER
LEGISLATIVE ETHICS COMMITTEE, MEMBER

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SESSION:
ALASKA STATE CAPITOL
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PHONE (907) 465-4968
FAX (907) 465-2040

Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SPONSOR STATEMENT FOR HB 13
BY: Representative Norman Rokeberg

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

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

The Supreme Court stated it was deciding the issue of successor liability because "...neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case..." We seek to respond to the invitation of the Supreme Court by filling the legislative void and declaring the law of Alaska on this subject.

HB 13 specifically addresses successor liability as it relates to products liability. The bill expressly rejects the continuity of enterprise exception adopted by the Supreme Court and adopts the generally recognized exceptions to the doctrine of successor liability as listed in the Restatement of Torts. Those four exceptions are: (1) the successor expressly assumed the liability; (2) the transfer was a fraudulent conveyance; (3) the transfer constituted a consolidation or merger; or (4) the transfer was a mere continuation of the predecessor.

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

Please join me in endorsing and passing HB 13.

ED 1: 2/25/03

statute of limitations has run, it is allowable if it "relates back" to the date of a timely original pleading.[24]

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

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

According to this standard, Hebert's second amended complaint will relate back to her timely November 1995 complaint against Honest Bingo if (1) the claim asserted against FDA arises out of the same transaction or occurrence set forth in the initial complaint; (2) FDA received sufficient notice such that it would not be prejudiced in maintaining its defense on the merits; (3) FDA knew or should have known that it would have been included as a party in the original complaint but for a mistake concerning its identity; and (4) FDA received notice and knew or should have known that, but for a mistake concerning its identity, it would have been included as a party within "the period provided by law for commencing the action against" it.[26]

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

It is not clear from the pleadings whether FDA did or did not receive sufficient notice of Hebert's claim within the limitations period. Hebert's complaint asserted that the nature of the named business entities was unknown. It also included the permittee of the bingo game as a John Doe defendant. Hebert's amended complaint states that FDA "is one of the three permitees jointly operating Honest Bingo" and that FDA "was in fact receiving the benefits of the operation of the bingo game at the time and place in question." This statement alleges the existence of a close business relationship between Honest Bingo and FDA, or possibly a joint venture or partnership.[28] While admitting that it is a permittee for bingo games, FDA denied the allegations of jointly operating Honest Bingo and of receipt of benefits of the operation. Viewing the facts in the light most favorable to Hebert, as we must for the purposes of the motion, it is clear that the existence of some type of close business relationship is alleged.

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

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

[13] "The court either may consider a motion for judgment on the pleadings at a preliminary hearing as provided by Rule 12(d) or may postpone its determination until trial."[31] We conclude that where appropriate and when a motion for judgment on the pleadings is brought on the basis of the affirmative defense of statute of limitations, the interests of justice are best served if the trial court considers the motion at a preliminary hearing instead of waiting until trial.

V. *CONCLUSION*

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

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

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

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

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

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

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

30. A Civil Rule 12(c) motion can be converted into a Rule 56 motion for summary judgment when the trial judge considers materials outside the pleadings. *See* Alaska R. Civ. P. 12(c). However, here the superior court explicitly stated that it did not consider matters outside the pleadings. Even if this court were to consider the additional materials contained in the record, it is still unclear whether FDA had notice of Hebert's lawsuit and knew or should have known that it would have been initially included as a defendant if Hebert had been aware of its identity.

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

SAVAGE ARMS, INC., Petitioner,

v.

WESTERN AUTO SUPPLY CO., Respondent.

Nos. 8612, 8721, 8611.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

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

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

Reversed and remanded.

1. Appeal and Error ⇐842(1)

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

2. Appeal and Error ⇐842(1)

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

3. Appeal and Error ⇐863

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

4. Appeal and Error ⇐893(1), 949

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

5. Action ⇐27(1)

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

6. Weapons ⇐18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alaska, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

7. Corporations ⇐445.1

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

8. Corporations ⇐445.1, 590(1)

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

9. Corporations ⇐445.1

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

10. Corporations ⇐445.1

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

11. Corporations ⇐445.1

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

12. Corporations ⇐445.1

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

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

13. Corporations ⇐445.1

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

14. Judgment ⇐181(15.1)

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

15. Evidence ⇐244(7)

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

16. Evidence ⇐244(7), 318(1)

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

17. Indemnity ⇐15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manufacturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

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

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

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

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

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

II. *FACTS AND PROCEEDINGS*

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

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

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

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

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

III. *DISCUSSION*

A. *Standard of Review*

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

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

B. *Choice of Law*

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

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

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

1. *See Langdon v. Champion*, 752 P.2d 999, 1001 (Alaska 1988).

2. *Guin v. Ho*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

3. *See Newton v. Mogill*, 872 P.2d 1213, 1215 (Alaska 1994).

4. *See Fairbanks N. Star Borough v. Kandik Constr., Inc. & Assoc.*, 795 P.2d 793, 802–03 (Alaska 1990), *vacated in part on other grounds*, 823 P.2d 632 (Alaska 1991).

5. *See Langdon*, 752 P.2d at 1001.

6. Savage Arms invokes our opinion in *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968), in which we held that Alaska law governs the question of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. *See id.* at 700–01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. *See id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

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

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

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

Other jurisdictions are split as to whether successor liability should be evaluated using the choice-of-law rules governing tort or corporate and contract law. The Fifth Circuit, for example, has held that the law of the state with the most significant corporate contacts should apply to successor liability questions.[12] The Seventh Circuit held similarly in *Ruiz v. Blentech Corp.*[13] But several federal district courts have explicitly applied the law of the state with the most significant torts contacts,[14] and state courts have split on the question.[15]

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

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

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

10. *See* Black's Law Dictionary 448 (7th ed.1997) (defining *dépeçage* as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); *see also* Bryan A. Garner, A Dictionary of Modern Legal Usage 266 (2d ed.1995).

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

12. *See Webb v. Rodgers Mach. Mfg. Co.*, 750 F.2d 368, 374 (5th Cir.1985).

13. 89 F.3d 320, 326 (7th Cir.1996).

14. *See, e.g., Ede v. Atwell Pump Co.*, 652 F.Supp. 656, 658 n. 1 (D.Colo.1987), *disagreed with on different grounds, Thomas v. Elkon Mfg.*, 867 F.2d 570, 579–80 (10th Cir.1989); *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983); *Kozetz v. Amsted Indus.*, 472 F.Supp. 136, 141–42 (E.D.Mich.1979), *declined to follow on other grounds, Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 746 (6th Cir.1999).

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

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

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

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

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

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

C. *Successor Liability*

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

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

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

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

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

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

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

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

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

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

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

1. *The traditional "mere continuation" exception*

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

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

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

Western Auto also asks us to adopt the modern "continuity of enterprise" and "product line" exceptions. We conclude that the facts in this case are ill-suited to the "product line" exception, and we therefore decline to consider it at this time.[25] We do, however, adopt the "continuity of enterprise" exception, for the reasons explained below.

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

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

22. *See id.* at 101.

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

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

25. Under the "product line" exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products. *See Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 8-11 (1977); 63 Am.Jur.2d *Products Liability* § 133 (1997); Pollak, *supra* note 15, at 104-16. Because the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

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

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

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

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

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

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

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

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.[36] For example, they assert that a buyer interested in purchasing substantially all of the assets of a corporation will, in some cases, decline to make the purchase if it will be forced to assume liability for past product defects as well. As a result, some corporations will be unable to find purchasers, and will instead be forced to sell off the corporate assets on a piecemeal basis, squandering any accumulated goodwill.[37] Such a piecemeal sale would give a corporation certain economic advantages: the seller's shareholders would be able to receive full value for the remaining assets, and successor liability would not flow to the purchasers under any of the traditional or modern theories.[38] But a piecemeal sale would cause an ongoing business to be lost to society, and potential claimants would be no better off.

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

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

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

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

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

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

35. The Third Restatement lists twenty-two states in which state courts (or federal courts applying state law) have rejected both the "continuity of enterprise" and "product line" exceptions. *See id.* § 12, Reporters' Note at 217-18. But one commentator estimates that only eighteen jurisdictions as of mid-1998 had actually rejected the modern exceptions, when considering those states whose highest courts had yet to rule on the issue. *See* Cupp, *supra* note 26, at 852-54. Professor Cupp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. *See* Cupp, *supra* note 26, at 854 n. 44.

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

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

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

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

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

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."[44] In many cases, a predecessor manufacturing company will be purchased by a larger, more financially-sound corporation. The rule we adopt here does not limit injured plaintiffs' recovery to the value of the assets purchased by the successor corporation, so there could conceivably be situations in which product defect victims would receive a larger recovery than they conceivably could have received had the predecessor company remained an ongoing concern, and been bankrupted by the total claims. The Restatement authors view the added recovery potential as an "injustice" to the successor corporation.[45] But we think the Restatement analysis defeats the assumptions behind tort law. We assume that meritorious claims will be paid; that they are sometimes not paid due to insolvency does not change that underlying assumption. To characterize as a "windfall" full recovery for losses caused by product defects unjustly challenges the legitimacy of the injuries suffered. And once again, purchasing corporations can attempt to account for this risk of loss in the purchase price.

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

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

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

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

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

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

45. *Id.* at 210.

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

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

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

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

Finally, this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally.[48] Corporations are currently motivated to correct defects to reduce their own exposure to liability, but the traditional successor liability regime undermines that incentive by giving the manufacturing corporation another option: offering itself for sale to a new investor. Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations' market value in event of sale.[50]

Some commentators,[51] including the Restatement authors,[52] reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts.[53] For example, the four traditional exceptions were created by the courts.[54] There is also some suggestion that legislation in other states has failed to address these problems.[55] We see no reason to await legislation before addressing this issue.

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

3. *Propriety of the summary judgment order*

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

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

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

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

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

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

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

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

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

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

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

D. *Journal Articles as Inadmissible Hearsay*

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

In effect, the statements were uttered at least twice, first by Savage Arms' CEO and ultimately by the articles' authors upon publication. When the statements were first uttered, the declarant was Savage Arms' CEO and the statements were not hearsay, because they were admissions by a party-opponent.[59] But when the articles were offered to prove the truth of their assertions—that the CEO had made the statements the articles attributed to him—their authors became the declarants whose out-of-court statements were being offered into evidence. If the articles were offered for their truth, they normally would have been inadmissible hearsay.[60] The superior court rejected Savage Arms' hearsay objection, but so far as we can tell from the record, did not address the author-as-declarant issue. Whether it must do so on remand depends on whether the articles are offered for the truth of the matters they assert.

E. *Real Parties in Interest*

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

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

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

57. *Id.*

58. *Id.* at 722.

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

60. Alaska R. Evid. 802.

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

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

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

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

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

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

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

Critical commentary bears out the significance of this distinction:

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

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

IV. *CONCLUSION*

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

63. *See id.* at 926.

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

65. *See id.*

66. *Id.* at 926.

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

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

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

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

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

Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, Anchorage, Eric T. Sanders, J., and wife appealed. The Supreme Court, Carpeneti, J., held that: (1) record supported finding that $25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth $10; (2) record supported assignment of 57% of marital property to wife; (3) wife was not entitled to have husband pay her future medical costs; (4) wife was not entitled to bifurcation of legal divorce; (5) wife was not entitled to travel and living expenses incurred by attending trial in Alaska; and (6) attorney fee award to wife of $3,185 was sufficient.

Affirmed.

1. Divorce ⇐252.1

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

2. Divorce ⇐286(8)

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

3. Divorce ⇐286(8)

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

4. Divorce ⇐286(5)

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

5. Divorce ⇐223, 286(4)

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

6. Divorce ⇐253(3)

Record in divorce case supported finding that, for equitable distribution purposes, $25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth $10; husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

7. Divorce ⇐253(2)

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

8. Divorce ⇐282, 283

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

9. Divorce ⇐253(2)

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

10. Divorce ⇐286(9)

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

11. Divorce ⇐239

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

Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tinker Bray

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

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

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

> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, as on whether the business itself has been transferred as an ongoing concern.

Id. at 12 (internal footnotes omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If a purchaser is larger and wealthier than a seller, then the "pocket is deeper" for a tort plaintiff under the court's new rule. The court concludes that is only fair. Id. at 16-17. Without going into the justice of the situation, or whether or not this results in a "windfall" to a tort plaintiff, by giving this new rule retroactive application the new rule is made patently unfair. A large tort claim, unknown and perhaps unknowable to the purchaser, will simply deprive the purchaser of its bargain. The court's offhand comment in this regard, that "once again, purchasing corporations can attempt to account will" it believes is inherent in an asset purchase justifies holding the purchaser liable. Id. at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

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

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

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

For businesses that have already made asset purchases, the only option now is to purchase insurance or other suitable risk management solutions to take into account the new classes of claims that the court has created.[2] Those insurance premiums and similar costs are an unfair, unreasonable burden, but unless the court recognizes that its reasoning only justifies prospective and not retroactive application, the alternatives are even worse.

[1] An argument rejected by the court "because [successor liability] is directly related to products liability law, a doctrinal road long traveled by courts." Savage Arms, No. 8203, at 19.

[2] While the decision is limited to products liability, long-time observers of the court might anticipate the rule being [illegible] to services and well as products, and other kinds of claims besides torts.

LEXSTAT Torts Third Products Liab. 12

Restatement of the Law, Third, Torts: Products Liability

Case Citations

Chapter 3 - Liability of Successors and Apparent Manufacturers

Restat 3d of Torts: Products Liability, § 12

§ 12 Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor becoming a continuation of the predecessor.

COMMENTS & ILLUSTRATIONS: Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: "one . . . who sells or distributes a defective product is subject to liability for harm . . . caused by the defective product."@ (Emphasis added.)@ Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

When the transferor goes out ofbusiness upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the

transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other business entities.

Tort claimants who, as a result of defective products sold by a predecessor corporation, seek recovery only after transfer of assets to a successor corporation often face difficulties in attempting to bring their claims within the foregoing legal rules. Their claims typically accrue after the predecessor corporation has lawfully distributed to its shareholders the proceeds from the transfer of assets and has ceased to exist. Under these circumstances, tort claimants who were not existing creditors at the time of the transfer of assets ordinarily have no recourse against the predecessor's shareholders. Unless they can pursue their claims against the successor corporation, or can reach other funds provided by existing insurance or by a statute, their only practical remedy lies with retailers and wholesalers in the predecessor's distributive chain, who may not be available as a practical matter. Statutes and judicial precedents governing the rights of creditors after a corporate assets transfer and dissolution generally do not address this problem of post-transfer claims accrual.

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against a successor for harm caused by defective products distributed by the predecessor in these circumstances.

A minority of jurisdictions impose liability on a successor corporation based on a broader concept of continuation of the business enterprise, even when there is no continuity of shareholders, officers, or directors. Some courts hold that the continuation of a predecessor's product line by the successor is sufficient to support imposition of successor liability for harm caused by defects in products sold before the assets transfer.

b. Rationale. Limiting the liability of successor corporations to the circumstances described in this Section is supported by fairness and efficiency considerations. An alleged successor that purchases the predecessor's productive assets piecemeal, other than as part of a going concern, cannot, by that fact alone, be said to have either manufacturedor sold defective products distributed by the predecessor before the transfer of assets. In the absence of circumstances in which the successor could be said to constitute a continuation of the predecessor, or somehow to have prejudiced subsequent tort plaintiffs by its own pre-acquisition conduct, imposing liability on a business entity that did not make or distribute the defective products that caused harm could be justified only because it increases the amount of money available post-acquisition out of which to satisfy plaintiffs' claims. But that alone cannot be justification for successor liability. Thus, imposing liability on the piecemeal purchase of productive assets would, for no compelling reason, impede the free alienability of corporate assets, thereby discouraging shareholder investment of capital and increasing social costs.

Imposing liability on successor corporations constitutes acceptable public policy when the successor either agrees to be liable or is implicated in the transfer of assets in a way that, without such liability, would unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor. Subsections (a) through (d) describe the types of corporate asset transfers that have been determined to justify imposing liability on the successor. Subsection (a) recognizes that contractual promises by the successor to pay subsequent tort claims, for which promises the successor has presumably been compensated, should be honored. Subsection (b) provides that when a business entity makes a fraudulent transfer in which the transferee is implicated, successor liability is appropriate for the same reason that liability would be imposed in favor of other creditors. Thus, a predecessor may arrange an asset transfer at an artificially deflated price, accompanied by an agreement by the successor to compensate either the predecessor, its owners, or its managers in ways that escape easy detection; or a successor may knowingly participate in an asset transfer coupled with a liquidating dividend by the predecessor to its shareholders for the purpose of leaving tort plaintiffs without remedy. If those transfers are fraudulent under applicable state law, imposing tort liability on the transferee for having knowingly participated in such transfers is justified.

Subsections (c) and (d) deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm.

A small minority of courts have fashioned successor liability rules more advantageous to products liability claimants than the rules stated in this Section. Those minority rules, in effect, extend the "change in form only" exception just described to include circumstances in which the successor continues a product line previously distributed by the predecessor. The minority position is based on the belief that a successor who purchases productive assets should not be allowed to benefit from receiving the goodwill and reputation of the predecessor's business without the burden of responding in tort to claims for harm caused by products sold by the predecessor prior to transfer. An argument advanced to support this minority view is that holding successors liable reduces the price that predecessors receive for transferring assets, thereby helping to strengthen incentives for the managers to invest in care before the transfer of the business.

This reasoning has proven unpersuasive to a substantial majority of courts that have considered the issue. Extending successor liability beyond the exceptions set forth in Subsections (a) through (d) would, in the judgment of most courts, be unfair and socially wasteful. Posttransfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice -- that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d)) -- with another, possibly greater, injustice: that the transfer may give tort plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.

Moreover, a majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without actually benefiting very many tort plaintiffs. In most instances, the magnitude of future liability for products distributed pretransfer is difficult, if not impossible, to assess. As a majority of courts have recognized, the result of imposing successor liability as a general rule would be to depress the prices for transferred assets to the point that piecemeal disposition of assets, which clearly would not subject the buyers to liability, would be a preferable alternative to sale of the assets as part of a going concern. In that event, the products liability claimant harmed by a pre-transfer product defect would still run the risk of ending up with an uncollectible judgment. The benefits to society of preserving the predecessor's assets as a going concern would be sacrificed, with no commensurate benefits to tort claimants.

And even if a more expansive successor liability rule did not invariably lead to piecemeal asset transfers, such a liability rule would depress the prices received for going-concern transfers to an extent that would threaten to undermine the objectives of the law governing corporations. One of the purposes served by the corporate structure is to provide limitation and certainty of risk to shareholders in order to encourage capital formation. Thus, the shareholders' initial risk is limited to the value of their shares of stock and they are able to withdraw from an investment by sale of the stock without incurring future potential liability. A more expansive successor liability rule might threaten shareholders'

investments by significantly restraining corporate assets transfers, thereby tending to frustrate corporation law's objective of encouraging shareholder investment.

Some critics of the majority rule argue that, when the successor continues to manufacture the same products as the predecessor, often under the same trademark, consumers have legitimate expectations that the successor will stand behind the predecessor's products. Disappointing these expectations is unfair, according to the critics, quite apart from the effects of successor liability upon the formation of capital. But this argument overlooks the reality that the predecessor's products that cause harm in these cases were distributed prior to the assets transfer, when there could be no reliance by consumers on the financial viability of the successor. One cannot logically rely on post-transfer expectations regarding the successor to justify the imposition of liability on the successor for pre-transfer distributions by the predecessor.

c. Nonliability in the absence of special circumstances. In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section. The successor is liable under § § 1-4 for harm caused by defective products it sells after acquisition. In the absence of the circumstances described in this Section, however, thesuccessor is not liable for defective products sold by another prior to that time.

Illustrations:

1. ABC Corp., which manufactures and sells lawn mowers, transfers all its assets to XYZ Corp., a manufacturing corporation with different officers, directors, and shareholders, for cash. ABC then dissolves, distributing the proceeds of the sale to its shareholders. ABC complies with all statutes governing its dissolution, and none of the exceptions in this Section appiies. XYZ retains most of ABC's employees and managers and continues to manufacture lawn mowers, some of which are the same as previously manufactured by ABC. A defective lawn mower made and distributed by ABC prior to the transfer of assets to XYZ harms a user three years after the transfer. XYZ is not subject to liability for the harm to the user of the lawn mower.

2. The same facts as Illustration 1, except that a defective lawn mower made and distributed by XYZ after the transfer of assets harms a user three years after the transfer. XYZ is subject to liability for the harm to the user of the lawn mower.

d. Agreement for successor to assume liability. When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed under Subsection (a) in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of products liability is not implied by the successor's assumption of specific duties with regard to product service or replacement.

Illustration:

3. The same facts as Illustration 1, except that the transfer-of-assets agreement contains a promise by XYZ to assume all of ABC's liabilities. XYZ is subject to liability for the harm to the user of the lawn mower.

e. Fraudulent transfer in order to avoid debts or liabilities. Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.

Illustration:

4. The same facts as in Illustration 1, except that the transfer of assets by ABC to XYZ is made as part of a plan between ABC and XYZ to leave tort claimants harmed by ABC's defective products without enforceable remedies. If a transaction constitutes a fraudulent transfer under applicable state law, XYZ is subject to liability for harm to the user of the lawn mower.

f. Consolidation or merger. When statutory consolidation or merger of two corporations takes place, products liability devolves on the successor corporation under Subsection (c). A more difficult question is whether, absent statutory merger, a de facto merger has taken place. Local law governing de facto mergers is determinative. Whether a de facto merger under Subsection (c) has occurred generally depends on whether: (1) there is a continuity of management, employees, location, and assets; (2) the successor corporation acquires the assets of the predecessor with shares of its own stock so that shareholders of the transferor corporation become shareholders of the transferee corporation; (3) the predecessor corporation ceases its ordinary business operations immediately or shortly after the transfer of assets; and (4) the successor assumes those liabilities and obligations of the predecessor necessary for the uninterrupted continuation of the normal operations of the predecessor.

Illustrations:

5. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ and constitutes a statutory merger of ABC and XYZ under applicable state law. XYZ is subject to liability to the user of the lawn mower.

6. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ, with which ABCredeems its own stock from its shareholders. ABC then ceases to operate its own business, which XYZ resumes with the same management and employees, at the same location. If it is determined under applicable state law that a de facto merger between ABC and XYZ has occurred, XYZ is subject to liability for harm to the user of the lawn mower.

g. Continuation of the predecessor. The exception recognized in Subsection (d), referred to by many courts as the "mere continuation" exception, applies when there has been a formal redesignation of the predecessor corporate entity but little or no change in underlying substance. The most important indicia of continuation, in addition to the continuation of the predecessor's business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations. A minority of jurisdictions recognize a broader exception, referred to as the "continuity of enterprise" exception, that imposes liability on the successor for continuing the business activities of the predecessor even when the corporate form of the successor is different from the predecessor. This Section does not follow that minority position.

Illustration:

7. The same facts as Illustration 1, except that XYZ is a corporation with the same officers, directors, and shareholders as ABC. After the assets transfer, XYZ continues the same manufacturing and distribution operations as ABC did previously. If XYZ is determined to constitute a "mere continuation" of ABC under Subsection (d), XYZ is subject to liability to the user of the lawn mower.

h. Necessity for the predecessor to transfer all of its assets and go out of business. Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed, the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery. The exceptions set forth in Subsections (c) and (d), merger and continuation, most frequently have significance when the predecessor has transferred all of its assets to the successor and, at least formally, has ceased to exist. But there is no reason that the exceptions set forth in Subsections (c) and (d) might not arise in connection with the transfer of a division of a large company, leaving the company in existence after the transfer. And the exceptions in Subsections (a) and (b) could arise in connection with transfers involving less than all of the predecessor's assets where the predecessor continues in existence after the transfer.

i. Relationship between the rule in this Section and the successor's independent duty to warn. This Section deals with a successor's liability for harm caused by the predecessor's defective products and is not premised on post-transfer wrongdoing by the successor itself. For the rules governing the liability of a successor for its own post-transfer failure to warn its predecessor's customers, see § 13.

Comment c. Nonliability in the absence of special circumstances. The following jurisdictions have limited the liability of successor corporations to the four exceptions set forth in § 12 and would reject both the "continuity of enterprise" approach (Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976)) and the "product line" exception (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)). See, e.g., Arkansas (Swayze v. A.O. Smith Corp., 694 F.Supp. 619, 623 (E.D.Ark.1988); Reed v. Armstrong Cork Co., 577 F.Supp. 246, 247-48 (E.D.Ark.1983)); Colorado (Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992)); Florida (Bernard v. Kee Mfg. Co., 409 So.2d 1047 (Fla. 1982)); Georgia (Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga.1985)); Illinois (Gonzalez v. Rock Wool Eng'g & Equip. Co., 453 N.E.2d 792

(Ill.App.Ct.1983); Domine v. Fulton Iron Works, 395 N.E.2d 19 (Ill.App.Ct.1979)); Iowa (Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996)); Kentucky (Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law)); Maryland (Nissen Corp. v. Miller, 594 A.2d 564 (Md.Ct.Spec.App.1991)); Massachusetts (Guzman v. MRM/Elgin, 567 N.E.2d 929 (Mass.1991)); Minnesota (Costello v. Unipress Corp., No. C6-95-2341, 1996 WL 106215 (Minn.Ct.App., Mar. 12, 1996); Cooper v. Lakewood Engineering & Mfg. Co., 45 F.3d 243 (8th Cir.1995) (applying Minnesota law)); Missouri (Bozell v. H & R 1871, Inc., 916 F.Supp. 951 (E.D.Mo.1996); Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir.1988) (applying Missouri law)); Nebraska (Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb.1982)); North Carolina (Budd Tire Corp. v. Pierce Tire Co., Inc., 370 S.E.2d 267 (N.C.Ct.App.1988); Comment, Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina, 30 Wake Forest L. Rev. 889 (Winter 1995)); North Dakota (Downtowner Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984)); Ohio (Welco Indus., Inc. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993)); Oklahoma (Goucher v. Parmac, Inc., 694 P.2d 953 (Okla.Ct.App.1984)); South Dakota (Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515 (S.D.1986)); Texas (Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287 (Tex.Ct.App.1985); Mudgett v. Paxson Mach. Co., 709 S.W.2d 755 (Tex.Ct.App.1986)); Vermont (Ostrowski v. Hydra-Tool Corp., 479 A.2d 126 (Vt. 1984)); Virginia (Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992)); West Virginia (Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561 (W.Va.1995) (per curiam)); Wisconsin (Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis.1985)); District of Columbia (LeSane v. Hillenbrand Indus., 791 F.Supp. 871, 873-74 (D.D.C.1992) (applying District of Columbia law)); Virgin Islands (Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986, V. I.)). Only a few states appear to have adopted liability based on the successor corporation's continuation of the predecessor's line of products: California (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); New Jersey (Ramirez v. Amsted Indus., 431 A.2d 811 (N.J. 1981); (but see possible limit to "product line" exception recognized in dicta in Leo v. Kerr-McGee Chem. Corp., 37 F.3d 96, 100-01 (3d Cir.1994) (applying New Jersey law) ("It seems apparent that, except perhaps in design defect cases, a defect in a product when the manufacturer distributed the product is likely to manifest itself and cause injury within a reasonable time after the product is manufactured. Accordingly, as a practical matter, successor liability under Ramirez is likely to be imposed in most cases, if at all, for a limited period.")); New Mexico (Garcia v. Coe Manufacturing Co., 933 P.2d 243 (N.M.1997)); Pennsylvania (Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa.Super.Ct.1981)); Bogart v. Phase II Pasta Machs., Inc., 817 F.Supp. 547 (E.D.Pa.1993)); Washington (Martin v. Abbott Labs., 689 P.2d 368 (Wash.1984); Fox v. Sunmaster Prods., Inc., 821 P.2d 502 (Wash.Ct.App.1991) (the continued product line must be the one that harms the plaintiff)). Although the product line exception is still theoretically viable in Pennsylvania, if a plaintiff has a possible remedy against the predecessor, a recent opinion held the exception could not be invoked. LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir.1991).

In an earlier draft of these Reporters' Notes, New Jersey was categorized as a jurisdiction that employs a very liberal test for corporate successor liability, a test premised on maximizing recovery rather than on evidence of express agreement to be liable or substantial deprivation of remedies for plaintiffs against the predecessor corporation. In support of this position Pacius v. Thermtroll Corp., 611 A.2d 153 (N.J.Super.Ct.Law Div.1992), was cited. In that case, the court held that any transfer of assets or use of the predecessor's goodwill entailed a de facto merger that, in turn, triggered successor liability. Id. at 157. Elaborating on the policy underlying this holding, the Pacius court quoted Rawlings v. DM Oliver Inc., 159 Cal.Rptr. 119, 124 (1979) for the following proposition:

Fundamental fairness has been sought through a balancing of the rights of the injured party against the rights of those engaged in business, including the latter's reasonable commercial expectations. Placing the economic burden on those best able to pay for those costs, while permitting the transfer to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed. The thrust from our high court as a matter of first priority has been to maximize recovery for the victim.

Id. at 157 (emphasis added).

Recently, however, New Jersey has reigned in the "deep pocket" approach set forth above by the Pacius court. In Saez v. S & S Corrugated Paper Machinery Co., 695 A.2d 740 (N.J.Super.App.Div.1997), the court expressed disagreement both with the decision of the Pacius court and with this Restatement's earlier characterization of New Jersey law. The court first noted that, in contrast to the holding in Pacius, in order for a successor corporation to be liable under New Jersey law, the corporation must not only benefit from the predecessor's goodwill but must also continue to manufacture the predecessor's product. Id at 16. Moreover, the court stated that the question to answer in determining whether successor liability has been triggered is "not whether there was 'any benefit that the successor obtain[ed] from the acquisition of the assets of its predecessor' or if the successor eliminated a competitor [since] [s]o broad a test would be no test at all."@ Id.

Several other jurisdictions have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or a common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala.1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D.N.H.1994).

Comment d. Agreement for successor to assume liability.

1. For general authority that agreements to assume liability will be enforced in favor of plaintiffs with products liability claims, see cases cited in the Reporters' Note to Comment a.

2. General assumption of a predecessor's liability, even without specific mention of products liability, will be interpreted to include liability for products liability claims. See, e.g., Bouton v. Litton Indus., Inc., 423 F.2d 643 (3d Cir.1970) (applying New York law); Grugan v. BBC Brown Boveri, Inc., 729 F.Supp. 1080 (E.D.Pa.1990). If the contractual obligation as to the successor's assumption of products liability is subject to conflicting interpretations, the issue is for the trier of fact. See, e.g., Gee v. Tenneco, Inc., 615 F.2d 857, 862-63 (9th Cir.1980) (applying California law); Florom v. Elliott Mfg., 867 F.2d 570, 574-76 (10th Cir.1989) (applying Colorado law); Davis v. Loopco Indus., Inc., 609 N.E.2d 144 (Ohio 1993).

3. Contractual agreements by the successor to repair or service a product sold by the predecessor do not amount to an agreement to assume products liability for injuries caused by the predecessor's defective products. See, e.g., Schwartz v. McGraw-Edison Co., 92 Cal.Rptr. 776 (Cal.Ct.App.1971) (disapproved on other grounds in Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); Shane v. Hobam, Inc., 332 F.Supp. 526 (E.D.Pa.1971) (applying New York law). Whether agreements to service a predecessor's products may create an independent duty to warn about defects is discussed in connection with § 13.

Comment e. Fraudulent transfer in order to avoid debts or liabilities. For the reason set forth in the Comment, this exception has rarely been used to impose successor liability for products liability claims. However, in Schmoll v. AC & S, Inc., 703 F.Supp. 868 (D.C.Or.1988), the court found that a complex corporate restructuring was undertaken to avoid both pending and future liability to persons who were certain to suffer asbestos-related illness and was thus the functional equivalent of a fraudulent transfer. See also Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C.Ct.App.1993) (reversing summary judgment when plaintiff's evidence raised a question of fact as to whether the defendant had purchased assets from the predecessor corporation in order to avoid creditors' claims); Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267 (N.C.Ct.App.1988); Mullen v. Alarmguard of Delmarva, Inc., No. CIV. A. 90C-11-40-1-CV, 1993 WL 258696 (Del.Super.Ct., Jun.16, 1993).

A much closer question is whether a successor corporation's actual or constructive knowledge that the predecessor's products are defective and likely to cause injury in the future is sufficient to render the transaction sufficiently tainted so as to come within the umbrella of this exception. There is little authority on the issue. In Nissen Corp. v. Miller, 594 A.2d 564, 569 n. 2 (Md.1991), the court noted that either knowledge of pending claims or knowledge of product defects might be sufficient to expose a successor liability since either would put in question the bona fides of the transaction.

Comment f. Consolidation or merger. For a discussion of what constitutes a "de facto merger," see Fletcher, Cyclopedia Corporations, § 7124.20; American Law of Products Liability § 7:10; Frumer and Friedman, Products Liability § 7.04[5]; Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297, 313 nn.136-137 (1994) (describing de facto merger and "mere continuation" doctrines). When the successor purchases the assets of the predecessor for cash, a de facto merger will not be found to have occurred. See, e.g., Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir.1977) (applying Indiana law); Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439-40 (7th Cir.1977) (applying Wisconsin law). Only courts applying the "continuity of enterprise" exception will impose liability when the successor corporation purchased the assets of the predecessor for cash and there is evidence of continuity of the original business. See Reporters' Note to Comment c.

Comment g. Continuation of the predecessor. For a discussion of the "mere continuation" exception, see Fletcher, Cyclopedia Corporations § 7124.10; American Law of Products Liability § 7:14; Frumer and Friedman § 7.04[4]. Also see Winch v. Yates Am. Mach. Co., Inc., 613 N.Y.S.2d 980 (N.Y.App.Div.1994); Swayze v. A.O. Smith Corp., 694 F.Supp. 619 (E.D.Ark.1988); Florom v. Elliott Mfg., 867 F.2d 570, 578 n. 3 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo.Ct.App.1992); Nissen Corp. v. Miller, 594 A.2d 564, 567 (Md.1991); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir.1981) (applying Missouri law); Chemical Design,

Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct.App.1993); U.S. v. Atlas Minerals & Chem., Inc., 824 F.Supp. 46 (E.D.Pa.1993); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986).

In analyzing continuation questions, some courts require purchase of stock or other benchmarks in order to establish the requisite continuity. See, e.g., Gehin-Scott v. Newson, Inc., 848 F.Supp. 585 (E.D.Pa.1994); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations"); Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992) (also requiring a common identity of officers, directors, and stockholders). Other courts deny a merger if no transfer of assets has taken place, as in Carreiro v. Rhodes Gill & Co., 68 F.3d 1443 (1st Cir. 1995). Contra, Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law) (holding that purchase of assets is not sufficient to warrant a finding of a de facto merger); Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir.1994) (applying Louisiana law). But several other states have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala. 1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D. N.H. 1994). See generally Sweatland v. Park Corp., 587 N.Y.S.2d 54 (N.Y.App.Div.1992).

REPORTERS NOTES: *Comment b. Rationale.* In a muchcited case, *Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986)* (applying Virgin Islands law), the court stated that the imposition of successor liability on a company that has merely purchased the assets of a predecessor for cash and does not otherwise fall within the stated exceptions would encourage the dissolution of a financially troubled corporation by piecemeal sale of assets rather than as a going business concern. In this event the plaintiff would not be able to reach the assets when the accident occurred years after dissolution. The end result would be the needless destruction of an ongoing business enterprise with no net advantage to anyone. Other courts have observed that the imposition of successor liability on small corporations could spell financial disaster to them. See, e.g., *Bernard v. Kee Mfg. Co. Inc., 409 So.2d 1047 (Fla.1982); DeLapp v. Xtraman Inc., 417 N.W.2d 219, 221 (Iowa 1987); Nissen Corp. v. Miller, 594 A.2d 564, 570 (Md.1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 100 (Minn.1989).* These courts have concluded that the imposition of strict liability on successor corporations is inconsistent with the principle of products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence. See also *Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992); Downtowner v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 827 (Wis.1985).*

Corporate successor liability has been the subject of considerable law review commentary. See, e.g., Phillips, Product Continuity and Successor Corporation Liability, *58 N.Y.U.L. Rev. 906 (1983)* (the article contains an exhaustive listing of law review literature; author supports the "product line" exception); Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, *72 Cornell L. Rev. 17 (1986)* (criticizing the rationale offered by courts and commentators in support of the liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products liability plaintiffs with adequate protection); Note, A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash, *71 Marq. L. Rev. 815 (1982)* (author criticizes the rationale offered to support expansive rules imposing liability on successor corporations and suggests expansion of independent duty to warn and fraudulent transfer category when the successor had actual or constructive knowledge of product defects); Rogala, Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?, *68 U. Det. L. J. 37 (1990)* (economic analysis supports the retention of the four basic exceptions and the rejection of "product line" and "continuity of enterprise" theories); Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297 (author criticizes both "product line" and "continuity of enterprise" exceptions and predicts that Ohio will follow four traditional exceptions). Much of the law review commentary supports liberalizing the rules imposing liability on corporate successors. The articles acknowledge, however, the overwhelming judicial rejection of the liberalizing rules. It is interesting that, after an early spurt of cases in the late 1970s and early 1980s arguing for more expansive liability, courts have refused to impose liability unless the plaintiff is able to come within the four traditional exceptions. See Green, Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, *87 Nw. U.L. Rev. 897, 909-10 (1993);* Henderson and Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, *37 UCLA L. Rev. 479, 492 and n.64 (1990).*

Several courts and commentators have recognized that the problems set forth in this Comment can best be addressed by legislation. For an insightful analysis and recommendation, see Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, *72 Cornell L. Rev. 17 (1986)* (criticizing the rationale offered by courts and commentators in support of liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products-liability plaintiffs with adequate protection). Courts have repeatedly espoused the same view. See, e.g., *Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 829 (Wis.1985):*

We conclude that the legislature is in a better position to make broad public policy decisions in actions based on products liability law. [Citation omitted]. The questions concerning the effect on the manufacturing business, the potential size and economic strength of successor corporations, the availability of commercial insurance and the cost of such insurance are all questions that . . . the legislature is in a better position to ascertain.

A similar sentiment was expressed in *Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir.1977):*

In recent years, for a variety of reasons, many have thought it necessary to turn to the courts in search of solutions to social problems. Courts are ill-equipped, however, to balance equities among future plaintiffs and defendants. . . . [S]uch broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate.

See also *Myers v. Putzmeister, Inc., 596 N.E.2d 754 (Ill.App.1992); Welco Indus. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993); Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104 (Ill.App.Ct.1982); Holifield v. Setco Indus., Inc., 168 N.W.2d 177 (Wis.1969),* overruled on other grounds, *Hansen v. A.H. Robins, Inc., 335 N.W.2d 578 (Wis.1983).*

One possible statutory approach might be to require that whenever a product manufacturer transfers a business or a product line as a going concern, some form of bond or other security must be posted by the predecessor manufacturer in an amount not to exceed the net value of the predecessor at time of transfer. The value of the bond or other security would be available to future tort plaintiffs to satisfy claims for harm caused by previously distributed defective products. The posting of such a security would, under terms of the statute, protect the successor from future liability for previously distributed products in excess of the value of the security. Presumably, obligations on thebond would be limited in time. Future plaintiffs injured by products previously distributed by the predecessor would be no worse off financially than if the transfer of assets had not occurred. The limit based on the value of the predecessor at the time of transfer, with an appropriate time limit, would render more calculable the amount of the security required, in contrast to the difficulty of calculating future liabilities without such limits under the more expansive successor liability rules applied in a minority of jurisdictions. The value of the predecessor's product line as a going concern, whenever that value exceeds the cost of the security against future liability, would be preserved without allowing the transfer of assets to prejudice tort plaintiffs' chances of recovery.

HB

15

LEGAL SERVICES

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

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State Capitol
Juneau, Alaska 99801-1182
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MEMORANDUM February 10, 2003

SUBJECT: Conceptual changes to HB 15 (L&C)
(Work Order No. 23-LS0058\H)

TO: Representative Tom Anderson
Attn: Josh

FROM: Barbara R. Craver
Legislative Counsel BRC

Enclosed is the new draft of HB 15(L&C). I wanted to point out the effect of the third change, which changes the phrase on page 2, line 27 from "the attorney general may annually adjust the fees below the stated maximum based on revenue history of the fees received by the designated agent" to "the attorney general may annually adjust the fees received by the designated agent." The phrase in version D would have allowed the fees charged to telephonic sellers to be adjusted annually, i.e. the fee structure for telephonic sellers could be revised based on the kind of revenues the contractor was receiving. The revision in version H now allows changes to the revenues received by the contractor, presumably by cutting into the contractor's share of revenues, but no adjustment to the charge to telephonic sellers. There is nothing inherently wrong with this, except for a different approach to the party bearing the burden of the costs of the No-Call Database if the preliminary estimate (now $750 per telephonic seller) is not realistic.

If I may be of further assistance, please advise.

BRC:med
03-123.med

Enclosure

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 21, 2003 **FURTHER REFERRALS: State Affairs Finance**

Date of Committee Action: _____

The LABOR AND COMMERCE Committee considered: **HB 15**

HOUSE BILL NO. 15 **TELEMARKETERS NO-CALL LISTS**

"An Act relating to establishing the Alaska No-Call List, a data base of residential telephone customers who do not wish to receive telephonic solicitations; providing that the data base be compiled at no cost to the customers; requiring paid telephonic sellers to purchase the data base; requiring telephonic sellers to identify themselves; requiring telephonic solicitors who are otherwise exempt from registration as telephonic solicitors to file with the Department of Law and purchase the data base; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN				X
	GATTO				X
	CRAWFORD	✓			
	GUTTENBERG				X
	Dahlstrom				X
	ROKEBERG	✓			
Chair:	ANDERSON	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 15
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act establishing the Alaska No-Call List, a data base of residential telephone customers . . ."
BRU Civil Division
Component Fair Business Practices
Sponsor Representative Fate
Requester House Labor & Commerce
Component No. 2206

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	103.4	103.4	103.4	103.4	103.4	103.4
Travel	0.4	0.4	0.4	0.4	0.4	0.4
Contractual	16.5	14.5	14.5	14.5	14.5	14.5
Supplies	1.9	1.9	1.9	1.9	1.9	1.9
Equipment	13.0					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**135.2**	**120.2**	**120.2**	**120.2**	**120.2**	**120.2**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	135.2	120.2	120.2	120.2	120.2	120.2
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**135.2**	**120.2**	**120.2**	**120.2**	**120.2**	**120.2**

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		2	2	2	2	2
Temporary						

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

HB 15 requires the attorney general to contract with an designated agent to establish and maintain a centralized data base of telephone subscribers who do not want to receive telephonic solicitations. Telephonic solicitors and organizations who are otherwise exempt from telephonic solicitation registration requirements, but who intend to conduct a solicitation, must purchase the data base. Fees charged to buy the "Alaska No-Call" data base must cover the direct and indirect costs of creating, updating, and maintaining the data base. Fees will be based on a sliding scale from zero, for solicitors with fewer than five employees and non-profit organizations, to a maximum of $500, for solicitors with more than 1,000 employees. In addition to the data base, the designated agent is to be charged with maintaining an automated complaint system for residential subscribers to report suspected violations to the appropriate enforcement agency, which is the Department of Law, via the Internet or 800 number.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 2/5/03 3:27 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 2/5/2003
Agency Department of Law

ANALYSIS CONTINUATION

The Colorado Public Utilities Commission was recently charged with implementing the Colorado No-Call Law, on which Alaska's HB 15 is modeled. The Colorado Attorney General's Office handles enforcement under that law. We have spoken with both of these agencies, and used their experience to develop this fiscal note, making adjustments for the smaller number of residential telephone subscribers in Alaska, as compared to Colorado.

COSTS TO THE STATE:

During the first year, the costs to the Department of Law will involve implementing the Alaska No-Call data base. Legal services will be necessary to develop and implement regulations, including holding public hearings on the draft regulations. Next, the procurement process to hire the designated agent will take place. Once a designated agent is under contract, considerable time will be required to oversee the web site content development including what consumer information should be available, and what information should be available to registering telemarketers. The development of the automated complaint system is expected to require significant amounts of time to ensure the department will receive all necessary information related to the complaints electronically, in a timely manner. Colorado estimated this phase of the project required as much as one-third of each of three full-time employees for five to six months (one full-time equivalent), and approximately 400 hours of attorney time and 100 hours of paraprofessional time. While hopefully, Alaska can piggyback on Colorado's experience, considerable time will still be required to fit our own circumstances.

We estimate the services of one-half of a full time attorney position and one-half of a full time paraprofessional position will be required for this implementation stage. In addition, we anticipate $2,000 will be needed for direct case costs associated with holding public hearings on the draft regulations. As there will be no fee revenue available to pay for these start-up costs, and the Department of Law cannot absorb this activity within its existing budget, these costs would need to be paid for with general funds.

Once the data base is up and running, a certain amount of attorney and paraprofessional time will be necessary to manage the program. This activity would include reviewing telephone solicitor registrations, supervising the web site, and regular contact with the designated agent. The Colorado PUC told us this regular contact took about four hours per week for them. We are assuming the impact of this in Alaska will be much smaller, both because some of their contact was due to problems with their web site and 800 number we hope to avoid using their example, and because Alaska has a much smaller population. We anticipate this regular contact will require no more than one-hour of paraprofessional time per week. In addition, the department estimates the annual readjustment of fees will require 10 hours of attorney time and 10 hours of paraprofessional time, with an additional 10 hours of attorney time needed to assist in preparation of the semi-annual report to the legislature.

As pointed out in the introduction, the bill also requires the designated agent set up and maintain an automated complaint system that would ". . . report violations to the appropriate state enforcement agency for enforcement action." The Department of Law would be responsible for these enforcement actions. The Colorado Attorney General's Office estimates they use the services of one-half of an attorney and one full-time paraprofessional for enforcement. We estimate the services of a half-time attorney position and a half-time paraprofessional position would be sufficient to handle all on-going maintenance and enforcement activities.

HB 15 requires that fees cover the cost of creating and maintaining the Alaska No-Call List. It is unclear whether enforcement actions would be considered creating or maintaining the data base, and we do not know if fees will be sufficient to cover any of the state's cost if that is the legislature's intent. (See subsequent discussion.) Accordingly, we have included all Department of Law anticipated costs as general funds starting in FY 2005 for the purposes of further discussion with the legislature.

ANALYSIS CONTINUATION

EXTERNAL COSTS AND REVENUES:
Under this bill, telemarketers purchase the data base from the designated agent, who receives the fees. Fees are designed to cover the costs of developing and maintaining the data base, so are adjusted annually. In Colorado, the contract with the designated agent requires that, in a given year, surplus revenues collected by the agent be placed in escrow, to be applied against future No-Call List contracts. Surplus revenues are those over the amount of the contract between the State of Colorado and the designated agent; costs to the state have not been charged against fees to date, although the Colorado AG has asked the legislature for authority to receive $15.0 in FY 2002, $55.0 in FY2003, and $50.0 in FY 2004 from fee revenue to offset part of their costs.

When the State of Colorado started the Colorado No-Call List, the number of potential telemarketers who might purchase the list was unknown. Only 40 telemarketers were registered with the Colorado Attorney General's Office. When Colorado's system was implemented, the rates were set as follows: 0-5 employees, $0; 6-10 employees, $100; 11-50 employees, $200; 51-100 employees, $300; 101-250 employees, $350; 251-400 employees, $400; 401-1000 employees, $450; 1001+ employees, $500. The list proved wildly successful.

As of November 30, 2002, there were 2,103 telemarketers registered under Colorado's No-Call program. Fees from 501, or 24 percent, of those telemarketers generated $156,750 in revenue. The Colorado Public Utilities Commission, who administers the No-Call List, have lowered the fees in FY 2003 due to revenues collected in FY 2002 being more than the contracted price for the period of the contract. Fees were lowered from 50 to 75 percent.

Colorado has approximately 2 million residential telephone subscribers, of which more than 1,000,000 have signed up for the No-Call List as of December 31, 2002. Alaska has approximately 275,000 residential subscribers, or 14 percent of Colorado's. If Alaska's subscribers follow Colorado's example, we could expect about 137,500 subscribers to sign up to be on the No-Call List.

Alaska has less than ten registered telemarketers, and 40 paid solicitors who would have to register under this bill. We have no idea how many other organizations there are who are exempt from registration, but who would need to purchase the No-Call List. We would expect that most, if not all, of these organizations have less than 1,000 employees. If we assume there are 50 exempt organizations, there may be 100 entities in total who would purchase the data base. Assuming an average fee of $350, $35,000 per year in revenue might be generated. However, if the Colorado experience is repeated in Alaska and only 24 percent of these 100 entities are paying all the fees, even if all 24 percent paid the maximum, total annual revenues would only be $12,000.

We do not know how much it would cost to hire the designated agent in Alaska. Colorado entered into a contract with their designated agent on December 18, 2001. The web site and toll free number were required to be operational July 1, 2002, but came on line May 8, 2002. The Colorado PUC entered a three-year contract with their designated agent totaling $126,500, and the Colorado Attorney General paid an additional $10,500 for the development and administration of their complaint reporting system. As of September 30, 2002, the agent showed $176,849 in expenses. Unexpected first year costs for the toll free voice recognition system and unanticipated legal fees for the vendor resulted in an amendment to the PUC's contract for $63,990. (The vendor was named in a federal lawsuit seeking to overturn the No-Call List law.) The contract amendment brings the 3-year total projected cost to $173,990, with much of the expenditure occuring in the first year.

We would expect that at least some of these start-up costs could be avoided in Alaska by using Colorado's experience as much as possible. In addition, we would not have the volume of toll free calls Colorado's toll free voice recognition system received in the early days because we don't have that many telephone subscribers. (Colorado's designated agent had to expand their number of toll free lines from eight to 24 in the first month of operation to handle the volume of calls coming in from consumers wanting to get on the No-Call List. They had an estimated $45,000 phone bill in that first month from those lines.)

ALASKA STATE HOUSE OF REPRESENTATIVES

Alaska State Capitol
Juneau, Alaska 99801
Room 432

Phone (907)-465-4954
Fax# (907)-465-2418

Representative Tom Anderson

FACSIMILE

To:	Barbara Craver	**Fax:**	2029
From:	Josh Applebee	**Date:**	2/7/2003
Re:	House Bill 15 Draft + Amendments	**Pages:**	10
CC:			

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Notes:

Barbara,

Attached please find CS for HB 15 (L&C) # 23-LS0058\D and the three conceptual amendments that the Committee adopted in their meeting on Friday Feb. 7th.

Please call me if there are any questions and forward to me the final copies. I am in Room 432

Please call my office if you have any questions at 465-4954.

-Josh Applebee
House Labor & Commerce
Committee Aide
Rep. Tom Anderson's Office

Conceptual Amendments to CSHB 15 (L&C)

Made by Representative Norman Rokeberg

#1
page 2 line 20 – delete "not more than $500" and replace with "$750"

#2
page 2 lines 22 – delete "the Attorney General will determine the fee on a sliding scale"

#3
page 2 line 27 – delete "below the stated maximum based on revenue history of the fee"

23-LS0058\D
Craver
2/4/03

CS FOR HOUSE BILL NO. 15( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES FATE, Gara

A BILL

FOR AN ACT ENTITLED

"An Act relating to establishing the Alaska No-Call List, a data base of residential telephone customers who do not wish to receive telephonic solicitations; providing that the data base be compiled at no cost to the customers; requiring paid telephonic sellers and paid solicitors to purchase the data base; requiring telephonic sellers to identify themselves; requiring telephonic solicitors who are otherwise exempt from registration as telephonic solicitors to file with the Department of Law and pay the data base access fee; and providing for an effective date."

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

* Section 1. AS 45.50.475(a) is amended to read:

(a) A person is in violation of AS 45.50.471(b)(41) if the person

(1) engages in the <u>telephonic</u> [TELEPHONE] solicitation of a residential telephone customer of a telecommunications company and the customer is identified in the <u>Alaska No-Call List, a data base established under (b) of this</u>

section [TELEPHONE DIRECTORY AS NOT WISHING TO RECEIVE TELEPHONE SOLICITATIONS]; or

(2) originates a telephone call using an automated or recorded message as a telephonic advertisement or solicitation.

* Sec. 2. AS 45.50.475(b) is repealed and reenacted to read:

(b) The attorney general shall contract with a designated agent to maintain the Internet web site and data base containing the Alaska No-Call List. The Alaska No-Call List is established as a data base for use when verifying that residential subscribers in the state have given notice of objection to receiving telephonic solicitations. The Alaska No-Call List shall be easily accessible by persons or entities desiring to make telephonic solicitations and by state and local law enforcement agencies. The following apply to the Alaska No-Call List:

(1) the attorney general shall, by regulation, establish guidelines for the designated agent for the development and maintenance of the Alaska No-Call List so that

(A) there is no cost for a residential subscriber to provide notification to the designated agent that the subscriber objects to receiving telephonic solicitations;

Am. 1 NR

(B) there is an annual data base access fee of ~~not more than $500~~ [$750] for persons or entities that wish to make telephonic solicitations or otherwise access the data base of telephone numbers and zip codes contained in the Alaska No-Call List data base; ~~the attorney general shall determine the fee on a sliding scale;~~ money collected under this section by the designated agent must cover the costs of creating, maintaining, and updating the data base, maintaining the online complaint system, and reimbursement to the attorney general for relevant expenditures; the attorney general may annually adjust the fees ~~below the stated maximum based on revenue history of the fees~~ [received] by the designated agent; the designated agent shall provide means for online registration and credit card payment of fees; when initially registering for the Alaska No-Call List, each person or entity shall provide information required by the attorney general, including a current business name, business address,

Am. 2 NR

Am. 3 NR

OK

electronic mail address, if available, and telephone number, and this information shall be revised when changes to it occur;

(C) a residential subscriber may give notice to the designated agent of the person's objection to receiving telephonic solicitations, or may revoke notice, by

(i) entering the area code, telephone number, and zip code of the subscriber directly into the data base by way of the designated state Internet web site; or

(ii) using a touch-tone telephone to enter the area code, telephone number, and zip code of the subscriber by way of a designated statewide, toll-free telephone number maintained by the designated agent as part of the Alaska No-Call List program;

(D) the date of every notice received under (C) of this paragraph is recorded and included as part of the information in the Alaska No-Call List;

(E) the designated agent shall, subject to supervision by the attorney general, revise information about the Alaska No-Call List program on the designated state Internet web site;

(F) the designated agent or a person or entity collecting information to be transmitted to the designated agent may not use or distribute subscriber information contained in the Alaska No-Call List except as expressly authorized under this subsection;

(G) the methods by which additions, deletions, changes, and modifications are made to the Alaska No-Call List data base are available to persons or entities on request; the methods must include provisions to remove a telephone number that has been disconnected or reassigned from the Alaska No-Call List on at least an annual basis;

(H) the designated agent shall maintain an automated, online complaint system for residential subscribers to report suspected violations using the designated state Internet web site; the automated, online complaint system must be able to electronically collect, sort, and report suspected

violations to the appropriate state enforcement agency for enforcement purposes;

(I) the Alaska No-Call List is available online at the Alaska No-Call List web site to a person or entity desiring to make telephonic solicitations if the person or entity paid the access fee under (B) of this paragraph; the list shall be available in a text or other compatible format, at the discretion of the attorney general, but shall allow telephonic solicitors to select and sort by specific zip codes and telephone area codes; and

(J) other matters relating to the data base as the attorney general considers necessary or desirable are covered by regulation;

(2) if the appropriate federal agency establishes a single national data base of telephone numbers of residential subscribers who object to receiving telephonic solicitations, the designated agent shall, at no additional charge, include that portion of a single national data base that relates to this state in the Alaska No-Call List established under this subsection;

(3) the state is not liable to a person for gathering, managing, or using information in the Alaska No-Call List data base under this subsection or for enforcing the provisions of this subsection;

(4) the designated agent is not liable to a person for performing the designated agent's duties under this subsection unless, and only to the extent that, the designated agent commits a willful and wanton act or omission;

(5) the designated agent shall revise the data base on a periodic basis with information provided by residential subscribers and local exchange providers;

(6) a person may not place or remove the telephone number of another person on the Alaska No-Call List without the authorization of the person to whom the number is assigned;

(7) the attorney general shall submit a report to the standing Finance Committees of the Alaska Legislature not later than January 31 each year; the report must include

(A) an account of fee revenue received under this section in the previous 12 months;

(B) expenditures for administration of the Alaska No-Call List program for the previous 12 months;

(C) projections of fee revenue for the next 12 months; and

(D) projections of expenditures for administration of the program for the next 12 months, including the expenditures of the designated agent and expenditures of the attorney general.

* **Sec. 3.** AS 45.50.475(d) is amended to read:

(d) A person who employs individuals to engage in **telephonic** [TELEPHONE] solicitations is not liable for the violation of **this section** [AS 45.50.475] if an employee solicits a residential telephone customer who is identified in the **data base** [TELEPHONE DIRECTORY] as not wishing to receive **telephonic** [TELEPHONE] solicitations if the person established that

(1) the person has adopted and implemented written procedures to comply with (a) of this section including corrective actions where appropriate;

(2) the person has trained its personnel in the procedures established under (1) of this subsection;

(3) the call that violated **this section** [AS 45.50.475] was made contrary to the procedures and policies established by the person; and

(4) calls on behalf of the person that result in violations of **this section occur not more than twice in a 30-day period** [AS 45.50.475 ARE INFREQUENT].

* **Sec. 4.** AS 45.50.475(e) is amended to read:

(e) An individual who solicits a residential telephone customer who is identified in the **data base** [TELEPHONE DIRECTORY] as not wishing to receive **telephonic** [TELEPHONE] solicitations is not liable for the violation of **this section** [AS 45.50.475] if the individual establishes that the individual did not intend to make a call in violation of **this section** [AS 45.50.475] and did not recklessly disregard information or policies and procedures that would have avoided the improper call.

* **Sec. 5.** AS 45.50.475(g)(3) is amended to read:

(3) "**telephonic** [TELEPHONE] solicitation"

(A) means **a voice or telefacsimile communication over a** [THE SOLICITATION BY A PERSON BY] telephone **line** [OF A

CUSTOMER AT THE RESIDENCE OF THE CUSTOMER] for the purpose of encouraging the [CUSTOMER TO] purchase, **lease, or rental of or investment in** property, goods, or services, or **the making of** [MAKE] a donation;

(B) does not include

(i) calls made in response to a request or inquiry by the called customer or communication made during a call made by the customer;

(ii) calls made by a charitable organization, a public agency, or volunteers on behalf of the charitable organization or public agency to members of the organization or agency or to persons who, within the last 24 months, have made a donation to the organization or agency or expressed an interest in making a donation;

(iii) calls limited to soliciting the expression of ideas, opinions, or votes;

(iv) business-to-business calls; or

(v) a person soliciting business from prospective purchasers who have, within the last 24 months, purchased from the person making the solicitation or from the business enterprise for which the person is calling but only if the person or business enterprise has not received a written request from the prospective purchaser asking that **telephonic** [TELEPHONE] solicitations cease; the person or business enterprise is presumed to have received a written request no later than 10 days after the prospective purchaser mailed it, properly addressed and with the appropriate postage.

* **Sec. 6.** AS 45.50.475 is amended by adding a new subsection to read:

(h) A person required to register under AS 45.63.010 or AS 45.68.010(b), or a person who is exempt from registration under AS 45.63.080, shall purchase access to the appropriate data base from the designated agent with which the attorney general has entered into a contract.

* **Sec. 7.** AS 45.63.010(b) is amended to read:

(b) To register under (a) of this section, a person shall file with the department

(1) a notice of intent to engage in a solicitation campaign; a separate notice of intent shall be filed for each solicitation campaign;

(2) an irrevocable consent appointing the department the person's agent for the receipt of service of process in a court action or other proceeding against the person, or the successor in interest of the person, for a violation of this chapter; [AND]

(3) **an acknowledgment from the designated agent that the person has paid the data base access fee under AS 45.50.475(b)(1)(B); and**

(4) a signed statement that the person has read and will comply with this chapter and the regulations adopted under this chapter.

* **Sec. 8.** AS 45.63.010(c) is amended to read:

(c) Registration under (b) of this section is not complete until the telephonic seller receives an **acknowledgment** [ACKNOWLEDGEMENT] from the department that the seller has complied with (b) of this section **and the telephonic seller has the data base of telephone numbers of residential customers who do not wish to receive telephonic solicitations**.

* **Sec. 9.** AS 45.63 is amended by adding a new section to read:

Sec. 45.63.045. Required representations. A telephonic seller

(1) shall, promptly and in a clear and conspicuous manner, disclose the registered seller's name and telephone number, whom the registered seller represents, and that the call is a sales call; and

(2) shall provide the information under (1) of this section at any time during the conversation after it is provided under (1) of this section if requested by a person at the number called; and

(3) may not repeatedly cause a telephone to ring or engage a person in a telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass a person at the telephone number called.

* **Sec. 10.** AS 45.50.475(c) is repealed.

* **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DATA BASE SETUP. (a) Not later than January 1, 2004, the attorney general shall

contract with a designated agent to maintain the Internet web site and data base containing the Alaska No-Call List. If only one entity bids on the contract, the attorney general may, at the attorney general's discretion, award the contract. If no responsive and responsible bids are received, the attorney general may advertise again for bids. The contract must begin not later than July 1, 2004.

(b) Not later than six months after the beginning of the contract, the designated agent, using the designated state Internet web site, shall develop and maintain the Alaska No-Call List data base with information provided by residential subscribers.

* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITIONAL PROVISIONS: REGULATIONS. Notwithstanding sec. 13 of this Act, the attorney general may proceed to adopt regulations necessary to implement this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of secs. 1 - 10 of this Act.

* **Sec. 13.** Sections 1 - 10 of this Act take effect July 1, 2004.

* **Sec. 14.** Sections 11 and 12 of this Act take effect immediately under AS 01.10.070(c).

COVER SHEET

Anchorage Legislative Information Office

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

To: Rep Tom Anderson

Atten: Chair, HL&C Fax: Phone:

From: Anch LIO Phone:

Instructions: Written T from S. Seavy on HB 15

Sent: Date: 2-7 Time:

Disposal of Original: Discard: Hold for Pickup:

Number of Pages: 2 (counting cover sheet)

Transmitted by: Jean

465-2418

AKPIRG
ALASKA PUBLIC INTEREST RESEARCH GROUP
Post Office Box 101093 / Anchorage, Alaska 99510 / (907) 278-3661

February 7, 2003

Testimony in Support of HB 15 – Alaska No-Call List

AkPIRG wishes to voice its strong support for HB 15, which will allow Alaskans to opt out of the ever-increasing barrage of telemarketing calls. This forward-thinking legislation will not only protect consumers from unwanted solicitations, but will assign the cost of establishing the no-call list to the entities wishing to conduct that sort of business. This indeed should be the price for doing such business in Alaska.

The bill is not overly broad in its limitations. HB 15 allows non-profit charities to obtain the no-call list for free and establishes a reasonable fee for business entities. It also allows businesses to maintain contact with their consumers.

Other states have taken the lead in establishing no-call lists. The Federal Trade Commission (FTC) plans to establish a national no-call list "as soon as funding is available." FTC documents and HB 15 both specify provisions that will make the interface between these two lists easy to accomplish.

AkPIRG urges quick passage and adoption of HB 15.

Steve Cleary
AkPIRG
278-3661

ALASKA STATE LEGISLATURE

House of Representatives

Representative Hugh (Bud) Fate

State Capitol, Room 128
Juneau, AK 99801
Phone: (907) 465-4976
Fax: (907) 465-3883
Toll Free: (866) 465-4976

Co-Chair Resources
Member:
Military & Veterans Affairs
Oil & Gas
Transportation

Sponsor Statement

House Bill 15

"An Act relating to establishing the Alaska No-Call List, a data base of residential telephone customers who do not wish to receive telephonic solicitations; providing that the data base be complied at no cost to the customers; requiring paid telephonic sellers to purchase the data base; requiring telephonic sellers to identify themselves; requiring telephonic solicitors who are otherwise exempt from registration as telephonic solicitors to file with the Department of Law and purchase the data base; and providing for an effective date."

House Bill 15 comes before the legislature because Alaska is no longer exempt from the annoying telephone calls, usually during the inconvenient hours, asking our citizens, especially seniors to buy something. During the past few years this industry has grown across the nation with offers to buy everything from vacation homes to stocks. Many of us have also heard about the growing scam-market, stealing life savings from senior citizens or others who are taken in by slick talking charlatans.

House Bill 15 allows our constituents to reduce the number of calls from telephone solicitors by adding their phone numbers to the Alaska No-Call List, a data base of those wishing not to be disturbed. The bill requires that businesses wishing to conduct telephone soliciting in Alaska to register and purchase the data base list from the state. It does not restrict the free distribution of that list to other telephone solicitors. The Alaska No-Call Bill also establishes a system in which individuals who are contacted, in violation of this bill will be able to easily file a complaint.

The Alaska No-Call bill does not end all forms of telephone soliciting. For many years, our non-profits have used the telephone asking for donations or offering tickets to various concerts. This will not end because for many of these organizations the phone call is the most valuable donation resource available. These non-profits will be able to continue. Likewise businesses with established data bases built on prior customer contact will not be prevented from calling their customers.

House Bill 15 will begin the process of eliminating those unsolicited phone calls asking you about your mortgage rate or if you want aluminum siding. Along with the regulations that will be promulgated, perhaps by next year at this time Alaskans will once again be able to sit down at the dinner table without the interruption of answering the phone, only to hear a complete stranger on the other end.

LEGAL SERVICES

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

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Mail Stop 3101

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

MEMORANDUM August 30, 2002

SUBJECT: Alaska No-Call List (Work Order No. 23-LS0058\A)

TO: Representative Hugh Fate
Attn: Jay

FROM: Barbara R. Craver
Legislative Counsel

You requested a bill drafted along the lines of the Colorado No-Call List, which was recently enacted by the State of Colorado, 6-1-901 - 6-1-908 C.R.S. I merged features of the Colorado bill into the existing law in Alaska regarding unwanted telephone solicitations.

Section 1. This section establishes that calling a person on the Alaska No-Call List is a violation of AS 45.50.471(b)(41), a section concerning unfair trade practices and consumer protection.

Section 2. This section reflects the provisions of the Colorado law found in C.R.S. 6 1 905 concerning the development and maintenance of the No-Call List. As I discussed with Jay, the attorney general will continue to administer this aspect of consumer protection, rather than Alaska's counterpart of Colorado's public utilities commission.

Sections 3 and 4. AS 45.50.475(d) and (e) already contain many of the provisions found in C.R.S. 6-1-906 of the Colorado law, so only minor technical changes were made to reflect the new database.

Section 5. This subsection of existing AS 45.50.475(g)(3) is modified to reflect the more expansive definition of "telephonic solicitation" found in the Colorado law - which includes facsimile transmissions and repeated calls. C.R.S. 6-1-903(10).

Section 6. This section requires that entities that make telephone solicitations, even if not required to register as telephone solicitors under AS 45.63.080, must purchase the database. It is not clear to me the extent of the Colorado law requiring the purchase of the database, but the wide use and distribution of the list is clearly in the best interest of consumers. This will not impose the cost of the database on non-profit or charitable organizations, but will require telephone solicitors to buy the list.

Sections 7 and 8. These sections require telephonic sellers to submit their payment for the database at the time of registration and to have the database before beginning any telephonic solicitation. The attorney general would forward the payment to the database provider as a part of the registration process.

Section 9. A new section is added to AS 45.63 to mirror C.R.S. 6-1-702, which is incorporated into the Colorado No-Call List requirements at C.R.S. 6-1-904(2). This requires a telephonic solicitor to inform the person called of the name, number and whom the caller represents within the first minute of the call. It also prohibits repeated calls or ringing of a phone by solicitors.

Section 10. This section repeals AS 45.50.475(c) which is superseded by the new database provisions.

Section 11. This temporary law establishes the deadlines for contracting with a designated agent to operate the database, and for the starting date of the database operation.

Section 12. The attorney general is directed to immediately begin to formulate and adopt regulations to implement the No-Call List.

Section 13. The effective date of the No-Call List is July 1, 2004.

Section 14. There is an immediate effective date for the temporary law in sections 11 and 12.

If I may be of further assistance, please advise.

BRC:med
02-536.med

AARP Alaska

Honorable Tom Anderson, Chair
House Labor and Commerce Committee
Alaska Capital, Room 432
Juneau, AK 99801-1182

February 2, 2003

RE: HB 15 (Fate)

Dear Chair Anderson:

AARP ALASKA PRIORITY ISSUES

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House Labor and Commerce Committee to support HB 15, authored by Representative Bud Fate and co-sponsored by Representative Les Gara.

Well over half the number of people targeted by telemarketers each day are age 50 and over – and many of them are your own constituents.

AARP's perspective:

In 2003, a dozen states are waging campaigns on the important issue of Do Not Call – good news to the tens of millions of Americans receiving unsolicited calls every day. Do Not Call efforts will mean increased privacy and decision-making power for consumers.

On December 18, 2002 the Federal Trade Commission (FTC) announced its revisions to the Telemarketing Sales Rule. This is a final rule but will need a Congressional appropriation before it can be implemented. It explicitly does not preempt state law in any way. The FTC anticipates that the Do Not Call registry will be up and running by the summer of 2003.

The FTC does not regulate intrastate calls. The FTC Chair has explained that it is very hard to predict how many calls the new federal registry will prevent, as telemarketers may establish in-state call centers to avoid the federal law. Therefore, state law is crucial to cover any Alaska-originated calls.

3601 C Street, Suite 1420 | Anchorage, AK 99503 | 907-341-2277 | 907-341-2270 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

The FTC has no jurisdiction over common carriers (such as long-distance companies or airlines), banks, credit unions, or insurance companies. There is no limitation on the states to regulate these calls and state law is needed to address the exemptions to the FTC rule.

In addition, telephone calls soliciting money for charitable institutions or political organizations are not covered by the Telemarketing Sales Rule. Alaska has the authority to regulate these types of solicitations should the Legislature decide to include them.

Realistically, it may be difficult to have comprehensive federal enforcement of a national Do Not Call law covering millions of people, given the relatively small size of the FTC's staff devoted to this issue and the resources available to fight abuse of consumers. Alaska is in a much better position to detect, deter, and prosecute Do Not Call violations. AARP believes a state law that is enforceable in state court is essential to give the law some needed teeth. Without a state statue, some telemarketers may not have a strong incentive to carefully monitor, update, and follow Do Not Call lists.

There will be a transition period whereby the FTC will set up a system to accept state Do Not Call lists (many states already have them). As the registration process progresses, the FTC will have more detailed information for consumers and states. It would be helpful if Alaska writes our Do Not Call law to allow transfer of information between the State and the FTC so that there is a "master" list of consumers who do not want to be called.

It should be much more cost-effective for Alaska to enact a Do Not Call law in 2003 since we will not have to bear the expense of collecting, updating, and disseminating the Do Not Call list. The FTC will allow consumers to register free-of-charge and will use a sliding scale to charge telemarketers for access to the list.

The FTC exempted existing business relationships from coverage and then only if a consumer has actually purchased goods or services within the last 18 months. If a consumer made only an inquiry or application, they can call the consumer for only 3 months, and then must not call. However, if a consumer gives a "Do Not Call" message to a business, regardless of when they call, it "trumps" the window in which they can call. In other words, if a consumer buys something from Sears and Sears calls back six months later, once the consumer says "do not call me anymore", they cannot call again.

This is the only exemption, which makes the federal "floor" stronger than many existing state laws. Should Alaska choose to fill in the gaps where the FTC cannot act or has chosen not to act (ie., for political calls or charities), AARP will support the stronger state law.

Do Not Call laws do not regulate the industry per se. Instead, they give consumers more control over unsolicited intrusions into their homes, and help avoid potentially fraudulent telemarketing calls – many of which are targeted toward seniors in your district.

These laws also won't stop every unsolicited call from coming to consumers who sign up for the list. AARP recommends making these exemptions as narrow as possible, so that consumers in Alaska who choose to place their names on a Do Not Call list experience a truly significant reduction in calls.

Why should Do Not Call be a key issue for legislators?

The number of unsolicited telemarketing calls that residents of Alaska receive is staggering. These calls present a significant privacy concern for individuals who are tired of multiple, daily intrusions into their privacy.

In today's information technology age, constituents value their privacy more than ever. AARP believes that, as consumers, they have the right to be free from unsolicited calls into their homes, and that they shouldn't have to be forced to screen calls by purchasing a caller ID system or answering machine. The vast majority of Americans – up to 97 percent according to some surveys – agree with this position.

Do Not Call legislation is a non-partisan issue. HB 15 has a Republican author and Democrat co-sponsor. Last year, nine Republicans and six Democrats joined as co-sponsors, including Speaker Brian Porter. We encourage you and your Committee colleagues to join Representative Fate as co-sponsors on this bill.

We look forward to your support of this bill in the House Labor and Commerce Committee and we sincerely thank you in anticipation of that support.

Should you have any questions about our position, please feel free to contact Marie Darlin (907.586.3637), Coordinator of the AARP Capitol City Task Force; Patrick Luby (907.762.3314), AARP Legislative Representative; or me (907.245.5259).

Thank you for your consideration.

Sincerely,

Marguerite Stetson

Marguerite Stetson
AARP Alaska
Executive Council Member for Advocacy
3009 Northwood Street
Anchorage, AK 99517-1871
907.245.5259 voice
907.245.5279 fax
ffmas@aurora.uaf.edu

cc: Representative Bud Fate
Vice-Chair Bob Lynn
Representative Nancy Dahlstrom
Representative Carl Gatto
Representative Norman Rokeberg
Representative Harry Crawford
Representative David Guttenberg
Representative Les Gara
Marie Darlin
Patrick Luby

LEGAL SERVICES

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

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

MEMORANDUM February 4, 2003

SUBJECT: Draft CSHB 15( ): Changes made to original bill
(Work Order No. 23-LS0058\D)

TO: Representative Hugh Fate
Attn: Jim Pound

FROM: Barbara R. Craver BRC
Legislative Counsel

Attached is the new version of your bill. I had to make some changes which I wish to briefly point out to you. I do not think that any of these changes alter the substance of the bill, but let me know if you need to discuss further.

1. The bill title was modified to reflect that "paid solicitors," a term only used in charitable solicitations in AS 45.68, are being required to use the Alaska No-Call List.

2. Section 2 has a new sentence added to AS 45.50.475(b) to give the attorney general the authority to hire a designated agent. The only other reference is in temporary law. There is an internal reference in section 2 "registered under (B) of this paragraph." That has been changed to "paid the access fee under (B) of this paragraph." Finally, AS 45.50.475(b)(1)(B) requires a "sliding scale" fee, but does not indicate on what the sliding scale is to be based.

3. I am not including the addition of "paid solicitor" to the definitions section AS 45.63.100(6) because that definition section only applies to AS 45.63, and paid solicitors are a term only used in AS 45.68, except for one reference in AS 45.63.080(9) under the exclusions to chapter 63.

If I may be of further assistance, please advise.

BRC:med
03-101.med

Enclosure

HOUSE LABOR & COMMERCE COMMITTEE

STATE CAPITOL, ROOM 432
Phone 465-4954

COMMITTEE MEMBERS

Rep. Tom Anderson
Chairman
Room 432
465-4939

Rep. Bob Lynn
Vice-Chair
Room 415
465-4931

Rep. Nancy Dahlstrom
Room 409
465-3783

Rep. Carl Gatto
Room 411
465-3743

Rep. Norman Rokeberg
Room 214
465-4968

Rep. Harry Crawford
Room 426
465-3438

Rep. David Guttenberg
Room 13
465-4457

HOUSE LABOR & COMMERCE

COMMITTEE PACKET

Josh Applebee
Committee Aide
Room 432

HOUSE LABOR & COMMERCE

COMMITTEE PACKET
Index

February 7, 2003

ALASKA STATE LEGISLATURE

House of Representatives

Representative Hugh (Bud) Fate

State Capitol, Room 128
Juneau, AK 99801
Phone: (907) 465-4976
Fax: (907) 465-3883
Toll Free: (866) 465-4976

Co-Chair Resources
Member:
Military & Veterans Affairs
Oil & Gas
Transportation

Sponsor Statement

House Bill 15

"An Act relating to establishing the Alaska No-Call List, a data base of residential telephone customers who do not wish to receive telephonic solicitations; providing that the data base be complied at no cost to the customers; requiring paid telephonic sellers to purchase the data base; requiring telephonic sellers to identify themselves; requiring telephonic solicitors who are otherwise exempt from registration as telephonic solicitors to file with the Department of Law and purchase the data base; and providing for an effective date."

House Bill 15 comes before the legislature because Alaska is no longer exempt from the annoying telephone calls, usually during the inconvenient hours, asking our citizens, especially seniors to buy something. During the past few years this industry has grown across the nation with offers to buy everything from vacation homes to stocks. Many of us have also heard about the growing scam-market, stealing life savings from senior citizens or others who are taken in by slick talking charlatans.

House Bill 15 allows our constituents to reduce the number of calls from telephone solicitors by adding their phone numbers to the Alaska No-Call List, a data base of those wishing not to be disturbed. The bill requires that businesses wishing to conduct telephone soliciting in Alaska to register and purchase the data base list from the state. It does not restrict the free distribution of that list to other telephone solicitors. The Alaska No-Call Bill also establishes a system in which individuals who are contacted, in violation of this bill will be able to easily file a complaint.

The Alaska No-Call bill does not end all forms of telephone soliciting. For many years, our non-profits have used the telephone asking for donations or offering tickets to various concerts. This will not end because for many of these organizations the phone call is the most valuable donation resource available. These non-profits will be able to continue. Likewise businesses with established data bases built on prior customer contact will not be prevented from calling their customers.

House Bill 15 will begin the process of eliminating those unsolicited phone calls asking you about your mortgage rate or if you want aluminum siding. Along with the regulations that will be promulgated, perhaps by next year at this time Alaskans will once again be able to sit down at the dinner table without the interruption of answering the phone, only to hear a complete stranger on the other end.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 15
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Telemarketers No-Call Lists
BRU: Banking, Securities & Corp. (115)
Component: Banking, Securities & Corp.
Sponsor: Representative Fate
Requester: House Labor & Commerce
Component No.: 1233

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 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 ( )						

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
Mark 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 legislation does not affect the operations of this department.

Prepared by: Mark Davis, Director — Phone 907-269-8452
Division: Banking, Securities & Corporations — Date/Time 1/28/03 5:31 PM
Approved by: Edgar Blatchford, Commissioner — Date 1/28/2003
Agency: Department of Community & Economic Development

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 9
() Publish Date:

Revision Date/Time (Note if correction):
Title: Home Inspectors/Contractors
Department: Labor and Workforce Development
BRU: Labor Standards & Safety
Component: Mechanical Inspection
Sponsor: Representative Rokeberg
Requester: House L&C
Component Number: 346

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 ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2003) cost: None

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 relates to home inspections and licensed contractors which are functions of the Department of Community and Economic Development. The proposed changes to AS 08 do not affect the Department of Labor and Workforce Development. The department anticipates no fiscal impact.

Prepared by: Hali Denton, Acting Director
Phone: 465-4855
Division: Labor Standards & Safety
Date/Time: 1/28/03 12:27 PM
Approved by: Greg O'Claray, Commissioner
Date: 01/28/03
Agency: Department of Labor and Workforce Development

For distribution information, call the Governor's Legislative Office

(Rev 1/26/2000 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 9
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Home inspectors / contractors
BRU: Alaska Housing Finance Corp.
Component: Operations
Sponsor: Rep. Rokeberg
Requester: (H) Labor and Commerce Committee
Component No.: 110

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

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
Mark 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)*

AS 18.56.300 is amended to establish a system for state-licensed home inspectors for the approval of homes for mortgage purchases by AHFC. The current construction standard is approved by the International Conference of Building Officials (ICBO).

Any AHFC costs of this new licensing program would relate to educational efforts regarding the changes to the home inspection process. For example, homebuyers, realtors, homebuilders and mortgage lenders will need to know of the new requirements to ensure minimal disruptions in closing home mortgage transactions. These activities can be adequately covered within AHFC's annual budget authorizations.

Prepared by: Bryan Butcher
Phone: 330-8445
Division: Alaska Housing Finance Corporation
Date/Time: 1/28/03 12:23 PM
Approved by: Larry Persily, Deputy Commissioner
Date: 1/28/2003
Agency: Department of Revenue

(Revised 9/2002 OMB)

Presentation to the House Labor and Commerce Committee 2/7/03

Chairman Anderson and committee members --

I am representing AARP of Alaska as Coordinator of the Volunteer Capital City Task Force. Our assignment is to present to you the AARP position on issues of concern to our 71,000 Alaska members. The Task Force includes representatives from other senior and retiree organizations who have like concerns.

Today I want to call your attention to the letter from our Alaska AARP State Office in support of this legislation - HB 15. Last session considerable time was spent on this Do Not Call legislation, as Respresentative Crawfordcan verify. So much of the initial work has been done.

And although the Federal Trade Commission has announced revisions to their telemarketing rules, it does not regulate intrastate calls. And although I would guess that many of the calls Alaskans get are from out of state, these telemarketers could simply set up in-state call centers. Therefore, it behooves Alaska to have our own Do Not Call statutes, as many other states are doing or have done. And the FTC rule does not pre-empt state law, so we need to get this done soon. Also, FTC needs a Congressional appropriation to implement their program.

So I urge you to not delay action on legislation to get rid of all these unwanted phone calls, and the opportunities for the fraudulent telemarketing schemes that target our seniors and retirees.

Thank you for the opportunity to present our thoughts and once again I urge you to review the information and thoughts in our Feb. 2nd letter.

M. Darlin

Marie Darlin
586-3637

HB

29

OUSE COMMITTEE REPOF

(7)
Date Referred to Committee: January 20, 2004 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: _____

The LABOR AND COMMERCE Committee considered: **SSHB 29**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29 **REAL PROPERTY TRANSACTIONS**

"An Act relating to real estate licensees and real estate transactions; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [✓] CS *for* SSHB 29 (L&C)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] **Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
CED				X

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Hazel J. Crawford	CRAWFORD	X			
	LYNN	X			
	GATTO	X			
	ROKEBERG	X			
	DAHLSTROM	(			
	GUTTENBERG			X	
Chair: Tom Anderson	ANDERSON	X			
Chair:					

ALASKA ASSOCIATION OF REALTORS, INC.
741 Sesame Street, Suite 100 • Anchorage, Alaska 99503
Telephone 907-563-7133 • Fax 907-563-8476

REALTOR ®

February 3, 2004

The Honorable Norm Rokeberg
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801

RE: House Bill 29, relating to real estate licensee and real estate transactions

Dear Representative Rokeberg,

The Alaska Association of REALTORS and the following member Boards;

- Anchorage Board of REALTORS
- Greater Fairbanks Board of REALTORS
- Kachemak Board of REALTORS
- Kenai Peninsula Board of REALTORS
- Kodiak Board of REALTORS
- Southeast Board of REALTORS
- Valley Board of REALTORS

supports House Bill 29, which would update the agency statute to conform to current real estate business practices.

The Association is in favor of this proposed legislation that would standardize the disclosure form that is used by real estate licensees statewide. It would define specific duties of licensees that are not currently in the statute, giving the consumers clearer expectations and guidelines.

The Alaska Association of REALTORS encourages the passage of House Bill 29.

Sincerely,

Kathryn Clark

Kathryn Clark
President

Prudential

Prudential Vista Real Estate
4241 B Street
Anchorage, AK 99503
Bus 907 562-6464
Fax 907 562-5485
www.alaskahousehunters.com

Representative Tom Anderson
State Capitol, Room 432
Juneau, AK 99801-1182

Dear Representative Anderson,

I am writing to you in support of HB 29. I have been in the real estate industry over 20 years and have seen the agency laws change from traditional agency where all brokers in the transaction represent the seller and the buyer is left with no representation at all to buyer, seller, and dual agency. Although that was a step in the right direction for the consumer, the way the law was written required a very cumbersome ritual for the real estate salesperson to go through and it was a law that was little understood by both the salesperson and the client. Most times the client would sign documents after having agency explained by the salesman as just another document that must be signed to complete the transaction. They did not care about agency as such unless there was a problem, then they hired an attorney and tried to unravel the contract any way they could and agency was a weak link that they could fall back on. We have never acted as agents in the sense of the definition, "acting on behalf of another." To do that would be more like acting as an attorney in fact, which broker typically does not allow their salespeople to do.

HB 29 was created over many hours by many people looking for a way to complete a transaction being fair to the parties and leaving less liability for the parties on the table. Attorneys have a hard time understanding that in a real estate transaction, both parties can win. There does not have to be an adversarial position between the buyer and seller to conclude a successful transaction. HB 29 builds on this concept by allowing the salesperson to act as a buyer licensee, seller licensee or neutral licensee. The salesperson's job is to help a buyer and a seller close a transaction that both parties have agreed to.

I ask that you and our other legislators heartily support this bill to passage early in the 2004 session.

Sincerely,

Denny Wood, ABR, CRS, GRI
Sales Manager, Associate Broker
President Elect Alaska Association of Realtors

23-LS0189\W.3
Bannister
2/3/04

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: SSHB 29

Page 8, line 17:

Delete "whom the neutral licensee represents or"

Page 8, line 20:

Delete "whom the licensee represents or"

Page 8, line 21:

Delete "whom the licensee represents or"

Page 10, line 3, following "licensee":

Insert "represents or"

Page 10, line 6, following "completes the":

Insert "representation or"

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: SSHB 29

Page 11, line 27, through page 12, line 3:

Delete all material and insert:

"**Sec. 08.88.690. Exemptions.** A real estate licensee is exempt from the signature requirements of AS 08.88.600 - 08.88.695 when the licensee provides specific assistance to

(1) a corporation that issues publicly traded securities;

(2) a business that has a net worth in the previous calendar year of $2,000,000 or more, if the business requests the exemption from the licensee; or

(3) a governmental agency; in this paragraph, "governmental agency" means a department, division, public agency, political subdivision, or other public instrumentality of the state or federal government, including the University of Alaska, the Alaska Railroad Corporation, the Alaska Housing Finance Corporation, the Alaska Industrial Development and Export Authority, and other public corporations."

POWELL REALTY INC.
GMAC REAL ESTATE®

February 1, 2004

Representative Norman Rokeberg
State Capital Building
Juneau, Alaska 99801

Re: HB 29,

Dear Representative Rokeberg,

Please convey to the House Labor and Commerce members that I am personally supportive of the current version of HB 29. It is my opinion that the current bill will not only protect the public but provide more education to the public, with the state mandated brochure explaining representation issues.

Ruth Blackwell

Ruth Blackwell, Associate Broker
Powell Realty, GMAC
9040 Glacier Highway
Juneau, Alaska 99801

Gene DuVal
REALTOR®

February 3, 2004

To Chairman Anderson,

I have carefully reviewed the Sponsor Substitute for House Bill Number 29, "an Act relating to real estate licensees and real estate transactions; and providing for an effective date."

I am a Real Estate member of the Alaska Association of Realtors, and an Associate Broker real estate licensee in Alaska. I believe this Act would offer needed protection to the public, and significantly simplify the process of explaining and documenting agency representation by licensees to the public.

I urge you to support it. Feel free to contact me via phone, fax, or e-mail for comments or inquiries.

Best wishes,

Gene DuVal

RE/MAX Associates of Fairbanks
529 5th Avenue, Suite #200
Fairbanks, Alaska 99701
Office: (907) 452-4363
Fax: (907) 452-1499
E-mail: duval@gci.net
www.geneduval.com
Each Office Independently Owned and Operated

TESTIMONY OF

KIRK WICKERSHAM
351-3726

SSHB 29
HOUSE LABOR AND COMMERCE COMMITTEE

FEBRUARY 4, 2004

This bill deals with the legal and practical relationship between real estate licensees and the consuming public, between real estate licensees and their clients, and between each other. It abolishes the common law of agency as applied to real estate licensees and their clients, and replaces it with a term called "representation." If the bill is adopted, it will improve relationships between the licensed professionals and the public in what is normally the largest and most significant transaction in their life -- the purchase of a home.

I have been a lawyer for over 34 years and a member of the Executive Committee of the ABA Real Estate Law Section for over 18 years. I have also been a real estate broker for over 25 years, and I served as both Vice Chairman and Chairman of the Alaska Real Estate Commission. I am a member of the Board of Realtors and served on the task force that developed this legislation.

I am a real estate licensee, but not an agent. For the last nine years I have owned and operated the For Sale By Owner Assistance Program, a real estate company that provides counseling services to people selling on their own. Thus, I and the other Realtors in my company are not affected by this bill, and I am testifying solely as an interested citizen. As people in Juneau say, I have no dog in this fight.

As a measure of my commitment, however, I would just like to say that I've been on sabbatical, attending screenwriting school at UCLA. and I've flown in from Los Angeles for this hearing.

I would like to provide some background and history. In the early 1980s, a series of state supreme court cases held that a real estate agent owed his or her client fiduciary duties similar to the duties a lawyer owed a client in a litigation situation -- or similar to the duties an attorney in fact owes to his or her principal. The legal structure of a real estate transaction was adversarial.

At that time, all agents, including those working with the buyer, were legally working for the seller. This created a huge clash between perception and reality, and

Alaska, along with the rest of the country, discovered that the consuming public expected and demanded that the agent working WITH the buyer be working FOR the buyer. This gave rise to exclusive buyers' agents, and as a result there are buyer agents operating today in all the major markets in the state.

Large firms, however, with many agents, had many listings and represented many buyers. These firms quickly ran into conflicts. The concept of dual agency, in which the company, and sometimes the individual agent, represented both the buyer and the seller, took hold. Today, 40 or 50 per cent of agent transactions involve dual agency.

I was a lawyer long before I was a Realtor, and the notion of dual agency is alien to me. However, the consuming public is apparently used to this arrangement, and relatively few problems have actually come up over the years, considered in the light of billions of dollars of transactions each year. In fact, the amount of litigation by consumers against real estate licensees is a fraction of what it was 15 years ago. And this is good.

Dual agency is specifically provided for in Alaska statutes. But it has inherent problems under Alaska court decisions. Under Alaska case law, an agent has duties to his client (among other things) to divulge to his client confidential information about his bargaining adversary, and to try to get the best possible price and terms for his client. These two duties are impossible when one is a dual agent, working for both parties.

Most licensees are probably dual agents. Despite the fact that transactions seem to go smoothly, agency disclosures are made and consumers seem to understand how dual agents operate, these conflicting legal duties and loyalties have given the industry significant heartburn over the years.

Recently, a lawsuit was settled after the court held that a dual agent had violated these duties -- the duty to divulge the other party's secrets and the duty to try to get the best price and terms -- to her buyer client.

The suit had several other issues, and the breach of agent duties was not as significant as the fact that she stole the buyer from another agent, and the fact that she did not properly or timely disclose her dual agency status to either of her clients as required by law.

Nevertheless, the suit has boiled this dual agency issue to a head. The Realtor task force began by considering reforms to the legal concept and duties involved with dual agency, but soon came to the conclusion that the entire legal notion of agency -- the

notion of the licensee as a hired combatant for his or her client in an adversarial conflict -- simply does not reflect the way real estate is bought and sold.

It never has. Real estate transactions are not like lawsuits, where the parties are adversarial from start to finish. They are basically cooperative ventures in which conflicts can arise. In other words, in a real estate transaction, unlike a lawsuit, each party needs what the other offers, so both can "win" at the conclusion.

This proposal, at its simplest, brings the law into conformance with this actual practice. The Realtor who helps a family find a house is not a predator, looking to exploit an advantage; he or she is a helper. The concept of the agent's bargaining adversary is replaced with the concept of the consuming public.

Likewise, the concept of agency -- trying to discover weaknesses on the other side and exploit them, is replaced with the concept of representation -- being a good solid advocate for the client.

Instead of dual agency, the bill creates the role of a neutral middleman, a professional who just helps the parties come together and close the transaction without advocating for either side. This, too, is just common sense.

The bill acknowledges, for the first time, that within the same firm, one Realtor can adequately represent the buyer and another can adequately represent the seller.

The bill clarifies and strengthens the licensee's requirement to disclose his or her relationship to the parties.

What's in it for the real estate industry? They can exhale for the first time in about 15 years, because the law will reflect the practice.

What's in it for the consumer? Greater clarity, a better level of service, and common sense. Likewise, the law will reflect the public's expectations. Also, the law eliminates a strange and harsh element of agency law: the client's vicarious liability for his Realtor's transgressions.

What's in it for trial lawyers? Frankly, I hope that the increased clarity and common sense reflected in this bill will mean less litigation based solely on the difference between form and substance. This is often litigation where the only winners are the lawyers. I do not mean to sound critical of lawyers because again, this really has not been a significant problem so far. This is perhaps a reflection of the fact that, although practice has not always conformed to the law, the public has rarely been harmed.

What's in it for the legislature? It's the right thing to do. Alaska will join a growing list of states that have developed alternatives to the traditional notion of real estate agency. We studied other state's approaches, and came up with our own. It is partly a reflection of our unique market, and partly an improvement over other states' attempts to resolve this problem. I think -- I hope -- that the approach we've proposed will in turn be a model for other states as they resolve this issue for themselves.

There is one final point I would like to raise. This bill does not define the only possible relationships between the Realtor and his/her client. For instance, my company would not fit into the bill's concept of conventional representation. Other real estate firms also offer a nontraditional mix of services. All this enhances consumer choice.

This bill ensures that innovation and consumer choice, as represented by my company and others, will be preserved. The Realtor task force has been clear from the very start that it wants to preserve consumer choice. Please ensure that this remains in the bill as it moves forward to adoption.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB 29
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: Real Property Transactions/Licensees
RDU: Occupational Licensing (117)
Component: Occupational Licensing
Sponsor: Representative Rokeberg
Requester: House Labor and Commerce
Component No.: 2360

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

SSHB 29 makes changes to practices conducted by real estate licensees. New funds are not required to implement these changes.

Prepared by: Jennifer Strickler, Administrative Manager
Phone (907) 465-2144
Division: Occupational Licensing
Date/Time 2/2/04 1:42 PM
Approved by: Edgar Blatchford, Commissioner
Date 2/2/2004
Agency: Department of Community & Economic Development

(Revised 9/2003 OMB)

ALASKA STATE LEGISLATURE
House of Representatives

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SPONSOR STATEMENT FOR HB 29
BY: Representative Norman Rokeberg

Alaskan consumers and our state's real estate industry have not been well served by the current agency provision of the real estate statute. Practical application of this statute is unworkable.

At issue in HB 29 is the interpretation of AS 08.88.396, Disclosure of Agency to Prospective Buyers and Sellers. As we take a closer look at agency, one thing is clear: this law, as currently written, is vague, confusing and results in a large number of differing views on how to comply with the statute.

In order to address this confusion, the real estate industry formed an Agency Task Force. This task force worked incredibly hard over the last two years, developing suggested changes to the regulations and statutes that would give real estate licensees some guidelines and standards for operating procedures. HB 29 is the product of their hard work.

HB 29:

- Replaces "agency" with the types of relationships a licensee may have with a buyer and/or seller.
- Allows for a licensee to work with both the buyer and seller in the same transaction as a neutral licensee. This replaces "dual agency" and sets forth the duties of a neutral licensee explicitly.
- Specifies the duties owed by a real estate licensee in all relationships, as well as the duties owed by a licensee when representing an individual.
- Clarifies what acts do not constitute a conflict of interest.
- Allows for a buyer and seller to be represented by different licensees within the same office, without creating a dual agency transaction.
- Sets forth provisions regarding compensation.
- Clarifies the duration of the licensee/licensor relationship.
- Limits the recovery to actual damages for failure to comply with these new provisions.
- Requires a broker to adopt a written policy identifying and describing the relationships into which their licensees may enter.
- Requires the Real Estate Commission to adopt regulations that establish:
    - Guidelines to assist brokers in adopting their written policies
    - A written pamphlet outlining the duties of the types of licensee relationships
    - Requirements for broker supervision of real estate licensees who work for the broker
- Government agencies and publicly held corporations are exempt from the signature requirements found in the new provisions.
- Provides definitions for terms.

This legislation informs and protects consumers and assists the commerce of our state. It will shield the public from vicarious liability inherent in our current law and protects small brokers in small communities. This bill is fully endorsed by the real estate community.

ED 1: 12/10/03

LEGAL SERVICES

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MEMORANDUM January 20, 2004

SUBJECT: Sectional summary of SSHB 29
(Work Order No. 23-LS0189\W)

TO: Representative Norman Rokeberg
Attn: Amanda

FROM: Theresa L. Bannister
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.

Section 1. Provides legislative findings and intent for the bill.

Section 2. Authorizes the real estate commission to investigate and take administrative action when there is a violation of the new article proposed by this bill.

Section 3. Requires a licensee with a conflict to disclose the conflict to persons adversely affected by the conflict and their licensees and to confirm the conflict in writing to the persons or their licensees as soon as possible after identification of the conflict.

Section 4. Limits the application of AS 08.88.396 to acts that occur before the effective date of this new subsection.

Section 5. Removes AS 08.88.396 from the list of sections whose violation triggers a misdemeanor penalty.

Section 6. Establishes a new article relating to licensee relationships and duties.

Sec. 08.88.600. Identifies the types of relationships a licensee may have with parties to real estate transactions.

Sec. 08.88.605. Allows for a licensee to have different licensee relationships with a party in separate transactions if the licensee complies with the new article when establishing the relationships.

Sec. 08.88.610. Allows a licensee to obtain preauthorization to act as a neutral licensee. Requires a licensee to obtain written consent to act as a neutral licensee in certain circumstances before the licensee shows the real estate.

Sec. 08.88.615. Identifies the duties that a licensee owes to each person to whom the licensee provides specific assistance.

Sec. 08.88.620. Identifies the duties that a licensee owes to a person whom the licensee represents.

Sec. 08.88.625. With two exceptions, prohibits a licensee or a person to whom a licensee provides specific assistance from waiving the duties identified under secs. 08.88.615 and 08.88.620.

Sec. 08.88.630. Describes the duties that a licensee does not owe to a person.

Sec. 08.88.635. Describes certain acts that do not amount to adverse or detrimental acts by a licensee or to conflicts of interest for the licensee.

Sec. 08.88.640. Provides some guidelines for the designated licensee relationship. Limits the persons to whom the duties, obligations, and responsibilities of the relationship extend and to whom knowledge is imputed. Allows a broker to have different designated licensees working for different parties in the same transaction. Allows a designated licensee to represent or provide specific assistance to the same person in different transactions even though the person has a different interest in each transaction.

Sec. 08.88.645. Identifies the duties of a neutral licensee.

Sec. 08.88.650. States that a neutral licensee's knowledge or information about one client is not imputed to other clients or to other licensees working for the same broker.

Sec. 08.88.655. Establishes certain rules relating to the compensation received by a broker. Allows a broker to be compensated by any party to a transaction, by a third party, or by parties splitting the compensation. States that payment will not be construed as establishing a relationship. In specified circumstances requires a licensee to disclose which party is anticipated to compensate the brokers. Requires the contract to indicate who is compensating the brokers.

Sec. 08.88.660. Establishes when a licensee relationship begins and ends, the effect of termination on other contractual rights, and the licensee's duties after termination.

Sec. 08.88.665. States that a seller, buyer, lessor, or lessee is not liable for an act, error, or omission of a licensee that arises out of the licensee relationship, except in two described circumstances.

Sec. 08.88.670. Establishes that, unless agreed to otherwise in writing, a seller, buyer, lessor, or lessee is not considered to know a fact known by the person's licensee unless the fact is actually known by the person. Establishes that, unless agreed to otherwise in writing, a licensee does not have knowledge or notice of a fact that is not actually known by the licensee.

Sec. 08.88.675. States that the new article abrogates the common law of agency in real estate transactions to the extent the common law is inconsistent with the new article.

Sec. 08.88.680. Prohibits a person from bringing an action against a neutral licensee for making a required or permitted disclosure. Addresses a plaintiff's remedy in a civil action against a licensee for failing to comply with the new article.

Sec. 08.88.685. Requires a broker to adopt a written policy identifying and describing the relationships the broker and the broker's licensees may engage in. Directs the real estate commission to adopt regulations relating to broker guidelines, the commission's pamphlet on licensee duties, and a broker's supervision of licensees.

Sec. 08.88.690. Establishes two exemptions from the article's signature requirements.

Sec. 08.88.695. Defines certain terms for the new article.

Section 7. Provides authority for the real estate commission to adopt regulations before the rest of the Act takes effect (because this section take effect before the rest of the Act; see bill sec. 9).

Section 8. Makes most of the bill effective January 1, 2005.

Section 9. Gives sec. 7 of this Act an immediate effective date.

If I may be of further assistance, please advise.

TLB:med
04-055.med