

AlaskaUSA® Title Agency

Honorable Kurt Olson, Chair
House Labor & Commerce Committee
145 Main Street Loop, Suite 221
Kenai, AK 99611

April 2, 2012

Dear Representative Olson:

Re: CS for Senate Bill No.122 (L&C)

This letter is written to express our concerns and opposition to Senate Bill 122 Sections 1 and 2.

Section 1 of the Bill would limit competition by requiring all title search and examinations in Alaska be done by a “title insurance limited producer” which is commonly referred to in the industry as “agents.” For those currently licensed title offices in Alaska who operate as a Direct Operation (those companies wholly owned by the national underwriters such as First American and Stewart Title) this would mean they could no longer issue their own examinations. This would immediately and obviously reduce competition and reduce the choices for consumers.

Section 2 of the Bill raises a question as to its constitutionality as outlined in the February 15, 2012, Memorandum by Dennis C. Bailey, Legislative Counsel, wherein he states his opinion that “seems likely that a court construing residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution” (copy enclosed).

Alaska USA Title Agency does support the proposed amendments to AS 34.15.105 Transfer Fee as outlined in Section 3 of SB122.

The true purpose and intention of the proposed changes outlined in Section 1 and 2 are unclear. The information provided about these sections has been limited and it does not appear that these sections benefit competition or consumers. Alaska USA Title Agency has asked for a synopsis on SB122 as currently drafted, but we have been unsuccessful in obtaining any meaningful information.

SB 122, Section 1 and 2 would restrict competition for title insurance companies and raises the question of the constitutionality of Section 2. Accordingly, we do not believe those sections of SB122 are good public policy.

Thank you for the opportunity to provide Alaska USA Title Agency’s concerns on Senate Bill 122.

Sincerely,



Crystal Peltola
Vice President/General Manager

Enclosure

cc: Linda Hall, Director, Alaska Division of Insurance
Curtis Thayer, Deputy Commissioner, Commerce, Community and Economic Development
Dan Fauske, CEO/Executive Director, Alaska Housing Finance Corporation

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MEMORANDUM

February 15, 2012

SUBJECT: Preparation of title reports and title examinations; amendment drafting issues (CSSB 122(CRA); Work Order No. 27-LS0789\B.1)

TO: Senator Dennis Egan
Attn: Dana Owen

FROM: Dennis C. Bailey *DCB*
Legislative Counsel

This memo accompanies the amendment prepared for you using language provided on the phone. Please be aware of the following issues that have come to my attention during drafting.

The proposed amendment reads:

All preliminary title reports and title examination reports shall be prepared by a person licensed under AS 21.66.270.

1. The licensing requirement under AS 21.66.270 requires a title insurance limited producer to be licensed in the manner provided for in AS 21.27.¹ Licensing under AS 21.66.270 only applies to title insurance limited producers.² The question that arises

¹ AS 21.66.270 provides:

Sec. 21.66.270. Title insurance limited producers to be licensed. A title insurance limited producer shall be licensed in the manner provided for in AS 21.27. A title insurance limited producer may not be licensed to sell insurance other than title insurance.

See AS 21.27.010 for licensing requirements; see also, AS 21.27.275 (director may issue license to nonresident who does not have a home state if the person meets the requirements of the chapter applicable to a resident applying for the same license)

² A title insurance limited producer is defined in AS 21.66.480(8):

(8) "title insurance limited producer" means a person, firm, association, trust, corporation, cooperative, joint-stock company, or other legal entity authorized in writing by a title insurance company to solicit

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is whether you intend that only title insurance limited producers may prepare preliminary title reports and title examinations. The proposed licensing requirement apparently excludes a title insurance company from preparing a preliminary report or title examination. The ability to prepare a preliminary report or title examination seems integral to the power of a "title insurance company" to conduct a title insurance business.³ Is that what you intend?

2. You may want to substitute "a licensed title insurance limited producer" instead of referring to AS 21.66.270.

3. The proposed language requires that the person preparing a preliminary title report or title examination report must be a resident of the state. As we briefly discussed, the residency requirement raises the question of whether a residency requirement violates the privileges and immunities clause of the U.S. Constitution.

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Article IV, section 2, Constitution of the United States). A state violates the federal privileges and immunities clause by denying a nonresident equal treatment with respect to a fundamental right or privilege that is essential "to the promotion of interstate harmony." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed.2d 205, 210 (1985). The courts will require that a state justify residency-based discrimination under the privileges and immunities clause if the court finds that the activity that is the subject of the discrimination enjoys privileges and immunities clause protection. Pursuit of an occupation outside one's home state is an activity that has been protected by the privileges and immunities clause. The United States Supreme Court has determined that state discrimination against nonresidents seeking to pursue employment within the state violates the privileges and immunities clause. *Hicklin v. Orbeck*, 437 U.S. 518, 52 L.Ed.2d 304 (1977).

title insurance, collect premiums, determine insurability in accordance with the underwriting rules and standards prescribed by the title insurance company that the licensee represents, and issue policies in its behalf.

³ AS 21.66.180 provides:

Sec. 21.66.180. General powers. A title insurance company may

(1) do business as defined in AS 21.66.480;

(2) do any act, directly or through a title insurance limited producer, incidental to making a contract or policy of title insurance, including, but not limited to, conducting or holding an escrow, settlement, or closing of a transaction; and,

(3) provide other services relative or incidental to the sale and transfer of real or personal property.

In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution.

Further, establishing a residency requirement would conflict with the insurance chapter, AS 21, including, for example, AS 21.66.480(7), which provides, in part, that a title insurance company means a foreign title insurance company issued a certificate of authority to transact a title insurance business within this state. A "foreign insurer" means an insurer formed under the laws of a jurisdiction other than this state and includes an alien insurer." AS 21.97.900(18). An "alien insurer" means an insurer formed under the laws of a country other than the United States of America, its states, districts, territories, and commonwealths." AS 21.97.900(3). In general, the insurance statute allows foreign insurance companies to be licensed to do business in the state. In the interest of getting you an amendment in a reasonable time, and in order to allow you to consider the residency issue in the context discussed, I have not prepared amendments to the insurance chapter to make the necessary exceptions prohibiting foreign title insurance companies from doing business in the state. Let me know if you want to proceed in that direction.

4. Incorporating the title insurance provisions of the amendment in a bill that currently addresses the topic of transfer fee covenants may violate the requirement that a bill address only a single subject. The single subject rule requires that all matters in an Act "fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."⁴ The Alaska Supreme Court has held that the purpose of this constitutional provision is to guard against legislative log-rolling, "the practice of 'deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure.'" *Evans v. State*, 56 P.3d 1046. 1069, quoting from *Gellert*, *infra*, at 1122.

Historically, the Alaska Supreme Court has interpreted Alaska's single subject rule to permit very broad subject matter in one bill without violating the single subject requirement. For example, the Court has held that bills relating to such broad themes as "development of water resources,"⁵ "taxation,"⁶ "land,"⁷ "intoxicating liquor,"⁸ and

⁴ *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

⁵ *Gellert v. State*, 522 P.2d 1120 (Alaska 1974).

⁶ *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 545 (Alaska 1978).

⁷ *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

⁸ *Van Brunt v. State*, 646 P.2d 872 (Alaska App. 1982).

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"criminal law"⁹ are acceptable.¹⁰ However, there was a strong dissent in one case against allowing broad subject matter in a single bill.¹¹ And in 2010, for the first time, the Alaska Supreme Court invalidated a piece of proposed legislation for failure to satisfy the single subject requirement.^{12,13}

CSSB 122(CRA) currently addresses transfer fee covenants in a document conveying real estate. The proposed amendment addresses licensing of title insurance producers. It is difficult to articulate a common subject. Both might be in the subject of "land transactions." Given Alaska's broad interpretation of the single subject rule, including the two topics in the same bill could be found constitutional. Failure to comply with the single subject requirement -- however unlikely -- could jeopardize your bill if it were ever challenged. The issue, of course, may be avoided entirely by using separate bills for each subject.

5. I routinely advise that bill sponsors engage the division of insurance in consideration of a bill in order to make use of their expertise. It seems appropriate to do so with respect to this amendment.

If I may be of further assistance, please advise.

DCB:ljw
12-126.ljw

Enclosure

⁹ *Galbraith v. State*, 693 P.2d 880 (Alaska App. 1985).

¹⁰ *Evans v. State*, 56 P.3d 1046, 1070 (Alaska 2002).

¹¹ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985). In his dissent, at page 1182, Justice Moore stated: "This court has mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce."

¹² *Croft v. Parnell*, 236 P.3d 369 (Alaska 2010).

¹³ The *Croft* ruling and the *Yute Air* dissent may indicate that the Alaska Supreme Court is moving toward a more stringent single subject standard by adding a dimension to the rule expounded in *Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987). *Harbor* interprets California's single subject rule to prohibit excessive generality because it violates the purpose and intent of the single subject rule.