

CS FOR HOUSE BILL NO. 414(L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered: 3/8/96

Referred: Judiciary

Sponsor(s): REPRESENTATIVE GREEN

A BILL

FOR AN ACT ENTITLED

1 "An Act requiring conciliation panel review prior to filing a civil action against
2 an architect, engineer, or land surveyor; amending Rule 402, Alaska Rules of
3 Evidence; and providing for an effective date."

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

5 * **Section 1.** AS 08.48.111 is amended to read:

6 Sec. 08.48.111. POWER TO REVOKE, SUSPEND, OR REISSUE
7 CERTIFICATE. The board may suspend, refuse to renew, or revoke the certificate of
8 or reprimand a registrant or corporation who is found guilty of (1) fraud or deceit in
9 obtaining a certificate; (2) gross negligence, incompetence, or misconduct in the practice
10 of architecture, engineering, or land surveying; or (3) a violation of AS 09.55.750(d), this
11 chapter, a regulation adopted under this chapter, or the code of ethics or professional
12 conduct as adopted by the board. The code of ethics or professional conduct shall be
13 distributed in writing to every registrant and applicant for registration under this chapter.
14 This publication and distribution of the code of ethics or professional conduct constitutes

1 due notice to all registrants. The board may revise and amend its code and, upon doing
2 so, shall immediately notify each registrant in writing of the revisions or amendments.
3 The board may, upon petition of the registrant or corporation, reissue a certificate if a
4 majority of the members of the board vote in favor of the reissuance.

5 * **Sec. 2.** AS 09.55 is amended by adding new sections to read:

6 **ARTICLE 9. MALPRACTICE CLAIM AGAINST DESIGN PROFESSIONAL.**

7 **Sec. 09.55.700. MANDATORY CONCILIATION PANEL REVIEW.** A person
8 who has a claim against a design professional for civil damages resulting from
9 professional negligence shall, before filing the claim with the court, submit the claim for
10 review by the design professional conciliation panel.

11 **Sec. 09.55.710. FILING OF CLAIM; DESIGN PROFESSIONAL**
12 **CONCILIATION PANEL.** (a) A claim required to be reviewed by a panel under
13 AS 09.55.700 shall be submitted to the department in writing with the fee required by
14 (b) of this section. The claimant shall set out facts upon which the claim is based, and
15 shall include the names of all design professionals against whom the claim is made who
16 are known to the claimant. Within 10 days after receiving a claim, the department shall
17 provide notice of the claim and of the deposit requirement under (b) of this section to
18 all design professionals against whom the claim is made. The notice must include a
19 date, at least 10 but not more than 20 days after mailing the notice, within which a
20 design professional against whom a claim is made may file a written response to the
21 claim.

22 (b) A claim may not be accepted by the department for filing unless the claimant
23 deposits \$750 with the department when the claim is filed. The design professional shall
24 deposit \$750 with the department not later than the date specified under (a) of this
25 section for filing a written response to the claim. If the design professional fails to
26 deposit the funds required by this subsection, the claimant may proceed with a civil
27 action in the appropriate court. If a claim is withdrawn or otherwise terminated without
28 participation by a panel, the department shall return all money collected to the respective
29 parties.

30 (c) Not more than 15 days after the date for receiving the response from the
31 design professional under (a) of this section, the department shall form a design
32 professional conciliation panel to consider the claim. A panel shall consist of one

1 individual acting as the chair, selected from among individuals who are familiar with and
2 experienced in the tort claims settlement process, one attorney licensed in this state and
3 experienced in trial practice, and one design professional. The chair shall be appointed
4 by the department. The attorney panel member shall be appointed by the chair from a
5 list of not less than 20 attorneys experienced in trial practice submitted annually to the
6 department by the Alaska Supreme Court. The design professional member shall be
7 appointed by the chair from a list of not less than 20 design professionals submitted
8 annually by the State Board of Registration for Architects, Engineers and Land Surveyors
9 established under AS 08.48. After a panel renders its decision or the claim is otherwise
10 disposed of, the panel shall be disbanded.

11 (d) The chair shall preside at the meetings of the panel. Panel members shall
12 be compensated at the rate of \$300 per claim and per diem and travel expenses
13 authorized for boards and commissions under AS 39.20.180. Panel member
14 compensation is due when the decision of the panel is submitted to the department. The
15 department shall pay panel members from funds collected from the claimant and
16 defendant.

17 (e) Office and meeting space, office equipment, and office supplies for the panel
18 shall be furnished by the department.

19 (f) The board shall prepare a list of design professionals, along with their
20 respective specialties, who shall then be considered consultants to the panel in their
21 respective fields. Panel members may also consult with other legal, technical, and
22 insurance specialists. A consultant called by the panel to appear before the panel shall
23 be paid per diem and travel expenses authorized for boards and commissions under
24 AS 39.20.180. Per diem and travel costs for a consultant shall be paid by the department
25 from funds provided under AS 09.55.710(b) or 09.55.750(d).

26 Sec. 09.55.720. REVIEW BY PANEL; VOLUNTARY TERMINATION. (a)
27 Within five business days after the panel is formed, the panel shall give notice of the
28 hearing, by certified mail, to all design professionals and others who are parties to the
29 claim. Notice of the hearing must include (1) a date and time, at least 15 but not more
30 than 30 days following the date the notice is mailed, for a hearing by the panel; (2) a
31 description of the nature and purpose of the panel's proceedings; and (3) the location of
32 the place for the hearing. The time and location originally set out in the notice may be

1 changed by the chair on due notice to all parties for good cause, provided that a party
2 requesting the rescheduling of the hearing within seven days of the scheduled date may
3 be required by the panel chair to compensate the panel in an additional amount equal to
4 the fee panel members receive under AS 09.55.710(d).

5 (b) At any time, by mutual consent of the parties involved, the department,
6 before the appointment of the chair, or the chair after the chair's appointment, may
7 terminate the proceedings and the claimant may proceed in the appropriate court.

8 Sec. 09.55.730. PANEL HEARING PROCEDURES. (a) A person, other than
9 the panel, witnesses, consultants called by the panel, and the persons listed in
10 AS 09.55.740, may not be present at a panel hearing except with the permission of the
11 chair. The panel may, in its discretion, conduct an inquiry of a party, witness, or
12 consultant without the presence of a party.

13 (b) A panel hearing shall be informal. The panel may record its proceedings for
14 the use of the panel, but the record may not be made available to the parties and is not
15 admissible in any other action or proceeding, except that a record of a statement made
16 at a panel hearing is admissible as provided under AS 09.55.750. The panel may receive
17 oral or documentary evidence. Questioning of parties, witnesses, and consultants may
18 be conducted by the panel, and the panel may, in its discretion, permit a party or counsel
19 for a party to question other parties, witnesses, or consultants. The panel may designate
20 who, among the parties, shall have the burden of going forward with the evidence with
21 respect to the issues it may consider. Unless otherwise designated by the panel, when
22 a design professional's records have been provided for the claimant's review, the burden
23 of going forward with the evidence shall initially rest with the claimant at the
24 commencement of a hearing.

25 (c) The panel has the power to require by subpoena the appearance and
26 testimony of witnesses and the production of documentary evidence. When subpoena
27 power is utilized, notice shall be given to all parties. The testimony of witnesses may
28 be taken either orally before the panel or by deposition. In cases of refusal to obey a
29 subpoena issued by the panel, the panel may invoke the aid of the appropriate court. A
30 member of the panel or the commissioner may sign subpoenas. A member of the panel
31 may administer oaths and affirmations, examine witnesses, and receive evidence. The
32 panel shall attempt to secure the voluntary appearance, testimony, and cooperation of

1 parties, witnesses, and consultants without coercion.

2 (d) At the panel hearing, and in arriving at its opinion, the panel shall consider
3 statements or testimony of witnesses, construction documents, inspection reports,
4 calculations, and other records kept in the usual course of the practice of the design
5 professional without the necessity for other identification or authentication. Statements
6 of fact or opinion on a subject contained in a published treatise, periodical, book, or
7 pamphlet, or statements of experts may be considered by a panel without the necessity
8 of the experts appearing at the hearing. The panel may, upon the application of a party
9 or upon its own decision, appoint as a consultant an impartial and qualified design
10 professional or other professional person or expert to testify before the panel or to
11 conduct necessary professional or expert examination of the claimant or relevant
12 evidentiary matter and to report to or testify as a witness. A panel consultant may not
13 be compensated or reimbursed except for per diem and travel expenses authorized for
14 boards and commissions under AS 39.20.180. Consultant per diem and travel expenses
15 shall be paid by the department from funds provided under AS 09.55.710(b) or
16 09.55.750(d). Except for a claim that involves personal injury or death, the parties may
17 not conduct discovery. Discovery in a claim involving personal injury or death shall be
18 conducted as provided under the Alaska Rules of Civil Procedure.

19 (e) During a panel hearing and at any time before the release of an advisory
20 decision under AS 09.55.750, the panel may encourage the parties to voluntarily settle
21 or otherwise dispose of the case.

22 Sec. 09.55.740. REQUIRED PANEL ATTENDANCE. Unless excluded or
23 excused by the panel, the following persons shall attend hearings before the panel:

24 (1) the party or parties making the claim;

25 (2) any design professional against whom the claim is made or a
26 representative of the design professional, other than counsel, authorized to act for the
27 design professional; and

28 (3) counsel representing the parties, if any.

29 Sec. 09.55.750. PANEL DECISIONS; ADDITIONAL PAYMENTS. (a) Except
30 as provided under (c) of this section, within 15 days after the completion of a hearing,
31 a panel shall file a written advisory decision on the claim with the commissioner. The
32 commissioner shall mail copies to all parties concerned, counsel of the parties concerned,

1 the board, and the representative of each design professional's liability insurance carrier
2 authorized to act for the carrier. The panel shall state its conclusions in writing. The
3 panel may not decide the issue of damages.

4 (b) Each member of the panel shall sign the decision, and the decision may
5 include concurring or dissenting opinions. The decision must contain one of the
6 following conclusions:

7 (1) the evidence does not indicate that the design professional failed to
8 comply with the applicable standard of care;

9 (2) the evidence does indicate that the design professional failed to
10 comply with the applicable standard of care and that failure is the proximate cause of the
11 alleged damages;

12 (3) the evidence indicates that the design professional failed to comply
13 with the applicable standard of care, but the failure is not a proximate cause of the
14 alleged damages; or

15 (4) the evidence indicates that there is a material issue of fact, not
16 requiring an expert opinion, bearing on liability that should be considered by a court or
17 jury.

18 (c) The advisory decision required by this section need not be filed if the claim
19 is settled or disposed of before the decision is written or filed.

20 (d) Before filing an advisory decision as required under (a) of this section, the
21 chair of the panel shall determine if sufficient funds have been deposited with the
22 department to pay all expenses allowed under AS 09.55.710 and 09.55.730. If funds on
23 deposit are insufficient, the parties to the conciliation proceeding shall contribute
24 sufficient funds to pay all panel expenses as provided under (e) of this section. A party
25 shall deposit the required funds within 10 days after receiving notice of the deposit
26 requirement. A panel decision may not be released until the department has sufficient
27 funds to pay all panel expenses.

28 (e) If the decision of the panel contains the conclusion described

29 (1) under (b)(1) of this section, the claimant shall deposit all additional
30 funds required under (d) of this section;

31 (2) under (b)(2) of this section, the design professional shall deposit all
32 additional funds required under (d) of this section; and

1 (3) under (b)(3) or (4) of this section, the parties to the conciliation
2 proceeding shall, in equal shares, deposit additional funds required under (d) of this
3 section.

4 (f) A design professional who fails to deposit funds as required under (e) of this
5 section has committed misconduct in the practice for which the design professional is
6 licensed, and the department shall provide notice of the misconduct to the board.

7 (g) If a claimant fails to deposit funds as required under (e) of this section, the
8 department shall impose a civil penalty of \$1,000 against the claimant.

9 Sec. 09.55.760. SUBSEQUENT LITIGATION; EXCLUDED EVIDENCE. A
10 claimant may institute litigation based on a claim heard by a panel in an appropriate
11 court only after a party to the design professional conciliation panel hearing rejects the
12 decision of the panel. A statement made in the course of the hearing of the panel is
13 admissible in a subsequent civil action to the extent allowed under the Alaska Rules of
14 Evidence. A decision, conclusion, finding, or recommendation of the panel may not be
15 admitted into evidence in a subsequent civil action, nor may a party to the panel hearing,
16 or the counsel or other representative of a party, refer to or comment on a decision,
17 conclusion, finding, or recommendation of the panel in an opening statement, an
18 argument, or at any other time, to the court or jury, except that a decision, conclusion,
19 finding, or recommendation may be admissible under AS 09.55.790(b).

20 Sec. 09.55.770. PANEL MEMBER IMMUNITY. A member of a panel is not
21 liable for civil damages for action taken or for a decision, conclusion, finding, or
22 recommendation made by the member while acting as a member of a panel.

23 Sec. 09.55.780. STATUTE OF LIMITATIONS TOLLED; LACK OF A
24 DECISION IN SIX MONTHS. Notwithstanding any other provision of law, the filing
25 of a claim with the department tolls any applicable statute of limitation until 30 days
26 after the date the decision of the panel is mailed or delivered to the parties. However,
27 the applicable statute of limitations may not be tolled for more than six months. If a
28 decision by the panel is not reached within six months after the claim is filed, the
29 applicable statute of limitations shall resume running and the party filing the claim may
30 commence a suit based on the claim in the appropriate court.

31 Sec. 09.55.790. DUTY TO COOPERATE; ASSESSMENT OF COSTS AND
32 FEES. (a) It is the duty of a person who files a claim with the panel and of a design

1 professional against whom a claim is made to cooperate with the panel for the purpose
2 of achieving a prompt, fair, and just disposition or settlement of a claim, provided that
3 the cooperation may not prejudice the substantive rights of the person.

4 (b) On application of the department, the court may award as a civil penalty
5 against a party all or a portion of the costs and expenses of the panel attributable to a
6 claim involving the person if the court finds that the person failed to cooperate with the
7 panel.

8 Sec. 09.55.800. COMPUTATION OF TIME. The provisions of AS 01.10.080
9 apply to AS 09.55.700 - 09.55.820 for purposes of calculating applicable time periods.

10 Sec. 09.55.810. ANNUAL REPORT. The department shall prepare annually,
11 20 days before the convening of a regular legislative session, a report containing the
12 department's evaluation of the operation and effects of AS 09.55.700 - 09.55.820. The
13 department shall notify the legislature that the report is available. The report must
14 include a summary of claims brought before a panel and the disposition of those claims.

15 Sec. 09.55.820. DEFINITIONS. In AS 09.55.700 - 09.55.820,

16 (1) "board" means the State Board of Registration for Architects,
17 Engineers and Land Surveyors;

18 (2) "commissioner" means the commissioner of commerce and economic
19 development;

20 (3) "department" means the Department of Commerce and Economic
21 Development;

22 (4) "design professional" means an architect, engineer, or land surveyor
23 licensed under AS 08.48;

24 (5) "panel" means the design professional conciliation panel;

25 (6) "professional negligence" means a negligent act or omission by a
26 design professional in providing professional services;

27 (7) "professional services" means services provided by a design
28 professional that are within the scope of the services for which the design professional
29 is licensed as an architect, engineer, or land surveyor.

30 * **Sec. 3.** AS 09.55.760, enacted by sec. 2 of this Act, has the effect of amending Rule 402,
31 Alaska Rules of Evidence, by providing that a decision, conclusion, finding, or recommendation
32 of the panel, and references to the decision, conclusion, finding, or recommendation, are not

1 admissible in a subsequent civil action except for the purpose of assessing a penalty under
2 AS 09.55.790(b).

3 * **Sec. 4.** This Act applies to causes of action that accrue on or after the effective date of this
4 Act.

5 * **Sec. 5.** This Act takes effect July 1, 1996.