

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

April 30, 2001

2:25 p.m.

**MEMBERS PRESENT**

Representative Norman Rokeberg, Chair  
Representative Scott Ogan, Vice Chair  
Representative John Coghill  
Representative Kevin Meyer  
Representative Ethan Berkowitz  
Representative Albert Kookesh

**MEMBERS ABSENT**

Representative Jeannette James

**OTHER LEGISLATORS PRESENT**

Senator Dave Donley

**COMMITTEE CALENDAR**

SENATE BILL NO. 183

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

- HEARD AND HELD

**PREVIOUS ACTION**

BILL: SB 183

SHORT TITLE:ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT

SPONSOR(S): FINANCE

Jrn-Date	Jrn-Page		Action
04/09/01	1014	(S)	READ THE FIRST TIME - REFERRALS
04/09/01	1015	(S)	FIN
04/23/01	1213	(S)	FIN RPT 4DP 5NR
04/23/01	1213	(S)	DP: DONLEY, GREEN, WARD, LEMAN;
04/23/01	1213	(S)	NR: KELLY, AUSTERMAN, HOFFMAN, OLSON,
04/23/01	1213	(S)	WILKEN
04/23/01	1214	(S)	FN1: ZERO(LAW)

04/23/01		(S)	FIN AT 9:00 AM SENATE FINANCE 532
04/23/01		(S)	Moved Out of Committee
04/23/01		(S)	MINUTE(FIN)
04/25/01	1261	(S)	RULES TO CALENDAR 1OR 4/25/01
04/25/01	1263	(S)	READ THE SECOND TIME
04/25/01	1263	(S)	ADVANCED TO 3RD READING FAILED Y14 N6
04/25/01	1264	(S)	ADVANCED TO THIRD READING 4/26 CALENDAR
04/25/01		(S)	RLS AT 10:45 AM FAHRENKAMP 203
04/25/01		(S)	MINUTE(RLS)
04/26/01	1285	(S)	READ THE THIRD TIME SB 183
04/26/01	1286	(S)	PASSED Y12 N8
04/26/01	1286	(S)	COURT RULE(S) ADOPTED Y14 N6
04/26/01	1286	(S)	ELLIS NOTICE OF RECONSIDERATION
04/27/01	1310	(S)	RECONSIDERATION NOT TAKEN UP
04/27/01	1311	(S)	TRANSMITTED TO (H)
04/27/01	1311	(S)	VERSION: SB 183
04/28/01	1296	(H)	READ THE FIRST TIME - REFERRALS
04/28/01	1296	(H)	JUD
04/28/01	1296	(H)	REFERRED TO JUDICIARY
04/30/01		(H)	JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

BILL CHURCH, Staff  
to Senator Dave Donley  
Alaska State Legislature  
Capitol Building, Room 506  
Juneau, Alaska 99801

POSITION STATEMENT: Testified on behalf of the Senate Finance  
Committee, sponsor of SB 183.

DALE BONDURANT  
Alaska Constitutional Legal Defense Conservation Fund  
31864 Moonshine Drive  
Soldotna, Alaska 99669

POSITION STATEMENT: Testified in opposition to SB 183.

AL SUNDQUIST, President  
Alaska Chapter  
Americans United for Separation of Church and State  
PO Box 244384

Anchorage, Alaska 99524

POSITION STATEMENT: Testified in opposition to SB 183.

ROBIN SMITH

14100 Jarvi

Anchorage, Alaska 99515

POSITION STATEMENT: Testified on behalf of herself in opposition to SB 183.

APRIL FERGUSON

PO Box 202869

Anchorage, Alaska 99520

POSITION STATEMENT: Testified in opposition to SB 183.

ROBERT BRIGGS, Staff Attorney  
Disability Law Center of Alaska

230 South Franklin Street

Juneau, Alaska 99803

POSITION STATEMENT: Testified in opposition to SB 183.

LAUREE HUGONIN

Alaska Network on Domestic Violence and Sexual Assault  
130 Seward

Juneau, Alaska 99801

POSITION STATEMENT: Testified in opposition to SB 183.

PAM LaBOLLE, President

Alaska State Chamber of Commerce

217 2nd Street

Juneau, Alaska 99801

POSITION STATEMENT: Testified in support of SB 183.

JUDY ERICKSON, Owner

Capital Information Group

PO Box 21804

Juneau, Alaska 99802

POSITION STATEMENT: Testified on SB 183.

#### **ACTION NARRATIVE**

TAPE 01-79, SIDE A

Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 2:25 p.m. Representatives Rokeberg, Ogan, Coghill, and Meyer were present at the call to

order. Representatives Berkowitz and Kookesh joined the meeting as it was in progress.

SB 183-ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT

CHAIR ROKEBERG announced the first order of business, SENATE BILL NO. 183, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0052

BILL CHURCH, Staff to Senator Dave Donley, Alaska State Legislature, came forth on behalf of the Senate Finance Committee, sponsor of SB 183. He stated:

Senate Bill [183] makes public interest litigants subject to Alaska Court Rule 82 regarding judgments for attorney fees, thus adopting a uniform standard for all litigants. Courts would still continue to have the ability to award higher fees or full attorney fees whenever the court felt that exceptional circumstances justified the higher award.

Through Alaska Supreme Court decisions, the doctrine known as Public Interest Litigant Doctrine [PILD] has been established. The doctrine isn't codified in law or set out in any court procedure. The courts apparently felt that the Public Interest Litigant Doctrine created a social policy to encourage plaintiffs to advocate for issues that are deemed by the court to be in the public interest.

Civil Rule 82 sets out the formula for the reimbursement of attorney fees to be collected by a prevailing party in a legal action. Court Civil Rule 82 limits attorneys' fees recovered by prevailing litigants to 20 percent of the litigants' reasonable actual attorneys' fees incurred on a case resolved without trial and 30 percent in a case that does go to trial.

The PILD does create an exception to Civil Rule 82 by allowing the courts to classify a party as a public interest litigant, thus allowing the party to collect full or reasonable attorney fees if they prevail. And if they lose, the public interest litigant pays none

of the prevailing party's attorney fees. And it's not a good public policy when not even innocent victims of violent crime who bring subsequent civil suit against criminals are allowed such generous attorney fees.

Additionally, Senate Bill 183 prevents legal fees from being awarded to a litigant for claims on which they did not prevail. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one or several of the points that they brought up at suit.

This problem was created recently in an Alaska Supreme Court decision titled Dansereau v. Ulmer in 1998. Prior to Dansereau v. Ulmer, lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau v. Ulmer set a precedent that allows courts to award lawyer fees for all contested points even if the public interest litigant only prevailed on one.

Senate Bill 183 also includes a provision that gives courts the flexibility to continue to follow the Dansereau case or award higher or full attorney fees when the court finds exceptional circumstances to justify the higher reward. Senate Bill 183 was introduced to make public interest litigants equally accountable for their lawsuits and to protect the state from having to pay excessive lawyer fees for frivolous public litigant cases. Based on the claims paid in recent years this legislation could save the state hundreds or thousands of dollars annually. ...

Finally, what this does is it promotes a uniform standard of attorney fee payments under Rule 82 to all litigants [and] it creates a disincentive to promote spurious lawsuits. ... It does not diminish the ability of the court to award higher or full attorney fees. In other words, a court can still award the full fee in a public interest litigant case, but it does set the standard for the court as a baseline that they are subject to Rule 82 unless they wish to go beyond that.

So, anyone that's going to say that this takes away their right to collect attorney fees, I don't believe

has really read the bill, because it does not do that. In each situation, it allows the court to award the attorney fees. And lastly, it's just good public policy to treat all litigants alike.

Number 0418

CHAIR ROKEBERG asked Mr. Church whether the change in policy in the Dansereau case is the primary rationale for bringing forth this particular bill.

MR. CHURCH responded that this bill was brought forth in the 21st legislature. It made it through the Senate, but it was too late in the session to receive a hearing in the House.

Number 0491

DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund, testified via teleconference in opposition to SB 183. He stated that he thinks this effectively eliminates the ability of an ordinary "John Doe" to legally defend the public's constitutional right under the national law.

MR. BONDURANT said he is a 54-year resident of Alaska and has been active in the fish, wildlife, and water resources of the state. In 1977, he was one of three named plaintiffs in the case in which the Alaska Constitutional Legal Defense Fund sued the Secretary of the Interior. They won that all Alaskan waters had reasonable access in Alaska.

MR. BONDURANT remarked that Alaska even adopted a change in statute to ensure that these waters were available for the use by all people. In 1987, he said, they dragged the state into another case and won for the treatment of 30 million acres of submerged land and over 100,000 miles of waters. Also under that case, the state won the right to manage all the resources within those waters.

MR. BONDURANT said [the Alaska Constitutional Legal Defense Fund] has consistently defended the privilege and immunity clauses, the constitution, equal protection rights, and having no discrimination because of race. He said he thinks [the Alaska Constitutional Legal Defense Fund] has proven its point; however, [SB 183] will eliminate them from the deal, because there is no guarantee that they will get their funding back. If they lost a big case, they would have to pay out of their own pockets.

MR. BONDURANT asked the committee to kill the bill because he thinks it denies the average citizen the right to protect the public from "big money."

Number 0756

REPRESENTATIVE OGAN stated that SB 183 is aimed at the organizations that continually bring public interest lawsuits against the state over wildlife issues. He said he understands that it is a "two-edged sword." He asked Mr. Bondurant whether those groups would be able to continue with lawsuits if this were to be eliminated. He said it seems that some groups use these issues to raise a tremendous amount of money. One example would be Greenpeace's using the ANWR (Arctic National Wildlife Refuge) issue as one of its greatest fundraisers. He emphasized that it seems \$100,000 is a "drop in the bucket" for [organizations] that have the national fundraising capacity of raising tens of millions of dollars.

MR. BONDURANT responded that he thinks Representative Ogan is right on those cases. He said this, however, is going to eliminate guys like him who are defending the rights of the general public, not those [large organizations]. If [the large organizations] lose a case, there are people willing to write them a \$.5 million check

REPRESENTATIVE OGAN asked whether there is a way to tighten [the bill] for people who are truly suing on behalf of the public's interest and don't have the resources to otherwise sue. He said he thinks anybody with deep pockets and millions of dollars in the bank who is funding a lawsuit with state money is abusing the system. He noted a letter in his bill packet about people with disabilities who can't sue and said he is looking for a way to accommodate that, with the bill sponsor.

MR. BONDURANT replied that he doesn't know how Representative Ogan could do that. He said it is hard to separate people into classes, and he thinks [the legislature] is responsible for making sure the public is heard. He added that he thinks his organization is well known in Alaska for fighting for the equal rights of everybody.

Number 1090

AL SUNDQUIST, President, Alaska Chapter, Americans United for Separation of Church and State, testified via teleconference in opposition to SB 183. He stated:

Americans United is based in Washington, D.C., and is a national, nonpartisan, nonsectarian organization committed to preserving the constitution and principle of religious liberty and separation of church and state. Founded in 1947, the organization represents 60,000 members and (indisc.) houses of worship in all 50 states.

Although only six months old, the Alaska chapter is growing rapidly, and in response to results, we established (indisc.) the First Amendment by far-right religious organizations. I oppose the placement of economic obstacles to the use of the courts by the Alaskan citizens. I am concerned about the loss of redress and grievances and actions regarding religious liberties threatened by this bill, as it is [a] denial of access by individuals to the courts to resolve these disputes. Please vote no on SB 183.

REPRESENTATIVE OGAN asked Mr. Sundquist whether he is part of the group that advocates removing "In God We Trust" from [U.S.] money.

REPRESENTATIVE BERKOWITZ suggested sticking to the subject.

MR. SUNDQUIST responded no [to Representative Ogan's question] and pointed out that [his organization] has been in defense of both the establishment clause and freedom of choice.

Number 1234

ROBIN SMITH testified via teleconference on behalf of herself in opposition to SB 183. She stated that she thinks this bill will effectively eliminate public interest lawsuits, except those by large or wealthy organizations. One reason lawsuits occur in Alaska, she said, is because several laws have passed that are unconstitutional. She suggested that one way to eliminate some lawsuits is to require that new laws pass a constitutionality requirement prior to enactment. This bill, she added, will have an impact on conservative and liberal interests.

MS. SMITH went on to say that Wev Shea spoke last year against a similar bill and again this year against this bill in the Senate

Finance Committee indicating that this wrongly eliminates the public's voice. She stated that she does not believe the bill has sufficient public input. The notification online, she said, was inaccurate, saying that the Senate Finance Committee was not going to take any testimony and that [the bill] is only going to be heard in the House once. She expressed that she doesn't think that is a good public process and asked, if this bill is such an excellent bill, why it is being rushed.

CHAIR ROKEBERG asked whether she had anything in mind for a constitutional test.

MS. SMITH responded that she didn't. She remarked that she has noticed several bills that have been challenged and put down based on their unconstitutionality. If all laws enacted by the legislature passed a constitutionality review, "we" wouldn't be setting ourselves up for lawsuits.

CHAIR ROKEBERG remarked that he is not so sure that most lawsuits emanate from laws passed by the legislature. He suggested that legislators are responsible for passing only constitutional laws.

MS. SMITH remarked that several times there have been attorneys tied to the state who don't think a particular law is constitutional, yet the legislature has passed bills like this in the past. In some ways, she said, the legislature sets itself up for lawsuits.

Number 1450

APRIL FERGUSON testified via teleconference in opposition to SB 183. She said she believes it is bad law and bad public policy. She stated:

I believe that this bill places a hurdle in front of citizens who wish to complain about government or seek redress from harm allegedly done by government. And I do not believe that all litigants are alike. I think that public [interest] advocates come (indisc.) on behalf of the general public and that this bill is really going to kill their ability to do so, or people are just not going to be able to afford to come before the court.

... I would like to bring your attention to a letter by Mr. Robert Briggs, a staff attorney for the

Disability Law Center. ... Mr. Briggs talks about some of the unintended consequences of SB 183 and how ... this particular bill may affect land use regulations, redistricting decisions, illegal taxes, unlawful election (indisc.), [and] school district actions. Virtually any type of challenged government action would be possibly impacted by this bill. ...

I also think that this is being rushed. I don't think that a lot of people know that it is out there, and I think it takes a much more careful, thoughtful scrutiny than being addressed in the last stage of the legislative session. And if the purpose of this bill is aimed at natural resource litigation or the environmental community, then we all know those particular groups have access to quite a bit more sums of money than a number of these other smaller groups such as the Disability Law Center.

Number 1612

ROBERT BRIGGS, Staff Attorney, Disability Law Center of Alaska, came forth in opposition of SB 183. He stated that if the purpose of the bill is to prevent frivolous litigation, it's unnecessary. Existing doctrine in the public interest litigant exception clearly states that people who bring cases in bad faith and for vexatious purposes are liable for full attorney fees and costs. That doctrine applies to public interest litigants as well as anybody who brings a case because of a direct financial interest.

MR. BRIGGS remarked that he thinks the bill will have little effect on some of the cases it is intended to prevent in the future. Most cases involving the permitting of infrastructure for research development in Alaska will be brought in federal court and won't be affected by this bill.

MR. BRIGGS said it is unlikely the bill will stop out-of-state moneyed interests; in fact, he thinks the bill will fuel their fundraising efforts. It will give them an example of how the Alaska State Legislature is so adverse to their interests that they need more money to fund their lawsuits.

MR. BRIGGS said the important point, brought up by Mr. Bondurant, is that there will be unintended victims of this bill - Alaskan victims. Mr. Briggs suggested that even ordinary litigants with public interest cases will be victims, because it

encourages focusing on who is a prevailing litigant based on issue, and it will cause two trials: one over the merits of the case, and one over who won by a greater margin and which issues they prevailed upon.

Number 1760

MR. BRIGGS went on to say that there is an insightful opinion by Justice Jay Rabinowitz against the revisions to Civil Rule 82 as it applies to regular litigants. Mr. Briggs stated that he had participated as part of the Civil Rule 82 revision committee around 1992. Justice Rabinowitz opposed Civil Rule 82 and argued that all of the factors would actually cause attorneys to fight more over the attorney fees after the litigation itself had been decided. Mr. Briggs said he thinks the supreme court wisely decided that that these factors should be fought about in public interest cases as well.

MR. BRIGGS stated that he thinks other victims of this bill would be those who seek court resolution of disputes involving something other than money. Some examples would be those who litigate over the question of when human life should be recognized; the parameters of religious practice and belief; or the limits of science and medicine and dealing with human cells or tissue, genetic, or health information.

MR. BRIGGS said if he has to tell a family that they should expect to pay 20 percent of the other side's fees, should they lose in a dispute, they will definitely be "chilled" from bringing a lawsuit, simply because they are poor.

MR. BRIGGS urged the committee to not pass the bill. However, if it should pass, he asked the committee to substantially revise it to eliminate its practical effect: taking away from the courts the discretion of when to exempt, from the penalty for losing, the cost of attorney fees.

Number 1869

CHAIR ROKEBERG asked Mr. Briggs whether the federal courts have the same [public interest litigant doctrine].

MR. BRIGGS responded that it has been awhile since he has brought a federal case. Generally, the Equal Access to Justice Act governs. He believes it to be somewhat similar to the public interest litigant exception; under that, people who bring a case against the federal government for reasons that don't

involve direct financial interests have a low risk of paying attorney fees, should they lose.

CHAIR ROKEBERG asked whether Rule 11 has ever been used in the State of Alaska.

MR. BRIGGS answered that he has never been involved in a case where it has been used; however, he hasn't been in state court very much. He believes a good civil litigator should never be in court, because he or she should convince the other side of the merits of the case before getting to the courthouse door.

CHAIR ROKEBERG asked Mr. Briggs what the National Association of Protection and Advocacy Systems is.

MR. BRIGGS responded that it is an association of nonprofit and state agencies in each of the 50 states. As a condition of receiving federal grants to serve people with disabilities, the state is required under federal law to set up a protection and advocacy system. The Disability Law Center, he said, was designated by Governor Hickel to be the protection and advocacy system of Alaska. As that system, [the Disability Law Center] receives some state and federal grants to advocate for people with disabilities. He stated, "It is our view that as part of the tools in our tool chest we need to bring lawsuits against the state."

MR. BRIGGS noted that currently he is litigating a series of administrative appeals about the administration of the Medicaid program on behalf of several families with disabled children. He said it is his belief that the state is not adequately managing the Medicaid system with regard to the benefits that should be made available to those families. He said, "If we lose the tool of seeking courts to redress how the state administers those benefits, it will be a significant tool we will have lost in advocating for people with disabilities."

CHAIR ROKEBERG asked whether in that case this has a general applicability to the individual or the group of clients.

Number 2053

MR. BRIGGS stated that he has five clients.

CHAIR ROKEBERG asked how that makes up the public interest.

MR. BRIGGS responded that [his organization] believes behavior the state exhibits is systemwide, at least in the Southeast region.

CHAIR ROKEBERG asked Mr. Briggs whether the courts have accepted their case as a public interest litigant case.

MR. BRIGGS answered that they are still in administrative proceedings and have prevailed in two of them; therefore, they will not need court action. He noted that they had moved to have the administrative proceedings joined as one proceeding, but the hearing officer declined.

CHAIR ROKEBERG asked whether it is in Mr. Briggs's best interest to try to group those cases together so they can qualify for a public interest litigant case.

MR. BRIGGS answered in the affirmative.

CHAIR ROKEBERG stated that he thinks the system is being corrupted.

Number 2117

MR. BRIGGS remarked that he would have to respectfully disagree with Chair Rokeberg about whether the system is being abused. In his experience, he said, there has not been a lot of public interest litigation that has been brought frivolously or abusively. The Dansereau case involved Wev Shea's challenge to the election practices of the current administration. The original request of fees involved about \$170,000 and the trial court awarded about \$20,000 in fees. He stated that perhaps it is abusive if the supreme court is saying, "You should not look into the factors in deciding whether to award attorney fees." However, he doesn't think the case itself was abusive; the issue was of fundamental importance to society, which is whether the city administration properly followed election law when deciding how to administer the election.

CHAIR ROKEBERG asked what the result of that case was and whether it had an effect on the state.

MR. BRIGGS answered that it is a larger question than he could answer.

CHAIR ROKEBERG stated that he figures it had almost no [effect] other than embarrassing the governor.

Number 2178

REPRESENTATIVE BERKOWITZ pointed out that there are four threshold questions that need to be answered affirmatively before someone can qualify as a public interest litigant. These are not easy thresholds to cross. He acknowledged that the public interest litigant serves another function besides advocating for the client and pursuing public policies. There is also a check and balance on governmental power. He stated that it is the only way he can think of whereby an individual can take on the weight of government. "If we retreat from that concept, we're retreating from one of the most fundamental notions of how a democracy should work," he added.

REPRESENTATIVE KOOKESH asked Mr. Briggs how long it will be after this bill passes before he would bring a suit.

MR. BRIGGS responded that he is not sure that [the Disability Law Center of Alaska] would challenge the bill if it were passed. He stated that it doesn't raise constitutional questions, except the right of access to the courts. The people who will be affected by this bill are going to be "mom and pop" people who can't afford the risk of loss. He explained that this would put those people "in the same pot" as all of the people who are subject to Rule 82. In most states, each side bears its attorney fees and costs, whether they win or lose; however, it is unusual that in Alaska if a person loses, he or she pays 20 percent of the defense's fees. He added that he thinks the Alaska Supreme Court wisely decided that public interest litigants should not be subject to that losing penalty the way the general litigant population is.

Number 2311

LAUREE HUGONIN, Alaska Network on Domestic Violence and Sexual Assault, came forth in opposition to SB 183. She stated:

We have the unfortunate circumstance of being a public interest litigant. In 1996, after the Domestic Violence Act passed, the court was refusing to implement all three forms of protective orders that the legislature had, in statute, allowed.

So, we didn't litigate against the executive branch or the legislative branch; we actually went to court against the court system and wanted a result to be

that they would conform to the statutory provisions that allowed a victim of domestic violence to be able to get one two or three protective orders, the way that the legislature had set it out.

We prevailed in that case. We did not get all of our attorneys' fees; we probably got about 75 or 80 percent. ... Since we did prevail, we didn't have to face the issue of - if we had lost - having to pay the court system's fees. I think that's an important concept in the public interest litigant venue. It's not as if we were going against someone, maybe, of an equal kind of circumstance.

We were litigating against the court system. ... They have almost unlimited resources available to them and ... [are] able to continue that litigation, whereas we don't accept any state money. The federal money we get, of course, is for projects; it's not available for any kind of litigation.

... So we were fundraising for private donations to be able to carry forward the litigation. And it was fortunate that I had had experience in the legislative process ... so I could do a lot of legwork for the attorney. I could get legislative records, and I knew how to look up and research statutes. And we put a lot of our own effort into the case.

We also didn't just enter the case frivolously. ... We approached the court forms committee in trying to talk to them about how to resolve the situation. We approached the court system's [administration] in trying to resolve the situation. We tried to get an attorney general's opinion about the statutes so that the court could feel more comfortable in relying on that to resolve the situation. All of the steps that we had taken were to no avail. The court system was firm in its position, and they were not accurate, and they did have to change to allow for these three forms of protection.

We entered the lawsuit on behalf of a Jane Doe, who currently had a threatening situation with the protective orders. And then we entered it on behalf of victims who had come after that to be able to take up this protection that the legislature had afforded

them. So, I think when you are determining whether or not to move forward with the legislation, it is important to keep in mind that it's not just the million-dollar environmental cases that come forward that take advantage ....

TAPE 01-79, SIDE B  
Number 2465

MS. HUGONIN continued:

... [They are] not after money, but they're going to try and clarify statutes, trying to uphold public policy, trying to be able to have the institution of government correct its misbehavior, and I think that's an important avenue to allow to continue.

So, while I understand that this bill would preclude - if for some reason we would have to be in the position of being a public interest litigant again - for us requesting attorneys' fees, I think it would be very difficult for us to go forward against an entity with unlimited resources if we were going to have to pay their costs in the end. ...

There might be some area for compromise if you're looking at prevailing issues. I can see some merit to the fact that if I brought a case and I lost, ... maybe I shouldn't get all of the money back, if it was something that I didn't have much of a hope of winning in the first place. ... I think it's very important that that's deliberately thought through, and ... this isn't the best way to get to the people that you're really having a problem with.

REPRESENTATIVE KOOKESH asked Ms. Hugonin to define the people with whom [the legislature] is having a problem.

MS. HUGONIN responded that she understood last year from testimony that it was the major environmental groups that were coming forward that made people feel they were taking advantage of the public interest litigant's status.

Number 2382

PAM LaBOLLE, President, Alaska State Chamber of Commerce, came forth in support of SB 183. She stated:

Some groups routinely challenge state resource development decisions and our granted public interest litigant status by the courts. And these groups are often special-interest groups posing as public interest groups and public trusts. And their challenges typically allege as many as 15 or 20 specific deficiencies in state's administrative finding. ... When they're challenging the resource development decisions and they prevail, they generally prevail ... on one or two issues; however, they are awarded the attorneys' fees on all, as if they had won the whole case. That is one of the problems.

The other problem is, we're in a case right now and we were unable to achieve ... public interest litigant status. We had to raise money; I think the meter is running at just a tad in excess of \$200,000 right now. This is in defense of the tort reform ... law that was passed in '97. And we feel that the ... unfair part about those who are public interest litigants [is] if they win, they win it all, and if they lose, they still win it all. ... The donations that we've collected for our case have been \$25 here, \$50 there, and \$100 someplace else. ... It is just a very one-sided situation. The state chamber was one of the leading groups [that] fought long and hard to achieve Rule 82, and the exception is not fair to those of us who have to abide by Rule 82.

CHAIR ROKEBERG remarked that he is astounded that the state chamber almost has to go to the "bake sale" level to acquire funding. He said he thought big business was the monolith of this state in terms of its deep pockets and its ability to generate money to influence the public process.

MS. LaBOLLE said that is a misconception.

CHAIR ROKEBERG asked Ms. LaBolle whether the environmental community has greater access to funding than the business community does in Alaska for public policy formation.

MS. LaBOLLE answered that that is the perception; however, she would have no way of knowing if there is proof to that.

Number 2215

REPRESENTATIVE BERKOWITZ asked Ms. LaBolle why their effort to achieve public interest litigant status was rejected.

MS. LaBOLLE responded that she doesn't know.

REPRESENTATIVE BERKOWITZ asked whether they tried to get in as an amicus.

MS. LaBOLLE responded that [the Alaska State Chamber of Commerce] is an amicus.

REPRESENTATIVE BERKOWITZ stated that on the face of what it takes to be a public interest litigant, that doesn't qualify. Only a private party can be expected to bring a suit. He stated that if the state were already involved, the public interest litigant would be the plaintiff, not the defendant.

CHAIR ROKEBERG remarked that it doesn't seem fair; with the \$3 million-plus cost, it could be put in the court budget.

Number 2144

REPRESENTATIVE BERKOWITZ noted that these are areas in which folks have won.

CHAIR ROKEBERG stated that perhaps it was only a portion of the claims.

REPRESENTATIVE BERKOWITZ stated that perhaps the payment only cost a portion of the cost.

REPRESENTATIVE KOOKESH stated that he doesn't think those suits would have gone away even if there hadn't been this exception to Rule 82. He said he thinks a lot of those people could afford to bring those cases.

Number 2116

MS. LaBOLLE remarked that [the Alaska State Chamber of Commerce] had found that some groups make a good living on these public interest litigant groups by suing on all sorts of issues within a case, knowing they can't prevail on much. However, if they prevail on one [issue], they've gained enough money to have six more cases.

REPRESENTATIVE BERKOWITZ asked who the groups are that are getting rich off of public interest litigant status.

MS. LaBOLLE answered that the perception is that they are mostly the environmental groups who are opposing resource development.

REPRESENTATIVE BERKOWITZ asked for the names of the groups.

CHAIR ROKEBERG asked Ms. LaBolle whether they would be Trustees for Alaska, Earth Justice, and the Sierra Club.

MS. LaBOLLE responded that "at the risk of being sued for alleging anything in this committee," it is generally believed that those are the sorts of groups that gather funding through the success of their lawsuits.

REPRESENTATIVE BERKOWITZ stated that he understands about perceptions, but he also understands one objective in court is to arrive at some form of truth. If the perception is incorrect, he thinks one way to correct reality is by putting real groups out there that are actually benefiting.

Number 2008

REPRESENTATIVE KOOKESH asked, when balancing what's in the best interest of the public, whether it is in [the state's] best interest to get rid of some of these conservation groups at the expense of the mom and pops.

MS. LaBOLLE responded that it is a difficult situation; however, if the commitment to a principle is there, then everyone should be willing to "pony up" the cost of the litigation. It will provide more basis if [a group] shows that it has gathered support to even bring the litigation.

REPRESENTATIVE KOOKESH asked what would happen to an individual who sees that he or she may owe somebody money down the line.

MS. LaBOLLE noted that court policy establishes public interest litigant status. What is being sought through legislation such as this is legislative intent, as well as having the elected representatives making the decisions as to what the public policy is.

CHAIR ROKEBERG asked, if this is court policy, whether the courts should pay, or whether the members of the bar should go pro bono so that there wouldn't be a discussion of legal fees.

Number 1811

JUDY ERICKSON, Owner, Capital Information Group, came forth to share a personal story. She stated that she and her husband brought a suit against the state for failure to disclose records that had been public for years. She said they were granted public interest litigant status and prevailed on most of their [claims]. Their attorneys got minimal fees; they negotiated with the state over the fees.

MS. ERICKSON remarked that her concern is that they could never have brought a suit against the state if they had thought they would have had to pay. The state could drag it out for years. She pointed out that it is the "small guy" [who is affected].

CHAIR ROKEBERG asked Ms. Erickson whether she understands the frustration exhibited by many of the members over this. In addition, he asked whether there is abuse of this.

MS. ERICKSON responded that she can see their frustration when [the legislature] promotes resource development and someone tries to stop it. She said she thinks in most cases people bring [suits] because they truly believe they're right. She stated:

You're throwing out the baby with the bath water. You're saying, ... "OK, we're going to get rid of the whole." And then what happens to the Dale Bondurants and the Judy Ericksons ... who are fighting for something? ... Pam [LaBolle] said that we should ... get a group going. ... I'm a sole proprietor ... and I don't have a lot of time to go soliciting to get contributions so that I can sue the state.

Number 1649

REPRESENTATIVE COGHILL stated that if a well-funded group had come [to Ms. Erickson] at the time when she was interested in pursuing her interest, it would have given her a lot of publicity. He said he thinks that is what [the legislature] is struggling about - how to filter. If there were people in Alaska who oppose getting information, they would only have the voice of the system. He asked Ms. Erickson whether she sees that as an unfairness.

MS. ERICKSON responded that she brought her case not knowing she had public interest litigant status. She said she first sued against the Hickel Administration, which opposed the status.

When the Knowles Administration came in, they continued the case, but they backed down on the opposition. Most people bring these cases not knowing if they are going to get the status or not. She added that if she had been denied the status, she would have had to reconsider the cost.

CHAIR ROKEBERG stated that he thinks the committee's interest is in the legal factors.

REPRESENTATIVE BERKOWITZ asked which [factor]. He said he keeps hearing about this great legal factor.

REPRESENTATIVE COGHILL responded that they have talked about environmental communities.

REPRESENTATIVE BERKOWITZ stressed that he has to hear names, because the environmental community is "this big nebulous thing." He asked which environmental law firms are doing this.

CHAIR ROKEBERG offered Trustees for Alaska.

REPRESENTATIVE BERKOWITZ agreed that that is an Alaskan-based organization.

CHAIR ROKEBERG offered Earth Justice.

REPRESENTATIVE BERKOWITZ indicated that Earth Justice is not an Alaskan-based organization. Therefore, he said, there is one case that [the environmental] community has had. He said he hardly sees evidence of rampant Alaskan environmental [lawsuits].

Number 1536

REPRESENTATIVE COGHILL remarked:

I think that if you look down through this list ... up through 1993, ... the case could be made. ... And I agree with ... Ms. Erickson - it's a tool that's being used, and sometimes it's not being used the way I personally would the public policy. Looking for the court to use Rule 82 is a way that they could use some discretionary powers.

REPRESENTATIVE OGAN stated that he supports the concept of what the bill is trying to do, but doesn't want to eliminate the Scott Ogans, Judy Ericksons, and Dale Bondurants, the "little

people" that this was designed for, to be able to sue and get some coverage. He said he would like to work on this a little more. He added that he doesn't think there are enough votes to amend the court rules the way the bill is written.

Number 1390

MR. CHURCH responded that he believes Senator Donley would be willing to work on the points that were raised. He said he thinks part of it is addressed within subsection (b)(3), subparagraph (K) of Rule 82. It says that the court can, in awarding attorney fees, consider other equitable factors deemed relative to the court.

MR. CHURCH said he thinks there is a lot of latitude given to the court to look at situations in which an individual versus a large corporation is bringing a public interest litigant case. Almost exclusively, he pointed out, the testimony has been that this will take away public interest litigant cases. He said he wonders if that means people don't trust the courts to make reasonable decisions in evaluating these cases.

MR. CHURCH clarified that the law establishes that Rule 82 applies to all cases, regardless of whether it is a public interest litigant or a victim of a horrendous crime trying to bring a civil suit against a perpetrator. This only gives the courts a baseline to look at an attorney fee award, and it in no way prevents the court from doing what it has done in the past: award full attorney fees.

MR. CHURCH offered some history. When [PILD] was established in 1974, the court said the exception to Rule 82 was designed to encourage plaintiffs to bring issues of public interest before the courts. There was no differentiation between individuals like [Ms. Erickson] and any large organization. Later, in the Anchorage v. McCabe opinion in 1977, Chief Justice Boochever submitted an opinion in opposition. His comments were:

The opinion [regarding the Gilbert v. State on the encouragement issue] seems to take the position that such litigation should be actively encouraged. In my view, our function is not to encourage litigation of any sort.

On the other hand I believe that we should strive to prevent our courts from becoming inaccessible as a

practical matter to those who seek to vindicate rights shared by the public.

MR. CHURCH explained that the chief justice at that time was looking for a balance in the cases. At the same time, a plaintiff shouldn't be encouraged to bring a case because of any perceived award. Certainly, he said, in these cases the only monetary award is to the attorneys.

Number 1151

MR. CHURCH stated that this would still allow the courts to disregard apportionment as in the Dansereau case. In that case, they were public interest litigants who only prevailed on one of three issues. The lower court apportioned the attorney fees, but the supreme court, on an appeal, awarded full attorney fees and said the lower court did not have the right to apportion fees.

CHAIR ROKEBERG asked Mr. Church whether he had looked at the federal Equal Access to Justice Act.

MR. CHURCH answered that he hadn't. The only thing he'd researched was what goes on in other states. Essentially, the other 49 states don't make a differentiation as to public interest litigants. They award attorney fees based on a set percentage or a set dollar value per hour.

CHAIR ROKEBERG asked whether [other states] recognize [PILD].

MR. CHURCH responded that they don't specifically. For example, cases that he reviewed on the West Coast do not.

REPRESENTATIVE BERKOWITZ clarified that the antecedents of public interest litigants is known in common law as *qui tan* suits. In other states, they are also known as private attorney general suits. This is not a uniquely Alaskan feature.

Number 0991

REPRESENTATIVE OGAN stated that he had talked with Gerald Luckhaupt [drafting attorney of Legislative Legal and Research Services], who said, "Alaska is the only state when you lose, you pay attorneys' fees." He asked Mr. Church whether that is correct.

MR. CHURCH answered that he has also heard that statement.

REPRESENTATIVE OGAN remarked that people who are interested in suing are afraid because of that, which is already a disincentive to litigate. This public interest law basically exempts them from that provision.

MR. CHURCH stated that when the state loses or wins a public interest litigant case, it pays the attorney fees.

CHAIR ROKEBERG stated that in the bill packet there is a list of at least 70 public interest litigant cases. He asked Mr. Church whether his office broke those down to see who they were by parties, and what type of representation they had.

MR. CHURCH responded that he has the information that the list was based on, which provides the case name and a description of the case; however, it does not give who the representing attorney was.

Number 0860

REPRESENTATIVE BERKOWITZ pointed out that there were 70 cases in the past ten years; the high year was 1995, with twenty [cases], and the low year was last year, with three. He said it hardly seems a rampant problem.

CHAIR ROKEBERG responded that the committee takes up a lot of issues that only affect a small number of people. They try to avoid the constitutional constraints about special-interest legislation, but many times try to "cure the evils" that may befall a small number of people.

REPRESENTATIVE BERKOWITZ remarked that he is trying to prevent the committee from creating a huge injustice. He said, "Let's move the bill and kill it."

CHAIR ROKEBERG stated that he would like to first see what research has been done, and that Representative Ogan has already agreed to work on the bill.

REPRESENTATIVE BERKOWITZ and CHAIR ROKEBERG spoke simultaneously: Representative Berkowitz moved to report SB 183 out of committee, while Chair Rokeberg announced that he would recess the meeting. [No action was taken on the motion. SB 183 was held over.]

#### **ADJOURNMENT**

Number 0788

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:48 p.m.