

CS FOR SENATE BILL NO. 97(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 5/5/04

Referred: Today's Calendar

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to public interest litigants and to attorney fees and costs and the**
2 **posting of bonds or other security; amending Rules 65, 79, 80, and 82, Alaska Rules of**
3 **Civil Procedure, and Rules 205, 508, and 602, Alaska Rules of Appellate Procedure; and**
4 **providing for an effective date."**

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

6 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
7 to read:

8 FINDINGS, PURPOSE, AND INTENT. (a) The legislature finds that

9 (1) the portion of the judicially created policy relating to the award of
10 enhanced attorney fees and enhanced costs to public interest litigants who prevail in part or in
11 full in a civil action or appeal that they initiate created an unbalanced set of incentives for
12 parties litigating issues that fall under the public interest litigant exception;

13 (2) this imbalance imposed significant costs on the state and municipalities
14 and, to a lesser degree, imposed unbalanced burdens on private citizens and businesses;

1 (3) the legislature responded to these and other problems with the public
2 interest litigant policy through the enactment of ch. 86, SLA 2003;

3 (4) the superior court has declared that certain reforms embodied in ch. 86,
4 SLA 2003, are beyond the legislature's authority or require a two-thirds vote of the
5 legislature; and

6 (5) while the legislature does not endorse the declaration of the superior court,
7 it seeks to avoid a clash with another branch of government by providing for more limited
8 reforms that are clearly within its authority.

9 (b) The purpose of sec. 2 of this Act is to provide for a more equal footing for parties
10 in civil actions and appeals by abrogating the special status given to public interest litigants
11 with respect to the award of attorney fees and costs. It is the intent of the legislature to
12 expressly overrule the decisions of the Alaska Supreme Court in *Dansereau v. Ulmer*, 955
13 P.2d 916 (Alaska 1998); *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544
14 (Alaska 1983); *Thomas v. Bailey*, 611 P.2d 536 (Alaska 1980); *Anchorage v. McCabe*, 568
15 P.2d 986 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974), and their progeny,
16 insofar as they relate to the award of attorney fees and costs to or against public interest
17 litigants in future civil actions and appeals.

18 (c) This Act does not preclude the enactment of, or create an implied repeal of,
19 specific statutes authorizing awards of costs or fees in particular situations, such as in
20 AS 45.50.537.

21 (d) Consistent with (c) of this section, this Act also is intended to enact a specific
22 statute governing the award of costs and fees in certain challenges to decisions of the Alaska
23 Board of Fisheries and the Alaska Board of Game.

24 * **Sec. 2.** AS 09.60.010 is amended by adding new subsections to read:

25 (f) Except as otherwise provided by statute, a court in this state may not
26 discriminate in the award of attorney fees and costs against a party in a civil action or
27 appeal based on the nature of the policy or interest advocated by the party, the number
28 of persons affected by the outcome of the case, whether a governmental entity could
29 be expected to bring or participate in the case, the extent of the party's economic
30 incentive to bring the case, or any combination of these factors.

31 (g) Except as otherwise provided by statute, a court in this state may not

1 discriminate in the award of attorney fees and costs to a party in a civil action or
2 appeal based on the nature of the policy or interest advocated by the party, the number
3 of persons affected by the outcome of the case, whether a governmental entity could
4 be expected to bring or participate in the case, the extent of the party's economic
5 incentive to bring the case, or any combination of these factors.

6 (h) In a civil action or appeal concerning the establishment, protection, or
7 enforcement of a right under the United States Constitution or the Constitution of the
8 State of Alaska, the court

9 (1) shall award, subject to (i) and (j) of this section, full reasonable
10 attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross
11 claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting
12 the right;

13 (2) may not order a claimant to pay the attorney fees of the opposing
14 party devoted to claims concerning constitutional rights if the claimant as plaintiff,
15 counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not
16 prevail in asserting the right, the action or appeal asserting the right was not frivolous,
17 and the claimant did not have sufficient economic incentive to bring the action or
18 appeal regardless of the constitutional claims involved.

19 (i) In calculating an award of attorney fees and costs under (h)(1) of this
20 section,

21 (1) the court shall include in the award only that portion of the services
22 of claimant's attorney fees and associated costs that were devoted to claims concerning
23 rights under the United States Constitution or the Constitution of the State of Alaska
24 upon which the claimant ultimately prevailed; and

25 (2) the court shall make an award only if the claimant did not have
26 sufficient economic incentive to bring the suit, regardless of the constitutional claims
27 involved.

28 (j) The court, in its discretion, may abate, in full or in part, an award of
29 attorney fees and costs otherwise payable under (h) and (i) of this section if the court
30 finds, based upon sworn affidavits or testimony, that the full imposition of the award
31 would inflict a substantial and undue hardship upon the party ordered to pay the fees

1 and costs or, if the party is a public entity, upon the taxpaying constituents of the
2 public entity.

3 * **Sec. 3.** AS 09.68.040 is amended by adding a new subsection to read:

4 (d) A court in this state may not excuse a litigant requesting the entry of a stay
5 or other interlocutory relief from posting a bond or other security to protect the
6 persons who will be adversely affected if the excuse is based on the nature of the
7 policy or interest advocated by the party, the number of persons affected by the
8 outcome of the case, whether a governmental entity could be expected to bring or
9 participate in the case, the extent of the party's economic incentive to bring the case, or
10 any combination of these factors.

11 * **Sec. 4.** AS 16.05 is amended by adding a new section to read:

12 **Sec. 16.05.812. Attorney fees and costs.** In a civil action or appeal
13 challenging a decision, order, regulation, or other action of the Board of Fisheries or
14 the Board of Game,

15 (1) a prevailing private plaintiff shall be entitled to an award of its full
16 actual reasonable attorney fees and costs if the party does not otherwise have an
17 economic incentive to bring the case; and

18 (2) a private plaintiff who does not prevail may not be subject to an
19 award of attorney fees or costs against it unless the party otherwise has an economic
20 incentive to bring the case or the party's claim or claims are frivolous.

21 * **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to
22 read:

23 **INDIRECT COURT RULE AMENDMENTS.** (a) AS 09.60.010(b), (c), (d), and (e),
24 enacted by ch. 86, SLA 2003, have the effect of amending Rules 79 and 82, Alaska Rules of
25 Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by restricting the
26 discretion of courts to enhance awards of attorney fees and awards of costs on the basis of
27 certain factors.

28 (b) AS 09.60.010(f), (g), (h), (i), and (j), added by sec. 2 of this Act, and
29 AS 16.05.812, added by sec. 4 of this Act, have the effect of amending Rules 79 and 82,
30 Alaska Rules of Civil Procedure, and Rule 508, Alaska Rules of Appellate Procedure, by
31 restricting the discretion of courts to enhance awards of attorney fees and awards of costs on

1 the basis of certain factors.

2 (c) AS 09.68.040(c), enacted by ch. 86, SLA 2003, has the effect of amending Rules
3 65 and 80, Alaska Rules of Civil Procedure, and Rules 205 and 602, Alaska Rules of
4 Appellate Procedure, by limiting the court's discretion related to the posting of bonds or other
5 security by certain parties.

6 (d) AS 09.68.040(d), added by sec. 3 of this Act, has the effect of amending Rules 65
7 and 80, Alaska Rules of Civil Procedure, and Rules 205 and 602, Alaska Rules of Appellate
8 Procedure, by limiting the court's discretion related to the posting of bonds or other security
9 by certain parties.

10 * **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

12 APPLICABILITY. Sections 2 - 5 of this Act apply to civil actions and appeals filed
13 on or after the effective date of this Act.

14 * **Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the
17 application of it to any person or circumstance is held to be invalid, the remainder of this Act
18 and the application to other persons or circumstances are not affected except that if

19 (1) AS 09.60.010(g) is held by the Alaska Supreme Court to be invalid or is
20 found to not effect a change to a court rule as provided in sec. 5 of this Act, then
21 AS 09.60.010(h), (i), and (j), AS 09.68.040(d), and AS 16.05.812 are not severable;

22 (2) the portion of AS 09.60.010(b), enacted by ch. 86, SLA 2003, relating to
23 awards of attorney fees to public interest litigants is held by the Alaska Supreme Court to be
24 invalid or is found to not effect a change to a court rule as provided in sec. 5 of this Act, then
25 AS 09.60.010(c), (d), and (e), AS 09.68.040(c), enacted by ch. 86, SLA 2003, and
26 AS 16.05.812 are not severable.

27 * **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 RETROACTIVITY. Sections 5(a) and (c) of this Act are retroactive to September 11,
30 2003.

31 * **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to

1 read:

2 CONDITIONAL EFFECT. Sections 1 - 8 of this Act take effect only if sec. 5 of this
3 Act receives the two-thirds majority vote of each house required by art. IV, sec. 15,
4 Constitution of the State of Alaska.

5 * **Sec. 10.** This Act takes effect immediately under AS 01.10.070(c).