

CS FOR SENATE BILL NO. 97(JUD) am(ct rule fld)(efd fld)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Amended: 5/6/04

Offered: 5/5/04

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."**

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

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

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

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

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

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

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

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

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

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

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

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

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

29 (g) Except as otherwise provided by statute, a court in this state may not
30 discriminate in the award of attorney fees and costs to a party in a civil action or
31 appeal based on the nature of the policy or interest advocated by the party, the number

1 of persons affected by the outcome of the case, whether a governmental entity could
2 be expected to bring or participate in the case, the extent of the party's economic
3 incentive to bring the case, or any combination of these factors.

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

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

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

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

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

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

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

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

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

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

10 **Sec. 16.05.812. Attorney fees and costs.** In a civil action or appeal
11 challenging a decision, order, regulation, or other action of the commissioner, the
12 department, the Board of Fisheries, or the Board of Game regarding subsistence use of
13 fish and game,

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

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

20 * **Sec. 5.** (This section did not receive the two-thirds majority vote of the senate required by
21 art. IV, sec. 15, Constitution of the State of Alaska.)

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

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

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

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

31 (1) AS 09.60.010(g) is held by the Alaska Supreme Court to be invalid or is

1 found to not effect a change to a court rule as provided in sec. 5 of this Act, then
2 AS 09.60.010(h), (i), and (j), AS 09.68.040(d), and AS 16.05.812 are not severable;

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

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

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

12 * **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to
13 read:

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