

ALASKA STATE LEGISLATURE
SENATE COMMUNITY AND REGIONAL AFFAIRS STANDING COMMITTEE

February 9, 2005

1:34 p.m.

MEMBERS PRESENT

Senator Gary Stevens, Chair
Senator Bert Stedman
Senator Johnny Ellis

MEMBERS ABSENT

Senator Thomas Wagoner
Senator Albert Kookesh

COMMITTEE CALENDAR

SENATE BILL NO. 86

"An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 86

SHORT TITLE: STATE/MUNI LIABILITY FOR ATTORNEY FEES

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/31/05	(S)	READ THE FIRST TIME - REFERRALS
01/31/05	(S)	CRA, JUD
02/09/05	(S)	CRA AT 1:30 PM BELTZ 211

WITNESS REGISTER

Scott Brandt-Erichsen, Attorney
Ketchikan Gateway Borough
344 Front Street
Ketchikan, Alaska 99901

POSITION STATEMENT: Suggested amendment to SB 86

Chris Kennedy
Assistant Attorney General
Department of Law
PO Box 110300

Juneau, AK 99811-0300

POSITION STATEMENT: Explained SB 86

Dale Bondurant

Soldotna, AK

POSITION STATEMENT: Opposes SB 86

ACTION NARRATIVE

CHAIR GARY STEVENS called the Senate Community and Regional Affairs Standing Committee meeting to order at [1:34:44 PM](#). Present were Senators Ellis, Stedman and Chair Gary Stevens.

SB 86-STATE/MUNI LIABILITY FOR ATTORNEY FEES

CHAIR GARY STEVENS announced SB 86 to be up for consideration. He noted that HB 117 is the companion bill and it had referrals to the House Community and Regional Affairs and State Affairs Committees.

CHAIR GARY STEVENS asked Mr. Brandt-Erichsen to begin his testimony.

[1:36:10 PM](#)

SCOTT BRANDT-ERICHSEN, Ketchikan Gateway Borough attorney, stated that SB 86 addresses a subject that he has commented on previously and the current version is superior to previous efforts. The question of public interest litigant attorney's fees or the possibility of full award of attorney's fees against public entities can be problematic because a community could be caught in middle, he said.

He cited a case when he worked for the Municipality of Anchorage and was defending a decision the city clerk had made. In that case there were public interest litigants on both sides, which assured that the city wouldn't recover any fees if they won, and if they lost they were likely to have to pay one party or the other. They did win the case and didn't have to pay fees, but were unsuccessful when they tried to recover incurred fees. The city argued for a change in the law, but the effort was unsuccessful.

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Currently, he said, there is disparity in the incentive to settle a case. If a party has more than one claim and one might

be successful, if it would otherwise qualify for the public interest litigant status there is little incentive to keep costs to a minimum and resolve the case. If full cost recovery is likely it could be used as a money making proposition.

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MR. BRANDT-ERICHSEN referenced page 2, line 5 and suggested a wording change; delete "cost or" and insert "attorney's". He made the point that the bill doesn't address costs; it addresses attorney's fees so the change would provide continuity and maintain clarity. "The distinction between awards of costs and attorney's fees is appropriate so the awards of costs are not affected, but awards of attorney's fees would be limited by this section except where there's an explicit authorization for the award of attorney's fees in the amount greater than that which would be provided in this section," he explained.

[1:41:04 PM](#)

CHAIR GARY STEVENS asked what "costs or fees" would include.

[1:41:25 PM](#)

MR. BRANDT-ERICHSEN said the court has applied the term "costs" several ways in statutes. Sometimes it includes attorney's fees, but not always. Under Rule 79, parties generally recover the full amount of money expended for filing fees, process fees and depositions while attorney's fees would be the time an attorney bills for providing the service. He suggested the change because the statute addresses limiting attorney's fees and not costs.

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CHAIR GARY STEVENS said the committee might want to consider amending the bill.

Finding no further questions for Mr. Brandt-Erichsen, he asked Mr. Kennedy to comment.

[1:42:56 PM](#)

CHRIS KENNEDY, assistant attorney general, spoke via teleconference and apologized for missing the first part of the meeting. He asked if anyone had formally introduced the bill.

CHAIR GARY STEVENS asked him to present the legislation.

[1:43:41 PM](#)

MR. KENNEDY said in Alaska civil suits, the losing party traditionally pays at least part of the winning litigants attorney's fees. The award usually isn't more than 20 percent of a money judgment and for non-money judgments it's usually not more than 30 percent of the winning party's fees.

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SB 86 addresses enhanced fee awards against state and local governments, which are the fees over and above normal partial compensation. Enhanced fees occur in the context of public interest litigation where the court determines a lawsuit advances what the court views as strong public policies. "A government can be ordered to pay full fees to a plaintiff even when the government prevails on most issues in the case," he said. For example even though his office successfully defended all but two provisions of the 1999 case, Alaska Civil Liberties Union (ACLU) versus State, the Alaska court awarded the ACLU full attorney's fees.

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SB 86 provides that for civil actions or appeals, the state and municipalities are not liable to pay more than 20 percent of the money judgment as attorney's fee to the other side. For civil actions in which no money judgment is recovered, liability is capped at 30 percent of reasonable actual attorney's fees incurred by the winning party on the issues on which they prevailed. If the case doesn't go to trial, the cap is 20 percent of the same amount.

For appeals in which no money judgment is recovered, state and municipality liability for attorney's fees is capped at 20 percent of the reasonable actual attorney's fees incurred by the prevailing side on the issues on which they prevailed

These limitations don't apply: when statutes apply differently; when the court awards attorney's fees as a sanction for misconduct by the government or its attorney; and in cases that involve eminent domain or condemnation.

SB 86 was introduced to protect the state treasury and to give the Legislature policy choices regarding subsidizing litigation against the state with public funds, he said.

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The unfair competition statute cited in the bill is an example in which immunity is waived and another is the public interest litigant statute enacted in 2003. The latter is under legal challenge, but would be an exception to SB 86 if it survives.

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"Because this bill relates to the Legislature's fundamental control over the state's fiscal matters and over suits against municipalities, it's not a change of rules and doesn't require a 2/3 vote. It's similar to the other immunities that are contained in chapter 65 of Title 9," he concluded.

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CHAIR GARY STEVENS asked whether he had any comment regarding Mr. Brandt-Erichsen's suggestion to amend.

MR. KENNEDY replied his office had no objection to the suggestion and the explanation made sense. However, he would suggest inserting the word, "attorney" in the singular because the bill refers to the fees in that way.

CHAIR GARY STEVENS noted there were no questions and thanked Mr. Kennedy for his comments. He then called Mr. Bondurant to give testimony.

[1:50:27 PM](#)

DALE BONDURANT, Soldotna resident, testified via teleconference. He said he has placed his property under a conservation easement and he opposes SB 86.

[1:51:04 PM](#)

MR. BONDURANT read his remarks into the record citing both the Alaska and the U.S. Constitutions.

[1:53:51 PM](#)

CHAIR GARY STEVENS thanked Mr. Bondurant for expressing his views and reminded him that he might want to track HB 117 as well.

There were no questions and no further testimony.

He announced that he didn't intend to move the bill, but he was willing to address the suggested amendment if the committee so desired.

[1:54:32 PM](#)

SENATOR BERT STEDMAN motioned to delete the words "costs or" on page 2, line 5 and insert the word "attorney". There being no objection, it was so ordered.

CHAIR GARY STEVENS announced he would hold the amended SB 86 in committee and that a committee substitute would be prepared.

There being no further business to come before the committee, Chair Gary Stevens adjourned the meeting at [1:54:51 PM](#).