

**ALASKA STATE LEGISLATURE**  
**SENATE LABOR AND COMMERCE STANDING COMMITTEE**

March 31, 2015

1:59 p.m.

**MEMBERS PRESENT**

Senator Mia Costello, Chair  
Senator Cathy Giessel, Vice Chair  
Senator Kevin Meyer  
Senator Gary Stevens  
Senator Johnny Ellis

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

CONFIRMATION HEARINGS

Commissioner, Department of Commerce, Community and  
Economic Development

Chris Hladick - Juneau

- CONFIRMATION ADVANCED

Real Estate Commission

Cynthia Cartledge - Anchorage

- CONFIRMATION ADVANCED

Alcoholic Beverage Control Board

Tom Manning - Juneau

- CONFIRMATION ADVANCED

Regulatory Commission of Alaska

Stephen McAlpine - Anchorage

- CONFIRMATION ADVANCED

SENATE BILL NO. 76

"An Act relating to private actions and remedies against real estate licensees for licensee relationships, disclosures, and

activity before January 1, 2005; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 77

"An Act relating to the books and records of a corporation, including the nonapplication of certain provisions to a state bank, the waiver or alteration of certain provisions by shareholder agreements, and the application of certain provisions to shareholder voting trusts; and amending Rule 26, Alaska Rules of Civil Procedure."

- SCHEDULED BUT NOT HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 76

SHORT TITLE: REAL ESTATE BROKERS; LIABILITY

SPONSOR(S): JUDICIARY

|          |     |                                   |
|----------|-----|-----------------------------------|
| 03/18/15 | (S) | READ THE FIRST TIME - REFERRALS   |
| 03/18/15 | (S) | L&C, JUD                          |
| 03/31/15 | (S) | L&C AT 1:30 PM BELTZ 105 (TSBldg) |

**WITNESS REGISTER**

CYNTHIA CARTLEDGE, Appointee

Real Estate Commission

Anchorage, Alaska

**POSITION STATEMENT:** Testified as an appointee to the Real Estate Commission

TOM MANNING, Appointee

Alcoholic Beverage Control (ABC) Board

Juneau, Alaska

**POSITION STATEMENT:** Testified as an appointee to the Alcoholic Beverage Control Board

STEPHEN MCALPINE, Appointee

Regulatory Commission of Alaska

Anchorage, Alaska

**POSITION STATEMENT:** Testified as an appointee to the Regulatory Commission of Alaska

CHRIS HLADICK, Commissioner designee

Department of Commerce, Community and Economic Development  
Juneau, Alaska

**POSITION STATEMENT:** Testified as Commissioner designee for DCCED.

GENEVIEVE WOJTUSIK, Staff  
Senator Lesil McGuire  
Juneau, Alaska

**POSITION STATEMENT:** Introduced SB 76 on behalf of the sponsor.

JEFFREY PICKETT, Staff Counsel  
Senate Judiciary Committee  
Anchorage, Alaska

**POSITION STATEMENT:** Delivered a sectional analysis of SB 76.

HOWARD S. TRICKEY, Attorney  
Anchorage, Alaska

**POSITION STATEMENT:** Described the history of the lawsuit leading to SB 76.

ERROL CHAMPION, Chair  
Legislative Issues Committee  
Alaska Association of Realtors (AAR)  
Juneau, Alaska

**POSITION STATEMENT:** Testified in support of SB 76.

## **ACTION NARRATIVE**

[1:59:00 PM](#)

**CHAIR MIA COSTELLO** called the Senate Labor and Commerce Standing Committee meeting to order at 1:59 p.m. Present at the call to order were Senators Ellis, and Chair Costello. Senators Stevens and Giessel arrived soon thereafter.

**CONFIRMATION HEARINGS**  
**Real Estate Commission**  
**Alcoholic Beverage Control Board**  
**Regulatory Commission of Alaska**

[2:00:02 PM](#)

**CHAIR COSTELLO** announced the first order of business would be confirmation hearings for appointments to boards and commissions. She explained the procedure and noted that that the board rosters, fact sheets, and appointee resumes were in the packets.

CHAIR COSTELLO recognized Ms. Cartledge and asked her to tell the committee about herself and her interest in serving on the Real Estate Commission.

[2:00:40 PM](#)

CYNTHIA CARTLEDGE, Appointee, Real Estate Commission, public seat, said she's an attorney from Anchorage who has been practicing with the same firm since 1988. She was appointed to the board in November 2013 and she's found the work engaging and challenging. She serves as a public member and believes she adds value to the board.

CHAIR COSTELLO asked what she sees as the main challenges facing the commission.

MS. CARTLEDGE offered that the challenges stem from the statutes and regulations that govern the profession. The industry is changing and the laws need to reflect those changes. She highlighted an example of the ongoing work on consumer disclosure information to help the general public understand what real estate agents do and what their responsibilities are.

CHAIR COSTELLO opened and closed public testimony and thanked Ms. Cartledge for being willing to continue to serve.

[2:04:08 PM](#)

CHAIR COSTELLO asked Mr. Manning to tell the committee about himself and his interest in serving on the Alcoholic Beverage Control Board.

[2:04:37 PM](#)

TOM MANNING, Appointee, Alcoholic Beverage Control (ABC) Board, said he recently retired from teaching and has been a partner in a liquor store for about 28 years. His interest in serving on the board stems from the work he's done through the CHARR organization on the Title 4 rewrite. He has some ideas and concerns about the ways that education can become a component in dealing with underage drinking.

CHAIR COSTELLO asked what he sees as the main challenge of the ABC Board.

MR. MANNING said he'd like to see an education process that goes beyond conversations about fines to address the issue of underage drinking.

[2:07:19 PM](#)

CHAIR COSTELLO opened and closed public testimony and thanked Mr. Manning.

CHAIR COSTELLO asked Mr. McAlpine to tell the committee about himself and his interest in serving on the Regulatory Commission of Alaska.

[2:07:45 PM](#)

STEPHEN MCALPINE, Appointee, Regulatory Commission of Alaska, said he's an active attorney who has maintained his bar membership for over 35 years. Since he joined the commission he has read over 1,200 pages of material, sat in numerous adjudications, and either watched or participated in three hearings. He's attended two training sessions and is actively involved in preparing for an upcoming rate case.

[2:08:51 PM](#)

SENATOR STEVENS asked how much time this position will take.

MR. MCALPINE replied it's a fulltime job for virtually everyone involved. He described the work as a great intellectual experience, and offered his suspicion that the challenge to attract and retain engineers relates to the relatively low pay compared to private industry.

SENATOR STEVENS thanked former lieutenant governor McAlpine for his long and continued dedication to the state.

SENATOR GIESSEL commented that she would expect the RCA positions to be a fulltime job; they're range 27salaried positions.

CHAIR COSTELLO asked if the legislature should be aware of upcoming regulatory issues.

MR. MCALPINE responded that the legislature should be aware that despite the fact that there are multiple utilities throughout the state, we are but one small utility. The RCA is a ratemaking body that also has to ensure sustainability and reliability at the utilities. He discussed challenges going forward and expressed concern that a utility might be adversely affected given that the Environmental Protection Agency (EPA) is looking at clean air.

[2:13:33 PM](#)

SENATOR ELLIS thanked former lieutenant governor McAlpine for being willing to serve on the RCA and attested to his intellect,

his knowledge of the state and issues relevant to the RCA, and his strong work ethic.

[2:14:34 PM](#)

CHAIR COSTELLO stated that this concludes the committee's consideration of the Governor's appointments to state boards and commissions. She thanked the members for reviewing the resumes and the appointees for being willing to serve the state.

She stated, "In accordance with AS 39.05.080, the Labor and Commerce Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration." Finding no objection, it was so ordered.

[The intention of the chair, and the paperwork the committee signed, was to forward the board and commission appointments from the hearings on February 24, March 12, March 17, March 19, and March 31.]

[2:15:23 PM](#)

At ease

**CONFIRMATION HEARING Commissioner, Department of Commerce,  
Community and Economic Development (DCCED)**

[2:17:00 PM](#)

CHAIR COSTELLO reconvened the meeting and announced the confirmation hearing of Chris Hladick as Commissioner of Department of Commerce, Community and Economic Development (DCCED).

[2:17:30 PM](#)

CHRIS HLADICK, Commissioner designee, Department of Commerce, Community and Economic Development (DCCED), reviewed his resume. He's served as a city manager for 25 years and his record shows that he likes to get things done.

SENATOR STEVENS commented that it's natural that a city manager would be considered for this position. He expressed appreciation for his service.

[2:19:37 PM](#)

SENATOR GIESSEL noted that he would be the designee for the AGDC board. She asked if he's kept abreast of the gas pipeline project.

COMMISSIONER HLADICK replied he's been studying and looks forward to the first meeting. "It's an important project for the state and we need to figure out how to get it done."

SENATOR GIESSEL commented on his efforts to get natural gas to Unalaska.

COMMISSIONER HLADICK described it as a natural evolution once you figure out the supply chain. "I think you have to go beyond the ISO tanks to get to long-term storage."

SENATOR GIESSEL highlighted that Senate Bill 138 provides for distributing the gas beyond the main corridor of the state. She then asked him to elaborate on his understanding of the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) issues.

COMMISSIONER HLADICK explained that there is a lot of environmental scrutiny on projects in Unalaska so he's had considerable experience dealing with federal agencies on NEPA and ESA matters.

[2:22:15 PM](#)

SENATOR GIESSEL thanked him for being willing to serve.

CHAIR COSTELLO asked him to talk about his vision for diversifying the economy.

COMMISSIONER HLADICK said the first step is to locate sources of cheap electricity.

SENATOR STEVENS asked for examples of value added in the products that are produced in Alaska.

COMMISSIONER HLADICK said there's a lot being done now with value-added seafood. He mentioned that the Alaska Seafood Marketing Institute (ASMI), in particular, has done a great job working on that issue.

SENATOR STEVENS asked if there are options to do processing in Alaska rather than shipping the seafood to China.

COMMISSIONER HLADICK replied it's dependent on low overhead costs, which goes back to finding sources of cheap energy. He noted that the effort in Anchorage several years ago failed.

[2:25:47 PM](#)

CHAIR COSTELLO asked what boards and commissions he'll sit on as commissioner and if he plans to send a designee or be involved personally.

COMMISSIONER HLADICK said it would be impossible to attend every meeting and still run the department. He and the deputy commissioners will split the responsibilities. He will serve on the Railroad Board, the Alaska Marine Pilot Board, and the Alaska Gasline Development Corporation. Fred Parady and Jon Bittner will sit on the others.

CHAIR COSTELLO asked if he's had time to look at the progress the legislature has made on moving forward on the AGDC plan.

COMMISSIONER HLADICK replied he's followed the project closely and is now reviewing the minutes and bylaws trying to get up to speed on what's transpired.

CHAIR COSTELLO asked why the governor solicited him for the position.

COMMISSIONER HLADICK explained that he showed the governor what they'd accomplished when he visited in October, and he must have liked what he saw in Unalaska.

CHAIR COSTELLO asked what she would see if she visited Unalaska.

COMMISSIONER HLADICK replied it's a friendly, vibrant, multi-cultural working community. There's no unemployment and the school system generally scores in the top three ever year.

[2:29:24 PM](#)

CHAIR COSTELLO opened and closed public testimony.

She stated that "In accordance with AS 30.05.080, the Labor and Commerce Committee reviewed the following and recommends the appointments be forwarded to a joint session for consideration."

Finding no objection, the name Chris Hladick was forwarded to the full body for further consideration as Commissioner of the Department of Commerce, Community and Economic Development.

[2:29:49 PM](#)

At ease

**SB 76-REAL ESTATE BROKERS; LIABILITY**

2:32:19 PM

CHAIR COSTELLO reconvened the meeting and announced the consideration of SB 76. "An Act relating to private actions and remedies against real estate licensees for licensee relationships, disclosures, and activity before January 1, 2005; and providing for an effective date."

2:32:45 PM

GENEVIEVE WOJTUSIK, Staff, Senator Lesil McGuire, introduced SB 76 speaking to the following sponsor statement: [Original punctuation provided.]

Under AS 08.88.396, a real estate licensee acting before January 1, 2005 was authorized to act as both a buyer's and a seller's representative, but only after the licensee informed both the buyer and the seller of his or her dual agency and obtained written consent from both. The statute, as originally enacted, did not specify remedies if a real estate licensee (or agent) violated its provisions.

In 2003, the Alaska Legislature acted to correct the remedies-omission. The Legislature was concerned that without specifying its intent with respect to appropriate remedies in the case of a violation, a court might feel compelled to impose the potentially business-ending remedy of forfeiture of real-estate sales commissions. The Legislature was particularly concerned that this could occur in cases even where the plaintiffs had suffered no actual damages.

In order to address this concern, the Legislature enacted House Bill 257, legislation that fixed this ambiguity by retroactively limiting the remedy for violations of AS 08.88.396 to actual damages. [House Bill] 257 passed the Legislature, was signed into law and has been found constitutional by the Alaska Supreme Court.

Despite the enactment of House Bill 257, and despite the Alaska Supreme Court's determination that the law is constitutional, questions have arisen regarding the Legislature's intent in amending AS 08.88.396. Senate Bill 76 is intended to make clear the Legislature's intent when it amended AS 08.88.396 in 2003 by specifying and clarifying that the "actual damages" limitation of the 2003 amendment applies to all claims

that are based upon or arise out of allegations of violations of AS 08.88.396.

The clarification is necessarily retroactive because the Legislature enacted House Bill 29 in 2004 which, among other things, specified that AS 08.88.396 ceased to apply to real estate transactions as of January 1, 2005; and the Legislature desires to ensure that any claims pre-dating the 2005 effective date of House Bill 29 are appropriately subject to the intent of its 2003 enactment of House Bill 257.

The retroactivity of the bill is constitutional, as provided in both U.S. Supreme Court and Alaska Supreme Court decisions.<sup>1</sup> This bill preserves the right of purchasers of real estate to seek redress for actual damages under AS 08.88.396 while ensuring that the Legislature's intent that only actual damages be awarded is recognized by courts hearing cases arising within the relevant time periods.

[2:35:45 PM](#)

JEFFREY PICKETT, Staff Counsel to the Senate Judiciary Committee, Anchorage, Alaska, proved the following sectional analysis:

Section 1 amends the wording of AS 08.88.396(e) which, for real estate transactions that occurred before January 1, 2005, limits civil litigation and other remedies for the failure of a real estate licensee to comply with certain requirements concerning relationships with and disclosures to buyers and sellers.

Section 2 provides that the bill applies to a real estate transaction that occurred on or before the bill's effective date, and to a court action related to such a transaction pending on the effective date of bill.

Section 3 makes sec. 1 of the bill retroactive to January 1, 1991.

Section 4 makes the bill effective immediately.

[2:37:20 PM](#)

SENATOR MEYER joined the committee.

SENATOR GIESSEL asked if it's possible to make a law retroactive if there's an ongoing case.

MR. PICKETT explained that there is case law that says a law may be retroactive in a pending case so long as there is not a final judgment. The U.S. Supreme Court has found that this does not violate the separation of powers, and that type of action has been found constitutional.

SENATOR GIESSEL asked if there have been any cases that this bill would impact.

MR. PICKETT answered yes; there's a case from 2002. In 2003 the legislature amended the statute to limit any remedy to actual damages. The litigants continued their motion practice and in 2005 Judge Hensley ruled that the amendment to AS 08.88.396 was a constitutional amendment and it limited remedies only to actual damages. In 2007 another judge affirmed Judge Hensley's 2005 finding. In 2010 another judge followed the theory that says there is a common law duty among real estate licensees to disclose if they're acting in a dual role. Because it is common law duty and not statutory duty, the remedy of forfeiture is available.

SB 76 clarifies that the remedy of forfeiture is not available to any action arising out of a failure to disclose dual agency.

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CHAIR COSTELLO asked what is at stake and what the bill seeks to resolve.

MR. PICKETT explained that the issue is what penalties might be imposed on a real estate licensee who did not disclose that he/she was acting in a dual capacity. His understanding is that prior to 2002, real estate licensees didn't comply with the requirement to disclose because there wasn't a penalty for not doing so. He surmised that there were a lot of back-dated disclosures following the lawsuit. The purpose was to provide the required notice and, in situations where nobody was harmed by the failure to disclose, to remove the threat of forfeiture of commissions.

CHAIR COSTELLO asked if part of the vagary is that the law neglected to say when the disclosure had to occur.

MR. PICKETT said he didn't know what the timing requirements were in 2002.

[2:44:08 PM](#)

CHAIR COSTELLO asked what significance it has to change the language on page 1, line 6, striking the term "for" and replacing it with "arising out of."

MR. PICKETT replied the term "arising out of" has a much broader meaning so any claim arising out of a failure to disclose dual agency now would come within the remedy restriction of actual damages.

CHAIR COSTELLO questioned how this legislation clarifies the intent of the legislature when the courts have been unable to do so.

MR. PICKETT opined that the "arising out of" language is broad enough to encompass common law claims. He acknowledged that it would ultimately be decided by a judge.

CHAIR COSTELLO commented on the court reviewing the public record to determine the intent of the legislature.

SENATOR ELLIS suggested the committee hear from Mr. Howard Trickey who could provide the history of the matter in layman's terms.

CHAIR COSTELLO opened public testimony.

[2:48:09 PM](#)

HOWARD S. TRICKEY, Attorney, related that he testified in 2003 about why it was necessary for the real estate industry to limit damages for the statutory violation to actual damages. At the time the industry was potentially exposed to \$70 million for forfeiture and disgorgement of all commissions that may have been earned over a three-year period by people in the industry who were involved in dual-agency transactions. The law permitted dual agency transactions once there was a disclosure and written consent was obtained. The industry practice at the time was to make the written and oral disclosures at the time the properties were being showed to a potential buyer. There were written disclosure forms that disclosed "I'm an agent for the seller" or "I'm an agent for this buyer" and then written consents were obtained both from the buyer and the seller. It was a buyer's market so when someone showed up at a residence that was being shown by a listing agent, offers were often made on the spot.

He said he's always characterized the violation that's asserted in the lawsuit as a technical timing violation. The industry made the disclosures and obtained the written consents, but there was confusion because the statute did not specify the timing for making those disclosures. That technical timing violation was exploited in the lawsuit and the threat to the industry was forfeiture of all commissions earned. It was a no harm no foul situation but aggregating claims through a class action creates a bet the farm type of case that puts the entire business at risk. The claim that's being asserted is for \$30 million, which is what led the legislature in 2003 to limit the remedy to actual damages.

MR. TRICKEY said this matter is before this committee again because a judge who didn't like the statute came up with a creative decision that allows the use of the statutory violations to support the remedy of a breach of a common law duty. The proof is based on identifying the problems that the legislature originally addressed in House Bill 257, which simply had to do with the timing of the written disclosures and the timing of obtaining the written consent. SB 76 seeks to bring the needed clarification.

He explained that the reason for using the term "arising out of" is that it's broader than the original statute but it's broad only in limiting remedies for the violation of the statute to actual damages. It doesn't take away any other existing claim. This remedy for violating the statute is actual damages.

Addressing Senator Giessel's question, he explained that it's constitutional because there is no contractual right to the remedy of punitive damages or to the remedy of forfeiture. There isn't any vested right because there is no final judgment in the case. When the legislature first passed tort reform and capped punitive damages, there were pending lawsuits that applied. The Alaska Supreme Court ruled that it was not an improper and unconstitutional retroactive application because no one had a judgement entitling them to damages. It's a matter of public policy for the legislature not the courts because it's a penalty, not a remedy for actual damages that someone has suffered.

The industry supports the legislation.

[2:56:26 PM](#)

CHAIR COSTELLO asked if he's testifying as a representative of the defendants or as a member of the public.

MR. TRICKEY confirmed he is being paid to address the issues as part of the representation he undertook years ago.

[2:57:02 PM](#)

ERROL CHAMPION, Chair, Legislative Issues Committee, Alaska Association of Realtors (AAR), stated support for SB 76 and noted that he submitted a letter stating the reasons.

CHAIR COSTELLO announced that she would hold SB 76 in committee and public testimony would remain open.

[2:58:14 PM](#)

There being no further business to come before the committee, Chair Costello adjourned the Senate Labor and Commerce Standing Committee meeting at 2:58 p.m.