

SB

183

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT

APR 23 2001

SENATE FINANCE
COMMITTEE

DATE: April 9, 2001

FURTHER:

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 23 April 01

Finance Committee considered SENATE BILL NO. 183

ATTY FEES: APPORTIONMENT/PUBLIC INTEREST LITIGANT

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

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
Law	4/17/01		✓	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>			X	
<i>[Signature]</i>			⊗	
<i>[Signature]</i>	✓			
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>			✓	

APR 23 2001

SENATE FINANCE
COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: SB 183
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to public interest litigants and to BRU Civil Division
attorney fees; and amending Rule 82, ... Rules of Civil Procedure." Component Deputy Attorney General's Office
Sponsor Senate Finance Committee
Requester Senate Finance Committee Component No. 2205

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
Under Rule 82, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.

SB 183 requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson Phone 465-5370
Division: Attorney General's Office Date/Time 4/17/01 11:00 AM
Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 4/17/01
Agency: Department of Law

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

BILL NO. SB 183

ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY96, \$143.1; FY97, \$134.3; FY98, \$186.4; FY99, \$413.9; FY00, \$34.7. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (<http://www.ajc.state.ak.us/Reports/atyfee.pdf>) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if SB 183 passes.



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

SPONSOR STATEMENT

SENATE BILL 183

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

SB 183 makes public interest litigants subject to Court Civil Rule 82 regarding judgments for attorneys' fees, thus adopting a uniform standard for all litigants. Courts would continue to have the authority to award higher or full attorney fees when a court felt exceptional circumstances justified a higher award.

Through Alaska Supreme Court decisions, a doctrine known as the *Public Interest Litigant Doctrine* (PILD) has been established. This doctrine is not codified in law or set out in any court procedure. The courts apparently created the PILD as social policy to encourage private plaintiffs to advocate for issues that are deemed by the court to be "in the public interest."

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

PILD creates an exception to Civil Rule 82 by allowing the courts to classify a party as a "public interest litigant", thus allowing said party to collect **full**, reasonable, actual attorney fees if they prevail. And if they lose, the public interest litigant pays **none** of the prevailing party's attorney fees. Not even the innocent victims of violent crime who bring subsequent civil suit against criminals are allowed such generous attorney fees.

Additionally, SB 183 prevents legal fees 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 of several points. This problem was created by the recent Alaska Supreme Court Decision *Dansereau v. Ulmer* 955 P.2d 916 1998. Prior to *Dansereau v. Ulmer* lawyer fees for public interest litigants were only awarded for issues on which they prevailed. *Dansereau v. Ulmer* sets a precedent that allows courts to award the lawyer fees for all contested points even if the public interest litigants only prevailed on one point.

SB 183 includes a provision that gives the courts the flexibility to continue to follow the *Dansereau* case and/or award higher or full attorney fees when the court finds exceptional circumstances to justify a higher award.

SB 183 seeks to prevent awards of lawyer fees of \$150 or more an hour to special interest litigating organizations that have staff attorney's on salary for \$30 - \$40 per hour. When organizations are awarded such unnecessarily high lawyer fees they are able to utilize the embellished award to not only pay their in house lawyers but to also finance political and advocacy operations. It is wrong that the current system is being exploited in this way.

The Senate Finance Committee introduced SB 183 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 claims paid in recent years this legislation could save the state hundreds of thousands of dollars annually.

A similar bill passed the State Senate in 2000. However, the legislation, sponsored by the Senate Finance Committee, failed to get a hearing in the House of Representatives.



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Senate Finance Committee

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State Capitol
Juneau, Alaska 99801-1182

Sectional Analysis

SB 183

Section 1. Amends AS 09.60.010 by providing that attorney fees may only be awarded to or against a public interest litigant as provided in Rule 82(g), Alaska Rules of Civil Procedure, as that rule reads on the effective date of this Act.

Section 2. Adds a new paragraph to Rule 82(b), A.R.C.P., that if the court chooses to vary an award of attorney fees beyond the amounts provided for in (b)(1) or (2), then the court is required to apportion attorney fees only on an issue that the party prevailed upon. However, if the court finds exceptional circumstances to be present, an increased award of attorney fees can be made without apportionment by issue.

Section 3. Adds a new subsection that awards attorney fees for or against a public interest litigant in the same manner as a non public interest litigant.

Section 4. Provides that section 1 only takes effect if sections 2 and 3 receive a two-thirds majority vote as required for court rule changes under article IV, section 15 of the Constitution for the State of Alaska.

DD/bc



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

TALKING POINTS

SENATE BILL 183

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

- SB 183 simply says that all PIL litigants are treated like all other civil litigants, unless the court finds exceptional circumstances justify a higher award of attorney fees.
- SB 183 prevents legal fees being awarded to a litigant for claims on which they did not prevail, unless the courts finds exceptional circumstances.
- SB 183 makes so called “public interest litigants” subject to Court Civil Rule 82 regarding judgments for attorneys’ fees, thus adopting a uniform standard for all litigants. For example, victims of crimes cannot even be awarded full attorney fees—just the allowable fees established in Rule 82.
- Through Alaska Supreme Court decisions, a doctrine known as the *Public Interest Litigant Doctrine* (PILD) has been established. This doctrine is not codified in law or set out in any court procedure.
- The courts apparently created the PILD as social policy to encourage private plaintiffs to advocate for issues that are deemed by the court to be “in the public interest.”
- As the ADN noted, the Alaska Supreme Court once said “the policy of awarding full attorney’s fees to public interest litigants was designed to encourage plaintiffs to raise issues of public interest as ‘private attorneys general.’ And a public interest litigant cannot, by definition, have a substantial economic motivation.”
- However, “economic motivation” does exist for “public interest litigants”(PILs)—that’s the problem. When the courts award attorney’s fees for all issues instead of only for the ones that the party prevailed on, it sends a message to the PILs to raise as many issues as possible in order to be awarded more money. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one of several points
- PILD creates an exception to Civil Rule 82 by allowing the courts to classify a party as a “public interest litigant”, thus allowing said party to collect **full**, reasonable, actual attorney fees if they prevail. And if they lose, the public interest litigant pays **none** of the prevailing party’s attorney fees.

Additional Information on SB 183

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

Definition of statute is included for clarity purposes

AS 09.17.900. Definition.

In this chapter, "fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Additional Information on SB 183

Alaska Rules of Civil Procedure

Rule 82. Attorney's Fees.

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

	Judgment and, if awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First	\$ 25,000	20%	18%	10%
Next	\$ 75,000	10%	08%	03%
Next	\$400,000	10%	06%	02%
Over	\$500,000	10%	02%	01%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) Motions for Attorney's Fees. A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) Determination of Award. Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) Equitable Apportionment Under AS 09.17.080. In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) Effect of Rule. The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

Additional Information for SB 183

ALASKA CONSTITUTION Article IV

The Judiciary

SECTION 1. JUDICIAL POWER AND JURISDICTION. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

SECTION 2. SUPREME COURT.

(a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law upon the request of the supreme court.

(b) The chief justice shall be selected from among the justices of the supreme court by a majority vote of the justices. His term of office as chief justice is three years. A justice may serve more than one term as chief justice but he may not serve consecutive terms in that office.

SECTION 3. SUPERIOR COURT. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

SECTION 4. QUALIFICATIONS OF JUSTICES AND JUDGES. Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

SECTION 5. NOMINATION AND APPOINTMENT. The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council.

SECTION 6. APPROVAL OR REJECTION. Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

SECTION 7. VACANCY. The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

SECTION 8. JUDICIAL COUNCIL. The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States

SECTION 9. ADDITIONAL DUTIES. The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

SECTION 10. COMMISSION ON JUDICIAL CONDUCT. The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office, retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the bases for judicial disqualification shall be established by law.

SECTION 11. RETIREMENT. Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

SECTION 12. IMPEACHMENT. Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

SECTION 13. COMPENSATION. Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State.

SECTION 14. RESTRICTIONS. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

SECTION 15. RULE-MAKING POWER. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

SECTION 16. COURT ADMINISTRATION. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.



SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

MEMORANDUM

TO: Senator Dave Donley

FROM: Bill Church *Bill*
Legislative Aide

DATE: March 19, 2001

RE: Department of Law Public Interest Litigant Payments

The Department of Law has provided a six year history (FY 95-01) of general funds used to pay attorney fees in PIL cases.

The breakdown is as follows:

FY	Criminal Division	Civil Division	Number of PIL
95	\$82,047	\$1,231,439	20
96	\$147,717	\$146,392	11
97	\$85,958	\$144,483	11
98	\$53,922	\$215,611	9
99	\$56,734	\$603,859	8
00	\$51,018	\$37,724	3
01	<u>\$209,415</u>	<u>\$211,320</u>	<u>8</u>
	\$686,811	\$2,590,828	70

This represents a total of \$3,277,639 in public interest litigant attorney fees for the entire seven-year period. This is an average cost to the state of \$468,234 per year. If the legislation were to become law and the amount paid out in PIL attorney fees was cut by 25 percent, the state could save approximately \$117,058 per year.

Co-Chair: Senate Finance Committee

Vice-Chair: Senate Judiciary Committee

Member: Legislative Budget and Audit Committee • Legislative Council

