

HB

117



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March 17, 2005

Representative Kurt Olson
State Capitol
Room 110
Juneau, Alaska 99801

Dear Representative Olson,

This letter is in response to the request by the C&RA Committee to provide information regarding the amount in enhanced attorney fees paid by municipalities that have lost in public interest litigant cases over the last five years.

I made numerous phone calls to communities throughout the state. While there, no doubt, have been some lawsuits which have been lost by a municipality during that time period, I was not able to track one down. The reason that was given across the board was that as public money was involved, all municipal attorneys and/or contract attorneys agreed that unless they were confident of winning, they did not enter into a litigious battle. They simply negotiated to settle.

Again, AML and its member communities are concerned with enhanced requirements made to the losing party. While it can be argued that the public interest is being served by those bringing and prevailing in the lawsuit, one must keep in mind that the public interest is also served by keeping attorney costs to a minimum. Municipalities, through the loss of revenue sharing, safe community funds and other sources of revenue are not in a position to limitlessly pay for attorneys to represent them. Many small communities no longer even have liability insurance, full well knowing that the risk of a potential lawsuit will be the final nail in the coffin.

Thank you, again for the opportunity to comment on this legislation. Please feel free to call us at any time, as we are always willing to find solutions that are amenable to the State of Alaska, Alaska's communities and the residents of the state.

Sincerely,

Kathie Wasserman
Alaska Municipal League

CHRIS KENNEDY
DEPT OF LAW

24-GH1052A

HOUSE BILL NO. 117

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 1/28/05

Referred: Community and Regional Affairs, Judiciary

A BILL

FOR AN ACT ENTITLED

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

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) awards of enhanced attorney fees to adverse parties that are significantly
8 beyond those ordinarily granted under the state's tradition of awarding a partial recovery of
9 attorney fees to a prevailing party impose a substantial cost on the state and municipalities at a
10 time of fiscal scarcity; and

11 (2) except if provided by a specific statute, if needed to preserve the courts'
12 authority to sanction litigants, or if there is an exercise of eminent domain, there is no public
13 policy that sufficiently supports such enhanced awards to justify their fiscal impact.

14 (b) The purpose of sec. 2 of this Act is to reduce the impact of the matters in the

1 findings made in (a) of this section on the state fisc, under art. II, sec. 21, of the Constitution
 2 of Alaska and the doctrine of sovereign immunity, and on the fisc of municipalities, through
 3 the legislature's power to confer immunity upon the state and municipalities.

4 (c) This Act does not preclude the enactment of, nor create an implied repeal of,
 5 specific statutes authorizing awards of ~~costs or fees~~ in particular situations, such as in
 6 AS 45.50.537. *Attorney fees*

7 * **Sec. 2.** AS 09.65 is amended by adding a new section to read:

8 **Sec. 09.65.065. Liability of the state and municipalities for attorney fees.**

9 (a) Except as otherwise provided by statute or awarded by a court as a sanction, in a
 10 civil action or appeal the state or a municipality is not liable to pay an attorney fee
 11 award exceeding the following:

12 (1) in a civil action or appeal in which a money judgment is recovered,
 13 20 percent of the money judgment recovered;

14 (2) in a civil action in which the prevailing party recovers no money
 15 judgment and

16 (A) that civil action goes to trial, 30 percent of the prevailing
 17 party's reasonable actual attorney fees that were necessarily incurred in
 18 litigating issues upon which the party prevailed; or

19 (B) that civil action is resolved without trial, 20 percent of the
 20 prevailing party's reasonable actual attorney fees that were necessarily incurred
 21 in litigating issues upon which the party prevailed;

22 (3) in an appeal in which the prevailing party recovered no money
 23 judgment, 20 percent of the prevailing party's reasonable actual attorney fees that were
 24 necessarily incurred in litigating issues upon which the party prevailed.

25 (b) The provisions of (a) of this section do not apply to a civil action or appeal
 26 relating to condemnation of property under the power of eminent domain.

27 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
 28 read:

29 **APPLICABILITY.** Section 2 of this Act applies to all civil actions and appeals filed
 30 on or after the effective date of this Act.

31 * **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

Summary HB 117 (Liability of State and Municipalities for Attorney Fees)

- In most civil cases in Alaska, the losing party pays a portion of the winning party's attorney fees. In cases that are about principles (rather than money), the standard fee reimbursement is usually 20 percent, and no more than 30 percent, of actual fees.
- In some cases the courts give much higher awards to people suing state and local governments, amounting to a 100% fee reimbursement. At the same time, if the state or local government wins one of these cases, it receives no payment of its own attorney fees.
- This situation represents a policy choice by the courts to subsidize certain types of litigation, often litigation that the courts believe will further what is, in its view, a strong public policy.
- For the state alone, over last 10 years the cost of this subsidy averages almost \$600,000 per year above normal "partial" compensation
- HB 117 creates a new provision in the chapter of title 9 devoted to immunities.
- The bill would set limits on liability that are similar to the limits that courts have found for years to represent fair partial compensation to a prevailing party.
- These limits do not apply to condemnation proceedings or in other situations where the legislature has voted to provide for enhanced fee reimbursement.
- the immunity created by HB 117 will save the state significant money each year, but, most importantly, it reasserts legislative control over state expenditures to encourage litigation on public concerns, based on policy priorities determined by the legislature.

Prepared by: Alaska Department of Law, February 25, 2005

HB 117



FRANK H. MURKOWSKI
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 27, 2005

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Harris:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to, as a matter of sovereign immunity, limit the award of attorney's fees against the state and municipalities.

Since territorial days, Alaska has had a statutory policy of requiring the losing party in most litigation to pay a portion of the prevailing party's attorney fees. In recent years, this policy has been embodied primarily in Alaska Rule of Civil Procedure 82, which the Alaska Supreme Court adopted in response to a legislative delegation, made immediately following statehood, in AS 09.60.010. In most cases, the prevailing party receives a partial fee award, equal to no more than 20 percent of a money judgment or 20 percent of actual fees in a non-monetary case.

In cases brought against state or local governments, departures from the general rule of partial fee reimbursement have occurred with some regularity, with the governmental party required to reimburse all of the prevailing party's fees. Ordinarily, the basis for these enhanced fee awards has been the judicially created public interest litigant policy, wherein selected litigants bringing suits to advance ends deemed by the court to reflect strong public policies are granted full fees as a subsidy from the state treasury. The cost of this subsidy has been significant to the state in all recent fiscal years and, on a more irregular basis, has been significant to the municipalities targeted by such lawsuits.

There are instances where a Legislative policy sufficiently supports full attorney fee awards and the legislature has chosen to provide for them by statute. Full reimbursement is also important for eminent domain proceedings. Beyond these contexts, the Legislature has not identified a policy that would support a direct public subsidy to private litigants that goes beyond the traditional norm of partial fee awards. To ensure that public money is not disbursed as a subsidy to these litigants without an appropriate legislative authorization, this bill would provide, as a matter of sovereign immunity, that the state or a municipality would not be liable for an attorney fee award in excess of certain percentages of a money

The Honorable John Harris
January 27, 2005
Page 2

judgment or, if a money judgment is not recovered, certain percentages of the reasonable actual attorney fees the prevailing party incurred in litigating the issues upon which the party prevailed. This would prevent enhanced fee awards against the state or municipalities that are not authorized by statute, but leave those governments open to the standard partial fee awards called for in the Civil Rule 82 fee schedule.

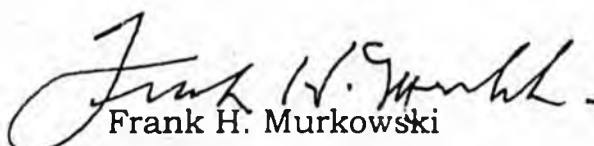
Section 1 of the bill describes the purposes of the Legislation. It notes the fiscal impact of enhanced fee awards, and specifically relies on the legislature's constitutional authorities in regulating this area. Section 1 states clearly that this bill, if enacted into law, would neither preclude nor repeal specific statutes authorizing the award of costs or fees in particular situations.

Section 2 of the bill would create a new provision in the chapter of AS 09 devoted to immunities. It provides that for civil actions or appeals in which a money judgment is recovered, the state and municipalities are not liable to pay more than 20 percent of the money judgment. In civil actions in which no money judgment is recovered, the liability of the state and municipalities for attorney fees for cases that go to trial is capped at 30 percent of the reasonable actual attorney fees that were necessarily incurred in litigating issues on which the party prevailed, and 20 percent for cases that do not go to trial. For appeals in which no money judgment is recovered, the liability of the state and municipalities for attorney fees is capped at 20 percent of reasonable actual attorney fees that were necessarily incurred in litigating issues on which the party prevailed. These limits on liability are very similar to the limits that courts have found for years to represent fair partial compensation to a prevailing party. These limitations do not apply if the statutes provide differently, if the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or the party's counsel, or in cases involving the condemnation of property under the power of eminent domain.

Section 3 of the bill would make the bill, if enacted into law, applicable only to civil actions or appeals initiated after it takes effect.

I urge your prompt consideration and passage of this bill.

Sincerely yours,


Frank H. Murkowski
Governor

Enclosure

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 117
 (H) Publish Date: 1/28/05

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An act relating to liability for attorney RDU Risk Management
fees in certain civil actions Component Risk Management
 Sponsor _____
 Requester _____ Component No. 71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Section 2 provides enhanced immunity for State and municipalities to not be liable to pay attorney fee awards exceeding those provided for in Civil Rule 82 (unless otherwise provided by specific statute).

Risk Management is not affected by this new limitation.

Any monetary judgment awarded on personal injury (tort) actions against the State of Alaska covered by the Risk Management self insurance program are presently addressed by Civil Rule 82 - which remains unchanged.

Prepared by: J. Brad Thompson, Director Phone 465-5723
 Division Risk Management Date/Time 12/10/04 10:46 AM
 Approved by: Michael Tibbles, Deputy Commissioner Date 12/10/2004
 Agency Department of Administration

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 117
 (H) Publish Date: 1/28/05

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to the liability of the state and RDU CIVIL
municipalities for attorney fees..." Component Labor & State Affairs
 Sponsor _____
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This bill would, as a matter of sovereign immunity, limit the award of attorney fees against the state and municipalities. Though the bill will apply to almost all actions against the state and municipalities, it will have a particular effect on attorney fees awarded to parties determined by the courts to be public interest litigants. HB 145, passed by the legislature in 2003, has been challenged in court and found by the superior court to be unconstitutional because it was viewed as requiring a court rule change, thus needing a two-third vote by both houses of the legislature, which it did not receive. In addition the court found it to be an unconstitutional denial of due process and equal protection insofar as it required public interest litigants to pay attorneys fees. That decision is being appealed to the Alaska Supreme Court. This bill responds to the Superior Court decision by narrowly focusing on the award of fees against the state or municipality and limiting the award to the amount applicable under Civil Rule 82 unless

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 12/9/04 4:09 PM
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 12/9/2004
 Agency: Department of Law

FISCAL NOTE #2

**STATE OF ALASKA
2005 LEGISLATIVE SESSION**

BILL NO. HB 117

ANALYSIS CONTINUATION

otherwise provided for in specific statutes, or if the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or the party's counsel, or in cases involving the condemnation of property under the power of eminent domain.

Passage of this legislation will not have a foreseeable fiscal impact on the Department of Law.

Summary HB 117 (Liability of State and Municipalities for Attorney Fees)

- In most civil cases in Alaska, the losing party pays a portion of the winning party's attorney fees. In cases that are about principles (rather than money), the standard fee reimbursement is usually 20 percent, and no more than 30 percent, of actual fees.
- In some cases the courts give much higher awards to people suing state and local governments, amounting to a 100% fee reimbursement. At the same time, if the state or local government wins one of these cases, it receives no payment of its own attorney fees.
- This situation represents a policy choice by the courts to subsidize certain types of litigation, often litigation that the courts believe will further what is, in its view, a strong public policy.
- For the state alone, over last 10 years the cost of this subsidy averages almost \$600,000 per year above normal "partial" compensation
- HB 117 creates a new provision in the chapter of title 9 devoted to immunities.
- The bill would set limits on liability that are similar to the limits that courts have found for years to represent fair partial compensation to a prevailing party.
- These limits do not apply to condemnation proceedings or in other situations where the legislature has voted to provide for enhanced fee reimbursement.
- the immunity created by HB 117 will save the state significant money each year, but, most importantly, it reasserts legislative control over state expenditures to encourage litigation on public concerns, based on policy priorities determined by the legislature.

Prepared by: Alaska Department of Law, February 25, 2005

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI,
GOVERNOR

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ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5274
FAX: (907)278-7022

February 22, 2005

By U.S. Mail and PDF

Ms. Kaci Schroeder
Legislative Aide to Representative Thomas
Committee Aide, House Community and Regional Affairs Committee
State Capitol, Room 428
Juneau, Alaska 99801-1182

Re: HB 117

Dear Ms. Schroeder,

You have asked two questions with respect to HB 117: (1) would HB 117 be rejected by the Superior Court on the same basis as was former HB 145 and, (2) can the statute be drafted in such a way as to take the income of the litigant into account.

We very much appreciate the Committee's thoughtful approach to HB 117. Before responding to your questions, I would like to first clarify several assumptions underlying the Committee's concerns. You suggest that the public interest litigant policy was put in place to protect public interest litigants who cannot match the resources that are available to governments. That is not correct. The public interest litigant policy was put in place by the courts for the stated purpose of encouraging certain types of lawsuits, those that raise matters of public importance. The policy makes no reference to the wealth of the litigants, but rather focuses only on the type of issues raised. Also keep in mind that it applies equally to private persons as well as governments. Thus, for example, if Bill Gates brings a public interest lawsuit against the City of Haines, Mr. Gates is subsidized with enhanced fees if he wins and protected from having to pay fees if he loses. The City of Haines is not.

Secondly, when speaking of the public interest litigant policy, it is important to keep in mind whose policy it is. In the view of the administration, the policy decision as to what litigation is appropriately subsidized with public monies is one for the Legislature. Consistent with this approach, there are a number of instances where the legislature has specifically determined that it wishes to

encourage litigation by requiring full fees to be paid to the winning parties. One example is AS 45.50.537 (consumer protection).

However, the public interest litigant subsidy was created and implemented by the court system. Thus the courts, and not the Legislature, have determined what are issues of public importance deserving of subsidy from public funds. Under HB 117, the baseline rule would be that there would be no enhanced fee awards, and special exceptions would be made by the Legislature based on policies the Legislature feels are important. It would reclaim for the legislature its rightful role as the body that makes policy relating to the use of public funds.

With that background, I will turn to you specific questions. HB 145 prohibited courts from treating litigants differently based on the public interest litigant criteria developed by the court system. This included instances when the public interest litigant policy was used either as a shield (to avoid paying fees) or as a sword (to obtain enhanced fees). HB 117 affects only the situation where the policy is used as a sword, to obtain enhanced fees. With respect to the part of HB 145 that affected the use of the public interest litigant policy as a sword, the sole basis for the court's decision was that the legislative action changed a court rule of procedure and required a 2/3 vote that it did not receive. Judge Collins thought this was a very close question, and in the end she ruled against HB 145 because she felt it micromanaged how the court would weigh some of the various factors listed in Rule 82.

While we disagree with this conclusion, and are currently challenging it in the Supreme Court, we do not believe that HB 117 raises the same concern. Rather than defining how the court will evaluate fee issues, it goes back to a much more basic level, dealing with the historically-recognized legislative prerogative to decide the extent to which the sovereign may be required to pay money. Courts, including our own, have consistently upheld the ability of the state to determine the extent of its sovereign immunity. Thus we believe that HB 117 is substantially more likely to withstand a court challenge.

Your second question was whether HB 117 could incorporate an indigency criterion for obtaining full fees. We believe that is not appropriate in this bill. First, as described above, this bill is set up as a simple assertion of sovereign immunity. If you begin to add in language that creates a scheme to differentiate among those against whom it is asserted, then you make the legislation more vulnerable to constitutional challenge. Secondly, it would be very difficult to define the exceptions. As you note there are many ways in which a party could get around such a requirement, such as by using an indigent person as a stalking horse while the litigation was in reality funded by a wealthy entity. In addition,

there are often instances when the individual is indigent, but the legal representation is provided at no cost by well-funded law firms such as Trustees for Alaska or Earthjustice. For these reasons we do not support an effort to incorporate an indigency requirement in this legislation.

However, that does not mean that what you propose cannot be done. The legislature can pass HB 117 as it now stands, setting a baseline, default ceiling that limits state and municipal liability. While we cannot speak for the Governor's Office on how it would approach such options, there are then several approaches which the legislature could use to openly subsidize public interest litigation that would be effective from a legal perspective. First, the immunity in HB 117 is expressly limited by the words "except as otherwise provided by statute." The legislature can provide for full fees for those kinds of litigation that the legislature believes are deserving. As noted above, an example of such legislation is AS 45.50.537. Another example is the provision in HB 145 that provides for full fees for successful constitutionally-based challenges.

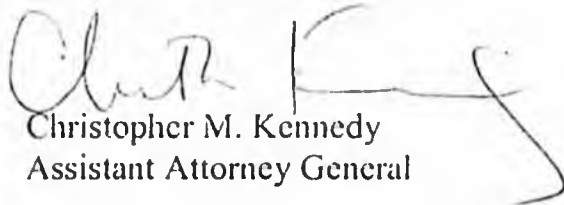
A second legally acceptable way to provide a subsidy of public money is, as you suggest, to deal with the financial means of the litigant rather than subject areas of litigation. This could be accomplished by appropriating specific monies to be used to fund litigation by indigent persons against the state on matters of public importance. Finally you could create some form of hybrid whereby you funded indigent persons who wished to bring lawsuits of public importance in certain areas of law.

I hope this responds to your concerns. If you have further questions, please feel free to contact us at your convenience.

Sincerely,

SCOTT J. NORDSTRAND
ACTING ATTORNEY GENERAL

By:


Christopher M. Kennedy
Assistant Attorney General

CMK/cam

cc: David Marquez
Craig Tillery
Linda Hay



Alaska State Legislature

Please enter into the record my testimony to the House Community & Regional Affairs
committee name

Committee on HB 117, dated 2-17-05
bill # / subject public hearing date

The Alaska Constitution is, without a doubt, the best constitution of any of the states in our union.

Article I, Section 1 of the Inherent Rights provision of the Alaska Constitution states that "all persons have the corresponding obligation to the people and to the state."

Our organization, The Alaska Constitutional Legal Defense Fund, is a public interest litigant that has been successful in all of our cases before the Alaska Supreme Court. We have never lost an Alaska case as a public interest litigant. These cases include: Payton, McDowell, Gulkana River, Owsheck and Totemoff. The Payton decision found that "uses rather than users were more proper and important as applied to public trust resources." The McDowell decision stated that, "fish was a common use resource and a simple one at that." The Gulkana River decision broadens the definition of navigability of rivers in Alaska and, therefore, as it pertains to all waters in Alaska. The Totemoff v. Alaska case was a very important case in which the U.S. Supreme Court refused to override the Alaska Supreme Court decision.

The Owsheck decision ruled that all fish and game guides are as close to the actual harvesters of these common property resources and, therefore, of all under the protection of these common property resource rules.

We find that our governor's stingy attitude does not recognize the need of the State of Alaska's support of the Alaska Constitution and those who are willing public trust litigants.

We also find that the 14th Amendment of the U.S. Constitution, "that those who are selected and or elected (i.e., governors) support those who are willing to act as responsible public interest litigants."

We thereby request that all of those who are selected (including the governor and legislators) and the general public be supportive of the Alaska Constitution and the U.S. Constitution's 14th Amendment. We find that they, in fact, are proposing changes to both the Alaska and U.S. Constitution without the proper citizenship's right to vote on such important public issues.

Signed: Dale Bondurant *Dale Bondurant*
Testifier

The Alaska Constitutional Legal Defense Fund
Representing (optional)

31864 Moonshine Dr Soldotna, AK 99669
Address

(907) 262-0818
Phone number

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@akclu.org

February 15, 2005

To: Representatives Kurt Olson and Bill Thomas, Co-Chairs
Members of the House Community and Regional Affairs Committee

From: Michael W. Macleod-Ball, Executive Director

RE: House Bill No. 117
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

Please accept this statement in opposition to the above referenced bill. We oppose HB 117 (SB 86) on the grounds that it will have a chilling effect on the ability of parties acting in the public interest to challenge the inappropriate exercise of governmental authority. Further, the bill will tend to widen the legal advantage currently held by governmental litigants over private individuals.

The typical plaintiff in a public interest lawsuit is an individual, a non-profit advocacy organization, or a charitable organization. The typical defendant in such a suit is a governmental entity - usually the federal or state government due to the nature of the issues commonly litigated. There can be no dispute that the typical suit pits a party with limited financial resources who needs to hire outside counsel against a governmental entity with access to substantially greater financial and legal resources. As often as not, the dispute is over principle and not over money.

Compare this to any other type of litigation. First, private suits almost always involve a fight over money or property interests. Typically, general civil litigation pits business against business or individual against individual. Certainly there are disparities in each party's ability to cope with the costs of litigation -- but it's a matter of happenstance.

The public interest litigant, therefore, is financially disadvantaged and typically does not have the prospective benefit of a money damages award. As a result, attorneys are not readily available to take on such cases without sizable retainers - it is not profitable for them to do so. Therefore, the public interest litigant is legally disadvantaged as well - because the governmental adversary will always have counsel on board from the start. In his letter of transmittal, the Governor complains that the public interest litigant is being subsidized by the current system of attorney fee reimbursement. But, bear in mind that the public interest litigant only receives reimbursement if a) he or she is acting in the public interest and b) he or she is successful in showing that the government acted wrongly. On the other hand, the government gets its subsidy from the taxpayers whether it wins or not. It's not as if the individual within the government who caused the government to violate the victim's rights is made to reimburse the taxpayers for

House Community and Regional Affairs Committee
February 15, 2005
Page 2

the internal costs of running the government in a manner violative of the public interest. The key is to set up a system that doesn't reward improper behavior -- and there will be no incentive for the government to stop inappropriate action if there is no one willing to speak out against such action through public interest legal action.

Who will this bill affect? It will affect those in our society least able to afford it -- the poor, the uneducated, the minorities, the disabled, the elderly -- all of whom have benefited from public interest litigation at one time or another -- and many of whom would not have been able to bring such actions in their own right. It won't make a difference to the wealthy individual who funds a public interest lawsuit -- for such individuals, attorney fee reimbursement is not a consideration. Rather, this law will discourage normal, everyday people from trying to make a difference when they see the government failing to do its job. If this bill becomes law, the state government will be able to rest easier that it can act against the public interest because it will be less likely to be held to account for its wrongful actions.

In short, this bill is presented as if the government is unfairly required to pay for a vengeful individual's lawsuit against the state. Nothing could be further from the truth. This bill will make it harder for someone acting in the public interest to force the government to comply with its legal obligations. We strongly urge you to reject this bill.

Michael McCann BA
ACLU -

OPPOSE -

ITANON BRETT (SP),

ADVOCATE FOR EFFICIENT
GOVERNMENT

OBI KALENKA

AK FOR EFFICIENT
GOVERNMENT

ITEN JALOUS -

DALE BOUNDENANT

AK CONSTITUTION LAW DEF. FUND

KATHY WASSERMAN - ACLU

HAS ALABAMA
EVER RECOVERED
COSTS FROM
A PUBLIC INT-
LITIGANT?

Summary HB 117 (Liability of State and Municipalities for Attorney Fees)

- Since territorial days, Alaska has had a statutory policy of requiring a losing party in most civil cases to pay a portion of the prevailing party's attorney fees. Soon after statehood, this policy was embodied in Civil Rule 82, which the Supreme Court adopted under a legislative delegation. In most cases, the prevailing party receives a partial fee award, no more than 20 percent of a money judgment or 30 percent of actual fees in a non-monetary case.
- HB 117 addresses the use of state or municipal funds to subsidize certain types of litigation through awards of attorney fees to prevailing parties that are higher than the partial awards that are the norm in Alaska. The legislation would limit these enhanced awards to instances in which the legislature has made a policy judgment to provide for them by statute.
- Enhanced fee awards against state and municipal governments—the amount over normal partial compensation—represents a significant impact on the state fisc and, on a more irregular basis, on local government treasuries. Ordinarily, the basis for these enhanced fee awards has been the judicially-created public interest litigant policy, where selected litigants suing to advance ends deemed by the court to reflect strong public policies are granted full fees as a subsidy from the state treasury.
- For the state alone, over last 10 years that impact averages almost \$600,000 per year above normal "partial" compensation
- HB 117 creates a new provision in the chapter of title 9 devoted to immunities.
- It relies on the legislature's constitutional authorities to regulate suits against the state and to confer immunities on the state and municipalities, as well as on the doctrine of sovereign immunity.
- It sets limits on liability are similar to the limits that courts have found for years to represent fair partial compensation to a prevailing party.
- These limits do not apply to condemnation proceedings or in other instances where the legislature has provided for enhanced fee awards by statute.
- There is also an exception allowing courts to enhance attorneys fees as a sanction for misconduct by a party or their counsel.
- HB 117 asserts legislative control over state expenditures, based on policy priorities determined by the legislature.



HB 117- Public Interest Litigants

February 15, 2005- House CRA

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Two bills currently under consideration in the Legislature would severely limit Alaskans' ability to challenge poor government decisions. **SB 86** and **HB 117** asserts sovereign immunity to ignore the Supreme Court rules that allow public interest litigants to recover legal expenses for challenges of decisions made by the State. The public interest litigant Rule 82 exemption is necessary to ensure that citizens can afford to challenge bad decisions by state agencies. SB 86/HB 117 limit the award of attorney's fees against the state or municipalities to the amount applicable under Civil Rule 82, **only 20-30% of legal expenses**. The limits will make it difficult for public interest litigants to find attorney's to challenge the state.

Public Interest Litigants, by definition, are *not* motivated by an economic incentive, but rather by an interest in the resolution of a significant public policy issue. In 1974 the Alaska Supreme Court removed barriers that allowed only the rich to challenge bad government decisions.

Limited Financial Benefit for the State

Over the 10 year period of 1993-2003, the state paid \$9,088,000 in attorney's fees. Over one half of the cost was for the ongoing Mental Health Trust Litigation. If the Trust litigation is deleted and HB 117/SB 86 passes the State will save an average of only about \$360,000 per year.

All Sides Impacted

Public interest litigants represent all points along the ideological and political spectrum. If not for the public interest rule, citizens, such as those cited below, could not afford to challenge poor government decisions.

Ruedrich, Cities of Craig, Valdez, Delta, et al. v. Alaska Redistricting Board, 44 P.3D 141 (Alaska 2001): The Republican Party and several communities challenged the proposed electoral redistricting

Citizens for the Preservation of the Kenai River, Inc. v. Sheffield, 758 P.2d 624 (Alaska 1988): A group of boat-owners brought suit challenging the validity of a state regulation limiting horsepower of motorized boats on the Kenai River.

Payton v. State, 938 P.2d 1036 (Alaska 1997): Rural residents sued DNR for failing to establish a subsistence salmon fishery on the upper Yentna River.

Alaska Survival, Inc. v. Dept. of Natural Resources, 723 P.2d 624 (Alaska 1988): An organization of local residents filed suit regarding state land disposal of 32 agricultural homesteads.

Is the bill constitutional?

Two superior courts have held that attorney's fees are a matter of procedure under the Alaska Constitution, and this issue will be heard by the Supreme Court this spring. Should the court agree this bill could require Court Rule change 2/3rds vote. because it again attempts to change procedural rules regarding the award of attorney's fees.

Alaskans building a better future.

Sectional Analysis of HB 117/SB 86 (Liability of State and Municipalities for Attorney Fees)

HB 117/SB 86 addresses the use of state or municipal funds to subsidize certain types of litigation through awards of attorney fees to prevailing parties that are higher than the partial awards that are the norm in Alaska. The legislation would limit these enhanced awards to instances where the legislature has made a policy judgment to provide for them by statute.

Sec. 1. The findings, purpose and intent section notes the fiscal impact of enhanced fee awards, and determines that except where provided by specific statute, where needed as a court sanction, or in the context of an exercise of eminent domain, no public policy sufficiently supports such awards to justify their fiscal impact. The section relies on the legislature's constitutional authorities to regulate suits against the State and to confer immunities on the State and municipalities, as well as on the doctrine of sovereign immunity. Section 1 states that this Act neither precludes nor repeals specific statutes authorizing the award of costs or fees in particular situations.

Sec. 2. The single substantive provision of the bill creates a new provision in the chapter of title 9 devoted to immunities. It provides that for civil actions or appeals in which a money judgment is recovered, the state and municipalities are not liable to pay more than 20 percent of the money judgment as an attorney fee award to the adverse party. In civil actions where no money judgment is recovered, the liability of the state and municipalities for attorney fees for cases that go to trial is capped at 30 percent of the reasonable actual fees that were necessarily incurred in litigating issues on which the party prevailed, and at 20 percent of the same figure for cases that do not go to trial. For appeals in which no money judgment is recovered, liability of the state and municipalities for attorney fees is capped at 20 percent of reasonable actual fees that were necessarily incurred in litigating issues on which the party prevailed. These limits do not apply where statutes provide differently, where the courts determine it is appropriate to award attorney fees as a sanction for misconduct by a party or their counsel, or in cases involving the condemnation of property under the power of eminent domain.

Sec. 3. The Act will apply only to civil actions or appeals initiated after the Act becomes effective.

Sec. 4. The Act will take effect immediately.

Summary SB 86 (Liability of State and Municipalities for Attorney Fees)

- Since territorial days, Alaska has had a statutory policy of requiring a losing party in most civil cases to pay a portion of the prevailing party's attorney fees. Soon after statehood, this policy was embodied in Civil Rule 82, which the Supreme Court adopted under a legislative delegation. In most cases, the prevailing party receives a partial fee award, no more than 20 percent of a money judgment or 30 percent of actual fees in a non-monetary case.
- SB 86 addresses the use of state or municipal funds to subsidize certain types of litigation through awards of attorney fees to prevailing parties that are higher than the partial awards that are the norm in Alaska. The legislation would limit these enhanced awards to instances in which the legislature has made a policy judgment to provide for them by statute.
- Enhanced fee awards against state and municipal governments—the amount over normal partial compensation—represents a significant impact on the state fisc and, on a more irregular basis, on local government treasuries. Ordinarily, the basis for these enhanced fee awards has been the judicially-created public interest litigant policy, where selected litigants suing to advance ends deemed by the court to reflect strong public policies are granted full fees as a subsidy from the state treasury.
- For the state alone, over last 10 years that impact averages almost \$600,000 per year above normal "partial" compensation
- SB 86 creates a new provision in the chapter of title 9 devoted to immunities.
- It relies on the legislature's constitutional authorities to regulate suits against the state and to confer immunities on the state and municipalities, as well as on the doctrine of sovereign immunity.
- It sets limits on liability are similar to the limits that courts have found for years to represent fair partial compensation to a prevailing party.
- These limits do not apply to condemnation proceedings or in other instances where the legislature has provided for enhanced fee awards by statute.
- There is also an exception allowing courts to enhance attorneys fees as a sanction for misconduct by a party or their counsel.
- SB 86 asserts legislative control over state expenditures, based on policy priorities determined by the legislature.