

SB

86

**SENATE BILL NO. 86**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**Introduced: 1/31/05**

**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~~ <sup>attorney</sup> fees in particular situations, such as in  
6 AS 45.50.537.

AG  
nt  
D/M

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

(possible amendment  
by Scott Brund  
Erickson)

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).

*Bill*

*HB 145*

*DEM  
4/21/05*

**SENATE BILL NO. 86**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**Introduced: 1/31/05**

**Referred: Community and Regional Affairs, Judiciary**

*lose some of Bill  
prev. enhanced*

**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

*HB 145  
NOT TAKE YOU  
MUCH OF  
RES. COSTS*

*pend. case  
on 1/14/05*

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.

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).

*WPA*  
*Refer to memo from*  
*2/10/04*

*HA 117*  
*SA 86*  
*Alaska*

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

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY THE SENATE JUDICIARY COMMITTEE**

**Amended: 5/6/04**

**Offered: 5/5/04**

**Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to public interest litigants and to attorney fees and costs and the  
2 posting of bonds or other security."

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

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

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

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

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

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

*6-7-04*  
*10/1/04*  
*Alaska*  
*lit*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## SB 86- Public Interest Litigants

February 8, 2005

810 N St, Ste 203, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177  
 PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

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 this expense.

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, (Alaska 2001):

The Republican Party of Alaska and several communities sued to make changes to 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.

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Anchorage Daily News

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**Attorney fee caps sought by governor****PROPOSAL: State would pay less if it lost a public-interest lawsuit.**

By LARRY PERSILY

Anchorage Daily News

*(Published: February 6, 2005)*

JUNEAU -- Gov. Frank Murkowski is making another run at legislation to reduce how much a judge could order the state and municipalities to pay in attorney fees when they lose public-interest lawsuits.

Opponents of the governor's proposal say it would make it harder -- more expensive -- for individuals and citizens groups to sue when they believe government is not following the law.

The governor wants to cap what a judge could order the state and municipalities to pay at generally no more than 30 percent of the winning party's actual attorney fees, similar to what private parties are required to pay in civil cases.

Alaska courts currently award full attorney fees to winning public-interest litigants in most cases.

A Superior Court judge in Juneau last April tossed out a similar measure, approved by the 2003 Legislature. This year's bill attempts to resolve the issues cited by the judge, said Jim Clark, the governor's chief of staff.

"The thing that has always seemed unreasonable, at least in my opinion," Clark said, is that public-interest litigants are not required to pay the state's legal bills if the state wins but they are allowed to collect their full costs if the state loses.

Murkowski's proposal this session does not eliminate all payments to winning public-interest litigants but merely scales back the amount they can receive, Clark said. "It's not a barrier. ... It just squares it away and puts everyone on the same footing."

Ray Metcalfe, founder of Alaska's Republican Moderate Party and a frequent critic of state actions, sees it otherwise. Limiting the amount public-interest groups can recover in lawsuits would weaken their ability to challenge state actions.

Groups could not afford the costs unless they could recover their actual expenses, he said.

"What good is the Constitution if you can't enforce it?" he said.

Legislators passed the 2003 law almost exclusively on party lines, with all but three Republicans backing their governor in his first year on the job. Clark, a former private attorney for timber, pulp mill and mining interests, said he has been involved in the issue for almost 20 years.

Much of the opposition in 2003 came from environmental groups, three of which joined with the Republican Moderate Party and two Native organizations in going to court to challenge the law.

The judge ruled in their favor, stating that the law violated due process. She also said the

## Anchorage Daily News | Attorney fee caps sought by governor

Legislature failed to properly adopt the measure. The 2003 legislation changed court rules, which requires a two-thirds legislative majority the Republicans did not have.

The measure, however, went much further than Murkowski's proposal this year. It would have covered not just lawsuits against the state, municipalities and school districts but also suits against private parties. And it would have required losing public-interest litigants to pay their opponents' legal bills.

This year's legislation, Senate Bill 86, is much narrower, avoiding the court rule change and allowing judges discretion to order additional payment of fees in some cases, Clark said.

The changes are not enough to sway Anchorage Democratic Sen. Hollis French, who opposed the 2003 bill and said he will fight this one too.

"It looks to overturn a long-standing court practice," French said, calling it "another stab at eliminating public-interest litigant fees."

The senator also said he doubts the arguments from supporters of the change that public-interest lawsuits are tying up the state.

Department of Law totals for fiscal years 1995 through 2000 show an average \$400,000 a year in legal fees paid by the state to winning public-interest litigants. More than half of the tab during those six years, however, came in one case over the state's illegal handling of Alaska's mental health trust lands.

The governor's bill will get its first hearing Wednesday afternoon before the Senate Community and Regional Affairs Committee.

Daily News reporter Larry Persilly can be reached at [lpersilly@adn.com](mailto:lpersilly@adn.com), or in Juneau at 523-9306.



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Public Interest Litigation  
93-03

Type	Cases	FY	Cost	SubTotal
Redistricting	SE Conf v. Hickel	93	635.8	
	SE Conf v. Hickel	95	106.9	
	2001 Redistricting	02	1,501.9	
	2001 Redistricting	03	240.9	
				2,485.5
Mental Health	Weiss v. State	93-03	4,578.7	
				4,578.7
Legislation	Bess v. Ulmer (same sex marriage)	99	50.2	
	Planned Parenthood (partial birth abortion)	01	102.7	
	Planned Parenthood (GR Med abortion)	02	228.0	
	ACLU v. State 96 campaign finance reform	02	107.8	
				488.7
CBR	Hickel v. Cowper (CBR) (amt for approp)	95	43.7	
	Cowper v. Knowles (CBR approp lang)	97	4.3	
				48.0
Prisoners	Cleary Case	95	82.0	
	Cleary Case	96	119.5	
	Cleary Case	97	85.9	
	Cleary Case	99	56.7	
	Cleary Case	00	13.2	
	Cleary Case	01	119.4	
	Cleary Case	02	9.3	
				486.0
Elections/Ballots	Kwethluk IRA v. Coghill (open polling places)	95	11.0	
	O'Callaghan v. Coghill (open/closed primary)	97	25.0	
	Pullen v. Ulmer (FISH Initiative)	98	24.2	
	Dansereau v. Ulmer (94 gubernatorial election)	98	83.3	
	AK for Efficient Gov't v. State (ballot measure #2 - capitol move)	03	24.0	
				167.5
Subsistence	Toksook Bay v. State (herring fishery)	95	33.3	
	Ken Sorenson v. State (moose hunting)	96	60.0	
	Payton v. State (Upper Yentna salmon)	98	54.7	
				148.0
Natural Resources	Stein v. State (placer mining)	93	14.0	
	Trustees for AK v. Gorsuch (coal mining)	94	39.8	
	Kuitsarak v. Swope offshore platinum Goodnews	94	37.9	
	SE AK Conserv Council v. State (Kuiu Island)	95	44.7	
	Trustees for AK v. State (oil/gas lease best int)	96	42.8	
	Tulksarmute v. Heinze (water permit mining)	96	6.2	
	Ninilichuk Council v. State (o/g lease sale #78)	97	85.0	
	Port Graham/Nanwalek v. State (discharge Cook Inlet platforms)	98	24.0	
	Kachemak Bay Soc v. State (o/g lease sale 85A)	99	37.0	
	Cook Inlet Keeper v. State (oil/gas lease sale)	01	81.7	
	NABC/Sierra Club v. State (ROW electric line)	01	99.1	
	Greenpeace v. State (Northstar water permitting)	01	12.5	
	Gilbertson v. State (RS2477 easement)	01	2.2	
	Neighborhood Mine Watch v. State (ROW Fairbanks Gold Mining)	03	22.2	
Lynn Canal Conserv v. State (reg uses state land)	03	20.2		
				569.3
Local Govt	Ekwo/Lake & Pen Borough v. LBC (boundary)	95	51.4	
	Keane v. LBC (City of Pilot Point)	96	11.0	
				62.4
Misc	Capital Information Group v. State (public documents)	97	20.0	
	Alexie v. State (cultural adoption, child support)	00	34.7	
				54.7
<b>TOTAL</b>	(actual total is \$9,090,422) (numbers rounded off)			9,088.8

based on Leg Research Report 4/21/03

# Alaska Civil Liberties Union

*An Affiliate of the American Civil Liberties Union*

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

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February 15, 2005

To: Senator Gary Stevens, Chairman  
Members of the Senate Community and Regional Affairs Committee

From: Michael W. Macleod-Ball, Executive Director

RE: Senate Bill No. 86  
*An Act relating to the liability of the state and municipalities for attorney fees in certain civil actions and appeals; and providing for an effective date*

Please accept this statement in opposition to the above referenced bill. We oppose SB 86 (HB 117) 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

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.

## 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.

5686



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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

January 27, 2005

The Honorable Ben Stevens  
President of the Sena  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, AK 99801-1182

Dear President Stevens:

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

COMMITTEE COPY

The Honorable Ben Stevens

January 27, 2005

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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.

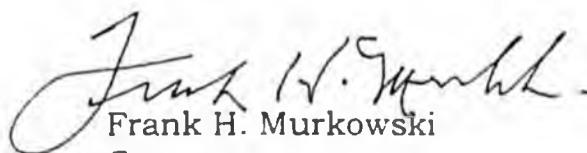
Section 1 of the bill describes the purposes of the Legislation. It notes the fiscal impact of enhanced fee awards, and specifically relies on the legislature's constitutional authorities in regulating this area. Section 1 states clearly that this bill, if enacted into law, would neither preclude nor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

## **Sectional Analysis of SB 86 (Liability of State and Municipalities for Attorney Fees)**

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, the 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.

Prepared by:

Alaska Department of Law  
February 4, 2005

from:  
Scott  
Brandt-  
Erickson

# THE COMMUNITY OF KETCHIKAN

## ISSUE STATEMENT

### AMENDMENT OF PROPERTY TAX REFUND COSTS

#### ISSUE SUMMARY:

AS 29.45.200 addresses the jurisdiction of the board of equalization. It allows a municipal board of equalization to hear appeals from the determination of the Municipal Assessor. AS 29.45.210 provides that the only grounds for adjustment of assessment are proof of unequal, excessive, improper, or under valuation based on facts that are stated in a valid written appeal or proven at the appeal hearing.

There are two very different types of appeals which find their way to the board of equalization review process. The traditional type is an appeal based on the valuation of the property. The other is an appeal asserting that the property, or some portion of it, is exempt from tax. AS 29.45.200 also allows a taxpayer to appeal the assessor's determination on an exemption directly to Superior Court.

A valuation appeal generally involves a determination of facts as to whether the valuation procedure applied by the assessor was sound and whether other similarly situated properties are valued similarly. More often than not, the determination of entitlement to an exemption involves not just questions of fact, but also questions of law interpreting the mandatory and optional exemptions allowed under AS 29.45.030 and AS 29.45.050. Boards of equalization are often not well suited to make interpretations of law.

While boards of equalization may be well suited to deciding questions of fact, they are rarely trained or well equipped to address questions of law. As a result boards of equalization may concur with the assessor, effectively passing the legal issue of entitlement to an exemption on to the Superior Court. Other times they may seek advice from their municipal attorney. The taxpayer, and the affected municipality are better served if questions of law regarding entitlement to exemptions are determined by the Superior Court on an appeal from the determination of the assessor.

The significance of this issue, and the impact of delay in getting finality of review from the Superior Court on exemption appeals, has resulted in an unintended trap for municipalities. The trap comes from the interrelationship between the timing of Superior Court appeals and the impact of AS 29.45.500.

The Legislature adopted AS 29.45.500 in 1985 as part of the re-write of Title 29. This section has been litigated in four Supreme Court decisions since 1985. Three of the four decisions focused on the entitlement of a taxpayer to its costs incurred in its efforts to recover taxes paid under protest. All three included fact situations where the taxpayer had asserted that it was exempt, paid the taxes under protest, brought a separate suit to recover the taxes paid under protest, and consolidated their appeal from the assessor's determination on an exemption with the suit to recover the taxes. Some taxpayers in cases of this type have argued that they are entitled to their full costs and attorney's fees even if the appeals result in only a nominal reduction in their tax liability. The Alaska Supreme Court in each case has let stand the Superior Court interpretation of AS 29.45.500 allowing the taxpayer to recover all of their costs, including attorneys fees, for all proceedings both before the board of equalization and in the courts.

continued on page 12



# THE COMMUNITY OF KETCHIKAN

continued from page 11

This situation puts an inappropriate level of pressure on boards of equalization which may, in many cases, be composed of lay persons without legal training. It also opens the appeal process to abuse in an attempt to obtain a windfall at the expense of the other taxpayers. As an example, the process can proceed as follows: The assessment is made as of January 1 of the tax year. Notices of assessment are sent out in February, and appeals are dealt with prior to certification of the tax roll. The tax roll must be certified by June 1st, and taxes must be levied by June 15th. Tax bills are sent out in July. A party may appeal their valuation or exemption determination to the board of equalization. This appeal is to be concluded before certification of the tax roll. However, a further appeal to the Superior Court is unlikely to be decided before the June 1 deadline for certification of the assessment roll.

If the roll is certified including a parcel which is or may be appealed to the Superior Court, the taxpayer will receive a bill while the appeal is pending. The taxpayer can then pay the tax under protest and bring a suit under AS 29.45.500 to recover the taxes paid under protest, plus their full costs and attorney's fees. The pendency of a suit to recover taxes paid under protest, and all costs and attorneys fees, raises the stakes for the municipality if any reduction in the tax liability results in full recovery of fees.

Arguably, the assessor could omit properties which are under appeal to the Superior Court in order to avoid the problem, but this option has two flaws. First, the time for appeal to the Superior Court may not have run by the time the roll must be certified. Second, if a property owner can delay the duty to pay taxes without penalty by appealing to the Superior Court, it may encourage appeals simply to delay the payment obligation.

A more sensible approach would preclude a suit to recover taxes paid under protest, and the associated potential liability for costs and attorneys fees, until after appeals of the valuation or entitlement to an exemption are finally decided. If a municipality refuses to refund any excess taxes paid after a final adjudication of the amount of the taxpayer's liability, then an award of full costs and attorneys fees would be warranted. However, allowing full costs and attorneys fees where there is an appeal pending imposes an unfair penalty on the municipality. The taxpayer has little incentive in such a situation to seek resolution of the appeal in a low cost expedient manner because they would receive full costs and attorneys fees if they prevail.

Another potential application of this problem arises if the taxpayer does not appeal, but simply waits and pays under protest and sues to recover the amount paid, alleging that the tax is improper because they are exempt. In such a situation the municipality is at a distinct disadvantage.

The proposed bill would address these problems by:

1. Providing that appeals from the assessor's determination as to an exemption are directly to the Superior Court, and not to the board of equalization;
2. Providing that a suit to recover taxes paid under protest, if the protest is based on a dispute as to valuation or entitlement to an exemption, cannot be brought until the underlying appeal from the assessor's determination is concluded and the municipality fails to refund any monies due within 30 days;
3. Providing that a taxpayer who is appealing a determination of the assessor may post a bond with the Court in the amount of the taxes allegedly due in order to avoid late payment penalties.



# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
Bill Version: SB 86  
(S) Publish Date: 1/31/05

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

**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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 Daughhetee, Director Phone: 465-3673  
Division: Administrative Services Division Date/Time: 12/9/04 4:09 PM  
Approved by: Kathryn Daughhetee 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. SB 86

**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

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 86  
 (S) Publish Date: 1/31/05

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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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