HB

87

<TARGET><BILL>HB 87</BILL><SUBJECT>HB 87</SUBJECT><COMM>HJUD27</COMM></TARGET>

Representatives
Kurt Olson &
Lindsey Holmes

Capitol Room 405
465-4919
465-2137 fax

M E M O R A N D U M

Date: 14 March 2011

To: Representative Carl Gatto,
Chair of the House Judiciary Committee

From: Representative Kurt Olson
Representative Lindsey Holmes

RE: Hearing Request for House Bill 87

Mr. Chair, I would like to request a hearing for House Bill 87, "An act relating to antitrust violations," in the House Judiciary Committee. HB 87 modernizes the penalties for antitrust violations by increasing them to reflect modern levels. Attached you will find a copy of the bill, the (H) L&C committee substitute for the bill, the sponsor statement, a sectional prepared by legislative legal and a sheet of back up information provided by the Department of Law. We expect that Ed Sniffen from the Department of Law will testify in favor of the bill. James R. Waldo from Rep. Holmes' staff is carrying this bill. He can be reached by email at james.waldo@legis.state.ak.us or his direct line at 465.6597. Please contact myself, James or Konrad Jackson from Rep. Olson's office if you have any questions regarding this legislation. Thank you very much for your consideration.

received
3-14-11 @ 3:15

Representatives Kurt Olson and Lindsey Holmes

House Bill 87 Sponsor Statement

"An Act relating to penalties for antitrust violations."

House Bill 87 updates the criminal penalties for the state's anti-trust laws, and adds a civil penalty provision. Under current law, an antitrust violation under AS 45.50.562 or 45.50.564 is a misdemeanor that is punishable by a fine of up to $20,000 for natural persons or $50,000 for organizations. These penalties do not serve as a significant deterrent to individuals and companies engaging in antitrust violations.

HB 87 increases criminal fines to $1 million for an individual and $50 million for an organization, and make such a violation a class "C" felony. Under analogous Federal antitrust law, violations are a felony and criminal fines are set at $1 million for individuals, and $100 million for a corporation (15 U.S.C.A. § 3).

Additionally, HB 87 adds a new provision to the antitrust law that will allow the Department of Law to pursue a civil action for antitrust violations, with the same maximum penalties of $1 million for a natural person and $50 million for an organization. The antitrust laws in most other states already contain civil penalty provisions, with fines of varying amounts.

This update to our antitrust statutes will give the Department of Law the necessary teeth for dealing with any antitrust violations in our state. Please join us in supporting HB 87

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MEMORANDUM February 25, 2011

SUBJECT: Sectional summary of CSHB 87( ) relating to civil and criminal penalties for antitrust violations (Work Order No. 27-LS0331\I)

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Amends AS 45.50.578 to increase the criminal penalty for a violation of AS 45.50.562 or 45.50.564 to a class C felony. Increases the possible fine for a natural person to $1,000,000, and refers to AS 12.55 (the sentencing and probation chapter) for the possible imprisonment for a natural person. Increases the possible fine for a person who is not a natural person to $50,000,000.

Section 2. Authorizes the attorney general to bring a civil action against a person who violates specified antitrust provisions or who violates an injunction issued under AS 45.50.580. Sets the maximum civil penalties.

If I may be of further assistance, please advise.

TLB:ljw
11-143.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB087**
() Publish Date

Identifier (file name): HB087-LAW-CIV-02-25-11
Dept. Affected: Law
Title: An Act relating to penalties for antitrust violations.
Appropriation: Civil
Allocation: Commercial and Fair Business
Sponsor: Representative(s) Olson, Holmes
Requester: (H) Labor & Commerce
OMB Component Number: 2717

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/25/11 1:30 PM
Approved by: John J. Burns, Attorney General — Date: 2/25/2011
Department of Law

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB087

Analysis

HB 87 will amend Alaska's antitrust statute to increase the criminal penalty for violating the statute from a misdemeanor to a class C felony, and increase the criminal fines from $20,000 to $1 million for a natural person, and from $50,000 to $50 million if not a natural person. It will also add a new section that allows the attorney general to bring a civil action for antitrust violations, and seek the same amounts in civil penalties.

There will be no fiscal impacts to the Department of Law.

STATE ANTITRUST CIVIL PENALTIES

State	Penalty	Notes
Alaska	$5,000/natural person, $50,000 all others	Also can be a CP violation – up to $25,000 per violation
California	$250,000 individual, $1 million all others, or 2x gross gain or loss	
Connecticut	$25,000 individual, $250,000 corporation	Trying to get it raised to $100k/$1 million
Delaware	$1,000 minimum to $100,000 maximum	No distinction between individual/corporation
Florida	$100,000 individual, $1 million corporation	
Illinois	$$100,000 individual, $1 million others	
Kansas	$100 to $5,000 per day	
New Jersey	Treble damages + Attorneys Fees + Cost of suit	
New Mexico	$50,000 individual, $250,000 corporation	Passed in 1979
North Carolina	$5,000/violation per week	
North Dakota	$50,000 everyone	
Nevada	5% of gross income	
Ohio	$500/day for each violation	
South Carolina	$5,000/violation per week	
Virginia	$100,000 for all	Must be willful or flagrant violation
Wisconsin	$50,000 individual, $100,000 corporation+ forfeiture	
U.S.D.O.J	$10 million individual $100 million others	Criminal penalty

Montana Code Annotated 1995

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27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

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Montana Code Annotated 1995

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25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

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Report of the 2011 Alaska Minerals Commission

Aqqaluk pit at Red Dog, the next twenty years

Arctic deposit Ambler district - Brooks Range

LMS drilling - Goodpaster district

Bornite headframe—Ambler district

ACTION ITEMS

1. **Provide support for permitting agencies instead of wasting state resources on an ill-timed Pebble study.**
2. **Implement reforms to prevent public litigant and third-party lawsuits from stifling development.**
3. **Build a road to Western Alaska that includes access to Brooks Range mineral deposits.**
4. **Support efforts to communicate the benefits that mining brings to Alaska and its communities.**
5. **Bring energy infrastructure to western Alaska to support communities and mining projects in the region.**

Mining provides the necessary building blocks of our society. The mining industry has demonstrated its ability to help diversify Alaska's economy and to provide wide-ranging employment opportunities in both rural and urban areas, all while operating to the highest environmental standards. In an industry controlled by global economic conditions, Alaska mineral development must be competitive while developing a sustainable industry. To this end, there are actions that the Governor and Legislature should take now in order for the mining industry to be able to grow and to continue to contribute to our society in the future for the prosperity of Alaska.

The Alaska Minerals Commission presents this 2011 report with the 5 specific action items identified above, thereby fulfilling the Commission's statutory mandate to make recommendations annually to the Governor and Legislature on ways to mitigate constraints on the development of minerals in Alaska.

CRITICAL SUPPORT FOR PERMITTING AGENCIES

Spending $750,000 on a poorly timed and misguided "study" aimed at Pebble is a waste of State resources. Alaska's interest would be better served by spending the money to augment the State's technical review of the project if and when one is proposed.

Funding a study of Pebble now would be a waste of State resources because there is no specific project to evaluate and the study lacks a specific scope or objective. Such a study could only be a sham, with the appearance of a predetermined outcome, as it would have no choice but to conjecture about potential project configurations and would have no way to evaluate what actually might be proposed by the company, including any mitigative measures that might be included. Such a small sum of money could never hope to improve upon the years of field work and the over one hundred million dollars that have been spent to understand the environment in the region. With no specific project to review and no way to better understand the local environment, such a study is doomed to irrelevancy compared to the multi-year, multi-million dollar environmental review process that surely awaits the actual project.

Spending this sum now would also impair the investment climate for the entire mining industry in Alaska, as unfortunately it would demonstrate that the project review process in Alaska is political rather than science based.

RECOMMENDATION

A better use of limited public funds would be to invest in technical support for the State Large Mine Permitting team. These funds could augment the team with experienced staff and third party technical experts to critically evaluate the project once a definitive proposal that warrants review is received. In fact, the State should critically review its financial support for all regulatory agencies to ensure that a core of competent staff are available to timely review all development projects in Alaska, not just at Pebble.

An alternative use of the funds would be for the legislature to study the entire permitting process to see if there are ways to make the process more efficient while still maintaining Alaska's high environmental standards.

LITIGATION REFORM

Resource development in Alaska must comply with one of the most stringent environmental jurisdictions in North America, yet public litigant and third-party lawsuits are further delaying and stifling development. Beyond the adverse impact on industries and investment in Alaska, the information requests for "discovery purposes" are further paralyzing the agencies by consuming their budgets and diverting limited staff from completing their constitutionally and legislatively assigned tasks. The following administrative and legislative support is required to limit the negative impact from this obstructionist legal maneuvering:

RECOMMENDATION

- Require bonds from organizations initiating legal actions;
- Continue to enjoin suits as an affected party in other states if an adverse decision in that case will become a precedent that may be applied in Alaska;
- Continue to enjoin suits filed in Alaska if an adverse decision in that case will adversely affect the state's ability to financially benefit from its natural resources;
- Support budgets to hire legal expertise needed in natural resource development cases;
- Require plaintiffs to pay legal fees for all portions of the rulings against their position;
- Support budgets that will enable the Attorney General to evaluate previous litigation reform in court rulings to develop a game plan for meaningful reform; and Work with other states to petition U.S. Congress to remove the "Tax Exempt" status from these litigious organizations.

TRANSPORTATION INFRASTRUCTURE

The Commission would like to thank the Governor's office and the legislature for support for the Western Alaska Access Project and for the Ambler Mining District Access studies. We encourage ongoing support to complete these critical projects.

RECOMMENDATION

- Build a road from Fairbanks to Nome that includes access to the Brooks Range mineral deposits in the Ambler Mining District through the Roads to Resources program.
- Investigate transportation corridors in southwest Alaska that would facilitate mineral development and also lower the cost of living and provide more affordable energy.

FINDINGS

- Transportation infrastructure related to mineral development has played a critical role in rural areas of the state, supporting lower cost energy and a lower cost of living. With the current upswing in commodity prices and interest in minerals development, Alaska can capitalize on leveraging private sector development with statewide goals and rural needs in public-private partnerships.
- The increase in activity in the Arctic for shipping, energy, and mineral development is necessitating an increased presence by the U.S. Coast Guard in the Arctic. The need for deep water ports in the Arctic associated with this increased presence provides an opportunity to coordinate roads to potential ports with mineral development projects.
- We also recommend that any transportation plan grow from the regional and project need in concert with statewide planning. Local support will be key for any projects to advance, hence the need for local support. Again a good example is the growing interest in roads in Northwest Alaska from the local levels and the coordination of the Department of Transportation working with industry and the communities for viable projects with local support.

MARKETING AND EDUCATION

The State of Alaska must very actively market itself to the rest of the world and demonstrate that it is open for business in resource development. Legislators and Alaskans in general need to understand the great benefits that mining brings to the State and its communities.

RECOMMENDATION

- Expand budget for marketing presence domestically and in foreign countries
- Encourage elected officials to participate in mine tours provided through the Council of Alaska Producers
- Increase funding for Alaska Resource Education (ARE) to $150,000 annually
- Provide funding for a statewide Minerals Education & Promotion Program
- Provide funding to make the UAF College of Engineering and Mines the premier mining and geology program in the United States
- Support state and federal programs to train and educate workers for the mining industry

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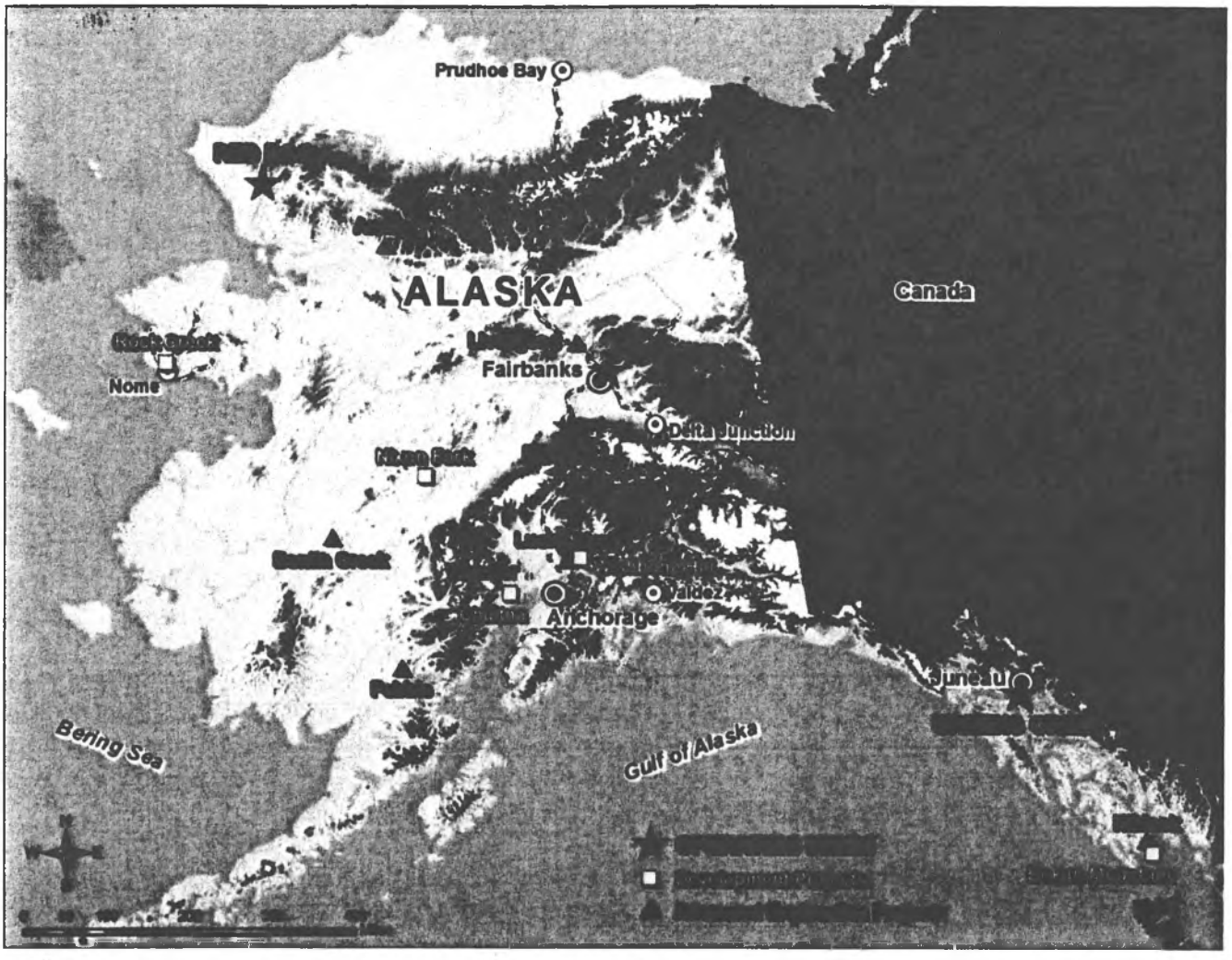

ENERGY

Invest in low-cost energy capacity on the existing grid. On a regional basis, expand energy distribution infrastructure and generation capacity using the least costly, most available resource whether that is coal, wind, solar, hydro, geothermal, or small scale nuclear.

RECOMMENDATION

- Bring energy infrastructure to western and southwestern Alaska to support communities and mining projects in the region.
- Expand low-cost base load energy on the existing electrical grid.

The Alaska Minerals Commission was created by the 14th Legislature and signed into law on June 6, 1986. The enabling legislation instructs the Commission to make recommendations to the Governor and Legislature on ways to mitigate constraints, including governmental constraints, on the development of minerals, including coal, in the state.

This publication was released by the Department of Commerce, Community, and Economic Development. Its purpose is to report the findings and recommendations of the Alaska Minerals Commission to the Governor and to the Legislature of Alaska. It was produced at a cost of $1.13 per copy and printed in Anchorage, Alaska. This publication is required by Chapter 98, Session Laws of Alaska, as amended by Chapter 4, Session Laws of Alaska, 1993.

LEGAL SERVICES

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MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

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court to require the plaintiff to give security for the reasonable expense, including attorney fees, that may be incurred by the moving party. The amount of the security may be increased or decreased from time to time in this discretion of the court upon a showing that the security has become inadequate or excessive. The corporation or other defendants may have recourse to the security in an amount as the court may determine upon the termination of the derivative action, whether or not the court finds the action was brought without reasonable cause.

(i) A derivative action may not be discontinued, abandoned, compromised or settled without the approval of the court having jurisdiction of the action. If the court determines that the interests of the shareholders or any class or classes of shareholders will be substantially affected by a discontinuance, abandonment, compromise, or settlement, the court in its discretion may direct that notice, by publication or otherwise, shall be given to the shareholders or class or classes of shareholders whose interests will be affected. If the court directs notice to be given, it shall determine which of the parties to the action shall bear the expense of giving the notice in an amount the court determines to be reasonable in the circumstances. The amount shall be awarded as special costs of the action.

(j) If the derivative action is successful, in whole or in part, or if anything is received as a result of the judgment, compromise, or settlement of that action, the court may award to the plaintiff or plaintiffs reasonable expenses, including reasonable attorney fees, and shall direct an accounting to the corporation for the remainder of the proceeds. This subsection does not apply to a judgment rendered only for the benefit of injured shareholders and limited to a recovery of the loss or damage sustained by them.

(Added by SCO 258 effective November 15, 1976; amended by Chief Justice Special Order No. 2052a effective July 1, 1989)

Note: Civil Rule 23.1 in its entirety was adopted by the Alaska Legislature in ch. 166, §§ 1, 17, SLA 1988, rather than by the Alaska Supreme Court.

Annotations

Cases

Shareholders who filed a derivative suit against the directors of a village corporation were not prevailing parties because the trial court found that the shareholders' failure to make a pre-suit demand was not excused; the trial court did not err in denying the shareholders' request for attorney fees. **Jerue v. Millett,** Op. No. 5676, 66 P.3d 736 (Alaska 2003).

Where a village corporation did not become a party plaintiff until after the events occurred that mooted a derivative suit, the village was not a prevailing party for purposes of recovering attorney fees. **Jerue v. Millett,** Op. No. 5676, 66 P.3d 736 (Alaska 2003).

Rule 23.2. Actions Relating to Unincorporated Associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interest of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23 (d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(Added by SCO 258 effective November 15, 1976)

Rule 24. Intervention.

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the ground therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. When the constitutionality of a state statute affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of Alaska of such fact, and the state shall be permitted to intervene in the action.

(Adopted by SCO 5 October 9, 1959; amended by SCO 258 effective November 15, 1976; corrected January, 1993; amended by SCO 1153 effective July 15, 1994; by SCO 1342 effective September 15 1998; by SCO 1713 effective May 16, 2009; and by SCO 1716 effective July 1, 2009)

Note: AS 10.06.628, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 24 by allowing a shareholder or creditor of a corporation to intervene in an action for involuntary dissolution of the corporation under AS 10.06.628.

Note: Chapter 105 SLA 1998 adopts AS 13.36.175 pertaining to contract actions against a trustee. According to section 23 of the act, subsection (c) of this statute amends Civil Rule 24 by allowing a beneficiary, or the attorney general and certain corporations under certain circumstances, to intervene in a contract action against a trustee without satisfying the criteria in the court rule. The act also adopts AS 13.36.185 pertaining to the tort liability of a trust. According to section