

SB

122

<TARGET><BILL>SB 122</BILL><SUBJECT>SB
122</SUBJECT><COMM>HJUD27</COMM></TARGET>

Alaska State Legislature

State Capitol, Room 510
Juneau, Alaska 99801
Phone: (907) 465-4947
Fax: (907) 465-2108



Committee Members:
Senator Dennis Egan, Chair
Senator Joe Paskvan, V. Chair
Senator Bettye Davis
Senator Linda Menard
Senator Cathy Giessel

Senate Labor and Commerce Committee

HCS CSSB 122 (L&C) Real Estate Transfer Fees/Title Plants Sponsor Statement

Committee Substitute for Senate Bill 122 (Labor & Commerce) seeks to improve the transfer of title to real property in Alaska. Firstly, the bill would ensure that Alaskans maintain oversight of title searches. Companies that operate mainly overseas routinely solicit business in Alaska. While promising lower back office costs, these companies are divorced from actual, on the ground, Alaskan experience, increasing the chance of imperfections in title due to inaccurate or incomplete title searches. The bill would mandate that anyone performing a title search in Alaska be licensed in Alaska and reside here.

Additionally, Alaska law currently allows a deed to real estate to contain a covenant requiring a fee to be paid to the original seller for any subsequent transfer of title. While these transfer fee covenants benefit the original seller, who can look forward to a steady income in perpetuity without performing any additional service, it is a positive harm to each successive buyer. Courts in the state of New York outlawed the practice in 1852, calling it a vestige of feudalism. Recently, Idaho, Indiana, Mississippi, and Montana have passed their own prohibitions, making 41 states that have outlawed the practice. There appears to be no justification for allowing title fee covenants in Alaska.

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SB 122 Real Estate Transfer Fees/Title Plants Summary of Changes

SB 122 to CSSB122 (CRA)

- Deletes Sec. 1, regarding title plant requirements. (Original bill would have extended the time that title plant records must cover from 25 to 50 years.)
- Adds Sec. 2, immediate effective date.
- New bill title to reflect both changes.

CSSB 122 (CRA) to CSSB122 (L&C)

- Adds Sec. 1, requiring a title insurance company to use a licensed title insurance limited producer to search and examine a title.
- Adds Sec. 2, requiring a title insurance limited producer to be an Alaska resident. ✓
- New bill title to reflect these changes.

HCS for CSSB 122 (L&C)

- Deletes p.2, lines 15 – 16, providing for a one-time transfer fee on the next transfer of title.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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Juneau, Alaska 99801-1182
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HJWB
4/11/12

MEMORANDUM

February 15, 2012

SUBJECT: Preparation of title reports and title examinations; amendment drafting issues (CSSB 122(CRA); Work Order No. 27-LS0789\B.1)

TO: Senator Dennis Egan
Attn: Dana Owen

FROM: Dennis C. Bailey *DCB*
Legislative Counsel

This memo accompanies the amendment prepared for you using language provided on the phone. Please be aware of the following issues that have come to my attention during drafting.

The proposed amendment reads:

All preliminary title reports and title examination reports shall be prepared by a person licensed under AS 21.66.270.

1. The licensing requirement under AS 21.66.270 requires a title insurance limited producer to be licensed in the manner provided for in AS 21.27.¹ Licensing under AS 21.66.270 only applies to title insurance limited producers.² The question that arises

¹ AS 21.66.270 provides:

Sec. 21.66.270. Title insurance limited producers to be licensed. A title insurance limited producer shall be licensed in the manner provided for in AS 21.27. A title insurance limited producer may not be licensed to sell insurance other than title insurance.

See AS 21.27.010 for licensing requirements; see also, AS 21.27.275 (director may issue license to nonresident who does not have a home state if the person meets the requirements of the chapter applicable to a resident applying for the same license)

² A title insurance limited producer is defined in AS 21.66.480(8):

(8) "title insurance limited producer" means a person, firm, association, trust, corporation, cooperative, joint-stock company, or other legal entity authorized in writing by a title insurance company to solicit

is whether you intend that only title insurance limited producers may prepare preliminary title reports and title examinations. The proposed licensing requirement apparently excludes a title insurance company from preparing a preliminary report or title examination. The ability to prepare a preliminary report or title examination seems integral to the power of a "title insurance company" to conduct a title insurance business.³ Is that what you intend?

2. You may want to substitute "a licensed title insurance limited producer" instead of referring to AS 21.66.270.

3. The proposed language requires that the person preparing a preliminary title report or title examination report must be a resident of the state. As we briefly discussed, the residency requirement raises the question of whether a residency requirement violates the privileges and immunities clause of the U.S. Constitution.

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Article IV, section 2, Constitution of the United States). A state violates the federal privileges and immunities clause by denying a nonresident equal treatment with respect to a fundamental right or privilege that is essential "to the promotion of interstate harmony." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed.2d 205, 210 (1985). The courts will require that a state justify residency-based discrimination under the privileges and immunities clause if the court finds that the activity that is the subject of the discrimination enjoys privileges and immunities clause protection. Pursuit of an occupation outside one's home state is an activity that has been protected by the privileges and immunities clause. The United States Supreme Court has determined that state discrimination against nonresidents seeking to pursue employment within the state violates the privileges and immunities clause. *Hicklin v. Orbeck*, 437 U.S. 518, 52 L.Ed.2d 304 (1977).

title insurance, collect premiums, determine insurability in accordance with the underwriting rules and standards prescribed by the title insurance company that the licensee represents, and issue policies in its behalf.

³ AS 21.66.180 provides:

Sec. 21.66.180. General powers. A title insurance company may

(1) do business as defined in AS 21.66.480;

(2) do any act, directly or through a title insurance limited producer, incidental to making a contract or policy of title insurance, including, but not limited to, conducting or holding an escrow, settlement, or closing of a transaction; and,

(3) provide other services relative or incidental to the sale and transfer of real or personal property.

In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution.

Further, establishing a residency requirement would conflict with the insurance chapter, AS 21, including, for example, AS 21.66.480(7), which provides, in part, that a title insurance company means a foreign title insurance company issued a certificate of authority to transact a title insurance business within this state. A "'foreign insurer' means an insurer formed under the laws of a jurisdiction other than this state and includes an alien insurer." AS 21.97.900(18). An "'alien insurer' means an insurer formed under the laws of a country other than the United States of America, its states, districts, territories, and commonwealths." AS 21.97.900(3). In general, the insurance statute allows foreign insurance companies to be licensed to do business in the state. In the interest of getting you an amendment in a reasonable time, and in order to allow you to consider the residency issue in the context discussed, I have not prepared amendments to the insurance chapter to make the necessary exceptions prohibiting foreign title insurance companies from doing business in the state. Let me know if you want to proceed in that direction.

4. Incorporating the title insurance provisions of the amendment in a bill that currently addresses the topic of transfer fee covenants may violate the requirement that a bill address only a single subject. The single subject rule requires that all matters in an Act "fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."⁴ The Alaska Supreme Court has held that the purpose of this constitutional provision is to guard against legislative log-rolling, "the practice of 'deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure.'" *Evans v. State*, 56 P.3d 1046, 1069, quoting from *Gellert*, *infra*, at 1122.

Historically, the Alaska Supreme Court has interpreted Alaska's single subject rule to permit very broad subject matter in one bill without violating the single subject requirement. For example, the Court has held that bills relating to such broad themes as "development of water resources,"⁵ "taxation,"⁶ "land,"⁷ "intoxicating liquor,"⁸ and

⁴ *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

⁵ *Gellert v. State*, 522 P.2d 1120 (Alaska 1974).

⁶ *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 545 (Alaska 1978).

⁷ *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982).

⁸ *Van Brunt v. State*, 646 P.2d 872 (Alaska App. 1982).

Senator Dennis Egan
February 15, 2012
Page 4

"criminal law"⁹ are acceptable.¹⁰ However, there was a strong dissent in one case against allowing broad subject matter in a single bill.¹¹ And in 2010, for the first time, the Alaska Supreme Court invalidated a piece of proposed legislation for failure to satisfy the single subject requirement.^{12,13}

CSSB 122(CRA) currently addresses transfer fee covenants in a document conveying real estate. The proposed amendment addresses licensing of title insurance producers. It is difficult to articulate a common subject. Both might be in the subject of "land transactions." Given Alaska's broad interpretation of the single subject rule, including the two topics in the same bill could be found constitutional. Failure to comply with the single subject requirement -- however unlikely -- could jeopardize your bill if it were ever challenged. The issue, of course, may be avoided entirely by using separate bills for each subject.

5. I routinely advise that bill sponsors engage the division of insurance in consideration of a bill in order to make use of their expertise. It seems appropriate to do so with respect to this amendment.

If I may be of further assistance, please advise.

DCB:ljw
12-126.ljw

Enclosure

⁹ *Galbraith v. State*, 693 P.2d 880 (Alaska App. 1985).

¹⁰ *Evans v. State*, 56 P.3d 1046, 1070 (Alaska 2002).

¹¹ *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985). In his dissent, at page 1182, Justice Moore stated: "This court has mistakenly continued to give the rule such an extremely liberal interpretation that the rule has become a farce."

¹² *Croft v. Parnell*, 236 P.3d 369 (Alaska 2010).

¹³ The *Croft* ruling and the *Yute Air* dissent may indicate that the Alaska Supreme Court is moving toward a more stringent single subject standard by adding a dimension to the rule expounded in *Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987). *Harbor* interprets California's single subject rule to prohibit excessive generality because it violates the purpose and intent of the single subject rule.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version CSSB 122 (L&C)
 Fiscal Note Number _____
 () Publish Date _____

Identifier (file name) SB122-DCCED-INS-03-14-12 Dept. Affected DCCED
 Title Real Estate Transfer Fees/Title Plants Appropriation Insurance
 Allocation Insurance
 Sponsor Senate Labor & Commerce
 Requester Senate Rules OMB Component Number 354

Expenditures/Revenues (Thousands of Dollars)

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

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
OPERATING EXPENDITURES	FY13	FY13	FY14	FY15	FY16	FY17	FY18
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							
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Estimated SUPPLEMENTAL (FY12) operating costs 0.0 (separate supplemental appropriation required;
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

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

This fiscal note updates the analysis section to reflect the changes made by the CS.

Prepared by Linda S. Hall, Director
 Division Insurance
 Approved by Susan K. Bell, Commissioner
Commerce, Community, and Economic Development

Phone 907-465-2560
 Date/Time 3/14/12 9:00 AM
 Date 3/14/2012

FISCAL NOTE

**STATE OF ALASKA
2012 LEGISLATIVE SESSION**

BILL NO. CSSB 122 (L&C)

Analysis

SB 122 requires a licensed title insurance limited producer conduct a reasonable search and examination and the company makes a determination of insurability of title. This legislation also provides that a title insurance limited producer may not obtain a license unless the producer is a resident of the state and that a document that conveys real estate may not include a provision that requires a subsequent transfer fee to convey the real estate.

There is no anticipated fiscal impact to the Division as a result of this legislation.

AlaskaUSA[®] Title Agency

April 11, 2012

Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
600 E. Railroad Ave.
Wasilla, AK 99654

Dear Representative Thompson:

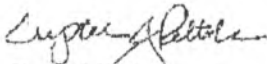
Re: CS for Senate Bill No.122 (L&C)

Alaska USA Title Agency has followed and commented on SB122 since introduced in the Senate Labor and Commerce Committee in 2011. Alaska USA position has consistently been that legislation should not restrict competition nor limit choices for Alaska consumers.

Alaska USA supports the current proposed SB122 only if Section 2 is removed since it may violate the privileges and immunities clause of the U.S. Constitution. Alaska USA concurs with Dennis Bailey's memorandum of February 15, 2012 (copy attached) that the proposed language in SB 122, section 2 raises the question of whether a residency requirement violates the U.S. Constitution. The memorandum states two specific case law examples on page 2, item 3. Both case law examples ruled against similar restrictive residency requirements. Accordingly, we do not believe section 2 of SB122 is good public policy.

Thank you for the opportunity to provide Alaska USA Title Agency's concerns on Senate Bill 122.

Sincerely,



Crystal Peltola
Vice President/General Manager

Enclosure

cc: Linda Hall, Director, Alaska Division of Insurance
Curtis Thayer, Deputy Commissioner, Commerce, Community and Economic Development
Dan Fauske, CEO/Executive Director, Alaska Housing Finance Corporation

received

3/16/2012
1:51 PM
PS

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LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

MEMORANDUM

March 15, 2012

SUBJECT: Residency requirement for title insurance limited producers
(CSSB 122(L&C), Work Order No. 27-LS0789\I)

TO: Senator John Coghill
Attn: Rynnieva Moss

FROM: Dennis C. Bailey
Legislative Counsel

You asked whether the provision of CSSB 122(L&C), sec. 2, which requires a title insurance limited producer to be a resident before the person may obtain a license under AS 21.66.270, raises constitutional issues. The residency requirement raises the question of whether a residency requirement violates the privileges and immunities clause of the U.S. Constitution.

The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. (Article IV, section 2, Constitution of the United States). A state violates the federal privileges and immunities clause by denying a nonresident equal treatment with respect to a fundamental right or privilege that is essential "to the promotion of interstate harmony." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279, 84 L.Ed.2d 205, 210 (1985). The courts will require that a state justify residency-based discrimination under the privileges and immunities clause if the court finds that the activity that is the subject of the discrimination enjoys privileges and immunities clause protection. Pursuit of an occupation outside one's home state is an activity that has been protected by the privileges and immunities clause. The United States Supreme Court has determined that state discrimination against nonresidents seeking to pursue employment within the state violates the privileges and immunities clause. *Hicklin v. Orbeck*, 437 U.S. 518, 57 L.Ed.2d 397 (1978).

In my opinion, it seems likely that a court construing the proposed residency requirement would find the provision unconstitutional as a violation of the privileges and immunities clause of the U.S. Constitution.

If I may be of further assistance, please advise.

DCB:plm
12-163.plm