

**ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672**

**8298 SENATE JUDICIARY**

2. Rules of construction to determine meaning of "administrative proceeding"

a. Common meaning of "administrative proceeding"

The Alaska Supreme Court recently noted that an "important right of the people implicated in all cases of constitutional construction" is the "right to have the constitution upheld as the people ratified it." Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162, 168 (Alaska 1991). See also Thomas v. Bailey, 595 P.2d 1 (Alaska 1979). At issue in Citizens Coalition was the meaning of "rule" in the context of the constitutional provision defining the rule-making power of the Alaska Supreme Court. The proper approach to the analysis of constitutional provisions, the court explained, is as follows:

Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. Rather, absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision. Normally, such deference to the intent of the people requires "adherence to the common understanding of words."

Id. at 169 (citations omitted). Applying this approach, the court looked to a standard dictionary to determine the common understanding of the word at issue.

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This approach is appropriate here to ascertain the meaning the people themselves probably placed on the term "administrative proceeding" when they ratified the proposed amendment.<sup>2</sup> In a legal context, "proceedings" is defined in Webster's Third New International Dictionary at 1807 (Unabridged 1976) as "the course of procedure in a judicial action or in a suit in litigation: legal action . . . (2) a particular action at law or case in litigation . . . ."

Since this definition makes reference to "litigation," and "cases or actions at law," the plain, ordinary meaning of these words is important, too. "Litigate" is defined as "to carry on a legal contest by judicial process . . . to contest in law." Webster Ninth New Collegiate Dictionary at 698 (1987). Thus, in the legal context, the common understanding of the term "proceeding" leads to the conclusion that only those administrative actions which can be analogized to legal contests are within the amendment.

Informal conferences fall outside the ambit of the common understanding of litigation or legal contests. A conference, in the common understanding of the word, is inapposite to a legal

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<sup>2</sup> Since the term "administrative proceeding" has not acquired a particular meaning by statutory definition or judicial construction, reference to a standard dictionary should be employed. See State v. Woods, 345 N.W.2d 457, 474 (Wis. 1984) ("[t]he common and approved usage of [proceeding] in a statute may be ascertained by reference to a recognized dictionary").

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contest. For example, Tormont Webster's Dictionary defines a conference as "a meeting for consultation or discussion." The Torrant Webster's Illustrated Encyclopeda Dictionary 367 (1990). This common understanding of the word squares with the statutory process for informal resolution of tax disputes. By statute, the informal conference is a meeting between the taxpayer (or the taxpayer's representative) and a department "appeals officer." 15 AAC 05.020. The "appeals officer" at the informal conference is not a judicial or quasi judicial officer. The written decision of the appeals officer following an informal conference simply sets out the points of disagreement between the parties. It is not a process which results in the protection of a legal right, or redresses or prevents a wrong, as does a judgment or other order enforceable by judicial process. Labeling the statutory conference as "informal" supports the conclusion that the "informal conference" is a process inherently different than a legal contest.

Application of well recognized tenets of statutory construction also yields the conclusion that the informal conference procedure is not an "administrative proceeding." Constitutional provisions are interpreted under the same principle as those applied in the interpretation of the statutes. See Citizens Coalition at 169 ("the basic principles of statutory interpretation apply to constitutions"). A "widely applied tenet

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of statutory interpretation [is] that if the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases." State, Real Estate Commission v. Johnston, 682 P.2d 383, 386-87 (Alaska 1984) (quoting 2A C. Dallas Sands, Sutherland Statutory Construction § 47.16 at 101 (4th ed. 1973)). Another rule of statutory construction applicable here is that provisions relating to the same subject matter should be read as a whole so that a total scheme evolves which maintains the integrity of each provision and avoids ignoring one provision over another. Conner v. State, 696 P.2d 680, 682 n.3 (Alaska App. 1985). Since in the amendment the term "administrative proceeding" appears in association with the phrase "litigation in a state or federal court," the electorate must have understood that the term "administrative proceeding" was used to express a process akin to litigation. This conclusion is supported by reference to the words "termination" and "settlement" used earlier in the amendment; these are words commonly used in reference to lawsuits, not conferences or meetings.

b. Harmonizing the amendment with the constitutional preference for unrestricted revenues

A preference for unrestricted revenues is implicit in the general prohibition against dedicated funds contained in the Alaska Constitution. Art. IX, § 7. However, under the amendment money required to be deposited into the budget reserve fund is dedicated, and is not available for the unfettered exercise of the legislative power of appropriation. The divergence between these provisions is minimized by construing "administrative proceeding" to avoid an expansive interpretation of the budget reserve amendment. See Abrams, 534 P.2d at 95 (if possible, conflicting provisions of constitution should be harmonized).

3. Legislative and electoral history

In determining the meaning of a term in the constitution, courts also scrutinize the history of the constitutional provision at issue. Citizens Coalition, 810 P.2d at 170. Unfortunately, here the history of the amendment provides little guidance for interpretation of "administrative proceeding."<sup>3</sup>

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<sup>3</sup> All tax disputes arising out of revenues from the development of the North Slope have been resolved through the administrative process. These informal conferences and formal hearings are confidential by law. AS 43.05.230. However, prior to enactment of the amendment, two settlements were publicly announced by the taxpayer and the state jointly because of the magnitude of the dollars involved. Both cases involved tax disputes with Atlantic Richfield Company. Both cases were administrative proceedings in formal hearing before the Department of Revenue. It appears that  
(continued...)

- a. The legislative history of the amendment provides no assistance in interpreting "administrative proceeding."

Article IX, section 17, was adopted by the 1990 legislature as Legislative Resolve No. 129. Although the vehicle for the Resolve was a Senate Resolution, SJR 5, that Resolution had earlier been drafted largely by the House Finance Committee as CSHJR 66 (Fin). An amendment adopted on the House floor essentially replaced the original Senate Resolution with CSHJR 66 (Fin), and the Senate later concurred with this amendment.

The original version of SJR 5 that came to the House from the Senate provided:

Except for money deposited into the permanent fund under Section 15 of Article IX, all money received by the State as a result of the termination through settlement or otherwise, of litigation in State or federal court involving mineral lease rentals, royalties, royalty sale proceeds, and federal mineral revenue sharing payments and bonuses shall be deposited in the budget reserve fund.

CSSSSJR 5 (Fin). The House Finance Committee modified this Resolution by, inter alia, including the reference to "an administrative proceeding" and adding "or involving taxes imposed on mineral income, production, or property."

The additional language was proposed to the House Finance Committee by Representative Kay Brown, and was drafted by the House

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<sup>3</sup>(...continued)  
these settlements were part of the inspiration for the amendment.

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Fiscal Policy Subcommittee in conjunction with the Office of Management and Budget. Mary Halloran, former Governor Cowper's budget officer, urged the committee to establish a budget reserve fund that included not only amounts received from the pending litigation--including the Amerada Hess and the Dinkum Sands cases--but also amounts received for "back taxes still under consideration in the Department of Revenue." House Finance Committee, Committee Tape 90-95, side 1 (May 1, 1990).<sup>4</sup>

These few historical items shed no light on interpretation of "administrative proceeding," and nothing else in the legislative process shows that a committee, subcommittee, or legislator directly considered the question of what constitutes an "administrative proceeding."<sup>5</sup>

- b. The ballot summary provided to the electorate before ratification provides no guidance in the interpretation of the term

When a proposed constitutional amendment is to be presented to the electorate for ratification, the official

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<sup>4</sup> Amerada Hess is a longstanding dispute in state court over the value of royalty oil to which the state was entitled; the original amount in dispute approached a billion dollars. Dinkum Sands, litigation in the United States Supreme Court, involves the location of the boundary between state and federal offshore mineral rights in the oil-rich Beaufort Sea; several hundred million dollars are at issue.

<sup>5</sup> Subsequent pronouncements of legislators regarding the legislative intent in enacting a provision "are irrelevant to a determination of legislative intent." Lynden Transport, Inc. v. State, 532 P.2d 700, 716 (Alaska 1975).

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elections pamphlet must include the full text of the proposed amendment, the ballot title and summary of the proposal prepared by the director of the Division of Elections or the lieutenant governor, a neutral summary of the amendment prepared by the Legislative Affairs Agency, and statements in support of and in opposition to the amendment. AS 15.58.020(6).

The ballot summary for the budget reserve fund amendment described the revenue source for the fund as "money the state receives from mineral revenue lawsuits or administrative actions." The neutral summary, prepared by the Legislative Affairs Agency uses the term "administrative proceeding" to explain one of the sources of potential funding. Neither summary described or defined the reach of the amendment with respect to "administrative proceedings." Nor did the statement in support of the amendment, authored by Senator Faiks and Representatives Brown and Phillips, distinguish between the two types of administrative processes involved in resolution of tax disputes.<sup>6</sup> All statements in the

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<sup>6</sup> This statement in the voter pamphlet makes three oblique references to administrative proceedings:

Revenues from mineral or oil and gas legal settlements and administrative proceedings will be deposited into the Budget Reserve.

. . . .

Legal settlements involving mineral or oil and gas revenues received after July 1, 1990, will be  
(continued...)

voter pamphlet associate the terms "administrative actions" or "administrative proceedings" with "lawsuits," providing additional support for the view that the "administrative action" referred to was a process in the nature of a legal contest or litigation.

c. The terms "windfalls" and "back taxes" are not helpful in resolving the issue

Although the terms "windfalls" and "back taxes" appear several times in the history of the amendment, they are of no real value to this inquiry. First, these terms do not appear in the text of the amendment, and cannot be grafted into it. See Gray v. State, 463 P.2d 897, 904 (Alaska 1970) (it is not for the court to rewrite statutes). Second, the amendment itself clearly places within the budget reserve fund proceeds of tax disputes that are neither longstanding nor "windfalls." For example, tax revenues arising from the early settlement of litigation initiated by the state to recover taxes cannot properly be called either "windfalls" or "back taxes."<sup>7</sup> "Windfalls" are commonly understood to be

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<sup>6</sup>(...continued)

deposited into the Budget Reserve. . . . If approved, the Budget Reserve Fund will help hold down spending by removing from the table the oil and gas revenue "windfalls" that result from pending litigation and tax disputes.

<sup>7</sup> It would not be permissible to exclude settlement proceeds clearly within the scope of the amendment merely because those proceeds did not spring from "back taxes" or represent a  
(continued...)

sudden and unexpected pieces of good fortune in financial form.<sup>8</sup> Recoveries of assessed taxes are not unexpected nor, generally, sudden. "Back taxes" would encompass all assessed taxes not paid upon receipt of the tax bill, and surely the amendment was not intended to sweep within its purview all disputed taxes. If such were the case, virtually all major tax assessments would be required to be placed in the budget reserve fund. Further, patently clear is that the amendment snares "future taxes" as well as "back taxes."

In sum, there is no firm evidence that either the legislature or the public directly considered the question of what constitutes an administrative proceeding for the purposes of the amendment. Accordingly, no conclusions on the proper interpretation of the amendment can be drawn from its history.

#### 4. Judicial decisions

While the interpretation of the amendment advanced here is based principally on an analysis of the text of the amendment, judicial decisions construing the phrases "administrative

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<sup>7</sup>(...continued)

"windfall." The amendment clearly requires some tax recoveries for other than long-standing back taxes to be placed in the budget reserve fund.

<sup>8</sup> According to William Safire, "'windfall' is a 400-year-old word that means an unexpected benefit, graphically describing the good fortune that falls to a passer-by when a piece of fruit is blown off a tree." William Safire, On Language 144 (1981).

proceeding" and "proceeding" provide helpful guidance for its interpretation. Research has revealed cases adopting an expansive definition of these terms as well as cases adopting a narrow definition of them. Generally, the outcomes in these cases turn on the context in which the term "administrative proceedings" is used. No cases were found interpreting "administrative proceeding" in a context similar to that of the amendment.

The more persuasive view expressed in the judicial decisions supports the conclusion that, in this context, "administrative proceeding" means "adjudicatory proceeding." See, e.g., Telco Communications v. Carbaugh, 885 F.2d 1225, 1227-30 (4th Cir. 1989) (an informal administrative fact-finding conference that was not "judicial in nature" was not an administrative proceeding for purposes of the Younger abstention doctrine); Manders v. Oklahoma ex rel. Dep't of Mental Health, 875 F.2d 263 (10th Cir. 1989) (a state agency's internal grievance procedure was not an "action or proceeding" within the meaning of § 706(k) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), governing awards of attorney's fees); American Centennial Ins. Co. v. EEOC, 722 F. Supp. 180 (D.N.J. 1989) ("proceeding" under § 709(e) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-8(e), which prohibits the disclosure of EEOC-obtained information "prior to the institution of any proceeding" under Title VII, did not include the EEOC's informal conference, conciliation, and persuasion process,

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undertaken after a charge is filed); Roosevelt-Wabash Currency Exchange v. Fornelli, 364 N.E.2d 449, 452-53 (Ill. App. 1977) (judiciary will review only an "administrative decision," defined as a decision "which terminates the proceedings before the administrative agency").

5. Conclusion

The amendment applies only to the proceeds of disputes that have progressed to an adjudicatory stage of the dispute resolution process. The amendment does not apply to the proceeds of disputes settled at the informal conference stage.<sup>9</sup>

Very truly yours,

Charles E. Cole  
Attorney General

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<sup>9</sup> Nothing in this memorandum alters the previous advice given to the Department of Revenue concerning the power of the attorney general to approve the compromise of tax claims. In a 1990 formal opinion, we explained the extent of the attorney general's and the department's power to correct or compromise tax claims at various stages of assessment or administrative appeal. 1990 Op. Att'y Gen. No. 1 (Dec. 3, 1990) (the attorney general's approval of a settlement that has the effect of compromising a tax claim is mandatory, even if the settlement of the dispute occurs before the matter is considered an administrative proceeding for purposes of allocating the recovery to the budget reserve fund).

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CEC:JLB:SCS:pml

## STATE OF ALASKA

## THE LEGISLATURE

1990

## Source

HCS CSSSSJR 5(Fin) am H

Legislative  
Resolve No.

129



Proposing an amendment to the Constitution of the State of Alaska relating to the budget reserve fund; depositing into the budget reserve fund, except for money deposited into the permanent fund, all money received by the state after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in state or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property; allowing an appropriation from the fund only if the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year or upon the affirmative vote of three-fourths of the members of each house of the legislature.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

\* Section 1. Article IX, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17. BUDGET RESERVE FUND. (a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

\* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

**S B**

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# MEMORANDUM

State of Alaska

Department of Law

TO: Nancy Bear Usera  
Commissioner  
Department of Administration

DATE: March 10, 1993

FILE NO: 223-93-0335

TEL NO: 465-3600

SUBJECT: Constitutionality of  
phase-out provisions of  
HB 81 and SB 58

FROM: John B. Gaguine *JBG*  
Assistant Attorney General  
Governmental Affairs - Juneau

We sent you a memorandum recently expressing our opinion that the provisions of HB 81 and SB 58 abolishing the longevity bonus but "grandfathering" in those who would turn 65 before January 1, 1997 would not violate the equal protection clauses of the state or federal constitutions. You have now asked whether there are constitutional problems with the differing amounts given to the "grandfathered" persons.<sup>1</sup>

We believe that these provisions would be constitutional for the same reason as the whole "grandfathering" scheme would be. The farther a person is from age 65 - retirement age for many people, and the age at which social security benefits begin - the longer the person has to adjust his or her retirement plans. Thus in our opinion a court would find that the legislature could permissibly conclude that a person turning 65 in 1996 would suffer less hardship from a reduced longevity bonus than would a person turning 65 in 1994, and accordingly the court would uphold the legislative decision to reduce the bonus to a greater degree for the former senior than for the latter.

If we can be of further assistance, please let us know.

cc: Roberley Waldron  
Eileen Plate

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<sup>1</sup> As we noted in our initial memorandum, those turning 65 before the start of 1994 would receive \$250 a month for life; those turning 65 in 1994, \$200; those turning 65 in 1995, \$150; and those turning 65 in 1996, \$100.

Senate Bill 58  
Sectional Analysis

Sec. 1: Provides for phase out of the Longevity Bonus Program.  
Specifically:

- a. All current Longevity Bonus recipients and persons reaching age 65 before January 1, 1994, would receive the current \$250 per month bonus payment.
- b. Persons reaching age 65 during calendar year 1994 would receive \$200 per month.
- c. Persons reaching age 65 during calendar year 1995 would receive \$150 per month.
- d. Persons reaching age 65 during calendar year 1996 would receive \$100 per month.

Under current law, all persons 65 or older are eligible to receive a \$250 per month bonus payment.

Sec. 2: Provides that persons must be 65 before January 1, 1997, to receive a bonus payment. Persons turning 65 after that time would not be eligible.

## MEMORANDUM

State of Alaska

Department of Law

|      |   |         |   |
|------|---|---------|---|
| TO   | Nancy Bear Users<br>Commissioner<br>Department of Administration                              | DATE    | March 5, 1993   |
|      |   | FILE NO | 663-93-0335   |
|      |   | TEL NO  | 465-3600  |
|      |   | SUBJECT | Constitutionality of<br>"grandfathering" in<br>current longevity bonus<br>recipients and those<br>who will soon turn 65 |
| FROM | John B. Gaguine <sup>JBG</sup><br>Assistant Attorney General<br>Governmental Affairs - Juneau |         |   |

You have asked for an opinion as to the constitutionality of the "grandfather" provisions of HB 81 and SB 58. These identical bills, both introduced by the respective rules committee on behalf of the governor, eliminate the longevity bonus for people who turn 65 on or after January 1, 1997. However, they contain "grandfather" provisions that allow persons turning 65 by the end of this year to keep receiving \$250 a month for the rest of their lives; persons turning 65 in 1994 to keep receiving \$200 a month for the rest of their lives; persons turning 65 in 1995 to keep receiving \$150 a month for the rest of their lives; and persons turning 65 in 1996 to keep receiving \$100 a month for the rest of their lives.

The question that these bills raise is whether the "grandfather" provisions violate the equal protection clause of the Alaska constitution, article I, section 1.<sup>1</sup> While we cannot give you a certain answer to this question, we believe strongly that a court would not overturn the "grandfather" provisions if either bill is entitled into law and the provisions were challenged.

Equal protection analysis in Alaska uses a "sliding scale" approach. When a legislative classification impairs an individual's interest, the court first looks at the weight of the that interest. The court then examines the legitimacy of the legislative purpose in enacting the classification. Finally, if the court finds that the interest is legitimate, it examines the "closeness of the fit" between the classification and the purpose. If the individual's interest is not especially weighty, a less-than-perfect fit will be tolerated. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 158-60 (Alaska 1982).

<sup>1</sup> If the provisions pass constitutional muster under the Alaska constitution, they will also pass muster under the federal equal protection clause, part of the Fourteenth Amendment, because the federal clause has been construed as more deferential to legislative enactments than the state clause. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 158 (Alaska 1982).

**GOVERNOR'S PROPOSAL  
LONGEVITY BONUS PHASE OUT  
TALKING POINTS**

Phase out program

- ~ Grandfathering all current recipients
- ~ End new enrollment with those who turn 65 before January 1, 1997
- ~ Reduce payment for new eligibles over next three years (94 -- \$200; 95 -- \$150; 96 -- \$100)

Origin of program

- ~ Established in 1972 to pay \$100/month to those over age 65 who lived in Alaska prior to statehood (January 3, 1959)
- ~ Intended to provide for Alaskans who helped build our state but didn't have retirement income to stay in Alaska

Program changes

- ~ Vest case (1984) eliminated original residency requirements
- ~ Changes focus of program and made it open ended
- ~ Monthly bonus increased from \$100 to \$250

Program growth and costs

- |        |                   |                            |
|--------|-------------------|----------------------------|
| ~ 1973 | 4,753 recipients  | \$346,100 annual cost      |
| ~ 1983 | 9,731 recipients  | \$27.5 million annual cost |
| ~ 1986 | 15,763 recipients | \$44 million annual cost   |
| ~ 1993 | 23,000 recipients | \$66 million annual cost   |
| ~ 2000 | 31,000 recipients | \$93 million annual cost   |
- ~ We've spent \$88 million more than we would if the program had been phased out in 1986.
  - ~ Each year phase out is delayed, the total (aggregate through end) cost of the program increases over \$100 million.

Changes for today's seniors

- ~ Alaska's life style and cost of living are now comparable to other states
- ~ More traditional employment opportunities have employer-based pensions
- ~ Social Security benefits have increased
- ~ Medical assistance programs are now available
- ~ ERISA protection for pensions is now provided

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
TO ASSURE LEGIBILITY**

# MEMORANDUM

## State of Alaska Department of Law

TO Nancy Bear Usera  
Commissioner  
Department of Administration

DATE March 5, 1993

FILE NO: 663-93-0335

TEL. NO: 465-3600

SUBJECT Constitutionality of  
"grandfathering" in  
current longevity bonus  
recipients and those  
who will soon turn 65

FROM John B. Gaguine <sup>RG</sup>  
Assistant Attorney General  
Governmental Affairs - Juneau

You have asked for an opinion as to the constitutionality of the "grandfather" provisions of HB 81 and SB 58. These identical bills, both introduced by the respective rules committees on behalf of the governor, eliminate the longevity bonus for people who turn 65 on or after January 1, 1997. However, they contain "grandfather" provisions that allow persons turning 65 by the end of this year to keep receiving \$250 a month for the rest of their lives; persons turning 65 in 1994 to keep receiving \$200 a month for the rest of their lives; persons turning 65 in 1995 to keep receiving \$150 a month for the rest of their lives; and persons turning 65 in 1996 to keep receiving \$100 a month for the rest of their lives.

The question that these bills raise is whether the "grandfather" provisions violate the equal protection clause of the Alaska constitution, article I, section 1.<sup>1</sup> While we cannot give you a certain answer to this question, we believe strongly that a court would not overturn the "grandfather" provisions if either bill is entitled into law and the provisions were challenged.

Equal protection analysis in Alaska uses a "sliding scale" approach. When a legislative classification impairs an individual's interest, the court first looks at the weight of the that interest. The court then examines the legitimacy of the legislative purpose in enacting the classification. Finally, if the court finds that the interest is legitimate, it examines the "closeness of the fit" between the classification and the purpose. If the individual's interest is not especially weighty, a less-than-perfect fit will be tolerated. Rose v. Commercial Fisheries Entry Commission, 647 P.2d 154, 158-60 (Alaska 1982).

<sup>1</sup> If the provisions pass constitutional muster under the Alaska constitution, they will also pass muster under the federal equal protection clause, part of the Fourteenth Amendment, because the federal clause has been construed as more deferential to legislative enactments than the state clause. Rose v. Commerical Fisheries Entry Commission, 647 P.2d 154, 158 (Alaska 1982).

Nancy Bear Usera  
Commissioner  
Our File: 663-93-0335

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The Alaska Supreme Court has held that an individual's interest in receiving government benefits is at the bottom of the sliding scale. State v. Anthony, 810 P.2d 155 (Alaska 1991) (permanent fund dividend); Sonneman v. Knight, 790 P.2d 702 (Alaska 1990) (unemployment compensation benefits). The Governor's introduction letter for both bills explains the purpose of the "grandfather" provisions: to protect current recipients, and those reaching age 65 in the next four years, because many of them have counted on the bonus in planning for retirement, and an abrupt termination of the program would cause hardship. Acting to prevent such hardship is obviously a legitimate legislative purpose. Finally, there is a substantial relationship between the purpose of the "grandfather" provisions and those provisions by "grandfathering" in current recipients and those soon to turn 65, hardship is prevented. The fit is not perfect: there are obviously some current wealthy recipients who would suffer no hardship if their bonus was terminated, and some persons in their fifties who have made retirement plans relying on the bonus. But, as noted, when the individual's interest is at the bottom of the sliding scale, the fit does not have to be perfect. There is here a sufficiently substantial relationship that we are confident a court would not invalidate the "grandfather" provisions.

Our research has not disclosed any Alaska cases concerning the constitutionality of "grandfather" provisions. However, other jurisdictions have upheld such provisions, when there was a reason for them. In City of New Orleans v. Dukes, 427 U.S. 297 (1976), the U.S. Supreme Court upheld a New Orleans ordinance banning pushcart food sales in the French Quarter but allowing pushcart vendors who had operated in the Quarter for eight years to continue operating. Even though only two vendors qualified under this "grandfather" provision, the Court upheld the ordinance, finding it to be a permissible economic regulation "aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans." Id. at 303. Dukes has been widely followed by state and federal courts.

For the above reasons we believe that if HB 81 or SB 58 were enacted into law, and a court were presented with a claim that the "grandfather" provisions of the enactment violate the equal protection clause of the Alaska constitution, the court would reject the challenge and uphold the "grandfather" provision.

If we can be of further assistance, please let us know.

cc: Roberley Waldron  
✓ Eileen Plate

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TALKING POINTS**

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| ~ 2000 | 31,000 recipients | \$93 million annual cost   |
- ~ We've spent \$88 million more than we would if the program had been phased out in 1986.
  - ~ Each year phase out is delayed, the total (aggregate through end) cost of the program increases over \$100 million.

**Changes for today's seniors**

- ~ Alaska's life style and cost of living are now comparable to other states
- ~ More traditional employment opportunities have employer-based pensions
- ~ Social Security benefits have increased
- ~ Medical assistance programs are now available
- ~ ERISA protection for pensions is now provided

- ~ The Permanent Fund Dividend program was initiated
- ~ Senior citizen tax relief is available
- ~ Free and/or subsidized private and governmental services are available for all senior citizens
- ~ OAC grant programs which fund a variety of community based senior services have been initiated

#### Annuity programs

- ~ After six years of trying, the issue has still not been resolved.
- ~ Government-operated annuity program will require new expenditures and new administrative programs
- ~ The new direct deposit feature for the PFD allows recipients to self-direct dividends to an account of their choice
- ~ Annuity concept requires large pool of participants to ensure financial viability
- ~ The less affluent will be able to invest little or none of their PFD

#### Time to act

- ~ Current year is a window of opportunity to assure grandfathering of existing recipients
- ~ Ability to provide any transition time is becoming more difficult
- ~ Pressure to terminate all non-needs based benefits is growing

**ALASKA LONGEVITY BONUS  
-PHASE OUT  
Questions and-Answers**

1. *Whom was the Longevity Bonus intended to serve?*

In 1972 the Legislature established the Longevity Bonus Program to serve seniors who were 25 year residents and lived in Alaska prior to statehood.

2. *What was the purpose of the Longevity Bonus Program?*

"The sole purpose of this chapter is to offer..... an incentive to continue uninterrupted residency in the state." Chapter 205 SLA 1972

3. *What changes have occurred since the creation of the Longevity Bonus Program in 1972 that reduce the need for the program?*

The need for future seniors to rely on the Longevity Bonus has been mitigated by a number of programs/protections that were not available when the Longevity Bonus was created.

- ~ Alaska's life style and cost of living are now comparable to other states
- ~ More traditional employment opportunities have employer-based pensions
- ~ Social Security benefits have increased
- ~ Medical assistance programs are now available
- ~ ERISA protection for pensions is now provided
- ~ The Permanent Fund Dividend program was initiated
- ~ Senior citizen tax relief is available
- ~ Free and/or subsidized private and governmental services are available for all senior citizens
- ~ OAC grant programs which fund a variety of community-based senior services have been initiated

In addition, elimination of the 25 year residency and requirement to be in Alaska before January 3, 1959, (Statehood) has drastically enlarged the group the program was designed to served.

4. *Why phase out the Longevity Bonus program?*

The state budget cannot sustain the projected growth of this program. Current recipients who are dependent on the Longevity Bonus are in jeopardy of eventually losing the benefit if growth is not curtailed. Projections indicate the program will exceed \$100,000,000 in the year 2002.

5. *Why end eligibility with those who are now age 62?*

This provides those with reasonable expectations of receiving the bonus some financial support from the Longevity Bonus. It provides adequate notice to others who have time for planning that the Longevity Bonus will no longer be available.

6. *Isn't a three year phase out short notice?*

Alaskans have been on notice that the Longevity Bonus was not likely to continue since 1986 when the legislature began considering proposals to phase out the program. Therefore, with the proposed three-year phase out, Alaskans will have known for over ten years that it was not likely that the program could be sustained indefinitely.

7. *Will phase out of the Longevity Bonus adversely affect the Alaska economy?*

No. The phase out will be gradual over 41 years so the effect will not be significant. With necessary budget reductions, the funds otherwise spent on the Longevity Bonus will be shifted to other priorities.

8. *In 1986 there was an advisory vote to end the Longevity Bonus and create an annuity program. Why doesn't this proposal contain an annuity plan?*

Economic conditions, investment options, and available technology have changed during the ensuing 7 years. The annuity plan calls for creation of a new government program at a time when it is necessary to downsize government operations. Additionally, Alaskans can now self-direct investment of their PFD to any number of options through direct deposit.

9. *Under other proposals that include an annuity plan, will seniors be guaranteed payment of \$250 per month when they reach age 65?*

Absolutely not. They will receive payments based only upon how much money they actually deposited in the program. The size of monthly payments will depend on the amount of annual investment; number of years in the program; and rate of interest earned. Those who did not invest any portion of their PFD will receive nothing.

10. *What costs has the state incurred by not ending the Longevity Bonus in 1986?*

The state has spent over \$88 million more than it would have if the growth had been held to the \$44 million budget of 1986. Today, the program serves 23,000 recipients and adds an additional \$5 million to the budget annually.

11. *Why will this approach to phasing out the Longevity Bonus program work when others have failed?*

This plan is simple. It is a single issue, not tied to development of new and financially complex programs. It is not dependent on uncertainties of the financial markets. It is sensitive to people's needs. It recognizes the special role of Senior Alaskans. It simply makes sense.

## GOVERNOR'S PROPOSAL LONGEVITY BONUS PHASE OUT

The original Longevity Bonus legislation stated, "The sole purpose of this chapter is to offer and provide ... an incentive to continue uninterrupted residency in the state." (Ch. 205, SLA 1972) We propose to phase out the Longevity Bonus Program because:

- ~ Other incentives are now offered that enhance the living conditions of seniors
  - Alaska's life style and cost of living are now comparable to other states
  - More traditional employment opportunities have employer based pensions
  - Social Security benefits have increased
  - Medical assistance programs are now available
  - ERISA protection for pensions is now available
  - The Permanent Fund Dividend program was initiated
  - Senior citizen tax relief is available
  - Free and/or subsidized private and governmental services are available for all senior citizens
  - OAC grant programs which fund a variety of community based services have been initiated
- ~ 25 year residency requirement was struck down, negating the original intent of the program
- ~ It is serving all those who were at least 45 years old when it was passed
- ~ Bonus amount has increased from \$100 to \$250 and will need further adjustment to keep pace with inflation
- ~ Combination of the increased Bonus and more recipients due to shorter residency has made the program too costly
- ~ Limited state resources should be focused on those less able to help themselves
- ~ Alaskans generally agree it's time to phase out the current program

### Key Provisions of Proposal

|   |  |
|---|--|
| Terms   | 3-year phase out<br>\$200, \$150, \$100<br>Grandfather all current recipients                                    |
| Cost  | Declines rapidly after 1996<br>Set formula allows for accurate budgeting   |
| Administration  | No new administrative cost<br>Program ends by 2040   |
| Investment Options for<br>Permanent Fund Dividend (PFD) | Self-directed through direct deposit instructions on<br>PFD application  |
| Effect on Alaska's Seniors                              | Proposal easily understood<br>Current recipients continue bonus at \$250<br>Provides for a reasonable transition |

## LONGEVITY BONUS PHASE OUT PROPOSALS COMPARISON CHART

|   | GOVERNOR'S PROPOSAL   | SENATE BILL 6   |
|---|---|---|
| TERMS   | <ul style="list-style-type: none"> <li>- 3 year phase out</li> <li>- \$200, \$150, \$100</li> <li>- Grandfather all current recipients</li> </ul>   | <ul style="list-style-type: none"> <li>- Estimated 15 year phase out</li> <li>- Bonus declines based on variable factors</li> <li>- Grandfather all current recipients</li> </ul>   |
| COST  | <ul style="list-style-type: none"> <li>- Declines rapidly after 1996</li> <li>- Set formula allows for accurate budgeting</li> </ul>  | <ul style="list-style-type: none"> <li>- Declines gradually</li> <li>- Declines dependent on PFD and investment income</li> <li>- Additional administrative costs</li> <li>- Variable nature makes budgeting difficult</li> </ul>   |
| ADMINISTRATION  | <ul style="list-style-type: none"> <li>- No new administrative costs</li> <li>- Program ends by 2040</li> </ul>   | <ul style="list-style-type: none"> <li>- New administrative system to determine annual payments within the longevity bonus program</li> <li>- create new government managed and administered annuity investment program</li> <li>- Longevity Bonus administration ends 2040</li> <li>- New annuity administration open ended</li> </ul> |
| INVESTMENT OPTIONS FOR PERMANENT FUND DIVIDENDS (PFD) | <ul style="list-style-type: none"> <li>- Available through direct deposit on PFD application</li> </ul>   | <ul style="list-style-type: none"> <li>- Creates complex state operated annuity program as option for investing PFD</li> <li>- May not have sufficient participation to sustain financial viability</li> </ul>  |
| EFFECT ON ALASKA'S SENIORS                            | <ul style="list-style-type: none"> <li>- Proposal easily understood</li> <li>- Current recipients continue at level they started</li> <li>- Provides for a reasonable transition</li> <li>- Frees resources for other senior needs</li> </ul> | <ul style="list-style-type: none"> <li>- Complex to understand</li> <li>- Annual bonus dependent on PFD and investment income</li> <li>- Dedicates more general funds to non-needs based senior program</li> </ul>  |

## Funds Spent on Senior Programs

*FY '93 unless otherwise noted*

| Program   | State   | Federal           | Total              |
|---|---|-------------------|--------------------|
| <b>Dept. of Administration</b>                    |   |                   |                    |
| Longevity Bonus                                   | 64,811,700                                      |                   | 64,811,700         |
| Pioneer Homes                                     | 30,432,500                                      |                   | 30,432,500         |
| Older Alaskans Commission                         | 6,053,500                                       | 6,486,900         | 12,523,400         |
| <b>TOTAL DEPT.</b>                                | <b>101,297,700</b>                              | <b>6,486,900</b>  | <b>107,767,600</b> |
| <b>Dept. of Health &amp; Social Services</b>      |   |                   |                    |
| Supplemental Security Income                      |   | 3,580,580         | 3,580,580          |
| Longevity Bonus Hold Harmless                     | 2,194,500                                       |                   | 2,194,500          |
| Adult Public Assistance (for aged)                | 14,600,000                                      |                   | 14,600,000         |
| Food Stamps for elderly                           |   | 165,600*          | 165,600*           |
| Medicaid home health care                         | 227,800   | 227,000           | 455,600            |
| Medicaid nursing homes                            |   |                   |                    |
| Skilled nursing                                   | 2,677,100                                       | 2,677,100         | 5,354,200          |
| Intermediate nursing                              | 16,385,400                                      | 16,385,400        | 32,770,800         |
| General Relief Medical (Nursing Homes)            | 253,900   |                   | 253,900            |
| Medicaid Permanent Fund (Hold Harmless)           | 2,621,200                                       |                   | 2,621,200          |
| <b>TOTAL DEPT.</b>                                | <b>38,959,900</b>                               | <b>23,035,680</b> | <b>61,996,380</b>  |
| <b>Dept. of Community &amp; Regional Affairs</b>  |   |                   |                    |
| Homeowners Property Tax Exemption                 | 2,838,800                                       |                   | 2,838,800          |
| Renters Equivalency Rebate                        | 820,000   |                   | 820,000            |
| Job Training Partnership Act                      |   | 185,125           | 185,125            |
| <b>TOTAL DEPT.</b>                                | <b>3,658,800</b>                                | <b>185,125</b>    | <b>3,843,925</b>   |
| <b>Dept. of Commerce and Economic Development</b> |   |                   |                    |
| Alaska Housing Finance Corporation                |   |                   |                    |
| Senior Housing Development                        | 141,100   |                   | 141,100            |
| Senior Housing Revolving Loan Program             | Up to \$30 million in bonds available from AHFC |                   |                    |
| <b>TOTAL DEPT.</b>                                | <b>141,100</b>                                  |                   | <b>141,100</b>     |
| <b>TOTAL ALL DEPARTMENTS</b>                      | <b>144,057,500</b>                              | <b>29,707,625</b> | <b>173,765,125</b> |

Total number of seniors age 60+ = 35,266. Average benefit per senior = \$4,927.00.

\* Estimated figure based on percentage of seniors served

*Note: All funding levels are for FY 93 authorized, except for Medicaid and Job Training Partnership Act, which are FY 92 actual.*

| Additional State Benefits--Revenues Lost   | Additional Municipal Benefits--Revenues Lost   |
|--|--|
| Dept. of Transportation, ferry fares: \$540,800  | Municipal Tax Exemptions: \$8,454,353*   |
| Dept. of Public Safety, vehicle registration: Estimated \$300,000.   | * The above information does not include municipal services or discounts for seniors. Municipalities also often offer sales tax exemptions, discounted bus fares and similar programs. |
| University of Alaska, tuition waiver: \$230,267 estimated  | Total number of seniors age 60+ = 35,266. Total revenues lost = \$8,454,353  |
| Dept. of Fish and Game: waivers of hunting, trapping, and fishing licenses (average cost: \$10.60): \$27,560 | Total average benefit = \$240.   |
| Total additional State benefits = \$1,098,627. Average senior benefit = \$31.15.                             |  |

**GOVERNOR'S PROPOSAL  
LONGEVITY BONUS PROGRAM  
PHASE OUT  
SUMMARY OF INTENT**

The Alaska Longevity Bonus Program was established in 1972 to pay \$100 per month as a "bonus" to those over age 65 who had lived in Alaska for 25 years and were here at the time of statehood. This was a finite, self liquidating group. The purpose of the program was to "offer and provide.... an incentive to continue interrupted residency in the state." (Ch. 205, SLA 1972) Were the original criteria still in place, those eligible to enroll in the program in 1996 would have been 28 years old at the time of statehood.

At the end of 1973 the program had 4,753 recipients and an annual cost of \$346,100. The program grew at a steady rate up through 1983 when there were 9,731 recipients and an annual budget of \$27,586,750. The \$100 monthly bonus was increased in 1976, 1978, 1981, and 1982 to its current level of \$250 per month. Current projections suggest the annual cost of the ALB will exceed \$90 million in the year 2000 and will pass the \$100 million mark in 2002.

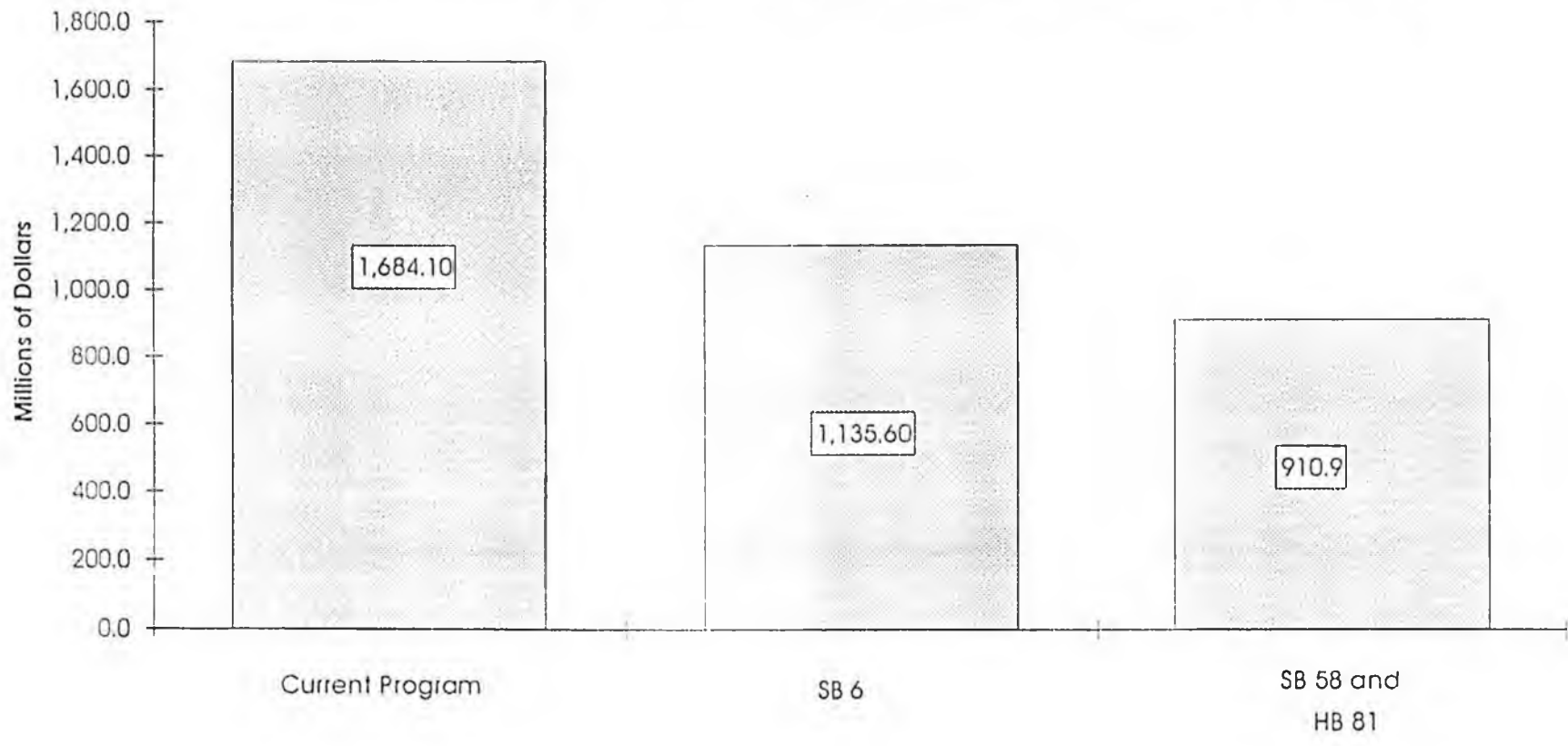
In 1984, the Supreme Court found the residency rules unconstitutional in the Vest case. By the end of 1986 the Longevity Bonus Program had 15,763 recipients with an annual budget of \$44,105,500. Compared to 1983, that represented a 62% increase in recipients and a 60% increase in budget. More important, the Vest case changed the group being served from a finite, self liquidating group (65 years old, 25 years in state, here at time of statehood) to a continually growing group (anyone age 65 with one year residency). Beyond the change in the size of the group, the basic purpose of the Longevity Bonus Program changed. It was no longer a program to provide an incentive to long term Alaskans who helped build our state prior to statehood.

During the years since the creation of the Longevity Bonus, there have been several changes that have improved the economic condition of Alaskan seniors. The federal government passed the Employee Retirement Income Security Act (ERISA) in 1976, Individual Retirement Accounts (IRAs) became widely available, Senior Citizen Property Tax Relief was enacted, property values increased, The Permanent Fund Dividend was established, State income taxes were repealed, and Social Security incomes steadily increased. As a group, those reaching age 65 today, have had the advantage of the economic growth of the past 20 years and are more economically stable than any previous group of seniors.

This proposal protects those who planned their retirement around the Longevity Bonus Program. They will be able to depend on it for the rest of the time they remain in Alaska. The three year transition period before new enrollment is ended allows those close to retirement to receive the Longevity Bonus. It gives future retirees time to make other plans for retirement income. This proposal does not provide for creating a government operated annuity plan. For those who wish to invest their Permanent Fund Dividend to provide for future retirement income, today they can do so by directing the Permanent Fund Dividend Division to send the PFD to a private annuity plan of their investment of their choice. This can be accomplished through direct deposit instructions on the application. This preserves the investment concept without creating a new bureaucracy to implement an insurance type program.

This proposal returns the Longevity Bonus Program to its original goal -- assisting a finite group who may not have remained in Alaska in retirement without this assistance.

Longevity Bonus Proposals - Cumulative Cost Through Fiscal Year 2010



## Longevity Bonus Program Alternative Funding Proposals

| Fiscal Year | Projected Cost  |               |                                  | Projected Number of Participants |               |                                  |
|-------------|-----------------|---------------|----------------------------------|----------------------------------|---------------|----------------------------------|
|             | Current Program | Senate Bill 6 | Senate Bill 58 and House Bill 81 | Current Program                  | Senate Bill 6 | Senate Bill 58 and House Bill 81 |
| 1994        | 69.6            | 69.6          | 69.1                             | 24,059                           | 24,059        | 24,059                           |
| 1995        | 74.8            | 74.7          | 70.8                             | 25,864                           | 25,864        | 25,864                           |
| 1996        | 78.2            | 77.5          | 71.1                             | 27,021                           | 27,021        | 27,021                           |
| 1997        | 81.2            | 79.5          | 69.9                             | 28,081                           | 28,081        | 26,581                           |
| 1998        | 84.4            | 81.1          | 66.9                             | 29,188                           | 29,188        | 25,525                           |
| 1999        | 87.5            | 82.0          | 63.9                             | 30,266                           | 30,266        | 24,444                           |
| 2000        | 90.8            | 82.3          | 60.9                             | 31,408                           | 31,408        | 23,385                           |
| 2001        | 93.9            | 81.4          | 57.7                             | 32,456                           | 32,456        | 22,272                           |
| 2002        | 97.1            | 79.7          | 54.7                             | 33,557                           | 33,557        | 21,181                           |
| 2003        | 100.4           | 76.9          | 51.6                             | 34,704                           | 34,704        | 20,087                           |
| 2004        | 103.8           | 72.9          | 48.5                             | 35,880                           | 35,880        | 18,950                           |
| 2005        | 107.5           | 67.7          | 45.4                             | 37,153                           | 37,153        | 17,814                           |
| 2006        | 111.9           | 61.0          | 42.2                             | 38,675                           | 38,675        | 16,666                           |
| 2007        | 116.9           | 52.7          | 39.1                             | 40,428                           | 40,428        | 15,512                           |
| 2008        | 123.1           | 42.3          | 36.0                             | 42,572                           | 42,572        | 14,367                           |
| 2009        | 128.9           | 29.3          | 33.0                             | 44,559                           | 44,559        | 13,239                           |
| 2010        | 134.1           | 25.0          | 30.1                             | 46,376                           | 46,376        | 12,136                           |

| Cumulative Costs Through 2010 |         |       |
|-------------------------------|---------|-------|
| 1,684.1                       | 1,135.6 | 910.9 |

All dollars in millions

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 58

Revision Date: 2/8/93

Department Affected: Administration

Title: An act relating to the Longevity Bonus

BRU: Pioneers' Benefits

Sponsor: Senate Rules Committee

Component: Longevity Bonus

Requestor: HES

Grants

COMPONENT SERIAL NO. 26

Expenditures/Revenues:

| OPERATING         | FY 94    | FY 95      | FY 96      | FY 97       | FY 98       | FY 99       |
|-------------------|----------|------------|------------|-------------|-------------|-------------|
| PERSONAL SERVICES | 0        | 0          | 0          | 0           | 0           | 0           |
| TRAVEL            | 0        | 0          | 0          | 0           | 0           | 0           |
| CONTRACTUAL       | 0        | 0          | 0          | 0           | 0           | 0           |
| SUPPLIES          | 0        | 0          | 0          | 0           | 0           | 0           |
| EQUIPMENT         | 0        | 0          | 0          | 0           | 0           | 0           |
| LAND & STRUCTURES | 0        | 0          | 0          | 0           | 0           | 0           |
| GRANTS, CLAIMS    | (500.0)* | (4,000.0)* | (7,100.0)* | (11,300.0)* | (17,500.0)* | (23,600.0)* |
| MISCELLANEOUS     | 0        | 0          | 0          | 0           | 0           | 0           |
| TOTAL OPERATING   | (500.0)  | (4,000.0)  | (7,100.0)  | (11,300.0)  | (17,500.0)  | (23,600.0)  |

|         |   |   |   |   |   |   |
|---------|---|---|---|---|---|---|
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
|---------|---|---|---|---|---|---|

|              |   |   |   |   |   |   |
|--------------|---|---|---|---|---|---|
| REVENUE      |   |   |   |   |   |   |
| FUND SOURCE: | 0 | 0 | 0 | 0 | 0 | 0 |

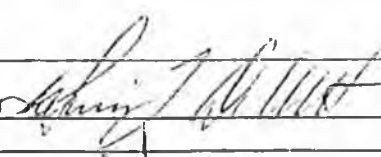
FUNDING:

|                          |         |           |           |            |            |            |
|--------------------------|---------|-----------|-----------|------------|------------|------------|
| 1002 Federal Receipts    | 0       | 0         | 0         | 0          | 0          | 0          |
| 1003 GF Match            | 0       | 0         | 0         | 0          | 0          | 0          |
| 1004 GF                  | (500.0) | (4,000.0) | (7,100.0) | (11,300.0) | (17,500.0) | (23,600.0) |
| 1005 GF/Program Receipts | 0       | 0         | 0         | 0          | 0          | 0          |
| 1006 GF/MHTIA            | 0       | 0         | 0         | 0          | 0          | 0          |
| OTHER                    | 0       | 0         | 0         | 0          | 0          | 0          |
| TOTAL                    | (500.0) | (4,000.0) | (7,100.0) | (11,300.0) | (17,500.0) | (23,600.0) |

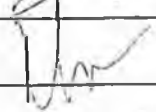
|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

Estimate of current year (FY93) impact: 0

ANALYSIS: \* Cost savings reflect the difference between current program costs and new program costs. Budget requests will continue to go up through FY96 due to growth in numbers of participants. By FY97 budget requests begin to go down. See attached table for details of the calculations.

Prepared by: Dennis L. DeWitt, Director   
Division: Pioneers' Benefits

Phone: 465-4400  
Date: 2/5/93

Approved by Commissioner: Nancy Bear Usura   
Agency: Administration

Date: 2/8/93

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## Longevity Bonus Fiscal Note

| FY   | Current Program        |             | Proposed Phase-Out     |             | Difference             |                             |
|------|------------------------|-------------|------------------------|-------------|------------------------|-----------------------------|
|      | Number of Participants | Annual Cost | Number of Participants | Annual Cost | Number of Participants | Annual Savings to the State |
| 1994 | 24,059                 | 69.6        | 24,059                 | 69.1        | 0                      | (0.5)                       |
| 1995 | 25,864                 | 74.8        | 25,864                 | 70.8        | 0                      | (4.0)                       |
| 1996 | 27,021                 | 78.2        | 27,021                 | 71.1        | 0                      | (7.1)                       |
| 1997 | 28,081                 | 81.2        | 26,581                 | 69.9        | (1,500)                | (11.3)                      |
| 1998 | 29,188                 | 84.4        | 25,525                 | 66.9        | (3,663)                | (17.5)                      |
| 1999 | 30,266                 | 87.5        | 24,444                 | 63.9        | (5,822)                | (23.6)                      |

Cost in Millions of Dollars

**Explanation:** 1. For purposes of consistency, we have used Legislative Research figures for the 'Number of Participants' and 'Annual Cost' for the Current Program and the Proposed Phase-Out.

**Note :** There is an additional fiscal note associated with this proposal for the administration component, for \$11,625 for computer modifications.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB58

Revision Date: \_\_\_\_\_  
Title: An act relating to the Longevity Bonus Program  
Sponsor: Rules Committee  
Requestor: Governor

Department Affected: Administration  
BRU: Pioneers' Benefits  
Component: Longevity Bonus

COMPONENT SERIAL NO. 27

Expenditures/Revenues:

| OPERATING         | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0     | 0     | 0     | 0     | 0     | 0     |
| TRAVEL            | 0     | 0     | 0     | 0     | 0     | 0     |
| CONTRACTUAL       | 11.6  | 0     | 0     | 0     | 0     | 0     |
| SUPPLIES          | 0     | 0     | 0     | 0     | 0     | 0     |
| EQUIPMENT         | 0     | 0     | 0     | 0     | 0     | 0     |
| LAND & STRUCTURES | 0     | 0     | 0     | 0     | 0     | 0     |
| GRANTS, CLAIMS    | 0     | 0     | 0     | 0     | 0     | 0     |
| MISCELLANEOUS     | 0     | 0     | 0     | 0     | 0     | 0     |
| TOTAL OPERATING   | 11.6  | 0     | 0     | 0     | 0     | 0     |

|         |   |   |   |   |   |   |
|---------|---|---|---|---|---|---|
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
|---------|---|---|---|---|---|---|

|                      |   |   |   |   |   |   |
|----------------------|---|---|---|---|---|---|
| REVENUE FUND SOURCE: | 0 | 0 | 0 | 0 | 0 | 0 |
|----------------------|---|---|---|---|---|---|

FUNDING:

|                          |      |   |   |   |   |   |
|--------------------------|------|---|---|---|---|---|
| 1002 Federal Receipts    | 0    | 0 | 0 | 0 | 0 | 0 |
| 1003 GF Match            | 0    | 0 | 0 | 0 | 0 | 0 |
| 1004 GF                  | 11.6 | 0 | 0 | 0 | 0 | 0 |
| 1005 GF/Program Receipts | 0    | 0 | 0 | 0 | 0 | 0 |
| 1006 GF/MHTIA            | 0    | 0 | 0 | 0 | 0 | 0 |
| OTHER                    | 0    | 0 | 0 | 0 | 0 | 0 |
| TOTAL                    | 11.6 | 0 | 0 | 0 | 0 | 0 |

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

Estimate of current year (FY93) impact: 0

ANALYSIS: (Attach a separate page if necessary.)

The proposed Longevity Bonus program changes would require modifications to both mainframe and microcomputer software and revised interface programs at an estimated cost of \$11.6.

Prepared by: Dennis L. DeWitt  
Division: Pioneers' Benefits

Phone: 465-4400  
Date: 1/15/93

Approved by Commissioner: Nancy Bear Usher  
Agency: Administration

Date: 1/15/93

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 64

Revision Date: 1/22/93  
Title: Civil Liability for Workplace Safety Inspections  
Sponsor: Senate Labor & Commerce Committee  
Requestor: \_\_\_\_\_

Department Affected: Commerce and Economic Development  
BRU: Insurance  
Component: Operations  
COMPONENT SERIAL NO. 354

EXPENDITURES/REVENUES:

| OPERATING         | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | 0     | 0     | 0     | 0     | 0     | 0     |
| TRAVEL            | 0     | 0     | 0     | 0     | 0     | 0     |
| CONTRACTUAL       | 0     | 0     | 0     | 0     | 0     | 0     |
| SUPPLIES          | 0     | 0     | 0     | 0     | 0     | 0     |
| EQUIPMENT         | 0     | 0     | 0     | 0     | 0     | 0     |
| LAND & STRUCTURES | 0     | 0     | 0     | 0     | 0     | 0     |
| GRANTS, CLAIMS    | 0     | 0     | 0     | 0     | 0     | 0     |
| MISCELLANEOUS     | 0     | 0     | 0     | 0     | 0     | 0     |
| TOTAL OPERATING   | 0     | 0     | 0     | 0     | 0     | 0     |

|         |   |   |   |   |   |   |
|---------|---|---|---|---|---|---|
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
|---------|---|---|---|---|---|---|

|                         |   |   |   |   |   |   |
|-------------------------|---|---|---|---|---|---|
| REVENUE<br>FUND SOURCE: | 0 | 0 | 0 | 0 | 0 | 0 |
|-------------------------|---|---|---|---|---|---|

FUNDING:

|                          |   |   |   |   |   |   |
|--------------------------|---|---|---|---|---|---|
| 1002 Federal Receipts    | 0 | 0 | 0 | 0 | 0 | 0 |
| 1003 GF Match            | 0 | 0 | 0 | 0 | 0 | 0 |
| 1004 GF                  | 0 | 0 | 0 | 0 | 0 | 0 |
| 1005 GF/Program Receipts | 0 | 0 | 0 | 0 | 0 | 0 |
| 1006 GF/M&TIA            | 0 | 0 | 0 | 0 | 0 | 0 |
| OTHER                    | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL                    | 0 | 0 | 0 | 0 | 0 | 0 |

POSITIONS:

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

Estimate of current year (FY 93) impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact.

Prepared by: Joan Brown, Administrative Officer *Joan Brown*  
Division: Insurance

Phone: 465-2597

Date: 1/29/93

Approved by Commissioner: Paul Fuhs *Paul Fuhs*  
Agency: Commerce and Economic Development

Date: 2-3-93

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**Zero fiscal note - Commerce**

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Juneau, Alaska 99801-2105

MEMORANDUM

February 3, 1993

**SUBJECT:** Workplace safety inspections - SB 64  
**TO:** Senator Tim Kelly  
**FROM:** Michael F. Ford  
Legislative Counsel

This memo is in response to comments by the Division of Insurance. The division questions the placement of the immunity provision as a part of title 21. The placement of the immunity provision is intended to complement the workplace safety program, which is located at AS 21.89.015. In short, the workplace safety inspection immunity provision seems to logically fit alongside the workplace safety program.

The Division of Insurance also questioned the lack of definition of several terms. A term is only defined if the meaning of the term is unclear. It does not appear that the terms referred to in the division's memo would require definition, in order to provide immunity for workplace safety inspections.

Please contact me if you have further questions.

TBC:lmb  
93-019.lmb

Legal Services Response

# Sponsor Statement

## SB-64 (L&C)

### Civil liability / workplace safety inspections

In 1988 the Legislature passed a comprehensive revision of Alaska's worker' compensation laws. Since taking effect the new workers' compensation provisions have proven successful.

In 1991, SB-219 was introduced by the Labor & Commerce Committee. The bill addressed two problems in the workers' compensation statutes; 1) injuries incurred as a result of employer sponsored recreational activities and; 2) removal of liability for safety inspections conducted on behalf of self-insured employers and workers' compensation carriers. These provisions have passed the Senate twice, but HCS CSSB 219 (Jud) am H was vetoed by the Governor because many more objectionable provisions were added in the House. The safety inspection issue was brought to the forefront as a result of the 1989 Van Biene v. ERA Helicopters, Inc. decision our Supreme Court, which held that "*workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of safety inspection if insurer actually inspected the working conditions of the employer prior to the incident.*" (See decision in bill file.)

SB-64, removes civil liability from insurers, insurance service agents, self-insured employers, or trade associations for damages resulting from the performance or failure to perform a workplace safety inspection or a safety advisory service unless the act is intentional.

SB-64, ensures workplace safety inspections will continue, that workers' compensation insurance will be available and affordable because of safety inspections, and that employees benefit from safety inspections.

The Department of Commerce is neutral on the bill, (see position paper) although their position suggests the law might better be placed under AS 23 (Labor and Workers' Compensation). Legislative Legal Services responds (see memo) that "*the workplace safety inspection immunity provision seems to logically fit alongside the workplace safety program.*" Legal Services further advised that placement of the law under AS 21 was the recommendation of the revisor of statutes, and Commerce responded that it was a minor point not germane to the issue at hand.

ZERO Fiscal Note, Department of Commerce, Division of Insurance.


sponsor statement

SB 64: "An Act relating to civil liability for safety and inspection; and providing for an effective date."

The Division of Insurance is neutral with respect to the content of this bill. The bill attempts to remove civil liability from insurers, insurance service agents self-insured employers, or trade associations for damages resulting from the performance or failure to perform work place safety inspection programs, unless there is intentional misconduct involved.

The division would like to point out several possible flaws in the format of the bill. The bill has a tort limitation objective as opposed to an insurance regulatory objective, and as such we would recommend that it be reassigned to a different title of the Alaska Statutes. The purpose and intent of the bill really does not fit well with Title 21.

Secondly, there are several terms which are undefined within Title 21. For example, an "insurance service agent" or "trade association" are undefined terms in the Alaska insurance statutes. In addition, the bill refers to an "insurance service agent" to a "self-insured employer." We do not regulate self-insured entities. "Self-insurance" is not the business of insurance. "Insurance" only exists when there is a transfer of risk. An entity that is "self-insured" simply has not transferred any risk to a separate entity. Therefore, all "self-insured" entities are not regulated by the Division of Insurance. It would be inappropriate to include within our statutory framework references to entities for which we have no statutory authority. It might be more appropriate to place the language in AS 23.

  
Paul Fuhs, Commissioner

2-3-93  
Date

dgl029pp.ins



## Alaska Timber Insurance Exchange

February 15, 1993

2555 First Avenue  
Ketchikan, Alaska 99901  
FAX (907) 225-9454  
(907) 225-9451

The Honorable Robin Taylor  
Chairman  
Judiciary Committee  
Alaska State Senate  
Room 30-State Capitol  
Juneau, Alaska 99801-1182

RE: Senate Bill number 64

Dear Senator Taylor:

The Van Biene Bill, (S.B. 64), now before the Senate Judiciary, is of particular importance to the management and policyholders of the Alaska Timber Insurance Exchange, (the Exchange).

Since beginning operations in 1980, the Exchange has developed into the State of Alaska's largest writer of workers' compensation insurance for loggers. Today we have 47 policyholders representing approximately 2,000 employees, most of whom are located in logging camps throughout Southeast Alaska.

Unfortunately, the Alaska Supreme Court decision, (Van Biene vs ERA), enlarging the ability of employees covered by Alaska State workers' compensation to sue the Carrier for damages in connection with safety audits and/or recommendations, forced the Exchange to make the hard call and no longer perform safety audits nor offer safety related recommendations.

The Van Biene decision fosters a departure from promoting a safe work environment and therefore, the passage of S.B. 64 is of paramount importance.

The Alaska Supreme Court realized the Van Biene decision could have an adverse effect on insurance companies' workplace safety programs, and on workers' safety in general. However, the court declined to make legal decision based on public policy considerations, stating: "We decline to judicially amend the Act on the basis of such a policy argument. This type of policy determination is appropriately left for the legislature."

AK Timber Ins. Exchange - Sup.

Alaska Timber Insurance Exchange

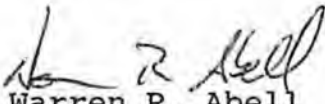
The Honorable Robin Taylor  
Senate Bill number 64  
February 15, 1993  
Page 2

Therefore, the Exchange encourages the Judiciary Committee to move S.B. 64 from Committee as quickly as possible so that workplace safety programs can once again be implemented without the fear of litigation.

Thank you for the opportunity to comment on this matter.

Sincerely,

ALASKA TIMBER INSURANCE EXCHANGE



Warren R. Abell  
General Manager

WRA/st

cc. Ms. Dona Lewis, President  
Mr. Martin Pihl, Chairman



217 Second Street, Suite 200 • Juneau, Alaska 99801 • Tel (907) 586-1325, Fax (907) 463-5480

February 15, 1993

TO: Senator Robin Taylor, Chair  
and  
Members, Senate Judiciary Committee

FROM: Kent E. Swisher, Executive Director *KES*

RE: SB 64 - An act relating to civil liability for workplace safety inspections

The Alaska Municipal supports the intent of SB 64 - Relating to civil liability for workplace safety inspections and wishes to suggest an amendment to the bill as introduced to clarify that it applies to self-insurance pools and self-insured employers.

The League's 1993 Policy Statement, Part III, E.7 states:

The League supports legislation that would limit civil liability for insurance pools, self-insured employers, an insurance agent to self-insured employers, carriers, or trade associations as a result of an act or omission in performing or failing to perform a workplace safety inspection or a safety advisory service.

As a representative of both a self-insurance pool, the Alaska Municipal League Joint Insurance Association, and municipalities that are self-insured, the League suggests the following amendment to SB 64 as introduced by your committee:

Sec. 21.89.017. IMMUNITY FROM CIVIL LIABILITY FOR WORKPLACE SAFETY INSPECTIONS. An insurer, an insurance service agent to a self-insured employer, a self-insured employer, a self-insurance pool, or a trade association is not liable for civil damages as a result of an act or omission in performing or failing to perform a workplace safety inspection or a safety advisory service unless the insurer's, agent's, employer's, pool's, or association's act or failure to act constitutes intentional misconduct.

Protection from civil liability for safety services was eliminated in 1990 by action of the Alaska State Supreme Court. According to the September 1992 issue of *The WCCA Sounder*, a workers' compensation reform newsletter, "as it now stands, any insurance carrier or safety service provider is subject to suit by an injured worker if the insured has provided, or failed to provide, safety inspections or advice."

Self-insured municipalities and self-insurance pools have active loss control and public and employee safety programs designed to prevent or limit future injuries. Legislation is needed to provide protection from civil liability for them as well as for other insurers who promote safety. AML's proposed amendment will extend that protection to self-insured employers and self-insurance pools as well as to private insurers and trade associations.

We appreciate your consideration of this request for an amendment and urge swift action on an amended version of SB 64.

LEG933:sb64.215

Member of the Na

Municipal League - Support

nties

# WCCA

Workers' Compensation  
Committee of Alaska

February 4, 1993

The Honorable Tim Kelly  
Alaska State Senate  
P.O. Box V  
Juneau, Alaska 99811

Re: Senate Bill 64

Dear Senator Kelly,

The Worker's Compensation Committee of Alaska, (WCCA) a state wide advocacy group for business and industry interests in worker's compensation, offers their **support for Senate Bill 64 in its originally introduced form.** This bill puts back the legislative intent of the 1988 Worker's Comp reform bill which was supported by a unified coalition of labor and management. As a result of the passage of the 1988 reform legislation, Alaska's worker's compensation system is looked upon as a model system by many states currently facing financial ruin in their comp programs.

Should you or your committee members require further information regarding the history and/or need for the provisions contained in Senate Bill 64 please feel free to contact us.

Sincerely,



Willem Van Hemert  
President  
Workers' Compensation Committee of Alaska

|  |                               |                |
|--|-------------------------------|----------------|
| Post-It® brand fax transmittal memo 7671 |                               | # of pages ▶ / |
| To <i>Sen Tim Kelly</i>                  | From <i>Willem Van Hemert</i> |                |
|  | Co.                           |                |
|  | Phone # <i>561-3252</i>       |                |
|  | Fax # <i>561-2273</i>         |                |

P.O. Box 200631  
Anchorage, Alaska 995

**Worker's Comp. - Support**



# Alaska National INSURANCE COMPANY

*A policy of service and protection*

February 1, 1993

The Honorable Tim Kelly, Chair  
Labor & Commerce Committee  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1162

Dear Senator Kelly:

Unfortunately, I will be unable to attend your hearing on SB 64 scheduled for Thursday, February 4, 1993. However, this bill is an extremely important one and I wanted to express my views.

This legislation (with the deletion of one key phrase) will help restore the workers' compensation system to its original intent -- i.e. a no fault system.

As you know, the workers' compensation system covers employee injuries whether or not the employee is at fault. Even gross negligence on the part of the employee does not free the employer of liability. In return, the employer and its insurance carrier are entitled to exclusive remedy. That is, the employer or carrier should not be subject to any liability beyond what is provided under the workers' compensation act.

If, in fact, an insurance carrier makes a mistake (intentional or otherwise) in a safety inspection, the employee is taken care of under the workers' compensation system. No need exists, nor should there be any incentive, for an employee to reap windfall benefits.

If an insurance carrier displays a pattern of poor inspection practices, remedies are available for the Director of the Division of Insurance to address the matter. From a practical standpoint, however, the market place will quickly come into play and insureds will go elsewhere for coverage and safety services.

I strongly urge your Committee to delete the language relative to "intentional misconduct". As currently written, this language may appear to embrace "motherhood" and "apple pie" but I assure you that such a belief is erroneous.

Letter-Tim Kelly  
February 1, 1993  
Page 2

First, as I have already pointed out, this additional club is not needed. The important consideration is that the employee is already taken care of.

Second, this type of language invites frivolous causes of action for which the principal beneficiaries are plaintiff and defense attorneys.

The problem is that such words as "intentional" or "misconduct" are issues of fact and, therefore, ultimately would have to be decided by a judge or jury. I know I am being repetitious here but the workers' compensation system was not designed to be adversarial in determining fault. Fault is not supposed to be an issue. Thus, I suggest that this language is inappropriate and respectfully request that it be removed.

I appreciate the fact that this overall issue is being addressed this year and urge that this corrective legislation be passed.

Sincerely,



James E. Pfeifer  
President

JEP/maj

[11] The California Supreme Court, in deciding a similar case, concluded that the fundamental purpose of workmen's compensation is to protect individuals from the "special risks" of employment. *Laeng*, 494 P.2d at 8-9. Therefore, when an employer exposes potential employees to risks inherent in a tryout period and the applicant is under his direction or control, any injury resulting during such a period is compensable as a matter of law. *Id.* See also *Mansfield Enters., Inc. v. Warren*, 154 Ga.App. 863, 270 S.E.2d 72, 74 (1980); *Moore*, 223 N.W.2d at 648; *Venezian Lamp Co.*, 168 N.Y.S.2d at 766.

[12] The Lodge argues that the tryout exception analysis is inappropriate to this case because Childs was on a personal errand for Tulin and the Lodge did not control the time, manner and method of work. We cannot accept this argument. These facts were disputed at the hearing and never decided by the Board.

[13] It is not this court's task on review to reweigh conflicting evidence, or substitute its judgment for that of the Board. *Whaley v. Alaska Workers' Compensation Bd.*, 648 P.2d 955, 957 (Alaska 1982). Nor is it within the province of this court to reweigh witness credibility and competing inferences from testimony because those functions are reserved to the Board. See *Delaney v. Alaska Airlines*, 693 P.2d 859, 863 (Alaska 1985). Accordingly, this court may not ascertain the facts of this case. However, it is sufficient to note, as suggested by the dissenting board member, that a tryout period may have been initiated.

### III. CONCLUSION

The decision of the superior court is REVERSED and the case is REMANDED to the superior court with directions to remand it to the Board for further proceedings consistent with this opinion.



Hollis VAN BIENE, Personal Representative of the Estate of Michael Brian Van Biene, and Stanley Thomson, Personal Representative of the Estate of Stanley Mark Thomson, Appellants,

v.

ERA HELICOPTERS, INC.; Employers Insurance of Wausau; Rowan Companies, Inc.; Intercontinental Dynamics Corporation; Gates Learjet, Appellees.

No. S-2571.

Supreme Court of Alaska.

Aug. 18, 1989.

Estates of two airline pilots who died in an airplane crash brought suit against the employer for the intentional tort of "overworking" the two pilots and against the employer's workers' compensation carrier for its negligence in the inspection, certification, authorization and approval of the employee's working conditions. The Superior Court, Third Judicial District, J. Justin Ripley, J., dismissed the claims, and the estates appealed. The Supreme Court, Moore, J., held that: (1) complaint alleging that employer violated a number of FAA regulations in dispatching pilots for a night flight without adequate rest or sleep, failed to allege the type of intentional tort actionable outside Workers' Compensation Act; (2) exclusivity doctrine did not bar negligence action against employer's workers' compensation carrier for negligent inspection of employer's workplace and therefore estates of pilots could bring suit against employer's workers' compensation carrier for negligent performance of a safety inspection; and (3) workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of a safety inspection if insurer actually inspected the working conditions of the employer prior to the accident.

Affirmed in part, reversed in part, vacated in part and remanded.

Van Biene v. ERA Heli.

1. Workers' Compensation ⇨2084, 2093, 2168

Liability of an employer under Workers' Compensation Act is exclusive and in place of all other liability of employer and any fellow employee to the employee, employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from employer or fellow employee; however, exception to exclusivity doctrine exists in cases of intentional torts committed by a fellow employee or employer. AS 23.30.055.

2. Workers' Compensation ⇨2093

Complaint alleging that employer violated a number of FAA regulations in dispatching pilots for a night flight without adequate rest or sleep, failed to allege the type of intentional tort actionable outside Workers' Compensation Act. AS 23.30.055.

3. Workers' Compensation ⇨2161

Exclusivity doctrine did not bar negligence action against employer's workers' compensation carrier for negligent inspection of employer's workplace and therefore estates of pilots could bring suit against employer's workers' compensation carrier for negligent performance of a safety inspection. AS 23.30.015(a), 23.30.055.

4. Workers' Compensation ⇨2161

Employer's workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of a safety inspection if insurer actually inspected the working conditions of the employer prior to the accident.

5. Parties ⇨65(1)

Trial court did not abuse its discretion in dismissing claims of estates of deceased pilots against Doe defendants where estates were unable to identify which allegedly defective component of airplane was manufactured by Doe defendants.

6. Death ⇨109

Award of 80% of actual attorney fees to employer was not manifestly unreasonable where pilots' estates' claims against employer were barred by exclusivity doc-

trine of Workers' Compensation Act. AS 23.30.055.

Robert H. Wagstaff, Wagstaff, Pope & Clocksin, Anchorage, for appellants.

Clark Reed Nichols, Perkins, Coie, Anchorage, for appellees.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

I. INTRODUCTION

This appeal arises out of litigation by the estates of two airline pilots who died in an airplane crash while employed by ERA Helicopters, Inc. (ERA). The estates seek recovery against ERA for the intentional tort of "overworking" the two deceased pilots and against Employers Insurance of WAUSAU (WAUSAU), ERA's workers' compensation carrier, for its negligence in the inspection, certification, authorization, and approval of ERA's working conditions.

For the reasons set forth below, we affirm the trial court's dismissal of the claims against ERA and the claims against the "Doe defendants." We reverse the trial court's dismissal of the claims against WAUSAU.

II. FACTS AND PROCEEDINGS

Stanley Thomson and Michael Van Biene were pilots employed by ERA. At 2:00 a.m. on August 20, 1985, ERA dispatched them to fly a Learjet to Gulkana, Alaska. By completing this mission, Thomson and Van Biene would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations. The Learjet crashed on approach to the Gulkana airport, killing both pilots. WAUSAU paid compensation for the pilots' deaths.

In the investigation of the accident, other ERA pilots told the National Transportation Safety Board (NTSB) of lengthy on-duty periods and exhausting flight sched-

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The es separate and thus gence as 23.30.015 gues tha tects it that reg WAUSA' dents to prove E

ules. Three captains reported ERA's disapproval of pilots' refusals to fly because they were fatigued. One captain believed that ERA intentionally overworked its pilots to increase its profits.

On September 14, 1987, the estates filed their Second Amended Complaint alleging negligence against WAUSAU in their inspection, certification, authorization, and approval of ERA's working conditions. The complaint made the following allegations against ERA:

On or about August 20, 1985, at 0205 AKDT, Stanley Thomson and Michael Van Biene were Captain and First Officer of Learjet N455JA which was dispatched by defendants ERA, Jet Alaska, and ROWAN for a night flight to Gulkana, Alaska. The mission dispatch was accomplished without obtaining current weather information and would necessarily exceed the flight time and duty requirements of Plaintiffs, and the aircraft was overweight for appropriate landing. The dispatch of the aircraft under the conditions described and given the preceding flying time of Plaintiffs without rest or sleep, constitutes negligence and gross negligence.

The estates contended at oral argument before the trial judge, and on appeal, that this language alleges an "intentional tort of dispatching [the deceased pilots] for a night flight ... without adequate rest or sleep." ERA argues that the complaint only alleges negligence against it as an employer, and that therefore, the claim is barred by the exclusivity provision of the Alaska Workers' Compensation Act, AS 23.30.055.

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine also protects it from such a negligence claim and that regardless of any immunity protection, WAUSAU did not owe a duty to the decedents to inspect, certify, authorize or approve ERA's working conditions.

Alaska Rep. 776-780 P.2d-3

The superior court granted ERA and WAUSAU's motions to dismiss under Civil Rule 12(b)(6) on the ground that the Alaska Workers' Compensation Act provides the workers' exclusive remedy against an employer or its compensation insurer. The estates appeal.

### III. DISCUSSION

A. Did the Court Err in Dismissing the Estates' Claims Against ERA under Civil Rule 12(b)(6) Instead of Treating It as One-for-Summary Judgment Under Civil Rule 56?

The estates argue that the trial judge should have treated ERA's motion to dismiss as one for summary judgment because ERA submitted affidavits and the court did not expressly or affirmatively rule that it was not considering this evidence outside the pleadings.

Civil Rule 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56." When material outside the pleadings is presented to the trial court, a motion to dismiss "is automatically converted into one for summary judgment unless the court 'affirmatively' and 'expressly' rules that it is not considering evidence outside of the pleadings." *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 15, 21 n. 11 (Alaska 1980).

From our review of the remarks of the judge and counsel during oral argument, we conclude that Judge Ripley expressed his intention not to rely on the affidavits when granting the motion to dismiss. Consequently, the court correctly dismissed the claims under Rule 12(b)(6) rather than Rule 56.

B. Did the Court Err in Holding that the Estates' Claim Against ERA Was Barred by the Exclusivity Doctrine of AS 23.30.055?

#### 1) Standard of Review

"A motion to dismiss for failure to state a claim is viewed with disfavor and should

rarely be granted." *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 359 (Alaska 1987) (citing *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986)). "In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to some enforceable cause of action." *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983). The court "is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Mattingly*, 743 P.2d at 359 (emphasis deleted).

## 2) Application of Exclusivity Doctrine to Intentional Torts of the Employer

[1] Under AS 23.30.055, the liability of an employer under the Workers' Compensation Act "is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee." See *Wright v. Action Vending Co., Inc.*, 544 P.2d 82, 85 (Alaska 1975).

In *Elliott v. Brown*, 569 P.2d 1323 (Alaska 1977), we recognized an exception to the exclusivity doctrine in cases of intentional torts committed by a fellow employee or employer. We found that the socially beneficial purposes of the workers' compensation law "would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability." *Id.* at 1327. The court concluded that the fellow employee's assault on the worker fell outside the purview of the accidental injuries covered by the act. The worker was therefore permitted to pursue a common-law tort action against the fellow employee.<sup>1</sup> Similarly, in *Stafford v. Westchester Fire Insurance Co.*, 526 P.2d 37, 43 n. 29 (Alaska 1974), overruled on other grounds, 556 P.2d 525 (Alaska 1976), we noted that:

1. The *Elliott* court, however, held that the corporate employer was not liable in tort on a

In suits for other intentional torts committed by the employer, recovery is permitted on the theory that the harm is not accidental and therefore not covered by the act. A stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents.

[2] The estates argue that the trial court erred in dismissing their claims against ERA since they allege an intentional tort which is not barred by the exclusivity doctrine. ERA argues that the complaint fails to allege an intentional tort by ERA.

The estates' Second Amended Complaint alleges that ERA violated a number of FAA regulations and that "given the preceding flying time of Plaintiffs without rest or sleep, [dispatching the flight] constitute[d] negligence and gross negligence." (Emphasis added). Paragraph IX generally alleges:

Defendants' actions as described and in other particulars as to be shown at trial constitute wilful misconduct and were jointly and separately negligent, gross, and wanton.

The estates contend that the complaint alleges an intentional tort of dispatching the deceased pilots for a night flight without adequate rest or sleep.

We conclude that these allegations fail to constitute the type of intentional tort actionable outside the workers' compensation system. Liberally construed, the facts alleged fail to make out an intentional tort. At best, the complaint alleges gross negligence or wilful and knowing violation of FAA regulations.

The vast majority of courts have held that such allegations do not constitute an intentional act allowing suit outside of the workers' compensation act. As Professor Larson notes:

Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under

theory of respondeat superior for the intentional tort of its supervisor. 569 P.2d at 1325-26.

the almost unanimity to include accidents of the gross, wanton, intentional, reckless negligence, breach of duty, or misconduct of the true intentional

Even if the act goes beyond aggravated negligence, it includes such elements as: (1) committing a hazardous act, knowing it would perform an extremely dangerous act, fully failing to exercise care, or even violating a safety rule, short of the kind of negligence that would injure that robot character.

2A A. Larson, *Labor Law* § 68.1 (Supp.1985) (footnote).

In *Stafford* we held that the exclusivity doctrine bars intentional torts on the grounds that but "[a] stiff burden is placed on the employee to demonstrate an intentional tort by the employer, or its agents." 526 P.2d at 43.

Even under a liberal construction, the allegations made in the complaint fail to allege an intentional tort by the pilots so as to fall outside the provision of the Act. We affirm the trial court's dismissal of the claims against

C. Did the Court's Application of the Exclusivity Doctrine of AS 23.30.055 Bar a Suit Against the Employer?

[3] The estates argue that the Act provides a separate legal remedy and thus may be applied as a theory of recovery under AS 23.30.015(a). It argues that the Act does not bar recovery from such a

the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.

Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

2A A. Larson, *Larson Workmen's Compensation* § 68.13, at 13-8 to -26 (1983 & Supp.1985) (footnotes omitted).

In *Stafford* we recognized this majority rule. As the court explained, suits for intentional torts have been permitted on the grounds that the harm is not accidental but "[a] stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents." 526 P.2d at 43 n. 29.

Even under a liberal interpretation of the allegations made by the complaint, the estates fail to allege an intent to harm the pilots so as to overcome the exclusivity provision of the act. In conclusion, we affirm the trial court's dismissal of the claims against ERA under Rule 12(b)(6).

C. Did the Court Err in Holding that the Exclusivity Doctrine Contained in AS 23.30.055 Bars a Negligence Action Against the Employer's Workers' Compensation Carrier, WAUSAU?

[3] The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine protects it from such a negligence claim.

The issue of whether a workers' compensation carrier can be sued for its own negligence in inspecting the employer's workplace is a question of first impression in Alaska. This court considered a related but distinctly different issue in *Stafford*. The court considered whether an employee was barred from suing his or her employer's compensation carrier for intentional torts. *Stafford* had alleged that the carrier wilfully and maliciously withheld compensation benefits resulting in infliction of emotional distress. The court concluded that "[u]nder our compensation act the carrier is considered a separate entity from the employer." 526 P.2d at 42. The court, however, then noted:

*Stafford* recognizes that the principle of subrogation may be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions in a damage action brought by the employee. However, *Stafford* argues that this immunity should not extend to intentional torts. This is supported by the decision of the Supreme Court of California in *Unruh v. Truck Insurance Exchange*, in which suit for an intentional tort by an injured employee against her employer's compensation carrier was allowed.

*Id.* (footnote omitted). After discussing the reasoning in *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 102 Cal.Rptr. 815, 498 P.2d 1063 (1972), the court concluded:

We believe that AS 23.30.155 was envisioned by Alaska's legislature to cover situations where the employer or carrier negligently, or wilfully, failed to make timely compensation payments, but that this section was not intended to operate as the exclusive remedy for all intentional wrongdoings. In so holding we adopt the reasoning of *Unruh*. In circumstances where there is tortious conduct that goes beyond the bounds of untimely payments, the immunity from suit provided by the Workmen's Compensation Act is lost. Normally the carrier must investigate claims in order that the compensation scheme of payments for actual injuries will be properly administered. However, intentional torts committed in

connection with the investigation of claims and payment thereof are not to be protected. Stafford has alleged that Westchester did more than delay in making benefit payments; he has asserted that it intentionally and maliciously misled him about his right to compensation and discouraged him from exercising his rights, resulting in emotional injury. We conclude that Stafford is not precluded, by virtue of AS 23.30.155, from a trial on the merits of his claims.

526 P.2d at 43-44.

We conclude that the *Stafford* court did not decide the issue in this case: whether the exclusivity provision bars suit against an insurance carrier for negligent inspection of an employer's workplace. First, the court did not expressly hold that the immunity extends to a carrier. Rather, the court accepted *arguendo* that the doctrine of subrogation *might* be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions. However, the court held that regardless of whether such immunity existed, intentional torts committed in the investigation of claims and payment thereof were actionable. *Id.* at 43-44.

While *Stafford* relied on the reasoning of *Unruh*, this should not be construed as an acceptance of the California courts' interpretation of its workers' compensation scheme since the Alaska scheme differs significantly from the California scheme.<sup>2</sup> Unlike the Alaska scheme, the California statute explicitly defines "employer" to include "insurer." Cal.Lab.Code § 3850(b)

2. *Unruh* cites two California Court of Appeal cases holding that a carrier may not be sued for negligence in performing work place inspections. *Burns v. State Comp. Ins. Fund*, 265 Cal. App.2d 98, 71 Cal.Rptr. 326 (1968); *State Comp. Ins. Fund v. Superior Court (Brededa)*, 237 Cal. App.2d 416, 46 Cal.Rptr. 891 (1965).

3. For decisions allowing suit against carriers as third-parties in the absence of express statutory language, see *Beasley v. MacDonald Eng. Co.*, 287 Ala. 189, 249 So.2d 844 (1971); *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 199 N.E.2d 769 (1964); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963); *Andrews v. Insurance Co. of N. Am.*, 60 Mich. App. 190, 230 N.W.2d 371, 374 (1975); *Corson v. Liberty Mut. Ins. Co.*, 110 N.H. 210, 265 A.2d 315

(West Supp.1987). In *Unruh*, this identification was held forfeited when the insurer stepped outside the proper bounds of an investigation of the nonmedical facts of the case. 102 Cal.Rptr. at 821, 825, 498 P.2d at 1069, 1073. Because the California statute specifically identified the insurer with the employer, the court resorted to a negligence/intentional tort distinction to hold that the insurer no longer was the employer's alter ego when it committed intentional torts.

Other jurisdictions confronting this question of third-party actions against insurers for alleged negligence in either safety inspections or medical services have reached differing results.<sup>3</sup> These decisions are of limited value since each state's statutory scheme differs greatly. We therefore turn to the specific language of the Alaska Act.

The Alaska Workers' Compensation Act does not mention an insurer in the exclusivity provision of AS 23.30.055, the definition of employer in AS 23.30.265(13), or in the third-party suit provision in AS 23.30.015(a). A "carrier" is defined in AS 23.30.265(5) as "a person authorized to insure under this chapter and includes self-insurers." Thus, as noted in *Stafford*, the Act defines "employers" and "insurers" as separate, distinct entities. 526 P.2d at 42.

Alaska Statute 23.30.015(i) subrogates an insurer to all the rights of the employer after the carrier has assumed the payment of compensation. WAUSAU argues that this provision provides them with the employers' immunity from a negligence action. Other courts have been hesitant to

(1970); *Rothfuss v. Bakers Mut. Ins. Co.*, 107 N.J.Super. 189, 257 A.2d 733 (App.Div.1969); *Derosia v. Duro Metal Products Co.*, 147 Vt. 410, 519 A.2d 601 (1986).

For decisions prohibiting suit against an insurer as a third party, see *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir.1985) (Arkansas law); *Gerace v. Liberty Mut. Ins. Co.*, 264 F.Supp. 95 (D.D.C.1966); *Mustapha v. Liberty Mut. Ins. Co.*, 268 F.Supp. 890 (D.R.I.1967), *aff'd*, 387 F.2d 631 (1st Cir.1967); *Barrette v. Travelers Ins. Co.*, 28 Conn.Sup. 1, 246 A.2d 102 (1968); *Reid v. Employers Mut. Liab. Ins. Co.*, 59 Ill.2d 194, 319 N.E.2d 769 (1974); *Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963); *Matthews v. Liberty Mut. Ins. Co.*, 354 Mass. 470, 238 N.E.2d 348 (1968).

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allow suit against a carrier due to the related problem of a subrogated carrier suing itself.<sup>4</sup> The concern is that since the carrier is subrogated to the injured employee's cause of action against a third-party tortfeasor, "if the carrier can be a third-party tortfeasor, the carrier will end by suing itself"—an incongruous result that the legislature could not have intended. 2A A. Larson § 72.95, at 14-321. However, as Larson points out:

This argument has been rejected on several grounds by the courts finding carrier liability. One is that the subrogation provisions are purely procedural and thus cannot be held to modify the definition of "employer." Another is that the subrogation passage "does not deal with the subject matter" in issue, which is the question whether the employee's common-law right is taken away from him. The original *Smith* case invoked a sort of dual capacity doctrine, saying that the carrier was being sued not as compensation carrier but as an independent third party. All such cases made short work of the spectre of double recovery by pointing out that the carrier would of course be entitled to set off in a judgment against itself as a tortfeasor the amount of compensation paid by it as insurance carrier. And running through all these opinions was the thought that this kind of result was really not all that preposterous. Increasingly common is the spectacle of an insurance carrier acting as compensation subrogation plaintiff and as defendant insurer on a third party's automobile liability risk. Problems of conflict of interest and of public policy may arise; but no one worries much any-

more about the conceptual problem whether the carrier can sue itself.

*Id.* at 14-322 (footnotes omitted). We similarly conclude that the subrogation provision in AS 23.30.015(i) does not bootstrap an insurer into the definition of an employer in subsection (a). We therefore conclude that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing a negligence action against a carrier for negligent inspection of the employer's workplace.<sup>5</sup>

WAUSAU contends that such a result is contrary to public policy since the threat of potential tort liability will discourage carriers from inspecting employers' workplaces.<sup>6</sup> We decline to judicially amend the Act on the basis of such a policy argument. This type of policy determination is appropriately left for the legislature.

In conclusion, we find that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing suit against a compensation carrier for the negligent performance of a safety inspection. Therefore, Judge Ripley erred in dismissing the estates' claims against WAUSAU.

D. Did WAUSAU Owe a Duty to the Pilots to Inspect ERA's Working Conditions in a Non-negligent Manner?

[4] WAUSAU argues that even if a carrier is not immune from suit for its negligent inspection of an employer's workplace, dismissal was proper on the alternative ground that WAUSAU owed no duty to the decedents to inspect ERA's working conditions. The estates contend that, even in the absence of contractual obligation between WAUSAU and ERA, WAUSAU may

4. See *Mustapha v. Liberty Mut. Ins. Co.*, 268 F.Supp. 890 (D.R.I.), *aff'd*, 387 F.2d 631 (1st Cir.1967); *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F.Supp. 547 (E.D.Mich.1965), *aff'd*, 372 F.2d 95 (6th Cir.1967); *Schulz v. Standard Acc. Ins. Co.*, 125 F.Supp. 411 (E.D.Wash.1954) (Idaho law); *Flood v. Merchant Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963).

5. In the absence of express legislative intent to the contrary, "[s]tatutes . . . that establish rights . . . in derogation of the common law are construed in a manner that effects the least change possible in the common law." *Hugo v. City of*

*Fairbanks*, 658 P.2d 155, 161 (Alaska App.1983) (citing 3 C. Sands, *Sutherland Statutory Construction* § 59.03, at 6-7 (4th ed. 1973)).

6. Some courts have extended immunity to carriers from third-party suits since they believed imposing liability on carriers would create a great disincentive to their carrying out the socially useful function of independent safety inspections. See *Kifer*, 777 F.2d at 1335, 1338-39; *Nelson*, 199 N.E.2d at 796 (Chafer, J., dissenting); *Matthews*, 238 N.E.2d at 348; *Kotarski*, 244 F.Supp. at 558-59 (Michigan law); 2A A. Larson § 72.98.

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be held liable for "negligent performance of undertaking to render services" if WAUSAU actually inspected the working conditions of ERA prior to the accident.

The estates' argument is well taken. The Restatement (Second) of Torts § 324A (1965) imposes liability on a defendant to a third party when the defendant negligently performs an undertaking to render services:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See *Adams v. State*, 555 P.2d 235, 240 n. 7 (Alaska 1976) (citing § 324A of the Restatement). In *Adams*, the court held that victims of a hotel fire had a cause of action against the state for failure to take action after fire inspectors discovered extremely jangerous fire conditions. *Id.* at 240-42. The court noted that "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach where there is a negligent failure to discover fire hazards which

7. *Beasley*, 249 So.2d at 847; *Sims v. American Cas. Co.*, 131 Ga.App. 461, 206 S.E.2d 121 (1974); *Nelson*, 199 N.E.2d at 779; *Fabricius*, 121 N.W.2d at 365.

8. ROWAN contends that the issue is not ripe for review since the superior court had not entered final judgment with respect to the "John Doe" defendants. In *Greater Anchorage Area Bor. v. City of Anchorage*, 504 P.2d 1027, 1030 (Alaska 1972), this court stated that the "basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case...." "[T]he reviewing court should look to the substance and effect, rather than the form, of the rendering court's judgment, and

would be brought to light by an inspection conducted with ordinary care." *Id.* at 240. The court then cited a number of cases in which employees were allowed to sue workers' compensation carriers for negligent safety inspections.<sup>7</sup>

The second amended complaint alleges that "WAUSAU ... did inspect, certify, authorize, and approve the working conditions of Defendants Jet Alaska, ERA and Rowan" and that WAUSAU's actions "were accomplished negligently." This language is sufficient to make out a cause of action for negligent performance of an undertaking. As a result, it would be improper to dismiss the allegations against WAUSAU for failure to state a cause of action. We, therefore, reverse the trial court's dismissal of the claims against WAUSAU under Civil Rule 12(b)(6) and remand the issue to the trial court for further proceedings.

E. Did the Court Err in Dismissing the Allegations Against the John Doe Defendants?

[5] We initially note that since all claims against the Doe defendants were dismissed by the trial judge, this question is ripe for review and properly before us.<sup>8</sup>

Judge Ripley dismissed the allegations against the "John Doe" defendants on the grounds that such use of fictitious defendants is not permissible under our rules of civil procedure.

At common-law, it was essential that a person's name appear in the complaint before he or she could be made a defendant in the action.<sup>9</sup> The majority of courts consid-

focus primarily on the operational or 'decretal' language therein."

We conclude that since Judge Ripley's order dismisses the Does from the case, the order disposes of the entire case as to the Does and the finality requirement is thereby satisfied.

9. Note, *Designation of Defendants by Fictitious Names—Use of John Doe Defendants*, 47 Iowa L.Rev. 773, 775 (1961). This requirement has been eliminated in certain situations by statutes which allow the pleading of fictitious or John Doe defendants. *Id.* at 776. However, as the above commentator noted "[t]his is not to say that the rule requiring the true name of the defendant to be stated in the complaint is with-

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ering this issue have held that jurisdiction to sue unknown or fictitious persons must be obtained pursuant to some express rule or statute.<sup>10</sup> However, at least one state has judicially adopted Doe pleading without an express statute or rule.<sup>11</sup>

The estates argue that there has been a long standing practice of Doe pleading in this state. While we acknowledge this past use of Doe pleading, we note that we have never been called upon to consider the propriety of this practice. We decline, however, to address the general propriety of Doe pleading in this case.<sup>12</sup> In the action before us, we find that Judge Ripley did not abuse his discretion in dismissing the claims against the Doe defendants since the estates are unable to identify which allegedly defective component of the Learjet was manufactured by the Doe defendants.<sup>13</sup> We therefore affirm the superior court's dismissal of the Doe defendants.

F. Did the Court Abuse Its Discretion in Awarding ERA and WAUSAU \$14,476 in Attorney's Fees, which Represented 80 Percent of Their Actual Attorney's Fees?

[6] The trial court awarded ERA and WAUSAU 80 percent of their fees, finding that the plaintiffs' claims "bordered very closely upon the nonmeritorious and the frivolous." Since we reversed the court's dismissal of the claim against WAUSAU, the award of fees to them is vacated. As to the award of fees to ERA, we conclude

out force; John Doe complaints are still an exception to the rule and used only under exceptional circumstances." *Id.*

10. *Hailey v. Interstate Machinery Co.*, 121 Ill. App.3d 237, 76 Ill. Dec. 709, 459 N.E.2d 346, 347 (1984) (citing 59 Am.Jur.2d Parties § 17 (1971)); *Hutchinson v. Fish Engineering Corp.*, 38 Del.Ch. 414, 153 A.2d 594 (1959); *Grantham Realty Corp. v. Bowers*, 215 Ind. 672, 22 N.E.2d 832, 836 (1939); *Hill v. Henry*, 66 N.J.Eq. 150, 57 A. 554 (1904); 59 Am.Jur.2d Parties § 16, at 401 (1987) ("In actions or proceedings which are not strictly in rem but are in personam or only quasi in rem, there is generally no authority to proceed against unknown persons in the absence of statute or rule. Jurisdiction to sue such persons must be obtained pursuant to

that the trial court did not at use its discretion in awarding fees.

In *State v. University of Alaska*, 624 P.2d 807, 817-18 (Alaska 1981), this court held that an award of "substantially full attorneys fees" is manifestly unreasonable in the absence of a claim that is "frivolous, vexatious or devoid of good faith." The court held that an award over 90 percent of actual costs was a substantially full award of fees. *Id.*

However, this court has affirmed partial awards of fees as high as 86 percent of actual fees even when the claims were not frivolous. See *Hausam v. Wodrich*, 574 P.2d 805, 811 (Alaska 1978) (court affirmed award of 86 percent of actual attorney's fees even though the case involved no improper conduct by the losing party); see also *O'Buck v. Cottonwood Village Condominium Ass'n, Inc.*, 750 P.2d 813, 821 (Alaska 1988) (court affirmed award of approximately 80 percent of actual attorney's fees to prevailing defendants); *Steenmeyer Corp. v. Mortenson-Neal*, 731 P.2d 1221, 1226 (Alaska 1987) (court affirmed award of 75 percent of actual attorney's fees); *Crook v. Mortenson-Neal*, 727 P.2d 297, 306 (Alaska 1986) (court affirmed award of 80 percent of actual attorney's fees).

We conclude that in this case an award of 80 percent of actual attorney's fees is not manifestly unreasonable. We therefore decline to interfere with the trial court's exercise of discretion and affirm the award of attorney's fees to ERA.

some statute or rule."); Note, *supra* note 9, at 776.

11. *Maddux v. Gardner*, 239 Mo.App. 289, 192 S.W. 14, 18 (1945).

12. We acknowledge the potential importance of this issue and have referred it to consideration to the Civil Rules Committee.

13. The Second Amended Complaint contains the following allegations against the "John Doe" defendants:

Defendants Doe I, II, and III negligently manufactured and designed other equipment used in Learjet N455JA, which items were not manufactured and designed in accordance with generally accepted standards.

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## IV.

In conclusion, we affirm the superior court's dismissal of the claims against ERA and the John Doe defendants. We reverse the dismissal of the claims against WAUSAU and remand the claims back to the superior court for further proceedings consistent with this opinion. We vacate the award of attorney's fees to WAUSAU and affirm the award of fees to ERA.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED for further proceedings consistent with this opinion.



Dale DRESSEL, Appellant,

v.

Marion S. WEEKS, Shirley Craft, personal representative of the Estate of Dorothy Kuhns, deceased, Appellees.

No. S-2580.

Supreme Court of Alaska.

Aug. 13, 1989.

Executor brought action against testator's live-in companion alleging conversion of money. Purchaser of cabin from testator filed third-party complaint against live-in companion. The Superior Court, Fourth Judicial District, Mary E. Greene, J., upheld conversion claim and held that quasi estoppel applied to preclude live-in companion from asserting legal title to cabin. Appeal was taken. The Supreme Court, Moore, J., held that: (1) trial court's finding that cash taken by companion belonged to the estate was not clearly erroneous, and (2) quasi estoppel applied to divest legal title to real property from companion who was titleholder of record.

Affirmed.

## 1. Trover and Conversion ⇨40(3)

Trial court's finding in conversion action that cash found in safe of testator's house belonged to testator's estate rather than to person with whom testator was living at the time of her death was not clearly erroneous; evidence showed that safe had been emptied of cash before testator's death and that live-in companion did not have combination to safe.

## 2. Wills ⇨563

Will which left beneficiary house and "all furnishings therein" did not encompass cash which was in safe in house.

## 3. Trover and Conversion ⇨4

Tort of "conversion" is intentional exercise of dominion or control over chattel which so seriously interferes with right of another to control it that actor may justly be required to pay the other full value of chattel.

See publication Words and Phrases for other judicial constructions and definitions.

## 4. Trover and Conversion ⇨40(6)

Evidence presented by executor was sufficient to meet her burden of proof of amount of damages sustained when testator's live-in companion took money from testator's safe after her death.

## 5. Estoppel ⇨52(1)

"Quasi-estoppel" precludes party from taking position inconsistent with one he or she has previously taken where circumstances render assertion of second position unconscionable.

See publication Words and Phrases for other judicial constructions and definitions.

## 6. Estoppel ⇨52.15

"Equitable estoppel" requires assertion of position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice.

See publication Words and Phrases for other judicial constructions and definitions.

## 7. Estoppel ⇨52.15

When applied to preclude the assertion of title to real property, equitable estoppel

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January 29, 1993

Hon. Tim Kelly, Chair  
Senator Labor and Commerce Committee  
Alaska State Legislature  
Room 101, Capitol Building  
Juneau, Alaska 99801-1182

Re: SB 66 (limited partnerships)

Dear Sen. Kelly:

SB 66 (limited partnerships) has been referred to your committee, and I would appreciate your scheduling a hearing on it as soon as possible.

This bill is a vital element in the completion of the updating of Alaska's 1917 version of the Uniform Limited Partnership Act. It picks up the National Conference of Commissioners on Uniform State Laws' 1985 amendments to the modern Act that were omitted from the bill passed by the legislature last year (ch. 128, SLA 1992).

The bill has a July 1, 1993 effective date, which coincides perfectly with the effective date of last year's enactment. So we will be able to have a completed update of our Uniform Limited Partnership Act this summer.

The heart of the bill is sec. 1. It substitutes the "notice" form (i.e., "short form") of the certificate of limited partnership for the old "long form" certificate. It thus recognizes modern-day types and uses of limited partnerships, conforms to the national standard, and facilitates doing business by means of this kind of entity in Alaska.

Thank you for considering this matter.

Yours truly,



Arthur H. Peterson  
Uniform Law Commissioner  
for Alaska

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# FISCAL NOTE

## STATE OF ALASKA 1993 LEGISLATIVE SESSION

BILL NO. SB66

Revision Date: \_\_\_\_\_ Department Affected: Natural Resources  
 Title: "An Act relating to limited partnerships; and providing for an effective date." BRU: Management and Administration  
 Components: Recorder's Office  
 Sponsor: Senator Duncan  
 Requestor: Senator Duncan Component Serial No. 802

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

| OPERATING              | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 |
|------------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES      |       |       |       |       |       |       |
| TRAVEL                 |       |       |       |       |       |       |
| CONTRACTUAL            |       |       |       |       |       |       |
| SUPPLIES               |       |       |       |       |       |       |
| EQUIPMENT              |       |       |       |       |       |       |
| LAND&STRUCTURES        |       |       |       |       |       |       |
| GRANTS, CLAIMS         |       |       |       |       |       |       |
| MISCELLANEOUS          |       |       |       |       |       |       |
| <b>TOTAL OPERATING</b> | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   | 0.0   |

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| 1002 Federal Receipts    |     |     |     |     |     |     |
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| 1004 GF                  |     |     |     |     |     |     |
| 1005 GF/Program Receipts |     |     |     |     |     |     |
| 1006 GF/MHTIA            |     |     |     |     |     |     |
| Other                    |     |     |     |     |     |     |
| <b>TOTAL</b>             | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**POSITIONS:**

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

Estimate of current year (FY93) Impact: \$ No fiscal impact anticipated

**ANALYSIS:** (Attach a separate page if necessary)  
 In 1992, legislation transferred the responsibility for accepting limited partnership filings to one Department of Commerce and Economic Development (DCED), effective July 1, 1993. DNR has already completed the filming of all limited partnership records presently in our custody and all records will be turned over to DCED by July 1. Therefore, the changes in the limited partnership laws as proposed by SB66 would have no effect on the Recorder's Office as the filing function will be fully assumed by DCED by July 1, 1993.

Prepared by: Sharon Young Phone: 762-2437  
 Division: Recorder's Office Date: 8-Feb-93  
 Approved by Commissioner: Glenn A. Olds Date: 2/9/93  
 Agency: Department of Natural Resources

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**FISCAL NOTE**

**STATE OF ALASKA**  
**1994 LEGISLATIVE SESSION**

**BILL NO. SB 66**

Revision Date: \_\_\_\_\_  
 Title: An Act relating to limited partnerships  
 \_\_\_\_\_  
 Sponsor: Senator Duncan  
 Requestor: \_\_\_\_\_

Department Affected: Commerce and Economic Development  
 BRU: Banking, Securities and Corporations  
 Component: \_\_\_\_\_  
 \_\_\_\_\_  
**COMPONENT SERIAL NO. 1233**

**Expenditures/Revenues:**

| OPERATING EXPENDITURES | FY 95    | FY 96    | FY 97    | FY 98    | FY 99    | FY 00    |
|------------------------|----------|----------|----------|----------|----------|----------|
| PERSONAL SERVICES      | 0        | 0        | 0        | 0        | 0        | 0        |
| TRAVEL                 | 0        | 0        | 0        | 0        | 0        | 0        |
| CONTRACTUAL            | 0        | 0        | 0        | 0        | 0        | 0        |
| SUPPLIES               | 0        | 0        | 0        | 0        | 0        | 0        |
| EQUIPMENT              | 0        | 0        | 0        | 0        | 0        | 0        |
| LAND & STRUCTURES      | 0        | 0        | 0        | 0        | 0        | 0        |
| GRANTS, CLAIMS         | 0        | 0        | 0        | 0        | 0        | 0        |
| MISCELLANEOUS          | 0        | 0        | 0        | 0        | 0        | 0        |
| <b>TOTAL OPERATING</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> |

|                             |   |   |   |   |   |   |
|-----------------------------|---|---|---|---|---|---|
| <b>CAPITAL EXPENDITURES</b> | 0 | 0 | 0 | 0 | 0 | 0 |
|-----------------------------|---|---|---|---|---|---|

|                               |   |   |   |   |   |   |
|-------------------------------|---|---|---|---|---|---|
| <b>CHANGE IN REVENUES ( )</b> | 0 | 0 | 0 | 0 | 0 | 0 |
|-------------------------------|---|---|---|---|---|---|

**FUND SOURCE**

|                          |          |          |          |          |          |          |
|--------------------------|----------|----------|----------|----------|----------|----------|
| 1002 Federal Receipts    | 0        | 0        | 0        | 0        | 0        | 0        |
| 1003 GF Match            | 0        | 0        | 0        | 0        | 0        | 0        |
| 1004 GF                  | 0        | 0        | 0        | 0        | 0        | 0        |
| 1005 GF/Program Receipts | 0        | 0        | 0        | 0        | 0        | 0        |
| 1006 GF/MHTIA            | 0        | 0        | 0        | 0        | 0        | 0        |
| Other                    | 0        | 0        | 0        | 0        | 0        | 0        |
| <b>TOTAL</b>             | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b> |

Estimate of current year (FY 94) cost: \$ 0

**POSITIONS**

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| FULL-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director  
 Division: Banking, Securities and Corporations

Phone: 465-2521  
 Date: \_\_\_\_\_

Approved by Commissioner: Paul Fuhs  
 Agency: Commerce and Economic Development

Date: 12/4/93

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**67**

DIVISION OF LEGAL SERVICES

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STATE OF ALASKA

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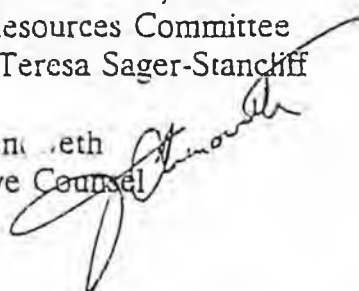
Juneau, Alaska 99801-2105

MEMORANDUM

January 28, 1993

**SUBJECT:** Senate Bill 67, amending provisions of ch. 66, SLA 1991 (relating to the reconstitution of the mental health trust); and providing for an effective date -- sectional analysis (Work Order No. 8-LS0409VA)

**TO:** Senator Mike Miller, Chair  
Senate Resources Committee  
ATTN: Teresa Sager-Stancliff

**FROM:** Jack Chen, eth  
Legislative Counsel 

The measure, based on CSSB 469 (Resources) of the last legislature, sets out a series of proposed amendments to ch. 66, SLA 1991, the legislation reconstituting the mental health trust. Necessarily, I will discuss these provisions out of the order in which they appear in the bill.

I

Sec. 54 of existing ch. 66, SLA 1991, reconstitutes the corpus of the mental health trust by identifying specific land held by the state and that is to be conveyed by it in order to reconstitute the trust. Sec. 55, ch. 66, SLA 1991, authorizes substitution of other state land (i.e. "replacement land" as substitution for former mental health lands that now cannot be returned to the trust because it is unavailable to the state) to the reconstituted trust and sets out standards to guide the making of replacement land substitutions. Sec. 56, ch. 66, SLA 1991, is an enforcement mechanism in that it hypothecates or pledges certain state assets to secure the transfer of compensation due the reconstituted trust corpus. These provisions are proposed to be repealed by bill section 8.

In their place, bill section 6 proposes to reconstitute the trust corpus in the permanent law. Some, but not all, of the land identified in sec. 54, ch. 66, SLA 1991, is carried over into this section. Omitted from the list approved in the 1991 Act is land identified in paragraph (5) (Tanana Valley State Forest and Haines State Forest

Resource Management lands), paragraph (6) (other land satisfactory to the plaintiffs drawn from legislatively-designated areas), and paragraph (7) (compensation land identified under former sec. 55). Added, in the enumeration set out in bill section 6, is land subject to "other lease" (proposed AS 38.05.800(2)(A)), land subject to mining claim or sale of materials (proposed AS 38.05.800(2)(D) and (E)), and land exclusive of that necessary to carry out purposes of an interagency land management agreement (proposed AS 38.05.800(3)).

In the 1991 legislation, existing AS 38.05.800 was to have been repealed. Since, in this bill, AS 38.05.800 would be modified and continued, the change set out in bill section 7 drops that section from the list of sections repealed in the 1991 legislation.

## II

This legislation also proposes to revise the mechanism by which to reconstitute an important element of the mental health trust, the mental health trust income account. Under current AS 37.14.036(c), the state obligates itself to pay to the mental health trust income account a declining percentage (six percent at inception declining to one percent in the last years) of unrestricted state revenue, the last payment to be made by June 30, 2003. The change proposed by bill section 4, a reenactment of AS 37.14.036(c), directs that a fixed annual payment of six percent of unrestricted state general fund revenue be allocated for an indefinite period "as compensation for land that constituted the [original] trust . . . and that is not reconstituted as part of the mental health trust corpus established under AS 38.05.800 . . . ." The payment, when made by the state and received by the trust, would be added to the balance of the mental health trust income account, the principal source of support for the programs and services to the trust beneficiaries.

However, payment of the allocation requires legislative appropriation. As a guarantee that the allocation will be made, bill section 5 adds two subsections to AS 37.14.036. Under proposed subsection (d), land that came to the state under the mental health enabling act and that has been since placed in so-called "legislatively-designated" land status—state park, state forest, state game refuge, and the like—would be pledged as security. Under proposed subsection (e), the superior court is given the authority to determine the manner of the trust's foreclosure against those lands in the event the state fails to make the required allocation under subsection (c).

I want to note that it was the decision to convert the six percent payment obligation from one with a set termination date to one of indefinite duration that prompted the addition or revision of permanent law sections and the repeal or deletion of temporary law sections.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO SB 67

Revision Date: \_\_\_\_\_ Department Affected: Natural Resources  
 Title: Mental Health Trust: BRU: Resource Management  
Alternative Settlement Proposal Components: Land Management  
 Sponsor: Senate Resources Committee  
 Requestor: \_\_\_\_\_ Component Serial No. 431

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING         | FY 94   | FY 95   | FY 96   | FY 97   | FY 98   | FY 99   |
|-------------------|---------|---------|---------|---------|---------|---------|
| PERSONAL SERVICES | 1,022.2 | 817.2   | 186.1   | 197.3   | 209.2   | 221.8   |
| TRAVEL            | 7.5     | 6.0     |         |         |         |         |
| CONTRACTUAL       | 890.0   | 1,625.0 | 2,000.0 | 2,000.0 | 2,000.0 | 2,000.0 |
| SUPPLIES          | 22.0    | 14.5    |         |         |         |         |
| EQUIPMENT         |         |         |         |         |         |         |
| LAND&STRUCTURES   |         |         |         |         |         |         |
| GRANTS, CLAIMS    |         |         |         |         |         |         |
| MISCELLANEOUS     |         |         |         |         |         |         |
| TOTAL OPERATING   | 1,941.7 | 2,462.7 | 2,186.1 | 2,197.3 | 2,209.2 | 2,221.8 |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|                      |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|
| REVENUE fund source: |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

|                          |         |         |         |         |         |         |
|--------------------------|---------|---------|---------|---------|---------|---------|
| 1002 Federal Receipts    |         |         |         |         |         |         |
| 1003 GF Match            |         |         |         |         |         |         |
| 1004 GF                  |         |         |         |         |         |         |
| 1005 GF/Program Receipts |         |         |         |         |         |         |
| 1006 GF/MHTIA            | 1,941.7 | 2,462.7 | 2,186.1 | 2,197.3 | 2,209.2 | 2,221.8 |
| Other                    |         |         |         |         |         |         |
| TOTAL                    | 1,941.7 | 2,462.7 | 2,186.1 | 2,197.3 | 2,209.2 | 2,221.8 |

POSITIONS:

|           |    |    |   |   |   |   |
|-----------|----|----|---|---|---|---|
| FULL-TIME | 16 | 11 | 2 | 2 | 2 | 2 |
| PART-TIME | 1  | 3  |   |   |   |   |
| TEMPORARY | 2  | 2  |   |   |   |   |

Estimate of current year (FY93) Impact: \$ 1941.7

ANALYSIS:

The program impacts of this legislation are somewhat difficult to determine because of ambiguity in the wording of the legislation. It is unclear if the legislation contemplates the conveyance of unencumbered Original Trust Land to the Trust Authority or its "redesignation" as Original Trust Land on DNR status plats. We have based our analysis on the premise that the aforementioned land is to be conveyed to the Trust Authority. This interpretation seems appropriate since Sec. 2 AS 37.14.009(a)(2) allows the Trust Authority to sell, lease, exchange, or otherwise dispose of land in the trust.

Prepared by: Ron Swanson Phone: 762-2692  
 Division: Land Date: 29-Jan-93  
 Approved by Commissioner: Glenn A. Olds Date: 2/2/93  
 Agency: Department of Natural Resources

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SB. 67<sup>1</sup>

## DIVISION OF LAND

*Original in  
mail, to  
arrive 2/3/93*

| 7100 Personnel Services       | FY 94        | FY 95          |
|-------------------------------|--------------|----------------|
| Mental Health Project Team    |              |                |
| (1) Project Manager           | 80.7         | 85.5           |
| (1) Lands Manager             | 55.5         | 58.8           |
| (2) NRO II                    | 122.6        | 129.9          |
| (2) NRO I                     | 103.2        | 130.4          |
| (1) CT III                    | 37.3         | 39.5           |
| (1) DPC II                    | 39.2         | 41.3           |
| (2) College Interns           | <u>27.5</u>  | <u>29.1</u>    |
|                               | 466.0        | 514.5          |
| Land & Resource Management    |              |                |
| (1) Cadastral Surveyor III    | 110.2        | 116.8          |
| Regional Offices              |              |                |
| Northern Regional Office      |              |                |
| (1) NRO II                    | 60.4         | 32.0           |
| Southeast Regional Office     |              |                |
| (1) NRO II                    | 60.4         | 32.0           |
| Southeast Regional Office     |              |                |
| (1) NRO II (6 mo.)            | <u>30.2</u>  | <u>32.0</u>    |
|                               | Subtotal     | Subtotal       |
|                               | 727.2        | 727.3          |
| 7200 Travel                   |              |                |
| Mental Health Project Team    | 3.0          | 3.0            |
| Land & Resources              | —            | —              |
| Regional Offices              |              |                |
| NRO                           | 1.5          | 1.0            |
| SCRO                          | 1.5          | 1.0            |
| SERO                          | <u>1.5</u>   | <u>1.0</u>     |
|                               | Subtotal     | Subtotal       |
|                               | 7.5          | 6.0            |
| 7300 Contractual Services     |              |                |
| Mental Health Project Team    |              |                |
| Hazardous Substance Inventory | 125.0        | 125.0          |
| Land & Resources              |              |                |
| Cadastral Survey              | <u>750.0</u> | <u>1,500.0</u> |
|                               | Subtotal     | Subtotal       |
|                               | 875.0        | 1,625.0        |

<sup>1</sup> Assumes conveyance of unencumbered OTL to MHTA.

7400 Supplies

|                            |            |            |
|----------------------------|------------|------------|
| Mental Health Project Team | 6.0        | 6.0        |
| Land & Resources           | 1.5        | 1.5        |
| Regional Offices           |            |            |
| NRO                        | 1.5        | 1.0        |
| SCRO                       | 1.5        | 1.0        |
| SERO                       | <u>1.5</u> | <u>1.0</u> |
| Subtotal                   | 12.0       | 10.5       |
| TOTAL                      | 1,621.7    | 2,368.8    |

|                     |           |           |
|---------------------|-----------|-----------|
|                     | <u>94</u> | <u>95</u> |
| Personnel-Full time | 11        | 9         |
| Part time           | 1         | 3         |
| Temporary           | 2         | 2         |

## SB 67

## LAND RECORD INFORMATION SECTION

|   | FY 94       | FY 95       |
|---|-------------|-------------|
| Personnel Services                      |             |             |
| (1) Analyst/Programmer IV               | 77.0        | 0           |
| (1) Analyst Programmer III              | 68.0        | 0           |
| (1) Natural Resource Officer II         | 65.0        | 0           |
| (1) Natural Resource Officer I          | 50.0        | 53.0        |
| (1) Data Processing Clerk I             | <u>35.0</u> | <u>37.0</u> |
| Subtotal                                | 295.0       | 90.0        |
| Contractual Services                    |             |             |
| DOA Data Processing Chargeback          | <u>15.0</u> | <u>0</u>    |
| Subtotal                                | 15.0        | 0           |
| Supplies                                |             |             |
| Plotter, Micrographic & Office Supplies | <u>10.0</u> | <u>4.0</u>  |
| Subtotal                                | 10.0        | 4.0         |
| TOTAL                                   | 320.0       | 94.0        |

## TOTAL PROJECT COST

|                      | FY 94        | FY 95       |
|----------------------|--------------|-------------|
| Personnel Services   |              |             |
| Division of Land     | 727.2        | 727.3       |
| LRIS                 | <u>295.0</u> | <u>90.0</u> |
| Subtotal             | 1,022.2      | 817.3       |
| Travel               |              |             |
| Division of Land     | 7.5          | 6.0         |
| LRIS                 | <u>0</u>     | <u>0</u>    |
| Subtotal             | 7.5          | 6.0         |
| Contractual Services |              |             |
| Division of Land     | 875.0        | 1,625.0     |
| LRIS                 | <u>10.0</u>  | <u>0</u>    |
| Subtotal             | 890.0        | 1,625.0     |
| Supplies             |              |             |
| Division of Land     | 12.0         | 10.5        |
| LRIS                 | <u>10.0</u>  | <u>4.0</u>  |
| Subtotal             | 22.0         | 14.5        |
| TOTAL                | 1,941.7      | 2,462.8     |

| Positions | FY 94 |      |       | FY 95 |      |       |
|-----------|-------|------|-------|-------|------|-------|
|           | Land  | LRIS | Total | Land  | LRIS | Total |
| Full time | 11    | 5    | 16    | 9     | 2    | 11    |
| Part time | 1     |      | 1     | 3     |      | 3     |
| Temp.     | 2     |      | 2     | 2     |      | 2     |

## OUT-YEAR COSTS

## Personnel Services

|                        | FY 96        | FY 97        | FY 98        | FY 99        |
|------------------------|--------------|--------------|--------------|--------------|
| Land Manager:          | 62.3         | 66.1         | 70.1         | 74.3         |
| Cadastral Survey       | <u>123.8</u> | <u>131.2</u> | <u>139.1</u> | <u>147.5</u> |
| Subtotal               | 186.1        | 197.3        | 209.2        | 221.8        |
| <br>                   |              |              |              |              |
| Contractural<br>Survey | 2,000.0      | 2,000.0      | 2,000.0      | 2,000.0      |
| <br>                   |              |              |              |              |
| TOTAL                  | 2,186.1      | 2,197.3      | 2,209.2      | 2,221.8      |

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 67

Revision Date: February 2, 1993  
Title: "...amending...Ch. 66, SLA 1991, that relate to the mental health trust..."  
Sponsor: Senate Resources Committee  
Requestor: Senate Resources Committee

Department Affected: Department of Law  
BRU: Legal Services  
Component: Mental Health Lands  
COMPONENT SERIAL NO. 1421

EXPENDITURES/REVENUES:

| OPERATING         | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 | FY 99 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES |       |       |       |       |       |       |
| TRAVEL            |       |       |       |       |       |       |
| CONTRACTUAL       |       |       |       |       |       |       |
| SUPPLIES          |       |       |       |       |       |       |
| EQUIPMENT         |       |       |       |       |       |       |
| LAND & STRUCTURES |       |       |       |       |       |       |
| GRANTS, CLAIMS    |       |       |       |       |       |       |
| MISCELLANEOUS     |       |       |       |       |       |       |
| TOTAL OPERATING   | -0-   | -0-   | -0-   | -0-   | -0-   | -0-   |

|         |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|
| CAPITAL |  |  |  |  |  |  |
|---------|--|--|--|--|--|--|

|                      |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|
| REVENUE FUND SOURCE: |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|

FUNDING:

|                          |     |     |     |     |     |     |
|--------------------------|-----|-----|-----|-----|-----|-----|
| 1002 Federal Receipts    |     |     |     |     |     |     |
| 1003 GF Match            |     |     |     |     |     |     |
| 1004 GF                  |     |     |     |     |     |     |
| 1005 GF/Program Receipts |     |     |     |     |     |     |
| 1006 GF/MHTIA            | -0- | -0- | -0- | -0- | -0- | -0- |
| OTHER                    |     |     |     |     |     |     |
| TOTAL                    | -0- | -0- | -0- | -0- | -0- | -0- |

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| FULL-TIME | -0- | -0- | -0- | -0- | -0- | -0- |
| PART-TIME |     |     |     |     |     |     |
| TEMPORARY |     |     |     |     |     |     |

Estimate of current year (FY93) impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division  
Approved by Commissioner: Richard I. Peques  
Agency: Department of Law

Phone: 465-3672  
Date: February 2, 1993  
Date: February 2, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 67

ANALYSIS CONTINUATION:

Enacting SB 67 as a proposed settlement of the mental health trust lands litigation will require the Department of Law to undertake some substantial effort, including:

1. Efforts to obtain court approval of the settlement. The mental health trust lands litigation is a class action lawsuit. Settlement of that lawsuit must comply with Rule 23 of the Alaska Rules of Civil Procedure. The parties may first need to draft a settlement agreement to present to the court (a settlement agreement may address terms not specifically provided for in the bill). The settlement agreement must then be presented to the court for preliminary approval--the court must determine that the settlement is fair, reasonable, and adequate. Following preliminary approval, notice of the settlement must be given to the class (in general, beneficiaries of the mental health land trust) so that they may comment to the court about the settlement. Only after notice may the court approve the settlement and dismiss the litigation.

The time and effort necessary to obtain final approval of a settlement arising from SB 67 is uncertain because it is not possible to predict what challenges may come. However, possible challenges include:

(a) that the constitutional prohibition against dedicated funds [Article IX, Sec. 7, Alaska Constitution] is violated by the provision in Sec. 4 of SB 67 [to be codified as AS 37.14.036(c)] that allocates 6% of the unrestricted general fund revenue during each fiscal year to the mental health income account, coupled with the restriction that future legislatures and governors may appropriate these amounts for other high priority public needs only if the funds are not "reasonably necessary to meet the projected operating and capital expenses of the integrated comprehensive mental health program" [Sec. 10, Ch. 66, SLA 1991, to be codified in AS 37.14].

(b) that the dedication of 6% of the unrestricted general fund revenue to the mental health income account [Sec. 4, SB 67], coupled with the reconstitution of almost one-half of the original one million acre land grant [Sec. 6, SB 67], coupled with the restrictions on appropriating amounts from that account under Sec. 10, Ch. 66, SLA 1991 [see Paragraph (a) above] may be challenged as being contrary to the public interest by persons who believe that the legislature and governor should not be restricted from appropriating public funds for other public needs if those needs are of higher priority (e.g. education, public safety, etc.). Different public interest groups will attach different priorities to the public need for different programs.

(c) that the allocation of 6% of the of the state's unrestricted general fund revenue to the mental health income account in perpetuity [Sec. 4, SB 67], coupled with the reconstitution of almost one-half of the original one million acre land grant [Sec. 6, SB 67], coupled with restrictions on appropriating "trust funds" [Sec. 10, Ch. 66, SLA 1991] is contrary to the public interest because it provides too much compensation to resolve this litigation. This claim was raised by intervenors Alaska Center for the Environment, et al. with respect to allegations that the state will overcompensate the ment health trust by reconstituting too much land under Ch.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 67

ANALYSIS CONTINUATION:

66. This "public interest" challenge could more easily be made as to the state overcompensating the mental health trust with funds under SB 67.

(d) that the transfer of any existing leases to the mental health trust [Sec. 6, SB 67, to be codified as AS 38.05.800(2)] could be challenged by the lessees. Marathon Oil Company and Union Oil Company of California have been permitted to intervene in the mental health trust land litigation to challenge the assignability of state oil and gas leases on state general grant land to the trust authority.

(e) that the combination in one bill of the reconstitution of mental health trust lands [Sec. 6, SB 67] with other substantive provisions [the remainder of SB 67] violates the constitutional provision that bills for appropriation shall be confined to appropriations [Article II, Sec. 13, Alaska Constitution]. The Alaska Center for the Environment, et al. have challenged the constitutionality of Ch. 66 on the grounds that this constitutional provision extends to bills that affect the status of public lands--such as reconstitution of land into the mental health trust.

(f) other challenges may be made by parties opposed to SB 67 as a resolution of the mental health trust lands litigation.

2. Enactment of SB 67 may result in litigation with the mental health trust plaintiffs and third-parties who hold interests in former trust lands over whether particular parcels are suitable for being reconstituted into the trust. The provisions in Sec. 6, SB 67 are ambiguous because the bill does not explicitly validate existing interests in former trust lands nor does it identify the specific parcels that will be reconstituted--e.g. trust land that "has not been conveyed or encumbered by the state" is subject to conflicting interpretations.

The settlement agreement negotiated under Ch. 66, SLA 1991 that provides specifically as to parcels which will be reconstituted will not serve SB 67. Under Ch. 66, SLA 1991 the parties negotiated parcels to be reconstituted with the understanding that for any former trust parcel not reconstituted, the state would provide substitute land of comparable character and equal fair market value--the value obtained by the trust was the same regardless of whether the former trust parcel was reconstituted. Under SB 67, the trust is given an all or nothing choice--reconstitute the former trust parcel or receive nothing. Plaintiffs are likely to claim that any parcel arguably described in Sec. 6, SB 67 for reconstituting must be reconstituted regardless of the impact on the state or third-party interests.

The Department of Law currently receives \$589,500 in general funds, and \$1,000,000 in mental health trust funds to implement the Ch. 66, SLA 1991 settlement, including reconstituting the mental health lands trust within the terms of the settlement. The general funds are used to pay for two attorneys, one paraprofessional, and one clerical employee, who carry-out the state's responsibilities under Ch. 66. The mental health trust funds are provided to the plaintiffs who have accepted the settlement so that they can carry-out their responsibilities under Ch. 66.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. SB 67

ANALYSIS CONTINUATION:

Because of the uncertainties described above, and because of the potential for continued legal challenges, we do not believe that the current efforts of either the state or the plaintiffs, will be reduced if SB 67 is adopted. This would cause existing resources to be redirected to implement and defend the new law. We cannot say if the bill would cause additional costs due to the uncertainty of potential litigation.

**DIVISION OF LEGAL SERVICES**

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MEMORANDUM

February 4, 1993

**SUBJECT:** Constitutional questions raised by Senate Bill 67  
(Work Order No. 8-LS0409\A)

**TO:** Senator Mike Miller, Chair  
Senate Resources Committee

**FROM:** Jack Chenoweth  
Legislative Counsel

I am responding to the two questions you have asked with respect to Senate Bill 67, an Act amending the 1991 mental health trust measure, reconstituting the mental health corpus, and altering the manner of enforcement of the state's obligation to compensate the reconstituted trust:

(1) Does section 4 of the bill, establishing an ongoing annual payment of six percent of the state's unrestricted general fund revenue to the mental health trust income account, violate the prohibition of article IX, section 7 of the state constitution against dedication of state funds?

(2) Does section 6 of the bill, identifying specific state land obtained by the territory and the state under the provisions of the former Alaska Mental Health Enabling Act of 1956 that shall be used to reconstitute the state's mental health trust corpus, constitute an appropriation such that its inclusion with other substantive provisions violate the second sentence of article II, section 13 wherein appropriation bills are to be confined to appropriations?

For the reasons set out below, I am inclined to answer both questions in the negative.

I

Section 4 of the bill establishes an ongoing obligation by which the state would pay six percent of the state's unrestricted general fund revenue into the mental health

CONSTITUTIONAL QUESTIONS

trust income account. <sup>1/</sup> The provision directs the commissioner of revenue to "allocate" the amount from the general fund into the mental health trust income account. <sup>2/</sup> The allocation of an amount of money from the general fund into an account established within that fund is, to my mind, nothing more than a bookkeeping matter, an accounting transfer that does not require a legislative appropriation. A legislative appropriation is required only as to the withdrawal of money from the state treasury. Article IX, section 13, Alaska constitution.

It is clear that the legislature prepared ch. 66, SLA 1991, contemplating that money would not be withdrawn or expended from the mental health trust income account without a legislative appropriation. <sup>3/</sup>

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<sup>1/</sup> The proposed language of the bill's section 4 would replace AS 37.14.036(c), added by sec. 11, ch. 66, SLA 1991. Subsection (c) directs

(c) In each of the following state fiscal years, the commissioner of revenue shall allocate from the general fund of the state to the mental health trust income account in the general fund an amount equal to the percent of the unrestricted revenue of the state specified for that fiscal year:

| FISCAL YEAR ENDING | PERCENT OF UNRESTRICTED STATE REVENUE |
|--------------------|---------------------------------------|
| June 30, 1992      | six percent                           |
| June 30, 1993      | six percent                           |
| June 30, 1994      | five percent                          |
| June 30, 1995      | five percent                          |
| June 30, 1996      | four percent                          |
| June 30, 1997      | four percent                          |
| June 30, 1998      | three percent                         |
| June 30, 1999      | three percent                         |
| June 30, 2000      | two percent                           |
| June 30, 2001      | two percent                           |
| June 30, 2002      | one percent                           |
| June 30, 2003      | one percent                           |

<sup>2/</sup> This "allocation" language is consistent with the approach taken in current AS 37.14.036(c), added by ch. 66, SLA 1991, the subsection being replaced by this bill section. The same section identifies the mental health trust income account as "a separate account within the general fund of the state." AS 37.14.036(a).

<sup>3/</sup> See AS 37.14.003, setting out the obligations of the governor, and AS 37.14.005, identifying the obligations of the legislature, in the handling of proposed appropriations of the balance of the mental health trust income account. Specifically, under AS 37.14.005(b):

(b) Before taking action on appropriations from the mental health trust income account proposed by the governor, the legislature shall consider

(continued...)

Consequently, since the transfer to the special account is an accounting mechanism and appropriation of the balance of the account involves an appropriation, the change proposed by bill section 4 does not violate the prohibition of article IX, section 7 of the state constitution against dedication of state funds.

## II

Section 6 of the measure proposes to reconstitute the mental health trust corpus. In essence, it identifies land that came to the state under provisions of the former Mental Health Enabling Act of 1956--former trust corpus land--that, in general, has not been conveyed or generally encumbered and that remains available now out of the general grant land inventory for restoration to the reconstituted trust or that is so encumbered that its removal from the state general grant land inventory and restoration to the reconstituted trust ought not to impair the interests of third parties.

Whether inclusion of section 6 within Senate Bill 67 improperly and unconstitutionally <sup>4/</sup> joins an appropriation with other material making a change in substantive law depends, of course, on whether or not section 6 makes an appropriation. If it makes an appropriation, it is an appropriation of land. The courts have held that land, as a state asset, may be a subject of appropriation, at least in certain circumstances. Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (initiative that would have provided state land to residents under the Alaska Homestead Act, the so-called "Beirne Initiative," invalidated as an "appropriation" made in violation of constitutional provision, article XI, section 7, precluding use of initiative to make appropriations); McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988) (required transfer of university assets in initiative to reestablish a separate community college system identified as an "appropriation" that is an impermissible violation of the constitutional prohibition).

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<sup>3/</sup>(...continued)

the needs of the beneficiaries of the trust without regard to other potential objects of state expenditure. The legislature shall make appropriations from the mental health trust income account in a separate appropriation bill limited to appropriations from the mental health trust income account.

(Emphasis added.)

<sup>4/</sup> Unconstitutionally as an asserted violation of the second sentence of article II, section 13:

FORM OF BILLS. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

The court has tagged the segregation and allocation of state assets as appropriations only in the context of upholding the prohibition of article XI, section 7, against use of the initiative process to accomplish the transfer of state assets. Whether the court is prepared to extend the reasoning it used to find a violation of article XI, section 7 to circumscribe appropriations of assets other than money by application of the second sentence of article II, section 13 is debatable. To date the court has not been asked to do so, and I hesitate to reach that conclusion in the absence of a definitive judicial opinion. <sup>5/</sup>

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<sup>5/</sup> The two circumstances are, to my mind, distinguishable. I have considered the matter in the context of whether a bill making an appropriation of money may combine or incorporate provisions appropriating non-monetary state assets and believe that the distinction in the handling of monetary and non-monetary state assets, at least for purposes of compliance with article II, deserves to be maintained.

Under the state constitution, the executive's treatment of measures appropriating money differs from the authority he or she has with respect to all other measures. Constitutionally, the governor must submit a general appropriation bill authorizing proposed expenditures during the ensuing fiscal year. Article IX, section 12, Alaska constitution. The appropriation bill making these expenditures serves only (or should serve only) to withdraw money from the state treasury. Other appropriation bills may also serve to withdraw money from the state treasury. Article IX, section 13.

All legislative bills, whatever the subject, must run the gauntlet of the executive's veto. However, under article II, section 15, the governor enjoys wider latitude with the disposition of appropriation bills in that the governor "may, by veto, strike or reduce items in appropriation bills." For a bill involving the appropriation of money, the ability to "strike or reduce" is meaningful, its use is well understood, and it is arguably limited to dealing with the dollar amount set out in the appropriation rather than with any of the language in which the appropriation appears in context. By contrast, for measures purporting to dispose of or appropriate other kinds of state assets, the governor's ability to "strike or reduce" the appropriation or disposition of a non-monetary asset is without precedent. Indeed, if the assets that is the subject of the appropriation is something other than money, a reduction or partial veto may amount to an alteration of substantive law.

Additionally, no case has as yet focussed on the treatment properly to be given the legislature's response to a veto in the event the appropriation involves an asset other than money in the state treasury. Left unanswered at this time is the question of whether the governor's veto of a legislative measure making an appropriation of a non-monetary asset must, under article II, section 16, be overridden with a vote of three-quarters of the legislature or whether a two-thirds override vote would be sufficient.

These considerations raise sufficient question as to whether the court would extend the reasoning applied in its Thomas and McAlpine decisions to equate the manner of handling of non-monetary state assets with that given monetary assets under article II of the state constitution.

The action required to be taken by the bill's section 6 may not, in fact, constitute an "appropriation."

In its McAlpine decision, the court indicated that a key reason that it was invalidating the property transfer provisions of the community college system initiative was to protect, to the widest possible degree, the discretion that was constitutionally given to the legislature to make decisions with respect to state assets:

. . . Outside the context of give-away programs, the more typical appropriation involves committing certain assets for a particular public purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. . . .

McAlpine, 762 P.2d at 88, 89 (emphasis added; footnote reference omitted). But, in the area in which Senate Bill 67 operates--restoration of the Alaska Mental Health Trust--the legislature decidedly does not have discretion or latitude to act to allocate assets among competing needs. That door closed when the court decided, in State v. Weiss, 706 P.2d 681 (Alaska 1985), that the trust should be reconstituted. The legislature is constrained by the "guidance" provided by the court to accomplish that end:

. . . [T]he redesignation [of former mental health trust land] legislation is invalid [and] the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. . . . We take the opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its

position just prior to the conveyance effected by the redesignation legislation.

Weiss, 706 P.2d 681, at 684. Arguably, the state's former holdings of the assets of the trust first established by the 1956 Mental Health Enabling Act, and the assets that have been derived from the sale, exchange, or other actions involving those original assets are not unencumbered or unobligated state assets over which the legislature has discretion, but are held subject to the court's opinion in Weiss. The court has already ordered allocation of assets into a reconstituted trust,<sup>6/</sup> and the legislature's actions taken in response to that order may not constitute, for purposes of article II, the appropriation of a state asset as the term "appropriation" has been explained in the McAlpine decision.

Finally, for whatever merit it may have, I should point out that the bill's section 6 in effect replaces an uncodified provision, sec. 54, ch. 66, SLA 1991, reconstituting the mental health trust corpus. If the approach taken in this section of this bill is unconstitutional as a violation of the second sentence of article II, section 13, it merely compounds the error made in legislation making a substantially similar effort to resolve the Weiss claims enacted in 1991.

\*

I trust this is responsive to your questions.

JBC:lmb  
93-028.lmb

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<sup>6/</sup> The court's disposition of the appeal in the Weiss decision is in marked contrast to the usual disposition of cases raising claims against the state. Under the relevant statute, AS 09.50.270:

**PAYMENT OF JUDGMENT AGAINST THE STATE.** No attachment or execution shall issue against the state. When a final judgment is rendered against the state in an action, the clerk of the court shall immediately transmit a certified copy of the judgment to the Department of Administration which shall either approve payment of the judgment against the state if a sufficient appropriation exists for payment, or audit the amount and transmit a copy to the legislature with the recommendation that an appropriation be made for its payment.

The court has observed that "[this] statute gives [a successful plaintiff] a specific, albeit uncertain, remedy: the chance to have his claim presented to the Legislature." Zerbetz v. Alaska Energy Center, 708 P.2d 1270, 1278 (Alaska 1985). But Zerbetz's claim involved money damages and was prosecuted under provisions of law that raised a question whether money might be drawn from the state treasury to pay the claim in the absence of an appropriation, a question involving article IX. No such uncertainty attends the disposition of the claim successfully litigated by Weiss and his colleagues.