

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 0072

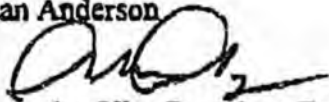
9936 HOUSE LABOR & COMMERCE

"Fractionalization" was never intended to represent more than one beneficiary on a policy. It was represented as the scenario described above. Not allowing for multiple beneficiaries on an insurance policy violates the rights of individuals to collectively purchase personal property. An insurance policy is nothing more than the personal property of the policyholder, and all policyholders have the right to sell personal property. It is important to not represent securities concerns that don't exist. It's not fair to the individuals selling their policies. It is similar to a homeowner being told they can't sell their home because it's a security.

In no way does any purchase program offered through Future First Financial Group represent a security. Future First does not take purchaser funds and buy policies with unknown expectations. Securities are investments that many times over are dependent on the growth and financial performance of the companies they invest in. The investor never truly knows the final outcome. All purchasers of the death benefits of life insurance policies know from the day they request the settlement what their future value return will be because it is set at life expectancy. I will say it again - all returns are fixed! They will never change! Only the rate of return is not known. This will not be known until the death of the policyholder. Purchasers will not lose their principal. The Trustee of the premium paying escrow fund pays all policy premiums until maturity.

I've run out of time on these comments but if there are any questions please call. Just remember, enforcing securities laws on non-securities is not the answer if the state wants some control over the Viatical Settlement Process. Simply have them model the legislation after Florida. They are tough but fair and have done all the work.

Alan Anderson



Executive Vice President, Future First Financial Group

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF BANKING, SECURITIES, AND CORPORATIONS

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ANCHORAGE
Corporation Information (907) 288-8140
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February 18, 1999

VIA FAX AND U.S. MAIL
(907) 297-7363

Jack Gwaltney
Premier Investments and Insurance, Inc.
3510 Spenard Road, Suite 104
Anchorage, AK 99503

Dear Jack Gwaltney:

Re: Future First Financial Group of Ponte Vedra Beach, FL

Reference is made to our conversation of February 17 regarding the program offered through the above sponsor (Future First) for the sale of interests in viatical settlement contracts (the viatical program). This office administers and enforces the Alaska Securities Act (AS 45.55) and it is our opinion that the viatical program, as offered through your agent Escrow Alaska Financial, Inc., is an investment contract security under AS 45.55.990(12) and subject to the registration provisions of AS 45.55.070. Firms and individuals that sell securities must also be registered as broker dealers or agents under AS 45.55.030.

Please immediately confirm to this Division in writing, as the Alaska General manager for the Future First viatical program, that the offer and sale of interests in the viatical program, including all advertising, has been voluntarily stopped. A copy of this letter must be provided to all firms and individuals who were previously authorized to sell the program and a list of those firms and individuals, including address and telephone numbers, must be provided to this office. Also, provide a list of all Alaskan purchasers of the viatical program. If you are offering any other viatical programs, disclosure to this office is required.

If you are aware of any other (non-affiliated) firms or individuals offering the Future First viatical program to Alaska residents, please identify.

As discussed, provide a copy of all written materials provided to or signed by an investor. If not set out in the written materials, disclose to this office supplementally the selling compensation structure of this offering. Provide a copy of any scripts used in telephone sales presentations and if none, so state. Provide a copy of any attorney's opinion, letters or court cases relied upon that supports your position that the viatical program does not constitute a security under AS 45.55. Forward a copy of any financial statements for Future First and if none, so state.

Mr. Jack Gwaltney

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02/18/99

Please be advised that the advertisement of "Returns up to 42% Guaranteed" (emphasis added) in the newspaper constitutes a public offering and that, even in the event a securities registration is subsequently made effective, is strictly prohibited by 3 AAC 08.900(2). Identify the publications used, provide a list of all dates of publication and a copy of any advertising or notice used to promote the viatical program by you, Premier Investments and Insurance, Inc, or any agent or affiliate.

You are required to immediately respond to this letter under AS 45.55.910 and state whether or not you, Premier Investments and Insurance, Inc and its agents and affiliates agree to voluntarily cease and desist from offering or selling the Future First viatical program to Alaska residents. A response to the other information items is required within 10 days. A decision whether to take formal action under the Alaska Securities Act will be held in abeyance pending your full response. If we determine subsequently that there were ongoing activities that violated the Alaska Securities Act after your receipt of this letter, we will treat any such activity as a knowing violation of the Act.

If you have any questions, please feel free to contact me at 907/465-2524. However, only written replies suitable for filing with the Administrator, subject to AS 45.55.160, will be considered as responding to this letter.

Sincerely,



Dennis Salvesson
Securities Examiner

Cc: Escrow Alaska Financial, Inc.
J.H. Judy Gopaul, Marg Walker
VIA FAX AND U.S. MAIL

From the desk of
David E. Gwaltney, C.I.C.

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Personal Correspondence

e-mail: dewg@ciic.com

February 19, 1999

Mr. Dennis Salvesson
State of Alaska
Division of Banking
P.O. Box 110808
Juneau, Alaska 99811-0808

Re: February 18, 1999 Premiere Investment Correspondence
Constitutional breach

Dear Mr. Salvesson:

Please accept this correspondence as the first of what I anticipate will be three letters addressing issues raised in your February 18, 1999 correspondence to Jack Gwaltney of Premiere Investments and Insurance, Inc. Mr. Gwaltney has passed your letter on to me as required in your correspondence, and I have ceased solicitation and discussion of the product voluntarily, at least temporarily.

My letter today deals with what I feel is a constitutional breach of rights. Further, I am somewhat incensed by the implication that I have broken statute and that "formal action...will be held in abeyance pending...response." First, the definition of Viatical has most definitely not been addressed by statute in this and most other states. Of those States which have classified the product, virtually all have opted for a definition in favor of insurance offerings, not securities. The legislature in Alaska can choose to classify the product as it wishes, though it looks likely they will be in a vast minority if it opts in the direction that HB83 seems to be heading on this issue. (This will be the subject of my next correspondence.)

My immediate concern is the arbitrary application of a cease and desist order on a product which is not addressed in any current statute or regulation, and to my understanding and research is only now pending definition. I have performed a word search on what I believe are the statutes relating to both Titles 45 and 21, and the term "viatical" is not found. It appears to me that your allegation that these products conform to the investment securities act seems to be a matter of opinion until it is defined by statute. (Without digressing into my next correspondence prematurely, viaticals do not place principal at risk, do provide a guaranteed return (subject to carrier solvency, which is a separate issue addressed under Title 21) and they have not been deemed securities by the SEC, which seems to carry as much weight as any argument I can imagine.)

Issuing a cease and desist order without defined regulatory authority seems to be to be a classical breach of constitutional rights. It is my understanding that "regulators" exist to protect the

public interest and welfare. Regulators protect the public at large from unscrupulous providers and inappropriate products. The sale of viaticals, at present, represents no such threat to public welfare. These products have been sold for more than a decade in the presented format and in my experience we've yet to have a single consumer complaint in Alaska.

Next month will be the twentieth anniversary of my insurance licensure in the State of Alaska. (Incidentally, I've been a Series 7 registered representative since 1984 as well.) Over those twenty years, there have been many concerns over the suitability of numerous products, including a certain class known as "Surplus Lines." Despite the potential public harm or concerns (which are potentially most devastating, by the way, certainly well in excess of viatical sales), the Division of Insurance never issued a cease and desist on the sale of those products. They (the Division) recognized that although additional regulation may be required to fully protect the consumer, the product was still valued and to remove it without cause or notification would place many Alaskan consumers as well as agents and brokers in an untenable position to protect themselves or earn a living.

Your order has done that. Consumers are now unable to exercise their right to purchase these products. Many salespeople are now offering these products for their livelihood, and your order is eliminating their ability to earn a living and provide for their families. Is there a statute that deals with this issue? Will there be State reimbursement? If not, I hope the Attorney General's office agrees with your position, or the State of Alaska will be offering liquidated damages at a time when we (the populace of our State) can least afford it.

In the case of Surplus Lines, the Division of Insurance solicited advise, counsel, and testimony from numerous sources and began issuing bulletins on findings. A subsequent law was promulgated and enforced with a defined inception date and penalties for non-compliance. This was a reasonable approach to the situation. During the fact finding period, no producers were held to a standard or law that "might" be passed. They dealt only with what was, then offered a period of time to gain compliance after the law was passed.

A secondary issue deals with your demand for "...all written materials provided to or signed by an investor." I will not comply with this demand at present for fear of a much larger problem, that being the Federal Privacy Act. As you're aware, by their very nature, the Viatical product deals with individual rights of privacy and terminal medical conditions. Until I can be shown, in writing and at the direction of a federal authority, that releasing this confidential medical information to you is deemed appropriate, my files will remain confidential. I will, however, be happy to provide all non-client specific sales material per your request.

Do these products need to be regulated? My opinion is yes, most definitely. But I feel they are reflective of insurance products much more than securities products. (Future correspondence to substantiate.) Even so, in the absence of statutory regulation, we the public can not be held accountable for laws that do not exist.

You also request information and/or attorney's opinion statements supporting our position on the products themselves. This request for information (supposedly to determine the nature and breadth of our violation), followed immediately by the implication that we have criminally violated Title 45 statutes, seems very close to a request to incriminate ourselves. Last time I checked our legal system, "criminals" were innocent until proven guilty. The burden of proof

does not rest on us - the burden that we have violated a law rests with you. If you feel this statement is an over-reaction, please explain the nature of the cease and desist, and also explain the not-even-veiled threat of further recrimination for non-voluntary compliance with your "request."

Please note that, without question, if HB83 passes in its current form, we will comply with all appropriate law and statute just as I have with insurance law for the last twenty years. I simply see no reason to comply with laws that don't exist nor sit idly while I'm threatened with the removal of my livelihood.

To summarize, I am complying with your cease and desist order, despite the fact I feel it is grossly inappropriate. I will follow this letter with additional correspondence to prove my point for Division of Insurance regulation. I will comply with your request for file information as soon as I'm assured that compliance will not violate or preempt an existing federal statute. And I respectfully request re-consideration of the cease and desist until laws relating to our conduct and product offering have been established.

Regards,



David E. Gwaltney, CIC

P.S. I am writing this letter under personal letterhead given my position for Viatical sales is under a personal agreement. Please note that my current industry positions include President, Principal/Manager and Compliance Officer of Gwaltney & Gwaltney, Inc., President, Alaska Independent Insurance Agents and Brokers, and Property Casualty Representative for the Division of Insurance Continuing Education Advisory Committee. My comments in this correspondence are personal in nature and have no correlation to those or other positions held.

cc: Rep. Norm Rokeberg (constituent)
Sen. Drue Pearce, (constituent)
Rep. Ramona Barnes (by request)

Viaticals Not Securities, Court Rules

By Jim Connolly

Viatical settlements are not securities subject to federal securities laws, a District of Columbia appeals court ruled in a 3-to-1 decision earlier this month.

The ruling in *Securities and Exchange Commission v. Life Partners, Inc. and Brian Pardo* reversed a district court decision handed down in August 1995 which addressed the sale of "fractional interests" in viatical settlements.

Viatical settlements are contracts in which an investor purchases a life insurance policy from a terminally ill person at a discount that can range from 20 percent to 40 percent depending on the life expectancy of the viator, the seller of the policy.

If viatical settlements are not securities, neither are they insurance policies, according to the court opinion which determined that "...a viatical settlement is not an insurance policy, and the business of selling fractional interests in insurance policies is no part of the business of insurance."

The court continued, "LPI's offering does not, therefore, qualify

for the insurance exemption from the federal securities laws, and is not shielded from federal regulation by the McCarran-Parguman Act."

The appeals court reasoned that viatical settlements are not securities because the "profits from their purchase do not derive predominantly from the efforts of a party or parties other than the investors."

Court Also Said That Viatical Settlements Are Not Insurance Policies

The district court had determined that the defendants were selling unregistered securities but that the case rested on a "gray area of securities law."

"We are disappointed with the outcome," said Leo Orenstein, assistant chief litigation counsel with the SEC. At press time, no decision had been made on whether the SEC would take further action.

But, according to Mr. Orenstein, the SEC could request a rehearing en banc by the appeals court. Such

petitions are granted "very infrequently," he said, but in this case, "there is a question of first impression. This is virgin territory."

Other options, he said, include an appeal to the Supreme Court, a rehearing and then an appeal to the Supreme Court, or a decision to let the current decision stand.

"Fractionalized interests are a very smart way to buy viatical settlements and spread risk and return," according to Brian Pardo, current chairman and former president of Life Partners, Waco, Texas.

Within 60 to 90 days, Life Partners "will begin to act as an agent selling fractionalized interests again," Mr. Pardo said. "Now a billion dollars and three years later, we can go back to the original way that we do business."

Speaking for the Viatical Association of America, Mair Eliaz, president, said, "we as an industry, are very much concerned that investors, one or many, have a very good understanding of the risks they are taking upon themselves by buying policies." This is particularly true of the small investor, he said.

**FutureFirst**

FINANCIAL GROUP



OFFICE OF THE PRESIDENT

November 5, 1998

The following analysis is provided to educate all concerned parties on the Future First Viatical Program, and how the Securities and Exchange Commission (SEC) may view this program. This analysis is strictly the opinion of Future First Financial Group, Inc. Future First strongly recommends the consultation with private legal counsel on the following position.

From all available information and in our opinion, it is not the intent of the SEC to exercise jurisdiction over Viatical Settlement Companies. Leo Orenstein, assistant chief litigation counsel at the SEC's division of enforcement says the SEC is not opposed to the simple brokering of insurance policies, yet Viatical Companies that do much more are having to 'bare all' to the SEC. To date, only one Viatical Company has been charged by the SEC.

Specifically, the SEC contended that the Viatical Company charged sold fractional interests in insurance contracts, thus constituting a sale of investment contracts subject to federal securities laws. The Future First Viatical Program coordinates the purchase of the death benefits of life insurance policies by direction of a Purchase Request Agreement (PRA). The Purchaser named in the PRA authorizes Future First to act on their behalf to purchase the death-related benefit of an insurance policy. The purchaser becomes a beneficiary of the death benefit of an insurance policy. Future First as well as most Viatical Companies coordinate this exchange of real property in a manner resembling the Real Estate Business. Viatical Brokers (requiring a license in many states) serve as agents for the Viators (sellers), and Viatical Companies (requiring a license in many states) serve as agents for the purchasers. The Future First Program requires an attorney for closing and through this closing the transaction is finalized through the exchange of money (value).

As in real estate all purchasers are exchanging money for property of value. This value is fixed - never to increase or decrease in value. Similarities to real estate are focused mostly on the transaction process not the future value. Investors in real estate base most of their future value estimates on the economy. Viatical Settlements coordinated through the Future First program have a fixed future value, not dependent on the economy.

The Future First Viatical Settlement Program does not meet the definition of a security under SEC v. W.J. Howey Co., 328 U.S. 293 (1946) [hereinafter Howey]. The Supreme Court under section 2(1) of the Securities Act defined an investment contract as an investment of money undertaken with the expectation of profit, whose profits are derived solely from the efforts of others with the existence of a common enterprise.

Under Howey, all Viatical Settlements require an investment of money with expectations of profit. These two points Future First cannot argue. Future First will argue that profits derived solely from the efforts of others and the existence of a common enterprise are not satisfied under Howey.

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For Howey to be satisfied, Viatical Settlement profits must be derived solely from the efforts of others. In application, the courts have not adhered to a literal interpretation of the word "solely." In *SEC v. International Loan Network, Inc.*, 968 F.2d 1304, 1308 (D.C.Cir.1992), "solely" was relaxed to "predominately." In any case, to satisfy this test, both the "others" whose effort produces profits and the effort itself must be identified. Under the Future First Viatical Program there are many possible "others:" the policy seller, a financial advisor of the seller, the policy broker, a financial advisor to the purchaser, and the purchaser's broker to name a few. The complexity of the settlement and the inability to know just when a person will die, makes it literally impossible to identify "others" and "whose effort" to satisfy Howey.

Common enterprise under Howey is defined in terms of horizontal and vertical commonality. Under horizontal commonality a common enterprise is defined in terms of the relationship between individual investors. A common enterprise exists if investor funds are pooled together, usually with pro-rata distribution of profits or losses. Both forms of vertical commonality define a common enterprise in terms of the relationship between the individual investor and the promoter. Narrow vertical commonality demands that the success or failure of the investor mirror the success or failure of the promoter. The broader form of vertical commonality requires that only the success or failure of the investor be dependent upon the efforts of the promoter. In our opinion, for Howey to be satisfied under common enterprise, both horizontal and vertical commonality must exist. It is difficult to argue against horizontal commonality, but neither forms of vertical commonality are present under the Future First Viatical Program. The success or failure of Future First Financial Group, Inc. has no correlation with the success or failure of a Viatical Settlement under the Future First Program. As described earlier, the value of the purchase is fixed at closing, never to increase - never to decrease. It is simply an exchange of real property finalized through a closing.

Beyond Howey and the SEC, Future First Financial Group, Inc. has developed the finest Viatical Program in the industry. Years of research and experience has uncovered the good and the bad in the industry, and Future First has capitalized on them all. Since day one, the Future First Viatical Program has become the model for the industry.

Probably the number one concern for all purchasers is: *who has access to purchaser funds?* Simply answered, *no one at Future First!* Future First is only authorized to make deposits. An independent CPA serves as trustee on the account, and only they have the authority to transact funds out of this account. This trustee is bound by a Trust and Escrow agreement limiting them to specific transactions at the direction of a law firm, and is personally covered by a Fidelity/Surety bond, providing third party protection of all purchaser funds.

The Future First Viatical Program has been designed to allow for as much choice as possible in the purchase process. As an agent for the purchaser, Future First is bound by the PRA to arrange the purchase of the death benefits of insurance policies under fixed program returns of their choice. The purchaser knows and agrees upon all settlement programs prior to closing.

After closing, the greatest concern for the purchaser is insurance policy premium payments. Some companies will not pay premium payments beyond their determination of life expectancy.

This should be a warning sign that these companies may not be placing appropriate life estimates with purchaser funds. The Future First Viatical Program, guarantees in writing under the PRA, to pay all insurance policy premiums to maturity, no matter how many years beyond the program the seller lives! This is accomplished through the Fidelity Viatical Special Trust. Advance premium payments required of the settlement at closing are deposited into this account. This is the sole purpose of this account, and bound by a Trust and Escrow agreement, this money can only be used for premium payments. All excess funds must remain in this account, earning interest over time, existing independent of Future First, to pay all policy premiums until maturity. Although this account may be over-funded, over-funding will allow for perpetual growth in the account even as individuals live beyond life estimates.

Future First Financial Group is a proponent for purchaser / investor protection. Protection may be in some form of regulation, but not at the expense of the entire industry. Regulation has almost ruined some industries, where de-regulation has been the savior. Any attempt to regulate a person's right to sell their personal property should not be approached. Most of the states developing legislation to regulate Viatical Settlements are following the lead of other states with legislation already in place. They are pushing the regulation through the insurance departments, with most of the emphasis on protection of the seller. Although this is an extremely important area to place emphasis, the protection of the purchaser / investor has received less attention.

This is not a reason for regulation by means of making this purchase of real property a security! It means that the insurance departments need to model the Viatical purchase process in some form similar to the Future First process. Regulation must not complicate this process and transform this process into something it's not. It is nothing more than the exchange of real property!

The future of this industry is not tied to more regulation. It is tied to legitimate claims of fixed future returns. The best 'statistical guessers' in the world will be wrong more times than right given a shorter time to be right. This is not magic, it's just common sense. Time is the key element to future events. This is why time is such a critical factor of the unknown. With more time, the unknown may be more predictable. Therefore, we must not be so naive and force naive on purchasers / investors by claiming to be of a higher power when it comes to estimating life expectancy. It is then reasonable to assume that Viatical Companies should have a much better track record on longer-term programs than shorter-term programs. No one really knows when a person will pass away. What we do know is that one day they will and the purchaser / investor will receive their promised fixed return as long as the Viatical Company or Third Party Trust has not let the policy lapse. Based on what the industry is offering in the competitive market for fixed returns, even a Viator doubling their life estimate presents an extremely competitive and risk averse return.

All of the employees, managers, and officers of Future First Financial Group, Inc. welcome you to the finest Viatical Program in the industry.

From the desk of
David E. Gwaltney, C.I.C.

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Anchorage, Alaska 99502
Telephone: (907) 297-7302
Facsimile: (907) 297-7363

Personal Correspondence

e-mail: dave@insurancecic.com

February 22, 1999

Representative Norman Rokeberg
Chairman, House Labor and Commerce
State of Alaska, House of Representatives

Re: February 19, 1999 committee testimony

Dear Chairman:

Thank you very much for allowing Jack and my testimony at your recent L&C Committee Hearing on HB-83. I know the procedure was somewhat unconventional, and your willingness to allow us the public forum to air our concerns was gratifying. I will even go onto say that my prior experiences with the legislative process have been less than desirable, and your efforts both on the part of our Association and now personally have renewed my hope for the system. I know we have a long way to go, but at least having an advocate like you looking at both sides gives me hope.

Per your request, please accept the following as my written testimony for the committee hearing of February 19, 1999:

Chairman Rokeberg, Members of the Committee:

I wish to add my concurrence with Jack's testimony. In addition, I wish to argue on a point of logic as to the actual nature of a viatical settlement. As you know, numerous State and Federal Courts have upheld that the proceeds of life insurance policies are personal property. They are sold as an estate asset or planning tool and have always been regulated by the Division of Insurance. Further, proceeds are taxed as personal property, not securities. The best comparison to a mature life insurance policy may be the equity in your personal residence. Both the insurance proceeds and home are considered personal property, not securities. To sell viaticals as securities would be the same as selling your house as a security. Selling any personal property as a security provides an undo complication (and will restrict free market trade to no appreciable benefit). Thank you for your consideration.

I am still distressed at the constitutional nature of the "cease and desist" request (the Director noted there was no "order") issued by the Division of Banking. First, if there is no order (or implied order), what's the big deal? Why couldn't we continue our sales efforts until the end result was ascertained?

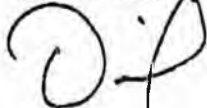
From a political standpoint, it's my feeling that the regulators are very quickly forgetting that if a "problem" is not consumer related, they really have no business involving themselves in the market system. As stated in our joint testimony, both Jack and I feel this product needs regulation (or at least a licensure process - Insurance License proceeds go into the General Fund, as you know), though the extra burden of securities disclosures, etc., would severely hamper the consumer's ability to purchase the product and would drive many salespeople out of the business.

I think it is important to note at this time that I happen to be a Series 7 Security Representative. Passage of the implied regulation as presented would actually help me personally by removing competition from the marketplace. Even though it would put money in my pocket, it still doesn't make the Division's position "right." I'd just like to make the point this is a regulation and market issue, not one of economics.

Please feel free to contact me if you would like additional information on this or other insurance related issues. I will be at your immediate disposal.

Thank you once again for your help and graciousness. I am very pleased to have voted for you and to have you as my Representative.

Most sincerely,

A handwritten signature in black ink, appearing to be 'D. Gwaltney', written over a horizontal line.

David E. Gwaltney, CIC

Viatical Settlements

HB 190

Alaska Department of Commerce and Economic Development

Division of Banking, Securities and Corporations

Franklin T. Elder, Division Director

P.O. Box 110807 Juneau, AK 99811

907-465-2521

Viatical Settlement Definitions

HB 190

The word "viatical" comes from the Latin word "viaticum," which means "supplies for a long journey."

To **viaticate** is the process in which a person sells the death benefit or ownership of a life insurance policy to a third party for less than its face value in exchange for the ownership and beneficiary rights upon the death of the insured or policy maturity.

The **viator** is an insured person who may face a catastrophic or life-threatening illness, and transfers, sells, assigns or bequeaths the benefits of his/her life insurance policy in return for a negotiated payment. In return, the viatical settlement provider, investor or trust will become the owner of the life insurance policy, and any investors may also become the irrevocable beneficiaries.

A **viatical settlement provider** typically is a company that enters into multiple viatical settlement contracts with viators each year for the purpose of resale. The provider arranges such settlements between viators and one or more investors.

Viatical settlement contract is an agreement for the purchase, sale, assignment, transfer or bequest of all or a portion of the death benefit or ownership of a life insurance policy or certificate for consideration that is less than the expected death benefit.

General Objectives of HB 190

- To clarify the securities status of viatical settlement contracts.
- To protect Alaskan investors from sales abuses that have injured investors in other states by:
 - Requiring adequate disclosure to Alaskan investors,
 - Requiring registration of sales agents,
 - Providing an easy and inexpensive mechanism for viatical settlement providers to comply with Alaska Securities Law.

Documented Sales Abuses Viatical Settlements HB 190

- An investor and his mother invested more than \$45,000 in viatical settlements, then received an early payoff when the viatical company sold its policies. They lost more than \$15,000. By buying life insurance policies of the terminally ill, investors thought they were getting a sure payoff from a humanitarian investment. Now they're waiting for the policyholders to die. In the same article the assistant commissioner from the California Department of Corporation's enforcement division is quoted as saying, "Viaticals are unique because legally you're not entitled to know much about the insureds," "You're completely at the mercy of the broker."
- Viatical-settlement investments really took off when terminal AIDS patients began selling their policies to viatical firms in the early 1990's. But when protease inhibitors and other medical advancements started extending patients' lives, viatical investors found themselves waiting longer than expected for a payout. Many are still waiting.
- *After five years, Mrs. Smith an investor from Nebraska hasn't received the expected payout. Meanwhile she's been diagnosed with Alzheimer's disease and her husband has died. Five years ago, a salesman in her hometown recommended that she cash in her certificates of deposits and buy a viatical for \$12,000. The investment was to pay out \$20,000 when the insured died which, she was told, should be in 18 to 36 months. Her daughter, requested an updated medical report, but the company hasn't responded. The daughter now wonders what will happen if her mother needs to enter a nursing home. She'll need the money to cover the bills. But if she doesn't have it, she'll have to apply for Medicare -- which might be difficult because of the viatical. "It complicates eligibility if you have an asset you can sell only at a tremendous discount," says Cynthia Barrett, an elderlaw attorney in Portland, Oregon.*

**Viatical Settlements
Regulation in other States
HB 190**

- Alaska, Arizona, Maine, Oregon, Missouri, North Dakota, South Dakota and Ohio either have been, or are currently, considering a modification of their statutory definition of a “security” to expressly include viatical investments.

- The following message was received from the state of Maine which introduced a securities bill to regulate the sale of viatical settlement contracts: “Good news on the viaticals front! We had hearings this week on our viatical bill which makes all viatical settlement contracts sold as investments securities, and provides a right of rescission to purchasers. Our legislative committee was so moved by the testimony from a former sales person and a victim (and maybe a little bit by my testimony), that they decided on their own to make this emergency legislation and to extend the right of rescission from 3 days to 30 days. The emergency provision means that the bill will become effective upon signing by the Governor which will probably be in the next month. Further, they asked me to report back next session about the effectiveness of the legislation, and hinted that if there are still abuses, they may ban sales of viaticals in Maine.”

Documented Sales Abuses Continued...
Viatical Settlements
HB 190

- In another similar situation, "Anne Jones's nephew, a viatical salesman, convinced his aunt that she'd get better returns from viatical investments than she would from an annuity. At his urging, she cashed out a recently purchased annuity, paid \$24,000 in surrender charges and bought portions of insurance policies on seven terminally ill people. By the end of 1995, she had invested more than \$214,000 in viatical settlements. She expected to receive \$309,000 when the people died -- which she was told should be no more than 24 to 36 months later. Jones received one payout, for \$24,000. Jones still has nearly \$193,000 tied up in the other six policies. The 15% return Jones was to receive on that policy has dwindled to less than 4.2% per year--and is still falling. There is another complication. The viaticals are in an IRA, and since Jones turned 70 1/2 recently, she needs to begin taking withdrawals. Other than the \$24,000 payout she received, the rest of her IRA money is trapped in the viaticals. Any required distributions she can't take will be considered excess accumulations and subject to a 50% penalty for every year they're not distributed.

Source: Kiplinger's Personal Finance Magazine, March 1999, from the article Death Watch

Everyone with vulnerable parents or friends should read this book. We didn't, and our parents were conned into several viatical investments that cost them many thousands of dollars as well as many sleepless nights.

— Richard D. Hausten, data processing manager

When I embarked on starting a viatical business to sell to investors, I naively assumed that all I would have to do is get companies to provide me with policies. After reading both of Gloria Wolk's books I am aware that the viatical industry has to be approached with open eyes, due diligence, and both of these viatical books.

— Frank Meyers, insurance agent, 12 Step Agency, Inc., Guardian Title

Wolk wrote *Cash for the Final Days: A Financial Guide for the Terminally Ill and their Advisors*, the first book to discuss viatical settlements. She now turns her attention to those who might consider buying such insurance policies.

— American Library Association *Booklist*

Viatical Settlements is a "must-read" for anyone considering investing in viaticals, who wants to protect their assets.

— Lee R. Phillips, author, *Protecting Your Financial Future*

For updated information and reviews visit our web site
<http://www.viatical-expert.net>

VIATICAL SETTLEMENTS

AN INVESTOR'S GUIDE

by

GLORIA GRENING WOLK, M.S.W.

Bulkin
Books

Laguna Hills, CA

CHAPTER SEVEN

“BELLY-UP” INSURANCE

Jack W. Traylor, D.P.A.

Investors are told that their principal is guaranteed by insurance companies, and if the insurer goes “belly-up,” state guarantee funds will pay. Now for the facts, from someone whose professional experience includes assisting state insurance departments with the resolution of insurer insolvencies.

WHILE DRIVING TO WORK RECENTLY I LISTENED TO A NATIONAL radio call-in program. An insurance expert took a call from a man who asked, “What happens if my annuity company goes ‘belly-up?’”

The expert gave a professional-sounding answer with references to

bankruptcy and the SEC. Her answer seemed to satisfy the caller but was not even close to being correct.

So what does this mean to the man who worries about his insurance company going "belly-up?" It means he must depend on his state government, usually the state insurance department, to take action on any insurance company impairment or insolvency.

If state regulators find an insurance company is financially impaired or insolvent, or simply that continued operation is a danger to the public, regulators are required to seize physical control of the company. After seizure, the state must correct the company's financial problems or close the company.

If the caller had known this, he might have asked, "How does closing down my insurance company help me?" This is a question that regulators are sometimes hard-pressed to answer. From an overall perspective, the public is clearly protected when the state takes over an insolvent company and prevents it from selling additional insurance. But does this action protect current policy holders?

In a state takeover, insurance company management is routinely replaced. Remember, it was this management that caused or, at the very least, failed to prevent the insolvency. In fact, it is not uncommon for the state to file civil (R.I.C.O.) actions against the officers and directors of such a company.¹

A state takeover replaces management with an independent third party whose duty is to protect the interests of policy holders *before* those of pre-existing trade creditors.¹ Although the law in every state specifies that policy holders must be paid 100 percent before any payment can go to trade creditors, some new creditors are paid before policyholders.²

If the radio caller had heard the above, he might have wondered how individual states could coordinate the affairs of a large company operating in many states. There was a time when they did not. In the not-too-distant past,

¹ R.I.C.O. = Racketeer Influenced and Corrupt Organizations. This is an anti-racketeering law.

the state where the company was incorporated (the domiciliary state) would attempt to take over the company and work with or around the laws in the other states.

To further complicate matters, each state had its own set of laws and seldom did they match. Multi-state insolvencies were, more often than not, a legal shoot-out between states as each tried to capture assets for their policy holders. Confusion and legal standoff were the order of the day.

Encouraged by a perceived threat of federal action to take back the regulation of insurance, state insurance commissioners and their senior staff began to draft model legislation at the quarterly meetings of the National Association of Insurance Commissioners (N.A.I.C.). They drafted what became known as the Insurers Rehabilitation and Liquidation Model Act.

Fearing federal regulation more than they did state regulation, the insurance industry joined the task and today a version of the "Model Rehabilitation and Liquidation Act" has been passed in every state.

Of equal importance was the creation of two model guaranty fund acts. One exists for property/casualty companies and another for life/health/annuity companies.

Each state has its own guaranty fund, and often separate funds for property/casualty and life/health/annuity companies. Because of complications that developed when the guaranty funds in each state tried to act independently of each other, a national association was created for each type of fund.

In practice, the national association works with the domiciliary state regulator to administer a multi-state insolvency. While the acts provide for state administrative action against companies, most state regulators prefer to take action through a state court. As a result, in a multi-state insolvency, regulators in the domiciliary state file an action in that state's court. Then, under supervision of the court, together with the national guaranty fund association, they work out a plan of rehabilitation or liquidation that is in the best interest of policy holders.

The model act is quite detailed and provides protections and restrictions on most all aspects of rehabilitation or liquidation. To get to the heart of the question of companies that go bankrupt, we have to turn our attention to a closer look at the guaranty fund system.

LIFE, HEALTH, AND ANNUITY GUARANTY FUND OPERATION

Each state now has a life, health, and annuity guaranty fund (or association) based on the Life and Health Insurance Guaranty Association Model Act adopted by NAIC. Like all model legislation, a NAIC model is subject to change as soon as the draft comes to the legislative floor. Variation has been greatly reduced in recent years as a result of NAIC's state certification program. To be certified, a state must adopt the NAIC-approved models without substantial change. NAIC certification has done much to increase uniformity between states, but there is still some variation.

HYPOTHETICAL INSOLVENCY

If we assume that the caller's company was insolvent, we get a clearer picture of how the system works. Let's assume that his imaginary company, Payless Annuity Insurance Company, was seized by the state insurance department and a court order has placed the company in rehabilitation and appointed the state insurance commissioner (or his deputy) as "receiver."

The receiver's first action is to place a moratorium on company payments except for necessary administrative expenses until the severity of the insolvency has been determined. In other words, the receiver will make no policy holder payments until the assets and liabilities are added up and the percentage that Payless can pay on each dollar is known.

While accountants are determining the payout percentage, the receiver notifies the National Association of Life and Health Guaranty Associations (NOLHGA). Instead of trying to deal with the association in each state where the company did business, the receiver works with the national organization, NOLHGA. Finally, a working document is presented to

NOLHGA. This "Assumption Document" lists^a

- ♦ Each policy holder (sorted by state)
- ♦ Policy value
- ♦ Number of contracts
- ♦ Coinsurance
- ♦ Policy value less coinsurance
- ♦ State guaranty limit
- ♦ Amount not covered

This type of list is prepared for both annuity and/or life insurance policy holders.

Several important observations can be made from this example. First, the state of California has what is called a 20 percent "co-insurance" requirement. This is a 20 percent deductible *not* covered by the state guaranty fund. Fortunately for policy holders, this deductible is applied first, before the \$100,000 state limit of coverage is applied.^b

All Payless policies owned by the same individual are lumped together. It does not matter if a policy holder has one contract or ten. The \$100,000 limit is applied to the *total*, not to individual contracts. The last column—the amount not covered—is the amount for which the annuitant may file a claim against the assets of Payless (along with all other creditors).

Usually the receiver cooperates with NOLHGA and solicits bids from other solvent insurance carriers to assume these contracts.^c In most situations there is a separate assumption for life insurance and a separate assumption for annuity contracts. The assumption is for the *amount covered by guaranty funds*.

Fortunately, in many insolvencies the assuming company offers to take over the uncovered amount as well. The assuming company receives the

^a See appendix I for an example of an Assumption Document based on an actual insurer insolvency.

^b The deductible is more costly to administer than the savings it generates.

^c Known as a reinsurance assumption.

payout percentage from the receiver. Additionally, a moratorium is placed on policy holder withdrawals for the time necessary for interest earnings to cover the shortage.

GUARANTY FUND LIMITS

When the questioner got word of Payless' insolvency, he may have rushed to get a copy of the state guarantee fund law. If he did, he read something like this:

The contractual obligations of the insolvent insurer for which the association becomes or may become liable shall be in excess of \$100 and shall be as great as but no greater than the contractual obligations of the insolvent insurer would have been in the absence of an insolvency.

A common feature of guarantee fund laws is a provision for a \$100 deductible. In actual practice, NOLHGA (the national association of funds) usually convinces the state associations to dispense with the deductible.¹

The jolting part of the law, at least for individuals with large life or annuity contracts, is the section dealing with the limit of coverage. That section usually reads

But the aggregate liability of the association on any one life shall not exceed \$100,000 with respect to the payment of cash values, or \$300,000 for all benefits.

What is urgently important for policy holders is the phrase "*aggregate liability of the association on any one life*." Even if the policy is for one million dollars, the aggregate liability for the guarantee fund is \$100,000—not \$300,000. The \$300,000 is for "all benefits."

It is understandable that someone reading the above could interpret it to mean that an annuitant or a life insurance policy holder would be paid up to \$300,000. It is not uncommon to hear insurance professionals talking about \$300,000 as the guaranty funds limit on a life contract. But the fact is,

NOLHGA and the individual state associations interpret the law to mean a *maximum of \$100,000 per individual* (annuity or life insurance).

These organizations don't specify what other benefits might add up to \$300,000. Whatever they may be, guaranty associations interpret the law to mean that for any one individual the limit is \$100,000 for cash values. Therefore, no matter how large any one individual's policy/contract, payment from the guaranty association will be limited to cash values of \$100,000. There will be no other payment for a life or an annuity contract.

CONCLUSION

The information provided in this chapter is a very general look at the solvency issue. Much more could be written about insurance company solvency, and much more detail could be given about how an insolvency is administered.

Additionally, this information should not be viewed as critical of the guaranty fund system. It is a relatively new system and far better than the confusion that reigned before the model acts and before individual states passed guaranty funds legislation.

As with everything in life, change is certain. We should expect the insurance solvency and guarantee fund laws to change.

END NOTES

1. The first persons paid are new creditors: the bankruptcy administrators. In some states employees are paid before policyholders.
2. Policyholders are paid up to some limits before pre-existing *trade* creditors.

CHAPTER EIGHT



FRAUD WATCH

When you write that check, what are you buying? The viatical industry has spawned a variety of schemes and fraud. Here's a sampling, and tips to help you avoid becoming a victim.

THE BIGGEST VIATICAL SCAM TO DATE—TOTALING \$95 MILLION AND affecting investors nationwide—made headlines in April 1997. Sixteen hundred people had invested as much as \$300,000 each, based on promises of annual interest payments of 25 percent.¹ The U.S. attorney's office charged three men and a woman with fraud.

Personal Choice Opportunities (PCO) based in Palm Springs, California, was charged with inducing investors to "lend" funds to PCO to finance viatical settlements. Investors came from 24 states and included brokers who

HB

201

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 15, 1999

FURTHER REFERRALS:

Finance

Date of Committee Action: APRIL 21, 1999

The LABOR AND COMMERCE Committee considered:

HB 201

HOUSE BILL NO. 201

OVERTIME COMPENSATION COMPUTATION

"An Act relating to the computation of overtime; and providing for an effective date."

recommends it be replaced
with the following committee substitute

CS HR 201 (L+C)

the same title
 a new title

additional referral to _____ Committee

attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) _____

zero fiscal note(s) LABOR

zero fiscal note(s) _____

| SIGNING WITH RECOMMENDATIONS | DP | DNP | NR | AM |
|------------------------------|----|-----|----|----|
| <i>Ann Kotely</i> | ✓ | | | |
| <i>Lauren</i> | ✓ | | | |
| <i>Michael Morris</i> | ✓ | | | |
| <i>William M. Goss</i> | ✓ | | | |
| <i>Ann Pfeiffer</i> | ✓ | | | |
| <i>Jim Sanders</i> | ✓ | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

CHAIR'S SIGNATURE

Ann Kotely

4-21-99

CS FOR HOUSE BILL NO. 201(L&C)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE LABOR AND COMMERCE COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the computation of overtime; and providing for an effective
2 date."

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

4 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

5 (1) some courts in the state have misinterpreted the intent of AS 23.10.060(b)
6 as it read before the effective date of this Act in a manner that may result in employers being
7 obligated to pay excessive overtime compensation; in particular, these courts have interpreted
8 AS 23.10.060(b) so that hours worked in excess of eight hours in a day are counted in order
9 to determine whether overtime is due under the statute's provision requiring payment of
10 overtime for hours worked in excess of 40 hours a week; the courts' interpretation has the
11 unintended result of requiring employers to pay overtime under the statute's provision
12 requiring payment of overtime for hours worked in excess of 40 hours a week under
13 circumstances in which the employee has not yet worked 40 hours at the employee's regular
14 rate of pay;

1 (2) AS 23.10.060(b) as it read before the effective date of this Act was not
2 intended to require employers to pay at the overtime rate under the statute's provision
3 requiring payment of overtime for hours worked in excess of 40 hours a week unless and until
4 employees had first worked 40 hours at the regular rate of pay; and

5 (3) although the legislature believes that AS 23.10.060(b) should not have been
6 interpreted by the courts in a manner inconsistent with the finding in (2) of this section, the
7 legislature further finds that it is necessary to amend AS 23.10.060(b) in order to eliminate
8 any doubt on this subject.

9 * Sec. 2. AS 23.10.060(b) is repealed and reenacted to read:

10 (b) If an employer finds it necessary to employ an employee for hours in
11 excess of the limits set in this subsection, overtime compensation for the overtime at
12 the rate of one and one-half times the regular rate of pay shall be paid. An employee
13 is entitled to overtime for hours worked in excess of

14 (1) eight hours a day; or

15 (2) 40 hours a week; overtime compensation under this paragraph shall
16 be paid only for those hours for which overtime compensation has not been paid under
17 (1) of this subsection.

18 * Sec. 3. RETROSPECTIVE EFFECT. This Act is retroactive to May 4, 1959.

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

FISCAL NOTE

STATE OF ALASKA
1999 LEGISLATIVE SESSION

BILL NO. HB 201

Revision Date/Time (Note if correction): _____
 Title: Overtime Compensation
 Computation: _____
 Sponsor: (H) L&C
 Requester: (H) L&C

Department Affected: Labor
 BRU: Labor Standards & Safety
 Component: Wage and Hour
 COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

| OPERATING | FY 2000 | FY 2001 | FY 2002 | FY 2003 | FY 2004 | FY 2005 |
|--------------------------|---------|---------|---------|---------|---------|---------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS & CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL | | | | | | |
| CHANGE IN REVENUE | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FUND SOURCE # | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|-------------------------|-----|-----|-----|-----|-----|-----|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipt | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS:

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

Estimate of current year (FY99) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

This bill codifies longstanding state policy and practice regarding how daily hours worked are counted when computing weekly overtime.

Prepared by: Alan W. Dwyer, Director *Alan W. Dwyer* Phone: 465-4855
 Division: Labor Standards & Safety Date/Time: 4/19/99 8:06 AM
 Approved by Commissioner: Ed Flanagan, Commissioner *Ed Flanagan*
 Agency: Department of Labor Date: 4/19/99

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ALASKA STATE LEGISLATURE

HOUSE LABOR AND COMMERCE COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Andrew Halcro, Vice-Chairman
Representative John Harris
Representative Lisa Murkowski
Representative Jerry Sanders
Representative Tom Brice
Representative Sharon Cissna



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4954
Fax: (907) 465-2040

SPONSOR STATEMENT HOUSE BILL 201

An Act relating to the computation of overtime; and providing for an effective date.

House Bill 201 would clarify a recent court decision that rules that overtime hours are to be calculated differently than they have historically been under AS 23.10.060(b).

The court's decision is contrary to the interpretation always used by Alaska's Department of Labor and to the understanding of Alaska's employers. The court's decision has ignored the historical application by Labor and all employers in the State.

The best way to bring the problem to the forefront is to give an example of what will happen under the court's decision:

Assume Employee worked the following schedule for a total of 43 hours:

| | | | |
|-----------|----------|----------|---------|
| Monday | 11 hours | Thursday | 8 hours |
| Tuesday | 8 hours | Friday | 8 hours |
| Wednesday | 8 hours | | |

As to Monday, everyone agrees that Employee is entitled to 3 hours of overtime. The issue is as to Friday. Under the Department's interpretation and the interpretation of employers, no overtime would be due as to Friday since Employee worked 43 hours during the week and has already been paid for 3 hours overtime. *Under the Court's ruling, Employee would receive overtime for 3 hours on Friday because in computing the 40 hours under the statute, one must include the 3 overtime hours worked on Monday. Consequently, Employee received 6 hours of overtime pay for the week even though he/she only worked 43 hours.*

HB 201 would clarify that the Employee above would only receive pay for the 3 hours of overtime worked. This would statutorily clarify the law and its interpretation for all involved, including the courts.

We urge your support of this legislation.

ALASKA STATE LEGISLATURE

HOUSE LABOR AND COMMERCE COMMITTEE

Representative Norman Rokeberg, Chairman
Representative Andrew Halcro, Vice-Chairman
Representative John Harris
Representative Lisa Murkowski
Representative Jerry Sanders
Representative Tom Brice
Representative Sharon Cissna



State Capitol
Juneau, AK 99801-1182
Telephone: (907) 465-4954
Fax: (907) 465-2040

SECTIONAL ANALYSIS HOUSE BILL 201


An Act relating to the computation of overtime; and providing for an effective date

- Section 1:** **Legislative Findings.** Discusses the historical interpretation of AS 23.10.060(b) regarding overtime compensation and indicates that due to some court decisions the Legislature finds it necessary to eliminate any doubt about how the law is to be construed.
- Section 2:** Amends AS 23.10.060(b) to make it clear that overtime compensation will be paid if an employee works in excess of eight hours a day or in excess of 40 hours a week without regard to hours that are worked in excess of eight hours a day.
- Section 3:** Act is retroactive to May 4, 1959.
- Section 4:** Effective date: Immediate

ROBERTSON, MONAGLE & EASTAUGH
801 West 10th Street, Suite 300
P.O. Box 21211
Juneau, Alaska 99802

Phone: (907) 586-3340 Fax: (907) 586-6818
E-mail Address: rpblasco@aol.com

M E M O R A N D U M

TO: Representative Rokeberg
FROM: Robert P. Blasco 
DATE: April 14, 1999
SUBJECT: PROPOSED LEGISLATION CLARIFYING AS 23.10.060(b)

The Alaska Superior Court, Judge Weeks, recently ruled that overtime hours are to be counted twice for purposes of compensation under the existing AS 23.10.060(b). The pertinent pages of that decision are attached. This double compensation for overtime is known as "pyramiding."

The decision of the court is contrary to how the Department of Labor has always interpreted AS 23.10.060(b). Attached are an affidavit of former Commissioner of Labor Tom Cashen and a letter of Randy Carr. The reason the statute should be clarified is because the Court's decision specifically disregarded the historical interpretation and application by the Department of Labor and, consequently, by all employers in the state—including the State of Alaska.

Unless clarified, the potential impact on employers, including the State of Alaska, is tremendous. Here is an example of what happens under the Court's decision:

Assume Employee worked the following schedule for a total of 43 hours:

| | | | |
|-----------|----------|----------|---------|
| Monday | 11 hours | Thursday | 8 hours |
| Tuesday | 8 hours | Friday | 8 hours |
| Wednesday | 8 hours | | |

As to Monday, everyone agrees that Employee is entitled to 3 hours of overtime. The issue is as to Friday. Under the Department's interpretation and the interpretation of employers, no overtime would be due as to Friday since Employee worked 43 hours during the week and has already been paid for 3 hours overtime. Under the Court's

Representative Rokeberg

April 14, 1999

Page No. 2

ruling, Employee would receive overtime for 3 hours on Friday because, in computing the 40 hours under the statute, one must include the 3 overtime hours worked on Monday. Consequently, Employee received 6 hours of overtime pay for the week even though he/she only worked 43 hours.

We propose the attached legislation simply as clarification. The attached legislation is consistent with the interpretation and policy of the Department of Labor, is consistent with how employers have applied the law, and is fair to the employees because they are fully compensated with overtime for actual hours worked.

Please do not hesitate to call me with any questions of if there is any other information I can provide.

RPB/yd

APR 21 1999



April 20, 1999

6141 South Airport Place
Anchorage, Alaska 99502-1809
(907) 245-1544
Fax: (907) 245-1744

Representative Norm Rokeberg
Chairman, House Labor and Commerce Committee
Pouch V
Juneau, AK 99801

RE: House Bill 201

Dear Mr. Chairman,

We support House Bill 201. This bill clarifies the intent of Alaska Law that requires overtime pay after 40 hours per week.

Recent challenges to this law will create confusion and complexities that will make the lawyers rich and the employees and employers poor.

We appreciate your support.

Sincerely,

LYNDEN, INC.

A handwritten signature in cursive script that reads 'Jim Jansen'.

Jim Jansen
President & CEO

JJ:lmg

RECEIVED

APR 12 1999

Robertson, Monagle & Eastaugh, P.C.
Juneau Alaska

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STUART HALLAM,)
)
Plaintiff,)
)
vs.)
)
HOLLAND AMERICA LINE, INC.,)
d/b/a WESTOURS MOTOR)
COACHES, INC.,)
)
Defendant.)
)
_____)

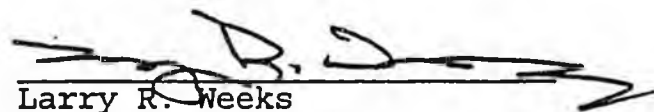
CLERK OF COURT
FIRST JUDICIAL DISTRICT
AT JUNEAU
4:00 pm 4/9/99
BY: mm

Case No. 1JU-96-1734 CI


MEMORANDUM AND ORDER

This case has been heard on appeal before the court. Contemporaneous with this order is a decision on the merits of the appeal, in which the Defendant has been determined to be the prevailing party. Pursuant to Appellate Rule 508(e), attorney fees in the amount of \$500 are awarded to the Defendant, to be paid by the Plaintiff.

Dated April 9, 1999.


Larry R. Weeks
Superior Court Judge

I certify that on the 9th day of April 1999, I served the above order to Stuart Hallam (by U.S. Mail) and Robert Blasco (by courtbox).


Tracy Ver Velde
Secretary to Judge Weeks

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STUART HALLAM,)
)
 Plaintiff,)
)
 vs.)
)
 HOLLAND AMERICA LINE, INC.,)
 d/b/a WESTOURS MOTOR)
 COACHES, INC.,)
)
 Defendant.)
)
 _____)

FILED IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
4:00 pm
BY: mm

Case No. 1JU-96-1734 CI

MEMORANDUM AND ORDER

This case comes before the court on appeal. The following matters are at issue:

1. Whether the court properly denied class certification or "conditional" class certification.
2. Whether summary judgment was proper dismissing plaintiff's first, second, and forth claims for relief.
3. Whether summary judgment was proper dismissing plaintiff's third and fifth claims for relief.
4. Whether it was an abuse of discretion to deny plaintiff's motions to amend his complaint.
5. Whether attorney fees and costs should be upheld.

I. Factual Background

Hallam was employed as a seasonal employee with Holland America Line as a bus driver during the 1994 summer tour season. His hourly salary was \$8.00. The last week of Hallam's employment was August 15-20, 1994. During this time he worked 41.25 hours and was paid overtime for 5.5 of those hours. Each of the overtime hours paid was for hours worked over 8 hours a day. Hallam was not paid overtime wages for his last day of employment even though the cumulative total of hours surpassed the 40-hour workweek. Hallam was paid as follows:

| Date | Regular Hours | Overtime Hours | Total Hours |
|---------|---------------|----------------|-------------|
| 8/15/94 | 8.0 | 0 | 8.0 |
| 8/16/94 | 8.0 | 1.5 | 9.5 |
| 8/17/94 | 8.0 | 1.0 | 9.0 |
| 8/18/94 | 0 | 0 | 0 |
| 8/19/94 | 8.0 | 3.0 | 11.0 |
| 8/20/94 | 4.25 | 0 | 4.25 |
| TOTALS | 36.25 | 5.5 | 41.75 |

Hallam's last day of employment was August 20, 1994. He was paid, via automatic bank deposit. Holland America contends that the funds were paid August 28, 1994 and Hallam argues that the funds were not available to him until September 1, 1994. In any event, it was not paid within the statutorily mandated three days.

II. Class Certification

On July 16, 1997 Hallam filed a motion to certify class. Judge Carpeneti denied this on October 21, 1997 because Hallam, acting *pro se* could not adequately represent the interests of the class. The case was then transferred to district court because Hallam's individual claims could not meet the jurisdictional requirements of Superior Court. A motion to reconsider was filed by Hallam and it was denied. Subsequently, Hallam has requested "conditional class certification" pending finding counsel to represent the class.

As indicated in Carpeneti's opinion denying class certification, the Supreme Court of Alaska has held that a *pro se* plaintiff cannot represent a class under Civil Rule 23(a).¹ While Hallam may adequately represent his own interests *pro se* he cannot adequately represent the interests of others without an attorney. Carpeneti rejected Hallam's argument that AS 23.10.110(b) permitted *pro se* representation of a class. "It merely provides that a class action may be brought for violation of the wage and hour laws, and that an aggrieved plaintiff may be the class representative."² Carpeneti further explained his rejection of this argument in his order denying reconsideration.³

¹ Hertz v. Cleary, 835 P.2d 438, 442, n.3 (Alaska 1992).

² Carpeneti Order Denying Class Certification, 10/21/97.

³ Order dated 11/18/97.

There is no rule providing for "conditional" class certification. Hallam has had sufficient opportunity to obtain counsel to represent the interests of the potential class and has failed to do so. The order denying class certification is AFFIRMED.

III. Motion for Leave to Amend Complaint

The last day to file motions to amend pleadings was March 4, 1997. On March 4, 1997 Hallam filed an amended complaint without the required accompanying motion. On March 14, 1997 Holland America filed a notice with the Superior Court advising the Court that it had received Hallam's amended complaint but would not answer until the proper Motion for Leave to Amend was filed. On April 25, 1997 Hallam filed a Motion for Leave to Amend, which was a one-sentence request to amend. The Superior Court denied this motion on June 10, 1997. Judge Carpeneti denied the motion because he found that these claims were not substantially related to the overtime claims asserted in the original complaint. The court found that the claims were time-barred because they do not relate back. On June 23 Hallam filed a motion for reconsideration, which was denied by Judge Carpeneti on July 1, 1997.

The amended complaint would have added four claims: liability for requiring plaintiffs to purchase uniforms, liability for interference with future employment and business opportunities, libel

and slander, and failure to pay Hallam his "tips." Hallam argues that he did not know that he was supposed to file a motion with his amended complaint. Even though he did not file the accompanying motion for leave to amend until a month and a half after he filed the amended complaint, the motion was considered by the court. The motion was denied for substantive reasons, not for lack of timeliness.

The standard of review is abuse of discretion.⁴ Judge Carpeneti found that the new claims "have little relationship to the claims now before the court." Judge Carpeneti found that the new claims do not relate back (so that granting the motion would require the defendant to defend claims upon which the statute of limitations had run), and that the defendant would be prejudiced by granting the motion. The claims before the court are claims of overtime pay, incentive pay, and failure to pay within three days. While the new claims relate generally to Hallam's employment, they are substantively different requiring new discovery and evidence.

The court must assess whether the nonmoving party will be prejudiced. Prejudice can result from the opposing party "being put to an added expense, a more burdensome and lengthy trial, or if the issues being raised in the amendment are remote from the scope of

⁴ Bauman v. Day, 942 P.2d 1130, 1132 (Alaska 1997) (citing Betz v. Chena Hot Springs Group, 742 P.2d 1346, 1348 (Alaska 1987)).

the original case."⁵ It is not an abuse of discretion to find that the issues raised in the amended complaint are remote from the original scope of the complaint, that additional expenses would be incurred by Holland America for discovery, or that the trial would become considerably more lengthy and burdensome. The order denying the motion for leave to amend is AFFIRMED.

IV. First, Second & Fourth Claims for Relief

The first and second claims allege that the defendant failed to pay overtime to plaintiff in accordance to the Alaska Wage & Hour Act. The fourth claim alleges that defendant failed to pay overtime in accordance to the employment contract. The relevant contractual clause states:

I agree, by signing this contract, to work for Westours for the basic wage of \$8.00 an hour. This wage is for straight time for the first eight (8) hours of each day, the first forty (40) hours of each week. I understand that my assignments may result in my working more or less than eight (8) hours per day or forty (40) hours per week. I will only be paid for actual hours worked. For any hours in excess of eight (8) hours in a day or forty (40) hours in a week, overtime compensation will be paid at 1.5 times the basic rate which will be \$12.00 an hour.

A motion for partial summary judgment of the first, second, and fourth claims for relief was first filed April 7, 1997. That motion was originally denied but reconsideration was granted. Before the motion was decided, District Court took over jurisdiction of the

⁵ Rutledge v. Alyeska Pipeline Service Co., 727 P.2d 1050, 1054 (Alaska 1986) (quoting

case. On December 19, 1997 Judge Froelich granted the motion for partial summary judgment and dismissed the first, second, and fourth claims for relief. A Motion for Reconsideration filed by Hallam was denied March 23, 1998.

A. Statute of Limitations

AS 09.10.070(3) provides for a 2-year statute of limitations "upon a liability created by statute." Hallam was terminated on August 20, 1994. Under AS 23.05.140(b) Holland America had until August 24, 1994, three working days after employment ended to pay him his due compensation. If Holland America failed to do so, it became liable upon the statute, and Hallam would have two years, until August 24, 1996 to bring suit upon wages due. It was not until 3 days after the last date of employment that the employer's duty arises to pay all wages and other compensation for services due.⁶ Hallam's suit is not barred by the statute of limitations.

B. "Pyramiding" Overtime Calculations

Hallam argues that he is entitled to all hours worked over 8 hours a day at overtime and all hours worked over forty hours a week (an additional 1.25 hours). The Department of Labor wrote a letter that Holland America submitted as Exhibit G to Appellee's Brief. It

Estate of Thompson v. Mercedes-Benz, 514 P.2d 1269, 1271 (Alaska 1973). .

⁶ See Dayhoff v. Temsco Helicopters, 772 P.2d 1085, 1087 (Alaska 1989) (holding statute of limitation for AS 23.05.140(b) does not start to run until violation occurs 3 days after termination) and Reed v. Municipality of Anchorage, 741 P.2d 1181, 1185 (Alaska 1987) (holding that employee's claims for unpaid overtime wages does not start to run until 3

states:

The daily overtime is straightforward. Any hours in excess of eight in a single workday are overtime. Weekly overtime is similar; an employee may work up to 40 straight-time hours in the workweek before any overtime is due.

The Department of Labor has interpreted the overtime requirements of the Alaska Wage & Hour act to mean that forty straight-time hours must accrue before the obligation of paying all additional hours at an overtime wage. The Department of Labor excludes all hours worked over eight hours in a day towards the forty hour requirement. This is the standard method for calculating overtime by the Department of Labor. An employer such as Holland America, who calculates overtime in this manner, is doing so in good faith.

Hallam argues that both regular and overtime hours should be included in the forty hours for the purposes of calculating overtime. AS 23.10.060(b) states:

If an employer finds it necessary to employ an employee in excess of 40 hours a week or eight hours a day, compensation for the overtime at the rate of one and one-half times the regular rate of pay shall be paid.

Holland America's employment contract states:

This wage for straight time is for the first eight hours of each day, the first forty hours of each week.... For any hours in excess of eight hours in a day or forty hours in a week, overtime compensation will be paid....

days following the termination, when the employer's duty arises).

Hallam argues that the current method used should be struck down because the statute clearly and unambiguously requires the payment of overtime wages for all hours worked over eight in a day and forty in a workweek.

The applicable standard under which this court should review the Department of Labor's interpretation of AS 23.10.060 is the independent judgment standard.⁷ While it appears that Holland America calculated overtime wages in accordance with the methods and procedures currently used by the Department of Labor, the clear and unambiguous language of the statute indicates that all hours are to be included in determining the forty-hour workweek. There is no exemption excluding hours worked over eight in a day towards the cumulative workweek total. Summary Judgment is REVERSED AND REMANDED. The District Court is instructed to enter an order in favor of Hallam in the amount of \$21.00 in gross earnings for 1.25 hours of overtime worked in excess of 40 hours a week plus interest at the statutory rate.

V. Third and Fifth Claims for Relief

Plaintiff's third claim for relief alleges liability for failure to pay plaintiff within three days of termination of his employment. The fifth claim for relief alleges liability for failing to pay incentive compensation as agreed in the contract. The

District Court entered summary judgment in favor of Holland America on August 3, 1998. Hallam moved for reconsideration and the District Court declined to address the motion.

A. Failure to Pay within 3 Days of Termination from Employment

Hallam's original complaint was based on his last paycheck received in 1994 at the close of the regular tourist season. His last day of employment was August 20, 1994 and therefore he argues he should have been paid by August 23, 1994. Hallam signed paperwork indicating he wanted automatic deposit to his bank account. The parties dispute whether the automatic deposit was made August 28, 1994 (as Holland America argues) or September 1, 1994 (as Hallam argues). Either way, there is no genuine issue of material fact as to whether Holland America was timely, they were not.⁸ In the worst case scenario, Holland America was six work days late in the automatic deposit.

A violation of AS 23.05.140(d)⁹ does not require a penalty. The award of a penalty under this section is within the sound

⁷ See *Tesoro Alaska Petro. v. Kenai Pipe Line*, 746 P.2d 896 (Alaska 1987).

⁸ Hallam now argues that his incentive bonus payment was due within three days of termination in spite of a contractual provision that it was to be paid by October 31, 1994. This argument is without merit. In addition, Hallam argues that his "last payment" for the purposes of this statute was not received until April 1997. This occurred after an audit of his employment records revealed some errors in calculations. Holland America issued a check including the "double-the wage" per statute in the amount of \$80.16. The only appropriate inquiry is Hallam's last regular paycheck received approximately nine business days after his termination.

⁹ AS 23.05.140(d) states: "...the employer may be required to pay the employee a penalty in the amount of the employee's regular wage, salary, or other compensation from the time of demand to the time of payment, or for 90 working days, whichever is the lesser amount."

discretion of the trial court.¹⁰ Holland America argues that the record supports a finding that the District Court was not clearly erroneous in the exercise of its discretion not to impose a penalty and that the District Court did not abuse its discretion in declining to impose a penalty. Holland America argued that it did not intentionally deprive Hallam of his pay and that following the normal course of automatic deposits, it was deposited. While Holland America does not explain why they do not issue an automatic deposit upon termination of employment within three days, Judge Carpeneti's decision not to impose a penalty is not an abuse of discretion. The summary judgment for the third claim for relief is AFFIRMED.

B. Failure to Pay Incentive Pay as Contracted

As part of his compensation package, the contract provides for an "incentive program." It states:

III. INCENTIVE PROGRAM

I may be entitled to incentive compensation based on a percentage of my Base Wages, as follows:

1. Accidents/Damage- Up to four percent (4.0%) of my base wages for safety. To qualify for this incentive compensation:
 - (a) I must have no preventable accidents during the period of my employment, as determined by the Westours Safety Department; and
 - (b) no damage can have occurred to equipment and/or properties owned by Westours while under my control due to negligence or any other act determined preventable

¹⁰ Klondike Indus. Corp. v. Gibson, 741 P.2ds 1161 (Alaska 1987).

by the Safety Department...

2. Job Performance- Up to three percent (3.0%) of my base wages for job performance. I understand that this award will be paid if have no infractions or written warnings in my file relating to performance at the end of my employment. Each performance related (non-accident) infraction during my employment will result in one and a half (1.5) percentage point deduction (i.e. two infractions would eliminate my Job Performance incentive compensation), and each written warning will result in a deduction of one half (.5) percentage point.
3. Customer Service- Up to five percent (5.0%) of my base wages for customer service based on customer ratings of my tours as evidenced by comment cards actually received by Westours Seattle office. Incentive compensation, if any, under this paragraph is computed by taking the arithmetic average of the ratings for safety, courtesy, narration, and grooming on all comment cards... and per the following schedule:

| Percentage of base Wages | Average Rating |
|--------------------------|----------------|
| 5% | 3.95 or better |
| 4% | 3.90-3.94 |
| 3% | 3.85-3.89 |
| 2% | 3.80-3.84 |
| 1% | 3.70-3.79 |
| 0% | Below 3.70 |

Holland America argues that the plain and unambiguous language of the contract indicates that the incentive pay is "discretionary." Holland America argues that the word "may" is discretionary in the interpretation of contracts, as opposed to "shall" that is mandatory. Holland America did pay Hallam a bonus, but Hallam contests the amount of the bonus. Holland America argues in its original motion for summary judgment: "The agreement plainly states that the payment of any bonus is discretionary and, if a bonus is

paid, the payment of that bonus follows a schedule set out in the contract."

Holland America elected to pay a bonus to Hallam and therefore obligates itself to follow the contract provisions. It appears that Holland America correctly calculated the bonus for no accidents as he received the full bonus possible. Holland America appears to have correctly calculated the "customer service" bonus as that is set forth in a schedule. Holland America has provided the basis for those calculations and they appear to be valid. The only questionable calculations are in the area for "job performance." Hallam received no bonus in this area. Hallam had one infraction and one written warning. The contract clause specifies deductions for these occurrences.

Each performance related (non-accident) infraction during my employment will result in a 1.5 percentage point deduction... and each written warning will result in a deduction of .5 percentage point.

Since Hallam received one of each, his contractual 3% bonus should have been reduced to 1%. Holland America determined that although Hallam was "eligible" for a 1% bonus for job performance, the Division Manager used his discretion not to award one (Affidavit of Chuck Acker, April 20, 1998).¹¹ Holland America's argument that

¹¹ "It appears that, in the estimation of the Division Manager, the infraction was significant enough that he determined Mr. Hallam would not receive the remaining discretionary 1%." Affidavit of Chuck Acker.

the Division Manager used his discretion not to award the "eligible" one-percent bonus conflicts with its earlier argument that once the bonus is given, it must adhere to the contract provisions.

Based on the mandatory language of the contract terms, the incentive pay is conditional upon certain performance, but is not discretionary if the performance is made. If an employee meets the performance aspects of the contract, Holland America is under a contractual obligation to pay the full bonus that one is eligible for. Hallam is entitled to the remaining 1% bonus in the amount of \$68.53. The summary judgment for the fifth claim for relief is REVERSED AND REMANDED. The District Court is instructed to enter judgment in the amount of \$68.53 plus the statutory interest rate.

VI. Attorney Fees & Costs Awarded

Upon disposition of all claims, the District Court indicated that attorney fees and costs would be awarded upon motion by the defendants. This order was entered on August 3, 1998. On August 14, 1998, Holland America filed the motion for attorney fees and costs. They moved for attorney fees in the amount of \$32,220 and costs in the amount of \$2,797.17. Hallam opposed the motion arguing that it was untimely. The court's final order was entered on August 3, 1998 and distributed by courtbox the same date. The motion was filed August 14, 1998. As Rule 82 states:

"The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment.... Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver..."

It is within the court's discretion to allow for a one-day late motion. The court will not reverse the attorney fees and costs award based on timeliness.

The court entered judgment requiring Hallam to pay \$2,797.17 in costs and \$6,444 in attorney fees. Hallam argues that Grimes v. Kinney Shoe Corp, 938 P.2d 997 (Alaska 1997) provides that Rules 79 and 82 do not apply to wage and hour cases. Hallam's argument fails. Holland America points out that Grimes interpreted the old AS 23.10.110(c). That statute was amended in part to specifically allow costs and attorneys fees to defendants. Awards of attorney fees are reviewed on an abuse of discretion standard. There was no abuse in discretion in awarding 20% of actual attorney fees in this case pursuant to the Rules of Civil Procedure.

Finally, the court now addresses whether the reversal of summary judgment on the issues of calculation of overtime wages or payment of incentive pay pursuant to contract, changes the prevailing party for the purposes of the award of attorney fees and costs. Hallam's claims for relief as granted above total \$89.53 plus interest. When the court questioned Hallam about the prospect

of settling his individual claims, Hallam stressed to the court that he felt that settling his individual claims would leave other members of the potential class without recourse. In so doing, the court understands Hallam's main goal in the vigorous pursuit of this action was to benefit an entire class of workers. However, as discussed above, Hallam's class certification has been denied and that denial has been affirmed. "A litigant who successfully defeats a claim of great liability may be the prevailing party, even though the other side is successful in receiving an affirmative recovery."¹² Holland America was successful in defeating Hallam's class certification, which was a potentially large liability for them. Holland America is the prevailing party for the purposes of attorney fees and costs. The award of attorney fees and costs is AFFIRMED.

VII. CONCLUSION

This case is REMANDED to District Court for a finding and judgment consistent with this order.

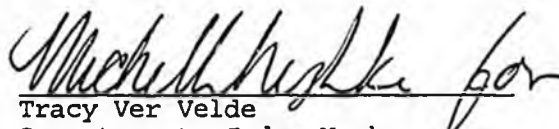
IT IS SO ORDERED.

Dated April 7, 1999.


Larry R. Weeks
Superior Court Judge

¹² Alaska Placer Co. v. Lee, 553 P.2 54, 63 (Alaska 1976).

I certify that on the ^{29th} day of April 1999, I served the above order to Stuart Hallam (by U.S. Mail) and Robert Blasco (by courtbox).


Tracy Ver Velde
Secretary to Judge Weeks

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 STUART HALLAM, Individually)
4 and as class representative,)
5 Plaintiff,)

6 v.)

7)
8 HOLLAND AMERICA LINE, INC.)
9 d/b/a WESTOURS MOTOR COACHES)
10 INC.,)
11 Defendant.)

Case No. 1JU-96-1734 Civil

12 AFFIDAVIT OF TOM CASHEN

13 I, Tom Cashen, being first duly sworn, state as follows:

14 1. I am the Commissioner of the Department of Labor for the State of
15 Alaska. I have served as the Commissioner for three years.

16 2. I have 29 years experience in the field of labor relations, including
17 negotiating labor agreements, drafting legislation, and drafting regulations.

18 3. It is my understanding that the plaintiff in this case claims he is entitled
19 to overtime in accordance with what is commonly referred to as "pyramiding" of overtime.
20 "Pyramiding" means that the claimant wants to count his overtime hours twice—once if he
21 works in excess of 8 hours in one day and a second time if his hours for the week exceed 40
22 hours.
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4. I have read the letter of Randy Carr, which is attached to this affidavit as Exhibit A. Mr. Carr's letter accurately expresses the interpretation of AS 23.10.060 (b) followed by the Department of Labor with respect to overtime claims. This has been the consistent interpretation as long as I have been Commissioner and, in my experience, since the enactment of the legislation.

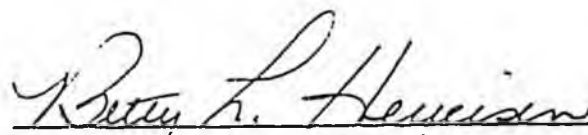
5. I have not reviewed the actual hours worked or claimed by this plaintiff. It is my understanding that the plaintiff did not submit a wage and hour claim to the Department of Labor. If he had submitted a claim for overtime, and the overtime claimed was calculated based on "pyramiding", the Department of Labor would have disallowed the claim.

FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 26th day of February, 1998.


TOM CASHEN

SUBSCRIBED AND SWORN TO before me this 26th day of February, 1998.


Notary Public, State of Alaska
My commission expires: 2/12/99

DEPARTMENT OF LABOR

WAGE AND HOUR ADMINISTRATION
LABOR STANDARDS & SAFETY DIVISION3301 Eagle Street, Suite 301
P.O. Box 107021
Anchorage, Alaska 99510-7021
Phone: (907) 268-4900
Fax: (907) 268-4915April 25, 1997
Dictated: 4/24/97RECEIVED
APR 27 1997

WHOL #120

Mr. Robert Blasco
Robertson, Monagle & Eastaugh
801 W. 10th, Suite 300
Juneau, AK 99801Chief, Wage & Hour Admin. Div.
Juneau, Alaska

Dear Mr. Blasco:

You have asked for clarification of the overtime requirements of the Alaska Wage and Hour Act. As you know, the Act requires that overtime be paid for hours of work that exceed eight in a single day or 40 in a week. A question has arisen as to how those overtime hours are counted.

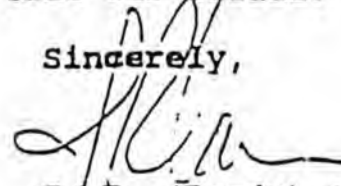
The daily overtime is straightforward. Any hours in excess of eight in a single workday are overtime. Weekly overtime is similar; an employee may work up to 40 straight-time hours in the workweek before any overtime is due.

There has been some confusion as to how to count the hours when both daily and weekly overtime is worked in the same workweek. Overtime hours are only counted once. If an employee works, for example, ten hours in one day, a daily audit would show that the employee has two hours of overtime coming.

If in that week the employee worked the 10-hour day and four 8-hour days, the employee would have worked 42 hours total. Auditing on a weekly basis, the worker should be paid 40 hours of straight-time and two hours of overtime. If the employer has paid the two hours of overtime for the daily occurrence, they would also have paid the employee correctly under the weekly standard.

I hope this information is helpful. If you have any further questions, do not hesitate to contact our office.

Sincerely,


J. R. (Randy) Carr
Chief
Labor StandardsJRC:cah
blascop 1 G

HB

207

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CS FOR HOUSE BILL NO. 207()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE ROKEBERG

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the licensure and registration of individuals who perform
2 home inspections; relating to home inspection requirements for residential loans
3 purchased or approved by the Alaska Housing Finance Corporation; and providing
4 for an effective date."

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 * Section 1. AS 08 is amended by adding a new chapter to read:

7 Chapter 57. Home Inspectors.

8 Article 1. Board of Home Inspectors.

9 Sec. 08.57.010. Creation and membership of board. There is created the
10 Board of Home Inspectors consisting of five members. Three members shall be
11 licensed under this chapter and shall have been engaged in the practice of home
12 inspection in the state for three years immediately preceding appointment, one member
13 shall be a licensed real estate broker or certified real estate appraiser, and one member
14 shall be a public member.

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Sec. 08.57.020. General duties. The board shall

- (1) administer and enforce this chapter;
- (2) regulate the practice of home inspection;
- (3) establish education and experience requirements that must be met for licensure under this chapter; the requirements established by the board must include Alaska or northern education or experience in Arctic construction or building;
- (4) establish standards for continuing education of home inspectors;
- (5) adopt a code of ethics for home inspectors; and
- (6) in addition to the meeting required under AS 08.01.070(2), meet when requested by a majority of the members of the board.

Sec. 08.57.030. Meetings. The board may meet by teleconference.

Article 2. Licensure.

Sec. 08.57.050. Licensure required. (a) Unless exempt under AS 08.57.900 or serving lawfully as an associate home inspector under (b) of this section, an individual may not perform a home inspection

- (1) for new construction unless that individual is licensed as a home inspector for new construction under this chapter;
- (2) for previously occupied construction unless that individual is licensed as a home inspector for previously occupied construction under this chapter.

(b) Notwithstanding (a) of this section, an individual who is not licensed under this chapter may perform a home inspection as an associate home inspector if the individual

- (1) is employed by a licensed home inspector who supervises the associate's work and the inspection is of the type that the supervising individual is authorized to perform; and
- (2) is registered with the board as an associate home inspector.

(c) A home inspector who employs an associate home inspector under (b) of this section is liable for the work done by the associate home inspector.

(d) An individual who holds a joint license is considered to be licensed as both a home inspector for new construction and a home inspector for previously occupied construction.

1 **Sec. 08.57.060. Qualifications.** The board shall authorize the department to
2 issue a home inspector license for new construction, previously occupied construction,
3 or both, as appropriate, to an individual who

4 (1) passes the appropriate home inspection examination; the
5 examination, which must include a written portion and other test methodologies as
6 determined by the board, must test competence in relation to Alaska construction
7 techniques and other matters as determined by the board; the examination may be
8 based on a recognized national examination or other methodology;

9 (2) meets the educational and experience requirements adopted by the
10 board in regulations for the type of license applied for;

11 (3) submits a complete application for licensure within one year after
12 passing the examination required under (1) of this section;

13 (4) within the seven years preceding the date of application, has not
14 been under a sentence for an offense related to forgery, theft in the first or second
15 degree, extortion, or conspiracy to defraud creditors or for a felony involving
16 dishonesty; and

17 (5) pays the appropriate fees.

18 **Sec. 08.57.070. License renewal; continued competency.** (a) A license
19 issued under this chapter may not be renewed unless the applicant submits proof of
20 continued competency relating to home inspecting that satisfies the board.

21 (b) A lapsed license may be reinstated within two years after the lapse upon
22 proof of continued competency, payment of a renewal fee for the intervening time
23 period, and payment of any penalty fee established under AS 08.01.100(b). If the
24 license has been lapsed for more than two years, the license may not be reinstated until
25 the individual also passes the appropriate home inspection examination described in
26 AS 08.57.060.

27 (c) The license of an applicant whose license has been suspended or against
28 whom a fine has been imposed under this chapter may not be renewed until the period
29 of suspension has expired and any fine has been paid.

30 **Sec. 08.57.080. Fees.** (a) The department shall set fees under AS 08.01.065
31 for

- 1 (1) licensure and renewal of licensure for a home inspector qualified
2 to inspect new construction;
- 3 (2) licensure and renewal of licensure for a home inspector qualified
4 to inspect previously occupied construction;
- 5 (3) joint licenses and renewal of joint licenses;
- 6 (4) registration and renewal of registration as an associate home
7 inspector;
- 8 (5) examinations; and
- 9 (6) board and departmental publications and seminars related to this
10 chapter.

11 (b) An individual who fails a home inspector examination shall pay the
12 examination fee set by the department if the individual applies to retake an
13 examination.

14 **Sec. 08.57.090. Identification requirements.** (a) Except as provided
15 otherwise by law, an individual who is licensed under this chapter by one name may
16 not act in the capacity of a home inspector under any other name unless the individual
17 is also licensed under that name.

18 (b) All advertising and business cards prepared by a home inspector for the
19 home inspection business must show the home inspector's name, mailing address, and
20 license number.

21 (c) Individual home inspectors and partners, associates, agents, salespeople,
22 solicitors, officers, and employees of home inspectors shall use their true names and
23 addresses and the true name of the home inspecting firm at all times while acting in
24 the capacity of a home inspector or performing related activities.

25 **Article 3. Insurance Requirement.**

26 **Sec. 08.57.200. Types of insurance.** Each applicant, at the time of applying
27 for licensure or for renewal of licensure, shall file with the board satisfactory evidence
28 that there is in effect for the applicant public liability and property damage insurance
29 covering the applicant's home inspecting operations in this state in the sum of not less
30 than \$20,000 for damage to property, \$50,000 for injury, including death, to any one
31 person, and \$100,000 for injury, including death, to more than one person.

1 **Sec. 08.57.210. Suspension of license.** If the insurance required in
2 AS 08.57.200 ceases to be in effect, the license of the home inspector shall
3 immediately be suspended until the insurance has been reinstated.

4 **Article 4. Disciplinary Actions; Other Enforcement Mechanisms.**

5 **Sec. 08.57.300. Grounds for disciplinary sanctions or other license**
6 **decisions.** The board may take disciplinary action authorized under AS 08.01.075 or
7 refuse to grant or renew a license or registration under this chapter on a finding that

8 (1) the application is fraudulent or misleading;

9 (2) the individual has knowingly violated this chapter or a lawful order
10 or regulation of the department or the board;

11 (3) the individual is incompetent or has engaged in fraudulent practices
12 relating to home inspection.

13 **Sec. 08.57.310. Administrative Procedure Act applicable.** Proceedings for
14 the denial, suspension, or revocation of a license or registration under this chapter are
15 governed by AS 44.62 (Administrative Procedure Act).

16 **Sec. 08.57.320. Injunction.** In an action instituted in the superior court by the
17 board or the department, the court may enjoin an individual from performing a home
18 inspection in violation of this chapter. In addition to other relief, the court may
19 impose a civil penalty of not more than \$250 for each violation. Each day that an
20 unlawful act continues constitutes a separate violation.

21 **Sec. 08.57.330. Violations.** (a) An individual who knowingly violates
22 AS 08.57.050 is guilty of a class B misdemeanor. A person who violates another
23 provision of this chapter is guilty of a violation punishable under AS 12.

24 (b) Criminal prosecution for a violation of this chapter does not preclude the
25 board or the department from seeking available civil remedies.

26 **Article 5. Miscellaneous Provisions.**

27 **Sec. 08.57.800. Legal actions by home inspector.** An individual may not
28 bring an action in a court of this state for the collection of compensation for the
29 performance of a home inspection or for breach of a contract for which a license is
30 required under this chapter without alleging and proving that the individual was a
31 licensed home inspector or registered associate home inspector at the time of

1 contracting for the performance of the work.

2 **Sec. 08.57.810. Legal actions against home inspector.** A person may not
3 bring an action against an individual licensed or registered under this chapter based on
4 the contents of or omissions in a written home inspection report prepared by the
5 inspector unless the action is brought

6 (1) by the person who contracted and paid for the report; and

7 (2) within one year after the date of the written report.

8 **Sec. 08.57.820. Inspection report required.** (a) Before performing a home
9 inspection, a licensee or an associate home inspector shall provide to the person on
10 whose behalf a home is inspected a written document specifying

11 (1) the scope of intended inspection, including the structural elements,
12 systems, and subsystems that will be inspected; and

13 (2) that the inspector will notify in writing the person on whose behalf
14 the inspection is being made of defects noted during the inspection along with a
15 recommendation, if any, that experts be retained to determine the extent of defects and
16 corrective action necessary to address the defects.

17 (b) After performing a home inspection, a licensee shall provide to the person
18 on whose behalf the inspection was performed a written description of defects noted
19 during the inspection along with a recommendation, if any, that experts be retained to
20 determine the extent and corrective action necessary to address the defects.

21 **Sec. 08.57.830. Prohibited acts.** (a) An individual licensed or registered
22 under this chapter, a company that employs an individual licensed or registered under
23 this chapter, or a company that is controlled by a company that also has a financial
24 interest in a company employing an individual licensed or registered under this chapter
25 may not

26 (1) perform or offer to perform, for an additional fee, repairs to a
27 structure on which the home inspector or the home inspector's company has prepared
28 a home inspection report in the past 12 months;

29 (2) inspect for a fee any property in which the home inspector or the
30 home inspector's company has a financial interest or an interest in the transfer of the
31 property;

1 (3) offer or deliver compensation, an inducement, or a reward to the
2 owner of the inspected property, the broker, or the agent, for the referral of business
3 to the home inspector or the home inspector's company;

4 (4) without the written consent of the home inspection client or the
5 client's legal representative, disclose information from a home inspection report
6 prepared by the home inspector or the home inspector's company unless the disclosure
7 is made

8 (A) more than one year after the date of the report; or

9 (B) to a subsequent client who requests a home inspection of
10 the same premises;

11 (5) without the written consent of all interested parties, accept
12 compensation from more than one interested party for the same services;

13 (6) accept from a person who has other dealings with a home
14 inspection client a commission or allowance, directly or indirectly, for work for which
15 the home inspector or the home inspector's company is responsible;

16 (7) accept an engagement to make an inspection or to prepare a report
17 in which the employment itself or the fee payable for the inspection is contingent upon
18 the conclusions in the report, preestablished findings, or the close of escrow.

19 (b) Contractual provisions that purport to limit the liability of a home inspector
20 to the cost of the home inspection report are contrary to public policy and void.

21 **Sec. 08.57.840. Limitation on activities.** A license or registration issued
22 under this chapter does not authorize the holder to perform an activity for which a
23 license is required under provisions of this title that are outside of this chapter.

24 **Article 6. General Provisions.**

25 **Sec. 08.57.900. Exemptions.** Notwithstanding other provisions of this chapter,
26 an individual who performs a home inspection is not required to be licensed or
27 registered under this chapter if the individual is

28 (1) employed by the federal or state government, a political subdivision
29 of the state, or a municipality or unincorporated community and the employee is
30 performing only duties that are within the employee's official duties;

31 (2) performing a home inspection only with respect to property that is

1 the individual's residence or in which the individual has a financial interest;

2 (3) registered as an engineer or architect and authorized under
3 AS 08.48.101 and 08.48.221 and regulations adopted under those statutes to use the
4 seal of an engineer or architect if the individual affixes the individual's seal to the
5 home inspection report;

6 (4) engaged as an engineer in training or architect in training who
7 works for and is supervised by a person described in (3) of this section and the person
8 described in (3) of this section affixes the person's seal to the home inspection report;
9 or

10 (5) licensed as a pesticide applicator by the Department of
11 Environmental Conservation and is performing only activities within the scope of that
12 license.

13 **Sec. 08.57.990. Definitions.** In this chapter,

14 (1) "board" means the Board of Home Inspectors;

15 (2) "department" means the Department of Community and Economic
16 Development;

17 (3) "home inspection" means an inspection of the condition of a
18 residence or intended residence performed for compensation on behalf of a prospective
19 buyer, seller, or lender in a real estate transaction or on behalf of the owner of the
20 residence;

21 (4) "joint license" means a license that authorizes an individual to
22 inspect both new construction and previously occupied residences;

23 (5) "real estate transaction" means the transfer or attempted transfer of
24 an interest in a unit of real property or an act conducted as a result of or in pursuit of
25 a contract to transfer an interest in a unit of real property;

26 (6) "residence" means

27 (A) a single-family home;

28 (B) a duplex, triplex, or four-plex; or

29 (C) a residential townhouse or residential condominium unit.

30 * Sec. 2. AS 08.01.010 is amended by adding a new paragraph to read:

31 (3) Board of Home Inspectors (AS 08.57.010).

1 * Sec. 3. AS 08.03.010(c) is amended by adding a new paragraph to read:

2 (22) Board of Home Inspectors (AS 08.57.010) -- June 30, 2004.

3 * Sec. 4. AS 18.56.300(b) is amended to read:

4 (b) As a condition of a commitment to purchase or approve a loan under this
5 section for residential housing the construction of which begins after June 30, 1992,
6 the corporation shall require inspection of the unit of residential housing that is the
7 subject of the loan. The inspection must be performed by a municipal building
8 inspector, by a person who is approved or certified to perform residential inspections
9 by the International Conference of Building Officials or the International Association
10 of Electrical Inspectors, by an individual who is licensed or registered under
11 AS 08.57.050 to perform home inspections [OR, WHEN THE UNIT OF
12 RESIDENTIAL HOUSING IS LOCATED IN A RURAL AREA], by an architect
13 licensed under AS 08.48, by an engineer licensed under AS 08.48, or by another
14 person approved by the corporation. When the unit of residential housing is located
15 in a rural area, the person who makes the inspection may use methods other than a
16 personal physical inspection to make the inspection if the method is approved by the
17 corporation, and variations from the applicable code may be accepted at the
18 corporation's discretion, if the person authorized to inspect the unit under this
19 subsection satisfies the corporation that the variation does not adversely affect the
20 structural integrity of the unit or the health and safety of the residents. The person
21 who makes the inspection shall determine whether the construction conforms to
22 relevant provisions of the construction codes of the municipality or of the state
23 building code, as applicable, at each of the following stages of construction:

- 24 (1) plan approval;
25 (2) completion of footings and foundations;
26 (3) completion of electrical installation, plumbing, and framing;
27 (4) completion of installation of insulation;
28 (5) final approval.

29 * Sec. 5. AS 18.56.300(b) is amended to read:

30 (b) As a condition of a commitment to purchase or approve a loan under this
31 section for residential housing the construction of which begins after June 30, 1992,

1 the corporation shall require inspection of the unit of residential housing that is the
2 subject of the loan. The inspection must be performed by a municipal building
3 inspector, [BY A PERSON WHO IS APPROVED OR CERTIFIED TO PERFORM
4 RESIDENTIAL INSPECTIONS BY THE INTERNATIONAL CONFERENCE OF
5 BUILDING OFFICIALS OR THE INTERNATIONAL ASSOCIATION OF
6 ELECTRICAL INSPECTORS,] by an individual who is licensed or registered under
7 AS 08.57.050 to perform home inspections, by an architect licensed under AS 08.48,
8 by an engineer licensed under AS 08.48, or by another person approved by the
9 corporation. When the unit of residential housing is located in a rural area, the person
10 who makes the inspection may use methods other than a personal physical inspection
11 to make the inspection if the method is approved by the corporation, and variations
12 from the applicable code may be accepted at the corporation's discretion, if the person
13 authorized to inspect the unit under this subsection satisfies the corporation that the
14 variation does not adversely affect the structural integrity of the unit or the health and
15 safety of the residents. The person who makes the inspection shall determine whether
16 the construction conforms to relevant provisions of the construction codes of the
17 municipality or of the state building code, as applicable, at each of the following stages
18 of construction:

- 19 (1) plan approval;
- 20 (2) completion of footings and foundations;
- 21 (3) completion of electrical installation, plumbing, and framing;
- 22 (4) completion of installation of insulation;
- 23 (5) final approval.

24 * Sec. 6. AS 44.62.330(a) is amended by adding a new paragraph to read:

25 (60) Board of Home Inspectors.

26 * Sec. 7. AS 45.50.471(b) is amended by adding a new paragraph to read:

27 (43) violating AS 08.57.830.

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

30 REGULATIONS. The Board of Home Inspectors may proceed to adopt regulations
31 to implement this Act. A regulation adopted under this section takes effect under AS 44.62

1 (Administrative Procedure Act) but not before the effective date of the law implemented by
2 the regulation.

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

5 INITIAL BOARD MEMBERS. Notwithstanding AS 08.57.010, added by sec. 1 of this
6 Act, the three home inspectors appointed to the initial Board of Home Inspectors are not
7 required to be licensed as home inspectors before appointment but must be licensed as home
8 inspectors in order to be appointed or reappointed after expiration of their first term in office.

9 * Sec. 10. The uncodified law of the State of Alaska is amended by adding a new section
10 to read:

11 TRANSITIONAL LICENSING PROVISIONS. (a) Notwithstanding AS 08.57, added
12 by sec. 1 of this Act, the Board of Home Inspectors shall issue a joint license that is valid
13 until January 1, 2002, to an individual who submits to the board satisfactory evidence of being
14 in the business of home inspection in the state at the time of application for a license under
15 this subsection and of having

16 (1) been in the business of home inspection in the state on October 1, 1999;

17 or

18 (2) passed the building inspector examination or property maintenance and
19 housing inspector examination given by the International Conference of Building Officials.

20 (b) Notwithstanding AS 08.57, added by sec. 1 of this Act, the Board of Home
21 Inspectors shall issue a license to practice home inspection of previously occupied residences
22 that is valid until January 1, 2002, to an individual who submits to the board satisfactory
23 evidence of being in the business of home inspection in the state at the time of application for
24 a license under this subsection and of having passed

25 (1) the national home inspector examination given by the American Society
26 of Home Inspectors; or

27 (2) the examination of the Examination Board of Professional Home Inspectors.

28 (c) Notwithstanding AS 08.57, added by sec. 1 of this Act, the Board of Home
29 Inspectors shall issue a license to practice home inspection of new construction that is valid
30 until January 1, 2002, to an individual who submits to the board satisfactory evidence of being
31 in the business of home inspection in the state at the time of application for a license under

1 this subsection and of having passed the combination inspector examination or the
2 combination dwelling inspector examination given by the International Conference of Building
3 Officials.

4 (d) Notwithstanding AS 08.57, added by sec. 1 of this Act, the Board of Home
5 Inspectors shall grant registration as an associate home inspector that is valid until January 1,
6 2002, to an individual who submits to the board satisfactory evidence of being employed by
7 an individual who is in the business of home inspection and is licensed under this section or
8 under AS 08.57.

9 (e) A license or registration issued under this section may not be renewed or extended.

10 (f) Except as provided in (e) of this section, a license or registration issued under this
11 section is considered to be a license or registration issued under AS 08.57, added by sec. 1
12 of this Act.

13 (g) In this section, "joint license" has the meaning given in AS 08.57.990, added by
14 sec. 1 of this Act.

15 * Sec. 11. AS 08.57.050, 08.57.090, 08.57.330(a), 08.57.800 - 08.57.820, enacted by sec. 1
16 of this Act, and the amendment of AS 18.56.300(b), made by sec. 4 of this Act, take effect
17 July 1, 2001.

18 * Sec. 12. Section 5 of this Act takes effect January 1, 2002.

19 * Sec. 13. Except as provided in secs. 11 - 12 of this Act, this Act takes effect immediately
20 under AS 01.10.070(c).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 17, 2000

SUBJECT: Sectional Summary of CSHB 207(). (Draft version "S")

TO: Representative Norman Rokeberg
Attn: Tom Manninen

FROM: Terri Lauterbach
Legislative Counsel *Terri Lauterbach*

You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. Except with respect to sec. 4 of the bill, you have not asked any specific questions about the legal effect of this bill, so this summary is brief.

Section 1. Establishes a Board of Home Inspectors and requires licensure of individuals who perform home inspections on behalf of the owner of a home or on behalf of a buyer, seller, or lender involved in the sale of a home. Exemptions from licensure are set out in AS 08.57.900.

Section 2. Adds the new board to the list of boards and commissions covered by the centralized licensing statutes in AS 08.01.

Section 3. Gives a 2004 sunset date for the new board.

Section 4. Allows licensed home inspectors to perform inspections required for residential AHFC loans. You have asked whether the amendment to this section would allow civil engineers to perform AHFC inspections in urban areas. In my opinion, it would not. In the bill, at page 8, lines 17 - 25, a civil engineer is allowed to prepare and certify a home inspection without being licensed under AS 08.57 as a home inspector. However, AS 18.56.300(b) requires a person who performs AHFC residential inspections to be licensed under AS 08.57. So, even though AS 08.57.900(b) allows a civil engineer to perform a home inspection without licensure under AS 08.57, that home inspection would not be usable for an AHFC loan unless the home was in a rural area.

Section 5. Adds the new board to the list of agencies that must comply with the Administrative Procedure Act.

Representative Norman Rokeberg
February 17, 2000
Page 2

Section 6. Puts violation of AS 08.57.830 under the list of unfair trade practices.

Section 7. Transitional provisions related to regulations.

Section 8. Transitional provisions related to initial board members.

Section 9. Transitional licensing provisions.

Section 10. Delays licensure requirements until July 1, 2001.

Section 11. Gives the rest of the bill an immediate effective date.

TML:glc
00-068.glc

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 207(), Draft Version "S"

- 1 Page 1, line 2, following "inspections;":
- 2 Insert "relating to home inspection requirements for residential loans purchased
- 3 or approved by the Alaska Housing Finance Corporation;"

- 4 Page 8, line 20, following "engineer":
- 5 Insert "or architect"

- 6 Page 8, line 22, following "engineer":
- 7 Insert "or architect"

- 8 Page 8, line 23, following "training":
- 9 Insert "or architect in training"

- 10 Page 9, lines 20 - 21:
- 11 Delete ", or, when the unit of residential housing is located in a rural area"
- 12 Insert "[OR, WHEN THE UNIT OF RESIDENTIAL HOUSING IS LOCATED IN
- 13 A RURAL AREA]"

2/18/00 *Also moved as working document no objections*

1-LS0132\S
Chenoweth/Lauterbach
2/9/00

CS FOR HOUSE BILL NO. 207()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVE ROKEBERG

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the licensure and registration of individuals who perform
2 home inspections; and providing for an effective date."

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

4 * Section 1. AS 08 is amended by adding a new chapter to read:

5 **Chapter 57. Home Inspectors.**

6 **Article 1. Board of Home Inspectors.**

7 **Sec. 08.57.010. Creation and membership of board.** There is created the
8 Board of Home Inspectors consisting of five members. Three members shall be
9 licensed under this chapter and shall have been engaged in the practice of home
10 inspection in the state for three years immediately preceding appointment, one member
11 shall be a licensed real estate broker or certified real estate appraiser, and one member
12 shall be a public member.

13 **Sec. 08.57.020. General duties.** The board shall

14 (1) administer and enforce this chapter;

- 1 (2) regulate the practice of home inspection;
- 2 (3) establish education and experience requirements that must be met
- 3 for licensure under this chapter; the requirements established by the board must include
- 4 Alaska or northern education or experience in Arctic construction or building;
- 5 (4) establish standards for continuing education of home inspectors;
- 6 (5) adopt a code of ethics for home inspectors; and
- 7 (6) in addition to the meeting required under AS 08.01.070(2), meet
- 8 when requested by a majority of the members of the board.

9 **Sec. 08.57.030. Meetings.** The board may meet by teleconference.

10 **Article 2. Licensure.**

11 **Sec. 08.57.050. Licensure required.** (a) Unless exempt under AS 08.57.900

12 or serving lawfully as an associate home inspector under (b) of this section, an

13 individual may not perform a home inspection

14 (1) for new construction unless that individual is licensed as a home

15 inspector for new construction under this chapter;

16 (2) for previously occupied construction unless that individual is

17 licensed as a home inspector for previously occupied construction under this chapter.

18 (b) Notwithstanding (a) of this section, an individual who is not licensed under

19 this chapter may perform a home inspection as an associate home inspector if the

20 individual

21 (1) is employed by a licensed home inspector who directly supervises

22 the associate's work and the inspection is of the type that the supervising individual

23 is authorized to perform;

24 (2) is registered with the board as an associate home inspector; and

25 (3) has not performed home inspections for more than two years

26 without being licensed under this chapter.

27 (c) A home inspector who employs an associate home inspector under (b) of

28 this section is liable for the work done by the associate home inspector.

29 (d) An individual who holds a joint license is considered to be licensed as both

30 a home inspector for new construction and a home inspector for previously occupied

31 construction.

1 **Sec. 08.57.060. Qualifications.** The board shall authorize the department to
2 issue a home inspector license for new construction, previously occupied construction,
3 or both, as appropriate, to an individual who

4 (1) passes the appropriate home inspection examination; the
5 examination, which shall be written and practical, must test competence in relation to
6 arctic structural and thermal construction techniques and other matters as determined
7 by the board in consultation with representatives of the construction industry;

8 (2) meets the educational and experience requirements adopted by the
9 board in regulations for the type of license applied for;

10 (3) applies for licensure within six months after passing the
11 examination required under (1) of this section;

12 (4) within the seven years preceding the date of application, has not
13 been under a sentence for an offense related to forgery, theft in the first or second
14 degree, extortion, or conspiracy to defraud creditors or for a felony involving
15 dishonesty; and

16 (5) pays the appropriate fees.

17 **Sec. 08.57.070. License renewal; continued competency.** (a) A license
18 issued under this chapter may not be renewed unless the applicant submits proof of
19 continued competency relating to home inspecting that satisfies the board.

20 (b) A lapsed license may be reinstated within two years after the lapse upon
21 proof of continued competency, payment of a renewal fee for the intervening time
22 period, and payment of any penalty fee established under AS 08.01.100(b). If the
23 license has been lapsed for more than two years, the license may not be reinstated until
24 the individual also passes the appropriate home inspection examination described in
25 AS 08.57.060.

26 (c) The license of an applicant whose license has been revoked or suspended
27 or against whom a fine has been imposed under this chapter may not be renewed until
28 the period of revocation or suspension has expired and any fine has been paid.

29 **Sec. 08.57.080. Fees.** (a) The department shall set fees under AS 08.01.065
30 for

31 (1) licensure and renewal of licensure for a home inspector qualified

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to inspect new construction;

(2) licensure and renewal of licensure for a home inspector qualified to inspect previously occupied construction;

(3) joint licenses and renewal of joint licenses;

(4) registration as an associate home inspector;

(5) examinations; and

(6) board and departmental publications and seminars related to this chapter.

(b) An individual who fails a home inspector examination shall pay the examination fee set by the department if the individual applies to retake an examination.

Sec. 08.57.090. Identification requirements. (a) Except as provided otherwise by law, an individual who is licensed under this chapter by one name may not act in the capacity of a home inspector under any other name unless the individual is also licensed under that name.

(b) All advertising and business cards prepared by a home inspector for the home inspection business must show the home inspector's name, mailing address, and license number.

(c) Individual home inspectors and partners, associates, agents, salespeople, solicitors, officers, and employees of home inspectors shall use their true names and addresses and the true name of the home inspecting firm at all times while acting in the capacity of a home inspector or performing related activities.

Article 3. Insurance Requirements.

Sec. 08.57.200. Types of insurance. (a) Each applicant, at the time of applying for licensure or for renewal of licensure, shall file with the board satisfactory evidence that there is in effect for the applicant

(1) to the extent required under AS 23.30, workers' compensation insurance that is purchased from a private insurer who is admitted to do business in the state and that shows coverage in this state, appropriate employee classifications, and rates applicable in this state, or a valid workers' compensation self-insurance certificate issued by the Alaska Workers' Compensation Board;

1 (2) public liability and property damage insurance covering the
2 applicant's home inspecting operations in this state in the sum of not less than \$20,000
3 for damage to property, \$50,000 for injury, including death, to any one person, and
4 \$100,000 for injury, including death, to more than one person; and

5 (3) errors and omissions insurance in a minimum amount of \$250,000
6 for each occurrence.

7 (b) An insurer shall notify the board of the intent to cancel or not renew an
8 errors and omissions insurance policy provided for a licensed home inspector. The
9 cancellation of renewal may not take effect until 10 days after the day on which the
10 board receives the insurer's notice.

11 **Sec. 08.57.210. Advertising prohibition.** Home inspectors may not advertise
12 that they are insured simply because they have complied with the insurance
13 requirements of this chapter.

14 **Sec. 08.57.220. Suspension of license.** If the insurance required in
15 AS 08.57.200 ceases to be in effect, the license of the home inspector shall be
16 suspended until the insurance has been reinstated.

17 **Article 4. Disciplinary Actions; Other Enforcement Mechanisms.**

18 **Sec. 08.57.300. Grounds for disciplinary sanctions or other license**
19 **decisions.** The board may take disciplinary action authorized under AS 08.01.075 or
20 refuse to grant or renew a license or registration under this chapter on a finding that

21 (1) the application is fraudulent or misleading;

22 (2) the individual has knowingly violated this chapter or a lawful order
23 or regulation of the department or the board;

24 (3) the individual is incompetent or has engaged in fraudulent practices
25 relating to home inspection.

26 **Sec. 08.57.310. Administrative Procedure Act applicable.** Proceedings for
27 the denial, suspension, or revocation of a license or registration under this chapter are
28 governed by AS 44.62 (Administrative Procedure Act).

29 **Sec. 08.57.320. Injunction.** In an action instituted in the superior court by the
30 board or the department, the court may enjoin an individual from performing a home
31 inspection in violation of this chapter. In addition to other relief, the court may

1 impose a civil penalty of not more than \$250 for each violation. Each day that an
2 unlawful act continues constitutes a separate violation.

3 **Sec. 08.57.330. Violations.** (a) An individual who knowingly violates
4 AS 08.57.050 is guilty of a class B misdemeanor. A person who violates another
5 provision of this chapter is guilty of a violation punishable under AS 12.

6 (b) Criminal prosecution for a violation of this chapter does not preclude the
7 board or the department from seeking available civil remedies.

8 **Article 5. Miscellaneous Provisions.**

9 **Sec. 08.57.800. Legal actions by home inspector.** An individual may not
10 bring an action in a court of this state for the collection of compensation for the
11 performance of a home inspection or for breach of a contract for which a license is
12 required under this chapter without alleging and proving that the individual was a
13 licensed home inspector or registered associate home inspector at the time of
14 contracting for the performance of the work.

15 **Sec. 08.57.810. Legal actions against home inspector.** A person may not
16 bring an action against an individual licensed or registered under this chapter based on
17 the contents of or omissions in a written home inspection report prepared by the
18 inspector unless the action is brought

19 (1) by the person who contracted and paid for the report; and

20 (2) within one year after the date of the written report.

21 **Sec. 08.57.820. Inspection report required.** (a) Before performing a home
22 inspection, a licensee or an associate home inspector shall provide to the person on
23 whose behalf a home is inspected a written document specifying

24 (1) the scope of intended inspection, including the structural elements,
25 systems, and subsystems that will be inspected; and

26 (2) that the inspector will notify in writing the person on whose behalf
27 the inspection is being made of defects noted during the inspection along with a
28 recommendation, if any, that experts be retained to determine the extent of defects and
29 corrective action necessary to address the defects.

30 (b) After performing a home inspection, a licensee shall provide to the person
31 on whose behalf the inspection was performed a written description of defects noted

1 during the inspection along with a recommendation, if any, that experts be retained to
2 determine the extent and corrective action necessary to address the defects.

3 (c) The provisions of this section apply only to a residence that is

4 (1) a single-family home;

5 (2) a duplex, triplex, or four-plex; or

6 (3) a townhouse or condominium unit.

7 **Sec. 08.57.830. Prohibited acts.** (a) An individual licensed or registered
8 under this chapter, a company that employs an individual licensed or registered under
9 this chapter, or a company that is controlled by a company that also has a financial
10 interest in a company employing an individual licensed or registered under this chapter
11 may not

12 (1) perform or offer to perform, for an additional fee, repairs to a
13 structure on which the home inspector or the home inspector's company has prepared
14 a home inspection report in the past 12 months;

15 (2) inspect for a fee any property in which the home inspector or the
16 home inspector's company has a financial interest or an interest in the transfer of the
17 property;

18 (3) offer or deliver compensation, an inducement, or a reward to the
19 owner of the inspected property, the broker, or the agent, for the referral of business
20 to the home inspector or the home inspector's company;

21 (4) without the written consent of the home inspection client or the
22 client's legal representative, disclose information from a home inspection report
23 prepared by the home inspector or the home inspector's company;

24 (5) without the written consent of all interested parties, accept
25 compensation from more than one interested party for the same services;

26 (6) accept from a person who has other dealings with a home
27 inspection client a commission or allowance, directly or indirectly, for work for which
28 the home inspector or the home inspector's company is responsible;

29 (7) accept an engagement to make an inspection or to prepare a report
30 in which the employment itself or the fee payable for the inspection is contingent upon
31 the conclusions in the report, preestablished findings, or the close of escrow.