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10638 SENATE LABOR & COMMERCE

Restatement 3rd of Torts

CHAPTER 3

LIABILITY OF SUCCESSORS AND APPARENT MANUFACTURERS

Section

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§ 12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor becoming a continuation of the predecessor.

Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic

liability rule in § 1 of this Restatement: "one ... *who sells or distributes* a defective product is subject to liability for harm ... caused by the defective product." (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

When the transferor goes out of business upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other business entities.

Tort claimants who, as a result of defective products sold by a predecessor corporation, seek recovery only after transfer of assets to a successor corporation often face difficulties in attempting to bring their claims within the foregoing legal rules. Their claims typically accrue after the predecessor corporation has lawfully distributed to its shareholders the proceeds from the transfer of assets and has ceased to exist. Under these circumstances, tort claimants who were not

existing creditors at the time of the transfer of assets ordinarily have no recourse against the predecessor's shareholders. Unless they can pursue their claims against the successor corporation, or can reach other funds provided by existing insurance or by a statute, their only practical remedy lies with retailers and wholesalers in the predecessor's distributive chain, who may not be available as a practical matter. Statutes and judicial precedents governing the rights of creditors after a corporate assets transfer and dissolution generally do not address this problem of post-transfer claims accrual.

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against a successor for harm caused by defective products distributed by the predecessor in these circumstances.

A minority of jurisdictions impose liability on a successor corporation based on a broader concept of continuation of the business enterprise, even when there is no continuity of shareholders, officers, or directors. Some courts hold that the continuation of a predecessor's product line by the successor is sufficient to support imposition of successor liability for harm caused by defects in products sold before the assets transfer.

b. Rationale. Limiting the liability of successor corporations to the circumstances described in this Section is supported by fairness and efficiency considerations. An alleged successor that purchases the predecessor's productive assets piecemeal, other than as part of a going concern, cannot, by that fact alone, be said to have either manufactured or sold defective products distributed by the predecessor before the transfer of assets. In the absence of circumstances in which the successor could be said to constitute a continuation of the predecessor, or somehow to have prejudiced subsequent tort plaintiffs by its own pre-acquisition conduct, imposing liability on a business

entity that did not make or distribute the defective products that caused harm could be justified only because it increases the amount of money available post-acquisition out of which to satisfy plaintiffs' claims. But that alone cannot be justification for successor liability. Thus, imposing liability on the piecemeal purchase of productive assets would, for no compelling reason, impede the free alienability of corporate assets, thereby discouraging shareholder investment of capital and increasing social costs.

Imposing liability on successor corporations constitutes acceptable public policy when the successor either agrees to be liable or is implicated in the transfer of assets in a way that, without such liability, would unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor. Subsections (a) through (d) describe the types of corporate asset transfers that have been determined to justify imposing liability on the successor. Subsection (a) recognizes that contractual promises by the successor to pay subsequent tort claims, for which promises the successor has presumably been compensated, should be honored. Subsection (b) provides that when a business entity makes a fraudulent transfer in which the transferee is implicated, successor liability is appropriate for the same reason that liability would be imposed in favor of other creditors. Thus, a predecessor may arrange an asset transfer at an artificially deflated price, accompanied by an agreement by the successor to compensate either the predecessor, its owners, or its managers in ways that escape easy detection; or a successor may knowingly participate in an asset transfer coupled with a liquidating dividend by the predecessor to its shareholders for the purpose of leaving tort plaintiffs without remedy. If those transfers are fraudulent under applicable state law, imposing tort liability on the transferee for having knowingly participated in such transfers is justified.

Subsections (c) and (d) deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at

practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm.

A small minority of courts have fashioned successor liability rules more advantageous to products liability claimants than the rules stated in this Section. Those minority rules, in effect, extend the "change in form only" exception just described to include circumstances in which the successor continues a product line previously distributed by the predecessor. The minority position is based on the belief that a successor who purchases productive assets should not be allowed to benefit from receiving the goodwill and reputation of the predecessor's business without the burden of responding in tort to claims for harm caused by products sold by the predecessor prior to transfer. An argument advanced to support this minority view is that holding successors liable reduces the price that predecessors receive for transferring assets, thereby helping to strengthen incentives for the managers to invest in care before the transfer of the business.

This reasoning has proven unpersuasive to a substantial majority of courts that have considered the issue. Extending successor liability beyond the exceptions set forth in Subsections (a) through (d) would, in the judgment of most courts, be unfair and socially wasteful. Post-transfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice—that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d))—with another, possibly greater, injustice: that the transfer may give tort

plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.

Moreover, a majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without actually benefiting very many tort plaintiffs. In most instances, the magnitude of future liability for products distributed pre-transfer is difficult, if not impossible, to assess. As a majority of courts have recognized, the result of imposing successor liability as a general rule would be to depress the prices for transferred assets to the point that piecemeal disposition of assets, which clearly would not subject the buyers to liability, would be a preferable alternative to sale of the assets as part of a going concern. In that event, the products liability claimant harmed by a pre-transfer product defect would still run the risk of ending up with an uncollectible judgment. The benefits to society of preserving the predecessor's assets as a going concern would be sacrificed, with no commensurate benefits to tort claimants.

And even if a more expansive successor liability rule did not invariably lead to piecemeal asset transfers, such a liability rule would depress the prices received for going-concern transfers to an extent that would threaten to undermine the objectives of the law governing corporations. One of the purposes served by the corporate structure is to provide limitation and certainty of risk to shareholders in order to encourage capital formation. Thus, the shareholders' initial risk is limited to the value of their shares of stock and they are able to withdraw from an investment by sale of the stock without incurring future potential liability. A more expansive successor liability rule might threaten shareholders' investments by significantly restraining corporate assets transfers, thereby tending to frustrate corporation law's objective of encouraging shareholder investment.

Some critics of the majority rule argue that, when the successor continues to manufacture the same products as the predecessor, often under the same trademark, consumers have legitimate expectations that the successor will stand behind the predecessor's products. Disappointing these expectations is unfair, according to the critics, quite apart from the effects of successor liability upon the formation of capital. But this argument overlooks the reality that the predecessor's products that cause harm in these cases were distributed prior to the assets transfer, when there could be no reliance by consumers on the financial viability of the successor. One cannot logically rely on post-transfer expectations regarding the successor to justify the imposition of liability on the successor for pre-transfer distributions by the predecessor.

c. Nonliability in the absence of special circumstances. In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section. The successor is liable under §§ 1–4 for harm caused by defective products it sells after acquisition. In the absence of the circumstances described in this Section, however, the successor is not liable for defective products sold by another prior to that time.

Illustrations:

1. ABC Corp., which manufactures and sells lawn mowers, transfers all its assets to XYZ Corp., a manufacturing corporation with different officers, directors, and shareholders, for cash. ABC then dissolves, distributing the proceeds of the sale to its shareholders. ABC complies with all statutes governing its dissolution, and none of the exceptions in this Section applies. XYZ retains most of ABC's employees and managers and continues to manufacture lawn mowers, some of which are the same as previously manufactured by ABC. A defective lawn mower made and distributed by ABC prior to the transfer of assets to XYZ harms a user three years after the transfer. XYZ is not subject to liability for the harm to the user of the lawn mower.

2. The same facts as Illustration 1, except that a defective lawn mower made and distributed by XYZ after the transfer of assets harms a user three years after the transfer. XYZ is subject to liability for the harm to the user of the lawn mower.

d. Agreement for successor to assume liability. When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed under Subsection (a) in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of products liability is not implied by the successor's assumption of specific duties with regard to product service or replacement.

Illustration:

3. The same facts as Illustration 1, except that the transfer-of-assets agreement contains a promise by XYZ to assume all of ABC's liabilities. XYZ is subject to liability for the harm to the user of the lawn mower.

e. Fraudulent transfer in order to avoid debts or liabilities. Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.

Illustration:

4. The same facts as in Illustration 1, except that the transfer of assets by ABC to XYZ is made as part of a plan between ABC and XYZ to leave tort claimants harmed by ABC's defective products without enforceable remedies. If a transaction constitutes a fraudulent transfer under applicable state law, XYZ is subject to liability for harm to the user of the lawn mower.

f. Consolidation or merger. When statutory consolidation or merger of two corporations takes place, products liability devolves on the successor corporation under Subsection (c). A more difficult question is whether, absent statutory merger, a de facto merger has taken place. Local law governing de facto mergers is determinative. Whether a de facto merger under Subsection (c) has occurred generally depends on whether: (1) there is a continuity of management, employees, location, and assets; (2) the successor corporation acquires the assets of the predecessor with shares of its own stock so that shareholders of the transferor corporation become shareholders of the transferee corporation; (3) the predecessor corporation ceases its ordinary business operations immediately or shortly after the transfer of assets; and (4) the successor assumes those liabilities and obligations of the predecessor necessary for the uninterrupted continuation of the normal operations of the predecessor.

Illustrations:

5. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ and constitutes a statutory merger of

ABC and XYZ under applicable state law. XYZ is subject to liability to the user of the lawn mower.

6. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ, with which ABC redeems its own stock from its shareholders. ABC then ceases to operate its own business, which XYZ resumes with the same management and employees, at the same location. If it is determined under applicable state law that a de facto merger between ABC and XYZ has occurred, XYZ is subject to liability for harm to the user of the lawn mower.

g. Continuation of the predecessor. The exception recognized in Subsection (d), referred to by many courts as the "mere continuation" exception, applies when there has been a formal redesignation of the predecessor corporate entity but little or no change in underlying substance. The most important indicia of continuation, in addition to the continuation of the predecessor's business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations. A minority of jurisdictions recognize a broader exception, referred to as the "continuity of enterprise" exception, that imposes liability on the successor for continuing the business activities of the predecessor even when the corporate form of the successor is different from the predecessor. This Section does not follow that minority position.

Illustration:

7. The same facts as Illustration 1, except that XYZ is a corporation with the same officers, directors, and shareholders as ABC. After the assets transfer, XYZ continues the same manufacturing and distribution operations as ABC did previously. If XYZ is determined to constitute a "mere continuation" of ABC under Subsection (d), XYZ is subject to liability to the user of the lawn mower.

h. Necessity for the predecessor to transfer all of its assets and go out of business. Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed, the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery. The exceptions set forth in Subsections (c) and (d), merger and continuation, most frequently have significance when the predecessor has transferred all of its assets to the successor and, at least formally, has ceased to exist. But there is no reason that the exceptions set forth in Subsections (c) and (d) might not arise in connection

with the transfer of a division of a large company, leaving the company in existence after the transfer. And the exceptions in Subsections (a) and (b) could arise in connection with transfers involving less than all of the predecessor's assets where the predecessor continues in existence after the transfer.

i. Relationship between the rule in this Section and the successor's independent duty to warn. This Section deals with a successor's liability for harm caused by the predecessor's defective products and is not premised on post-transfer wrongdoing by the successor itself. For the rules governing the liability of a successor for its own post-transfer failure to warn its predecessor's customers, see § 13.

REPORTERS' NOTE

Comment b. Rationale. In a much-cited case, Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986) (applying Virgin Islands law), the court stated that the imposition of successor liability on a company that has merely purchased the assets of a predecessor for cash and does not otherwise fall within the stated exceptions would encourage the dissolution of a financially troubled corporation by piecemeal sale of assets rather than as a going business concern. In this event the plaintiff would not be able to reach the assets when the accident occurred years after dissolution. The end result would be the needless destruction of an ongoing business enterprise with no net advantage to anyone. Other courts have observed that the imposition of successor liability on small corporations could spell financial disaster to them. See, e.g., Bernard v. Kee Mfg. Co. Inc., 409 So.2d 1047 (Fla.1982); DeLapp v. Xtraman Inc., 417 N.W.2d 219, 221 (Iowa 1987); Nissen Corp. v. Miller, 594 A.2d 564, 570 (Md.1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 100 (Minn.1989). These courts have concluded that the imposition of strict liability on successor corporations is inconsistent with the principle of products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence. See also Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992); Downtowner v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 827 (Wis. 1985).

Corporate successor liability has been the subject of considerable law review commentary. See, e.g., Phillips, Product Continuity and Successor Corporation Liability, 58 N.Y.U. L. Rev. 906 (1983) (the article contains an exhaustive listing of law review literature; author supports the "product line" exception); Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, 72 Cornell L. Rev. 17 (1986) (criticizing the rationale offered by courts and commentators in support of the liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products liability plaintiffs with adequate protection); Note, A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's

Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash, 71 Marq. L. Rev. 815 (1982) (author criticizes the rationale offered to support expansive rules imposing liability on successor corporations and suggests expansion of independent duty to warn and fraudulent transfer category when the successor had actual or constructive knowledge of product defects); Rogala, Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?, 68 U. Det. L. J. 37 (1990) (economic analysis supports the retention of the four basic exceptions and the rejection of "product line" and "continuity of enterprise" theories); Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297 (author criticizes both "product line" and "continuity of enterprise" exceptions and predicts that Ohio will follow four traditional exceptions). Much of the law review commentary supports liberalizing the rules imposing liability on corporate successors. The articles acknowledge, however, the overwhelming judicial rejection of the liberalizing rules. It is interesting that, after an early spurt of cases in the late 1970s and early 1980s arguing for more expansive liability, courts have refused to impose liability unless the plaintiff is able to come within the four traditional exceptions. See Green, Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, 87 Nw. U. L. Rev. 897, 909–10 (1993); Henderson and Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479, 492 and n.64 (1990).

Several courts and commentators have recognized that the problems set forth in this Comment can best be addressed by legislation. For an insightful analysis and recommendation, see Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, 72 Cornell L. Rev. 17 (1986) (criticizing the rationale offered by courts and commentators in support of liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products-liability plaintiffs with adequate protection). Courts have repeatedly espoused the same view. See, e.g., Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 829 (Wis.1985):

> We conclude that the legislature is in a better position to make broad public policy decisions in actions based on products liability law. [Citation omitted]. The questions concerning the effect on the manufacturing business, the potential size and economic strength of successor corporations, the availability of commercial insurance and the cost of such insurance are all questions that ... the legislature is in a better position to ascertain.

A similar sentiment was expressed in Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir.1977):

> In recent years, for a variety of reasons, many have thought it necessary to turn to the courts in search of solutions to social problems. Courts are ill-equipped, however, to balance equities among future plaintiffs and defendants.... [S]uch broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate.

See also Myers v. Putzmeister, Inc., 596 N.E.2d 754 (Ill.App.1992); Welco Indus. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993); Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104 (Ill.App.Ct.1982); Holifield v. Setco Indus., Inc., 168 N.W.2d 177 (Wis.1969), overruled on other grounds, Hansen v. A.H. Robins, Inc., 335 N.W.2d 578 (Wis.1983).

One possible statutory approach might be to require that whenever a product manufacturer transfers a business or a product line as a going concern, some form of bond or other security must be posted by the predecessor manufacturer in an amount not to exceed the net value of the predecessor at time of transfer. The value of the bond or other security would be available to future tort plaintiffs to satisfy claims for harm caused by previously distributed defective products. The posting of such a security would, under terms of the statute, protect the successor from future liability for previously distributed products in excess of the value of the security. Presumably, obligations on the bond would be limited in time. Future plaintiffs injured by products previously distributed by the predecessor would be no worse off financially than if the transfer of assets had not occurred. The limit based on the value of the predecessor at the time of transfer, with an appropriate time limit, would render more calculable the amount of the security required, in contrast to the difficulty of calculating future liabilities without such limits under the more expansive successor liability rules applied in a minority of jurisdictions. The value of the predecessor's product line as a going concern, whenever that value exceeds the cost of the security against future liability, would be preserved without allowing the transfer of assets to prejudice tort plaintiffs' chances of recovery.

Comment c. Nonliability in the absence of special circumstances. The following jurisdictions have limited the liability of successor corporations to the four exceptions set forth in § 12 and would reject both the "continuity of enterprise" approach (Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976)) and the "product line" exception (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)). See, e.g., Arkansas (Swayze v. A.O. Smith Corp., 694 F.Supp. 619, 623 (E.D.Ark. 1988); Reed v. Armstrong Cork Co., 577 F.Supp. 246, 247–48 (E.D.Ark. 1983)); Colorado (Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo.Ct.App.1992)); Florida (Bernard v. Kee Mfg. Co., 409 So.2d 1047 (Fla. 1982)); Georgia (Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga.1985)); Illinois (Gonzalez v. Rock Wool Eng'g & Equip. Co., 453 N.E.2d 792 (Ill. App.Ct.1983); Domine v. Fulton Iron Works, 395 N.E.2d 19 (Ill.App.Ct. 1979)); Iowa (Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996)); Kentucky (Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law)); Maryland (Nissen Corp. v. Miller, 594 A.2d 564 (Md.Ct.Spec.App.1991)); Massachusetts (Guzman v. MRM/Elgin, 567 N.E.2d 929 (Mass.1991)); Minnesota (Costello v. Unipress Corp., No. C6–95–2341, 1996 WL 106215 (Minn.Ct.App., Mar. 12, 1996); Cooper v. Lakewood Engineering & Mfg. Co., 45 F.3d 243 (8th Cir.1995) (applying Minnesota law)); Missouri (Bozell v. H & R 1871, Inc., 916 F.Supp. 951 (E.D.Mo.1996); Wallace v. Dorsey Trailers Southeast, Inc.,

849 F.2d 341, 343 (8th Cir.1988) (applying Missouri law)); Nebraska (Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb.1982)); North Carolina (Budd Tire Corp. v. Pierce Tire Co., Inc., 370 S.E.2d 267 (N.C.Ct.App.1988); Comment, Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina, 30 Wake Forest L. Rev. 889 (Winter 1995)); North Dakota (Downtowner Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D.1984)); Ohio (Welco Indus., Inc. v. Applied Co., 617 N.E.2d 1129 (Ohio 1993)); Oklahoma Goucher v. Parmac, Inc., 694 P.2d 953 (Okla.Ct.App.1984)); South Dakota (Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515 (S.D. 1986)); Texas (Griggs v. Capitol Mach. Works, Inc., 690 S.W.2d 287 (Tex.Ct.App.1985); Mudgett v. Paxson Mach. Co., 709 S.W.2d 755 (Tex. Ct.App.1986)); Vermont (Ostrowski v. Hydra–Tool Corp., 479 A.2d 126 (Vt. 1984)); Virginia (Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992)); West Virginia (Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561 (W.Va. 1995) (per curiam)); Wisconsin (Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis.1985)); District of Columbia (LeSane v. Hillenbrand Indus., 791 F.Supp. 871, 873–74 (D.D.C.1992) (applying District of Columbia law)); Virgin Islands (Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir.1986, V. I.)). Only a few states appear to have adopted liability based on the successor corporation's continuation of the predecessor's line of products: California (Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); New Jersey (Ramirez v. Amsted Indus., 431 A.2d 811 (N.J. 1981); (but see possible limit to "product line" exception recognized in dicta in Leo v. Kerr–McGee Chem. Corp., 37 F.3d 96, 100–01 (3d Cir.1994) (applying New Jersey law) ("It seems apparent that, except perhaps in design defect cases, a defect in a product when the manufacturer distributed the product is likely to manifest itself and cause injury within a reasonable time after the product is manufactured. Accordingly, as a practical matter, successor liability under *Ramirez* is likely to be imposed in most cases, if at all, for a limited period.")); New Mexico (Garcia v. Coe Manufacturing Co., 933 P.2d 243 (N.M.1997)); Pennsylvania (Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa.Super.Ct.1981)); Bogart v. Phase II Pasta Machs., Inc., 817 F.Supp. 547 (E.D.Pa.1993)); Washington (Martin v. Abbott Labs., 689 P.2d 368 (Wash.1984); Fox v. Sunmaster Prods., Inc., 821 P.2d 502 (Wash.Ct. App.1991) (the continued product line must be the one that harms the plaintiff)). Although the product line exception is still theoretically viable in Pennsylvania, if a plaintiff has a possible remedy against the predecessor, a recent opinion held the exception could not be invoked. LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir.1991).

In an earlier draft of these Reporters' Notes, New Jersey was categorized as a jurisdiction that employs a very liberal test for corporate successor liability, a test premised on maximizing recovery rather than on evidence of express agreement to be liable or substantial deprivation of remedies for plaintiffs against the predecessor corporation. In support of this position Pacius v. Thermtroll Corp., 611 A.2d 153 (N.J.Super.Ct.Law Div.1992), was cited. In that case, the court held that *any* transfer of assets or use of the predecessor's goodwill entailed a de facto merger that, in turn, triggered successor liability. Id. at 157. Elaborat-

ing on the policy underlying this holding, the Pacius court quoted Rawlings v. DM Oliver Inc., 159 Cal.Rptr. 119, 124 (1979) for the following proposition:

> Fundamental fairness has been sought through a balancing of the rights of the injured party against the rights of those engaged in business, including the latter's reasonable commercial expectations. Placing the economic burden on those *best able to pay* for those costs, while permitting the transfer to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed. The thrust from our high court as a matter of first priority has been to *maximize recovery for the victim.*

Id. at 157 (emphasis added).

Recently, however, New Jersey has reigned in the "deep pocket" approach set forth above by the *Pacius* court. In Saez v. S & S Corrugated Paper Machinery Co., 695 A.2d 740 (N.J.Super.App.Div.1997), the court expressed disagreement both with the decision of the *Pacius* court and with this Restatement's earlier characterization of New Jersey law. The court first noted that, in contrast to the holding in *Pacius*, in order for a successor corporation to be liable under New Jersey law, the corporation must not only benefit from the predecessor's goodwill but must also continue to manufacture the predecessor's product. Id at 16. Moreover, the court stated that the question to answer in determining whether successor liability has been triggered is "not whether there was 'any benefit that the successor obtain[ed] from the acquisition of the assets of its predecessor' or if the successor eliminated a competitor [since] [s]o broad a test would be no test at all." Id.

Several other jurisdictions have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or a common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala.1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D.N.H.1994).

Comment d. Agreement for successor to assume liability.

1. For general authority that agreements to assume liability will be enforced in favor of plaintiffs with products liability claims, see cases cited in the Reporters' Note to Comment *a*.

2. General assumption of a predecessor's liability, even without specific mention of products liability, will be interpreted to include liability for products liability claims. See, e.g., Bouton v. Litton Indus., Inc., 423 F.2d 643 (3d Cir.1970) (applying New York law); Grugan v. BBC Brown Boveri, Inc., 729 F.Supp. 1080 (E.D.Pa.1990). If the contractual obligation as to the successor's assumption of products liability is subject to conflicting interpretations, the issue is for the trier of fact. See, e.g., Gee v. Tenneco, Inc., 615 F.2d 857, 862–63 (9th Cir.1980) (applying California law); Florom v. Elliott Mfg., 867 F.2d 570, 574–76 (10th Cir.1989) (applying Colorado law); Davis v. Loopco Indus., Inc., 609 N.E.2d 144 (Ohio 1993).

3. Contractual agreements by the successor to repair or service a product sold by the predecessor do not amount to an agreement to assume products liability for injuries caused

by the predecessor's defective products. See, e.g., Schwartz v. McGraw–Edison Co., 92 Cal.Rptr. 776 (Cal.Ct. App.1971) (disapproved on other grounds in Ray v. Alad Corp., 560 P.2d 3 (Cal.1977)); Shane v. Hobam, Inc., 332 F.Supp. 526 (E.D.Pa.1971) (applying New York law). Whether agreements to service a predecessor's products may create an independent duty to warn about defects is discussed in connection with § 13.

Comment e. Fraudulent transfer in order to avoid debts or liabilities. For the reason set forth in the Comment, this exception has rarely been used to impose successor liability for products liability claims. However, in Schmoll v. AC & S, Inc., 703 F.Supp. 868 (D.C.Or.1988), the court found that a complex corporate restructuring was undertaken to avoid both pending and future liability to persons who were certain to suffer asbestos-related illness and was thus the functional equivalent of a fraudulent transfer. See also Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C.Ct.App.1993) (reversing summary judgment when plaintiff's evidence raised a question of fact as to whether the defendant had purchased assets from the predecessor corporation in order to avoid creditors' claims); Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267 (N.C.Ct.App.1988); Mullen v. Alarmguard of Delmarva, Inc., No. CIV. A. 90C–11–40–1–CV, 1993 WL 258696 (Del.Super.Ct., Jun.16, 1993).

A much closer question is whether a successor corporation's actual or constructive knowledge that the predecessor's products are defective and likely to cause injury in the future is sufficient to render the transaction sufficiently tainted so as to come within the umbrella of this exception. There is little authority on the issue. In Nissen Corp. v. Miller, 594 A.2d 564, 569 n. 2 (Md.1991), the court noted that either knowledge of pending claims or knowledge of product defects might be sufficient to expose a successor liability since either would put in question the bona fides of the transaction.

Comment f. Consolidation or merger. For a discussion of what constitutes a "de facto merger," see Fletcher, Cyclopedia Corporations, § 7124.20; American Law of Products Liability § 7:10; Frumer and Friedman, Products Liability § 7.04[5]; Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297, 313 nn.136–137 (1994) (describing de facto merger and "mere continuation" doctrines). When the successor purchases the assets of the predecessor for cash, a de facto merger will not be found to have occurred. See, e.g., Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir.1977) (applying Indiana law); Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439–40 (7th Cir. 1977) (applying Wisconsin law). Only courts applying the "continuity of enterprise" exception will impose liability when the successor corporation purchased the assets of the predecessor for cash and there is evidence of continuity of the original business. See Reporters' Note to Comment *c*.

Comment g. Continuation of the predecessor. For a discussion of the "mere continuation" exception, see Fletcher, Cyclopedia Corporations

§ 7124.10; American Law of Products Liability § 7:14; Frumer and Friedman § 7.04[4]. Also see Winch v. Yates Am. Mach. Co., Inc., 613 N.Y.S.2d 980 (N.Y.App.Div.1994); Swayze v. A.O. Smith Corp., 694 F.Supp. 619 (E.D.Ark.1988); Florom v. Elliott Mfg., 867 F.2d 570, 578 n. 3 (10th Cir.1989) (applying Colorado law); Johnston v. Amsted Indus., Inc., 830 P.2d 1141, 1146 (Colo.Ct.App. 1992); Nissen Corp. v. Miller, 594 A.2d 564, 567 (Md.1991); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir.1981) (applying Missouri law); Chemical Design, Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct.App.1993); U.S. v. Atlas Minerals & Chem., Inc., 824 F.Supp. 46 (E.D.Pa.1993); Hamaker v. Kenwel–Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986).

In analyzing continuation questions, some courts require purchase of stock or other benchmarks in order to establish the requisite continuity. See, e.g., Gehin–Scott v. Newson, Inc., 848 F.Supp. 585 (E.D.Pa.1994); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations"); Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992) (also requiring a common identity of officers, directors, and stockholders). Other courts deny a merger if no transfer of assets has taken place, as in Carreiro v. Rhodes Gill & Co., 68 F.3d 1443 (1st Cir. 1995). Contra, Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir. 1995) (applying Maine law) (holding that purchase of assets is not sufficient to warrant a finding of a de facto merger); Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994) (applying Louisiana law). But several other states have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala. 1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D. N.H. 1994). See generally Sweatland v. Park Corp., 587 N.Y.S.2d 54 (N.Y.App.Div.1992).

§ 13. Liability of Successor for Harm Caused by Successor's Own Post–Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

Various Briefs on Retroactivity Provision

MEMORANDUM

FROM: Theodore M. Pease, Jr., Esq.

DATE: April 9, 2002

RE: Constitutionality of CSHB-499

This memorandum is submitted in response to Chairman Rokeburg's invitation to Jim Powell of Hughes Thorsness and Ted Pease of Burr, Pease & Kurtz to submit legal memoranda on the contention, raised at the House Judiciary Committee hearing on HB-499 on April 5, 2002, that the State of Alaska might be held monetarily liable to Allstate in the pending litigation if CSHB-499 is made retroactive in application. The possibility of such liability was suggested by Therese Bannister, legislative counsel, in her February 12, 2002 memorandum to Chairman Rokeburg in which she stated that a retroactive application of HB-499, ". . . may result in a taking by the state for which just compensation is required under Article I, Section 18 of the Alaska Constitution."[1] Mr. Powell, in his April 5th testimony, stated, without citation to any legal authority, that the State of Alaska could become liable to his clients, Lloyds of London and Allstate, if HB-499 were given retroactive effect. This memorandum addresses the following:

1. Even if the court should find (which it will not) that the retroactive application of HB-499 to the Savage Arms case would constitute a taking of a vested property right, or would be a constitutionally prohibited *ex post facto* law,

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[1] "Eminent Domain. Private property shall not be taken or damaged for public use without just compensation." Constitution of Alaska, Article I, Section 18.

under no possible procedural scenario could the State be found liable to Allstate and Underwriters.

2. Retroactive application of HB-499 to the Savage Arms case would not amount to the taking of or impairment to a property right.

3. Retroactive application of HB-499 is not an *ex post facto* law prohibited by Section 15, Article I of the Alaska Constitution.

1. **Under No Procedural Scenario Could the State of Alaska be Found Liable to Allstate and Underwriters.**

There has been no final judgment in *Savage Arms*; this is an on-going case that has been remanded to the Superior Court in Kenai (Judge Link) with a trial set for November 2002. (The procedural history and status of this case is described in a memorandum dated February 12, 2002 previously submitted. A copy of that memorandum is attached hereto for ready reference.) Under no possible outcome could the State of Alaska be found liable to anyone. Consider the following scenarios which are all the possible outcomes of the litigation if HB-499 is retroactive:

A. Judge Link recognizes the retroactivity of HB-499 and refuses to instruct the jury on the continuity of enterprise doctrine adopted by the Supreme Court. The case is submitted to the jury on other theories of liability and Allstate wins. The issue is now moot.

If, however, Allstate loses and there is a defense verdict, Allstate would then appeal to the Supreme Court advancing its claims that the retroactive application of HB-499 constitutes the taking of a vested property right or that retroactive application of HB-499 is an *ex post facto* law. If the Supreme Court rejects those arguments, upholds

Judge Link, and finds that there is no taking of property or impairment of a contract or an *ex post facto* law, the case is over. If, however, the court agrees with Allstate and finds that the retroactive application of HB-499 is constitutionally prohibited, it would vacate the judgment and send the case back to Judge Link to retry the case before a jury on the continuity of enterprise doctrine. If Allstate then wins, it has a judgment against Savage Arms; if it loses it has nowhere else to turn.

B. Alternatively, suppose Judge Link declines to recognize the retroactivity provision of HB-499 and presents the case to the jury on the continuity of enterprise doctrine. If the jury finds Savage Arms not liable under the continuity of enterprise doctrine, Allstate has had its day in court and the case is over. If the jury finds Savage Arms liable to Allstate and Underwriters under the continuity of enterprise doctrine, Savage Arms could then appeal to the Supreme Court asking the Supreme Court to uphold the retroactive application of HB-499 and find that there is no impairment of a vested property interest or an *ex post facto* law. If Savage Arms is unsuccessful in that appeal, then Allstate and Underwriters are free to pursue their judgment against Savage Arms. If, however, the Supreme Court agrees with Savage Arms and holds that HB-499 must be given retroactive effect, the case would be over and Allstate would have no claims against the State of Alaska or anyone else with the court having found that there is no taking of a property right, nor an impairment of a contract, nor an *ex post facto* law.

2. Retroactive Application of HB-499 to the Savage Case Does Not Impinge on Any Vested Property Right.

Vested property rights are protected against state action by the Fourteenth Amendment of the United States Constitution. Moreover, Article I § 7 of the Alaska state constitution further protects vested property rights: "No person shall be deprived of life, liberty, or property, without due process of law."

A right is vested when it has been so far perfected that it cannot be taken away by statute. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). A "vested rights" analysis is not ordinarily used in determining whether a statute is retroactive; rather, it is traditionally used in determining whether a retroactive statute is unconstitutional. *Id.* at 1092; *see also Underwood v. State*, 881 P.2d 322, 327 (Alaska 1994), *cert. denied* 115 S.Ct. 1694, 514 U.S. 1064 (1995) (noting that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights).

Allstate and Underwriters Have No Vested Property Right in a Continuity of Enterprise Cause of Action. In *Kitchen v. United States*, 741 F.Supp. 182, 185 (D. Alaska 1989) (copy of decision attached), the United States District Court in Alaska rejected the plaintiff's claim that the retroactive application of a statute to her case deprived her of vested rights. In that case, Congress enacted a statute that effectively abolished the plaintiff's state law claims against the defendant. The plaintiff complained that the retroactivity of the statute, which was amended after she had filed suit in state

court and which provided protection for the defendant from the plaintiff's medical malpractice claim, deprived her of her state law causes of action.

The court held that the plaintiff had no vested rights in her state law causes of action. *Id.* The court noted that the question whether the rights asserted in the plaintiff's state law causes of action were "vested" could not be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted the statute. *Id.* Quoting the United States Supreme Court, the court held that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Id.* The court stated that this is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. *Id.* The court concluded that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. *Id.* Because rights in tort do not vest until there is a final, unreviewable judgment, the court held that Congress abridged no vested rights of the plaintiff by enacting the statute and retroactively abolishing the plaintiff's cause of action in tort. *Id.* In making this ruling the District Court relied on the following quote from *Hammond v. U.S.*, 786 F.2d 8, 12:

> No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp.* v

Assetta, 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting §2212 and retroactivity abolishing her cause of action in tort. *Id.*

Likewise, the Alaska Supreme Court has, on numerous occasions, upheld the retrospective application of statutes. For example, in *Underwood v. State* (copy of decision attached), the court held that the plaintiffs had no vested right to a 1993 permanent fund dividend (PFD). 881 P.2d 322, 327 (Alaska 1994). In that case, the Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. The Underwoods understood that in order to qualify for the 1993 PFD, they had to be state residents on or before April 1, 1992. The Underwoods moved to Alaska on March 25, 1992.

On March 31, 1992, h wever, the governor of Alaska signed a statute that amended the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaskan residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods sued in superior court, challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an *ex post facto* law, that it was an impermissible taking of property, and that the state was equitably

stopped from amending the law. The superior court granted summary judgment in favor of the state on all of the Underwoods' claims and the Underwoods appealed.

Addressing the Underwoods' due process claim, the court noted that vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions. *Id.* The court, however, rejected the Underwoods' claim that upon their arrival in Alaska in March 1992 they had a vested right to 1993 PFDs, subject only to their continuing residence, reasoning that at that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *Id.*

In addition, the court discarded the Underwoods' assertion that the 1992 amendment constituted an *ex post facto* law in violation of the Alaska Constitution. *Id.* The court noted that in determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *Id.* The court noted that the Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time. *See also, Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 574 n. 12 (Alaska 1989) (holding that a statutory change which merely disappoints economic expectations and does not affect vested rights is not an *ex post facto* law); *Bidwell v. Scheele*, 355 P.2d 584, 586–87 (Alaska 1960); and memo of February 12, 2002 attached hereto entitled: Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

3. Summary.

Based on the above authority, making this statute retroactive will not deprive Allstate or any other party of any vested rights and the state of Alaska would not be exposed to liability. Specifically, a supposed deprivation of property rights argument advanced by Allstate, wherein it might assert that it has a vested property right in the judicially announced Alaska law regarding successor liability, fails because no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.

Here, the Alaska Supreme Court has simply announced the law and remanded the case back for trial under the applicable standards. Allstate has not yet received a final, unreviewable judgment. Consequently, its alleged right to this judicially announced law has not yet vested.

Furthermore, logically, any action for a deprivation of rights would necessarily have to involve some element of reliance on the law in existence at the time a party's conduct occurred. In this case, Allstate settled the case years before the Supreme Court adopted the continuity of enterprise theory and therefore it cannot claim to have relied upon that theory when making the settlement.

MEMORANDUM

RE: Western Auto's Insurers v. Savage Arms

DATE: February 12, 2002

ISSUE

Can the Alaska legislature act and affect a pending case in which the Alaska Supreme Court has previously decided the law?

BRIEF ANSWER

Yes. The Alaska legislature is empowered by well-established statutory and case law authority to apply a statute retroactively. Further, even if the Alaska legislature does not expressly provide for retrospective application of a statute, legislation that is "curative" may be applied retroactively.

DISCUSSION

A. Retroactivity Expressly Provided

Restrospective legislation is not in and of itself unconstitutional. *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985). In fact, a nearly forty-year old Alaska statute explicitly provides the legislature with authority to apply a statute retroactively. Specifically, Alaska statute Section 01.10.090 states: "No statute is retrospective unless expressly declared therein." The Alaska Supreme Court has also recognized the legislature's authority to apply statutes retroactively. *See, e.g., Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 948 (Alaska 1989) (stating statutes will be applied to causes of action arising prior to their enactment when the legislature so intends, either expressly or impliedly); *State v. Kaatz*, 572 P2d 775, 779 (Alaska 1977); *Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 (Alaska 1985); *Brice v. State*, 669 P.2d 1311, 1315 (Alaska 1983); *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 711 (Alaska 1992); *State v. Alaska Pulp America, Inc.*, 674 P.2d 268, 272 (Alaska 1983); *Stephens v. Rogers Const. Co.*, 411 P.2d 205, 208 (Alaska 1966) (noting

whether or not a statute operates retrospectively depends upon the language of the statute).

B. Curative Legislation

Even if the Alaska legislature does not expressly provide for retrospective application of a statute, the Alaska Supreme Court has recognized an exception to the general rule against retroactivity for legislation that is "curative." Curative legislation is legislation promptly enacted by the legislature in response to a particular judicial decision with which the legislature disagrees. *See, e.g., Zurfluh v. State*, 620 P.2d 690, 693 (Alaska 1980) (discussing the curative legislation exception to the general rule against retroactivity). In *Zurfluh*, the Alaska legislature acted within two months following an Alaska Supreme Court decision and statutorily instituted incarceration as a condition to a suspended sentence after the Alaska Supreme Court had decided against such a condition. Despite the lack of retroactive language in the newly enacted statute, the Alaska Supreme Court deemed the statute "curative" and applied it retroactively to the pending case, effectively overruling their own recent opinion.

Specifically, in *Zurfluh*, the defendant broke into a store and stole a safe containing over $42,000. In October 1978, the defendant turned himself in and pled no contest. Incarcerating a defendant as a condition of a suspended sentence was a common practice in Alaska before December 1, 1978, when the Alaska Supreme Court in *State v. Boyne*, held that the courts did not have the authority to do so. In response to *Boyne*, the next session of the Legislature, which began in January 1979, enacted a statute effective May 2, 1979, which allowed for incarceration as a condition of a suspended sentence.

The issue in *Zurfluh* was whether the newly enacted statute could be applied retrospectively to the 153-day period between the *Boyne* decision on December 1, 1978 and May 2, 1979, the statute's effective date. It was during this period that the defendant was sentenced.

After citing the general rule that "[n]o statute is retrospective unless expressly declared therein," the court noted that the new statute did not expressly provide for retrospective application. *Zurfluh*, 620 P.2d at 693. The court found, however, that the timing of the legislation and the hearing testimony on the bill indicated the statute was curative legislation proposed in reaction to the ruling in *Boyne*. *Id.* The court stated that curative legislation was an exception to the general rule against retroactivity and emphasized that retroactivity would be

ascribed to curative legislation more readily than to that which might disadvantageously, though legal, affect past relations and transactions. *Id.* Consequently, the court held that on remand the trial judge was to apply the new statute when he considered the defendant's sentence. *Id.*

CONCLUSION

The Alaska Legislature has well-established authority to enact a statute and apply it retroactively to pending cases. The legislature should expressly state that the statute is to be applied retroactively to all pending cases. Alternatively, or in addition, the statute should state that it is curative legislation in response to the Alaska Supreme Court's decision in *Savage Arms, Inc. v. Western Auto Supply Co.*

Goodwill. Vocation rehabilitation had closed their file on Williams as rehabilitated. (Tr. p. 200).

When reviewing agency decisions concerning disability benefits, questions of fact, including the credibility of a claimant's subjective testimony, are primarily for the Secretary to decide, not the courts. To engage in fact-finding in a Social Security case is not within the province of a federal court. *Benskin v. Bowen*, 830 F.2d 878, 882–83 (8th Cir.1987). The Secretary's decision must be affirmed if it is supported by substantial evidence. 42 U.S.C. § 405(g); *Clark v. Heckler*, 733 F.2d 65 (1984). "Substantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.' " *Metcalf v. Heckler*, 800 F.2d 793, 794 (8th Cir.1986), *quoting Consolo v. Federal Maritime Commission*, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate support for a conclusion." *Clark v. Heckler*, 733 F.2d at 68.

I find that the decision of the ALJ is supported by substantial evidence.

JUDGMENT

IT IS THEREFORE ORDERED that the decision of the Secretary is affirmed.

Lucy KITCHEN, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. N89-001 Civ.

United States District Court, D. Alaska.

June 30, 1989.

Medical malpractice plaintiff moved to remand suit against Indian contractor to state court. The District Court, Holland, Chief Judge, held that Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment.

Motion denied.

1. Removal of Cases ⇐2

Removal statute for suits against federal employees, as amended in 1988, was applicable to pending state court case; moreover, amendment's requirement that removal motion be made within 60 days of enactment of amendment was not applicable to case which was not tried in state court. 28 U.S.C.A. § 2679(d)(2).

2. Removal of Cases ⇐21

Indian contractor was federal "employee" for purposes of removing medical malpractice claim against contractor to federal court; Federal Tort Claims Act was plaintiff's exclusive remedy upon certification by Attorney General that contractor was federal employee acting within scope of his employment. 28 U.S.C.A. §§ 1346(b), 2671 et seq., 2679(d)(2); Public Health Service Act, § 244(a), as amended, 42 U.S.C.A. § 233(a).

3. Constitutional Law ⇐253(4)
Removal of Cases ⇐2

Medical malpractice plaintiff had no vested right in state law cause of action prior to judgment such as would render unconstitutional retroactive application of statute pursuant to which case was removed to federal court. U.S.C.A. Const. Amend. 5.

William G. Azar, Anchorage, Alaska, for plaintiff.

Larry Card, Office of the U.S. Atty., R. Collin Middleton, Middleton, Timme & McKay, Anchorage, Alaska, Leon B. Taranto, Torts Branch, Civ. Div. U.S. Dept. of Justice, Washington, D.C., for defendant.

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The District Court, Holland, held that Federal Tort Claims ntiff's exclusive remedy upon by Attorney General that con- federal employee acting within employment.

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of Cases ⇐2

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of Cases ⇐21

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onal Law ⇐253(4)

of Cases ⇐2

malpractice plaintiff had no in state law cause of action gment such as would render nal retroactive application of uant to which case was re- deral court. U.S.C.A. Const.

Azar, Anchorage, Alaska, for

l, Office of the U.S. Atty., R. eton, Middleton, Timme & orage, Alaska, Leon B. Taran- anch, Civ. Div. U.S. Dept. of ington, D.C., for defendant.

ORDER

Motion to Strike & Motion to Remand Denied

HOLLAND, Chief Judge.

The court has now before it plaintiff Lucy Kitchen's motion to remand this case to the Superior Court for the State of Alaska, Second Judicial District at Nome. The plaintiff has also filed a motion to strike the notice substituting the United States as the party defendant. Said motions are opposed by the defendant, United States of America. Plaintiff has requested oral argument, but the court does not deem oral argument necessary to the disposition of these motions.

This is a medical malpractice action originally brought against Norton Sound Health Corporation for the alleged negligence of one of its doctor employees. Plaintiff alleges that as a result of said doctor's negligence, while acting within the scope of his employment, plaintiff suffered severe permanent brain injuries.

[1] The United States removed the instant case pursuant to 28 U.S.C. § 2679(d)(2). Plaintiff argues that said statute is inapplicable to this case. In the first place, plaintiff contends that Section 2679(d)(2) is applicable only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment. This argument is largely based on the assumption that Section 2679, as amended in 1988,[1] is not applicable to this case. Plaintiff also argues that, even if Section 2679(d)(2) is applicable to this case, the United States' removal of this case was untimely.

Section 2679(d)(2) provides:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a state court shall be removed without bond *at any time before trial* by the Attorney General to the District Court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(Emphasis added.) Section 2679(d)(2) of Title 28, United States Code, by its express, plain language, has application to pending state court cases such as this. This case was not tried in state court. It was properly and timely removed before trial.

Plaintiff contends that Public Law No. 100-694 at Section 8(c)[2] applies in this case. Public Law No. 100-694 at Section 8(c) provides as follows:

> (c) Pending State Proceedings.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

This case was not removed within sixty days of enactment of Public Law No. 100-694. However, because the instant case was not *tried* in state court, the time for removal has not expired. Section 8(c) of Public Law No. 100-694 has no application to this case.

Returning to plaintiff's contention that Section 2679 applies to suits against federal employees arising from their operation of motor vehicles, the plain language of Public Law No. 100-694 makes it clear that this

1. Public Law No. 100-694

2. Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub.L. No. 100-694, 1989 U.S.Code Cong. & Admin. News (102 Stat.) 4563, 4566.

amendment has application to all claims which are cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* The amendment to Section 2679(b)(1) makes no mention of suits against federal employees arising out of their operation of motor vehicles.[3] Plaintiff is mistaken in her contention that the removal statute in question applies only to suits against federal employees arising out of their operation of motor vehicles in the scope of their employment.

[2] Plaintiff also contends that "[n]o 'employee' was ever a Defendant in this action." Section 2679(d)(2) provides:

> This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

In the instant case, the attorney general has certified that Norton Sound Health Corporation was an employee acting within the scope of its employment. The question of whether or not an Indian contractor is an "employee" for purposes of Section 2679(d)(2) is answered by Public Law No. 100-446 which became law on September 27, 1988, and which provides in pertinent part:

> [F]or purposes of ... 42 U.S.C. § 233(a) ... with respect to claims by any person for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental or related functions ... an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under Sections 102 or 103 of this Act is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees ... *are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.*[4]

Title 42 U.S.C. § 233(a) provides:

> (a) The remedy against the United States provided by Sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under Section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental or related functions, including the conduct of clinical studies or investigation by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

By virtue of the reference to 42 U.S.C. § 233(a), in Public Law No. 100-446, it is clear that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, is the exclusive remedy for claims such as plaintiff's and that Indian contractors are "employees" protected by Public Law No. 100-446. Thus, Norton Sound Health Corpora-

3. "[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."
Kremer v. Chemical Construction Corp., 456 U.S. 461, 468, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1982), *quoting Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976).
28 U.S.C. § 2679(b)(1), as amended by Public Law No. 100-694, now provides for actions against "any employee". 28 U.S.C. § 2679(b)(1) states:
(b)(1) The remedy against the United States provides by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

4. Public Law No. 100-446 modified Public Law No. 100-202, which preceded Public Law No. 100-446 (emphasis supplied).

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tion was an employee acting within the scope of its employment for purposes of 28 U.S.C. § 2679(d)(2) upon certification by the attorney general.

[3] Next, the court considers the plaintiff's contentions that Public Law No. 100-446 is unconstitutional because it is the product of illegal lobbying activities by Norton Sound Health Corporation, and/or because the retroactive application of Public Law No. 100-446 unconstitutionally deprives plaintiff of a vested right.

In the first place, the plaintiff has failed to provide the court with any authority whatsoever that "illegal lobbying efforts" by a defendant can have the effect of depriving a plaintiff of due process of law. Furthermore, plaintiff complains that the retroactivity of Public Law No. 100-446 to her case deprives her of vested rights. Plaintiff filed her action in state court which, she claims, provided her with: "a trial by jury; liberal tolling of the statute of limitations in cases of brain injury; the ability to sue a private corporation for its acts of negligence; a convenient forum; the ability to place the action on a fast track system for quick resolution; and, the availability of the insurance coverage of the North Sound Health Corporation." Plaintiff's reply memorandum at 10.

Quite simply, the plaintiff has no vested rights in her state law causes of action.

The question whether the rights asserted in plaintiff's state-law causes of action are "vested" cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted § 2212. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, *see 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort. *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (citations and footnote omitted).

On the foregoing authority, this court rejects plaintiff's argument that the retroactive application of Public Law No. 100-446 unconstitutionally deprives her of vested rights is contrary to established precedent.

For the foregoing reasons, the plaintiff's motions for remand and to strike notice of substitution of the United States as the party defendant are hereby denied.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,

v.

Paula MARQUA, Personal Representative of the Estate of Jennifer W. Chamberlain, Defendant.

Brian CHAMBERLAIN and Paula Marqua, Personal Representative of the Estate of Jennifer W. Chamberlain, Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Defendant.

No. A87-574 Civ.

United States District Court, D. Alaska.

Nov. 8, 1989.

Husband and wife were named insureds under automobile policy, and suits

but will merely enforce the shifted obligation, as contemplated in the written agreement.[7]

B. *Equitable Estoppel Argument*

Deborah argues that the doctrine of equitable estoppel should apply to prevent a parent who has not actually had custody of the child from asserting a claim for child support arrearages. Deborah acknowledges that such an approach would violate the rigid rule against child support modifications, but she cites a line of Illinois cases which she claims have continued to apply equitable estoppel even after adopting the strict federal prohibition on retroactive modifications.

Regardless of the merits of the argument, the entire equitable estoppel discussion is moot in this appeal. Deborah acknowledges that the application of equitable estoppel would not entitle her to an award of child support for the period in question (October 1991 to March 1992). She merely claims that the doctrine should prevent Billy from asserting a claim for child support for this same period. This argument is moot because Billy has asserted both to the superior court and this court that he is not attempting to collect child support for this period, but merely for January 1991 to September 1991.

IV. *CONCLUSION*

For the reasons stated above, the order of the superior court is AFFIRMED.

7. Billy also disagrees with the master's failure to include the September 1991 payment in Deborah's past due obligation, and with her finding that Billy's obligation of $868.50 began in September and not October of 1991, even though Scott did not move out of his father's residence until sometime late in September. Billy did not raise this issue in his Statement of Points on Appeal, and therefore we consider it waived. *See Welcome v. Jennings*, 780 P.2d 1039, 1042 n. 4 (Alaska 1989).

Charles E. UNDERWOOD, Jr., Susie G. Underwood, and Anthony C. Underwood, Appellants,

v.

STATE of Alaska, Governor Walter J. Hickel and Department of Revenue, Appellees.

No. S-5802.

Supreme Court of Alaska.

Sept. 30, 1994.

Residents, who moved into state prior to April 1 of year in which statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, took effect, filed action claiming that denial of PFD violated constitutional rights. The Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., granted summary judgment in favor of state. Residents appealed. The Supreme Court, Moore, C.J., held that: (1) enactment of amendment did not deprive residents of equal protection; (2) enactment of amendment did not violate due process rights of residents; (3) amendment was not impermissible "ex post facto" law; and (4) state was not estopped from denying PFD to residents.

Affirmed.

1. Constitutional Law ⇐234.6
States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not deprive residents who moved into state prior to April 1 of year in which change took effect of equal protection; changed qualifying date was fairly and substantially related to goal of improving overall

efficiency of PFD program. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

2. Constitutional Law ⇐211(2)

Under sliding scale approach to equal protection questions adopted by Alaska Supreme Court, applicable standard of review for given case is to be determined by importance of individual rights asserted and by degree of suspicion with which Supreme Court views resulting classification scheme; as level of scrutiny selected moves up the sliding scale, the asserted governmental interest must be relatively more compelling, and legislation's means-to-ends fit must be correspondingly closer. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(2)

Under minimum level of scrutiny applicable to equal protection challenge regarding economic interest, state must show that challenged enactment was designed to achieve a legitimate governmental objective, and that means bear a fair and substantial relationship to accomplishment of that objective. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐291.6

States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not violate due process rights of residents who moved into state prior to April 1 of year in which change took effect; upon move into state, residents possessed nothing more than inchoate expectancy of PFD. Const. Art. 1, § 1; U.S.C.A. Const.Amend. 14; AS 43.23.005(a).

5. Constitutional Law ⇐197

"Ex post facto" law is law passed after occurrence of fact or commission of act, which retrospectively changes legal consequences or relations of such fact or deed. Const. Art. 1, § 15.

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

6. Constitutional Law ⇐188

In determining whether statute affecting preenactment conduct is unconstitutionally retrospective, one inquiry is into whether statute affects vested rights. Const. Art. 1, § 15.

7. Constitutional Law ⇐199

States ⇐127

Enactment of statutory amendment changing eligibility requirements for permanent fund dividend (PFD) to coincide with calendar year, rather than the former date of April 1, did not constitute impermissible "ex post facto" law in violation of Alaska Constitution, where at time of amendment, no Alaskan had vested right to dividend, and change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Const. Art. 1, § 15; AS 43.23.005(a).

8. Estoppel ⇐62.2(2)

State was not estopped from denying permanent fund dividend (PFD) to residents who moved into state prior to April 1 of year in which amendment changing eligibility requirements for PFD to coincide with calendar year, rather than the former date of April 1, took effect; residents took calculated risk when they decided to move to state prior to April 1, rather than later date they would allegedly hav otherwise preferred, and state engaged in no conduct encouraging residents' action or guaranteeing that residents would qualify for PFD if they arrived prior to April 1. AS 43.23.005(a).

Robert John, Law Office of Robert John, Fairbanks, for appellants.

Vincent L. Usera, Asst. Atty. Gen., and Bruce M. Botelho, Atty. Gen., Juneau, for appellees.

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

OPINION

MOORE, Chief Justice.

At issue in this appeal is the constitutionality of a 1992 amendment to the permanent fund dividend (PFD) statutes, Chapter 4,

section 4, SLA 1992. The amendment changed the qualifying date set forth in AS 43.23.005(a) for a 1993 PFD. Charles E. Underwood, Jr., along with his wife and son, Susie G. Underwood and Anthony C. Underwood (the Underwoods), allege that they were unlawfully denied 1993 PFDs as a result of the change. They instituted this action against the State of Alaska, Governor Walter J. Hickel and the Department of Revenue (collectively "the State"), claiming that the amendment violated a number of their constitutional rights and that the State was estopped from denying their dividend applications. The superior court granted summary judgment in favor of the State. We affirm.

I. *FACTS AND PROCEEDINGS*

The facts are not in dispute. The Underwoods timed their move from Texas to Alaska with the specific intention of becoming Alaska residents in time to qualify for a 1993 PFD. According to Charles Underwood, he understood that in order to qualify for the 1993 PFD, the family members had to be state residents on or before April 1, 1992. Although Charles otherwise would have preferred to remain at his job in Texas until May 1992, he resigned in March. Had Charles remained at his job until late May as he desired, Charles claims he would have earned roughly another $3,000 in after tax wages. The family arrived in Alaska on March 25, 1992.

On March 31, 1992, Governor Hickel signed Chapter 4, section 4, SLA 1992, which amended AS 43.23.005 by changing the eligibility requirements for a PFD to coincide with the calendar year. As a result, to be eligible for a 1993 PFD, applicants had to show Alaska residency as of January 1, 1992. Accordingly, persons who established Alaskan residency between January 2, 1992 and April 1, 1992 were not eligible for a 1993 PFD, whereas under prior law they would have been eligible.

The Underwoods brought suit in superior court challenging the constitutionality of the enactment. They specifically claimed that it violated the equal protection and due process guarantees of the federal and state constitutions, that it constituted an ex post facto law, that it was an impermissible taking of property, and that the State was equitably estopped from amending the law.

The superior court granted summary judgment in favor of the State on all of the Underwoods' claims. The Underwoods appeal.

II. *DISCUSSION*

The parties agree that there are no issues of material fact, and that this case may be properly resolved as a matter of law. The constitutional and other purely legal questions at bar are issues to which this court will apply its independent judgment. *State v. Anthony*, 810 P.2d 165, 166–67 (Alaska 1991); *Croft v. Pan Alaska Trucking*, 820 P.2d 1064, 1066 (Alaska 1991).

A. *The Challenged Enactment Does Not Violate The Underwoods' Constitutional Rights.*

Alaska Statute 43.23.005 governs the eligibility requirements for a PFD. Following the enactment of Chapter 4, section 4, SLA 1992, the statute provided that:

> (a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if
>
> ....
>
> (3) the individual was a state resident for at least the calendar year immediately preceding *January 1* of the current dividend year; ....

AS 43.23.005(a)(3) (emphasis added). Prior to the 1992 amendment, the statute required Alaska residency for the twelve month period immediately preceding *April 1* of the current dividend year. AS 43.23.005(a)(2) (effective June 11, 1991).

1. *Equal Protection*

[1] The Underwoods assert that the 1992 enactment denied them equal protection and opportunity under both the Federal and Alaska Constitutions. *See* U.S. Const. amend. XIV; Alaska Const. art. I, § 1. Because Alaska's equal protection clause "is more protective of individual rights than the

federal equal protection clause," *State v. Anthony*, 810 P.2d at 157, we focus our analysis on the Alaska Constitution.[1]

[2] We have adopted a sliding scale approach to equal protection questions. *State v. Erickson*, 574 P.2d 1, 11–12 (Alaska 1978). Under this approach, "'[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.'" *State, Dep't of Revenue v. Corio*, 858 P.2d 621, 629 (Alaska 1993) (quoting *State v. Ostrosky*, 667 P.2d 1184, 1192–93 (Alaska 1983)). As the level of scrutiny selected moves up the sliding scale, the asserted governmental interests must be relatively more compelling, and the legislation's means-to-ends fit must be correspondingly closer. *Ostrosky*, 667 P.2d at 1193. Conversely, "if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated." *Id.* (footnote omitted).

[3] We have held that an individual's interest in a PFD "is merely an economic interest and therefore is entitled only to minimum protection under our equal protection analysis." *Anthony*, 810 P.2d at 158. Under this minimum level of scrutiny, the State must show that the challenged enactment was designed to achieve a legitimate governmental objective, and that the means bear a "fair and substantial" relationship to the accomplishment of that objective. *Corio*, 858 P.2d at 629; *Anthony*, 810 P.2d at 158–59.[2]

The State asserts that the purpose of the challenged legislation was to improve the overall efficiency of the PFD program. By moving the qualifying date to coincide with the calendar year, the PFD division of the Department of Revenue gains three months to process applications. This additional time should result in earlier detection of ineligible applicants and fewer improperly paid PFDs, less need for temporary staff to process applications, and quicker resolution of questioned applications, thereby decreasing the number of delayed payments. The State also asserts that the amendment was intended to simplify the PFD program, thereby decreasing public confusion and minimizing the many date-related errors that result in missed dividends.

These objectives are legitimate ones, and we reject the Underwoods' argument to the contrary. The Underwoods contend that the cited objectives are not legitimate because they are based on cost savings and efficiency. *See Herrick's Aero–Auto–Aqua Repair Serv. v. State, Dep't of Transp.*, 764 P.2d 1111, 1114 (Alaska 1988) ("[C]ost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis."). However, the challenged legislation here is distinguishable from that in *Herrick's*. It is not justified solely by cost savings that are "achieved by excluding a class of persons from benefits they would otherwise receive." *Id.* (quoting *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 272 (Alaska 1984)). Moreover, the State's goals of improved efficiency and consumer understanding represent different objectives than the mere goal of cost savings discussed in *Herrick's* or in *Brown*. *See id.*; *Brown*, 687 P.2d at 272. We therefore conclude that the goals of the 1992 amendment pass the legitimacy test.

The means-to-ends tailoring of the amendment also satisfies the "fair and substantial relation" test. In arguing to the contrary, the Underwoods largely look to the fact that the State extended the application period for

1. Article I, section 1 of the Alaska Constitution states, "[t]his constitution is dedicated to the principle[] that ... all persons are equal and entitled to equal rights, opportunities, and protection under the law...." Although the parties do not specifically address the issue, the class allegedly subject to disparate treatment under the amendment includes all persons who would have been eligible for a 1993 PFD but for the three month change in the qualifying date.

2. Although the Underwoods acknowledge that the rational basis test ordinarily applies to a person's interest in a PFD, they assert that the 1992 enactment interferes with their right to travel, thereby implicating strict scrutiny analysis. However, the issues in this case do not implicate the right to travel and are properly subject to rational basis review.

1993 PFDs through June 1992.[3] Their argument is that, because the *application* period for 1993 PFDs was extended, the legislature also could and should have extended the *eligibility* period for 1993 PFDs.

However, the extended application period was specifically intended to reduce public confusion resulting from the 1992 statutory amendments, and it is substantially related to the purpose of the legislation. Moreover, the fact that the application time was extended says little about the claims at issue in this case. The State does not assert that it rejected the Underwoods' applications because of the additional burden in processing them. The issue is merely whether the changed qualifying date is fairly and substantially related to the goals of the 1992 amendments. Certainly, the State *could* have elected to permit applicants to achieve the one year residency requirement any time during the extended 1993 application period, thereby resulting in acceptance of the Underwoods' applications. However, the State's decision not to extend the qualifying date along with the application deadline does not mean that the enactment fails to satisfy the fair and substantial relation test. To the contrary, viewing the goals and means of the challenged legislation, we conclude that the State was not constitutionally required to extend the eligibility period for 1993 PFDs simply because it was feasible to do so.

The Underwoods next rely on *Isakson v. Rickey*, 550 P.2d 359, 363–65 (Alaska 1976), to argue that the exclusion of people in their situation from 1993 PFD eligibility fails the fair and substantial relation test. However, *Isakson* does not control the outcome in this case. There, the purpose of the challenged statute was to allocate limited entry commercial fishing permits, with selection to be based upon certain hardship standards. *Id.* at 360. To demonstrate hardship, the statute specified that the applicant must have been the holder of a gear license prior to a cut-off date of January 1, 1973. *Id.* at 360–61. It was assumed that holders of gear licenses obtained after January 1, 1973 could not show hardship. We determined that the January 1, 1973 cut-off date was not fairly and substantially related to identifying the hardship necessary for an entry permit. *Id.* at 365. We found that the cut-off date was both overbroad and underinclusive. It was overbroad because it would include pre-1973 gear license holders who were no longer involved in commercial fishing and could not show hardship; it was underinclusive because it would exclude other persons who actively participated in and were economically dependent upon the fishery. *Id.*

The statute at issue in *Isakson* cannot be logically compared to the challenged amendment in this case. Unlike the extremely loose tailoring in *Isakson*, the action moving the qualifying date for 1993 PFDs by three months is fairly and substantially related to the purpose of simplifying the PFD program in order to decrease public confusion and to improve efficiency and accuracy in administering the program. There is no significant danger of over or underinclusiveness as a result of the State's action.

Because the challenged amendment derives from a legitimate governmental objective, and the means bear a fair and substantial relation to that objective, the 1992 amendment to AS 43.23.005(a) survives minimal scrutiny under Alaska's Constitution. Accordingly, the Underwoods' equal protection claim fails.

2. *Due Process*

[4] The Underwoods next assert that the enactment violated their due process rights because upon their arrival in Alaska in March 1992, they had a vested right to 1993 PFDs, subject only to their continuing residence.[4] We disagree.

3. The PFD application period is governed by AS 43.23.011, which became effective on January 1, 1993 and requires that applications for PFDs be filed between January 2 and March 31 of the dividend year. Chapter 4, section 19(b), SLA 1992 provided that, notwithstanding this section, the application period for 1993 would extend through June 30, 1993.

4. Article I, section 7 of the Alaska Constitution provides:

"No person shall be deprived of life, liberty, or property, without due process of law...." The Fifth Amendment to the United States Constitution contains a similar guarantee.

We are satisfied that this change did not unfairly or unreasonably impinge upon any property rights or settled expectations. Thus, we find that the amendment does not violate the constitutional prohibition against retroactive legislation. The Underwoods' claim on this ground therefore fails. *See, e.g., ARCO Alaska, Inc. v. State*, 824 P.2d 706, 710-12 (Alaska 1992) (upholding a tax law amendment which retroactively applied to a seven month period); *Wien Air Alaska, Inc. v. State, Dep't of Revenue*, 647 P.2d 1087 (Alaska 1982) (assuming the constitutionality of amendments to a tax statute retroactively applying to a six month period).

B. *The State Is Not Equitably Estopped From Denying the Underwoods Their 1993 PFDs.*

[8] The Underwoods lastly claim that the State should be estopped from enforcing the 1992 amendment as to them because they acted in detrimental reliance on the prior law. We reject this claim. In short, the Underwoods undertook a calculated risk when they decided to move to Alaska in March rather than May of 1992. The State engaged in no conduct encouraging this action, or in any way guaranteeing that the Underwoods would qualify for a 1993 PFD if they arrived in March. Thus, while it is unfortunate that the Underwoods' calculated risk did not pay off, the State is not obligated to pay for any losses incurred by the Underwoods as a result of their decision to move to Alaska in March.

III. *CONCLUSION*

The State's amendment to the eligibility statute for 1993 PFDs did not violate the Underwoods' constitutional rights. Nor is the State equitably estopped from denying the Underwoods a 1993 dividend. Accordingly, the superior court's order granting summary judgment in favor of the State is AFFIRMED.

Joseph M. RUDDEN, Appellant,

v.

STATE of Alaska, Appellee.

No. A-4769.

Court of Appeals of Alaska.

Sept. 30, 1994.

Defendant was convicted by jury of attempted first-degree murder of service station mechanic during unprovoked attack following trial in the Superior Court, First Judicial District, Thomas E. Schulz, J. Defendant challenged 35-year sentence on appeal. The Court of Appeals, Bryner, C.J., held that: (1) failing to give greater weight to rehabilitation as sentencing goal was not clear mistake; (2) declining to treat crime as aggravated first-degree assault was not clear mistake; and (3) sentence was not excessive.

Affirmed.

1. Criminal Law ⇐986.2(1)

Determining priority and relationship of various goals of sentencing is primarily a matter for the sentencing court; the court need not emphasize rehabilitation in all cases, or even in all cases involving first offenders.

2. Homicide ⇐358(1)

Emphasizing sentencing goals other than rehabilitation for defendant convicted of attempted murder was not a clear mistake given defendant's poor prospects for rehabilitation and seriousness of crime. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

3. Homicide ⇐358(1)

Declining to treat attempted first-degree murder as aggravated case of first-degree assault during sentencing was not clear mistake given that sentencing judge recognized that victim had not been killed and crime verged on completed act of murder. AS 11.31.100(a), 11.41.100(a)(1), 12.55.125(b).

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arrival in Alaska in
d a vested right to 1993
to their continuing resi-
e.

of the Alaska Constitution

deprived of life, liberty, or
e process of law...." The
the United States Constitu-
lar guarantee.

As of March 31, 1992, the Underwoods had been Alaska residents for approximately six days, far short of the twelve month requirement of AS 43.23.005 as it existed when the Underwoods arrived. At that time, the Underwoods possessed nothing more than an inchoate expectancy of a 1993 PFD that is not afforded constitutional protection. *See Norton v. Alcoholic Beverage Control Bd.*, 695 P.2d 1090, 1092 n. 4 (Alaska 1985) (vested property rights are protected against state action by the due process clauses of the Alaska and United States Constitutions); *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960) (same).

The Underwoods cite to real property cases from other jurisdictions to support their claim that their reliance on AS 43.23.005 at the time of their move to Alaska should give them a vested right in the law as it existed on the date of their move. The Underwoods' analogy between real property transactions and the present case is unpersuasive. Unlike real property situations in which the complaining party indisputably possesses property rights in specific land, the Underwoods had no property right whatsoever in a 1993 PFD.[5] Accordingly, there is no due process violation in this case.

3. *Ex Post Facto Law*

[5] The Underwoods next assert that the 1992 amendment constitutes an ex post facto law in violation of the Alaska Constitution.[6] An ex post facto law is a law "'passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.'" *Danks v. State*, 619 P.2d 720, 722 n. 3 (Alaska 1980) (quoting *Black's Law Dictionary* 520 (5th ed. 1979)).

[6, 7] In determining whether a statute affecting pre-enactment conduct is unconstitutionally retrospective, one inquiry is into whether the statute affects vested rights. *See Norton*, 695 P.2d at 1092; *see also Black's Law Dictionary* 1317–18 (6th ed. 1990) (A "retrospective" or "retroactive" law is generally defined as a law which "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect to transactions or considerations already past.") (citation omitted). The Underwoods had no vested right to a 1993 PFD as of March 31, 1992, just as no Alaskan had a vested right to a 1993 dividend at that time.[7] Therefore, under a vested rights inquiry, the amendment clearly does not constitute an impermissible ex post facto law in violation of the Alaska Constitution. *See Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 587, 574 n. 12 (Alaska 1989) (a statutory change which merely disappoints economic expectations and does not affect vested rights is not an ex post facto law).

The Underwoods alternatively urge us to reject a vested rights inquiry and instead review the challenged enactment for fairness and reasonableness. *See Norton*, 695 P.2d at 1092–93 (noting the deficiencies of the vested rights analysis in determining whether a statute is in fact retroactive and whether it is unconstitutional); 2 Norman J. Singer, *Sutherland Statutory Construction* § 41.05, at 369–71 (5th ed. 1993) (fairness considerations represent a more meaningful standard of evaluating retroactive laws than a vested rights analysis). Even under such a standard, however, we find that the 1992 amendment at issue in this case withstands constitutional scrutiny.

The effective date of the 1992 amendment to AS 43.23.005 was January 1, 1993. The amendment made state residency during calendar year 1992 relevant to eligibility for a 1993 PFD, thereby bearing some relation to events dating back to January 1, 1992, instead of April 1, 1992 as under the prior law.

5. Similarly, because the Underwoods had nothing more than an inchoate expectancy of a 1993 PFD, they had no property that could have been the subject of a taking in violation of the Fifth Amendment of the Federal Constitution and Article I, section 18 of the Alaska Constitution. Accordingly, this argument also fails.

6. Article I, section 15 of the Alaska Constitution provides that "[n]o bill of attainder or ex post facto law shall be passed...."

7. In fact, because the entire dividend program is a creature of the legislature, it could have been abolished during the 1992 legislative session, so that no Alaskan received a 1993 PFD.

HB

504

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 April 27, 2002

SUBJECT: Lodging and board deductions from wages
(Work Order No. 22-LS1595\BA.1)

TO: Senator Ben Stevens
Attn: Deborah Grundmann

FROM: Barbara R. Craver
Legislative Counsel

BRC/bgt

You have asked for an amendment to CSHB 540(FIN) am to clarify the legislature's policy that an employer must be allowed to deduct lodging or board from an employee's wages if it is customary in a certain industry. CSHB 540(FIN) am only applies to fisheries businesses. The amendment you propose would apply to any business where board or lodging is customarily furnished by the employer. This is the reason why the title of the bill must be changed, as it is not restricted to "wages of people working in the fisheries business." A title change resolution will be needed to suspend the uniform rules if this amendment is adopted.

Currently the language in AS 23.10.085(c) permits the director to determine in which industries deductions for board or lodging shall be allowed. The regulation concerning reductions from wages, 8 AAC 15.160, appropriately contains much more detail than the statute. Additional conditions are imposed upon an employer wishing to make board or lodging deductions in an occupation where board or lodging is customarily furnished by the employer such as: other board and lodging must be available at the worksite; the employee must agree in writing prior to employment to the deduction from wages; and the charge for lodging and board must be reasonable and without profit to the employer.[1]

---

[1] 8 AAC 15.160 . . .
(d) Nothing in (a) of this section [including a deduction which would reduce a wage below the statutory minimum] prohibits deductions from earnings, based on a written agreement, to reimburse an employer for the reasonable cost of furnishing board and lodging, if

(1) alternative public board and lodging facilities are accessible to the worksite and the employee has declined to use such facilities;

(2) the board and lodging facilities of the employer are customarily furnished by the employer and used by the employees; and

(3) the cost to the employee for the use of the employer's board and lodging facilities, is reasonable and without profit to the employer.

The permissive language in AS 23.10.085(c) does not require that regulations allow employers to deduct board or lodging. If this amendment were adopted, the requirement of alternate board and lodging available to employees (8 AAC15.160(d)(1)) would have to be removed.

It shall continue to be up to regulations to determine what the reasonable cost would be for each industry. CSHB 540(FIN) am sets in place a presumed reasonable deduction of $15 a day for both board and lodging in the fisheries business. Currently the regulations require an audit and review by the department of the employer's proposed charges, expenses, and the net profit, if any, to the employer before the employer can make a deduction from wages.

I would like to caution you that there might be a way to thwart the legislature's intent of allowing employers to deduct board or lodging from employee's wages even if this amendment is adopted. Consider the entirety of AS 23.10.085:

> Sec. 23.10.085. Scope of administrative regulations.
>
> (a) The director may adopt, amend, or rescind administrative regulations not inconsistent with the purposes and provisions of AS 23.10.050 - 23.10.150 that are necessary for the administration of AS 23.10.050 - 23.10.150.
>
> (b) The regulations may, without limiting the generality of (a) of this section, define terms used in AS 23.10.050 - 23.10.150, and restrict or prohibit industrial homework or other acts or practices that the director finds appropriate to carry out the purpose of AS 23.10.050 - 23.10.150, or to prevent the circumvention or evasion of AS 23.10.050 - 23.10.150.
>
> (c) The regulations may permit deductions by an employer from the minimum wage applicable under AS 23.10.050 - 23.10.150 to employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

(e) Unless the employer and the employee have executed a written agreement as described in (d) of this section, at the time of hire, the employer is prohibited from seeking to retroactively deduct the cost of board and lodging as an offset against wages due upon termination or wage deficiencies subject to collection by the department.

(f) The director will make the determination regarding the cost of board and lodging under (d)(3) of this section. The determination will be made in accordance with 29 C.F.R. 531.3 - 531.5 and 531.29 - 531.35.

Even if (c) is amended to require the regulations to permit deductions for board or lodging the director retains discretion under (a) not to adopt regulations at all.

An alternate amendment, which would directly permit, by statute, an employer to deduct the reasonable costs of board or lodging, is set out below. A title change and a title change resolution would still be needed:

Page 2, following line 1:
Insert new bill sections to read:

"* **Sec. 2.** AS 23.10 is amended by adding a new section to read:

Sec. 23.10.073. Deductions for board and lodging. An employer may deduct from the minimum wage applicable under AS 23.10.050 - 23.10.150 paid to an employee an amount that is reasonable and without profit to the employer for the cost of board and lodging the employer furnishes to the employee if the board or lodging is customarily furnished by the employer and used by the employee.

* **Sec. 3.** AS 23.10.085(c) is repealed."

If I may be of further assistance, please advise.

BRC:med:lmb
02-432.med

22-LS1595\BA.1
Craver
4/26/02

AMENDMENT

OFFERED IN THE SENATE

TO: CSHB 504(FIN) am

Page 1, line 1, following "**business**":

Insert "**; and permitting employers to deduct the cost of board and lodging from wages**"

Page 2, following line 1:

Insert a new bill section to read:

"* **Sec. 2.** AS 23.10.085(c) is amended to read:

(c) The regulations **shall** [MAY] permit deductions by an employer from the minimum wage applicable under AS 23.10.050 - 23.10.150 to employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee."

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 504 (FIN)
(H) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Labor & Workforce Dev.
Title: Minimum Wage for Workers in Fisheries
BRU: Labor Standards & Safety
Component: Wage & Hour
Sponsor: House Rules
Requester:
Component Number: 345

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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 EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Representative Eldon Mulder
Co-Chair
Phone 465-2647/465-3424

Representative Bill Williams
Co-Chair
Date

COPY

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

GLOBEN A. DIAZ,

For Himself and On Behalf of All Others Similarly Situated

Plaintiffs,

v.

SILVER BAY LOGGING, INC.,

Defendant.

Case No. 1JU-98-1521 Civil

VIDEOTAPED

DEPOSITION OF DONALD R. WILSON

Taken: April 7, 1999

Place: Juneau, Alaska

employer. Employee must receive the benefit, if this is to be deducted," et cetera.

Does that comport with your understanding of 8 AAC 15.160(d), the three point test, or not?

12:05 A. What is the three point test? I am trying to pull this out of here. Is the three point test that room and board must be at actual cost? Is that a point? Is that what he is saying? With no profit to the employer? Is that a point?

12:18 MS. TATSUDA: I guess I'll object to the question. It's hearsay.

12:18 Q. I can't --

12:18 A. I don't know what Randy is talking about, a three point test.

12:20 MS. TATSUDA: Calling for hearsay. The question calls for hearsay.

12:24 A. What is this three point test?

12:27 Q. All right. Let me ask you the question. If we assume that the three points of (d)(1), (2), and (3) are the three point test -- make that assumption that --

12:37 A. Oh, oh.

12:39 Q. -- (d)(1), (2), and (3) constitutes the three point test --

18:22:43 MS. TATSUDA: Objection. States facts not in the evident.

18:22:46 Q. Make the assumption for me that the three point test is --

18:22:47 MS. TATSUDA: Calls for speculation.

18:22:49 Q. -- is (d)(1), (2), and (3). Is it your understanding that if you meet the three point test, that is, alternative housing, a choice was given if it was accessible, the costs were reasonable, so on and so forth, that deductions may be made below minimum wage and overtime?

18:23:24 A. At a remote site?

18:23:28 Q. Let's start with that, a remote site.

18:23:41 A. Assuming that the three point test is (1), (2), and (3)?

My answer to this, I guess, would be you don't touch the minimum wage, regardless. In other words, just because -- okay. If (1), (2), and (3) are a part -- I don't think you can take it below the minimum wage, regardless. You can't touch the minimum wage. You can't tamper with the minimum wage.

18:25:00 Q. Okay. That was your understanding of the regulation?

18:25:00 A. I believe so, yes.

18:25:02 Q. Okay.

1:30:43 A. Right.

In other words, if I own a motel and I have a room I rent to the public for $65 a month, I probably arrived at the cost of that $65 a month based on what it cost me to build the place, amortizing loans, and all the other things that go into this, the cost of utilities, and the cost of repair and various things, and I come up with all these kind of costs and everything and this would cost me. And if I charge that, I simply pay my bills, and I don't make any money. So then I tack on top of that a few more bucks, so that I make a profit. Okay? Well, when I start tacking those few more bucks on top of the cost of that room that I charge the public for, I can't do that to my employees, because then I am tacking those dollars on to make a profit.

Does that make any sense?

1:31:41 Q. Yeah, that makes sense.

I think, in the interest of wrapping it up and in not stumbling over specific documents, and at the risk of doing an asked-and-answered objection, which I will risk, describe for me in one paragraph, if you will, what did -- what did 8 AAC 15.160(d) do that was not already done by statute? Why is it -- why is it there?

1984 Dept Law

32:20 A. Because the statute is very limiting in its language. It is limiting in the sense that it doesn't give a full guidance.

Very few statutes are ever constructed that way, long paragraph. And that's why you have regulations. And the whole purpose of that 160(d) was to say that deductions can be made, we want to -- the statute says you can make deductions, it says you can make deductions, and here are the circumstances under which you can make the deductions and the limits that you have to stay within.

33:13 Q. Did I have to stay within those limits, those limits of subsection (d), for any room and board deductions?

33:43 A. Yes. You have to stay within those limits when you are making deductions for room and board, because you have put the employee in a position where he has to make a choice. And in making that choice in consideration of the conditions, you are facilitating both you and him. You are trying to give the man a job, you are trying to make a profit for yourself, but you shouldn't be necessarily making that profit off of the employee. You have got to be reasonable, and you have got to give him those reasonable kind of costs. But you are doing business, and it is not a giveaway.

Particularly, where there is a choice concerned, where -- soldiers don't have a choice. They are conscripted or they voluntarily enlist. You know, I mean, they are there. Prisoners don't have a choice, you know. That is why none of these laws apply to these people. But in a free society, where I am free to make a choice, whether it is a choice, in this case, between taking public housing that is available or taking an employer's housing that is available, I am making a choice. It is a free society, it is a free choice; and it is not coerced, and it is not induced. Or in making a choice on whether to take the job at a remote location because there is no other housing and such available, and I know in taking that choice I am going to carry part of the weight of feeding and housing myself, because I do that anyplace I went, anyway, and that being there is as much a benefit to me as it is to the employer, because none of us would be out there working if it weren't there. The employer would not have a camp, I wouldn't have a job, and nothing would turn. The wheels would not turn.

That is how I look at things. When I did this, this is how I look at things.

I don't put heavy onus on people.

You know, everybody works together, and they do things together, darn it. And there is a right and a wrong in every situation. And that is the way I worked on these things. And that was my intent all the way through. I never expected anybody to carry the full load.

Now, I don't know what to tell you.

11:36:22 Q. You never expected anybody to carry the full load? Could you --

11:36:26 A. Well, it's when I went back -- when I went back to --

11:36:27 Q. -- rephrase that, so I can understand more precisely what you are saying?

11:36:31 A. Well, I will go back and say it again. That where you have got a chance to make a choice, everybody is going to carry some load.

11:36:39 Q. Everybody, employees and employers, or --

11:36:40 A. Sure. Everybody has got to carry some of the load, yeah. What is wrong with that?

11:36:48 Q. I have nothing further.

FURTHER EXAMINATION

11:36:53 BY MS. TATSUDA:

STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
9-

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA IV

FIRST JUDICIAL DISTRICT AT JUNEAU

GLOBEN A. DIAZ,
For Himself and on Behalf of All Others
Similarly Situated,

Plaintiffs,

vs.

SILVER BAY LOGGING, INC.,

Defendant.

Case no. 1JU-98-1521 CI

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the court on defendant Silver Bay Logging's motion for partial summary judgment. The question presented is whether Silver Bay Logging's deductions from employee wages for board and lodging, made pursuant to a written agreement between the parties, were lawful under 8 AAC 15.160. This requires an interpretation of the meaning of that regulation. While the court addresses the legal question of interpretation in this memorandum, summary judgment is inappropriate at this time. Summary judgment is granted only where the evidence in the record fails to disclose a genuine issue of material fact and the moving party is entitled to judgment as a matter of

law.[1] In considering a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party.[2] Because plaintiffs say there exist genuine issues of material fact and they have not had the opportunity for discovery, summary judgment is not decided at this time and further discovery is allowed.

II. GENERAL BACKGROUND

Globen A. Diaz, as the named plaintiff, has brought a class action lawsuit against his former employer, Silver Bay Logging ("SBL"). The class has not yet been certified. In his complaint, he seeks damages for unlawful deductions from wages by SBL; damages for unpaid overtime compensation; liquidated damages equal to unpaid wages; statutory penalties; and an award of costs and attorney's fees.[3] SBL's motion for partial summary judgment was filed only as to the question of unlawful deductions. On February 3, 1999, the court ordered a stay of all discovery except with regard to the proper interpretation of 8 AAC 15.160 and its authorizing statutes.[4] Oral arguments were heard on September 10, 1999.

For the purposes of this motion, the following facts are viewed in the light most favorable to Diaz.[5] Diaz was an employee of SBL during the 1994 through 1997 logging

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[1] Mathis v. Sauser, 942 P.2d 1117, 1120 (AK 1997).
[2] Id.
[3] Complaint at 1.
[4] Scheduling and Discovery Order filed February 8, 1999.
[5] Alaska R. Civ. P. 56(a).

seasons. He and the other members of the class were assigned to remote logging sites in Alaska. SBL provided its employees with board and lodging at these remote sites. Prior to beginning employment, each employee was required to authorize, in a written agreement, the deduction of $10.00 per day as payment for board and lodging at SBL's facilities. There were no alternative public lodging facilities accessible within 50 road miles of the logging site. Over the course of Diaz's employment, he estimates that $6,500.00 was withheld from his wages alone for board and lodging. Since 1992, Diaz estimates that more than $1,000,000.00 has been withheld from the wages of the class. Factual disputes may exist as to whether the deductions taken reduced any employee's wage below the applicable minimum wage, whether the amount of the deduction was reasonable and whether Diaz took his wages "free and clear." None of these matters needs to be resolved in order to answer the question presented regarding the meaning of 8 AAC 15.160. Drawing all inferences in favor of Diaz and against SBL does not change the analysis of the meaning of 8 AAC 15.160. Rather the meaning of the regulation is necessary in order to apply those facts to the law.

III. DISCUSSION

1. Summary of Defendant's Argument

SBL contends that wage deductions for room and board are lawful where they do not reduce an employee's wage below the applicable minimum wage per 8 AAC 15.160(a). Under SBL's interpretation, 8 AAC 15.160(d) is applicable only where there is a choice of facilities and not at remote sites where there is no choice. SBL claims that there is

no agency expertise or fundamental policymaking involved and that substitution of judgment is the proper standard of review.[6] Further, SBL argues that the written agreement is merely a condition on an offer of employment, that there is no "entitlement" to compensation prior to being hired and doing some work, and that 8 AAC 15.160(a) does not prohibit conditioning job offers on accepting such terms of employment.[7]

2. Summary of Plaintiff's Argument

Diaz claims that SBL's deductions from his wages for board and lodging are unlawful. He bases that conclusion on the Department of Labor's ("DOL") interpretation of 8 AAC 15.160. Under this interpretation, such deductions are proper only where (1) the employee has a choice between the employer's facility and alternate public facilities, (2) the facilities are customarily furnished by the employer and used by employees, and (3) the cost is reasonable and without profit to the employer.[8] Diaz argues that the background of the promulgation and revisions of 8 AAC 15.160 together with Wage and Hour Opinion letters establishes that this is agency policymaking requiring judicial deference.[9] Diaz also claims that the written agreement is unlawful because it is a "condition of employment" and

[6] Defendant Supplemental Reply at 5-8.
[7] Defendant Reply in Support at 21-25.
[8] Plaintiff Opposition at 7.
[9] Plaintiff Supplemental Opposition at 23.

therefore violates 8 AAC 15.160(a) which prohibits an employer from requiring an employee to give up, under duress, any part of the compensation to which the employee is entitled.[10]

3. Applicable Law

a. Statutory Grant of Rulemaking Authority by the Legislature to DOL

The Alaska Wage and Hour Act ("AWHA"), section AS 23.10.085(a), grants rulemaking authority on the director of the Department of Labor. It states that:

> The director may adopt, amend, or rescind administrative regulations not inconsistent with the purposes and provisions of AS 23.10.050 - 23.10.150 that are necessary for the administration of AS 23.10.050 - 23.10.150.

The language of AS 23.10.085(c) is clearly permissive with regard to deductions for board and lodging. It states:

> The regulations may permit deductions by an employer from the minimum wage applicable under AS 23.10.050 - 23.10.150 to employees for the reasonable cost, as determined by the director on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.

b. Deductions from Employee Wages

8 AAC 15.160 provides for deductions from an employee's wages. It states in pertinent part:

> (a) AS 23.10.085(c) does not limit the right of an employer and employee to enter into a written agreement to provide for deductions of monetary obligations of an employee. Requiring or inducing an employee to return or give up any part of the compensation to which the employee is entitled, whether by force, intimidation, or threat of dismissal from employment, or by any other manner, is prohibited. A written agreement for deductions payable to the employer or person

[10] Plaintiff Opposition at 12.

acting in the employer's behalf or interest is not valid if it would have the effect of reducing an employee's wage rate below the statutory minimum, or if it would require an employee to reimburse the employer for any of the following:

...

(d) Nothing in (a) of this section prohibits deductions from earnings, based on a written agreement, to reimburse an employer for the reasonable cost of furnishing board and lodging, if

(1) alternative public board and lodging facilities are accessible to the work site and the employee has declined to use such facilities;
(2) the board and lodging facilities of the employer are customarily furnished by the employer and used by the employees; and
(3) the cost to the employee for the use of the employer's board and lodging facilities, is reasonable and without profit to the employer.

...

4. Standard of Review

Four standards of review of administrative decisions have been recognized in Alaska.[11] Questions of law which do not involve agency expertise require application of the "substitution of judgment" standard.[12] It is well settled that "an agency's interpretation of its own regulation presents a question of law."[13]

Since the interpretation of 8 AAC 15.160(d) does not implicate agency expertise or fundamental policymaking, no deference is required and the court may substitute its own judgment.[14] The record shows a history of competing interpretations by the DOL.

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[11] In this case, it is not the validity of the regulation itself that is at issue, although defendant suggests that notice may not have been proper should the court find that Diaz's interpretation is correct. Whether the procedures of the Alaska Administrative Procedure Act were followed is not an issue before the court in this motion. Rather, it is the validity of the interpretation of the regulation put forth by Diaz that is at issue. There is no agency interpretation specific to the facts in this case for the court to assess, although the agency has interpreted the regulation on other occasions.

[12] Handley v. State, Dept. of Revenue, 838 P.2d 1231, 1233 (Alaska 1992).

[13] Rose v. Commercial Fisheries Entry Comm'n., 647 P.2d 154, 161 (Alaska 1982).

[14] Id; Madison v. Alaska Dept. of Fish and Game, 696 P.2d 168, 173 (Alaska 1985).

The matter involves no agency expertise or fundamental policymaking. Rather, it is a question of statutory and regulatory interpretation. Therefore, this court interprets the regulation independently. Since it is legislative in character, it is to be "interpreted using the same principles applicable to statutes."[15] When interpreting a statute, the court is to "adopt the most persuasive rule of law in light of precedent, reason, and policy."[16]

5. Interpretation of the Regulation

SBL argues that 8 AAC 15.160 arises out of and implements AS 23.10.085(c).[17] Under SBL's interpretation, subsection (a) is a general rule, and subsections (b) through (d) establish exceptions to (a) and allow deductions which do reduce an employee's wage below the statutory minimum so long as all the "if" clauses of the applicable subsection are met.[18] SBL also argues that if subsection (d) is in fact the general rule for all board and lodging deductions then it would render the regulation invalid because it was never the intent of the legislature to tie all such deductions to the existence of alternative housing.[19] If the interpretation is as Diaz claims, SBL finds that the regulation is *ultra vires*. SBL finds no authority for the agency to prohibit employers from securing reimbursement irrespective of its impact on wages.[20]

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[15] Piquniq Management Corp. v. Reeves, 965 P.2d 732, 734 n. 5 (Alaska 1998), citing State, Dept. of Highways v. Green, 586 P.2d 595, 603 n. 24 (Alaska 1978).
[16] Piquniq at 734 n.5.
[17] Defendant Motion for Summary Judgment at 6.
[18] Id.
[19] Id. at 12.
[20] Id. at 13-14.

Diaz argues that the regulation makes clear that deductions from employee wages are disfavored and that subsection (a) generally prohibits such deductions while the other subsections provide alternate rules that allow for deductions only in special circumstances.[21] Diaz reads the first sentence of 8 AAC 15.160(a) as an "interpretive rule" and not a regulation that authorizes broad authority to make wage deductions; it merely explains that the statute should not be read to prohibit the director from adopting regulations governing deductions not specifically included in the statute.[22] Diaz also contends that subsection (d) allows board and lodging deductions only when all three of its requirements are met.

While these are both possible interpretations, they are contrary to the language and legislative history of AS 23.10.085(c) as well as subsections (a) and (d) of the regulation. Neither the regulation nor the statute expressly addresses board and lodging deductions from employee wages at remote work sites where only the employer's facility is available. Whether that silence means that such deductions are prohibited is at the heart of this motion. "The objective of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others."[23] Because the prior interpretations of the regulation conflict, the court interprets it in light of its enabling

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[21] Plaintiff Opposition at 9.
[22] Id. at 13.
[23] City of Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1271, 1276 (Alaska 1994) (citations omitted).

statute, looking to the purpose of AS 23.10.085(c) and 8 AAC 15.160, and to legislative history and finds that board and lodging deductions at remote sites where no alternative public facilities are available should be allowed where such facilities are customarily furnished and the cost is reasonable and without profit to the employer.

The purpose of the AWHA is to "establish minimum wage and overtime compensation standards ... and [to] safeguard existing minimum wage and overtime compensation standards that are adequate to maintain the health, efficiency and general well-being of workers...".[24] In furtherance of this purpose, the agency has been granted authority to promulgate regulations "not inconsistent with" and that are necessary for the administration of the AWHA.[25] The enabling statute specifically authorizes the director to "permit deductions by an employer from the minimum wage ... to employees for the reasonable cost ... of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee.[26] The language of AS 23.10.085(c) is permissive with regard to allowing board and lodging deductions.[27]

Reading the language of the regulation in light of its enabling statute supports a finding, as a matter of law, that the regulation does not preclude the deduction of board and lodging costs from employee wages at remote sites where no alternative public facilities are

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[24] AS 23.10.050.
[25] AS 23.10.085.
[26] AS 23.10.085(c).
[27] "The regulations may permit deductions by an employer from the minimum wage. . . ."

available. The legislative history indicates that the language in this section of the Wage and Hour Act was left virtually untouched from its inception. The statute takes the language of the Act verbatim [28] It specifically grants authority to the agency for promulgating regulations allowing deductions from the minimum wage for board and lodging costs. The regulation states specifically that AS 23.10.085(c) does not limit the right of an employer and employee to enter into a written agreement to provide for deductions for monetary obligations of the employee.[29] The regulation does prohibit such agreements where they are made by force, threat, or intimidation. Subsection (a) of 8 AAC 15.160 and its reference to AS 23.10.085(c) concerns allowing board and lodging deductions generally. The regulation goes on to provide for situations in which other costs may or may not be deducted based on agency determination. Subsection (b) addresses a non-board/lodging cost (deductions to third parties) that the agency has determined may be deducted from wages under the proper conditions, as does subsection (c) (transportation).[30] Subsection (d) addresses the conditions

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[28] AS 23.10.085(c).

[29] 8 AAC 15.160(a).

[30] 8 AAC 15.160(b): Nothing in (a) of this section prohibits deductions from earnings based on a written agreement, if the employer has been directed by the employee to pay a sum for the benefit of that employee to a creditor, donee, or other third party. Neither the employer nor any person acting in the employer's behalf or interest may derive any profit or benefit from the transaction.

8 AAC 15.160(c): Nothing in (a) of this section prohibits deductions from earnings based on a written agreement to reimburse an employer for transportation from the place of hire to the place of employment when such transportation is incidental to a recruiting program, if the deduction does not

(1) reduce the employee's wages below the statutory minimum; or
(2) reduce the overtime compensation rate below one and one-half times the contractual rate of pay.

under which board and lodging deductions may be made. It includes three subsections. Subsection (d)(1) requires both the existence of alternative public facilities and the employee's consent to use the employer facility. If there is no alternative facility available, then the employee can not decline its use and subsection (d) either becomes moot, the deduction must be prohibited, or the requirements of subsections (2) and (3) must be met. Because language of the regulation expressly joins subsections (2) and (3) with the word "and," the latter is the correct interpretation.

The regulation should be read as allowing board and lodging deductions in the following circumstances: a) if alternate public facilities are available then (d)(1) is applicable and (d)(1), (d)(2), and (d)(3) must be satisfied; or b) if there are no alternate public facilities available then (d)(1) does not apply and (d)(2) and (d)(3) both must be satisfied. Diaz's position, while consistent with the current agency interpretation, is not consistent with, nor does it take into account the permissive nature of AS 23.10.085(c) and 8 AAC 15.160 with regard to board and lodging deductions. It is also arguable that the interpretation espoused by Diaz renders 8 AAC 15.160(d) invalid as beyond the grant of authority to the DOL to promulgate regulations protecting the minimum wage. Contrary to SBL's interpretation which makes subsection (d) inapposite where there are no alternate facilities available, 8 AAC 15.160(d) applies to all deductions for board and lodging. The court therefore interprets the regulation to mean that board and lodging deductions are allowable either where an employee chooses the employer housing when there is a choice between that and public

housing, or, where there are no alternate facilities available, the employer-provided facilities are customarily furnished by the employer and the cost for its use is reasonable and without profit to the employer.

6. The Written Agreement is a Lawful Condition for an Offer of Employment

The parties dispute whether, under the second sentence of 8 AAC 15.160(a),[31] it is lawful to condition an offer of employment on an agreement by a prospective employee to the deduction of board and lodging costs from his wages. SBL argues that such an agreement is not precluded by the regulation and that it is a valid condition on an offer of employment that a prospective employee accepts when he accepts the job after being fully informed of the condition. SBL finds no expertise or policy formulation behind this interpretation in that such a condition does provide a choice and is lawful.[32] On the other hand, Diaz finds this to be a involuntary agreement contrary to the requirement that there be no force, intimidation or threat of dismissal in agreeing to wage deductions.[33]

The AWHA and the regulations promulgated under it were enacted to establish and safeguard minimum wage and overtime compensation standards that can adequately

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[31] "Requiring or inducing an employee to return or give up any part of the compensation to which the employee is entitled, whether by force, intimidation, or threat of dismissal from employment, or by any other manner, is prohibited."

[32] Defendant Supplemental Reply at 23 - 25.

[33] Plaintiff Opposition at 12.

protect and maintain adequate health, efficiency, and general well being of workers.[34] There is no indication that there was an intent to preclude an employer from conditioning an offer of employment on the acceptance of specific work conditions by the employee. The terms of 8 AAC 15.160(a) apply only where the employer/employee relationship has commenced. Prior to accepting and commencing employment with SBL, Diaz was not "entitled" to any remuneration because he was not yet an employee of SBL and had not performed any services for them. Also, contrary to Diaz's claim, his agreement with SBL was not made with "force, intimidation, or threat of dismissal ... or any other manner..." under 8 AAC 15.160(a). The court agrees with SBL that hiring and firing are not similar circumstances and that conditioning employment on acceptance of SBL's terms for board and lodging does not, on its face, constitute force, intimidation or "any other manner" under 8 AAC 15.160(a).

Although a case decided under the Federal Labor Standards Act, Lopez v. Rodriguez sheds light on what constitutes voluntary and uncoerced acceptance of a condition of employment where the "living-in" aspect of the job is an integral part of the job.[35] In Lopez, a resident alien who had obtained employment as a professional housekeeper, won a judgment for unpaid minimum wages against her employer. The court of appeals found that the district court had erred in denying the employers credit for board and lodging furnished to the employee on the ground that the employee's acceptance of the job was coerced and not

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[34] AS 23.10.050.
[35] 668 F.2d 1376 (D.C. Cir. 1981).

voluntary. The court of appeals held that voluntary acceptance of a job that required that the employee "live-in" in order to do the job, where the employee understood that requirement prior to accepting the job, indicated voluntary "acceptance of the lawful conditions of employment."[36] The court distinguished three other cases where the prospective employee could have chosen to live elsewhere and still performed the job.[37]

This construction of what constitutes voluntary and uncoerced acceptance of a lawful condition of employment in an offer of employment makes sense. There is no authority stating that the condition required by SBL is unlawful. The AWHA was not enacted to prevent employers and employees from entering lawful contracts. It does however preclude the imposition of coercive conditions regarding wage deductions after the employment relationship has arisen. In this case, it appears that the condition of employment was entered into voluntarily since Diaz accepted the seasonal position several years in a row. It also appears that the condition was not changed during the employment contract.

IV. CONCLUSION

The court finds as a matter of law, in light of precedent, reason and policy, that 8 AAC 15.160 does not prohibit deductions for board and lodging costs from employee wages at remote sites where alternative public facilities are not available so long as the requirements of 8 AAC 15.160(d)(2) and (d)(3) are met. The court also finds that 8 AAC

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[36] Id. at 1380.
[37] Id.

15.160(d)(1) addresses such deductions in the specific circumstance where the employee does have a choice between employer provided housing and alternative housing and does not preclude deductions where such a choice does not exist. Further, requiring deductions for room and board as a condition of employment, where the requirements of 8 AAC 15.160 are met, is lawful.

The court defers a decision on the summary judgment motion at this time to allow for additional discovery pursuant to Alaska R. Civ. P. 56(f). Plaintiff shall have 120 days from the date of this order to conduct further discovery and to file any additional materials in opposition to the motion.

Dated this 29TH day of September, 1999, at Juneau, Alaska.

Larry R. Weeks
Superior Court Judge

I certify that on the 30th day of September 1999, I served the above order on the following parties: Laurel Jatsuda - mail
David Walker - ct-box
W. Ruddy - ct-box

Tracy Ver Velde
Secretary to Judge Weeks

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **CSHB 504(L&C)**
() Publish Date:

Revision Date/Time (Note if correction):
Department: **Labor and Workforce Development**
Title: **Minimum Wage for Workers in Fisheries**
BRU: **Labor Standards & Safety**
Component: **Wage & Hour**

Sponsor: **House Rules**
Requester: **House L&C**
Component Number: **345**

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	13.1	13.1	13.1	13.1	13.1	13.1
Travel	1.5	1.5	1.5	1.5	1.5	1.5
Contractual	3.5	3.5	3.5	3.5	3.5	3.5
Supplies	3.5	0.5	0.5	0.5	0.5	0.5
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	21.6	18.6	18.6	18.6	18.6	18.6
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	21.6	18.6	18.6	18.6	18.6	18.6
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	21.6	18.6	18.6	18.6	18.6	18.6

Estimate of any current year (FY2002) cost: None

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time	0.25	0.25	0.25	0.25	0.25	0.25
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

See Attached Analysis

Prepared by: **Richard A. Mastriano, Director** Phone: **269-4919**
Division: **Labor Standards & Safety** Date/Time: **4/12/02 4:40 PM**
Approved by: **Ed Flanagan, Commissioner** Date: **04/12/02**
Agency: **Department of Labor and Workforce Development**

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)

ANALYSIS: (continued)

The division assumes that a substantial percentage of remote fish processors will choose to take advantage of the flat-rate provision in the bill; however, a significant portion are expected to elect the "reasonable costs" alternative.

This bill amends AS 23.10 by adding a new section concerning wages for fisheries businesses. The amendment allows employers engaged in fisheries businesses, as defined in AS 43.75.290, to deduct from the applicable minimum wage paid to an employee costs associated with board and lodging. These deductions are based on a written agreement with the employee, and the costs of board and lodging are to be reasonable and without profit to the employer. Additionally, the board and facilities are those customarily furnished by employers and used by employees.

The "reasonable costs ... without profit" would be subject to interpretation and would require close oversight on the part of the department. At least one new half-time Wage and Hour Investigator position in Anchorage will be necessary for six months per year to conduct the complex audits required to determine actual costs to the employer for the purpose of validating a deduction.

In order to perform these audits, the investigator must travel to the employer's business locations where employees are housed to verify the charged expenses. These business locations are frequently in remote areas requiring travel to visit them.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: CSHB 504 (FIN)
(H) Publish Date:

Revision Date/Time (Note if correction):
Title: Minimum Wage for Workers in Fisheries
Sponsor: House Rules
Requester:

Dept. Affected: Labor & Workforce Dev.
BRU: Labor Standards & Safety
Component: Wage & Hour
Component Number: 345

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
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 EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Representative Eldon Mulder, Co-Chair — Phone 465-2647/465-3424
Representative Bill Williams, Co-Chair — Date

ALASKA STATE LEGISLATURE

Representative Pete Kott, Chair
Representative Brian Porter
Representative Vic Kohring
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House of Representatives
Rules Committee

Sponsor Statement for HB 504

Since statehood, when the Alaska Wage & Hour Act was adopted, it had long been established that some Alaskan businesses, such as fisheries, operate under unique circumstances. In response, for authorized occupations that customarily furnished board and lodging, The Act, provided a mechanism for some flexibility in terms of paying wages.

> **AS 23.10.085 (c)** provides that "the regulations may permit deductions by an employer from the minimum wage to employees for the reasonable cost as determined on an occupation basis, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee."

Because of a conventionally modest minimum wage, the fishery business has rarely asserted the statutory option laid out in AS 23.10.085. As a matter of course, fisheries businesses pay their workers at, or slightly above the minimum wage for their regular 8-hour day, plus overtime paid at time and a half. In addition to their earnings, in many locations of the state, fishery workers are customarily furnished room and board for the term of their employment.

For the past 40 years, that arrangement worked quite well for both the fishery employer and employee. However, with the minimum wage poised to increase by 26.5% and annual adjustments for the cost of living, Alaska's beleaguered fisheries industry faces unprecedented financial disaster on all fronts. This industry can no longer absorb the cost of board and lodging at no cost to the employee.

The Wage and Hour Act authorizes deductions by an employer from the minimum wage payable to employees for the reasonable cost for furnishing board or lodging that is customarily provided. The enabling regulations allow for deductions below the minimum wage, based upon a written agreement at the time of hire, for the reasonable cost without profit to the employer. However, the regulations, as written, do not treat seafood processing sites equally. Plants located in remote locations in the state are specifically excluded by the Department of Labor's regulations. In other words, a facility located in Petersburg can deduct room and board but a facility located in Akutan may not.

In order to insure that the fisheries business can rely on the clear language of the Wage and Hour Act, the regulations need to be cleaned up and compiled into a new section of the statute.

HB 504 utilizes language from 8 AAC 15.160 (d) to provide:

- the fishery employer and employee to contract the hourly wage that may be lower than the a minimum wage in consideration for accommodations that are customarily provided to their employees.
- The deduction will be presumed to be up to $15 each day for combined room and board.
- The department shall allow a deduction higher than $15 each day if the employer demonstrates to the department that the combined room and board is reasonable and without profit to the employer.

HB 504

An Act relating to the wages of people working in the fisheries business.

HB 504 has been introduced by request of Alaska's seafood processing industry that seeks intervention by the Alaska Legislature in overcoming regulatory impediments that preclude its benefiting from provision of Alaska statutes that originate in federal and common law. Alaska statutes permit an employer to take a credit the value of board or lodging as credit against payment of wages. It some situations, it authorizes deducting the reasonable cost of room and board from the minimum wage regardless of their urban or rural setting. Meanwhile, the Alaska Department of Labor permits this deduction only in areas where alternative public housing exists. Effectively, this precludes Alaska's remote seafood processors from using this just provision.

With the minimum wage set to increase to $7.15, the remote processors have determined that they cannot afford to pay their employee's transportation costs, room and board expenses on top of their basic wage and overtime. For the first time, the fisheries business seeks the assistance of the Alaska Legislature to correct the Department of Labor's overreaching regulations. Unlike critics have claimed, supporting HB 504 does not set a disturbing precedence, it merely reiterates and clarifies what has been in Statute since Statehood. This is not a new exception, it is not a perk give to a special interest group. It is the law of the United States of America and it is the law of the State of Alaska as well. Unfortunately, the Department of Labor claims that their regulation is preeminent over state law. This is not right, it is not grounded in Alaska statute, in Federal law or regulation, nor is it supported by case law.

In 1948, there were 168 processors operating in Alaska. In 1988, there were 60. In the past dozen years, sites have been closed down due to fire, financing, soft markets, aggressive competition from international markets, consolidations, salmon disasters, fishing regulations. Today, Alaska's processing business faces disaster on every front and this year, with at least six sites shut down this season. Fishermen are receiving notices that there is no buyer for their fish.

We all know that this particular industry has been an integral piece of the Alaskan fabric for better or worse – since the late 1800's. Almost by definition, industries and vocations in Alaska, are situated at remote locations. The answer is simple: Alaska's industry has always been dominated by resource extraction. While some processing may become centralized, the historical and enduring fact is processing operations must take place in remote locations. Hence, the fisheries businesses tend to locate where the fish harvesting takes place rather than where the people build their communities. True, some Alaskan communities grew up around old canneries, more typical is the abandoned cannery site that harkens back to the first half of the 20th Century when Salmon was the king of Alaskan industry.

Parallel to Alaska's fishery and mining industries, was the development of the Fair Labor Standards Act, which gave rise to the minimum wage, regular time, over time and what defined a work week. In 1938, when that Act became the law of the land, all industries and businesses were forced to adapt. This included the Territory of Alaska and its mining, fishing and logging industries.

What impacts did the Fair Labor Standards Act have on territorial industries when it was adopted in 1938? Like all American industries, Alaskan businesses struggled to conform their operations to the new framework of federal minimum wage, regular pay and overtime rules. Nationwide, there was a period of adjustment marked by lawsuits and modifications to the Fair Labor Standards Act. Interestingly, one such lawsuit that resulted in a modification to the Fair Labor Standard Act was *initiated in Alaska.*

Walling v. Alaska Pacific Consol Mining Co.

In 1938, the Admiral of the Wage and Hour Division of the federal Department of Labor sued a remote gold mine that operated in the Talkeetna Mountains, 70 miles from Anchorage. The case arose following the effective date of the Act, as the Company had considerable concerns as to how they could best comply with the requirements of the FLSA. Attempting to achieve the pre-1938 status quo, the employees and employer willingly negotiated a contract to achieve the same level of wages by creatively "tweaking" regular time and overtime by using an algebraic formula. One of the holdings in Walling v. Alaska Consolidated Mining case interpreted Section 3(m) of the Fair Labor Standards Act to mean,

"it seems clear that the cost of board and lodging customarily furnished employees must also be included in the regular rate particularly as Section 3(m) of the Act itself specifically provides that "wages" include the reasonable cost of such board and lodging....We must look 'not to contract nomenclature' but to all payments, wages, piece work rates, bonuses, or things of value forming part of the normal weekly income to determine the statutory regular rate."

Note that at this remote mining operation, the employer did provide board and lodging. Some miners utilized this, others did not, yet the employer was not precluded from charging the employee's room and board, regardless of the remote location.

At statehood, Alaska adopted the Wage and Hour Act, which also adopted this language from the Fair Labor Standards Act. At that time, while the Alaskan seafood processors were not exempted from the Wage and Hour Act (as were the commercial fishermen), deference was paid in the form of **AS 23.10.085 (c)**. Taking language from the federal Fair Labor Standards Act, this statutory provision provides a mechanism for flexibility in terms of the minimum wage.

I. Alaska Statute

The statute promulgated by the Alaska Legislature in 1959 states:

"The regulations may permit deductions by an employer from the minimum wage applicable under the Wage & Hour Act to employees for the reasonable cost, as determined by the *director on an occupation basis*, of furnishing board or lodging if board or lodging is customarily furnished by the employer and used by the employee." AS 23.10.085 (c)

No doubt about this, the Wage and Hour Act permits deductions by an employer, on an occupation basis, from the minimum wage payable to employees for furnishing board or lodging that is customarily provided. Clearly, the seafood processors fit that description. In fact, this statute is permissive, in that it applies to *all* employers that customarily furnish board or lodging to their employees.

Next, we consider how that statute is treated by its enabling regulations.

II. Enabling Regulations: 8 AAC 15.160

The enabling regulations allow for deductions, based upon a written agreement at the time of hire, for the reasonable cost without profit to the employer. The enabling regulations promulgated by the Alaska Department of Labor not only mimic the verbiage of the Fair Labor Standards Act, but 8 AAC 15.160(f) demonstrates that AS 23.10.0859(c) and its enabling Regulations are utterly integrated. 8 AAC 15.160(f) stipulates that:

(d) Nothing in (a) of this section prohibits deductions from earnings, based on a written agreement, to reimburse an employer for the reasonable cost of furnishing board and lodging, if

(1) alternative public board and lodging facilities are accessible to the worksite and the employee has declined to use such facilities;
(2) the board and lodging facilities of the employer are customarily furnished by the employer and used by the employees; and
(3) the cost to the employee for the use of the employer's board and lodging facilities, is reasonable and without profit to the employer.

(e) Unless the employer and the employee have executed a written agreement as described in (d) of this section, at the time of hire, the employer is prohibited from seeking to retroactively deduct the cost of board and lodging as an offset against wages due upon termination or wage deficiencies subject to collection by the department.

(f) The director will make the determination regarding the cost of board and lodging under (d)(3) of this section. The determination will be made in accordance with 29 C.F.R. 531.3 - 531.5 and 531.29 - 531.35.

We assert that the Department of Labor has made an error in promulgating 8 AAC 15.160(d)(1) in that no authority independent of the Department's internal policy authorizes restricting deducting the cost of board and lodging to essentially rural areas of the state.

Not only is 8 AAC 15.160(d)(1) **NOT** supported by Statute or the federal Fair Labor & Standard Act, but it has distinct colors of Equal Protection violations. The Alaska Department of Labor's regs clearly treat remote or rural industries differently than urban industries.

Regulations not only alludes to provisions **[Title 29, Chapter 8, Section 203.3(m)]** in the Fair Labor Standards Act that discuss how "reasonable cost" of "furnishing" "board or lodging" that is "customarily" "furnished" by the employer and used by the employee, **THEY ACTUALLY CITE FLSA'S REGULATIONS WHEN MAKING THE DETERMINATION.**

III. Fair Labor Standards Act of 1938

Title 29, Chapter 8, Section 203.3(m) states:
"Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded there from under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to -

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

IV. FLSA's Enabling regulations in the Code of Federal Regulations

(These definitions and interpretations are critical to the discussion as they are cited by 8AAC 15.160 – *The director will make the determination regarding the cost of board and lodging under (d)(3) of this section. The determination will be made in accordance with 29 C.F.R. 531.3-5 and 531.29-35.* These items from the federal code interpret the Fair Labor Standards Act from which Title 29, Chapter 8, Section 203.3(m) is rooted in.

Title 29 –Labor
Part 531 Wage Payments Under the Fair Labor Standards Act of 1938
Subpart B – Determinations of "Reasonable Cost" and "Fair Value"; Effects of Collective Bargaining Agreements:

"reasonable cost" 29 C.F.R. 531.3

(a) The term reasonable cost as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) Reasonable cost does not include a profit to the employer or to any affiliate person.

(c) Except whenever any determination made under Section 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5.5 percent) for interest on the depreciated amount of capital invested by the employer: Provided, that if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the IRS for tax purposes, and the term "depreciation" includes obsolescence.

(d) (1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive:

i. tools of the trade and other materials and services incidental to carrying on the employer's business;
ii. the cost of any construction by and for the employer;
iii. the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

Making determinations of "reasonable cost" 29 C.F.R. 531.4

(a) Procedure. Upon his own motion or upon the petition of any interested person, the Administrator may determine generally or particularly the "reasonable cost" to the employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employee. Notice of proposed determination shall be published in the Federal Register...Consideration shall be given to all relevant matter presented in the adoption of any rule.

(b) Contents of petitions submitted by interested persons. Any petition by an employee or an authorized representative of employees, an employer or group of employers, or by other interested persons shall include the following information:

1. The name and location of the employer's place or places of business;
2. A detailed description of the board, lodging, or other facilities furnished by the employer or employers, and whether or not they are alleged to constitute "wages;"
3. the charges or deductions made for the facility or facilities by the employer or employers;
4. When the actual cost of the facility or facilities is known an itemized statement of such cost to the employer or employers of the furnished facility or facilities;
5. the cash wages paid;
6. the reason or reasons for which the determination is requested, including any reason or reasons why the determinations in Sec. 531.3 should not apply; and
7. whether an opportunity to make an oral presentation is requested; and if it is requested, the inclusion of a summary of any expected presentation.

making determinations of "fair value." 29 C.F.R. 531.5

(a) Procedure. The procedures governing the making of determinations of the "fair value" of board, lodging, or other facilities for defined classes of employees and in defined areas under section 3(m) of

the Act shall be the same as that prescribed in Section 531.4 with respect to determinations of "reasonable cost."

(b) Petitions of interested persons. Any petition by an employee or an authorized representative of employees, an employer or group of employers, or other interested persons for a determination of "fair value" under section 3(m) of the Act shall contain the information required under paragraph (b) of section 531.4 and in addition, to the extent possible, the following:

i. A proposed definition of the class or classes of employees involved;
ii. A proposed definition of the area to which any requested determination would apply;
iii. Any measure of "fair value" of the furnished facilities which may be appropriate in addition to the cost of such facilities.

Title 29 --Labor
Part 531 – Wage Payments Under the Fair Labor Standards Act of 1938
Subpart C – Interpretations:

Board lodging, or other facilities 29 C.F.R. 531.29

Section 3(m) applies to both of the following situations:

a. where board, lodging, or other facilities are furnished in addition to a stipulated wage; and
b. where charges for board, lodging, or other facilities are deducted from a stipulated wage.

The use of the word "furnishing" and the legislative history of this section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions or deductions from wages.

"Furnished" to the employee. 29 C.F.R. 531.30

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced.

Turning to the case law on how the federal court held relative to the essential quality that acceptance be voluntary and uncoerced, . See Williams v. Atlantic Coast Line Railroad Co. (E.D.N.C.). 1 W.H. Cases 289*.

*this case is unlocatable, but another case, on point that cites Atlantic Coast for its authority is Davis Brothers v. Raymond Donovan, Sec'ty of Labor. This case is cited in the Federal Code as an authoritative interpretation of the issues of "furnished" and "voluntary and uncoerced. In 1983, the Secretary of the Department of Labor makes essentially the same argument that the Commissioner of the Alaska Department of Labor makes, but the federal court holding struck down the Secretary's interpretation of wage. **A copy of this case is attached.**

"Customarily furnished." 29 C.F.R. 531.31

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the employee, it will be considered a sufficient satisfaction of the requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished. ***Note: from this case is the first judicial interpretation that board and lodging can be considered wage. It arose from a remote mine in the Talkeetna Mountains in 1938. The case has never been overturned and continues to be referenced in the Federal Code for its authority***

"Other facilities" 29 C.F.R. 531.32

(a) "other facilities," as used in this section must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias, or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees, housing furnished for dwelling purposes; general merchandise furnished at company stores

In conclusion:

At best, the department of Labor's offensive regulation 8 AAC 15.160(d)(1) is misguided. The Legislature delegated to the agency the authority to formulate policy in carrying out this statute, but instead, they took this too far. While the Department allows some employers to take a credit on the cash component of their wage obligation for board and lodging regularly provided, it disallows it for others. Rather than making the determination on an occupational basis, the Department of Labor discriminates between remote and non-remote locations. The Department asserts that if the employee has no alternative board and lodging available, they cannot make a meaningful choice to accept the cash credit for the accommodations. This is not right, it is not grounded in Alaska statute, in Federal law or regulation, nor is it supported by case law.

Statute

(3) require and subpoena from an employer a statement in writing, when t
or the representative considers it necessary, of hours worked by and the wag
person in the employ of the employer, and the commissioner may require the
make the statement under oath;

(4) question an employee in a place of employment during work hours wit
the wages paid and the hours worked by the employees;

(5) compel the attendance of witnesses and the production of books, papers,
documents by subpoena when necessary for the purpose of a hearing or investig
provided for in AS 23.10.050 — 23.10.150. (§ 6(2) ch 171 SLA 1959)

Sec. 23.10.085. Scope of administrative regulations. (a) The director may ad
amend, or rescind administrative regulations not inconsistent with the purposes
provisions of AS 23.10.050 — 23.10.150 that are necessary for the administration o
23.10.050 — 23.10.150.

(b) The regulations may, without limiting the generality of (a) of this section, de
terms used in AS 23.10.050 — 23.10.150, and restrict or prohibit industrial homewor
other acts or practices that the director finds appropriate to carry out the purpose of
23.10.050 — 23.10.150, or to prevent the circumvention or evasion of AS 23.10.05
23.10.150.

(c) The regulations may permit deductions by an employer from the minimum
applicable under AS 23.10.050 — 23.10.150 to employees for the reasonable cost
determined by the director on an occupation basis, of furnishing board or lodging if bo
or lodging is customarily furnished by the employer and used by the employee. (§ 6(3
171 SLA 1959)

NOTES TO DECISIONS

This section and AS 23.10.095 constitute a delegation of authority from the legislature to the agency to formulate policies, leaving to the agency's discretion the issue whether federal definitions of "regular rate of pay" and other terms can be applied consistently with AS 23.10.050 — 23.10.150. Dresser Indus., Inc. v. Alaska Dep't of Labor, 633 P.2d (Alaska 1981), cert. denied, 455 U.S. 1019, 102 S. 1716, 72 L. Ed. 2d 137 (1982).

Applied in Alaska Int'l Indus., Inc. v. Musarra P.2d 1240 (Alaska 1979).

Sec. 23.10.090. Administrative procedures. Regulations adopted or hearings
ducted under AS 23.10.050 — 23.10.150 shall be adopted or conducted and be subje
judicial review in accordance with AS 44.62 (Administrative Procedure Act). (§ 6(
171 SLA 1959)

NOTES TO DECISIONS

Cited in Dayhoff v. Temsco Helicopters, Inc., 772 P.2d 1085 (Alaska 1989).

Sec. 23.10.095. Adoption of federal regulations. The commissioner may
regulations and interpretations that are made by the administrator of the Wage and
Division of the federal Department of Labor and that are not inconsistent with
23.10.050 — 23.10.150. (§ 6(5) ch 171 SLA 1959)

NOTES TO DECISIONS

Sec. 23.10.100. Employer
at least three years at the p
ddress, and occupation of eac
riod to each employee, the
mployee, and other payroll ir
(b) The commissioner or an
he employer's records at a
ommissioner or the represer
records, and the commissione
forms the commissioner has p

Public policy interest and burd
if an employee produces sufficient e
the amount and extent of the wor
employee was improperly compensa
shifts to the employer to come forwa
sufficient to negate the reasonablen
ence drawn from the employee's evi
this burden of proof in an action u
Wage and Hour Act is not binding
court in a proceeding to determine

Sec. 23.10.105. Posting
— 23.10.150 shall keep a s
commissioner, posted in a co
them is employed. An emplo
request without charge. (§ 8

Sec. 23.10.110. Remedie
tlement; waiver. (a) An em
is liable to an employee affe
vertime compensation, as th
in an additional equal amou
(b) An action to recover
employer is liable may be m
and for other employees simi
writing an agent or represer
shall be filed in the court in
less than the amount to whic
commissioner may take an
which the employee is ent
necessary to collect the clai
(c) The court in an action
warded to the plaintiff, all
this section, reasonable atto
case of actions brought und
commissioner to the Depart
ay the filing fee or other co
laimants against the same
(d) In an action under (a

Regs

rincipal. To qualify for the exemption, all the requirements set out in l ch. 5 of this title relating to the

ler this section will not be less than 75 stablished under AS 23.10.065.
imum wages for full-time students Fair Labor Standards Act of 1938, as implemented in 29 C.F.R. 519.1 — oyment subject to the provisions of ster 68)

AS 23.10.085

I FOR SEARCHING FOR PLACER
. The exemption from AS 23.10.050 — 0.055(10) applies to those activities cting" and does not apply once devel- a known mineral source has begun.

AS 23.10.085

N FOR INDIVIDUALS UNDER 18 MPLOYEES. The exemption from led AS 23.10.055(11) does not apply a individual normally within the mployed in excess of 30 hours. (Eff.

AS 23.10.085

ING THE NUMBER OF EMPLOY-
3 23.10.060(d)(1). In determining the employer employs for purposes of f a corporation who actively engage in mployees will be counted regardless of vorked. (Eff. 12/9/78, Register 68; am

AS 23.10.085

NING OPERATIONS. (a) For pur- ining season" means the cumulative operations are carried on during a g 20 weeks.
the payment for overtime under gaged in small mining operations is

available to the employer for an aggregate of 14 weeks, commencing on the first day the mine begins active operations in a calendar year. Periods during which the mine is not actively engaged in mining operations for reasons including assessment work and repair or construction of buildings or equipment are not part of the exemption period.

(c) Repealed 9/28/85.

(Eff. 12/9/78, Register 68; am 9/28/85, Register 95; am 4/29/99, Register 150)

Authority: AS 23.05.060 AS 23.10.060 AS 23.10.085

ARTICLE 4. REDUCTION OF WAGES.

8 AAC 15.160. DEDUCTIONS FROM AN EMPLOYEE'S WAGES. (a) AS 23.10.085(c) does not limit the right of an employer and employee to enter into a written agreement to provide for deductions of monetary obligations of an employee. Requiring or inducing an employee to return or give up any part of the compensation to which the employee is entitled, whether by force, intimidation, or threat of dismissal from employment, or by any other manner, is prohibited. A written agreement for deductions payable to the employer or person acting in the employer's behalf or interest is not valid if it would have the effect of reducing an employee's wage rate below the statutory minimum wage or overtime rates, or if it would require an employee to reimburse the employer for any of the following:

(1) customer checks returned due to insufficient funds or any other reason;

(2) non-payment for goods or services as a result of theft or credit default;

(3) cash or cash register shortages unless the employee admits, willingly and in writing, to having personally taken the specific amount of cash that is alleged to be missing;

(4) lost, missing, or stolen property, unless the employee admits willingly and in writing, to having personally taken the specific property alleged to be lost, missing, or stolen; or

(5) damage or breakage costs unless clearly due to willful conduct of the employee and the employee has acknowledged responsibility in writing.

(b) Nothing in (a) of this section prohibits deductions from earnings based on a written agreement, if the employer has been directed by the employee to pay a sum for the benefit of that employee to a creditor, donee, or other third party. Neither the employer nor any person acting

in the employer's behalf or interest may derive any profit or benefit from the transaction.

(c) Nothing in (a) of this section prohibits deductions from earnings based on a written agreement to reimburse an employer for transportation from the place of hire to the place of employment if the deduction does not

(1) reduce the employee's wages below the statutory minimum; or

(2) reduce the overtime compensation rate below one and one-half times the contractual rate of pay.

(d) Nothing in (a) of this section prohibits deductions from earnings, based on a written agreement, to reimburse an employer for the reasonable cost of furnishing board and lodging, if

(1) alternative public board and lodging facilities are accessible to the worksite and the employee has declined to use such facilities;

(2) the board and lodging facilities of the employer are customarily furnished by the employer and used by the employees; and

(3) the cost to the employee for the use of the employer's board and lodging facilities, is reasonable and without profit to the employer.

(e) Unless the employer and the employee have executed a written agreement as described in (d) of this section, at the time of hire, the employer is prohibited from seeking to retroactively deduct the cost of board and lodging as an offset against wages due upon termination or wage deficiencies subject to collection by the department.

(f) The director will make the determination regarding the cost of board and lodging under (d)(3) of this section. The determination will be made in accordance with 29 C.F.R. 531.3 — 531.5 and 531.29 — 531.35.

(g) An employer may deduct an amount from the wages of an employee as a security deposit to ensure the return, in clean and in a state of good repair, of uniforms or equipment issued by the employer, if

(1) the deduction is based on a written agreement;

(2) the total deposit does not exceed the cost of the item; and

(3) the deduction does not reduce the employee's wage below the statutory minimum, or reduce the employee's overtime compensation below one and one-half times the contractual rate of pay.

(h) An employer shall give each employee a statement of earnings and deductions for each pay period. The statement of earnings and deductions must contain

(1) employee's rate of pay;

(2) gross wages;

(3) net wages;

(4) the beginning and ending dates of the pay period and the weekly hours actually worked during the period;

(5) repealed 9/28/85;

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reimburse an employer for transpor-
e place of employment if the deduction

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pensation rate below one and one-half
›ay.
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ard and lodging, if
and lodging facilities are accessible to
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›cilities of the employer are customar-
and used by the employees; and
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ding dates of the pay period and the
›d during the period;

(6) repealed 9/28/85;
(7) federal income tax deductions;
(8) Federal Insurance Contribution Act deductions;
(9) Alaska Employment Security Act contributions;
(10) board and lodging costs;
(11) advances; and
(12) other authorized deductions. (Eff. 12/9/78, Register 68; am 9/28/85, Register 95; am 4/29/99, Register 150)

Authority: AS 23.05.060 AS 23.10.065 AS 23.10.095
AS 23.10.060 AS 23.10.085

8 AAC 15.165. PURCHASE OF UNIFORM OR EQUIPMENT. An employer may not require an employee to purchase a uniform or equipment if

(1) the uniform or equipment is required by the federal state, or local safety or health codes, or

(2) the nature of the employer's business requires the use of either and if the uniform or equipment

(A) is distinctive and advertises or is associated with the products or services of the employer; and

(B) cannot be worn or used during normal social activities of the employee. (Eff. 9/28/85, Register 95; am 4/29/99, Register 150)

Authority: AS 23.05.060 AS 23.10.085 AS 23.10.095
AS 23.10.065

ARTICLE 5. PROCEDURES RELATING TO VIOLATIONS, INVESTIGATIONS, OR HEARINGS.

8 AAC 15.175. ASSIGNMENT OF CLAIMS. Repealed 9/28/85.

8 AAC 15.180. INVESTIGATIONS, CONFERENCES AND PERSUASION. (a) The labor standards and safety division will investigate potential violations of AS 23.10.050 — 23.10.150 on its own motion.

(b) If, after an investigation, the division finds that probable cause exists for believing that a violation of AS 23.10.050 — 23.10.150 has occurred, it will attempt to correct the unlawful practice by conference and persuasion as follows:

(1) the division will provide the employer believed to have violated AS 23.10.050 — 23.10.150 with a copy of the assignment or a description of the alleged violation and inform the employer of the results of its investigation; and

Sec. 23.10.140. Penalty. An employer who violates a provision of AS 23.10.050 — 23.10.150, or of any regulation or order of the commissioner issued under it, upon conviction is punishable by a fine of not less than $100 nor more than $2,000, or by imprisonment for not less than 10 nor more than 90 days, or by both. Each day a violation occurs constitutes a separate offense. (§ 9(2) ch 171 SLA 1959; am § 2 ch 113 SLA 1972)

Dayhoff v. Temsco Helicopters, Inc., Alaska 1989).

person fails to comply, refuses to produce evidence, may be lawfully interrogated ioner or an authorized repre in the case of disobedience of sal to testify before it. (§ 9(5

150 — 23.10.150 do not limit sentatives of their own cho e applicable minimum und rk shorter than the appli 71 SLA 1959)

n for unpaid minimum wage under AS 23.10.050 — 23.10.150 after the cause of action accru be started on the date when the 7 ch 59 SLA 1982)

m tolls statute. — Department of labor are a form of quasi-judicial relief; there statutory wage claim with the depart ly tolls the statute of limitations if the ements of that doctrine are established. emsco Helicopters, Inc., 772 P.2d 108).

on complaint tolls statute. — Where an initial motion to certify classes in a uit alleging violations of the Alaska Wage t, the trial court reserved the plaintiffs e for certification again after further e statute of limitations was tolled from e original class complaint. Fred Meyer v. Adams, 963 P.2d 1025 (Alaska 1998).

S 23.10.050 — 23.10.150 if the authorized representative of the enforcement of AS 23.10.050 authorized representative to any d required under the provisions l accessible, or to furnish a sworn ired for the enforcement of AS ner or an authorized representa 150 as required by AS 23.10.105 gainst an employee because the r caused to be instituted any 50, or has testified or is about to

NOTES TO DECISIONS

Quoted in Gore v. Schlumberger Ltd., 703 P.2d 5 (Alaska 1985).

Sec. 23.10.145. Definitions. If not defined in this title or in regulations adopted under this title, terms used in AS 23.10.050 — 23.10.150 shall be defined as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it. (§ 2(2) ch 171 SLA 1959; am § 4 ch 47 SLA 1983)

Cross references. — For the Fair Labor Standards Act of 1938, see 29 U.S.C. 201-219.

NOTES TO DECISIONS

Applicability of federal regulatory definitions. — This section directs the courts to apply federal regulatory definitions "where applicable," and such definitions are "applicable" only when the state director of the wage and hour division and the commissioner of labor have refrained from defining terms in the state regulations, pursuant to their discretionary authority under AS 23.10.085 and 23.10.095. Dresser Indus., Inc. v. Alaska Dep't of Labor, 633 P.2d 998 (Alaska 1981), cert. denied, 455 U.S. 1019, 102 S. Ct. 1716, 72 L. Ed. 2d 137 (1982).

A prisoner is not an "employee" of the state under the federal act, and therefore is not so by virtue of AS 23.10.065. McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

Sec. 23.10.150. Short title. AS 23.10.050 — 23.10.150 may be cited as the Alaska Wage and Hour Act. (§ 1 ch 171 SLA 1959)

Secs. 23.10.155 — 23.10.320. Equal pay for women, discrimination in employment, and age discrimination. [Repealed, § 8 ch 117 SLA 1965, § 5 ch 125 SLA 1980. For present provisions, see AS 18.80.220.]

Article 4. Employment of Children.

Collateral references. — 53 Am. Jur. 2d, Master and Servant, § 154.

51B C.J.S., Labor Relations, § 1021.

Sec. 23.10.325. Purpose. It is the purpose of AS 23.10.325 — 23.10.370 to establish protective standards for child labor to the end that their health, morals, education, and future welfare will be protected during the formative years and to the further end that any abuses or unjust exploitation of this labor will be effectively prohibited. (§ 1 ch 73 SLA 1949)