

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

10771 HOUSE JUDICIARY

3 AAC 53.299(1) is repealed, 3 AAC 53.299(2) – (3) are amended and new paragraphs are added to read:

3 AAC 53.299. Definitions. Unless the context indicates otherwise, in 3 AAC 53.200 - 3 AAC 53.299,

(1) repealed; ____/____/____, Register ____) ["ANCHORAGE SERVICE AREA" MEANS THE SERVICE AREA CERTIFICATED TO ATU TELECOMMUNICATIONS BY CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY NO. 120 AS OF APRIL 8, 1998;]

(2) "commission" means the Regulatory Commission of Alaska [ALASKA PUBLIC UTILITIES COMMISSION];

(3) "dominant carrier" means a local exchange carrier designated by the commission as a dominant carrier under 3 AAC 53.220 [DETERMINED BY THE COMMISSION TO HAVE MARKET POWER];

(4) "incumbent carrier" means the telephone utility, or its successor, certificated to provide local exchange telephone service within its service area as of February 8, 1996;

(5) "interexchange carrier" means a carrier certificated by the commission to provide intrastate interexchange telephone service;

(6) "local exchange carrier" means a carrier certificated to provide local exchange telephone service;

(7) "nondominant carrier" means a local exchange carrier other than a dominant carrier;

(8) "recorded authorization" means a voice communication that clearly grants the authority to transfer a customer's local exchange service from one local exchange carrier to another and that may be accurately retrieved for later review;

(9) "competitive service area" means the portion or portions of a certificated local exchange service area where multiple telecommunications providers are certificated to provide local exchange service and provide local exchange service throughout the area; however upon petition or its own motion, the commission may designate an additional area as a competitive service area based on the nature and extent of competition available;

(10) "customer connection" means any connection used to provide local exchange service, and shall include lines sold through local service resale, and shall exclude lines sold as unbundled network element loops; however, a line used to serve multiple customers or end-users shall be appropriately weighted based on its voice line equivalent; and

(11) "eligible telecommunications carrier" is a carrier that has been designated as an eligible telecommunications carrier by the commission under 47 U.S.C. 214(e) as that provision existed on January 1, 2003. (Eff. 6/21/98,

Register 146; am ____/____/____, Register ____)

Authority: AS 42.05.141 AS 42.05.151 [AS 42 05.720]

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THE SUPREME COURT OF THE STATE OF ALASKA

ACS OF ALASKA, INC., ACS OF)	
THE NORTHLAND, INC., and)	Supreme Court No. S-10466
ACS OF FAIRBANKS, INC.,)	
	)	Superior Court Nos.
Appellants,	)	3AN-98-4759/4903/4905 CI &
	)	3AN-99-3494/3499 CI
v.)	
	)	<u>OPINION</u>
REGULATORY COMMISSION)	
OF ALASKA, and GCI)	[No. 5762 - December 12, 2003]
COMMUNICATION CORP., d/b/a)	
GENERAL COMMUNICATION,)	
INC.,)	
)	
Appellees.)	
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Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Reese, Judge.

Appearances: S. Lynn Erwin, Alaska Communications Systems, Anchorage, and Elizabeth H. Ross, Birch, Horton, Bittner & Cherot, Washington, D.C., for Appellants. Ron Zobel, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee Regulatory Commission of Alaska. Martin M. Weinstein, General Communication, Inc., Anchorage, for Appellee GCI.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and
Bryner, Justices. [Carpeneti, Justice, not participating.]

FABE, Chief Justice.

I. INTRODUCTION

This case arises under the local telephone competition provisions of the federal Telecommunications Act of 1996. GCI petitioned the Regulatory Commission of Alaska (RCA) to terminate the rural exemptions of three Alaska Communication Systems (ACS) subsidiaries so that GCI could compete with these companies in rural Alaska. The RCA terminated ACS's rural exemptions, and ACS appeals that decision. Because the RCA erred in allocating the burden of proof to ACS, we reverse and remand for additional proceedings before the RCA with GCI shouldering the burden of proof. Additionally, because the RCA erred in terminating ACS's rural exemption for its Glacier State Study Area, we reverse that decision.

II. FACTS AND PROCEEDINGS

A. The Telecommunications Act of 1996

The federal Telecommunications Act significantly changed the delivery of telephone service in this country.¹ At the heart of the Act, and at issue in this case, are the provisions designed to promote local telephone competition.² These provisions

¹ See, e.g., STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 717 (2001); Salvatore Massa et al., *Pricing Network Elements Under the Telecommunications Act of 1996: Back to the Future*, 23 HASTINGS COMM. & ENT. L.J. 751, 752 (2001) (noting Act is "revolutionary piece of legislation"); Aimee M. Adler, Notes and Comment, *Competition in Telephony: Perception or Reality? Current Barriers to the Telecommunications Act of 1996*, 7 J.L. & Pol'y 571, 571 (1999).

² BENJAMIN ET AL., *supra* TELECOMMUNICATIONS LAW AND POLICY, at 716.

eliminate state-imposed barriers to competition and force incumbent local exchange carriers to cooperate with their potential competitors.³ These competitors are referred to as competitive local exchange carriers.⁴ The Act facilitates competition in a number of ways.⁵ First, the Act requires incumbents to allow competitors to interconnect with the incumbent's existing local network.⁶ This provision, referred to as interconnection, allows new entrants to use the incumbent's existing network to provide competing local telephone service.⁷ Second, the unbundled access provision of the Act requires incumbents to provide competitors with access to elements of the incumbent's network on an unbundled basis.⁸ The unbundling provision permits new entrants "that have not completely built out their own networks to offer services over a combination of their own facilities and those leased from incumbents."⁹ Third, the Act requires incumbents to sell to competitors, at wholesale prices, any telecommunications services it sells to its customers at retail rates.¹⁰ This provision, referred to as the resale provision, allows competitors to resell to customers at retail prices the telecommunications services they

³ *Id.*

⁴ *Id.* at 1047.

⁵ 47 U.S.C. § 251(c) (2001); Michael Glover & Donna Epps, *Is the Telecommunications Act of 1996 Working?*, 52 ADMIN. L. REV. 1013, 1014 (2000).

⁶ 47 U.S.C. § 251(c)(2) (2001).

⁷ *Id.*

⁸ 47 U.S.C. § 251(c)(3) (2001).

⁹ Glover and Epps, *supra* at 1014.

¹⁰ 47 U.S.C. § 251(c)(4) (2001).

purchase from the incumbent at wholesale.¹¹ These competitive provisions are found in section 251(c) of the Telecommunications Act.

Despite the Act's general theme favoring competition,¹² Congress, in the interest of promoting universal service, exempted rural telephone companies from the duty to compete. Congress defined "rural telephone company" as

a local exchange carrier operating entity to the extent that such entity —

(A) provides common carrier service to any local exchange carrier study area that does not include either —

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.^{13]}

Because these rural telephone companies are free from the competitive obligations imposed by the Act, these ILECs remain monopolist providers of local telephone service

¹¹ *Id.*

¹² BENJAMIN ET AL., *supra* n.1.

¹³ 47 U.S.C. § 153(37) (2001).

in their areas. The rural exemption is contained in section 251(f)(1) of the Act and provides, in pertinent part:

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).¹⁴

Until a state commission makes the requisite findings under these three elements, rural telephone companies are exempt from competition.¹⁵

B. The Rural Exemption Proceedings

In April 1997 GCI requested interconnection with three rural telephone companies. These companies were PTI Communications of Alaska, Inc., Telephone Utilities of Alaska, Inc., and Telephone Utilities of the Northland, Inc. These companies are now subsidiaries of ACS and we refer to them collectively as ACS.

The Alaska Public Utilities Commission (APUC)¹⁶ held public hearings in December 1997 to determine whether to terminate ACS's rural exemptions. In an order issued January 8, 1998, APUC continued ACS's rural exemptions reasoning that (1) the evidence in the record did not support an affirmative finding that the utility would not suffer an undue economic burden if the exemptions were terminated and (2) support mechanisms had not yet been reformed to accommodate competition in local service.

¹⁴ 47 U.S.C. § 251(f)(1)(A) (2001).

¹⁵ *Id.*

¹⁶ APUC is the forerunner to the RCA. On July 1, 1999, APUC ceased to exist and the RCA assumed its duties. Ch. 25, SLA 1999.

GCI appealed APUC's decision to the superior court. Finding that APUC had erroneously placed the burden of proof on GCI, the superior court remanded the case to APUC for another hearing. APUC held a second hearing in June of 1999. On June 30, 1999, APUC granted GCI's petition to terminate ACS's rural exemptions. APUC reasoned that adequate mechanisms were in place to preserve and further universal service such that terminating ACS's exemptions would not frustrate these goals.

ACS petitioned APUC's successor, the RCA, for review of the decision to terminate ACS's rural exemptions. ACS asserted that APUC's revocation of the exemptions "exposed high cost rural consumers to the detriments of competition without establishing the basis for offsetting competitive benefits." Because the RCA found that APUC's decision lacked an adequate analysis of the disputed legal, factual, and policy issues, it granted ACS's motion for reconsideration. However, after reviewing the record, the RCA affirmed APUC's termination of the utility's rural exemptions. ACS appealed to the superior court, Judge John E. Reese presiding. The superior court affirmed the RCA, and ACS appeals the RCA's decision to this court.

III. STANDARD OF REVIEW

We do not defer to a superior court decision when that court acts as an intermediate court of appeal.¹⁷ We apply the substitution of judgment standard when reviewing legal questions that do not require agency expertise "or where the agency's specialized knowledge and experience would not be particularly probative as to the meaning of the statute."¹⁸

¹⁷ *Tlingit-Haida Reg'l Elec. Auth. v. State*, 15 P.3d 754, 761 (Alaska 2001); *United Utils., Inc. v. Alaska Pub. Utils. Comm'n*, 935 P.2d 811, 814 (Alaska 1997).

¹⁸ *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (continued...)

IV. DISCUSSION

A. Progression of Federal and State Litigation Over 47 U.S.C. § 251(f)(1) Rural Exemption Proceedings

The central issue on appeal is whether the RCA erred in allocating the burden of proof to ACS in the rural exemption proceeding. Because telecommunications regulation is primarily federal, it is important to view the history of the present controversy in the context of significant federal litigation that was proceeding simultaneously.

1. *Iowa I*

Shortly before GCI sought to compete with ACS, the Federal Communications Commission (FCC) promulgated a rule allocating the burden of proof in rural exemption proceedings to the incumbent local exchange carrier.¹⁹ The regulation provided: "Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled . . . to continued exemption" from the Telecommunications Act's interconnection requirements.²⁰

Three months before APUC held the initial hearing in this case, the United States Court of Appeals for the Eighth Circuit vacated this rule in *Iowa Utilities Board*

¹⁸ (...continued)

(Alaska 1987); *see also id.* (" '[This] standard is appropriate where the knowledge and experience of the agency is of little guidance to the court or where the case concerns statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience.' ") (quoting *Earth Res. Co. of Alaska v. State, Dep't of Revenue*, 665 P.2d 960, 965 (Alaska 1983) (internal quotations omitted)).

¹⁹ 47 C.F.R. § 51.405(a) (2002).

²⁰ *Id.*

v. Federal Communications Commission (Iowa I), reasoning that the FCC exceeded its jurisdiction in promulgating the regulation.²¹ The court noted: “The plain meaning of subsection[] 251(f)(1) (governing exemptions) . . . indicates that the state commissions have the exclusive authority to make these determinations, and nothing in [this provision], or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations.”²² The Eighth Circuit also looked to the legislative history of the Telecommunications Act to support its conclusion that the FCC exceeded its authority in promulgating 47 C.F.R. § 51.405(a):

Congress rejected both a Senate bill and a House bill that gave the FCC concurrent jurisdiction with state commissions to administer the exemption and waiver provisions. It would be unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission — the agency it decided to exclude from the exemption process — in a position to dictate the substantive standards governing the exemption process.^{23]}

The clear guidance that the FCC had provided through its regulation 47 C.F.R. § 51.405(a) therefore no longer existed when APUC first addressed this case.

In the first hearing, APUC assigned the burden of proof to GCI. APUC denied GCI’s petition to terminate ACS’s rural exemptions on January 8, 1998, and GCI appealed APUC’s decision to the superior court.

²¹ 120 F.3d 753, 802 (8th Cir. 1997), *aff’d in part, rev’d in part*, 525 U.S. 366 (1999).

²² *Id.*

²³ *Id.* (citing S. REP. NO. 104-23, 1995 WL 142161 at *206-07 (§ 251(i)(3)) (1995); H.R. 1555, 104th Cong. § 242(e) (1995)).

2. United States Supreme Court's review of *Iowa I* and state superior court's response

Prior to the superior court decision, the United States Supreme Court reversed the Eighth Circuit's *Iowa I* ruling, concluding that the FCC had "jurisdiction to promulgate rules . . . regarding rural exemptions . . ." ²⁴ The Court remanded the case to the Eighth Circuit to consider the substantive challenges to the regulation. ²⁵ The superior court had the benefit of the Supreme Court's decision in deciding GCI's appeal from APUC. The superior court concluded that APUC erred in allocating the burden of proof to GCI and remanded for another agency hearing, noting that "fairness concerns prescribe the conclusion that the party in control of the evidence, in this case [ACS], bears the burden of proving that evidence."

After the superior court remanded the case to APUC, APUC held a second hearing in June 1999, with ACS shouldering the burden of proof. APUC issued its decision terminating the rural exemptions on June 30, 1999. In its brief order, APUC determined that ACS would not face an undue economic burden, were it required to interconnect with GCI. Additionally, APUC noted that GCI's request for interconnection was technically feasible. Thus, APUC turned to consider whether interconnection would be consistent with the goals of universal service. APUC concluded that federal and state universal service funds would adequately preserve and advance universal service. APUC emphasized the importance of competition in its order:

Without removal of [ACS's] rural exemption, it is questionable whether the rural portions of Alaska that are the subject of GCI's petition will ever have competitive local exchange service. Therefore, the Commission has

²⁴ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999).

²⁵ *Id.* at 385, 397.

determined that it is appropriate to remove that roadblock and proceed down the path to competition.

The RCA reconsidered APUC's decision and affirmed on October 11, 1999. ACS appealed to the superior court.

3. Eighth Circuit's decision on remand - *Iowa II*

In the midst of ACS's administrative appeal to the superior court, the Eighth Circuit decided *Iowa Utilities Board v. Federal Communications Commission*²⁶ (*Iowa II*). This time, the federal court vacated on substantive grounds the FCC's rule that, under the Telecommunications Act, a rural incumbent telephone company must bear the burden of proof in demonstrating to a state commission that it is entitled to a continued exemption from competition.²⁷ The court reasoned that "[t]he plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption."²⁸

In reviewing ACS's administrative appeal, Judge Reese acknowledged the Eighth Circuit's authority but concluded that any error in the burden of proof allocation was harmless, even in light of *Iowa II*. Judge Reese noted: "This [c]ourt recognizes the authority of the Eighth Circuit in this matter, but does not find the *Iowa Utilities Bd. II* decision decisive on the outcome of the current appeal." Judge Reese emphasized that the RCA based its decision on the evidence presented at the hearings and not on a consideration of the burden of proof. Judge Reese concluded:

²⁶ 219 F.3d 744 (8th Cir. 2000), *reversed in part on other grounds by Verizon Communications, Inc. v. Fed'l Communications Comm'n*, 535 U.S. 467 (2002).

²⁷ *Id.* at 762.

²⁸ *Id.*

This [c]ourt must determine the applicability of *Iowa Utilities Bd. II* to the current appeal. The APUC used a record created in two separate hearings in its decision to terminate ACS[']s rural exemption. Both ACS and GCI were responsible for bearing the burden of proof at one of the hearings. Both ACS and GCI presented evidence and created a record accordingly. The RCA found that the record from both hearings justified termination of the rural exemption. The RCA's [decision to terminate ACS's rural exemptions] clearly shows that the Commission made its findings based on the weight of the evidence and not because of an unmet burden of proof[.]”

Implicit in Judge Reese's statement is an apparent determination that any error in the allocation of proof to ACS in light of *Iowa II* was harmless. Accordingly, the superior court affirmed the RCA's termination of ACS's rural exemptions.

B. The RCA Erred in Placing the Burden of Proof on ACS, the Incumbent Local Exchange Carrier.

On appeal, ACS argues that the RCA erred in placing the burden of proof on ACS because this is contrary to federal law as announced in the Eighth Circuit's *Iowa II* decision. In *Iowa II*, the Eighth Circuit concluded that the plain meaning of 47 U.S.C. § 251(f)(1)(A) and (B) “requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.”²⁹ Given the Eighth Circuit's holding, ACS asserts that “federal law squarely places the burden of proof on GCI rather than [ACS].”

GCI responds to ACS's contentions with a number of policy reasons for placing the burden of proof on ACS; two of these reasons have some strength.³⁰ First,

²⁹ *Id.*

³⁰ In addition to the policy reasons put forward by GCI, the RCA argues that
(continued...)

GCI notes that ACS, as the incumbent local exchange carrier, controls relevant information on issues including: its financial health and status, its ability to withstand the expected competitive pressures exerted by competition, its ability to withstand the costs of providing the services requested by the competitor, and its network design and ability to facilitate the competitor's requests. GCI asserts that because ACS has superior access to this information, ACS should bear the burden of proof because it is "in the best position to produce the relevant information and to explain how competitive pressures could harm the incumbent or service to rural customers." Second, GCI argues that placing the burden of proof on ACS is consistent with the Telecommunications Act's statutory scheme for rural exemption proceedings. This is true, according to GCI, because under 47 U.S.C. § 251(c), after a competitor files notice with the state commission that it seeks to compete with an incumbent, the state commission has 120 days to gather the necessary information to determine whether to terminate the incumbent's rural exemption.³¹ GCI argues that this short time frame "does not permit rounds of discovery, delay and associated costs frequently tolerated in the traditional model of civil litigation." GCI concludes that the limited time frame and ACS's superior

³⁰ (...continued)

after the first appeal from APUC to the superior court, the superior court's allocation of the burden of proof to ACS became the law of the case. "The doctrine of law of the case requires a lower court to follow an appellate court's prior decision and prohibits reconsideration of issues which have been adjudicated in an appeal of the case." *Bauman v. Day*, 942 P.2d 1130, 1132 n.1 (Alaska 1997). To the extent that APUC was bound by the superior court's decision on remand, the superior court's allocation of the burden of proof to ACS was the law of the case. We, however, are not bound by the superior court's allocation of the burden of proof, as this issue has not been brought to this court before. *See, e.g., Demuptiis v. Unocal Corp.*, 63 P.3d 272, 277 (Alaska 2003).

³¹ 47 U.S.C. § 251(f)(1)(A), (B) (2001).

access to information relevant to the continuation of its rural exemption weigh in favor of ACS's shouldering the burden of proof.

While we see the logic in GCI's arguments, policy arguments cannot control the outcome in this case. A number of developments suggest to us that we should be guided by the Eighth Circuit's decision in *Iowa II*.

The United States Supreme Court has held that the FCC, a federal agency, has jurisdiction to promulgate regulations under the Telecommunications Act to guide state commissions.³² After the FCC promulgated regulations under the Telecommunications Act, in its *First Report and Order*,³³ numerous parties challenged those regulations.³⁴ Under the Hobbs Act, the federal circuit courts of appeal have exclusive jurisdiction over those challenges. The Hobbs Act provides:

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of —

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.^{35]}

³² *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 385 (1999).

³³ *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999) (citing *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 F.C.C.R. 15499 (1996)).

³⁴ *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1267 (9th Cir. 2000).

³⁵ 28 U.S.C. § 2342 (1994).

The parties challenging the FCC regulations brought suits in various federal appellate courts.³⁶ When agency regulations are challenged in multiple circuits, the panel on multidistrict litigation, acting under 28 U.S.C. § 2112, consolidates the petitions and assigns them to a single court of appeal.³⁷ The panel assigned the challenges concerning the FCC's Telecommunications Act regulations to the Eighth Circuit.³⁸ Thus, the Eighth Circuit became the only forum to consider the challenges to the FCC regulations following the FCC's *First Decision and Order*.³⁹

In addition to the FCC's jurisdiction to promulgate regulations under the Telecommunications Act and the federal appellate courts' (in this case, Eighth Circuit's) exclusive jurisdiction to hear challenges to those regulations, the United States Supreme Court has recognized the need for a national standard for telecommunications regulation under the 1996 Act, noting that the federal government has unquestionably "taken local telecommunications competition regulation away from the States [] [w]ith regard to the matters addressed by the 1996 Act," and that "a federal program administered by 50 independent state agencies [would be] strange."⁴⁰ All of these factors suggest that we should look to the only available federal guidance in deciding which party shoulders the burden of proof in a rural exemption proceeding: the Eighth Circuit's decision in *Iowa II*. The Eighth Circuit is the only federal court to speak to the issue of the burden of proof allocation in rural exemption proceedings under 47 U.S.C. § 251(f)(1). We adopt

³⁶ *MCI*, 204 F.3d at 1267.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999).

⁴⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

the Eighth Circuit's holding that the competitor must bear the burden of proof. Therefore, we now turn to the question whether the RCA's error in placing the burden of proof on ACS was harmless.

1. Harmless error analysis

As discussed above, the superior court implicitly found that any error in the RCA's allocation of the burden of proof to ACS was harmless, noting: "The RCA's conclusion [to terminate ACS's rural exemptions] clearly shows that the Commission made its findings based on the weight of the evidence and not because of an unmet burden of proof[.]" Despite the superior court's assertion, an examination of the RCA's analysis reveals that the RCA did indeed base a number of its conclusions either on ACS's failure to satisfy the burden of proof or on a general lack of proof. For example, when discussing the economic burden element of section 251 (f)(1)(a), the RCA explicitly based its finding in favor of GCI on the fact that "[t]he Commission finds that [ACS] did not meet [its] burden of proving undue economic burden." Similarly, with regard to one aspect of universal service, the RCA based its decision in favor of GCI on the fact that "[t]here was no showing by [ACS] that customers would have any less access to advanced services than they do now if the rural exemption [were] terminated." The RCA's repeated dependence upon the burden of proof allocation in reaching its decision suggests that this error affected ACS's substantial rights.⁴¹ Because we cannot conclude that the RCA's error was harmless, we remand this case for the RCA to analyze the rural exemption issue with GCI shouldering the burden of proof on the three elements

⁴¹ Alaska R. Civ. P. 61; see, e.g., *Sloan v. Atlantic Richfield Co.*, 541 P.2d 717, 722 (Alaska 1975) (noting appellant must show substantial prejudice to demonstrate error not harmless).

of 47 U.S.C. § 251(f)(1)(A): undue economic burden, technical feasibility, and universal service.

2. Proceedings on remand

On remand, the RCA may elect to hold a supplemental evidentiary hearing on one or more of the issues, as it sees fit. The RCA is free to consider the current state of the evidence and is not bound by the record before it in 1999 when it issued its last order in these proceedings. As noted above, GCI has expressed concern about its ability to amass the relevant information to shoulder its burden of proof. Specifically, it noted ACS's superior access to information and the short 120-day time frame for the RCA to gather information before making its decision. These concerns can be relieved by the RCA's control and management of the discovery process in the remand proceedings. Generally, "the conduct and extent of discovery is left to the sound discretion of the agency"⁴² The RCA may order discovery and require ACS's active participation in assisting GCI to analyze and organize the information, including ordering ACS to produce summaries of information and provide analyses to accompany documents it produces.⁴³

Moreover, because we are remanding this case to the RCA, there will be a period of time between this decision and the RCA's determination on remand. Thus, we must consider how the parties should proceed during that interim period. ACS asks

⁴² CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 5.40 (2d ed. 1997).

⁴³ The legislature has accorded to the RCA authority to "issue subpoenas, subpoenas duces tecum, and other process to compel the attendance of witnesses and the production of testimony, records, papers, accounts, and documents in a[] . . . hearing The commission may petition a court of this state to enforce its subpoenas, subpoenas duces tecum, or other process." AS 42.05.151(c).

us to roll the clock back and reinstate APUC's original 1998 order in this case, in which APUC denied GCI's request to terminate ACS's rural exemption. GCI responds that reinstating the 1998 order would not be in the public interest, asserting that if the 1998 order were reinstated, service to its customers in the areas covered by the order would be disrupted. GCI also points out that "[s]uch harm and confusion to the public might be entirely unnecessary if the RCA were to subsequently terminate the rural exemption again on remand." We decline to reinstate APUC's original order and instead leave it to the RCA's discretion whether to continue the status quo and allow ACS and GCI to provide service to these areas simultaneously.

C. The RCA Erred in Terminating ACS's Glacier State Study Area Exemptions.

Initially, GCI sought to compete with ACS throughout the Glacier State Study Area. A "study area" is the designated geographic area that a carrier serves.⁴⁴ The Glacier State Study Area encompasses areas near Fairbanks, on Kodiak Island, and cities on the Kenai Peninsula. GCI formally withdrew its request to compete with ACS throughout the entire Glacier State Study Area, however. Thereafter, GCI maintained that its request was limited to only one exchange in the Glacier State Study Area. As Gene Strid, GCI witness and Vice President and General Manager of Local Services at GCI, explained at the first hearing: "GCI at the present time seeks an interconnection for the termination and transport of local traffic, only at [ACS's] North Pole exchange." On remand, in May of 1999, Strid gave identical testimony. He testified explicitly that GCI had not requested interconnection at any other location in the Glacier State Study Area. "At the present time no interconnection other than at the North Pole wire center is

⁴⁴ 47 U.S.C. § 214(e)(5) (2001). ACS-N has two study areas, the Glacier State Study Area and the Sitka Study Area.

contemplated.” At the June 1999 remand hearing before APUC, Strid testified on cross-examination that GCI was only seeking collocation at the North Pole exchange office. The RCA appeared to understand the limited nature of GCI’s request, recognizing that “GCI’s request as modified during the hearing process is for interconnection at one location and resale throughout the balance of [ACS’s] service area.”

Ultimately, however, the RCA terminated ACS’s exemptions for the entire Glacier State Study Area. ACS appealed this decision, arguing primarily that by terminating ACS’s exemption for the entire study area, despite GCI’s limited request, the RCA acted contrary to the plain language of section 251(f)(1)(A) of the Telecommunications Act. The superior court affirmed the RCA’s decision without discussing the scope of the Glacier State termination. ACS then filed a motion for clarification with the RCA, requesting that the RCA specify whether the scope of the termination was limited to the parameters of GCI’s request. The RCA denied this motion.

ACS argues that the RCA erred by terminating its rural exemption for the entire Glacier State Study Area when GCI made only a limited request. The RCA responds that a “partial” or “divisible” exemption cannot be granted under section 251(f) and that, once a bona fide request — even a narrow, localized request — is made, and once evidence supporting that request is presented, the Act requires the RCA to terminate the areawide exemption completely. But we find this response unpersuasive. The RCA cites no authority to support its reading of section 251(f). Moreover, nothing in section 251(f)’s language precludes localized termination or requires areawide termination when, as here, a request is specifically limited to one exchange among many included in an exempted study area. Indeed, the RCA’s proposed reading of section 251(f) would invite anomalous consequences, for it would open broad areas to competition based on

artificially constricted evidence and findings concerning the economic and technical hardships that a competitor's presence might create in an isolated segment of the exempted area. We thus agree with ACS's argument and hold that, even if the burden of proof had been properly allocated, the RCA would have erred in terminating the Glacier State Study Area exemption, except as it applied to the North Pole exchange.

V. CONCLUSION

Because the RCA erred in allocating the burden of proof to ACS, we REVERSE and REMAND the RCA's decision. Additionally, we REVERSE the RCA's decision with regard to the Glacier State Study Area.

HB

1

Conforming Amendment ^{#1} by Rep. McGuire

AS ~~11.56~~ ^{11.56}.740(c) is amended to read:

(c) In this section, "protective order" means an order issued or filed under AS 18.65.850-18.65.870 or 18.66.100-18.66.180.

Amendment #2 Adopted
Amendment for HB 1.

offered by Rep. McGuire

- 1 AS 18.65.540(a) is amended to read:
- 2 (a) The Department of Public Safety shall maintain a central registry of
- 3 protective orders issued by or filed with a court of this state under AS 18.65.850 -
- 4 18.65.870 or 18.66.100 - 18.66.180. The registry must include for each protective order the
- 5 names of the petitioner and respondent, their dates of birth, and the conditions and
- 6 duration of the order. The registry shall retain a record of the protective order after it
- 7 has expired.

Subject: HB1 Clarifications

Date: Fri, 07 Feb 2003 18:38:54 -0900

From: "gary l. wells" <wells1@gci.net>

To: Representative_Harry_Crawford@legis.state.ak.us,
Representative_Lesil_McGuire@legis.state.ak.us

*Vanessa,
FYI,
-J*

Representatives Harry & Lesil,

Thank you for being there.

1. Would someone please fax/email the amendments - my fax is 333-2174.
2. I would like to go back a few steps. With last year's bill, it was my understanding that the following would occur:

We the victim, would go to the courthouse and/or talk to a police officer, complete a form "Petition for Protective Order (DV-100 (12/99) (st.4))" and be given a time to meet with a judge and state why we need the restraining order.

If this is true and utilizing the above form, under HB1,

a. Page "3 of 6, item e", addresses the issue of the stalker following the vehicle in my possession or occupied by me and/or my family members. The petitioner is given the option of prohibiting him/her from following their vehicle by marking the box "X".

b. Page "4 of 6, items a & b", addresses the issue of the stalker to "a) respondent not to use or possess a deadly weapon (including a firearm)". "b) respondent to surrender any firearm owned or possessed by respondent". The petitioner is given this option by marking the box "X".

c. Page "4 of 6, item e" addresses the issue of rehabilitation and treatment for drug of controlled substance." The petitioner is given the option by marking the box "X".

3. Found my notes from my meeting with Mark Avery on why he decided NOT to use the harassment charge/process.

a. AK statutes "Harassment Sec. 11.61.120 1-5" did not address the issue of this guy "visiting my boys at school" and arriving at my home to give us "presents" - mostly covers annoyance, insults, taunts, challenges to provoke an immediate violent response, repeated telephone and calls and calls at inconvenient times. [any unmarked boxes left on our front door during this period went directly into the dumpster - safety came first]

Since, the bill looked different from last year, Bruce asked me to refrain from making any comments about the above, especially not having the statutes in front of him.

A thought. We are not breaking new legal grounds here. We are following suit from other states who have had similar issues. So, to carry the thought further, if the law is working in other states without problems, what legal history would demonstrate Alaska would be different than the other states?

Thank you again.

Alaska State Legislature
House of Representatives

Alaska State Capitol
Juneau, Alaska 99801-1182
1-907-465-3438 (phone)
1-888-478-3438 (toll free)
1-907-465-4565 (fax)



Interim Address
716 West Fourth Avenue
Anchorage, Alaska 99501-2133
(phone) 1-907-269-0100
(fax) 1-907-269-0105

Representative Harry Crawford
District 21

Memorandum

TO: Representative Lesil McGuire
Chair House Judiciary Committee

FROM: Representative Harry T. Crawford

DATE: January, 22nd 2003

RE: House Bill 1

I respectfully request that House Bill 1 be scheduled for hearing in the House Judiciary Committee at your earliest possible convenience. I have attached a sponsor statement, and a copy of the bill. Hard copies of background information will follow.

Alaska State Legislature
House of Representatives

Alaska State Capitol
Juneau, Alaska 99801-1182
1-907-465-3438 (phone)
1-888-478-3438 (toll free)
1-907-465-4565 (fax)



Interim Address
716 West Fourth Avenue
Anchorage, Alaska 99501-2133
(phone) 1-907-269-0100
(fax) 1-907-269-0105

Representative Harry Crawford
District 21

SPONSOR STATEMENT: HOUSE BILL 1

HB 1 closes a dangerous loophole in the Alaska statutes by allowing victims of stalking unacquainted with their stalkers to enjoy the security of a judicial protective order. Current law provides protection to those in domestic situations and minor children, but does not provide the victims of strangers equal protection under the law.

HB 1 allows the victims of stalking to seek and obtain a protective order in cases of stalking that are not crimes involving domestic violence. This bill streamlines the process for public safety and judicial practitioners by mirroring the arrest and notification procedures to those already in place for domestic violence situations. The bill adds the crime of violation of a child protective order and of a violation of stalking protective order, these changes also reflect existing practitioner procedures.

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

January 21, 2003

SUBJECT: Sectional Summary - HB 1 (Work Order No. 23-LS0005\D)

TO: Representative Harry Crawford
Attn: Jay

FROM: Gerald P. Luckhaupt *JPL*
Legislative Counsel

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

Section 1. Amends the existing crime of violating a protective order, AS 11.56.740(a), by adding violations of stalking protective orders, sec. 5 of the CS(), and child protective injunctions under AS 47.17.069 as alternative ways to commit this crime.

Section 2. Amends AS 18.65.530(a) to provide a conforming change to the change made in sec. 2 of the CS().

Section 3. Amends AS 18.65 by adding new sections that provide for the issuance of protective orders in cases of stalking, that are not crimes involving domestic violence.

Section 4. Amends AS 18.66.990(3) to provide a conforming change to the change made in sec. 2 of the CS().

Section 5. Provides notice that sec. 5 includes an indirect amendment to a court rule.

GPL:med
03-042.med

Municipality
of
Anchorage



P.O. Box 196650
Anchorage, Alaska 99519-6650
Telephone: (907) 343-4250
Fax: (907) 274-6689
<http://www.ci.anchorage.ak.us>

George P. Wuerch, Mayor

DEPARTMENT OF LAW
Office of the Prosecutor
420 L Street, Suite 100

April 18, 2002

Representative Harry Crawford
State Capitol Building, Room 426
Juneau, Alaska 99801

FAX: 907-465-4565
Hard copy will follow by mail.

Dear Representative Crawford:

I am writing on behalf of the Municipal Department of Law regarding HB 317. You may recall I testified telephonically from Anchorage on March 6, 2002, in support of the bill. We continue to support the bill, as amended, and are pleased it left committee with unanimous support.

While we were able to help Ms. Wells in ultimately resolving the problem, it was only after some delay in process because of the lack of a procedural safeguard which your bill covers. When your bill becomes law, a victim of stalking-type conduct will be able to seek judicial intervention and protection at an earlier phase of the criminal justice process, which provides an additional law enforcement tool and greater victim safety.

Thank you for allowing us to participate and provide input into this issue. If you have any further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Roberts". The signature is stylized and somewhat cursive, with a long horizontal line extending to the right.

R. Bruce Roberts
Deputy Municipal Attorney
Department of Law
Criminal Division

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



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Pres. Prince of Wales Chapter

John Lucking, Jr., Member
Unalaska
Pres. Aleutian Islands Chapter

Jeff Odom, Member
Wrangell
Pres. Wrangell Chapter

January 14, 2003

Representative Harry Crawford
State Capitol
Juneau AK 99801-1182

Dear Representative Crawford:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing House Bill No. 1, an act relating to stalking and to violating a protective order.

The APOA State Board of Directors recently met and after discussing this proposed legislation, decided to unanimously support this bill.

Your legislative amendment will help to close the gap on those who are victims of stalking, without the occurrence having been a crime involving domestic violence or involving a household member. We believe that this proposed legislation will be of benefit to both citizens and law enforcement.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo J. Brandlen
State President

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 1
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to stalking and protective BRU Criminal Division
orders; amending Rules 4 and 65, Alaska Rules of . . ." Component 1st-4th Judicial Districts; Criminal
 Sponsor Representative Crawford Appeals/Special Litigation
 Requester House Judiciary Committee Component : o. 2198-99;2201/03/61/79

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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						
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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-Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 1 would allow a person who believes they are a stalking victim to petition the court to grant a protective order to keep the alleged stalker away from them.

While passage of this bill will create new prosecutions, the Department of Law does not anticipate a significant fiscal impact.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 2/5/03 8:50 AM
 Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General Date 2/5/2003
 Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 1
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Public Safety
 Title An act relating to stalking and to violating a BRU AST Detachment
protective order Component AST Detachment
 Sponsor Representative Crawford
 Requester House Judiciary Component No. 2325

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Lieutenant Matthew Leveque Phone 907 269-0390
 Division: Alaska State Troopers Date/Time 2/5/03 4:05 PM
 Approved by: William Tandeske, Commissioner Date 2/5/2003
 Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 1
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act relating to stalking... BRU Legal and Advocacy Service
 Component Public Defender Agency
 Sponsor Rep. Crawford
 Requester (H) Judiciary Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 This legislation would create a new section in the protective order statutes to provide for the application and issuance of a protective order for victims of the crime of stalking, that is not a crime of domestic violence. Under the proposed legislation, if a person allegedly violates the protective order, they may be prosecuted for the crime of violating a protective order, a class A misdemeanor.
 This legislation will likely have a fiscal impact on the Public Defender Agency, because it broadens the scope of the crime of violating a protective order, which will likely result in more cases, handled by the Agency, charging a violation of this crime. However it is not possible to predict with any certainty the number of new cases this bill will generate, therefore an indeterminate fiscal note is submitted.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416
 Division: Public Defender Agency Date/Time 2/3/03 9:33 AM
 Approved by: Sharon Barton, Acting Commissioner Date 2/3/2003
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number _____
Bill Version: HB 1
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
Title Stalking Protective Orders BRU Alaska Court System
Component Trial Courts
Sponsor Rep. Crawford
Requester House Judiciary Committee Component No. 768

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING

CAPITAL EXPENDITURES						
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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--Do not abbreviate)						
TOTAL	.	.	.	.	.	.

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

House Bill 1 establishes new procedures for obtaining protective orders for those petitioners who reasonably believe that they are victims of the crime of stalking but who do not have a relationship with the respondent that would allow them to obtain a domestic violence restraining order. This bill also makes it a crime to violate such an order.

The passage of HB 1 would impact the court system because new crimes and new protective orders will require additional court proceedings. This fiscal note does not contain a specific dollar amount because estimating the number of new crimes likely to be charged and the number of petitions likely to be filed is too speculative at this time. However, if the impact of either change is significant the court system may return to the legislature with a request for additional funding.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750
Division Alaska Court System Date/Time 2/4/03 12:35 PM
Approved by: Stephanie Cole, Administrative Director Date 2/4/03
Agency Alaska Court System

HB

2

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg



State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: March 10, 2003

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0008\A, HB 2: Civil Statute of Limitations/Sex Offenses, incorporating the conceptual amendment described below. The bill was passed out of committee today.

Page 1, Lines 6 and 13: Remove the clauses, "Notwithstanding other provisions in this chapter,"

If you have any questions, please call me at 4990. Thank you!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is




REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

MEMORANDUM

DATE: February 12, 2003

TO: Representative Lesil McGuire
Chair, House Judiciary Committee

FROM: Representative Kevin Meyer 

RE: Hearing Request for HB 2

At your earliest convenience, please schedule HB 2 Civil Statute of Limitations/Sex Offenses for a hearing in the House Judiciary Committee.

HB 2 clarifies which sexual assault crimes have a three-year statute of limitation on civil actions, and which felonies have no statute of limitation on civil actions.

In 2001, the Twenty-second Legislature passed HB 210 Statute of Limitations: Sexual Assault and Sexual Abuse of a Minor. HB 210 was amended on the House floor and as a result, several statutory inconsistencies pertaining to the statute of limitations for misdemeanor sexual assault and sexual abuse crimes were created. HB 2 cleans up the inconsistencies that were created as a result of the floor amendment.

Thank you for your time and consideration.



REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

Sponsor Statement

House Bill 2

“An Act relating to the statute of limitations for certain civil actions; and providing for an effective date.”

House Bill 2 is a clean-up bill that clarifies which misdemeanors and felonies involving sexual assault and sexual abuse have a three-year statute of limitation on civil actions, and which felonies have no statute of limitation on civil actions.

In 2001, the Twenty-second Legislature passed HB 210 Statute of Limitations: Sexual Assault and Sexual Abuse of a Minor. HB 210 removed the criminal statute of limitations for felony sexual assault and sexual abuse of a minor. HB 210 was amended on the House floor and as a result, both the criminal and civil statute of limitations for all felony sexual assault and felony sexual abuse of a minor were removed. The floor amendment caused several statutory inconsistencies pertaining to the statute of limitations for misdemeanor sexual assault and sexual abuse crimes.

Because the floor amendment did not make a specific provision for misdemeanor sexual abuse or sexual assault crimes, the civil statute of limitations for those crimes dropped to two years, for torts in general. Prior to the floor amendment, the statute of limitations was three years.

“Felony sexual abuse of a minor” and “felony sexual assault” were not defined by reference to particular sections of the criminal code. It is unclear whether certain felonies included in AS 09.10.060(c) that are not sexual abuse or sexual abuse of a minor, are intended to have: 1. No statute of limitations; 2. A two-year statute of limitations; or 3. A three-year statute of limitations.

House Bill 2 establishes the civil statute of limitations at three years for misdemeanor sexual assault, misdemeanor sexual abuse of a minor, incest, and felony indecent exposure. Under HB 2, Unlawful Exploitation of a Minor, a class B felony, is added to the list of sexual assault crimes in which the civil statute of limitations is removed.

Last Updated: February 12, 2003

LEGAL SERVICES

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

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


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

MEMORANDUM

February 10, 2003

SUBJECT: HB 2 (Work Order No. 23-LS0008\A); Civil Statute of Limitations for sex offenses

TO: Representative Kevin Meyer

FROM: Pam Finley 
Revisor of Statutes

You have asked for a sectional analysis of HB 2.

Bill section 1. This section amends AS 09.10.065 by adding unlawful exploitation of a minor to the list of sex offenses that do not have a civil statute of limitations. The amendment also clarifies that (1) it is the defendant's conduct, not a criminal conviction, that makes the section apply, and (2) for the purposes of this section, the defendant's conduct is to be judged according to the elements of the offenses as they existed at the time of the offense (not, for example, at the time the civil lawsuit is filed.)

Bill section 2. This bill section establishes a three year civil statute of limitations for conduct constituting misdemeanor sexual abuse of a minor, misdemeanor sexual assault, incest, and felony indecent exposure. Currently, acts described by these offenses would have a two year civil statute of limitations under AS 09.10.070.

Bill section 3. This bill section amends AS 09.10.140(b) to conform to the fact that conduct covered by AS 09.10.065(a) ---in bill section 1--- no longer has a statute of limitations. It is essentially a technical amendment.

Bill section 4. This bill section makes bill sections 1-3 retroactive to October 1, 2001, which was the effective date of sec. 1, ch. 86, SLA 2001. Section 1, ch. 86, SLA 2001, eliminated the civil statute of limitations for felony sexual abuse of a minor and felony sexual assault and also indirectly changed the civil statute of limitations for unlawful exploitation of a minor, misdemeanor sexual abuse of a minor, misdemeanor sexual assault, incest, and felony indecent exposure from three years to two years. Based on discussions of last year's revisor's bill, it appears that the legislature did not intend the indirect change from three years to two years. To reflect the legislature's intent in restoring the three year civil statute of limitations, this bill is made retroactive. (The addition of unlawful exploitation of a minor to those offenses that have no civil statute of limitations is also retroactive, as is the technical amendment in bill section 3.) While I do

not believe that this provision creates any constitutional problems, the bill does limit retroactivity "to the extent permitted by the state and federal constitutions."¹

Bill section 5. This bill section gives the bill an immediate effective date.

Because it may be helpful to see the statutes to which this bill relates, I have set out below AS 09.10.070 (the two year statute of limitations for torts in general), AS 09.55.650 (referred to in sec. 3), and the current versions of related criminal statutes. I am also attaching copies of the former statutes referred to in AS 09.55.650(c), as they existed at the time of their repeal in 1980.

AS 09.10.070. (general statute of limitations for torts):

Sec. 09.10.070. Actions for torts, for injury to personal property, for certain statutory liabilities, and against peace officers and coroners to be brought in two years.

(a) Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment, (2) for personal injury or death, or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery; (4) upon a statute for a forfeiture or penalty to the state; or (5) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years of the accrual of the cause of action.

(b) A person may not bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within two years. This subsection does not apply to an action for an escape.

AS 09.55.650 (referred to in sec. 3):

Sec. 09.55.650. Claim based on sexual abuse to a minor under 16 years of age.

(a) A person who, as a minor under 16 years of age, was the victim of sexual abuse may maintain an action for recovery of damages against the perpetrator of the act

¹ Normally, a civil statute of limitations may be extended before it has expired. Assuming that HB 2 takes effect before October 1, 2003, the statute of limitations for all acts occurring after ch. 86, SLA 2001 took effect will not have expired. However, there may be acts that occurred while the statute of limitations was three years (e.g., in 2000), but which would have been barred in 2002 under a two year statute of limitations. There are some cases in some jurisdictions that suggest that a defendant may have a vested, constitutionally protected right not to be sued once the statute of limitations has expired. See discussion at 51 AM JUR 2d, Limitation of Actions §§ 4, 49, 50, and 51. While these may be distinguishable from the situations covered by HB 2, and while Alaska's Supreme Court has not ruled on this issue, I thought it prudent to indicate that even if the constitution prevents HB 2 from being applied retroactively to some cases, it should be applied retroactively to those cases for which there is no constitutional impediment.

or acts of sexual abuse based on the perpetrator's intentional conduct for an injury or condition suffered as a result of the sexual abuse.

(b) If the defendant committed more than one act of sexual abuse on the plaintiff, the plaintiff is not required to prove which specific act caused the injury.

(c) In this section, "sexual abuse" means an act committed by the defendant against the plaintiff maintaining the cause of action if the defendant's conduct would have violated a provision of AS 11.41.410 - 11.41.440 or 11.41.450 - 11.41.458, former AS 11.15.120, 11.15.134, or 11.15.160, or former AS 11.40.110 at the time it was committed.

AS 11.41.410 - 11.41.458

Sec. 11.41.410. Sexual assault in the first degree.

(a) An offender commits the crime of sexual assault in the first degree if

(1) the offender engages in sexual penetration with another person without consent of that person;

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 11.41.420. Sexual assault in the second degree.

(a) An offender commits the crime of sexual assault in the second degree if

(1) the offender engages in sexual contact with another person without consent of that person;

(2) the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state;

(3) the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed; or

(4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the second degree is a class B felony.

Sec. 11.41.425. Sexual assault in the third degree.

(a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.

(b) Sexual assault in the third degree is a class C felony.

Sec. 11.41.427. Sexual assault in the fourth degree.

(a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.

(b) Sexual assault in the fourth degree is a class A misdemeanor.

Sec. 11.41.432. Defenses.

(a) It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

(1) mentally incapable; or

(2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant.

Sec. 11.41.434. Sexual abuse of a minor in the first degree.

(a) An offender commits the crime of sexual abuse of a minor in the first degree if
(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 11.41.436. Sexual abuse of a minor in the second degree.

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) - (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the second degree is a class B felony.

Sec. 11.41.438. Sexual abuse of a minor in the third degree.

(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the third degree is a class C felony.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree.

(a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor.

Sec. 11.41.445. General provisions.

(a) In a prosecution under AS 11.41.434 - 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 - 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the victim to be that age or older; and

(2) undertook reasonable measures to verify that the victim was that age or older.

Sec. 11.41.450. Incest.

(a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony.

Sec. 11.41.455. Unlawful exploitation of a minor.

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to

Representative Kevin Meyer

February 10, 2003

Page 7

engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality;
- (6) the lewd exhibition of the child's genitals; or
- (7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc.

Sec. 11.41.458. Indecent exposure in the first degree.

(a) An offender commits the crime of indecent exposure in the first degree if

(1) the offender violates AS 11.41.460(a);

(2) while committing the act constituting the offense, the offender knowingly masturbates; and

(3) the offense occurs within the observation of a person under 16 years of age.

(b) Indecent exposure in the first degree is a class C felony.

PF:lmb

03-025.lmb

Enclosure:

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 2
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Statute of Limitation for Sex Crimes BRU Alaska Court System
 Component Trial Courts
 Sponsor Representative Meyer
 Requester House Judiciary Component No. 768

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 2.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750
 Division: Alaska Court System Date/Time 3/10/03 8:38 AM
 Approved by: Stephanie Cole, Administrative Director Date 3/10/2003
 Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 2
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to the statute of limitations for BRU Civil Division
certain civil actions; . . ." Component Special Litigation
 Sponsor Representative Mever
 Requester House Judiciary Committee Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill removes the statute of limitations for when a person may bring a civil action for unlawful exploitation of a minor, and extends the statute of limitations for other civil actions stemming from certain criminal conduct.

This bill concerns private rights of action against perpetrators of specified criminal conduct, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
 Division: Attorney General's Office
 Approved by: Kathryn Daughhettee for Gregg D. Renkes, Attorney General
 Agency: Department of Law

Phone (907) 465-5370
 Date/Time 3/10/03 11:28 AM
 Date 3/10/2003

HB

9

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Jim Holm
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg



State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: February 5, 2003

Re: CS Draft Request

Please create a House Judiciary Committee Substitute for work order # 23-LS029\D incorporating the attached amendments:

If you could get a draft to me by tomorrow that would be wonderful! If you have any questions, please call myself at 4990 or Heather Nobrega at 6848. Thank you!

AMENDMENT #1

OFFERED IN THE HOUSE

TO: CSHB 9(L&C)

1 Page 13, following line 12:

2 Insert a new bill section to read:

3 **"* Sec. 27.** AS 08.18.123 is amended to read:

4 **Sec. 08.18.123. Denial, suspension, and revocation of endorsement or**
5 **home inspector registration.** (a) The department may suspend, revoke, or refuse to
6 grant or renew a residential contractor endorsement, **a home inspector registration,**
7 **or an associate home inspector registration** upon a finding that

8 (1) the application is fraudulent or misleading;

9 (2) the **endorsement holder or registrant** [CONTRACTOR] has
10 knowingly violated this chapter or a lawful order or regulation of the department;

11 (3) the **endorsement holder or registrant** [CONTRACTOR] is
12 incompetent or has engaged in fraudulent practices.

13 (b) Proceedings for the denial, suspension, or revocation of residential
14 contractor endorsement, **home inspector registration, or associate home inspector**
15 **registration** are governed by AS 44.62 (Administrative Procedure Act)."
16

17 Renumber the following bill sections accordingly.

18

19 Renumber internal references to bill sections in accordance with this amendment. Below are
20 all internal bill section references in this bill:

21 Page 22, lines 1, 12, 20, and 31

22 Page 23, lines 7, 17, 19, 20, 21, 22, 24, 25, and 26

Conceptual Amendment #3

TO CS HB 9 (L+C)

Page 6, Line 7 after "section."

Insert:

In cases of new homes, this
report can be in the form of
a certificate of occupancy.

CSHB 9

Amendment No. _____

Rep. Gara

Section 17. Add the following provision:

(e) the limitations periods in ~~section~~ this section ~~is~~ will not begin until the later of the date of the home inspection report; or the date a ~~reasonable~~ claimant should reasonably become aware of an actionable claim.

Conceptual Assessment

1) Current Statute of repose applies



Municipality of Anchorage

Office of the Mayor

George P. Wuerch, Mayor



February 4, 2003

Representative Norman Rokeberg
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: House Bill 9

Dear Representative Rokeberg,

Purchasing a home is, for most families, the largest single investment they will make. Before making that investment, many people are now turning to home inspectors to assist them in making their purchase decision. Unfortunately, anyone can call himself or herself a home inspector and there is no oversight of this growing industry.

A faulty inspection could have serious consequences for consumers when selling or purchasing a home. Consumers should have the peace of mind of knowing that the home inspector they are hiring is qualified to do the inspection and that they can be held accountable for their work.

The Municipality of Anchorage supports your efforts, through HB 9 to provide protection to Alaskans by establishing proof of competency for home inspectors as well as registration, identification, bonding and insurance requirements.

Sincerely,

Tim Rogers
Legislative Program Coordinator



Alaska State Legislature

Please enter into the record my testimony to the House JUDICIARY Committ.
Committee name
Committee on HR-9 dated 2/5/03
Bill/Subject

✓ AM NOT IN FAVOR
of this bill AS
Lumped together
AS IS

Signed: John P. Brachman
Testifier
BRADford SERVICE INC
Representing (Optional)
12401 E. Soapstone RD
Address
907-446-2612
Phone number



Alaska State Legislature

Please enter into the record my testimony to the

House Judicial Comm

Committee name

Committee on

HB 9

Bill/Subject

, dated

1/5/03

4 PAGES

Signed:

William Bruce

Testifier

Self

Representing (Optional)

165 E. PARKS Hwy Ste 207 WASILLA AK 99654

Address

907 373 5296

Phone number

Testimony of Mr. William H. Bruu ICBO Inspector 0865499-55
1/5/03 Judicial Committee

I feel that this legislation does not foster consumer protection for reasons stated below. I feel that for the past five years Representative Rokeberg has tried to satisfy his obligation to his Real Estate associates by passing legislation that will require licensing of Home Inspectors and ICBO Certified Combination Dwelling Inspectors.

The current proposed legislation is flawed in that it assesses a common set of liabilities to two totally different activities.

As to certification a HOME INSPECTOR is an individual who says, "I AM A HOME INSPECTOR". Meanwhile a ICBO **Certified Combination Dwelling Inspector** is a person who has proven his knowledge of the all the applicable codes through a comprehensive test. Many of the current ICBO inspectors in Alaska obtained that certification by attending a week long series of seminars and then challenging the test. For those attempting the test for the first time the test had an failure rate in excess of 50%, the test is comprehensive and tough. The ICBO inspector is also required to maintain his/her certification by testing on code changes and additions on a three year cycle.

One aspect of the legislation before you. Pages 5 line 21-31 and page 6 lines 1-12 in summary lay out the required reports that a Home Inspector is required to provide and perform as part of the inspection. An ICBO inspector is already required leave a copy of his field notes at each phase inspection. The requirement that he provide a verbal report to the customer is counter productive. All the inspections performed by the ICBO inspector on new construction are required to be formally documented on an AHFC form PUR-102. The PUR 102 becomes a recordable document upon completion. The completed PUR 102 is then recorded and becomes attached to the deed on the property. The name and the ICBO certification number of the inspector becomes a matter of record and in reality the inspector stands liable for those inspections as long as the document

exists. A previous Legislature has provided some protection for the inspectors from unscrupulous clients by adopting the provision in 18.56.300(C). This legislation proposes to drop that protection.

As to function of the home inspector versus the ICBO inspector there is world of difference. The ICBO Inspector is required to perform a series of inspection during the construction. Those periodic inspection include a plans review(may take up to 4 hours depending on the complexity), footing and foundation(some foundation types require 5 trips to the site to view progress), rough-ins inspections(includes four major sub assemblies), insulation and vapor retarder(extremely important in our severe climate areas), and a final inspection(AHFC has published very specific policy on final inspections). All installed appliances and systems are checked for installation and function. It would be very, very unusual if any of the appliances or mechanical equipment installed in new construction be "Used" and require the inspector to render an opinion as to life expectancy.

Conversely, the Home Inspector visits a house once for a period of time usually less than three hours. He is expected to visually inspect the property. He cannot and is not expected to view the interior of walls and other hidden parts of the construction. He is expected to comment on the age and condition of appliances and system installed. The American Society of Home Inspectors in their Standards of Practice recommend that an Inspector not address code issues because they are not trained nor equipped with the knowledge to do so.

There are other major differences in the scope of the responsibilities of a ICBO inspector and a Home Inspector that this legislation does not address.

If this legislation passes as written there will be a major reduction in the standards to which homes have to be built in order that they be financed by AHFC. Sections 33 and 34, when implemented, will allow anyone who claims to be a Home Inspector and is licensed by the state to perform code inspections on new construction. The inspector will not have to be certified by any of the code writing organizations. If the legislature wishes to keep the standards as high

as they are today and have the inspectors respond to changes and advancements, then they should continue to call for the new home inspectors to be certified by the code writing organizations. AHFC should continue to be required to have their collateral inspected to insure they have code compliant dwellings in compliance with the legislature's wishes and provided some consumer protection..

Wisdom & Associates, Inc.

PO Box 4184
Horner, Alaska 99603
907-235-6045

Fax 907-283-9188

PO Box 3413
Kenai, Alaska 99611
907-283-0629

February 13, 2003

House Judiciary Committee,

Re: House Bill 9

In discussion of Section 7 of AS 08.18.022, certifying registration of home inspectors for new homes and existing homes, House Bill Number 9 states that for existing home inspectors (as per line 24) must pass an examination offered by the American Society of Home Inspectors, American Home Inspectors Training Institute or National Association of Home Inspectors. However, as per line 26 of House Bill Number 9, it states "(B) new homes or for a joint registration is the examination offered by the International Conference of Building Officials."

Line 26 of Section 7 of AS 08.18.22 would allow joint inspectors (those who may inspect existing and new homes) to take one test, a code compliant competency test and then be certified as an existing home inspector which is an area they did not show competency in. The International Conference of Building Officials test for a combination dwelling license for one or two family dwellings is a test that covers current residential codes. An existing home inspector is not inspecting homes for code compliance, but for "information regarding the condition of the systems and components of the home as inspected at the time of the Home Inspection" as stated by *The American Society of Home Inspectors Standards of Practice and Code of Ethics*.

Furthermore line 26 of this house bill would only require new home inspectors to be certified by the International Conference of Building Officials. ICBO has dozens of certifications, most of which would not be appropriate for the inspection of residential new construction.

We suggest that the language on line 26 be revised to say, "(B) new homes registration is the examinations for a combination dwelling inspector offered by the International Conference of Building Officials." This language would identify that new home inspectors would need to complete the competency exams by ICBO to inspect all components of new residential homes. ICBO offers certification exams in safety, plans examination, and commercial as well as residential, simply requiring new home inspectors to pass an ICBO examination would allow a home inspector to pass an exam in any of ICBO certification areas, whether they apply to residential buildings or not.

In addition, Section 16 of AS 08.18.085 par (a) (1) states that a person may not bring an action against an individual registered under this chapter based on a home inspection report unless the action is commenced within "(1) two years after the date of the home inspection report if the report is related to a new home."

This language is inappropriate. While we do not disagree with there being a period of time that the home inspector may be held liable for the services they performed, however, we disagree for the amount of time a home inspector should be held liable for his services. A general contractor who does the work is only held liable for a warranty period of one (1) year.

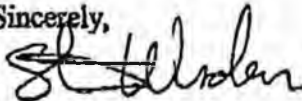
We suggest that the language in this part of the bill read; "(1) one year after the date of the home inspection report if the report is related to a new home."

Finally in Section 08.18.156 (3) it states "registered as an engineer or architect under AS 08.48, prepares a written report after the inspection, affixes the individual's seal to the home inspection report signs and dates the report and puts the individual's registration number on the report;"

This would allow engineers or architects to legally perform inspections with only their engineers or architects license. We feel that an engineers license is not a sufficient certification to certify code compliance or has had the specialized training to perform existing home inspections. While engineers may have knowledge about structural components of a building, we feel that to be an effective code compliant inspector for new construction they should also be well versed in plumbing, electrical, and mechanical. Simply having knowledge about structural components does not necessarily mean they have knowledge about electrical or other new home component codes. As this section is written, a landscape architect or engineer could certify code compliance for your home.

We thank you for your time, and urge all of you to re-examine this bill and make the necessary changes to allow for a more airtight law.

Sincerely,



Steven R. Wisdom

FEB. 5. 2003 1:02PM

NO. 1644 P. 1

TO: John Birney
Rep. Raubert Office
1-907-465-2040

SUMMARY OF BUILDING INSPECTIONS For Site-Built Construction

Owner of record: _____
Legal description: _____
Site address: _____ (Include recording district)

This certification is issued pursuant to the requirements of AK Statute 18.56.300 and AHFC's regulations 15 AAC 150.030. An inspector qualified under the International Association of Electrical Inspectors may complete the Electrical Inspection. An Architect or Engineer may only perform inspections for a project or phase of construction conducted in a community with a population of 6,500 or less that is not connected by road or rail to Anchorage or Fairbanks. Use of alternate methods, such as videos, must have PRIOR WRITTEN APPROVAL of Alaska Housing Finance Corporation.

By my signature below I certify I have the current, applicable certifications of authority. I am not personally or financially related to the builder, seller, buyer, realtor, or other interested party for this project, other than as a fee inspector.

1) **PLAN APPROVAL:**

Name (Please Print) _____ Signature _____ * ICBO # _____ Date _____

2) **COMPLETION OF FOOTINGS AND FOUNDATION:**

a. Footings:

Name (Please Print) _____ Signature _____ * ICBO # _____ Date _____

b. Foundation:

Name (Please Print) _____ Signature _____ * ICBO # _____ Date _____

3) **COMPLETION OF FRAMING, ELECTRICAL, PLUMBING, & MECHANICAL:**

a. Framing: (If pre-assembled panels were used, each panel was appropriately stamped with the ICBO listing number.)

Name (Please Print) _____ Signature _____ * ICBO # _____ Date _____

b. Electrical:

Name (Please Print) _____ Signature _____ * ICBO # _____ Date _____

c. Plumbing:

Name (Please Print) Signature * ICBO # Date

d. Mechanical:

Name (Please Print) Signature * ICBO # Date

4) **COMPLETION OF INSTALLATION OF INSULATION AND VAPOR BARRIER:**

Name (Please Print) Signature * ICBO # Date

5) **CONDITIONAL APPROVAL:**

Items to be completed: _____
To be Completed by: _____

Name (Please Print) Signature * ICBO # Date

6) **FINAL APPROVAL:**

Name (Please Print) Signature * ICBO # Date

* Or, if applicable, Electrician, Architect or Engineer State Registration Number.

By my signature below I hereby certify that the required inspections have been completed and that the building meets or exceeds the standards set forth under AS 18.56.300 and 15 AAC 150.030. I also certify that any pre-assembled wall panels are currently listed with ICBO and to my knowledge there has been no action taken to rescind the ICBO approval.

Builder's Signature: _____ Date _____

Builder's Name: _____ Builder's License # _____
(If applicable)

Name of Business: _____

Address: _____

City, State _____ Zip _____

Before me, a Notary Public in and for the State of Alaska, _____ has executed the foregoing document of his/her own free will.

(Notary Signature)

My Commission expires: _____

Alaska State Legislature

House of Representatives



Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Representative Lesil McGuire, Chair
House Judiciary Committee

FROM: Representative Norman Rokeberg

A handwritten signature in black ink, appearing to read "Norman Rokeberg".

DATE: January 30, 2003

RE: Bill packet for HB 9

Thank you for scheduling HB 9, Home Inspectors. Here is the packet material:

1. CS HB 9 (L & C)
2. Sponsor Statement
3. Sectional Analysis
4. Fiscal notes
5. Memo to committee members regarding legal issues of bill
6. AS 08.18.071
7. AS 18.56.300
8. Various Articles
 - a. Existing State Home Inspection Regulatory Legislation
 - b. This is No Home Sweet Home
 - c. Letter to Editor
 - d. Should We Care About Who the Buyer Chooses to Do a Home Inspection?
 - e. Home Inspection Bill Would Help Buyers
 - f. Expert Home Inspections Useful For Buyer and Seller
 - g. Inspect the Inspector: Choosing the Right One Can Help Avoid Costly Mistakes
9. Residential Real Property Disclosure Statement
10. Letters, Memos and Correspondence
 - a. Letter from Richard F. Gaver
 - b. Letters & e-mails of support (many refer to HB 27, which was the House bill number from the previous legislature)

AMENDMENT

1

OFFERED IN THE HOUSE

BY ROKEBERG

TO: HB 9

Page 4, Line 23:

After "examination"

DELETE: "or set of applicable courses"

Page 4, Line 24:

After "American Society of Home Inspectors"

INSERT: ", American Home Inspectors Training Institute, or National Association of Home Inspectors"

Page 4, line 25:

After "examination"

DELETE: "or set of applicable courses"

Page 6, line 11:

After "valid for"

DELETE: "six months"

INSERT: "180 days after the date the home inspector signs and dates the report"

Page 6, line 21:

After "competency requirements."

INSERT: "The department shall require at least 8 hours continuing competency per licensing period."

Page 22, line 25:

After "American Society of Home Inspectors"

INSERT: ", American Home Inspectors Training Institute, or National Association of Home Inspectors"

Amendment # 2

Offered by Rep. Rokeberg

Page 15 Line 16 – change “or” to “and”

Page 15 Line 22 – after “report” change “or” or “and”

Page 15 Line 17 and 22 – after “signs” Insert “and dates”

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House of Representatives



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SPONSOR STATEMENT FOR CSHB 9 (L & C)

BY: Representative Norman Rokeberg

TITLE: An Act relating to the registration of individuals who perform home inspections; relating to regulation of contractors; relating to registration fees for specialty contractors, home inspectors, and associate home inspectors; relating to home inspection requirements for residential loans purchased or approved by the Alaska Housing Finance Corporation; relating to civil actions by and against home inspectors and to civil actions arising from residential unit inspections; and providing for an effective date.

HB 9 will protect consumers and the home inspection industry by requiring registration of home inspectors in Alaska.

Currently, anyone can call himself or herself a home inspector. There is no state agency overseeing the industry. Consumers desire assurance that the home inspector they hire is competent, and that they have recourse against inspectors that are not. HB 9 accomplishes this by establishing registration requirements, identification requirements, bonding, insurance, and proof of competency via examination and continuing competency requirements. Home inspectors will also be required to provide consumers with a written and signed inspection report.

A faulty inspection could have serious consequences for consumers, especially when they are buying or selling a home. Common sense dictates that home inspectors must be held accountable for their work. The legislation limits legal actions against a registered home inspector to a written home inspector report that is not more than 180 days old and/or unlawfully disclosed.

For ease of administration and in order to keep costs at a minimum, home inspectors are added to the statutes concerning specialty contractors. Clarifying language is inserted in the statutes as necessary.

I would urge your support for this legislation.

ED02: 01/30/03

Alaska State Legislature

House of Representatives



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SECTIONAL ANALYSIS CSHB 9 (L & C)

BY: Representative Norman Rokeberg

Title: An Act relating to the registration of individuals who perform home inspections; relating to regulation of contractors; relating to registration fees for specialty contractors, home inspectors, and associate home inspectors; relating to home inspection requirements for residential loans purchased or approved by the Alaska Housing Finance Corporation; relating to civil actions by and against home inspectors and to civil actions arising from residential unit inspections; and providing for an effective date.

- Section 1: Amends AS 08.01.010 [Centralized Licensing, Applicability of Chapter] to add reference to home inspectors.
- Section 2: Amends AS 08.01.065(c) [Centralized Licensing, Establishment of Fees] to add reference to new subsection in Section 3.
- Section 3: Amends 08.01.065 [Centralized Licensing, Establishment of Fees] to require that the fees established for AS 08.18 [Construction Contractors] so that fee levels for specialty contractors, home inspectors, and associate home inspectors shall equal total regulatory costs for these three categories. Fee for home inspector, associate home inspector, and joint license shall be the same.
- Section 4: Amends 08.18.011 [Construction Contractors, Registration required] to make clarifying amendments concerning contractor registration.
- Section 5: Amends 08.18.011 [Construction Contractors, Registration required] to require registration for home inspectors and associate home inspectors. Associate home inspector is to be employed by a registered home inspector who will be liable for the associate's work. Clarifies that an individual holding a joint registration for home inspection is considered to be registered as both a home inspector for new homes and existing homes.
- Section 6: Amends AS 08.18.021(a) [Construction Contractors, Application for registration] to insert language concerning home inspector registration and to clarify requirements for home inspectors and contractors. Corrects

reference to "employer" social security number in the current statute to the "applicant's" social security number.

Section 7: Adds new sections to AS 08.18 [Construction Contractors] as follows:

Section 08.18.022. Home inspectors; associate home inspectors. Sets forth examination requirements, education and experience requirements, and application requirements for registration as a home inspector or associate home inspector.

Section 08.18.023. Pre-inspection documents and inspection reports. Establishes the procedure for pre-inspection documents and inspection reports. Sets forth the items to be included in the report and requires a written report. Indicates that an oral inspection report may be given by a home inspector during or after the inspection. Sets the validity period of the inspection report at 180 days.

Section 8: Amends AS 08.18.031(a) [Construction Contractors, Certificate of Registration] to clarify the renewal of home inspector registrations.

Section 9: Adds new section to 08.18.031 [Construction Contractors, Certificate of Registration]. Sets forth the renewal procedure for a home inspector registration. Permits the Department to adopt regulations concerning continuing competency requirements. Requires at least eight hours of continuing competency activity. Indicates that regulations must provide that a continuing competency activity approved by one of the following entities satisfies the continuing competency requirements if the activity meets the Department's requirements: Alaska Housing Finance Corporation, University of Alaska, American Society of Home Inspectors Alaska Chapter, a chapter of the International Conference of Building Officials Alaska, Alaska State Homebuilders Association, or a state agency whose activity meets the Department requirements.

Section 10: Amends 08.18.041 [Construction Contractors, Fees] to permit the Department to establish fees for registration of home inspectors, associate home inspectors, renewal of registration, and examinations.

Section 11: Amends 08.18.051(a) [Construction Contractors, Identification requirements] to clarify that this subsection applies to contractors.

Section 12: Adds new section to AS 08.18 [Construction Contractors] to provide identification requirements for home inspectors. Includes that a home inspector or associate home inspector registered under one name may not act under another name; sets forth advertising requirements; establishes

that "registered home inspector" may only be used by individuals registered with the Department as a home inspector.

- Section 13: Amends AS 08.18.061 [Construction Contractors, Requirements of political subdivision] to add reference to home inspectors.
- Section 14: Amends AS 08.18.071 [Construction Contractors, Bond required]. Adds home inspection activity to this section.
- Section 15: Amends AS 08.18.071(b) [Construction Contractors, Bond required]. Adds home inspectors to the \$5,000 bond requirement. Cash deposit or other negotiable security acceptable to the commissioner may be used in lieu of bond.
- Section 16: Amends AS 08.18.081(a) [Construction Contractors, Claims against contractor]. Adds home inspector to this section.
- Section 17: Adds new section to AS 08.18 [Construction Contractors]. Legal actions against home inspector. Sets out provisions concerning legal actions against a home inspector. Actions must be commenced within two years from the date of the inspection report on new homes and one year on existing homes. Limitations of this section may not be waived by contract. Home inspector and associate home inspector not liable to person if person is not a party to the transaction or is unlawfully in receipt of home inspection report. Contractual provisions that purport to limit liability of home inspector to cost of home inspection report are contrary to public policy and void.
- Section 18: Amends AS 08.18.111 [Construction Contractors, Advertising bond and insurance]. Adds home inspectors to this section.
- Section 19: Amends AS 08.18.115 [Construction Contractors, Return of cash deposit]. Adds provisions for home inspector who ceases doing business to have any cash deposit in lieu of bond returned.
- Section 20: Amends AS 08.18.116 [Construction Contractors, Investigations] to provide that the Department of Community and Economic Development is the agency to investigate alleged or apparent violations against home inspectors.
- Section 21: Amends AS 08.18.117 [Construction Contractors, Issuance of citations] to provide that the Department of Community and Economic Development may issue citations for violations with regard to home inspectors.

- Section 22: Amends AS 08.18.121(a) [Construction Contractors, Suspension and revocation of registration] to add home inspector to provisions indicating that if insurance under AS 08.18.101 (worker's compensation, property and liability) is not in effect, the registration is suspended until such time the insurance is reinstated.
- Section 23: Amends AS 08.18.121(b) [Construction Contractors, Suspension and revocation of registration] to add home inspector to provisions indicating that if any final judgment impairs the liability of the surety bond or depletes any cash deposit that registration is suspended until bond liability in required amount, unimpaired by unsatisfied judgment claims, has been furnished.
- Section 24: Amends AS 08.18.121 (c) [Construction Contractors, Suspension and revocation of registration] to add home inspector to provisions indicated that if a bonding company cancels the bond, the registration shall be revoked. Registration may be regained by again complying with bonding requirements.
- Section 25: Amends AS 08.18.121(d) [Construction Contractors, Suspension and revocation of registration] to add home inspectors to the provisions concerning suspension for failure to follow 08.18.071. Further provides that if a bond is suspended three times, the commissioner may permanent revoke registration.
- Section 26: Amends AS 08.18.121(f) [Construction Contractors, Suspension and revocation of registration] to provisions concerning violations and the authority of the Department of Commerce and Economic Development with regard to home inspectors.
- Section 27: Amends AS 08.18.131 [Construction Contractors, Injunction] to add reference to civil penalty. Further adds reference to ability of Department to enjoin person who is violating home inspectors statutes from acting in that capacity.
- Section 28: Amends AS 08.18.141(a) [Violations] to include home inspector. Those violating 08.18.011 [Registration required] or 08.18.025 [Residential contractors] may be guilty of class B misdemeanor; other violations of this chapter are punishable under AS 12.
- Section 29: Amends AS 08.18.151 [Construction Contractors, Legal actions by contractor] to add reference to home inspectors.

Section 30: Amends AS 08.18 [Construction Contractors] to add new section as follows:

- a. 08.18.152. Prohibited acts for home inspectors. Sets out the acts which home inspectors may not do, such as: repairs to subject property for additional fees; inspect property for a fee in which home inspector has a financial interest; offer rewards or compensation for business referrals; without written consent of client, disclose information from a home inspection report unless to a subsequent client who requests an inspection on the same premises or in a judicial action; accept compensation from more than one party for the same home inspection; accept commission; accept engagement for home inspection based on outcome of inspection report.
- b. 08.18.154. Limitation on home inspector's activities. Sets for limitation on activities.
- c. 08.18.156. Exemptions related to home inspectors. Exempts following from registering as a home inspector or associate home inspector in order to inspect a home: federal, state or local government employee performing duties within scope of office; inspecting own home or one in which person has a financial interest; registered engineer or architect who affixes seal, signs and dates the report and puts registration number on report; engineer or architect in training supervised by registered engineer or architect; pesticide applicator performing duties in scope of license issued by Department of Environmental Conservation; general contractor with residential contractor endorsement performing activities within scope of that registered; real estate appraiser performing those duties; determining if thermal and lighting energy standards are being met. Establishes that the definition of "home inspection" does not include repairing, maintaining, or installing systems or components listed in new 08.18.171(12) and inspects those systems or components in order to perform or offer repair, maintenance or installation work on those items.

Section 31: Amends 08.18.161 [Construction Contractors, Exemptions] to add qualifying reference to contractors.

Section 32: Amends AS 08.18.171 [Construction Contractors, Definitions] to add definitions for: existing home, home inspection, home inspector, joint registration, knowingly, new home, residence, and visual examination.

Section 33: Amends AS 18.56.300(b) [Alaska Housing Finance Corporation, Construction standards for housing eligible for purchase of loans] current AHFC statute requiring a home inspection before certain loan

commitments are made by AHFC. Adds registered home inspectors to list of people qualified to accomplish an inspection and eliminates the distinction in current law for rural areas, thus allowing an architect, engineer, or other person approved by AHFC to qualify as a home inspector under the AHFC statute for all homes, not just those in rural areas.

- Section 34: Amends same AHFC statute described in Section 33 [Alaska Housing Finance Corporation, Construction standards for housing eligible for purchase of loans], but amendment does not take effect until January 1, 2005, so is set out separately. Would eliminate persons certified by the ICBO and IAEA from being qualified to do the AHFC inspections referred to in AS 18.56.300(b) as these individuals would now be under the home inspector license requirements.
- Section 35: Amends AS 36.30.050(b) [State procurement code, Lists of contractors] to add qualifying language concerning contractors.
- Section 36: Amends 36.30.115(a) [State procurement code, subcontractors for construction contracts] to add clarifying references to contractors.
- Section 37: Amends 36.30.210 [State procurement code, Request for proposals] to add clarifying reference to contractors.
- Section 38: Amends AS 36.90.290(1) [State procurement code, definition] adds qualifying language to definition of "prime contractor".
- Section 39: Amends AS 45.50.471(b) [Competitive Practices and Regulations on Competition, unlawful acts and practices] to bring violations of 08.18.023(b) [inspection reports] and 08.18.152 [prohibited acts for home inspectors] under unfair trade practice statutes.
- Section 40: Repeals AS 18.56.300(c) [Alaska Housing Finance Corporation, construction standards for housing eligible for purchase of loans] effective July 1, 2005 (see Section 46).
- Section 41: Applicability: Change made in Section 40 applies to causes of action that accrue on or after July 1, 2005.
- Section 42: Regulations: Permits Department to proceed to adopt regulations regarding home inspectors.
- Section 43. Provides for transitional licensing.

Section 44: Effective date for certain provisions of the legislation.

Section 45: Section 34 effective date is January 1, 2006.

Section 46: Sections 40 and 41 take effect July 1, 2005.

Section 47: Immediate effective date for remainder of legislation except as provided for in sections 44-46.

Alaska State Legislature

House of Representatives

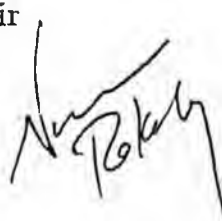


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MEMORANDUM

TO: Representative Lesil McGuire, Chair
House Judiciary Committee

FROM: Representative Norman Rokeberg 

DATE: February 3, 2003

RE: Legal Issues in CSHB 9 (L & C), Home Inspectors

The following are some of the legal issues that the House Judiciary Committee might want to address during its hearing on HB 9:

1. Pg. 6, Line 11: Validity of The Home Inspection Report

As currently written, the home inspection report is only valid for 180 days from the day the inspector signs and dates the report.

2. Pg. 9, Line 7: Claims Against Contractor and Home Inspectors

Except as provided in Section 17 of the bill (see below), a person having a claim against a home inspector for any of the items referred to in AS 08.18.071 (Bond Requirements) may bring suit upon the bond in the district court of the judicial district in which venue lies. This is a conforming amendment adding home inspectors and referencing the newly created section on legal actions against home inspectors.

3. Pg. 9, Line 27 (Section 17): Legal Actions Against Home Inspectors

- Statute of Limitations:
 - 2 years for a new home, 1 year for an existing home
- Statute of limitations applies to all actions.
Limitations cannot be waived by contract.
- Home inspector not liable to a person if the person is
 - not a party to the transaction for which the home inspection was conducted, or
 - unlawfully in receipt of the home inspection report

- Contractual provisions that limit liability of a home inspector to the cost of the home inspection report are contrary to public policy and void.

4. **Pg. 13, Line 23: Class B Misdemeanor**

Practicing without a home inspector license is a class B misdemeanor.

5. **Pg. 21, Line 29: Repeal of AS 18.56.300 (c)**

AS 18.56.300 (c) states:

A person may not bring an action for damages based on a duty imposed by (b) of this section to inspect a residential unit unless the action is for damages caused by gross negligence or intentional misconduct.

This section gave ICBO inspectors, under AHFC laws, immunity from liability unless grossly negligent or intentionally misbehaving. By repealing this section, we no longer give such immunity to these inspectors.



Standards of Practice

Code of Ethics

Glossary of Terms

Consumer Alerts

State Regulations

FAQ's on Inspections



Download ASHI's official position on the regulation of the home inspection profession.

Existing State Home Inspector Regulatory Legislation

Alabama Licensure (Act 517 of 2002) Requires individuals performing home inspection to become licensed by the Alabama Building Commission. The Alabama Standards of Practice and Code of Ethics is adopted from the ASHI Standards of Practice and Code of Ethics. The Alabama Building Commission gratefully acknowledges ASHI's consent. The bill also outlines educational and experiential requirements to become licensed, sets license fees and insurance requirements, and defines penalties under which licensure may be suspended or revoked. This law replaces Act 96-574.

For more information, contact the State of Alabama Building Commission, (334) 242-40 (334) 242-4182 fax, email buildcom@bc.state.al.us

To download Act 517 go to: <http://alisdb.legislature.state.al.us/acas/ACASLogin.asp>, click on Bills, click on Status, type in HB216 and click on Get Status, click on the HB216 button click View for PDF.

Arizona Certification (Chapter 1, Sec. 5, Title 32) enacted in 2000. Under the Arizona Home Inspector Registration Act, registration requirements for home inspectors are administered by the State Board of Technical Registration (SBTR). The law establishes process and requirements for registration and registration renewal as a home inspector. In addition, the law requires that registered home inspectors have one of the following financial assurances: a. Errors and Omissions in the amount of \$200,000 in the aggregate and \$100,000 per occurrence; b. \$25,000 bond; or c. Financial assurance mechanism with a value of at least \$25,000. The law states that a failure to obtain, or loss of, financial assurance is grounds for revocation of registration. The law allows a practicing home inspector to present evidence of sufficient experience to not have to obtain training or pass an exam through December 31, 2002. Exempts individuals from course study requirements for registration who can provide evidence to the SBTR that they have performed 250 or more home inspections for compensation.

For more information, contact State Board of Technical Registration, (602) 255-4053, (602) 255-4051 fax.

To download the law go to: <http://www.btr.state.az.us/> and click "Legislative Updates," click "Senate Bill 1132." To download the Rules, click "Applicable Statutes" and then "Statute Governing the AZ BTR effective Aug. 8, 2001."

Arkansas Registration (Act 791 of 1997) enacted in 1997. Under the "Arkansas Home Inspector Registration Act," all home inspectors in the state must register with the Secretary of State. In addition, home inspectors must conduct all inspections in adherence to the Standards of Practice and Code of Ethics of ASHI, the Arkansas Association of Real Estate Inspectors, or an equivalent professional home inspection association. The law also prohibits inspectors from performing repairs on a structure that he has inspected within

last 12 months. In order to register under the law, an applicant must procure general liability insurance of at least \$100,000 and, if applicable, workers compensation insurance coverage. Home inspectors must also demonstrate a positive net worth, or provide a \$10,000 bond payable to the Secretary of State.

For more information, contact Secretary of State, Division of Corporations
(501) 682-3409
(501) 682-3437 f
<http://www.sosweb.state.ar.us/business.html>

To download the law go to: http://www.ark-homeinspectors.com/law_formatted.htm.

California Trade practice act (Chapter 338) enacted in 1996. The law in California prohibits unethical home inspection practices, including repairing properties that home inspectors have inspected in the previous 12 months. The law encourages courts to consider the Standards of Practice and Code of Ethics of ASHI and the California Real Estate Inspection Association when determining whether an inspection meets the required standard of care.

For more information, contact the License Board
(916) 255-3900

To download the law go to:
<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=07001-08000&file=7>

Connecticut Licensure (Chapter 400F enacted in 1999). Connecticut law requires home inspectors to be licensed under the "Home Inspection Licensing Board." In order to be eligible for a home inspector license, an applicant shall: 1) have successfully completed high school or its equivalent; 2) have either been engaged as a home inspector intern for not less than one year and not performed less than 200 home inspections for compensation or taken and successfully completed a board-approved training program, earned a home inspector intern permit, and performed not less than 100 home inspections under the direct supervision and in the presence of a licensed home inspector; 3) have passed an oral, written, or electronic competency examination; and 4) have paid a \$200 fee. In order to receive a permit as a home inspector intern, an applicant shall: 1) have successfully completed high school or its equivalent; 2) have enrolled in and completed a board-approved training program; 3) have an identified supervisor who is licensed as a home inspector, is in good standing, and has agreed to perform the supervisory function required; and 4) have paid a \$100 fee.

For more information, contact the Dept. of Consumer Protection, Licenses Service Division
(860) 713-6000
(860) 713-7239 f
email: licencse.services@po.state.ct.us

For Regulations, applications, etc. go to:
<http://www.dcp.state.ct.us/licensing/professions.htm>

To download the law only go to: <http://www.cga.state.ct.us/2001/pub/Chap400f.htm>

Georgia Trade practice act (Chapter 3, Title 8) enacted in 1994. Georgia law requires home inspectors to provide written documents containing certain information with regard to inspections. This written document must include the scope of the inspection, including the structural elements and systems to be inspected, that the inspection is a visual inspection and that the home inspector will notify, in writing, the person on whose behalf such inspection is being made of any defects noted during the inspection.

For more information, contact the Secretary of State, Construction Industry License Board
(901) 207-1416
(901) 207-1425 f
<http://www.sos.state.ga.us/plb/construct/>

To download the law go to:

www.state.ga.us/cgi-bin/pub/ocode/ocasearch?docname=OCODE/G/8/3/330.

Illinois Licensure (Public Act 92-039). Illinois law creates the "Home Inspector Licensure Act" and establishes a Home Inspector Advisory Board within the Office of Banks and Real Estate, which is charged with regulating home inspectors. The law directs the Board to establish standards of practice, as well as educational and administrative requirements they relate to the practice of home inspections. Under the law, home inspectors are required to take a Board-approved examination. The Board is responsible for developing administrative rules to define and establish the education requirements, application and appropriate fees, as well as establishing any penalties or disciplinary actions for violating the terms of a license. The law also exempts certain professionals from licensure as a home inspector while acting under the scope of their licenses. The law becomes effective January 1, 2003.

For more information contact the Office of Banks and Real Estate
(217)782-3000
(217)524-5941 f
www.obre.state.il.us.

To download the law go to:

<http://www.legis.state.il.us/legisnet/legisnet92/hbgroups/hb/920HB1805enq.html>

Louisiana Licensure (Chapter 17-A of Title 37) enacted in 1999. Louisiana law creates the "Louisiana Home Inspectors Licensing Act." It creates the Louisiana State Board of Home Inspectors within the Department of Economic Development and requires the Board to establish minimum qualifications for licensing and allows the Board to charge and collect fees. Applicants must be at least 18 years old and must have successfully completed high school or its equivalent, and passed the required examination. Applicants must show evidence of successful completion of at least 120 hours of instruction, at least 30 hours no more than 40 of which must be in course work containing actual practical home inspections. Home inspectors are required to provide a written report of the home inspection, and are prohibited from, at the time of inspection and for a reasonable time thereafter, advertising or soliciting to perform repair services on the home upon which the inspection was performed. As a condition of renewal of a license, a home inspector must show evidence of completion of 20 hours of continuing education. Active licensees are required to carry errors and omission insurance, and the Board must establish a group insurance program.

For more information, contact the Louisiana State Board of Home Inspectors
225-248-1334
225-248-1335 fax
1-866-244-1334.

To download the law go to:

<http://la.realtorplace.com/Meetings/fallmtng98/agendas/homeinspectbill.htm>.

To download the Rules and Regulations of the Board go to: www.lsbhi.com/documents.

Maryland Trade practice act enacted in 1992. Maryland law requires home inspectors disclose professional qualifications and the scope of the inspection within the home inspection contract. The law also requires home inspectors to conduct home inspections in accordance with the standards of practice set forth by a professional home inspection trade association such as ASHI or the National Association of Home Inspectors.

Licensure (Chapter 470) enacted in 2001. Maryland law creates the State Commission on Real Estate Appraisers and Home Inspectors to regulate home inspectors in the state. The Commission is charged with establishing a code of ethics and standards of practice for licensed home inspectors, and providing a copy of such standards to each licensed home inspector. To qualify for licensure prior to July 1, 2002, an applicant must complete two of the following conditions: 1) complete a minimum of 48 hours of an on-site training course approved by a national home inspection organization of the Commission, 2) complete a