

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

10825 HOUSE JUDICIARY

HB

245





HB 245: providing protection from tort lawsuits  
in four areas of governmental activity

Search and Rescue

- Provides immunity from tort lawsuits for state and local government and their employees.
- There are approximately 400 search and rescues conducted each year in Alaska.
- The Alaska State Troopers coordinate search and rescue activities using state and community resources.
- This provision is found in Section 2 of the bill.

Intra-military Tort Claims

- Bars tort actions for damages against the state and its employees by service members - there is no change to their entitlement to state workers compensation when on state duty and federal benefits when on federal duty.
- Provides the State and its military personnel the same protection from tort lawsuits that the federal government and federal military personnel have under the *Feres* doctrine; consistent with the vast majority of states.
- These provisions are found in Sections 4 - 6 of the bill.
- Bars tort claims by third parties against the State for acts of the organized militia unless the acts were in the line of duty while on active state service under AS 26.05.070.
- This provision is found in Section 3 of the bill.
- Both of these provisions recognize that the federal government, and not the State of Alaska, is responsible for injuries and claims while service members are under federal command and control.

Civil Defense and Homeland Security

- Bars tort claims against the government, employees, and authorized volunteers for damages sustained by a homeland security worker - does not affect the worker's or authorized volunteer's rights to state workers compensation.
- Bars third party tort claims against the government, employees, and authorized volunteers for damages unless malice or reckless indifference is shown by clear and convincing evidence.
- These provisions are found in Sections 7 - 11 of the bill.

Fire Management and Firefighting Activities

- Amends two statutory sections to bar tort claims by third parties against the state, local government, other firefighting groups and their employees.
- Every year the State Division of Forestry is called upon to respond to hundreds of fires throughout the State of Alaska.
- This change is necessary due to two Alaska Supreme Court cases holding that the State may be sued for firefighting activities.
- Litigation disrupts Forestry's day to day operations and diverts substantial state resources to defend lawsuits.
- This provision is consistent with federal and common law in other jurisdictions that immunizes these activities.
- This provision does not affect existing entitlement to workers compensation or the availability of federal or state disaster relief benefits.
- These provisions are found in Sections 12 and 13 of the bill.

# STATE OF ALASKA

*Frank H. Murkowski, Governor*

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300  
JUNEAU, ALASKA 99811-0300  
PHONE: (907)465-3600  
FAX: (907)465-2075

April 3, 2003

Representative Lesil McGuire  
House Judiciary Committee  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801

Re: "An act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date"

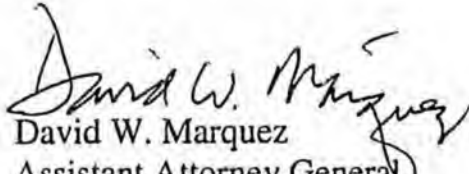
Dear Representative McGuire:

I am writing this letter to request that you schedule the above act, pending referral, for a hearing at your earliest convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES  
Attorney General

By:   
David W. Marquez  
Assistant Attorney General

DWM:lb

Cc: Mike Tibbles, Legislative Director, Office of the Governor  
Deborah Behr, Legislation and Regulations Attorney, Department of Law

**STATE OF ALASKA**  
**DEPARTMENT OF ADMINISTRATION**  
*OFFICE OF THE COMMISSIONER*

*FRANK MURKOWSKI, GOVERNOR*

*P.O. BOX 110200  
JUNEAU, ALASKA 99811-0200  
PHONE: (907) 465-2200  
FAX: (907) 465-2135*

April 8, 2003

The Honorable Lesil McGuire  
Chair House Judiciary Committee  
Alaska State House  
State Capitol  
Juneau, Alaska 99801-1182

Dear Representative McGuire:

This letter is to request that you schedule HB 245, an act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and fire fighting, for a committee hearing as soon as possible.

Your favorable consideration of this request will be greatly appreciated.

Sincerely,



Kevin Jardell  
Assistant Commissioner

## Sectional Analysis of SB 171/HB 245

This legislation amends several statutory provisions and adds others in order to immunize the State and its employees against claims and lawsuits arising from various activities involving the Alaska National Guard and State Defense Force, homeland defense and security, search and rescue, civil defense, and fire-fighting.

Section 1 is a declaration of legislative intent to not waive the State's sovereign immunity as to claims related to the activities listed in the preceding paragraph.

Section 2 creates a new statutory provision, AS 18.60.125, which would immunize the State and its employees for claims or lawsuits arising from acts or omissions relating to search and rescue activities, including failure to initiate same. This section would afford the State of Alaska the same immunity from suit afforded for other law enforcement activities, such as criminal investigations.

Section 3 amends AS 26.05.140 to immunize the State and its employees of the organized militia, namely the Alaska State Defense Force and the Alaska National Guard, unless the acts or omissions from which a claim or lawsuit arises occurred while the member was under State active duty pursuant to Title 26. Specifically, this amendment would grant immunity for the acts or omissions of Guardsmen where the service performed was under Title 32 of the United States Code, including weekend drills and other types of inactive duty training, active duty and active duty for training, active guard and reserve duty and civilian technicians paid by the federal government. This amendment would not affect the rights to pursue a claim or lawsuit against the United States pursuant to the Federal Tort Claims Act for the act or omission.

Section 4 creates a new statutory provision, AS 26.05.145, to immunize the State and its employees for lawsuits brought by members of the military, including the Alaska State Defense Force, Alaska National Guard, the United States' military branches, and the national guard units of the other states, for death, personal injury or property damage arising out of or incident to the member's military service. This amendment has the effect of creating the same immunity for the State as that held by

the federal government under the *Feres* doctrine and overrides the decision of the Alaska Supreme Court in *Himsel v. State*, 36 P.3d 35 (Alaska 2001).

Section 5 amends AS 26.05.260(d) to include a sentence limiting state workers' compensation benefits to members of the organized militia who are called to active state service by the Governor under AS 26.05.070. This provision will not affect the rights of Alaska National Guard members to receive federal benefits under Title 32 of the U.S. Code.

Section 6 amends AS 26.05.260(e) to clarify that only the spouse and dependents of a member of the organized militia who dies as a result of injury during active state service under AS 26.05.070 will be entitled to death benefits under state workers' compensation law provided in AS 23.30.215. This provision will not affect the rights of survivors of Alaska National Guard members to receive federal benefits under Title 32 of the U.S. Code.

Sections 7-11 amend AS 26.20.140, the civil defense immunity statute, and extend it to immunize homeland security and disaster response activities as well as civil defense activities. Section 7 makes an exception only when malice or reckless indifference to the interests, rights, or safety of others is shown by clear and convincing evidence. Section 8 adds a new subsection defining "civilian defense or homeland security worker" for purposes of this immunity. Sections 9 and 10 amend AS 26.20.200, definitions in the civil defense chapter, to amend the definition of "civil defense" and to define "homeland security." Section 11 amends the disaster statutes, AS 26.20, to specify that the immunity provisions of AS 26.20.140 apply when entities or persons covered by that section perform duties under AS 26.23 relating to disasters, except as otherwise provided in the Emergency Management Assistance Compact adopted under AS 26.23.136.

Sections 12-13 add identical provisions to AS 41.15, which governs protection of forested land from fire and other destructive agents, and AS 41.17, Alaska's Forest Resources and Practices Act. The new sections provide immunity from civil actions for damages based on death, personal injury, or property damage resulting from acts or omissions arising out of performance of the State's

firefighting obligations in each chapter. Persons immunized include the state, its officers, employees, and agents; political subdivisions and their officers, employees and agents; authorized firefighting organizations; and others assisting in fire control or suppression at the request of state or federal authorities. This section overrides the decision of the Alaska Supreme Court in *Angnabooguk v. State*, 26 P.3d 447 (Alaska 2001), that, because the state legislature had not explicitly made all firefighting activities and decisions immune from suit, both the state and individual firefighters could be held liable for damage caused by a wildfire.

Section 14 provides that the Bill affects only causes of action accruing after the effective date and does not affect pre-existing causes of action.

Section 15 gives the Bill an immediate effective date.

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: HB 245  
 (H) Publish Date: 4/4/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
 Title "An Act relating to certain suits and claims by BRU Civil  
members of the military services . . ." Component Special Litigation  
 Sponsor Rules Committee  
 Requester Governor 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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)  
 The Alaska Supreme Court, in a recent decision, ruled that the State of Alaska may be sued and could be held liable for tort claims by injured members of the Alaska National Guard and a member of the Indiana National Guard for injuries that were incurred during the members' service with the national guard. The Alaska Supreme Court did not adopt the federal rule (known as the *Feres* doctrine) that bars tort claims by military service personnel for injuries arising out of activities that were incident to their service in the federal military or the national guard. While the Alaska Supreme Court did not address tort claims by members of the United States military or other parts of the Alaska organized militia, its ruling could be applied to permit such claims against the State of Alaska. This bill will essentially adopt the federal *Feres* doctrine, and would provide the state and state military personnel with the same protection from tort lawsuits that the federal government and federal military personnel are provided under the *Feres* doctrine. It

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

Phone: (907) 465-5370  
 Date/Time: 1/27/03 3:13 PM  
 Date: 1/27/2003

FISCAL NOTE #1

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

BILL NO. HB 245

**ANALYSIS CONTINUATION**

will also make clear that the state can be liable to third parties only for the conduct of militia members on active state service acting in the line of duty under orders of the governor, and not for the conduct of "borrowed" federal employees. Similarly, the bill clarifies that state workers' compensation benefits would only be due for injuries or death of organized militia members ordered into active state service by the governor.

Passage of this legislation will have no fiscal impact on the Department of Law.

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: HB 245  
 (H) Publish Date: 4/4/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Natural Resources  
 Title Tort Immunity BRU Statewide Fire Suppression  
 Component Fire Suppression  
 Sponsor Rules  
 Requester Governor Component No. 437

**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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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)

Tort immunity legislation will require no operating or capital expenditures. It has the potential of saving the state a significant but undeterminable amount in litigation costs and damages resulting from natural disasters such as wildfire.

Prepared by: Dean Brown  
 Division: Forestry  
 Approved by: Tom Irwin, Commissioner  
 Agency: Natural Resources

Phone 269-8476  
 Date/Time 4/3/2003  
 Date 4/3/2003

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 3  
 Bill Version: HB 245  
 (H) Publish Date: 4/8/03

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to certain claims and BRU Risk Management  
suits..... Component Risk Management  
 Sponsor \_\_\_\_\_  
 Requester \_\_\_\_\_ Component No. 71

**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						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	*	*	*	*	*	*

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)

The state's self insurance program for tort liability exposures will be favorably affected by this bill.

The limitation of civil actions arising out of certain claims & suits by members of the military services or regarding acts or omissions of the organized militia, or arising out of certain search & rescue, civil defense, homeland security, and fire management & fire fighting activities will reduce state liability exposure and thereby decrease future defense costs.

Projected costs for a low frequency yet potentially high severity risk is not possible, therefore the fiscal impact is indeterminate. In future years, Risk Management's liability premium assessments will reflect the reductions actually realized as our premium charges are developed from actual claims expense incurred.

Prepared by: J. Brad Thompson, Director Phone \_\_\_\_\_  
 Division: Risk Management Date/Time 2/14/03 7:46 AM  
 Approved by: Mike Miller, Commissioner Date 2/14/2003  
 Agency: Administration

**HB**

**249**



# Alaska State Legislature

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Chair, Judiciary Committee  
Vice-Chair, House Committee on  
Economic Development,  
Trade and Tourism

Member  
Oil & Gas Committee

## Representative Lesil McGuire

*House District 28*

### Sponsor Statement HB 249

**“An Act relating to actions involving monopolies and restraints of trade; and providing for an effective date.”**

This bill clarifies the provision of the Alaska Antitrust Act that governs the award of attorney fees and costs to the prevailing party.

Since 1962, Alaska statutes have authorized the Alaska Supreme Court to adopt court rules providing that the losing party in a lawsuit shall pay all or part of the costs and attorney fees of the prevailing party. The Supreme Court has adopted such a rule, specifically Alaska Rule of Civil Procedure 82(a), which provides that as a matter of routine, the losing party in litigation in Alaska is ordered to pay costs and partial attorney fees to the prevailing party. These rules discourage bringing meritless lawsuits and encourage bringing valid claims and presenting valid defenses by providing the successful party with partial reimbursement for the costs of litigation.

The Alaska Antitrust Act includes a provision specifically declaring that a successful plaintiff may recover at least partial attorney fees, and in some circumstances may recover full attorney fees. See AS 45.50.576(a). The Act does not state expressly how, if at all, this special statutory provision is intended to affect the right of a successful antitrust defendant to recover partial attorney fees from the losing plaintiff, in accordance with Rule 82.

The history of the Alaska Antitrust Act confirms that there was never an intent to preclude a successful antitrust defendant from recovering partial attorney fees. However, some courts have reached a different interpretation by assuming that successful antitrust defendants could not recover any attorney fees because the current statute does not explicitly authorize such an award. This bill is designed to clarify that the standard attorney fee rules, applicable to essentially all civil cases, apply to successful antitrust defendants. It ensures that the provision that authorizes recovery of attorney fees to successful antitrust plaintiffs will not be misinterpreted to prohibit successful antitrust defendants from partial recovering attorney fees in accordance with standard court rules.

It is unfair to permit a situation where antitrust defendants, if they go to trial and lose a complex lawsuit, must be prepared to pay part or all of the plaintiffs' attorney fees, while plaintiffs face no risk of paying even part of the defendants' fees if a jury decides that plaintiffs' claims are meritless. This bill does not even demand full equity, because successful defendants would be enabled to recover only partial attorney fees, in contrast to some successful plaintiffs' ability to recover full attorney fees. However, this bill ensures that some right of recovery, along with some risk of having to pay damages, applies to both sides in an antitrust case.

The Legislature enacted a very similar statutory provision in 1998 concerning attorney fees in consumer protection and unfair trade practice cases, which are closely related to antitrust cases. AS 45.50.537 states expressly that a successful plaintiff in a consumer protection and unfair trade practice case shall recover full reasonable attorney fees, and a successful defendant shall recover partial attorney fees in accordance with standard court rules.

Because this bill does not create any change in law, but merely clarifies existing law, it is appropriate for the bill to take effect immediately upon passage.

**Current Law:**

**Sec. ~~45.50.576~~. Suits by persons injured; treble damages.**

(a) A person who is injured in business or property by a violation of AS 45.50.562 - 45.50.570, or a person so injured because the person refuses to accede to a proposal for an arrangement that, if consummated, would be a violation of AS 45.50.562 - 45.50.570, may bring a civil action

(1) for damages sustained by the person, and if the judgment is for the plaintiff and the trier of fact finds that the defendant's conduct was wilful, the plaintiff shall be awarded threefold the amount of damages sustained by the person, plus the costs of the suit, including reasonable attorney fees; and

(2) to enjoin the unlawful practice, and if judgment is for the plaintiff, the plaintiff may be awarded the costs of the suit, including reasonable attorney fees.

(b) When the state, a home rule or general law city or borough, or other governmental entity is injured by reason of a violation of AS 45.50.562 - 45.50.570, it may maintain an action in the same manner as prescribed in (a) of this section for an injured person; and the state, city, borough, or other governmental entity is entitled to the same relief as provided in (a) of this section.

*Gregoire v. National Bank of Alaska*, Op. No. 336, 413 P2d 27 (Alaska 1966).

Where a client states by affidavit that he has discharged his attorney by means of letter, it is not error to allow that attorney to withdraw, even though the attorney does not serve the client with notice of hearing on a motion to be allowed to withdraw. *Moran v. Kenai Towing and Salvage, Inc.*, Op. No. 1056, 523 P2d 1237 (Alaska 1974).

Where there is no dispute as to the material terms of a settlement, the provisions of paragraph (e) of this rule are met if both parties admit either in a writing filed with the clerk or orally in open court that a settlement had been reached. *Interior Credit Bureau, Inc., v. Bussing*, Op. No. 1366, 559 P2d 104 (Alaska 1977).

Trial court did not err in holding that plaintiff, who was both a doctor and a lawyer, could either represent himself or be represented by counsel, but not both, in his action against hospital for its failure to renew his staff privileges. *Eufemio v. Kodiak Island Hosp.*, Op. No. 3868, 837 P2d 95 (Alaska 1992).

Trial court abused its discretion in denying attorney's properly presented motion to withdraw as counsel. *Devineenzi v. Wright*, Op. No. 4136, 882 P2d 1263 (Alaska 1994).

**Rule 82. Attorney's Fees.**

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First \$ 25,000	20%	18%	10%
Next \$ 75,000	10%	8%	3%
Next \$400,00	10%	6%	2%
Over \$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be deter-

mined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; by SCO 1246 effective July 15, 1996; by SCO 1281 effective August 7, 1997; by SCO 1340 effective January 15, 1999; and by SCO 1455 effective July 15, 1993)

**Note to SCO 1118am:** By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., *Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); *City of Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-

prevailing party. See, e.g., *Malvo v. J.C. Pen Co.*, 512 P.2d 575, 588 (Alaska 1973); *Demosh New*, 737 P.2d 780, 788 (Alaska 1987).

**Note:** AS 25.25.313(c), added by § 6 of ch. 57 § 1995 (the Uniform Interstate Family Support Act) has the effect of amending Civil Rule 82 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a proceeding listed in AS 25.25.301.

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in [SCO 1118]. In my view no compelling case has been demonstrated for these changes.<sup>1</sup> For my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflecting (b)(3)(A) through (K), will unnecessarily and automatically increase litigation over attorney's awards both in our trial courts as well as in court.<sup>2</sup>

<sup>1</sup>In this regard I note that the Alaska Judicial Council is scheduled to conduct an in depth empirical study of the workings of Civil Rule 82. My preference is to await the results of the Council's study before deciding whether any of the current provisions of Rule 82 should be amended. Such a study should position this court to make a more informed assessment as to whether the current rule operates in a fashion which unjustly denies access to our courts. I further note that our Civil Rules Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's question indicated: that Civil Rule 82 does not deter people from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that there is no need to discourage frivolous litigation.

<sup>2</sup>Any attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K), request variations from the attorney's fees awarded under either the monetary recovery statute provisions of (b)(1), or the provisions of (b)(3) which apply where no money judgment is recovered by the prevailing party.

**Note to SCO 1281:** In 1997 the legislature amended AS 09.30.065 concerning offers of judgment according to ch. 26, § 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rule 68 and 82 by requiring the offeree to pay cost reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by cha-

provisions relating to attorney fee awards. According to § 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

**Note:** Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

#### Annotations

#### Cases

- I. In General
  - II. Prevailing Party
  - III. Review
    - A. Standard
    - B. Abuse of Discretion or Error
  - IV. Fee Schedule
- I. In General

The common law did not permit allowance of attorney's fees as costs to the prevailing party, but in Alaska such allowance is of relatively ancient origin and prior to attainment of statehood the matter was regulated by statute. *McDonough v. Lee*, Op. No. 378, 420 P2d 459 (Alaska 1966).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

Where a mechanics' lienor files a four-count complaint against the beneficiary of a deed of trust to foreclose the mechanics' liens but prevails on only one count, the trial court may properly refuse to award either party costs or attorney's fees. *Brand v. First Federal Savings & Loan Association of Fairbanks*, Op. No. 658, 478 P2d 829 (Alaska 1970).

This rule does not apply where plaintiffs seek an injunction and are awarded an injunction which is to be void if the defendant pays certain damages, since the rule in such case is not an accurate criterion for determining a fee. *Stauber v. Granger*, Op. No. 777, 495 P2d 67 (Alaska 1972).

The purpose of this rule is only to partially compensate a client for the productive work done by his attorney. It is irrelevant that actual attorney's fees are several times the amount awarded. *State v. Abbott*, Op. No. 804, 498 P2d 712 (Alaska 1972).

The determination of which party prevails and is entitled to costs is within the discretion of the trial judge. *DeWitt v. Liberty Leasing Co. of Alaska*, Op. No. 818, 499 P2d 599 (Alaska 1972).

A party is not barred from appealing from the disallowance of costs and attorney's fees by his acceptance of payment of the judgment and by signing a document entitled "Satisfaction of Judgment." *DeWitt v. Liberty Leasing Co. of Alaska*, Op. No. 818, 499 P2d 599 (Alaska 1972).

Under this rule, an award of prejudgment interest is to be included in the amount of the "money judgment." *Era Helicopters, Inc. v. Digicon Alaska, Inc.*, Op. No. 999, 518 P2d 1057 (Alaska 1974).

Under this rule, a trial judge may award attorney fees without a formal motion and without a hearing, especially in a situation where the parties seeking to be heard did not file a formal request for fees. *Urban Development Company v. Dekreon*, Op. No. 1083, 526 P2d 325 (Alaska 1974).

This rule does not apply in a divorce action. *Burrell v. Burrell*, Op. No. 1169, 537 P2d 1 (Alaska 1975).

A trial judge may award attorney's fees without a formal motion and without a hearing. *National Bank of Alaska v. J.B.L. & K. of Alaska, Inc.*, Op. No. 1239, 546 P2d 579 (Alaska 1976).

A "hold harmless" indemnity clause includes the cost of recovery in the clause itself. *Manson-Osberg Co. v. State*, Op. No. 1292, 552 P2d 654 (Alaska 1976).

Where parties' potential liability for payment of actual recovery greatly exceeded potential liability for cost of defense, the main issue could not be said to be the cost of defense. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

The cost of in-house counsel is not an attorney's fee within the meaning of this rule. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Attorney's fees should be computed on basis of net, not gross, recovery. *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc.*, Op. No. 1324, 555 P2d 964 (Alaska 1976).

Attorney's fees are not recoverable under this rule in an action in federal court grounded on both admiralty and diversity jurisdiction. *Kalanback, Inc. v. Insurance Co. of the State of Pennsylvania, Inc.*, 422 FS 44 (USDC Alaska 1976).

Where defendant is dismissed under Civil Rule 41(a)(1)[a] before service of any pleading or motion by defendant but would have required trial court to consider merits of controversy, there is no joinder of issue, no prevailing party, and an award of attorney's fees is precluded. *State v. Alaska International Air, Inc.*, Op. No. 1409, 562 P2d 1064 (Alaska 1977).

One and one-half page memorandum devoid of authorities was not statement required by Civil Rule 77(b)(2), so that motion to dismiss was frivolous and issue was not joined, precluding award of attorney's fees. *State v. Alaska International Air, Inc.*, Op. No. 1409, 562 P2d 1064 (Alaska 1977).

When condemnee is eligible for attorney's fees in eminent domain action, he must receive full compensation under Civil Rule 72, not partial compensation under Civil Rule 82. *Greater Anchorage Area Borough v. Ten Acres*, Op. No. 1417, 563 P2d 269 (Alaska 1977).

It was proper to allow party attorney's fees for defending against one party, and separate fee for prevailing on cross-claim against third party. *Kaps Transport, Inc. v. Henry*, Op. No. 1527, 572 P2d 72 (Alaska 1977).

When a public corporation's active representation in litigation is by in-house counsel rather than retained counsel, award of attorney's fees pursuant to Rule 82 is proper. *Greater Anchorage Area Borough v. Sisters, Etc.*, Op. No. 1550, 573 P2d 862 (Alaska 1978).

An oral explanation on the record by the trial judge is adequate to justify decision denying attorney's fees. *Larry v. Dupree*, Op. No. 1652, 580 P2d 326 (Alaska 1978).

Civil Rule 82 applies only to "costs of the action," and not to attorney's fees incurred in the conduct of a prior arbitration. *Alaska State Housing v. Riley Pleas, Inc.*, Op. No. 1765, 586 P2d 1244 (Alaska 1978).

Attorney's fees could not be assessed against a public school teacher whose dismissal from employment was upheld by the superior court where the teacher had a statutorily guaranteed right to contest his dismissal in the courts. *Crisp v. Kenai Peninsula Borough Sch. Dist.*, Op. No. 1771, 587 P2d 1168 (Alaska 1978).

Civil Rule 82 had no application to claim for attorney fees by defendant retailer in suit based on strict tort liability against retailer and manufacturer, but retailer could recover costs based on indemnification obligation of manufacturer. *Heritage v. Pioneer Brokerage & Sales*, Op. No. 1855, 604 P2d 1059 (Alaska 1979).

Plaintiffs were jointly and severally liable for costs and attorney's fees although they filed separate complaints, where cases were consolidated for trial. *Stepanov v. Gavrilovich*, Op. No. 1823, 594 P2d 30 (Alaska 1979).

Civil Rule 82 does not govern appeals to Superior Court from administrative agency decision. *Kodiak Western Alaska v. Bob Harris Flying Service*, Op. No. 1820, 592 P2d 1200 (Alaska 1979).

A client's absence of obligation to pay for legal services rendered does not preclude an award of attorney's fees. *Arctic Slope Native Assoc. v. Paul*, Op. No. 2058, 609 P2d 32 (Alaska 1980).

Where prevailing party's attorneys, apparently motivated by considerations of professional courtesy, charged him for their services at the rate of \$30.00 per hour rather than the customary rate of \$75.00 per hour, the court would be justified in valuing those services using the customary rate. *Arctic Slope Native Assoc. v. Paul*, Op. No. 2058, 609 P2d 32 (Alaska 1980).

In determining the amounts of attorney's fees on appeal in public interest litigation, the same considerations are applicable as at the trial level, and it is therefore appropriate to award full attorney's fees on appeal to a successful public interest litigant. *Thomas v. Bailey*, Op. No. 2094, 611 P2d 536 (Alaska 1980).

It was not unreasonable for the superior court to find that plaintiffs exercising their rights under the election contest statute, were public interest litigants against whom an assessment of attorney's fees would be improper. *Thomas v. Croft*, Op. No. 2135, 614 P2d 795 (Alaska 1980).

Where the defendants in litigation stemming from a contested gubernatorial election were the state and the primary winners, it was proper to award attorney's fees against the state as a coprevailing party since the litigation was caused by the irregularities of state election officials in the conduct of the election. *Thomas v. Croft*, Op. No. 2135, 614 P2d 795 (Alaska 1980).

Under this rule, trial court could in its discretion order co-defendant to pay all of the fees awarded to the prevailing party, especially where the court believed that party co-defendant to be the wrongdoer. *Moses v. McGarvey*, No. 2139, 614 P2d 1363 (Alaska 1980).

This rule does not require the court to limit its award to amount requested. *State v. Fairbanks North Star Borough School Dist.*, Op. No. 2257, 621 P2d 1329 (Alaska 1981).

To the extent that work performed is duplicative unnecessary, it should not be considered in determining proper award under this rule. *State v. Fairbanks North Star Borough School Dist.*, Op. No. 2257, 621 P2d 1329 (Alaska 1981).

An attorney-litigant who defends an action through retained counsel should not be reimbursed for his own participation unless the court clearly segregates his compensable time expended as an attorney active in the litigation, and noncompensable time, expended as client. *Sherry v. She*, Op. No. 2271, 622 P2d 960 (Alaska 1981).

The decision in *Crisp v. Kenai Peninsula Borough School District*, 587 P2d 1168 (Alaska 1978) does not apply to appeals of administrative decisions if the consequences there are for less significant than in the *Crisp* case, and courts continue to assess reasonable attorney's fees against the losing party in such cases. *Sjong v. State*, Op. No. 2269, 622 P2d 1329 (Alaska 1981).

While attorney's fees are costs, they are not covered by literal requirements of Civil Rule 79(b). *State v. University of Alaska*, Op. No. 2303, 624 P2d 807 (Alaska 1981).

Under this rule an attorney is entitled to attorney's fees and punitive damage award unless the court in its decision specifically states otherwise. *Sturni, Ruger & Co. v. Day*, No. 2330, 627 P2d 204 (Alaska 1981).

Superior court does not have authority to award costs and attorney's fees in a child in need of aid proceeding. *Cooper v. State*, No. 2453, 638 P2d 174 (Alaska 1981).

Award of costs and fees in child custody action may include costs or fees incurred in any other action, such as child in need of aid proceeding, no matter how closely related the issues might be. *Cooper v. State*, Op. No. 2453, 638 P2d 174 (Alaska 1981).

On appeal to superior court of a municipal zoning decision it was error for the court to award attorney's fees to prevailing parties based upon the civil rules rather than appellate rules. *Royal Krest Const. v. Anchorage*, Op. No. 2400, 640 P2d 133 (Alaska 1981).

Award of attorney's fees under this rule to prevailing party in state action arising out of the admiralty jurisdiction of the United States was proper. *Williams v. Eckert*, Op. No. 2443, 643 P2d 991 (Alaska 1982).

Where natural parent consented to adoption of her child but then unsuccessfully sought to withdraw such consent, an award of substantial attorney's fees to the prevailing party manifestly unreasonable. *S.O. v. W.S.*, Op. No. 2491, 643 P2d 997 (Alaska 1982).

Where it was unclear what the parties intended in a settlement on offer and acceptance which provided that attorney's fees be provided under the terms of "an Alaska Civil Rule endorsement" contained in an insurance policy of defendant, it was appropriate to determine whether there was a meeting of the minds of the parties on the issue of attorney's fees.

fees. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

In a proceeding to modify the terms of a property settlement incorporated into a divorce decree, an award of attorney's fees and costs is properly made pursuant to this rule. *Stone v. Stone*, Op. No. 2522, 647 P2d 582 (Alaska 1982).

Trial court's award of twenty percent of prevailing party's costs and fees in case where no recovery was had was not abuse of discretion. *Alvey v. Pioneer Oilfield Services*, Op. No. 2532, 648 P2d 599 (Alaska 1982).

When assessing attorney's fees in litigation under the Truth-in-Lending Act, the standards set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir. 1974) should be applied. *Hayer v. National Bank of Alaska*, Op. No. 2658, 663 P2d 547 (Alaska 1983).

Given the dissimilar underlying policies between awards of attorney's fees under this rule and 15 U.S.C. § 1640(a)(3) of the Truth-in-Lending Act, it was error for the trial court to resort to the guidelines of this rule in determining its fee award under the federal act. *Hayer v. National Bank of Alaska*, Op. No. 2658, 663 P2d 547 (Alaska 1983).

Where the right to the conveyance of certain real property was the "main issue" in litigation involving a demand for specific performance and a claim of unlawful detainer, the party prevailing on the "main issue" was entitled to attorney's fees notwithstanding that the final accounting between the parties showed that on balance the prevailing party owed damages to the other party. *Currington v. Johnson*, Op. No. 2828, 685 P2d 73 (Alaska 1984).

Where State's motion for attorney's fees cited Appellate Rule 508 as authority for its request for fees, the court's order granting the State's motion, which appeared on the very same document, could not reasonably be construed as based on any other authority. *Rosen v. State Bd. of Public Accountancy*, Op. No. 2880, 689 P2d 478 (Alaska 1984).

Unsuccessful challenger to a rezoning decision on ground that open meetings act was violated qualified as a public interest litigant under this rule. *Brookwood Area Homeowners v. Anchorage*, Op. No. 2953, 702 P2d 1317 (Alaska 1984).

In a divorce action, the "prevailing party" standard of this rule does not apply. *H.P.A. v. S.C.A.*, Op. No. 2961, 704 P2d 205 (Alaska 1985).

Although award of attorney fees was not unreasonable, the judgment for attorney's fee had to be vacated since part of the judgment on which it was based was reversed. *Dillingham Comm. Co. v. City of Dillingham*, Op. No. 2966, 705 P2d 410 (Alaska 1985).

In unsuccessful negligence action by sawmill employee against state for alleged failure of state to properly inspect the sawmill for safety violations, it was not manifestly unreasonable to award \$65,000 to the state for attorney fees even though the employer insisted on full satisfaction of its compensation lien, making settlement impossible. *Smith v. State*, Op. No. 2984, 706 P2d 1160 (Alaska 1985).

An explanation is required in all cases where the trial court refuses to award attorney fees to the prevailing party. *Pratt v. Kirkpatrick*, Op. No. 3054, 718 P2d 962 (Alaska 1986).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended and a brief description of the services reflected by those hours should be submitted. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Failure of the judgment to grant attorney's fees on punitive damage award was a legal error, but trial judge had discretion to waive the thirty-day rule for correcting such errors so as to grant a late request for modification of the judgment. *Alaskan Village, Inc. v. Smalley*, Op. No. 3069, 720 P2d 945 (Alaska 1986).

As the prevailing party at trial, defendant could receive the maximum amount of attorney fees under Civil Rule 82; the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

Superior court's award of \$55,000 in attorney's fees, which amounted to approximately 60 percent of the requested amount and 45 percent of the actual fees incurred, was sustained on appeal. *Dahle v. Atlantic Richfield Co.*, Op. No. 3120, 725 P2d 1069 (Alaska 1986).

Where party successfully enjoined nonjudicial foreclosure of deed of trust, award of \$5000 in attorney fees, based upon the party's potential liability of \$57,000, the amount by which he was alleged to be in default, was not manifestly unreasonable. *Tolstrup v. Miller*, Op. No. 3129, 726 P2d 1304 (Alaska 1986).

Award of 80 percent of prevailing party's attorney fees was not manifestly unreasonable where trial court characterized the losing party's defense as bordering on bad faith. *Crook v. Mortenson-Neal*, Op. No. 3128, 727 P2d 297 (Alaska 1986).

In computing prejudgment interest on negligence action award to plaintiff, trial court correctly computed the interest on the entire judgment amount rather than computing the interest on the judgment amount less worker's compensation benefits paid to plaintiff. *Alyeska Pipeline Service Co. v. Beadles*, Op. No. 3151, 731 P2d 572 (Alaska 1987).

Trial court's award of 75 percent of the prevailing party's actual attorney's fees was not manifestly unreasonable. *Steenmeyer Corp. v. Mortenson-Neal*, Op. No. 3154, 731 P2d 1221 (Alaska 1987).

Award to plaintiff of \$700 in interim attorney's fees for its cost in litigating defendant's successful motion to have defendant's own admissions withdrawn was proper. *City of Kenai v. Ferguson*, Op. No. 3155, 732 P2d 184 (Alaska 1987).

The purpose of this rule is to compensate a prevailing party partially, not fully, for attorney's fees; an award of full attorney's fees is "manifestly unreasonable" in the absence of bad faith or vexatious conduct by the losing party. *Demoski v. New*, Op. No. 3184, 737 P2d 780 (Alaska 1987).

Contract provision allowing the prevailing party "reasonable" attorney fees justified trial court's award of full instead of partial attorney fees since the plain meaning of a contract provision prevails over any limitation otherwise imposed by this rule. *Ursin Seafoods v. Keener Packing Co.*, Op. No. 3217, 741 P2d 1175 (Alaska 1987).

Trial court had no authority to require the state to pay costs or attorney's fees as a sanction in a juvenile case. *State v. Superior Court, Third Jud. Dist.*, Op. No. 744, 743 P2d 381 (Alaska App. 1987).

Although workers' compensation claim by employees against an adjuster was not made in bad faith, it was frivolous, justifying an award of full attorneys' fees. *Crawford and Co. v. Vienna*, Op. No. 3243, 744 P2d 1175 (Alaska 1987).

This rule does not apply to judgments in divorce cases. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The "prevailing party" standard and the divorce action judgment exception to this rule are inappropriate standards for determining the question of attorney's fees in connection with motions to amend or enforce child custody orders. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The statutory standard of "willfully and without just excuse" is appropriate for determining the question of attorney's fees after a motion to amend or enforce a custody or visitation order is adjudicated; in this way any unsuccessful party who reasonably, and in good faith, believes that his or her action was justified by the best interests of the children will not be deterred from action by the possibility of an award of fees and costs. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

Projected attorney's fees under this rule based on a stipulated projected verdict were a part of a wrongful death defendant's liability insurance policy limits. *Schultz v. Travelers Indem. Co.*, Op. No. 3325, 754 P2d 265 (Alaska 1988).

Whether an entity is a public interest litigant cannot depend on the interests of a single member; rather, it must depend on the interests of typical members; accordingly, where only a few out of more than 100 members of a nonprofit corporation bringing suit had sufficient personal economic incentive to bring such a suit, the nonprofit corporation could qualify as a public interest litigant. *Citizens For The Preservation v. Sheffield*, Op. No. 3368, 758 P2d 624 (Alaska 1988).

In child support modification action, trial court did not err in awarding attorney's fees to the Child Support Enforcement Division under this rule. *Patch v. Patch*, Op. No. 3379, 760 P2d 526 (Alaska 1988).

The prevailing party rule for determining attorney fee awards under this rule does not apply to fee awards in divorce cases. *Mann v. Mann*, Op. No. 3491, 778 P2d 590 (Alaska 1989).

The divorce judgment exception to this rule does not extend to post-judgment modifications and enforcement motions. *Hartland v. Hartland*, Op. No. 3459, 777 P2d 636 (Alaska 1989).

Clause in lease/option agreement providing for full reasonable attorney's fees to prevailing party in any legal action relating to the demised premises was not superseded by subsequent earnest money agreement which did not mention attorney's fees. *Jackson v. Barbero*, Op. No. 3456, 776 P2d 786 (Alaska 1989).

The "prevailing party" rule used for determining attorney fees under this rule does not apply to divorce cases; instead relevant considerations are the relative economic situation and earning power of each party. Also, the court may award attorney fees where there is bad faith. *Streb v. Streb*, Op. No. 3443, 774 P2d 798 (Alaska 1989).

Trial court erred in awarding attorney fees to the prevailing party in a post-judgment child custody and support case after a finding that the other party acted in bad faith. *Houlihan v. House*, Op. No. 3498, 779 P2d 1204 (Alaska 1989).

Award of attorney fees in a child custody and support action between unmarried individuals is to be governed by the standard used in divorce actions rather than the prevailing party standard. *Bergstrom v. Lindback*, Op. No. 3516, 779 P2d 1235 (Alaska 1989).

Superior court did not err in allowing the prevailing party to file a supplemental memorandum five months after the party's initial motion for attorney fees was made, where the supplemental memorandum itemized fees requested for work after the initial motion was filed in opposing the losing party's motion for relief from judgment. *Kenai Peninsula Borough v. English Bay Village*, Op. No. 3517, 781 P2d 6 (Alaska 1989).

Trial court erred in taking past settlement negotiations into account in making an award of attorney fees under this rule. *Doyle v. Peabody*, Op. No. 3519, 781 P2d 957 (Alaska 1989).

Trial court did not abuse its discretion in ruling that the prevailing party's attorney fees, filed 70 days after entry of judgment, were not excessive, absent any substantial prejudice resulting from the delay. *T & G Aviation, Inc. v. Foothold*, Op. No. 3609, 792 P2d 671 (Alaska 1990).

In suit by insured against insurer for violating insurance agreement, trial court erred in permitting jury to award insured attorney fees beyond those authorized by this rule. *Alaska Pacific Assurance Co. v. Collins*, Op. No. 3614, 792 P2d 936 (Alaska 1990).

A non-attorney pro se litigant is not entitled to attorney fees under this rule. *Alaska Federal S & L v. Bernhardt*, Op. No. 3562, 794 P2d 579 (Alaska 1990).

The argument that trial courts should never be permitted to award fees in excess of those established under "noncontested" or "without trial" schedules of Civil Rule 68 following acceptance of an offer of judgment under Civil Rule 68 was rejected. *Van Dorn v. Culliton*, Op. No. 3630, 797 P2d 642 (Alaska 1990).

In arbitration proceeding by borough against brokerage in which the brokerage firm sued certain borough officials for contribution, ascertain by brokerage firm that law firm had a conflict of interest in representing both the borough in the arbitration proceeding and the individual defendants in the contribution case, and should therefore be barred on public policy grounds from receiving an award of attorney fees. *Integrated Res. Equity v. Fairbanks Borough*, Op. No. 3633, 799 P2d 295 (Alaska 1990).

Where nationwide class action law suit was not submitted to Alaska attorney general as required by A

statute, the action was deemed frivolous as to Alaska claimants; accordingly, the defendant, as prevailing party vis-a-vis the Alaska claimants, was entitled to recover for its attorney fees spent in Alaska. *Deadwyler v. Volkswagen of America, Inc.*, 748 F. Supp. 1146 (W.D.N.C. 1990).

In property dispute case, award of attorney fees to an adverse possessor was appropriate notwithstanding argument that the award amounted to an unjustified "windfall." *Nome 2000 v. Fagerstorm*, Op. No. 3638, 799 P2d 304 (Alaska 1990).

The appellate rules rather than the civil rules control an award of attorney fees when the superior court determines an administrative appeal. *Diedrich v. City of Ketchikan*, Op. No. 3661, 805 P2d 362 (Alaska 1991).

The divorce judgment exception to this rule does not apply to post-judgment modification and enforcement motions; accordingly, fees in such cases are awarded under the prevailing party standard of this rule for post-judgment money and property issues, under which the parties' relative economic positions are irrelevant. *Lowe v. Lowe*, Op. No. 3725, 817 P2d 453 (Alaska 1991).

Any award of attorney fees for legal services incurred subsequent to a judgment for past due child support is a cost of the action to the extent the fees are attributable to reasonable and necessarily incurred legal efforts to collect the judgment. *Cameron v. Hughes*, Op. No. 3805, 825 P2d 882 (Alaska 1992).

The four criteria for determining whether a particular lawsuit involves the public interest are: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance? *Anchorage Daily News v. Anchorage School Dist.*, Op. No. 3652, 803 P2d 402 (Alaska 1990); *Citizens Coalition v. McAlpine*, Op. No. 3686, 810 P2d 162 (Alaska 1991); *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

Any award of attorney fees for legal services incurred subsequent to a judgment for past due child support is a cost of the action to the extent the fees are attributable to reasonable and necessarily incurred legal efforts to collect the judgment. *Cameron v. Hughes*, Op. No. 3805, 825 P2d 882 (Alaska 1992).

Award of attorney fees in divorce cases is not governed by this rule. *Hilliker v. Hilliker*, Op. No. 3831, 828 P2d 1205 (Alaska 1992).

The "prevailing party" standard of this rule does not apply in divorce actions; instead, court must base award of fees on parties' relative economic situations and earning power. *Jones v. Jones*, Op. No. 3856, 835 P2d 1173 (Alaska 1992).

Argument that this rule violates due process clauses of state and federal constitutions because risk of incurring large attorney fee award deters many plaintiffs from bringing suit was rejected. *Van Huff v. Sohio Alaska Petroleum Co.*, Op. No. 3857, 835 P2d 1181 (Alaska 1992).

Opposing party should have been allowed ten days to file motion opposing award of attorney's fees. *McGill v. Wahl*, Op. No. 3886, 839 P2d 393 (Alaska 1992).

Where a statute expressly calls for an award of reasonable attorney's fees to successful plaintiffs, full fees should be awarded as long as those fees are reasonable. *Bobich v. Stewart*, Op. No. 3913, 843 P2d 1232 (Alaska 1992).

In awarding attorney fees and costs to plaintiffs who successfully challenged state legislative redistricting plan, trial court did not err by (1) failing to apportion awards by issue, (2) awarding fees for post-trial litigation in which plaintiffs did not prevail, and (3) awarding fees and costs for work attributable to both state case and noncompensable Department of Justice proceedings. *Hickel v. Southeast Conference*, Op. No. 4055, 868 P2d 919 (Alaska 1994).

Award of attorney's fees under this rule must relate solely to attorney's services performed in case in which judgment is entered and must only provide compensation for services performed up to time of judgment. *Torrey v. Hamilton*, Op. No. 4073, 872 P2d 186 (Alaska 1994).

Attorney's fees incurred in adversary proceeding in bankruptcy were not recoverable as costs of collection for original state court judgment. *Torrey v. Hamilton*, Op. No. 4073, 872 P2d 186 (Alaska 1994).

It is within the trial court's discretion to consider a party's pre-litigation fees in determining an award of attorney's fees. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

It is error for the court to rule on a motion for an award of attorney's fees before the opposing party in given an opportunity to respond. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Attorney's fees award was vacated in light of ruling requiring remand of case for further evidencing hearing. *Sweet v. Sisters of Providence in Washington*, Op. No. 4200, 893 P2d 1252 (Alaska 1995).

An award of only approximately thirty percent of the prevailing party's attorney's fees was within the court's discretion since the case was the first Alaska case dealing with arbitral immunity. *Feichtinger v. Conant*, Op. No. 4189, 893 P2d 1266 (Alaska 1995).

When a trial court awards attorney's fees, it may, but need not, take into account the existence of an unaccepted Rule 68 offer if the claimant-offeree fails to better the offer. *Fairbanks North Star Borough v. Lakeview Enterprises, Inc.*, Op. No. 4218, 897 P2d 47 (Alaska 1995).

Given the amendments to Civil Rule 82 effective July 15, 1993, pre-amendment case law discussing the impact of successful Rule 68 offers on attorney's fees awards have limited application. *Fairbanks North Star Borough v. Lakeview Enterprises, Inc.*, Op. No. 4218, 897 P2d 47 (Alaska 1995).

Where case was in process when new Rule 82 went into effect, new rule was to be applied of attorney's fees. *Bishop v. Municipality of Anchorage*, Op. No. 4233, 899 P2d 149 (Alaska 1995).

Non-profit corporation organized for purpose of discouraging prostitution which brought action to abate house of prostitution qualified as public interest litigant. *SAC v. Lot 3, Block 3, Evergreen*, Op. No. 4245, 902 P2d 766 (Alaska 1995).

Amendment to this rule effective July 15, 1993, should have been applied to case where summary judgment was entered on June 7, 1993, defendants were declared prevailing parties on August 16, 1993; and attorney's fees were award on November

1, 1993. *Nielson v. Benton*, Op. No. 4258, 903 P2d 1049 (Alaska 1995).

The rule of *Cameron v. Hughes*, 825 P2d 882 (Alaska 1992), that legal costs reasonably and necessarily incurred in collecting a judgment for past-due child support should be treated as "costs of the action" and awarded to the collecting party, applies only to post-judgment fees incurred after a support obligation has been reduced to a unitary, fixed-sum judgment and only in child support cases. It does not apply in an action to reduce a spousal support obligation to judgment. *Saltz v. Saltz*, Op. No. 4272, 903 P2d 1070 (Alaska 1995).

While this rule does not generally apply to divorce cases, it does apply to post-judgment enforcement and modification motions. *Saltz v. Saltz*, Op. No. 4272, 903 P2d 1070 (Alaska 1995).

Native Alaskan Council of elders which filed suit to prevent clearcut harvesting of tract of timber believed to be location of historic Eyak village and burial ground qualified as public interest litigant. *Eyak Elders Council v. Sherstone, Inc.*, Op. No. 4273, 904 P2d 420 (Alaska 1995).

This rule does not preempt applicability of common fund doctrine, wholly or in part. *Edwards v. Alaska Pulp Corp.*, Op. No. 4362, 920 P2d 751 (Alaska 1996).

This rule, a fee-shifting tool which provides partial reimbursement of prevailing party's legal fees, was not intended to cap recovery of attorney fees under common fund doctrine, a fee-spreading mechanism which prevents unjust enrichment of those who derive benefit from efforts of others. *Edwards v. Alaska Pulp Corp.*, Op. No. 4362, 920 P2d 751 (Alaska 1996).

Where class representatives agreed to pay their lawyers whatever fees the court awarded, determination by court of "actual" fees was not necessarily limited to hourly fees. *Municipality of Anchorage v. Gentile*, Op. No. 4388, 922 P2d 248 (Alaska 1996).

Where police officers and fire fighters prevailed in class action against municipality to prevent reduction of post-retirement medical benefits, and class representatives had agreed to pay their attorneys whatever attorney fees were awarded by trial court, trial court had discretion to use risk enhancement and common fund doctrine as factors in calculating fee award and to require class members to contribute to attorney fees from benefits created or protected by class action. *Municipality of Anchorage v. Gentile*, Op. No. 4388, 922 P2d 248 (Alaska 1996).

All motions for attorney fees, including motions grounded on statutes, made after July 15, 1996, must be made within 10-day time frame of this rule. *Jones v. Jones*, Op. No. 4430, 925 P2d 1339 (Alaska 1996).

Excess insurer was not responsible for part of attorney's fees paid by primary insurer. *Safety Nat. Cas. v. Pacific Employees*, Op. No. 4440, 927 P2d 748 (Alaska 1996).

Trial court's ruling that labor organization representing city firefighters in litigation against city was not entitled to full, reasonable attorney fees under bad faith exception to this rule was not clearly erroneous. *Fairbanks Fire Fight. Ass'n v. Fairbanks*, Op. No. 4801, 934 P2d 759 (Alaska 1997).

Final findings of fact and conclusions of law in which trial court denied grandparents' petition for adoption and awarded physical custody of child to father was final judgment triggering 10-day period for filing of motion for attorney fees and

costs; petition for review of interim custody order had on finality of trial court's entry of findings and cor and stay of trial court's order did not affect trial jurisdiction to entertain motions for costs and attorney fees. *D.L.M. v. M.W.*, Op. No. 4840, 941 P2d 900 (Alaska 1997).

Contractors who filed declaratory judgment action that amendments to Little Davis-Bacon Act should apply to their pre-existing contracts failed to qualify as public interest litigants since each had substantial economic incentive to sue. *Eastwind, Inc. v. State*, Op. No. 4927, 951 P2d 1070 (Alaska 1997).

Court does not abuse its discretion if it fails to treat prevailing party's victory on subsidiary issue as "a factor" mandating reduction of award to prevailing party. *Nielson v. Benton*, Op. No. 4978, 957 P2d 971 (Alaska 1997).

Award of attorney fees to property claimant in forfeiture proceeding had to be reversed if property used fictitious name. *State v. Johnson*, Op. No. 4991, 958 P2d 440 (Alaska 1998).

Where trial court unquestionably possessed jurisdiction over state in civil forfeiture proceeding power to award attorney's fees against state notwithstanding that court released jurisdiction over res prior to award. *Johnson*, Op. No. 4991, 958 P2d 440 (Alaska 1998).

Superior court hearing appeal from administrative award of attorney's fees under Appellate Rule 508, not Appellate Rule 82. *Stalnaker v. Williams*, Op. No. 5003, 960 P2d 1070 (Alaska 1998).

Argument that losing plaintiff in civil rights action be shielded from liability for fees and costs under this rule unless plaintiff's lawsuit is frivolous, unreasonable or without foundation was rejected. *Muody-Herrera v. State of Alaska Natural Resources*, Op. No. 5050, 967 P2d 79 (Alaska 1998).

Divorce exception to this rule did not apply to post-judgment action. *Rubright v. Arnold*, Op. No. 5083, 973 P2d 1070 (Alaska 1999).

Where trial ended after three days when directed verdict motion was granted, case did in fact go "to trial" for purposes of this rule. *Martin v. State*, Op. No. 1622, 973 P2d 1070 (Alaska App. 1999).

This rule is not authority for assessing attorney's fees against counsel. *Wilson v. Municipality of Anchorage*, Op. No. 5111, 977 P2d 713 (Alaska 1999).

Civil Rules 79(h) and 82(e), which address the allocation of costs and attorney's fees respectively between third-party plaintiffs and third-party defendants joined in an action under Alaska's equitable apportionment statute, do not apply if the original plaintiff has made a direct claim against the party defendant; in such cases, the usual Alaska practice of awarding costs and attorney's fees to the prevailing party applies. *City of Kodiak v. Parish*, Op. No. 5170, 986 P2d 1070 (Alaska 1999).

Award of attorney's fees in any proceeding arising under Alaska's Uniform Landlord and Tenant Act should be made under AS 34.03.350 rather than Civil Rule 82. *Sullivan v. Subramanion*, Op. No. 5270, 2 P3d 66 (Alaska 2000).

Because child support case was settled without reference to attorney's fees and because alleged prev party failed to notify other party of her intent to pursue R attorney's fees in addition to terms negotiated in settle

agreement, any award of Rule 82 attorney's fees was barred. *Sanders v. Barth*, Op. No. 5328, 12 P3d 766 (Alaska 2000).

Award of attorney fees under this rule may not include fees incurred in defending against 42 U.S.C. § 1988 claims. *Brown v. Ely*, Op. No. 5347, 14 P3d 257 (Alaska 2000).

Where plaintiffs' claims were based upon common law and the Unfair Trade Practices Act, trial court had discretion to look to both this rule and the statute in deciding attorney's fees. *Garrison v. Dixon*, Op. No. 5378, 19 P3d 1229 (Alaska 2001).

This rule does not allow for awards of "several" attorney's fees against multiple non-prevailing parties; an award is based on the amount of the prevailing party's actual reasonable attorney's fees, and the number of non-prevailing parties is inconsequential. *Garrison v. Dixon*, Op. No. 5378, 19 P3d 1229 (Alaska 2001).

Where there is no dispute about the reasonableness of attorney's fees awarded under Civil Rights 68, the factors listed in this rule cannot be applied to reduce the award. *Kellis v. Crites*, Op. No. 5380, 20 P3d 1112 (Alaska 2001).

Where defendant prevails on state law claims brought in state court that are integrally related to federal civil rights claims, defendant is entitled to award of attorney's fees without showing that plaintiff's claims were frivolous, unreasonable or without foundation. *Sengupta v. University of Alaska*, Op. No. 5397, 21 P3d 1240 (Alaska 2001).

In action for reformation of recorded easement, this rule, which provides for award of partial attorney's fees to prevailing party, was overridden by provision in easement agreement calling for "reasonable attorney's fees," which was interpreted as meaning full reasonable attorney's fees. *Gamble v. Northshore Partnership*, Op. No. 5445, 22 P3d 457 (Alaska 2001).

This rule only applies to "costs of action," not attorney's fees incurred in conduct of prior arbitration. *Holderness v. State Farm Fire and Casualty Co.*, Op. No. 5425, 24 P3d 1235 (Alaska 2001).

Alaska R. Civ. P. 82(a) provides for an award of attorney's fees to the prevailing party "except as otherwise provided by law." If a specific statutory scheme for attorney's fees or costs exists, Alaska R. Civ. P. 79 and 82 do not apply. *Enders v. Parker*, Op. No. 5446, 28 P3d 280 (Alaska 2001).

Court can award costs and attorney's fees even after it concludes that it lacks subject matter jurisdiction over a party's claims. *Foster v. State*, Op. No. 5504, 34 P3d 1288 (Alaska 2001).

Accepting a motion for attorney's fees despite the fact that it was one day past the Alaska R. Civ. P. 82(c) deadline was well within the superior court's discretion. *Kaiser v. Sakata*, Op. No. 5526, 40 P3d 800 (Alaska 2002).

## II. Prevailing Party

Even though there has not been a final determination on the merits in the case, where the complaint has been dismissed for failure to comply with an order to produce corporate records, the defendant is the "prevailing party," and as such is entitled to attorney fees as costs. *Hart v. Wolff*, Op. No. 724, 489 P2d 114 (Alaska 1971).

A party may be the "prevailing party" within this rule if he is successful with regard to the main issues in the action. *Cooper v. Carlson*, Op. No. 907, 511 P2d 1305 (Alaska 1973).

The prevailing party in each case should not automatically be awarded the full amount of attorney fees incurred. *Malvo v. J.C. Penney Co., Inc.*, Op. No. 901, 512 P2d 575 (Alaska 1973).

The purpose of this rule is to partially compensate the prevailing party for the costs and fees incurred where such compensation is justified, not to penalize a party for litigating a goodfaith claim. *Malvo v. J. C. Penney Co., Inc.*, Op. No. 901, 512 P2d 575 (Alaska 1973).

The purpose of this rule is to compensate partially a prevailing party for costs which he has incurred in litigation. *City of Valdez v. Valdez Development Company*, Op. No. 1051, 523 P2d 177 (Alaska 1974).

It is not the purpose of this rule to penalize a party for litigating goodfaith claim but rather partially to compensate the prevailing party where such compensation is justified. *Gilbert v. State*, Op. No. 1085, 526 P2d 1131 (Alaska 1974).

Generally, for purposes of awarding costs and attorney fees to the prevailing party, the "prevailing party" is considered to be the party who has successfully prosecuted or defended against the action — the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered and the judgment entered. *Adoption of v. M.C.*, Op. No. 1103, 528 P2d 788 (Alaska 1974).

Determination of prevailing party does not automatically follow if party receives an affirmative recovery, but is grounded in which party prevails on the main issues. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Litigant may be prevailing party if he is successful with regard to the main issue in the action, even if other side receives some affirmative recovery. *Alaska Placer Co. v. Lee*, Op. No. 1294, 553 P2d 54 (Alaska 1976).

When trial court does not award attorney's fees to a prevailing party who was not awarded a money judgment, it must state the basis for its decision. *Stordahl v. Government Employees Insurance Co.*, Op. No. 1422, 564 P2d 63 (Alaska 1977).

Attorney's fees are to be awarded to plaintiff who prevails in public interest case, although they would not be assessed against him if he did not prevail. *Anchorage v. McCabe*, Op. No. 1490, 568 P2d 986 (Alaska 1977).

The trial court retains discretion to refrain from characterizing either party as "prevailing" for purposes of awarding attorney's fees. *Tobeluk v. Lind*, Op. No. 1781, 589 P2d 873 (Alaska 1979).

The purpose of Civil Rule 82 is to compensate a prevailing party partially, not fully, for costs and attorney's fees incurred. *Stepanov v. Gavrilovich*, Op. No. 1823, 594 P2d 30 (Alaska 1979).

Where jury assessed damages against principal, failure to assess damages against agent did not convert agent into prevailing party entitled to attorney's fees in discretion of court. *Dowling Supply & Equipment v. Gardner*, Op. No. 1974, 602 P2d 1250 (Alaska 1979).

Two teachers who brought suit against their school district for a salary increase allegedly due them did not meet the "public interest" exception to the normal rule permitting a discretionary award of attorney's fees to the prevailing party. *Rouse v. Anchorage School Dist.*, Op. No. 2106, 613 P2d 263 (Alaska 1980).

If a debtor raises a claim under the Truth-in-Lending Act as a partial defense, the debtor may be awarded a reasonable attorney's fee pursuant to the provisions of that act for successful assertion of his claim; however, success on one claim does not necessarily make the debtor the prevailing party in the entire action, and need not preclude the court from awarding offsetting attorney's fees to the prevailing party under this rule. *Hayer v. National Bank of Alaska*, Op. No. 2211, 619 P2d 474 (Alaska 1980).

The party who obtains an affirmative recovery is not necessarily the prevailing party within the meaning of this rule, and it is error for a court to rely solely on that factor in awarding attorney's fees. *Hayer v. National Bank of Alaska*, Op. No. 2211, 619 P2d 474 (Alaska 1980).

A dispute between the state and three individuals concerning valuable private property seized for violating state laws regulating a commercial enterprise does not fall within the "public interest" exception to the normal award of attorney's fees to the prevailing party. *F/V American Eagle v. State*, Op. No. 2227, 620 P2d 657 (Alaska 1980).

Where disposition of issues presented on appeal clearly established husband as the prevailing party, award of attorney's fees to wife, who initiated action seeking modification of terms of property settlement incorporated into divorce decree, was properly vacated and remanded to afford husband an opportunity to seek award of attorney's fees. *Stone v. Stone*, Op. No. 2522, 647 P2d 582 (Alaska 1982).

Class action against state and borough asserting that service area provisions of statute violated constitutional rights of all borough residents was public interest litigation, thus court's failure to award attorney's fees to the borough as prevailing party was not error. *Falke v. Fairbanks North Star Borough*, Op. No. 2530, 648 P2d 597 (Alaska 1982).

Plaintiff had sufficient private economic reasons to litigate decision by Alaska Department of Health and Social Services, which allowed a "certificate of need" for a hospital facility to remain in effect indefinitely, to justify superior court's award of attorney's fees to defendant as the prevailing party, against plaintiff's contention that the case came within the public interest litigation exception to this rule. *Sisters of Providence v. Dept. of Health, Etc.*, Op. No. 2536, 648 P2d 970 (Alaska 1982).

In applying the public interest exception to this rule, it makes no difference whether the defendant is a private rather than a public entity. *Southeast Alaska Conservation Council v. State*, Op. No. 2662, 665 P2d 544 (Alaska 1983).

In action by a private conservation council against the state challenging on constitutional and statutory grounds a timber sales contract entered into between the state and a timber company, it was a violation of the public interest exception to this rule for the court to award attorney's fees against the conservation council. *Southeast Alaska Conservation Council v. State*, Op. No. 2662, 665 P2d 544 (Alaska 1983).

Where grant of summary judgment against corporations for violating implied duty of good faith and fair dealing in employment contract was reversed, award of attorneys' fees to the corporations was vacated even though the corporations prevailed with respect to other related issues. *Mitford v. de Lasala*, Op. No. 2679, 666 P2d 1000 (Alaska 1983).

If a condemnee asserts counterclaims that are basically common law actions, such as negligence, the condemnor can be awarded costs and attorney's fees if it is the prevailing party

on those issues. *Stewart v. State, Dept. of Transportation*, Op. No. 2895, 693 P2d 827 (Alaska 1984).

Once the State agreed to dismissal of condemnation act, condemnation was no longer an issue, thus State was entitled attorney's fees thereafter incurred in successfully defense against condemnee's counterclaims seeking to prevent the State from removing trees and building a retaining wall on State's own property. *Stewart v. State, Dept. of Transportation*, Op. No. 2895, 693 P2d 827 (Alaska 1984).

Unsuccessful challenger to a rezoning decision on ground that open meetings act was violated qualified as a public interest litigant under this rule. *Brookwood Area Homeowners v. Anchorage*, Op. No. 2953, 702 P2d 1317 (Alaska 1985).

In a divorce action, the "prevailing party" standard of rule does not apply. *H.P.A. v. S.C.A.*, Op. No. 2961, 704 P2d 205 (Alaska 1985).

Unsuccessful suit by Labor Federation to enforce the requirements of the Little Davis-Bacon Act was motivated principally by private rather than public concerns, hence Federation was not a public interest litigant; therefore, court's award of attorney fees to the prevailing party was an abuse of discretion. *Alaska State Federation of Laborers v. State*, Op. No. 3014, 713 P2d 1208 (Alaska 1986).

In contested marriage and partnership dissolution proceeding, trial court did not abuse its discretion in awarding prevailing party actual attorney's fees of \$21,932 due vexatious conduct by the losing party. *Horton v. Hansen*, Op. No. 3072, 722 P2d 211 (Alaska 1986).

Generally, since a dismissal with prejudice is an adjudication on the merits, a "prevailing party" determination possible for purposes of this rule. *Municipality of Anchorage v. Baugh Const.*, Op. No. 3083, 722 P2d 919 (Alaska 1986).

Defendant was clearly the prevailing party even if two of affirmative defenses were rejected. *Municipality of Anchorage v. Baugh Const.*, Op. No. 3083, 722 P2d 919 (Alaska 1986).

Trial court did not abuse its discretion in awarding prevailing party \$12,000 for attorney fees instead of \$22,594 actually incurred, since although the losing party's case was weak, it was not vexatious or brought in bad faith. *Wickwire v. Arctic Circle Air Services*, Op. No. 3084, 722 P2d 930 (Alaska 1986).

Where taxpayer paid the challenged tax under protest, then sued for a refund on constitutional grounds and lost, judgment merely upheld the constitutionality of the tax statute and did not result in a money judgment, thus the state as prevailing party was only entitled to attorney fees "in a reasonable amount" rather than attorney fees "commensurate with amount and value of legal services rendered." *Atlantic Refining Co. v. State*, Op. No. 3096, 723 P2d 1249 (Alaska 1986).

A contribution-claim defendant is not a prevailing party entitled to costs and attorney's fees when it secures summary judgment against the contribution-claimant by settling with injured plaintiff. *Foss Alaska Line, Inc. v. Northland Services*, Op. No. 3112, 724 P2d 523 (Alaska 1986).

A party who successfully defeats a claim of great potential liability may be the prevailing party even if the other side is successful in receiving an affirmative recovery. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

Defendant, who faced a potential liability of \$275,000 was required to pay only \$1,937 less 40 percent, was

prevailing party. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

The "prevailing party" standard and the divorce action judgment exception to this rule are inappropriate standards for determining the question of attorney's fees in connection with motions to amend or enforce child custody orders. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The statutory standard of "willfully and without just excuse" is appropriate for determining the question of attorney's fees after a motion to amend or enforce a custody or visitation order is adjudicated; in this way any unsuccessful party who reasonably, and in good faith, believes that his or her action was justified by the best interests of the children will not be deterred from action by the possibility of an award of fees and costs. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The prevailing party rule used for determining attorney's fees awards under this rule does not apply to fee awards in divorces. *Rhodes v. Rhodes*, Op. No. 3339, 754 P2d 1333 (Alaska 1988).

As long as defense costs are reasonable, a successful defendant may recover whatever portion the trial court in its sound discretion sees fit to award; attorney's fees which prevailing defendants may recover are not limited as a matter of law by the amount of damages the unsuccessful plaintiff sought. *Stevens By Park View Corp. v. Richardson*, Op. No. 3313, 755 P2d 389 (Alaska 1988).

Plaintiff, who successfully prosecuted his action against defendant for moneys owed from the 1984 fishing season and defeated defendant's counterclaim for damages, was the prevailing party despite failing on his claim for moneys owed from the 1982 season and on his claim that he was defendant's employee rather than an independent contractor. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

For purposes of awarding fees pursuant to this rule, the general rule is that the prevailing party is the one who has successfully prosecuted or defended against the action, the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered and the judgment entered. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

A party does not have to prevail on all the issues in the case to be a "prevailing party"; one who defeats a claim of great potential liability may be the prevailing party even though the other side receives an affirmative recovery. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

In personal injury action by plaintiffs against helicopter owner following plaintiff's settlement with the helicopter component manufacturers, where defendant ultimately did not have to pay plaintiffs anything after the verdict in the plaintiff's favor was reduced by the amount of their previous settlements, the trial court did not abuse its discretion in holding that the defendant was the prevailing party. *Buoy v. ERA Helicopters, Inc.*, Op. No. 3423, 771 P2d 439 (Alaska 1989).

Trial court did not abuse its discretion in concluding that each side should bear its own costs and attorney fees since each side prevailed in substantial areas of the litigation. *Orksmith v. Brusich*, Op. No. 3434, 774 P2d 191 (Alaska 1989).

The divorce judgment exception to this rule does not apply to post-judgment modification and enforcement motions; accordingly, fees in such cases are awarded under the prevailing party standard of this rule for post-judgment money and

property issues, under which the parties' relative economic positions are irrelevant. *Lowe v. Lowe*, Op. No. 3726, 817 P2d 453 (Alaska 1991).

Estate of deceased minor, which prevailed in action for damages against store that illegally sold alcohol to the minor, did not satisfy the "public interest" litigant criteria, thus was not entitled to actual attorney fees. *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

The four criteria for determining whether a particular lawsuit involves the public interest are: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance? *Anchorage Daily News v. Anchorage School Dist.*, Op. No. 3652, 803 P2d 402 (Alaska 1990); *Citizens Coalition v. McAlpine*, Op. No. 3686, 810 P2d 162 (Alaska 1991); *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

Where insureds prevailed on their claim of policy coverage and received \$50,000 on that claim, but failed on their claim of bad faith against insurance company, trial court erred in designating insurance company rather than insureds as prevailing party. *Hillman v. Nationwide Mut. Fire Ins. Co.*, Op. No. 3971, 855 P2d 1321 (Alaska 1993).

Public interest litigant's general prevailing party status did not mean litigant should recover fees incurred in bringing or defending petitions for review on which it did not prevail. *Hickel v. Southeast Conference*, Op. No. 4055, 868 P2d 919 (Alaska 1994).

Plaintiff, whose recovery was slight compared to \$700,000 in damages requested, but who succeeded in obtaining full damages requested for past medical expenses and \$16,000 for past and future physical impairment and pain and suffering, was prevailing party. *Blumenshine v. Baptiste*, Op. No. 4060, 869 P2d 470 (Alaska 1994).

The "prevailing party" is the party who is successful with regard to the main issues in the action, even if the other party receives some affirmative recovery. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Party who retained ownership of the majority of the disputed items in a probate case was the prevailing party for purposes of awarding attorney's fees. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Trustee bank was neutral party in action concerning whether sale of trust property would be in best interest of all trust beneficiaries; as such, beneficiary input regarding proposed course of action could not be contrary to trustee's interests, thus award of fees against beneficiary and to trustee was unjustified. *Barber v. Barber*, Op. No. 4345, 915 P2d 1204 (Alaska 1996).

In state court action by merchant mariners against ship owners and asbestos manufacturers for injuries and wrongful deaths caused by exposure to asbestos which was dismissed on forum non conveniens grounds, court did not err in awarding attorney fees and costs to defendants as prevailing parties, nor did such award conflict with admiralty law. *Hughes v. Foster*, Op. No. 4790, 932 P2d 784 (Alaska 1997).

Alaska Wage and Hour Act, prior to its amendment in August 1995, did not permit award of attorney fees and costs to

prevailing employer. *Grimes v. Kinney Shoe Corp.*, Op. No. 4815, 938 P2d 997 (Alaska 1997).

Where main issue in action for reformation of public trust was approval or rejection of settlement agreement, intervenor who prevailed on that issue was entitled to attorney's fees even if intervenor's legal arguments did not directly, primarily or necessarily cause court's favorable decision. *Alaska Center For the Environment v. State*, Op. No. 4830, 940 P2d 916 (Alaska 1997).

Prevailing defendants in actions to recover wages under Alaska Wage and Hour Act are not entitled to award of attorney's fees pursuant to this rule. *Schorr v. Frontier Transp. Co.*, Op. No. 4847, 942 P2d 418 (Alaska 1997).

In an in rem civil forfeiture proceeding in which trial court dismissed state's forfeiture complaint because of state's delay and ordered res released to claimant, claimant was prevailing party for purposes of attorney fee award even though res was seized by federal government when claimant did not show to take receipt of res. *State v. Johnson*, Op. No. 4991, 958 P2d 440 (Alaska 1998).

Trial court did not abuse its discretion by splitting prevailing party status for divergent claims. *Bliss v. Bobich*, Op. No. 5043, 971 P2d 141 (Alaska 1998).

In cases involving mixed causes of action, some governed by attorney fee provisions of this rule and some governed by attorney fee provisions of Alaska Wage and Hour Act, determination of prevailing party status remains matter of trial court discretion. *Bliss v. Bobich*, Op. No. 5043, 971 P2d 141 (Alaska 1998).

Prevailing plaintiff did not waive its claim to an enhanced attorney's fee award, even though it did not request an enhanced award in its original motion for fees. *Alderman v. Iditarod Props., Inc.*, Op. No. 5486, 32 P3d 373 (Alaska 2001).

### III. Review

#### A. Standard

The trial judge has large discretion in allowing attorney's fees for the prevailing party, but the supreme court will reduce the allowance where the amount awarded is unduly high. *Davidson v. Kirkland*, Op. No. 38, 362 P2d 1068, 1070 (Alaska 1961).

Court-initiated amendment as to attorney's fees awarded as costs under this rule, did not affect the running of the time for appeal as provided under Supreme Court Rule 7(a). *Radich v. Fairbanks Builders, Inc.*, Op. No. 285, 399 P2d 215 (Alaska 1965).

Where appellant employer, albeit rightly so, prosecuted an appeal in a workmen's compensation case and thereby imposed upon employee the necessity to engage counsel to represent him in the superior court, trial judge did not abuse his discretion under this rule in denying an attorney's fee to appellant. *M-B Contracting Company v. Davis*, Op. No. 275, 399 P2d 433 (Alaska 1965).

Even if it may be assumed that appellant were "prevailing party" within the meaning of Civil Rule 54(d) and 82(a)(1), the trial court's determination as to denial of attorney's costs where the action was settled pursuant to Civil Rule 68 was not disturbed on appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. *Albritton v. Estate of Larsson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

Awarding attorney's fees to the prevailing party is committed to the broad discretion of the trial court. *Dn v. G Anchorage Area Borough*, Op. No. 476, 439 P2d 790 (1968); *Fruelicher v. Hadley*, Op. No. 486, 442 P2d 51 (1968).

The award of \$1,300 as attorney's fees rather than \$ requested on the basis of hourly charges of \$30 and \$4 hour and \$350 per day for trial, is not an abuse of discretion. *Connelly v. Peede*, Op. No. 577, 459 P2d 362 (Alaska 1970).

The supreme court will interfere with the trial court's exercise of discretion in awarding attorney's fees as cost where such discretion has been abused. An abuse of discretion is established where it appears that the trial court's determination is manifestly unreasonable. *Palfy v. Rice*, Op. No. 473 P2d 606 (Alaska 1970).

The award of \$7,100 attorney's fees in an action arising out of a collision of an automobile and a tractor trailer combination on an ice and snow-covered curve of a highway is not an abuse of discretion, in view of the complexity of the factual issues, the length of the trial and the potentially large liability parties. *Ferrell v. Baxter*, Op. No. 688, 484 P2d 250 (1971).

Where an affidavit which is filed by the defendant in support of several factual allegations of the plaintiff and a memorandum filed by the defendant raises four defenses, such document tantamount to an answer and the plaintiff's right to dismissal is terminated. Thus, although the plaintiff files a voluntary dismissal of the suit, the trial court has the authority to award defendant attorney fees. *Miller v. Wilke*, Op. No. 78, P2d 176 (Alaska 1972).

Where a subcontractor is the prevailing party in an action against a contractor for recovery of prepayments, an award of \$10,000 as attorney's fees to the subcontractor is not an abuse of discretion in view of the potentially large liability of the subcontractor. *Owen Jo Sons, Inc. v. C.R. Lewis Co., Inc.*, Op. No. 795, 497 P2d 176 (Alaska 1972).

A trial court does not necessarily abuse its discretion in refusing to award attorney's fees to a property owner who successfully defends a suit for specific performance contract to sell property. *Hollaus v. Arend*, Op. No. 89, P2d 1074 (Alaska 1973).

The award of attorney's fees is discretionary with the trial judge and is reviewable on appeal only for an abuse of discretion. *Conper v. Carlson*, Op. No. 907, 511 P2d 1305 (1973).

Although an award of attorney's fees to a prevailing party is not mandatory, the denial of a motion for such fees may be arbitrary or capricious or result from improper motive. *Conper v. Carlson*, Op. No. 907, 511 P2d 1305 (Alaska 1973).

In an action against the state to recover additional compensation arising out of a contract, an award to the state of attorney's fees of \$22,633.91 is not an abuse of discretion, where the case was pending for over four years, the case involved potential liability of over \$500,000 and culminated in a five-day trial against the contention that the state should receive compensation greater than the equivalent to the hourly salary of the plaintiff's paid assistant attorney general who worked on the case multiplied by the number of hours allowed by the trial court. *Morrison-Knudson Co., Inc., v. State*, Op. No. 1012, 511 P2d 834 (Alaska 1974).

The amount award as attorney fees is within the sound discretion of the trial court. Review is limited to question of whether the court exceeded that discretion. *City of Valdez v. Valdez Development Company*, Op. No. 1051, 523 P2d 177 (Alaska 1974).

The refusal to award attorney's fees in a case where each party prevails in part, and in which each award is of approximately equal value, it is not an abuse of discretion. *City of Valdez v. Valdez Development Company*, Op. No. 1051, 523 P2d 177 (Alaska 1974).

The award of attorney's fees is vested in the sound discretion of the trial court, and will be interfered with on appeal only when that discretion is manifestly abused. *Grasle Electric Co. v. Clark*, Op. No. 1073, 525 P2d 1081 (Alaska 1974).

Where the trial in a personal injury action lasts over four days and involves complicated medical and psychiatric issues, an award of attorney's fees of over \$15,000, based entirely on the schedule set out in this rule, is not an abuse of discretion. *Grasle Electric Co. v. Clark*, Op. No. 1073, 525 P2d 1081 (Alaska 1974).

Both the award of costs and attorney fees to a prevailing party and the actual determination of who the "prevailing" party is are within broad discretion of the trial court. Only on a clear abuse of discretion will the supreme court interfere with its exercise, such abuse being established only where it appears that the trial court's determination is manifestly unreasonable. *Adoption of V.M.C.*, Op. No. 1103, 528 P2d 788 (Alaska 1974).

In reviewing a trial court's settlement of attorneys' fees granted at its discretion, the supreme court will disturb such a finding only upon a showing that a warrant was manifestly unreasonable. *Western Airlines, Inc. v. Lathrop Co.*, Op. No. 1146, 535 P2d 1209 (Alaska 1975).

Determination of which party prevails and is entitled to costs is within discretion of the trial judge. *First National Bank of Fairbanks v. Enzler*, Op. No. 1170, 537 P2d 517 (Alaska 1975).

Moot issues will not be reviewed solely to provide a means of contesting trial court's award of attorney's fees. *Munroe v. City Council for City of Anchorage*, Op. No. 1236, 545 P2d 165 (Alaska 1976).

To require widow to pay \$10,750 in attorney's fees to defendant in wrongful death action whose counsel was provided by insurance carrier was not improper. *Sloan v. Atlantic Richfield Co.*, Op. No. 1195, 552 P2d 157 (Alaska 1976).

Determination of which party is the prevailing party is in the trial judge's discretion and is reviewable only for abuse. *Continental Ins. Co. v. U. S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Trial court's discretion in awarding attorney's fees will be interfered with only when manifestly unreasonable. *Alaska Placer Co. v. Lee*, Op. No. 1294, 553 P2d 54 (Alaska 1976).

An award of attorney's fees under this rule will not be reversed unless manifestly unreasonable, arbitrary or designed for a purpose other than justly deserved compensation. *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc.*, Op. No. 1324, 555 P2d 964 (Alaska 1976).

It was not abuse of discretion to award additional attorney's fees as compensation for efforts to force opposing party to answer interrogatories and appear at depositions. *Fairbanks*

*Builders, Inc. v. Sandstrom Plumbing & Heating, Inc.*, Op. No. 1324, 555 P2d 964 (Alaska 1976).

Trial court's discretion under this rule is broad enough to warrant the denial of attorney's fees altogether. *Haskins v. Shelden*, Op. No. 1357, 558 P2d 487 (Alaska 1976).

Trial court's discretion under this rule will be interfered with only when abuse is established by a "manifestly unreasonable" award. *Haskins v. Shelden*, Op. No. 1357, 558 P2d 487 (Alaska 1976).

In view of complexity of issues, time during which case was pending before trial, amount of potential liability, and amount of trial preparation and presentation, trial court was not manifestly unreasonable in awarding \$192,111 attorney's fees. *Beech Aircraft Corp. v. Harvey*, Op. No. 1338, 558 P2d 879 (Alaska 1976).

Award of \$14,000 in attorney's fees where \$1,750 would have been awarded under this rule was not abuse of discretion in six-day trial with extensive pre- and post-trial briefing and with a significant number of difficult and complex legal issues. *Chugach Electric Association v. Northern Corp.*, Op. No. 1408, 562 P2d 1053 (Alaska 1977).

An award of attorney's fees which represented 86 percent of the total bill submitted by plaintiffs' counsel was somewhat high but not manifestly unreasonable under the circumstances of the case. *Hausam v. Wodrich*, Op. No. 1558, 574 P2d 805 (Alaska 1978).

It was not manifestly unreasonable in determining attorney's fees and costs for the court to take into account that it ruled against the prevailing party on one of the contested issues. *Alaska State Bank v. Gen. Ins. Co.*, Op. No. 1564, 579 P2d 1362 (Alaska 1978).

Court did not abuse its discretion in denying attorney's fees to defendant who prevailed in paternity suit brought in good faith even though denial was based in part on fact that defendant admitted to having sexual relations with a minor. *Larry v. Dupree*, Op. No. 1652, 580 P2d 326 (Alaska 1978).

Where plaintiffs' status as a prevailing party could not be inferred from the settlement agreement because of the political nature of the case, the trial court did not err in denying plaintiffs' claim for attorney fees. *Tobeluk v. Lind*, Op. No. 1781, 589 P2d 873 (Alaska 1979).

Attorney fee award of \$9,861 was not abuse of discretion where party had agreed to accept legal services in partial consideration of claim against attorney and the value of the attorney services was well in excess of \$10,000. *Puritan Life Ins. Co. v. Guess*, Op. No. 1881, 598 P2d 900 (Alaska 1979).

Complexity of a case may be considered in determining the amount of attorney's fees, but that factor alone does not justify an award of full fees. *Moses v. McGarvey*, Op. No. 2139, 614 P2d 1363 (Alaska 1980).

Award of \$55,000 in attorney's fees was not manifestly unreasonable for complex litigation which extended for over two years. *F/V American Eagle v. State*, Op. No. 2227, 620 P2d 657 (Alaska 1980).

Award of \$15,000 for attorney's fees to successful public interest plaintiff was not abuse of discretion where the award did not cover actual attorney's fees but did constitute full "reasonable" attorney's fees. *City of Yakutat v. Ryman*, Op. No. 2581, 654 P2d 785 (Alaska 1982).

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 249  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Monopolies and restraint of trade BRU Alaska Court System  
 Component Trial Courts  
 Sponsor Representative McGuire  
 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 249.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750  
 Division Alaska Court System Date/Time 4/8/03 4:03 PM  
 Approved by: Stephanie Cole, Administrative Director Date 4/3/2003  
 Agency Alaska Court System

**HB**

**257**

# LEGAL SERVICES

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

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FAX (907) 465-2029  
Mail Stop 3101

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

## MEMORANDUM

May 4, 2003

**SUBJECT:** CSHB 257(JUD): retrospective operation  
(Work Order No. 23-LS0893\V)

**TO:** Representative Lesil McGuire, Chair  
House Judiciary Committee  
Attn: Vanessa  
*VB*

**FROM:** Theresa L. Bannister  
Legislative Counsel

This memo accompanies the bill described above. The comments in this memo are not triggered by the changes made for this committee substitute but were present in HB 257. The following comments are to advise you that the applicability section may raise constitutional issues. I do not know how they would be resolved, but wanted you to be aware that they exist.

1. Application of disciplinary sanctions to pre-enactment activity (bill sec. 5(a)). The first issue originates with sec. 5(a) allowing the new provision in bill sec. 1 to apply to a person for a violation of AS 08.88.396 that occurs before the bill takes effect. The imposition of these sanctions on pre-enactment activity may be considered to be unconstitutional as an ex post facto law if the sanctions are considered punitive. However, if there is a sufficiently rational relationship between the past activity and the public interest, this may not be considered a punishment and the law may not be considered ex post facto.
2. Removal of cause of action (bill sec. 5(b)). Section 5(b) removes a cause of action a person may have accrued or filed before the bill takes effect for a violation of AS 08.88.396, unless a final judgment has been entered. This may be inconsistent with the due process clause to the extent the cause of action is considered to be a vested property right in the particular case.
3. Equal protection (bill sec. 5(b)). Section 5(b) may violate equal protection to the extent it draws a distinction that is based solely on when a person received a final decision in a court action. To survive a state equal protection challenge, part of the test is that the distinction must be reasonable and not arbitrary. The reasonableness of a distinction based on the date a final judgment is received is not evident on the face of the bill, although there may be underlying reasons why it is reasonable.

May 4, 2003

Page 2

Notwithstanding the above comments, a court may consider the law more favorably if the provision is passed to cure defects in prior law. I do not know if this would be found to be the case here.

If I may be of further assistance, please advise.

TLB:lmb

03-170.lmb

# HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: April 15, 2003

FURTHER REFERRALS:

Date of Committee Action: May 2, 2003

The JUDICIARY Committee considered:

HB 257

HOUSE BILL NO. 257

DISCLOSURES BY REAL ESTATE LICENSEES

"An Act relating to the disclosure requirements for real estate licensees, to disciplinary action against real estate licensees, to private actions against real estate licensees, and to real estate licensee agency relationships, fiduciary duties, and other duties; and providing for an effective date."

Recommends it be replaced with  HCS or  CS for HB 257 (JUD)  
 For Senate Bills with new title:  Technical Title  New Title: HCR \_\_\_\_\_  Same Title  New Title

- attach amendments
- add new referral to \_\_\_\_\_ Committee
- Letter of Intent \_\_\_\_\_ Committee

List of Abbrev for Depts.:

- ADM
- CED
- COR
- CRT
- EED
- DEC
- DFG
- GOV
- HSS
- LEG
- LAW
- LWF
- MVA
- DNR
- DPS
- REV
- DOT
- UA

<u>NEW FISCAL NOTES</u>				
<small>*Assigned by Chief Clerk's Office</small>				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
CED	1			✓

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Holm			✓	
	SAMUELS	✓			
	Carr			✓	✓
	Gruenberg			✓	✓
Chair:	McGinn	✓			
Chair:					

G.G.



# 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:** Terri Bannister, Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** May 3, 2003  
**Re:** CS Request

---

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0893\U, HB 257, incorporating the four amendments listed below. The bill passed out of committee yesterday. I have also written the changes into the attached copy of the bill for clarification of the amendments.

**Amendment #1:**

P.4, L. 17

Before "consent" delete "blanket" and insert "written preauthorized"

**Amendment #2:**

P.3, L. 3

After "relationships" insert ", law of agency,"

\*\*\*Perhaps it should instead read "agency law" if we want to conform to the rest of this section.

If you agree, please make that change.\*\*\*

**Amendment #3:**

P.3, L.13, 17, 19, 28

Reinsert "agency"

**Amendment #4:**

P.4, L. 8

After BOTH "dual"'s (between "dual" and "representation") insert "agency"

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

# 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  
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## House Judiciary Committee

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 prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

23-LS0893U  
Bannister  
5/1/03

**CS FOR HOUSE BILL NO. 257( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - FIRST SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES ROKEBERG, Foster**

**A BILL**  
**FOR AN ACT ENTITLED**

1 **"An Act relating to the disclosure requirements for real estate licensees, to disciplinary**  
2 **action against real estate licensees, to private actions and remedies against real estate**  
3 **licensees, and to real estate licensee agency, relationships, and duties; and providing for**  
4 **an effective date."**

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

6 **\* Section 1. AS 08.88.071(a)(3) is amended to read:**

7 (3) after hearing, have the authority to suspend or revoke the license of  
8 a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a  
9 licensee who

10 (A) with respect to a real estate transaction

11 (i) made a substantial misrepresentation;

12 (ii) made a false promise likely to influence, persuade,  
13 or induce;

14 (iii) in the case of a real estate broker, pursued a

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1                   flagrant course of misrepresentation or made a false promise through  
2                   another real estate licensee;

3                               (iv) has engaged in conduct that is fraudulent or  
4                   dishonest;

5                               (v) violates AS 08.88.391;

6                               (vi) violates AS 08.88.396;

7                               (B) procures a license by deceiving the commission, or aids  
8                   another to do so;

9                               (C) has engaged in conduct of which the commission did not  
10                   have [HAD NO] knowledge at the time the licensee was licensed  
11                   demonstrating the licensee's unfitness to engage in the business for which the  
12                   licensee is licensed;

13                              (D) knowingly authorizes, directs, connives at, or aids in  
14                   publishing, distributing, or circulating a material false statement or  
15                   misrepresentation concerning the licensee's business or concerning real estate  
16                   offered for sale, rent, or lease, or managed in the course of the licensee's  
17                   business in this or any other state or concerning the management of an  
18                   association in the course of a licensee's business in this or another state;

19                              (E) if a real estate broker, wilfully violates AS 08.88.171(d) or  
20                   08.88.291;

21                              (F) if an associate real estate broker, claims to be a real estate  
22                   broker, or, if a real estate salesperson, claims to be a real estate broker or an  
23                   associate real estate broker;

24                              (G) if a real estate broker, employs an unlicensed person to  
25                   perform activities for which a real estate license is required;

26                              (H) if an employed real estate licensee of a real estate broker,  
27                   fails immediately to turn money or other property collected in a real estate  
28                   transaction over to the employing real estate broker;

29       \* Sec. 2. AS 08.88.181(a) is amended to read:

30                              (a) The real estate examinations may include questions on real estate business  
31                   ethics and standards; arithmetic and accounting; elementary principles of land

1 economics and appraisal; the general principles in state statutes relating to deeds,  
 2 mortgages, real estate contracts, subdivisions, common interest communities, legal  
 3 descriptions, building restrictions, real estate licensee relationships, [AGENCY], <sup>law of agency, (or agency law)</sup>  
 4 brokerage, disclosure requirements, trust accounting requirements, and landlord and  
 5 tenant law; property management ethics and standards; community association  
 6 management operations, ethics, and standards; and the general provisions of this  
 7 chapter and of the regulations of the commission.

8 \* Sec. 3. AS 08.88.396 is amended to read:

9 **Sec. 08.88.396. Licensee relationships, disclosures, and activity**  
 10 **[DISCLOSURE OF AGENCY TO PROSPECTIVE BUYERS AND SELLERS].**

11 (a) A person licensed under this chapter shall, when acting as a real estate licensee  
 12 [AN AGENT] for a prospective seller or lessor of real estate, <sup>reinsert</sup>

13 (1) disclose in writing the licensee's (AGENCY) relationship with the  
 14 seller or lessor to each prospective buyer or lessee at the time that the licensee begins  
 15 to provide specific assistance to locate or acquire real estate for the buyer or lessee,  
 16 and obtain from each prospective buyer or lessee a signed acknowledgment  
 17 [ACKNOWLEDGEMENT] that the buyer or lessee is aware of the (AGENCY) <sup>reinsert</sup>  
 18 relationship between the licensee and the seller or lessor; and

19 (2) include in the purchase agreement a statement of the (AGENCY) <sup>reinsert</sup>  
 20 relationship between the licensee and the seller or lessor.

21 (b) A person licensed under this chapter shall, when acting as a real estate  
 22 licensee [AN AGENT] for a prospective buyer or lessee of real estate,

23 (1) disclose the licensee's relationship with the buyer or lessee to a  
 24 prospective seller or lessor of real estate, or to the seller's or lessor's real estate  
 25 licensee [AGENT], at the time of the initial contact between the licensee and the  
 26 prospective seller or lessor, or the seller's or lessor's real estate licensee [AGENT],  
 27 and confirm the relationship in writing as soon as possible after the initial contact;

28 (2) include in the purchase agreement a statement of the (AGENCY) <sup>reinsert</sup>  
 29 relationship between the licensee and the buyer or lessee;

30 (3) if the prospective seller or lessor has an unexpired exclusive listing  
 31 contract for a property, present all offers to purchase that property through the seller's

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or lessor's real estate licensee [AGENT]; and

(4) disclose in writing to all parties to a transaction when the licensee's compensation as real estate licensee [AGENT] for the buyer or lessee is to be paid by anyone other than the buyer or lessee being represented by the licensee.

(c) A person licensed under this chapter may act as a real estate licensee [AN AGENT] for both a prospective seller or lessor and a prospective buyer or lessee of real estate only after the licensee informs both the seller or lessor and the buyer or lessee of the dual <sup>agency</sup> representation [AGENCY] and obtains written consent to the dual <sup>agency</sup> representation [AGENCY] from both principals.

(d) When a change occurs during a transaction that makes a prior written disclosure required by this section incomplete, misleading, or inaccurate, the licensee shall make a revised disclosure, in writing, to all parties to the transaction as soon as possible. The revised disclosure must include the date of the revision and shall be acknowledged in writing by all the parties. However, until the nature of the licensee's relationship with a party is completely established, a revised disclosure is not required under this subsection if the licensee obtains from the party a <sup>written</sup> blanket consent to changes before the changes occur. <sup>preauthorized</sup>

\* Sec. 4. AS 08.88.396 is amended by adding a new subsection to read:

(e) The failure of a licensee to make a written disclosure as required by this section or to obtain a written acknowledgment or consent as required by this section does not give a person a cause of action against the licensee for the failure. However, this subsection does not limit a person's ability to take any other action or pursue any other remedy to which the person may be entitled under other law to recover for damages or losses suffered.

\* Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to read.

APPLICABILITY AND RETROSPECTIVITY. (a) The provisions of this Act apply to a real estate transaction that occurs before, on, or after the effective date of this Act, and to that extent, are retrospective under AS 01.10.090. In this subsection, "real estate transaction" has the meaning given in AS 08.88.990.

(b) In addition to the application of AS 08.88.396(e), enacted by sec. 4 of this Act,

1 under (a) of this section, AS 08.88.396(e) applies to an action pending in a court in the state in  
2 which a final judgment has not been rendered before the effective date of this Act and, to that  
3 extent, is retrospective under AS 01.10.090.

4 \* **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

# ALASKA STATE LEGISLATURE

## House of Representatives

### COMMITTEE ASSIGNMENTS:

RULES COMMITTEE, CHAIRMAN  
LABOR & COMMERCE COMMITTEE, MEMBER  
LEGISLATIVE COUNCIL, MEMBER  
SPECIAL COMMITTEE ON OIL & GAS, MEMBER  
LEGISLATIVE ETHICS COMMITTEE, MEMBER

website: <http://www.akrepublicans.org/rokeberg/>



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SESSION:  
ALASKA STATE CAPITOL  
JUNEAU, AK 99801-1182  
PHONE: (907) 465-4968  
FAX: (907) 465-2040

## Representative Norman Rokeberg

e-mail: Representative\_Norman\_Rokeberg@legis.state.ak.us

### SPONSOR STATEMENT FOR HB 257

BY: Representative Norman Rokeberg

**Title: An Act relating to the disclosure requirements for real estate licensees, to disciplinary action against real estate licensees, to private actions against real estate licensees, and to real estate licensee agency relationships, fiduciary duties, and other duties; and providing for an effective date.**

HB 257 makes several improvements to Alaska's real estate laws.

#### Commercial Real Estate Transactions

HB 257 exempts commercial real estate licensees from certain disclosure requirements. The purpose of the disclosure requirements in AS 08.88.896 is to provide consumer protection to those people who may not be familiar with their legal responsibilities and rely in part on real estate licensees for advice when buying and selling real estate. Commercial real estate practitioners should be exempt from these requirements because of the level of sophistication and knowledge typical of parties to commercial real estate transactions. Parties to commercial transactions do not need this protection and the disclosure requirements do not reflect the standards of practice in commercial real estate.

HB 257 also provides that in those cases where the commercial transaction is exempt from the disclosure requirements, and the real estate licensee is representing both the buyer and seller (or both lessor and lessee), the common law principles of agency do not apply. Instead, the licensee shall act with honesty, fairness and good faith when representing both parties.

#### AS 08.88.396

In addition to the commercial real estate licensees' exemption, HB 257 makes several other changes to the disclosure statute. First, all references to a real estate "agent" have been replaced with real estate "licensee." This is to conform with the rest of the real estate statutes which use the term "licensee." Second, references to lessors and lessees have been added to the statute to reflect that the disclosure statute also applies to real estate lease transactions. Finally, subsection (g) clarifies that a failure to disclose or obtain written consent as required by the statute does not give rise to a private cause of action, but can result in a disciplinary action against the licensee. However, in cases of fraud, misrepresentation or deceit a person can bring an action against the real estate surety fund for damages.

I encourage your support of this legislation.

# ALASKA STATE LEGISLATURE

## House of Representatives

### COMMITTEE ASSIGNMENTS:

RULES COMMITTEE, CHAIRMAN  
LABOR & COMMERCE COMMITTEE, MEMBER  
LEGISLATIVE COUNCIL, MEMBER  
SPECIAL COMMITTEE ON OIL & GAS, MEMBER  
LEGISLATIVE ETHICS COMMITTEE, MEMBER

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## Representative Norman Rokeberg

e-mail: [Representative\\_Norman\\_Rokeberg@legis.state.ak.us](mailto:Representative_Norman_Rokeberg@legis.state.ak.us)

### SECTIONAL ANALYSIS FOR HB 257

BY: Representative Norman Rokeberg

**Title:** An Act relating to the disclosure requirements for real estate licensees, to disciplinary action against real estate licensees, to private actions against real estate licensees, and to real estate licensee agency relationships, fiduciary duties, and other duties; and providing for an effective date.

**Section 1:** Legislative findings and intent.

**Section 2:** Adds the disclosure statute (AS 08.88.396) to the list of actions that the Real Estate Commission can discipline a real estate licensee for violating. Also makes several grammatical corrections.

**Section 3:** Changes "agent" to "real estate licensee." Adds references to lessor and lessee. Corrects misspelling of "acknowledgment."

**Section 4:** Changes "agent" to "real estate licensee." Adds references to lessor and lessee.

**Section 5:** Changes "agent" to "real estate licensee." Adds references to lessor and lessee.

**Section 6:** AS 08.88.396(e): Exempts certain commercial real estate transactions from the disclosure statute.

AS 08.88.396(f): For those transactions exempt under (e), common law principles of agency do not apply and licensee must act with honesty, fairness and good faith when representing both parties.

AS 08.88.396(g): Failure to make a disclosure or obtain written consent required by this statute does not give a person a cause of action against the licensee for the failure. An action can be brought against the Real Estate Surety Fund in cases of fraud, misrepresentation or deceit, if there are damages.

**Section 7:** (a) The provisions of this Act apply to a real estate transaction that occurs before, on or after the effective date of this Act.

(b) AS 08.88.396(g) applies to an action pending in a court in the state in which a final judgment has not been rendered before the effective date of this Act.

**Section 8:** This Act takes effect immediately.

# FISCAL NOTE

STATE OF ALASKA  
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: HB 257  
(H) Publish Date: 4/15/03

Revision Date/Time (Note if correction):  
Title Disclosures By Real Estate Licensees  
Sponsor Representative Rokeberg  
Requester House Labor & Commerce  
Dept. Affected: DCED  
BRU Occupational Licensing (117)  
Component Occupational Licensing  
Component No. 2360

**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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
-------------------------------	------------	------------	------------	------------	------------	------------

**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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)

HB 257 amends disclosure requirements for real estate licensees. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager Phone 907-465-2144  
Division: Occupational Licensing Date/Time 4/14/03 2:08 PM  
Approved by: Edgar Blatchford, Commissioner Date 4/14/2003  
Agency: Department of Community & Economic Development

## **Discussion on Residential Dual Agency Issues**

### **By Representative Norman Rokeberg**

#### **What is the Problem?**

A group of clever lawyers believes it has hit upon a way to force Alaska real estate agents to disgorge millions of dollars worth of commissions even if no one has done anything wrong and no one has been harmed. They filed a class action lawsuit against Prudential Vista seeking that result.

#### **How Does that Work?**

These lawyers believe that failure to have proper paperwork will justify forfeiting commissions. They believe almost every dual agency transaction done in Alaska in recent years was not properly documented. They contend AS 08.88.396 requires signed acknowledgements from both buyer and seller every time a prospective buyer wants to see a house listed with the same brokerage; not just blanket consents but new signed acknowledgments from buyer and seller (both parties to the new dual agency relationships) every single time a new buyer wants to see a listed home.

#### **What if the Agent Made Oral Disclosures?**

It doesn't matter. Unless the agent obtained signed acknowledgments from both sides before doing any work, these lawyers contend the commission was unlawfully earned and should be forfeited. This is not about whether clients actually got the disclosures they need.

#### **What if No One Was Harmed?**

That doesn't matter either. This is not about paying consumers for harm they have suffered. It is about making agents forfeit commissions.

#### **How Does HB 257 Work?**

The purpose is to say that failure to document disclosures and obtain signatures in the right form and at the right time will not, all by itself, support a lawsuit.

#### **What if an Agent Lied or Mised Someone?**

They can and should be sued. This bill is not intended to excuse anyone for misconduct. If a client can prove that an agent did something wrong, they should recover in full for their actual harm. This bill does not change the duties that an agent owes to his/her clients. This bill is only intended to prevent forfeitures where no one did anything wrong and no one was harmed.

#### **Is this just a Prudential Vista Problem?**

Absolutely not. Other brokers have been quoted several times saying this is an industry problem. Every broker and agent can be sued. If these lawyers are right, almost everyone is potentially vulnerable to a lawsuit. Only brokerages that do not engage in dual agency transactions (like buyers brokers) should feel safe.

#### **Is this an Anchorage problem?**

No. Dual agency is more common in rural areas than in Anchorage.

**Will this Stop with Prudential Vista?**

If Vista wins the lawsuit, it might. If they lose, this will definitely not go away. If the bill doesn't pass, and Vista loses its case, every brokerage should assume it will be fighting a class action.

**Is this About Bonnie Mehner?**

No. The judge found Bonnie committed intentional misconduct, made representations and/or hid facts from her client. Nothing in this bill would have prevented him from suing her and winning. The civil case against her is over. It was settled months ago. Nothing in this bill will provide her a defense against her license.

**Will This Harm any Alaskan Agents or Brokers?**

No. It is either neutral or will help them.

**Why is it Retroactive?**

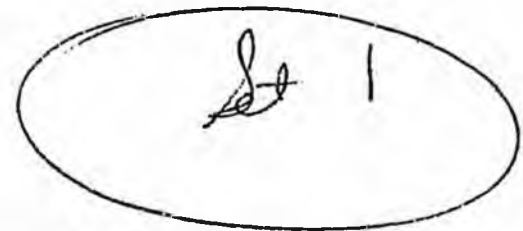
Because what is at issue is forfeiture of commissions earned over the last three years. Changing the law prospectively will not protect Alaska agents and brokers from these class action lawsuits.

**Why Not Just Outlaw Class Actions for This?**

Class actions are regulated by court rule. It requires a supermajority for the legislature to change a court rule. HB 257 changes a statute to prevent its misuse, something the legislature can do easily if it chooses.

**Bond, Stephens & Johnson, Inc.**

**Fax**



**To:** c/o Heather Nobrega  
Attn: Rep. Norm Rokeberg

**From:** Chris Stephens, CCIM

**Fax:** 907-465-~~6848~~  
2040

**Fax:** 907-786-7326

**Phone:** 907-243-1454

**Phone:** 907-786-7305

**Date:** 4/11/2003

**Pages:** \*

**Subject:** Agency Forms Samples

**Notes:**

Dear Representative Rokeberg:

Attached are the agency disclosure forms that our attorney drafted for us after the court ruling on agency. As you can see, they are very comprehensive because they are our attorney's effort to meet all of the requirements of the judge's ruling. They are also very awkward to work with.

I will be sending you a statement on the proposed House Bill No. 257.

Sincerely,

Chris Stephens, CCIM

\* 1st set 17 pages  
2nd set 16 pages  
3rd set 17 pages

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- Form No.10 --- Revised Disclosure**
- Form No.11 --- Disclaimer of Representations by Company/Agent (Without Acknowledgment)**
- Form No.12 --- Disclaimer of Representations by Company/Agent (With Acknowledgment)**

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**BOND, STEPHENS & JOHNSON, INC.  
DISCLOSURE OF SELLER/LANDLORD REPRESENTATION**

**Disclosure**

Pursuant to AS 08.88.396(a)(1), the Company Bond, Stephens & Johnson, Inc., through its Agent, \_\_\_\_\_, hereby discloses to the Buyer/Tenant, \_\_\_\_\_, of the following-described real property ("Property"), that it represents the Seller/Landlord, \_\_\_\_\_, in seeking a sale/lease of the following Property:

\_\_\_\_\_

BOND, STEPHENS & JOHNSON, INC., an  
Alaska Corporation

Dated: \_\_\_\_\_, 20

By: \_\_\_\_\_  
\_\_\_\_\_, Agent

**Acknowledgment**

I (we) hereby acknowledge (a) that such disclosure occurred before Company/Agent began to provide specific assistance to me (us) or my (our) agent with respect to such Property and (b) that Company/Agent represent only Seller/Landlord and not me (us).

Buyer/Tenant:

Dated: \_\_\_\_\_, 20

By: \_\_\_\_\_  
\_\_\_\_\_, Buyer

Buyer/Tenant:

Dated: \_\_\_\_\_, 20

By: \_\_\_\_\_  
\_\_\_\_\_, Buyer

**BOND, STEPHENS & JOHNSON, INC.  
DISCLOSURE OF BUYER/TENANT REPRESENTATION**

**Disclosure**

Pursuant to AS 08.88.396(b)(1), the Company Bond, Stephens & Johnson, Inc., through its Agent, \_\_\_\_\_, hereby discloses to the Seller/Landlord, \_\_\_\_\_, of the following-described real property ("Property"), that it represents the Buyer/Tenant, \_\_\_\_\_, in seeking a sale/lease of the following Property:

BOND, STEPHENS & JOHNSON, INC., an  
Alaska Corporation

Dated: \_\_\_\_\_, 20

By: \_\_\_\_\_  
\_\_\_\_\_, Agent

**Acknowledgment**

I (we) hereby acknowledge (a) that such disclosure of representation of Buyer/Tenant (i) occurred at the time of initial contact between Company/Agent and me (us) or my (our) agent with respect to such Property and (ii) was confirmed by this writing as soon as reasonably possible after such initial contact, and (b) that Company/Agent represent only Buyer/Tenant and not me (us). and not me (us).

Dated: \_\_\_\_\_, 20

Seller/Landlord:  
By: \_\_\_\_\_  
\_\_\_\_\_, Seller/Landlord

Its:

Dated: \_\_\_\_\_, 20

Seller/Landlord:  
By: \_\_\_\_\_  
\_\_\_\_\_, Seller/Landlord

Its:

**BOND, STEPHENS & JOHNSON, INC.  
CONSENSUAL DUAL AGENCY AGREEMENT**

**Seller/Landlord:** \_\_\_\_\_

**Buyer/Tenant:** \_\_\_\_\_

**Company:** Bond, Stephens & Johnson, Inc., through its Agent, \_\_\_\_\_

**Seller/Landlord's Property:**

[Property Description]  
\_\_\_\_\_

**1. Consensual Dual Agency Representation.**

Pursuant to AS 08.88.396(c), Seller/Landlord and Buyer/Tenant hereby acknowledge, consent and agree to Company/Agent becoming **dual agents** of Seller/Landlord and Buyer/Tenant for their sale-purchase/lease of Seller/Landlord's Property.

**2. Anticipatory Consensual Dual Agency Representation.**

If only Seller/Landlord (Buyer/Tenant) executes this Agreement, it hereby gives its unconditional consent to Broker to enter into a dual **agency** with any Buyer/Tenant (Seller/Landlord) on the terms of this Agreement by (i) having such Buyer/Tenant (Seller/Landlord) execute this Agreement and (ii) delivering a copy of the fully executed Agreement to all of the resulting parties to this Agreement. The dual **agency** allowed by this Agreement shall not commence until such delivery occurs.

**3. Dual Agent's Role.**

Because Company/Agent will be acting as a **dual agent** for **both** Seller/Landlord and Buyer/Tenant in this transaction, Company/Agent will use their best efforts to remain impartial to Seller/Landlord and Buyer/Tenant. In such **dual agency** role, Company/Agent may obtain information which, if disclosed, could harm the bargaining position of the client who provided that information to them. As a result, Company/Agent shall have no duty to disclose, and not be liable for refusing or failing to disclose, information which, in the reasonable discretion of Company/Agent, might harm Seller/Landlord's or Buyer/Tenant's bargaining position to the benefit of the other. Nothing contained herein shall relieve Company or

Agent from their obligation to disclose to Buyer/Tenant material defects in the physical condition of Seller/Landlord's Property that are then actually known to Company/Agent, but Company/Agent shall have no obligation to independently investigate or inspect for any such defects or retain any contractor or professional to do so.

#### **Seller/Landlord's and Buyer/Tenant's Roles.**

Seller/Landlord and Buyer/Tenant shall each have the responsibility to make its own independent investigations and inspections of Seller/Landlord's Property and to make independent decisions as to what price/rent and other material terms and conditions are to be included in any sale-purchase/lease agreement between them. Seller/Landlord and Buyer/Tenant have each been advised to seek competent independent legal counsel to assist them in their determinations (a) as to whether to enter into this Agreement and (b) the terms and conditions of any sale-purchase/lease agreement between them. Seller/Landlord and Buyer/Tenant have each either consulted with competent independent legal counsel with respect to such matters or knowingly and voluntarily waived their respective rights and opportunities to do so. Seller/Landlord and Buyer/Tenant acknowledge that they, and not Company or Agent, have a duty to carefully negotiate, draft, read and fully understand any purchase-sale/lease agreement to assure that it accurately sets forth the price/rent and other material terms and conditions which each of them wants included in such agreement and it is in their individual best interests.

#### **4. Specific Things That Company/Agent *cannot and will not do.***

- a. Disclose confidential information that they may know about Seller/Landlord and/or Buyer/Tenant (*e.g.* motivation to sell/buy/lease, price/rent/other material terms or conditions, negotiation strategy, etc.) without written permission of the client to whom they owe such confidence.
- b. Disclose the price/rent or other material terms or conditions Seller/Landlord would accept other than the listing price/rent or other material terms and conditions without written permission of Seller/Landlord.
- c. Disclose the price/rent or other material terms or conditions Buyer/Tenant is willing to offer other than the offered price/rent or other material terms and conditions without written permission of Buyer/Tenant.
- d. Recommend or suggest the price/rent or other materials terms and conditions Buyer/Tenant should accept, offer or counteroffer.

- e. Recommend or suggest the price/rent or other material terms and conditions Seller/Landlord should accept, offer or counteroffer.

5. **Specific Things That Company/Agent *can and will do.***

- a. Treat Seller/Landlord and Buyer/Tenant neutrally, fairly and honestly.
- b. Provide information about Seller/Landlord's Property to Buyer/Tenant.
- c. Respond to Buyer/Tenant's questions about Seller/Landlord's Property to the best of their knowledge.
- d. Disclose to Buyer/Tenant all known material defects (if any) in the physical condition of Seller/Landlord's Property (without assuming any independent duty to find any such defects).
- e. Explain local real estate terms, procedures and practices.
- f. Explain closing costs and procedures.
- g. Provide information about comparable properties, so Seller/Landlord and Buyer/Tenant may make an independent educated decision on what price/rent and other material terms to accept, offer or counteroffer.
- h. Assist with preparing purchase-sale/lease agreements and addenda and amendments thereto.
- i. Work diligently to facilitate the sale-purchase/lease.

6. **General.**

- a. In the event that Seller/Landlord and Buyer/Tenant do not enter into an agreement for the sale-purchase/lease of Seller/Landlord's Property or any such agreement does not close by the closing date set forth in such agreement, Company/Agent may terminate such **dual agency** and this Agreement unilaterally by giving written notice thereof to Seller/Landlord and Buyer/Tenant.
- b. If any provision of this Agreement contradicts or conflicts with any earlier

oral or written agreements or any other documents or instruments in any way, such provision of this Agreement shall control.

- c. As used in this Agreement, the term "Agent" includes all brokers, associate brokers and agents employed by or associated with Company, including those at any of the Company's branch offices and the Agent that executed this Agreement on behalf of the Company.

**Seller/Landlord and Buyer/Tenant (a) understand the limitations of Company/Agent's dual agency role and the consequential legal disadvantages to them of such dual agency, and (b) have nevertheless independently determined that the benefits of entering into a transaction with Company/Agent acting as dual agents for them outweighs the possible prejudicial effects of such limitations.**

**The only commission or other compensation that will be paid to Company/Agent is a commission equal to \_\_\_\_\_ % of the gross sales/lease price that will be paid by \_\_\_\_\_ .**

**This is a legally binding consensual Dual Agency agreement pursuant to Alaska Statute 08.88.396. By their signatures below, Seller/Landlord and Buyer/Tenant agree that Company/ Agent may act as their Dual Agents in this transaction on the terms of this Agreement notwithstanding any contrary or inconsistent principles of agency or other applicable law. This Agreement is incorporated by reference into any resulting sale-purchase/lease agreement between Seller/Landlord and Buyer/Tenant.**

**Signatures on next page.**



**BOND, STEPHENS & JOHNSON, INC.**  
**EXCLUSIVE LISTING AGREEMENT FOR SALE AND LEASE**

This listing agreement ("Agreement") is by and between: (a) \_\_\_\_\_ ("Seller/Landlord"), a(n) \_\_\_\_\_, and (b) Bond, Stephens & Johnson, Inc. ("Broker"), an Alaska corporation.

1. Seller/Landlord hereby grants to Broker the exclusive right to sell or lease the real property ("Property") shown or described in the term sheet ("Term Sheet") attached as Exhibit A (incorporated by reference) on the terms and conditions stated in the Term Sheet (or as otherwise subsequently agreed to by Seller/Landlord) for the \_\_\_\_\_ (\_\_\_\_\_) -day period commencing on \_\_\_\_\_, 20\_\_\_\_ ("Term"). In the event the Property is removed from the market due to the acceptance by Seller/Landlord of an offer to purchase or lease the Property during the Term, and the sale or lease is not consummated for any reason, then if and when the Property is put back on the market the Term shall be extended for a period of time equal to the number of days that the Property was removed from the market.

2. Seller/Landlord shall pay Broker a commission ("Commission") in accordance with Broker's Schedule of Sale and Lease Commissions ("Schedule") attached as Exhibit A (incorporated by reference) if, during the Term or the Tail Period (defined in Section 4): (a) the Property is sold or leased to a purchaser or tenant procured by Broker, Seller/Landlord or any other person or entity; (b) a purchaser or tenant is procured by Broker, Seller/Landlord, or any other person or entity who is ready, willing and able to purchase or lease the Property on the (i) terms and conditions stated in the Term Sheet or (ii) on any other terms and conditions acceptable to Seller/Landlord; (c) any contract for the sale or lease of the Property is entered into by Seller/Landlord; or (d) if Seller/Landlord is a corporation, partnership, limited liability company, trust or other business entity, a controlling interest in such entity is transferred in lieu of a sale or lease of the Property. If an earnest money or similar deposit made by a prospective purchaser or tenant is forfeited, in addition to any other Commission rights Broker has pursuant to this Agreement, Broker shall be entitled to a Commission of one-half (1/2) of such deposit.

3. In the event that an option or refusal right to purchase or lease the Property is granted during the Term or the Tail Period, Seller/Landlord shall pay Broker a Commission in accordance with the Schedule based upon the price paid for the option or refusal right or for any extensions thereof upon receipt by Seller/Landlord of any such payment(s). In the event that such option or refusal right is exercised during the Term, the Tail Period or at any time thereafter, Seller/Landlord shall also pay Broker a Commission on the gross sale or lease price of the Property in accordance with the Schedule. However, to the extent that

Seller/Landlord's Initials:

\_\_\_\_\_

all or part of the price paid for the option, refusal right or any extension thereof is applied to the sale or lease price of the Property, then any Commission previously paid by Seller/Landlord to Broker on account of such option or refusal right or any extension thereof shall be credited against the Commission payable to Broker on account of the exercise of that option or refusal right.

4. Seller/Landlord shall pay Broker a Commission in accordance with the Schedule if, within one (1) year after the expiration of the Term ("Tail Period"), the Property is sold or leased to, or Seller/Landlord enters into a contract, option or refusal right for the sale or lease of the Property with, any person or entity (including his/her/its successors, assigns or affiliates) with whom Broker has negotiated or otherwise communicated with respect to the Property (either directly or indirectly through another broker or agent) or by or to whom the Property has been inspected or shown prior to the expiration of the Term.

5. Seller/Landlord shall (a) cooperate and deal fairly and in good faith with Broker in seeking a sale or lease of the Property on terms and conditions at least as favorable to Seller/Landlord in the aggregate as those listed in the Term Sheet and (b) refer immediately to Broker all persons or entities interested in purchasing or leasing the Property. All negotiations for the sale or lease of Property shall be handled by and through Broker. Broker is exclusively authorized to market and advertise the Property for sale or lease by such means as, in Broker's sole discretion, would facilitate a sale or lease of the Property. Seller/Landlord and its legal counsel shall be solely responsible for drafting and/or determining the legal sufficiency of all offer, acceptance, contract, conveyance and other documents and instruments relating to any sale/purchase or lease transaction contemplated by this Agreement.

6. Seller/Landlord shall disclose to Broker in writing and to all prospective purchasers or lessees of the Property any and all information which Seller/Landlord knows or has within its custody, control or possession regarding the following matters affecting the Property: (a) present and future zoning, building and land use restrictions; (b) environmental matters, including, without limitation, the presence and location of underground storage tanks, petroleum products, asbestos, PCBs and other toxic, hazardous or extremely hazardous or toxic substances located in, on, or about the Property; (c) physical defects and hazards in and soils conditions in, on or about the Property; (d) whether the Property is or may be situated in a flood zone; and (e) any other information which a prudent buyer/tenant would reasonably consider in making its decision to buy/lease the Property. Broker is authorized to disclose all such information to prospective purchasers or tenants.

Seller/Landlord's Initials:

7. Seller/Landlord represents and warrants to Broker that, except as may be set forth in the Term Sheet: (a) Seller/Landlord holds good, marketable and unencumbered fee simple title to the Property; and (b) that no person or entity who has an ownership interest in the Property is a foreign person as defined in the Foreign Investment in Real Property Tax Act (commonly known as "FIRPTA").
8. Broker is irrevocably authorized: (a) to deduct its Commission from any deposits, payments or other funds, including proceeds of sale or lease payments, paid by a purchaser or tenant in connection with any transaction contemplated by this Agreement. Seller/Landlord hereby irrevocably assigns such deposits, payments and funds to Broker to the extent necessary to pay such Commission; and (b) to order on behalf of Seller/Landlord and in its name a preliminary commitment from a local title insurer to issue title insurance on the Property or other form of title report, which Seller/Landlord shall pay for.
9. Each signator to this Agreement represents and warrants: (a) that he or she has full authority to execute and deliver this Agreement on behalf of the party which he/she purportedly represents; and (b) that this Agreement binds such party and is valid and fully enforceable against such party in accordance with its terms.
10. Seller/Landlord shall defend, indemnify and hold harmless Broker and its agents, shareholders, directors and employees from and against any obligations, liabilities, demands, claims, fees and costs suffered or incurred by any of them, that arise out of, result from, are based upon or are caused by, in whole or in part, directly or indirectly, any acts or omissions of Seller/Landlord or any person for whom Seller/Landlord is legally responsible, including, without limitation, all acts and omissions in any way relating to erroneous disclosures or partial or complete failures to disclose required information regarding physical conditions or defects in or environmental contamination affecting the Property or any adjacent or nearby properties.
11. As used in this Agreement and its Exhibits, (a) the term "lease" shall also include subleases and sub-subleases; (b) the term "tenant" shall also include subtenants and sub-subtenants and their respective successors and assigns; and (c) the term "purchaser" shall also include purchaser's successors and assigns.
12. This Agreement (a) is fully integrated; (b) constitutes the entire agreement between Seller/Landlord and Broker with respect to its subject matter; and (c) supersedes all prior discussions, negotiations, promises, understandings and agreements with respect thereto, whether oral or written. No amendment, novation, supplementation, termination or rescission of this Agreement shall be valid or enforceable unless made in writing and executed and delivered by both Seller/Landlord and Broker. This Agreement shall not be

Seller/Landlord's Initials:

\_\_\_\_\_



**Term Sheet**

- 1. Property Description:  
\_\_\_\_\_
- 2. Authority to Submit to MLS Listing?      Yes      No
- 3. Authorized to place sign on Property?    Yes      No
- 4. For Sales:
  - a. Price:  
\_\_\_\_\_
  - b. Payment Terms:  
\_\_\_\_\_
- 5. For Leases:
  - a. Rent:  
\_\_\_\_\_
  - b. Term:  
\_\_\_\_\_
- 6. Other Terms/Conditions:  
\_\_\_\_\_  
(Supplement as necessary)

Seller/Landlord's Initials:

\_\_\_\_\_

**Exhibit A****Bond, Stephens & Johnson, Inc.  
Schedule of Sale and Lease Commissions  
For Listing Agreement for Sellers and Landlords****A. SALES:**

1. For sales of improved real properties, the Commission shall be six percent of the gross sales price. For sales of unimproved real property, the Commission shall be ten percent of the gross sales price. The gross sales price shall include any and all monetary consideration and the fair market value of all non-monetary consideration in whatever form paid or given by or on behalf of the purchaser to Seller or its designee(s) for or with respect to the Property, including but not limited to the assumption or release of existing liabilities. For purposes of this Schedule, the Property is deemed to be  improved  unimproved (deemed to be unimproved if unchecked).
2. The Commission shall be paid upon the earlier to occur of: (a) the closing of the transaction; (b) when the sales price is paid (for installment sales, the entire commission is due with the down payment); (c) Seller's failure or refusal to close the transaction; or (d) when provided in the Term Sheet or otherwise.

**B. LEASES:**

For leases the Commission shall be six percent of the aggregate gross rent for the original term, without reductions, deductions, credits or offsets, payable in its entirety upon the execution of the lease, subject to the following:

1. *Month to Month Tenancy.* The minimum Commission for a month to month tenancy, tenancy at will, or any tenancy which is not reduced to a written lease between a tenant and Landlord shall be equal to 50 % of the first month's base rent or \$1,000, whichever is greater. The Commission shall be payable upon occupancy. In the event such a tenant subsequently executes a written lease with Landlord, either directly or with the assistance of Broker or any other person or entity, within 24 months from the date of initial occupancy, then Broker shall receive a Commission with respect to such lease in accordance with the provisions of paragraph B above.

Seller/Landlord's Initials:

\_\_\_\_\_

2. *Extension, Renewal or New Lease.* If the lease term is effectively renewed or extended, in accordance with the terms of an option, refusal right, new lease, substitute lease or otherwise, then Landlord shall pay Broker a Commission at one-half of the commission rate provided in Section B of this Schedule based on the aggregate gross rent payable during the extended or renewed lease term for the existing space, without deduction, credit, reduction or set-off. If additional space is leased during the initial, renewed or extended term, Landlord shall pay Broker a Commission at the commission rate provided in Section B of this Schedule based on the aggregate gross rent for the additional space payable during the extended or renewed lease term, without deduction, credit, reduction or set-off. Such Commission shall be earned and payable at the time the extended or renewed term commences for the existing space and at the time of agreement for any additional space.
3. *Purchase of Property by Tenant.* If a tenant, its successors or assignees, or any agent, officer, employee, principal, partner, member, director, manager or shareholder of such tenant or its successors or assigns purchases the Property during (a) the term of the lease, (b) any extension or renewal thereof, or (c) within 180 days after the expiration thereof, then a Commission shall be paid to Broker in accordance with the provisions of Section A above; provided however, that there shall be a credit against such Commission in the amount of the Commission previously paid to Broker for the portion of the purchaser's lease term which is cancelled by reason of such sale. In no event shall such credit exceed the amount of such sales Commission.
4. *Percentage Rent.* If a lease for which a Commission is payable hereunder contains a percentage rent or similar clause, Seller/Landlord shall pay a Commission on the percentage rent or similar payment payable by the tenant at the Commission rate in Section B above applicable to the period of the lease term for which the percentage rent or similar payment is payable. This Commission shall be payable to Broker within 15 days after the tenant's payment of the percentage rent or similar payment for such period. Notwithstanding the foregoing, at the end of the third full lease year Landlord shall pay Broker a Commission on the percentage rent or similar payment for the remainder of the original term of the lease. For the purpose of calculating this Commission, the percentage rent or similar payment for each remaining year of the term of the lease shall be deemed to be the same amount as the percentage rent or similar payment payable for the third full lease year.

Seller/Landlord's Initials:

\_\_\_\_\_

5. *Ground Lease.* If a lease is a ground lease, the Commission shall not exceed what the Commission would be for a sale of the Property at a price equal to the value of the Property used to compute the Property rental rate or, if no such value was used, the then fair market value of the Property.

The provisions hereof are subject to the terms and provisions of any Term Sheet or other agreement to which this Schedule may be attached and which is executed by the parties hereto.

In the event Seller/Landlord fails to make Commission payments to Broker within the time limits set forth herein, then from the date due until paid the delinquent amount shall bear interest at the legal rate set forth in AS 45.45.010 or the maximum legal interest rate chargeable on such amount in Alaska, whichever is less. If Broker is required to pursue legal action against Seller/Landlord to collect any Commission due it, Broker shall be entitled to also recover from Seller/Landlord the reasonable actual attorneys' fees and costs it incurs in such pursuit.

Seller/Landlord's Initials:

\_\_\_\_\_

Exclusive Listing Agreement for Sale & Lease  
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Page 8 of 8  
BSJ Form No. 4, 12/02 cd.

Bond, Stephens & Johnson, Inc., Commercial Real Estate Services  
3000 "A" Street, Suite 200, Anchorage, AK 99503  
Ph 907-563-7733 Fax 907-561-8929  
Email [bsi@bsjalaska.com](mailto:bsi@bsjalaska.com) [www.bsjalaska.com](http://www.bsjalaska.com)

**Bond, Stephens & Johnson, Inc.****Fax**

**To:** c/o Heather Nobrega  
Attn: Rep. Norm Rokeberg

**From:** Chris Stephens, CCIM

**Fax:** 907-465-~~6848~~

**Fax:** 907-786-7326

2040

**Phone:** 907-243-1454

**Phone:** 907-786-7305

**Date:** 4/11/2003

**Pages:**

★

**Subject:** Agency Forms Samples

**Notes:**

Dear Representative Rokeberg:

Attached are the agency disclosure forms that our attorney drafted for us after the court ruling on agency. As you can see, they are very comprehensive because they are our attorney's effort to meet all of the requirements of the judge's ruling. They are also very awkward to work with.

I will be sending you a statement on the proposed House Bill No. 257.

Sincerely,

Chris Stephens, CCIM

★ 1st set 17 pages  
2nd set 16 pages  
3rd set 17 pages

**BOND, STEPHENS & JOHNSON, INC. SINGLE-PARTY  
LISTING AGREEMENT FOR SALE AND LEASE**

This listing agreement ("Agreement") is by and between: (a) \_\_\_\_\_ ("Seller/Landlord"), a(n) \_\_\_\_\_, and (b) Bond, Stephens & Johnson, Inc. ("Broker"), an Alaska corporation.

1. Seller/Landlord hereby grants to Broker the exclusive right to sell or lease the real property ("Property") shown or described in the term sheet ("Term Sheet") attached as Exhibit A (incorporated by reference) on the terms and conditions stated in the Term Sheet (or as otherwise subsequently agreed to by Seller/Landlord) only to the prospective buyer/tenant identified in the attached Exhibit B. Broker's right to sell or lease the Property shall be for the \_\_\_\_\_ (\_\_\_\_\_) day period commencing on \_\_\_\_\_, 20\_\_\_\_ ("Term"). In the event the Property is removed from the market due to the acceptance by Seller/Landlord of an offer to purchase or lease the Property during the Term, and the sale or lease is not consummated for any reason, then if and when the Property is put back on the market the Term shall be extended for a period of time equal to the number of days that the Property was removed from the market.

2. Seller/Landlord shall pay Broker a commission ("Commission") in accordance with Broker's Schedule of Sale and Lease Commissions ("Schedule") attached as Exhibit A (incorporated by reference) if, during the Term or the Tail Period (defined in Section 4): (a) the Property is sold or leased to a purchaser or tenant procured by Broker, Seller/Landlord or any other person or entity; (b) a purchaser or tenant is procured by Broker, Seller/Landlord, or any other person or entity who is ready, willing and able to purchase or lease the Property on the (i) terms and conditions stated in the Term Sheet or (ii) on any other terms and conditions acceptable to Seller/Landlord; (c) any contract for the sale or lease of the Property is entered into by Seller/Landlord; or (d) if Seller/Landlord is a corporation, partnership, limited liability company, trust or other business entity, a controlling interest in such entity is transferred in lieu of a sale or lease of the Property. If an earnest money or similar deposit made by a prospective purchaser or tenant is forfeited, in addition to any other Commission rights Broker has pursuant to this Agreement, Broker shall be entitled to a Commission of one-half (1/2) of such deposit.

3. In the event that an option or refusal right to purchase or lease the Property is granted during the Term or the Tail Period, Seller/Landlord shall pay Broker a Commission in accordance with the Schedule based upon the price paid for the option or refusal right or for any extensions thereof upon receipt by Seller/Landlord of any such payment(s). In the event that such option or refusal right is exercised during the Term, the Tail Period or at any time thereafter, Seller/Landlord shall also pay Broker a Commission on the gross sale or lease price of the Property in accordance with the Schedule. However, to the extent that all or part of the price paid for the option, refusal right or any extension thereof is applied

Seller/Landlord's Initials:

to the sale or lease price of the Property, then any Commission previously paid by Seller/Landlord to Broker on account of such option or refusal right or any extension thereof shall be credited against the Commission payable to Broker on account of the exercise of that option or refusal right.

4. Seller/Landlord shall pay Broker a Commission in accordance with the Schedule if, within one (1) year after the expiration of the Term ("Tail Period"), the Property is sold or leased to, or Seller/Landlord enters into a contract, option or refusal right for the sale or lease of the Property with, any person or entity (including his/her/its successors, assigns or affiliates) with whom Broker has negotiated or otherwise communicated with respect to the Property (either directly or indirectly through another broker or agent) or by or to whom the Property has been inspected or shown prior to the expiration of the Term.

5. Seller/Landlord shall (a) cooperate and deal fairly and in good faith with Broker in seeking a sale or lease of the Property on terms and conditions at least as favorable to Seller/Landlord in the aggregate as those listed in the Term Sheet and (b) refer immediately to Broker all persons or entities interested in purchasing or leasing the Property. All negotiations for the sale or lease of Property shall be handled by and through Broker. Broker is exclusively authorized to market and advertise the Property for sale or lease by such means as, in Broker's sole discretion, would facilitate a sale or lease of the Property. Seller/Landlord and its legal counsel shall be solely responsible for drafting and/or determining the legal sufficiency of all offer, acceptance, contract, conveyance and other documents and instruments relating to any sale/purchase or lease transaction contemplated by this Agreement.

6. Seller/Landlord shall disclose to Broker in writing and to all prospective purchasers or lessees of the Property any and all information which Seller/Landlord knows or has within its custody, control or possession regarding the following matters affecting the Property: (a) present and future zoning, building and land use restrictions; (b) environmental matters, including, without limitation, the presence and location of underground storage tanks, petroleum products, asbestos, PCBs and other toxic, hazardous or extremely hazardous or toxic substances located in, on, or about the Property; (c) physical defects and hazards in and soils conditions in, on or about the Property; (d) whether the Property is or may be situated in a flood zone; and (e) any other information which a prudent buyer/tenant would reasonably consider in making its decision to buy/lease the Property. Broker is authorized to disclose all such information to the prospective buyer/tenant identified in the attached Exhibit B.

7. Seller/Landlord represents and warrants to Broker that, except as may be set forth in the Term Sheet: (a) Seller/Landlord holds good, marketable and unencumbered fee simple title to the Property; and (b) that no person or entity who has an ownership interest

Seller/Landlord's Initials:

In the Property is a foreign person as defined in the Foreign Investment in Real Property Tax Act (commonly known as "FIRPTA").

8. Broker is irrevocably authorized: (a) to deduct its Commission from any deposits, payments or other funds, including proceeds of sale or lease payments, paid by a purchaser or tenant in connection with any transaction contemplated by this Agreement. Seller/Landlord hereby irrevocably assigns such deposits, payments and funds to Broker to the extent necessary to pay such Commission; and (b) to order on behalf of Seller/Landlord and in its name a preliminary commitment from a local title insurer to issue title insurance on the Property or other form of title report, which Seller/Landlord shall pay for.

9. Each signator to this Agreement represents and warrants: (a) that he or she has full authority to execute and deliver this Agreement on behalf of the party which he/she purportedly represents; and (b) that this Agreement binds such party and is valid and fully enforceable against such party in accordance with its terms.

10. Seller/Landlord shall defend, indemnify and hold harmless Broker and its agents, shareholders, directors and employees from and against any obligations, liabilities, demands, claims, fees and costs suffered or incurred by any of them, that arise out of, result from, are based upon or are caused by, in whole or in part, directly or indirectly, any acts or omissions of Seller/Landlord or any person for whom Seller/Landlord is legally responsible, including, without limitation, all acts and omissions in any way relating to erroneous disclosures or partial or complete failures to disclose required information regarding physical conditions or defects in or environmental contamination affecting the Property or any adjacent or nearby properties.

11. As used in this Agreement and its Exhibits, (a) the term "lease" shall also include subleases and sub-subleases; (b) the term "tenant" shall also include subtenants and sub-subtenants and their respective successors and assigns; and (c) the term "purchaser" shall also include purchaser's successors and assigns.

12. This Agreement (a) is fully integrated; (b) constitutes the entire agreement between Seller/Landlord and Broker with respect to its subject matter; and (c) supersedes all prior discussions, negotiations, promises, understandings and agreements with respect thereto, whether oral or written. No amendment, novation, supplementation, termination or rescission of this Agreement shall be valid or enforceable unless made in writing and executed and delivered by both Seller/Landlord and Broker. This Agreement shall not be construed against its drafter. This Agreement shall be binding upon, and shall benefit, the heirs, successors and assignees of the parties. This Agreement and the respective rights and obligations of the parties hereunder shall be construed and interpreted as a contract under the laws of the State of Alaska, without regard to its conflicts of law principles. If a question, dispute or requirement for interpretation or construction should arise with respect

Seller/Landlord's Initials:



**Term Sheet**

1. Property Description:

\_\_\_\_\_

2. For Sales:

a. Price:

\_\_\_\_\_

b. Payment Terms:

\_\_\_\_\_

3. For Leases:

a. Rent:

\_\_\_\_\_

b. Term:

\_\_\_\_\_

4. Other Terms/Conditions:

\_\_\_\_\_  
(Supplement as necessary)

Seller/Landlord's Initials:

\_\_\_\_\_

**Exhibit A**

**Bond, Stephens & Johnson, Inc.**  
**Schedule of Sale and Lease Commissions**  
**For Single Party Listing Agreement for Sellers and Landlords**

**A. SALES:**

1. For sales of improved real properties, the Commission shall be six percent of the gross sales price. For sales of unimproved real property, the Commission shall be ten percent of the gross sales price. The gross sales price shall include any and all monetary consideration and the fair market value of all non-monetary consideration in whatever form paid or given by or on behalf of the purchaser to Seller or its designee(s) for or with respect to the Property, including but not limited to the assumption or release of existing liabilities. For purposes of this Schedule, the Property is deemed to be  improved  unimproved (deemed to be unimproved if unchecked).

2. The Commission shall be paid upon the earlier to occur of: (a) the closing of the transaction; (b) when the sales price is paid (for installment sales, the entire commission is due with the down payment); (c) Seller's failure or refusal to close the transaction; or (d) when provided in the Term Sheet or otherwise.

**B. LEASES:**

For leases the Commission shall be six percent of the aggregate gross rent for the original term, without reductions, deductions, credits or offsets, payable in its entirety upon the execution of the lease, subject to the following:

1. *Month to Month Tenancy.* The minimum Commission for a month to month tenancy, tenancy at will, or any tenancy which is not reduced to a written lease between a tenant and Landlord shall be equal to 50 % of the first month's base rent or \$1,000, whichever is greater. The Commission shall be payable upon occupancy. In the event such a tenant subsequently executes a written lease with Landlord, either directly or with the assistance of Broker or any other person or entity, within 24 months from the date of initial occupancy, then Broker shall receive a Commission with respect to such lease in accordance with the provisions of paragraph B above.

2. *Extension, Renewal or New Lease.* If the lease term is effectively renewed or extended, in accordance with the terms of an option, refusal right, new lease, substitute lease or otherwise, then Landlord shall pay Broker a Commission at one-half of the

Seller/Landlord's Initials:

commission rate provided in Section B of this Schedule based on the aggregate gross rent payable during the extended or renewed lease term for the existing space, without deduction, credit, reduction or set-off. If additional space is leased during the initial, renewed or extended term, Landlord shall pay Broker a Commission at the commission rate provided in Section B of this Schedule based on the aggregate gross rent for the additional space payable during the extended or renewed lease term, without deduction, credit, reduction or set-off. Such Commission shall be earned and payable at the time the extended or renewed term commences for the existing space and at the time of agreement for any additional space.

3. *Purchase of Property by Tenant.* If a tenant, its successors or assignees, or any agent, officer, employee, principal, partner, member, director, manager or shareholder of such tenant or its successors or assigns purchases the Property during (a) the term of the lease, (b) any extension or renewal thereof, or (c) within 180 days after the expiration thereof, then a Commission shall be paid to Broker in accordance with the provisions of Section A above; provided however, that there shall be a credit against such Commission in the amount of the Commission previously paid to Broker for the portion of the purchaser's lease term which is cancelled by reason of such sale. In no event shall such credit exceed the amount of such sales Commission.

4. *Percentage Rent.* If a lease for which a Commission is payable hereunder contains a percentage rent or similar clause, Seller/Landlord shall pay a Commission on the percentage rent or similar payment payable by the tenant at the Commission rate in Section B above applicable to the period of the lease term for which the percentage rent or similar payment is payable. This Commission shall be payable to Broker within 15 days after the tenant's payment of the percentage rent or similar payment for such period. Notwithstanding the foregoing, at the end of the third full lease year Landlord shall pay Broker a Commission on the percentage rent or similar payment for the remainder of the original term of the lease. For the purpose of calculating this Commission, the percentage rent or similar payment for each remaining year of the term of the lease shall be deemed to be the same amount as the percentage rent or similar payment payable for the third full lease year.

5. *Ground Lease.* If a lease is a ground lease, the Commission shall not exceed what the Commission would be for a sale of the Property at a price equal to the value of the Property used to compute the Property rental rate or, if no such value was used, the then fair market value of the Property.

The provisions hereof are subject to the terms and provisions of any Term Sheet or other

Seller/Landlord's Initials:

\_\_\_\_\_

agreement to which this Schedule may be attached and which is executed by the parties hereto.

In the event Seller/Landlord fails to make Commission payments to Broker within the time limits set forth herein, then from the date due until paid the delinquent amount shall bear interest at the legal rate set forth in AS 45.45.010 or the maximum legal interest rate chargeable on such amount in Alaska, whichever is less. If Broker is required to pursue legal action against Seller/Landlord to collect any Commission due it, Broker shall be entitled to also recover from Seller/Landlord the reasonable actual attorneys' fees and costs it incurs in such pursuit.

Seller/Landlord's Initials:

\_\_\_\_\_

Single Party Listing Agreement for Sale & Lease  
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BSJ Form No. 5, 12/02 ed.

Bond, Stephens & Johnson, Inc., Commercial Real Estate Services  
3000 "A" Street, Suite 200, Anchorage, AK 99503  
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Email [bsj@bsjalaska.com](mailto:bsj@bsjalaska.com) [www.bsjalaska.com](http://www.bsjalaska.com)

**Exhibit B**

**Identity of Buyer/Tenant for Single-Party Listing Agreement**

**Name:** \_\_\_\_\_

**Seller/Landlord:**

\_\_\_\_\_  
, Seller/Landlord

Dated: \_\_\_\_\_, 20

**Company:**

BOND, STEPHENS & JOHNSON, INC.,  
an Alaska corporation

By: \_\_\_\_\_  
, Agent

Dated: \_\_\_\_\_, 20

Seller/Landlord's Initials:

\_\_\_\_\_

**BOND, STEPHENS & JOHNSON, INC.**  
**AGENCY AGREEMENT FOR BUYERS AND TENANTS**

This agency agreement ("Agreement") is by and between: (a) Bond, Stephens & Johnson, Inc. ("Broker"), an Alaska corporation, the address of which is 3000 "A" Street, Suite 200, Anchorage, Alaska 99503; and (b) ("Buyer/Tenant"), a(n) \_\_\_\_\_, the address of whom/which is \_\_\_\_\_.

1. Appointment of Agent. Buyer/Tenant hereby appoints Broker as its exclusive agent for the Term (defined in paragraph 2 below) to procure a purchase or lease of suitable real property on its behalf on the terms and conditions stated in the term sheet ("Term Sheet") incorporated by reference in this Agreement.

2. Term of Agency. The term of this agency ("Term") shall commence on the effective date hereof and, subject to the Tail Period (defined in paragraph 6 below), terminate \_\_\_\_\_ (\_\_\_\_\_) days thereafter.

3. Broker's Obligations. Broker shall make diligent and good faith effort to (a) locate, evaluate and advise Buyer/Tenant on a suitable property for Buyer/Tenant, (b) negotiate with a prospective seller or lessor on behalf of Buyer/Tenant to purchase or lease such property, and (c) assist Buyer/Tenant in closing the transaction.

4. Buyer/Tenant's Obligations. Buyer/Tenant shall (a) make a diligent and good faith effort to cooperate with Broker in evaluating, inspecting and making a prompt determination on whether to purchase or lease any property procured by Broker which meets the requirements set forth in the Term Sheet and (b) at its expense, obtain legal counsel to draft, review and advise it on all legal documentation required for the transaction.

5. Commission.

Payable by Buyer/Tenant. Buyer/Tenant shall pay Broker a commission ("Commission") in accordance with Broker's Schedule of Sale and Lease Commissions ("Schedule") attached as Exhibit A (incorporated by reference) if, during the Term or the Tail Period (defined in Section 6): (a) a seller/landlord is procured by Broker, Buyer/Tenant or any affiliate, or any other person or entity who is ready, willing and able to sell or lease any property to Buyer/Tenant or any affiliate on the terms and conditions stated in the Term Sheet or on any other terms and conditions acceptable to Buyer/Tenant or any affiliate; (b) any contract for the purchase or lease of any property is entered into by Buyer/Tenant or any affiliate thereof on the terms and conditions stated in the Term Sheet or on any other terms and conditions acceptable to Buyer/Tenant or any affiliate; or (c) Buyer/Tenant or any affiliate purchases or leases any property on the terms and conditions

stated in the Term Sheet or any other terms and conditions acceptable to Buyer/Tenant or any affiliate.

Pavable by Seller/Landlord. Broker shall make a reasonable effort to persuade each prospective seller/landlord to agree to pay Broker a Commission for procuring Buyer/Tenant for such seller/landlord. If Broker cannot persuade a seller/landlord who is willing to sell/lease property to Buyer/Tenant on terms acceptable to Buyer/Tenant to agree to pay Broker a Commission, Buyer/Tenant shall either: (a) pay Broker the Commission; or (b) neither purchase/lease, nor allow any affiliate to purchase/lease, any property from such seller/landlord. The Commission shall be computed and become due and owing as if it were originally to be paid by Buyer/Tenant, regardless of whether the foregoing box is checked.

6. Tail Period. If within one (1) year after the expiration of the Term ("Tail Period"), Buyer/Tenant purchases or leases, or enters into any contract, option or refusal right to purchase or lease, any property (a) from any person, entity (including his/her/its successors, assigns or affiliates) with whom Broker has negotiated or otherwise communicated on behalf of Buyer/Tenant or (b) which has been inspected or shown to Buyer/Tenant prior to the expiration of the Term, then Buyer/Tenant shall pay Broker the Commission provided for in Paragraph 5(b).

7. Authority. Each signator to this Agreement represents and warrants: (a) that he or she has full authority to execute and deliver this Agreement on behalf of the party which he/she purportedly represents; and (b) that this Agreement (i) binds such party and (ii) is valid and fully enforceable against such party in accordance with its terms.

8. Indemnity/Release. Buyer/Tenant hereby: (a) discharges and releases Broker and its agents, shareholders, directors and employees (with prejudice) from all obligations, liabilities, claims, fees and costs they may hereafter owe or have to Buyer/Tenant which in any way arise out of, result from, are based upon or are caused by, in whole or in part, directly or indirectly, their failure to discover, or obtain required disclosures from any seller/landlord of any physical defects or conditions or any environmental contamination affecting any real property the Buyer/Tenant may purchase/lease as a result of Broker's efforts under this Agreement or any adjacent or nearby properties; and (b) agrees to defend, indemnify and hold them harmless from and against any and all obligations, liabilities, demands, claims, fees and costs, which they may owe to any third person that in any way arise out of, result from, are based upon or are caused by, in whole or in part, directly or indirectly, (i) any such defects, conditions or contamination or (ii) acts or omissions by Buyer/Tenant or any person for whom Buyer/Tenant is legally responsible with respect to any property of any seller/landlord or any adjacent or nearby property.

9. General. This Agreement is fully integrated; constitutes the entire agreement between Buyer/Tenant and Broker with respect to its subject matter; and supersedes all prior discussions, negotiations, promises, understandings and agreements with respect thereto, whether oral or written. This Agreement shall not be construed against the

drafter. Each party has read, understands and agreed to be bound by this Agreement after consultation with competent independent legal counsel or after having voluntarily and knowingly waived the right to consult with such counsel. No amendment, novation, supplementation, termination or rescission of this Agreement shall be valid or enforceable unless made in writing and executed and delivered by both Buyer/Tenant and Broker. This Agreement shall be binding upon, and shall benefit, the heirs, successors and assignees of the parties. This Agreement and the respective rights and obligations of the parties hereunder shall be construed and interpreted as a contract under the laws of the State of Alaska, without regard to its conflicts of law principles. If a question, dispute or requirement for interpretation or construction should arise with respect to this Agreement, the jurisdiction and venue therefore shall lie exclusively with the courts for the Third Judicial District for the State of Alaska, at Anchorage, Alaska, or, alternatively, with the United States District Court for the District of Alaska, at Anchorage, Alaska, unless a nonwaivable federal or Alaska state law should require to the contrary. In the event any provision of this Agreement shall be deemed to be void or unenforceable based on any controlling state or federal law, the remaining provisions shall be unaffected thereby, such provision shall be deemed modified to the minimum extent necessary to make it valid and enforceable, and such provision shall be enforced as so modified.

10. Definitions. As used in this Agreement and its Exhibits, (a) the term "lease" shall also include subleases and sub-subleases; (b) the term "lessor" shall also include sublessors, sub-sublessors and their respective successors and assigns and entities which they respectively control; and (c) the terms "seller," and "Other Clients" shall also include their respective successors and assigns and entities which they respectively control.

**Company:**  
 BOND, STEPHENS & JOHNSON, INC.,  
 an Alaska corporation

**Buyer/Tenant:**

By: \_\_\_\_\_  
 , Agent

\_\_\_\_\_  
 , Buyer

Dated: \_\_\_\_\_, 20

Dated: \_\_\_\_\_, 20

\_\_\_\_\_  
 , Buyer

Dated: \_\_\_\_\_, 20

**Term Sheet**

1. Property Requirements:

\_\_\_\_\_

2. For Purchases:

a. Price:

\_\_\_\_\_

b. Payment Terms:

\_\_\_\_\_

3. For Leases:

a. Rent:

\_\_\_\_\_

b. Term:

\_\_\_\_\_

4. Other Terms/Conditions:

\_\_\_\_\_

(Supplement as necessary)

**Exhibit A**

**Bond, Stephens & Johnson, Inc.**  
**Schedule of Sale and Lease Commissions**  
**For Agency Agreement for Buyers and Tenants**

**A. SALES:**

1. For purchases of improved real properties, the Commission shall be six percent of the gross sales price. For purchases of unimproved real property, the Commission shall be ten percent of the gross sales price. The gross sales price shall include any and all monetary consideration and the fair market value of all non-monetary consideration in whatever form paid or given by or on behalf of the Buyer to the seller or its designee(s) for or with respect to the property, including but not limited to the assumption or release of existing liabilities. For purposes of this Schedule, the Property is deemed to be  Improved  unimproved (deemed to be unimproved if unchecked).

2. The Commission shall be paid upon the earlier to occur of: (a) the closing of the transaction; (b) when the sales price is paid (for installment sales, the entire commission is due with the down payment); (c) Buyer's failure or refusal to close the transaction; or (d) when provided in the Term Sheet or otherwise.

**B. LEASES:**

For leases the Commission shall be six percent of the aggregate gross rent for the original term, without reductions, deductions, credits or offsets, payable in its entirety upon the execution of the lease, subject to the following:

1. *Month to Month Tenancy.* The minimum Commission for a month to month tenancy, tenancy at will, or any tenancy which is not reduced to a written lease between Tenant and a landlord shall be equal to 50% of the first month's base rent or \$1,000, whichever is greater. The Commission shall be payable upon occupancy. In the event Tenant subsequently executes a written lease with a landlord, either directly or with the assistance of Broker or any other person or entity, within 24 months from the date of initial occupancy, then Broker shall receive a Commission with respect to such lease in accordance with the provisions of paragraph B above.

2. *Extension, Renewal or New Lease.* If the lease term is effectively renewed or extended, in accordance with the terms of an option, refusal right, new lease, substitute lease or otherwise, then Tenant shall pay Broker a Commission at one-half of the commission rate provided in Section B of this Schedule based upon the aggregate gross rent payable during the extended or renewed lease term for the existing space, without deduction, credit, reduction or set-off. If additional space is leased during the initial, renewed or extended term, Landlord shall pay Broker a Commission at the commission

rate provided in Section B of this Schedule based on the aggregate gross rent for the additional space, without deduction, credit, reduction or set-off. Such Commission shall be earned and payable at the time the extended or renewed term commences for the existing space.

3. *Purchase of Property by Tenant.* If Tenant, its successors or assignees, or any agent, officer, employee, principal, partner, member, director, manager or shareholder of Tenant or its successors or assigns purchases the Property during (a) the term of the lease or any substitute or new lease, (b) any extension or renewal thereof, or (c) within 180 days after the expiration thereof, then a Commission shall be paid to Broker in accordance with the provisions of Section A above; provided however, that there shall be a credit against such Commission in the amount of the Commission previously paid to Broker for the portion of the purchaser's lease term which is cancelled by reason of such sale. In no event shall such credit exceed the amount of such sales Commission.

4. *Percentage Rent.* If a lease for which a Commission is payable hereunder contains a percentage rent or similar clause, Tenant shall pay a Commission on the percentage rent or similar payment payable by Tenant at the Commission rate in Section B above applicable to the period of the lease term for which the percentage rent or similar payment is payable. This Commission shall be payable to Broker within 15 days after Tenant's payment of the percentage rent or similar payment for such period. Notwithstanding the foregoing, at the end of the third full lease year, Tenant shall pay Broker a Commission on the percentage rent or similar payment for the remainder of the lease term. For the purpose of calculating this Commission, the percentage rent or similar payment for each remaining year of the term of the lease shall be deemed to be the same amount as the percentage rent or similar payment payable for the third full lease year.

5. *Ground Lease.* If a lease is a ground lease, the Commission shall not exceed what the Commission would be for a sale of the property at a price equal to the value of the property used to compute the property rental rate or, if no such value was used, the then fair market value of the property.

The provisions hereof are subject to the terms and provisions of any Term Sheet or other agreement to which this Schedule may be attached and which is executed by the parties hereto.

In the event Buyer/Tenant fails to make Commission payments to Broker within the time limits set forth herein, then from the date due until paid the delinquent amount shall bear interest at the legal rate set forth in AS 45.45.010 or the maximum legal interest rate chargeable on such amount in Alaska, whichever is less. If Broker is required to pursue legal action against Buyer/Tenant to collect any Commission due it, Broker shall be entitled to also recover from Buyer/Tenant the reasonable actual attorneys' fees and costs it incurs in such pursuit.

