ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11160 SENATE JUDICIARY

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 97
(S) Publish Date: 3/03/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to public interest litigants and to attorneys fees; and amending Rule 82, ...Civil Procedure."
BRU Civil Division
Component Deputy Attorney General's Office
Sponsor Rules Committee
Requester Governor
Component No. 2205

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

Under Rule 82, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.

This bill requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 1/27/03 8:28 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/27/2003
Agency Department of Law

(Revised 8/2002 OMB)

COMMITTEE COPY

ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY98, $186.4; FY99, $413.9; FY00, $34.7; FY01 $298.4; FY02 $335.9. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (http://www.ajc.state.ak.us/Reports/atyfee.pdf) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if this bill passes.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 97
(S) Publish Date: 3/03/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to public interest litigants.....
BRU: Risk Management
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						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

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)*

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director
Phone
Division: Risk Management
Date/Time: 2/3/03 11:52 AM
Approved by:
Date: 2/3/2003
Agency: Administration

(Revised 9/2001 OMB)

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APR 2 2 2003

ALASKA STATE CHAMBER OF COMMERCE

SB 97 – Public Interest Litigants
Testimony by Pamela La Bolle, President

The Alaska State Chamber of Commerce, representing approximately 700 business members and 35 local chambers of commerce, offers the following comments in support of SB 97 regarding Public Interest Litigants.

The Public Interest Litigant is a special status granted to a certain group of Alaskans over the interests of other Alaskans. This status was not created by the elected representatives of Alaskans through the recognized public process of the legislature, but instead was created by the courts.

Under this special status, litigants are provided exemption from the requirements of Rule 82 (g) of the Alaska Rules of Civil Procedure that provides for the prevailing party in a civil procedure to recover a portion of its attorney fees. Under Rule 82, if the prevailing party is the defendant, they can recover 20-30% of the attorney fees incurred. The rationale, in addition to encouraging settlement, is to provide partial compensation to parties who are forced to go to litigation to defend their rights.

The Alaska State Chamber was among those who worked hard to bring Rule 82 into law, and it is our belief that it is fair to all. We believe that no groups, based on their political characteristics, should be accorded special treatment or immunity from Rule 82.

The public interest litigant doctrine came about in the 1990 case of *The Anchorage Daily News v. Anchorage School District* before the Alaska Supreme Court. Under this special status, the court determined that if the prevailing party is considered a public interest litigant, they are able to recover all of their attorney fees. If the public interest litigant loses, however, they do not have to pay any of the other parties' attorney's fees.

Some groups routinely challenge state resource development decisions and are granted the status of public interest litigant by the courts. These groups are often special interest groups posing as public trusts. Such challenges typically allege as many as 15 to 20 specific deficiencies in the state's administrative finding. When groups challenging resource development decisions prevail, they generally do so on just one or two issues, however they are typically awarded full costs and attorneys fees.

SB 97 will return fairness to the civil proceedings. Under Rule 82, the court is allowed to raise or lower the amount to be awarded in attorney's fees based upon established factors. The rule should be applied equally to all litigants.

We urge the committee to support SB 97.

NFIB
The Voice of Small Business

ALASKA

Statement of Support

Senate Bill 97

Public Interest Litigant Fees

March 8, 2003

The Alaska Chapter of the National Federation of Independent Business has over 2,500 members, making it the largest small-business advocacy group in the state. NFIB supports SB 97. This bill allows for equal treatment of litigants under Court Civil Rule 82.

Civil rule 82 provides for a percentage of attorney fees to be reimbursed to the prevailing party. Through Alaska Supreme Court decisions, a policy has been established to exempt public interest litigants from Rule 82 when they do not prevail and give them a higher percentage when they do. This gives public interest litigants an incentive to litigate even weak claims because they will suffer no economic burden if they lose and usually are able to obtain full attorney fees if they prevail.

Groups that litigate "in the public interest" have imposed substantial economic burdens on the State in the development of its resources. Passing SB 97 will take away the incentive to litigate just to delay a project. Such delaying tactics have caused otherwise good projects to become uneconomic and not go forward.

Public interest litigants will not be unfairly treated by SB 97. They will simply be treated like all other Alaskans. They have the right to provide public input before an agency decision is made. They have the right to administratively appeal an agency decision with no cost to them if they lose. This bill will simply treat public interest litigants like every other litigant when they decide to go to court to contest a decision of a resource agency in making a coastal consistency determination, adopting regulations or making other administrative decisions for which there has been an opportunity for public comment.

Passage of SB 97 will benefit the economy in Alaska by reducing project delays.

NFIB/Alaska urges support for SB 97

Submitted by Thyes Shaub on behalf of NFIB/Alaska

National Federation of Independent Business – ALASKA
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DISABILITY LAW CENTER OF ALASKA

JUNEAU
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(907) 586-1627
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April 8, 2003

By Hand Delivery

Honorable Ralph Seekins, chairman
Senate Judiciary Committee
Alaska State Capitol, Room 125
Juneau, Alaska

Re: **SB 97: Public Interest Litigants, attorneys fees, and Rule 82, Alaska R. Civil Proc.**

Dear Senator Seekins:

Enclosed is a copy our comments on CSSB 97, a work draft of SB 97. The bill passed out of the Senate Resources Committee without adopting the amended version, to which these comments were addressed. With the colloquy that took place, it appears that SB 97 as passed is intended to not adversely affect access to the court system by Alaskans with disabilities. The bill appears to be limited to disputes arising out of actions by the Alaska Departments of Environmental Conservation, Fish and Game, or Natural Resources.

However, SB 97 as currently before your committee still contains ambiguity. The structure of the revision of AS 09.60.010 and new rule 82(g) [see sections 1 and 3 of the bill] could be construed to apply more broadly to any dispute involving any "agency" action to adopt a regulation or to appeal any administrative adjudicative proceeding. The problem is the intended effect of the phrase that follows "determination" on page 1, line 14: does the phrase that follows modify the preceding phrase, or is it a separate category of civil action that is governed? Also, the term "agency" is undefined in the bill, and so it is unclear whether the effect of the bill is limited to just the three agencies listed, to all state agencies, or whether it applies to all levels of government (municipal, borough, or other public agencies).

Alaskans with disabilities may be involved in disability-related disputes with DEC, Fish and Game, or DNR. The Disability Law Center of Alaska has represented individuals who, because of their disability, were unable to access hunting and fishing areas. Based upon our advocacy, modifications to regulation were provided, enabling our clients equal access to the hunting and fishing programs of the State. The disability laws apply to all aspects of state function, including regulation of fish, game and other natural resources. See, e.g., *Applicability of the Americans with Disabilities Act to Regulations of the Boards of Fish and Game*, Inf. Op. Atty. Gen. Alaska (Oct. 23, 1992)(copy enclosed).

We have previously opposed bills that have been more broadly worded than the current version of SB 97, now before your committee. For your benefit, I enclose a copy of the minutes from a hearing before the Alaska House Judiciary Committee from 2001 on former Senate Bill 183. The testimony given then is still relevant today. We urge reconsideration of the idea that elimination of the public interest litigant exception is the best approach.

We look forward to working with your committee, staff, and the Administration to ensure that Alaskans with disabilities continue to have access to the court system -- as public interest litigants when appropriate -- to redress grievances. We urge that the ambiguities of SB 97 be clarified, and if not clarified, that the bill should not become law as it would create more problems than it would solve.

Very truly yours,

Bob Briggs

Robert B. Briggs

Cc: (w/ encls.)

Members of Senate Judiciary Committee
James Clark, Chief of Staff, Office of the Governor
Gregg Renkes, Attorney General

CSSB 97
Testimony of Janel Wright
Disability Law Center of Alaska
April 7, 2003

The "public interest litigants" rule currently protects the public's ability to challenge State decisions on matters of broad public interest without subjecting themselves to the financial hardship of paying the State's attorney fees if litigation is not successful. CSSB 97 eliminates this protection by prohibiting courts from taking into consideration the public interest nature of the case when a court determines whether to award attorney fees to the prevailing party.

The Disability Law Center of Alaska is the Protection and Advocacy System designated to advocate on behalf of Alaskans with disabilities. An important component of our ability to effectively advocate on behalf of Alaskans with disabilities is judicious pursuit of state court remedies. To eliminate public interest litigant status will effectively eliminate individuals with disabilities' opportunity to access the judicial branch of their government to enforce their rights. Individuals with disabilities have the highest rate of unemployment of any group in our country and, as a group, have the highest number living in poverty. If faced with the prospect of liability for the defense's attorney fees, individuals with disabilities will be unable to protect their rights.

Eliminating the current body of case law regarding allocation of attorney fees is unnecessary. The "public interest litigant exception" does not foster frivolous lawsuits. The Alaska Supreme Court has clearly stated that *any* lawsuit brought frivolously or vexatiously exposes both the attorney and the client to payment of the defense's attorney fees, including an award of full fees in egregious cases. As such, there is no real need for this bill.

It was the wise decision of the framers of both the Alaska and the U.S. Constitutions that citizens have not one, but three avenues to access their government and redress their grievances. The executive, the legislative and judicial branches of the government each serve an important role in providing checks and balances against unwarranted government action against individuals. Alaska Civil Rule 82's public interest litigant exception is designed to recognize and enable access by individuals to the judicial branch of their government to resolve legal disputes. The effect of CSSB 97 is to deter citizens from participating in good faith actions to protect their rights when government agencies overstep their authority, violate their rights and make arbitrary decisions.

I urge you to vote against this bill.

House JUDICIARY Minute

H

Apr 30, 2001

SB 183-ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT

CHAIR ROKEBERG announced the first order of business, SENATE BILL NO. 183, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0052

BILL CHURCH, Staff to Senator Dave Donley, Alaska State Legislature, came forth on behalf of the Senate Finance Committee, sponsor of SB 183. He stated:

> Senate Bill [183] makes public interest litigants subject to Alaska Court Rule 82 regarding judgments for attorney fees, thus adopting a uniform standard for all litigants. Courts would still continue to have the ability to award higher fees or full attorney fees whenever the court felt that exceptional circumstances justified the higher award.
>
> Through Alaska Supreme Court decisions, the doctrine known as Public Interest Litigant Doctrine [PILD] has been established. The doctrine isn't codified in law or set out in any court procedure. The courts apparently felt that the Public Interest Litigant Doctrine created a social policy to encourage plaintiffs to advocate for issues that are deemed by the court to be in the public interest.
>
> Civil Rule 82 sets out the formula for the reimbursement of attorney fees to be collected by a prevailing party in a lega action. Court Civil Rule 82 limits attorneys' fees recovered by prevailing litigants to 20 percent of the litigants' reasonable actual attorneys' fees incurred on a case resolved without trial and 30 percent in a case that does go to trial.
>
> The PILD does create an exception to Civil Rule 82 by allowing the courts to classify a party as a public interest litigant, thus allowing the party to collect full or reasonable attorney fees if they prevail. And if they lose, the public interest litigant pays none of the prevailing party's attorney fees. And it's not a good public policy when not even innocent victims of violent crime who bring subsequent civil suit against criminals are allowed such generous attorney fees.
>
> Additionally, Senate Bill 183 prevents legal fees from being awarded to a litigant for claims on which they did not prevail. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one or several of the points that they brought

up at suit.

This problem was created recently in an Alaska Supreme Court decision titled Dansereau v. Ulmer in 1998. Prior to Dansereau v. Ulmer, lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau v. Ulmer set a precedent that allows courts to award lawyer fees for all contested points even if the public interest litigant only prevailed on one.

Senate Bill 183 also includes a provision that gives courts the flexibility to continue to follow the Dansereau case or award higher or full attorney fees when the court finds exceptional circumstances to justify the higher reward. Senate Bill 183 was introduces to make public interest litigants equally accountable for their lawsuits and to protect the state from having to pay excessive lawyer fees for frivolous public litigant cases. Based on the claims paid in recent years this legislation could save the state hundreds or thousands of dollars annually. ...

Finally, what this does is it promotes a uniform standard of attorney fee payments under Rule 82 to all litigants [and] it creates a disincentive to promote spurious lawsuits. ... It does not diminish the ability of the court to award higher or full attorney fees. In other words, a court can still award the full fee in a public interest litigant case, but it does set the standard for the court as a baseline that they are subject to Rule 82 unless they wish to go beyond that.

So, anyone that's going to say that this takes away their right to collect attorney fees, I don't believe has really read the bill, because it does not do that. In each situation, it allows the court to award the attorney fees. And lastly, it's just good public policy to treat all litigants alike.

Number 0418

CHAIR ROKEBERG asked Mr. Church whether the change in policy in the Dansereau case is the primary rationale for bringing forth this particular bill.

MR. CHURCH responded that this bill was brought forth in the 21st legislature. It made it through the Senate, but it was too late in the session to receive a hearing in the House.

Number 0491

DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund, testified via teleconference in opposition to SB 183. He stated that he thinks this effectively eliminates the ability of an ordinary "John Doe" to legally defend the public's constitutional right under the national law.

MR. BONDURANT said he is a 54-year resident of Alaska and has been active in the fish, wildlife, and water resources of the state. In 1977, he was one of three named plaintiffs in the case in which the Alaska Constitutional Legal Defense Fund sued

the Secretary of the Interior. They won that all Alaskan waters had reasonable access in Alaska.

MR. BONDURANT remarked that Alaska even adopted a change in statute to ensure that these waters were available for the use by all people. In 1987, he said, they dragged the state into another case and won for the treatment of 30 million acres of submerged land and over 100,000 miles of waters. Also under that case, the state won the right to manage all the resources within those waters.

MR. BONDURANT said [the Alaska Constitutional Legal Defense Fund] has consistently defended the privilege and immunity clauses, the constitution, equal protection rights, and having no discrimination because of race. He said he thinks [the Alaska Constitutional Legal Defense Fund] has proven its point; however, [SB 183] will eliminate them from the deal, because there is no guarantee that they will get their funding back. If they lost a big case, they would have to pay out of their own pockets.

MR. BONDURANT asked the committee to kill the bill because he thinks it denies the average citizen the right to protect the public from "big money."

Number 0756

REPRESENTATIVE OGAN stated that SB 183 is aimed at the organizations that continually bring public interest lawsuits against the state over wildlife issues. He said he understands that it is a "two-edged sword." He asked Mr. Bondurant whether those groups would be able to continue with lawsuits if this were to be eliminated. He said it seems that some groups use these issues to raise a tremendous amount of money. One example would be Greenpeace's using the ANWR (Arctic National Wildlife Refuge) issue as one of its greatest fundraisers. He emphasized that it seems $100,000 is a "drop in the bucket" for [organizations] that have the national fundraising capacity of raising tens of millions of dollars.

MR. BONDURANT responded that he thinks Representative Ogan is right on those cases. He said this, however, is going to eliminate guys like him who are defending the rights of the general public, not those [large organizations]. If [the large organizations] lose a case, there are people willing to write them a $.5 million check

REPRESENTATIVE OGAN asked whether there is a way to tighten [the bill] for people who are truly suing on behalf of the public's interest and don't have the resources to otherwise sue. He said he thinks anybody with deep pockets and millions of dollars in the bank who is funding a lawsuit with state money is abusing the system. He noted a letter in his bill packet about people with disabilities who can't sue and said he is looking for a way to accommodate that, with the bill sponsor.

MR. BONDURANT replied that he doesn't know how Representative Ogan could do that. He said it is hard to separate people into classes, and he thinks [the legislature] is responsible for making sure the public is heard. He added that he thinks his organization is well known in Alaska for fighting for the equal rights of everybody.

Number 1090

AL SUNDQUIST, President, Alaska Chapter, Americans United for Separation of Church and State, testified via teleconference in opposition to SB 183. He stated:

> Americans United is based in Washington, D.C., and is a national, nonpartisan, nonsectarian organization committed to preserving the constitution and principle of religious liberty and separation of church and state. Founded in 1947, the organization represents 60,000 members and (indisc.) houses of worship in all 50 states.
>
> Although only six months old, the Alaska chapter is growing rapidly, and in response to results, we established (indisc.) the First Amendment by far-right religious organizations. I oppose the placement of economic obstacles to the use of the courts by the Alaskan citizens. I am concerned about the loss of redress and grievances and actions regarding religious liberties threatened by this bill, as it is [a] denial of access by individuals to the courts to resolve these disputes. Please vote no on SB 183.

REPRESENTATIVE OGAN asked Mr. Sundquist whether he is part of the group that advocates removing "In God We Trust" from [U.S.] money.

REPRESENTATIVE BERKOWITZ suggested sticking to the subject.

MR. SUNDQUIST responded no [to Representative Ogan's question] and pointed out that [his organization] has been in defense of both the establishment clause and freedom of choice.

Number 1234

ROBIN SMITH testified via teleconference on behalf of herself in opposition to SB 183. She stated that she thinks this bill will effectively eliminate public interest lawsuits, except those by large or wealthy organizations. One reason lawsuits occur in Alaska, she said, is because several laws have passed that are unconstitutional. She suggested that one way to eliminate some lawsuits is to require that new laws pass a constitutionality requirement prior to enactment. This bill, she added, will have an impact on conservative and liberal interests.

MS. SMITH went on to say that Wev Shea spoke last year against a similar bill and again this year against this bill in the Senate Finance Committee indicating that this wrongly eliminates the public's voice. She stated that she does not believe the bill has sufficient public input. The notification online, she said, was inaccurate, saying that the Senate Finance Committee was not going to take any testimony and that [the bill] is only going to be heard in the House once. She expressed that she doesn't think that is a good public process and asked, if this bill is such an excellent bill, why it is being rushed.

CHAIR ROKEBERG asked whether she had anything in mind for a constitutional test.

MS. SMITH responded that she didn't. She remarked that she has noticed several bills that have been challenged and put down

based on their unconstitutionality. If all laws enacted by the legislature passed a constitutionality review, "we" wouldn't be setting ourselves up for lawsuits.

CHAIR ROKEBERG remarked that he is not so sure that most lawsuits emanate from laws passed by the legislature. He suggested that legislators are responsible for passing only constitutional laws.

MS. SMITH remarked that several times there have been attorneys tied to the state who don't think a particular law is constitutional, yet the legislature has passed bills like this in the past. In some ways, she said, the legislature sets itself up for lawsuits.

Number 1450

APRIL FERGUSON testified via teleconference in opposition to SB 183. She said she believes it is bad law and bad public policy. She stated:

> I believe that this bill places a hurdle in front of citizens who wish to complain about government or seek redress from harm allegedly done by government. And I do not believe that all litigants are alike. I think that public [interest] advocates come (indisc.) on behalf of the general public and that this bill is really going to kill their ability to do so, or people are just not going to be able to afford to come before the court.
>
> ... I would like to bring your attention to a letter by Mr. Robert Briggs, a staff attorney for the Disability Law Center. ... Mr. Briggs talks about some of the unintended consequences of SB 183 and how ... this particular bill may affect land use regulations, redistricting decisions, illegal taxes, unlawful election (indisc.), [and] school district actions. Virtually any type of challenged government action would be possibly impacted by this bill. ...
>
> I also think that this is being rushed. I don't think that a lot of people know that it is out there, and I think it takes a much more careful, thoughtful scrutiny than being addressed in the last stage of the legislative session. And if the purpose of this bill is aimed at natural resource litigation or the environmental community, then we all know those particular groups have access to quite a bit more sums of money than a number of these other smaller groups such as the Disability Law Center.

Number 1612

ROBERT BRIGGS, Staff Attorney, Disability Law Center of Alaska, came forth in opposition of SB 183. He stated that if the purpose of the bill is to prevent frivolous litigation, it's unnecessary. Existing doctrine in the public interest litigant exception clearly states that people who bring cases in bad faith and for vexatious purposes are liable for full attorney fees and costs. That doctrine applies to public interest litigants as well as anybody who brings a case because of a direct financial interest.

MR. BRIGGS remarked that he thinks the bill will have little effect on some of the cases it is intended to prevent in the future. Most cases involving the permitting of infrastructure for research development in Alaska will be brought in federal court and won't be affected by this bill.

MR. BRIGGS said it is unlikely the bill will stop out-of-state moneyed interests; in fact, he thinks the bill will fuel their fundraising efforts. It will give them an example of how the Alaska State Legislature is so adverse to their interests that they need more money to fund their lawsuits.

MR. BRIGGS said the important point, brought up by Mr. Bondurant, is that there will be unintended victims of this bill - Alaskan victims. Mr. Briggs suggested that even ordinary litigants with public interest cases will be victims, because it encourages focusing on who is a prevailing litigant based on issue, and it will cause two trials: one over the merits of the case, and one over who won by a greater margin and which issues they prevailed upon.

Number 1760

MR. BRIGGS went on to say that there is an insightful opinion by Justice Jay Rabinowitz against the revisions to Civil Rule 82 as it applies to regular litigants. Mr. Briggs stated that he had participated as part of the Civil Rule 82 revision committee around 1992. Justice Rabinowitz opposed Civil Rule 82 and argued that all of the factors would actually cause attorneys to fight more over the attorney fees after the litigation itself had been decided. Mr. Briggs said he thinks the supreme court wisely decided that that these factors should be fought about in public interest cases as well.

MR. BRIGGS stated that he thinks other victims of this bill would be those who seek court resolution of disputes involving something other than money. Some examples would be those who litigate over the question of when human life should be recognized; the parameters of religious practice and belief; or the limits of science and medicine and dealing with human cells or tissue, genetic, or health information.

MR. BRIGGS said if he has to tell a family that they should expect to pay 20 percent of the other side's fees, should they lose in a dispute, they will definitely be "chilled" from bringing a lawsuit, simply because they are poor.

MR. BRIGGS urged the committee to not pass the bill. However, if it should pass, he asked the committee to substantially revise it to eliminate its practical effect: taking away from the courts the discretion of when to exempt, from the penalty for losing, the cost of attorney fees.

Number 1869

CHAIR ROKEBERG asked Mr. Briggs whether the federal courts have the same [public interest litigant doctrine].

MR. BRIGGS responded that it has been awhile since he has brought a federal case. Generally, the Equal Access to Justice Act governs. He believes it to be somewhat similar to the public interest litigant exception; under that, people who bring

a case against the federal government for reasons that don't involve direct financial interests have a low risk of paying attorney fees, should they lose.

CHAIR ROKEBERG asked whether Rule 11 has ever been used in the State of Alaska.

MR. BRIGGS answered that he has never been involved in a case where it has been used; however, he hasn't been in state court very much. He believes a good civil litigator should never be in court, because he or she should convince the other side of the merits of the case before getting to the courthouse door.

CHAIR ROKEBERG asked Mr. Briggs what the National Association of Protection and Advocacy Systems is.

MR. BRIGGS responded that it is an association of nonprofit and state agencies in each of the 50 states. As a condition of receiving federal grants to serve people with disabilities, the state is required under federal law to set up a protection and advocacy system. The Disability Law Center, he said, was designated by Governor Hickel to be the protection and advocacy system of Alaska. As that system, [the Disability Law Center] receives some state and federal grants to advocate for people with disabilities. He stated, "It is our view that as part of the tools in our tool chest we need to bring lawsuits against the state."

MR. BRIGGS noted that currently he is litigating a series of administrative appeals about the administration of the Medicaid program on behalf of several families with disabled children. He said it is his belief that the state is not adequately managing the Medicaid system with regard to the benefits that should be made available to those families. He said, "If we lose the tool of seeking courts to redress how the state administers those benefits, it will be a significant tool we will have lost in advocating for people with disabilities."

CHAIR ROKEBERG asked whether in that case this has a general applicability to the individual or the group of clients.

Number 2053

MR. BRIGGS stated that he has five clients.

CHAIR ROKEBERG asked how that makes up the public interest.

MR. BRIGGS responded that [his organization] believes behavior the state exhibits is systemwide, at least in the Southeast region.

CHAIR ROKEBERG asked Mr. Briggs whether the courts have accepted their case as a public interest litigant case.

MR. BRIGGS answered that they are still in administrative proceedings and have prevailed in two of them; therefore, they will not need court action. He noted that they had moved to have the administrative proceedings joined as one proceeding, but the hearing officer declined.

CHAIR ROKEBERG asked whether it is in Mr. Briggs's best interest to try to group those cases together so they can qualify for a public interest litigant case.

MR. BRIGGS answered in the affirmative.

CHAIR ROKEBERG stated that he thinks the system is being corrupted.

Number 2117

MR. BRIGGS remarked that he would have to respectfully disagree with Chair Rokeberg about whether the system is being abused. In his experience, he said, there has not been a lot of public interest litigation that has been brought frivolously or abusively. The Dansereau case involved Wev Shea's challenge to the election practices of the current administration. The original request of fees involved about $170,000 and the trial court awarded about $20,000 in fees. He stated that perhaps it is abusive if the supreme court is saying, "You should not look into the factors in deciding whether to award attorney fees." However, he doesn't think the case itself was abusive; the issue was of fundamental importance to society, which is whether the city administration properly followed election law when deciding how to administer the election.

CHAIR ROKEBERG asked what the result of that case was and whether it had an effect on the state.

MR. BRIGGS answered that it is a larger question than he could answer.

CHAIR ROKEBERG stated that he figures it had almost no [effect] other than embarrassing the governor.

Number 2178

REPRESENTATIVE BERKOWITZ pointed out that there are four threshold questions that need to be answered affirmatively before someone can qualify as a public interest litigant. These are not easy thresholds to cross. He acknowledged that the public interest litigant serves another function besides advocating for the client and pursuing public policies. There is also a check and balance on governmental power. He stated that it is the only way he can think of whereby an individual can take on the weight of government. "If we retreat from that concept, we're retreating from one of the most fundamental notions of how a democracy should work," he added.

REPRESENTATIVE KOOKESH asked Mr. Briggs how long it will be after this bill passes before he would bring a suit.

MR. BRIGGS responded that he is not sure that [the Disability Law Center of Alaska] would challenge the bill if it were passed. He stated that it doesn't raise constitutional questions, except the right of access to the courts. The people who will be affected by this bill are going to be "mom and pop" people who can't afford the risk of loss. He explained that this would put those people "in the same pot" as all of the people who are subject to Rule 82. In most states, each side bears its attorney fees and costs, whether they win or lose; however, it is unusual that in Alaska if a person loses, he or she pays 20 percent of the defense's fees. He added that he thinks the Alaska Supreme Court wisely decided that public interest litigants should not be subject to that losing penalty the way the general litigant population is.

Number 2311

LAUREE HUGONIN, Alaska Network on Domestic Violence and Sexual Assault, came forth in opposition to SB 183. She stated:

> We have the unfortunate circumstance of being a public interest litigant. In 1996, after the Domestic Violence Act passed, the court was refusing to implement all three forms of protective orders that the legislature had, in statute, allowed.
>
> So, we didn't litigate against the executive branch or the legislative branch; we actually went to court against the court system and wanted a result to be that they would conform to the statutory provisions that allowed a victim of domestic violence to be able to get one two or three protective orders, the way that the legislature had set it out.
>
> We prevailed in that case. We did not get all of our attorneys' fees; we probably got about 75 or 80 percent. ... Since we did prevail, we didn't have to face the issue of - if we had lost - having to pay the court system's fees. I think that's an important concept in the public interest litigant venue. It's not as if we were going against someone, maybe, of an equal kind of circumstance.
>
> We were litigating against the court system. ... They have almost unlimited resources available to them and ... [are] able to continue that litigation, whereas we don't accept any state money. The federal money we get, of course, is for projects; it's not available for any kind of litigation.
>
> ... So we were fundraising for private donations to be able to carry forward the litigation. And it was fortunate that I had had experience in the legislative process ... so I could do a lot of legwork for the attorney. I could get legislative records, and I knew how to look up and research statutes. And we put a lot of our own effort into the case.
>
> We also didn't just enter the case frivolously. ... We approached the court forms committee in trying to talk to them about how to resolve the situation. We approached the court system's [administration] in trying to resolve the situation. We tried to get an attorney general's opinion about the statutes so that the court could feel more comfortable in relying on that to resolve the situation. All of the steps that we had taken were to no avail. The court system was firm in its position, and they were not accurate, and they did have to change to allow for these three forms of protection.
>
> We entered the lawsuit on behalf of a Jane Doe, who currently had a threatening situation with the protective orders. And then we entered it on behalf of victims who had come after that to be able to take up this protection that the legislature had afforded them. So, I think when you are determining whether or

not to move forward with the legislation, it is important to keep in mind that it's not just the million-dollar environmental cases that come forward that take advantage ....

TAPE 01-79, SIDE B
Number 2465

MS. HUGONIN continued:

... [They are] not after money, but they're going to try and clarify statutes, trying to uphold public policy, trying to be able to have the institution of government correct its misbehavior, and I think that's an important avenue to allow to continue.

So, while I understand that this bill would preclude - if for some reason we would have to be in the position of being a public interest litigant again - for us requesting attorneys' fees, I think it would be very difficult for us to go forward against an entity with unlimited resources if we were going to have to pay their costs in the end. ...

There might be some area for compromise if you're looking at prevailing issues. I can see some merit to the fact that if I brought a case and I lost, ... maybe I shouldn't get all of the money back, if it was something that I didn't have much of a hope of winning in the first place. ... I think it's very important that that's deliberatively thought through, and ... this isn't the best way to get to the people that you're really having a problem with.

REPRESENTATIVE KOOKESH asked Ms. Hugonin to define the people with whom [the legislature] is having a problem.

MS. HUGONIN responded that she understood last year from testimony that it was the major environmental groups that were coming forward that made people feel they were taking advantage of the public interest litigant's status.

Number 2382

PAM LaBOLLE, President, Alaska State Chamber of Commerce, came forth in support of SB 183. She stated:

Some groups routinely challenge state resource development decisions and our granted public interest litigant status by the courts. And these groups are often special-interest groups posing as public interest groups and public trusts. And their challenges typically allege as many as 15 or 20 specific deficiencies in state's administrative finding. ... When they're challenging the resource development decisions and they prevail, they generally prevail ... on one or two issues; however, they are awarded the attorneys' fees on all, as if they had won the whole case. That is one of the problems.

The other problem is, we're in a case right now and we were unable to achieve ... public interest litigant status. We had to raise money; I think the meter is

> running at just a te... in excess of $200,000 right no... This is in defense of the tort reform ... law that was passed in '97. And we feel that the ... unfair part about those who are public interest litigants [is] if they win, they win it all, and if they lose, they still win it all. ... The donations that we've collected for our case have been $25 here, $50 there, and $100 someplace else. ... It is just a very one-sided situation. The state chamber was one of the leading groups [that] fought long and hard to achieve Rule 82, and the exception is not fair to those of us who have to abide by Rule 82.

CHAIR ROKEBERG remarked that he is astounded that the state chamber almost has to go to the "bake sale" level to acquire funding. He said he thought big business was the monolith of this state in terms of its deep pockets and its ability to generate money to influence the public process.

MS. LaBOLLE said that is a misconception.

CHAIR ROKEBERG asked Ms. LaBolle whether the environmental community has greater access to funding than the business community does in Alaska for public policy formation.

MS. LaBOLLE answered that that is the perception; however, she would have no way of knowing if there is proof to that.

Number 2215

REPRESENTATIVE BERKOWITZ asked Ms. LaBolle why their effort to achieve public interest litigant status was rejected.

MS. LaBOLLE responded that she doesn't know.

REPRESENTATIVE BERKOWITZ asked whether they tried to get in as an amicus.

MS. LaBOLLE responded that [the Alaska State Chamber of Commerce] is an amicus.

REPRESENTATIVE BERKOWITZ stated that on the face of what it takes to be a public interest litigant, that doesn't qualify. Only a private party can be expected to bring a suit. He stated that if the state were already involved, the public interest litigant would be the plaintiff, not the defendant.

CHAIR ROKEBERG remarked that it doesn't seem fair; with the $3 million-plus cost, it could be put in the court budget.

Number 2144

REPRESENTATIVE BERKOWITZ noted that these are areas in which folks have won.

CHAIR ROKEBERG stated that perhaps it was only a portion of the claims.

REPRESENTATIVE BERKOWITZ stated that perhaps the payment only cost a portion of the cost.

REPRESENTATIVE KOOKESH stated that he doesn't think those suits would have gone away even if there hadn't been this exception to

Rule 82. He said he thinks a lot of those people could afford to bring those cases.

Number 2116

MS. LaBOLLE remarked that [the Alaska State Chamber of Commerce] had found that some groups make a good living on these public interest litigant groups by suing on all sorts of issues within a case, knowing they can't prevail on much. However, if they prevail on one [issue], they've gained enough money to have six more cases.

REPRESENTATIVE BERKOWITZ asked who the groups are that are getting rich off of public interest litigant status.

MS. LaBOLLE answered that the perception is that they are mostly the environmental groups who are opposing resource development.

REPRESENTATIVE BERKOWITZ asked for the names of the groups.

CHAIR ROKEBERG asked Ms. LaBolle whether they would be Trustees for Alaska, Earth Justice, and the Sierra Club.

MS. LaBOLLE responded that "at the risk of being sued for alleging anything in this committee," it is generally believed that those are the sorts of groups that gather funding through the success of their lawsuits.

REPRESENTATIVE BERKOWITZ stated that he understands about perceptions, but he also understands one objective in court is to arrive at some form of truth. If the perception is incorrect, he thinks one way to correct reality is by putting real groups out there that are actually benefiting.

Number 2008

REPRESENTATIVE KOOKESH asked, when balancing what's in the best interest of the public, whether it is in [the state's] best interest to get rid of some of these conservation groups at the expense of the mom and pops.

MS. LaBOLLE responded that it is a difficult situation; however, if the commitment to a principle is there, then everyone should be willing to "pony up" the cost of the litigation. It will provide more basis if [a group] shows that it has gathered support to even bring the litigation.

REPRESENTATIVE KOOKESH asked what would happen to an individual who sees that he or she may owe somebody money down the line.

MS. LaBOLLE noted that court policy establishes public interest litigant status. What is being sought through legislation such as this is legislative intent, as well as having the elected representatives making the decisions as to what the public policy is.

CHAIR ROKEBERG asked, if this is court policy, whether the courts should pay, or whether the members of the bar should go pro bono so that there wouldn't be a discussion of legal fees.

Number 1811

JUDY ERICKSON, Owner, Capital Information Group, came forth to

share a personal story. She stated that she and her husband brought a suit against the state for failure to disclose records that had been public for years. She said they were granted public interest litigant status and prevailed on most of their [claims]. Their attorneys got minimal fees; they negotiated with the state over the fees.

MS. ERICKSON remarked that her concern is that they could never have brought a suit against the state if they had thought they would have had to pay. The state could drag it out for years. She pointed out that it is the "small guy" [who is affected].

CHAIR ROKEBERG asked Ms. Erickson whether she understands the frustration exhibited by many of the members over this. In addition, he asked whether there is abuse of this.

MS. ERICKSON responded that she can see their frustration when [the legislature] promotes resource development and someone tries to stop it. She said she thinks in most cases people bring [suits] because they truly believe they're right. She stated:

> You're throwing out the baby with the bath water. You're saying, ... "OK, we're going to get rid of the whole." And then what happens to the Dale Bondurants and the Judy Ericksons ... who are fighting for something? ... Pam [LaBolle] said that we should ... get a group going. ... I'm a sole proprietor ... and I don't have a lot of time to go soliciting to get contributions so that I can sue the state.

Number 1649

REPRESENTATIVE COGHILL stated that if a well-funded group had come [to Ms. Erickson] at the time when she was interested in pursuing her interest, it would have given her a lot of publicity. He said he thinks that is what [the legislature] is struggling about -- how to filter. If there were people in Alaska who oppose getting information, they would only have the voice of the system. He asked Ms. Erickson whether she sees that as an unfairness.

MS. ERICKSON responded that she brought her case not knowing she had public interest litigant status. She said she first sued against the Hickel Administration, which opposed the status. When the Knowles Administration came in, they continued the case, but they backed down on the opposition. Most people bring these cases not knowing if they are going to get the status or not. She added that if she had been denied the status, she would have had to reconsider the cost.

CHAIR ROKEBERG stated that he thinks the committee's interest is in the legal factors.

REPRESENTATIVE BERKOWITZ asked which [factor]. He said he keeps hearing about this great legal factor.

REPRESENTATIVE COGHILL responded that they have talked about environmental communities.

REPRESENTATIVE BERKOWITZ stressed that he has to hear names, because the environmental community is "this big nebulous thing." He asked which environmental law firms are doing this.

CHAIR ROKEBERG offered Trustees for Alaska.

REPRESENTATIVE BERKOWITZ agreed that that is an Alaskan-based organization.

CHAIR ROKEBERG offered Earth Justice.

REPRESENTATIVE BERKOWITZ indicated that Earth Justice is not an Alaskan-based organization. Therefore, he said, there is one case that [the environmental] community has had. He said he hardly sees evidence of rampant Alaskan environmental [lawsuits].

Number 1536

REPRESENTATIVE COGHILL remarked:

> I think that if you look down through this list ... up through 1993, ... the case could be made. ... And I agree with ... Ms. Erickson - it's a tool that's being used, and sometimes it's not being used the way I personally would the public policy. Looking for the court to use Rule 82 is a way that they could use some discretionary powers.

REPRESENTATIVE OGAN stated that he supports the concept of what the bill is trying to do, but doesn't want to eliminate the Scott Ogans, Judy Ericksons, and Dale Bondurants, the "little people" that this was designed for, to be able to sue and get some coverage. He said he would like to work on this a little more. He added that he doesn't think there are enough votes to amend the court rules the way the bill is written.

Number 1390

MR. CHURCH responded that he believes Senator Donley would be willing to work on the points that were raised. He said he thinks part of it is addressed within subsection (b)(3), subparagraph (K) of Rule 82. It says that the court can, in awarding attorney fees, consider other equitable factors deemed relative to the court.

MR. CHURCH said he thinks there is a lot of latitude given to the court to look at situations in which an individual versus a large corporation is bringing a public interest litigant case. Almost exclusively, he pointed out, the testimony has been that this will take away public interest litigant cases. He said he wonders if that means people don't trust the courts to make reasonable decisions in evaluating these cases.

MR. CHURCH clarified that the law establishes that Rule 82 applies to all cases, regardless of whether it is a public interest litigant or a victim of a horrendous crime trying to bring a civil suit against a perpetrator. This only gives the courts a baseline to look at an attorney fee award, and it in no way prevents the court from doing what it has done in the past: award full attorney fees.

MR. CHURCH offered some history. When [PILD] was established in 1974, the court said the exception to Rule 82 was designed to encourage plaintiffs to bring issues of public interest before the courts. There was no differentiation between individuals

like [Ms. Erickson] and any large organization. Later, in the Anchorage v. McCabe opinion in 1977, Chief Justice Boochever submitted an opinion in opposition. His comments were:

> The opinion [regarding the Gilbert v. State on the encouragement issue] seems to take the position that such litigation should be actively encouraged. In my view, our function is not to encourage litigation of any sort.
>
> On the other hand I believe that we should strive to prevent our courts from becoming inaccessible as a practical matter to those who seek to vindicate rights shared by the public.

MR. CHURCH explained that the chief justice at that time was looking for a balance in the cases. At the same time, a plaintiff shouldn't be encouraged to bring a case because of any perceived award. Certainly, he said, in this cases the only monetary award is to the attorneys.

Number 1151

MR. CHURCH stated that this would still allow the courts to disregard apportionment as in the Dansereau case. In that case, they were public interest litigants who only prevailed on one of three issues. The lower court apportioned the attorney fees, but the supreme court, on an appeal, awarded full attorney fees and said the lower court did not have the right to apportion fees.

CHAIR ROKEBERG asked Mr. Church whether he had looked at the federal Equal Access to Justice Act.

MR. CHURCH answered that he hadn't. The only thing he'd researched was what goes on in other states. Essentially, the other 49 states don't make a differentiation as to public interest litigants. They award attorney fees based on a set percentage or a set dollar value per hour.

CHAIR ROKEBERG asked whether [other states] recognize [PILD].

MR. CHURCH responded that they don't specifically. For example, cases that he reviewed on the West Coast do not.

REPRESENTATIVE BERKOWITZ clarified that the antecedents of public interest litigants is known in common law as qui tan suits. In other states, they are also known as private attorney general suits. This is not a uniquely Alaskan feature.

Number 0991

REPRESENTATIVE OGAN stated that he had talked with Gerald Luckhaupt [drafting attorney of Legislative Legal and Research Services], who said, "Alaska is the only state when you lose, you pay attorneys' fees." He asked Mr. Church whether that is correct.

MR. CHURCH answered that he has also heard that statement.

REPRESENTATIVE OGAN remarked that people who are interested in suing are afraid because of that, which is already a disincentive to litigate. This public interest law basically

exempts them from that provision.

MR. CHURCH stated that when the state loses or wins a public interest litigant case, it pays the attorney fees.

CHAIR ROKEBERG stated that in the bill packet there is a list of at least 70 public interest litigant cases. He asked Mr. Church whether his office broke those down to see who they were by parties, and what type of representation they had.

MR. CHURCH responded that he has the information that the list was based on, which provides the case name and a description of the case; however, it does not give who the representing attorney was.

Number 0860

REPRESENTATIVE BERKOWITZ pointed out that there were 70 cases in the past ten years; the high year was 1995, with twenty [cases], and the low year was last year, with three. He said it hardly seems a rampant problem.

CHAIR ROKEBERG responded that the committee takes up a lot of issues that only affect a small number of people. They try to avoid the constitutional constraints about special-interest legislation, but many times try to "cure the evils" that may befall a small number of people.

REPRESENTATIVE BERKOWITZ remarked that he is trying to prevent the committee from creating a huge injustice. He said, "Let's move the bill and kill it."

CHAIR ROKEBERG stated that he would like to first see what research has been done, and that Representative Ogan has already agreed to work on the bill.

REPRESENTATIVE BERKOWITZ and CHAIR ROKEBERG spoke simultaneously: Representative Berkowitz moved to report SB 183 out of committee, while Chair Rokeberg announced that he would recess the meeting. [No action was taken on the motion. SB 183 was held over.]

INFORMAL OPINIONS

OFFICE OF THE ATTORNEY GENERAL

1992 Vol.II

DEPARTMENT OF LAW
STATE OF ALASKA

MEMORANDUM

State of Alaska
Department of Law

Hon. Carl L. Rosier
Commissioner
Dep't of Fish and Game

DATE: October 23, 1992

FILE NO.: 663-93-0088

TEL. NO.: 465-3600

SUBJECT: Applicability of the Americans with Disabilities Act to regulations of the Boards of Fish and Game

FROM: Jack Griffin/S/
Assistant Attorney General
Natural Resources Section

You have asked several questions about what the Joint Boards of Fisheries and Game and the Department of Fish and Game can do to ensure that hunting and fishing regulations in Alaska comply with the Americans with Disabilities Act (ADA). This memorandum will explore the general requirements of the ADA, address whether the boards may delegate to the commissioner the authority to accommodate persons with disabilities (they can), and suggest procedures that the boards may adopt to enable hunters and fishers with disabilities to request reasonable modifications to policies they feel are discriminatory.[1]

I. GENERAL REQUIREMENTS OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE IMPLEMENTING REGULATIONS

Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12101 *et seq.* (Supp. 1992), because among other things "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem; . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and the] failure to make modifications to existing facilities and practices . . . ; [and] the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity . . . to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C.A. § 12101(2), (5), and (9). To ensure its provisions are

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[1] This memorandum does not try to address the full impact of the ADA upon the boards and the department. For example, the potential need for wheelchair access to board meetings or sign language interpreters for informational programs of the department is not addressed. The scope of this memorandum is limited to the potential impact of the ADA upon hunting and fishing regulations in Alaska, and the procedures the boards and department may adopt to insure that those regulations do not discriminate against the disabled.

complied with, the Act provides persons who have suffered discrimination because of their disabilities the same remedies, procedures, and rights that are available under the Civil Rights laws. *See* 42 U.S.C.A. § 12132. As with those laws, the Department of Justice has broad enforcement authority.

Title II of the ADA, 42 U.S.C.A. § 12131 *et seq.* (Supp. 1992), prohibits public entities from discriminating against individuals with disabilities when providing public services:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

A "qualified" individual with a disability is an individual with a disability who meets the "essential eligibility requirements" of the agency's program, service, or activity.[2] Generally, there are no "essential eligibility requirements" to sport hunt or fish in Alaska other than the possession of a valid sport hunting or fishing license. Thus, virtually anyone with a disability may be qualified to hunt or fish in Alaska. "Disability" means, with respect to an individual, "a physical or

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[2] A "qualified individual with a disability" is defined as one who,

> with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12131(2) (Supp. 1992).

mental impairment that substantially limits one or more of the major life activities of such individual . . . ."[3]

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[3] The definition of disability found in the Department of Justice's title II regulations provides in full:

> Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.
>
> (1)(i) The phrase physical or mental impairment means--(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
>
> (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
>
> (iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.
>
> (2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits

(continued...)

The antidiscrimination provisions of title II of the ADA clearly apply to the Department of Fish and Game and the Boards of Fisheries and Game. For purposes of title II, a "public entity" includes any state or local government, and any department, agency, or other instrumentality of a state or local government. 42 U.S.C. § 12131(1)(A) & (B) (Supp. 1992). It is also likely a court would find that the regulations promulgated by the boards, such as those identifying the areas and the methods and means for taking fish and game, are part of a "service," "program," or "activity," since

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[3](...continued)
one or more major life activities.

(4) The phrase is regarded as having an impairment means--

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

28 C.F.R. § 35.104, 56 Fed. Reg. 35717 (1991).

sport hunting and fishing must take place in conformance with those regulations.[4]

Congress directed the Department of Justice to adopt regulations implementing title II of the ADA, *see* 42 U.S.C. § 12134(a) (Supp. 1992), and those regulations have been codified at 28 C.F.R. part 35. Section 35.130 sets forth the general prohibition against discrimination, and provides, in part, as follows:

> (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
>
> (b)(1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability-(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; [or] (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others . . .; [or]. . . (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

These regulations also provide that an agency may not employ "methods of administration" that have the effect of denying persons with disabilities the ability to enjoy the benefits of an agency's programs:

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[4] While neither the ADA nor the regulations promulgated pursuant to the ADA define these terms, the 1988 amendments to the Rehabilitation Act of 1973 define "program or activity" to mean "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a state or of a local government . . . ." 29 U.S.C.A. § 794(b) (Supp. 1992). Because of the close relationship between the Rehabilitation Act of 1973 and the ADA, courts may look to this definition when interpreting the ADA.

> A public entity may not . . . utilize criteria or methods of administration:
>
> (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or]
>
> (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities . . . .

28 C.F.R. § 35.130(b)(3).

There is a dearth of case law interpreting the ADA, due of course to its recent enactment. Nevertheless, it is possible to obtain substantial insight into the scope and meaning of Title II by examining case law interpreting its precursor, section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394, 29 U.S.C.A. § 794 (1985 and Supp. 1992). Section 504 is virtually identical to section 202 of the ADA, 42 U.S.C.A. § 12132, except that section 504 applies only to state agencies receiving "Federal financial assistance." The Department of Justice, in the comments preceding the regulations implementing title II of the ADA, describes title II as "essentially extend[ing] the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance . . . ."[5]

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[5] 56 Fed. Reg. 35694 (1991). As a result, the Department of Justice's regulations implementing title II of the ADA "[hew] closely to the provisions of existing section 504 regulations." *Id.* This approach is in fact mandated by section 204 of the ADA, which provides that the regulations implementing Title II must be consistent with the Department of Health, Education, and Welfare's coordination regulation for section 504, now codified at 28 C.F.R. Part 41, and, with respect to "program accessibility, existing facilities," and "communications," with the Department of Justice's section 504 regulations for its federally conducted programs and activities, codified at 28 C.F.R. Part 39. 42 U.S.C.A. 12134(b) (Supp. 1992). *See* 56 Fed. Reg. 35694 (1991). In addition, section 203 of the ADA, 42 U.S.C.A. 12133 (Supp. 1992), provides that the remedies, procedures, and rights available under section 504, set forth in section 794a of Title 29, shall be the remedies, procedures, and rights for any person alleging discrimination on the basis of disability in violation of 42 U.S.C.A. § 12132.

In determining whether a particular regulation is consistent with the ADA, the primary issue will be whether the person with a disability has been given "meaningful access" to the benefit or service at issue. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985). In *Choate*, the United States Supreme Court, interpreting § 504 of the Rehabilitation Act, held that the balance between the rights of the handicapped to be integrated into society and the legitimate interests of agencies in preserving the integrity of their programs is met where "an otherwise qualified individual [is] provided with meaningful access to the benefit the [agency] offers." 469 U.S. at 301.

> The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the [agency's] program or benefit may have to be made.

Id. *See Southeastern Community College v. Davis*, 442 U.S. 397, 410-13 (1979). In determining the appropriate scope of the benefit at issue, and whether it is "readily accessible to and usable by individuals with disabilities," the regulations implementing title II provide that the service, program, or activity must be "viewed in its entirety."[6]

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[6] 28 C.F.R. § 35.150(a) provides:

> General. A public entity shall operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. The paragraph does not--
>
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
>
> (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
>
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative

(continued...)

The principle of meaningful access is illustrated in *Baker v. Department of Environmental Conservation* 634 F. Supp. 1460, 1464-66 (N.D.N.Y. 1986), where a number of handicapped individuals alleged that a regulation prohibiting the use of "mechanically propelled vessels and aircraft" on certain bodies of water within the Adirondack State Park discriminated against them in violation of § 504 of the Rehabilitation Act. The court rejected the handicapped individuals' arguments on the grounds that "over fifty-one percent of the Park land is classified . . . [to] allow the use of motorized vehicles and float planes . . . [and e]ighty-three percent of the publicly usable Adirondack lake/pond surface water is open to motors . . . ." 634 F. Supp. at 1465. As a result, "it is clear the handicapped do have *meaningful access to the Adirondack Park as a whole*." *Id.* (emphasis added). The analysis employed by the court in *Baker* illustrates the analysis the boards and the department should use to determine whether a particular hunting or fishing regulation denies persons with disabilities a meaningful opportunity to hunt or fish.

If there is no meaningful access to the service or benefit at issue, federal regulations require the agency to "make *reasonable* modifications in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability . . . ." 28 C.F.R. § 35.130(b)(7), 56 Fed. Reg. 35718-19 (1991) (emphasis added). *See Choate*, 469 U.S. at 300. Modifications do not have to be made, however, if the agency "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or would result in "undue financial and administrative burdens."[7] These regulations mirror the *Choate* and

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[6](...continued)
burdens . . . .

(Emphasis added.)

[7] 28 C.F.R. 35.150(a)(3). When a public entity believes that complying with the ADA will fundamentally alter the nature of its program or result in undue administrative burden or expense, it has the burden of proof and must make specific findings that support its conclusion:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and
>
> (continued...)

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[7](...continued)

> administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 C.F.R. 35.150(a)(3). The Department of Justice's regulations further suggest methods a public agency may use to comply with the regulations:

> A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting

(continued...)

Davis decisions, where the Supreme Court held that "while a[n agency] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Choate*, 469 U.S. at 300.

While it is impossible to predict with certainty the effect these principles will have upon fish and game management in Alaska, it is more likely than not that few, if any, modifications to existing regulations will be required. To illustrate a circumstance where modification of a regulation might be required, imagine the Board of Game permitted but a single moose hunt in Alaska, in an area traversed by roads and trails, but limited access exclusively to access by foot. Modification of the hunt to permit a hunter with a disability to use pack animals or an off-road vehicle would probably be required by the ADA, since a meaningful opportunity for persons with disabilities to take moose would not otherwise exist, and allowing one or more persons with disabilities to use pack animals or an off-road vehicle probably would not fundamentally alter the hunt or cause undue administrative burdens or expense. Notice, however, that the modification relates to a barrier created by the Board, *i.e.*, the prohibition of access except by foot. Let us assume that in this hypothetical hunt any form of access was permissible, but that because of rugged terrain and thick brush, *i.e.*, barriers created by nature, access by persons with disabilities was as a practical matter precluded. In our view the ADA would not require modification of the hunt, since there is nothing in that Act to indicate an intent that public entities cure the disparate impact natural barriers have upon persons with disabilities.[8]

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[7](...continued)
appropriate.

28 C.F.R. 35.150(B)(1).

[8] This is evidenced in part by § 507(c)(1) of the ADA, which deals with access to federal wilderness areas:

> Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act *no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness*

(continued...)

II. THE BOARDS MAY DELEGATE TO THE COMMISSIONER THE AUTHORITY TO ACCOMMODATE REQUESTS FROM PERSONS WITH DISABILITEES FOR MODIFICATIONS TO EXISTING HUNTING AND FISHING REGULATIONS AND POLICIES

You have asked whether "the boards [can] establish eligibility criteria and delegate to the commissioner the authority to accommodate disabled persons." If by "establish[ing] eligibility criteria" you are referring to a process to determine who does or does not have a disability, the answer is yes, as long as the boards do not establish criteria that are any more rigorous or less comprehensive than required by the ADA's definition of "disability." The boards also can empower the commissioner to determine whether a particular hunter or fisher fits within the ADA's definition, and may further delegate to the commissioner the authority to make reasonable accommodations for persons with disabilities. This should not, however, discourage the boards from addressing the concerns of persons with disabilities in the first instance, when proposals for particular hunting or fishing regulations are initially considered.

The Boards of Fisheries and Game were created for purposes of conservation and development of the fishery and game resources of the state. AS 16.05.22(a)(b). Pursuant to AS 16.05.251, the Board of Fisheries may adopt regulations it considers advisable for "establishing open and closed seasons and areas for the taking of fish," AS 16.05.251(a)(2); "establishing the means and methods employed in the pursuit, capture and transport of fish," AS 16.05.251(4); and "regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries," AS 16.05.251(a)(12). The Board of Game has similar powers with respect to the state's game resources. *See* AS 16.05.255(2), (3), and (10). For the purpose of administering AS 16.05.251 and 16.05.255, each board has been given specific authority to "delegate authority to the commissioner to act in its behalf." AS 16.05.270.

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[8](...continued)
area in order to facilitate such use.

42 U.S.C.A. § 12207(c)(1) (emphasis added).

However, if the Board of Game chose to establish a hunt in a particular area simply because that area was inaccessible to the disabled, that would be an act of purposeful discrimination prohibited by the ADA.

Requests for accommodation from hunters and fishers with disabilities will necessarily affect the boards' regulations governing, among other things, the methods and means of taking the state's fish and game resources. Since it is possible the boards will not be able to address every request for accommodation -- because of the limits imposed by the boards' schedules, or because the impacts of a particular regulation were not obvious at the time it was adopted, or for other reasons -- procedures should be in place that enable the department to address requests for accommodation as they arise. Because neither the department nor the boards have the discretion to ignore the ADA's requirements, the boards' failure to adopt adequate procedures probably will not be a defense to a lawsuit alleging the state failed to make a reasonable accommodation. AS 16.05.270 provides the necessary authority for the boards to adopt such procedures. So long as these procedures are consistent with the ADA and reasonably necessary to carry out that statute's purpose, the boards' approach will be upheld. *See Trustees for Alaska v. State, Department of Natural Resources*, 795 P.2d 805, 812 (Alaska 1990) (regulations delegating a statutory determination to another agency will be upheld where they are consistent with and reasonably necessary to carry out the purposes of the statute).

III. SUGGESTED PROCEDURES FOR ENABLING THE DEPARTMENT TO HANDLE REQUESTS FOR ACCOMMODATION UNDER TITLE II OF THE ADA

A number of states have grappled with the issue of how to effectively accommodate the concerns of persons with disabilities in their desire to hunt and fish. For our present purposes, the approach adopted by the Missouri Conservation Commission (the rough equivalent of Alaska's Boards of Fisheries and Game) is probably the most helpful. The relevant provision of the Missouri Wildlife Code provides as follows:

3 CSR 10-7.411 Special Methods for Handicapped Persons.

> (1) The director may issue special authorization to physically handicapped persons to allow them to hunt and take wildlife by methods not prescribed in hunting rules in accordance with the following:
>
> > (A) Any handicapped person may make application to the director for a special exemption using a form provided by the department which describes the physical handicap and the type of exemption desired and is signed by a licensed physician. If

> granted, the authorization will be in writing and describe in detail the handicap and the type of special method authorized. This written authorization shall be carried by the person at all times while hunting.
>
> (B) The person must have the physical disability described in the special authorization and the disability must be to such an extent that hunting by prescribed methods is impossible.

Under this approach, the person with a disability submits an application for an exemption from the requirements of a specific hunting restriction (a typical example might be the general rule against hunting from a motorized vehicle), and includes with the application a physician's verification of the disability. If the exemption is granted, the person with a disability carries written authorization for the exemption while hunting.[9] A copy of the form developed by the Director of the Missouri Department of Conservation is attached to this memorandum.

The Department of Law believes that the approach adopted by Missouri is essentially sound, and provides a useful starting point for the development of a similar approach by the Boards of Fisheries and Game under the ADA. We would recommend slightly modifying Missouri's approach, as follows:

1. The boards and the department should take all necessary steps to ensure that the regulations and policies they adopt or propose to adopt comply with the ADA. A person with a disability (or personal representative of the person with a disability) who believes a proposed or existing regulation or policy is inconsistent with the ADA should, if possible, submit an alternate proposal (under the normal schedule for

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[9] Under the Missouri regulation, the applicant must carry at all times a "detailed description" of the applicant's disability. We believe such a requirement would raise serious concerns under Alaska's constitutional right of privacy, Alaska Const., art. I, § 22. The written authorization should therefore omit any description of the applicant's disability or should limit the description to the minimum necessary to allow enforcement in the field; the description of the exemption or modification can be as detailed as the circumstances require. The Missouri regulation also refers only to physical disabilities. The ADA applies to both physical and mental disabilities.

submitting proposals or by petition) to the relevant board that (a) explains why the regulation or policy prohibits meaningful access to a program, service, or benefit; and (b) suggests modifications to the regulation or policy that will reasonably accommodate the needs of persons with disabilities. The boards should use the standards set forth in paragraphs 5, 6, and 7, below, to evaluate their regulations, policies and proposals.

2. A person with a disability (or personal representative of the person with a disability) who believes an existing regulation or policy prohibits meaningful access to a program, service, or benefit, should submit an application, on a form developed and made available by the commissioner, that contains:

(a) the statement of a physician or other competent documentary evidence sufficient to enable the commissioner to ascertain the nature and extent of the individual's disability;

(b) a statement by the person with a disability that identifies the regulation or policy at issue and explains why the individual feels the regulation or policy prohibits meaningful access to a program, service, or benefit; and

(c) a statement by the person with a disability requesting an exemption from the regulation or policy, or suggesting one or more modifications to the regulation or policy that the individual feels are necessary to reasonably accommodate the individual's disability.

3. An application requesting an exemption from or modification to an existing regulation or policy should be submitted to the commissioner at least 30 days prior to the date the person with a disability wants to hunt, fish, or participate in the activity that is the subject of the application. This deadline will enable the commissioner to evaluate the application and the effects, if any, that granting the exemption or modification may have upon the conservation, development, or utilization of the fish and game resources of the state. The commissioner should be given the discretion to accept applications that are submitted after the deadline where there is a legitimate reason for not complying. An obvious example would be a hunt that has been modified by an emergency regulation.

4. The commissioner should determine whether to grant an exemption or modification as soon as practicable after

receiving an application, and where possible at least two weeks prior to the date the applicant wishes to hunt, fish, or participate in the activity that is the subject of the application.

5. The commissioner need not grant an exemption or modification where the regulation or policy does not, when viewing the relevant program, service or benefit as a whole, prohibit the person with a disability from obtaining meaningful access to the program, service, or benefit.

6. In deciding whether to grant the relief requested, the commissioner is not limited to the form of the exemption or modification requested by the person with a disability. The commissioner may, when necessary to avoid discrimination, adopt any exemption or modification that provides the person with a disability meaningful access to the program, service, or benefit at issue.

7. If an existing regulation or policy prohibits a person with a disability from meaningful access to a program, service, or benefit, but the commissioner finds that the person cannot be accommodated without (a) fundamentally altering the program, service, or benefit; or (b) incurring undue administrative burdens and expense, the commissioner should set forth, in writing, all facts that support the decision. The decision must be made after considering all resources available for use in the funding and operation of the service, program, or benefit. The commissioner should take any other action that would not result in such an alteration or burdens but that nevertheless provides persons with disabilities the benefits or services at issue.

8. If the commissioner decides to grant all or part of the relief requested in the application, the commissioner should provide a written description of the authorized exemption or modification to the handicapped individual. The written authorization should be carried by the person at all times while hunting or fishing.

The procedure outlined above attempts to incorporate many of the terms and specific requirements of the ADA. The procedure is illustrative only, and we do not suggest this procedure is the only possible means of carrying out the ADA's obligations. Nevertheless, the approach ultimately adopted by the boards should be adopted as regulations and should contain the substance of the procedure described above. Finally, please note that this memorandum, by setting forth the minimum requirements of the ADA,

should not be construed as discouraging the boards or the department from doing *more* than the ADA requires to provide persons with disabilities opportunities to hunt and fish in Alaska.

IV. CONCLUSION

The Boards of Fisheries and Game and the Department of Fish and Game must ensure that their regulations and policies do not preclude persons with disabilities from a meaningful opportunity to hunt and fish in Alaska. The boards may delegate to the commissioner the authority to grant reasonable exemptions from or modifications to existing regulations or policies when those exemptions or modifications are necessary to accommodate persons with disabilities and avoid discrimination. No exemptions or modifications are necessary where existing regulations or policies do not impose artificial barriers upon hunters and fishers with disabilities, or where such exemptions would fundamentally alter the program, service, or benefit at issue, or cause undue administrative burdens or expense.

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(d) **Withdrawal of Attorney.**

(1) An attorney who has appeared for a party in an action or proceeding may be permitted to withdraw as counsel for such party only as follows:

(A) For good cause shown, upon motion and notice of hearing served upon the party in accordance with Rule 77 and after the withdrawing attorney provides to the court the last known address and telephone number of the attorney's client; or

(B) Where the party has other counsel ready to be substituted for the attorney who wishes to withdraw; or

(C) Where the party expressly consents in open court or in writing to the withdrawal of the party's attorney and the party has provided in writing or on the record a current service address and telephone number.

(2) An attorney shall be considered to have properly withdrawn as counsel for a party in an action or proceeding in which a period of one year has elapsed since the filing of any paper or the issuance of any process in the action or proceeding, and

(A) The final judgment or decree has been entered and the time for filing an appeal has expired, or

(B) If an appeal has been taken, the final judgment or decree upon remand has been entered or the mandate has issued affirming the judgment or decree.

This subparagraph (2) shall not apply to an attorney who files and serves a notice of continued representation.

(e) **Stipulations.** Stipulations between parties or their attorneys will be recognized only when made in open court, or when made in writing and filed with the clerk.

(f) **Time for Argument.** Unless otherwise specially ordered no longer than one quarter hour shall be allowed each party for argument upon any motion, or on any hearing other than a final hearing on the merits. The time for opening statements and arguments at the trial of an action shall be determined in accordance with Civil Rule 46(h).

(g) **Disbarment and Discipline.** Whenever it appears to the court that any member of the bar has been disbarred or suspended from practice or convicted of a felony, that member shall not be permitted to practice before the court until the member is thereafter reinstated according to existing statutes and rules.

(Adopted by SCO 5 October 9, 1959; amended by SCO 98 effective September 16, 1968; by SCO 258 effective November 15, 1976; by SCO 355 effective April 1, 1979; by SCO 390 effective November 7, 1979; by SCO 604 effective September 14, 1984; by SCO 612 effective January 1, 1985; by SCO 696 effective September 15, 1986; by SCO 876 effective July 15, 1988; by SCO 1153 effective July 15, 1994; and by SCO 1450 effective October 15, 2001)

Annotations

Cases

Trial court did not abuse discretion but acted appropriately and with high regard to propriety and to the public image of the legal profession in granting motion of counsel for his voluntary disqualification where a conflict of interest was not yet actually indicated but it could not be determined that such a conflict might not develop by testimony to be offered during the trial. **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. **Devincenzi 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	$400,000	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 determined 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; and by SCO 1340 effective January 15, 1999)

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-

(c) **Reversal or Partial Reversal.** In cases of reversal of any judgment, order or decision of the superior court, costs shall be allowed the appellant or petitioner unless otherwise ordered by the court. In cases of partial affirmance and partial reversal, the court will determine which party, if any, shall be allowed costs.

(d) **Costs to be Awarded.** When costs are awarded in the appellate court, they shall include, unless the court otherwise orders and subject to Rules 210(b)(6) and (c)(6), the filing fee, the costs of preparing the transcript, premiums for any bond under Rule 204(c) or 204(d), and the costs of duplicating and mailing briefs and excerpts of records. Duplicating costs will not be awarded in excess of the rate generally charged by printers in the city in which counsel is located.

(e) **Attorney's Fees.** Attorney's fees may be allowed in an amount to be determined by the court. If such an allowance is made, the clerk shall issue an appropriate order awarding fees at the same time that an opinion or an order under Rule 214 is filed. If the court determines that an appeal or cross-appeal is frivolous or that it has been brought simply for purposes of delay, actual attorney's fees may be awarded to the appellee or cross-appellee.

(f) **Procedure.**

(1) *Bill of Costs.* At the time an opinion or an order under Rule 214 is filed, the clerk shall notify the party or parties entitled to recover costs under subsections (b) and (c) of this rule. That party or parties shall serve and file an itemized and verified bill of costs within 10 days after the date of notice of the opinion or order. Date of notice is defined in Civil Rule 58.1(c). The bill of costs shall be limited to the items specified in subsection (d) of this rule. Failure to file a timely bill of costs is a waiver of the right to recover costs. Objections to the bill of costs may be filed within 7 days after service of the bill. Promptly after expiration of the time for filing objections, the clerk shall issue an itemized award of costs. A hearing on the bill of costs shall not be held unless requested by the clerk. The clerk may not delegate to a deputy clerk the authority to award costs in cases in which objection is filed, except with the approval of the chief justice. Return of the record shall not be delayed pending the award of costs.

(2) *Reconsideration.* A party aggrieved by an order awarding costs under subsection (f)(1) of this rule or an order awarding attorney's fees under subsection (e) of this rule may file a motion for reconsideration within ten days after the date of notice of the order. The non-moving party may file a response within seven days after service of the motion. Reconsideration of an award of costs or attorney's fees under (f)(1) or (e) will be determined by an individual justice or judge. Full court reconsideration of such individual justice's or judge's decision may be sought pursuant to Appellate Rule 503(b).

(3) *Rehearing.* If a timely petition for rehearing is filed, the clerk shall not award costs until the court has disposed of the case on rehearing. Supplemental or amended bills of costs may not be filed after disposition of a petition for rehearing unless requested by the court.

(g) **Exemptions.**

(1) *Workers' Compensation Appeals.* In an administrative appeal from the Alaska Workers' Compensation Board or in an appeal from a denial of a claim of benefits under the Employment Security Act, an award of costs or attorney's fees shall not be made against the claimant in either the supreme court or the superior court unless the court finds that the claimant's position was frivolous, unreasonable, or taken in bad faith.

(2) In an administrative appeal from the Alaska Workers' Compensation Board, full reasonable attorney's fees will be awarded to a successful claimant. Counsel for the claimant shall serve and file an affidavit of services rendered on appeal within 10 days from the date of notice of an opinion or an order under Rule 214. Objections to the affidavit of services may be filed within 7 days of service of the affidavit. An individual justice shall determine the amount of fees to be awarded.

(h) **Execution.** Upon proper application, the clerk of the trial court may issue writs of execution upon the award of costs and attorney's fees made pursuant to this rule, without the approval of a judge of the trial court.

(SCO 439 effective November 15, 1980; amended by SCO 507 effective July 1, 1982; by SCO 508 effective July 1, 1982; by SCO 512 effective October 1, 1982; by SCO 552 effective February 1, 1983; by SCO 554 effective April 4, 1983; by SCO 562, effective May 2, 1983; by SCO 583 effective February 1, 1984; by SCO 619 effective June 15, 1985; by SCO 847 effective January 15, 1988; by SCO 1024 effective July 15, 1990; by SCO 1155 effective July 15, 1994; by SCO 1279 effective July 31, 1997; and by SCO 1440 effective October 15, 2001)

NOTE: In 1997 the legislature enacted AS 18.16.030(m), which provides that a filing fee may not be required of, and court costs may not be assessed against, a minor in a proceeding to bypass parental consent to an abortion. According to ch. 14, § 10 SLA 1997, AS 18.16.030(m) has the effect of amending Administrative Rule 9, Civil Rule 79, and Appellate Rule 508 by prohibiting filing fees and assessment of court costs in certain actions. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass proceedings in the superior

Rule 506. Rehearing.

(a) **Grounds for Petition.** The court may order a rehearing of a matter previously decided if, in reaching its decision:

(1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or

(2) The court has overlooked or misconceived some material fact or proposition of law; or

(3) The court has overlooked or misconceived a material question in the case.

A rehearing will not be granted if it is sought merely for the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court.

(b) **Time for Filing — Form of Petition.** An original and five copies of a petition for rehearing must be filed within 10 days after the date of notice of the opinion or other decision. Date of notice is defined in Civil Rule 58.1(c) and Criminal Rule 32.3(c). The petitioner shall specifically state which of the grounds for rehearing specified in paragraph (a) exists, and shall specifically designate that portion of the opinion, the brief, or the record, or that particular authority, which the petitioner wishes the court to consider. The petition shall be prepared in conformity with Rule 513.5(b) and when filed shall be accompanied by proof of service on all parties. No petition for rehearing shall exceed five typewritten pages. No memoranda or briefs in support of a petition for rehearing, and no response to a petition for rehearing, shall be received unless requested by the court.

(SCO 439 effective November 15, 1980; amended by SCO 554 effective April 4, 1983; by SCO 584 effective February 1, 1984; by SCO 688 effective May 1, 1986; by SCO 718 effective September 15, 1986; and by SCO 827 effective August 1, 1987)

Annotations

Cases

Rehearing was granted on state's representation that a portion of its argument had been misconstrued. **State v. Keep**, Op. No. 313, 409 P2d 321 (on hearing). (Alaska 1965).

Questions raised for the first time on petition for rehearing will not be considered by the supreme court. **Watts v. Seward School Board**, Op. No. 380, 423 P2d 678 (on rehearing). (Alaska 1967).

An argument not raised on appeal will not be considered on rehearing. **Wernberg v. State**, Op. No. 972, 519 P2d 801 (Alaska 1974).

On appeals of workman's compensation decision to superior court, superior court did not abuse its discretion in reducing the original fee award to appellees following appellant's motion to reconsider by (1) not requesting a reply from appellees to appellant's motion for reconsideration or (2) by reducing the fee award because appellees' brief was excessive. **Childs v. Tulin**, Op. No. 3645, 799 P2d 1338 (Alaska 1990).

This rule was not intended to allow parties to raise new arguments after they have had a chance to analyze an appellate court decision; the rule implicitly limits rehearing to legal principle or propositions that were raised by the parties in the normal course of the appeal. **Booth v. State**, Op. No. 1428, 903 P2d 1079 (Alaska App. 1995).

Rule 507. Judgment.

(a) The opinion of the appellate court, or its order under Rule 214, shall constitute its judgment, and shall contain its directions to the trial court, if any. No mandate shall be issued.

(b) Unless the opinion or order expressly states otherwise, the judgment of the appellate court takes effect and full jurisdiction over the case returns to the trial court on the day specified in Rule 512(a) for return of the record. However, in an appeal under Appellate Rule 207 relating to release prior to judgment, the judgment of the Court of Appeals takes immediate effect and full jurisdiction over the case returns to the trial court on the day the Court of Appeals issues its opinion or order deciding the appeal.

(c) A motion to stay the effect of the judgment of the appellate court beyond the day specified in Rule 512(a) shall be made to that court.

(SCO 439 effective November 15, 1980; amended by SCO 551 effective February 1, 1983; amended by SCO 729 effective December 15, 1986)

Annotations

Cases

An order of dismissal by the supreme court is not in itself a mandate. **Singletary v. State**, Op. No. 1711, 583 P2d 847 (Alaska 1978).

Although appellate court opinion reversing defendant's conviction and remanding the case for a new trial was issued on June 6, 1986, the opinion did not become operative and had no force or validity as an order for a new trial until the date specified for return of the record, thus the date specified for return, not the issuance date, triggered commencement of the 120-day speedy trial period. **Nitz v. State**, Op. No. 759, 745 P2d 1379 (Alaska App. 1987).

Rule 508. Costs.

(a) **Dismissal or Denial.** If an appeal is dismissed or petition denied by the appellate court, costs shall not be allowed to the appellee or respondent, unless otherwise ordered by the court.

(b) **Affirmance of Judgment.** In all cases of affirmance of a judgment or any order or decision of the superior court, costs shall be allowed to the appellee or respondent unless otherwise ordered by the court.

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. Penney Co.,** 512 P.2d 575, 588 (Alaska 1973); **Demoski v. New,** 737 P.2d 780, 788 (Alaska 1987).

Note: AS 25.25.313(c), added by § 6 of ch. 57 SLA 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 support 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 1118am.] In my view no compelling case has been made demonstrating the need for these changes,[1] Further, my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court.[2]

[1]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 questionnaire indicated: that Civil Rule 82 does not deter people of moderate means from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that the rule is needed to discourage frivolous litigation.

[2]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 awards called for under either the monetary recovery schedule provisions of (b)(1), or the provisions of (b)(2) 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 Rules 68 and 82 by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by changing 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).

SB

98

Alaska State Legislature

DURING SESSION
STATE CAPITOL
JUNEAU, AK 99801-1182
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FAX: (907) 465-3871

WEB SITE
www.akrepublicans.org/Bunde

SENATOR CON BUNDE
District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

DURING INTERIM
716 W. FOURTH AVE.
ANCHORAGE, AK 99501-2133
(907) 269-0181
FAX: (907)269-0184

E-MAIL
Senator.Con.Bunde@legis.state.ak.us

MEMORANDUM

DATE: April 10, 2003

TO: Senator Ralph Seekins
Chair, Senate Judiciary Committee

FROM: Senator Con Bunde

RE: Hearing Request

I respectfully request that you schedule a hearing for CSSB 98 (TRA), "An Act relating to civil liability for boat owners and to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date" at your earliest convenience.

I have attached the following materials:

- CSSB 98 (TRA)
- Sponsor Statement for the CS
- Sectional Analysis for the CS
- Zero Fiscal Note (Dept. of Law)
- SB 98
- Letters of Support

If you require any additional backup, please contact my aide, Karen McCarthy, at 3881.

Thank you.

Alaska State Legislature

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SENATOR CON BUNDE
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SPONSOR STATEMENT

CSSB 98

"An Act relating to civil liability for boat owners and to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Thousands of Alaskans own private aircraft and/or watercraft and routinely share the enjoyment of these activities with friends, relatives, and neighbors. In doing so, those owners expose themselves to being sued if an accident occurs. SB 98 is the "Good Neighbor Bill." It will clarify the responsibilities of airplane and boat owners and their guests when injuries are caused by the inherent risk of the activity, not by owner negligence.

Common law recognizes that certain activities carry inherent risks, and that participants take some responsibility for injuries they may sustain while participating in those activities. However, America is a litigious society, and people will sue -- often without consideration for the guest's responsibility for his or her own injury. SB 98 seeks to clarify in statute that people who accept an invitation to participate in a non-commercial recreational activity in a watercraft or aircraft also accept the inherent risks of such activity.

SB 98 does not absolve the owners of the aircraft or watercraft from maintaining and operating their equipment in a safe and prudent manner.

Due to inherent risks associated with these activities, rising insurance rates have forced many owners to forgo insurance on their expensive equipment. By discouraging frivolous lawsuits, SB 98 will also help keep a lid on the rising costs of insurance for airplane and boat owners.

LEGAL SERVICES

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

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

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

MEMORANDUM April 10, 2003

SUBJECT: Civil liability for plane/boat passengers - CSSB 98(TRA)

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford
Legislative Counsel

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

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040.

Section 2. Creates immunity from civil liability for negligence when an owner or operator of an aircraft or watercraft transports a passenger and the aircraft or watercraft is not being used for commercial purposes. Provides that accidents resulting from gross negligence or reckless or intentional misconduct, involving a common carrier, or occurring during a sales demonstration are not immune. Also when the owner or operator has certain insurance coverage or fails to tell passengers that no insurance exists, immunity does not apply.

Section 3. Amends a sunset provision of law to provide that immunity under SB 98 is an exception to the liability imposed under AS 05.25.040. This section is necessary to avoid a conflict of law if AS 05.25.040 is repealed and reenacted as provided in the Boating Safety Act (Ch. 28, SLA 2000).

Section 4. Provides that the Act applies to accidents that occur after the effective date of the Act.

Section 5. Provides that sec. 3 of SB 98 only takes effect if the sunset provisions of Sec. 9, Chapter 28, SLA 2000, take effect.

Section 6. Effective date for all sections of SB 98, except for sec. 3.

MFF:lmb
03-148.lmb

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 98
(S) Publish Date: 4/9/03

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to civil liability for guest passengers on an aircraft or watercraft; . . ."
BRU Civil Division
Component Special Litigation
Sponsor Senator Bunde
Requester Senate Transportation Committee
Component No. 2213

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

Under this bill, owners or operators of an aircraft or watercraft would not be liable for civil damages of a guest passenger if the owner or operator is not being compensated for the transportation, except under certain specified circumstances.

This bill concerns civil actions between private parties, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/7/03 2:24 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 4/7/2003
Agency Department of Law

(Revised 9/2002 OMB)

ALASKA BOATING ASSOCIATION

Senator Con Bunde
State Capital
Juneau Alaska 99801-1182

March 26,2003

Re: Senate Bill 98

Dear Senator Bunde,

The Alaska Boating Association supports the passage of SB 98, "An act relating to civil liability for guest passengers on an aircraft or watercraft." The Alaska Boating Association is a statewide organization with a membership of more than 1200. The association is an organization dedicated to the enhancement and preservation of the boating experience in Alaskan waters. Our organization represents the boating public on all issues concerning boating activities. As a past member of the Governors Boating Safety Advisory Council I personally reviewed statistics depicting boating accidents and related personal injury. Alaskans are involved in a high rate of boating accidents with personal injury and death to both operators and passengers- one of the results is high insurance rates. Insurance rates for the group of boaters that I fall into has more than doubled in the past three years. My insurance has gone from $825.00 three years ago to over $1,600.00 for the coming season. Other boaters have experienced similar rate increases. Some folks have actually made the decision not to purchase a boat, or to sell the one they have due to high insurance rates. Passage of SB98 would surely help to buffer future rate increases. Again the Alaska Boating Association is a strong supporter of SB98 and we commend you for the time that you have spent drafting and introducing this legislation.

Cliff Judkins, President
Alaska Boating Association

Cliff Judkins - President • P.O. Box 874124 • Wasilla, Alaska 99687
(907) 373-3591 • Fax 373-3592 • E-Mail: cjudkins@customcpu.com

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March 24, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182

Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters, but also to avoid the treacherous crags of a litigious society.

The cost of not passing SB 98 can be measured in terms of lost opportunities for recreation and enjoyment. Key to this is a boat owner's legitimate fear of potentially losing ones life savings in a world rife with frivolous lawsuits and unspecified civil damages. This legislation will relieve an unnecessary and unfair burden on recreational boaters while protecting passengers from negligent acts.

It seems obvious that boat owners should be able to take their friends fishing or sightseeing without the fear of an expensive lawsuit should their trip end in misfortune. Similarly, non-commercial passengers should not have their choice to ride in a boat made by a legal system more concerned with contingency awards than with personal freedoms.

Our club promotes the sport of watercraft riding, education, and boating safety. Several of our members belong to the Coast Guard Auxiliary. Annually, we contribute our time and equipment to help Alaskans with disabilities at the Challenge Alaska Summer Splash. We are staunch supporters of boating rights and are a member club of the Alaska Outdoor Council, the Alaska State Boaters Association, and ABATE. Because of our interest in recreational boating, the PWCA is particularly interested in the success of your legislation.

Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff and may be reached directly at 258-2420 (wk) or at davealaska@aol.com. Please let me know how we can assist you in reaching your vision for Alaska.

Sincerely,

David Ausman
PWCA President

Personal Watercraft Club of Alaska (PWCA)
P.O. Box 112984
Anchorage, AK 99511-2984
website: www.pwcalaska.org
email: akpwcrdr@aol.com
phn: 907-345-6723

cc:

Cliff Judkins, Alaska State Boater Association

Ed & Inge Crane
5260 Lupin Place
Anchorage, AK 99507

Senator Con Bunde
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

March 18, 2003

Dear Senator Bunde,

Thank you for introducing SB 98. While I am not sufficiently knowledgeable to address the commercial aspects of the legislation, I would like to express wholehearted support for the potential effects on private aircraft owners and operators.

I am an instrument-rated private (i.e., non-commercial) pilot who owns a modest small airplane. I fly that airplane strictly for pleasure, under favorable conditions only, and I operate only from improved airports. I have some 1,400+ hours of flying experience, with no record of accidents, incidents, emergencies, regulatory violations, or insurance claims.

Despite the foregoing, it has for several years been increasingly difficult (as I believe it has been for most Alaska pilots) to obtain and/or afford adequate liability insurance. Because of my history, my carrier has "grandfathered" my personal injury liability coverage at a level which it no longer makes available in Alaska generally. Nevertheless, I no longer carry passengers other than my spouse. Within the context of today's society and the influence of personal injury lawyers, the risks of exposure for myself, my family, and my estate are more than I can rationally tolerate. On the other hand, I would have no problem assuming the totally controllable risks of "gross negligence or reckless or intentional misconduct" which would result in liability under SB 98.

So no longer can I share with friends, neighbors, or visitors the awesomeness and beauty of SouthCentral Alaska which can be reasonably and safely accessed by a simple and inexpensive flight. No longer can I experience the pleasure of implementing a youngster's "first flight", or of using my aircraft to pique a teenager's interest in an aviation career. If passed, SB 98 would make these things once again possible - not only for me, but for countless thousands of Alaskans and visitors!

Very truly yours,

Ed Crane

From: Dr. Frost
To: senator.con.bunde.@legis.state.ak.us
Cc: (left blank for privacy purposes)
Sent: Monday, March 17, 2003 6:19 PM
Subject: Senate Bill 98

Dear Senator Bunde,

I have reviewed Senate Bill 98 and would like to express my strong support for it. As you know I own and fly my own piper cub here in Alaska. I have never flown commercially. I have always been concerned with my family's potential liability if I were to be involved in a serious aircraft accident and to have any passengers injured.

Clearly since I do all of my own flying I never place a passenger in a situation which I am personally not comfortable for myself. However as you know there are times when weather changes unexpectedly or other circumstances may create a hazardous situation. Since the passengers are enjoying the benefits of the flight for no cost they should be expected to shoulder some of the responsibility as well.

I will be out of town for the next week. I can not personally speak for the Alaska Bowhunters Association and Alaska Chapter of SCI but I would suspect that they would support the bill as well. By sending them a copy of this I will solicit their opinions.

Sincerely,
John D. Frost MD

Subject: Re: SB 98, Recreational Liability Bill
Date: Mon, 03 Feb 2003 18:45:10 -0900
From: "William G. Nelson"
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

I strongly support SB 98. As an owner of a small private aircraft, I do on occasion take visitors to our state for a "flight seeing" ride. They always indicate that it was the highlight of their trip. I would do so more often, but do not feel the need to shoulder the liability.

Certainly, visitors that see the real Alaska are less likely to be swayed by special interest groups supporting causes detrimental to the development of Alaska.

Thank you for your sponsorship of this bill.

William G. Nelson

March 26, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182

Dear Senator Bunde,

I am writing in support of Senate Bill 98, "an act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date".

As a responsible watercraft and boat owner I feel this is important legislation to provide a limit on civil liability for boaters (and aircraft owners). We live in a litigious society and it seems everyone wants to lay fault or blame on the other person and make them pay. This legislation will allow boat owners and aircraft owners a little more peace of mind when taking passengers on board for pleasure rides.

Thank you for writing a bill that promotes safety in recreational activities. I am a member of the Personal Watercraft Club of Alaska (PWCA) as well as Alaska Boating Association. I know the PWCA has given their support to this bill and I'm sure they have contacted the Boating Association and asked them to contact you with their support as well.

If there is anything else I can do to help promote and support this bill please do not hesitate to contact me. I can be reached at 345-6723 or email at akpwcrdr@acsalaska.net.

Sincerely,

Gina Poths
11600 Trails End Rd.
Anchorage, AK 99507

March 26, 2003

Senator Bunde

REF: SB98 Recreational Liability

Senator Bunde, although I am writing this letter on my behalf to express support for SB 98 "Good Neighbor Bill" I am also President of the Alaskan Bowhunters Association one of the largest outdoor organizations in the state and I have asked that the entire executive board and general membership across the state show their support.
I moved to Alaska 29 years ago so that I may be involved in the out of doors in the most beautiful state in the union. I have always owned boats for recreation since moving to Alaska and have been fortunate to travel around the state with friends of mine that own small fixed wing planes.
I have discovered as has many of my friends that one of the greatest joys of living in Alaska is the ability to share the experience of the outdoors with friends in Alaska that may not have the ability or friends and business acquaintances from lower forty-eight. A concern that I have always had is the possibility of leaving my family liable for something that may have not been in my control to prevent. There is always a risk of potential life threatening accidents with any journey in to the outdoors in Alaska that is part of the mystique of Alaska. If I am operating my boat or plane in a safe manor and an accident does occur I do not believe that my family should be liable for something that they had no part in.
This bill is long over due and I encourage the Senate to fully support this bill. There is no disadvantage to this bill other than leaving the door open for frivolous lawsuits. Thank you for your time and consideration into this matter.

Sincerely
Phil Pringle
10086 Explorer Cr.
Anchorage AK. 99515
907-344-8812

Phillip H. Mabry, D.D.S.

2601 BONIFACE PARKWAY ANCHORAGE, ALASKA 99504 (907) 337-9448 FAX (907) 337-4123

March 20, 2003

Senator Con Bunde
716 W. Fourth Avenue
Anchorage, Alaska 99501-2133

Dear Mr. Bunde,

I've just read your proposed S.B. 98. It's about time the legislature addressed this issue. You've done a remarkable job of covering all the bases. It protects the individual who is entertaining someone but doesn't eliminate the use of proper conduct and safety. Hopefully your fellow Senator's will agree and move this bill onward.

Thank you again for your good sense.

Sincerely,

Phillip H. Mabry D.D.S.

Phillip Mabry DDS

Greg Remaklus, D.M.D.
Practice Limited to Periodontics
Suite 102
4200 Lake Otis Parkway
Anchorage, Alaska 99508
Office Phone (907) 561-1884

March 26, 2003

Senator Con Bunde
State Capital
Juneau, Alaska 99801-1182

Dear Senator Bunde:

Please accept my support and encouragement for Senate Bill 98. Existing liability concerns have for a long time discouraged me from transporting others and insurance is increasingly more difficult to afford. I hope your efforts can help change all that. Thank you.

Kindest personal regards,

Greg

Greg Remaklus, D.M.D.

March 20, 2003

Senator Con Bunde
State Capitol
Juneau, AK 99801-1182

Re: SB 98, "An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

Dear Senator Bunde,

On behalf of the Personal Watercraft Club of Alaska (PWCA), I would like to express our support for SB 98.

This legislation provides a much needed limit of civil liability for boaters. Currently, Alaskan boat owners have two jobs when they take the helm, not only to navigate safely through waters but also to avoid the treacherous crags of a litigious society.

The cost of not passing SB 98 can be measured in terms of lost opportunities for recreation and enjoyment. Key to this is a boat owner's legitimate fear of potentially losing ones life savings in a world rife with frivolous lawsuits and unspecified civil damages. This legislation will relieve an unnecessary and unfair burden on recreational boaters while protecting passengers from negligent acts.

It seems obvious that boat owners should be able to take their friends fishing or sightseeing without the fear of an expensive lawsuit should their trip end in misfortune. Similarly, non-commercial passengers should not have their choice to ride in a boat made by a legal system more concerned with contingency awards than with personal freedoms.

Our club promotes the sport of watercraft riding, education, and boating safety. Several of our members belong to the Coast Guard Auxiliary. Annually, we contribute our time and equipment to help Alaskans with disabilities at the Challenge Alaska Summer Splash. We are staunch supporters of boating rights and are a member club of the Alaska Outdoor Council, the Alaska State Boaters Association, and ABATE. Because of our interest in recreational boating, the PWCA is particularly interested in the success of your legislation.

Almost all of our club members ride 2-4 seat watercraft and take passengers. We have traveled from Whittier to Valdez and from Anchorage to Kenai on PWC. Modern PWC are quiet transportation, leave little wake, and burn a fraction of the fuel of many boats. These clean burning machines meet the rigid 2006 EPA standards. Light, durable, and stable, they very well may prove to be the snow

machine of the water for many communities. They are a fun and exciting way to experience the Alaskan outdoors.

I am available to discuss this legislation with you or your staff. Please let me know how our club can assist you in reaching your vision for Alaska.

I know this is basically a copy of a letter you have received from our club president, but I share the same views.

Sincerely,

Thomas Byers
Club member

cc:

Cliff Judkins, Alaska State Boater Association

Subject: SB98
Date: Mon, 7 Apr 2003 09:43:19 -0800
From: "Robert Dreeszen" [redacted]
To: <Senator_Con_Bunde@Legis.state.ak.us>

We support SB98.

Robert & Carol Dreeszen
Outlet Lower Ugashik Lake AK

Subject: Re: [Fwd: SB 98 Scheduled for a Hearing]
Date: Sun, 06 Apr 2003 21:34:37 -0800
From: (deleted for privacy)
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Karen.

At our meeting last week, the KCK (Knik Canoers and Kayakers) Board of Directors voted unanimously to endorse this bill. I will be out of town for the rest of the week.

Thank you,
-Fran Hall

Subject: Re: SB 98
Date: Sun, 06 Apr 2003 14:35:35 -0800
From: Marilyn Warren [redacted]
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Mr. Bunde:
As an aircraft and water craft owner I encourage you to support the passage of SB 98. As an aircraft owner I can not afford to purchase insurance and so am denied the pleasure of taking friends or acquaintances flying with me because of the substantial liability involved. This bill needs to be passed. Thank you, Charles Warren

Subject: SB 98
Date: Sun, 06 Apr 2003 16:33:19 -0800
From: Don & Nita Meierhoff <[redacted]>
To: Con Bunde <Senator_Con_Bunde@Legis.state.ak.us>

Dear Senator Bunde:

Just a short note to let you know I support your bill SB 98 wholly. I am an owner of an aircraft and the liability prospect has stopped me from transporting friends out fishing and hunting with me a number of times.

Good luck and thanks for the hard work!

Don Meierhoff

3637 North Point Dr.

Anchorage, AK. 99502

907-243-1046

Constituent Support for SB 98, "Recreational Liability"
Expressed as Replies to Legislative Update

Thank you for sponsoring both pieces of legislation Con. We support them. As an aircraft owner, I particularly appreciate the liability legislation.

These sound like good Bills. Thanks for all your work.

Dear Con, I am a boat owner and applaud your new bill. Thanks

Con: I support your efforts on both bills.

Senate Bill 98 sounds like a great idea. As a private pilot this is something that I think of often. I support your endeavors with this bill.

Good Luck with SB 98!

I like the objective of SB98 and wish to compliment you on common sense legislation.

Thank you for both pieces. Especially logical and sensible is the Good Neighbor Bill. I hope for its passage.

As an owner of a small aircraft, we appreciate and support the intent of SB98.

I believe SB98 is a step in the right direction. Thanks

As for SB 98, I surely wish you well. As a pilot/owner that truly enjoys showing Alaska to others, it is very sobering to know what liable risk we take in so doing.

Dear Con, This is excellent and thank you for all your fine work.

Senator Bunde's Legislative Update privacy policy forbids using constituents' names when sharing their comments on issues before the Legislature.

Provided by Senator Con Bunde

Public Opinion Message
4/9/2003

Mr. Donald M Quarberg
HC 60 Box 3070
Delta Junction, AK 99737

Bill #98: SB 98 LIABILITY: PLANE AND BOAT PASSENGERS

MESSAGE: Support this Bill. It is a practical approach to an ever increasing problem – frivolous lawsuits! Thank you!

DISTRIBUTION: 60

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MEMORANDUM April 18, 2003

SUBJECT: Civil liability of boat/airplane owners to passengers (CSSB 98(TRA))

TO: Senator Con Bunde
Attn: Karen

FROM: Michael F. Ford
Legislative Counsel

You have asked several questions regarding CSSB 98(TRA).

First, does the term "watercraft" that appears in Sec. 2 need to be defined. This is a judgment call, but I don't think that it does. There are several definitions in existing law, but they all apply to particular situations. See AS 28.35.030(r)(3). There is no general statutory definition of "watercraft." A definition is often helpful to clarify a meaning or to exclude some unintended meaning. But since "watercraft" has a generally accepted meaning defining the term seems unnecessary. Also, there is some risk in creating a definition, in that you may inadvertently exclude or include some category.

Second, you have asked about the validity of liability waivers. This issue was recently before the Alaska Supreme Court in Moore v. Hartley Motors, Inc., 36 P.3d 628 (Alaska 2001). In that case, a liability waiver for injuries resulting from a ATV class was held valid and did protect the defendant from claims of negligence. However, the court noted that not all liability waivers were valid. In some cases, public policy considerations preclude a waiver from being effective against civil claims. I have attached a copy of that decision for your information.

Please contact me if you have further questions.

MFF:med
03-416.med

Enclosure

Moore v Hartley Motors, Inc. et al (09/14/2001) sp-5469

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

GAYLE W. MOORE, Appellant, v. HARTLEY MOTORS, INC.; ATV SAFETY INSTITUTE; SPECIALTY VEHICLE INSTITUTE OF AMERICA, a corporation incorporated in the District of Columbia; and JIM CROAK, Appellees.	Supreme Court No. S-9336 Superior Court No. 3PA-95-505 CI O P I N I O N [No. 5469 - September 14, 2001]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Beverly W. Cutler, Judge.

Appearances: Thomas R. Wickwire, Fairbanks, for Appellant. John B. Thorsness and Kimberlee A. Colbo, Hughes Thorsness Powell Huddleston & Bauman, LLC, Anchorage, for Appellee Hartley Motors, Inc. L. G. Berry, Robertson, Monagle & Eastaugh,

Anchorage, for Appellees ATV Safety Institute, Specialty Vehicle Institute of America, and Jim Croak.

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

FABE, Chief Justice.

I. INTRODUCTION

Gayle Moore was injured during an all-terrain vehicle (ATV) safety class when she drove her ATV over a rock and the vehicle rolled over. Before participating in the class, Moore signed a release of liability. After her injury, however, she sued for damages the safety class instructor, the organizations that developed and offered the class, and the owner of the property on which the class took place. She alleged that the release was not valid because she received no consideration, the release was against public policy, and the course was inherently unsafe. The superior court granted summary judgment to the defendants. Because there is a factual dispute regarding whether the layout of the course was unnecessarily dangerous, we reverse and remand for trial on that issue.

II. FACTS AND PROCEEDINGS

Gayle Moore and her husband bought a Suzuki four-wheel ATV in May 1993 from Suzuki, Arctic Cat Motor Sports. At the time of the sale, the salesperson offered the Moores a $50 rebate upon completion of an ATV rider safety class. On October 23, 1993, the Moores attended an ATV rider safety class held on the property of Hartley Motors, Inc. James Croak instructed the class using the curriculum of the ATV Safety Institute. Before starting instruction, Croak requested that all participants sign a consent form and release. Moore signed the consent form and release.

The driving portion of the class took place on a course marked with cones on unpaved ground. During the class, Moore drove her ATV through high grass beyond a cone marking the course. Her vehicle rolled up on a rock protruding from the ground in the high grass. Moore was thrown from her vehicle, suffering injuries as a result.

Moore brought suit in July 1995 against Hartley Motors, the dealer that sold the Moores their ATV, ATV Safety Institute, and Jim Croak. [Fn. 1] She alleged that the defendants negligently failed to provide a safe ATV rider training course and location, and negligently concealed the fact that the course was unsafe.

In 1996 the defendants [Fn. 2] sought summary judgment based on the release signed by Moore before the class. In opposition to summary judgment, Moore presented a transcript of a telephone conversation between an investigator hired by her attorney and Michael Swan, a former ATV Safety Institute instructor. In this telephone conversation, Swan indicated that he had chosen not to teach an ATV rider course at the Hartley Motors location because he found the location inappropriate.

Superior Court Judge Beverly W. Cutler initially denied the motion for summary judgment. She concluded that while the release was valid as a matter of law, genuine issues of material fact existed regarding the defendants' knowledge of the suitability of the course site and whether they informed Moore of its suitability before she signed the release. In denying summary judgment, the superior court relied upon a theory of material nondisclosure by the defendants. The court found that the allegations presented in the telephone conversation with Swan could be supported by admissible evidence at trial.

In 1999 ATV Safety Institute, Specialty Vehicle Institute of America, and Croak (collectively ATVSI) sought reconsideration of the 1997 summary judgment denial because Michael Swan had died and therefore could not testify at trial. The superior court denied the motion for reconsideration but granted Hartley Motors's motion in limine to exclude hearsay statements by or attributed to Swan.

ATVSI then filed a motion for summary judgment and Hartley Motors filed a renewed motion for summary judgment based on the release Moore had signed. The superior court granted summary judgment to the defendants. The superior court entered final judgment for $32,817.56 fees and costs to Hartley Motors, and $21,049.12 fees and costs to ATVSI. Moore appeals.

III. DISCUSSION

A. Standard of Review

This court reviews grants of summary judgment de novo. [Fn. 3] We will affirm a summary judgment if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. [Fn. 4] When making this determination, we draw all reasonable inferences in favor of the non-moving party. [Fn. 5] "We make no attempt to weigh the evidence or evaluate the credibility of witnesses, and we assume that all facts set forth in the nonmoving party's affidavits are true and capable of proof." [Fn. 6]

B. The Superior Court Did Not Err in Finding that the Release Was Valid.

The superior court determined in 1997 that "the release itself is valid as a matter of law against negligence claims brought by [Moore]." Moore asserts that the trial court erred in treating the release as valid because (1) there was no consideration for the release and (2) the release should have been declared void as against public policy.

1. There was consideration for the release.

Moore argues that she did not receive any consideration in return for her release. She contends that the $50 rebate promised by the salesperson upon completion of the course [Fn. 7] was to have been the consideration for her release of liability. Because Moore did not complete the course, she did not receive the $50 rebate. [Fn. 8] She asserts that since she did not receive any consideration for the release, it was not effective to protect the defendants from liability.

Moore misconstrues the role of consideration by equating inducement with consideration. Here ATVSI provided consideration for the release, not by offering a $50 rebate, but by offering participation in the class. Thus, even if the $50 rebate induced Moore to take the class, the only reasonable inference from the facts presented is that Moore exchanged the release of liability for participation in the program. Whether Moore considered the $50 rebate her inducement is immaterial to the sufficiency of consideration. [Fn. 9] The trial court did not err in rejecting Moore's claim that the release was invalid for failure of consideration.

2. The release did not violate public policy.

Moore argues that the release should "be set aside as unconscionable and contrary to public policy." An otherwise valid release is ineffective when releasing a defendant from liability would violate public policy. [Fn. 10] Moore argues that public policy considerations should invalidate the release she signed.

In Municipality of Anchorage v. Locker, we evaluated whether an exculpatory release should be invalidated as against public policy. [Fn. 11] In Locker, we concluded that a limited liability clause in a contract for an advertisement in the yellow pages was unconscionable and void as against public policy. [Fn. 12] We relied upon Tunkl v. Regents of the University of

California [Fn. 13] in identifying the factors for review in invalidating an exculpatory provision on public policy grounds, noting that such a provision is likely invalid when

> [i]t concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[[Fn. 14]]

Of particular relevance to this case is the type of service performed and whether the party seeking exculpation has a decisive advantage in bargaining strength because of the essential nature of the service. [Fn. 15] Here, the ATV safety course, although perhaps providing a desirable opportunity for an ATV driver, is not an essential service, and therefore the class providers did not have a "decisive advantage of bargaining strength" in requiring the release for participation in the class. [Fn. 16] Moore had a choice whether to take the class or not, and chose to sign the release in order to participate. The release in this circumstance does not present a violation of public policy.

Other courts have upheld exculpatory releases for activities similar to ATV riding where the activities themselves were not regulated by statute. These releases precluded liability for injuries sustained while parachute jumping, [Fn. 17] riding a dirt bike motorcycle in a motorcycle-park facility, [Fn. 18] and scuba diving as a part of a scuba diving course. [Fn. 19] The Alaska legislature does not regulate ATV riding. By contrast, the legislature has acted to regulate the ski industry, and as part of this regulation has precluded ski facility operators from obtaining waivers of liability for negligence. [Fn. 20] Importantly, the Alaska Ski Safety Act of 1994 [Fn. 21] defines the duties of a ski operator [Fn. 22] and prevents actions against ski operators for injuries resulting from the inherent danger and risk of skiing. [Fn. 23] The legislature has not chosen to regulate ATV course operators in a similar way.

Moore also contends that because a consent decree issued in a consumer products safety lawsuit requires ATV manufacturers to carry liability insurance covering participants in training courses, [Fn. 24] it is therefore against public policy for an ATV safety program to require participants to waive and release any injury claims. Moore cites no authority to support this interpretation of the consent decree, and we have discovered no reported decisions that have addressed this issue. We decline to invalidate an otherwise valid release between participants and providers of ATV safety courses on this basis.

C. A Genuine Issue of Material Fact Exists as to Whether the Course Layout Was Inherently Dangerous.

The trial court's summary judgment analysis focused on alleged misrepresentations that could have invalidated the release. As with any contract, a release of liability is only valid to the extent that it reflects a "conspicuous and unequivocally expressed" intent to release from liability. [Fn. 25] The trial court granted

summary judgment after determining that no genuine issue of material fact existed as to whether ATVSI or Hartley Motors knew that the course was allegedly unsafe.

Even if there was no genuine issue of material fact regarding a misrepresentation, the trial court erred in failing to consider the scope of the release signed by Moore. [Fn. 26] Moore agreed to release the ATV Safety Institute and all other organizations and individuals affiliated with the ATV safety class from liability, loss, and damages "including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse." But the release does not discuss or even mention liability for general negligence. Its opening sentences refer only to unavoidable and inherent risks of ATV riding, and nothing in its ensuing language suggests an intent to release ATVSI or Hartley Motors from liability for acts of negligence unrelated to those inherent risks. Based on this language, we conclude that Moore released ATVSI and Hartley Motors only from liability arising from the inherent risks of ATV riding and ordinary negligence associated with those inherent risks. [Fn. 27] As we noted in Kissick v. Schmierer, an exculpatory release can be enforced if "the intent to release a party from liability for future negligence" is "conspicuously and unequivocally expressed." [Fn. 28] However, underlying the ATV course release signed by Moore was an implied and reasonable presumption that the course is not unreasonably dangerous.

Moore claims that she was injured when she fell off her ATV after riding over a rock obscured by tall grass. We assume the truth of this assertion for purposes of reviewing the superior court's summary judgment order. Moore asserts that the course on which the class operated was set up in such a way that she had to ride into the grass and that this posed an unnecessary danger.

The allegedly improper course layout may be actionable if the course posed a risk beyond ordinary negligence related to the inherent risks of off-road ATV riding assumed by the release. [Fn. 29] As we have explained in the context of skiing, "[i]f a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger" and is therefore not an inherent risk of the sport. [Fn. 30] We have described an "unreasonable risk" as one for which "the likelihood and gravity of the harm threatened outweighed the utility of the . . . conduct and the burden on the [defendant] for removing the danger." [Fn. 31] If the course was designed or maintained in such a manner that it increased the likelihood of a rider encountering a hidden rock, then the course layout may have presented an unnecessary danger; holding an ATV safety class on an unnecessarily dangerous course is beyond the ordinary negligence released by the waiver. Holding a safety class on an unreasonably risky course may give rise to liability even if encountering rocks is generally an inherent risk of ATV riding. Moreover, the fact that the course was geared towards novice ATV riders may also affect the level of care required of ATVSI and Hartley Motors to reduce unnecessary dangers and unreasonable risk. [Fn. 32]

Whether the injury resulted from an unnecessarily dangerous course or a course placed perilously close to an obscured obstacle are questions of fact. Here, Moore presented facts that could support a finding that the ATV safety course was laid out in an unnecessarily dangerous manner that was not obvious to novice ATV riders and therefore not within the scope of the release. Thus, it was error to grant summary judgment.

IV. CONCLUSION

Moore agreed to release the defendants from liability for injuries sustained as a result of participation in the ATV riding and safety class. The trial court erred in granting summary judgment because genuine issues of material fact existed regarding whether the injury resulted from unreasonable dangers not within

the scope of the release. Therefore, we REVERSE the grant of summary judgment in favor of the defendants and REMAND the case to the trial court for further proceedings consistent with this opinion.

FOOTNOTES

Footnote 1:

Specialty Vehicle Institute of America was added as a defendant in the Second Amended Complaint in October 1995.

Footnote 2:

The ATV dealer was dismissed as a defendant in 1997.

Footnote 3:

See Ganz v. Alaska Airlines, Inc., 963 P.2d 1015, 1017 (Alaska 1998).

Footnote 4:

See Parson v. Marathon Oil Co., 960 P.2d 615, 618 (Alaska 1998).

Footnote 5:

See id.

Footnote 6:

Samaniego v. City of Kodiak, 2 P.3d 78, 83 (Alaska 2000).

Footnote 7:

Moore has not presented evidence that the parties to this case promised to provide the $50 rebate.

Footnote 8:

Moore also asserts that the release was not valid because the instructor returned the signed release to her after the injury. She claims that by returning the slip of paper to her, Croak rejected the release, and therefore the release does not bind Moore. The physical location of the signed consent form -- in ATVSI's possession or Moore's -- has no effect on the bargained-for exchange that occurred before Moore began participation in the class.

Footnote 9:

A comment to the Restatement (Second) of Contracts states:

Even in the typical commercial bargain, the

promisor may have more than one motive, and the person furnishing the consideration need not inquire into the promisor's motives. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.

Restatement (Second) of Contracts sec. 81 cmt. b (1979).

Footnote 10:

See Municipality of Anchorage v. Locker, 723 P.2d 1261, 1264-67 (Alaska 1986).

Footnote 11:

Id.

Footnote 12:

Id. at 1264-65.

Footnote 13:

383 P.2d 441 (Cal. 1963).

Footnote 14:

Locker, 723 P.2d at 1265 (quoting Tunkl, 383 P.2d at 445-46).

Footnote 15:

See id.

Footnote 16:

Id. at 1265.

Footnote 17:

See Boucher v. Riner, 514 A.2d 485 (Md. App. 1986).

Footnote 18:

See Kurashige v. Indian Dunes, Inc., 200 Cal. App. 3d 606 (Cal. App. 1988).

Footnote 19:

See Mann v. Wetter, 785 P.2d 1064, 1066 (Or. App. 1990).

Footnote 20:

See AS 05.45.120.

Footnote 21:

See AS 05.45.010-.210.

Footnote 22:

See AS 05.45.040-.070.

Footnote 23:

See AS 05.45.010.

Footnote 24:

The United States government brought suit under the Consumer Product Safety Act, 15 U.S.C. sec. 2061 (1981), against the manufacturers of ATVs for "relief as may be necessary to protect the public from the risk of an imminently hazardous consumer product." The case settled and the court issued a consent decree requiring manufacturers to market ATVs within specified guidelines, "offer to all interested persons a nationwide hands-on training program," and offer incentives to consumers to take the classes.

Footnote 25:

Kissick v. Schmierer, 816 P.2d 188, 191 (Alaska 1991).

Footnote 26:

The release signed by Moore reads as follows:

IMPORTANT INFORMATION. YOU MUST READ AND SIGN THIS CONSENT FORM AND RELEASE: The Consumer Product Safety Commission ("CPSC") reports that over 1,186 people, including many children, have died in accidents associated with ATVs since March, 1986. You should also be aware that 70cc to 90cc ATVs should be used only by persons aged 16 and older. Having been advised of the above, the undersigned agrees to release the ATV Safety Institute, the Specialty Vehicle Institute of America, its members, Trustees, employees, agents, representatives and all other organizations affiliated with the ATV RiderCourse, from any and all liability, loss, damage claim or cause of action, known or unknown, including but not limited to all bodily injuries and property damage arising out of participation in the ATV RiderCourse.

Footnote 27:

The inherent risks of an activity such as ATV riding are those risks that are obvious and necessary to the sport. These inherent risks, by the very nature of being "inherent," are beyond the control of instructors teaching the activity, the landowner on whose land the activity is conducted, or an organization conducting a program involving the activity.

Footnote 28:

816 P.2d at 191.

Footnote 29:

See Scott v. Pacific West Mountain Resort, 834 P.2d 6, 10 (Wash. 1992) (noting that an exculpatory clause should not be upheld where "the negligent act falls greatly below the standard established by law for protection of others").

Footnote 30:

Hiibschman ex rel. Welch v. City of Valdez, 821 P.2d 1354, 1360 n.12 (Alaska 1991) (quoting Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Liability Statute and Injured Skiers, 3 V. L. Rev. 129, 141-42 (1978)).

Footnote 31:

State v. Abbott, 498 P.2d 712, 725 (Alaska 1972).

Footnote 32:

See, e.g., Hiibschman, 821 P.2d at 1360 (citing as evidence of ski operator negligence evidence that a ski jump that caused injury was on a beginner's slope, and that an expert witness stated that there should not have been any jumps on a beginner's slope, especially if it was not clearly marked as only being for expert skiers); Scott, 834 P.2d at 15 (reversing summary judgment where "some of the evidence would support a conclusion that the race course was laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student").

SB

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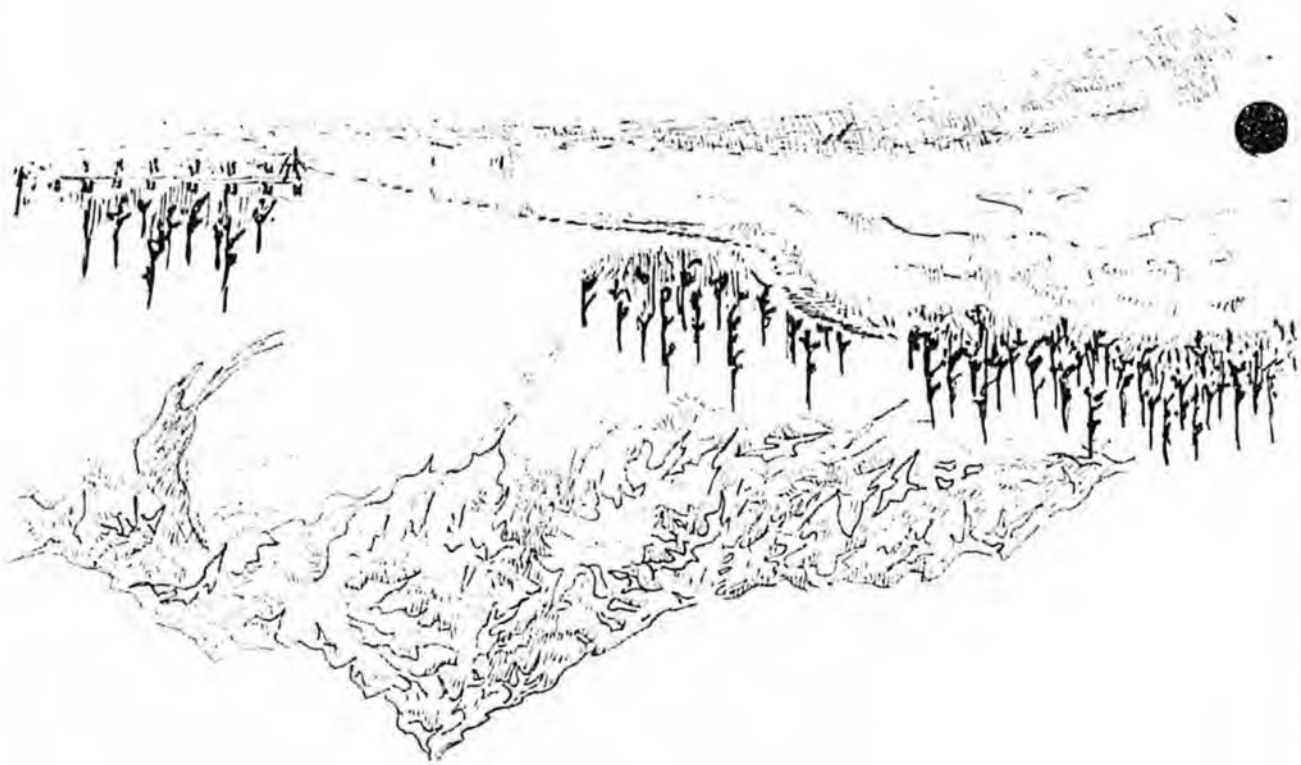

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Pioneer Peak (Palmer, AK) *Picture drawn by: Suzan Stoltze (my mom)*