



STATE OF ALASKA
Legislative Affairs Agency

A
REPORT TO THE
TWENTY-SECOND STATE LEGISLATURE

Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
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A REPORT TO THE
TWENTY-SECOND STATE LEGISLATURE

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and Opinions of the Attorney General
Construing Alaska Statutes

The report examines published cases construing Alaska Statutes
that were decided by the state courts between
October 1, 1999, and September 30, 2000,
and by the federal courts and reported in
175 F.3d to 212 F.3d 1384 and in 46 F. Supp.2d 1385 to 98 F. Supp.2d 1386

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 1999, and September 30, 2000

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INTRODUCTION

AS 24.20.065(a) requires that the Legislative Council annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

- (1) the courts and agencies are properly implementing legislative purposes;
- (2) there are court or agency expressions of dissatisfaction with state statutes;
- (3) the opinions or regulations indicate unclear or ambiguous statutes;
- (4) the courts have modified or revised the common law of the state.

Under AS 24.20.065(b) the Council is to make a comprehensive report of its findings and recommendations to the members of the Legislature at the start of each regular session.

This edition of the review by the attorneys of the Legislative Affairs Agency examines the opinions of the Alaska Supreme Court, the Alaska Court of Appeals, the United States Court of Appeals for the Ninth Circuit, and the United States District Court for the District of Alaska. As in the past, those cases where the court construes or interprets a section of the Alaska Statutes are analyzed. Those cases where no statute is construed or interpreted or where a statute is involved but it is applied without particular examination by the court are not reviewed. In addition, those major cases that have already received legislative scrutiny are not analyzed. However, cases that reject well-established common law principles or reverse previously established case law that might be of special interest to the legislature are analyzed. Because the purpose of the report is to advise members of the legislature on defects in existing law, we have generally not analyzed those cases where the law, though it may have been criticized, has been changed since the decision or opinion was published.

The formal and informal opinions of the Attorney General are also reviewed. As with court opinions, we have only analyzed those opinions where a provision of the Alaska Statutes is construed or interpreted, or which might otherwise be of special interest to the legislature.

The review of administrative regulations is the responsibility of the Administrative Regulation Review Committee under AS 24.20.460 and is not included within this review.

The review of court decisions was prepared by Terry Cramer and Mike Ford, Legislative Counsel. The review of the Opinions of the Attorney General was prepared by Terri Lauterbach, Legislative Counsel. Both reviews were undertaken under the general direction of Tamara Brandt Cook, Director of the Division of Legal and Research Services, Legislative Affairs Agency.

The Agency welcomes comments from members of the Legislature on ways in which this review may become of more assistance to members.

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AS 04.11.330(a)
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FAILURE TO OPERATE LICENSED PREMISES RESULTS IN LOSS OF LIQUOR LICENSE.

The Supreme Court of Alaska ruled that denial of renewal of a liquor license for failure to operate the premises was a valid exercise of the authority granted to the Alcoholic Beverage Control Board. Under 15 AAC 104.170, the board adopted a regulation requiring denial of a license renewal if the applicant was seeking a third or subsequent consecutive waiver from the statutory requirement that the applicant meet certain operating requirements. While acknowledging that the regulation was more restrictive than the statutory provision, the court found that the regulation was valid because it was reasonably related to the statutory objectives of AS 04.11.330.

Rollins v. State, 991 P.2d 621 (Alaska 1999)

Legislative review is not recommended.

AS 06.05.175

COURT INTERPRETS LAW REGARDING BANK RECORDS.

The United States District Court for the District of Alaska ruled that an Alaska statute establishing the confidentiality of records of bank depositors did not protect the bank records from disclosure required under a grand jury subpoena. Under AS 06.05.175, bank records are confidential except when disclosure is required by court order or by federal law. The court recognized that amendments adopted by the legislature in 1993 were intended to protect bank records from disclosure pursuant to a subpoena, but the court determined that the exception allowing disclosure when required by federal law in effect eliminated this confidentiality protection. The court also recognized that it was unclear under AS 06.05.175 whether the bank had a duty to notify customers of the disclosure.

In Re Grand Jury Subpoena, 41 F.Supp. 2d 1026 (D. Alaska 1999)

Legislative review is recommended to consider the issue of customer notification following disclosure of bank records pursuant to a subpoena.

AS 09.10.170

SUIT ON NOTE OF ONE DEBTOR WAS STAYED BY ANOTHER DEBTOR'S BANKRUPTCY PROCEEDING.

The Supreme Court of Alaska held that since the statute of limitations for filing a foreclosure suit on a deed of trust and the statute of limitations for filing suit on the underlying debt are the same, the statute of limitations for foreclosure of the deed of trust did not begin to run until after the last payment was made on the note. Since there was a stay under the

Bankruptcy Code that applied to a suit on the underlying debt, that stay also applied to the foreclosure action. Given that, after considering the bankruptcy stay, less than 6 years had run since the last payment on the underlying debt was made, the six-year statute of limitations had not yet run and the foreclosure action was timely filed.

Osbourne v. Buckman, 993 P.2d 409 (Alaska 1999)

Legislative review is not recommended.

AS 09.19.010

TECHNICALLY DEFICIENT FILING OF PETITION FOR POST-CONVICTION RELIEF SATISFIED STATUTE OF LIMITATIONS.

The Court of Appeals of Alaska ruled that a petition for post-conviction relief filed before the deadline but without the required filing fee was timely even though the application for exemption from the filing fee was submitted more than three weeks after the deadline. The court explained that the submission of the application for exemption cured the technical deficiency. The court noted that it was applying the long-standing rule that a pleading may satisfy a filing deadline even though it is technically deficient. The court pointed out that the state's suggested interpretation, that the deadline could not be considered satisfied until either filing fee was submitted or the court had ruled on a prisoner's petition for waiver of the fee, would lead to unfair results. Judicial delay in ruling on the waiver petition would penalize some prisoners without any fault on the part of the prisoner.

Mullin v. State, 996 P.2d 737 (Alaska App. 2000)

Legislative review is not recommended.

AS 09.50.250(3)

STATE IS NOT IMMUNE FROM SUIT FOR NEGLIGENT NONDISCLOSURE SINCE CLAIM DID NOT ALLEGE FINANCIAL OR COMMERCIAL MISREPRESENTATIONS.

The Supreme Court of Alaska ruled that the doctrine of sovereign immunity did not protect the state from suit for negligent nondisclosure where the claim did not allege financial or commercial misrepresentations. The case was brought by foster parents whose children were injured by a foster child. The foster parents alleged that the Division of Family and Youth Services knew or should have known of the threat to others posed by the foster child and that the division had a duty to inform them as foster parents before placing the foster child in

their home. The state argued that under the sovereign immunity statute, this suit was subject to dismissal because the claim arose out of misrepresentation. The court examined the interpretation of similar statutes by other courts and ruled that the statutory immunity from suit applies only to interferences with financial and commercial interests.

P.G. v. DFYS, 4 P.3d 326 (Alaska 2000)

Legislative review is recommended to consider whether the legislature agrees with the interpretation reached by the court.

AS 09.55.540
AS 09.55.550

CLAIM FOR FAILURE TO ADEQUATELY SUPERVISE PATIENT DIAGNOSED WITH SCHIZOPHRENIA PROPERLY RESOLVED UNDER ORDINARY NEGLIGENCE STANDARDS.

The Supreme Court of Alaska ruled that the claim of a hospital patient for damages resulting from the hospital's failure to prevent her from leaving the hospital grounds should not be decided under the medical malpractice standards but were properly resolved using ordinary negligence principles. The majority of the court noted that it was far from clear whether the case should be viewed as a medical malpractice action which, under Alaska statutes, would require either the submission of the claim to arbitration or the appointment of an expert advisory panel within 20 days after the answer to the complaint was filed. The majority noted that the superior court had recognized that the parties failed to treat the action as one for medical malpractice. In reaching its decision, the majority cited case law that supports a distinction between medical malpractice claims and claims based on a health care professional's ordinary negligence and ruled that the hospital's failure to prevent the patient from leaving the premises should be decided by the jury under standards of reasonable care. It was error for the trial court to require the plaintiff to present expert testimony regarding the hospital's alleged breach of its duty of care.

Justice Carpeneti, in dissent, relied on the broad statutory use of the term "medical malpractice" and the common definition of "malpractice" to support requiring the plaintiff to comply with the statutes governing medical malpractice claims, which would have required the presentation of expert testimony. He also argued that since the allegedly negligent act took place during the provision of professional medical services, the statute requires proof of the applicable standard of care and proof of a breach of that standard using expert testimony, which the plaintiff failed to provide.

D.P. v. Wrangell General Hospital, 5 P.3d 225 (Alaska 2000)

Legislative review is recommended to consider the arguments raised by the dissent.

AS 11.41.100(a)
AS 12.55.125(a)

MANDATORY SENTENCING PROVISIONS FOR FIRST DEGREE MURDER CREATE SEPARATE OFFENSE OF AGGRAVATED FIRST-DEGREE MURDER.

The Court of Appeals of Alaska ruled that the mandatory sentencing statute for first degree murder must be considered to create a separate offense of aggravated first-degree murder, that aggravated first degree murder must be separately charged, and that the aggravating factors must be proved to the jury beyond a reasonable doubt. The mandatory sentencing statute imposed the maximum sentence in the sentencing range for first degree murder -- 99 years in prison -- but also foreclosed the possibility of discretionary parole which otherwise would be available to convicted defendants. In reaching its decision the court noted that the legislature has authority to require an enhanced sentence for egregious forms of first-degree murder but that if the sentence exceeded the normal maximum penalty for the crime then the defendant was entitled to receive notice in the charging document, and the government should be required to prove the aggravating factors beyond a reasonable doubt to a jury.

Malloy v. State, 1 P.3d 1266 (Alaska App. 2000)

Legislative review is recommended.

AS 11.46.190(a)
AS 12.10.030

THEFT STATUTES CONSTRUED BY THE COURT.

The Court of Appeals of Alaska ruled that theft by receiving was not an offense that involves a continuing course of conduct. The court reviewed the legislative history of Alaska's theft statutes and AS 12.10.030, which provides that a criminal statute should not be construed as creating a continuing offense unless it plainly appears that this was the intent of the legislature. While noting that there were plausible arguments why the theft by receiving statute might be construed as a continuing offense, the court concluded that the legislature intended to describe the defendant's action at a particular point in time and not in the sense of an ongoing continuing possession.

Saathoff v. State, 991 P.2d 1280 (Alaska App. 1999)

Legislative review is not recommended.

AS 11.46.990(10)

AMENDING INDICTMENT AT TRIAL TO NAME A DIFFERENT VICTIM DOES NOT INVALIDATE CONVICTION FOR FORGERY.

The Court of Appeals of Alaska held that the crime of forgery is committed when a person, acting with intent to defraud any person, forges a written instrument or possesses or circulates a forged instrument. Accordingly, when a forgery or theft indictment is amended at trial to name a different victim, the amendment does not allege a different offense and the alteration of the indictment is not fatal to the proceeding. The court noted that there might be circumstances under which the identity of the victim was relevant (where, for example, the defendant claimed to have been authorized by the victim).

Hosier v. State, 1 P.3d 107 (Alaska App. 2000)

Legislative review is not recommended.

AS 11.61.200(a)

COURT CONSTRUES LAW REGARDING CONVICTION OF A FELONY.

The Court of Appeals of Alaska ruled that the phrase "convicted of a felony" required that the defendant be found guilty, but not that the defendant be sentenced. Under AS 11.61.200(a)(1) a felon is prohibited from possessing a concealable firearm. The court considered the precedent, policy and reasoning of other courts and concluded that "convicted" only required the defendant to be found guilty by a jury or other fact finder. The court also noted that there are offenses that require a defendant be both convicted and sentenced. The dissent argued that because the statute was ambiguous, the court should construe the law narrowly and require the defendant to be both found guilty and sentenced before being considered "convicted."

Brant v. State, 992 P.2d 590 (Alaska App. 1999)

Legislative review is recommended to consider the definition of "convicted" adopted by the court.

AS 11.76.110
AS 11.81.210

STATUTE MAKING INTERFERENCE WITH CONSTITUTIONAL RIGHTS A CRIME DOES NOT CREATE A PRIVATE CIVIL ACTION.

The Supreme Court of Alaska ruled that the fact that the legislature made interference with constitutional rights a crime (a class A misdemeanor)

does not demonstrate a legislative intent to create a purely private civil action for that crime. The court accordingly upheld the trial court's dismissal of the claim.

Belluomini v. Fred Meyer of Alaska, Inc., 993 P.2d 1009 (Alaska 1999)

Legislative review is not recommended.

AS 12.25.150(b)

ARRESTEE'S RIGHT TO "IMMEDIATE" COMMUNICATION ATTACHES WHEN ARRESTEE IS BROUGHT TO PLACE OF DETENTION.

The Alaska Court of Appeals ruled that an arrestee's statutory right to "immediate" communication with attorneys, relatives, and friends normally does not attach until the arrestee is brought to a place of detention such as a police station or a jail. The arrestee, relying on the statutory directive that a prisoner has the right to communicate with an attorney and a relative or friend immediately after being arrested, argued that he should have been offered the use of the arresting police officer's cellular phone. The court noted that the statute granting a right to immediate communication was enacted in 1957, before the development of mobile communications technology, that prior case law involved situations where the suspect had already been brought to a place of detention, and that until a police officer brings an arrestee to a place of detention, the situation remains volatile. The court considered adopting a case-by-case analysis but decided that a holding that required permitting arrestees to use police officers' cell phones in some instances would not provide those arrestees with a significant benefit and would lead to uncertainty and litigation. Instead, the court concluded that the legislative intent was better served by a clear event that triggered the right to make a phone call. The court cautioned police against using the ruling in this case as a means of delaying a defendant's right to make an immediate phone call.

Wardlow v. State, 2 P.3d 1238 (Alaska. App. 2000)

Legislative review is not recommended.

AS 12.30.020

FAILURE TO MEET CONDITIONS OF RELEASE CANNOT JUSTIFY FORFEITURE OF BAIL.

The Court of Appeals of Alaska refused to expand the law regarding forfeiture of bail. The trial court ordered bail forfeiture when the defendant failed to comply with the conditions of release. The appellate

court found that under AS 12.30.060, forfeiture of bail is allowed when the defendant fails to appear, but that there is no legislative history to support bail forfeiture for violating other conditions of release. The expansion of bail forfeiture to conditions other than the appearance of the defendant would be a major change in the law of bail and affect the readiness of sureties to pledge their money and property to secure a defendant's release.

Lonis v. State, 998 P.2d 441 (Alaska App. 2000)

Legislative review is not recommended.

AS 12.30.027(b)

COURT MAY NOT PERMIT A PERSON RELEASED ON BAIL FOR A CRIME INVOLVING DOMESTIC VIOLENCE TO RETURN TO LIVE WITH THE ALLEGED VICTIM.

The Court of Appeals of Alaska ruled that the statute governing release on bail for a crime involving domestic violence restricts the trial court from permitting the petitioner to reside with his alleged victim, even if the alleged victim testified that she wanted him to do so. The petitioner had argued that the restriction should be applied only to those victims who had secured a protective order. The court noted that the petitioner's interpretation would make part of the language of the statute redundant and declined to adopt that reading of the statute.

State v. Roberts, 999 P.2d 151 (Alaska App. 2000)

Legislative review is not recommended.

AS 12.35.040

CIVILIAN PARTICIPATION IN EXECUTION OF SEARCH WARRANT APPROVED BY THE COURT.

The Court of Appeals of Alaska ruled that a search warrant issued for the purpose of recording a telephone conversation was valid when executed by a civilian. The court pointed to the authority granted by AS 12.35.040 and AS 18.65.100 that allows the police to enlist the aid of civilians to enforce the criminal laws of the state, including obtaining legal evidence. The court did point out that some degree of participation or supervision by the police in executing the search is required, even when enlisting the aid of civilians. The required degree of participation or supervision varies depending on the circumstances.

Bohanan v. State, 992 P.2d 596 (Alaska App. 1999)

Legislative review is not recommended.

AS 12.45.045

ALASKA'S RAPE SHIELD LAW CONSTRUED BY THE COURT.

The Court of Appeals of Alaska ruled that under AS 12.45.045, Alaska's rape shield law, evidence of a victim's prior sexual conduct is admissible if the prior conduct is relevant. While evidence of prior sexual conduct is inadmissible when the relevance of the evidence rests on an inference of bad character, in this case the prior conduct involved the defendant. As evidence of the relationship between the defendant and the victim, the evidence was relevant and AS 12.45.045 does not require exclusion of the evidence.

Napoka v. State, 996 P.2d 106 (Alaska App. 2000)

Legislative review is not recommended.

AS 12.55.085(f)

SUSPENDED IMPOSITION OF SENTENCE CAN BE IMPOSED FOR CONSPIRACY CONVICTION.

The Court of Appeals of Alaska ruled that a suspended imposition of sentence can be imposed for a person convicted of conspiracy to commit first degree robbery. Under AS 12.55.085(f)(1), a suspended imposition of sentence cannot be imposed for a person convicted of first degree robbery. The court found that there was no legislative history indicating an intent to preclude a court from imposing a suspended imposition of sentence for the conspiracy offense. In light of this ambiguous legislative intent, the court determined that the statute must be construed against the government and in favor of leniency.

George v. State, 988 P.2d 1116 (Alaska App. 1999)

Unless the legislature wishes to consider the issue of suspended imposition of sentence for conspiracy to commit robbery, legislative review is not recommended.

AS 12.55.125
AS 12.55.145

PRESUMPTIVE SENTENCING LAW CONSTRUED BY THE COURT.

The Court of Appeals of Alaska held that two Oregon criminal offenses were prior felony convictions for purposes of presumptive sentencing under Alaska law. Under AS 12.55.145 a conviction in another jurisdiction is counted for purposes of presumptive sentencing if the offense has elements similar to those of a felony under Alaska law. The Court examined two Oregon offenses, first degree burglary and second

degree robbery, and concluded that both offenses had elements similar to felonies under Alaska law. Therefore the two Oregon offenses count as prior felony convictions for purposes of presumptive sentencing under AS 12.55.125. The court reversed a lower court ruling that the Oregon offenses were not prior convictions for purposes of presumptive sentencing.

State v. Delagarza, 8 P.3d 362 (Alaska App. 2000)

Legislative review is not recommended.

AS 12.55.175

COURT CONSTRUES JURISDICTION OF THREE-JUDGE PANEL.

The Court of Appeals of Alaska ruled that a three-judge panel exceeded its authority when it sentenced a defendant and the sentence was one that could be imposed by the trial judge. Under AS 12.55.175, the three-judge panel is required to remand the case to the sentencing court if the panel does not agree with the sentencing court's finding of manifest injustice. The Court held that when the three-judge panel imposes a sentence that can also be imposed by the lower court, implicitly there is no manifest injustice and the case must be remanded to the lower court for sentencing. The jurisdiction of the three-judge panel is appropriate when the sentence imposed by the three-judge panel requires a deviation from the normal constraints of the presumptive sentencing laws.

Morrison v. State, 7 P.3d 955 (Alaska App. 2000)

Legislative review is not recommended.

AS 15.25.060

CONSTITUTIONALITY OF BLANKET PRIMARY IN QUESTION.

After the United States Supreme Court decision striking down California's blanket primary, *California Democratic Party v. Jones*, the Alaska Attorney General issued a formal opinion advising the Lieutenant Governor that Alaska's blanket primary is also constitutionally suspect and that the manner of holding the August 2000 primary should be adjusted if a political party objected to the blanket primary approach, notwithstanding contrary provisions of AS 15.25.060. (A blanket primary permits a registered voter, regardless of political affiliation, to cast a vote on a single ballot for a candidate of any political party running for that office; the top vote-getter from each political party then advances

to the general election ballot.) Since the Republican Party of Alaska (RPA) objected to the state's blanket primary and no other party objected, voters were required to choose between two separate ballots during the August 2000 primary, one that listed all RPA candidates and one that listed all other candidates. However, AS 15.25.060 remains on the books. (2000 Op. Att'y Gen., No. 2, June 29, 2000)

Legislative review is recommended.

AS 16.05.258

"AREA OR COMMUNITY" AS USED IN SUBSISTENCE LAW MAY ENCOMPASS A GROUPING OF SEVERAL SUBDISTRICTS; BOARD OF FISHERIES HAS DISCRETION TO DECLINE TO MANAGE CHUM SALMON AS A SEPARATE "FISH STOCK."

The Supreme Court of Alaska ruled that under the state subsistence law, the Board of Fisheries had substantial discretion to determine the boundaries of an "area or community" within which the board proposed to regulate subsistence use. The court noted that the board's discretion is limited by the criteria set out in the statute and by the statutory purpose of providing a preference for subsistence uses. In the case before it, the court found that the board had acted within its discretion in drawing the boundaries as it had, noting that the board's decision was based on practical considerations and administrative expertise and reflected a reasoned choice. On the issue of whether to regulate chum salmon as a separate stock, the court stated that it gives the board's identification of fish stocks under the subsistence law considerable deference because the determination requires expertise and because the subsistence law defines "fish stocks" broadly, allowing the board to identify any category of fish "manageable as a unit" as a "stock." The court found that the board had grouped salmon stocks together because the board found that subsistence users customarily and traditionally take the species interchangeably. The court also noted that the board had informally considered a chum salmon component when looking at escapement counts.

Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999)

Legislative review is not recommended.

AS 16.05.831

COMMISSIONER OF FISH AND GAME HAS AUTHORITY TO ALLOW SALMON ROE STRIPPING.

The Supreme Court of Alaska ruled that the Commissioner of Fish and Game has the authority to promulgate an administrative regulation

allowing salmon roe stripping. The court examined AS 16.05.831, which prohibits the waste of salmon, and concluded that while the question was close, the roe stripping regulation was consistent with the statute. However the court noted that AS 16.05.831 was not clearly written and that there are at least two possible interpretations of permitted uses of salmon carcasses. The court also rejected arguments that the salmon roe regulation violated the common use clause in article VIII, section 3, of the Alaska Constitution, the market parity requirement under AS 16.10.450(b), and the Pacific Marine Fisheries Compact under AS 16.45.020.

O'Callaghan v. Rue, 996 P.2d 88 (Alaska 2000)

Given the court's difficulty in applying the prohibitions against waste of salmon, legislative review is recommended.

AS 21.06.220

FAILURE TO MEET STATUTORY DEADLINE DOES NOT PRECLUDE FURTHER AGENCY ACTION.

The Supreme Court of Alaska ruled that failure to meet a 30-day deadline for issuing an order following an administrative hearing did not preclude the agency from taking further administrative action. Under AS 21.-06.220(a), the director of the Division of Insurance is required to issue an order following an administrative hearing within 30 days after termination of the hearing. The Court rejected an argument that failure to meet the 30-day deadline precluded further administrative action. The Court also acknowledged that while timely adjudication is an important public concern, that it would be contrary to the public interest to remedy the agency's delay by prohibiting further agency action in the matter.

State v. Schnell, 8 P.3d 351 (Alaska 2000)

Legislative review is not recommended.

AS 21.42.110
AS 21.36.210
AS 21.36.220

INSURER MAY RESCIND COVERAGE FOR FRAUD OR MATERIAL MISREPRESENTATION.

The Supreme Court of Alaska ruled that the common law remedy of rescission for fraud or material misrepresentation is available to insurers as a method to deny coverage to an insured. The court recognized that under AS 21.36.210(f) and AS 21.36.220 fraud and misrepresentation are grounds for cancellation, a remedy that renders the policy void from the date of cancellation. However, the court also ruled that the legislature

intended to preserve the insurer's right to rescission, at least with respect to claims made by the insured and not by innocent third parties.

Bennett v. Hedglin, 995 P.2d 668 (Alaska 2000)

Legislative review is not recommended.

AS 22.30.011(a)
AS 22.30.080(2)

JUDICIAL CONDUCT COMMISSION RETAINS JURISDICTION OVER RETIRED JUDGES.

The Alaska Supreme Court ruled that the Alaska Commission on Judicial Conduct retained jurisdiction to consider allegations of misconduct over judges after they retire. The court based its conclusion on the plain language in the statutes, which extend jurisdiction to judges who are the subject of investigation. The court held that because the commission had begun its investigation within its six-year limitations period, the commission retained jurisdiction after the subject of the investigation retired. The court found that although the House Judiciary Committee of the legislature, in enacting the measure, had removed the words "retired judge" from the definition of "judge," the discussion surrounding that amendment made clear that the committee believed that a judge who was made the subject of an investigation while on active duty could not avoid the commission's jurisdiction by retiring even if a charge had not yet been filed as of that date.

In re Johnstone, 2 P.3d 1226 (Alaska 2000)

Legislative review is not recommended.

AS 23.20.315

DEPARTMENT HAD AUTHORITY TO MAKE LIABILITY DETERMINATION UNDER EMPLOYMENT SECURITY LAW FOR FUTURE QUARTERS.

The Supreme Court of Alaska ruled that the Department of Labor had authority to make a determination that an employer contracting company was a "liable employer" required to make contributions under the Alaska Employment Security Act (AS 23.20) even though the department had earlier determined that the employer was not liable and there was no new evidence concerning the employer's status. The court held that the Act permitted the department to prospectively change its initial determination and noted that there is a difference, under the chapter, between "determinations" and "redeterminations." A redetermination can be applied retrospectively to change an initial determination and must be based on evidence that was not considered in reaching the original

determination. In deciding that the department had authority to make a new, prospectively-applied determination, the court noted that generally in tax law, each period subject to contribution liability stands alone, to be determined and assessed separately.

The court also held that the contracting company was an employer for purposes of the Act because it received "services" from the lease-drivers and because the lease-drivers were not independent contractors under the statutory test. The court noted that "services" is not defined in the Act but that definitions used by the department and by other courts have common elements of work, labor, or effort expended for the benefit of another person or entity. The court found that the lease-drivers provided services to the employer under this definition and did not act as independent contractors. Therefore, the employer was liable for contributions under the Act.

Alaska Contracting & Consulting, Inc. v. Alaska Dep't of Labor, 8 P.3d 340 (Alaska 2000)

Legislative review is not recommended.

AS 23.20.379(a)

DISABLED WORKER COULD NOT BE DENIED UNEMPLOYMENT COMPENSATION BENEFITS FOR QUITTING WORK HE WAS PHYSICALLY ABLE TO PERFORM BUT WHICH WAS "UNSUITABLE".

The Supreme Court of Alaska ruled that the Department of Labor should not have disqualified a disabled worker from receiving benefits for the first six weeks of unemployment compensation benefits. The department found that the worker had voluntarily left suitable employment without good cause. The worker argued that although he was physically able to perform the work, his doctors had advised that the work was detrimental to his long-term health. The court noted that under the statute, a worker is permitted to quit work which he or she is physically able to perform without the six-week waiting period penalty if the work is "unsuitable." The court held that to find suitability, the department was required to consider not only physical fitness — whether the worker is capable of performing the work — but also any detriment that the work might cause to the worker's undisputed physical impairment. The court remanded the case so that the department could determine the worker's entitlement to benefits under this standard.

Westcott v. State, Dep't. of Labor, 996 P.2d 723 (Alaska 2000)

Legislative review is not recommended.

AS 23.30.015(g)

MEDICAL EXPENSES PAID BY COLLATERAL SOURCES DO OFFSET EMPLOYER WORKERS' COMPENSATION CREDIT.

The Supreme Court of Alaska ruled that when an employee's medical expenses are paid from collateral sources, that payment does require a reduction in an employer's credit against future medical expenses. Under AS 23.30.015(g), any employer credit against payment of medical expenses is required to be reduced by any "amount payable" by the employer. Therefore when an employer would be otherwise responsible for the employee's medical expenses, any employer credit is reduced when the employee or a collateral source pays the medical expenses. The court recognized that this interpretation is consistent with federal law and with the humanitarian purposes of the Workers' Compensation Act.

Berger v. Wien Air Alaska, 995 P.2d 240 (Alaska 2000)

Legislative review is not recommended.

AS 23.30.015(g)

BOTH PAST AND FUTURE WORKERS' COMPENSATION BENEFITS DETERMINE EMPLOYER'S SHARE OF ATTORNEY FEES AND COSTS.

The Supreme Court of Alaska ruled that in determining an employer's pro rata share of attorney fees and costs due on a recovery from a third party, both past and future workers' compensation benefits should be included. Under AS 23.30.015(g), an employer is entitled to reimbursement from a third party recovery for benefits paid to the employee. The reimbursement is reduced by the employer's pro rata share of the litigation costs and fees. The court held that because the employer is allowed to deduct future benefits from a recovery from a third party, the same rules should apply to the employees' recovery from a third party. Also, the court noted that the employer is entitled to a credit against future benefits payable, avoiding the possibility of an excess recovery by the employee.

Stone v. Fluid Air Components of Alaska, 990 P.2d 621 (Alaska 1999)

Legislative review is not recommended.

AS 23.30.150(g)

EMPLOYER MAY CLAIM REIMBURSEMENT FOR WORKERS' COMPENSATION BENEFITS FROM THIRD-PARTY SETTLEMENT.

The Supreme Court of Alaska ruled that an employer can claim

reimbursement for paid workers' compensation benefits from the proceeds generated in a third-party settlement, even when the proceeds are held by someone other than the employee. Under AS 23.30.015(g), an employer is entitled to reimbursement from the employee when the employee recovers an amount from a third-party. In this instance, the settlement proceeds were being held by the employee's attorneys who argued that under AS 23.30.015(g) the employer could only enforce a claim against the employee. The court rejected this argument and held that the employer had a valid claim and that the claim could be enforced as an equitable lien or under the constructive trust doctrine.

Alaska National Insurance Co. v. Jones, 993 P.2d 424 (Alaska 1999).

Legislative review is not recommended.

AS 23.30.155(f)

LOST CHECK DOES NOT EXCUSE FAILURE TO PAY WORKERS' COMPENSATION.

The Supreme Court of Alaska held that when a workers' compensation payment check is lost and the employer issues a second check, that the requirement of payment within 14 days under AS 23.30.155(f) still applies. The court rejected arguments that it was commercially reasonable to issue the second check more than 14 days after payment on the first check was halted. The court held that a penalty for late payment still applies regardless of the reason for the lack of timely payment.

American International Group v. Carriere, 2 P.3d 1222 (Alaska 2000)

Legislative review is not recommended.

AS 23.35.070
AS 23.35.150(3)

FISHERMAN DISABLED IN A TEST FISHERY IS NOT ELIGIBLE FOR FISHERMEN'S FUND BENEFITS.

In response to an inquiry from the Commissioner of Labor (now, Commissioner of Labor and Workforce Development), the Attorney General's office advised that a fisherman disabled during a test fishery is not eligible for benefits from the Fishermen's Fund based on the injury. While AS 23.35.070 provides that "a fisherman, upon becoming disabled, is entitled to receive benefits..." the applicable definition of "fisherman" in AS 23.35.150 limits benefits to persons engaged in commercial fishing. Since prior Alaska court decisions have held that test fishing is not commercial fishing, fishermen who are injured while they are test fishing are not entitled to the benefits of the Fishermen's Fund because they were test fishing, not commercial fishing, when they were injured.

(Inf. Op. Att'y Gen., February 17, 1999)

Legislative review is not recommended unless the legislature wishes to change the definition of "fisherman" in AS 23.35.150.

AS 25.24.150(c)

IN AWARDING CUSTODY, COURT NEED NOT MAKE EXPLICIT FINDINGS CONCERNING STATUTORY FACTORS FOR DETERMINING CHILD'S BEST INTERESTS.

A majority of the Supreme Court of Alaska ruled that a trial court's factual findings on custody are adequate if they give a clear indication of the factors which the trial court considered important in exercising its discretion or if they allow the appellate court to glean from the record what considerations were involved; the trial court need only discuss the factors it considered actually relevant to its decision. In dissent, two justices argued that the statute, when read together with a court rule, requires that the trial court's findings and conclusions be stated explicitly either in writing or in an oral minute order. The dissent pointed out that this would aid in the appellate review process.

Virgin v. Virgin, 990 P.2d 1040 (Alaska 1999)

Legislative review is recommended to consider the dissent's argument.

AS 25.24.160(a)

LONG-TERM ALIMONY PERMITTED WHEN "JUST AND NECESSARY."

The Supreme Court of Alaska held that the statute permitting a court to award a spouse alimony for an "indefinite period" was not violated when the court awarded a wife alimony until she remarried or began receiving payments from her husband's retirement accounts. The husband argued that prior interpretations of the statute limited the award of alimony to the period necessary for rehabilitation and reorientation. The court noted that the statute and prior case law expressly allow alimony of indefinite duration when it is "just and necessary."

Hammer v. Hammer, 991 P.2d 195 (Alaska 1999)

Legislative review is not recommended.

AS 25.27.045
AS 25.27.120(a)

CHILD SUPPORT ENFORCEMENT DIVISION HAS AUTHORITY TO SEEK MODIFICATION OF A CUSTODY AND SUPPORT ORDER.

A majority of the Supreme Court of Alaska ruled that the Child Support Enforcement Division (CSED) has statutory authority to seek to impose a support obligation on a parent who has legal custody of children but has permitted the other parent to assume physical custody of them when the other parent is receiving public assistance for the children. The decision required the court to consider whether, under AS 25.27.120(a), the state could seek reimbursement from the parent with legal custody for public assistance payments made to the parent with physical custody. The majority overturned language in a previous case, Henrron v. State, Dep't of Revenue, 957 P.2d 1350 (Alaska 1998), to hold that CSED had that authority. One judge, in dissent, noted that the majority opinion gives good policy reasons why CSED should have the power to seek modifications in these circumstances but argued that the statutory language was clear and only the legislature has the power to amend statutes.

State, Dep't of Revenue, CSED v. Leitch, 999 P.2d 782 (Alaska 2000).

Given the argument in the dissenting opinion, legislative review is recommended.

AS 25.27.170(b)

APPEAL OF CSED'S INFORMAL CONFERENCE DECISION PREVENTED DECISION FROM BECOMING FINAL.

The Supreme Court of Alaska ruled that a decision issued by the Child Support Enforcement Division (CSED) after an informal conference is a final decision only if no formal hearing is requested. The court reached its decision by considering the plain language of the statute and the legislative history.

State, Dep't of Revenue, CSED v. Button, 7 P.3d 74 (Alaska 2000)

Legislative review is not recommended.

AS 25.27.260

EMPLOYER'S LIABILITY FOR FAILURE TO COMPLY WITH AN ORDER TO TURN OVER PROPERTY AND WAGES AN EMPLOYEE OWED FOR PAST DUE CHILD SUPPORT IS TERMINATED BY THE EMPLOYEE'S PAYMENT OF THE PAST DUE CHILD SUPPORT.

In a per curiam decision, the Supreme Court of Alaska adopted the decision of the superior court holding that when an employee satisfies a past due child support obligation, the collection agency that is acting on

behalf of the state cannot collect on an Order to Withhold Income and Deliver Property (WID), issued pursuant to AS 25.27.250. Both the supreme court and the superior court noted that the language of the statute was ambiguous. The collection agency argued that AS 25.27.260 should be interpreted to impose a penalty on a non-complying employer, to better encourage employers to obey WID's. In the case before the court, the employer had been served with three WID's over the course of several years and had failed to respond to any of them. In a concurring opinion, two justices argued that the court should have decided the case on narrower grounds.

CSRS v. Inn at the Waterfront, Inc., 7 P.3d 63 (Alaska 2000)

Legislative review is recommended.

AS 28.15.291

MANDATORY SENTENCE OF COMMUNITY WORK SERVICE CANNOT BE CONVERTED INTO A FINE.

The Court of Appeals of Alaska ruled that a statute that requires community work service to be performed does not allow the community work service to be converted into a fine. Under AS 28.15.291, a person convicted of driving with a suspended driver's license must perform at least 80 hours of community work service. The trial court allowed the defendant to convert any uncompleted work service to a fine. The Court of Appeals ruled that this type of sentence violated AS 28.15.291 and is illegal. While the court recognized that other Alaska statutes allow courts to convert one form of punishment for another, in this instance it appeared the Legislature did not want the courts to have the power to replace community work service with fines.

State v. Fogg, 995 P.2d 675 (Alaska App. 2000)

Legislative review is not recommended.

AS 28.35.030(n)

PRESUMPTIVE SENTENCING HELD APPLICABLE TO FELONY DRIVING WHILE INTOXICATED.

The Court of Appeals of Alaska ruled that presumptive sentencing does apply to a defendant convicted of felony driving while intoxicated. The Court rejected an argument that because the Legislature enacted mandatory minimum sentences for felony driving while intoxicated under AS 28.35.030(n), the presumptive sentencing law did not apply. The Court found that the presumptive sentencing laws under AS 12.55.125 and the mandatory minimum sentences under AS 28.35.030(n) serve

different purposes. A presumptive term represents the Legislature's judgment as to the appropriate sentence for a typical felony offender, whereas a mandatory minimum sentence is the Legislature's judgment as to the minimum sentence appropriate for an offender whose conduct is the least serious contemplated by the definition of the offense.

Clark v. State, 8 P.3d 1149 (Alaska App. 2000)

Legislative review is not recommended.

AS 28.35.031

IMPLIED CONSENT LAW CONSTRUED BY THE COURT.

The Alaska Supreme Court refused to expand the implied consent law regarding testing the blood alcohol content of a person arrested for driving while intoxicated. Under AS 28.35.031 a person arrested for driving while intoxicated is deemed to have given consent for a blood test if the person is unconscious or is involved in an accident that causes death or serious physical injury. In this instance, the court refused to recognize a third exception, when the device used to test a person's breath is malfunctioning. The court recognized that the statute was clear and unambiguous and that the legislature chose to allow only two limited situations when a blood test could be imposed.

Sosa v. State, 4 P.3d 951 (Alaska 2000)

Unless the legislature desires to review the implied consent law, legislative review is not recommended.

AS 28.35.031(g)

PORTABLE BREATH TEST ADMINISTERED UNDER A SUSPICIONLESS SEARCH PROGRAM IS UNCONSTITUTIONAL.

A majority of the Court of Appeals of Alaska ruled that the statute that provides that persons who operate or drive a motor vehicle and who are involved in a motor vehicle accident causing death or serious physical injury to another person are deemed to have given consent to law enforcement officers to administer a breath test is unconstitutional. In reaching its decision, the court distinguished federal cases that upheld statutes or regulations that permit searches to be conducted without individualized suspicion. The state court noted that the United States Supreme Court justified the suspicionless searches at issue in those cases as serving special societal needs other than normal law enforcement. In contrast, the state court found that the statute before it did not meet the "special needs" test -- normal law enforcement needs would not be

jeopardized by requiring the government to have individualized suspicion before subjecting a person to a breath test.

In dissent one judge agreed that the breath test result was unconstitutionally secured but argued that suppression of the breath test evidence did not require reversal on one of the crimes for which the defendant had been convicted.

Blank v. State, 3 P.3d 359 (Alaska App. 2000)

Legislative review is not recommended.

AS 28.35.032(e)
AS 28.35.038

DRIVING WHILE INTOXICATED STATUTES CONSTRUED BY THE COURT.

The Court of Appeals of Alaska held that a motorist's refusal to perform field sobriety tests is admissible evidence in a prosecution for driving while intoxicated. The court rejected the argument that because evidence of a motorist's refusal to submit to a breath test is admissible under AS 28.35.032(e), that lack of a similar statute for field sobriety testing means the state cannot introduce this type of evidence. The court also held that under AS 28.35.038, municipalities may enact vehicle impoundment and vehicle forfeiture laws that are harsher than their state counterparts. These harsher penalties can include mandatory forfeiture of a vehicle involved the offenses of driving while intoxicated or refusal to take a breath test.

McCormick v. State, 999 P.2d 155 (Alaska App. 2000)

Legislative review is not recommended.

AS 28.40.060

BREATH TESTING STATUTE HELD CONSTITUTIONAL.

The Court of Appeals of Alaska held that a conviction for driving while intoxicated did not violate due process or equal protection guarantees of the Alaska Constitution when the conviction was based on a breath testing statute that allowed for a certain level of inaccuracy. Under AS 28.35.030, a person can be convicted of driving while intoxicated based on a chemical test of the person's breath. Under AS 28.35.060, the breath test results are not affected by the fact that the machine used to determine the breath test results has a margin of error. The Court examined the historical framework in which AS 28.35.060 was enacted and held that the legislature intended to approve a system in which the margin of error of the breath testing machine was irrelevant to the driver's

guilt under AS 28.35.030. The dissent argued that this process was an unconstitutional delegation of legislative authority.

Bushnell v. State, 5 P.3d 889 (Alaska App. 2000)

Legislative review is not recommended.

AS 29.45.670
AS 29.25.020(b)
AS 29.71.800(18)

REMOVAL OF AN EXEMPTION FROM A CITY SALES TAX ORDINANCE DOES NOT REQUIRE VOTER APPROVAL; ORDINANCE MUST BE PUBLISHED IN A NEWSPAPER OF GENERAL CIRCULATION, IF THERE IS ONE, BEFORE ADOPTION.

The Supreme Court of Alaska ruled that the removal of an exemption from an existing sales tax ordinance did not require voter approval. In reaching its decision, the court held that removal of an exemption was neither a new sales tax nor the increase in the rate of levy. Before the ordinance removing the exemption was adopted, the city had posted notice of the proposal in five public places but had not published notice in a newspaper of general circulation. The court held that under AS 29.25.020(b), publication of notice in a newspaper of general circulation is mandatory for the valid adoption of an ordinance and that failure to comply with the requirement invalidates the ordinance. Here, however, it was not clear whether there was a newspaper of general circulation. If there was not, then the alternative notice provisions (posting in at least three places) would apply and the city had satisfied that requirement. The court noted that deciding that the publication notice was mandatory could have significant consequences, since the practice of the city was to give notice only by posting notices and the validity of other ordinances would be called into question. The court considered the important role of the publication requirement in reaching its decision. The court remanded the case for determination of whether there was a newspaper of general circulation, as defined by the Municipal Code, in the city.

City of St. Mary's v. SMNC, 9 P.3d 1002 (Alaska 2000)

Legislative review is recommended.

AS 31.05.110(a), (b)
AS 31.05.110(i)

ALASKA OIL AND GAS CONSERVATION COMMISSION HAD JURISDICTION TO RETROACTIVELY GRANT COMPULSORY UNITIZATION ORDER.

The Supreme Court of Alaska ruled that the Alaska Oil and Gas Conservation Commission had jurisdiction to hear and decide a petition

for compulsory unitization that was filed at the end of a lease period even though the commission's decision would be issued after the expiration of the lease. The court held that under the statute, the commission had authority to grant the unitization order retroactive to the date of filing of the petition and so should have heard and decided the petition on its merits. The commission argued that because the order could not be issued before the expiration of the lease, it did not have jurisdiction to decide the matter.

Allen v. Alaska Oil & Gas Conservation Com'n, 1 P.3d 699 (Alaska 2000)

Legislative review is not recommended.

AS 38.05.035(e)

GRANT OF RIGHT-OF-WAY PERMIT IS A "DISPOSAL" OF AN "INTEREST IN LAND"; PERMIT IS NOT REVOCABLE FOR PURPOSES OF STATUTORY EXCEPTION.

The Supreme Court of Alaska ruled that the Department of Natural Resource's grant of a right-of-way permit for construction of an electric transmission line (the Northern Intertie) constituted disposal of an interest in land under the statute requiring that the department make a finding that the interests of the state will be best served by the granting of the permit. The department argued that the right-of-way permit was not an "interest in land," but the court held that given the constitutional mandate to protect the public interest in dispositions of state land, "interests in land" should be construed to include permits. The department also argued that the grant of a permit was not a disposal because of the permit's limited duration and because the permit did not convey an exclusive possessory interest. The court was not persuaded by either argument, noting that the statute specifically included the conveyance of leases, which also have a limited duration and which can convey a nonexclusive possessory interest, as interests in land.

The department also argued that the right-of-way permit was not subject to the written best interest finding because it was revocable by its own terms. The court, however, adopted a two-part test for determining functional revocability. Under the first part of the test, a permit is not deemed revocable if the revocation would result in the destruction of a licensee's sizable investments. The second part of the test examines whether the licensee could vacate the land without permanently damaging or destroying the property for governmental use. Applying this two-part test, the court concluded that the Northern Intertie failed the first part because the enormous expenditure of resources required for the intertie made the permit not functionally revocable and also failed the second part of the test because the project presents the likelihood of irreversible

ecological changes. The court therefore held that the permit was not functionally revocable and so was not exempted from the written best interest finding requirement.

Northern Alaska Environmental Center v. DNR, 2 P.3d 629 (Alaska 2000)

Legislative review is recommended to consider whether the test adopted for application of the exception in AS 38.05.035(e)(6)(C) is consistent with legislative intent.

AS 39.52.350

COMPLAINTS IN THE EXECUTIVE BRANCH ETHICS ACT.

A majority of the Supreme Court of Alaska ruled that the Attorney General can file an accusation under the Executive Branch Ethics Act without first serving a complaint on the accused employee. The employee argued that the accusation should be limited to the alleged violations specified in the complaint filed by the department for which he worked. The majority noted that the Attorney General must first find probable cause before serving the accusation and that the accusation process provides the employee with notice and an opportunity to respond. In dissent, two justices read the provisions of the Ethics Act and the legislative history to require that allegations be set out in a complaint before they may be brought in the public process of any formal proceedings. By not filing a complaint, the state deprived the employee of the opportunity to resolve the charges confidentially, which the dissent suggested violated his privacy rights.

The court also held that an employee who files a disclosure of possible conflicts of interest is not entitled to rely on his department's failure to respond as a finding that there is no conflict. The employee argued that he reasonably relied on the department's failure to respond. While agreeing that the department should have responded to his filing, the majority pointed out that the language of the statute is clear, requiring an employee to refrain from taking official action on the subject matter until a determination is made.

With regard to a charge that the employee made improper use of information not disseminated to the public, the court agreed with the state's position that "disseminated to the public" should be given a narrow interpretation. The court noted that a definition in regulation, which could not apply to the employee because the regulation was adopted after the actions giving rise to the charges, nonetheless was consistent with the Ethics Act's stated statutory purpose and the mandate that the Act be construed to "promote high standards of ethical conduct

in state government.” Under the regulation, public dissemination is limited to publication in the media, in a nonconfidential court filing, other published reports, and public speeches or testimony.

The court also ruled that the mere purchase of a business license could not be considered to be improper outside service under AS 39.52.170. The court explained that merely purchasing the license did not constitute “rendering services” or “accepting employment.”

Skvorc v. State, Personnel Bd., 996 P.2d 1192 (Alaska 2000)

Legislative review is recommended to consider the dissent’s arguments concerning complaints.

AS 41.35.020

COURT REFUSES TO RECOGNIZE STATUTORY PROPERTY RIGHT TO ARTIFACTS.

The Supreme Court of Alaska held that there is no statutory basis for a property interest in archaeological sites and artifacts below the mean high tide line. The court rejected the argument that AS 41.35.020 created a Native property right to archeological resources on state-owned lands. The court did acknowledge that the statute created certain limited cultural rights to study and display artifacts but that these rights did not include a property right sufficient to support a claim for damages to artifacts not actually possessed and controlled.

Chenega Corp. v. Exxon Corp., 991 P.2d 769 (Alaska 1999)

Legislative review is not recommended.

AS 44.09.015

STATE CAN PROSECUTE A PERSON WHO MANUFACTURES AND SELLS COINS THAT USE THE STATE SEAL WITHOUT PERMISSION.

The Court of Appeals of Alaska ruled that the state statute prohibiting the use of the official state seal for advertising or commercial purposes without the permission of the lieutenant governor proscribed commercial speech only and did not violate either the state or federal constitutional guarantees of free speech. The court noted that the state has a legitimate governmental interest in regulating the commercial use of the state seal.

State v. Robart, 988 P.2d 1114 (Alaska App. 1999)

Legislative review is not recommended.

AS 44.47.565

LOCAL BOUNDARY COMMISSION MEMBER MUST SATISFY RESIDENCY REQUIREMENT THROUGHOUT THE MEMBER'S TERM OF OFFICE.

In response to an inquiry from the Local Boundary Commission, the Attorney General's office advised that a member of the Local Boundary Commission appointed to serve based on residency in a particular judicial district may not continue to serve on the commission in that position after moving to another judicial district. The original qualification of being from a particular judicial district at the time of appointment, as required under AS 44.47.565, is a continuing qualification, not just a qualification to be met at the time of appointment. (Inf. Op. Att'y Gen., July 28, 1999)

Legislative review is not necessary.

AS 45.02.719

SELLER WHO ACTED IN BAD FAITH IN BREACHING WARRANTY CANNOT ENFORCE BAR IN WARRANTY TO CONSEQUENTIAL DAMAGES.

The Supreme Court of Alaska ruled that if a contractual warranty provision that creates a limited remedy fails, the exclusion of consequential damages under the warranty will survive as long as its survival is not unconscionable. The court noted that there is an ambiguity in the Uniform Commercial Code between the subsection that permits a buyer to pursue any available remedy under the commercial code when a limited remedy fails and the next subsection, which permits contracts to limit or exclude consequential damages as long as the limitation or exclusion is not unconscionable. The court decided to follow the example of the majority of courts in other jurisdictions that have addressed this dilemma and adopted a balancing approach, permitting the bar to consequential damages to survive as long as the bar itself is not unconscionable, either in the contract formation or because of the conduct of the breaching party. The court noted that a minority of jurisdictions hold that if a limited remedy fails, the restoration of the right to seek any remedy under the code supersedes the exclusion of consequential damages in all circumstances. In the case before it, the court noted that the trial court jury had found that the seller's conduct was unconscionable. The supreme court therefore remanded the case for consideration of the buyer's evidence on consequential damages.

Pierce v. Catalina Yachts, Inc., 2 P.3d 618 (Alaska 2000)

Legislative review is recommended to consider whether the decision is consistent with legislative intent.

AS 46.03.822
AS 46.03.824

DAMAGES RESULTING FROM OIL SPILL INCLUDE MUNICIPAL CLAIMS FOR DIVERTED SERVICES.

The Supreme Court of Alaska held that under AS 46.03.822, municipalities can recover the cost of diverted municipal services as a result of the Exxon Valdez oil spill. The court rejected the argument that under the common law free public services doctrine, municipal claims against individual wrongdoers for diverted services are barred. Assuming that the doctrine does apply in Alaska, the legislature under AS 46.03.822 expressed an intent to permit compensation for governmental services, including those services usually noncompensable under the free public services doctrine. The court also held that the compensable harms described under AS 46.03.822(a) did not exclude other claims for different spill-related harms or constrict the universe of future recovery for a claimant.

Kodiak Island Borough v. Exxon Corp., 991 P.2d. 757 (Alaska 1999)

Legislative review is not recommended.

AS 46.03.822

FUEL DISTRIBUTOR NOT STRICTLY LIABLE FOR DAMAGES RESULTING FROM OIL CONTAMINATION.

The Supreme Court of Alaska ruled that a commercial fuel supplier was not strictly liable for damages resulting from a leaking fuel tank. Under AS 46.03.822, a person who is an owner, an operator, or a person having control over a hazardous substance is strictly liable for unpermitted releases. The court ruled that a fuel supplier is not strictly liable under the statute for contamination occurring after sale and delivery of the fuel supplier's product. A fuel supplier is not the owner, operator, or person having control over the fuel once it has been delivered and therefore is not strictly liable under the provisions of AS 46.03.822.

Parks Highway Enterprises v. CEM Leasing, Inc., 995 P.2d 657 (Alaska 2000)

Legislative review is not recommended.

AS 47.10.013(a)(4)

TOKEN VISITATION BY PARENT AND FAILURE TO FOLLOW OTHER COMPONENTS OF CASE PLAN CONSTITUTES FAILURE TO PARTICIPATE IN REUNIFICATION PLAN.

The Supreme Court of Alaska ruled that the conduct of the parent of a minor child constituted failure to participate in a suitable reunification

plan and therefore justified a finding of abandonment of the child for purposes of terminating her parental rights. The parent, who had substance abuse problems, had failed to follow through with mental health and substance abuse aspects of the case plan that the Division of Family and Youth Services had put together for her shortly after the birth of the child. The court held that the parent's failure to even minimally participate in her case plan for over six months constituted failure to participate in a suitable plan designed to reunite her with her child and therefore satisfied the statutory standard for finding abandonment.

A.B. v. State, Dep't. of H. & S. Services, 7 P.3d 946 (Alaska 2000)

Legislative review is not recommended.

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