



STATE OF ALASKA
Legislative Affairs Agency

A
REPORT TO THE
TWENTY-FIFTH STATE LEGISLATURE

Listing Alaska Statutes with
Delayed Repeals or Delayed Amendments
and
Examining Court Decisions
and Opinions of the
Attorney General
Construing Alaska Statutes

Prepared by
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TWENTY-FIFTH STATE LEGISLATURE

Listing Alaska Statutes with Delayed Repeals
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and Opinions of the Attorney General
Construing Alaska Statutes

The report lists Alaska Statutes that will be amended or repealed
between March 1, 2008, and March 1, 2009, according to laws
enacted before the 2008 legislative session.

The report also examines published cases construing Alaska Statutes
that were decided by the courts and reported between
October 1, 2006, and September 30, 2007,

and

Opinions of the Attorney General
that were made available through Internet distribution between
October 1, 2006, and September 30, 2007.

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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 or the common law of the state;
- (3) the opinions, decisions, 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.

This report also includes a list of Alaska Statutes that, absent any action by the 2007 Legislature, will be repealed or amended before March 1, 2008, because of repealers or amendments enacted by previous legislatures with delayed effective dates.

The review of state court decisions was prepared by Jerry Luckhaupt and Jean Mischel, Legislative Counsel. Dennis Bailey, Legislative Counsel, reviewed federal court decisions and Opinions of the Attorney General, and Kathryn Kurtz, Assistant Revisor of Statutes, prepared the list of delayed repeals and amendments.

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**DELAYED REPEALS, ENACTMENTS
OR AMENDMENTS**
taking effect between March 1, 2008 and March 1, 2009
according to laws enacted before the 2008 legislative session

Laws enacted in 1996

Ch. 116, SLA 1996, am ch. 85, SLA 1998, ch. 86, SLA 2002, and ch. 86, SLA 2004 --
State Training and Employment Program

AS 23.15.620	repealed effective June 30, 2008
AS 23.15.625	repealed effective June 30, 2008
AS 23.15.630	repealed effective June 30, 2008
AS 23.15.635	repealed effective June 30, 2008
AS 23.15.640	repealed effective June 30, 2008
AS 23.15.645	repealed effective June 30, 2008
AS 23.15.651	repealed effective June 30, 2008
AS 23.15.660	repealed effective June 30, 2008

Laws enacted in 1998

Ch. 82, SLA 1998 -- Liability of Motor Fuel Dealers for Payment of Certain Motor Fuel
Taxes

AS 43.40.025	repealed effective July 1, 2008
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Laws enacted in 1999

Ch. 6, SLA 1999 -- Joint Armed Services Committee

AS 24.20.650	repealed effective January 1, 2009
AS 24.20.655	repealed effective January 1, 2009
AS 24.20.660	repealed effective January 1, 2009
AS 24.20.665	repealed effective January 1, 2009
AS 24.20.670	repealed effective January 1, 2009
AS 24.20.675	repealed effective January 1, 2009
AS 24.20.680	repealed effective January 1, 2009

Laws enacted in 2000

Ch. 43, SLA 2000 as amended by sec. 1, ch. 110, SLA 2003, and sec. 1, ch. 51, SLA
2005 -- Alaska Regional Economic Assistance Program

AS 44.33.895	repealed effective July 1, 2008
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Laws enacted in 2001

Ch. 63, SLA 2001, am ch. 28, SLA 2004 -- Operation of Alcoholic Beverage Delivery
Sites

AS 04.11.494	repealed effective July 1, 2008
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Laws enacted in 2002

Ch. 137, SLA 2002 -- Commercial Fisheries Limited Entry System

AS 16.43.010(a)	amended effective December 30, 2008
AS 16.43.100	repealed effective December 30, 2008
AS 16.43.450	repealed effective December 30, 2008
AS 16.43.460	repealed effective December 30, 2008
AS 16.43.470	repealed effective December 30, 2008
AS 16.43.480	repealed effective December 30, 2008
AS 16.43.490	repealed effective December 30, 2008
AS 16.43.500	repealed effective December 30, 2008
AS 16.43.510	repealed effective December 30, 2008
AS 16.43.520	repealed effective December 30, 2008
AS 16.43.960(a)	amended effective December 30, 2008
AS 16.43.970 various	amended effective December 30, 2008

Laws enacted in 2003

Ch. 35, SLA 2003 -- Revisor's Bill (amendments to take effect when AS 44.33.895 is repealed July 1, 2008, under sec. 2, ch. 43, SLA 2000, as amended by sec. 1, ch. 110, SLA 2003, and sec. 1, ch. 51, SLA 2005)

AS 09.65.170(c)(2)	amended effective July 1, 2008
AS 36.30.850(b)(30)	amended effective July 1, 2008

Ch. 126, SLA 2003 -- Teachers and Nurses Housing Loan Program

AS 18.56.109	repealed effective July 1, 2008
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Laws enacted in 2004

Ch. 33, SLA 2004 -- Coin Commission

uncodified law	repealed effective January 1, 2009
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Laws enacted in 2005

Ch. 91, SLA 2005 -- Regulations Affecting Small Businesses

AS 44.62.218	repealed effective January 1, 2009
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Laws enacted in 2007

Ch. 25, SLA 2007 -- Alcoholic Beverages

AS 04.11.150(g)	amended effective July 1, 2008
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Ch. 36, SLA 2007 -- Timeline Requirements for a Final Order of the Regulatory Commission of Alaska

AS 42.05.175(c)	amended effective July 1, 2008
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Ch. 37, SLA 2007 -- Powers and Duties of Regulatory Commission of Alaska

AS 24.20.271	amended effective January 1, 2009
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Ch. 43, SLA 2007 -- Task Force to Review the Council on Domestic Violence and Sexual Assault

uncodified law, secs. 1 and 2	repealed effective April 16, 2008
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Ch. 47, SLA 2007 -- Ethics

AS 15.13.040(m) amended effective January 1, 2009
AS 24.60.210(c) enacted effective January 1, 2009
AS 39.50.050(a) amended effective January 1, 2009

Ch. 50, SLA 2007 -- Mortgage Lending

AS 06.01.050(3) amended effective July 1, 2008
AS 06.60 enacted effective July 1, 2008
AS 09.38.015(e) enacted effective July 1, 2008
AS 09.38.065(a) amended effective July 1, 2008
AS 12.62.400(15) enacted effective July 1, 2008
AS 44.62.330(a) enacted effective July 1, 2008
AS 44.64.030(a)(5) amended effective July 1, 2008
AS 45.50.471(b)(52) enacted effective July 1, 2008
AS 45.50.481 enacted effective July 1, 2008

Ch. 55, SLA 2007 -- Uniform Money Services Act

AS 06.55 enacted effective July 1, 2008

Ch. 61, SLA 2007 -- Improper Sale of Tobacco Products

AS 18.74 enacted effective August 1, 2008

Ch. 66, SLA 2007 -- Prescription of Pharmaceutical Agents by Optometrists

AS 08.72.272(a) enacted effective January 1, 2009

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

INSURANCE POLICY THAT REFERS TO "DEPENDENT CHILDREN IN YOUR CARE" INCLUDES FOSTER CHILDREN.

The household exclusion in a homeowner's policy bars from coverage the claims of an "insured person" against the insured. The Falgousts argued that the term "insured person" does not include foster children. The Alaska Supreme Court held that "insured person" as defined in the policy includes "dependent children" in the care of the insured person and that this includes foster children.

Allstate Insurance Company v. Falgoust, 160 P.3d 134 (Alaska 2007)

Legislative review is not recommended unless the legislature wishes to exclude foster children from being considered as dependents and insured persons under homeowner insurance policies.

DISTRIBUTION OF CHURCH PROPERTY PROPERLY ANALYZED UNDER NEUTRAL, NOT DEFERENTIAL, STANDARDS.

A locally affiliated church of the United Methodist Church was discontinued as a Methodist church and a dispute over property ownership of the church and grounds arose. In selecting an approach to settle the property dispute, the Alaska Supreme Court sided with the neutral principle precedent in reviewing church ownership issues, analyzing church documents for an intent to create a trust for the benefit of the church as a whole and not for the local founders and parishioners. The court expressly rejected a deferential review under first amendment or other principles.

St. Paul Church et al. v. Board of Trustees, Alaska Missionary Conference of the United Methodist Church, 145 P.3d 541 (Alaska 2006)

Legislative review is not recommended.

INTER VIVOS TRANSFERS ARE PRESUMPTIVELY GIFTS IN ALASKA.

Susan Ware sued her brother Brandie Ware for control of the family homestead, alleging that Brandie had exerted undue influence on their mother and had convinced her to give him the homestead before she died. The superior court ruled that the transfer was a gift that was presumptively valid and that Susan did not sustain her burden to overcome the presumption. The Alaska Supreme Court noted that it had not previously ruled on this issue and affirmed the superior court finding that unexplained transfers of property from parent to child create a rebuttable presumption that the transfer was a gift. The court also noted that this was also the majority view among the jurisdictions that have ruled on this issue. Because the transfer was a gift, Susan had a high burden to meet to overturn the transfer and the court ruled that Susan had not met this burden.

Ware v. Ware, 161 P.3d 1188 (Alaska 2007)

Legislative review is not recommended unless the legislature desires to adopt the minority view or otherwise lower the burden upon those seeking to overturn inter vivos gifts from parent to child.

Art. II, sec. 14,
Art. XI, sec. 1,
Constitution of the
State of Alaska

REJECTION OF INITIATIVE BEFORE BEING VOTED ON IS PROPER IF THE INITIATIVE CONFLICTS WITH CONSTITUTION.

The lieutenant governor denied certification of an initiative before it was voted on and initiative supporters challenged the denial. Since the initiative called for a 2/3 vote to increase certain taxes and Art. II, sec. 14 of the Alaska Constitution authorizes the legislature to pass most laws by majority vote, the court upheld the denial of the certification. The court reasoned that Art. XI, sec. 1 of the Alaska Constitution does not allow an initiative to amend a constitutional provision and therefore may be rejected prior to a vote.

Alaskans for Efficient Government, Inc. v. State of Alaska, 153 P.3d 296 (Alaska 2007)

Legislative review is not recommended since the court is properly exercising its interpretive authority on a constitutional provision.

Art. VIII
Constitution of the
State of Alaska
AS 16.05.258(b)

**THE SUBSISTENCE HUNTING POINT SYSTEM AS
DEFINED IN REGULATION UNLAWFULLY
DISCRIMINATED AGAINST URBAN HUNTERS IN
CERTAIN RESPECTS.**

The Department of Fish and Game adopted a regulation assigning points to certain hunting criteria and game ratios to issue subsistence hunting permits. A Girdwood resident challenged the system on equal access and equal protection grounds and prevailed on the criteria that assigned points to all residents of certain communities based upon "access to alternative sources of game" but not on other criteria such as "cost of groceries" or gasoline. The court reasoned that the resident community of an applicant should not exclude a hunter from a subsistence hunt since the community's ratio may not be accurate and since the availability of alternative game will not necessarily remain stable.

State of Alaska, Department of Fish & Game v. Manning, 161 P.3d 1215 (Alaska 2007)

Legislative review is recommended to determine alternative methods, not precluded by this opinion, that would allow for accurate assessments of game availability and ratios for subsistence hunting permits.

Alaska R.Cr.P.
Rule 35.1

**DEFENDANTS SEEKING POST-CONVICTION
RELIEF MUST SUPPLY SUPPORTING AFFIDAVITS
OR EXPLAIN WHY THOSE AFFIDAVITS CAN NOT
BE OBTAINED.**

Allen was convicted of murder in the second degree. Allen sought post-conviction relief under Rule 35.1, Alaska Rules of Criminal Procedure, arguing that his attorneys had provided him ineffective assistance of counsel by failing to call two witnesses. The superior court dismissed the petition and Allen appealed to the Alaska Court of Appeals arguing that the court erred in dismissing his petition without a hearing. The court of appeals affirmed the dismissal stating that persons seeking post-conviction relief must support their petitions with affidavits - or explain why those affidavits can not be obtained - before they are entitled to a hearing.

Allen v. State, 153 P.3d 1019 (Alaska App. 2007)

Legislative review is not recommended.

42 U.S.C. 1983

A SOCIAL WORKER EMPLOYED BY THE STATE WAS NOT PRECLUDED FROM PRESENTING FURTHER EVIDENCE WHEN SUED IN HER PERSONAL CAPACITY FOR CIVIL RIGHTS VIOLATIONS.

A social worker testified in a child in need of aid (CINA) case. She was later sued by the parent and the child involved in that case, including claims brought under 42 U.S.C. sec. 1983, the federal civil rights statute, that the social worker had violated the plaintiffs' rights to due process. Through a motion of collateral estoppel, or issue preclusion, the plaintiffs tried to prevent the social worker from submitting additional evidence to supplement her earlier testimony, a motion that the trial court granted. The trial court order prevented the social worker from relitigating a number of factual findings made in the earlier CINA trial. On petition for review, the Alaska Supreme Court determined that, because the social worker was not in privity with the government in the prior lawsuit in which she testified as a government employee, additional testimony and evidence was not precluded in the suit brought against her personally.

State of Alaska v. Doherty, 167 P.3d 58 (Alaska 2007)

Legislative review is not recommended.

AS 01.10.030

AS 12.55

ALASKA'S PRESUMPTIVE SENTENCING LAW IS NOT FATALY FLAWED EVEN IF SOME PROCEDURES MUST BE MODIFIED TO COMPLY WITH UNITED STATES SUPREME COURT DECISIONS.

This is another in a long line of cases applying the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296 (2004). The *Blakely* decision required that certain aggravating factors (factors that increase the sentence that an offender might receive) must be proved to a jury beyond a reasonable doubt. Moreno was accused of sexual abuse of a minor in the first degree and argued that under *Blakely* Alaska's presumptive sentencing law as a whole must be struck down (this was prior to the rewrite of the law in 2005 -- the rewritten law now complies with *Blakely*). The trial court agreed and sought to sentence Moreno as if the law did not exist. The state sought review and the Alaska Court of

Appeals reversed the trial court finding that any shortcomings in the pre-2005 law could be corrected by requiring that certain aggravating factors be tried to a jury.

State v. Moreno, 151 P.3d 480 (Alaska App. 2006)

Legislative review is not recommended.

AS 05.15.150(a)
AS 22.20.040(a)

CHARITABLE GAMING PROCEEDS MAY BE USED FOR A FREE BICYCLE LOAN PROGRAM AND A COMPETING FOR PROFIT BUSINESS OWNER'S CORPORATION MAY NOT TRANSFER ITS CLAIMS TO THE INDIVIDUAL BUSINESS OWNER.

A business owner challenged the Department of Revenue's approval of a non-profit organization's free bicycle loan program, which was supported by gaming profits. Under a broad reading of gaming provisions, the bicycle loan program was an appropriate charitable purpose. The court held that the business owner's assignment of the claim to the business owner as an individual was inappropriate because the assignment was an attempt to circumvent requirements of AS 22.20.040(a)(2), regarding required corporate representation by an attorney.

Roberts v. State, Dept. of Revenue, 162 P.3d 1214 (Alaska 2007)

Legislative review is not recommended.

AS 08.18.071(a)(3)

CONTRACTOR'S FAILURE TO PAY WORKERS' COMPENSATION PREMIUM IS NOT GROUNDS FOR LICENSING ACTION FOR BREACH OF CONTRACT.

An insurance company filed a complaint for disciplinary action against a contractor's license for failure to pay workers' compensation premiums as a breach of contract under the licensing statutes. The court reviewed the context of the licensing standards and concluded that failure to pay insurance premiums was not covered under the licensing provisions as an activity related to contractor's work.

Alaska National Insurance Co. v. Northwest Cedar Structures, Inc. et al., 153 P.3d 336 (Alaska 2007)

Legislative review is recommended to determine consistency with competing legislative policies related to insurance and contracting.

AS 09.05.020
AS 09.05.040
AS 09.10.130

THE STATUTE OF LIMITATIONS IS NOT TOLLED WHEN A DEFENDANT IS OUTSIDE OF THE STATE BUT AMENABLE TO SERVICE.

The statute that extends the statute of limitations while a defendant is outside of the state does not apply when the defendant is available for service of process purposes. In this case, the defendant was outside of the state receiving medical treatment for several months. The plaintiffs sued after the expiration of the statute of limitations. The court had previously held that a person who moved out of state and was available for substitute service under another statute was not subject to the tolling provision. Since a third statute (the long arm statute) provided for substitute service even when a person was temporarily outside of the state, the statute of limitations could not be tolled.

Kuk v. Nalley, 166 P.3d 47 (Alaska 2007)

Legislative review is recommended to resolve the ambiguity presented by the applicable statutes for persons who are temporarily outside of the state.

AS 09.10.140(c)

STATUTE OF LIMITATIONS APPLIED TO CHILDREN WHO ARE INJURED BEFORE TURNING EIGHT YEARS OLD IS A DENIAL OF PROCEDURAL DUE PROCESS.

A child who was one month shy of turning eight years old was injured by a dog. Five years later, the parents sued the dog's owners. The statute of limitations applied to a child under the age of eight tolled the time for filing suit until the child turned eight years old, and, thereafter, provided two years in which to file suit. The statute of repose allows a ten year limit for all personal injury actions, including actions brought by minors. The court determined that the statute of limitations for minors injured before their eighth birthday foreclosed the minor's personal injury claim based on a parent or guardian's lack of diligence and concluded that it violates the minor's procedural due process right to access to the courts. The court found that

the public interest in reducing state claims and litigation costs did not outweigh the risk of erroneous deprivation of the private interest.

Sands v. Green, 156 P.3d 1130 (Alaska 2007)

Legislative review is not recommended since the court determines the constitutionality of state policy choices.

AS 09.17.010

VICTIM OF MULTIPLE CRIMINAL ACTS DURING A SINGLE CONTINUOUS EPISODE ENTITLED TO RECOVER UP TO THE CAP FOR NONECONOMIC DAMAGES FOR EACH CRIMINAL ACT.

C.J. was sexually assaulted by Carter who had recently been released from prison on mandatory parole. C.J. was subjected to three separate acts of sexual penetration during a single criminal episode. Carter was convicted of three counts of sexual assault in the first degree for the three acts of sexual penetration. Carter argued that he should only be subject to a single sentence because it was a single continuous episode. The state argued for separate sentences for each count and the court found in favor of the state and imposed three separate sentences. C.J. filed suit against the state for negligent supervision of Carter. Among the issues raised by C.J. was the claim that AS 09.17.010 permitted her to recover up to \$400,000 in noneconomic damages for each separate act of sexual penetration. The state argued that C.J. could only recover a total of \$400,000 for the entire criminal episode. The court ruled in favor of the state on this issue and C.J. appealed to the Alaska Supreme Court. The court reversed, finding that AS 09.17.010 places the \$400,000 cap on each incident and that C.J. had suffered three distinct incidents of sexual penetration, and that therefore a separate cap applies to each incident.

C.J. v. State, Department of Corrections, 151 P.3d 373 (Alaska 2006)

Legislative review is only recommended if the legislature wishes to define the term "incident" for purposes of the cap on noneconomic damages in a manner that is different than applied by the court in this case.

AS 09.17.080(d)

A PURE SEVERAL LIABILITY APPROACH REQUIRES TORT DAMAGES TO BE OFFSET ONLY BY THE SHARE OF DAMAGES OWED BY A DEFENDANT WHO SETTLED OUT OF COURT, NOT BY THE FULL AMOUNT OF THE SETTLEMENT.

A customer and gas station lessee were injured while filling a propane tank and both sued the propane supplier and distributor. The customer also filed suit against the lessee. Before trial, the supplier and distributor settled with the customer. After a jury found the lessee and distributor each approximately 50 percent liable for a total amount that exceeded the lessee's liability, the lessee claimed an offset credit for the full amount of the settlement so that the lessee would owe the customer nothing. Adopting a proportionate share rule, the court instead held that under a pure several liability approach to damages, the lessee could only claim an offset of the percentage that correlated to the lessee's liability, not the entire amount paid by the settling defendants.

Petrolane, Inc. v. Robles, 154 P.3d 1014 (Alaska 2007)

Legislative review is not recommended.

AS 09.30.070

ALASKA STATUTE SETTING PREJUDGMENT INTEREST RATE FOR ECONOMIC LOSS APPLIES TO ECONOMIC DAMAGES WHEN A STATE LAW CLAIM IS HEARD IN FEDERAL COURT.

In a federal case involving state law claims for damages resulting from an oil spill, the parties settled their claims with the exception of the rate of prejudgment interest to be paid. Under the Erie doctrine, when a federal court has jurisdiction to hear a state law claim, the court applies state law to substantive issues. Prejudgment interest is a substantive, rather than procedural, issue. Thus, absent federal preemption, state law applied to the issue of prejudgment interest. The court held that the Alaska prejudgment interest rate under AS 09.30.070 applied because Congress had not preempted state law claims for purely economic loss or for prejudgment on those claims, and Alaska had a strong interest in regulating oil pollution and in providing remedies for damages caused by oil spills.

Sea Hawk Seafoods v. Exxon Corp. (In re Exxon Valdez), 484 F.3d 1098 (9th Cir. 2007)

Legislative review is not recommended.

AS 11.46.130(a)(6)

ENHANCED PUNISHMENT PROPER FOR SECOND DEGREE THEFT WHEN DEFENDANT WAS SENTENCED FOR PRIOR CONVICTIONS WITHIN THE PREVIOUS FIVE-YEAR PERIOD.

Wooley stole a \$289 jigsaw from a hardware store. Due to the value of the jigsaw Wooley's crime would normally be third degree theft (less than \$500). AS 11.46.130(a)(6) provides that thefts like Wooley's are theft in the second degree if in the preceding five years the defendant has been convicted and sentenced for theft two or more times. Wooley was sentenced for two prior theft offenses within five years of his current offense. Wooley argued that his convictions for those offenses were actually over five years old - Wooley's sentencing took place several months after he was found guilty of the offenses - and, since he was not "convicted and sentenced" within the preceding five-year period, his crime should not be elevated to second degree theft. The superior court rejected Wooley's argument and the Alaska Court of Appeals agreed. The court found that the relevant date for applying the five-year period of AS 11.46.130(a)(6) was the date of sentencing and that there was no plausible reason for the legislature to require that both the date of the finding of guilt and the date of the sentencing to be within the five year period.

Wooley v. State, 157 P.3d 1064 (Alaska App. 2007)

Legislative review is not recommended unless the legislature wishes that both the finding of guilt and the sentencing be within the five year period of AS 11.46.130(a)(6).

AS 11.46.482

IN A PROSECUTION OF CRIMINAL MISCHIEF THE STATE BEARS THE BURDEN OF PROOF THAT THE DEFENDANT DAMAGED PROPERTY WITHOUT RIGHT OR WITHOUT ANY REASONABLE GROUND FOR BELIEVING THAT SUCH A RIGHT EXISTED.

McGee was charged with criminal mischief for breaking the windows of a vehicle. McGee claimed he did so to stop another person from assaulting him with the vehicle. At trial, McGee argued that he acted both by necessity and in self defense (both of which are defenses under Alaska law). The

superior court instructed the jury on necessity but not on self defense and found that McGee bore the burden of proof on this defense. McGee was convicted. McGee appealed to the Alaska Court of Appeals and that court affirmed his conviction. McGee then petitioned the Alaska Supreme Court for review and the court granted the petition and reversed McGee's conviction. The state argued that the use of the term "right" in the criminal mischief statute applied to property rights and not to other rights, including self defense. The court rejected the state's approach, finding that AS 11.46.482 requires the state to prove beyond a reasonable doubt the absence of self defense and necessity assuming that the defendant presents some evidence raising these defenses.

McGee v. State, 162 P.3d 1251 (Alaska 2007)

Legislative review is recommended to clarify if the legislature intended for the criminal mischief law to require the state to disprove various defenses a defendant might have in addition to whether the defendant has various property rights vis-a-vis the property that was damaged.

AS 11.56.757(a)

DEFENDANT VIOLATES CONDITIONS OF RELEASE PROHIBITING CONTACT WITH ANOTHER PERSON WHEN THE DEFENDANT ENGAGES IN INDIRECT CONDUCT THAT WOULD CONSTITUTE A COMMUNICATION TO THE OTHER PERSON.

Pastos was convicted of engaging in unlawful contact with his ex-girlfriend. At Pastos's sentencing, the victim had stated that she had wrote a check to Pastos over three years earlier that Pastos had not accepted so as to make her feel obligated to him. The victim kept the check in a lock box in her house and stated that it was still there the last time she looked. Pastos was ordered to report to jail the next morning and his release was conditioned that he have no direct or indirect contact with the victim. Pastos left the courtroom and cashed the check that the victim had referred to at sentencing - apparently the victim had not had custody of the check. The state argued that Pastos had engaged in indirect contact with the victim, in violation of his conditions of release, by cashing the check to show her that he still had power over her. The superior court agreed finding that Pastos's actions constituted a communication to the victim in violation of the order that he have no contact with her. Pastos appealed and the Alaska Court of Appeals agreed with the superior court finding that Pastos's actions constituted an

indirect contact with the victim in violation of the order that he have no contact with her.

Pastos v. State, 157 P.3d 1066 (Alaska App. 2007)

Legislative review is not recommended unless the legislature wishes to limit or otherwise explain what might constitute a contact in similar situations or applications.

AS 11.61.200
AS 18.65.705

CONVICTED FELON WHO HAS BEEN PARDONED IS NOT ELIGIBLE FOR A CONCEALED HANDGUN PERMIT ALTHOUGH THAT PERSON MAY POSSESS CONCEALED HANDGUNS UNDER CERTAIN CIRCUMSTANCES.

Gabrielle was convicted of two felonies in the 1980's and subsequently received a pardon from Governor Hickel in 1993. Gabrielle applied for a concealed handgun permit. AS 18.65.705 provides that to be eligible for a permit a person must be eligible to own or possess a handgun under the state law. The commissioner of public safety refused to issue the permit finding that, as a convicted felon, Gabrielle did not generally have a right to possess a concealed handgun under state law. Gabrielle appealed and the Alaska Supreme Court agreed with the commissioner of public safety. The court found that Gabrielle, as a pardoned felon, did have an affirmative defense under AS 11.61.200(g) to a charge of possessing a concealed handgun. That affirmative defense only applies when the defendant possesses the handgun at his home or on his own land or while engaged in lawful outdoor activities that necessarily involves the carrying of a weapon for protection. Issuing a concealed handgun permit to Gabrielle would not give him any right to possess a concealed handgun any place other than the places permitted under the affirmative defense under AS 11.61.200(g) and so would serve no lawful purpose. Accordingly, the court found that Gabrielle was not eligible to own or possess a handgun under the laws of the state and, because that eligibility is a necessary condition for issuance of a concealed handgun permit, he was ineligible for the permit to carry a concealed handgun.

Gabrielle v. State, 158 P.3d 813 (Alaska 2007)

Legislative review is not recommended unless the legislature wishes to expand the places and times where a pardoned felon may possess a concealed handgun.

AS 12.30.027(b)

CATEGORICALLY FORBIDDING A PERSON ON PRE-TRIAL RELEASE IN A DOMESTIC VIOLENCE CASE FROM RETURNING TO THE ALLEGED VICTIM'S RESIDENCE IS UNCONSTITUTIONAL.

AS 12.30.027(b) forbids a court from allowing a person alleged to have committed a domestic violence offense from returning to the home of the alleged victim. Williams was accused of fourth degree assault on his wife of more than 20 years and was granted a pre-trial release that barred him from contacting his wife or returning to the residence they shared. Several weeks after his release, Williams sought permission from the court to reestablish contact with his wife, who also sought the contact, and the court allowed the contact but still barred Williams from the residence. Several months later, the court granted Williams permission to care for the house and the family dog while his wife was out of town. Eight months after the incident, Williams sought permission to join his wife and daughter in the residence for Christmas and challenged the constitutionality of AS 12.30.027(b) as it interfered with his right to maintain his marital relationship and on other grounds. Williams's wife supported the motion. The court denied Williams's motion. Williams sought review in the Alaska Court of Appeals and the court found that the statute violates Alaska's guarantee of equal protection and is overly inclusive as it burdens persons who are not similarly situated. Significant to the court's decision was the statute's failure to allow for any judicial discretion to permit an alleged perpetrator to return to the home of the victim.

Williams v. State, 151 P.3d 460 (Alaska App. 2006)

Legislative review is recommended to apply AS 12.30.027(b) to pre-trial detainees in a manner that comports with the constitution by limiting inclusiveness of AS 12.30.027(b) and imposing a measure of judicial discretion.

AS 12.55.025(c)

PERSON ON ELECTRONIC MONITORING NOT ENTITLED TO CREDIT FOR TIME SERVED.

Matthew pleaded guilty to felony driving while under the influence. Matthew was sentenced but asked the court to delay his confinement so that he could work in Barrow. Matthew proposed that while he was in Barrow, he would be required to wear a bracelet and be subject to electronic monitoring of his

movements and alcohol consumption. The superior court agreed but warned Matthew that he would not receive credit for time served for the time he was subject to electronic monitoring. After completing his work in Barrow, Matthew filed a motion seeking credit for time served while on electronic monitoring. The superior court denied the motion and Matthew appealed. The Alaska Court of Appeals held that the electronic monitoring that Matthew was subject to did not approximate the conditions or restrictions experienced by a person who is incarcerated.

Matthew v. State, 152 P.3d 469 (Alaska App. 2007)

Legislative review is not recommended as the decision appears to correctly apply the statute and decisions interpreting the statute.

AS 12.55.045(g)

WHEN ASSESSING RESTITUTION, COURT DOES NOT HAVE TO CONSIDER THE DEFENDANT'S ABILITY TO PAY.

Hodges was convicted of second degree theft. The state asked that Hodges be required to make restitution to the victims in the full amount of their losses, \$86,814.50. Hodges argued that it was unconstitutional to set the amount of restitution without considering his ability to pay the restitution. The superior court found that AS 12.55.045 requires the court to assess restitution without considering the defendant's ability to pay. Accordingly the court set the amount of restitution as requested by the state and found that the court only has to consider the defendant's ability to pay when setting up a payment schedule and that this process comports with the Alaska Constitution. Hodges appealed and the Alaska Court of Appeals affirmed the superior court finding that this method of assessing restitution is proper and constitutional.

Hodges v. State, 158 P.3d 864 (Alaska App. 2007)

Legislative review is not recommended as the decision is consistent with the process outlined by the legislature in AS 12.55.045.

AS 12.55.080
AS 12.55.090
AS 33.05.040

COURT MAY NOT IMPOSE ADDITIONAL CONDITIONS OF PROBATION NOT IMPOSED AT SENTENCING THAT WOULD CONSTITUTE AN INCREASE IN PUNISHMENT OR, WITH REGARD TO OTHER CONDITIONS, WITHOUT GIVING THE DEFENDANT AN OPPORTUNITY TO BE HEARD CONCERNING THOSE CONDITIONS.

Marunich was convicted and sentenced for two robberies. He received a period of probation to begin after the completion of a prison term. A week after the sentencing the superior court issued its written judgments. The judgments contained a number of general conditions of probation not mentioned by the trial judge at sentencing. Marunich appealed arguing that these additional conditions of probation constituted an increase in his punishment in violation of constitutional principles of double jeopardy. The Alaska Court of Appeals found that Alaska, unlike other jurisdictions, does not generally impose by statute standard conditions of probation. The court found that some of the conditions imposed were either required by statute (see AS 12.55.100(d)) or merely implemented or were duplicative of conditions that were imposed at sentencing and there was no error in the court adding them. The court found that other conditions were proper for the Department of Corrections to impose in its supervision of a probationer but that the court needed to allow Marunich an opportunity to comment upon these conditions before their imposition. An additional provision was found to be an impermissible increase in punishment.

Marunich v. State, 151 P.3d 510 (Alaska App. 2006)

Legislative review is recommended to consider the need to establish a standard set of general conditions that would apply to all probationers to be supplemented by special conditions imposed by the court.

AS 12.55.155

A DEFENDANT'S FAILURE TO COMMENT UPON AN AGGRAVATING FACTOR DOES NOT RELIEVE THE STATE FROM PROVING THE AGGRAVATOR.

Douglas was convicted of several counts of sexual assault. At sentencing, the state argued the existence of several aggravating factors and the defendant made no comment on two of the aggravating factors. The superior court found several aggravating factors applied to Douglas's offenses and

increased Douglas's term of imprisonment beyond the presumptive term. Douglas appealed, arguing that the aggravating factors should have been found by the jury as required by *Blakely v. Washington*, 542 U.S. 296 (2004). The Alaska Court of Appeals held that *Blakely* is not violated if at least one of the aggravating factors found by the court is established by the jury's verdict, by the defendant's concession, or by the existence of the defendant's prior convictions. The court held that a defendant's silence or failure to comment on an aggravating factor is not a concession that would satisfy the requirements of *Blakely*.

Douglas v. State, 151 P.3d 495 (Alaska App. 2006)

Legislative review is not recommended.

AS 14.40.140
AS 14.40.150
AS 39.05.065(d)

**THE GOVERNOR MAY NOT REMOVE A
UNIVERSITY OF ALASKA REGENT WITHOUT
CAUSE.**

This attorney general's opinion addressed whether the governor has the power to remove a University of Alaska regent without cause. The opinion disagreed with earlier opinions by legislative counsel concluding that regents serve at the pleasure of the governor and may be removed at any time and by University of Alaska counsel that a regent may be removed only through impeachment by the legislature. Based on examination of the constitutional history of the university, the attorney general concluded that a regent may only be removed by the governor for cause following an appropriate hearing. The opinion suggested that it may be possible for the legislature to provide for removal of a regent through enactment of a statute consistent with the constitution that would preserve the University's politically independent constitutional status.

2007 Op. Att'y Gen. (February 2, 2007; File No. 663-06-0103)

Legislative review is recommended to clarify under what circumstance and by what method a regent may be removed from office.

AS 15.45.130

THE LIEUTENANT GOVERNOR PROPERLY APPROVED SIGNATURES CONTAINED IN PETITION BOOKLETS FOR A CRUISE SHIP INITIATIVE THAT CONTAINED TECHNICAL ERRORS RELATED TO VOTER REGISTRATION VERIFICATION AND THE NAME OF THE PAYOR OF THE PETITION CIRCULATOR.

The North West CruiseShip Association of Alaska and others requested a declaratory judgment that the lieutenant governor's office, division of elections, had improperly verified the signatures of an initiative imposing additional taxes on the cruise ship industry. The court held that although the division's method of auditing the signatures may have been somewhat imprecise in that a subscriber's voting registration status could only be verified as of the date the petitions were filed and the payor was indicated on some, but not all, of the pages of the petition, the audit was nevertheless reasonable given that there was no statutory requirement that each signature be dated at the time of the audit. Because the failure to provide a place of execution was a technical deficiency that did not impede the purpose of the certification requirement, the court concluded that the petition booklets should not be rejected on those grounds. The court also held that the division construed its own regulations in a manner that struck a careful balance between the people's right to enact legislation by initiative and the regulations requiring that potential petition subscribers be made aware that the circulators may have a motivation to induce them to sign the petition other than a personal belief in the value of the initiative.

North West CruiseShip Assn. of Alaska et al. v. State of Alaska, 145 P.3d 573 (Alaska 2006)

Legislative review is recommended to clarify whether substantial compliance with election laws is adequate for initiatives.

AS 21.36.460(d)(1)

INSURANCE COMPANY'S REQUEST TO "FREEZE" A POLICY HOLDER'S CREDIT INFORMATION AT POLICY ISSUANCE AND TO RELY UPON THAT FOR RENEWAL DECISIONS VIOLATED STATUTE PROHIBITING CREDIT SCORING FOR RENEWAL.

Current statutes prohibit the use by underwriters of credit scores in considering policy renewal decisions. Appellees

maintained that consideration of an insured's credit history at policy issuance allowed them to reconsider that same information for renewal purposes, without additional underwriting. The court disagreed, interpreting the policy renewal as an "underwriting decision" that could not involve considerations of credit histories.

State, Department of Commerce, Community, and Economic Development, Division of Insurance v. Progressive Casualty Insurance Company et al., 165 P.3d 624 (Alaska 2007)

Legislative review is not recommended since the court's statutory interpretation seems reasonable.

AS 21.89.020

WRITTEN WAIVER OF UNINSURED MOTORIST COVERAGE NOT REQUIRED WHEN COVERAGE IS LESS THAN THE LIABILITY COVERAGE.

An insured who was involved in an automobile accident made a claim against the underinsured/uninsured motorist (UIM) provision of her own policy. She discovered that the UIM coverage was half the amount of her liability coverage amount. She sought a declaration that the insurer provide UIM coverage equal to the amount of liability coverage. The court reviewed the statutory language and concluded that the statute requires insurance companies to obtain written waivers only if the UIM coverage is less than the statutory minimum, not when it is less than the options required to be offered by an insurance company, including offering the mirror image of liability coverage.

Ayres v. United Services Automobile Assn., 160 P.3d 128 (Alaska 2007)

Legislative review is not recommended since the judicial interpretation of UIM coverage appears to be consistent with legislative policy.

AS 23.20.070

PERSON MAY BE PROSECUTED AND STATEMENT USED AGAINST THE PERSON IF PERSON DOES NOT ASSERT PRIVILEGE AGAINST SELF-INCRIMINATION AT A HEARING CONCERNING UNEMPLOYMENT BENEFITS.

Rivers was suspected of fraudulently obtaining unemployment benefits. An investigator set up an interview with Rivers. Rivers made incriminating statements at the interview and was subsequently indicted for theft by deception. Rivers moved to suppress his incriminating statements arguing that AS 23.20.070 requires a claimant for unemployment benefits to submit to interviews and hearings in connection with the claim for benefits. The trial court agreed and suppressed Rivers's statements. The state sought review of this ruling and the Alaska Court of Appeals reversed the trial court and found that suppression of the statements was not warranted. The Court of Appeals found that AS 23.20.070 does not excuse a person from attending and testifying at an interview on the ground that the person might give testimonial evidence that would be self-incriminating. It requires the person to assert the person's privilege against self-incrimination; if the person asserts the privilege against self-incrimination, then the person may not be prosecuted for statements that are then compelled. The court also found that under AS 23.20.070, Rivers needed to assert his privilege against self-incrimination at the time of the interview. Rivers did not; therefore, the trial court's suppression of the statements he made to the investigator was improper.

State v. Rivers, 146 P.3d 999 (Alaska App. 2006)

The court's interpretation of AS 23.30.070 appears reasonable and in accord with the intent of the legislature. Legislative review is not recommended.

AS 23.30.007

CREATION OF THE WORKERS' COMPENSATION APPEALS COMMISSION IN THE EXECUTIVE BRANCH DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES.

The plaintiffs filed a declaratory action to determine whether the newly formed Workers' Compensation Appeals Commission appointed by the governor violated separation of powers principles. The commission is statutorily authorized to conduct hearings and to determine questions of law and fact.

The commission's decisions are not subject to superior court review as is typical for administrative hearings bodies. The court concluded that the legislature may constitutionally delegate some adjudicative power to an executive agency, but not all judicial powers. Concerned about the delegation's removal of superior court review and the potential precedential effect of administrative decisions, the court upheld the delegation but only by narrowing those delegated functions. The court ordered that while it could conduct direct reviews of the Appeals Commission decisions in its appellate capacity, those reviews may be de novo without regard to the findings of the commission.

Alaska Public Interest Research Group v. State of Alaska et al., 167 P.3d 27 (Alaska 2007)

Legislative review is not recommended.

AS 23.30.095(e)

AN EMPLOYEE MAY NOT BE DENIED WORKERS' COMPENSATION BENEFITS FOR REFUSING TO TRAVEL OUT OF STATE FOR AN INDEPENDENT MEDICAL EXAMINATION.

An employee was injured in a fall at work and subsequently moved out of state, accepting benefits for the injury and claiming additional injury. The Workers' Compensation Board denied compensation for the additional injury, in part, on the basis of the employee's refusal to travel several hundred miles from her home state to receive an independent medical examination (IME). Since the statute only addresses a "reasonable time" for conducting an IME, the court interpreted the law to require consideration of employee convenience, particularly when IMEs are available at other, closer locations.

Thoeni v. Consumer Electric Services, et al., 151 P.3d 1249 (Alaska 2007) (rehearing denied)

Legislative review is recommended since current law fails to specify location and convenience of independent medical examinations for workers' compensation benefits.

AS 24.10.130

LEGISLATIVE EMPLOYEES ARE NOT ENTITLED TO PER DIEM FOR TIME SPENT IN JUNEAU.

Benavides works as a legislative aide to a member of the Alaska Legislature. Benavides lives in Anchorage but is required to spend the legislative session in Juneau. Benavides is not entitled to per diem during his time in Juneau even though legislators are entitled to per diem under a policy adopted by the Alaska Legislative Council. Benavides filed a claim for session per diem with the Department of Administration arguing that AS 24.10.130 entitles him to per diem. The department found against Benavides, who appealed to the superior court which affirmed the department's decision, and again appealed to the Alaska Supreme Court. The court affirmed the department's decision, finding that AS 24.10.130 does not entitle legislative staff to the same per diem that legislators receive, nor does it require that legislative staff receive per diem for time spent in Juneau during the legislative session.

Benavides v. State, 151 P.3d 332 (Alaska 2006)

The decision appears to be in accord with longstanding legislative practice. Legislative review is not recommended unless the legislature wishes to require the payment of per diem to legislative staff during the legislative session.

AS 24.60.030(e)(3)

A LEGAL DUTY REQUIRING A LEGISLATOR TO DISCLOSE TO THE ALASKA LEGISLATURE EMPLOYMENT NEGOTIATIONS WILL NOT BE IMPLIED IN THE ABSENCE OF AN EXPRESS DUTY.

The issue presented to the court was whether evidence concerning a legislator's duty to disclose employment negotiation would be admissible in a corruption trial. The court concluded that it would be inappropriate to imply a duty to disclose matters within the ambit of AS 24.60.030(e)(3) in the absence of an express duty. Therefore, the associated evidence was inadmissible.

United States v. Kott and Weyhrauch, 2007 U.S. Dist. LEXIS 66125 (D. Alaska 2007)

Legislative review is recommended if the legislature wants to make explicit the legislator's affirmative duty to disclose employment negotiations.

AS 28.22.101
AS 28.20.440(b)(2)
AS 28.20.440(l)

AN AUTOMOBILE INSURER MAY DENY COVERAGE FOR THE TORT OF NEGLIGENT ENTRUSTMENT OF A VEHICLE IF THE INSURANCE POLICY EXCLUDED A NAMED DRIVER.

Parents of a 21-year old son purchased an automobile insurance policy that specifically excluded the son from coverage. The son drove his parent's vehicle and hit a pedestrian who sued for negligent entrustment under the policy. The superior court correctly determined as a matter of law that the named driver exclusion in the insureds' insurance policy operated to exclude the victim's claim for negligent entrustment. The excluded activity, the son's operation of the vehicle, was an indispensable element of a claim of negligent entrustment. The court held that, in light of the countervailing legislative policies at issue, the legislature's concern with enabling households to secure affordable insurance, and the plain language of AS 28.20.440(l), the named driver exclusion was a permissible exception to Alaska's minimum liability coverage provisions. Finally, the named driver exclusion in the insurer's form did not exceed the scope of AS 28.20.440(l), as the listed warning was in compliance with the division of insurance regulations intended to make policyholders aware of the law. The division had reviewed and approved the insurer's form and in doing so, must have contemplated the potential risks. Thus, AS 28.20.440(l) and the form provided a narrow exception to the minimum liability coverage otherwise required by Alaska Statutes.

Nelson et al. v. Progressive Casualty Insurance Co. et al., 162 P. 3d 1228 (Alaska 2007) (rehearing denied)

Legislative review is recommended to determine whether the policy and interpretation of overlapping insurance laws of negligent entrustment and named driver exclusion were applied correctly.

AS 28.35.030

LEGISLATURE COULD PROPERLY RESTRICT THE AVAILABILITY OF "BIG GULP" DEFENSE IN PROSECUTIONS FOR DRUNK DRIVING AND ALSO HINGE A FINDING OF GUILT ON THE RESULTS OF A CHEMICAL TEST ADMINISTERED WITHIN FOUR HOURS OF DRIVING.

In 2004, the legislature amended the drunk driving law to allow for a conviction for drunk driving based solely upon the

results of a chemical test given within four hours of the person driving - and not requiring a jury finding that the person was actually impaired when driving - and by restricting evidence that the defendant might not have been impaired because of how the person consumed the alcohol, for example by "big gulps" shortly before driving (see AS 28.35.030(s)). Valentine was convicted of drunk driving under the amended law and challenged his conviction on several grounds. The Alaska Court of Appeals affirmed Valentine's conviction finding that the amended law was not vague or overbroad, did not impose criminal liability without a culpable mental state, did not deny Valentine due process or equal protection, and did not infringe upon the rule-making powers of the Alaska Supreme Court.

Valentine v. State, 155 P.3d 331 (Alaska App. 2007)

Legislative review is not recommended as the court appears to have correctly applied the changes made by the legislature.

AS 33.20.021
22 AAC 05.400

**ALASKA PRISONER SERVING SENTENCE IN
ARIZONA MAY SUE ARIZONA PRISON
CONTRACTOR.**

Rathke is an Alaska inmate held in Arizona under a contract between the Corrections Corporation of America (CCA) and the Alaska Department of Corrections. Rathke failed a drug test of his urine and was immediately placed in administrative segregation. Rathke argued that he had never previously failed a drug test and contested the results and requested a retest. CCA failed to conduct a retest, Rathke's hearing advocate failed to show up for his administrative hearing, and Rathke was found to have committed an infraction under Alaska Administrative Code, 22 AAC 05.400(c)(7). Rathke continued to contest the drug test results, and CCA found that they had used the wrong standard for the drug test; the sample was retested and Rathke passed the test. A CCA officer recommended that all records relating to Rathke's infraction should be removed from his records but CCA did not act on this recommendation. Rathke then sued CCA arguing that he was a third-party beneficiary of the contract between the CCA and the department and should be entitled to sue CCA for breach of contract. The superior court ruled against Rathke and the Alaska Supreme Court reversed. The court found that Alaska prisoners held in Arizona are entitled to the protections contained in the Cleary FSA, a settlement agreement, that concluded litigation between the department and inmates and

which is an enforceable contract between the department and inmates. The court further found that inmates are intended third-party beneficiaries of those portions of the contract between CCA and the department that incorporate the Cleary provisions.

Rathke v. Corrections Corporation of America, 153 P.3d 303 (Alaska 2007)

Legislative review is not recommended unless the legislature wishes to alter the common law regarding third-party beneficiaries of contracts.

AS 33.30.011
AS 33.30.071

COMMISSIONER OF CORRECTIONS IS ONLY RESPONSIBLE FOR PRISONERS ONCE THEY HAVE BEEN ACCEPTED OR ADMITTED INTO A CORRECTIONAL FACILITY.

The City of Kotzebue operated the Kotzebue Regional Jail under a contract with the state. Kotzebue felt that it was not being paid enough to operate the jail and decided to shut down the jail on July 1 and let the contract expire. Kotzebue asserted that the state had a duty to receive all prisoners arrested by Kotzebue police officers. The state asserted that it had no such duty and that Kotzebue would have to deliver the prisoners that the city arrested to the nearest state facility in Nome. The commissioner of corrections asserted that he had no duty with regard to those prisoners until the prisoners were admitted into a correctional facility designated by the commissioner for the care and custody of prisoners. Kotzebue reopened the jail shortly after it closed. The city asserted that the state was required to pay for all prisoners held at the jail even after the expiration of the contract. The state asserted that the Kotzebue Jail had ceased to be a designated correctional facility and the state had no duty and responsibility toward the jail and the prisoners in it until those prisoners were delivered to a designated correctional facility. The superior court generally ruled in favor of the state with regard to the housing issues although the court found that the Department of Public Safety was responsible for transporting prisoners to court for arraignment. Kotzebue appealed. The Alaska Supreme Court found that the state had no financial liability to the jail after the date the state notified Kotzebue that the jail was no longer a correctional facility authorized by the commissioner of corrections for the care and custody of prisoners. The court found that this notification did not occur

until July 18 and Kotzebue was entitled to payment for housing prisoners until that date.

Kotzebue v. State, 166 P.3d 37 (Alaska 2007)

Legislative review is not recommended as the decision seems in accord with the statutes and the intent of the legislature.

AS 36.30.585(b)

INTEGRITY OF PROCUREMENT SYSTEM DOES NOT OUTWEIGH OTHER FACTORS WHEN CONSIDERING A REMEDY FOR MISCONDUCT DURING THE PROCUREMENT PROCESS.

Two losing bidders filed successful protests to a Fairbanks office lease awarded by the Department of Administration. To remedy the bidding irregularities found by the hearing officer, bid preparation costs were ordered to be paid to the bidders. The original bid award was confirmed after consideration of several statutory factors. On appeal, the Supreme Court declined to require that greater emphasis be placed on the integrity of the procurement system to invalidate the bid award, despite findings of misconduct in the process. Instead, the court held that the hearing officer appropriately exercised his discretion by evaluating the cost to the state among other considerations and declining to emphasize system integrity in selecting the remedy.

State, Department of Administration v. Bachner Company, Inc. and Bowers Investment Company, 167 P.3d 58 (Alaska 2007)

Legislative review is not recommended since the statute does not place a higher priority on any one factor to be considered when selecting the remedy for bidding violations.

AS 39.35.480(a)
AS 14.25.142

PROVIDING COST OF LIVING ALLOWANCE ONLY TO PERS AND TRS RECIPIENTS LIVING IN ALASKA IS NOT UNCONSTITUTIONAL.

The Public Employees' Retirement System (PERS) and Teachers' Retirement System (TRS) provide a statutory cost of living allowance (COLA) for retirees who continue to live in Alaska. Gallant receives a PERS retirement benefit but lives in Hawaii and so does not receive COLA. Gallant and others sued claiming that the COLA restriction violated the right to

travel and equal protection under the federal and Alaska Constitutions and on other grounds. The superior court agreed with Gallant and the Alaska Supreme Court reversed. The court held that the legislature could legitimately choose to encourage retirees to continue to live in Alaska by providing them COLA and that this decision does not violate either the federal or Alaska Constitutions.

Public Employees' Retirement System v. Gallant, 153 P.3d 346 (Alaska 2007)

This decision comports with the respective statutes and legislative review is not recommended.

AS 41.17.118
AS 41.17.119
AS 41.17.900(b)
AS 46.39
AS 46.40

FEDERAL TIMBER SALES MUST COMPLY WITH THE ALASKA FOREST RESOURCES AND PRACTICES ACT TO BE CONSISTENT WITH THE ALASKA COASTAL MANAGEMENT PROGRAM.

The Alaska Department of Natural Resources requested an opinion from the attorney general regarding which state timber harvest policies are applicable to timber sales in the Tongass National Forest under the Alaska Coastal Management Program. The opinion concluded that federal timber sales must comply with the resource protection provisions of the Alaska Forest Resources and Practices Act (AS 41.17) and the regulations adopted under that chapter in order to be consistent with the Alaska Coastal Management Program. [Note: the Alaska Coastal Management Program is scheduled for repeal (sec. 18, ch. 31, SLA 2005) effective July 1, 2011 (sec. 22, ch. 31, SLA 2005).]

2006 Op. Att'y Gen. (November 17, 2006; File No. 661-03-0536)

Legislative review is not recommended.

AS 42.05.371

AN EXCULPATORY CLAUSE CONTAINED IN A TARIFF FOR PHONE SERVICE DIRECTORY PUBLICATION IS CONSTRUED LIKE A CONTRACTUAL LIMIT OF LIABILITY IN THAT IT IS TO BE STRICTLY CONSTRUED AGAINST THE UTILITY COMPANY AND IN FAVOR OF THE CUSTOMER.

Defendant-appellee, a telephone directory publisher under contract to a telephone company services provider, attempted to rely upon an exculpatory provision in a tariff that limited the phone company's liability for errors in telephone directory printing to the cost of the listing in error. The court ruled that the provision was ambiguous as to whether it applied to the contractor and as to the limitation of negligence actions. The court applied contract interpretation standards to the provision since the same policies disfavoring exculpatory provisions in contracts also applied to tariffs. The court concluded that the provision in the tariff did not work to limit the contractor's liability for negligence.

Uncle Joe's Inc., v. L. M. Berry and Co., 156 P.3d 1113 (Alaska 2007)

Legislative review is recommended since laws applicable to utility tariffs leave open the question of limiting liability.

AS 43.05.010(14)

ALASKA MAY TAX A CORPORATION THAT HAS CONTINUED TO DO BUSINESS IN ALASKA AFTER IT WAS DISSOLVED IN ITS STATE OF DOMICILE.

Northwest Medical Imaging (Northwest) was incorporated in Washington in 1988. Dr. James Pister was the sole director and shareholder of the corporation. Washington dissolved the corporation in 1990 for failure to pay its license fee and to meet other requirements. Despite the dissolution, Northwest continued to act as a corporation and do business in Alaska. The Department of Revenue sought to collect corporate income taxes from Northwest for business conducted between 1991 and 1995. Northwest argued that since the corporation was dissolved in 1990, Alaska could not impose taxes after that date. The Office of Tax Appeals agreed with Northwest, the state appealed, and the superior court found that Northwest owed the back taxes. Northwest appealed to the Alaska Supreme Court and the court affirmed the superior court decision. The court found that although Northwest had been

administratively dissolved, it continued to exist for tax purposes and that Alaska properly could continue to impose taxes on Northwest where Northwest continued to do business in Alaska.

Northwest Medical Imaging v. State, Department of Revenue, 151 P.3d 434 (Alaska 2006)

Legislative review is not recommended.

AS 43.23.005(a)(3)
AS 43.23.008(a)(3)

ACTIVE DUTY MILITARY ABSENCE EXEMPTION TO RESIDENCY REQUIREMENT FOR PERMANENT FUND DIVIDEND PAYMENT DOES NOT EXTEND INDEFINITELY.

A former Navy serviceman claimed an active duty exemption to the residency requirement for permanent fund dividend payments for eight years despite only making two week trips to Alaska five times over a 16-year period. After eight years, the Department of Revenue denied dividend eligibility since the serviceman could not overcome a presumption in regulation that an applicant does not intend to return to Alaska if absent from the state for more than five years. The serviceman unsuccessfully challenged the presumption on the basis of federal preemption and equal protection principles. Congressmen and their staff members are exempt from the presumption by regulation but the court ruled that federal preemption did not apply and that the serviceman waived his equal protection argument concerning disparity of treatment by failing to raise it at the administrative or superior court level.

Eagle v. State of Alaska, Department of Revenue, 153 P.3d 976 (Alaska 2007)

Legislative review is recommended since the presumption is based upon an interpretation of "allowable absence" in statute and since the equal protection question has not been resolved.

AS 45.50.471(a), (b)

TRIPLE DAMAGES AWARDED AGAINST AUTO DEALERSHIP FOR ACTIONS TAKEN TO ENFORCE A SALES CONTRACT WITH A PERSON UNDER GUARDIANSHIP PROPER.

The manager of an automobile dealership refused to void a sales contract with a person who was the ward of a

guardianship order; failed for a month to consult with an attorney about the guardianship; proceeded with the sale of the ward's trade-in vehicle; attempted to modify the guardianship order to allow for the sale; and sent direct correspondence to the ward seeking to enforce the contract and demanding additional fees. The dealership asserted that triple damages, awarded by the jury for an unfair or deceptive trade practice, was improper since the statute required proof of something more than the mere assertion of a good faith but mistaken belief that a contract was valid. The court agreed, siding with the majority of other states, but upheld the damage award on the basis of a finding of substantial evidence of unfair trade practices on the facts of the case and constructive and actual notice of the guardianship.

Kenai Chrysler Center, Inc. v. Denison, 167 P.3d 1240 (Alaska 2007)

Legislative review is not recommended.

AS 45.50.531
AS 45.50.577(i)

THE ALASKA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT DO NOT ALLOW THE ATTORNEY GENERAL TO ASSERT ANTITRUST CLAIMS ON BEHALF OF INDIRECT PURCHASERS.

The state attempted to participate as a plaintiff in a class antitrust price fixing case filed in California. The Alaska cases were dismissed because the 2003 amendments to AS 45.50.577(i), which allow the Alaska Attorney General to seek monetary relief on behalf of an indirect purchaser, did not take effect until after the conduct occurred. Further, the court held that the Alaska Unfair Trade Practices and Consumer Protection Act, AS 45.50.531, does not permit the attorney general to assert monetary claims on behalf of an indirect purchaser.

State v. Infineon Technologies AG, 2007 U.S. Dist. LEXIS 67475 (N. D. Cal. 2007)

Legislative review is not recommended.

AS 46.14.240

A COMPANY WAS CORRECTLY BILLED BY THE STATE FOR ADMINISTRATIVE PERMIT COSTS, INCLUDING APPEALS.

Appellant company objected to being billed by the state for the state's costs of defending against its clean air permit appeals. Federal law requires states to recover permit appeal costs. The court interpreted the former statute to be consistent with federal law under state policy and found that "administrative costs" was broad enough to allow billing of costs associated with appeals of permit decisions. Since no other statute expressly provided for the costs, the court upheld the assessment, holding that, because the assessment did not impede the appellant from seeking review of its permit, the assessment did not violate due process rights.

Alyeska Pipeline Service Co. v. State of Alaska, Department of Environmental Conservation, 145 P.3d 561 (Alaska 2006)

Legislative review is not recommended since the statute has since been amended to expressly provide for scheduled costs associated with permit appeals.

AS 47.07.010

PATIENT HAS RIGHT TO ENFORCE A MEDICAID PROVIDER AGREEMENT.

A patient refused to pay all of the co-pay charged to "balance bill" for an amount exceeding the allowed co-pay for medical treatment the patient had received. The prohibition on "balance billing" was part of a provider agreement signed by the Medicaid provider but the patient is not a party to that agreement. The federal and state statutes do not explicitly create a private right of action for Medicaid recipients to enforce a provider agreement but the court held that, since a provider agreement was a contract, the third party beneficiary common law should apply and allow for third party enforcement of the terms of the agreement.

Smallwood v. Central Peninsula General Hospital, 151 P.3d 319 (Alaska 2007)

Legislative review is recommended to clarify the standard for determining beneficiaries' rights under Medicaid provider agreements.

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