STATE OF ALASKA

Legislative Affairs Agency

A

REPORT TO THE

TWENTY-SEVENTH 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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Division of Legal and Research Services
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State Capitol
Juneau, Alaska 99801-1182

DECEMBER 2010

A REPORT TO THE TWENTY-SEVENTH STATE LEGISLATURE

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

The report lists Alaska Statutes that will be amended or repealed between February 28, 2011, and March 1, 2012, according to laws enacted before the 2011 legislative session.

The report also examines published cases construing Alaska Statutes that were decided by the courts and reported between October 1, 2009, and September 30, 2010,

and

Opinions of the Attorney General that were made available through Internet distribution between October 1, 2009, and September 30, 2010.

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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 review also covers formal and informal opinions of the Attorney General. 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 in this report.

This report also includes a list of Alaska Statutes that, absent any action by the 2011 Legislature, will be repealed or amended before March 1, 2012, 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. 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 February 28, 2011 and March 1, 2012 according to laws enacted before the 2011 legislative session

Laws enacted in 2004

Ch. 70, SLA 2004, as amended by ch. 61, SLA 2009 and ch. 48, SLA 2010 -- Sport Fishing

AS 16.05.340(a)(26)	repealed effective January 1, 2012
AS 16.40.260	repealed effective January 1, 2012
AS 16.40.270	repealed effective January 1, 2012
AS 16.40.280	repealed effective January 1, 2012
AS 16.40.290	repealed effective January 1, 2012
AS 16.40.299	repealed effective January 1, 2012
AS 25.27.244(s)(2)(A)(xviii)	repealed effective January 1, 2012
AS 25.27.244(s)(2)(A)(xix)	repealed effective January 1, 2012
AS 41.21.506(b)	amended (conditionally) effective January 1, 2012 by secs. 22 and 31, ch. 58, SLA 2010 contingent on repeal of AS 16.40.260 and 16.40.270 under ch.70, SLA 2004

Laws enacted in 2005

Ch. 31 and ch. 42, SLA 2005 -- Coastal Management

AS 09.45.230	amended effective July 1, 2011
AS 37.10.058(2) and (7)	amended effective July 1, 2011
AS 38.05.035(e)(1)(C)	amended effective July 1, 2011
AS 38.05.945(d)	amended effective July 1, 2011
AS 41.17.900(d)	amended effective July 1, 2011
AS 41.17.900(e)	repealed effective July 1, 2011
AS 41.21.492(b)	amended effective July 1, 2011
AS 41.21.504(b)	amended effective July 1, 2011
AS 41.23.420(d)	amended effective July 1, 2011
AS 44.33.781	repealed effective July 1, 2011
AS 44.33.788	amended effective July 1, 2011
AS 44.33.790	amended effective July 1, 2011
AS 44.33.844	amended effective July 1, 2011
AS 46.39.010	repealed effective July 1, 2011
AS 46.39.030	repealed effective July 1, 2011
AS 46.39.040	repealed effective July 1, 2011
AS 46.39.900	repealed effective July 1, 2011
AS 46.40.010	repealed effective July 1, 2011

AS 46.40.020	repealed effective July 1, 2011
AS 46.40.030	repealed effective July 1, 2011
AS 46.40.040	repealed effective July 1, 2011
AS 46.40.050	repealed effective July 1, 2011
AS 46.40.060	repealed effective July 1, 2011
AS 46.40.070	repealed effective July 1, 2011
AS 46.40.090	repealed effective July 1, 2011
AS 46.40.094	repealed effective July 1, 2011
AS 46.40.096	repealed effective July 1, 2011
AS 46.40.100	repealed effective July 1, 2011
AS 46.40.110	repealed effective July 1, 2011
AS 46.40.140	repealed effective July 1, 2011
AS 46.40.150	repealed effective July 1, 2011
AS 46.40.180	repealed effective July 1, 2011
AS 46.40.190	repealed effective July 1, 2011
AS 46.40.195	repealed effective July 1, 2011
AS 46.40.205	repealed effective July 1, 2011
AS 46.40.210	repealed effective July 1, 2011

Laws enacted in 2007

Ch. 1, FSSLA 2007 -- Senior Benefits

AS 09.38.015(a)(11)	repealed effective June 30, 2011
AS 47.45.301	repealed effective June 30, 2011
AS 47.45.302	repealed effective June 30, 2011
AS 47.45.304	repealed effective June 30, 2011
AS 47.45.306	repealed effective June 30, 2011
AS 47.45.308	repealed effective June 30, 2011
AS 47.45.309	repealed effective June 30, 2011

Laws enacted in 2008

Ch. 9, SLA 2008 -- School Funding

AS 14.09.010(c)	repealed effective June 30, 2011

Ch. 102, SLA 2008 -- Noxious Weeds

AS 03.05.027	repealed effective June 30, 2011

Ch. 103, SLA 2008 -- Tourism Marketing

AS 44.33.125	amended effective July 1, 2011

Laws enacted in 2010

Ch. 14, SLA 2010 -- Higher education grants and scholarships

AS 14.03.113	enacted effective July 1, 2011
AS 14.42.030(e)	amended effective July 1, 2011
AS 14.43.810	enacted effective July 1, 2011
AS 14.43.820	enacted effective July 1, 2011
AS 14.43.825	enacted effective July 1, 2011
AS 14.43.830	enacted effective July 1, 2011
AS 14.43.840	enacted effective July 1, 2011
AS 14.43.850	enacted effective July 1, 2011
AS 14.45.130(a)	amended effective July 1, 2011

Ch. 49, SLA 2010 -- Pawnbrokers

AS 06.20.330(b)	amended effective July 1, 2011
AS 08.01.010	enacted effective July 1, 2011
AS 08.76.010(a)	amended effective July 1, 2011
AS 08.76.010(b)	repealed effective July 1, 2011
AS 08.76.020	amended effective July 1, 2011
AS 08.76.040	repealed effective July 1, 2011
AS 08.76.100 - 590	enacted effective July 1, 2011
AS 45.01.211(b)	amended effective July 1, 2011

PLEASE NOTE: "Sunsets" of boards and commissions under AS 08.03.010 and AS 44.66.010 are not reflected in the list above. Also, the list does not include repeals of uncodified law, including sunsets of advisory boards and task forces and pilot projects of limited duration created in uncodified law.

ANALYSIS OF COURT CASES AND OPINIONS OF THE ATTORNEY GENERAL

Art. I, sec. 22,
Art. I, sec. 14,
Constitution of the
State of Alaska

REASONABLE EXPECTATION OF PRIVACY IN TRASH AT CURB.

Grocery store employees reported to police that an adult male had purchased numerous items commonly used to make methamphetamine. The police recognized the employees' description of the defendant and drove to his home. Police officers seized and searched garbage he had set out on public property for collection. The Supreme Court of Alaska held that some expectation of privacy in garbage set out for routine collection on a public street was objectively reasonable under the Alaska Constitution, but that in this case the police officers' reasonable suspicion that the defendant was manufacturing methamphetamine was sufficient to justify their warrantless seizure and search of his garbage. The police removed the bags the same way trash collectors would have removed them and they caused no disturbance.

Beltz v. State, 221 P.3d 328 (Alaska 2009).

Legislative review is not recommended.

Art. IV, secs. 1 - 8,
Constitution of the
State of Alaska
AS 22.05.080
AS 22.07.070
AS 22.10.100
AS 22.15.170

ALASKA'S USE OF A MERIT SYSTEM IN SELECTING JUDGES IS NOT PRECLUDED BY THE EQUAL PROTECTION CLAUSE.

The plaintiffs challenged Alaska's constitutional and statutory merit system for appointing state justices and judges on equal protection grounds. Finding no constitutional barrier to Alaska's system, the district court dismissed the plaintiff's suit. The Ninth Circuit Court of Appeals affirmed the district court dismissal. The court rejected the plaintiff's argument that all participants in Alaska's judicial selection process must either be elected themselves or be appointed by a popularly elected official.

Kirk v. Carpeneti, __ F.3d __ (9th Cir. 2010), No. 09-35860, decided September 30, 2010.

Legislative review is not recommended.

Alaska R. Cr. P. Rule16(c)(5)

DEFENDANT ASSERTING A DEFENSE OF ENTRAPMENT NEED ONLY GIVE NOTICE OF THE DEFENSE.

In this case, the defendant provided notice before trial that he would rely upon a defense of entrapment at trial and asked for a hearing on that defense. The trial judge refused to allow the defendant to present the defense at a hearing, or to rely upon the defense at trial, because the defendant failed to support the defense by evidence submitted prior to the hearing. The Alaska Supreme Court found that Rule 16(c)(5) only requires a defendant to give notice of the defendant's intent to rely upon a defense of entrapment in order to obtain a hearing on the defense. The court held that to require the defendant to submit evidence in advance of the hearing would violate the defendant's right against self-incrimination as guaranteed by the Constitution of the State of Alaska.

Marshall v. State, 238 P.3d 590 (Alaska 2010).

Legislative review is not recommended as the decision is based upon art. I, sec. 9, Constitution of the State of Alaska, as applied in Scott v. State, 519 P.2d 774 (Alaska 1974).

AS 08.36.350

COURT IDENTIFIES TEST FOR ENFORCEABILITY OF COVENANT NOT TO COMPETE IN A CONTRACT FOR THE SALE OF A BUSINESS.

A contract for sale of a dental clinic included a covenant not to compete, requiring the dentist selling the clinic to refrain from practicing dentistry within a specified radius of the clinic being sold for a specified period of time. The seller subsequently found employment at the Alaska Native Medical Center dental clinic, a federally funded nonprofit clinic within the specified radius. The buyer sued, demanding liquidated damages. The issue in this case is whether the court should enforce the covenant not to compete, given prior precedent holding that noncompetition agreements "are disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood."

The Supreme Court adopted a new test for determining whether a covenant not to compete in a contract for the sale of a business should be enforced, calling for consideration of whether "the restriction bargained for is no greater than is

needed to protect the goodwill the purchaser has acquired in the business, and, if so, whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely injury to the public." The case was remanded for further consideration.

Wenzell v. Ingrim, 228 P.3d 103 (Alaska 2010).

Legislative review is not recommended.

AS 09.17.080

FAULT MAY BE APPORTIONED TO A DECEASED PERSON WITHOUT THE NECESSITY OF ESTABLISHING AN ESTATE.

The case stemmed from a fatal shooting involving United States Marshals, Alaska State Troopers, and members of the Homer police department, which resulted in the injury to the deceased's children who were the plaintiffs in the case. The United States sought apportionment of fault against the City of Homer and the deceased father, and the City of Homer sought apportionment against the deceased father. Both defendants sought apportionment without the necessity of establishing an estate for the deceased father, which the plaintiffs declined to establish. The court held that opening an estate is not required under Alaska law in order to apportion fault to a decedent.

Dietzmann v. United States, No. 3:09-cv-0019-RJB (D. Alaska, February 22, 2010); 2010 U.S. Dist. LEXIS 15527.

Legislative review is not recommended.

AS 09.38.080
AS 09.38.085
Alaska R. Civ. P. Rule 4

SERVICE OF PROCESS ON PRISONER WAS INVALID AS TROOPER DELIVERED THE PROCESS TO THE SUPERINTENDENT AND THE PROCESS WAS LATER FAXED TO THE PRISON AND DELIVERED TO THE PRISONER.

The state was awarded attorneys' fees after Hertz lost a lawsuit against the state. The state attempted to execute on Hertz's prisoner trust account and directed the Alaska State Troopers to serve the writ of execution on the superintendent of Spring Creek Correctional Center and the notices of execution on Hertz. The trooper served all of the paperwork on the superintendent and did not serve Hertz with any paperwork. Sometime later the state faxed copies of the paperwork to the

institution and a guard served the faxed paperwork on Hertz. Although Hertz eventually received actual notice of the execution, the Alaska Supreme Court found that Hertz had not been properly served as required by statute or court rule and the execution could not proceed.

Hertz v. Carothers, 225 P.3d 571 (Alaska 2010).

Legislative review is recommended to determine if the legislature should provide specific guidance and procedures for service of process on prisoners in state correctional facilities, or should include prison guards in the definition of "peace officer" for purpose of service of process under Rule 4, Alaska Rules of Civil Procedure.

AS 09.55.250

WHEN TAKING LAND BY EMINENT DOMAIN FOR A PUBLIC BUILDING OR GROUNDS, LAND MAY BE TAKEN FOR SUBSIDIARY FEATURES PROVIDED THOSE FEATURES ARE NECESSARY TO ACCOMPLISH THE PURPOSE OF THE TAKING.

The City of Homer sought land of a private property owner by eminent domain to expand its water treatment plant. Some of the land sought was to create a vegetative buffer between the facilities and the property owner's remaining property. The property owner objected on several grounds, including that taking of the land for the protective buffer in fee simple was not necessary for the project. The superior court found that the city could properly obtain the land in fee simple by eminent domain. Hillstrand appealed and the Alaska Supreme Court found that the taking was proper. The court found that when considering a taking by eminent domain for "public buildings or grounds" a court should permit a taking when the land "supports either the building or subsidiary features reasonably necessary to serve its purpose. . . ."

Hillstrand v. City of Homer, 218 P.3d 685 (Alaska 2009).

Legislative review is not recommended unless the legislature desires to restrict the application given to AS 09.55.250 by the court.

AS 11.41.200
AS 12.55.125(c)

COURT MUST ACCEPT LEGISLATIVE DETERMINATION IMPOSING SAME PUNISHMENT FOR DIFFERENT CRIMES.

Alexie was convicted of first degree assault for recklessly causing serious physical injury to another person by means of a dangerous instrument. Under AS 12.55.125(c), the presumptive sentencing range for this offense is 7 - 11 years. Alexie contended that because this same presumptive sentencing range also applies to a person who is convicted of the reckless killing of a person (manslaughter) that he should be subject to a lesser presumptive sentencing range because his crime did not result in the death of a person. The Alaska Court of Appeals held that while the reckless killing of a person would be viewed by most people as a more serious offense than the reckless injury of another person, it is up to the legislature to decide the proper penalty for each. The court further held that if the legislature wants to provide the same punishment for these crimes, as the legislature has here, then the court must accept that legislative determination.

Alexie v. State, 229 P.3d 217 (Alaska App. 2010).

Legislative review is not recommended unless the legislature desires to review the presumptive sentencing ranges for manslaughter and first degree assault.

AS 11.81.900(3)

EXPLANATION OF THE SCOPE OF FORESEEABILITY REQUIRED FOR IMPOSITION OF CRIMINAL LIABILITY FOR RECKLESS CONDUCT.

In this case the Alaska Supreme Court for the first time discusses the scope of foreseeability that is required for the imposition of criminal liability for an act committed with the reckless mental state. A person acts recklessly:

> when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . .

If the result is not a foreseeable result of the action of the defendant, then the defendant could not have disregarded "a substantial and unjustifiable risk" and the defendant's act would not be a proximate cause of the harm caused. The court explained foreseeability in the following manner:

> A defendant is responsible for the natural consequences of his or her act or failure to act. Natural consequences are those reasonably foreseeable in light of ordinary experience. The defendant need not have foreseen the specific manner of resulting harm so long as (1) the general type of harm was foreseeable, and (2) the actual harm falls within the scope of risk hazarded by the defendant's conduct and is not too remote or accidental in occurrence.

Johnson v. State, 224 P.3d 105 (Alaska 2010).

Legislative review is not recommended as the result appears reasonable and in accord with the definition of "reckless" as established by the legislature.

AS 12.55.045

STATUTE CHANGE PROVIDING THAT RESTITUTION ORDER IS A CIVIL JUDGMENT IS PROCEDURAL AND MAY BE ENFORCED ON ORDERS ISSUED BEFORE OR AFTER THE CHANGE.

In 1995, Lapp was convicted of manslaughter and assault. As part of his sentence, he was ordered to pay restitution to his victims. In 2001, the legislature amended the restitution statute, AS 12.55.045, to provide that an order of restitution "is a civil judgment" (the statute previously provided that a restitution order could be enforced as if it were a civil judgment). Lapp argued that under the ex post facto clauses of the United States and Alaska Constitutions this change could not be applied to him because his conviction predated the change in statute. The Alaska Court of Appeals found that the statutory change was merely procedural and did not increase the punishment imposed upon Lapp in violation of the ex post facto clauses.

Lapp v. State, 220 P.3d 534 (Alaska App. 2009).

It appears that the court has correctly applied the statute. Legislative review is not recommended.

AS 14.08.081

EVALUATING PETITION FOR RECALL OF SCHOOL BOARD MEMBER.

The attorney general evaluated the grounds for recall submitted to the division of elections in a petition for the recall of a regional school board member under AS 14.08.081, and concluded that the signers did not properly sign the petition as sponsors and that the petition failed to sufficiently state the grounds for recall because all of the broad allegations in the petition failed to identify specific violations of Alaska law.

2010 Op. Alaska Att'y Gen. (June 7).

Legislative review is not recommended.

AS 15.40.070

INITIATIVE VIOLATED SINGLE SUBJECT RULE FOR DEDICATING OIL PRODUCTION TAX TO CAMPAIGN FINANCE REFORM.

The sponsors of an initiative to dedicate a portion of the oil production tax to support campaign finance reform argued that the trial court improperly interpreted the single subject rule to require a nexus between a funding source and the funded program beyond the fact of the funding. The Alaska Supreme Court noted that the single subject rule protected the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately. This allowed voters to express their will through their votes more precisely, prevented the adoption of policies through stealth or fraud, and prevented the passage of measures lacking popular support by means of log-rolling. The court held that the proposed initiative would satisfy the requirements of the single subject analysis only if its two provisions -- campaign finance and taxation of the oil industry -- otherwise related to a single subject. The permanent fund dividend was entirely unrelated to the purpose of the clean elections program; offering the chance of increased permanent fund dividend payments ran the risk of garnering support for the clean elections program from voters who were otherwise indifferent -- or even unsupportive -- of publicly funded campaigns.

Croft v. Parnell, 236 P.3d 369 (Alaska 2010).

Legislative review is not recommended.

AS 15.45.040

INITIATIVE DEFINING A HUMAN BEING FROM THE BEGINNING OF BIOLOGICAL DEVELOPMENT, INCLUDING SINGLE-CELL EMBRYO, AS A LEGAL PERSON.

The attorney general reviewed an application for an initiative for a bill providing, "That all human beings, from the beginning of their biological development as human organisms, including the single-cell embryo, regardless of age, health, level of functioning, condition of dependency or method of reproduction, shall be recognized as legal persons in the state of Alaska." The opinion concluded that (1) the proposed initiative satisfied the form requirements, (2) for the purpose of certifying an application for an initiative, the measure is not clearly unconstitutional, and (3) extending legal person status prenatally could be enforceable unless there are countervailing constitutional considerations. Thus, legal person status would not be legally enforceable in the abortion context, but courts could find it legally enforceable in other contexts.

2009 Op. Alaska Att'y Gen. (October 22).

Legislative review is not recommended.

AS 15.45.090(a)

INITIATIVE SUMMARY MAY BE CORRECTED AFTER PETITION SIGNED.

The sponsors submitted the Parental Involvement Initiative (PNI), relating to notification of abortions performed on minors, and the lieutenant governor prepared a petition summary. Appellants asserted that the summary was defective. The Alaska Supreme Court concluded that the PNI could be placed on the ballot without recirculating the petition, provided that the summary was corrected and that the Parental Consent Act (AS 18.16.010 and 18.16.020) and the enforcement provisions implicated by the PNI were made available to the voters. When faced with a statewide initiative petition circulated with a defective summary, the court considered the nature and magnitude of the misleading statement or omission, the likelihood and extent of petition-signer inadvertence, the hardship to sponsors from invalidating signatures, and the hardship to opponents from permitting it to go forward. Although the summary in the current case was deficient, particularly in omitting a felony provision for

physician's violations, the court found that it was not as misleading as some other petitions and that inadvertence by the petition signers was unlikely or minimal. The court also found that the omissions did not substantially misrepresent the essential nature of the PNI, and the hardship to the sponsors of invalidating the signatures would have been great. The court discerned little hardship to the opponents if a corrected summary was used as the ballot summary.

Planned Parenthood v. Campbell, 232 P.3d 725 (Alaska 2010).

Legislative review is recommended since misrepresentations and omissions in a ballot initiative may be inconsistent with legislative intent for initiative standards.

AS 16.05.255
Art. VIII, sec. 4,
Constitution of the
State of Alaska

PREDATOR CONTROL REQUIRES ADHERENCE TO SUSTAINED YIELD PRINCIPLES.

The appellants argued that the Board of Game failed to consider and apply the principle of sustained yield to its management of wolves and bears affected by predator control plans the board established in 2006. The Supreme Court found nothing in the language of the sustained yield clause, Alaska Constitution, art. VIII, sec. 4, suggesting that a distinction should be drawn between predator and prey populations for purposes of applying the sustained yield principle. The sustained yield clause applied to both predator and prey populations, including populations of wolves and bears. Based upon the text of Alaska's intensive management statute, AS 16.05.255, the principle of sustained yield applied to predator populations but the management of wildlife resources may include a selection between predator and prey populations. The appellants did not show that the board's 2006 predator control plans violated principles of sustained yield.

West v. State, __ P.3d __ (Alaska 2010), Sup. Ct. Nos. S-13184/S-13343, decided August 6, 2010.

Legislative review is recommended to determine whether the court correctly applied the statute.

AS 18.07.091(a)

INTERPRETATION OF CERTIFICATE OF NEED STATUTE CONFERS STANDING AFTER ADMINISTRATIVE APPEAL PERIOD.

A pain treatment center sought to convert office space into an ambulatory surgery center. A medical center alleged that the pain center knowingly misrepresented material facts in requesting and obtaining its certificate of need (CON) determination. The trial court granted summary judgment to the pain center on the basis that the medical center's complaint was filed after the deadline for an administrative appeal. On appeal, the medical center argued that it had standing under AS 18.07.091(a) to seek injunctive relief, and that it was therefore error to grant summary judgment to the pain center. The Supreme Court concluded that there were two main reasons why summary judgment should not have been entered against the medical center on the standing issue. AS 18.07.091(a) allowed substantially and adversely affected members of the public to challenge any violation of Alaska's CON statutes or associated regulations, not just violations of an existing CON. The medical center was a member of the public. The Supreme Court also agreed with the contention that the medical center would be substantially and adversely affected.

Mat-Su Valley Medical Center v. Advanced Pain Centers of Alaska, 218 P.3d 698 (Alaska 2009).

Legislative review is recommended to determine whether the court correctly interpreted the applicable statute that allowed alternative challenges to a CON.

AS 23.30.045
AS 23.30.055

PROJECT OWNER STATUTE PREVENTS EMPLOYEE OF SUBCONTRACTOR FROM SUING OWNER OF PROJECT FOR INJURIES RECEIVED WHILE WORKING ON THE PROJECT.

Anderson was employed by Doyon Universal Services, a contractor for Alyeska Pipeline Services, at Pump Station 5 on the Trans-Alaska Pipeline. As part of the contract, Alyeska provided workers' compensation insurance for the Doyon employees. Anderson was injured when a table owned by Alyeska, which had been propped against a wall, fell on her, resulting in injuries to Anderson. Anderson received workers' compensation benefits and sued Alyeska for negligence. The

Alaska Supreme Court found that Alyeska was a project owner under AS 23.30.045. Under AS 23.30.045, a project owner is liable for payment of workers' compensation insurance if a contractor of the owner does not pay the insurance. The court further found that since Alyeska was a project owner, Alyeska was immune from suit under AS 23.30.055 and Anderson's sole remedy was workers' compensation. Under these statutes, the court stated that Anderson "posed difficult hypothetical examples about the potential workers' compensation liability of small business owners that use contractors to carry out functions extraneous to their businesses."

Anderson v. Alyeska Pipeline Service Co., 234 P.3d 1282 (Alaska 2010).

Legislative review is not recommended as the court appears to have correctly applied the statute. The legislature may wish to address the "difficult" hypothetical examples that were presented in the case related to small business owners that use contractors to carry out functions extraneous to their businesses. If these small business owners are project owners, they may be liable for the workers' compensation premiums of their contractors employees under the statute.

AS 23.30.045(a)
AS 23.30.055

CHANGES TO WORKERS' COMPENSATION STATUTE DO NOT VIOLATE RIGHTS OF EMPLOYEE.

An employee sued an oil services company for injuries he suffered when he was working on the oil company's platform. After removal of the case to the federal district court, the oil company moved for summary judgment, arguing that the Alaska Workers' Compensation Act, AS 23.30.010 - 23.30.400, barred the employee's tort claims because the oil company was the employee's statutory employer and therefore immune from suit. The employee asserted an equal protection claim based on the 2004 changes to the Act. Under minimum scrutiny, the court held that the state's objectives in enacting the legislation were legitimate and the amendments had a fair and substantial relationship to the state's objectives. Therefore, the employee's equal protection rights under the Alaska Constitution were not violated. The court also held that the 2004 amendments did not violate the employee's due process rights because the employee could access the courts and was

still able to get compensation for his injury through the workers' compensation system.

Schiel v. Union Oil Co., 219 P.3d 1025 (Alaska 2009).

Legislative review is not recommended.

AS 23.30.108
AS 23.30.110

WORKERS' COMPENSATION BOARD'S DESIGNEE MAY CONDUCT PREHEARING CONFERENCE WITHOUT ENGAGING IN THE UNAUTHORIZED PRACTICE OF LAW WHEN DECIDING PROCEDURAL ISSUES.

The attorney general concluded that workers' compensation officers do not engage in the unauthorized practice of law as described in Alaska Bar Rule 63 by making prehearing decisions authorized by statute because (1) officers do not hold themselves out as attorneys, (2) an officer's position description does not require an officer to be an attorney, (3) the officer does not represent a party or provide legal advice to a party for compensation, (4) the officer is acting for the agency, not as an advocate, and (5) prehearing determinations by an officer are authorized by statute and regulation. The officer also has a duty to assist claimants by advising them of the important facts of their case and instructing them on how to pursue their right to compensation.

2010 Op. Alaska Att'y Gen. (January 6).

Legislative review is not recommended.

AS 23.30.250

INJURED EMPLOYEE HAS NO AFFIRMATIVE DUTY TO DISCLOSE INFORMATION THAT WOULD AFFECT A RIGHT OF COMPENSATION.

Shehata was injured while working for the Salvation Army and collected workers' compensation benefits. While collecting those benefits, he began working part-time for another employer but did not report the wages from that employment to the Salvation Army. If Shehata would have reported those wages, his workers' compensation benefits would have been reduced. After working five weeks at the part-time job, the Salvation Army asked Shehata if he was earning any wages from employment and Shehata falsely answered no. The Salvation Army sought reimbursement from Shehata for some

of the benefits paid while he was working on the basis of fraud under AS 23.30.250(b) and the Alaska Workers' Compensation Board ordered repayment for the entire time that Shehata was working. The Alaska Supreme Court held that Shehata had no affirmative duty to disclose his earnings under Alaska law and his nondisclosure of earnings could not be the basis for a fraud claim under AS 23.30.250(b), as the legislature had only provided for fraud claims and disqualification for benefits based upon a false statement or representation. "The parties agreed that no statute or regulation explicitly imposes on an employee the duty to inform the employer, the adjustor, or the board that he is working." The court noted that the legislature has included omissions and nondisclosures as the basis for disqualification in other schemes such as unemployment benefits, where the failure to disclose or report a material fact is a basis for disqualification (see AS 23.20.387) but has not done so with regard to workers' compensation benefits. The court found that reimbursement was not allowed under the statute for the period prior to Shehata's affirmative misstatement to the Salvation Army that he was not earning wages.

Shehata v. Salvation Army, 225 P.3d 1106 (Alaska 2010).

Legislative review is recommended to determine if the legislature should provide that material omissions and nondisclosures should support disqualification and a claim for reimbursement for workers' compensation as it has provided for unemployment compensation.

AS 25.23.130

CUSTODY AND VISITATION OF A FORMER FOSTER CHILD MAY NOT INCLUDE CONSIDERATION OF FOSTER PARENT STATUS.

A couple bought a home together and became foster parents of a one week old child. The foster mother adopted the child when he was sixteen months old. The foster father left the home and did not join in the adoption. In a custody dispute involving the child, the court upheld sole custody awarded to the adoptive mother and denied visitation to the father. The court clarified a distinction between the issue of psychological parent status and significant connection to a child. Psychological parent status must be demonstrated to prove that denial of visitation of custody is clearly detrimental to a child. Proof of a significant connection is a threshold question

needed for standing to assert a claim for custody or visitation. The court disallowed use of the foster parent status to prove psychological parent status as inconsistent with the basic premise of foster care and adoption programs and only considered the three month time period after the mother's adoption of the child. The short time period, the child's young age, and the fact that the father allowed the mother alone to adopt the child all weighed against establishing psychological parent status. The father failed to prove that it was in the child's best interest to order visitation over the mother's objection.

Osterkamp v. Stiles, 235 P.3d 178 (Alaska 2010).

Legislative review is recommended to determine whether the court properly interpreted state policy on foster parent status and subsequent rights.

AS 28.15.165

CRIMINAL LAW SPEEDY TRIAL REQUIREMENTS DO NOT APPLY TO DRIVER'S LICENSE SUSPENSION OR REVOCATION PROCEEDINGS.

Alvarez was arrested for drunk driving in Ketchikan in 2004. At the station, Alvarez's blood alcohol concentration was recorded as .091 on her fifth attempt to provide a sample. Alvarez timely requested a hearing to contest the revocation. After her arrest the arresting officer was deployed to Iraq with the military and the criminal charges were dismissed as the officer "was expected to be unavailable 'for at least one year.'" After a hearing the license revocation was continued until the arresting officer's return from Iraq in 2006. At the hearing, conducted some 31 months after the arrest, the officer appeared by telephone and was cross-examined by Alvarez. At the conclusion of the hearing, the hearing officer suspended Alvarez's license for 90 days. Alvarez sought review of the suspension in court on several grounds, including that the 31 month delay violated her right to a speedy trial and denied her due process. The Alaska Supreme Court found the speedy trial requirements only apply to criminal prosecutions and since license suspension or revocation proceedings are civil, not criminal, the speedy trial requirements do not apply. The court held that mere administrative delay, without prejudice, does not violate due process. The court then stated that any prejudice suffered by Alvarez due to the delay was slight, as Alvarez was given a temporary license during the delay and an audio tape of the initial arrest and an audio and partial video

tape of the breath sample process was made and retained by the arresting officer and agency.

Alvarez v. State, __ P.3d __ (Alaska 2010), Sup. Ct. No. S-12768, decided August 13, 2010.

Legislative review is not recommended unless the legislature desires to limit the period of time that a driver's license suspension hearing can be continued.

AS 28.15.211

TEN-YEAR STATUTE OF LIMITATIONS DOES NOT BAR DMV FROM CHARGING A $100 FEE UPON REINSTATEMENT OF A DRIVER'S LICENSE.

In 1995, the Alaska division of motor vehicles (DMV) suspended the appellant's driver's license because he violated Alaska's mandatory insurance and financial responsibility laws. When the appellant applied for license reinstatement in 2007, DMV told him that he had to pay a $100 reinstatement fee. The appellant sued the state, arguing that the ten-year statute of limitations barred DMV from charging him the $100 reinstatement fee. The Supreme Court of Alaska held that AS 28.15.271(b)(3)(A) provided authority for the $100 reinstatement fee because the appellant's license had "been suspended" within the ten years preceding his reinstatement application. Imposing the $100 reinstatement fee was also not an "action" for purposes of the statute of limitations set forth in AS 09.10.100. The court questioned the applicability of the reinstatement provision to the type of suspension at issue but did not reach a conclusion since the issue was not raised by either party.

Bradshaw v. State, 224 P.3d 118 (Alaska 2010).

Legislative review is recommended as the court is interpreting and questioning the reinstatement provisions.

AS 28.35.030

ALASKA RECOGNIZES A DEFENSE OF INVOLUNTARY INTOXICATION TO DRIVING UNDER THE INFLUENCE; THE DEFENSE IS NOT AVAILABLE TO DEFENDANTS WHO KNEW OR SHOULD HAVE KNOWN THAT THE BEVERAGE OR SUBSTANCE CONSUMED WAS AN INTOXICANT.

Solomon was convicted of driving under the influence in violation of AS 28.35.030(a). Solomon argued that he should not have been convicted because his intoxication arose from his ingestion of two bottles of NyQuil cold medicine. Solomon argued that he did not read the labels on the bottles (the labels state that NyQuil contains 10 percent alcohol) and was unaware that NyQuil was an intoxicant. The Alaska Court of Appeals found that involuntary intoxication was available as a defense to a charge of driving under the influence but the defense is only available to a person that makes "a reasonable, non-negligent mistake concerning the intoxicating nature of the beverage or substance they ingested." A person cannot claim the defense if they "knew or ought to have known that the beverage or substance was an intoxicant." The court found that Solomon's actions in drinking two bottles of NyQuil (approximately one quart) without reading the label and then driving was not reasonable and non-negligent.

Solomon v. State, 227 P.3d 461 (Alaska App. 2010).

The decision of the court appears reasonable and consistent with the Model Penal Code and other jurisdictions. Legislative review is not recommended.

AS 29.26.110(a)(4)

INITIATIVE PROCESS MAY NOT BE USED TO REQUIRE A REFERENDUM ON EACH BOROUGH LAND USE ORDINANCE.

An initiative was rejected by the Mat-Su borough clerk that would have provided that all land use planning, regulation, and platting ordinances would expire unless approved by borough voters. The trial court agreed with the borough clerk that the proposed measure was unenforceable as a matter of law under AS 29.26.110(a)(4), because initiatives could not be used to deprive a municipality of a power which state law specifically allowed (and mandated) that it perform. The Supreme Court found that the proposed initiative would enact sweeping changes to present and future land use ordinances, including

zoning, by imposing termination dates without any involvement by the planning commission or any consideration of consistency with the comprehensive plan. It would also impose termination dates on future amendments to the comprehensive plan without any planning commission input. The present case involved a general law municipality with legislative powers conferred under AS 29.04.020. The legislature's policy goals included marking the land use planning and regulation process with certainty, continuity, consistency, and comprehensiveness. The court held that the will of the people would be thwarted by the proposed initiative.

Carmony v. McKechnie, 217 P.3d 818 (Alaska 2009).

Legislative review is not recommended.

AS 34.35.475

MEDICAL LIEN STATUTE BARS INTERVENTION AND ASSIGNMENT.

An injured motorist received emergency care and other medical services. A medical center alleged that the services had a value of $301,863. The motorist allegedly signed two forms in which she ostensibly assigned to the medical center all claims for payment against third parties for the reasonable value of medical services. The medical center also recorded a health care lien against the motorist for $301,863.59 under AS 34.35.475. The motorist brought a personal injury lawsuit against the driver of the other vehicle. The superior court did not err by denying the medical center's motion to intervene in that suit. The Supreme Court of Alaska held that Alaska law prohibited the assignment of personal injury claims under Alaska's lien statute, which provided the medical center's exclusive remedy against the motorist.

Mat-Su Regional Medical Center v. Burkhead, 225 P.3d 1097 (Alaska 2010).

Legislative review is recommended.

AS 38.05.070

RIGHT TO WHARF OUT INTO NAVIGABLE WATERS MAY BE ENCUMBERED BY STATE LEASE.

A paddle boat operator that owned riparian land adjacent to the Chena River objected to the Department of Natural Resources (DNR) statutory lease requirements for a wharf built into the navigable river. The superior court ruled that DNR did not have the authority to require commercial property owners to enter into a lease in order to exercise their riparian right to wharf out. On review, the Supreme Court held that DNR possessed the authority to require leases. Under AS 38.05.070 and Alaska Constitution art. VIII, sec. 16, property owners who had constructed improvements on tide and submerged land prior to statehood were granted special preference rights, but DNR was authorized to enter into leases with all other parties for their occupancy of state lands, including when such property owners constructed wharves into adjacent navigable waters. To this extent, AS 38.05.070 restricted the common law right to wharf out when the Alaska Land Act was passed in 1959. However, requiring a lease fee based upon passenger count violated 33 U.S.C. 5(b), which prohibits states from collecting a fee for use of any navigable waters subject to federal authority.

State v. Alaska Riverways, Inc., 232 P.3d 1203 (Alaska 2010).

Legislative review is not recommended.

AS 45.50.471(b)

CONSUMER PROTECTION ACT STATUTE OF LIMITATION BEGINS AT TIME OF LOSS, NOT AT DISCOVERY OF ILLEGAL ACT.

A consumer purchased a vehicle from an automobile dealership. After he agreed to buy the vehicle and without disclosing the fee to him, the automobile dealership added a $200 documentation preparation fee in the final sale paperwork. More than two years later, the consumer discovered that it was illegal for car dealerships to charge document preparation fees. He filed a class action alleging that the automobile dealership routinely breached AS 45.50.471(b)(43) of the Unfair Trade Practices and Consumer Protection Act by charging fees and costs not included in a vehicle's advertised sale price. The automobile dealership moved to dismiss, arguing that the consumer's claim was barred by the two-year statute of limitations under

AS 45.50.531(f). On review of the judgment of dismissal, the court, in deciding an issue of first impression, held that the consumers claim was time-barred because the two-year limitations period under AS 45.50.531(f) began to run when a plaintiff discovered, or reasonably should have discovered, that the dealership's conduct caused a loss and not when the plaintiff discovered that the conduct was illegal.

Weimer v. Continental Care and Truck, LLC, 237 P.3d 610 (Alaska 2010).

Legislative review is recommended to determine whether the court correctly interpreted the statute of limitation trigger.

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