THE ALASKA SUPREME COURT YEAR IN REVIEW 1988

I. INTRODUCTION

This Year in Review is intended to provide practicing attorneys with a practical guide to every decision published by the Alaska Supreme Court in 1988. Clearly, due to the sheer volume of cases, space will not permit a thorough discussion and critique of each decision. Rather, we have attempted to highlight those decisions which represent a departure from prior law or resolve issues of first impression. Other cases are necessarily discussed in a more cursory fashion.

For easy reference, the opinions have been grouped alphabetically according to the general subject matter of their holding rather than the nature of the underlying claim. There are twelve categories: administrative law, Alaska Native law, business law, constitutional law, criminal law, employment law, family law, fish and game law, procedure, property, tax law, and torts. Within each of these categories, to the extent practicable, the cases have been subdivided according to more specific legal areas.

Please note that while we attempt to provide a thorough picture of the state of the law in a particular field at the time of the court's decisions, it is possible that some holdings may have become partially obsolete by the date of this note's publication due to subsequent rulings or legislative action. The primary purpose of this note is to inform the practitioner which cases were decided in 1988, which substantive areas of law were addressed, which statutes or prior common law principles were interpreted, and what the essence of the holdings was. Attorneys are advised not to use the information contained in this note without further reference to the cases cited.

II. ADMINISTRATIVE LAW

The area of administrative law was a rather busy one for the court in 1988. The court decided numerous cases challenging agency actions or regulations on a variety of procedural, statutory, and constitutional grounds. While these cases primarily involve issues of administrative law, they also have ramifications in other fields, including business and constitutional law. The general trend in this area has

been for the court to show deference to the state's rule making authority except in cases of extreme constitutional infirmity.

A case which involved such constitutional infirmity was *McAlpine v. University of Alaska,*[1] a controversy arising from the lieutenant governor's attempt to place a resolution on the ballot for the 1988 general election. The resolution called for the establishment of a separate community college system which would require the University to transfer some of its property to the new system.[2] Because such appropriations may not be effected by means of an initiative, the University challenged the resolution.[3] This action is an appeal from the lower court's judgment, removing the initiative from the ballot.[4]

In reaching its decision to allow the initiative to remain on the ballot without the sentence which, in the court's opinion, effected the appropriation, the court analyzed three primary issues.

First, the court held that the University's suit was not barred by the relevant statute of limitations.[5] Overturning its ruling in *Boucher v. Engstrom,*[6] the court held that the thirty-day statute of limitations does not apply solely to the members of an initiative committee; rather, it applies to anyone seeking to challenge the lieutenant governor's decision regarding the initiative. However, the court refused to apply this new rule retroactively to *McAlpine.*[7] Therefore, the suit was not barred.

Second, the court rejected all of the lieutenant governor's arguments and ruled that the initiative would constitute an impermissible appropriation. The court's ruling was an attempt to "ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[8]

The third part of the court's analysis involved defining a court's duties when faced with an initiative which is constitutionally infirm. The court concluded, by analogy to statutory severability, that it is within the court's power to sever the initiative and allow the constitutionally sound portion to remain on the ballot.[9] This is precisely the

1. 762 P.2d 81 (Alaska 1988).

2. *Id.* at 83.

3. *Id.* at 84.

4. *Id.* at 82.

5. *Id.* at 86. Section 15.45.240 of the Alaska Statutes provides for a thirty-day statute of limitations for actions brought to have the determination by a lieutenant governor reviewed. ALASKA STAT. § 15.45.240 (1988).

6. 528 P.2d 456 (Alaska 1974), *overruled by* McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988).

7. *McAlpine,* 762 P.2d at 86.

8. *Id.* at 88 (emphasis in original).

9. *Id.* at 94.

remedy this court fashioned after finding that the initiative satisfied the court's three-prong test for severability.[10]

In *Citizens for the Preservation of the Kenai River v. Sheffield,*[11] the Citizens for the Preservation of the Kenai River ("CPKR") challenged the validity of a Department of Natural Resources regulation prohibiting boats with engines stronger than thirty-five horsepower from travelling on the Kenai River. The supreme court upheld the regulation's validity, stating that (1) the burden of proving the invalidity of the regulation properly fell on plaintiffs, (2) the regulation was "consistent with and reasonably necessary to carry out the legislature's purposes," and (3) despite the fact that the defendant prevailed, the court could not award attorneys' fees against CPKR[12] since it was a public interest litigant satisfying the four-part test of *Alaska Survival v. State, Department of Natural Resources.*[13]

The court addressed the issue of discrimination in enforcement of regulations in *Herrick's Aero-Auto-Aqua Repair Services v. State, Department of Transportation.*[14] In this case, the court held, inter alia, that the Department of Transportation ("DOT") had discriminatorily enforced regulations imposing insurance and permit requirements so as to violate equal protection guarantees of the Alaska Constitution.[15] Specifically, the DOT had been requiring lessees of land at Anchorage International Airport to incur regulatory costs for permits and insurance while exempting itinerant merchants from such requirements. In applying an equal protection analysis to this situation, the court employed the " ' "uniform balancing" test which place[s] a greater or lesser burden on the state to justify a classification depending on the

10. The court ruled that an impermissible portion should be severed when:

> (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.

Id. at 94-95 (footnote omitted).

11. 758 P.2d 624 (Alaska 1988).

12. *Id.* at 625-27.

13. 723 P.2d 1281 (Alaska 1986). The four-point test is as follows:

> (1) whether a case is designed to effectuate strong public policies; (2) whether, if the plaintiff succeeds, numerous people will benefit from the lawsuit; (3) whether only a private party could be expected to bring the suit; and (4) whether the litigant claiming public interest status would lack sufficient economic incentive to bring the lawsuit if it did not involve issues of general importance.

Id. at 1292 (quoting Oceanview Homeowners Ass'n, Inc. v. Quadrant Constr. and Eng'g, 680 P.2d 793, 799 (Alaska 1982)).

14. 754 P.2d 1111 (Alaska 1988).

15. *Id.* at 1116; ALASKA CONST. art. I, § 1.

importance of the individual right involved.' "[16] The court characterized the case at bar as involving an economic interest, which is subject to the "lowest level of scrutiny."[17] Therefore, the court noted that the state need only show a rational basis for its actions.[18] Even in the face of this fairly liberal standard, the statute failed to meet its burden and the court consequently ordered injunctive relief against the DOT.[19]

In *Homer Electric Association, Inc. v. Alaska Public Utilities Commission,*[20] the supreme court upheld an Alaska Public Utilities Commission ("APUC") ruling that prohibited electric companies from including lobbying expenses in the total cost figure used to determine rates charged to their customers.[21] Several other APUC actions were also at issue, the most notable being APUC's allocation to Homer of one hundred percent of the costs of the APUC proceedings.[22] APUC argued that Homer should be assessed one hundred percent of the costs because it not only initiated the proceeding but also would be able to pass the costs through to its customers.[23] However, the court agreed with Homer's arguments, finding that these grounds were insufficient by themselves to justify the allocation, and remanded to have APUC make further findings as to the propriety of the one hundred percent cost allocation.[24] The court argued further that since the two factors mentioned above are present in virtually every APUC hearing, "[t]o allow the APUC to base its findings as to its own liability upon such superficial and recurring grounds would be tantamount to interpreting the statute to read that 'the commission may allocate costs among the parties *excluding the commission.*' "[25] The court found this to be inconsistent with the legislative intent to allocate costs among the parties, including the commission.[26]

Ben Lomond, Inc. v. Municipality of Anchorage[27] involved a suit challenging the city's revocation of building permits for several of the plaintiff's apartment buildings. In affirming the judgment below in favor of the defendant, the court adopted a different reasoning, holding that the plaintiff had waived its right to sue in court because it had failed to exhaust available administrative remedies such as an appeal

16. *Id.* at 1114 (quoting Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984) (citing State v. Erickson, 574 P.2d 1 (Alaska 1978))).
17. *Id.* at 1114.
18. *Id.*
19. *Id.* at 1116.
20. 756 P.2d 874 (Alaska 1988).
21. *Id.* at 878.
22. *Id.* at 880-81.
23. *Id.* at 880.
24. *Id.* at 881.
25. *Id.* at 880-81 (emphasis added).
26. *Id.* at 881.
27. 761 P.2d 119 (Alaska 1988).

to the very zoning board that revoked the permits.[28] By failing to exhaust all administrative remedies, the plaintiff had deprived the municipality of the chance to correct its own errors, thereby giving rise to this suit. The court argued that had the plaintiff pursued these remedies, it could have avoided this litigation.[29]

In *VECO International, Inc. v. Alaska Public Offices Commission,*[30] the court upheld as constitutional the portion of the Alaska Campaign Disclosure Act that requires certain groups to register with the Alaska Public Offices Commission before making a campaign contribution and to file periodic reports concerning its contributions.[31] VECO, who had been fined for failure to comply with the Act, raised ten issues on appeal.[32] The court agreed with VECO that (1) the commission should be partially estopped from acting against VECO since some of VECO's activities were in reliance on commission opinions, (2) a "statement of reasons" regarding penalties should have been provided VECO as required by statute, and (3) further accrual of fines during the administrative appeal process was improper.[33] However, the court rejected VECO's arguments on all other issues and remanded to the commission for reassessment of fines in accordance with its holdings.[34]

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28. *Id.* at 122.

29. *Id.*

30. 753 P.2d 703 (Alaska), *appeal dismissed,* — U.S. —, 109 S. Ct. 298 (1988).

31. *Id.* at 707; ALASKA STAT. §§ 15.13.040(b), (c), (d), (e), 15.13.050, 15.13.130(4) (1988).

32. *VECO,* 753 P.2d at 707. The ten issues presented on appeal are as follows:

1. The superior court erred in giving retroactive effect to the Commission's regulations.
2. VECO did not form a group with its employees as defined by AS 15.13.130(4).
3. The Commission is estopped from finding that the VECO withholding plan constituted group activity.
4. The Alaska Campaign Disclosure Act is unconstitutionally overbroad.
5. The Act is unconstitutionally vague.
6. The Act violates the right to privacy.
7. The Commission abused its discretion in failing to give VECO notice of delinquency.
8. The Commission erred in failing to make findings or state reasons regarding the penalties it assessed.
9. The penalties assessed are excessive.
10. The accrual of penalties during appeal is unconstitutional.

Id. (footnote omitted).

33. *Id.*

34. *Id.* at 719.

The court rejected the argument that VECO's fundraising activities did not constitute "joint action" for purposes of the statute.[35] Specifically, the court held that "[w]hen two people or entities act jointly, they cooperate or collaborate. One need not control the other. In this context, joint action exists if the employer has a significant role in candidate selection."[36]

With regard to the remaining errors alleged by VECO, the court concentrated primarily on those arguments involving the statute's alleged constitutional infirmities, including overbreadth, invasion of privacy, and vagueness. The court held that (1) the burden placed on freedom of expression is outweighed by the need for an informed electorate, reaffirming the court's position as expressed in *Messerli v. State,*[37] (2) VECO failed to brief the issue of its *own* right to privacy and therefore lacked standing to raise this claim,[38] and (3) the statutory definitions were not unconstitutionally vague as analyzed under the "fair notice" standard requiring that "[l]aws should give the ordinary citizen fair notice of what is and what is not prohibited."[39]

The court addressed the constitutionality of a portion of the Executive Budget Act[40] in *Fairbanks North Star Borough v. State.*[41] In this case, the court upheld the constitutionality of a provision which allowed the governor to reduce appropriations to state agencies in accordance with revenue shortfalls.[42] Affirming the superior court's holding that this was an unconstitutional delegation of legislative power, the court remanded for further consideration.[43] As a result of this decision, the governor's orders withholding expenditure authority on funds earmarked for Fairbanks North Star Borough, among others, were vacated, thus permitting disbursement of the funds.[44] Prior to the payment, however, the legislature "explicitly ratified and approved all of the restrictions imposed by the governor,"[45] thereby curing the constitutional infirmity to the satisfaction of the superior court. Fairbanks appealed again, and the supreme court again affirmed the lower

35. *Id.* at 708. Section 15.13.130(4) of the Alaska Statutes provides in pertinent part that " 'group' means . . . any combination of two or more persons or individuals acting jointly who take action the major purpose of which is to influence the outcome of an election . . . ." ALASKA STAT. § 15.13.130(4) (1988).

36. *VECO,* 753 P.2d at 708.

37. 626 P.2d 81 (Alaska 1981).

38. *VECO,* 753 P.2d at 715.

39. *Id.* at 714.

40. ALASKA STAT. § 37.07.080 (1988).

41. 753 P.2d 1158 (Alaska 1988).

42. *Id.* at 1160-61; ALASKA STAT. § 37.07.080(g) (1988).

43. *Fairbanks North Star Borough,* 753 P.2d at 1159.

44. *Id.* (citing State v. Fairbanks North Star Borough, 736 P.2d 1140, 1144 (Alaska 1987)).

45. *Id.* at 1159.

court's ruling in favor of the state, holding that as long as the legislature did not abdicate by giving the governor sweeping powers, and as long as the legislature limited its authorization to specific appropriations, there was no constitutional infirmity.[46]

In *State v. Anderson,*[47] the court upheld regulations[48] that required land surveyors to have the Department of Environmental Conservation ("DEC") approve wastewater treatment and disposal capability plans before (1) recordation of the final subdivision plat,[49] and (2) sale by the surveyor of an interest in the subdivision.[50] The court entered judgment in favor of the state and held that the regulations were reasonably necessary and consistent with the DEC's authority to enforce its regulations.[51] The court based its holding on the belief that, pursuant to its statutory obligation and grant of authority, the DEC was fulfilling its duties in promulgating and enforcing regulations regarding pollution and sanitation.[52]

The remaining two decisions in the field of administrative law are largely confined to their facts. In *Department of Community and Regional Affairs v. Sisters of Providence in Washington,*[53] the court ruled that the Sisters of Providence were not entitled to state aid for hospital construction as provided for in title 29, chapter 90, of the Alaska Statutes.[54] This statute was repealed in 1983 by legislation which contained a grandfather clause providing that those "receiving or entitled to receive" a subsidy prior to repeal would be able to continue doing so.[55] The supreme court held that the sisters were not so "entitled," even though construction of their hospital had commenced prior to repeal, because they had not submitted an application for funding prior to the repeal date.[56] The court explains its holding as sound policy, particularly in light of the ambiguous and inconclusive legislative history of the Act.[57]

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46. *Id.* at 1161.
47. 749 P.2d 1342 (Alaska 1988).
48. *Id.* at 1347.
49. ALASKA ADMIN. CODE tit. 18, § 72.065(e) (Oct. 1987).
50. *Id.* tit. 18, § 72.065(f).
51. *Anderson,* 749 P.2d at 1347.
52. *Id.* at 1345.
53. 752 P.2d 1012 (Alaska 1988).
54. *Id.* at 1017; ALASKA STAT. tit. 29, ch. 20, *repealed by* Act, ch. 95, § 10, 1983 Alaska Sess. Laws. For current law, see Temporary and Special Acts, ch. 95, § 9, 1983 Alaska Sess. Laws.
55. ALASKA STAT. tit. 29, ch. 20, *repealed by* Act, ch. 95, § 10, 1983 Alaska Sess. Laws.
56. *Sisters of Providence,* 752 P.2d at 1017.
57. *Id.* at 1016.

Finally, in *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation and Public Facilities,*[58] the court held, in an abbreviated opinion, that a bidder whose contract was cancelled was entitled to reimbursement for out-of-pocket mobilization costs.[59] Finding that the bidder had substantially complied with the requirement that documentation be submitted within thirty days by virtue of its having attached such documentation to the administrative appeal,[60] the court remanded for computation of these costs.

In In re *Inquiry Concerning a Judge,*[61] the only professional responsibility case before the court in 1988, the court addressed the constitutionality of a statute that empowered the Commission on Judicial Conduct to impose the sanction of public reprimand,[62] finding that it exceeded the scope of power granted by the Alaska Constitution.[63] The court's interpretation of this statute included a comparison with constitutions of other states, concluding that, although the statute is "similar to other states' *constitutions,*" the Alaska Constitution is "more limited than either the Alaska Statute or other states' constitutions."[64] The statute was therefore invalidated, and the commission is now relegated to doing no more than *recommending* sanctions.[65]

III. ALASKA NATIVE LAW

While the court decided only three major cases dominated by questions of Alaska Native law, it nevertheless addressed several important issues involving interpretation of the Alaska Native Claims Settlement Act. More important, though, was a decision involving native villages and their rights to sovereign immunity.

The most significant case involving Alaska Native law during 1988 was *Native Village of Stevens v. A.M.P.*[66] In *Stevens,* a case evolving from a contract dispute, a sharply divided court held that the Native Village of Stevens may not claim sovereign immunity from suit because it is not a sovereign entity.[67] This decision was controversial because it appeared to be at odds with the federal district court's holding in *Native Village of Tyonek v. Puckett*[68] that Tyonek *does* possess

58. 765 P.2d 1360 (Alaska 1988).
59. *Id.*
60. *Id.*
61. 762 P.2d 1292 (Alaska 1988).
62. ALASKA STAT. § 22.30.001(d)(3) (1988).
63. ALASKA CONST. art. IV, § 10.
64. *Inquiry Concerning a Judge,* 762 P.2d at 1295 (emphasis in original).
65. *Id.* at 1296.
66. 757 P.2d 32 (Alaska 1988).
67. *Id.* at 34.
68. Civil No. A-82-369 (D. Alaska 1982), *appeal filed,* No. 87-3587 (9th Cir. 1987)

sovereign immunity. However, *Tyonek* was based upon that tribe's "unique history."[69] In *Stevens,* the court's decision was based upon its interpretation of congressional intent "that most Alaskan native groups not be treated as sovereigns,"[70] as well as prior Alaska Supreme Court opinions such as *Atkinson v. Haldane,*[71] and *Metlakatla Indian Community, Annette Island Reserve v. Egan.*[72]

The court suggested certain factors which could permit a village to be granted immunity.[73] For example, immunity might be proper if a Native group achieves tribal status[74] or attains self-governing status[75] under the Indian Reorganization Act.[76] The court noted, however, that no tribal recognition had been conferred upon the Native Village of Stevens and that passage of the Alaska Native Claims Settlement Act ("ANCSA")[77] "evidences Congress's intent that non-reservation villages be largely subject to state laws."[78] Justice Rabinowitz' strongly worded dissent provides contrary arguments, focusing primarily on the view that "Congress has never stated with sufficient clarity an intent to waive the sovereign immunity of Alaska Native villages."[79]

The court also decided two cases which involved application of ANCSA.[80] In *Hakala v. Atxam,*[81] the court interpreted section 14(c)(1) of ANCSA, which provides that a village corporation is required to reconvey any land received under patent from the federal government to its current occupant (as of December 18, 1971), if the land is being used as, inter alia, a "primary place of business."[82] Hakala and his partner occupied certain land as a base camp for their hunting guide operation and therefore sought to have the corporation convey this land to them under the Act. Finding that the campsite was the nucleus, "or center of activity," of the guide business and, as

69. *Stevens,* 757 P.2d at 36.
70. *Id.* at 34.
71. 569 P.2d 151 (Alaska 1977) (holding that the Metlakatla Indians possessed tribal sovereign immunity).
72. 362 P.2d 901 (Alaska 1961), *rev'd in part,* 369 U.S. 45 (1962) (Alaska Supreme Court held that regulations issued by the Secretary of the Interior were invalid as applied to the Indian Communities of Metlakatla, Kake, and Angoon. The United States Supreme Court reversed the decision with regard to Metlakatla and affirmed with regard to the other two villages).
73. *Stevens,* 757 P.2d at 40.
74. *Id.* at 41.
75. *Id.* at 40.
76. 25 U.S.C. §§ 461-492 (1982 & U.S.C.A. Supp. 1989).
77. 43 U.S.C. §§ 1601-1629e (1982 & West Supp. 1988).
78. *Stevens,* 757 P.2d at 41.
79. *Id.* at 43 (Rabinowitz, J., dissenting).
80. 43 U.S.C. §§ 1601-1629e (1982 & West Supp. 1988).
81. 753 P.2d 1144 (Alaska 1988).
82. 43 U.S.C. § 1613(c)(1) (1982).

such, satisfied the court's test for "primary place of business," the supreme court reversed the lower court's decision.[83] The interpretation of "primary place of business" was a matter of first impression by the court, which noted that the legislative history provided no guidance and that there was no case law interpreting section 14(c)(1) of ANCSA.[84]

The court was faced with another ANCSA question in *Tetlin Native Corp. v. State,*[85] where it discussed the validity of five material site easements granted by the Bureau of Indian Affairs ("BIA") to the state after the land was conveyed to Tetlin Native Corporation under ANCSA.[86] Although the conveyance had deleted reference to the easements, the court found that the state had not waived its right to claim an interest in the easements despite a clause in the conveyance requiring that any party with an alleged property interest appeal in order to preserve its claim.[87] Whether the sites were deleted through inadvertence or assumed adjudication and cancellation is of no consequence.[88] The court also held that Tetlin was estopped to deny the validity of the easements as validly created rights of way.[89] Placing Tetlin in the shoes of the government, the court found that (1) the BIA and Bureau of Land Management knew the facts, (2) they intended their conduct to be acted upon, (3) the state was ignorant of the "true" facts, (4) the state relied upon the actions of the BIA and BLM, and (5) the government, in denying and granting easements, engaged in affirmative conduct.[90]

IV. BUSINESS LAW

The court decided a great many cases this past year in the area of business law. The decisions fall into four categories: insurance, secured transactions, contracts, and general business.

A. Insurance

Litigation involving insurance companies is typically fact specific and frequently results in holdings limited to the terms of the particular

83. *Hakala,* 753 P.2d at 1149.
84. *Id.* at 1147.
85. 759 P.2d 528 (Alaska 1988).
86. 43 U.S.C. §§ 1601-1629e (1982 & West Supp. 1988).
87. *Tetlin,* 759 P.2d at 533.
88. *Id.*
89. *Id.* at 537. Even if adjudication were the basis for deletion, neither notice nor a hearing occurred to render a cancellation valid. *Id.*
90. *Id.* at 535-36.

policy.[91] The issues addressed by the court this year relate primarily to statutes of limitation, coverage, defenses, and third party claims.

Any effective claim by an insured party or beneficiary under a particular policy must be brought within the applicable statute of limitations. For life insurance claims, the statutory period is six years after the death of the insured.[92] In *Carman v. Prudential Insurance Co. of America,*[93] the court addressed the tolling of the statutory period when the insured has disappeared and the beneficiary relies on a statutory presumption of death.[94] The court held that the beneficiary's cause of action accrues on the day that the presumptive death period expires.[95] For purposes of consistency, the court presumes that a demand for payment was made and refused on that date in order to commence the six-year statute on the insurance claim.[96]

With respect to coverage, the court generally views insurance policies as contracts and attempts to assign liability in accordance with the terms of the policy.[97] However, because insurance policies are contracts of adhesion, the court also attempts to determine the reasonable expectations of the parties and to honor the contract in order to fulfill those expectations.[98] In so doing, the court resolves any ambiguities in the contract language in favor of the insured.[99] In 1988, this has resulted in the court's uniformly upholding the claims of the insured party in construing the terms of the policy.

In *Hillman v. Nationwide Mutual Fire Insurance Co.,*[100] the court addressed the validity of uninsured motorist provisions that exclude

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91. *See, e.g.,* State v. Underwriters at Lloyds, London, 755 P.2d 396 (Alaska 1988); Huber v. Insurance Co. of North America, 760 P.2d 1028 (Alaska 1988).

92. ALASKA STAT. § 09.10.050(1) (1983). Life insurance claims are subject to the same period as actions on contracts. Carman v. Prudential Ins. Co., 748 P.2d 743, 745 (Alaska 1988).

93. 748 P.2d 743 (Alaska 1988).

94. Under Alaska Statutes section 13.06.035(3), a person who is absent for a continuous period of five years, and whose absence is unexplained, is presumed to have died at the end of the five-year period. ALASKA STAT. § 13.06.035(3) (1985 & Supp. 1988).

95. *Carman,* 748 P.2d at 744.

96. *Id.* at 745. Despite granting this liberal time period in which the beneficiary may assert a claim, the court ruled against Mrs. Carman because she delayed unnecessarily even beyond the extended period during which the claim may permissibly be filed.

97. Hillman v. Nationwide Mut. Fire Ins. Co., 758 P.2d 1248, 1250 (Alaska 1988); State v. Underwriters at Lloyds, London, 755 P.2d 396, 400 (Alaska 1988). *See also infra* notes 100-05 and accompanying text.

98. *Hillman,* 758 P.2d at 1250. *See also* Huber v. Insurance Co. of North America, 760 P.2d 1028, 1029 (Alaska 1988), and *infra* notes 106-07 and accompanying text.

99. *Hillman,* 758 P.2d at 1250.

100. 758 P.2d 1248 (Alaska 1988).

coverage when the insured is driving an owned but uninsured vehicle. Recognizing that the purpose of uninsured motorist coverage is to protect the insured party from harm at the hands of uninsured tortfeasors, the court declared invalid the policy's exclusion for uninsured-owned motor vehicles, stating that "[s]tatutory coverage bears no relationship to the occupancy of any particular motor vehicle by the person insured."[101]

In *State v. Underwriters at Lloyds, London,*[102] a jet owned by Japan Airlines ("JAL") was damaged when it slid off an icy runway at Anchorage International Airport. The court construed JAL's policy indemnifying the state broadly, holding that the premises-operations coverage applies to "all operations necessary or incidental"[103] to the course of standard business and is not narrowly confined to accidents on the leased premises.[104] The court interpreted the cross-liabilities contained in the policy to require that each claim be viewed as a separate contract; therefore, an exclusion for aircraft owned by JAL did not affect the state's recovery because the damaged aircraft was owned by JAL and not by the state.[105]

The issue of whether an insurance company could be considered the "owner" under a homeowner's contract with a building contractor and therefore be required to comply with its terms was addressed in *Huber v. Insurance Co. of North America.*[106] The court held that by approving the proposal submitted by the contractor assenting to its terms, the insurer became the "owner" and may therefore be obligated to carry the fire insurance coverage specified in the proposal.[107]

Coverage issues also include the amount a party may recover under a particular policy, as addressed in *Schultz v. Travelers Indemnity Co.*[108] In cases where the parties to a dispute agree to a settlement

101. *Id.* at 1252. The court was interpreting Alaska Statutes section § 28.20.440, which set forth the requirements of owner's liability insurance and prohibited uninsured-owned motor vehicle exclusions. ALASKA STAT. § 28.20.440 (1984 & Supp. 1988) (originally enacted in 1966). The court adopted this interpretation despite the passage of section 28.20.445(d) in 1984, which provided that uninsured motorist coverage does not apply when the insured is occupying an owned but uninsured vehicle. ALASKA STAT. § 28.20.445(d) (1984). The accident at issue occurred in 1983 and section 28.20.445(d) took effect on January 1, 1985. The court said that the 1984 statute could not be considered a mere clarification of section 28.20.440, and the plaintiff was permitted to recover under the law existing at the time of the accident. *Hillman,* 758 P.2d at 1252.

102. 755 P.2d 396 (Alaska 1988).

103. *Id.* at 399 (quoting Hale v. Fireman's Fund Ins. Co., 731 P.2d 577, 580 (Alaska 1987)).

104. *Id.* at 399-400.

105. *Id.* at 400.

106. 760 P.2d 1028 (Alaska 1988).

107. *Id.* at 1029.

108. 754 P.2d 265 (Alaska 1988).

and stipulate that the prevailing party will receive "policy limits," the insured is entitled to recover the maximum face value of the policy plus attorneys' fees based on a projected verdict award *if* the insurance policy provides coverage for attorneys' fees and court costs.[109] Thus, the prevailing party is not penalized for early resolution of the dispute, a result which benefits all parties, including the courts.

Several of the court's holdings concern defenses posed by insurers to avoid paying claims. In *Davis v. Criterion Insurance Co.*,[110] the court addressed the issue of whether an insurance company, after denying coverage for an accident, may be held liable in a suit to recover damages when the insured failed to notify the insurer that she was being sued. The court held that if an insurer unjustifiably denies coverage, it terminates its rights to demand compliance with the other terms of the insurance contract, including its right to be notified.[111] The insurer therefore cannot claim as a defense to a default judgment entered against it that the insured failed to provide the insurer with notice of the suit.[112]

Another issue relating to defenses concerns the standard of proof required for an insurance company to assert the defense successfully. In *Dairy Queen v. Travelers Indemnity Co.*,[113] the insurance company refused to pay a fire insurance claim because the probable cause of the fire was found to be arson. In affirming the lower court's ruling in favor of the insurer,[114] the court held that for an insurance company to assert arson and false swearing as a defense to paying a claim, it need prove the defense only by a preponderance of the evidence and not by the higher standard of clear and convincing evidence.[115]

While few decisions favored the insurance company over the insured party, the court did limit the rights of third party claimants against a tortfeasor's insurance company. For example, the court held that an insurance policy with an indemnification clause does not flatly require indemnification of all contractual obligations of the insured. As discussed in *Alaska National Insurance Co. v. Industrial Indemnity*

109. *Id.* at 266-67.
110. 754 P.2d 1331 (Alaska 1988).
111. *Id.* at 1332. The case was remanded to the lower court for a determination of the validity of the denial of coverage.
112. *Id.*
113. 748 P.2d 1169, 1169-70 (Alaska 1988).
114. *Id.* at 1172.
115. *Id.*

Co.,[116] the insured must first become legally obligated to pay damages.[117] Therefore, if the insured is not made a party to the underlying action, no judgment will establish the liability of its insurance company.[118] Without any obligation on the part of the insured, there can be no indemnification of a third party by the insurer.[119]

In *O.K. Lumber Co. v. Providence Washington Insurance Co.*,[120] the court, deciding an issue of first impression, held that a third party claimant has no cause of action against an insurer for breach of the duty of good faith and fair dealing; this right runs only to the party with whom the insurer has a fiduciary relationship, that is, the insured party.[121] The court further held that a third party claimant has no cause of action under the Unfair Claim Settlement Practices Act ("UCSPA").[122] In addition, a third party would have no claim as a purchaser of goods and services for breach of warranty under the Consumer Protection Act,[123] because the Act exempts from coverage all activities regulated by the UCSPA.[124]

B. Secured Transactions

The rules promulgated by the supreme court with respect to secured transactions are fairly straightforward. Two cases decided on the same day, *Conrad v. Counsellors Investment Co.*[125] and *Moening v. Alaska Mutual Bank*,[126] clarify the means by which secured creditors may collect on the obligations owed them. In the event of a defaulted payment, a secured creditor typically has the right either to sue on the note or to foreclose on the secured property, unless the deed of trust between the parties provides otherwise.[127] The court held in *Conrad* that the fact that a deed of trust entitles the creditor to foreclose nonjudicially (sell the property and retain the proceeds in satisfaction of the debt) does not imply that he cannot foreclose judicially (sue for a deficiency judgment or a court-ordered foreclosure sale).[128] However,

116. 757 P.2d 1052 (Alaska 1988).
117. *Id.* at 1054. In this case, the insurance policy specifically stated that "all sums which the insured shall become legally obligated to pay as damages . . ." were covered by the indemnification clause. *Id.*
118. *Id.*
119. *Id.*
120. 759 P.2d 523 (Alaska 1988).
121. *Id.* at 526.
122. *Id.* at 527; ALASKA STAT. § 21.36.125 (1984).
123. ALASKA STAT. § 45.50.471-.561 (1986 & Supp. 1988).
124. *O.K. Lumber Co.*, 759 P.2d at 528.
125. 751 P.2d 10 (Alaska 1988).
126. 751 P.2d 5 (Alaska 1988).
127. *Conrad*, 751 P.2d at 12.
128. *Id.*; ALASKA STAT. § 34.20.070(a) (1985 & Supp. 1988).

Moening provided that a creditor who first elects a non-judicial foreclosure does forfeit his rights to a later deficiency judgment,[129] while a creditor who sues on the note and receives a deficiency judgment may still foreclose the security either judicially or non-judicially if the judgment remains unsatisfied.[130]

The court also addressed the rights of junior lienholders in two cases. In *Adams v. FedAlaska Federal Credit Union,*[131] the court examined the general proposition that a junior lienholder will lose his security interest as a result of a senior lienholder's foreclosure sale, even when the junior creditor is the purchaser at sale.[132] The court declined to adopt a rule that would allow the junior creditor to recover from the debtor the difference between the value of the property purchased and the outstanding indebtedness[133] and found that the loss of the security interest permits the junior lienholder to obtain a writ of attachment to the debtor's accounts to collect on the underlying obligation.[134]

Dahlby v. Guzzardi[135] established that when a junior lienholder pays the borrower's underlying debt owed to a senior creditor in order to protect his own interest, he becomes subrogated to the rights of the senior lienholder.[136] Therefore, the junior creditor, who then assumes the senior lien, may collect the amount he paid in satisfaction of the senior debt against the proceeds from a liquidation sale of the security.[137]

The final matter in this section, while involving security interests, does not concern secured transactions per se. In *Fehir v. State,*[138] the court addressed the rights of an innocent, non-negligent security holder of a vessel forfeited to the government for violations of fishing law. The plaintiff claimed that he was entitled to a hearing under the Alaska Constitution to obtain remission of the vessel or reimbursement for his security interest.[139] The court held that while failure to perfect a security interest in the vessel does not mandate forfeiture of the right to a remission hearing, it first requires the holder to prove

129. *Moening,* 751 P.2d at 7-8; ALASKA STAT. § 34.20.100 (1985).

130. *Conrad,* 751 P.2d at 13; *Moening,* 751 P.2d at 8; ALASKA STAT. § 09.45.200 (1983).

131. 757 P.2d 1040 (Alaska 1988).

132. *Id.* at 1044; ALASKA STAT. § 34.20.090 (1985 & Supp. 1988).

133. *Adams,* 757 P.2d at 1043.

134. *Id.* at 1044. The dissent argued that this rule in fact "allows junior lienholders to do indirectly that which would be prohibited if done directly." *Id.* (Bryner, J., dissenting).

135. 763 P.2d 223 (Alaska 1988).

136. *Id.* at 226.

137. *Id.* at 227; ALASKA STAT. § 45.09.306(a), (b) (1986).

138. 755 P.2d 1107 (Alaska 1988).

139. *Id.* at 1108; ALASKA CONST. art. I, § 7.

that he has an interest senior to that asserted by others, including the state, in order to receive compensation.[140]

C. Contracts

In the area of contract law, the cases before the court in 1988 predominantly addressed collateral issues, such as settlement and remedies, rather than substantive issues relating to the nature and enforcement of claims.

The most common way to dispose of a claim other than by judicial proceeding is through an out-of-court settlement between the parties. While a mutually satisfactory settlement must generally be reduced to writing to be considered valid and enforceable under the Statute of Frauds,[141] the parties are estopped from subsequently denying such settlement if "the party against whom enforcement is sought admits . . . the making of an agreement."[142] In *Pavek v. Curran,*[143] the court enforced a previously agreed upon settlement despite one party's refusal to execute it, holding that a client will be bound by his attorney's statement that he has agreed to settle provided the client is present at the settlement hearing and fails to object to the terms of the agreement.[144]

Another means of non-judicial settlement of a claim is by accord and satisfaction. When a party negotiates a check which states that acceptance of the check constitutes full payment, he implicitly agrees to accord and satisfaction and relinquishes the right to sue for further amounts.[145] In *Danac, Inc. v. Gudenau & Co.,*[146] the court ruled that in such a situation, the creditor has the option to destroy the check and sue for all amounts which it believes it is owed or to negotiate the instrument and consider the dispute settled.[147] Therefore, an election to negotiate the check would constitute acceptance of the check for the full value of the obligation.

The court discussed the equitable remedy of restitution in *Ben Lomond, Inc. v. Allen.*[148] Restitution is typically granted to a party defaulting on a contract to the extent that the benefit retained by the non-breaching party exceeds the damages incurred by that party as a

140. *Fehir,* 755 P.2d at 1109-1110; ALASKA STAT. § 45.09.301(a)(2) (1986).
141. ALASKA STAT. § 09.25.010 (1983).
142. *Id.* § 09.25.020(4).
143. 754 P.2d 1125 (Alaska 1988).
144. *Id.* at 1127.
145. Danac, Inc. v. Gudenau & Co., 751 P.2d 947, 950 (Alaska 1988) (finding attempt to reserve rights through a letter ineffective).
146. 751 P.2d 947 (Alaska 1988).
147. *Id.* at 950 (citing Air Van Lines, Inc. v. Buster, 673 P.2d 774, 778 (Alaska (1983)).
148. 758 P.2d 92 (Alaska 1988).

consequence of the breach.[149] The burden of proof is on the defaulting party to prove the amount by which the benefits exceed the damages.[150]

The court also decided an issue concerning the standing of a contractor to assert a claim for breach of contract. The applicable statute requires a contractor to be registered in order to be able to bring such a claim.[151] In *Hale v. Vitale,*[152] the court ruled that, so long as a contractor is registered at the time of entering into the contract and the registration is valid, the suit may not be dismissed for his failure to be bonded.[153]

D. General Business

The court decided six cases which fall into the area of general business, two of which relate to the form of incorporation of an enterprise and are fairly fact specific. An additional three decisions address routine problems occurring in business relationships, while the remaining, and perhaps most important, case incorporates into Alaska law a federal exception to the doctrine of finality of judgments.

In *Norman v. Nichiro Gyogyo Kaisha, Ltd.,*[154] the court narrowly applied the "common accident" exception to the doctrine of finality of judgments. This case concerned a shareholder's motion for relief from a judgment dismissing an action for loss in value arising from breach of a shareholders' agreement. The plaintiff initially brought his claim in 1982 and was denied recovery.[155] Because the court subsequently awarded relief to a second party who suffered the identical harm from the defendant in the same transaction, the court ruled that the original plaintiff was entitled to an exception under Civil Rule 60(b)(6) which would permit the claim to be relitigated.[156] In balancing the interest in the finality of judgments against the interest in maintaining public confidence in the judicial system, the court held that "when two litigants are injured in the same 'accident' and only one recovers" due to

149. *Id.* at 94-95.

150. *Id.* at 95.

151. ALASKA STAT. § 08.18.151 (1987).

152. 751 P.2d 488 (Alaska 1988).

153. *Id.* at 489. Hale had been bonded, but his bond was cancelled six months before entering into the contract. *Id.* at 488.

154. 761 P.2d 713 (Alaska 1988).

155. Norman v. Nichiro Gyogyo Kaisha, Ltd., 645 P.2d 191 (Alaska 1982), *overruled on other grounds by* Hikita v. Nichiro Gyogyo Kaisha, Ltd., 713 P.2d 1197 (Alaska 1986).

156. *Norman,* 761 P.2d at 717. Alaska Rules of Civil Procedure rule 60(b)(6) provides, "the court may relieve a party . . . from a final judgment . . . [if] (6) any other reason justif[ies] relief from the operation of the judgment." ALASKA R. CIV. P. 60(b)(6).

a faulty application of law, "a compelling case is presented for divergence from strict application of the finality of judgment doctrine."[157]

In a significant decision involving partnership law, *Parker v. Northern Mixing Co.*,[158] the court held that an agreement to share profits does not in and of itself conclusively prove the existence of a partnership,[159] stating that an individual who advances money to a partnership does not by law become a partner merely because he is entitled to a share in the profits.[160] Rather, the fact that he expects repayment of the obligation, coupled with the fact that he has no expectation of management or control of the business, tends to prove that he is merely a creditor of the partnership and not a general partner.[161]

Parker involved an action for accounting in a dissolution of the partnership. The court ruled that, with respect to the parties who were partners, personal services rendered may qualify as a non-cash capital contribution to a partnership, but only if an express or implied agreement exists to that effect.[162] Finally, the court addressed the extent of each partner's liability for losses of the partnership. In the absence of an agreement to the contrary, each partner shares in losses according to his predetermined share in the profits and not pro rata according to his capital contribution.[163]

The rules governing close corporations are more akin to partnership law than to traditional corporate doctrines. In *Stevens* ex rel. *Park View Corp. v. Richardson*,[164] the court adopted the common law rule that directors of a close corporation may not vote to compensate themselves for past services in the absence of an express or implied agreement.[165] However, ratification by a disinterested majority of shareholders will approve such action even in the absence of any agreement.[166] The court upheld the compensation awarded in *Stevens* despite the inclusion of interested shareholder votes in the majority, ruling that the directors' action is presumptively valid unless the dissenting shareholder proves that the transaction was substantively unfair.[167]

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157. *Norman*, 761 P.2d at 717.

158. 756 P.2d 881 (Alaska 1988).

159. Parker v. Northern Mixing Co., 756 P.2d 881, 887 (Alaska 1988); *see also* ALASKA STAT. § 32.05.020(3) (1986).

160. *Id.* at 887.

161. *Id.*

162. *Id.* at 888. The court remanded this issue to the trial court for a determination of whether such an agreement existed.

163. *Id.* at 890; ALASKA STAT. § 32.05.130(1) (1986).

164. 755 P.2d 389 (Alaska 1988).

165. *Id.* at 392.

166. *Id.* at 395.

167. *Id.* The dissenting shareholder failed to meet this burden in *Stevens*.

The court discussed the rights of former employees in *Data Management, Inc. v. Greene,*[168] where it addressed the validity of overbroad covenants not to compete. Rejecting such covenants as unconscionable per se, the court adopted the position that "if an overbroad covenant not to compete can be reasonably altered to render it enforceable, then [a] court shall do so unless it determines the covenant was not drafted in good faith."[169]

In *Foltz-Nelson Architects v. Kobylk,*[170] the court determined the proper method of computing the time in which an action may be commenced to foreclose a mechanic's lien. The court held that the six-month statutory period begins to run the day after an extension of the lien has been filed and terminates six months from the date of filing.[171]

Finally, the court took a strong position against anti-competitive practices in government procurement in *McBirney & Associates v. State.*[172] Acknowledging the need for "as much fairness, certainty, publicity, and absolute impartiality"[173] as is possible in competitive bidding, the court ruled that preferential dealings in pre-solicitation negotiations and the availability of inside information constitute "demonstrated impropriety" that is wholly unacceptable in government procurement.[174] Therefore, in this case the court denied the award of a public contract to a bidder who had access to inside information that conferred upon him an unfair advantage against competing bidders.[175]

V. CONSTITUTIONAL LAW

In 1988, the supreme court was faced with only three cases that were dominated by questions of law under the federal and Alaska constitutions. The first of these, a case interpreting the federal Constitution, is *Vest v. Schafer.*[176] *Vest,* originally a constitutional challenge to

168. 757 P.2d 62 (Alaska 1988).

169. *Id.* at 64. This rule represents an adoption of Restatement (Second) of Contracts, section 184(2), and is consistent with Alaska Statutes section 45.02.302, which provides an option to modify an unconscionable clause in a contract rather than invalidate the contract in its entirety. RESTATEMENT (SECOND) OF CONTRACTS § 184(2) (1981); ALASKA STAT. § 45.02.302 (1986). The burden of proving good faith is shifted to the employer in this situation. *Greene,* 757 P.2d at 64.

170. 749 P.2d 1347 (Alaska 1988).

171. *Id.* at 1348. *See* ALASKA STAT. §§ 01.10.080 (1982), 34.35.080(a)(2) (1985 & Supp. 1988).

172. 753 P.2d 1132 (Alaska 1988).

173. *Id.* at 1136 (citing Pratt Elec. Supply, Inc. v. City of Seattle, 16 Wash. App. 265, 271, 555 P.2d 421, 421, 427 (1976) (citations omitted)).

174. *Id.* at 1137.

175. *Id.* at 1138.

176. 757 P.2d 588 (Alaska), *petition for cert. filed,* No. 88-447 (1988).

an Alaska statute[177] which was later found to violate the equal protection clause of the fourteenth amendment, involved on second appeal a suit for damages for benefits that were lost as a result of the operation of the statute. The court affirmed the superior court's grant of summary judgment against the plaintiffs for several reasons.

First, the court, upholding its decision in *State v. Green,*[178] held that not only is the state protected from section 1983 claims by its eleventh amendment immunity, but also states are not "persons" for the purposes of section 1983.[179] The consequence of this holding is to immunize states from such suits in both state and federal courts.

Second, the court refused to permit a judicially created damages remedy (*Bivens*-type remedies)[180] in this case because the United States Supreme Court has not recognized such remedies in either (1) actions against states, or (2) actions under the fourteenth amendment.[181]

Finally, the court decided that claims against the administrator of the longevity bonus program are barred because, when the administrator is sued in her official capacity, she is immune.[182] Also, because such claims are actually directed against the state, the administrator is not a proper party defendant at all if sued in her personal capacity.[183]

The court was required to interpret a provision of the Alaska Constitution that prohibits political subdivisions of the state from contracting debt[184] in *Village of Chefornak v. Hooper Bay Construction Co.*[185] In an action for breach of contract, Chefornak's attorney discussed a proposed settlement with city council members, many of whom did not speak English.[186] Leaving the meeting with the belief that settlement was authorized, the attorney signed a stipulation for entry of judgment against the city.[187] The city subsequently moved to have the judgment set aside, arguing primarily that it violated the

177. The statute in question was the state's Longevity Bonus Program, which paid monthly benefits to "twenty-five year Alaska residents, age 65 or over, who had been domiciled in Alaska before statehood." ALASKA STAT. §§ 47.45.010-47.45.170 (1984 & Supp. 1988).

178. 633 P.2d 1381 (Alaska 1981).

179. *Vest,* 757 P.2d at 591; 42 U.S.C. § 1983 (1982).

180. *Id.* at 594. *Cf.* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) (holding that a violation of the fourth amendment by a federal agent acting under color of his authority gave rise to a cause of action for damages directly under the Constitution, even though no such action had been provided for by statute).

181. *Vest,* 757 P.2d at 596.

182. *Id.* at 599.

183. *Id.* at 599-600.

184. ALASKA CONST. art IX, § 9.

185. 758 P.2d 1266 (Alaska 1988).

186. *Id.* at 1268.

187. *Id.*

Alaska Constitution's municipal debt restrictions.[188] The court rejected the village's argument and held that the contract was enforceable. The court reasoned that the provision was intended only "to restrict a municipality's ability to voluntarily borrow funds or issue bonds,"[189] and not "to insulate cities from valid judgments."[190]

A final dispute arising under the Alaska Constitution took place in *Patrick v. Lynden Transport, Inc.*[191] In *Patrick,* the plaintiff challenged an Alaska statute requiring out-of-state plaintiffs to post security bonds for "anticipated costs and attorneys' fees as a condition of bringing suit in an Alaska Court."[192] The court struck down the statute, holding that it violated the equal protection provision of the Alaska Constitution in that it "unreasonably restricts nonresident access to Alaska Courts."[193] Specifically, the court felt that, although access to the court system is not a fundamental right, it is a right important enough to demand close scrutiny of any statute abrogating it.[194] Because the statute is both overinclusive (it imposes the requirement on *all* nonresident plaintiffs regardless of their ability or willingness to pay judgments) and underinclusive (it does not impose such requirements on resident plaintiffs who may be difficult debtors), the court found the statute unconstitutional.[195]

VI. CRIMINAL LAW

The criminal cases decided by the Alaska Supreme Court in 1988 were concerned less with the substantive offenses charged than with the procedural problems accompanying the arrests and trials, despite a diverse sampling of underlying offenses, which ranged from sexual assault on a minor to murder to driving while intoxicated. The court

188. *Id.*; ALASKA CONST. art. IX, § 9.
189. *Village of Chefornak,* 758 P.2d at 1269.
190. *Id.*
191. 765 P.2d 1375 (Alaska 1988).
192. Section 09.60.060 of the Alaska Statutes provides:

> *Security for costs where plaintiff a nonresident or foreign corporation.* When the plaintiff in an action resides out of the state or is a foreign corporation, security for the costs and attorney fees, which may be awarded against the plaintiff, may be required by the defendant, if timely demand is made within 30 days after the defendant discovers that the plaintiff is a nonresident. When required, all proceedings in the action shall be stayed until an undertaking executed by one or more sufficient sureties is filed with the court to the effect that they will pay the costs and attorney fees which are awarded against the plaintiff, for not less than $200. A new or an additional undertaking may be ordered by the court upon proof that the original undertaking is insufficient in amount or security.

Id. at 1376 n.2 (quoting ALASKA STAT. § 09.60.060 (1983)).
193. *Id.* at 1376.
194. *Id.* at 1379.
195. *Id.*; ALASKA STAT. § 09.60.060 (1983).

generally adopted a conservative stance, tightening the grasp of the law on offenders, except for the cases in which the defendant's constitutional rights were at issue, where the court tended to be more protective of the defendant.

This juxtaposition is best demonstrated in the cases relating to evidentiary issues. For example, in *Clifton v. State,*[196] the court reversed and remanded a first degree murder conviction, holding that the trial court erred in allowing the prosecution to impeach the defense witness with prior convictions that were more than five years old because they were not necessary for a fair determination of the case.[197] The court established a two-step analysis to determine whether "stale" convictions are admissible for impeachment purposes. First, a court must "weigh the probative value of the evidence against its prejudicial effect."[198] Second, it must determine whether "admission of the evidence is necessary for a fair determination of the case."[199]

In another case respecting admissibility of certain evidence, the court moved to protect defendants from the use of illegally extracted convictions. In *Webb v. State,*[200] the arresting officers read the defendant his *Miranda*[201] rights but informed him that they would not return his driver's license unless he followed them to police headquarters and gave a statement. The court found that the statement was involuntary due to the coercive nature of the troopers' actions and therefore was inadmissible.[202] In so holding, the court adopted a per se rule deeming "involuntary a *Miranda* waiver obtained by conditioning the exercise of the constitutional guarantee against self-incrimination against the loss of another constitutionally protected interest."[203]

In cases involving prisoners, the court further protected the constitutional rights of defendants on evidentiary issues; however, it otherwise ruled more strictly with respect to personal liberties. *Department of Corrections v. Kraus*[204] involved two prisoners, Kraus and Winter, who had been sanctioned for violating prison rules and correspondingly lost a portion of their accrued "good time."[205] The court cited an earlier opinion, *McGinnis v. Stevens,*[206] in which it held that

196. 751 P.2d 27 (Alaska 1988).
197. *Id.* at 29.
198. *Id.*; ALASKA R. EVID. 609(c).
199. *Clifton,* 751 P.2d at 29; ALASKA R. EVID. 609(b).
200. 756 P.2d 293 (Alaska 1988).
201. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).
202. *Webb,* 756 P.2d at 297.
203. *Id.* The court held that the retention of Webb's driver's license constituted a denial of his property without due process of law.
204. 759 P.2d 539 (Alaska 1988).
205. *Id.* at 539.
206. 543 P.2d 1221 (Alaska 1975).

while inmates do not have an automatic right of appeal, they are entitled to judicial review only when "fundamental constitutional rights are alleged to be abridged in disciplinary proceedings."[207] The court found that Winter's claim that the disciplinary committee had relied on evidence not offered in the proceeding constituted a defect amounting to a failure of due process.[208] However, with respect to Kraus' claim that the punishment was excessive, the court held that excessive sanctions do not constitute an abridgement of constitutional rights.[209]

In another case concerning prisoners and good time, the court answered the narrow question of "whether a person imprisoned for refusal to pay a fine is entitled to 'good time' reductions to his sentence."[210] In *Murphy v. City of Wrangell,*[211] the court interpreted the relevant statute,[212] which guarantees such reductions only to prisoners "convicted of an offense against the state and sentenced to imprisonment,"[213] as excluding from the definition of "offense" the refusal to pay a fine.[214] The court limited the statute's application to situations involving a breach of the criminal law, misdemeanor, or felony, thereby holding that Murphy was not entitled to a "good time" reduction.[215]

In keeping with its propensity to protect individuals' due process rights, the court, in *Matter of Elder,*[216] addressed the rights of an individual who had been held in contempt and imprisoned for failing to return money he had unlawfully appropriated from an insurance settlement awarded to his comatose brother.[217] The court found that such incarceration takes on a punitive character and is improper if the individual is unable to comply with the court's order (to return the misappropriated funds.)[218] The court held that when the funds or property ordered to be produced are held by third parties or have been converted to illiquid form and the contemnor has no control, he may not be imprisoned without first being granted the due process protection generally accorded criminal defendants.[219]

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207. *Kraus,* 759 P.2d at 540 (citing McGinnis v. Stevens, 543 P.2d 1221, 1236 n.45 (Alaska 1975)).
208. *Id.* at 529.
209. *Id.* at 540-41.
210. Murphy v. City of Wrangell, 763 P.2d 229, 230 (Alaska 1988).
211. 763 P.2d 229 (Alaska 1988).
212. ALASKA STAT. § 33.20.010 (1986).
213. *Id.*
214. *Murphy,* 763 P.2d at 231.
215. *Id.* at 232.
216. 763 P.2d 219 (Alaska 1988).
217. *Id.*
218. *Id.* at 222-23.
219. *Id.* at 223.

The court was extremely conservative in considering statute of limitations issues, which bore harsh consequences for criminal defendants. In *State v. Creekpaum,*[220] the court found that it is constitutionally permissible to extend the statute of limitations for the crime of sexual assault on a minor, provided the statutory amendment creating the extension was enacted before the original statute had run in a particular case.[221] At the time of the alleged offense in *Creekpaum*, the applicable statute of limitations was five years.[222] While the statutory period was running, the legislature enlarged the period for bringing charges to five years plus the earlier of (1) one year after the crime has been reported, or (2) the time the victim reaches the age of sixteen.[223]

Relying primarily on *Weaver v. Graham*[224] and *Clements v. United States,*[225] the court found that the extension of a statute of limitations was merely a procedural change that did not affect the substantive rights of the defendant.[226] The extension was not an unconstitutional ex post facto law because it did not render a previously innocent act criminal, aggravate or increase the punishment for the crime charged, alter the rules of evidence, or penalize the defendant for an otherwise innocent act.[227]

With respect to criminal suspects as plaintiffs, the court was more lenient, extending an individual's ability to bring suit against the police and vindicate his personal rights. In *Jenkins v. Daniels,*[228] the court determined the appropriate statute of limitations on claims for false arrest and imprisonment. Finding that such claims are brought against police officers acting in their official capacity, the court held that they are subject to the three-year statute of limitations governing claims against "peace officers."[229] In the same case, however, the court held that a civil rights claim for arrest without probable cause[230] resulting from the same incident was a personal injury claim and not a claim against a peace officer. Therefore, such a claim is subject to the two-year tort limitation period.[231]

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220. 753 P.2d 1139 (Alaska 1988).

221. *Id.* at 1140.

222. ALASKA STAT. § 12.10.010 (1984).

223. *Id.* § 12.10.020(c) (1984 & Supp. 1988).

224. 450 U.S. 24 (1981).

225. 266 F.2d 397 (9th Cir.), *cert. denied,* 359 U.S. 985 (1959).

226. *Creekpaum,* 753 P.2d at 1144.

227. *Id.* at 1143 (citing Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied,* 359 U.S. 985 (1959)).

228. 751 P.2d 19 (Alaska 1988).

229. *Id.* at 23; ALASKA STAT. § 09.10.060(a) (1983).

230. 42 U.S.C. § 1983 (1982). Although the plaintiff did not proceed in the supreme court under this statute, it is the applicable statute for a civil rights claim. *Jenkins,* 751 P.2d at 23.

231. *Jenkins,* 751 P.2d at 24; ALASKA STAT. § 09.10.070 (1983).

Pletnikoff v. Johnson,[232] although a civil rape case, derives from a criminal complaint. Pletnikoff had been convicted of rape in a criminal proceeding; the conviction was later overturned due to inadmissible evidence, and he subsequently pleaded nolo contendere.[233] Reversing the superior court's decision, the court held that the criminal conviction had no collateral estoppel effect on the issue of defendant's liability in a civil proceeding.[234] In order to have a binding collateral estoppel effect, "a judgment must be valid, final and on the merits."[235] Reversal of the conviction by an appellate court prevented it from satisfying the finality requirement.[236]

The final category of criminal cases addresses the offense of driving while intoxicated ("DWI").[237] Again, the court adhered to its general dichotomy of conservative resolution of substantive issues and leniency with respect to the fundamental rights of criminal suspects. In *State, Department of Public Safety v. Conley,*[238] the court broadened the definition of "driving" to require that the automobile be in the defendant's physical control and that it be operable.[239] With respect to physical control, the court adopted the position that the car's engine need not be running; rather, it is sufficient to show that "[a] person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move."[240] Concerning the issue of operability, the court found that the Department of Public Safety need show merely "that the car is 'reasonably capable of being rendered operable.' "[241]

In *Ward v. State,*[242] the court reversed a lower court DWI conviction, holding, inter alia, that the failure by the arresting officer to allow the suspect his statutory opportunity to obtain an independent

232. 765 P.2d 973 (Alaska 1988).

233. *Id.* at 974.

234. *Id.* at 976.

235. *Id.* (quoting 18 C. WRIGHT, A. MILLER & B. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4432, at 298 (1981)).

236. *Id.* at 976. The court declined to express a view as to the res judicata effect of Pletnikoff's nolo contendere plea because it had not been suficiently briefed by the parties. *Id.* at 976 n.2. The dissent did not view this as a problem, however, expressing the opinion that a conviction resulting from a nolo plea "may be used for any purpose for which any conviction based on a plea of guilty might be used," including collateral estoppel. *Id.* at 981 (Matthews, C.J., dissenting).

237. ALASKA STAT. § 28.15.165 (1984).

238. 754 P.2d 232 (Alaska 1988).

239. *Id.* at 234-36.

240. *Id.* at 235 (quoting Cincinnati v. Kelley, 47 Ohio St. 2d 94, 97-98, 351 N.E.2d 85, 87-88 (1976), *cert. denied,* 429 U.S. 1104 (1977)).

241. *Id.* at 236 (quoting State v. Smelter, 36 Wash. App. 439, 444, 674 P.2d 690, 693 (1984)).

242. 758 P.2d 87 (Alaska 1988).

breathalyzer test[243] was a violation of his rights.[244] Therefore, the suspect was entitled to suppression of the results of the test administered by the police in order to enable him to put forth a meaningful defense.[245]

Finally, in *Miller v. State, Department of Public Safety,*[246] the court addressed the collateral estoppel effect of a prior criminal DWI conviction on a subsequent administrative license revocation proceeding. Because the defendant pled no contest to the DWI charges, the police stop which resulted in his arrest was ruled presumptively valid.[247] However, the court allowed him to challenge the stop's validity in the revocation hearing, stating that the prior criminal proceeding had no res judicata effect on the issue of the stop's validity because the defendant did not testify at the criminal hearing.[248] The court nevertheless affirmed the revocation of the license since it independently found on the facts that the police officer had due cause for the stop.[249]

VII. EMPLOYMENT LAW

During 1988, the court decided numerous cases in the field of employment law. Those cases have been separated into two major subcategories, wrongful discharge and workers' compensation, as well as an additional subcategory that includes the miscellaneous issues.

A. Wrongful Discharge

While many of the wrongful discharge cases in 1988 restated fundamental principles of employment law, such as requirements of "ample notice and opportunity to be heard," [250] perhaps a more significant development in the field of employment law involved the supreme court's decision in *ARCO Alaska, Inc. v. Akers,*[251] in which the court capitalized on an opportunity to clarify the state of the law with regard to terminability at will. In *ARCO,* the court held, inter alia,[252]

243. ALASKA STAT. § 28.35.033(e) (1984).
244. *Ward,* 758 P.2d at 90-91.
245. *Id.* at 91.
246. 761 P.2d 117 (Alaska 1988).
247. *Id.* at 117.
248. *Id.* at 118.
249. *Id.* at 119.
250. Degnan v. Bering Strait School Dist., 753 P.2d 146, 149 (Alaska 1988).
251. 753 P.2d 1150 (Alaska 1988).
252. The opinion also presents useful insights on both the amount of evidence necessary to present a jury question on the issue of just cause and the proper jury instructions for a cause of action based on the implied covenant of good faith and fair dealing.

that punitive damages are not recoverable in a wrongful discharge action for breach of the implied covenant of good faith and fair dealing.[253] In doing so, the court brought Alaska law in line with authority in other states similarly refusing to grant punitive damages for such a breach.[254] The court rationalized its decision by explaining that the implied covenant is an obligation springing from the contract itself. "Mere breach of implied covenant of good faith and fair dealing, however, does not constitute a tort."[255] As such, breach of an implied covenant should be redressed only through traditional contract remedies such as compensatory damages or, in extreme cases, specific enforcement of the contract.

The court did suggest, however, that in instances where the breach also constitutes an independent tort, punitive damages may be proper.[256] One example of such an independent tort is the violation of the public policy exception; however, the *ARCO* court expressly refused to state whether this exception, well known in other jurisdictions, would be valid under Alaska law.[257]

The court also refused to recognize the public policy exception[258] in *Walt v. State,*[259] a case involving a wrongful discharge action which raised questions about (1) the qualified immunity of public officials, and (2) the preclusive effect of a collective bargaining agreement on statutory and common law tort claims.

With regard to the first issue, the court held that the official who discharged Walt should be granted immunity from suit under section 1983 of title 42 of the United States Code, since his actions did not violate constitutional rights of the employee in existence at the time the official's decision was made.[260] Specifically, Walt's constitutional

253. *ARCO,* P.2d at 1154.

254. For examples of such decisions in other states, see Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 607, 440 N.E.2d 998, 1006 (1982) (refusing to recognize a tort remedy based on an employer's "bad faith" breach of an implied covenant of fair dealing); Monge v. Beebe Rubber Co., 114 N.H. 130, 134, 316 A.2d 549, 552 (1974) (plaintiff cannot recover damages for mental suffering in an action for breach of an employment contract). *But see* Seaman's Direct Buying Serv. v. Standard Oil, 36 Cal. 3d 752, 780, 686 P.2d 1158, 1174, 206 Cal. Rptr. 354, 370 (1984) ("A breach of contract may also constitute a tortious breach of the covenant of good faith and fair dealing . . . ."); Gates v. Life of Mont. Ins. Co., 205 Mont. 304, 668 P.2d 213 (1983) (a breach of duty to deal fairly and in good faith by an employer is a tort).

255. *ARCO,* 753 P.2d at 1154.

256. *Id.*

257. *Id.* at 1153. *See, e.g.,* Glenn v. Clearman's Gold Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25, 27 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

258. Walt v. State, 751 P.2d 1345, 1353 n.16 (Alaska 1988).

259. 751 P.2d 1345 (Alaska 1988).

260. *Id.* at 1349; 42 U.S.C. § 1983 (1982).

right to a pretermination hearing[261] did not become clear until the United States Supreme Court decided *Cleveland Board of Education v. Loudermill,*[262] months after the decision to terminate was made.[263] Therefore, reliance on pre-*Loudermill* standards for pretermination hearings and determination of the immunity question was justified.

In determining that Walt's tort claims should be barred by the collective bargaining agreement, the court relied not only on the express language of the agreement but also on existing caselaw from Alaska and other states that suggests that disputes arising out of such agreements ought to be decided on contractual grounds according to established grievance procedures set forth in the agreement, and not on tort theory.[264]

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261. U.S. CONST. amend. XIV, § 1.

262. 470 U.S. 532 (1985).

263. *Walt,* 751 P.2d at 1349.

264. *Id.* at 1351. In the opinion at pages 1350-1353, the court discusses cases supporting this position, including Bush v. Lucas, 462 U.S. 367 (1983) (holding that, because the claims arose out of an employment relationship governed by administrative procedures and remedies, it would be inappropriate for the court to imply a cause of action and grant a non-statutory damages remedy); Stevens v. State, 746 P.2d 908 (Alaska 1987) (in general, the state does not owe a duty of care to its citizens when it brings a cause of action against them); Public Safety Employees Ass'n v. State, 658 P.2d 769 (Alaska 1983) (analyzing whether arbitration was to be the exclusive remedy for the claim); Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986) (refusing to recognize a cause of action in tort arising from an employer-employee dispute, where the employee is adequately protected from discharge by the contract/collective bargaining agreement); Melley v. Gillette Corp., 19 Mass. App. 511, 475 N.E.2d 1227 (1985), *aff'd,* 397 Mass. 1004, 491 N.E.2d 252 (1986) (holding that where there is a comprehensive remedial statute, creation of a new cause of action based on public policy would interfere with that remedial scheme and frustrate legislative preference for administrative solutions to disputes between employers and employees); Phillips v. Babcock v. Wilcox, 349 Pa. Super. 351, 503 A.2d 36 (1986) (refusing to recognize an action for tort of wrongful discharge when terms of the collective bargaining agreement provided protection against suspension or discharge without proper cause). *But see* Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (recognizing an action in tort for wrongful discharge, independent of any contract remedy available to employee through the collective bargaining agreement based on a public policy rationale of protecting the employee from unscrupulous employers), *cert. denied,* Prestress Eng'g Corp. v. Gonzalez, 472 U.S. 1032, *and cert. denied,* Sackett-Chicago, Inc. v. Midgett, 474 U.S. 909 (1985), *appeal after remand on other grounds sub nom.* Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986) (holding that a tort claim for wrongful discharge is clearly mandated by public policy), *petition for cert. filed,* (Mar. 14, 1987); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980), *aff'd,* 85 N.J. 668, 428 A.2d 1317 (1981) (holding that an employee has a cause of action in tort for wrongful discharge or discrimination and that such an action is not preempted by contractual remedies or other statutory provisions).

Soon thereafter, the court decided a wrongful discharge suit challenging the validity of Alaska Statutes section 14.14.140(a), which provides in part as follows: "Members of the immediate family of a school board member may not be employed by the school board except upon written approval of the commissioner [of education]."[265]

In *Degnan v. Bering Strait School District*,[266] Charles Degnan's employment contract was voided because his sister was an employee of the school board. In disputing his termination, Degnan argued, inter alia, that an Alaska Administrative Code provision defining "immediate family" as including "brother and sister"[267] is invalid because it conflicts with the "plain wording of [Alaska Statutes section] 14.14.140(a)."[268] The court, citing several cases involving both statutory and contractual construction, held that "immediate family" as used in the Alaska statute in question is "broad enough to include siblings,"[269] particularly in light of the statute's apparent purpose of "preventing nepotism or the appearance of nepotism in local school board hirings."[270] However, in a footnote, the court appears to back away from a rigid interpretation of "immediate family" by stating that in certain contexts "immediate family" may carry a more narrow meaning.[271]

Morkunas v. Anchorage Telephone Utility[272] involved another wrongful discharge suit against a public employer. The central issue before the supreme court was whether notice to the employee of the imposition of a probationary period was required by law.[273] Morkunas argued that he was entitled to notice pursuant to the rule pertaining to probationary periods.[274] Anchorage Telephone Utility argued that Morkunas was an executive employee whose employment was governed *exclusively* by a rule that allows the mayor or a designee

265. ALASKA STAT. § 14.14.140(a) (1987).

266. 753 P.2d 146 (Alaska 1988).

267. ALASKA ADMIN. CODE tit. 4, § 18.900 (May 1971).

268. *Degnan*, 753 P.2d at 148.

269. *Id.* at 149 (citing Fisher v. Hodge, 162 Conn. 363, 294 A.2d 577 (1972); Golston v. Lincoln Cemetery, 573 S.W.2d 700 (Mo. App. 1978); Avrum Realty v. Talton, 120 Misc. 2d 534, 467 N.Y.S.2d 489 (N.Y. App. Term. 1983)).

270. *Id.*

271. *Id.* at 149 n.5. The court did not elaborate on what these "contexts" might be other than citing Kingsley v. Hawthorne Fabrics, 41 N.J. 521, 527-28, 197 A.2d 673, 676 (1964) (holding that property holdings of a brother not living in same household as stockholder are not considered holdings of the "immediate family" member for purposes of corporation franchise tax statute).

272. 754 P.2d 1117 (Alaska 1988).

273. *Id.* at 1118-19.

274. *Id.* at 1119. See *infra* note 276 with regard to the relevant rule.

to dismiss or demote without notice.[275] The majority ruled that, pursuant to the relevant Anchorage Municipal Code section,[276] Morkunas was entitled to notice of his pending probationary status.[277] Interpreting the rule literally, the court found that such an interpretation "furthers the statutory purpose of informing employees of their rights and benefits."[278] Therefore, the case was remanded for further determination as to whether such notice had been actually received.[279]

However, Justice Moore and Chief Justice Matthews argued convincingly in dissent that Anchorage Municipal Code section 3.30.073(D) should not apply to Morkunas, since he was an "executive" employee who served at the pleasure of the mayor.[280] Therefore, they believed that Morkunas is governed only by Personnel Rule 17,[281] granting the mayor plenary authority to demote an employee without right of grievance or appeal,[282] so long as the demotion had no discriminatory purpose. No such purpose was alleged here.[283]

Finally, in *Kollodge v. State,*[284] the court held that (1) a discharged employee who appealed a fourth-step grievance hearing after the union refused to take his grievance to arbitration was time-barred because such a suit is subject to the 30-day statute of limitations contained in Appellate Rule 602(a)(2),[285] and (2) the employee's suit against his union for breach of the duty of fair representation is without merit since the union represented the employee in a professional manner and based its decision not to arbitrate on the judgment that there was little likelihood of success.[286] The court was deferential to the union's broad discretion in determining which grievances to take to arbitration. Specifically, the court expressed reluctance to intrude

275. *Morkunas,* 754 P.2d at 1119; ANCHORAGE, ALASKA, MUNICIPAL CODE §§ 3.30.171-3.30.177.

276. The code stated the following:

> Demoted Employees. When an employee is demoted to a position in a class where he previously held permanent status, no probationary period shall be served, except in the case of demotion for disciplinary reasons. *When an employee is demoted to a position in which he did not hold permanent status, the agency head shall decide whether a probationary period will be served, subject to approval of the director. The employee concerned shall be notified of the decision, in writing, before the demotion.*

ANCHORAGE, ALASKA, MUNICIPAL CODE § 3.30.073(D), *repealed* (emphasis added).

277. *Morkunas,* 754 P.2d at 1119.

278. *Id.* at 1120.

279. *Id.*

280. *Id.* (Moore, J., and Matthews, C.J., dissenting).

281. ANCHORAGE, ALASKA, MUNICIPAL CODE §§ 3.30.171-3.30.177.

282. *Morkunas,* 754 P.2d at 1120.

283. *Id.* at 1119 n.6.

284. 757 P.2d 1028 (Alaska 1988).

285. *Id.* at 1033.

286. *Id.* at 1036.

upon this discretion, absent evidence of arbitrariness, discrimination, or bad faith.[287]

B. Workers' Compensation

The court also decided a host of cases in the workers' compensation area. The tendency of the court in these cases has been to force employers to comply with statutory requirements by strictly enforcing legislative intent.

In *Wade Oilfield Service Co. v. Providence Washington Insurance Co.*,[288] the court affirmed superior court rulings that (1) for purposes of determining workers' compensation insurance premiums under the payroll limitation rule, employees who work regular, seven-day, twelve-hour shifts, one week on/one week off, shall be deemed to have been employed under a single, year-long employment contract rather than twenty-six separate one-week contracts;[289] and (2) it was reasonable to charge employer premiums for coverage of oil platform employees under the Longshore and Harbor Workers' Compensation Act[290] since, at the time, the settled law appeared to make such workers subject to the Act.[291] The court adopted this position despite the United States Supreme Court's holding in *Herb's Welding, Inc. v. Gray*,[292] a case which was decided after the superior court ruled in *Wade Oilfield*.[293]

The court established a new standard for calculating benefits in certain instances of permanent disability in *Peck v. Alaska Aeronautical, Inc.*[294] Acknowledging that the Workers' Compensation Board and the lower court calculated disability benefits which appear on their face to comply with the statute,[295] the court nevertheless held that such a result is grossly unfair and would tend to negate the underlying legislative intent of such statutes which attempt to award "injured employees an amount reasonably representing their future earning capacity."[296] Specifically, the statute would seem to require

287. *Id.* at 1034 (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)).
288. 759 P.2d 1302 (Alaska 1988).
289. *Id.* at 1306.
290. 33 U.S.C. §§ 901-950 (1982 & Supp. IV 1986).
291. *Wade Oilfield*, 759 P.2d at 1307.
292. 470 U.S. 414 (1985). The *Wade Oilfield* court characterized the *Herb's Welding* decision as holding "that a welder who performed exclusively welding functions on a fixed offshore oil platform was not engaged in 'maritime employment' and thus did not qualify for benefits under the [Longshore and Harbor Workers' Compensation Act]." *Wade Oilfield*, 759 P.2d at 1306.
293. *Wade Oilfield*, 759 P.2d at 1306.
294. 756 P.2d 282 (Alaska 1988).
295. ALASKA STAT. §§ 23.30.175(b), 23.30.220(3) (1984 & Supp. 1988).
296. *Peck*, 756 P.2d at 288.

that benefits be calculated based on the rate of pay at the time of Mr. Peck's initial injury (1964) rather than the rate in effect at the time he became permanently disabled (1982).[297] The court refused to allow such a result and remanded for recalculation of benefits, consistent with the newly announced standard.[298]

In *Alaska International Constructors v. Kinter,*[299] the court addressed the standard for determining whether a claimant was permanently disabled so as to merit compensation. Defining "permanent" to mean "lasting the rest of claimant's life,"[300] sufficient evidence existed to show that Mr. Kinter (a welder) was permanently disabled, for purposes of the relevant statute,[301] even though experts offered "some cautious comments that Kinter might someday be able to work in a non-demanding job."[302] The court further held that a claimant "need not establish that there is no chance of him ever doing anything again."[303] Consequently, the potential future ability to perform "odd jobs" or "sedentary work" does not preclude a claimant from "permanent total disability classification."[304]

Alaska International Constructors v. State[305] involved the interpretation of the Alaska Second Injury Fund statute.[306] The purpose of the statute is to remove disincentives to hiring physically impaired workers by reimbursing employers for compensation payments necessitated, at least in part, by the preexisting injury.[307] In order to obtain reimbursement, the employer must prove through written records that it knew of the injury prior to hiring the employee.[308] The court held

297. *Id.* at 287-88.

298. *Id.*

299. 755 P.2d 1103 (Alaska 1988).

300. *Id.* at 1105.

301. Section 23.30.180 of the Alaska Statutes, as applicable at the time of Mr. Kinter's injury, provided:

> In case of total disability adjudged to be permanent 66 2/3 percent of the injured employee's average weekly wages shall be paid to the employee during the continuance of total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts.

ALASKA STAT. § 23.30.180 (1984 & Supp. 1988).

302. *Kinter,* 755 P.2d at 1105.

303. *Id.*

304. *Id.*

305. 755 P.2d 1090 (Alaska 1988).

306. ALASKA STAT. § 23.30.205 (1984).

307. *Alaska International,* 755 P.2d at 1092.

308. ALASKA STAT. § 23.30.205(c) (1984).

that an employer may not satisfy the knowledge requirement by providing written records kept by the union.[309] For purposes of the statute, these records must be in the employer's possession.[310] The court specifically rejected the argument that the union's knowledge should be imputed to the employer since the union acts as the employer's agent in hiring.[311] Specifically, the court noted that a union is the agent of its employee/members and not the employer,[312] and if the definition of "employer" were extended to include unions, certain employers could unjustifiably benefit from the fund, thereby circumventing legislative intent.[313]

Accurate testimony regarding a plaintiff's physical condition is critical to a fair determination of disability in a workers compensation claim. In *Grainger v. Alaska Workers' Compensation Board,*[314] the court remanded a workers' compensation case to the superior court for further determination of the facts because the doctor who examined the claimant appeared, upon testifying, to be unfamiliar with the case.[315] Citing its decisions in *Wade v. Anchorage School District*[316] and *Fox v. Alascom, Inc.,*[317] the court ruled that when the evidence is insufficient for a proper resolution of the issues, the proper response is to remand the case for further determination.[318]

In *Cuffe v. Sanders Construction Co.,*[319] the court was faced with a question involving the exclusive remedy provision of the Alaska Workers' Compensation Act,[320] which makes the statutory remedy the exclusive remedy available to employees injured on the job. The remedy negates all other liability of the employer or co-employees.[321] In *Cuffe,* the defendant attempted to defend a suit for tortious negligence by claiming co-employee status.[322] However, the plaintiff introduced evidence suggesting that the defendant was not a co-employee

309. *Alaska International,* 755 P.2d at 1093.
310. ALASKA STAT. § 23.30.205 (1984).
311. *Alaska International,* 755 P.2d at 1093.
312. *Id.* (quoting 51 C.J.S. *Labor Relations* § 43 (1967)).
313. *Id.*
314. 751 P.2d 1355 (Alaska 1988).
315. *Id.* at 1355-56 n.1.
316. 741 P.2d 634 (Alaska 1987) (holding that Worker's Compensation Board could not rely on evidence that claimant did not experience unusual stress not experienced by other employees in similar position).
317. 718 P.2d 977 (Alaska 1986) (holding that a mentally disabled employee's belief that her disability resulted from job-related stress was not dispositive on that issue, rejecting all objective threshold tests for mental stress claims).
318. *Grainger,* 751 P.2d at 1355.
319. 748 P.2d 328 (Alaska 1988).
320. ALASKA STAT. § 23.30.055 (1984).
321. *Cuffe,* 748 P.2d at 329.
322. The defendant, president of a general contracting firm, was operating a forklift which caused injury to the claimant.

and was therefore not immune from suit.[323] The plaintiff named the defendant's company, the general contractor, as an additional party defendant.[324] The company pleaded as a defense the fact that the claimant had failed to introduce evidence that the general contractor "retained control" over the claimant's company, an independent contractor.[325] The court held that (1) when conflicting inferences may be drawn from evidence of co-employee status, a jury question is presented and a directed verdict is improper;[326] and (2) "when a general contractor's employee injures a subcontractor's employee by his own affirmative act of negligence, the general contractor remains liable without regard to the extent of his control over the subcontractor's work" because of standard principles of respondeat superior.[327]

While employers' liability for injury or death of their employees is usually limited by workers' compensation statutes such as those discussed above,[328] plaintiffs often seek other remedies under the common law. One example of the types of issues that arise in this context is *Croxton v. Crowley Maritime Corp.*[329] In *Croxton,* the court found an exception to the general rule of non-assignability of personal injury claims. In the limited context where an employer or his insurer has been assigned a cause of action by operation of a workers' compensation statute,[330] the employer (or insurer) may validly reassign the action to the employee's estate without violating public policy.[331] The court was willing to allow such an exception because none of the policy reasons supporting the general rule of non-assignability, such as unscrupulous trafficking in choses of action or champertous behaviour, are present, and the reassignment represents merely the restoration of the real parties in interest.[332]

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323. *Cuffe,* 748 P.2d at 329.
324. *Id.*
325. *Id.* at 331.
326. *Id.*
327. *Id.* at 332.
328. *See supra* notes 319-27 and accompanying text.
329. 758 P.2d 97 (Alaska 1988).
330. Section 23.30.015(c) of the Alaska Statutes provides that an employer who has paid money into the state's Second Injury Fund as part of a compensation scheme for an employee who has died without any dependents will be assigned the rights of the deceased to pursue any actions against third persons. Further, if the employer's insurer has paid the compensation, such rights will be assigned to the insurer. ALASKA STAT. § 23.30.015(c) (1984).
331. *Croxton,* 758 P.2d at 99.
332. *Id.*

C. Miscellaneous

The court decided a variety of additional employment law cases which address diverse substantive areas such as employment contracts, arbitration, overtime pay, and unions. In *Municipality of Anchorage v. Higgins,*[333] the court was faced with a breach of contract case involving an employee's allegedly wrongful reclassification. In *Higgins,* the employer sought to dismiss the claim because the employee failed to exhaust his internal administrative remedies.[334] The superior court denied the motion, basing its decision on the employee's claim of futility.[335] The futility argument arose because the administrative remedies involved appeals to individuals who had played instrumental roles in Higgins' reclassification.[336] However, because the grievance procedure also allowed for arbitration,[337] the supreme court reversed the superior court's decision, holding that where impartial arbitration is available, the futility defense normally will not excuse an employee from the requirement of exhausting his or her administrative remedies.[338] The court placed upon the employee the burden of proving that "a resort to arbitration . . . would so certainly result in an adverse decision as to render the remedy 'futile.' "[339] The court then remanded the case for further determination of Higgins' claim that the municipality should be equitably estopped from asserting exhaustion of remedies as a defense.[340]

Alaska Public Employees Association v. City of Fairbanks[341] presented the supreme court with the narrow question of whether the compulsory binding arbitration provision of the Public Employment Relations Act[342] gave arbitration rights to all employees in the mixed bargaining unit.[343] The supreme court affirmed the ruling below that arbitration rights extend only to those employees who have been prohibited from striking by other provisions of the Act.[344] The court read

333. 754 P.2d 745 (Alaska 1988).
334. *Id.* at 746.
335. *Id.* at 747.
336. *Id.*
337. *Id.*
338. *Id.* at 747-48.
339. *Id.* at 748.
340. *Id.*
341. 753 P.2d 725 (Alaska 1988).
342. ALASKA STAT. § 23.40.200(b) (1984).
343. The bargaining unit in question included different classifications of employees, some of whom were empowered to strike and some of whom were prohibited from striking. *Id.* § 23.40.200(b), (c), (d).
344. *Alaska Public Employees Ass'n,* 753 P.2d at 727.

the arbitration provision of the statute literally as applying to only those employees empowered to strike.[345]

The court addressed the method of computing routine pay in *Janes v. Otis Engineering Corp.*[346] Specifically, the court remanded for a proper construction of the overtime pay regulation's definition of "regular rate of pay," as well as a determination of whether the employer's scheme violated a federal regulation (incorporated by reference into the state regulation)[347] governing employees who are paid at two or more different rates during the work week.[348] The federal regulation required overtime work to be compensated at one and one-half times the regular rate.[349] Therefore, the court's decision reflects its concern over the method of computing the "regular rate" in dual rate situations as it relates to compliance with the federal regulation by Alaska employers.[350]

Local 959, International Brotherhood of Teamsters v. Wells[351] involved an action by a union member against his local for intentional infliction of emotional distress caused by the local's threats against the member's life. Counsel for the local argued unsuccessfully that the state law tort action was preempted by federal labor law statutes.[352] The supreme court held, inter alia, that (1) claims for intentional infliction of emotional distress are "so deeply rooted in local feeling and responsibility that Congress would not have intended to invalidate the state sanction,"[353] (2) in claims for intentional infliction of emotional distress, threats to one's life are outrageous conduct per se,[354] and (3) as a matter of law, emotional distress is a reasonably foreseeable result of a threat against someone's life.[355]

In a decision largely limited to its facts, the court confronted another employment contract issue in *Parliment v. Yukon Flats School*

345. *Id.* at 728. This literal interpretation results in denying arbitration to all employees but those classified as (a)(1) employees in section 23.40.200(a)(1) of the Alaska Statutes. Those employees include police, fire, jail, and hospital personnel. ALASKA STAT. § 23.40.200(a)(1) (1984).

346. 757 P.2d 50 (Alaska 1988).

347. ALASKA ADMIN. CODE tit. 8, § 15.100(b) (1985).

348. *Janes,* 757 P.2d at 55-56.

349. 29 C.F.R. § 778.107 (1988).

350. *Janes,* 757 P.2d at 55.

351. 749 P.2d 349 (Alaska 1988).

352. *Id.* at 356-57.

353. *Id.* at 355. The court adopts the United States Supreme Court's position in Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977), and San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

354. *Wells,* 749 P.2d at 358.

355. *Id.*

District.[356] *Parliment* involved a school teacher's suit for breach of an employment contract, as well as a suit in quantum meruit concerning an agreement to haul water. The superior court granted partial relief on both claims. The supreme court reversed, holding that (1) the employment contract never came into existence because the teacher failed to meet one of the four conditions precedent to the contract,[357] and (2) the quantum meruit theory failed because the defendant was not unjustly enriched in that it had paid fair consideration for the water hauling services by supplying electricity to the school which employed plaintiff.[358]

Yukon's refusal to hire Parliment was based upon his non-fulfillment of the fourth criterion, that Parliment be a Bureau of Indian Affairs ("BIA") employee at the time of transfer, because Parliment's non-retention by the BIA became effective June 6, 1983 (prior to the transfer).[359] Parliment argued that since his case was later reopened to correct a "procedural error in the non-retention process"[360] and since the effective date of his termination was consequently changed to February 23, 1984 (after the transfer), he was technically employed by the BIA at the time of the transfer. Parliment argued, therefore, that he had fulfilled all conditions precedent.[361] The court found this latter approach unavailing.[362] Parliment based his argument on *Aleutian Region R.E.A.A. v. Wolansky,*[363] in which the Alaska Supreme Court held "that a wrongfully terminated teacher who 'should have been retained' when his school district was absorbed by another district was entitled to be reinstated by the new district . . . ."[364] The court easily distinguished the present case primarily because Parliment's nonrentention, unlike Wolansky's, was "ultimately upheld on the merits;" therefore, he was not a teacher who "should have been retained."[365]

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356. 760 P.2d 513 (Alaska 1988).

357. *Id.* at 517. When it became clear that the Bureau of Indian Affairs ("BIA") school which employed Parliment was about to be transferred to the state school system, Yukon Flats promised to retain Parliment if he fulfilled the following four conditions:

> (1) that the Parliments receive a favorable recommendation from the local school board, (2) that there be a transfer of the BIA school to Yukon Flats, (3) that there be vacancies at the time of the transfer, and (4) that the Parliments be BIA employees when the transfer occurred.

Id. at 514-15.

358. *Id.* at 518.

359. *Id.* at 515.

360. *Id.*

361. *Id.* at 517.

362. *Id.*

363. 630 P.2d 529 (Alaska 1981).

364. *Parliment,* 750 P.2d at 517 (quoting *Wolansky,* 630 P.2d at 532).

365. *Id.*

Finally, the court confronted a traditional labor law issue involving dual representation in *City of Fairbanks v. State, Department of Labor.*[366] In this case, the court summarily affirmed a lower court ruling that upheld the state Labor Relations Agency's determination that the same union could represent both supervisory and rank-and-file personnel of the Fairbanks Municipal Utilities System.[367] The court agreed with the lower court's reasoning that the Agency's policy is both reasonable and consistent with public employees' statutory rights to choose their own bargaining representatives.[368]

VIII. FAMILY LAW

The supreme court decided seventeen cases this past year which addressed a variety of issues in five primary areas of family law: jurisdiction, property division, child support, attorneys' fees, and parental rights.

A. Jurisdiction

The cases decided by the court address jurisdiction in both divorce proceedings and custody disputes. The Alaska statutes do not contain a minimum residency requirement for a spouse to institute a divorce proceeding.[369] *Perito v. Perito*[370] upheld the common law jurisdictional requirement that one of the parties be domiciled in Alaska, defining "domicile" as "physical presence plus an intent to remain permanently,"[371] where "permanently" means "indefinitely."[372] Mrs. Perito filed a divorce action one day after she moved to Alaska.[373] The court held that her failure to satisfy the thirty-day statutory residency requirement[374] was of no consequence because the residency statute was "intended to define 'residency' only as the term is used in other statutes."[375]

Jurisdiction over custodial issues is typically determined under the Uniform Child Custody Jurisdiction Act ("UCCJA").[376] The UCCJA generally vests Alaska with jurisdiction if it is the home state

366. 763 P.2d 976 (Alaska 1988).
367. *Id.*
368. *Id.* at 977.
369. This requirement (codified at ALASKA STAT. § 09.55.140) was repealed by the state legislature (Act, ch. 208, § 5, 1975 Alaska Sess. Laws) after it was held unconstitutional by the court in State v. Adams, 522 P.2d 1125 (Alaska 1974).
370. 756 P.2d 895 (Alaska 1988).
371. *Id.* at 898.
372. *Id.* at 898-99.
373. *Id.* at 896.
374. ALASKA STAT. § 01.10.055 (Supp. 1988).
375. *Perito,* 756 P.2d at 898.
376. ALASKA STAT. §§ 25.30.010-25.30.910 (1983 & Supp. 1988).

of the child[377] but allows for circumstances which may necessitate removal or dismissal, such as inconvenience of forum.[378] To ensure that such removal does not leave a party stranded without an available forum, the court held in *Waller v. Richardson*[379] that for a court properly to decline jurisdiction, it must (1) articulate its reasons for doing so,[380] and (2) designate a specific state that is willing and able to assume jurisdiction.[381]

The court also held that it will decline to exercise jurisdiction in a custody battle under the UCCJA when the parent has "wrongfully taken the child from another state or has engaged in similar reprehensible conduct . . . ."[382] A court should deny jurisdiction when the litigant's conduct is "so objectionable that a court . . . cannot in good conscience permit the party access to its jurisdiction."[383] In *Stokes v. Stokes,*[384] the court applied this rule and declined jurisdiction with respect to a custody claim, but it remanded on the issue of a divorce claim because divorce jurisdiction is not dependent on the UCCJA.[385]

The UCCJA will govern jurisdiction in all custody issues except when it expressly conflicts with the Parental Kidnapping Prevention Act of 1980 ("PKPA")[386] governing interstate custody disputes. This statute was enacted to provide a uniform federal standard in determining which state has jurisdiction to modify an existing custody order.[387] In *Murphy v. Woerner,* a mother, along with her two children, moved from Kansas to Alaska and later obtained a modification of the Kansas custody decree limiting the father's visitation rights and imposing upon him a child support obligation.[388] The court vacated the modification order because the children still maintained sufficient contact

377. *Id.* §§ 25.30.020(a)(1), 25.30.900(5).
378. *Id.* § 25.30.060 (1983).
379. 757 P.2d 1036 (Alaska 1988).
380. *Id.* at 1038.
381. *Id.* at 1039-40.
382. Stokes v. Stokes, 751 P.2d 1363, 1365 (Alaska 1988) (citing ALASKA STAT. § 25.30.070(a) (1983 & Supp. 1988)). This principle also applies to modification. *See* Waller v. Richardson, 757 P.2d 1036, 1040 (Alaska 1988) (Alaska Statutes section 25.30.070(b), regarding modification, "applies only when an Alaska court is asked to modify a foreign custody decree.")
383. *Stokes,* 751 P.2d at 1366 (citing UCCJA § 8 commissioners' note, 9 U.L.A. 143 (master ed. 1979)). In *Stokes,* the mother dismissed a divorce action she had instituted in Ohio which awarded temporary custody to the father. *Id.* at 1364. She then took the child to Alaska and recommenced divorce proceedings as an Alaska resident. *Id.* at 1365. The court denied jurisdiction due to the reprehensible nature of her conduct. *Id.* at 1366.
384. 751 P.2d 1363 (Alaska 1988).
385. *Id.* at 1366.
386. 28 U.S.C. § 1738(A) (1982).
387. Murphy v. Woerner, 748 P.2d 749, 750 (Alaska 1988).
388. *Id.* at 750.

with Kansas such that Kansas retained modification jurisdiction.[389] Under the PKPA, Alaska would have the power to modify the decree only if it has jurisdiction and Kansas no longer has jurisdiction or declines to exercise it.[390]

B. Property Division

Generally, the court has advocated broad discretion at the trial court level in formulating equitable property divisions in divorce proceedings. However, as evidenced in *Hilliker v. Hilliker,*[391] it has taken a somewhat more critical stand with respect to alimony awards.[392] When the marital assets are sufficiently large such that a property award may be fashioned to furnish adequate support, the court will decline to award alimony on the grounds that it is unjust and unnecessary.[393]

Traditionally, divisions of marital property have been effected according to the procedure first enunciated in *Wanberg v. Wanberg.*[394] This process involves three stages. First, the court must determine which assets constitute marital property available for distribution.[395] Second, the court must undertake a factual determination with respect to the value of the property.[396] Finally, the court must ensure that the property is distributed equitably between the parties.[397] Upon appeal to a higher court, the first and third steps are reviewed under an abuse of discretion standard,[398] while the second step may be reversed only upon a finding of clear error.[399]

This year, however, in *Rose v. Rose,*[400] the court affirmed a lower court ruling that recognized an alternate form of property distribution

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389. *Id.* at 751.

390. 28 U.S.C. § 1738(A)(f) (1982).

391. 755 P.2d 1111 (Alaska 1988).

392. *See id.*; Rhodes v. Rhodes, 754 P.2d 1333 (Alaska 1988).

393. *Hilliker,* 755 P.2d at 1112. *See also Rhodes,* 754 P.2d at 1335 ($60,000 alimony award unnecessary when marital assets are large enough to make favorable compensatory award to spouse).

394. 664 P.2d 568, 570 (Alaska 1983). *Accord* Rose v. Rose, 755 P.2d 1121, 1123 (Alaska 1988); Moffitt v. Moffitt, 749 P.2d 343, 346 (Alaska 1988).

395. *Wanberg,* 664 P.2d at 570.

396. *Id.*

397. *Id.*

398. *Id.* With respect to inclusion of property, see Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988) (not an abuse of discretion to find that property was fully includable in marital property, even though only 16.8% of it had been purchased with marital assets). With respect to division of property, see Hayes v. Hayes, 756 P.2d 298 (Alaska 1988) (unequal division in wife's favor not an abuse of discretion because it was supported by factors identified in lower court's decision).

399. *Wanberg,* 664 P.2d at 570; ALASKA R. CIV. P. 52(a).

400. 755 P.2d 1121 (Alaska 1988).

when the marriage is one of short duration and the parties' assets have not been significantly comingled.[401] In this situation, the trial court may treat the property division as an action in rescission and attempt to place the parties as near as possible to "the financial position they would have occupied had no marriage taken place."[402]

Most cases are still likely to be decided under the *Wanberg* analysis and standards of review. With respect to the inclusion of assets in the marital property, the court held in *Matson v. Lewis*[403] that property acquired in a previous divorce settlement was not part of the marital property in a subsequent divorce action.[404] However, it also held that the use of such premarital assets as a down payment on property purchased during the marriage evidenced an intent to treat the new property fully as marital property and not partially in proportion to the amount paid from marital assets.[405]

With respect to the accurate valuation of marital property, the court established in *Rice v. Rice*[406] that valuation is a factual determination that will not be held clearly erroneous if supported by the evidence.[407] The court routinely reversed and remanded valuation issues, as in *Hayes v. Hayes*[408] and *Moffitt v. Moffitt,*[409] when it found no evidentiary basis for the result due to the trial court's failure to state any particular method in support of its valuation.[410]

Marital property is sometimes distributed in monthly or annual payments, in which case it may be classified as alimony.[411] If it is so considered, the husband's obligation to pay ceases upon the wife's remarriage.[412] However, classification as a property distribution may have other consequences. In *Bryant v. Bryant,*[413] the court held that a husband's military retirement pay, which may be attached to pay alimony, could not be garnished to enforce a property settlement where

401. *Id.* at 1125.
402. *Id.*
403. 755 P.2d 1126 (Alaska 1988).
404. *Id.* at 1127.
405. *Id.* at 1128.
406. 757 P.2d 60 (Alaska 1988).
407. *Id.* at 62. *See also* Moffitt v. Moffitt, 749 P.2d 343, 348 (Alaska 1988) (valuation of Aniak property).
408. 756 P.2d 298 (Alaska 1988).
409. 749 P.2d 343 (Alaska 1988).
410. *Hayes,* 756 P.2d at 300 (valuation of fox farm); Matson v. Lewis, 755 P.2d 1126, 1129 (Alaska 1988) (valuation of personal benefits); *Moffitt,* 749 P.2d at 347 (valuation of good will).
411. Bryant v. Bryant, 762 P.2d 1289, 1291 (Alaska 1988) (citing 42 U.S.C. § 662(c) (1982), which defines alimony for purposes of 42 U.S.C. § 659(a) (1982), which prohibits garnishment of military retirement pay to satisfy a property settlement).
412. *Id.*
413. 762 P.2d 1289 (Alaska 1988).

the parties had not been married for at least ten years.[414] Therefore, a wife would be required to return any alimony payments previously received which had been collected through garnishment.[415]

C. Child Support

In *Patch v. Patch,*[416] the court found that the amount of support a parent must provide is not limited to his income[417] and stated that other assets of the parent may be considered in determining his ability to continue a current level of child support payments despite a temporary reduction in his income.[418] The court also held, in *Rhodes v. Rhodes,*[419] that it is not an abuse of discretion to establish child support payments based on a parent's earnings potential rather than on his temporary minimal income.[420]

D. Attorneys' Fees

The general rule for the award of attorneys' fees is that they may be awarded to the prevailing party in a proceeding.[421] However, for divorce actions, the court held that the appropriate manner of assigning responsibility for fees was to consider "the relative economic situation and earning power of each party."[422] The court further held that such an award "is discretionary with the trial judge and is reviewable on appeal only for an abuse of discretion."[423]

The court established a dichotomy with respect to fees in post-settlement proceedings. In those cases concerning child support or property division (money and property issues), attorneys' fees are properly awarded under the prevailing party standard established in

414. *Id.* at 1292; Social Security Act, 42 U.S.C. § 659(a) (1982); Computation of Retired Pay Act, 10 U.S.C. § 1408(d)(2) (1982).

415. *Bryant,* 762 P.2d at 1292. In *Bryant,* the husband sought a court order to halt alimony payments upon the wife's remarriage. The payments had previously been awarded from the husband's military retirement pay. When the wife contested the order on the grounds that the alimony was in fact intended as property settlement and not as support, she was thrust into a "Catch-22" situation, whereby if the payments constituted property division, she was not entitled to receive them out of the military pay, and if they represented alimony, she lost them due to her remarriage.

416. 760 P.2d 526 (Alaska 1988).

417. *Id.* at 529.

418. *Id.* at 530.

419. 754 P.2d 1333 (Alaska 1988).

420. *Id.* at 1335.

421. ALASKA R. CIV. P. 82(a).

422. Rhodes v. Rhodes, 754 P.2d 1333, 1335 (Alaska 1988). *See also* Hilliker v. Hilliker, 755 P.2d 1111, 1114 (Alaska 1988) ("relative economic situations, their earning power, and such other factors as may be germane").

423. Perito v. Perito, 756 P.2d 895, 899 (Alaska 1988).

Civil Rule 82.[424] For proceedings involving custody and visitation rights, however, such as *L.L.M. v. P.M.*,[425] the prevailing party is entitled only to "reasonable" attorneys' fees from the party who acted "willfully and without just excuse."[426]

E. Parental Rights

Three cases were decided this year which resulted in the termination of parental rights. In *E.J.S. v. State, DHSS,*[427] the court clearly established a two-prong test for conditions justifying termination. For a court to terminate a parent's association with his or her child, it must first find that the child is a "child in need of aid."[428] This may be established by showing evidence of a complete disregard for parental obligations resulting in the destruction of the parent-child relationship.[429] Second, the court must find that the parent's conduct creating this condition is "likely to continue"[430] and justifies terminating the parent's rights. The court reiterated this test in *R.C. v. State, DHSS,*[431] in which it also held that statutes regarding the termination of parental rights are not unconstitutionally vague.[432]

The answers to these questions must be supported by the testimony of qualified expert witnesses.[433] Federal guidelines suggest that such testimony must respond to two questions related to the abovementioned tests: (1) will the conduct cause serious emotional or physical harm to the child, and (2) can the parent be persuaded to change such damaging conduct.[434] In an issue of first impression, the court held in *Matter of Parental Rights of T.O.*[435] that it was not necessary that one expert answer both questions; rather, the testimony of one or more expert and lay witnesses may be aggregated to satisfy the test.[436]

424. Patch v. Patch, 760 P.2d 526, 531 (Alaska 1988); ALASKA R. CIV. P. 82.
425. 754 P.2d 262 (Alaska 1988).
426. *Id.* at 264-65 (same standard as in action for failure to permit visitation); ALASKA STAT. § 25.24.300 (1983).
427. 754 P.2d 749 (Alaska 1988).
428. *Id.* at 750; ALASKA STAT. § 47.10.010(a)(2) (1984 & Supp. 1988).
429. *E.J.S.,* 754 P.2d at 751.
430. *Id.* at 750.
431. 760 P.2d 501, 504 (Alaska 1988).
432. *Id.* at 506.
433. 25 U.S.C. § 1912(f) (1982).
434. 44 Fed. Reg. 67584, 67593 (1979) (cited in *In re* Parental Rights of T.O., 759 P.2d 1308, 1310 (Alaska 1988)).
435. 759 P.2d 1308 (Alaska 1988).
436. *Id.* at 1310-11.

IX. FISH AND GAME LAW

During 1988, the court responded to numerous statutory and constitutional challenges to decisions in the areas of fish and game law. In *Owsichek v. State, Guide Licensing and Control Board,*[437] the supreme court ruled, inter alia, that statutes granting guides exclusive rights to lead hunts in certain areas[438] are unconstitutional because they violate Alaska's guarantee of common use of all fish, wildlife, and water.[439] Although a question of first impression for the court, its decision was heavily influenced by a previously announced policy to "apply the common use clause [of the Alaska Constitution] in a way that strongly protects public access to natural resources."[440]

Another challenge under the Alaska Constitution arose in *Johns v. Commercial Fisheries Entry Commission.*[441] In *Johns* the court's primary holding that a limitation restricting the number of permits at a non-distressed fishery to thirty-five was within the commission's authority[442] was constitutional[443] and served the purposes of the Limited Entry Act.[444] However, the court did find error in the commission's failure to set the optimum number of permits while applications were still pending and remanded the case to superior court in accordance with this finding.[445]

Another case involving the Limited Entry Act was *Arkanakyak v. State, Commercial Fisheries Entry Commission.*[446] In *Arkanakyak,* the court ruled that a permit applicant's statutory and constitutional challenges to the permit's denial were not ripe for judicial review because appellant did not allege specifically that the commission's policy was discriminatory.[447] Mrs. Arkanakyak asserted that the particular facts

437. 763 P.2d 488 (Alaska 1988).

438. ALASKA STAT. §§ 08.54.040(a)(7), 08.54.195 (1987 & Supp. 1988).

439. Article VIII, section 3, of the Alaska Constitution provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." ALASKA CONST. art. VIII, § 3.

440. *Owsichek,* 763 P.2d at 492.

441. 758 P.2d 1256 (Alaska 1988).

442. *Id.* at 1260. The commission's authority is derived from the Limited Entry Act. This Act was designed to limit entry into fisheries recognized or designated as distressed or as requiring limitation of use in order to safeguard the economic welfare of the state's fisheries. ALASKA STAT. §§ 16.43.010-16.43.990 (1987 & Supp. 1988).

443. *Johns,* 758 P.2d at 1263. The commission's actions survived scrutiny under the equal rights provisions of article I, § 1,and article VIII, § 17, of the Alaska Constitution. *Id.*

444. *Id.* at 1263; ALASKA STAT. §§ 16.43.010-16.43.990 (1987 & Supp. 1988).

445. *Johns,* 758 P.2d at 1266.

446. 759 P.2d 513 (Alaska 1988).

447. *Id.* at 517.

of her case warranted an exception to the general policy.[448] The court consequently remanded to the commission for further proceedings to determine whether the plaintiff's special factual circumstances warranted treating her as an exception to the commission's policy against giving crew participation points to non-licensed members.[449]

Finally, in *CWC Fisheries v. Bunker,*[450] the supreme court addressed the rights of a title holder to tidelands. The court held that any state tideland conveyance which fails to satisfy the requirements set forth in *Illinois Central Railroad Co. v. Illinois*[451] will be subject to public easements for purposes of navigation, commerce, and fishery.[452] In dismissing an action for trespass, the court further held that a state conveyance to a private party pursuant to class I preference rights under state statute[453] (such as the conveyance to CWC's predecessor in interest) is subject to such easements.[454]

X. PROCEDURE

Since the cases in this section address numerous legal issues but lack large numbers of cases in any one category, they will be presented case by case. However, the cases will be discussed in the order that the various issues would be encountered by an attorney during the course of a typical case. The issues will be presented in the following order: justiciability, venue, joinder, compulsory counterclaims, service of process, discovery, jury trial, voir dire, statutes of limitations, and court costs and attorneys' fees. Although in practice this sequence varies from case to case, for purposes of this section the above order serves as a basic guideline.

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448. Mrs. Arkanakyak's specific argument was that she should be exempted from the normal requirement that fishermen be licensed in order to obtain crew participation points because cultural and language barriers prevented her from learning the legal requirements of commercial fishing. She likened her situation to that of a minor, for whom the commission already recognizes an exemption. *Id.* at 516.

449. *Id.* at 517. For contrary arguments, see the dissenting opinion of Justices Matthews and Burke. *Id.* at 517-18.

450. 755 P.2d 1115 (Alaska 1988).

451. 146 U.S. 387 (1892). In construing the *Illinois Central* test, the *CWC Fisheries* court held as follows:

> In determining whether a state conveyance has passed title to a parcel of tideland free of any trust obligations under *Illinois Central,* we must ask, first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest in state tidelands.... If either of these questions can be answered in the affirmative, conveyance free of the public trust would be permissible....

CWC Fisheries, 755 P.2d at 1119 (citations omitted).

452. *Id.* at 1118.

453. ALASKA STAT. § 38.05.820 (1984).

454. *CWC Fisheries,* 755 P.2d at 1121.

Within the realm of justiciability, the case of *Bowers Office Products, Inc. v. University of Alaska*[455] involved a question of ripeness. Bowers challenged the University's competitive bid practices, alleging that dissatisfied bidders ought to be granted full hearings on the validity of their grievances.[456] However, Bowers did not seek relief for its own dispute but, rather, sought a prospective ruling which would affect such bidders in the future.[457] Because Bowers pleaded no case or controversy, the supreme court affirmed the lower court's dismissal, holding that even though Bowers may have suffered sufficient injury by virtue of its reduced ability to bid effectively on future University procurement contracts, the case was not ripe for adjudication since a new "Procurement Code" had taken effect which created "an exclusive remedy for 'interested parties' protesting the state's award of a purchasing contract."[458] Until an injury arises under the new code, there is no ripe controversy.[459] While this decision is somewhat limited to its facts, the opinion contains an interesting and useful discussion of the current state of the law of justiciability in Alaska, particularly in demonstrating how Alaska courts have become "more open to litigants than [have] federal courts."[460]

The court addressed venue in *Ketchikan General Hospital v. Dunnagan,*[461] where it established rules for dealing with improperly situated cases. In *Ketchikan,* a complaint in negligence was filed in the incorrect judicial district of the superior court.[462] Nevertheless, the superior court retained jurisdiction and venue. The decision was appealed to the supreme court, which held that the superior court had improperly retained venue.[463] The court stated further that when faced with an improperly situated case, a superior court should transfer the case to the proper district (where the claim arose and service took place), and in instances of bad faith on the part of the plaintiff, the superior court may dismiss the action entirely.[464] The court noted that the plaintiff would have been free to file his complaint in the proper district and move for a change of venue on grounds of forum non conveniens.[465]

455. 755 P.2d 1095 (Alaska 1988).
456. *Id.* at 1096.
457. *Id.* at 1098.
458. *Id.* at 1098-99.
459. *Id.* at 1099.
460. *Id.* at 1097.
461. 757 P.2d 57 (Alaska 1988).
462. The plaintiff's rationale for filing in the judicial district in question involved the injured plaintiff's being hospitalized and consequently unable to attend trial in the proper judicial district. *Id.* at 58.
463. *Id* at 59.
464. *Id.*
465. *Id.* at 59 n.6.

Once properly in court, attorneys may encounter joinder problems such as those in *Tesoro Alaska Petroleum Co. v. State.*[466] In *Tesoro,* the court affirmed a lower court ruling that denied Tesoro's motion to intervene in a lawsuit between the state and the Amerada Hess Corporation.[467] The court did not address the question whether such intervention would be appropriate under Civil Rule 24(a) or 24(b).[468] Rather, the court based its opinion solely on a contract between Tesoro and the state which included a provision expressly prohibiting Tesoro's intervention in the *Amerada Hess* litigation without the state's consent, thereby waiving its ability to intervene in the litigation pursuant to Civil Rule 24.[469] Since the court found no misrepresentation or bad faith on the state's part, it gave the contractual provision full force and effect and refused to allow Tesoro's intervention.[470]

Miller v. LHKM[471] involved the court's interpretation of the compulsory counterclaim provision of Alaska Civil Rule 13.[472] In *Miller,* the court held generally that the plaintiff was prohibited from litigating her claim (for breach of a joint venture agreement) because she did not raise the issue as a compulsory counterclaim in a previous litigation in which the parties were co-defendants.[473] Specifically, the court held that (1) Miller's paving claim arose from the same transaction as the original interpleader action itself (the aforementioned prior litigation),[474] and (2) once LHKM asserted a cross-claim against Miller in the prior litigation, the parties became "opposing parties" within the meaning of Rule 13 with respect to that claim.[475] Therefore, the compulsory counterclaim rule must be applied.

The court addressed the procedural issue of substituted service of process in *Beam v. Adams,*[476] a case which was essentially a damages

466. 757 P.2d 1045 (Alaska 1988).

467. State v. Amerada Hess Corp., No. 1JU 77-847 Civil (Juneau Super. Ct.) (pending as of June 24, 1988).

468. ALASKA R. CIV. P. 24(a), (b).

469. *Tesoro,* 757 P.2d at 1048-49.

470. *Id.* at 1051-52.

471. 751 P.2d 1356 (Alaska 1988).

472. Rule 13 of the Alaska Rules of Civil Procedure provides, in part, as follows:

> (a) *Compulsory Counterclaims.* A *pleading* shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any *opposing party,* if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . .

ALASKA R. CIV. P. 13 (emphasis added).

473. *Miller,* 751 P.2d at 1359.

474. *Id.* at 1361.

475. *Id.* at 1359.

476. 749 P.2d 366 (Alaska 1988).

suit involving a mortgagor's refusal to vacate premises after foreclosure. The court, in construing the requirements of Alaska Civil Rule 4(d)(1)[477] for the first time, affirmed the lower court's ruling that service at the mortgagor's former wife's residence was improper.[478] The court based its ruling on specific evidence that (1) it was not the mortgagor's residence, (2) no evidence was introduced to prove that the mortgagor visited the residence after he relocated, and (3) no evidence was introduced that the mortgagor had named his ex-wife as his agent for purposes of receiving service of process.[479] Therefore, none of the requirements of Rule 4(d)(1) were met.

In *Langdon v. Champion,*[480] the supreme court discussed the work-product doctrine of discovery with respect to documents existing in the files of Champion's insurance company. The court held that such documents are not protected by the attorney-client privilege unless the insurer received them at the express behest of counsel for the insured.[481] In addition, the court noted that such documents are normally presumed to be outside the scope of the work-product doctrine since they are prepared in the regular course of business.[482] However, this presumption may be overcome by a showing that the materials were prepared at the insured's attorney's request or under his or her supervision.[483] In a footnote, the court explained that, although these materials may not be protected by the work-product doctrine, other relevant discovery provisions may protect such materials nevertheless.[484]

Another discovery issue was confronted in *Honda Motor Co. v. Salzman,*[485] in which the court affirmed a ruling imposing liability on

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477. Rule 4(d)(1) of the Alaska Rules of Civil Procedure provides as follows:

> (d) *Summons—Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) Individuals. Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally, or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

ALASKA R. CIV. P. 4(d)(1).

478. *Beam,* 749 P.2d at 367.

479. *Id.* at 369.

480. 752 P.2d 999 (Alaska 1988).

481. *Id.* at 1004.

482. *Id.* at 1006.

483. *Id.* at 1007.

484. *Id.* at 1007 n.14.

485. 751 P.2d 489 (Alaska), *cert. dismissed,* — U.S. —, 109 S. Ct. 20 (1988).

Honda as a sanction for noncompliance with discovery. Such a measure may seem extreme in light of the existing policy that any discovery sanction that operates to establish an element of the offense to be considered established must be sufficiently related to the withheld information.[486] However, the court's decision was based on several important factors. First, Honda's delay and noncompliance with the discovery process was itself extreme.[487] Second, the sanction is closely tailored to the misconduct because the documents which Honda refused to present were the very documents Salzman would have needed to prove the key elements of liability.[488]

In *Sparks v. Gustafson,*[489] which is substantively discussed in the property section of this note,[490] the court discussed the standards for granting a continuance. In denying a continuance to a party seeking additional time for discovery, the court cited the principle that "[a] continuance based on the absence of evidence is properly refused if the applicant failed to use due diligence to produce the evidence by testimony, deposition, or other method."[491]

Waiver of the right to jury trial was addressed in *Frank v. Golden Valley Electric Association, Inc.*[492] The court held that the failure to file jury instructions within the deadline set forth in the pretrial order does not, in and of itself, amount to a waiver of the right to trial by jury guaranteed by the Alaska Constitution.[493] Alaska Civil Rule 38, which discusses the right to trial by jury, provides for specific circumstances that will amount to waiver.[494] However, Alaska Civil Rule 51, which discusses jury instructions, makes no mention of waiver of the right to jury trial as a sanction for failure to comply.[495] Therefore, the court found that a late filing of jury instructions did not warrant a waiver of the right to trial by jury.[496] However, the court carefully noted that this holding is narrowly tailored and should not be read as indicating that a trial court may never reasonably imply a waiver of

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486. *Id.* at 493.

487. *Id.*

488. *Id.*

489. 750 P.2d 338 (Alaska 1988).

490. *See infra* text accompanying notes 573-76.

491. *Sparks,* 750 P.2d at 341. The court held that a delay of 18 months before requesting information when the party had two years to prepare constituted a failure to pursue discovery in a timely fashion. *Id.*

492. 748 P.2d 752 (Alaska 1988).

493. *Id.* at 753; ALASKA CONST. art. I, § 16.

494. ALASKA R. CIV. P. 38. The court in interpreting Civil Rule 38(d) noted specifically that "the right to trial by jury (1) is waived by a party's failure to make a timely demand for jury trial as required under Civil Rule 38(b), and (2) may be impliedly waived by a party's failure to appear at trial." *Frank,* 748 P.2d at 754.

495. ALASKA R. CIV. P. 51.

496. *Frank,* 748 P.2d at 755.

the right to jury trial from a party's post-order conduct.[497] In fact, the court detailed examples of misrepresentation and acquiescence which would rise to the level of waiver.[498]

The supreme court reviewed a challenge to a trial court's refusal to excuse jurors who admitted bias but who later made good faith statements that they would be impartial in *Sirotiak v. H.C. Price Co.*[499] The court refused to adopt the standard urged by appellants that once bias has been admitted, the court must be convinced that the jurors' impartiality is "unequivocal and absolute."[500] Rejecting this standard as intruding on the court's discretion, the court held, "All that is required of a prospective juror is a good faith statement that he or she will be fair, impartial and follow instructions."[501] Applying this standard to *Sirotiak*, the court held, inter alia, that the trial court's refusal to excuse two jurors for cause was not harmful error, even though the jurors expressed predispositions regarding inflated tort judgments, because the jurors stated that they would hear the case impartially and follow the judge's instructions.[502]

In *Powers v. State, Public Employees Retirement Board,*[503] the supreme court upheld a lower court finding that Mr. Powers' appeal from an administrative decision was time-barred by the thirty-day statute of limitations found in Appellate Rule 602(a)(2).[504] The rule requires an appeal to be filed no later than thirty days from the date on which the order being appealed is mailed or delivered to the appellant.[505] Powers received notice of the board's decision on December 4, 1986, but did not file his appeal until January 9, 1987. He argued, however, that the board's decision was not the final order being appealed since the board must "submit its finding to the administrator."[506] Powers read this as a requirement that the administrator rule on the submitted findings. Since the administrator had not so ruled, Powers argued that the statute had not begun to run.[507] The court

497. *Id.* at 756.

498. *Id.* (citing Howard S. Lease Construction v. Holly, 725 P.2d 712, 719-20 (Alaska 1988); Gregoire v. National Bank of Alaska, 413 P.2d 27, 41-42 (Alaska 1966), *cert. denied,* 385 U.S. 923 (1966)).

499. 758 P.2d 1271 (Alaska 1988).

500. *Id.* at 1276. The appellants' position has been adopted by several jurisdictions. *See, e.g.,* United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976); Auriemme v. State, 501 So. 2d 41, 44 (Fla. App. 1986); State v. Land, 478 S.W.2d 290, 292-93 (Mo. 1972); Williams v. State; 565 S.W.2d 63, 65 (Tex. Ct. App. 1978).

501. *Sirotiak,* 758 P.2d at 1277.

502. *Id.*

503. 757 P.2d 65 (Alaska 1988).

504. *Id.* at 68; ALASKA R. APP. P. 602(a)(2).

505. ALASKA R. APP. P. 602(a)(2).

506. *Powers,* 757 P.2d at 67; ALASKA STAT. § 39.35.040 (1987).

507. *Powers,* 757 P.2d at 67.

rejected this analysis, citing a board regulation that provides, "the written decision of the Board is the final administrative decision required for purposes of appeal to the superior court."[508]

Justice Rabinowitz dissented, arguing that the rule ought to have been relaxed in this instance for several reasons, including the fact that there was confusion about the procedure, the fact that the appeal was only four days late, and the fact that the state was not disadvantaged by the delay.[509]

The supreme court was faced with a problematic application of Alaska Civil Rule 68 in *Taylor Construction Services, Inc. v. URS Co.*[510] The rule involves settlement offers and provides, in pertinent part, that "if the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."[511]

The evenly divided court affirmed a lower court ruling that imposed the "penal costs" rule on the plaintiffs for failing to obtain a judgment more favorable than an earlier settlement offer.[512] The result of the lower court ruling was to increase the amount of damages paid to defendants on their counterclaim and additionally to award the defendants attorneys' fees and court costs.[513] The supreme court affirmed, holding that the judgment obtained was not more favorable than the settlement offer,[514] and that the lower court was within its discretion in awarding greater attorneys' fees than are usually allowed for in the schedule.[515] The apparent effect of this holding is to broaden the ambit of Civil Rule 68 by interpreting the language to include the net effect of counterclaims on the final recovery when the dropping of those counterclaims is a condition of the settlement offer.

508. 2 ANCHORAGE, ALASKA, ADMIN. CODE § 35.180 (eff. Oct. 21, 1983).

509. *Powers,* 757 P.2d at 68 (Rabinowitz, J., dissenting).

510. 758 P.2d 99 (Alaska 1988).

511. *Id.* at 101 (quoting ALASKA R. CIV. P. 68(b)(1)).

512. *Taylor,* 758 P.2d at 101.

513. *Id.*

514. Indeed, the question of whether the judgment obtained was more favorable than the settlement offer was the main issue on appeal because the defendants offered to settle the case for $700,000.00, including an agreement to drop their counterclaim. The actual judgment which the plaintiff received at trial was for $162,000.00, but the plaintiff was found liable on the counterclaim in the amount of $223,700.00. *Id.* at 100.

515. *Id.* at 102. The schedule referred to is set forth in Civil Rule 82(a), and it is to be adhered to "[u]nless the court, in its discretion, otherwise directs." ALASKA R. CIV. P. 82(a)(1).

XI. PROPERTY

The court's decisions in the area of property and real estate law frequently are resolved on other grounds, such as contract law or civil procedure. The substantive property issues may be divided into the following categories: eminent domain, covenants, title, accountings, probate and estates, natural resources, and miscellaneous.

A. Eminent Domain

Typically, when the state takes a private individual's land in a condemnation proceeding, it deposits the estimated just compensation with the court for the benefit of the landowner.[516] The individual may withdraw any portion of this amount pending final determination of the compensation due.[517] If the condemnee fails, through his own delay, to withdraw the funds, he is not entitled to receive interest on the deposit.[518] In *Hofstad v. State,*[519] the court held that requiring the condemnee to return with interest any amounts withdrawn in excess of the final stipulation does not place him in "double jeopardy" because the individual has the option of placing the money in an interest bearing account to provide for any repayment.[520]

One factor that must be considered in determining just compensation is the use of the property taken. When a single tract of property is "split-zoned,"[521] the compensation may be dependent upon the permitted use for each particular zone.[522] In a case that presented more of a zoning issue than an eminent domain question, the court in *Bocek Brothers v. Municipality of Anchorage*[523] held that "use district boundaries should be respected even where they do not coincide with lot boundaries."[524] The court refused to award enhanced damages for an increased industrial taking, finding that where property was zoned two-thirds industrial and one-third residential, off-street parking and/or loading was not permitted in the residential section to serve the needs of the industrial usage of the property.[525]

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516. *See* Hofstad v. State, 763 P.2d 1351, 1351 (Alaska 1988).
517. ALASKA STAT. § 09.55.440(b) (1983).
518. Hofstad v. State, 763 P.2d 1351, 1352 (Alaska 1988).
519. 763 P.2d 1351 (Alaska 1988).
520. *Id.* at 1352-53.
521. "Split-zoned" property is that which is zoned for more than one use. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.12 (3d ed. 1986).
522. Boceck Bros. v. Municipality of Anchorage, 750 P.2d 335 (Alaska 1988).
523. 750 P.2d 335 (Alaska 1988).
524. *Id.* at 338.
525. *Id.* at 337. The court construed Anchorage Municipal Code section 21.40.040(K) to mean that parking in R-2 residential districts is prohibited "unless associated with a permitted R-2 use." *Id.* (citing ANCHORAGE, ALASKA, MUNICIPAL CODE § 21.40.040(k) (1983)).

The court further addressed the adequacy of compensation in *0.958 Acres, More or Less v. State*,[526] discussing the rights of a condemnee who has forfeited land abutting a public highway. The court held that while an abutter owns "a right of reasonable access" to an existing highway, the right ordinarily does not extend to a newly constructed highway.[527] Rather, the taking of a section line easement is compensable only if it "deprives the landowner of reasonable access to the network of streets to which it previously had access."[528] The court held that an analysis of reasonable access includes an examination of the potential uses of the property as well as of all the roads that actually or potentially lead to the property.[529]

Attorneys' fees in eminent domain proceedings are awarded under Civil Rule 72(k).[530] Courts generally will award fees only when "necessary to achieve a just and adequate compensation of the owner."[531] In *State, Department of Transportation v. 4.085 Acres*,[532] the court extended this standard to instances where the state appeals the master's allowance but the landowner does not.[533] In evaluating the propriety of attorneys' fees in this situation, courts should consider any pre-judgment settlement offers by the state as well as the landowner's response.[534]

B. Covenants

The court decided several cases regarding the enforceability of restrictive covenants. These holdings are generally very fact-specific and, for the most part, do not espouse any new principles of law. Each addresses a different issue regarding the enforcement of covenants.

It is not necessary that an individual fully violate a restrictive covenant before action may be taken to compel his conformity with its terms. *Lamoreux v. Langlotz*[535] involved an injunction to bar construction of a home which would allegedly violate the minimum size requirements of a restrictive covenant. The court upheld the injunction, ruling that the suit to enforce the covenant was not premature or

526. 762 P.2d 96 (Alaska 1988).
527. *Id.* at 99.
528. *Id.* at 100.
529. *Id.* at 101.
530. ALASKA R. CIV. P. 72(k).
531. *Id. See* State, Dep't of Transp. v. 4.085 Acres, 752 P.2d 1008, 1010 (Alaska 1988) ("court may only award fees necessarily incurred"); Bocek Bros. v. Municipality of Anchorage, 750 P.2d 335, 338 (Alaska 1988) (interest on attorneys' fees is not necessary).
532. 752 P.2d 1008 (Alaska 1988).
533. *Id.* at 1010.
534. *Id.* at 1011.
535. 757 P.2d 584 (Alaska 1988).

unripe simply because the defendant had two years to bring the building within the requirements.[536] Rather, in the context of enforcing restrictive covenants, it is proper to bring suit for injunctive or declaratory relief as soon as someone begins to build in violation of the covenant.[537] In fact, any delay could potentially bar the suit under the affirmative defense of laches.[538]

The court addressed the requirements for abandonment of a covenant in *B.B.P. Corp. v. Carroll.*[539] Generally, "a covenant will be deemed abandoned when the evidence reveals substantial and general noncompliance."[540] These conditions may be met when full compliance is impossible and substantial compliance is extremely burdensome, coupled with the fact that a covenant has neither been complied with nor enforced.[541] In *Carroll,* a suit to enforce a covenant requiring the cutting of certain types of trees on residential lots was defeated because the covenant had been abandoned.[542]

The court also decided two cases which specifically addressed the application of particular rules and covenants. In the first, *O'Buck v. Cottonwood Village Condominium Association,*[543] the court upheld the rights of a condominium unit to adopt and enforce rules banning the mounting of television antennae on the exterior of the buildings.[544]

Finding that the Association's "Declaration of Condominium" authorized such rulemaking for the purposes of protecting the structure and preserving a uniform exterior appearance,[545] the court applied a balancing test to determine whether the rule was reasonable. In balancing the importance of the rule's purpose against the importance of the interest infringed upon, that is, the financial burden of paying for cable service, the court held that the rule was reasonable.[546] The court also held that the condominium contract and prior use of an antenna by the owner did not create a statutory easement, implied easement, or easement by estoppel for continued use.[547]

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536. *Id.* at 586.

537. *Id.*

538. *Id.* at 585-86.

539. 760 P.2d 519 (Alaska 1988).

540. *Id.* at 524.

541. *Id.*

542. *Id.* The court also held that a covenant requiring downhill lot owners to cut trees obstructing uphill owners' views has not been abandoned. *Id.*

543. 750 P.2d 813 (Alaska 1988).

544. *Id.* at 814.

545. *Id.* at 815. The court stated that the absence of a provision expressly authorizing the right to ban antennae was not fatal to the Association's right to do so to accomplish its other goals. *Id.* at 816.

546. *Id.* at 818.

547. *Id.* at 819-21. Regarding statutory easements, see ALASKA STAT. § 34.07.170 (1985). Regarding implied easements, see Freightways Terminal Co. v. Industrial and

Finally, in *Jones v. Brown,*[548] the court interpreted a covenant that restricted structures in a given neighborhood to single family dwellings that were either "one story or split level in design" to impose a height restriction on residences rather than a design restriction.[549] While a home may appear to contain more than one level, so long as it is within the applicable height range, it will survive a challenge for breach of covenant.[550]

C. Title

Disputes frequently arise over who legally holds title to a particular piece of land. Although written agreements are considered the norm for ascertaining the true owner, oral contracts may sometimes be enforced under the full performance exception to the Statute of Frauds.[551] For example, in *Carter v. Hoblit,*[552] three individuals orally agreed to purchase land jointly; however, Hoblit, the actual purchaser, took the deed in his name alone.[553] In reversing a summary judgment which had awarded the entire tract to Hoblit, the court held, inter alia, that the agreement could not be held invalid under the Statute of Frauds[554] because each party rendered full performance (payment of the purchase price), which was accepted by Hoblit in accordance with the contract.[555] In addition, the court found that sufficient evidence existed to determine the extent of Hoblit's breach and the appropriate remedies owed the other two parties.[556]

Commercial Constr., Inc., 381 P.2d 977, 988 (Alaska 1963) (to be implied, easement must be "reasonably necessary for beneficial enjoyment of the property"). For equitable estoppel, oral grant and reliance are required. *O'Buck,* 750 P.2d at 820 (quoting *Freightways,* 381 P.2d at 984). In *O'Buck,* the same purpose could be achieved through cable installation, and the plaintiff was compensated for the value of the antenna; therefore, recovery was not permitted on these grounds. *Id.* at 820.

548. 748 P.2d 747 (Alaska 1988).

549. *Id.* at 749.

550. *Id.*

551. ALASKA STAT. § 09.25.020(1) (1983).

552. 755 P.2d 1084 (Alaska 1988).

553. *Id.* at 1085. The parties never executed a written contract to purchase the land jointly, but each fully paid his share of the purchase price. *Id.*

554. ALASKA STAT. § 09.25.010 (1983).

555. *Carter,* 755 P.2d at 1088-89. The court cited Alaska Statutes section 09.25.020(1), an exception to the Statute of Frauds. ALASKA STAT. § 09.25.020(1) (1983). This exception was not codified at the time of the agreement but was recognized by decisional law in Rassmus v. Cary, 11 Alaska 456, 462 (1947). *Carter,* 755 P.2d at 1088.

556. *Carter,* 755 P.2d at 1089.

Foster v. State[557] involved an interpretation of the Land Registration Law.[558] This law required landowners to register title to real property; failure to register resulted in imposition of a fine and possible foreclosure on the property by the state.[559] In *Foster,* the court addressed the ownership of land foreclosed upon by the Territory of Alaska in 1957.[560] While the original record holder may repurchase the property for the nominal amount of the foreclosure judgment,[561] he must first establish a perfect chain of title leading to himself.[562] Absent such a showing, repurchase is precluded and the state retains title, as it did in this case.[563] The court further held that a person cannot acquire state land by adverse possession.[564]

D. Accountings

Issues often reach the court respecting the calculation of damage awards or settlements over which the litigants disagree. In *Gaudiane v. Lundgren,*[565] the court determined the appropriate means to calculate an individual's share of profits in a leasing transaction where the individual became a party to the transaction by exercising an option to acquire a twenty-five percent interest in the property.[566] The court held that by exercising the option, the individual (Gaudiane) assumed the position he would have occupied had he been an original participant in the transaction.[567] Therefore, in an accounting, he was not entitled to early receipt of future installments due on a note to

557. 752 P.2d 459 (Alaska 1988).

558. Ch. 134, 1953 Alaska Sess. Laws (codified as amended at ALASKA STAT. §§ 34.10.010-34.10.240, *repealed by* Act, ch. 182, § 20, 1978 Alaska Sess. Laws). The court found two purposes of the law: to determine ownership of remote parcels and to return abandoned land to the state. *Foster,* 752 P.2d at 460. Although the Land Registration Law was repealed in 1978, the cases respecting ownership of land previously foreclosed upon pursuant to the Land Registration Law are decided under its provisions. *Id.* at 459.

559. *Foster,* 752 P.2d at 460. *See* ALASKA STAT. §§ 34.10.040, 34.10.050, 34.10.080-.130 (1985).

560. *Foster,* 752 P.2d at 460.

561. *Foster,* 752 P.2d at 460; ALASKA STAT. § 34.10.220. This provision remained in effect until 1983.

562. *Foster,* 752 P.2d at 462.

563. *Id.* at 463. The court found that the denial of title in this case was supported by adequate relevant evidence. *Id.*

564. *Id.* at 464; ALASKA STAT. § 38.95.010 (1984). A second individual sought title to the land by virtue of adverse possession. *Foster,* 752 P.2d at 463. The claimant's assertion that the initial foreclosure was void and title rested with a private individual rather than the state was barred under the doctrine of laches. *Id.* at 465-66.

565. 754 P.2d 742 (Alaska 1988).

566. *Id.* at 743.

567. *Id.* at 744. Gaudiane exercised his option coincidentally with the sale of the property to a third party. *Id.* at 743.

purchase the property, but he was instead required to wait until the installments came due.[568]

The court also addressed the question of who bears the burden of justifying expenses in an accounting between tenants in common. Generally, the managing co-tenant, who keeps the books and controls day-to-day management, bears the burden of proof as to the accuracy of the accounting because that party "controls the evidence which bears upon that fact."[569] In *Sloan v. Jefferson,*[570] the court applied this principle and reversed the findings of the trial court, holding in favor of a non-managing tenant who provided testimony and affidavits while the managing co-tenant produced no reliable evidence.[571]

E. Probate and Estates

In *Sparks v. Gustafson,*[572] the court addressed the issue of unjust enrichment with respect to compensation awarded to the friend of a decedent who managed a portion of the decedent's estate. Ruling that the estate would be unjustly enriched if it received a benefit without compensating the donor for its value, the court held that compensation is equitable when the benefit is not given gratuitously and the donor expects payment for his efforts.[573] Addressing for the first time what constituted "gratuitous intent," the court suggested that services rendered by a close friend or relation that were not necessary to maintain the beneficiary's status quo were representative of gratuitous donations.[574] Finding that management and maintenance services are "business services for which one would ordinarily expect to be paid" and therefore typically not given gratuitously, the court awarded compensation to the donor.[575]

F. Natural Resources

The court decided two cases in 1988 which addressed the issue of ownership of minerals and mining rights. In *Hayes v. Alaska Juneau*

568. *Id.* at 744. In addition, he was responsible for 25% of the title clearing expenses incidental to the sale of the property.

569. Sloan v. Jefferson, 758 P.2d 81, 83 (Alaska 1988) (citing Holcomb v. Davis, 431 S.W.2d 881, 883 (Ky. 1968); Dixon v. Anadarko Prod. Co., 505 P.2d 1394, 1396 (Okla. 1972)).

570. 758 P.2d 81 (Alaska 1988).

571. *Id.* at 85. The court is free to reverse the findings of a trial court that rejected the findings of the master. *Id.* (citing Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504, 509 (1977); First Nat'l Bank of Martinsville v. Cobler, 215 Va. 852, 213 S.E.2d 800, 802 (1975)).

572. 750 P.2d 338 (Alaska 1988).

573. *Id.* at 342.

574. *Id.*

575. *Id.* at 343.

Forest Industries, Inc.,[576] the court determined the rightful ownership of certain minerals contained in mine tailings (residual ore deposits remaining after most minerals have been extracted)[577] that had been deposited on certain tidal and submerged lands owned by the State of Alaska. The predecessor company to the defendant had dumped the tailings for the purpose of disposal.[578] Stating that "[w]here mine tailings are deposited for purpose of disposal, [they] are considered realty,"[579] the court ruled that the tailings belonged to the state because they had been "deposited in such a manner . . . that they become real estate,"[580] thereby becoming the property of the owner of the underlying land.[581]

Kile v. Belisle[582] addressed the issues of abandonment and forfeiture with respect to ownership of mining claims. Regarding abandonment, the court found that when a claimant abandons a claim and later attempts to quitclaim his interest to another party, claimants under his deed have no title because he has no valid interest to convey.[583] In a related claim, the court held with respect to forfeiture that orders withdrawing lands from a claim site divest the rights of all claimants who have not substantially complied with annual assessment requirements.[584] With regard to part two of the holding, the court relied on the United States Supreme Court's decision in *Hickel v. Oil Shale Corp.*,[585] which "suggests that, in any withdrawal context, claims which are not in substantial compliance with the annual work requirement are divested."[586]

G. Miscellaneous

The court addressed the issue of replatting vacated public lands in *Grand v. Municipality of Anchorage.*[587] Anchorage developed a plan to improve Merrill Field Airport which included a provision calling

576. 748 P.2d 332 (Alaska 1988).
577. BALLENTINE'S LAW DICTIONARY 1252 (3d ed. 1969).
578. *Id.* at 333.
579. *Id.* at 336 (citing State v. A.J. Industries, 397 P.2d 280, 284 (Alaska 1964)).
580. *Id.* (citing Steinfeld v. Omega Copper Co., 16 Ariz. 230, 141 P. 847, 848 (1914)).
581. *Id.* at 337. In this case, the state was the owner of the underlying land. *Id.* at 336. The court also noted that tailings may become real estate through abandonment, intention, or adaption and use. *Id.*
582. 759 P.2d 1292 (Alaska 1988).
583. *Id.* at 1297. The court noted that the test for abandonment requires "a subjective intent to abandon coupled with an external and objective act by which that intent is carried into effect." *Id.* at 1296.
584. *Id.* at 1301.
585. 400 U.S. 48 (1970).
586. *Kile*, 759 P.2d at 1298.
587. 753 P.2d 141 (Alaska 1988).

for vacation of two feeder taxiways that abutted Grand's property.[588] Grand opposed the original replat because, despite the additional land awarded him, it impinged on his construction plans by essentially reducing the size of his usable space.[589] The municipality then drafted a revised replat which excluded Grand altogether and awarded the vacated feeder taxiways in full to the other adjoining leaseholders.[590] Citing a provision of the Anchorage Municipal Code which provides that "title to . . . public right-of-way vacated on a plat attaches to the lot or lands bordering on the area in equal proportions . . .,"[591] the court found that Grand was entitled to his proportionate share of the vacated taxiways and ordered an amendment of the final replat.[592]

Wassink v. Hawkins[593] addressed the state's ability to terminate a land sale contract with the purchasers of a dairy farm. The parties had previously agreed to a stipulation that extended the deadline for compliance with the terms of the contract and bound the purchasers to waive "any and all defenses" in the event of an alleged breach.[594] The court refused to find the stipulation invalid under a theory of economic duress or contract of adhesion.[595] However, the court did conclude that the waiver of "any and all defenses" did not constitute a waiver of defenses arising after the stipulation was signed, such as frustration or estoppel, and held that sufficient evidence existed to raise genuine issues of material fact regarding these defenses.[596]

XII. TAX LAW

The tax cases before the court in 1988 involved both state and local tax regulations and covered both personal and corporate taxation issues. Most interesting in the corporate field are two cases involving apportionment of worldwide income under the unitary business concept. Although the cases were not factually similar, the court generally ruled in favor of revenue enhancement, except in a case of discriminatory taxation by a local government. The court ruled in favor of the state in all four of the tax cases that the court decided.

The most complex tax case in 1988 was *Gulf Oil Corp. v. State, Department of Revenue.*[597] Gulf challenged the Department of Revenue's determination of the company's worldwide income for state tax

588. *Id.* at 141.
589. *Id.* at 142.
590. *Id.* at 143.
591. *Id.* (citing ANCHORAGE, ALASKA, MUNICIPAL CODE § 21.14.130(D)(1)).
592. *Id.*
593. 763 P.2d 971 (Alaska 1988).
594. *Id.* at 972.
595. *Id.* at 973-74.
596. *Id.* at 975.
597. 755 P.2d 373 (Alaska 1988).

purposes for the years 1975-1977. At issue was whether extraordinarily high income taxes paid to OPEC contries were, in fact, income taxes or taxes based on imputed income and therefore inconsistent with "income taxes" as used in the Alaska statute.[598] The Department of Revenue argued that the tax payments were income taxes as intended by the statute and therefore were not deductible from Gulf's worldwide income for purposes of applying Alaska's apportionment formula.[599] The court agreed with the state and ruled that despite the fact that the taxes were extremely high, they fell within the meaning of the statute and were not deductible from worldwide income.[600] Gulf attempted to bolster its argument by citing the Internal Revenue Code[601] and its definition of foreign income taxes. However, the court summarily dismissed this argument as inapplicable to this state taxation case.[602]

The second issue with regard to the apportionment formula was the value of various leaseholds belonging to Gulf. Gulf argued that leaseholds that turned out to be dry should be valued at zero since they contributed nothing to Gulf's business in Alaska. However, the court rejected this argument.[603] Relying on its decision in *State, Department of Revenue v. Amoco,*[604] the court noted that the dry leases were in fact a contributing portion of an oil company's property due to the necessity of exploration in determining which fields will produce.[605] Upon further analysis, the court also determined that Gulf's constitutional right of due process was not violated, as the taxpayer

598. *Id.* at 373; ALASKA STAT. § 43.20.031(c) (1983 & Supp. 1988).

599. Justice Moore's opinion reviews worldwide formula apportionment in detail. The excellent synopsis is written in such a way that the attorney or lay person, without significant tax knowledge, can understand the application of the formula. The formula itself computes the proprotionate share of the company's worldwide income subject to Alaska taxation. This figure is determined by averaging three factors: "the proportion of the compnay's property located in Alaska, the proportion of the taxpayer's payroll which is paid in Alaska, and the proportion of the taxpayer's sales that occur in state," multiplied by the taxpayer's worldwide income. *Gulf Oil,* 755 P.2d at 374-75.

600. *Id.* at 379.

601. *Id.* (citing 26 U.S.C. § 901 (1982 & Supp. 1986).

602. *Id.* at 279-80; ALASKA STAT. §§ 43.20.031(c), 43.20.036(a) (1983 & Supp. 1988).

603. *Gulf Oil,* 755 P.2d at 387.

604. 676 P.2d 595 (Alaska 1984) (holding that Amoco's non-producing leaseholds were "used" for purposes of relevant statute because exploration is an integral part of discovery process; consequently, leaseholds have value apart from production capabilities).

605. *Gulf Oil,* 755 P.2d at 385.

did not meet its burden of proof of providing " 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' or has 'led to a grossly distorted result.' "[606]

This holding represents a strong endorsement by the court of the worldwide apportionment method of determining state income taxes and a continued willingness to apply the formula strictly, despite dicta by the United States Supreme Court that apportionment can lead to inequities and that it is difficult to achieve a proper allocation.[607]

In another case relating to apportionment, the court in *Alaska Gold Co. v. State, Department of Revenue*[608] interpreted the standard for applying the unitary business concept for the purposes of applying Alaska's unitary apportionment formula.[609] Alaska Gold objected to the Department of Revenue's inclusion of an out-of-state subsidiary of a common parent as a member of its unitary group for tax purposes.[610] The taxpayer argued that the parent was involved in two separate unitary groups, one with itself and another with the out-of-state subsidiary. The court disagreed and applied the reasoning it had used in *Earth Resources Company of Alaska v. State, Department of Revenue.*[611]

In *Earth Resources,* the court set forth a standard of review for the Department of Revenue's application of the unitary business concept. Although the state urged the court to apply a rational basis standard of review in the *Alaska Gold* case, the court refused and reiterated the substitution of judgment standard of review, while still giving weight to the administrative decision.[612] The court further applied *Earth Resources* by requiring that the taxpayer must prove the disputed entity was operating autonomously and independently.[613] Unity will be found if "functional integration" can be established and centralization of management is shown.[614] The court did find unity and therefore ruled that the apportionment formula was correctly applied.[615]

606. *Id.* at 387 (quoting Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983)).

607. *Id.* at 383 (citing Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983); Norfolk & W.R. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968)).

608. 754 P.2d 247 (Alaska 1988).

609. The apportionment formula is discussed in *Gulf Oil* at length. *See supra* note 599.

610. *Alaska Gold,* 754 P.2d at 250.

611. *Id.* at 250, 253; 665 P.2d 960 (Alaska 1983).

612. *Earth Resources,* 665 P.2d at 965.

613. *Alaska Gold,* 754 P.2d 251-53.

614. *Id.* at 967 (quoting F.W. Woolworth Co. v. Taxation and Revenue Dep't, 458 U.S. 354, 364 (1982)).

615. *Alaska Gold,* 754 P.2d at 251.

The significance of *Alaska Gold* lies in the reiteration of the substitution-of-judgment standard. While the United States Supreme Court has taken a "non-interventionist" stance on issues such as this, the Alaska Supreme Court has been aggressive in imposing its own judgment in these situations.[616]

In *Ben Lomond, Inc. v. Fairbanks North Star Borough Board of Equalization,*[617] the court interpreted state and local tax statutes[618] and found that a developer, who had a twenty-three-year leasehold interest in land as well as a twenty-year interest in the buildings and improvements constructed thereon, had a "taxable interest" for the purposes of the borough's real property taxation statutes.[619] The developer, who constructed a project on a federally owned military reservation, had leased the land from the government. He subsequently leased the project back to the government and was taxed on his interests in both the land and the buildings. He argued, inter alia, that he enjoyed none of the rights of ownership and should, therefore, not be taxed.[620] Nevertheless, the supreme court upheld the lower court ruling that Lomond had a taxable interest in both the land and the buildings.[621] Specifically, the court found that the factual situation in this case was covered by statutes which provide that, although property owned by the government is exempt from taxation, private interests therein are taxable to the extent of the interest.[622]

At issue in *Kenai Peninsula Borough v. State, Department of Community and Regional Affairs*[623] was a Kenai property tax ordinance which taxed personal property at a higher rate than real property and which also taxed oil and gas property at the higher personal property rate. The court found the ordinance statutorily impermissible because (1) by taxing personalty at a higher rate than realty, the borough violated former sections 29.53.010-29.53.180 of the Alaska Statutes,[624] which required a "uniform rate of levy on real and personal property within a borough," and (2) the oil and gas distinction violated the intent of a statute[625] designed to prevent boroughs from shifting the weight of taxation onto the shoulders of the oil and gas industry while

616. *Id.* at 250.

617. 760 P.2d 508 (Alaska 1988).

618. *See* ALASKA STAT. § 29.45.030(a)(1) (1986); FAIRBANKS NORTH STAR BOROUGH, ALASKA, ORDINANCE § 3.08.020 (1988).

619. *Ben Lomond,* 760 P.2d at 513.

620. *Id.* at 511.

621. *Id.* at 513.

622. *Id.* at 511; ALASKA STAT. § 29.45.030(a)(1) (1986); FAIRBANKS NORTH STAR BOROUGH, ALASKA, ORDINANCE § 3.08.020(c) (1988).

623. 751 P.2d 14 (Alaska 1988).

624. ALASKA STAT. §§ 29.53.010-29.53.180, *repealed by* Act, ch. 74, § 88, 1985 Alaska Sess. Laws.

625. *Id.* § 43.56.010(b) (1983 & Supp. 1988).

relieving general property owners of a burden which is properly theirs.[626]

With regard to the first holding concerning taxation of personalty at a higher rate, the court noted that the statute facially required only that all property be assessed at its "true and full value."[627] The statute did not expressly prohibit the taxing of assessed property at different rates. However, the practical effect of the personalty/realty differential in this ordinance was to assess indirectly real property at less than its "true and full value"[628] by nominally assessing it at full value, only later to tax it at a lower rate.[629] The court stated that, "What the Borough cannot do directly, it cannot do indirectly."[630] Furthermore, the court found unpersuasive Kenai's challenges to the Department of Community and Regional Affair's ("DCRA") actions on statutory enforcement theories and on constitutional grounds.[631] Specifically, the court concluded that (1) "setting the tax rate is a procedure subject to DCRA's statutory enforcement authority,"[632] and (2) "the Borough is not a 'person' and therefore may not assert due process or equal protection claims against its creator, the State."[633]

XIII. TORTS

The court decided a wide variety of personal tort claims in 1988 which have been broadly segregated into the following areas: malpractice, contribution and indemnification, negligence, libel, and miscellaneous tort issues.

A. Malpractice

Perhaps the most significant development in malpractice law came in the area of medical malpractice, where the court upheld the constitutionality of Alaska Statutes section 09.55.536, which requires mandatory pretrial review of malpractice claims by an expert advisory panel and provides that the panel's report is admissible as evidence at trial.[634] In *Keyes v. Humana Hospital Alaska, Inc.*,[635] the court addressed several claims of constitutional violations, holding first that the statute does not impair the doctor's right to a jury trial[636] in that

626. *Kenai*, 751 P.2d at 16.
627. *Id.*
628. *Id.* at 16-17.
629. *Id.*
630. *Id.* at 17.
631. *Id.* at 17.
632. *Id.* at 18.
633. *Id.*
634. ALASKA STAT. § 09.55.536 (1983 & Supp. 1988).
635. 750 P.2d 343 (Alaska 1988).
636. ALASKA CONST. art. I, § 16.

the panel's report serves only as an evidentiary submission, equal to that of other expert testimony, and not as a determination of liability.[637]

With respect to due process, the statute passed muster on both substantive and procedural grounds.[638] Finding the review procedure to be "a reasonable legislative response to a perceived crisis in medical malpractice insurance rates," the court rejected a substantive due process argument.[639] Procedurally, the statute satisfied due process constraints because it does not at all deprive the parties of their rights to litigate fully the malpractice claim before a jury and to support, rebut, or impeach the panel report.[640] In addition, the statute itself contains many procedural safeguards designed to protect the integrity of the review hearing.[641]

The statute further withstood the contention that it violated the principle of separation of powers by vesting judicial authority in non-judicial personnel.[642] Because the report serves only as an expert opinion and not as a basis for entry of judgment, the panel is not entrusted with any judicial power.[643]

Finally, the court denied the plaintiff's equal protection challenge.[644] Citing its holding in *Wilson v. Municipality of Anchorage,*[645] which provided that the " 'interest in redressing wrongs through the judicial process' is only 'significant,' and an 'interest in suing a particular part . . . is not fundamental,' "[646] the court applied a low level of scrutiny to the class of medical malpractice litigants and found that the statute "bears a fair and substantial relation" to its purposes of encouraging settlement and reducing litigation.[647]

The court addressed two claims of attorney malpractice in 1988. In the first, *Wettanen v. Cowper,*[648] the court addressed the issue of whether an action for malpractice was a tort claim and subject to a two-year statute of limitations[649] or a breach of contractual obligation to perform certain duties and subject to the six-year limitation on contract actions.[650] Holding that the complaint was of negligence and

637. *Keyes,* 750 P.2d at 346-51.
638. *Id.* at 352, 354-55; ALASKA CONST. art. I, § 7.
639. *Keyes,* 750 P.2d at 351-352.
640. *Id.* at 353.
641. *Id.* at 354. *See* ALASKA STAT. § 09.55.536(a), (e), (g), (h) (1983).
642. *Keyes,* 750 P.2d at 357; ALASKA CONST. art. IV, § 1.
643. *Keyes,* 750 P.2d at 355-57.
644. *Id.* at 358; ALASKA CONST. art. I, § 1.
645. 669 P.2d 569 (Alaska 1983).
646. *Keyes,* 750 P.2d at 358 (quoting *Wilson,* 669 P.2d at 572).
647. *Id.* at 358.
648. 749 P.2d 362 (Alaska 1988).
649. *Id.* at 364; ALASKA STAT. § 09.10.070 (1983).
650. *Wettanen,* 749 P.2d at 364; ALASKA STAT. § 09.10.050 (1983).

therefore subject to the two-year tort statute, the court barred the malpractice claim.[651] It found that the statute begins to run when the client is actually harmed, which is deemed to be when judgment has been entered against him, and is not postponed until the client learns the full extent of the damages.[652]

The second attorney malpractice case concerned the standards for imposing liability for negligence. In order to hold an attorney liable for malpractice, a court must find the attorney's acts to have been (1) negligent, and (2) the proximate cause of harm to the client.[653] In *Boyles v. Smith,*[654] a malpractice claim stemming from a usury action against the plaintiffs, the court held that issues of negligence and causation required findings of fact and therefore must be decided by a jury.[655] In addition, because the underlying transaction was not usurious on its face, the nature of the information conveyed by the client to the attorney was held to be material.[656]

The court also discussed an accountant's liability for malpractice in making investment recommendations that were passed on to third parties without his knowledge. In *Selden v. Burnett,*[657] the court held that an action for negligence lies only when the accountant owes the third party investor a duty of care.[658] Recognizing the broad duty owed when an accountant certifies financial statements that are available generally to the public, the court imposed a more limited obligation when an accountant provides personal tax advice in a private capacity.[659] The court held that in the case of a verbal recommendation to a private client, the duty of care extends to third parties only if the accountant intends such parties to rely on the recommendations and only if such intent is known by the third parties.[660] Imposition of any broader duty would be far too expansive and would unfairly penalize an accountant who would be forced to accept significant risk without realizing the benefit of remuneration from unknown third parties.[661]

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651. *Wettanen,* 749 P.2d at 364-66.
652. *Id.* at 365.
653. Boyles v. Smith, 759 P.2d 518, 521 (Alaska 1988).
654. 759 P.2d 518 (Alaska 1988).
655. *Id.* at 520.
656. *Id.* at 520-21.
657. 754 P.2d 256 (Alaska 1988).
658. *Id.* at 259.
659. *Id. See* RESTATEMENT (SECOND) OF TORTS § 552, comment h, illustration 10 (1977).
660. *Selden,* 754 P.2d at 259.
661. *Id.* at 260.

B. Contribution and Indemnification

The Uniform Contribution Among Tortfeasors Act ("UCATA")[662] creates a right to pro rata contribution among joint tortfeasors. Therefore, if an insurance company pays a claim in full, it is entitled to contribution from all those adjudged liable. In *Providence Washington Insurance Co. v. McGee,*[663] the court held that "a claim for contribution is substantively separate from the underlying tort and does not arise until the contribution claimant has paid more than his or her proportionate share of the total claim."[664] It is, therefore, not a compulsory counterclaim and would not be barred under Civil Rule 13(a).[665]

The court addressed a more narrow issue of contribution in *Tommy's Elbow Room, Inc. v. Kavorkian.*[666] The UCATA also provides that when a plaintiff gives a release or covenant not to sue to one or more joint tortfeasors, the claim against the others must be reduced by the greater of (1) the amount stipulated in the settlement, or (2) the amount actually recovered.[667] In this case, one tortfeasor settled and gave a release; a second tortfeasor agreed to a consent judgment and assigned his rights against his insurer to the injured party.[668] The court held that, like a formal release, an assignment of rights requires a reduction in the claim against the remaining tortfeasor by the full amount of the consent judgment, not the amount actually recovered from the insurance company.[669]

In 1986, the Alaska Legislature enacted the Tort Reform Act (the "Act"), which provided for joint liability among tortfeasors according to fault.[670] Faced with the question of whether the Act repealed the UCATA, the court, in *Ogle v. Craig Taylor Equipment Co.,*[671] held that the Act applies only to cases where the plaintiff's injury occurred on or after June 11, 1986, the Act's effective date.[672] All other claims are subject to joint and several contribution, irrespective of degree of fault under the UCATA.[673]

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662. ALASKA STAT. §§ 09.16.010-09.16.060 (1983).

663. 764 P.2d 712 (Alaska 1988).

664. *Id.* at 715.

665. *Id.*; ALASKA R. CIV. P. 13(a). This rule requires all counterclaims arising out of the occurrence that is the basis of the opposing party's claim either to be joined in the pleadings or forfeited.

666. 754 P.2d 243 (Alaska 1988).

667. ALASKA STAT. § 09.16.040 (1983).

668. *Tommy's Elbow Room,* 754 P.2d at 244.

669. *Id.* at 246-47. This holding assumes the recovery will not exceed the amount of the stipulation.

670. ALASKA STAT. § 09.17.080 (Supp. 1988).

671. 761 P.2d 722 (Alaska 1988).

672. *Id.* at 725.

673. *Id. See also* ALASKA STAT. § 09.16.020(1) (1983).

In an action for strict products liability, the appropriate means of assigning liability is indemnification, not contribution.[674] In *Koehring Manufacturing v. Earthmovers of Fairbanks,*[675] the court held that a lessor or retailer found liable on a strict products liability theory may obtain indemnity from the manufacturer so long as he is not judged to be independently negligent.[676] Therefore, absent a pleading of the lessor's negligence as an affirmative defense, the manufacturer will be held liable in an indemnification action.[677] The manufacturer in this case was required to indemnify the lessor for attorneys' fees from the date the plaintiff's negligence claim was abandoned and the cause of action proceeded under a strict liability theory.[678]

Another indemnification action, *Schnabel Lumber Co., Inc. v. State,*[679] addressed the meaning of "loss" for purposes of indemnification reimbursement. After settling a case with the original complainant in a damages action following a bridge collapse, the state was awarded indemnification from the party causing the collapse for forty percent of the settlement cost.[680] The court upheld the award and ruled that, for the purposes of an indemnification provision between the state and a contractor, "loss" is defined as the settlement cost rather than the actual value of the property destroyed.[681]

C. Negligence

A common basis for tort claims is negligence. The cases in the following section address two of the fundamental issues of negligence, duty and causation, as well as negligence per se. In *Gordon v. Alaska Pacific Bancorporation,*[682] the court found that the host of a large party where alcoholic beverages are freely dispensed may owe his guests a duty to provide adequate security to protect them against altercations, if a jury finds such altercations to have been reasonably foreseeable by the host.[683] In addition, the court addressed the "good samaritan" aspect of protective care.[684] Affirming the Restatement (Second) of Torts,[685] the court found that liability may be imposed if

674. Koehring Mfg. v. Earthmovers of Fairbanks, 763 P.2d 499 (Alaska 1988).
675. 763 P.2d 499 (Alaska 1988).
676. *Id.* at 504.
677. *Id.* at 504-08.
678. *Id.* at 509.
679. 761 P.2d 718 (Alaska 1988).
680. *Id.* at 719.
681. *Id.* at 720.
682. 753 P.2d 721 (Alaska 1988).
683. *Id.* at 723.
684. *Id.* at 724.
685. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

an individual, in undertaking to protect another, fails to exercise reasonable care and as a result increases the risk of harm or causes harm to be suffered as a result of detrimental reliance on his protective efforts.[686]

The court again addressed the necessity of finding a duty before imposing negligence liability in *Estate of Breitenfeld v. Air-Tek, Inc.*[687] A widow brought suit against an electrical repair company for the wrongful death of her husband in an airplane crash due to a defective ceiling detection light.[688] Because the company had no contract with the airport and had merely agreed to order a replacement when the light was found to be inoperable, the court held that it had not "voluntarily assumed to perform a particular act" giving rise to a duty and therefore affirmed the lower court's summary dismissal of the claim.[689]

Negligence per se is found where a tortfeasor's violation of a statutory provision results in injury to the plaintiff.[690] In *West v. Municipality of Anchorage,*[691] a driver moving thirty miles per hour hit and killed a pedestrian. The statutory speed limit in Anchorage is twenty miles per hour "unless otherwise posted."[692] The court held that whether a thirty-five-miles-per-hour sign posted just before the turnoff to the road on which the accident occurred was "otherwise posted" so as to negate liability was a question of fact properly posed to the jury.[693]

McCarthy v. McCarthy[694] also involved an automobile accident and addressed the issues of negligence and causation. Two cars collided as one was leaving and the other was entering a parking lot.[695] The lower court, while finding both drivers negligent, held that the defendant's negligence was not the legal cause of the accident.[696] However, because the departing car did not stop before pulling into

686. *Gordon,* 753 P.2d at 724.

687. 755 P.2d 1099 (Alaska 1988).

688. *Id.* at 1100. A ceiling detection light is a beacon that measures the cloud cover over an airport. *Id.*

689. *Id.* at 1101-03.

690. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON, ON THE LAW OF TORTS § 36, at 229-30 (5th ed. 1984) [hereinafter PROSSER & KEETON].

691. 754 P.2d 1120 (Alaska 1988).

692. 13 ANCHORAGE, ALASKA, ADMIN. CODE § 02.275(b) (eff. before 7/28/59; am. 6/28/79).

693. *West,* 754 P.2d at 1122.

694. 753 P.2d 137 (Alaska 1988).

695. *Id.* at 137.

696. *Id.*

the street, the supreme court found that the defendant's action satisfied both the "but for" and "substantial factor" tests of causation[697] and overturned the lower court's finding that his action was not a legal cause.[698]

A major decision in 1988 will affect attempts to impose negligence liability on design professionals. In *Turner Construction Co., Inc. v. Scales,*[699] the court held unconstitutional the six-year statute of repose on suits against design professionals.[700] The statute provides that no action for damages may be brought against such professionals "more than six years after substantial completion of an improvement."[701] In *Turner,* a contractor was sued for negligent construction and installation of a fireplace.[702] The court affirmed the lower court's ruling that the suit could not be barred by the statute of repose.[703] The court found that the statute violated the equal protection clause of the Alaska Constitution[704] because the means were neither substantially nor rationally related to the ends: "[T]here is no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction."[705]

D. Libel

The court decided two cases in 1988 in which it set forth the prerequisites to a valid claim for libel. For a "public figure" to recover damages for an allegedly libelous statement, he must show "that the statement was false and that the false statement was made with 'actual malice.' "[706] In *Rybachek v. Sutton,*[707] the court found that the plaintiff, a local columnist and owner of a gold mine, was a public figure under the United States Supreme Court's definition, which includes "any individual who 'voluntarily injects himself or is drawn into a particular public controversy' thereby 'engag[ing] the public's attention in an attempt to influence its outcome.' "[708] However, the court affirmed

697. *Id.* at 138. The "but for" test requires that the accident would not have occurred but for the event in question. The "substantial factor" test means that reasonable men would view the event as a cause and attach liability. *Id.*

698. *Id.* at 139.

699. 752 P.2d 467 (Alaska 1988).

700. *Id.* at 472; ALASKA STAT. § 09.10.055 (1983).

701. ALASKA STAT. § 09.10.055 (1983).

702. *Turner,* 752 P.2d at 469.

703. *Id.* at 472.

704. ALASKA CONST. art. I, § 1.

705. *Turner,* 752 P.2d at 472.

706. Rybachek v. Sutton, 761 P.2d 1013, 1014 (Alaska 1988). *See* Moffatt v. Brown, 751 P.2d 939, 941 (Alaska 1988).

707. 761 P.2d 1013 (Alaska 1988).

708. *Id.* at 1014 (quoting Gertz v. Welch, 418 U.S. 323 (1974)).

the lower court's judgment against the plaintiff because the plaintiff produced no proof that the defendant's actions violated the "actual malice" standard.[709]

The malice standard was more fully discussed in an earlier decision, *Moffatt v. Brown,*[710] in which the court reaffirmed the requisite mental state for a finding of malice in libel actions as reckless disregard sufficient to permit the inference that the defendant "subjectively entertained serious doubts as to the truth of his statement."[711] More importantly, perhaps, in *Moffatt,* the court declined to follow the United States Supreme Court's standard for summary judgment in libel cases, enunciated in *Anderson v. Liberty Lobby, Inc.,*[712] of whether the evidence supports a finding "that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."[713] On the grounds that *Anderson* was "a case about federal procedure," the court instead elected to continue its own standard for denial of motions for summary judgment that "a genuine issue of material fact exists to be litigated."[714] The court's reasoning was based on the belief that the *Anderson* standard requires a weighing of the evidence by the judge, a function which intrudes into the province of the jury.[715]

E. Miscellaneous Tort Issues

The court decided several issues of first impression in 1988 in various areas of tort law. *Doe v. Colligan,*[716] a civil sexual abuse case, addressed for the first time the question whether punitive damages may be recovered from the estate of a deceased tortfeasor. The court joined a majority of states in holding that recovery of punitive damages is not permitted.[717] Given that punitive damages are intended both to punish the wrongdoer and to serve as a deterrent to future tortious conduct, the court reasoned that the beneficial effect of these elements would be lost if the tortfeasor were deceased.[718]

In 1987, the court recognized, for the first time, a minor child's cause of action for loss of parental consortium resulting from tortious

709. *Id.* at 1014-15.
710. 751 P.2d 939 (Alaska 1988).
711. *Id.* at 942 (quoting Green v. Northern Publishing Co., 655 P.2d 736, 742 (Alaska 1982), *cert. denied,* 463 U.S. 1208 (1983)) (emphasis deleted).
712. 477 U.S. 242 (1986).
713. *Moffatt,* 751 P.2d at 942 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986)).
714. *Id.* at 943-44; ALASKA R. CIV. P. 56(c).
715. *Moffatt,* 751 P.2d at 944.
716. 753 P.2d 144 (Alaska 1988).
717. *Id.* at 146.
718. *Id.* at 145.

injury to a parent in *Hibpshman v. Prudhoe Bay Supply, Inc.*[719] In an effort to further protect the interests of minors, in the 1988 case of *Truesdell v. Halliburton Co., Inc.*[720] the court established that the statute of limitations for such claims was not tolled until the child reaches the age of majority, at which point it will extend for two years.[721] The court recognized, however, that full retroactivity would have strong implications with respect to potential double recoveries and the reopening of closed cases and, therefore, opted for limited retroactivity.[722] Thus, in any case where at least one parent has brought an action for damages related to an accident which has been the subject of a judgment or final settlement, the minor's claim will be barred.[723]

The court also addressed the prerequisities to a valid claim for the tort of abuse of process in *Kollodge v. State.*[724] In the plaintiff's abuse of process action against the state's attorney arising from an earlier proceeding, the court cited the two elements which comprise the tort: an ulterior purpose and a willful act not proper in the regular conduct of the judicial process.[725] Because the plaintiff never pleaded that any willful act had been taken by the state, the court recognized that the filing of suit, in and of itself, is not enough to support the cause of action, and it affirmed the lower court's dismissal of the claim.[726]

Finally, the court decided two cases concerning the discovery rule and statutes of limitation. In *Mine Safety Appliances Co. v. Stiles,*[727] which involved a construction worker's products liability claim for the defective design of a safety helmet, the court rejected the contention that the two-year statute of limitations should have been tolled until the plaintiff discovered actual evidence supporting his claim.[728] Rather, the court held that the statutory period commences to run when "a reasonable person would have notice of facts 'sufficient to prompt a person of average prudence to inquire,' and thus [the person] should be deemed to have notice of all facts which reasonable inquiry would disclose."[729] Therefore, the statute would begin to run at the time of the injury or, in this case, as soon as the plaintiff regained his

719. 734 P.2d 991 (Alaska 1987).
720. 754 P.2d 236 (Alaska 1988).
721. *Id.* at 238. *See* ALASKA STAT. § 09.10.140 (1983).
722. *Truesdell,* 754 P.2d at 241-42.
723. *Id.* at 242.
724. 757 P.2d 1024 (Alaska 1988).
725. *Id.* at 1026, (citing PROSSER & KEETON, *supra* note 291, § 121, at 898).
726. *Id.* at 1027-28.
727. 756 P.2d 288 (Alaska 1988).
728. *Id.* at 291-92.
729. *Id.* at 292 (quoting Russell v. Municipality of Anchorage, 743 P.2d 372, 376 (Alaska 1987)(quoting Vigil v. Spokane County, 42 Wash. App. 796, 714 P.2d 692, 695 (1986)).

competence thereafter.[730] Holding that the claim was necessarily time-barred by the two-year statute of limitations,[731] the court reversed the lower court's denial of summary judgment and rejected the claim altogether.[732]

In answering a question certified by the federal district court, the court declared that the discovery rule, while applicable to tort causes of action, would not extend to contract claims for breach of warranty in *Armour v. Alaska Power Authority.*[733] While claims for breach of warranty do carry a four-year statute of limitations,[734] the statutory period begins to run on the date the product is purchased and not on the date the injury occurs.[735] Although an exception is permitted in cases where the warranty "*explicitly* extends to future performance," in this case the goods were purchased with an *implied* warranty.[736] Therefore, a person claiming to have been injured by a defective good may instead assert a tort claim within two years of the date of injury.[737]

Caroline F. Bergman
Gregg R. Melinson

730. *Id.* at 292.
731. *Id. See* ALASKA STAT. § 09.10.070 (1983).
732. *Mine Safety,* 756 P.2d at 293.
733. 765 P.2d 1372 (Alaska 1988); ALASKA STAT. § 45.02.318 (1986) (warranty protection).
734. ALASKA STAT. § 45.02.725(a) (1986).
735. *Armour,* 765 P.2d 1375; ALASKA STAT. § 45.02.725(b) (1986).
736. *Armour,* 765 P.2d at 1374.
737. *Id.* at 1375.