
NOTE

THE CONSTITUTIONAL BATTLE OVER THE PUBLIC INTEREST LITIGANT EXCEPTION TO RULE 82

*Attorney fee-shifting laws arouse a great deal of contention in American legal debates because they aim to answer the difficult question of who should pay the cost of litigation. Lawmakers are constantly re-examining this issue, recognizing that civil litigation is costly and the high price for legal services often determines whether a party will use the courts to settle his or her grievances. This is no less true in Alaska, the only state in America with a general “loser pays” attorney fee-shifting system for most civil litigation. This Note addresses the current dilemma that Alaska faces regarding attorney’s fees awards in public interest litigation. The author begins by examining the development of the common law public interest litigant doctrine and the substantive revisions to Rule 82 of the Alaska Rules of Civil Procedure made by the Alaska Supreme Court in 1993. Next, he discusses recent legislative attempts to repeal the doctrine, which prompted a constitutional challenge in *Native Village of Nunapitchuk v. State*, a case likely to be appealed to the Supreme Court of Alaska. The author then analyzes the legal issues raised in the *Nunapitchuk* decision and argues for affirmation if appealed. Finally, the author concludes by suggesting what substantive revisions to the public interest litigant doctrine should be considered and how they should be made within the purview of the Alaska Constitution.*

I. INTRODUCTION

Alaska has a unique and complex attorney fee-shifting regime that awards partial fees in a two-way fee-shifting system to both prevailing plaintiffs and defendants.¹ Unlike most states, where fee-shifting exists

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1. ALASKA R. CIV. P. 82. Alaska’s attorney’s fees laws have a long history dating back to the state’s territorial days. ALASKA JUDICIAL COUNCIL, ALASKA’S ENGLISH RULE: ATTORNEY’S FEE-SHIFTING IN CIVIL CASES 29–30 (1995). For many years prior to

only in limited statutorily-mandated circumstances,² Alaska's attorney fee-shifting system is codified in the Alaska Rules of Civil Procedure as Rule 82. Specifically, Rule 82 provides that prevailing parties in a civil case may recover attorney's fees pursuant to an established schedule based either on the monetary judgment award or on a percentage of reasonable attorney's fees incurred when no money award is recovered.³ The Rule provides discretion for the court to deviate from this fee schedule upon consideration of a variety of factors.⁴

In general, two-way fee-shifting systems such as Alaska's are lauded for encouraging meritorious claims and discouraging nuisance claims.⁵ However, two-way fee-shifting regimes have disincentive effects beyond merely discouraging non-meritorious claims.⁶ Middle- and lower-income individuals may be effectively deterred from pursuing promising claims because of the threat of having to pay their opponent's attorney's fees.⁷ Given the uncertainty of litigation, the opportunity cost of litigating claims, even ones with strong public interest implications, may be too high to justify the potential loss of limited disposable income.⁸ To accommodate these competing interests, the Alaska courts developed a common law exception to the attorney fee-shifting rule for public interest litigants and made substantive revisions to Rule 82 to maintain the courts' discretion to consider these public policy concerns.

In 2003, the Alaska state legislature passed House Bill 145, which altered the attorney fee-shifting exception for public interest cases.⁹ The bill raised important constitutional questions, particularly regarding separation of powers. House Bill 145 limited a court's discretion to modify an attorney's fees award for equitable considerations based on the public interest nature of the case, though it preserved an exception to the Rule for claims based on the state or federal constitution.¹⁰ In essence, the state legislature substantively amended a disputably proce-

statehood, Alaska's legal system operated under the Federal Rules of Civil Procedure, but still maintained its fee-shifting regime. *Id.* at 32–33. In 1960, the Alaska Supreme Court, under its exclusive constitutional authority, promulgated rules of civil procedure for the State of Alaska. *Id.* at 34. Supreme Court Order 5 established Rule 82 in the Alaska Rules of Civil Procedure. Alaska Sup. Ct. Order 5 (1960).

2. ALASKA JUDICIAL COUNCIL, *supra* note 1, at 14–15.

3. ALASKA R. CIV. P. 82 (a)–(b).

4. *Id.* § b(3).

5. Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee-shifting*, 47 LAW & CONTEMP. PROBS. 139, 147 (Winter 1984).

6. *Id.* at 153.

7. *Id.*

8. *Id.*

9. H.B. 145, 23d Leg., 1st. Sess. (Alaska 2003) (enacted).

10. *Id.*

dural rule. In doing so, it sparked controversy over which branch of government has jurisdiction over the public interest litigant doctrine.

In *Native Village of Nunapitchuk v. State*,¹¹ a group of organizations representing several public interest sectors challenged the constitutionality of House Bill 145, arguing, among other things, that the bill failed to receive the two-thirds majority required for the legislature to amend rules of civil procedure.¹² The *Nunapitchuk* case raised the question of whether the public interest litigant doctrine was a procedural rule or a substantive law that is subject to legislative revision.¹³ The Superior Court for the State of Alaska struck down the bill, holding that it impermissibly attempted to amend a rule of civil procedure.¹⁴ The court, however, stated that there is no bright line rule regarding the constitutional issues raised,¹⁵ an assertion that this Note attempts to disprove. While it is uncertain whether this bill will survive judicial review by the supreme court, the legislature has made clear that the public interest litigant doctrine needs revision and attempts to amend it will likely persist.

II. RELEVANT LAW

Throughout the history of Rule 82, the courts have had broad discretion to alter the general rule governing attorney's fees awards. The original Alaska Civil Rule 82 read, "[u]nless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to."¹⁶ The courts exercised this discretion by establishing a common law exception to Rule 82 for litigants bringing forth good faith claims on behalf of the public interest.¹⁷ In 1993, the supreme court adopted Court Order 1118, adding section b(3) to the Rule, which gave the courts explicit discretion to adjust attorney's fees awards based on several factors.¹⁸ The following section will discuss the development of the public interest litigant exception in the common law and the subsequent codification of the exception into the Alaska Rules of Civil Procedure.

A. Common Law History

The public interest litigant exception to Rule 82 has its roots in the common law. In the early years following statehood, the supreme court

11. No. 1JU-03-700 CI, slip op. (Alaska Super. Ct. filed Apr. 6, 2004).

12. *Id.* at 1–2.

13. *Id.*

14. *Id.* at 2–3.

15. *Id.* at 14–15.

16. Alaska Sup. Ct. Order 5 (1960).

17. ALASKA JUDICIAL COUNCIL, *supra* note 1, at 73–77.

18. Alaska Sup. Ct. Order 1118 (July 15, 1993).

recognized the burden that fee-shifting placed on unsuccessful litigants bringing good faith claims in the public's interest. In *Malvo v. J.C. Penny Company, Inc.*,¹⁹ the court outlined several public policy considerations in determining whether to award attorney's fees.²⁰ In that case, parents of a black teenage girl sued a department store for slander and false imprisonment related to a mistaken allegation of shoplifting.²¹ The trial court found for the defendants and awarded the department store the full amount of attorney's fees requested under Rule 82.²² The supreme court reversed the attorney's fees award²³ and, in doing so, made several policy determinations about the discretion that trial courts may exercise in awarding attorney's fees. Writing for the majority, Justice Boochever acknowledged the wide discretion that Rule 82 grants to a trial court, but argued that the rule was designed solely for the purpose of providing compensation when justified.²⁴ In criticizing the lower court's granting of full attorney's fees to the department store, Justice Boochever stressed the importance of considering the good faith of an unsuccessful litigant's claims and the policy justification for requiring the payment of attorney's fees.²⁵ He cautioned that failure to consider these policy concerns would lead to serious detriment to the judicial system.²⁶ In coming to this conclusion, he relied on *Boddie v. Connecticut*,²⁷ where the United States Supreme Court held that "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."²⁸ The Alaska Supreme Court concluded by declaring that the purpose of Rule 82 was to partially compensate successful litigants where attorney's fees awards are justified, not to penalize unsuccessful parties for bringing good faith claims.²⁹

Justice Boochever's reasoning in *Malvo*, however, did not initially mark a new wave of deference towards unsuccessful public interest litigants in the determination of attorney's fees. A few months later, in *Jefferson v. City of Anchorage*,³⁰ the supreme court, in an opinion joined by Justice Boochever,³¹ upheld an attorney's fees award against two tax-

19. 512 P.2d 575 (Alaska 1973).

20. *Id.* at 586–88.

21. *Id.* at 577.

22. *Id.*

23. *Id.* at 588.

24. *Id.* at 587.

25. *Id.*

26. *Id.*

27. 401 U.S. 371 (1971).

28. *Malvo*, 512 P.2d at 587 (quoting *Boddie*, 401 U.S. at 380).

29. *Id.* at 588.

30. 513 P.2d 1099 (Alaska 1973).

31. *Id.* at 1100.

payers purporting to assert a claim on behalf of a public interest.³² There, two taxpayers challenged a city ordinance that raised the annual salary of the Mayor of Anchorage.³³ In upholding the fee award against the plaintiffs, the court argued that the public interest would not be served by a claim that so clearly lacked validity.³⁴ While acknowledging that a more valid claim by the plaintiffs might have altered their holding with respect to attorney's fees, the court did however draw attention to precedent where attorney's fees awards were upheld in spite of public interest claims.³⁵

One year later, in the landmark case of *Gilbert v. State*,³⁶ the supreme court for the first time explicitly established that unsuccessful public interest litigants were exempt from paying attorney's fees.³⁷ In that case, a candidate for state senate challenged the constitutionality of the residency requirement for those seeking legislative office.³⁸ The superior court had rejected his constitutional claim and awarded attorney's fees to the state.³⁹ The supreme court upheld the decision of the superior court on the merits of the case⁴⁰ but reversed the award of attorney's fees, finding that the trial court abused its discretion in awarding attorney's fees against a losing party who raised a question of genuine public interest in good faith before the courts.⁴¹ The court derived an express exception to the fee-shifting rule from *Jefferson*, noting that "denial of attorney's fees might be appropriate in a proper case where the public interest is involved."⁴²

Three years after *Gilbert* was decided, the court completed the public interest exception by deciding that prevailing public interest litigants are entitled to full reasonable attorney's fees. In *Anchorage v. McCabe*,⁴³ the City of Anchorage appealed an award of full attorney's fees to homeowners who prevailed in a suit against the city over the constitutionality of a zoning ordinance.⁴⁴ The city argued that the superior court abused its discretion in awarding such high fees because, under

32. *Id.* at 1102–03.

33. *Id.* at 1100.

34. *Id.* at 1102.

35. *Id.* at 1102–03 (citing *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 793 (Alaska 1968)).

36. 526 P.2d 1131 (Alaska 1974).

37. ALASKA JUDICIAL COUNCIL, *supra* note 1, at 74.

38. *Gilbert*, 526 P.2d at 1132.

39. *Id.*

40. *Id.* at 1134–36.

41. *Id.* at 1136.

42. *Id.*

43. 568 P.2d 986 (Alaska 1977).

44. *Id.* at 988–89.

then-established precedent, public interest litigants were not entitled to attorney's fees.⁴⁵ The city contended that litigants who are relieved from the risk of being charged with attorney's fees if they lose should not benefit from the fee-shifting rule if they prevail.⁴⁶ The city further warned that the award to the homeowners would create a slippery slope that would "increase the number of public interest suits and encourage attempted resolution of political disputes through the judicial process."⁴⁷ The court was unpersuaded by the city's concerns, as the concerns undermined the policy considerations raised in *Gilbert*.⁴⁸

In establishing a public interest exception to Rule 82, the court reasoned that the public interest exception was created to encourage plaintiffs to bring good faith public interest claims to the courts and remove the financial burden of bringing such suits.⁴⁹ The court found widespread support for this policy in both federal and state jurisdictions, where the law provides exceptions for successful public interest litigants to the general American rule that each side is responsible for his or her attorney's fees.⁵⁰ In these jurisdictions, the public interest litigant serves as a "private attorney general" that vindicates a significant legislative policy.⁵¹ The court determined that if jurisdictions that do not ordinarily award attorney's fees to prevailing parties make an exception for successful public interest litigants, then one-way fee-shifting most certainly existed in a state where compensation was the rule.⁵²

The *McCabe* decision is particularly important for establishing concrete criteria for Alaska courts to use when deciding when to invoke the public interest exception. Borrowing from the United States District Court for the Northern District of California decision in *La Raza Unida v. Volpe*,⁵³ the court stressed the presence of three factors: "(1) the effectuation of strong public policies; (2) the fact that numerous people received benefits from plaintiffs' litigation success; [and] (3) the fact that only a private party could have been expected to bring this action."⁵⁴ Five years later, the supreme court recognized a fourth criterion, namely "whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only

45. *Id.* at 989.

46. *Id.* at 989–90.

47. *Id.* at 990.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 990–91.

53. 57 F.R.D. 94 (N.D. Cal. 1972).

54. *McCabe*, 568 P.2d at 991 (quoting *La Raza Unida*, 57 F.R.D. at 101).

narrow issues lacking general importance.”⁵⁵ The rationale for this addition is that litigants with substantially greater private interests in a suit should not be otherwise deterred from using the courts to bring a good faith claim.⁵⁶ Despite this reasoning however, the supreme court has held that plaintiffs are not necessarily precluded from public interest status due to their comparatively minor economic interests in the outcome of their cases so long as the other criteria have been met.⁵⁷

B. Rule 82 Revisions

In 1993, the supreme court dramatically advanced the discretionary authority of the courts to amend fee awards, adopting Supreme Court Order 1118, which repealed and reenacted Rule 82.⁵⁸ The most significant change in the Rule is embodied in Section b(3), which explicitly articulates the conditions under which a court may deviate from the fee schedule in the Rule.⁵⁹ The provision conditions the courts’ ability to vary the fee award upon consideration of several factors.⁶⁰ Most relevant to the present issue are subsections I and K, which read as follows:

The court may vary an attorney’s fee award. . .if, upon consideration of the factors below, the court determines a variation is warranted. . .

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts. . .

(K) other equitable factors deemed relevant.⁶¹

The revised Rule states that if a court employs one of these exceptions, it need only explain its reasons for doing so.⁶² These sections signify a dramatic departure from the original Rule, which required that the prescribed attorney’s fees schedule be adhered to “[u]nless the court, in its discretion, otherwise directs.”⁶³ The more detailed provisions of the new Rule expounded upon the vague language in the original that served as the basis for the common law public interest exception.⁶⁴ It codified

55. *Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 223 (Alaska 1982).

56. *Id.*

57. *See Anchorage Daily News v. Anchorage Sch. Dist.*, 803 P.2d 402, 404 (Alaska 1990).

58. Alaska Sup. Ct. Order 1118 (July 15, 1993).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Alaska Sup. Ct. Order 5 (1960).

64. Then Chief Justice Rabinowitz strongly dissented to the revisions, finding no compelling justification for the changes. Alaska Sup. Ct. Order 1118 (July 15, 1983). Chief Justice Rabinowitz further expressed concern that the amendment would have a negative effect on civil litigation:

what had already been a general practice in the courts—the discretionary altering of the fee awards to advance public policy concerns.

The modified Rule does not explicitly mention public interest litigants nor does it spell out the four-part public interest criteria laid out in *McCabe* and *Kenai Lumber*. However, subsections I and K state as exceptions to the general fee-shifting rule the same rationale that the court considered in *McCabe*—that the fee schedule may need to be altered so as not to make the option of litigation financially prohibitive to some potential litigants.

Since the enactment of Supreme Court Order 1118, the supreme court has, on one notable occasion, referenced section b(3) in connection with the public interest exception. In *Dansereau v. Ulmer*,⁶⁵ the supreme court used section b(3) as authority for invoking the public interest litigant exception.⁶⁶ The case involved a voter challenge to the 1994 gubernatorial election, charging three violations of state election laws.⁶⁷ The plaintiffs prevailed on one of three claims and agreed with the defendant that the superior court would act as an arbiter to determine attorney's fees "under the public interest exception to Civil Rule 82 or under Civil Rule 82(b)(3)."⁶⁸ Because the plaintiffs prevailed on only one of three issues, they were awarded fees substantially less than the full fees they had requested and appealed.⁶⁹ The supreme court held that the superior court abused its discretion because public interest litigants were entitled to full attorney's fees awards on all public interest issues whether or not they prevailed on those claims.⁷⁰ In coming to this determination, the court cited Rule 82(b)(3)(K) as the authority for the court to deviate from the general attorney's fees rule and to grant an exception for the public interest litigant in this case.⁷¹ *Dansereau* has been

[M]y judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflected in (b)(3)(A) through (K), will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court. . . . I further note that our Civil Rules Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's questionnaire indicated: that Civil Rule 82 does not deter people of moderate means from filing valid claims; that the rule does not put excessive pressure on moderate income people to settle valid claims; and that the rule is needed to discourage frivolous litigation.

Id. Chief Justice Rabinowitz entered his objection into the rule as a matter of record. *Id.*

65. 955 P.2d 916 (Alaska 1998).

66. *Id.* at 918–19.

67. *Id.* at 917.

68. *Id.*

69. *Id.* at 918.

70. *Id.* at 920. The court further noted that this entitlement to full attorney's fees on public interest claims may be departed from only in exceptional circumstances. *Id.*

71. *Id.* at 919.

cited for its precedent relating to the public interest exception in several subsequent opinions.⁷²

While subsections I and K do not codify the public interest exception, they do codify the court's discretion to depart from the general rule to consider policy rationales similar to those that shaped the public interest exception. Furthermore, the *Dansereau* decision indicates the court's acknowledgement of section b(3) as authority for the public interest exception.

III. HOUSE BILL 145

On September 11, 2003, House Bill 145 was adopted as law, repealing and reenacting the public interest litigant exception as established by the supreme court. The bill was proposed in response to the adverse effects that court interpretation of the doctrine had on state resource development projects. For years, legislators had considered eliminating the exception for public interest litigants altogether to level the playing field of all litigation. However, further review of the legislative committee hearings reveal that the main impetus behind the legislation was to reverse the effects of the public interest litigant exception on what was believed to be a judicial impediment to environmental agency policies. The bill underwent many dramatic changes and revisions, most notably regarding the constitutionality of amending a civil procedure rule via a simple majority in the Alaska Legislature. The following discussion illustrates the development of House Bill 145, the fruition of years of legislative debate on the judicial effects of the public interest litigant exception.

A. Legislative History

1. *Previous legislative attempts to repeal the public interest litigant doctrine.* House Bill 145 is not the first time the Alaska Legislature considered repealing the public interest litigant exception. The common law doctrine has been a source of controversy and discussion within the state government for several years. In March 1999, Senate Bill 123 was introduced to amend the public interest litigant exception.⁷³ Senate Bill 123 would have added subsection b(3)(g) to the Rule to read as follows:

72. See, e.g., *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*, 71 P.3d 845, 852 (Alaska 2003); *Diaz v. Silver Bay Logging, Inc.*, 55 P.3d 732, 737 (Alaska 2002); *Metanuska Elec. Ass'n v. Rewire the Board*, 36 P.3d 685, 696 (Alaska 2001); *Laverty v. State R.R. Corp.* 13 P.3d 725, 738 (Alaska 2000).

73. S.J. 21, 1st Sess., at 701 (Alaska 1999).

Attorney's fees shall be awarded to or against a public interest litigant in the same manner as attorney's fees may be awarded to or against a non-public interest litigant under (b) of this section.⁷⁴

The proposed bill amendment permitted a narrow exception for public interest litigants to recover attorney's fees only under "exceptional circumstances."⁷⁵ Interestingly, the proposal noted that the bill could only take effect if passed by a two-thirds majority vote in both houses, as required by Article IV, Section 15 of the Alaska Constitution.⁷⁶ Senate Bill 123 was passed in the state senate 14-5, with one abstention.⁷⁷ The bill was brought to the attention of the house in March 2000, but no action was taken before the close of the session.⁷⁸

In the next legislative session, the state senate reconsidered Senate Bill 183 under the same title.⁷⁹ Senate Bill 183 was identical to Senate Bill 123, which had passed in March 2000, and the amended court rules passed 12-8 in the state senate.⁸⁰ The bill was introduced in the house in April 2001.⁸¹ In the House Judiciary Committee hearings, proponents of the amendment expressed concern over the use of the public interest exception in the wake of the court's decision in *Dansereau v. Ulmer*.⁸² According to one presenter, the *Dansereau* decision was problematic in that it would promote "spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one or several of the points that they brought up at suit."⁸³

An opponent to the proposed bill argued that Senate Bill 183 would effectively eliminate the ability of an ordinary person to legally defend his or her constitutional rights under the law.⁸⁴ Representative Ogan acknowledged this concern but noted this legislation was aimed at those organizations that continually use state resources via the public interest

74. S.B. 123, 21st Leg., 1st Sess. (Alaska 1999).

75. *Id.*

76. *Id.*

77. S.J. 21, 2d Sess., at 2479 (Alaska 2000).

78. *An Act relating to public interest litigants and to attorney fees; amending Rule 82, Alaska Rules of Civil Procedure: Hearing on S.B. 123 Before the House Judiciary Comm.*, 21st Leg., 2d Sess., at 2480 (Alaska 2000) (scheduled hearing by House Judiciary Comm.).

79. S.B. 183, 22d Leg., 1st Sess. (Alaska 2001).

80. S.J. 22, 1st Sess., at 1286 (Alaska 2001).

81. H.J. 22, 1st Sess., at 1296 (Alaska 2001).

82. *An Act relating to public interest litigants and to attorney fees; amending Rule 82, Alaska Rules of Civil Procedure: Hearing on S.B. 183 Before the House Judiciary Comm.*, 22d Leg., 1st Sess. (Alaska 2001) (statement of Bill Church, Staff to Senator Dave Donley, Alaska State Leg.).

83. *Id.*

84. *See, e.g., id.* (statement of Dale Bondourant, Alaska Constitutional Legal Defense Conservation Fund).

exception to raise tremendous amounts of money for their national causes.⁸⁵ A representative from an environmental non-profit organization concurred with this concern regarding well-funded national organizations but distinguished his group as an example of those organizations whose litigation serves the public's interest, not their organization's, and on whom Senate Bill 183 would have a chilling effect.⁸⁶ Several other opponents of the bill argued that it was overbroad and failed in its targeting of wealthy non-profit organizations.⁸⁷ By eliminating the exception for all public interest litigants, the amendment would in fact effectively eliminate public interest lawsuits except for those wealthy organizations the bill was intended to target.⁸⁸ Advocates also expressed concern that the bill did not receive sufficient public input and was being rushed through the legislature.⁸⁹ They further warned that a bill of this nature would be challenged on constitutional grounds.⁹⁰

Perhaps the most insightful criticism of the bill came from the Disability Law Center of Alaska (DLC). DLC argued that it was unnecessary to pass such an overbroad bill to prevent frivolous litigation because sanctions against bad faith and vexatious claims already existed in Rule 82, even for public interest litigants.⁹¹ DLC's representative advocated that the *Dansereau* holding should stand as is. He stated that the proposed bill would further encumber and discourage public interest litigants by forcing them to litigate both on the merits of their cases and over which parties won by a greater margin on the several issues upon which they prevailed.⁹² He further noted that not all public interest litigation cases involved money awards.⁹³ The proposed bill, it was contended, would strongly dissuade potential litigants who sought judicial

85. *Id.* (statement of Rep. Scott Ogan, Member, House Judiciary Comm.) (referencing Greenpeace as an example). Other such organizations mentioned included Trustees for Alaska, Earth Justice, and the Sierra Club. *Id.* (statement of Pam LaBolle, President, Alaska State Chamber of Commerce).

86. *Id.* (statement of Dale Bondourant).

87. Mr. Bondourant argued that large, well-funded organizations would still have the economic incentive and resources to challenge state laws and regulations. *Id.* In subsequent hearings, it was proffered that such a bill might actually aid national fundraising efforts as evidence that the organizations were successfully frustrating state resource development projects. *Id.* (statement of Robert Briggs, Staff Attorney, Disability Law Center of Alaska).

88. *Id.* (statement of Robin Smith).

89. *Id.*

90. *Id.*

91. *Id.* (statement of Robert Briggs).

92. *See id.*

93. *Id.*

remedy for issues where non-monetary claims were at stake.⁹⁴ Many of these potential litigants, he noted, are poor and would not otherwise bring forth good faith, meritorious claims, if told that they would be expected to pay part of the opponent's fees should they lose.⁹⁵ Throughout the hearing, there was concern that the bill would create a huge injustice.⁹⁶ Ultimately, the bill was moved to the Rules Committee and was not acted upon before the legislative session expired.⁹⁷

2. *Legislative history of House Bill 145.* On June 13, 2003, Governor Murkowski signed House Bill 145, purporting to repeal the public interest litigant exception to Rule 82.⁹⁸ House Bill 145 is the latest in the series of attempts to eliminate the public interest litigant exception. Unlike the previous two attempts, House Bill 145 was introduced at the executive level. The bill was first introduced to the legislature by the governor in March 2003 to address the problem of public interest groups impeding the state from developing its resources.⁹⁹ Murkowski's proposal argued that the present exception for public interest litigants "creates several undesirable incentives when decisions of the state are called into question."¹⁰⁰ In particular, he was concerned with the affirmative incentive of well-financed groups to overturn state resource development decisions with doubtful claims because they could win large awards without the countervailing risk of fees being awarded against them.¹⁰¹ Therefore, his proposal called for the abolishment of the common law public interest exception in that narrow set of cases.¹⁰²

At the outset of the House Judiciary Committee hearings, it was clear that House Bill 145 was intended to target a more limited set of circumstances than Senate Bill 183, which passed in the Senate during

94. *Id.* Mr. Briggs cited as examples of such non-monetary claims: "the question of when human life should be recognized; the parameters of religious practice and belief; or the limits of science and medicine and dealing with human cells or tissue, genetic, or health information." *Id.*

95. *Id.*

96. *Id.* (statement by Rep. Ethan Berkowitz, Member, House Judiciary Comm.).

97. S.J. 22, 2d Sess., at 3280 (Alaska 2002).

98. H.J. 23, 1st Sess., at 2224 (Alaska 2003).

99. H.J. 23, 1st Sess., at 359 (Alaska 2003).

100. *Id.*

101. *Id.*

102. *Id.* The letter narrowly requests that the public interest exception be abolished for "[those] cases contesting decisions by the Department of Environmental Conservation, the Department of Fish and Game, or the Department of Natural Resources making a coastal consistency determination, adopting regulations, or in which the public had an opportunity to comment to the agency and seek administrative review before the agency." *Id.*

the prior legislative session.¹⁰³ The original proposed amended section b(3)(g) referred only to claims against a limited range of administrative decisions.¹⁰⁴ It read as follows:

In a civil action contesting a decision of the Department of Environmental Conservation, the Department of Fish and Game, or the Department of Natural Resources making a coastal consistency determination, adopting regulations, or for which there was an opportunity for the public to comment to the agency before the final agency decision and to seek administrative review before the agency following the initial agency decision, attorney's fees may only be awarded to or against a public interest litigant in the same manner as attorney's fees may be awarded to or against a non-public interest litigant under (b) of this rule.¹⁰⁵

The Attorney General's office made the case that legal actions in these situations did not require additional judicial deference because the actions were in response to administrative decisions in which there had already been extensive public participation.¹⁰⁶ Assistant Attorney General Tillery proffered that such a bill would "balance the incentives in litigation between those who attack a state resource agency decision and those who would defend it," thereby eliminating any disadvantage.¹⁰⁷

The most noteworthy contribution from the Attorney General's office was a proposal to discard subsection (g) and all reference to amending the civil rule and alternatively add changes to Alaska Statutes section 09.060.010, the corresponding enabling statute of Rule 82.¹⁰⁸ The rationale for this proposal was to bypass the supermajority vote needed to change Rule 82(b) and simply proceed as a change in statute.¹⁰⁹ Representative Gruenberg raised doubts about the constitutionality of passing House Bill 145 without a supermajority vote in both houses.¹¹⁰ However, a representative from the Alaska Chamber of Commerce believed

103. *An Act relating to public interest litigants and to attorney fees; amending Rule 82, Alaska Rules of Civil Procedure: Hearing on H.B. 145 Before the House Judiciary Comm.*, 23 Leg., 1st Sess. (Alaska 2003) [hereinafter "*H.B. 145 House Judiciary Comm. Hearings*"] (statement of Craig Tillery, Assistant Attorney General, Env'tl. Section, Civil Div., Dep't. of Law).

104. *See* H.B. 145, 23d Leg., 1st Sess. (Alaska 2003) (version A).

105. *Id.*

106. *H.B. 145 House Judiciary Comm. Hearings*, *supra* note 103, (statement of Craig Tillery).

107. *Id.* Mr. Tillery did not appear in favor of eliminating the public interest litigant exception altogether and further proposed to codify the four-part public interest test of *McCabe* and *Kenai* within the rules as a definitional term for "public interest litigant." *See id.*

108. *Id.*

109. *Id.*

110. *Id.* (statement of Rep. Max Gruenberg, Member, House Judiciary Comm.).

that the opening language of the Rule itself (“[e]xcept as otherwise provided by law”)¹¹¹ provided legislative authority to effect a change in Rule 82 without a formal court rule change because the Rule was subject to contrary language in other sources of law, such as statutes.¹¹² No legal precedent or commentary was offered in support of this interpretation of the clause nor was there support for the suggestion that statutes may supercede court-enacted civil rules, which normally fall under the authority of the supreme court.¹¹³

The first two days of hearings proceeded using the proposed rule as limited to environmental decisions.¹¹⁴ Although the limited scope of the new bill raised fewer objections, some legislators were still concerned about endangering the availability of an effective check on the government with respect to environmental agency decisions.¹¹⁵ A representative from the Alaska Chamber of Commerce suggested that subparagraphs I and K could, in those situations, be used as an alternative to a blanket public interest litigant exception.¹¹⁶ It was questioned to what extent these subsections had been effectively used for public interest means in the past.¹¹⁷ In response, it was asserted that, with the availability of the common law public interest exception, there has rarely been a need to rely on those provisions.¹¹⁸

In general, many advocates of this version of the bill recognized the value of the public interest litigant exception. Thus, they wished to keep the exception intact for other claims outside the scope of environmental agency challenges.¹¹⁹ Even some organizations that had objected to past broader versions of the bill found this version less objectionable.¹²⁰ The compromises of this version were more palatable to some organizations because of the extreme financial pressures on the legislature and state

111. ALASKA CIV. R. 82

112. *H.B. 145 House Judiciary Comm. Hearings, supra* note 103 (statement of Benjamin Brown, Legis. Assistant, Alaska State Chamber of Commerce).

113. *See id.* Mr. Brown further noted that the Alaska Chamber of Commerce supported a “very, very limited” abrogation of the public interest litigant doctrine to the narrow cases involving administrative decisions of the several named environmental agencies and supported the preservation of the public interest litigant exception otherwise. *Id.*

114. *Id.*

115. *See, e.g., id.* (statement of Rep. Les Gara, Member, House Judiciary Comm.).

116. *Id.* (statement of Benjamin Brown).

117. *Id.* (statement of Rep. Les Gara).

118. *Id.* (statement of Rep. Lesil McGuire, Chair, House Judiciary Comm.).

119. *See, e.g., id.* (statement of Robert Briggs, Staff Attorney, Disability Law Center of Alaska).

120. Mr. Briggs, who had for several years advocated against bills aimed at eliminating the public interest exception, did not raise a formal objection to the bill as applied only to environmental agency decisions. *Id.*

fiscal system and the benefit of resource development to the State, including general fund revenues it produces for all native Alaskans.¹²¹ Even so, Representative Gara and several others expressed concern. In light of previous legislative attempts to eliminate the public interest litigation exception altogether, they argued that there should be further safeguards to protect the exception as it applied to plaintiffs outside the scope of House Bill 145.¹²²

The bill was subsequently moved to the House Finance Committee for review, where it encountered the most dramatic changes.¹²³ A Committee Substitute was drafted for approval, severely broadening the scope of House Bill 145.¹²⁴ The Committee Substitute did three major things: it (1) eliminated the public interest litigant doctrine; (2) reenacted a more limited form of the doctrine for constitutional claims; and (3) proactively asserted its constitutionality under Article IV, Section 15 of the Alaska Constitution.¹²⁵ Concern was expressed that the bill was introduced too late in the deliberations without prior notice.¹²⁶

The amended version appeared to garner more support than past versions; however, many objections were raised to the substantive changes and the far-reaching effect of the new draft proposal.¹²⁷ In the Senate Finance Committee hearings, it was argued that because of the late introduction of the substantive changes, the legislature had primarily heard testimony with regard to the bill's effect on state resource development.¹²⁸ Very little testimony, however, was presented regarding the bill's broader impact on public interest litigation.¹²⁹ Aside from testimony from the DLC, no discussion was given as to whether the bill violated article IV, section 15 of the state constitution for attempting to enact a rule of civil procedure via legislation without a supermajority

121. *Id.*

122. The proposed addition read:

Nothing in this section shall prohibit the court from awarding a successful public interest litigant costs and reasonable attorney's fees or refusing to award any costs or attorney's fees against an unsuccessful public interest litigant if the court determines that such an order is warranted under Alaska Rule of Civil Procedure 82(b)(3).

Id. The Judiciary Committee voted 2-5 against the amendment. *Id.*

123. H.J. 23, 1st Sess., at 1450 (Alaska 2003).

124. *See* H.B. 145, 23d Leg., 1st Sess. (Alaska 2003) (version C).

125. *See An Act relating to public interest litigants and to attorney fees; amending Rule 82, Alaska Rules of Civil Procedure: Hearing on H.B. 145 Before the House Finance Comm., 23 Leg., 1st Sess. (Alaska 2003) [hereinafter "H.B. 145 House Finance Comm. Hearings"]*.

126. *Id.* (statement of Rep. Ethan Berkowitz).

127. *Id.*

128. *Id.* (statement of Robert Briggs).

129. *See id.*

vote.¹³⁰ After passing by a supermajority in the house, the bill passed with minor revisions in the senate by a vote of 12-8.¹³¹

B. House Bill 145: Provisions and Implications

House Bill 145 was adopted as an amendment to Alaska Statutes section 09.060.010 and became effective on September 11, 2003.¹³² The statute was a procedurally flawed attempt to eliminate the public interest litigant doctrine as created by the Supreme Court of Alaska.¹³³ The statute was a result of legislative attempts to reconcile the two main competing concerns raised in the committee hearings: (1) that the public interest litigant doctrine unfairly benefits public interest litigants and overburdens state resource development, and (2) that without the exception, there is a disincentive for private litigants to bring non-economic public interest claims to court.

House Bill 145 overtly overturned the four-part public interest litigant test established in Alaska case law.¹³⁴ This was very controversial because it removed any discretion for the court to alter the fee-shifting schedule on the basis of the public interest nature of the claim even

130. *See id.*

131. S.J. 23, 1st Sess., at 1653 (Alaska 2003).

132. H.J. 23, 1st Sess., at 2224 (Alaska 2003).

133. House Bill 145 expressly stated that its purpose was to overturn the case law pertaining to the public interest litigant doctrine:

PURPOSE. (a) The judicially created doctrine respecting the award of attorney fees and costs for or against public interest litigants has created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigant exception. This imbalance has led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens. More importantly, application of the public interest litigant exception has resulted in unequal access to the courts and unequal positions in litigation.

(b) The purpose of sec. 2 of this Act to [sic] provide for a more equal footing for parties in civil action and appeals by abrogating the special status given to public interest litigants with respect to the award of attorney fees and costs. It is the intent of the legislature to expressly overrule the decisions of the Alaska Supreme Court . . . insofar as they relate to the award of attorney fees and costs to or against public interest litigants in future civil actions and appeals.

Act of Sept. 11, 2003, Ch. 86, § 1, 2003 Alaska Sess. Laws 168, 168 (Lexis). The statute mentioned specific cases including *Dansereau v. Ulmer*, 955 P.2d 916 (Alaska 1998), *McCabe v. Anchorage*, 568 P.2d 986 (Alaska 1977), *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974), and their progeny as they relate to the award of attorney's fees. *Id.*

134. Section 2 (b) read:

Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

Id. § 2.

though the trend in subsequent revisions to Rule 82 has only been to strengthen, not weaken, a court's discretion to alter the fee award for public interest considerations.¹³⁵ The authority for the legislature to trump the court's jurisdictional powers in this way is questionable. Curiously, the statute did not address the court's authority to alter a fee award under the Rule 82(b)(3) factors or the extent to which those factors, specifically I and K, embody public interest rationales. This would have left open the opportunity for the court to justify departing from the general rule for public interest litigants for reasons other than the four-part common law test.

In the absence of the judicially created public interest litigant doctrine, House Bill 145 preserved a two-way exception to Rule 82 in a narrow set of cases with constitutional claims.¹³⁶ It both enabled prevailing claimants to receive full attorney's fees and provided immunity from adverse fee awards on non-prevailing constitutional claims.¹³⁷ By limiting the exception to constitutional claims, the statute ignored the wide ambit of public interest claims that do not arise out of a grievance under the state or federal constitutions, but which do pass muster under the court's stringent four-part test. Such claims often arise in cases involving election law, environmental law, education law, and disability law.

House Bill 145 dealt specifically with the court's holding in *Dansereau v. Ulmer* by limiting fee award exceptions to prevailing constitutional claims only.¹³⁸ The statute authorized the court to exempt defen-

135. See *supra* Part II. B.

136. Section 2 (c) read:

In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross-claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, crossclaimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

Act of Sept. 11, 2003, Ch. 86, § 2, 2003 Alaska Sess. Laws at 169.

137. *Id.*

138. Sections 2 (d) and 2 (e) read:

(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

dants from paying attorney's fees when they have lost a constitutional claim either if such an award would create undue hardship or if the party is a public entity supported by public tax revenue.¹³⁹ Most significantly, this would have enabled courts to relieve state and federal agencies from paying attorney's fees to prevailing litigants.¹⁴⁰ These provisions demonstrate the legislature's attempts to dictate the outcome of judicial inquiry under Rule 82, when discretionary authority is properly allocated to the court.

IV. *NATIVE VILLAGE OF NUNAPITCHUK V. STATE*

In April 2004, the Superior Court in Juneau, in *Native Village of Nunapitchuk v. State*, struck down House Bill 145 for failing to fulfill the constitutionally required supermajority vote of both houses to amend a court rule.¹⁴¹ In *Nunapitchuk*, a group of non-profit organizations, representing, among others, native tribal and environmental interests, challenged the constitutionality of the bill for violating the rule-making authority provisions of the state constitution.¹⁴² Superior Court Judge Patricia Collins tackled the difficult question of whether the award of attorney's fees is under the procedural jurisdiction of the judiciary or the substantive jurisdiction of the legislature.¹⁴³ Judge Collins acknowledged several supreme court decisions that defined attorney's fees awards as an equitable power of the court, but determined that these mere declarations did not provide a clear answer to the substantive versus procedural question.¹⁴⁴

In addressing the substantive versus procedural distinction, Judge Collins concluded that there is no bright-line rule.¹⁴⁵ Finding little guidance in the Alaska common law precedent, Judge Collins consulted a broad range of authority, including the New Jersey Constitution, which was used as a model for the rule-making clause of the Alaska Constitution.¹⁴⁶ She specifically noted New Jersey case law, holding that attor-

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

Id.

139. *Id.*

140. *Id.*

141. No. 1JU-03-700 CI, slip op. at 3 (Alaska Super. Ct. Apr. 6, 2004).

142. *Id.* at 1-2. Additionally, the plaintiffs alleged that the bill violated their due process and equal protection rights. *Id.* These issues are beyond the scope of this Note.

143. *Id.* at 13.

144. *Id.* at 14.

145. *Id.* at 15.

146. *Id.* at 18.

ney's fees and costs were within the scope of the New Jersey Supreme Court's rule-making authority.¹⁴⁷ Judge Collins also appeared to rely heavily on a Michigan study examining state constitutional revisions, which suggested that "how costs should be taxed" is a question for the courts and that "the amount of costs that should be taxed" is a question for the legislature.¹⁴⁸ Admitting that the variety of sources consulted provided no definitive answer, she concluded that the award of attorney's fees is procedural in nature.¹⁴⁹ On the more difficult issue of whether the public interest litigant doctrine is procedural or substantive, Judge Collins again sided with the plaintiffs, holding that the doctrine is a procedural rule separate from the general fee-shifting schedule.¹⁵⁰ Ultimately, Judge Collins rested her conclusions on the equitable discretionary powers granted by the rule.¹⁵¹

V. CONSTITUTIONAL ANALYSIS OF HOUSE BILL 145

As Governor Murkowski stated, House Bill 145 set out to "change the Alaska Rules of Civil Procedure."¹⁵² Even though the legislature recognized at the outset that the bill required a supermajority vote in both houses, the legislation presupposed its constitutionality by purporting to amend substantive law by a simple majority vote. In *Nunapitchuk*, Judge Collins correctly concluded that House Bill 145 was unconstitutional, but understated the clarity and weight of legal precedent that prohibits the way in which the bill was passed. Rather, the boundaries that delineate the powers of the legislature and judiciary are more explicitly defined in the constitution than Judge Collins suggests, and the distinction between substantive and procedural law has been more definitively established in the common law than she observed. Whether or not the statute survives, this legal battle raises these important constitutional issues. A more comprehensive analysis of the existing law is therefore demanded.

147. *Id.* at 19 (quoting *Du-Wel Prods., Inc. v. U.S. Fire Ins. Co.*, 565 A.2d 1113 (N. J. Super. 1990)).

148. *Id.* at 20.

149. *Id.* at 22.

150. *Id.* at 24.

151. *Id.*

152. H.J. 23, 1st Sess., at 360 (Alaska 2003).

A. The Alaska Constitution Clearly Delineates the Rule-making Powers of the Legislative and Judicial Branches of the State Government

Article IV of the Alaska Constitution provides clear guidelines for the establishment and amendment of rules of civil procedure by vesting rule-making authority in the Supreme Court of Alaska:

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.¹⁵³

Concurrently, article IV, section 1 vests the judicial power of the state in the courts.¹⁵⁴ The supreme court has on many occasions commented on the scope and mechanics of article IV's rule-making clause to define the boundaries between judicial and legislative authority. In *Thomas v. State*,¹⁵⁵ the court declared that, although the power to create substantive rights is a legislative power, the authority to enact procedures to implement those rights is judicial.¹⁵⁶ In doing so, the court identified the jurisdictional balance between the legislature and the judiciary as a matter of substantive versus procedural law.

There are times, however, when these branches of government may intrude upon the duties of each other. Although courts may not legislate, the judiciary, by virtue of sections 1 and 15 of article IV, has both substantive and procedural rule-making authority.¹⁵⁷ In *Citizens' Coalition for Tort Reform, Inc. v. McAlpine*,¹⁵⁸ the court held that, although purely substantive rules may not be allowed under section 15, the distinction between procedural and substantive rules is not dispositive for rules enacted under section 1.¹⁵⁹ *McAlpine* involved the denial of certification of an initiative to cap attorney's fees in personal injury cases by the lieu-

153. ALASKA CONST. art. IV, § 15.

154. *Id.* art. IV, § 1.

155. 566 P.2d 630 (Alaska 1977).

156. *Id.* at 637.

157. *See* *Citizens' Coalition for Tort Reform Inc. v. McAlpine*, 810 P.2d 162, 165 (Alaska 1991); *see also* *Coghill v. Coghill*, 836 P.2d 921 (Alaska 1992). In *Coghill*, the court dealt with the constitutionality of a civil procedure rule that empowered the court to influence a matter of substantive law covered by statute. *Id.* at 927. Civil Rule 90(3) established guidelines to enable courts to determine child support awards, instituting a formula based on the income of the non-custodial parent. *Id.* Alaska Statutes section 25.24.160 allowed for courts to set child support awards as may be "just and proper" for the parties. *Id.* The court held that Rule 90(3) did not violate the separation of powers doctrine by allowing the courts to exercise legislative powers because the rule merely interpreted and established guidelines within the statute. *Id.* at 927-28.

158. 810 P.2d 162 (Alaska 1991).

159. *Id.* at 167 n.10.

tenant governor on the grounds that the initiative attempted to prescribe a rule of court.¹⁶⁰ The court noted that it derived its broad rule-making authority under the two provisions of article IV and spoke to the differences between section 1 and section 15 rule-making authority.¹⁶¹ Reasoning that the authority to regulate the courts and the practice of law under section 1 “includes the authority to regulate with greater substantive effect inside the limited ambit of the judicial system than . . . under . . . article IV, section 15 powers,”¹⁶² the court held that limitations on attorney’s fees in personal injury cases were rules of court.¹⁶³

On the other hand, the constitution carefully limits when the legislature may infringe on the court’s otherwise exclusive rule-making authority by requiring a two-thirds vote rather than a simple majority to change rules of practice and procedure.¹⁶⁴ The rationale for the supermajority vote requirement is to prevent unintentional, hasty, and ill-advised legislation that “would ultimately frustrate the sound purpose in giving courts the primary authority and responsibility for regulating their own affairs.”¹⁶⁵ When the legislature does seek to amend court rules by a supermajority vote, the bill must specifically state its purpose to do so.¹⁶⁶ Further, the legislature’s stated intentions are not dispositive in discerning whether it has attempted to prescribe a different procedure than that contained in a court rule.¹⁶⁷

160. *Id.* at 163–64.

161. *Id.* at 164–65.

162. *Id.* at 167, n.10.

163. *Id.* at 167.

164. ALASKA CONST. art. IV, § 15; *see also* *Leege v. Martin*, 379 P.2d 447, 450 (Alaska 1963); *City of Valdez v. Valdez Dev. Co.*, 506 P.2d 1279, 1283 (Alaska 1973). However, the court in *Leege* held that the judicial power to make rules of practice and procedure is not absolute and that “the legislature may change rules initiated by the judiciary when the desirability of making a change is evident, such as in a case where a particular rule of procedure may involve considerations of public policy that are better left to the legislature to pass upon.” *Leege*, 379 P.2d at 450.

165. *Leege*, 379 P.2d at 450.

166. ALASKA UNIF. R. LEGIS. P. 39(e). The rule reads, in relevant part: If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

Id.; *see also* *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1047 (Alaska 1981).

167. *Leege*, 379 P.2d at 451.

If the supreme court finds House Bill 145 constitutional, the enactment of this law presents troubling implications for the separation of powers within the Alaska government. As observed similarly in *Citizens' Coalition*, any challenge to House Bill 145 will raise questions about whether a statutory limit on attorney's fees preempts the court's rule-making authority under the constitution. The reasoning in *Citizens' Coalition* is very much applicable here. The authority and discretion to alter attorney's fee awards is granted to the supreme court by virtue of Rule 82.¹⁶⁸ An argument might be raised that in every other jurisdiction of the United States, attorney fee-shifting law is not a matter of court procedure and therefore not a rule within the judiciary's primary authority. Such an assertion is inapposite here because Alaska's unique fee-shifting system is codified in the rules of civil procedure. As such, the authority to make rules regarding attorney's fees is under the jurisdiction of the court, excepting legislation by a supermajority vote.

House Bill 145 undermined the authority of the court to effectuate the workings of the Alaska Rules of Civil Procedure. As exemplified in *Citizens' Coalition*, the court's rule-making authority is explicitly broad. Some might argue that even if the authority to alter fee awards in public interest cases is within the court's rule-making authority, the court created the public interest litigant exception merely as a common law doctrine, not as a section 15 rule of court; therefore House Bill 145 interferes only where the court has spoken as a matter of substantive law. This contention fails on several grounds. First, there is no precedent to suggest that courts may not prescribe rules of court through case law. Second, the legislature does not have the power to make rules, but only to change them by a supermajority vote in both houses.¹⁶⁹ Therefore, if the public interest litigant doctrine is considered a "rule" within the scope of Civil Rule 82, the legislature had no constitutional authority to pass House Bill 145 regardless of whether the court invoked its section 15 rule-making authority to create the public interest litigant doctrine.

B. The Distinction between Substantive and Procedural Laws is Well-established in Alaska

Ultimately, the issue of where the authority lies to create and amend the public interest litigant doctrine depends on whether the doctrine is a matter of substantive or procedural law. The supreme court has held that substantive law creates, defines and regulates rights, while procedural law prescribes the method for enforcing those rights.¹⁷⁰ In *Channel Fly-*

168. ALASKA R. CIV. P. 82(b)(3).

169. *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 575 (Alaska 1969) (citing ALASKA CONST. art. IV, § 15).

170. *See, e.g., id.* at 576.; *Nolan*, 627 P.2d at 1042.

ing, Inc., the court upheld a statute that provided for the preemptory disqualification of a judge because it defined and created a substantive right to have a fair trial before an impartial judge.¹⁷¹ However, the supreme court struck down a statute for prescribing procedural law in *Nolan v. Sea Airmotive, Inc.*¹⁷² *Nolan* involved a constitutional challenge to legislation amending class action procedure under the Alaska Wage and Hour Act by requiring class members to be specifically named in order to toll the statute of limitations.¹⁷³ In defense of the statute, the defendants argued that the legislation was closely associated with the creation of substantive rights because it sought to require individualized satisfaction of the statute of limitations period in class action suits.¹⁷⁴ The court was unconvinced by this argument and struck down the statute for conflicting with Civil Rule 23's statute of limitations procedure.¹⁷⁵ The court explained that the statute was procedural because the commencement of an action is a procedural matter within the court's policy objective of promoting efficiency.¹⁷⁶ The court further noted that the statute's failure to affect was procedural because the plaintiff's cause of action reinforced the procedural nature of the statute.¹⁷⁷

Civil Rule 93 confirms the supremacy of court-promulgated rules by stating that "to the extent that [the Alaska Rules of Civil Procedure] are inconsistent with any procedural provisions of any statute not enacted for the specific purpose of changing a rule, [they] shall supersede such statute to the extent of such inconsistency."¹⁷⁸ To this end, the court has established a three-part inquiry in order to invalidate a statute as procedural. First, the court must find that the statute indeed conflicts with a rule promulgated by the court.¹⁷⁹ Second, the statute must have more than merely an incidental effect on procedure.¹⁸⁰ Finally, a statute that seeks to change a procedural rule will be invalidated if it does not explicitly state its purpose.¹⁸¹

In most states, attorney fee-shifting is a matter of substantive law because state and federal statutes governing attorney's fees create and define rights in litigation. In Alaska, attorney's fees are a matter of civil

171. *Channel Flying, Inc.*, 451 P.2d at 576.

172. *Nolan*, 627 P.2d at 1047.

173. *Id.* at 1040.

174. *Id.* at 1045.

175. *Id.* at 1046.

176. *Id.* at 1045.

177. *Id.* at 1046.

178. ALASKA R. CIV. P. 93.

179. *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 545 (Alaska 1975).

180. *Id.* at 547.

181. *Leege v. Martin*, 379 P.2d 447, 451 (Alaska 1963).

procedure; therefore, it intuitively follows that the public interest litigant exception to the general fee-shifting rule is a matter of procedural law in Alaska. Case law supports the assertion that House Bill 145 amended court procedure. Similar to the challenged statute in *Nolan*, House Bill 145 sought to amend a procedure of Alaskan civil litigation. A proponent of House Bill 145's legality might contend that the statute defines the litigants' substantive rights to attorney's fees based on the nature of their claims. This argument is a legal fiction because attorney's fees in Alaska are not "rights" but procedural matters relating to the administration and functioning of the court system. Although Rule 82 is an oft-litigated rule, causes of action in these cases arise from an alleged abuse of discretion in fee awards, not from a substantive right granted by legislation.

In order to further test whether House Bill 145 should have been invalidated as procedural, it is necessary to apply the three-part common law inquiry discussed above. The first question asks whether the legislation conflicts with a court-promulgated rule. House Bill 145 does this in two ways. First, it abrogates the court's discretionary authority to alter fee awards under factors I and K of section b(3) of Rule 82. Second, House Bill 145 directly conflicts with the court's establishment of the public interest litigant exception to the extent that the exception may be considered a legitimate court rule. The next question asks whether the main subject of the statute is substantive with only an incidental effect on procedure. As discussed earlier, House Bill 145 deals with legal issues that are primarily procedural. The legislature expressly recognized this procedural nature in both House Bill 145 as initiated in previous years and as introduced in past years. The final product affects the same aspect of law (the judicial discretion to alter fee awards) as the original bill yet curiously assumes its constitutional validity. The third question asks whether the legislature has changed the rule with the stated intention of doing so. Per Rule 39 of the Uniform Rules of Alaska Legislative Procedure, the bill should have expressly cited the Rule it was changing and noted the proposed changes. To the contrary, the legislature ignored these guidelines.

VI. CONCLUSIONS AND SUGGESTIONS FOR REFORM

The supreme court should affirm the unconstitutionality of House Bill 145 on appeal in *Nunapitchuk*. The issue before the court will be a compelling one because the court will be in a position to protect the doctrine it created and believed was necessary to avoid injustice in Alaska's legal system. Additionally, the court will be asked to determine the scope of its authority to make rules under the state constitution, an issue in which it has a vested interest. If it were to conclude that the public interest exception is substantive law under the primary jurisdiction of the

legislature, the court would undermine and limit its authority to interpret the civil rules. Even if it does uphold the constitutionality of House Bill 145, there is nothing to stop the court from exempting public interest litigants under the authority of Rule 82(b)(3)(I) and (K). If that is the case, then House Bill 145 will have failed to achieve its purpose of amending public interest litigation for non-constitutional claims.

Although the constitutionality of House Bill 145 is uncertain, its passage publicizes the need for the court to address the competing public policy arguments concerning the public interest litigant doctrine. The current public interest litigant exception and House Bill 145 both fail to adequately resolve these public policy concerns. That is not to suggest that this is an easy task. However, an evaluation of the inherent problems with each approach may reveal possible solutions.

House Bill 145 was created out of concern that the public interest litigant exception shifted the balance excessively in favor of public interest litigants. The judicial fairness of the exception is a legitimate public policy concern. The possibility of an award for full attorney's fees without any risk of adverse award creates an additional economic incentive to litigate beyond obtaining a favorable judgment. It encourages plaintiffs to bring unpromising public interest claims so long as they meet the minimum legal standard of merit. When a plaintiff abuses this bias, it is unfair to a prevailing defendant who must pay the cost a weak claim. This bias may make public interest claims coercive because of the certainty that defendants will have to pay—either their attorneys or both side's attorneys—regardless of the outcome. When the plaintiff is a large organization, there is an additional risk that public interest suits will be used as a fund-raising mechanism.

On the other hand, contemporary legal theory suggests that immunity from adverse fee awards is an essential safeguard for preserving public interest litigation incentives and access to the courts, particularly when the party is indigent and the claim is non-economic. House Bill 145 failed to account for the effect of such immunity on public interest litigants who bring non-constitutional claims.

It is possible to accommodate concerns regarding fairness and access to the courts in public interest litigation. Regardless whether the supreme court declares House Bill 145 unconstitutional, the court or the legislature should consider revising the public interest litigant exception to preserve incentives to litigate and prevent incentives to fundraise. This can be accomplished by granting public interest litigants immunity from adverse awards in non-prevailing suits and granting only partial fees, according to the schedule in Rule 82, for prevailing claims. Such a fee-shifting regime would deter large organizations from litigating claims with only a modicum of merit for the sole purpose of frustrating legitimate state actions. Moreover, it would remove the incentive barrier

for indigent potential plaintiffs who have legitimate legal claims but limited resources to pursue them in court.

Not all public interest litigants are equal; several situational factors influence their willingness to litigate.¹⁸² Public interest litigants may be differentiated into two categories: “one-shotters,” individuals who use the courts infrequently, and “repeat players,” which tend to be large, well-financed organizations.¹⁸³ In general, the former class is considered more risk-averse than repeat players with respect to the economic incentives of litigation.¹⁸⁴ Likewise, not all public interest claims are equal. Some involve the potential for large punitive awards, while others involve non-punitive claims. The relative importance of the attorney’s fees is usually greater when the stakes are smaller or even non-monetary; high fee awards can make a non-monetary or small claim prohibitively expensive.¹⁸⁵

All public interest claims, even good faith ones, have unpredictable results. Given the uncertainties of litigation, an indigent public interest litigant challenging an environmental agency action may be effectively prohibited from using the courts by the risk of having to pay the winner’s litigation costs. Since litigation usually involves the assertion or establishment of legal rights, courts should be made accessible to everyone. Providing immunity from adverse fee awards for losing public interest litigants ensures that individuals with lesser financial means will participate in the judicial system. Removing their ability to get full fees for a prevailing claim will disable the incentive for these litigants to abuse it.

Abizer Zanzi

182. Rowe, *supra* note 5, at 142.

183. *Id.*

184. *Id.*

185. *Id.* at 143.