

MEMORANDUM

To: Richard Rainery
From: Jim Gottstein
Date: October 27, 2003
Subject: Modification and Enforcement Provisions of the Trust Settlement

Background

In connection with the suggestion the Alaska Mental Health Board (AMHB) and the Advisory Board on Alcoholism and Drug Abuse (ABADA) consider their position on merging and the issue of what implications this discussion has on the settlement of the mental health trust litigation in *Weiss, et. al., v. State of Alaska*, 4FA-82-2208 CI, I thought I would set forth what I see as the relevant provisions of the settlement. This analysis is completely separate and does not address whether the merger idea might be a good one. It solely addresses the questions of the process for amending the settlement and the potential consequences for failure to do so properly.

People may or may not find significant that I was an attorney in the case representing people with serious mental illness and my clients opposed the settlement. Other major participants in the litigation/settlement process that are still involved are Jeff Jessee, who was the attorney for the developmentally disabled, John Malone who was a representative of NAMI-Alaska, and Nelson Page, who was a representative on behalf for the Alzheimer's and Related Disorders group, all of whom supported the settlement. Our opposition was based on the value of the settlement and what was seen as structural defects. Structural defects that drew objections included the modification and enforcement provisions, which are directly implicated in the discussion about merger because the current 4 board structure is specifically a material term of the settlement and any change to it a material breach of the settlement.

Relevant Provisions

Article VI, Section 5 of the Settlement Agreement provides:

5. **Modification and Future Enforcement.** By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with *State v. Weiss*, 706 P.2d 681 (Alaska 1985). The provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

Relevant provisions of the settlement legislation, Chapter 5, FSSLA 1994 as amended by Chapter 1, SSLA 1994, include:

Section 21, amends 44.29.140 to provide:

- (a) The [Advisory Board On Alcoholism and Drug Abuse] shall
 - (1) act in an advisory capacity to the legislature, the governor, and state agencies in the following matters:
 - (A) special problems affecting mental health that alcoholism or drug abuse may present;
 - (B) educational research and public informational activities in respect to the problems presented by alcoholism or drug abuse;
 - (C) social problems that affect rehabilitation of alcoholics and drug abusers;
 - (D) legal processes that affect the treatment and rehabilitation of alcoholics and drug abusers;
 - (E) development of programs of prevention, treatment, and rehabilitation for alcoholics and drug abusers; and
 - (F) evaluation of effectiveness of alcoholism and drug abuse programs in the state;
 - (2) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for the people who are described in AS 47.30.056(b)(3), and concerning the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031.
- (b) The board is the planning and coordinating body for purposes of federal and state laws relating to alcohol, drug, and other substance abuse prevention and treatment services.
- (c) The board shall prepare and maintain a comprehensive plan of services
 - (1) for the prevention and treatment of alcohol, drug, and other substance abuse; and
 - (2) for persons described in AS 47.30.056(b)(3).

Section 24 amends 47.30.016(b), to provide:

- (b) The board [of the Trust Authority] consists of seven members appointed by the governor and confirmed by the legislature. The members appointed under this subsection shall be appointed
 - (1) based upon their ability in financial management and investment, in land management, or in services for the beneficiaries of the trust;
 - (2) after the governor has considered a list of persons prepared by a panel of six persons who are beneficiaries, or who are the guardians, family members, or representatives of beneficiaries; the panel shall consist of
 - (A) one person selected by the Alaska Mental Health Board established by AS 47.30.661 ;
 - (B) one person selected by the Governor's Council on Disabilities and Special Education;
 - (C) one person selected by the Advisory Board on Alcoholism and Drug Abuse established by AS 44.29.100 ;
 - (D) one person selected by the Alaska Commission on Aging established by AS 44.21.200 ;

- (E) one person selected by the Alaska Native Health Board; and
- (F) one person selected by the authority.

Section 35 amends 47.30.660, to provide:

The [Alaska Mental Health Board] is the state planning and coordinating body for the purpose of federal and state laws relating to mental health services for persons with mental disorders identified in AS 47.30.056 (b)(1). On behalf of those persons, the board shall

- (1) prepare and maintain a comprehensive plan of treatment and rehabilitation services;
- (2) propose an annual implementation plan consistent with the comprehensive plan and with due regard for the findings from evaluation of existing programs;
- (3) provide a public forum for the discussion of issues related to the mental health services for which the board has planning and coordinating responsibility;
- (4) advocate the needs of persons with mental disorders before the governor, executive agencies, the legislature, and the public;
- (5) advise the legislature, the governor, the Alaska Mental Health Trust Authority, and other state agencies in matters affecting persons with mental disorders, including, but not limited to,
 - (A) development of necessary services for diagnosis, treatment, and rehabilitation;
 - (B) evaluation of the effectiveness of programs in the state for diagnosis, treatment, and rehabilitation;
 - (C) legal processes that affect screening, diagnosis, treatment, and rehabilitation;
- (6) provide to the Alaska Mental Health Trust Authority for its review and consideration recommendations concerning the integrated comprehensive mental health program for those persons who are described in AS 47.30.056 (b)(1) and the use of money in the mental health trust settlement income account in a manner consistent with regulations adopted under AS 47.30.031 ; and
- (7) submit periodic reports regarding its planning, evaluation, advocacy, and other activities.

The Superior Court's December 6, 1994 Decision granting final approval to the Settlement Agreement, states in pertinent part:

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and

Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

* * *

For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent. [Fn 108]

* * *

[T]he Trust Authority will exist as an advocate for the trust. The Trust Authority can be expected to actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority also may be in a position to influence the governor to veto any legislation which makes a material change in this settlement. Given the notoriety of this case, it is unlikely the legislature could override such a veto.

Fn 108 The institutional memory of the legislature may not be long, but one function of the Trust Authority is to serve as a reminder of the trust obligations owed to the beneficiaries.

The Superior Court's December 14, 1994, ORDER, provides in pertinent part:

The following sections of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, are incorporated into and material to the settlement agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also material to the settlement agreement. In the event the Legislature materially alters any of these legislative enactments, the plaintiffs may seek relief from the judgment dismissing this case, pursuant to Alaska Civil Rule 60(b)(6), and file a new action reasserting all of their claims including their original claims and the claim that the mental health lands trust has not been adequately reconstituted. This dismissal with prejudice will not bar these claims.

Analysis

Materiality

The settlement agreement and the Superior Court's December 14, 1994, Order are clear that sections 21, 24 and 35, set forth above, are material terms of the settlement. I think it is also worth noting, as set forth above, the Superior Court specifically held the four board structure was considered an important element of the negotiated settlement ("each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority").

Potential Consequences of a Material Breach

The Superior Court's December 14, 1994, Order is also quite clear that if "the Legislature materially alters" any of the specified sections, which includes the sections regarding the two boards and the Trust Authority set forth above, the plaintiffs can re-start the litigation with all of their original claims. This was reaffirmed by the Alaska Supreme Court as follows:

The superior court noted in its decision granting final approval that "nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist." The court stated that, in the event of such legislative action, the class can move for relief from judgment under Civil Rule 60(b)(6). The trial court also relied on the expectation that the Trust Authority, as an advocate for the trust, will

actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority may also be in a position to influence the governor to veto any legislation which makes a material change in this settlement.

Finally, the trial court found that third parties, such as "purchasers of state land, hardrock miners, and oil companies... would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit."

Weiss et. al, v. State et. al., 939 P.2d 380, 396-7 (1997). This "En Terrorem"¹ remedy was thus specifically put into place to prevent a unilateral change to the settlement by the state. Both the Superior Court and the Alaska Supreme Court relied on the premise that the Trust Authority would stand against unilateral changes in the settlement as a first line defense against unilateral changes, including to remind future legislatures and governors about these provisions and to warn them of the potential consequences of a unilateral change.

In the appeal of settlement approval, the viability of this approach was questioned and the Alaska Supreme Court responded:

A material change of the settlement agreement by the legislature would thus present one of the narrowly defined situations that clearly present "other reason[s] justifying relief" under Rule 60(b)(6).

Id., at 397. There thus seems little question that a unilateral merger of the AMHB and ABADA by the state is a material breach of the settlement giving rise to the *en terrorem* remedy of re-opening the original litigation.

¹ "En terrorem" means provisions in terror or to terrorize a person into doing something. In this case, of course, it means to terrorize the state into not doing something -- unilaterally change the terms of the settlement.

Modification

As set forth above, the Settlement Agreement provides: "In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties." Frankly, while this is standard language for a contract, it makes no sense whatsoever in the context of the Settlement Agreement. Who are the parties? What about the class (i.e., beneficiaries)?²

The following parties were listed in the Settlement Agreement.

- Vern Weiss and Earl Hilliker represented by David Walker.
- Alaska Mental Health Association and Mary Nanuwak represented by me.
- H.L., M.K. and Alaska Alcohol Rehabilitation Services (Nugen's Ranch) represented by Philip Volland.
- Bosel, Doulin, Goodwin, Mayoc, represented by what is now known as the Disability Law Center/Jeff Jessee.
- Alaska Center for the Environment, et al, represented by the Sierra Club Legal Defense Fund.
- Marathon and Unocal oil companies represented by Burr, Pease & Kurtz.
- Alaska Alzheimer's Association, represented by the Law Offices of Davis & Goerig,
- State of Alaska, represented by the Attorney General's Office.

At the outset, it should be noted that only three parties actually signed this agreement; (1) the state, (2) representatives of the Developmentally Disabled (Jessee), and (3) representatives of chronic alcoholics with psychosis (Volland). It should also be initially noted the Alzheimer's Association was never a formal party in the case.

Does the modification provision of the Settlement Agreement mean that just the three sets of signing "parties" can modify the settlement, those three being: (1) the state, (2) H.L., M.K., and Alaska Alcohol Rehabilitation Services (Nugen's Ranch), and (3) Bosel, Doulin, Goodwin, Mayoc? Since the mentally ill and ADRD beneficiaries didn't sign the Settlement Agreement, does that mean they have no say?³ That doesn't seem possible. Does it mean that all eight have to sign? The Alaska Center for the Environment and the oil companies (Marathon and Unocal) have every interest in doing whatever it takes to prevent the litigation from opening up again. Carl Hilliker is now over the age of majority. Does that mean Vern Weiss is no longer

² This is not the place for a primer on class action lawsuits, but it is probably fair to say that the beneficiaries of the Trust are the same as the members of the class and they all have rights under the settlement agreement.

³ The court in its Final Approval Decision set forth the definition of the class as follows:

The class definition was modified August 2, 1994. The class was redefined as all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition, at 1-2 (Aug. 2, 1994).

a proper party? Does anyone know where either are, or H.L., M.K. Bosel, Doulin, Goodwin, and Mayoc for that matter?

It seems the only conclusion to be drawn is the modification procedure set forth in the settlement agreement is problematic. Since there seems to be no way to sign an amendment to the Settlement Agreement and a unilateral change gives rise to the *en terrorem* enforcement mechanism of re-opening the original litigation, prudence dictates that judicial approval be sought for any modification.

The Superior Court did not retain jurisdiction over the administration of the settlement, so it would appear a new action has to be filed for any modifications. *See, e.g., In re Nazi Era Cases Against German Defendants Litigation*, 213 F.Supp.2d 439 (D.N.J.,2002).

Even without the party/representation problems, it seems likely the entire class would have to be notified of any potential modification and have an opportunity to object. This would require court approval of both the form and manner of notice. As recited by the Alaska Supreme Court with respect to the original notice:

Notice of the proposed settlement was sent to every household in Alaska and to 1400 providers of mental health and other services. In addition, notice was published in newspapers, announced on radio and television, distributed on audio cassette, published in Braille and large print, and translated into Spanish, Filipino, Inupiaq, and Yupik.

Weiss, supra., at 400. Since identification of the beneficiaries is problematic, any notice may very well have to be sent to every household in Alaska again. The form of notice, of course, would depend upon any proposed modifications.

In considering whether to approve any proposed amendment(s) the best interests of the class must almost certainly be the criteria. That being so, it seems to follow that any consideration by the Trust, AMHB and ABADA must begin (and probably end) with that inquiry. It also seems this inquiry should be rigorous enough to be defended in court against attack.