

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Polly is employed as a tour guide with Great Alaska Tours. In September 2010, Polly filed a lawsuit seeking overtime compensation pursuant to the Alaska Wage and Hour Act. During the period for which she sought compensation (January 2008-September 2010), Polly had a contract with Great Alaska Tours which established that she would work 14-hour days and be paid \$100 per day. The contract did not address overtime compensation.

The trial court granted partial summary judgment for Polly in January 2011, concluding that Polly was entitled to overtime pay as a matter of law. The court ruled that Polly's right to overtime was perfected at the end of each pay period in which she worked, noting that, under Alaska law, a cause of action for unpaid overtime accrues at the end of each period that overtime is due. The court found that the Alaska Wage and Hour Act explicitly states that the section governing overtime compensation is incorporated into every employment contract. The court did not determine the value of the overtime compensation due.

In February 2011, before the trial court entered final judgment, the Alaska Legislature amended the Alaska Wage and Hour Act, exempting workers like Polly from overtime compensation requirements. The amendment explicitly stated that it was retroactive to January 2008. The sponsor statement acknowledged the pending litigation, stating the retroactivity would apply to the claims in that litigation. The statement said the purpose of the legislation was to dispose of frivolous litigation and to protect the crucial but fragile tourism industry.

1. Did the legislature's amendment of the Alaska Wage and Hour Act effect a taking under the Alaska Constitution? Do not discuss principles of employment law in your answer, except those stated in the trial court's ruling, which you should assume were correct.
2. Did the retroactive application of the amendment violate the contracts clause of the Alaska Constitution? Do not discuss principles of employment law in your answer, except those addressed in the trial court's ruling, which you should assume were correct.

GRADERS' GUIDE
*****QUESTION NO. 6*****
CONSTITUTIONAL LAW

I. Whether the legislature's amendment of the Alaska Wage and Hour Act effected a taking under the Alaska Constitution. 75 points

Article I, section 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." This clause is interpreted liberally in favor of the property owner.¹ Alaska's takings clause is more protective than its federal counterpart contained in the Fifth Amendment of the federal Constitution.²

To determine whether an unconstitutional taking has occurred, two questions must be answered: (1) whether the claimant has a property interest protected by the takings clause; and (2) if so, whether the government action in question effected a taking of that property without just compensation.³

Polly has a property interest protected by the takings clause, and the legislature's retroactive amendment of the Alaska Wage and Hour act effected a taking of that property.

A. Whether a claimant has a property interest protected by the takings clause depends on whether the interest has vested.

Whether a claimant has a property interest protected by the takings clause depends on whether the claimant's right or property interest has

¹ *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993).

² *Ehrlander v. State, Dep't of Transp. & Pub. Facilities*, 797 P.2d 629, 633 (Alaska 1990).

³ See *Pfeifer v. State, Dept. of Health & Social Services, Div. of Public Assistance*, 260 P.3d 1072, 1080 -1081 (Alaska 2011); see also *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d 444, 449 (Alaska 2009) (citing *Arctic Slope*, 834 P.2d 134, 138 (Alaska 1991)).

“vested.”⁴ A person’s inchoate expectation is not entitled to constitutional protection; rather, the person’s rights must have vested to entitle it to constitutional protection against a government taking.

The question presented here is whether Polly’s right to overtime compensation had vested by the time the legislature amended the Alaska Wage and Hour Act.

On one hand, the trial court had not entered a final judgment in Polly’s case. However, the Alaska Supreme Court has held that a cause of action is a property right protected by the takings clause, even before final judgment is entered.⁵ In this case, the trial court found that, as a matter of law, Polly was entitled to overtime compensation. And, because Polly’s cause of action for unpaid overtime accrued at the end of each pay period for which overtime was due, her interest in unpaid overtime compensation vested at the end of each pay period. Polly therefore has a property interest protected by the takings clause.

B. Whether the governmental action at issue effected a taking of that property without just compensation.

The second factor in takings analysis is whether the governmental action at issue effected a taking of that property without just compensation. In Alaska, this question is answered by examining:

- (1) the character of the government action, which includes consideration of the legitimacy of the interest advanced by the action;
- (2) its economic impact; and
- (3) its interference with reasonable investment-backed expectations.⁶

1. The character of the governmental action weighs in favor of finding a taking.

The character of the governmental action weighs in favor of finding a taking here. On one hand, a “taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common

⁴ *Pfeifer*, 260 P.3d at 1080-1081; see also *Hageland Aviation Servs., Inc. v. Harms*, 210 P.3d at 449.

⁵ *Hageland*, 210 P.3d at 459.

⁶ *Id.* at 449-450.

good.”⁷ The legislature’s amendment exempting tour guides from overtime compensation requirements is a prime example of adjusting the benefits and the burdens of economic life. However, the purpose of the retroactivity amendment was to dispose of Polly’s litigation in Great Alaska Tours’ favor, essentially taking money out of Polly’s pocket and putting it in the pocket of Great Alaska Tours. While it may be permissible for the legislature to adjust the Alaska Wage and Hour Act to eliminate overtime compensation for workers like Polly in order to adjust the benefits and burdens of economic life, it is not permissible for the legislature to make that adjustment retroactive to apply to already-earned overtime compensation. Once Polly’s property right in the overtime compensation vested, the legislature could not, without just compensation, require her to give it to another party.

It is of no consequence that the State does not directly benefit economically from retroactively exempting Polly from overtime compensation. The Alaska Supreme Court has held that, in takings analysis, the question is whether the governmental action deprives someone of the economic benefits of ownership, not whether the government itself captures those benefits.⁸

2. The economic impact of the legislation weighs in favor of finding a taking.

Consideration of the economic impact weighs in favor of finding a taking. The economic impact of the change in eligibility criteria was to deprive Polly completely of any reimbursement for overtime compensation. The result was thus a total wipeout of her interest in reimbursement. It is immaterial that the court had not yet determined the value of her interest in compensation.⁹

3. The amendment interfered with reasonable, investment-backed expectation.

The reasonableness of investment-backed expectations is an objective factor¹⁰. For takings purposes, “a reasonable investment-backed expectation

⁷ *Anchorage v. Sandberg*, 861 P.2d 554, 558 (Alaska 1993).

⁸ *Waiste v. State*, 10 P.3d 1141, 1154 (Alaska 2000).

⁹ *Hageland*. 210 P.3d at 450.

¹⁰ *Id.*

must be more than a “unilateral expectation or an abstract need.”¹¹ Although the contract under which Polly was working did not address overtime compensation, Polly had a reasonable expectation to be paid according to applicable law. Polly therefore had a reasonable, investment-backed expectation with which the legislature interfered when it made its amendment to the Alaska Wage and Hour Act retroactive.

For the foregoing reasons, the legislature’s amendment of the Alaska Wage and Hour Act effected an unconstitutional taking.

II. Whether the retroactive application of the amendment violates the contracts clause of the Alaska Constitution? (25 points)

According to Article One, Section 15 of the Alaska Constitution, “[n]o law impairing the obligation of contracts ... shall be passed.”

To determine whether a governmental action violates the contract clause of the Alaska Constitution, it is necessary to consider first whether the change in state law has operated as a substantial impairment of a contractual relationship. If there is a substantial impairment, then whether the substantial impairment violates the contracts clause depends on whether the impairment is reasonable and necessary to serve an important public purpose.¹²

A. Whether the change in state law has operated as a substantial impairment of a contractual relationship.

To determine whether a change in law has operated as a substantial impairment of a contractual relationship, it is necessary to determine (1) whether there is a contractual relationship, (2) whether the law impairs the contractual relationship, and (3) whether the impairment is substantial.¹³

Here, there is a contractual relationship. Although Polly’s contract with Great Alaska Tours does not address overtime compensation, the Alaska Wage and Hour Act states that the section governing overtime compensation is incorporated into every contract.

¹¹ *State, Dept. of Nat’l Resources v. Arctic Slope Regional Corp.*, 834 P.2d 134, 140 (Alaska 1991) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,1005 (1984).

¹² *Hageland*, 210 P.3d at 451 (Alaska 2009).

¹³ *Id.* at 452.

By eliminating Polly's claim to overtime compensation, the law impairs the contractual relationship. Whether the impairment is substantial is governed by *Hageland Aviation Servs., Inc. v. Harms*, in which the Alaska Supreme Court held that an enactment that completely eliminated employees' contractual right to overtime compensation is a substantial impairment of a contractual right.

B. Whether the change is reasonable and necessary to serve an important public purpose.

This factor requires close examination of the purpose of the legislation. "The severity of the impairment measures the height of the hurdle the state legislation must clear.... Severe impairment ... will push the inquiry to a careful examination of the nature and purpose of the state legislation."¹⁴ Here, the amendment's impairment of Polly's contractual right to overtime compensation was severe in that it completely eliminated Great Alaska Tours' obligation to pay Polly the overtime wages that she was entitled to under the superior court's summary judgment order on liability.

On one hand, the sponsor statement establishes the legislature's belief that the legislation was necessary to protect the vulnerable tourism industry. While this public purpose is sufficient to justify shifting the economic burdens of overtime to the employee, it is not sufficient to justify denying Polly the overtime compensation she was entitled to according to law when she had already performed the work.¹⁵ Although the sponsor statement calls Polly's litigation "frivolous", the trial court had already determined, as a matter of law, that Polly was entitled to overtime compensation.

For the foregoing reasons, the legislature's retroactive amendment of the Alaska Wage and Hour Act violates the Contracts Clause of the Alaska Constitution.

¹⁴ *Id.* at 453 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 235 (1978)).

¹⁵ *Id.*