

HB

722

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

*File with  
Members*

February 19, 1976

Terry Gardiner, Chairman  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Re: House Bill No. 722, "An act  
relating to consumer protection."

Dear Terry:

I would like to express my very strong support for House Bill No. 722 which would amend AS 45.50.531(b) of the Unfair Trade Practices and Consumer Protection Act by deleting that language which requires the Attorney General's approval prior to the bringing of a class action suit by private plaintiffs. I have for some time been troubled by the implications of having such a reviewing function entrusted to this office, and I have concluded that the section as it presently reads raises a number of serious constitutional questions.

First, AS 45.50.531(b), in effect, amends Alaska Rule of Civil Procedure 23 which sets forth the factors to be considered by a court in determining the propriety of bringing a class action by giving the Attorney General the opportunity to make a nearly identical determination prior to the litigant's filing of the class action complaint in court. Article IV, § 15 of the Alaska Constitution grants the Supreme Court the exclusive power to promulgate rules "governing practice and procedure in civil and criminal cases in all courts," and the rules so promulgated may be changed by the legislature only "by two-thirds vote of the members elected to each house." To avoid the disruptive effect of inadvertent or unintentional changes by the legislature in the judiciary's rules of procedure, the Alaska Supreme Court has consistently interpreted this constitutional provision as requiring an express statement in the bill itself that it is the legislature's purpose to effect such a change. Leege v. Martin, 379 P.2d 447 (Alaska 1963); City of Valdez v. Valdez Development Company, 506 P.2d 1279 (Alaska 1973). In the case of AS 45.50.531(b), there was no such express declaration of legislative intent contained in either the bill itself nor can such a purpose be gleaned from its scant history. The "Judiciary Committee Report on HCSCS for Senate Bill No. 352," House Journal, Sixth Legislature, 2nd Sess. (Supp. No. 10 to March 31, 1970) contains the only

Terry Gardiner, Chairman  
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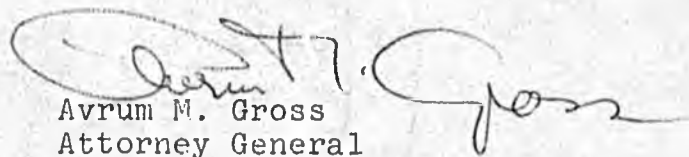
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passage dealing directly with the class action limitation, and it makes no mention of an intent to alter an established rule of the court. Thus, I fear the portion of AS 45.50.531(b) which requires a litigant to obtain my approval to bring a class action may be in violation of Art. IV, § 15 of our State constitution.

In addition, there may well be certain separation of powers questions raised by the Act since the Attorney General's authority to disapprove of the institution of a particular class action would in effect supersede the court's authority to make its own determination on the validity of the class litigation. Interposing the Attorney General's discretion between a private litigant and his access to the court may also present due process difficulties especially in cases where the suit is brought against a state agency.

In view of my concerns relating to the constitutional soundness of the relevant portions of AS 45.50.531(b), I am in full agreement with those that seek their deletion. Furthermore, the loss of this approval authority in no way diminishes or affects the ability of the Attorney General to enforce the substantive provisions of the Unfair Trade Practices and Consumer Protection Act. Whether the named plaintiffs adequately represent the rights of the class or whether the nature of the injury suffered by the members of the class is appropriate for the invocation of the class action procedure are questions more properly left to the courts to determine in the light of the criteria set forth in Civil Rule 23.

Very truly yours,

  
Avrum M. Gross  
Attorney General

AMG:chp

cc: Representative Bill Parker

LAW OFFICES OF  
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MEMORANDUM

TO: Representative Terry Gardiner,  
House Judiciary Committee

FROM: Donald E. Clocksin *DE*

RE: House Bill 772, "An Act Relating to Consumer Protection"

DATE: February 19, 1976

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This memorandum is to support House Bill 772.

1. Present Law.

Under the present law, a private citizen who is injured by a violation of the Unlawful Trade Practices and Consumer Protection Act (A.S. 45.50.471 et seq.) may bring a lawsuit to recover actual damages or \$200, whichever is greater. However, if similar injury has been caused to a number of people by the same illegal act, the lawsuit may not be brought on behalf of all of them until a) the Attorney General has approved the suit, and b) a bond of \$5,000 or more has been filed.

2. Effect of The Bill.

House Bill 772 would eliminate the two requirements (approval and the bond) and leave it to the courts under existing law and court rules whether the lawsuit may be brought.

3. Why the Bill Was Filed.

A. The requirements of a prior Attorney General approval and the mandatory minimum bond are probably unconstitutional.

The requirement that the Attorney General approve the class amends Civil Rule 23. That rule sets out the procedure for bringing class actions. However,

there is no evidence by vote or otherwise that the sixth Legislature intended to amend Civil Rule 23. See - Judiciary Committee Report on HCSCSSB 352, House Journal, March 31, 1970 (Supplement 10), Sixth Legislature, Second Session. Therefore, the requirement violates Article IV, Section 15 of the Alaska Constitution which requires a two-thirds vote to amend a court rule of practice or procedure. No such vote occurred. The Attorney General agrees that the requirement of approval is of questionable constitutionality.

The requirement of filing a minimum \$5,000 bond is probably unconstitutional because it bars the right of many litigants to assert their rights in court. Boddie v. Connecticut, 401 U.S. 371 (1971) held that it was a denial of due process for a state to deprive an indigent from getting a divorce by imposing a prohibitively high filing fee. See also Bush v. Reid, 516 P.2d 1215 (Alaska 1973) where denying a parolee access to courts was ruled to be in violation of the state and federal constitutions. To deny people similarly injured the right to be a part of a class action by requiring an arbitrarily high bond is also probably unconstitutional.

- B. Whether or not the conditions are unconstitutional, they are unfair. Many people who have been injured by unfair and deceptive practices will not have a remedy unless class actions are allowed. Such actions will not be filed if the person or persons representing the class must get approval and file a bond of at least \$5,000. That bond will usually exceed the amount those representatives will eventually recover and will discourage them before they begin.

cc: Representative Parker  
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