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BILL CONTACT/ACTION

DATE	CONTACT/ACTION
4/28	LINDA OBANNON NOTIFIED OF 5/1
	MEETING & THAT ITS BEING TRIENCONFERENCE
	ALSO J.P. TANGEN (6-2286)
	" JIM IAGOV'S

BILL SHEFFIELD
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

HB 125

January 25, 1985

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends and re-names art. 4 of AS 45.50, which is currently titled "Unfair Trade Practices and Consumer Protection." (AS 45.50.-471 -- 45.50.561 or "the UTP Act.") The title change emphasizes the intent of this bill's amendments and makes clear that the article includes protections for "businesses" as well as for "consumers." If enacted, this bill would be the first comprehensive revision of these statutes since 1974. The bill was prepared by the consumer protection section of the Department of Law in response to decisions by our courts under the present statutes, and is based on the suggestions of businesses, consumers, attorneys, and legislators in our state.

The bill has seven major goals:

1. to clarify that every Alaskan who buys or leases any item in trade or commerce for use (not for resale) is a protected consumer under these statutes, whether the buyer is an individual buying a car, a business concern buying airline tickets for employees, or a village corporation buying office photocopier supplies;

2. to clarify that honest business competitors may bring a private cause of action for damages against their less scrupulous competitors who injure them through the use of unfair or deceptive trade practices;

3. to clarify and simplify the investigative procedures used by the attorney general, and to make them less threatening to a business under investigation;

4. to clarify the role of the attorney general when bringing an enforcement action on behalf of the general public to stop an unlawful practice and to seek restitution for injured consumers;

5. to eliminate any barriers to private victims of fraud who wish to seek their own redress in the courts;

6. to ensure that out-of-state businesses which reach into our marketplace to do business with Alaskans are covered by the UTP Act, and to further ensure that all aspects of "trade or commerce" in the Alaskan marketplace are also covered, not just the narrow area of "goods or services";

7. to cure substantive, procedural, and language defects which have made the UTP Act difficult to enforce in the past.

In order that the full intent of this bill be clearly understood, a detailed section-by-section analysis follows.

SECTION-BY-SECTION ANALYSIS

Section 1. Actions in which Attachment is Authorized

Section 1 is just a compatibility amendment to make sure that the current statute listing the actions in which attachment is authorized, AS 09.40.010(a), is consistent with the new language in AS 45.50.501(i)(1) (which appears in sec. 5 of the bill).

Section 2. Consolidating Consumer Laws

Section 2 of the bill amends AS 45.50.471(b), which is a list of examples of the type of unfair or deceptive trade practices that the Act prohibits. Two practices are added to the list, failure to comply with AS 45.45.105 -- 45.45.110, regarding unsolicited merchandise, and failure to comply with AS 45.45.120 regarding disclosure of funeral costs. Although these statutes contain no enforcement provisions, it has been the informal opinion of the attorney general that they may be enforced under the UTP Act, since they are clearly meant to protect consumers. Their express inclusion in the Act more clearly provides for their en-

forcement. Alaskans are frequent victims of unsolicited merchandise schemes from the lower 48, and of funeral home over-reaching in sales to bereaved families.

Section 3. Exemptions from the Act

Section 3 of the bill would clear up an area of ongoing confusion regarding what types of business activities are exempt from the UTP Act under AS 45.50.481(1). This paragraph is in need of amendment because it has been a source of continued controversy due to its "double-negative" language, and because of its (arguable) potential to exempt almost all commercial activities from the UTP Act. Under AS 45.50.481(1), as amended by this bill, the UTP Act would not apply to acts or transactions which are regulated by other laws, only if the other law: (1) prohibits the same type of unlawful practices, (2) does not exempt from regulation the very person who is committing a prohibited act or practice, (3) provides a private cause of action for injured consumer or competitor victims, and (4) provides the state with adequate means to compel compliance with the statute and to recover restitution for injured parties, in the public interest.

This amended exemption section recognizes that while government should not duplicate regulatory efforts, the state also should not exempt a licensed professional or tradesperson from the standard of honest conduct that governs unlicensed, unregulated vendors of a different type of goods or services. It also recognizes that activity should not be exempt from the UTP Act merely because the activity constitutes a crime.

The amendment does not cause "double regulation" of licensed professions or occupations, but rather acknowledges that "regulation" through licensure or certification by a board or commission is not the same type of public law enforcement protection as that provided in the UTP Act. Although some boards have power to prohibit a licensed professional from repeating unlawful practices in the future, most boards do not have authority to order, grant, or even to seek restitution for members of the public who were injured by the licensee.

This section of the bill would ensure that both private injuries and injuries to the public interest can be corrected, but it does not set up a new "regulatory" scheme.

Section 4. Investigations by the Attorney
General

Section 4 of this bill is a comprehensive revision of AS 45.50.495, which deals with the investigative powers of the attorney general. Currently, the grant of investigative powers focuses on the use of a "subpoena," without describing the method by which the attorney general decides to issue a subpoena, nor the rights of the subpoenaed person to challenge the scope or method of the investigation. This section of the bill more clearly sets out the steps the attorney general must follow before and during formal investigations.

At AS 45.50.495(a), the bill inserts new language that shows that the attorney general must have cause to believe that an illegal act is happening, based on information received from public complaints, information from other agencies, or from information gained by the attorney general's own inquiries. Also, in this subsection the new term "civil investigative demand" is first used. This term is substituted for the word "subpoena," which some persons feel has a more onerous or quasi-criminal connotation.

AS 45.50.495(b) as revised by this bill, describes in detail what information is required to be included on the face of an investigative demand. Although it has been the practice of the attorney general to disclose this information, having the requirements set by law makes it more clear to both the attorney general's staff and to the person involved in the investigation.

The bill adds new AS 45.50.495(c), describing the way in which the attorney general may serve a civil investigative demand. Previously, a subpoena had to be served by a process server or a state trooper, which often caused undue alarm to the person being served. Under this new subsection, service may be made the same way as for a subpoena from a civil court action, which is much less onerous and does not always require delivery by a process server or a law enforcement officer.

New AS 45.50.495(d), (e), and (f) set out the location where material and testimony sought under a civil investigative demand must be made available, and the manner in which a person may seek a modification or waiver of the civil investigative demand. If the attorney general denies a request for modification, the person under investigation may

file a petition in court, asking the court to grant the request.

New AS 45.50.495(g) provides that a person served with an investigative demand who does not seek relief under (f) of that section, and who fails to respond to the demand and to a judicial enforcement order, may be held in contempt of court for failure to answer the investigative demand. Again, although standards for enforcement similar to those set out in the bill are already followed, it is the opinion of the attorney general that statutory notice would better ensure procedural fairness to all parties concerned.

Section 5. Public Interest Lawsuits
by the Attorney General

Section 5 of the bill would expand and clarify AS 45.50.501, which is the section under which the attorney general brings public interest actions in the courts to stop unfair and deceptive trade practices. The attorney general does not have power to order a business to stop, but must go to court and prove a civil case before a business will be ordered by the court to stop a particular practice.

The new language in AS 45.50.501(a) includes a vital revision to clarify that anyone outside Alaska who solicits the business of Alaskans or otherwise trades with Alaskans with knowledge that the goods or services will reach Alaska, is subject to the jurisdiction of our courts and to prosecution by our attorney general for any unfair or deceptive trade practices which harm Alaskan businesses or consumers. Although legislative history shows that this was the intent of the existing language, a 1980 Alaska Supreme Court decision throws some doubt on whether the existing language in AS 45.50.501 is sufficient to vest the courts with the total extent of "long-arm jurisdiction" granted to them in AS 09.05.015. Swenson Trucking & Excavating Inc. v. Truckweld Equipment Co., 604 P.2d 1113 (Alaska 1980). The amendment in the bill cures this potential defect.

The new language in AS 45.50.501(a) and (b) also clarifies that not only may the attorney general seek a temporary, preliminary, or permanent order or injunction against unlawful practices, but that the attorney general may also, acting on behalf of citizens injured by an unlawful act or practice, seek to restore the status quo by a court order to return to victims whatever money or property they may have lost by the unlawful actions of the business defendant.

Other amendments to AS 45.50.501 became necessary when a recent court decision interpreted current AS 45.50.501(b) so as to create several barriers to the attorney general's ability to obtain restitution for victims in a public interest action. State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982). Specifically, the new language in subsecs. (b) -- (g) clarify that when the attorney general seeks restitution for a group of injured citizens, the attorney general does not "represent" each of them as would a private attorney, and that the attorney general's lawsuit is not what is otherwise known to the courts as a "class action." If the attorney general were forced to follow the cumbersome procedures for "class actions" each time he seeks restitution, the attorney general might be forced -- in the interest of putting an expeditious halt to unlawful activity -- to seek only injunctive relief and not restitution to victims.

Restitution to victims plays a critical role in law enforcement, since a civil injunction against a business violator, without a requirement that the violator repay ill-gotten profits back to the victims, would not provide an adequate deterrent to businesses who might violate the law. It is in the interest of honest competitors, consumer victims, and the general public, that those who violate the law lose their ill-gotten gains, and that this money be put back into the marketplace.

New AS 45.50.501(c) provides that the attorney general will give notice of actions brought under (b) of that section to all affected consumers. New AS 45.50.501(d) provides a method by which consumer victims could decide to "opt-out" from the public action.

The addition of AS 45.50.501(e) and (f) ensures that consumer victims will not get duplicate recoveries, once from the public interest action by the attorney general, and once by a private action. It further ensures that a victim who elects the public action by the attorney general will be bound by a court's decision in that case and be prevented from pursuing a private claim for the same remedy.

New AS 45.50.501(g) ensures that procedural requirements will not interfere with speedy law enforcement by the attorney general, so that requirements for consumer notice and elections to opt-in or opt-out of the public interest action would not delay a request by the attorney general for an order or injunction to halt the unlawful activity.

New AS 45.50.501(h) is intended to strengthen the message to our courts that once the court has found, to a sufficient degree of probability, that an unfair practice is occurring, the court should and must grant a preliminary injunction in the public interest to restrain the use of the unlawful act pending the time when the court can hear a full trial on the case. The message to the courts would be clear that an unlawful trade practice should not be tolerated longer than necessary.

New AS 45.50.501(i) amends a serious deficiency in existing AS 45.50.501(b). The bill gives the court further powers to ensure that there will be, if at all possible, money available to make restitution to victims of the unlawful scheme. The bill adds the specific power of the court to grant a prejudgment attachment of a violator's money or property to make restitution, or in the alternative, to appoint a receiver to manage the business's money or property until the time for restitution. The prejudgment attachment would only occur after opportunity for a hearing, to assure due process of law.

This addition to existing AS 45.50.501(b) is needed because of court rulings that under our prejudgment attachment statute, AS 09.40.010, the courts do not have power to grant prejudgment attachment of money upon request of the attorney general in an action enforcing the UTP Act. When the attorney general wins a case at final trial, one or two years after the fraud actually occurs, the business has often transferred its assets or filed for bankruptcy. With this amendment, the courts may use all legal or equitable remedies that may be necessary to restore the status quo, and make whole all persons injured by an unlawful act.

Sections 6 -- 9. Private and Class Actions for Consumers and Businesses

Section 6 of the bill amends AS 45.50.531(a) and expands the private and class actions that may be brought by individual members of the public. The new language in subsec. (a) makes it clear that any person who purchases or leases any item of value in trade or commerce for use and not for resale (not merely the traditional household or family consumer buying goods or services), may bring a private cause of action against a party who uses an unfair trade practice which harms the purchaser or lessee. Another amendment to subsec. 531(a) deletes the existing clause

specifying in which judicial district the injured person must sue. This designation is moved to new AS 45.50.531(j), in sec. 9 of the bill.

Section 7 of the bill amends the private class action portion of the UTP Act (AS 45.50.531(b)) to eliminate the requirement that an injured person wishing to bring a class action on behalf of himself and other similarly situated persons is required first to get the approval of the attorney general. Such a prerequisite is an unfair and perhaps unconstitutional barrier to a private party's right to seek redress from the courts.

Section 8 of the bill amends AS 45.50.531(h), which allows Alaskan merchants who are found liable for damages in a court action under the Act to seek redress in turn from their manufacturer or supplier of merchandise. The bill amends this provision to enable a retailer also to seek redress from the manufacturer or supplier when the retailer satisfies a customer's claim without a legal action. The retailer must give reasonable notice and an opportunity to satisfy the customer's claim to the manufacturer or supplier, but if the manufacturer or supplier does not do so, the retailer would have a private cause of action to recover the cost of satisfying the customer.

Section 9 of the bill amends AS 45.50.531 in a very important way by adding a new provision that a business that is injured by a competitor who commits an unfair or deceptive trade practice has a private cause of action against the competitor. This cause of action may be inferred in the current UTP Act, but, in order to enhance the rights of private business competitors to guard their own place in the market against unfair competition, a clearly spelled out private cause of action for the injured competitor is needed.

Section 9 also cures a serious potential defect in the Act, by clarifying in new AS 45.50.531(j) that a private consumer or business that exercises the private right of action under sec. 531 is entitled to seek relief not only against a business located in Alaska, but also against outside businesses that solicit trade with Alaskans or send merchandise or services into Alaska. As with the amendment to AS 45.50.501(a) in sec. 5 of the bill, dealing with the attorney general's lawsuits, this revision is necessary to eliminate the ambiguity caused by the 1980 Alaska Supreme Court decision in the Swenson Trucking case, which implied that the existing Act might not apply to a Seattle business

that did not maintain a place of business within Alaska. Under Alaska's "long-arm" jurisdiction statute, AS 09.05.015, most outside businesses that deal with Alaska would be subject to the "personal" jurisdiction of our courts, but perhaps not to the "subject matter" jurisdiction of this Act. This ambiguity will be cured by adding new AS 45.50.531(j).

Sections 10 -- 13. Revised and Expanded Definitions
of Who is Protected by the UTP Act; Short Title

Section 10 of the bill amends AS 45.50.541, the only section of the UTP Act where it is appropriate to restrict the word "consumer" to mean a person who acquires goods or services for personal, family, or household purposes (as opposed to a business or municipal "consumer" who purchases goods for use in the work place). AS 45.50.541 is concerned with the non-negotiability of consumer installment contracts or "paper," such as the three-year contract signed by a consumer purchasing a health spa membership or an automobile. The special protections in this section are necessary only for a consumer who finances the traditional type of consumer purchase made for personal, family, or household use. Therefore, a restrictive definition of "consumer" is added to AS 45.50.541 as subsec. (d).

Section 11 of the bill deals with a similar problem. Presently, AS 45.50.542 contains a provision that "consumers" cannot waive their protections under the Act. To make it clear that this Act covers all types of customers, and not merely a restrictively defined "consumer," the bill amends this section to read that a waiver by any person who is the intended beneficiary of the protections in the Act is contrary to public policy, and is void.

In sec. 12 of the bill, new AS 45.50.560 provides for a short title by which to cite AS 45.50.471 -- 45.50.561, "The Unfair Trade Practices Act." (Normally, of course, this would be the last section in the article; however, in this instance there is no room left after the definition section and before the next article begins.)

Section 13 of the bill amends AS 45.50.561 by adding three definitions. The first, AS 45.50.561(10), clarifies that whenever the word "person" is used in the UTP Act, it has the meaning given to it in the general definition section for the Alaska Statutes, AS 01.10.060(7), which is "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

The second new definition, AS 45.50.561(11), is a crucial component of this bill. It adds a definition of "trade or commerce" that affects the operative section of the entire Act, AS 45.50.471, which forbids unfair or deceptive practices in "the conduct of trade or commerce." Recent court decisions have limited the coverage of the UTP Act to merely the sale of "goods or services," which would eliminate real property and commercial intangibles, such as commodity futures, from the Act. However, it is the opinion of the attorney general that it was the original intent of the legislature to prohibit all unfair trade practices, not only in the sale of goods or services, but in the conduct of any type of "trade or commerce." The new definition of trade or commerce includes not only a sale or lease, but all advertisements or offers for sale, or the barter or any other type of distribution of any type of goods, services, or any type or property, article, commodity, or other thing of value.

This definition of "trade or commerce" is especially critical in reversing the Alaska Supreme Court's ruling that the UTP Act does not cover the sale of real property. State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982). Under that ruling and traditional property law, a builder or developer who sells a piece of land with a newly built home on it, may not be covered by the UTP Act because the house and arguably the materials, appliances, and builder services included in its construction are considered to be "real property."

The court's restriction of the UTP Act to "goods or services" also leaves other gaps in the public protection. For instance, Alaskans are often exposed to high pressure offers to buy commodity futures, an item of value in trade or commerce, but which is not regulated by our state securities law, and arguably is not "goods" or "services," under the UTP Act.

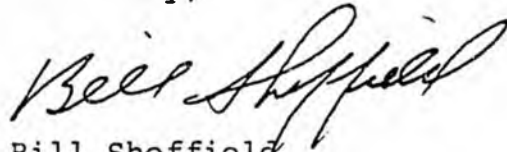
HB 236, introduced during the 1983 session, contained the same definition of "trade or commerce."

Section 13 also adds, as AS 45.50.561(12), a definition of what it means for a person to "wilfully" violate the statute. The term "wilful" is not relevant in public actions brought by the attorney general, but is the operative language that gives rise to triple damages in private actions brought by consumer victims or honest competitor victims who use their private cause of action against unfair trade practices.

Section 14 of the bill repeals AS 45.50.561(6), the definition of "consumer." Section 10 of the bill adds a more restrictive definition of "consumer" only to AS 45.50.541, concerning the non-negotiability of consumer paper, where it is appropriate.

In summary, this bill reflects the practical experience of the attorney general's staff, as well as that of consumers and businesses in the state, over the last 10 years of using the existing Unfair Trade Practices Act. Such a vital law enforcement tool as this Act is due for a well-planned refinement to better serve our citizens. I therefore urge your prompt and favorable action on this bill.

Sincerely,

A handwritten signature in cursive script that reads "Bill Sheffield". The signature is written in dark ink and is positioned above the printed name and title.

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Handwritten initials and scribbles

88142

Revision Date: _____

REQUEST

Bill/Resolution No.: HB 125
 Title: "...relating to unfair trade practices."
 Sponsor: House Rules/by req. of Gov.
 Requestor: Governor's Ofc./OMB
 Date of Request: 12/11/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: Public Protection
 BRU, Program or Subprogram(s) Affected: Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Richard I. Pegues, Director
 Division: Administrative Services
 Approved by Commissioner: Norman C. Gorsuch
 Agency: Department of Law

Phone: 465-3672
 Date: 12/12/84
 Date: 12/12/84

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

HB 125
page 282

December 12, 1984

This bill is the first comprehensive revision of Alaska's unfair trade practices and consumer protection statutes since 1974. The bill clears up ambiguities raised by Alaska court decisions; for instance, the bill reaffirms that the statute is meant to protect: (1) purchasers of real property, and (2) business or government entities purchasing goods or services as "consumers". The bill encourages members of the public to seek private redress for violations of the statute, by clarifying the private cause of action provisions, and creating a new cause of action by an honest business against a competitor which damages the honest merchant by its deceptive conduct.

It is not expected that this bill will have any fiscal impact on the Department of Law's Consumer Protection Section because the bill refines the Section's law enforcement tools (by eliminating substantive and procedural ambiguities), and encourages more citizens to act on their own behalf rather than seeking government intervention (by the strengthened private action amendments).

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

April 29, 1986

BILL SHEFFIELD, GOVERNOR

REPLY TO

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The Honorable Pat Rodey
Senate Judiciary Committee
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Re: HB 125

Dear Senator Rodey:

The purpose of this letter is to summarize CS HB 125 and to provide the committee with information concerning the need for passage of this legislation. We also are providing the committee with a section by section analysis of the bill.

This bill would make three major changes to the Unfair Trade Practices Act: First, it makes clear that the Unfair Trade Practices and Consumer Protection Act protects businesses as well as consumers. Second, the proposed legislation would, by changing the definition of trade and commerce, make it clear that consumer real property transactions would be entitled to the protection of the Act. And third, this proposed legislation clarifies the exemption provisions in the Act.

Protection for Business

Some of the most prevalent types of consumer scams or rip-offs today are often directed at the small business. Under the present Unfair Trade Practices Act it is not clear whether a small business would have the protection an individual consumer would have in these situations. One type of scam that is often perpetrated against small businesses is to send solicitations which appear to be bills or invoices. Often these solicitations are for a subscription to some type of alleged trade or professional journal. Sometimes these solicitations are for a listing in a trade directory or for advertising in a specialized magazine or other circulated printed matter. Very often the small business appoints a person to pay the bills, take care of bookkeeping tasks, etc., who is not informed on purchasing security. Therefore, the phony solicitation which is generally for a small amount, under \$100, is paid because it appears to be a bill that was actually incurred for an item ordered. In truth and fact the scam operator often never publishes the alleged directory or if it is printed it is only circulated to those

businesses who subscribed to it.

Another type of scam that is perpetrated against small businesses is what is often referred to as the "paper pirates" or office supply hustlers scam. This type of scam has many variations. One of the more common variations is to phone a small business in Anchorage or other location in Alaska and say "We have shipped a supply of name-brand toner that can be used in your copying machine to another business. They just went out of business and are not able to take that shipment. It is sitting in the airport in Anchorage, if you take the shipment we'll sell it to you at half-price." The unsuspecting secretary, receptionist or office manager in a small business who receives such a phone call is likely to act on impulse and agree to such an order. Of course, the toner is not sitting in the Anchorage airport; there was never another business that ordered it; and in fact, it not only is not the brand-name product, but use of it in the brand-name product machine will void the warranty and will cause a need for expensive repairs.

The changes proposed in Section 3 to AS 45.50.541(a) and the change in Section 10 to the definitions AS 45.50.561(10) to give "person" the definition found in AS 01.10.060(7) would clarify that businesses are entitled to the same protection from fraudulent operators as are consumers whenever businesses are acting as consumers and not purchasing merchandise for resale.

Business Private Causes of Action

Another important aspect of this legislation would be to provide a method for businesses to privately enforce the UTP Act against unscrupulous competitors and competitors who because of violations in the Act harm the honest business. These changes are found in Section 6 of the proposed committee substitute amending AS 45.50.531. This is a very desirable change in the statute from a budgetary view. As the population of Alaska grows and the volume of trade or commerce increases, the need for additional state enforcement efforts may also increase, coupled with decreases in revenue adequate enforcement levels may not be possible. To some extent this problem might be avoided by allowing private enforcement of the Act. Regularly we receive calls and complaints from businesses who are concerned about the actions of their competitors. While the state may act on those cases to stop any violations of law, we are not, nor should the state be in a position to recover any damages for the honest competitor harmed. Nevertheless, the honest competitor should have a remedy that would encourage the seeking of such damages, assuming the competitor could prove that the violations caused

the damages. The treble damage award proposed in the statute would act as a penalty provision in such cases of private enforcement.

Consumer Real Property Transactions

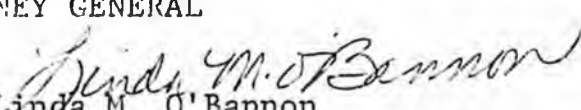
Finally the proposed bill would make it clear that the protective provisions of the UTP Act are applicable to consumer real property transactions as well as the sale of goods and services. Thus, the most costly and important consumer transaction, the purchase of a family home -- whether it be a condominium or a single family home would be afforded protection of the UTP Act.

We urge the Senate Judiciary Committee to give this bill careful consideration and to pass the bill.

Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

By:


Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection
Section

LMO/ssr
cc: Art Peterson

Section by Section Analysis to Proposed
Committee Substitute to HB 125

Prepared by: Department of Law
Consumer Protection Section
April 29, 1986

Section 1

New paragraphs (27) and (28)

These two paragraphs are additions to the "laundry list" in 45.50.471(b) of specifically enumerated "unfair or deceptive acts or practices." There is little doubt that violations of either statute referred to in paragraphs (27) and (28) would already be considered "unfair methods of competition and unfair or deceptive acts or practices" under AS 45.50.471(a) as both statutes were enacted to protect consumers. In other words, a violation of AS 45.45.105-110 (paragraph 27) or AS 45.45.120 (paragraph 28) would be a per se violation of AS 45.50.471(a). Nevertheless, it is clearer and provides better notice to the public and the business community to specifically reference the two statutes in paragraphs (27) and (28) in AS 45.50.471(b).

Paragraph (27)

The unordered merchandise provisions, AS 45.45.105-110, were clearly enacted to protect consumers from the unfair business practice of mailing or delivering unordered merchandise to a consumer than demanding payment for that merchandise. AS 45.45.110 provides that "unsolicited merchandise received shall be considered an unconditional gift to the recipient." The enactment of this statute and similar ones in other states greatly reduced this type of consumer fraud for the obvious reason if a consumer can keep the unordered merchandise or throw it in the trash, without owing anything to the merchant - most businesses aren't going to send or deliver unordered merchandise. The practice has not totally disappeared and some consumers spend time and money in an attempt to return unordered merchandise and stop fraudulent billings for the merchandise.

Paragraph (28)

It is already the informal opinion of the Attorney General that violation of AS 45.45.120 with respect to disclosure of funeral costs is an unfair or deceptive act or practice pursuant to AS 45.50.471(a). AS 45.45.120 was enacted to protect consumers in perhaps the most vulnerable time of arranging for the funeral of loved ones. The Funeral Disclosure Act merely requires written disclosures of the itemized costs of specific funeral services listed in the act before the time of rendering the service or providing the merchandise.

Section 2

Section 2 of the bill would clear up an area of ongoing confusion regarding what types of business activities are exempt from the UTP Act under AS 45.50.481(1). This paragraph is in need of amendment because it has been a source of continued controversy due to its "double-negative" language, and because of its (arguable) potential to exempt almost all commercial activities from the UTP Act. Under AS 45.50.481(1), as amended by this bill, the UTP Act would not apply to acts or transactions which are regulated by other laws, only if the other law: (1) prohibits the same type of unlawful practices, (2) does not exempt from regulation the very person who is committing a prohibited act or practice, (3) provides a private cause of action for injured consumer or competitor victims, and (4) provides the state with adequate means to compel compliance with the statute and to recover restitution for injured parties, in the public interest.

This amended exemption section recognizes that while government should not duplicate regulatory efforts, the state also should not exempt a licensed professional or tradesperson from the standard of honest conduct that governs unlicensed, unregulated vendors of a different type of goods or services. It also recognizes that activity should not be exempt from the UTP Act merely because the activity constitutes a crime.

This amendment does not cause "double regulation" of licensed professions or occupations, but rather acknowledges that "regulation" through licensure or certification by a board or commission is not the same type of public law enforcement protection as that provided in the UTP Act. Although some boards have power to prohibit a licensed professional from repeating unlawful practices in the future, most boards do not have authority to order, grant, or even seek restitution for members of the public who were injured by the licensee.

An example of the current confusion that could occur in AS 45.50.481(1) would be that an argument could be made that Barbers and Hairdressers whose professions are regulated in AS 08.13.010-220 are exempt from the UTP Act. The licensing statute does not, however, address any consumer remedies or any enforcement of fraudulent business activities. Thus, a hairdresser could consistently advertise \$15 hair cut prices, but charge each customer in the shop \$25 yet refuse to cooperate in any enforcement efforts under the UTP Act because s/he is "regulated" under the licensing statutes. There are no provisions in the UTP Act that would attempt to regulate the quality of service

of the hairdresser but the UTP Act does prohibit dishonesty, misrepresentations and fraud in business and provides consumer remedies.

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Section 4 of the bill amends the private class action portion of the UTP Act (AS 45.50.531(b)) to eliminate the requirement that an injured person wishing to bring a class action on behalf of himself and other similarly situated persons is required first to get the approval of the attorney general. Such a prerequisite is an unfair and perhaps unconstitutional barrier to a private party's right to seek redress from the courts.

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Section 7 of the bill amends AS 45.50.541, the only section of the UTP Act where it is appropriate to restrict the word "consumer" to mean a person who acquires goods or services for personal, family, or household purposes (as opposed to a business or municipal "consumer" who purchases goods for use in the work place). AS 45.50.541 is concerned with the non-negotiability of the consumer installment contracts or "paper," such as the three-year contract signed by a consumer purchasing a health spa membership or an automobile. The special protections in this section are necessary only for a consumer who finances the traditional type of consumer purchase made for personal, family, or household use. Therefore, a restrictive definition of "consumer" is added to AS 45.50.541 as subsection (d).

Section 8

Section 8 of the bill deals with a similar problem. Presently, AS 45.50.542 contains a provision that "consumers" cannot waive their protections under the Act. To make it clear that this Act covers all types of customers, and not merely a restrictively defined "consumer," the bill amends this section to read that a waiver by any person who is the intended beneficiary of the protections in the Act is contrary to public policy, and is void.

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Section 9 of the bill, new AS 45.50.560 provides for a short title by which to cite AS 45.50.471 -- 45.50.561, "The Unfair Trade Practices Act." (Normally, of course, this would be the last section in the article; however, in this instance there is no room left after the definition section and before the next article begins.)

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Section 10 of the bill amends AS 45.50.561 by adding three definitions. The first, AS 45.50.561(10), clarifies that whenever the word "person" is used in the UTP Act, it has the meaning given to it in the general definition section for the Alaska Statutes, AS 01.10.060(7), which is

"person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

The second new definition, AS 45.50.561(11), is a crucial component of this bill. It adds a definition of "trade or commerce" that affects the operative section of the entire Act. AS 45.50.471, which forbids unfair or deceptive practices in "the conduct of trade or commerce." Recent court decisions have limited the coverage of the UTP Act to merely the sale of "goods or services," which would eliminate real property and commercial intangibles, such as commodity futures, from the Act. However, it is the opinion of the attorney general that it was the original intent of the legislature to prohibit all unfair trade practices, not only in the sale of goods or services, but in the conduct of any type of "trade or commerce." The new definition of trade or commerce includes not only a sale or lease, but all advertisements or offers for sale, or the barter or any other type of distribution of any type of goods, services, or any type of property, article, commodity, or other thing of value.

This definition of "trade or commerce" is especially critical in reversing the Alaska Supreme Court's ruling that the UTP Act does not cover the sale of real property. State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982). Under that ruling and traditional property law, a builder or developer who sells a piece of land with a newly built home on it, may not be covered by the UTP Act because the house and arguably the materials, appliances, and builder services included in its construction are considered to be "real property."

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Section 10 also adds, as AS 45.40.561(12), a definition of what it means for a person to "willfully" violate the statute. The term "willful" is not relevant in public actions brought by the attorney general, but is the operative language that gives rise to triple damages in private actions brought by consumer victims or honest competitor victims who use their private cause of action against unfair trade practices.

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STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION**

February 21, 1985

XX REPLY TO

— 1031 W 4th SUITE 110
ANCHORAGE ALASKA 99501
PHONE (907) 279-0428

— 1st NATIONAL CENTER
100 CUSHMAN SUITE 400
FAIRBANKS ALASKA 99701
PHONE (907) 456-8588

— S S FULLER BLDG
4th & HARRIS SUITE 214
POUCH K
JUNEAU ALASKA 99811
PHONE (907) 465-3692

— STATE COURTHOUSE ROOM 26
P O BOX 671
VALDEZ ALASKA 99686
PHONE (907) 835-2462

Honorable M. Mike Miller
Chairman
House Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Representative Miller:

During the House Judiciary Committee hearing on February 8, 1985, on HB 125, Representatives Pettyjohn and Gruenberg requested a listing of the current litigation cases in the Consumer Protection Section of the Department of Law. I have enclosed that information for the committee's use. In the listing we included all litigation cases that were opened or closed during this fiscal year to date with a very brief summary about the cases. We hope this information is useful to you and the committee members. If we can provide any further information please don't hesitate to contact us.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:

Linda M. O'Bannon
Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection
Section

LMO/ssr
Encl.

CURRENT CONSUMER PROTECTION CASES

SUMMARY OF CASES OPENED, PENDING,
OR CLOSED DURING FY 85
Consumer Protection Section
Department of Law

State v. Marvin L. Hanson 122-679-83

The defendant in this case, a surveyor, allegedly obtained advance payments from some 70 consumers to survey fishing set net sites in the Bristol Bay area and then failed to complete the work promised. This impeded the consumers' efforts to get state shorefishery leases for their sites. The case is still pending, but after long delays the defendant has recently made substantial progress toward completing the surveys.

State v. MD Associates, Inc. and
Donald Burke 122-741-83

The State brought this action against a California corporation and its local distributor who manufactured and distributed an imitation milk beverage, MDA Farms. The State alleged that misrepresentations were made about the nutritional properties of the imitation milk product in comparison with real milk. The State also alleged misrepresentations concerning the cost savings of the product. Allegations were also made about defendants multi-level marketings plan. The State and the defendants entered into a consent judgment and injunction which was approved by the court. The defendants agreed to pay the State a total of \$5000 in penalties, costs and attorney's fees, and agreed to an injunction prohibiting certain activities in future conduct and providing consumer restitution in the form of refunds to purchasers of the product.

State v. Nugget Properties
d/b/a Brigantine Bay, William
Lange, Ted Hanson, et al. 122-761-84

The State sued the developers of a timeshare project located near Seward, Alaska for various misrepresentations in the sale of timeshares. These misrepresentations included information given to persons solicited to attend timeshare presentations as well as persons who actually attended and purchased timeshares.

The defendants and the State entered into a consent judgment and injunction approved by the court which provided for a payment of \$25,000 in penalties, costs and attorney's fees to the State. Consumers who had relied on the defendant's misrepresentations in the purchase of timeshare units at Brigantine Bay were offered restitution pursuant to the consent judgment.

State v. John Jarrett
d/b/a Kennelly and Associates,
Inc. 122-486-85

This case involves a contractor who used an illegal pre-printed form contract from the State of Washington to contract with Alaskan consumers. Alaska's door-to-door solicitation statute allows a consumer five business days in which to cancel or revoke an offer to purchase. The defendant's contract stated a three day cancellation period. Further the defendant contracted with several Alaskan consumers, received consumer down payments and in some cases, payments in full for the work to be done and never performed the work. One Alaskan consumer paid \$10,000 to the defendant and to date has not seen or heard from him again. In several cases in Fairbanks, this same contractor received full payment from consumers and failed to pay the supplier. The supplier sent "notice of right to lien" to these consumers forcing these consumers to hire attorneys to protect their homes from liens. Another consumer paid to have work completed on their home and the work was not done in a professional manner and some of the work agreed upon was not done at all. The consumer used his home as collateral for a loan from the contractor to do the work and the contractor has since assigned that deed of trust to a third party. The consumer can not now stop paying for the work that was not done for fear that the third party will foreclose on his home. We have just recently obtained service and are awaiting defendant's answer. Defendant is believed to be now residing in Louisiana.

State v. Brunner J22-122-82

This litigation involves misrepresentations made to consumers who hired defendants for guided hunting in Alaska.

State v. George Smith
d/b/a A and M Associates 122-420-84

The State filed this action against the defendant tax preparer after he did not return to his business premises after April 16, 1983. Defendant had taken consumer deposits for tax preparation work. Not only did consumer tax returns not get filed by defendant as promised but consumers could not obtain their tax records in order to complete their tax preparation or have another tax preparer complete their tax preparation. There was a court hearing in this case and the court entered a preliminary order requiring the defendant to

give notice to all his clients as to his present location and how they could go about obtaining their tax documents. In addition certain consumer deposits were ordered to be refunded. No time has been set for an action on a permanent injunction. The case is still pending but apparent compliance with the court's order and each of further violations suggests the case may be closed without requirement of actually going to trial.

State v. American Home Furnishings,
Olympus Waterbed, Mike Ryan,
Mitchell Ryan, Valley Home
Furnishings, American Waterbeds,
et al. 122-687-84

The State filed this action to halt false advertising claims made by defendants in their various going out-of-business sales. It was alleged that defendants moved merchandise from location to location during the sales. Further it was alleged that advertising of going out-of-business sales was deceptive because although the various stores were owned by the same person their different names suggested they were in competition with each other, coupled with the fact that rather than actually having a going out-of-business sale that would liquidate the entire stock of a particular retail outlet the stock was just transferred from location to location. Defendants entered into a consent judgment with the State and agreed to pay the State \$5000 in costs, attorney's fees and penalties.

State v. Alaska Towing and
Wrecking 122-917-84

The State and Alaska Towing and Wrecking entered into an Assurance of Voluntary Compliance which was approved by the court. Alaska Towing and Wrecking agreed to refrain from asserting any lien rights not granted them by statute. By statute Alaska Towing and Wrecking is entitled to a lien on a motor vehicle for towing and storage charges. Alaska Towing and Wrecking had been implying that they also had a lien for other charges such as a Department of Motor Vehicle title or ownership search or other administrative costs.

State v. Saleh, Baghdadi,
and Enus d/b/a National
Chemical Co. 122-089-85

The defendant and the State of Alaska entered into a

Voluntary Assurance which was approved by the court. Defendants were selling a home cleaning fluid for approximately \$68 per gallon. Defendants agreed to comply with Alaska's door-to-door sales law and to refrain from misrepresentations about the product in the future as well as pay the State \$1000 in investigative costs. Further defendants agreed not to represent that the cleaning fluid was safe around food and food preparation areas.

State v. Mary O'Brannon
d/b/a Alaska Directory
Service, Inc.

122-209-85

The State of Alaska and the defendant entered into an Assurance of Voluntary Compliance in which she agreed to return consumer business deposits for advertising in a telephone directory that was never published.

State v. United Financial
Incentives

122-735-83

The State sued this Pennsylvania corporation for operation of a chain referral sales plan which is a violation of the Unfair Trade Practices Act. The plan was the United Financial Incentives Grocery Tape Purchase Plan. The defendant offered distributorships promising \$20,000 per month income for collecting grocery tape receipts. Defendant entered into an Assurance of Voluntary Compliance with the State, agreeing not to conduct a chain referral or chain distributor plan in Alaska and to pay the State \$1000 in costs and investigative fees. The corporation ultimately went out of business.

State v. Alaska Financial
and Insurance Co. d/b/a
Stepp Brothers Lincoln/
Mercury

122-959-84

This Assurance of Voluntary Compliance entered into by the State of Alaska and Michal D. Stepp, president, on June 4, 1984, requires the defendant to conduct repossession sales in a "commercially reasonable manner". It had been alleged previously that in the course of repossessing vehicles, for whatever reason, defendant had not followed the standards set out by federal or state law in regards to notice provisions and timeframes within which the dispossessed owner would have an opportunity to redeem. Further it was alleged that defendant did not have a public sale whereby it sold the repossessed vehicle to the highest bidder as required by law.

State v. Northwest Trade
Corporation

122-383-80

This case involved a health club which rented temporary quarters and began a advertisement campaign to stimulate the purchase of memberships. After a large number of memberships were sold in the Anchorage area, the Northwest Trade Corporation closed its doors with the money and did not re-open. This has been indicative of a number of national health clubs which will open temporary branches, obtain money and then close their doors claiming they are going out of business. In the case of Northwest Trade Corporation we were unable to obtain restitution for all consumers involved.

State v. David Pillott et al. 122-740-83

This case involved an outside distributor who began advertising Necchi sewing machines for sale. Alaska law, federal law, and Alaska Retail Advertising Regulations state that you cannot misrepresent the price of goods, the manufacturer's suggested retail price, or the regular price in an effort to mislead consumers into thinking they are buying at a discounted price. The defendant advertised that the sewing machines were regularly sold at \$729 and \$629 and that he was offering them for sale for \$399 and \$299 respectively. The truth of the matter was that these sewing machines cost substantially less than the price for which they were being sold and were not worth near the \$629 and \$729 as stated in the advertisement. Further defendant indicated that it was a public sale and that these were "unclaimed school orders" and "must be sold" creating the impression of special or circumstances forcing a sale when in fact this was not the case. Consumers were misled and deceived into thinking that they were buying a certain quality sewing machine when in fact they were buying a lesser quality sewing machine. The State obtained injunctive relief and civil penalties in the amount of \$500.

State v. Capetti d/b/a
Capetti and Associates

122-258-85 .

This case involved a concert promoter who scheduled a program for the Sullivan Arena. When he saw that the attendance was not going to be as he hoped it would be, he cancelled the show but failed to refund money to consumers. He had received approximately \$9000 from consumers and consumers were unable to contact him for refunds. Alaska

law requires a concert promoter to refund money within 10 days after the date of a program which has been cancelled and also to place on the tickets an address where the promoter can be reached for refunds. The concert promoter in this case failed to provide consumers with the necessary information for refunds and failed to refund monies to consumers. The State obtained an Assurance of Voluntary Compliance and full refunds for all consumers.

MEMORANDUM

State of Alaska

TO: Mike Miller, Chair
House Judiciary Committee
Alaska State Legislature

DATE: March 27, 1985

FILE NO: 377-033-85

TELEPHONE NO: 279-0428

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: HB 125

By: *Linda M. O'Bannon*
Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection Section

Attached is a draft proposed committee substitute for consideration by the committee as requested.

LMO/mf

Attachment

cc: Rep. Don Clocksin
Rep. Max F. Gruenberg, Jr.
Rep. Fritz Pettyjohn
Rep. Randy Phillips
Rep. John Sund
Rep. Robin L. Taylor

Section by Section Analysis to Proposed
Committee Substitute to HB 125

Prepared by: Department of Law
Consumer Protection Section
March 27, 1985

Section 1

New paragraphs (27) and (28)

These two paragraphs are additions to the "laundry list" in 45.50.471(b) of specifically enumerated "unfair or deceptive acts or practices." There is little doubt that violations of either statute referred to in paragraphs (27) and (28) would already be considered "unfair methods of competition and unfair or deceptive acts or practices" under AS 45.50.471(a) as both statutes were enacted to protect consumers. In other words, a violation of AS 45.45.105-110 (paragraph 27) or AS 45.45.120 (paragraph 28) would be a per se violation of AS 45.50.471(a). Nevertheless, it is clearer and provides better notice to the public and the business community to specifically reference the two statutes in paragraphs (27) and (28) in AS 45.50.471(b).

Paragraph (27)

The unordered merchandise provisions, AS 45.45.105-110, were clearly enacted to protect consumers from the unfair business practice of mailing or delivering unordered merchandise to a consumer then demanding payment for that merchandise. AS 45.45.110 provides that "unsolicited merchandise received shall be considered an unconditional gift to the recipient." The enactment of this statute and similar ones in other states greatly reduced this type of consumer fraud for the obvious reason if a consumer can keep the unordered merchandise or throw it in the trash, without owing anything to the merchant - most businesses aren't going to send or deliver unordered merchandise. The practice has not totally disappeared and some consumers spend time and money in an attempt to return unordered merchandise and stop fraudulent billings for the merchandise.

Paragraph (28)

It is already the informal opinion of the Attorney General that violation of AS 45.45.120 with respect to disclosure of funeral costs is an unfair or deceptive act or practice pursuant to AS 45.50.471(a). AS 45.45.120 was enacted to protect consumers in perhaps the most vulnerable time of arranging for the funeral of loved ones. The Funeral Disclosure Act merely requires written disclosures of the itemized costs of specific funeral services listed in the act before the time of rendering the service or providing the merchandise.

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 13, 1985

SUBJECT: House Bill 125 and Alaska Rule of
Civil Procedure 89

TO: Representative M. Mike Miller
Chairman, House Judiciary Committee

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have requested the following:

1. an opinion whether Section 1 of HB 125 conflicts with Alaska Rule of Civil Procedure 89 and how a conflict should be addressed in the bill; and
2. a draft of new language for Civil Rule 89 conforming it to HB 125.

From my review of the pertinent authorities, it is my opinion that the ability to apply for pre-judgment attachment of property is a matter of substance rather than a matter of procedure. "[S]ubstantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." Ware v. City of Anchorage, 439 P.2d 793, 794 (Alaska, 1968). The remedy of pre-judgment attachment gives the plaintiff a substantial right, that of preventing the defendant from exercising defendant's normal rights over its property during the pendency of the action. The court in Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1042-43 (Alaska 1981), used as the criteria for distinguishing between procedure and substance, whether the matter was more related to judicial rule-making power or to the making of public policy. The right of one party in a court action to restrict the other party's use of its property during the action appears to me to be a matter of policy to be set by the legislature rather than a rule of procedure to be set by the court system. It creates a new right in one party and removes a right in the other party.

The basic authority to seek pre-judgment attachment comes from AS 09.40.010(a). That statute lists the areas in which the remedy is available. In addition to contract matters, AS 09.40.010(a) gives the remedy to a state in the collection of its state taxes or license fees. The source of the remedy is statute, not court rule. Civil Rule 89 sets up the procedure for obtaining the remedy.

With regard to the relationship between § 1 of the bill and Civil Rule 89, it is my opinion that Section 1 of the bill does not conflict with Civil Rule 89. Part (a) of Civil Rule 89 indicates that the right of pre-judgment attachment given in AS 09.40.010-110 is to be pursued in accordance with the provisions of Civil Rule 89. In other words, the substantive matter in the statute is to be handled by the procedure in the rule.

The addition, of another cause of action that is entitled to seek pre-judgment attachment relief, to AS 09.40.010 cannot conflict with the rule as it is now worded. Part (b)(1)-(3) of Civil Rule 89 apparently was designed only for the contracts portion of AS 09.40.010, since it does not apply to state taxes or license fees. The Rule could use some re-working, and the court system may want to do so, but it is unnecessary for the legislature to re-write it because of HB 125. Re-writing the problematical language of Civil Rule 89 (b) (1)-(3) may also create a problem with Article IV, Section 15 of the Alaska Constitution. Since Part (b) establishes the form and contents of a document to be submitted for the relief, it is very possible that it would be held to constitute a rule for the internal administration of the court and, therefore, not available for amendment by the legislature.

In light of the above, I have not re-worked the court rule. However, if you still wish that to be done, please so advise.

TLB:obj
J11/083

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Urge your prompt action on this bill.

Sincerely,

/s/

Bill Sheffield
Governor"

B 124

HOUSE BILL NO. 124 by the Rules Committee by request of the Governor, entitled:

"An Act extending the Older Alaskans Commission; and providing for an effective date."

was read the first time and referred to the State Affairs and the Health, Education & Social Services Committee.

A zero fiscal note with an analysis was attached and appears in House Journal Supplement No. 8.

The Governor's transmittal letter, dated January 25, 1985, appears below:

"Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to extend the life of the Older Alaskans Commission for four years. The commission is currently scheduled to "sunset" (under AS 4.66.010(a)(10)) on June 30, 1985. I view the work of this commission as essential, and believe that the commission should be extended for another four years. I urge you to join me in providing this support to our senior citizens.

Sincerely,

/s/

Bill Sheffield
Governor"

B 125

HOUSE BILL NO. 125 by the Rules Committee by request of the Governor, entitled:

"An Act revising the Alaska Unfair Trade Practices and Consumer Protection Act; adding new causes of action for private business; and providing for an effective date."

was read the first time and referred to the Judiciary

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A zero fiscal note with an analysis was attached and appears in House Journal Supplement No. 8.

The Governor's transmittal letter, dated January 25, 1985, follows:

"Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends and re-names art. 4 of AS 45.50, which is currently titled "Unfair Trade Practices and Consumer Protection." (AS 45.50.-471 -- 45.50.561 or "the UTP Act.") The title change emphasizes the intent of this bill's amendments and makes clear that the article includes protections for "businesses" as well as for "consumers." If enacted, this bill would be the first comprehensive revision of these statutes since 1974. The bill was prepared by the consumer protection section of the Department of Law in response to decisions by our courts under the present statutes, and is based on the suggestions of businesses, consumers, attorneys, and legislators in our state.

The bill has seven major goals:

1. to clarify that every Alaskan who buys or leases any item in trade or commerce for use (not for resale) is a protected consumer under these statutes, whether the buyer is an individual buying a car, a business concern buying airline tickets for employees, or a village corporation buying office photocopier supplies;
2. to clarify that honest business competitors may bring a private cause of action for damages against their less scrupulous competitors who injure them through the use of unfair or deceptive trade practices;
3. to clarify and simplify the investigative procedures used by the attorney general, and to make them less threatening to a business under investigation;
4. to clarify the role of the attorney general when bringing an enforcement action on behalf of the general public to stop an unlawful practice and to seek restitution for injured consumers;
5. to eliminate any barriers to private victims of fraud who wish to seek their own redress in the courts;
6. to ensure that out-of-state businesses which reach into our marketplace to do business with Alaskans are covered by the UTP Act, and to further ensure that all aspects of "trade or commerce" in the Alaskan marketplace are also covered, not just the narrow area of "goods or services";
7. to cure substantive, procedural, and language defects which have made the UTP Act difficult to enforce in the past.

In order that the full intent of this bill be clearly understood, a detailed section-by-section analysis

TRANSMITTAL

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SECTION-BY-SECTION ANALYSISSection 1. Actions in which Attachment is Authorized

Section 1 is just a compatibility amendment to make sure that the current statute listing the actions in which attachment is authorized, AS 09.40.010(a), is consistent with the new language in AS 45.50.501(i)(1) (which appears in sec. 5 of the bill).

Section 2. Consolidating Consumer Laws

Section 2 of the bill amends AS 45.50.471(b), which is a list of examples of the type of unfair or deceptive trade practices that the Act prohibits. Two practices are added to the list, failure to comply with AS 45.45.105 -- 45.45.110, regarding unsolicited merchandise, and failure to comply with AS 45.45.120 regarding disclosure of funeral costs. Although these statutes contain no enforcement provisions, it has been the informal opinion of the attorney general that they may be enforced under the UTP Act, since they are clearly meant to protect consumers. Their express inclusion in the Act more clearly provides for their enforcement. Alaskans are frequent victims of unsolicited merchandise schemes from the lower 48, and of funeral home over-reaching in sales to bereaved families.

Section 3. Exemptions from the Act

Section 3 of the bill would clear up an area of ongoing confusion regarding what types of business activities are exempt from the UTP Act under AS 45.50.481(1). This paragraph is in need of amendment because it has been a source of continued controversy due to its "double-negative" language, and because of its (arguable) potential to exempt almost all commercial activities from the UTP Act. Under AS 45.50.481(1), as amended by this bill, the UTP Act would not apply to acts or transactions which are regulated by other laws, only if the other law: (1) prohibits the same type of unlawful practices, (2) does not exempt from regulation the very person who is committing a prohibited act or practice, (3) provides a private cause of action for injured consumer or competitor victims, and (4) provides the state with adequate means to compel compliance with the statute and to recover restitution for injured parties, in the public interest.

This amended exemption section recognizes that while government should not duplicate regulatory efforts, the state also should not exempt a licensed professional or tradesperson from the standard of honest conduct that governs unlicensed, unregulated vendors of a different type of goods or services. It also recognizes that activity should

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not be exempt from the UTP Act merely because the activity constitutes a crime.

The amendment does not cause "double regulation" of licensed professions or occupations, but rather acknowledges that "regulation" through licensure or certification by a board or commission is not the same type of public law enforcement protection as that provided in the UTP Act. Although some boards have power to prohibit a licensed professional from repeating unlawful practices in the future, most boards do not have authority to order, grant, or even to seek restitution for members of the public who were injured by the licensee.

This section of the bill would ensure that both private injuries and injuries to the public interest can be corrected, but it does not set up a new "regulatory" scheme.

Section 4. Investigations by the Attorney General

Section 4 of this bill is a comprehensive revision of AS 45.50.495, which deals with the investigative powers of the attorney general. Currently, the grant of investigative powers focuses on the use of a "subpoena," without describing the method by which the attorney general decides to issue a subpoena, nor the rights of the subpoenaed person to challenge the scope or method of the investigation. This section of the bill more clearly sets out the steps the attorney general must follow before and during formal investigations.

At AS 45.50.495(a), the bill inserts new language that shows that the attorney general must have cause to believe that an illegal act is happening, based on information received from public complaints, information from other agencies, or from information gained by the attorney general's own inquiries. Also, in this subsection the new term "civil investigative demand" is first used. This term is substituted for the word "subpoena," which some persons feel has a more onerous or quasi-criminal connotation.

AS 45.50.495(b) as revised by this bill, describes in detail what information is required to be included on the face of an investigative demand. Although it has been the practice of the attorney general to disclose this information, having the requirements set by law makes it more clear to both the attorney general's staff and to the person involved in the investigation.

The bill adds new AS 45.50.495(c), describing the way in which the attorney general may serve a civil investigative demand. Previously, a subpoena had to be served by a process server or a state trooper, which often caused undue alarm to the person being served. Under this new subsection, service may be made the same way as for a subpoena from a civil court action, which is much less onerous and does not always require delivery by a process server or a law enforcement officer.

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New AS 45.50.495(d), (e), and (f) set out the location where material and testimony sought under a civil investigative demand must be made available, and the manner in which a person may seek a modification or waiver of the civil investigative demand. If the attorney general denies a request for modification, the person under investigation may file a petition in court, asking the court to grant the request.

New AS 45.50.495(g) provides that a person served with an investigative demand who does not seek relief under (f) of that section, and who fails to respond to the demand and to a judicial enforcement order, may be held in contempt of court for failure to answer the investigative demand. Again, although standards for enforcement similar to those set out in the bill are already followed, it is the opinion of the attorney general that statutory notice would better ensure procedural fairness to all parties concerned.

Section 5. Public Interest Lawsuits by the Attorney General

Section 5 of the bill would expand and clarify AS 45.50.501, which is the section under which the attorney general brings public interest actions in the courts to stop unfair and deceptive trade practices. The attorney general does not have power to order a business to stop, but must go to court and prove a civil case before a business will be ordered by the court to stop a particular practice.

The new language in AS 45.50.501(a) includes a vital revision to clarify that anyone outside Alaska who solicits the business of Alaskans or otherwise trades with Alaskans with knowledge that the goods or services will reach Alaska, is subject to the jurisdiction of our courts and to prosecution by our attorney general for any unfair or deceptive trade practices which harm Alaskan businesses or consumers. Although legislative history shows that this was the intent of the existing language, a 1980 Alaska Supreme Court decision throws some doubt on whether the existing language in AS 45.50.501 is sufficient to vest the courts with the total extent of "long-arm jurisdiction" granted to them in AS 09.05.015. Swanson Trucking & Excavating Inc. v. Truckweld Equipment Co., 604 P.2d 1113 (Alaska 1980). The amendment in the bill cures this potential defect.

The new language in AS 45.50.501(a) and (b) also clarifies that not only may the attorney general seek a temporary, preliminary, or permanent order or injunction against unlawful practices, but that the attorney general may also, acting on behalf of citizens injured by an unlawful act or practice, seek to restore the status quo by a court order to return to victims whatever money or property they may have lost by the unlawful actions of the business defendant.

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Other amendments to AS 45.50.501 became necessary when a recent court decision interpreted current AS 45.50.501(b) so as to create several barriers to the attorney general's ability to obtain restitution for victims in a public interest action. State v. First Nat'l Bank of Anchorage, 669 P.2d 406 (Alaska 1982). Specifically, the new language in subsecs. (b) -- (g) clarify that when the attorney general seeks restitution for a group of injured citizens, the attorney general does not "represent" each of them as would a private attorney, and that the attorney general's lawsuit is not what is otherwise known to the courts as a "class action." If the attorney general were forced to follow the cumbersome procedures for "class actions" each time he seeks restitution, the attorney general might be forced -- in the interest of putting an expeditious halt to unlawful activity -- to seek only injunctive relief and not restitution to victims.

Restitution to victims plays a critical role in law enforcement, since a civil injunction against a business violator, without a requirement that the violator repay ill-gotten profits back to the victims, would not provide an adequate deterrent to businesses who might violate the law. It is in the interest of honest competitors, consumer victims, and the general public, that those who violate the law lose their ill-gotten gains, and that this money be put back into the marketplace.

New AS 45.50.501(c) provides that the attorney general will give notice of actions brought under (b) of that section to all affected consumers. New AS 45.50.501(d) provides a method by which consumer victims could decide to "opt-out" from the public action.

The addition of AS 45.50.501(e) and (f) ensures that consumer victims will not get duplicate recoveries, once from the public interest action by the attorney general, and once by a private action. It further ensures that a victim who elects the public action by the attorney general will be bound by a court's decision in that case and be prevented from pursuing a private claim for the same remedy.

New AS 45.50.501(g) ensures that procedural requirements will not interfere with speedy law enforcement by the attorney general, so that requirements for consumer notice and elections to opt-in or opt-out of the public interest action would not delay a request by the attorney general for an order or injunction to halt the unlawful activity.

New AS 45.50.501(h) is intended to strengthen the message to our courts that once the court has found, to a sufficient degree of probability, that an unfair practice is occurring, the court should and must grant a preliminary injunction in the public interest to restrain the use of the unlawful act pending the time when the court can hear a full trial on the case. The message to the courts would be clear that an unlawful trade practice should not be tolerated longer than necessary.

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New AS 45.50.501(i) amends a serious deficiency in existing AS 45.50.501(b). The bill gives the court further powers to ensure that there will be, if at all possible, money available to make restitution to victims of the unlawful scheme. The bill adds the specific power of the court to grant a prejudgment attachment of a violator's money or property to make restitution, or in the alternative, to appoint a receiver to manage the business's money or property until the time for restitution. The prejudgment attachment would only occur after opportunity for a hearing, to assure due process of law.

This addition to existing AS 45.50.501(b) is needed because of court rulings that under our prejudgment attachment statute, AS 09.40.010, the courts do not have power to grant prejudgment attachment of money upon request of the attorney general in an action enforcing the UTP Act. When the attorney general wins a case at final trial, one or two years after the fraud actually occurs, the business has often transferred its assets or filed for bankruptcy. With this amendment, the courts may use all legal or equitable remedies that may be necessary to restore the status quo, and make whole all persons injured by an unlawful act.

Sections 6 -- 9. Private and Class Actions for Consumers and Businesses

Section 6 of the bill amends AS 45.50.531(a) and expands the private and class actions that may be brought by individual members of the public. The new language in subsec. (a) makes it clear that any person who purchases or leases any item of value in trade or commerce for use and not for resale (not merely the traditional household or family consumer buying goods or services), may bring a private cause of action against a party who uses an unfair trade practice which harms the purchaser or lessee. Another amendment to subsec. 531(a) deletes the existing clause specifying in which judicial district the injured person must sue. This designation is moved to new AS 45.50.531(j), in sec. 9 of the bill.

Section 7 of the bill amends the private class action portion of the UTP Act (AS 45.50.531(b)) to eliminate the requirement that an injured person wishing to bring a class action on behalf of himself and other similarly situated persons is required first to get the approval of the attorney general. Such a prerequisite is an unfair and perhaps unconstitutional barrier to a private party's right to seek redress from the courts.

Section 8 of the bill amends AS 45.50.531(h), which allows Alaskan merchants who are found liable for damages in a court action under the Act to seek redress in turn from their manufacturer or supplier of merchandise. The bill amends this provision to enable a retailer also to seek redress from the manufacturer or supplier when the retailer satisfies a customer's claim without a legal action. The retailer must give reasonable notice and an opportunity to

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satisfy the customer's claim to the manufacturer or supplier, but if the manufacturer or supplier does not do so, the retailer would have a private cause of action to recover the cost of satisfying the customer.

Section 9 of the bill amends AS 45.50.531 in a very important way by adding a new provision that a business that is injured by a competitor who commits an unfair or deceptive trade practice has a private cause of action against the competitor. This cause of action may be inferred in the current UTP Act, but, in order to enhance the rights of private business competitors to guard their own place in the market against unfair competition, a clearly spelled out private cause of action for the injured competitor is needed.

Section 9 also cures a serious potential defect in the Act, by clarifying in new AS 45.50.531(j) that a private consumer or business that exercises the private right of action under sec. 531 is entitled to seek relief not only against a business located in Alaska, but also against outside businesses that solicit trade with Alaskans or send merchandise or services into Alaska. As with the amendment to AS 45.50.501(a) in sec. 5 of the bill, dealing with the attorney general's suits, this revision is necessary to eliminate the ambiguity caused by the 1980 Alaska Supreme Court decision in the Johnson Trucking case, which implied that the existing Act did not apply to a Seattle business that did not maintain a place of business within Alaska. Under Alaska's "long-arm" jurisdiction statute, AS 09.05.015, most outside businesses that deal with Alaska would be subject to the "personal" jurisdiction of our courts, but perhaps not to the "subject matter" jurisdiction of this Act. This ambiguity will be cured by adding new AS 45.50.531(j).

Sections 10 -- 11. Revised and Expanded Definitions of Who is Protected by the UTP Act; Short Title

Section 10 of the bill amends AS 45.50.541, the only section of the UTP Act where it is appropriate to restrict the word "consumer" to mean a person who acquires goods or services for personal, family, or household purposes (as opposed to a business or municipal "consumer" who purchases goods for use in the work place). AS 45.50.541 is concerned with the non-negotiability of consumer installment contracts or "paper," such as the three-year contract signed by a consumer purchasing a health spa membership or an automobile. The special protections in this section are necessary only for a consumer who finances the traditional type of consumer purchase made for personal, family, or household use. Therefore, a restrictive definition of "consumer" is added to AS 45.50.541 as subsec. (d).

Section 11 of the bill deals with a similar problem. Presently, AS 45.50.542 contains a provision that "consumers" cannot waive their protections under the Act. To make it clear that this Act covers all types of customers, and not merely a restrictively defined "consumer," the bill amends this section to read that a waiver by any person who is the intended beneficiary of the protections in the Act is contrary to public policy, and is void.

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In sec. 12 of the bill, new AS 45.50.560 provides for a short title by which to cite AS 45.50.471 -- 45.50.561, "The Unfair Trade Practices Act." (Normally, of course, this would be the last section in the article; however, in this instance there is no room left after the definition section and before the next article begins.)

Section 13 of the bill amends AS 45.50.561 by adding three definitions. The first, AS 45.50.561(10), clarifies that whenever the word "person" is used in the UTP Act, it has the meaning given to it in the general definition section for the Alaska Statutes, AS 01.10.060(7), which is "person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

The second new definition, AS 45.50.561(11), is a crucial component of this bill. It adds a definition of "trade or commerce" that affects the operative section of the entire Act, AS 45.50.471, which forbids unfair or deceptive practices in "the conduct of trade or commerce." Recent court decisions have limited the coverage of the UTP Act to merely the sale of "goods or services," which would eliminate real property and commercial intangibles, such as commodity futures, from the Act. However, it is the opinion of the attorney general that it was the original intent of the legislature to prohibit all unfair trade practices, not only in the sale of goods or services, but in the conduct of any type of "trade or commerce." The new definition of trade or commerce includes not only a sale or lease, but all advertisements or offers for sale, or the barter or any other type of distribution of any type of goods, services, or any type or property, article, commodity, or other thing of value.

This definition of "trade or commerce" is especially critical in reversing the Alaska Supreme Court's ruling that the UTP Act does not cover the sale of real property. State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982). Under that ruling and traditional property law, a builder or developer who sells a piece of land with a newly built home on it, may not be covered by the UTP Act because the house and arguably the materials, appliances, and builder services included in its construction are considered to be "real property."

The court's restriction of the UTP Act to "goods or services" also leaves other gaps in the public protection. For instance, Alaskans are often exposed to high pressure offers to buy commodity futures, an item of value in trade or commerce, but which is not regulated by our state securities law, and arguably is not "goods" or "services," under the UTP Act.

HB 226, introduced during the 1983 session, contained the same definition of "trade or commerce."

Section 13 also adds, as AS 45.50.561(12), a definition of what it means for a person to "wilfully" violate the statute. The term "wilful" is not relevant in public actions

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brought by the attorney general, but is the operative language that gives rise to triple damages in private actions brought by consumer victims or honest competitor victims who use their private cause of action against unfair trade practices.

Section 14 of the bill repeals AS 45.50.561(6), the definition of "consumer." Section 10 of the bill adds a more restrictive definition of "consumer" only to AS 45.50.541, concerning the non-negotiability of consumer paper, where it is appropriate.

In summary, this bill reflects the practical experience of the attorney general's staff, as well as that of consumers and businesses in the state, over the last 10 years of using the existing Unfair Trade Practices Act. Such a vital law enforcement tool as this Act is due for a well-planned refinement to better serve our citizens. I therefore urge your prompt and favorable action on this bill.

Sincerely,

/s/

Bill Sheffield
Governor"

HB 126

HOUSE BILL NO. 126 by the Rules Committee by request of the Governor, entitled:

"An Act amending the Alaska Securities Act."

was read the first time and referred to the Labor & Commerce, Judiciary and Finance Committees.

Two fiscal notes were attached and appear in House Journal Supplement No. 8.

The Governor's transmittal letter, dated January 25, 1985, appears below:

"Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends the Alaska Securities Act (AS 45.55) by extending its scope to include offers to buy or sell interests in oil, gas, or mining rights on land in the state, regardless of where the offer or sale occurs.

The bill was jointly prepared by the division of banking, securities and corporations of the Department of Commerce and Economic Development and the consumer protection section of the Department of Law in response to numerous complaints of fraudulent oil and gas lease schemes. These schemes typically involve solicitations by firms located outside Alaska who acquire an interest in oil or gas leases through bid offerings of the Department of Natural Resources or the federal Bureau of Land Management.

DEPARTMENT OF LAW
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION SECTION

April 29, 1986

The Honorable Pat Rodey
Senate Judiciary Committee
Alaska State Legislature
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Re: HB 125

Dear Senator Rodey:

The purpose of this letter is to summarize CS HB 125 and to provide the committee with information concerning the need for passage of this legislation. We also are providing the committee with a section by section analysis of the bill.

This bill would make three major changes to the Unfair Trade Practices Act: First, it makes clear that the Unfair Trade Practices and Consumer Protection Act protects businesses as well as consumers. Second, the proposed legislation would, by changing the definition of trade and commerce, make it clear that consumer real property transactions would be entitled to the protection of the Act. And third, this proposed legislation clarifies the exemption provisions in the Act.

Protection for Business

Some of the most prevalent types of consumer scams or rip-offs today are often directed at the small business. Under the present Unfair Trade Practices Act it is not clear whether a small business would have the protection an individual consumer would have in these situations. One type of scam that is often perpetrated against small businesses is to send solicitations which appear to be bills or invoices. Often these solicitations are for a subscription to some type of alleged trade or professional journal. Sometimes these solicitations are for a listing in a trade directory or for advertising in a specialized magazine or other circulated printed matter. Very often the small business appoints a person to pay the bills, take care of bookkeeping tasks, etc., who is not informed on purchasing security. Therefore, the phony solicitation which is generally for a small amount, under \$100, is paid because it appears to be a bill that was actually incurred for an item ordered. In truth and fact the scam operator often never publishes the alleged directory or if it is printed it is only circulated to those

businesses who subscribed to it.

Another type of scam that is perpetrated against small businesses is what is often referred to as the "paper pirates" or office supply hustlers scam. This type of scam has many variations. One of the more common variations is to phone a small business in Anchorage or other location in Alaska and say "We have shipped a supply of name-brand toner that can be used in your copying machine to another business. They just went out of business and are not able to take that shipment. It is sitting in the airport in Anchorage, if you take the shipment we'll sell it to you at half-price." The unsuspecting secretary, receptionist or office manager in a small business who receives such a phone call is likely to act on impulse and agree to such an order. Of course, the toner is not sitting in the Anchorage airport; there was never another business that ordered it; and in fact, it not only is not the brand-name product, but use of it in the brand-name product machine will void the warranty and will cause a need for expensive repairs.

The changes proposed in Section 3 to AS 45.50.541(a) and the change in Section 10 to the definitions AS 45.50.561(10) to give "person" the definition found in AS 01.10.060(7) would clarify that businesses are entitled to the same protection from fraudulent operators as are consumers whenever businesses are acting as consumers and not purchasing merchandise for resale.

Business Private Causes of Action

Another important aspect of this legislation would be to provide a method for businesses to privately enforce the UTP Act against unscrupulous competitors and competitors who because of violations in the Act harm the honest business. These changes are found in Section 6 of the proposed committee substitute amending AS 45.50.531. This is a very desirable change in the statute from a budgetary view. As the population of Alaska grows and the volume of trade or commerce increases, the need for additional state enforcement efforts may also increase, coupled with decreases in revenue adequate enforcement levels may not be possible. To some extent this problem might be avoided by allowing private enforcement of the Act. Regularly we receive calls and complaints from businesses who are concerned about the actions of their competitors. While the state may act on those cases to stop any violations of law, we are not, nor should the state be in a position to recover any damages for the honest competitor harmed. Nevertheless, the honest competitor should have a remedy that would encourage the seeking of such damages, assuming the competitor could prove that the violations caused

The Honorable Pat Rodey
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the damages. The treble damage award proposed in the statute would act as a penalty provision in such cases of private enforcement.

Consumer Real Property Transactions

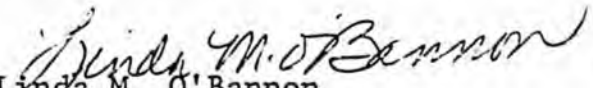
Finally the proposed bill would make it clear that the protective provisions of the UTP Act are applicable to consumer real property transactions as well as the sale of goods and services. Thus, the most costly and important consumer transaction, the purchase of a family home -- whether it be a condominium or a single family home would be afforded protection of the UTP Act.

We urge the Senate Judiciary Committee to give this bill careful consideration and to pass the bill.

Sincerely,

HAROLD M. BROWN
ATTORNEY GENERAL

By:


Linda M. O'Bannon
Assistant Attorney General
Chief, Consumer Protection
Section

LMO/ssr
cc: Art Peterson

Section by Section Analysis to Proposed
Committee Substitute to HB 125

Prepared by: Department of Law
Consumer Protection Section
April 29, 1986

Section 1

New paragraphs (27) and (28)

These two paragraphs are additions to the "laundry list" in 45.50.471(b) of specifically enumerated "unfair or deceptive acts or practices." There is little doubt that violations of either statute referred to in paragraphs (27) and (28) would already be considered "unfair methods of competition and unfair or deceptive acts or practices" under AS 45.50.471(a) as both statutes were enacted to protect consumers. In other words, a violation of AS 45.45.105-110 (paragraph 27) or AS 45.45.120 (paragraph 28) would be a per se violation of AS 45.50.471(a). Nevertheless, it is clearer and provides better notice to the public and the business community to specifically reference the two statutes in paragraphs (27) and (28) in AS 45.50.471(b).

Paragraph (27)

The unordered merchandise provisions, AS 45.45.105-110, were clearly enacted to protect consumers from the unfair business practice of mailing or delivering unordered merchandise to a consumer than demanding payment for that merchandise. AS 45.45.110 provides that "unsolicited merchandise received shall be considered an unconditional gift to the recipient." The enactment of this statute and similar ones in other states greatly reduced this type of consumer fraud for the obvious reason if a consumer can keep the unordered merchandise or throw it in the trash, without owing anything to the merchant - most businesses aren't going to send or deliver unordered merchandise. The practice has not totally disappeared and some consumers spend time and money in an attempt to return unordered merchandise and stop fraudulent billings for the merchandise.

Paragraph (28)

It is already the informal opinion of the Attorney General that violation of AS 45.45.120 with respect to disclosure of funeral costs is an unfair or deceptive act or practice pursuant to AS 45.50.471(a). AS 45.45.120 was enacted to protect consumers in perhaps the most vulnerable time of arranging for the funeral of loved ones. The Funeral Disclosure Act merely requires written disclosures of the itemized costs of specific funeral services listed in the act before the time of rendering the service or providing the merchandise.

Section 2

Section 2 of the bill would clear up an area of ongoing confusion regarding what types of business activities are exempt from the UTP Act under AS 45.50.481(1). This paragraph is in need of amendment because it has been a source of continued controversy due to its "double-negative" language, and because of its (arguable) potential to exempt almost all commercial activities from the UTP Act. Under AS 45.50.481(1), as amended by this bill, the UTP Act would not apply to acts or transactions which are regulated by other laws, only if the other law: (1) prohibits the same type of unlawful practices, (2) does not exempt from regulation the very person who is committing a prohibited act or practice, (3) provides a private cause of action for injured consumer or competitor victims, and (4) provides the state with adequate means to compel compliance with the statute and to recover restitution for injured parties, in the public interest.

This amended exemption section recognizes that while government should not duplicate regulatory efforts, the state also should not exempt a licensed professional or tradesperson from the standard of honest conduct that governs unlicensed, unregulated vendors of a different type of goods or services. It also recognizes that activity should not be exempt from the UTP Act merely because the activity constitutes a crime.

This amendment does not cause "double regulation" of licensed professions or occupations, but rather acknowledges that "regulation" through licensure or certification by a board or commission is not the same type of public law enforcement protection as that provided in the UTP Act. Although some boards have power to prohibit a licensed professional from repeating unlawful practices in the future, most boards do not have authority to order, grant, or even seek restitution for members of the public who were injured by the licensee.

An example of the current confusion that could occur in AS 45.50.481(1) would be that an argument could be made that Barbers and Hairdressers whose professions are regulated in AS 08.13.010-220 are exempt from the UTP Act. The licensing statute does not, however, address any consumer remedies or any enforcement of fraudulent business activities. Thus, a hairdresser could consistently advertise \$15 hair cut prices, but charge each customer in the shop \$25 yet refuse to cooperate in any enforcement efforts under the UTP Act because s/he is "regulated" under the licensing statutes. There are no provisions in the UTP Act that would attempt to regulate the quality of service

of the hairdresser but the UTP Act does prohibit dishonesty, misrepresentations and fraud in business and provides consumer remedies.

This section of the bill would ensure that both private injuries and injuries to the public interest can be corrected, but it does not set up a new "regulatory" scheme.

Sections 3 - 6. Private and Class Actions for Consumers and Businesses

Section 3

Section 3 of the bill amends AS 45.50.531(a) and expands the private and class actions that may be brought by individual members of the public. The new language in subsection (a) makes it clear that any person who purchases or leases any item of value in trade or commerce for use and not for resale (not merely the traditional household or family consumer buying goods or services), may bring a private cause of action against a party who uses an unfair trade practice which harms the purchaser or lessee. Thus a business concern buying airline tickets for employees, or a village corporation buying office photocopier supplies as well as the individual who purchases an automobile for personal use would have UTP Act protection. Another amendment to subsection 531(a) deletes the existing clause specifying in which judicial district the injured person must sue. The general venue laws and rules would apply.

Section 4

Section 4 of the bill amends the private class action portion of the UTP Act (AS 45.50.531(b)) to eliminate the requirement that an injured person wishing to bring a class action on behalf of himself and other similarly situated persons is required first to get the approval of the attorney general. Such a prerequisite is an unfair and perhaps unconstitutional barrier to a private party's right to seek redress from the courts.

Section 5

Section 5 of the bill amends AS 45.50.531(h), which allows Alaska merchants who are found liable for damages in a court action under the Act to seek redress in turn from their manufacturer or supplier of merchandise. The bill amends this provision to enable a retailer also to seek redress from the manufacturer or supplier when the retailer satisfies a customer's claim without legal action. The retailer must give reasonable

notice and an opportunity to satisfy the customer's claim to the manufacturer or supplier, but if the manufacturer or supplier does not do so, the retailer would have a private cause of action to recover the cost of satisfying the customer.

Section 6

Section 6 of the bill amends AS 45.50.531 in a very important way by adding a new provision that a business that is injured by a competitor who commits an unfair or deceptive trade practice has a private cause of action against the competitor. This cause of action may be inferred in the current UTP Act, but, in order to enhance the rights of private business competitors to guard their own place in the market against unfair competition, a clearly spelled out private cause of action for the injured competitor is needed. Businesses who often have the resources to pursue private causes of action should not have to depend on state action to stop unfair practices by their competitors.

Sections 7 - 11. Revised and Expanded Definitions of Who is Protected by the UTP Act; Short Title

Section 7

Section 7 of the bill amends AS 45.50.541, the only section of the UTP Act where it is appropriate to restrict the word "consumer" to mean a person who acquires goods or services for personal, family, or household purposes (as opposed to a business or municipal "consumer" who purchases goods for use in the work place). AS 45.50.541 is concerned with the non-negotiability of the consumer installment contracts or "paper," such as the three-year contract signed by a consumer purchasing a health spa membership or an automobile. The special protections in this section are necessary only for a consumer who finances the traditional type of consumer purchase made for personal, family, or household use. Therefore, a restrictive definition of "consumer" is added to AS 45.50.541 as subsection (d).

Section 8

Section 8 of the bill deals with a similar problem. Presently, AS 45.50.542 contains a provision that "consumers" cannot waive their protections under the Act. To make it clear that this Act covers all types of customers, and not merely a restrictively defined "consumer," the bill amends this section to read that a waiver by any person who is the intended beneficiary of the protections in the Act is contrary to public policy, and is void.

Section 9

Section 9 of the bill, new AS 45.50.560 provides for a short title by which to cite AS 45.50.471 -- 45.50.561, "The Unfair Trade Practices Act." (Normally, of course, this would be the last section in the article; however, in this instance there is no room left after the definition section and before the next article begins.)

Section 10

Section 10 of the bill amends AS 45.50.561 by adding three definitions. The first, AS 45.50.561(10), clarifies that whenever the word "person" is used in the UTP Act, it has the meaning given to it in the general definition section for the Alaska Statutes, AS 01.10.060(7), which is

"person" includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.

The second new definition, AS 45.50.561(11), is a crucial component of this bill. It adds a definition of "trade or commerce" that affects the operative section of the entire Act. AS 45.50.471, which forbids unfair or deceptive practices in "the conduct of trade or commerce." Recent court decisions have limited the coverage of the UTP Act to merely the sale of "goods or services," which would eliminate real property and commercial intangibles, such as commodity futures, from the Act. However, it is the opinion of the attorney general that it was the original intent of the legislature to prohibit all unfair trade practices, not only in the sale of goods or services, but in the conduct of any type of "trade or commerce." The new definition of trade or commerce includes not only a sale or lease, but all advertisements or offers for sale, or the barter or any other type of distribution of any type of goods, services, or any type of property, article, commodity, or other thing of value.

*substantive
lots*

This definition of "trade or commerce" is especially critical in reversing the Alaska Supreme Court's ruling that the UTP Act does not cover the sale of real property. State v. First Nat'l Bank of Anchorage, 660 P.2d 406 (Alaska 1982). Under that ruling and traditional property law, a builder or developer who sells a piece of land with a newly built home on it, may not be covered by the UTP Act because the house and arguably the materials, appliances, and builder services included in its construction are considered to be "real property."

The court's restriction of the UTP Act to "goods or services" also leaves other gaps in the public protection. For instance, Alaskans are often exposed to high pressure offers to buy commodity futures, an item of value in trade or commerce, but which is not regulated by our state securities law, and arguable is not "goods" or "services," under the UTP Act.

Section 10 also adds, as AS 45.40.561(12), a definition of what it means for a person to "willfully" violate the statute. The term "willful" is not relevant in public actions brought by the attorney general, but is the operative language that gives rise to triple damages in private actions brought by consumer victims or honest competitor victims who use their private cause of action against unfair trade practices.

Section 11 of the bill repeals AS 45.50.561(6), the present definition of "consumer." Section 7 of the bill adds a more restrictive definition of "consumer" only to AS 45.50.541, concerning the non-negotiability of consumer paper, where it is appropriate.

Offered: 4/1/85
Referred: Rules

Original sponsor: Rules/Governor

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR HOUSE BILL NO. 125 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 FOURTEENTH LEGISLATURE - FIRST SESSION
5 A BILL
6 For an Act entitled: "An Act revising the Alaska Unfair Trade Practices
7 and Consumer Protection Act; and adding new causes of
8 action for private business."
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
10 * Section 1. AS 45.50.471(b) is amended by adding new paragraphs to
11 read:
12 (26) failing to comply with AS 45.45.105 - 45.45.110 relat-
13 ing to unsolicited merchandise;
14 (27) failing to comply with AS 45.45.120 relating to disclo-
15 sure of funeral costs.
16 * Sec. 2. AS 45.50.481 is amended to read:
17 Sec. 45.50.481. EXEMPTIONS. Nothing in AS 45.50.471 -
18 45.50.561 applies to
19 (1) an act or transaction regulated under laws administered
20 by the state, by a [ANY] regulatory board or commission, or an officer
21 acting under statutory authority of the state or of the United States,
22 if [UNLESS] the law regulating the act or transaction
23 (A) prohibits [DOES NOT PROHIBIT] the practices de-
24 clared unlawful in AS 45.50.471;
25 (B) does not exempt from regulation the person commit-
26 ting the prohibited act or practice;
27 (C) provides remedies for injured persons equal to or
28 greater than those provided in AS 45.50.471 - 45.50.561; and
29 (D) unless the law is a federal law that preempts

1 state action, provides the state with adequate enforcement and
2 restitution remedies in the public interest similar to those
3 remedies in AS 45.50.501 and 45.50.551;

4 (2) an act done by the publisher, owner, agent, or employee
5 of a newspaper, periodical or radio or television station in the
6 publication or dissemination of an advertisement, when the owner,
7 agent or employee did not have knowledge of the false, misleading or
8 deceptive character of the advertisement or did not have a direct
9 financial interest in the sale or distribution of the advertised
10 product or service;

11 (3) an act or transaction regulated under AS 21.36 or
12 AS 06.05 or a regulation adopted [ANY REGULATIONS PROMULGATED] under
13 the authority of either of those chapters; [insert A here]

14 * Sec. 3. AS 45.50.531(a) is amended to read:

15 (a) A person who purchases or leases an item of value in trade
16 or commerce for use and not for resale, [GOODS OR SERVICES] and who
17 thereby suffers an ascertainable loss of money or real or personal
18 property [, REAL OR PERSONAL,] as a result of another person's act or
19 practice declared unlawful by AS 45.50.471, may bring a civil action
20 [IN THE JUDICIAL DISTRICT IN WHICH THE SELLER OR LESSOR RESIDES OR HAS
21 HIS PRINCIPAL PLACE OF BUSINESS OR IS DOING BUSINESS,] to recover
22 actual damages or \$200, whichever is greater. The jury, or, if the
23 action is tried without a jury, the judge, may, in cases of wilful
24 violation, award up to three times the actual damages sustained. In
25 [, AND IN] all cases the court may provide equitable relief it consid-
26 ers necessary or proper.

27 * Sec. 4. AS 45.50.531(b) is amended to read:

28 (b) A person entitled to bring an action under this section may,
29 [AFTER INVESTIGATION BY AND APPROVAL OF THE ATTORNEY GENERAL,] if the

1 unlawful act or practice has caused similar injury to numerous other
2 persons similarly situated and if the person [HE] adequately repre-
3 sents the similarly situated persons, bring an action on behalf of all
4 [HIMSELF AND OTHER] similarly injured and situated persons to recover
5 actual damages. A person planning to bring an action under this
6 subsection shall deliver [FIRST SUBMIT] to the attorney general a copy
7 of the [HIS PROPOSED] complaint when it is filed with the court [, AND
8 HE MAY NOT FILE THE COMPLAINT IN COURT WITHOUT THE ATTORNEY GENERAL'S
9 APPROVAL]. In an action brought under this subsection, the court may
10 in its discretion order, in addition to damages, injunctive or other
11 equitable relief.

12 * Sec. 5. AS 45.50.531(h) is amended to read:

13 (h) A manufacturer or supplier [MANUFACTURERS OR SUPPLIERS] of
14 merchandise, whose [THE] fault [OF WHICH] is the basis for the action
15 under this chapter, is [ARE] liable for the damages assessed to or
16 suffered by a retailer sued or [RETAILERS] charged under this chapter.
17 A retailer has a private cause of action to recover from a
18 manufacturer or supplier under this subsection the actual damages
19 suffered by the retailer if

20 (1) the retailer has given the manufacturer or supplier
21 reasonable notice and a reasonable opportunity to satisfy the
22 customer's claim;

23 (2) the manufacturer or retailer has not satisfied the
24 customer's claim;

25 (3) the retailer satisfies, before the customer files an
26 action in court, a claim of the customer against the manufacturer or
27 supplier arising under this subsection; and

28 (4) the retailer has suffered damage by satisfying the
29 customer's claim.

1 * Sec. 6. AS 45.50.531 is amended by adding a new subsection. to read:

2 (i) A business person whose business is injured and who suffers
3 an ascertainable loss of money or real or personal property as a
4 result of a competitor's act or practice declared unlawful by AS 45.-
5 50.471, may bring a civil action to recover actual damages. The jury,
6 or, if the action is tried without a jury, the judge, may, in cases of
7 wilful violation, award up to three times the actual damages sus-
8 tained. In all cases the court may provide equitable relief it con-
9 siderers necessary or proper.

10 * Sec. 7. AS 45.50.541 is amended by adding a new subsection to read:

11 (d) In this section, "consumer" means a person who seeks or
12 acquires goods or services, whether or not affixed to real property,
13 by lease or purchase, for personal, family, or household purposes.

14 * Sec. 8. AS 45.50.542 is amended to read:

15 Sec. 45.50.542. WAIVER VOID. A waiver by a person [CONSUMER] of
16 a provision [THE PROVISIONS] of AS 45.50.471 - 45.50.561 that was
17 enacted to protect that person is contrary to public policy and is
18 unenforceable and void.

19 * Sec. 9. AS 45.50 is amended by adding a new section to read:

20 Sec. 45.50.560. SHORT TITLE. AS 45.50.471 - 45.50.561 may be
21 cited as the Unfair Trade Practices Act.

22 * Sec. 10. AS 45.50.561 is amended by adding new paragraphs to read:

23 (10) "person" has the meaning given in AS 01.10.060;

24 (11) "trade or commerce" means the advertising, offering for
25 sale, barter, or distribution of a service or property, tangible or
26 intangible, real, personal, or mixed, or other article, commodity, or
27 thing of value, wherever situated, and includes trade or commerce
28 directly or indirectly affecting the people of the state;

29 (12) "wilful" means that the person committing the act or

1 practice declared unlawful by AS 45.50.471 knew or should have known
2 that the conduct was an unfair or deceptive trade practice or unfair
3 method of competition.

4 * Sec. 11. AS 45.50.561(6) is repealed.