

SB

319

FISCAL NOTE

No. 1
 Bill Version: CSB319(L&C)
 (S) Publish Date: 3/13/98

STATE OF ALASKA
 1998 LEGISLATIVE SESSION

Revision Date (Note if correction) _____	Dept Affected _____ Law _____
Title <u>An Act relating to arbitration, amending Rules 57(a)</u>	BRU <u>Civil Division</u>
<u>and 77(g) Alaska Rules of Civil Procedure</u>	Component <u>Commercial</u>
Sponsor <u>Senator Phillips</u>	
Requester <u>Senate Labor and Commerce Committee</u>	Component Serial No <u>2211</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SB 319 amends Title 9, Chapter 43, relating to arbitration. The bill adds a new section requiring that arbitration agreements contain a prominent notice that states that a party has the option to compel arbitration and to bind the other party to the arbitration decision, as well as identifying the rights and remedies available under arbitration, as compared to those available under the law. Failure to comply with the notice agreement would be grounds to stay an arbitration proceeding, or to vacate an award procured through arbitration.

The bill also makes a substantial modification to AS 09.43.010. It leaves intact the requirement of enforcing agreements to arbitrate claims or disputes which arise before the agreement to arbitrate is executed. However, a new subsection (b) is added which prevents consumers from being required to arbitrate certain types of claims, when these claims arise after the execution of the contract which includes the arbitration requirement. Thus, this bill will shelter consumers from form

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Division <u>Attorney General's Office</u>	Date <u>2/10/98</u>
Approved by Commissioner <u>Bruce M. Botelho, Attorney General</u>	Date <u>2/10/98</u>
Agency <u>Department of Law</u>	

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FISCAL NOTE

STATE OF ALASKA
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BILL NO. SB 319
#1

ANALYSIS CONTINUATION

agreements or other non-negotiated contracts (e.g., adhesion contracts) which include arbitration clauses by making those clauses unenforceable unless the parties agree, after the claim arises, to arbitrate the dispute. The claims covered by this new subsection include, in part, personal injury claims, insurance contract coverage disputes, and property or services purchase agreements valued at less than \$5,000.

This bill will have no fiscal impact on the Department of Law.



ALASKA STATE LEGISLATURE

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SPONSOR STATEMENT

CSSB 319 (RLS), "An Act relating to arbitration; amending Rules 57(a) and 77(g), Alaska Rules of Civil Procedure; and providing for an effective date."

Last year, the Legislature directed the Alaska Judicial Council to propose a program for alternative dispute resolution (arbitration). An arbitration clause is now being used as a standard procedure in contracts. Possibly the most common use, and the one that effects the most people, is in real estate contracts. It is all too easy for anyone purchasing or selling a house to sign a real estate contract that includes this arbitration clause without fully understanding the implications of arbitration. In addition, there are no guidelines established anywhere governing many aspects of an arbitration proceeding. Questions such as what can be arbitrated, and what are the qualifications of the arbitrator and who decides those qualifications remain unanswered. In addition, there is no provision that arbitration be preceded by mediation. The arbitrator does not have to follow state law, or any law, during proceedings or in making a decision. There is no limit on the amount of money requested by a party to arbitration by another, and no limit on the time an arbitration can be pursued after a contract is signed.

Absent ground rules, it is important that parties subject to arbitration are aware of the implications of an agreement to arbitrate. SB 319 requires that in a contract subject to arbitration, language to that effect will be typed in capital letters within the arbitration agreement or separate document. This language will state clearly that a party to arbitration may be limiting or waiving rights to other remedies, including appeal of an arbitrator's decision to a court of law. It limits the amount that can be arbitrated to \$7,500.

CSSB 319 (RLS) clarifies provisions in the Labor and Commerce Committee Substitute. It excludes labor management agreements unless the parties agree that they want to include an arbitration clause. It also adds that these provisions do not apply to (1) personal injury claims, very small claims where the total consideration, not the amount to be arbitrated, is less than the small claims amount, and (3) insurance claims or annuity contracts, except for contracts between insurance companies.

**Testimony Before the Senate Judiciary Committee re: SB 319 Amending
Alaska's Arbitration Statutes**

**Offered by Francine D. Harbour, Attorney at Law
May 6, 1998**

My law firm represents many consumers and small businesses involved in real estate transactions and other contracts. My colleague, attorney Bill McNall, and I drafted the original version of SB 319.

This bill is important consumer protection legislation. The essence of the bill is the requirement of specific disclosures about the consequences of mandatory arbitration. These disclosures are necessary so that the consumer or small businessperson can be on a level playing field with more sophisticated people or companies.

Sophisticated business people know both the upside and the downside of mandatory arbitration. They know that arbitration can offer the advantages of speed, privacy and cost savings that litigation cannot offer. They also know, however, that arbitration can expose them to totally unfair results. So what do these sophisticated parties do to get the efficiencies of arbitration but avoid the unfairness? They negotiate whether certain due process protections available in a court should also be available in arbitration.

Unsophisticated consumers and businesses, however, are not being informed about the consequences of arbitration. As a result, they do not have even the opportunity to negotiate a better deal.

Testimony has already been provided about the downside of mandatory arbitration. For example, in arbitration:

- there is no right to appeal an unfair decision to a court of law**
- statutory and constitutional rights that can only be enforced in a court of law will be lost if the arbitrator decides not to enforce those rights**

- even if the contract is procured by fraud, an arbitration clause in the contract "survives" and the victim has no right to go to court
- due process rights such as discovery and confrontation of witnesses will be lost if the arbitrator decides not to grant those rights

The proposed legislation would require written, conspicuous disclosure of these and other significant consequences of mandatory arbitration.

With disclosure of this information, all parties to the contract can make an informed decision about whether to agree to arbitration.

Without disclosure of this information, consumers and small businesses are misled to believe that arbitration will give them a quick, cheap, fair resolution of a contract dispute, when in reality, arbitration may give them a long, expensive, terribly unfair result.

Also, without disclosure of this information, advisors such as real estate agents are exposed to liability for failure to explain the consequences of the mandatory arbitration clauses in their standardized real estate forms.

Many other states have provisions in their arbitration statutes that regulate the disclosure and process of arbitration. Some states, such as Montana, take a minimalist approach and only require a conspicuous statement that the clause is in the contract. Other states, such as Florida, are more heavy-handed and have detailed regulations about who can serve as an arbitrator, how that arbitrator must be selected, how the arbitration hearing must be conducted, how the decision must be made, and so on.

SB 319 takes the middle approach of requiring fairly detailed disclosures about the consequences of arbitration, but then leaving it up to the parties to decide what to do.

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85

Ln 3

Sec 11

Jan 1

1989

A M E N D M E N T

OFFERED IN THE HOUSE
TO: CSSB 319(RLS)

BY REPRESENTATIVE ROKEBERG

1 Page 3, line 24, following "parties":

2 Insert "(1)"

3 Page 3, line 26:

4 Delete "(1)"

5 Insert "(A)"

6 Page 3, line 28:

7 Delete "(2)"

8 Insert "(B)"

9 Page 4, line 1:

10 Delete "(3)"

11 Insert "(C)"

12 Page 4, line 2, following "companies":

13 Insert ", or

14 (2) if the agreement allows the parties complete and unlimited court
15 review and appeal of the award and arbitration process, and the review and appeal are
16 not limited to the court review and appeals provisions of this chapter"

EARNEST MONEY RECEIPT AND AGREEMENT TO PURCHASE

Regarding Property described as _____

request or closing any and all information and copies of documents related to this sale to both the Listing and Selling Brokers and their agents.

7 **AGENCY DISCLOSURE.** The following agency relationship(s) are hereby confirmed for this transaction: The Listing Broker and his/her agents are considered the agent of the Seller exclusively unless otherwise acknowledged and approved in writing by the Seller and Buyer. The Selling Broker and his/her agents are considered the agent of THE BUYER EXCLUSIVELY, THE SELLER EXCLUSIVELY, BOTH THE BUYER AND SELLER UNDER DUAL AGENCY. The Seller acknowledges that if the Selling Broker is an agent of the Buyer, the Selling Broker is sharing in the compensation paid by the Seller to the Listing Broker unless otherwise described here: _____

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

8. **EARNEST MONEY - DISPOSITION.** If either Buyer or Seller fail to comply with this agreement, then the other party may terminate this agreement with written notice. In the event that the Broker holding the earnest money is unable to determine to the Broker's satisfaction which party is responsible for failing to perform the requirements of the contract, the Broker may require the parties to execute an agreement for release of the earnest money. If they are unwilling to execute such an agreement, Buyer and Seller agree to submit the matter to mediation. If mediation is not successful, the Broker holding the earnest money may file an interpleader action in a court of competent jurisdiction for determination of disposition of the earnest money. If interpleaded, the Broker shall be entitled to an award, from the earnest money, of attorney's fees and costs.

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

9 **MEDIATION/ARBITRATION OF DISPUTES.** Outside of earnest money disputes, Buyer and Seller agree to mediate any dispute or claim between them, or by or against Broker(s) and/or their Agent(s), which arises out of this contract or any resulting transaction before arbitration or litigation can proceed. Buyer and Seller recognize that settlement through mediation is almost always a better economic solution than continuing the cost of formally resolving a dispute. Buyer and Seller understand that reducing costs and reaching an agreement for parties involved in dispute resolution are recognized as the primary goals.

If a matter is not resolved through mediation, the matter shall then be submitted and decided by binding arbitration pursuant to Rules of the American Arbitration Association, or litigation, but not both. Please choose one: Arbitration Litigation

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

10. **PROPERTY DISCLOSURE.** Buyer has has not received a copy of a written disclosure statement.

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

11. **LEAD-BASED PAINT INSPECTION.** This Agreement is contingent upon a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards at the Buyer's expense. (Intact lead-based paint that is in good condition is not necessarily a hazard. See EPA pamphlet *Protect Your Family From Lead in Your Home* for more information.) Within ten (10) days after acceptance, Buyer will report to Seller in writing a list of the specific existing deficiencies and corrections needed, together with a copy of the inspection and/or risk assessment report. The Seller may, at the Seller's option, within five (5) days after delivery of the report, elect in writing whether to correct the conditions prior to close of escrow. If the Seller elects to correct the condition, the Seller will furnish the Buyer with certification from a risk assessor or inspector demonstrating that the condition has been remedied before the close of escrow. If Seller does not elect to make the repairs, or if the Seller makes a counter-offer, the Buyer will have five (5) days to respond to the counter-offer or waive this contingency and take the property in an "as is" condition with respect to this matter, or this Agreement will terminate. Buyer may waive this contingency at any time without cause.

Buyer's Initials _____ / _____ Seller's Initials _____ / _____

12. **ENTIRE AGREEMENT.** Seller's acceptance of this Agreement will be based upon Buyer's apparent ability to qualify for this purchase within the agreed time and according to the agreed terms. This Agreement is not assignable without the express written consent of Seller.

In any action, proceeding or arbitration arising out of this agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs.

This agreement has significant legal and financial consequences. If you do not understand the effect of any part of this agreement, you are advised to seek independent legal and financial counsel, including tax advice from a tax attorney or CPA, before signing. The broker or agent cannot give legal advice.

This document and any referenced attachments, totaling _____ pages contain the entire agreement between the parties. It may not be modified except in writing and signed by the Parties. Time is of the essence in this contract.

BUYER SELLER