# SB

# 177

Proposed language for CSSB 177 Sec. 5(7):

(7) compel an insured or third-party claimant in a case where liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in fact and law that is documented in the insurer's file.

FAX TRANSMISSION COVER SHEET

# Office of
# Representative Pete Kott
ALASKA STATE LEGISLATURE

Mike Ford
TO

3
number of pages, including cover

2029
FAX

ORGANIZATION
Legis House (JUD)

FROM 4990

DATE

INTERNET: http://www.akrepublicans.org/Kott.htm
E-MAIL: Representative_Pete _Kott@Legis.state.ak.us

MESSAGE: Please insert attached conceptual & technical amendments into new JUD CS for SB 177
--Thank you. Lisa



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1-LS0902\M.1
Ford
4/14/00

# AMENDMENT #1

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HCS CSSB 177(L&C)

Page 4, line 7, following "loss":

Insert "**or harm**"

Page 4, lines 9 - 10:

~~Delete "whether the violation was a single act or a trade practice"~~ NO

Insert "**the promptness and completeness of remedial action**"

after violation.

Page 4, following line 10:

Insert a new bill section to read:

"* **Sec. 9.** AS 21.36.320 is amended by adding a new subsection to read:

(h) If the violation of this chapter is a single act, the director may not impose a penalty unless the violation results in loss or harm or is intentional."

Renumber the following bill section accordingly.

Note: only change to what is typed is that line 4 will not be included in the amendment and line 5 of the amendment should be included after the word violation.

Proposed language for CSSB 177 Sec. 5(7):

(B) ~~(8)~~ compel an insured or third-party claimant in a case where liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in fact and law that is documented in the insurer's file.

- Mike:

(1) Please insert the above language into a new CS for SB 177 as (7)(B), pg 3 currently lines 3 to 7. replacing current language in (7)(B) from version 902\M.

(2) Please amend (7)(A) by deleting word compelling from line 29 and making (7)(A) read "a pattern or practice of compelling insureds to litigate for recovery of amounts due under insurance policies by offering substantially less than the amounts ultimately recovered in actions brought by the insureds."

Note: It may be the case that 7(A) becomes simply (7) and 7(B) becomes 8 now that the two are no longer interconnected by word "compel." This amendment to 7(A) & (B) was conceptual. The next page w/ Amendment #1 is technical and should be incorporated in the new CS. -Leslie

## SUMMARY OF SURVEY RESULTS

The Division of Insurance recently polled all the states on the following questions. The following states responded. This is a very brief paraphrase and summary of the results. Most state laws have some variations and unique features not mentioned here. The relevant statutes and regulations should be consulted.

| | **"Regarding unfair trade practices, unfair methods and deceptive acts, does your statute prohibit single incidents, or only ongoing patterns and practices?** | **Regarding unfair claim settlement practices, does your statute protect insureds only, or does it also protect third-party claimants? Does your statute specifically mention insured and/or third party claimants, or simply refer to any person or any claimant?** | **Cite:** |
|---|---|---|---|
| California | Knowingly on one occasion or frequently enough to indicate a practice. | Some regulations protect insureds, others protect all claimants. | California Insurance Code section 790.03; 10 CCR 2695.1 |
| Connecticut | Single acts, except claim settlement practices which must be committed or performed with such frequency to indicate a general business practice. | All claimants, except that "insureds" cannot be compelled to litigate claims. | CT. Gen. Stat. 38a-816(6), as amended 10/1/99 by Public Act 99-284 §30. |
| Florida | Isolated events and business practices, but some claim settlement practices must be done with such frequency to indicate a general practice. | Insureds and "other persons." | FS §626.9541(1) |
| Idaho | Single incident. | No reference to either 1st or 3rd party; insurer must perform reasonably and fairly. | |
| Indiana | Single incidents prohibited. | Different sections protect insureds, insureds and beneficiaries, and claimants. Insureds cannot be compelled to litigate. | Ind. Code §27-4-1-4.5, 6 |
| Kentucky | Not specified. Commissioner has authority and discretion for all issues. | Commissioner authority and discretion | KRS 304.1, 304.12 |
| Maryland | Single incidents and general business practices. | | MD Code Ann., Ins. §§27.301-305; COMAR 31.15.07, 08. |

| | | | |
|---|---|---|---|
| Nebraska | Flagrantly and in conscious disregard, or a general business practice, with a statutory exception elsewhere in statutes for "victims of abuse" protection. | Claimants and insureds. May not compel "insureds and beneficiaries" to litigate. | Neb. Stat. 44-1539-1544. |
| Oregon | Single incidents prohibited. Unfair practices specified by administrative rule. | Acts are simply prohibited.. Any reference is to a "claimant." | ORS 746.075, 100, 110, 160, 240; OAR 836-080-0205 et seq. |
| Pennsylvania | Commissioner has some discretion in isolated incidents, but by precedent an ongoing practice is generally required for enforcement action. Claims practice must be frequent enough to indicate business practice. | Some generically without reference to "claimant" or "insured," others specifically reference claimants, insureds, and beneficiaries. | 40 PS §1171.1-15. |
| Rhode Island | Flagrant disregard of law or committed with such frequency. Enforcement action usually taken for patterns. | All claimants, first and third party. | RI §27-9.1 |
| Tennessee | Statute does not specify, except unfair settlement practices which must be a general business practice. | Various sections refer to insured, claimant, or both, or are silent. | TCA 56-8-101 et seq. |
| Wisconsin | Single incidents prohibited. | The rule specifically promotes fair and equitable treatment of policyholders, claimants, and insurers. Compelling "insureds and claimants" to litigate prohibited. | §628.34 Wis.Stat.; Ins 6.11, Wis. Adm. Code |

1-LS0902\M.2
Ford
4/13/00

# AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE ROKEBERG

TO: HCS CSSB 177(L&C)

Page 2, line 29, through page 3, line 6:

Delete all material and insert:

"(7) compel **an insured or third-party claimant regarding a claim in which liability is not at issue to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have a reasonable basis in law and fact** [INSUREDS TO LITIGATE FOR RECOVERY OF AMOUNTS DUE UNDER INSURANCE POLICIES BY OFFERING SUBSTANTIALLY LESS THAN THE AMOUNTS ULTIMATELY RECOVERED IN ACTIONS BROUGHT BY THOSE INSUREDS];"

Here is suggested language for limiting the director's single act authority in SB 177. The amendment does this by adding a new section to AS 21.36.320, the penalty provision.

The current language of AS 21.36.320(g) states:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, and deterrence of the violator or others.

Here is suggested language that would add two elements to (g) and add a new subsection (h) to restrict enforcement dealing with single acts:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss or harm caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, the promptness and completeness of remedial action, and deterrence of the violator or others.

(h) If the violation is a single act, the director may not impose a fine unless the violation ~~caused loss or harm~~ or is willful. caused loss or harm (but wants removed)

(Best) but attached is a compromise. From Lodr at request of Rep. Rokeburg.

# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE


**MEMORANDUM**

To: Representative Pete Kott
Chair, House Judiciary Committee

From: Senator Dave Donley DD

Re: Hearing Request for SB 177 - "The Alaska Insurance Consumers Protection Act"

Date: April 12, 2000

I request that you schedule House CS for Senate Bill 177 (L&C), "The Alaska Insurance Consumers Protection Act", for a hearing in your committee. SB 177 passed the Senate by a 19-1 vote.

House CS SB 177 (L&C) will give injured Alaskans and insurance consumers a fairer playing field when dealing with insurance companies by allowing the Division of Insurance to take corrective action on individual acts of unfair or deceptive insurance trade practices.

The Alaska Division of Insurance strongly supports this legislation.

I have included the sponsor statement for your review.

If you have any questions, please contact James Armstrong of my staff at 3887.

DD/jja


Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

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# SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE


**Sponsor Statement**
**for**
**CS for SB 177 (L&C)**
**"The Alaska Insurance Consumers Protection Act"**

Senate Bill 177 "The Alaska Insurance Consumers Protection Act" will give injured Alaskans and insurance consumers a fairer playing field when dealing with insurance companies. The Alaska Division of Insurance supports SB 177.

Section #3 of SB 177 makes a major step toward better consumer protection by allowing the Division of Insurance to take corrective action on individual acts of unfair or deceptive insurance trade practices. Amazingly, under existing law, the division does not have the jurisdiction to take action on individual acts of unfair insurance claims practices. The division is powerless to take action on an individual insurer until a pattern of deceptive trade practices has developed. Such a pattern is often very difficult to prove and can require staffing the division currently does not have. This lack of jurisdiction promotes bad claims practices by insurance companies since they know that there is little enforcement to protect individual injured victims and consumers.

Section #4 of Senate Bill 177 also protects consumers by protecting those who blow the whistle on iliegal insurance acts. Many consumers and even insurance agents are sometimes intimidated from pursuing a fair settlement because of fear of retaliation from the insurer. This discourages claimants ..om pursuing a fair settlement and hinders the consumer protection ability of the Division of Insurance, as they are unable to gain access to information needed to effectively protect consumers. SB 177 provides immunity from liability for defamation for those persons who provide the division with information regarding an unfair act or practice. This provision will better protect both agents and insurance consumers.

Section #5 of SB 177 increases protections against unfair claims practices against injured Alaskans. Under existing law, injured third party claimants are not entitled to the same statutory protections as first party claimants. Insurers know this and often will require an injured third party to pay the costs of arbitration or mediation before the process even begins. If the amount at issue is less than the cost of arbitration the insurer can unfairly "low ball" the injured party. Additionally, insurers often use the high cost of litigation, which also may exceed the value of the claim, as leverage in coercing legitimate third party claimants to accept settlements that do not adequately compensate them for their injuries. Under current law such practices are prohibited as to first party claims but not as to third party claims. SB 177 expands the


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prohibition against such bad faith actions to third party claimants and affords them a fair arbitration claims process while also curtailing unnecessary litigation. Affording and expanding insurance claims protections to both first and third party claimants is fair, equitable and good public policy.

Section #6 of SB 177 clearly states that the provisions of AS 21.36.125, which define unfair claims practices, do not create a private cause of action which is the current status quo.

Section #7 of SB 177, at the specific request of the Division of Insurance, prohibits insurers from denying a claim in which multiple causes caused the loss to occur and there is a secondary cause that is not covered by the policy. SB 177 ensures that a claim is covered when a loss has more than one cause and the dominant cause is covered by the policy.

Section #8 of SB 177 makes it clear that the Division of Insurance can take into account the fact that a potential violation was a single act or trade practice.

Injured Alaskans and insurance consumers deserve better protection from insurance company unfair claims practices. Senate Bill 177 will help provide the Division of Insurance with the necessary authority it needs to protect injured Alaskans and insurance consumers.

DD/jja

**CS FOR SENATE BILL NO. 177(L&C)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

**BY THE SENATE LABOR AND COMMERCE COMMITTEE**

**Offered: 3/1/00**
**Referred: Rules**

**Sponsor(s): SENATOR DONLEY**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to insurance trade practices; and providing for an effective date."**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Insurance Consumers Protection Act.

*** Sec. 2.** AS 21.36.010 is amended to read:

**Sec. 21.36.010. Purpose.** The purpose of this chapter is to regulate **an act or a** trade **practice** [PRACTICES] in the business of insurance in accordance with the intent of Congress as expressed in **15 U.S.C. 1011 - 1015 (McCarran-Ferguson Act)** [THE ACT OF CONGRESS OF MARCH 9, 1945 (P.L. 79-15; CH. 20, 59 STAT. 33),] by defining or providing for determination of all the practices in this state that constitute **an** unfair **method** [METHODS] of competition or **an** unfair or deceptive **act**

**or practice** [ACTS OR PRACTICES] and by prohibiting them.

* **Sec. 3.** AS 21.36.020 is amended to read:

**Sec. 21.36.020. Unfair methods, deceptive acts prohibited.** A person may not engage in **an act or** a trade practice in this state or relative to a subject resident, located, or to be performed in this state that is defined in this chapter as, or determined under this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

* **Sec. 4.** AS 21.36.070(b) is amended to read:

(b) A person providing the director with information concerning the financial condition or **an act or a practice** [PRACTICES] of a licensee of the division is immune from liability for defamation.

* **Sec. 5.** AS 21.36.125 is amended to read:

**Sec. 21.36.125. Unfair claim settlement practices.** A person may not commit [OR ENGAGE IN WITH SUCH FREQUENCY AS TO INDICATE A PRACTICE] any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) compel **an insured or third-party claimant** [INSUREDS] to litigate for recovery of **an amount** [AMOUNTS] due under **an** insurance **policy** [POLICIES] by offering substantially less than **an amount** [THE AMOUNTS]

ultimately recovered in **an action** [ACTIONS] brought by **the insured or third-party claimant** [THOSE INSUREDS];

(8) attempt to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

(9) attempt to settle a claim on the basis of an application that has been altered without the consent of the insured;

(10) make a claims payment without including a statement of the coverage under which the payment is made;

(11) make known to **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] a policy of appealing from **an** arbitration **award** [AWARDS] in favor of **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] for the purpose of compelling **the insured or third-party claimant** [THEM] to accept **a settlement or compromise** [SETTLEMENTS OR COMPROMISES] less than the amount awarded in arbitration;

(12) delay investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

(13) fail to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

(15) offer a form of settlement or pay a judgment in any manner prohibited by AS 21.89.030.

* **Sec. 6.** AS 21.36.125 is amended by adding a new subsection to read:

(b) The provisions of this section do not create a private cause of action for a violation of this section.

* **Sec. 7.** AS 21.36 is amended by adding a new section to read:

**Sec. 21.36.212. Prohibited denial of claim for causation.** An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

INS. Work Adopted

* **Sec. 8.** AS 21.36.320(g) is amended to read:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, **whether the violation was a single act or a trade practice,** and deterrence of the violator or others.

* **Sec. 9.** This Act takes effect January 1, 2001.

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Division of Insurance
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March 20, 2000

The Honorable Dave Donley
Alaska State Senate
State Capitol, Room 508
Juneau, AK 99801-1182

Dear Senator Donley:

The Alaska Division of Insurance (ADOI) supports SB 177, the Alaska Insurance Consumer Protection Act, sponsored by Senator Dave Donley. The bill is now in the Senate Rules Committee.

Currently under AS 21.36.125 the ADOI cannot penalize a single unfair action of an insurance company in its handling of consumer claims, no matter how serious. Alaska Statute 21.36.125 gives authority to the director to take action against an insurance company only if a pattern of unfair trade practices acts amounting to a general business practice or multiple violations of the same claims standard is found. Individual consumers can be seriously harmed by a single unfair action of an insurance company. For example, in a recent complaint received at the division, a consumer was pre-certified for hospitalization by a health insurance company, but the insurance company unfairly delayed payment of the hospital's $186,000 bill for six months, threatening the consumer's credit rating. Had the provisions of SB 177 been in place, the division would have been able to take action against the insurance company to deter such actions in the future.

The Alaska Supreme Court stated in State Farm v. Nicholson, 777 P. 2d 1152 (Alaska 1989):

> Under AS 21.36.125, entitled "Unfair claims settlement practices," an insurance company only violates the chapter if it engages in certain proscribed acts "with such frequency as to indicate a practice. [emphasis added]."

The bill confirms that AS 21.36.125 does not create a private cause for legal action.

The bill also clarifies the meaning of causation for insurance policies in Alaska. This clarification will make sure that policy benefits are consistent with the reasonable expectations consumers have regarding their insurance coverage. Consumers should not have to make complex legal arguments relating to the cause of a loss in order for insurance companies to pay benefits for their losses under the insurance policy.

Sincerely,

Robert A. Lohr
Director

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LAW OFFICES

*Michael J. Schneider, P.C.*

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ANCHORAGE, ALASKA 99501

February 16, 2000

The Honorable Dave Donley
Alaska State Legislature
Mail Stop: 3100/Room 508
Juneau, AK 99801-1182

***RE: SB 177: "An Act Relating to Insurance Trade Practices; and Providing for an Effective Date"***

Dear Senator Donley:

I write in support of SB 177.

The Bill makes a single, unlawful, and unreasonable act by insurance carriers subject to scrutiny by the Division of Insurance. It is about time. Alaska insurance consumers should not be subject to the "one free bite" rule. It should not be incumbent upon an insurance consumer to show some sort of pattern or practice before Alaska's regulatory agency takes action on that consumer's behalf. A carrier that does not engage in illegal or predatory practices should have nothing to fear from this change in the law.

I also want to make you aware of some common insurance company practices that I hear about every day as I interview potential clients in my office. Legislators need to be aware that constituents are being taken advantage of on a regular basis in a planned and orchestrated way by major insurance carriers who have defined an uneven playing field. If insurers cannot win on the law and the facts, they can win because of the practical circumstances of these cases.

Medical payments coverage, as you know, is coverage that pays for medical bills based on status. Typically, you have to have the status of riding in an insured automobile. If you are injured and you have medical bills, the medical payments coverage is supposed to pay for those medical bills no matter who caused the precipitating incident. No one likes to go to the doctor and no one likes to run up medical bills. Your constituents, when injured, obtain health care and follow the recommendations of their physicians. Unfortunately, this does not lead to the prompt payment of these medical bills that Alaska insurance consumers have a right to expect.

Instead, the insurance industry will slow pay the medical providers, obtain a "medical records review" from some nurse or physician (often from another state), find a basis therein to deny paying bills that have already been incurred in good faith by your constituents, and then refuse to resolve the matter with either the physician, whose bills are unpaid, or your constituent, whose medical bill is unpaid and whose credit worthiness is now at risk. This, of course, is aside from the frustration that these people feel because they cannot obtain needed medical care. There are certainly circumstances where

this practice may ultimately have adverse and serious long-term consequences for a claimant requiring time-sensitive care.

How do insurance carriers get away with it? It is really quite easy. Disputes over medical payments coverage in most auto policies are relegated to arbitration. There is nothing wrong with that. However, there is no award of attorney's fees and costs provided in these policies to the successful party. When one of your constituents appears in my office with $10,000.00 worth of controverted and unpaid medical bills, there is little encouragement I can offer. No matter how righteous their position, they will have to spend their own money to hire an attorney, bring their doctors into testify and pay for an arbitrator. Thus, using hypothetical figures, their problem grows from $10,000.00 to some number likely twice as large. Or, they can pay an attorney a percentage of their recovery plus litigation costs advanced by the attorney. The last approach is purely theoretical. Attorneys would have to spend more time and money than the claim is worth to get a good result. Most of us are, therefore, very disinterested in handling these cases for the same reason that your constituents who are homebuilders refuse to pay $300,000.00 to build houses only to sell them for half that much. We simply cannot stay in business fighting some of the largest economic forces in America on a *pro bono* basis. Even if we took these cases, your constituents would be left holding the bag. They need 100% of their medical bills paid, not some percentage left over after attorneys fees and costs. Anyway you shake it, regular, ordinary, everyday Alaskans are getting the short-end of the stick from an industry that seems perfectly willing to bully them to defeat and deny these reasonable claims.

Your Bill has the advantage of giving the Division of Insurance a bit more leverage when it comes to looking into these claims. The Bill could further be improved if legislation were introduced compelling carriers to pay costs, attorney's fees, and related arbitration expenses only when they lose a dispute over medical payments or some other coverage. This costs the industry nothing when its position is righteous: it will cost it plenty on a regular basis in light of practices that the industry currently engages in. It would make it possible for private attorneys to become involved in these cases, and it would make it possible for your constituents, who have medical payments coverage claims, to be, for the first time, treated with a measure of respect and to receive what they reasonably thought they had a right to receive under their medical payments coverage.

If you or other members of the Legislature have any questions about this letter or my opinions regarding these practices, I hope you will feel free to call me. Thanks again for your good work in proposing SB 177. I hope it receives the bi-partisan support that it deserves.

Yours very truly,

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.

Michael J. Schneider

cc: Robert Lohr, Director
Division of Insurance

# MEMORANDUM

# State of Alaska
Department of Law

TO: Robert A. Lohr
Director
Division of Insurance
Department of Community &
Economic Development

DATE: January 25, 2000

FILE NO.:

TEL. NO.: 269-5229

FROM: Virginia A. Rusch
Assistant Attorney General
Fair Business Practices Section
Anchorage

SUBJECT: AS 21.36.150

In connection with a pending bill that would modify AS 21.36.010, AS 21.36.020 and AS 21.36.125 to prohibit a single unfair and deceptive act (as well as repetitive acts constituting an unfair and deceptive practice), you have asked for an interpretation of AS 21.36.150.[1] Specifically, you asked

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1 This statute provides:

**Sec. 21.36.150. Procedures as to undefined practices.**

(a) If the director believes that a person engaged in the insurance business is engaging in this state in an unfair method of competition or in an unfair or deceptive act or practice in the conduct of the business that is not defined as being unfair or deceptive under this chapter, the director shall hold a hearing on the matter, if the director believes it would be in the public interest to do so after giving notice of the hearing and of the charges. Upon conclusion of the hearing the director shall make a written report of the findings of fact relative to the charges and serve a copy upon the person and any intervenor at the hearing.

(b) If the report charges a violation of this chapter and if the method of competition, act, or practice has not been discontinued, the director may, through the attorney general of this state, at any time after the service of the report, cause an action to be instituted to enjoin and restrain the person from engaging in the method, act, or practice. In the action the court may grant a restraining order or injunction upon just terms, but the state may not be required to give security before the issuance of the order or injunction. If a record of the proceedings in the hearing before the director was made, a certified transcript, including all evidence taken and the report and findings, shall be received in evidence in the action.

(c) If the director's report made under (a) of this section, or order on hearing made under AS 21.36.320 does not charge a violation of this chapter, an intervenor in the proceedings may appeal from the order or report within the time and in the manner provided for appeals from the director generally.

whether this statute authorizes the director of the Alaska Division of Insurance to determine that a single act, rather than a pattern of repetitive acts, constitutes a violation of these provisions of the trade practices and frauds chapter of the Alaska Insurance Code.

Briefly, the answer to your question is that AS 21.36.150 authorizes and establishes a procedure for the state insurance regulator to examine whether an activity that is not otherwise prohibited in the trade practices and frauds chapter, AS 21.36, or by regulations adopted under it, is unfair and deceptive, and should therefore be forbidden. Nothing in the language of this statute suggests that is is intended to authorize the director to determine that a single act is a violation of statutory provisions that forbid a practice of, or repetitive acts of, a defined unfair or deceptive activity. Even if AS 21.36.150 can be interpreted to give the director this authority, the process described in AS 21.36.150 would be a cumbersome way to enforce the prohibitions against unfair or deceptive acts .

The discussion below explains this answer by reviewing commentary on the source from which this section was derived and some examples of past orders issued under it.

AS 21.36.150 was adopted in 1966 as part of a major revision of the Alaska Insurance Code. It is derived from the National Association of Insurance Commissioners (NAIC) Model Unfair Trade Practices Act initially approved in 1946. According to the legislative history (See NAIC Model Regulation Service, p.880-19), this model act was the result of one of the first efforts to develop state laws regulating insurance after Congress passed the McCarran –Ferguson Act of 1945 (P.L. 79-15) that provided for continued state regulation of insurance. P.L. 79-15 contained a moratorium from the application of federal law to permit the states time to develop laws, but provided for federal regulation if the states did not take on the responsibility.

Five years after the Alaska legislature adopted AS 21.36.150 in 1966, the NAIC substantially revised the model act provisions on which this statute was based. The historical commentary for sections 7 and 8 of this model act reports that the commissioners concluded that the procedure for dealing with "undefined" unfair trade practices was too cumbersome. (NAIC Model Regulation Service, p. 880-30). The NAIC revised these sections of the model act to authorize a state insurance commissioner to hold hearings, issue cease and desist orders and impose penalties. In 1976, the Alaska legislature added AS 21.36.320, which gave the director of the Alaska division of insurance authority similar to the NAIC's revised sections 7 and 8. But the Alaska legislature left AS 21.36.150 in place, making only slight changes in 1985 (substituting a reference in subsection (c) to AS 21.36.320 for AS 21.36.140, which was repealed), and in 1992 (adding subsection (d) with other stylistic changes). The addition of subsection (d) in 1992 made clear that the director can also use the regulation adoption process to define unfair and deceptive trade practices.

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(d) In addition to the unfair methods and unfair or deceptive acts or practices expressly defined in this title, the director may adopt regulations to define other methods of competition and other acts and practices related to the business of insurance that are unfair or deceptive.

This history, as well as the language of AS 21.36.150, therefore shows the statute was intended to deal with "undefined" practices. It is a procedure to determine whether questioned practices are unfair and deceptive, rather than a procedure to determine whether a person is guilty of conduct that has previously been defined as unfair and deceptive. The statute incorporates due process protections, including requirements for notice of the issue to the person who is carrying on the activity, a hearing, and a written report with findings of fact. But this section gives the director no authority to order a cease and desist order or impose penalties for a violation. The director is required to apply to a court for enforcement orders. In contrast, under AS 21.36.320, the director is authorized to issue cease and desist orders and impose penalties for violations of the trade practice and frauds chapter, AS 21.36.

Among orders of the director of the division of insurance compiled in the National Insurance Law Service (NILS Publishing Company, Chatsworth, CA) are two examples issued under this statute in 1970. In Order R70-1, Workmen's Compensation Deposit Insurance Premium Unfair Practice (Dec 14, 1970), the director concluded that a practice of billing a voluntary expiration or termination payroll report and continuing to hold the deposit premium until a physical audit of the payroll records often resulted in substantial excess worker's compensation premiums being held by insurers. The director declared this an unfair practice and defined a practice to be used instead.

In Order R70-2, Trans-Alaska Pipeline Wrap-Up (April 17, 1970), the director held a hearing on a complaint from the Alaska Association of Insurance Agents that the proposed insurance program of the Trans-Alaska Pipeline System was an unfair practice in the insurance business. The director rejected the complaint finding that there was no evidence that the pipeline consortium "is or was at any time engaged in the insurance business or contemplates engaging the insurance business."

Conclusion. Based on the language of the statute, the historical commentary on the NAIC model on which it is based, and examples of how AS 21.36.150 has been used in the past, we conclude that its purpose is to establish a procedure for determining whether a particular activity in the insurance business should be prohibited as unfair or deceptive. More recent legislative enactments give the director other means to both define unfair and deceptive trade practices in the insurance business and enforce the prohibition against them. But we find nothing in AS 21.36.150 that authorizes the director to determine that a single act is a violation of a statute that prohibits a practice of certain defined conduct in the business of insurance.

VAR:jem

# MEMORANDUM State of Alaska

TO: Bob Lohr DATE: March 9, 2000

FILE NO:

TELEPHONE NO:

FROM: Dale Whitney
Rate & Form Analyst

SUBJECT: Rate Impact of SB 177

You asked me yesterday whether there was a probable rating impact of the concurrent causation language in SB 177, and how we would handle a proposed rate increase from an insurance company based on this change to the law. The proposed language reads as follows:

> **Sec. 21.36.212. Prohibited denial of claim for causation.** An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

This language would, in very unusual cases, extend coverage where it does not currently exist. The coverage would be extended to the traditional level it had been at before insurers began including concurrent causation language in the mid to late '80s. While it is possible that an exhaustive actuarial study could quantify a rating impact from this change, I believe the impact would be so minor as to be of virtually no consequence as a matter of rate-making. I do not believe the encroachment of concurrent causation language into policy forms resulted in any significant downward trends in rates in the mid- to late 1980s. I would expect the converse would be true if this bill were adopted.

It is important to remember that this language would not extend coverage to all cases of concurrent causation, but only those cases where the covered peril, and not the excluded one, is the dominant cause of loss. In a major earthquake, for example, the majority of homeowners in this state would have no coverage. This would be true even for an insured suffering an earthquake loss in which a covered peril contributed, when the earthquake is the real cause of the loss. So the bill would not have that great of an impact. On the other hand, if a fire broke out in a home and the insurer could somehow establish some kind of a link to an excluded cause, such a minor tremor or a flood, the bill would prevent a denial of coverage on that basis. I see the rarity of such cases to be so great that the impact of this change would only be noticeable to the rare insured unlucky enough to suffer a loss caused by two different perils at once, and only then when the covered peril was the dominant one.

In making rates, insurers are required to consider "past and prospective loss experience inside and outside this state, to the conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors inside and outside this state." AS 21.39.030(2). Alaska is a very small market, and loss ratios can fluctuate dramatically from year to year. Some years insurers make a lot of money in Alaska, and others they lose a lot. Thus, Alaska loss ratios are usually credibility-weighted against nationwide data, which fluctuates less. These days, insurer profit is more often derived from investment earnings on reserve funds than on premium income, and these earnings are also considered in rate-making. Thus, fluctuations in the financial markets often affect rates more than losses, though losses are certainly still a contributing factor.

Any request for a rate increase must be submitted with data to justify the increase. Under AS 21.39.040 there is room for an insurer to include many different kinds of data, but it is the insurer's responsibility to justify its rates and to file data clearly demonstrating that its rates are not excessive. If we deem the data submitted to be insufficient to support a rate change, we would require additional information under AS 21.39.040(a). If the data then submitted was still not adequate to demonstrate that an increase is appropriate, the request would be disapproved under AS 21.39.050.

I am very skeptical that an insurer could make a case that this change in language would increase losses enough to significantly affect rates. To do so, an insurer would probably need to demonstrate statistics showing the number of claims denied because a covered loss occurred in combination with an excluded loss, and I don't believe any insurers are keeping such data. Because of the number of factors affecting losses, I would likewise be suspicious of a suggestion that an insurer could demonstrate that losses decreased in the '80s after the concurrent causation language was adopted by insurers, and that any such decrease was necessarily related to the change in policy forms.

When the insurance industry began adopting this kind of language in policy forms I do not believe it alone resulted in any significant reduction in rates. Likewise, I do not expect adoption of SB 177 alone would cause any material change the other way.

4/12/00 Hales a working document
Bruce out w/ind recs + fiscal note

1-LS0902\K
Ford
4/11/00

**HOUSE CS FOR CS FOR SENATE BILL NO. 177( )**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

**BY**

**Offered:**
**Referred:**

**Sponsor(s): SENATOR DONLEY**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to insurance trade practices; and providing for an effective date."**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Alaska Insurance Consumers Protection Act.

*** Sec. 2.** AS 21.36.010 is amended to read:

**Sec. 21.36.010. Purpose.** The purpose of this chapter is to regulate **an act or a** trade **practice** [PRACTICES] in the business of insurance in accordance with the intent of Congress as expressed in **15 U.S.C. 1011 - 1015 (McCarran-Ferguson Act)** [THE ACT OF CONGRESS OF MARCH 9, 1945 (P.L. 79-15; CH. 20, 59 STAT. 33),] by defining or providing for determination of all the practices in this state that constitute **an** unfair **method** [METHODS] of competition or **an** unfair or deceptive **act**



*New Text Underlined [DELETED TEXT BRACKETED]*

or practice [ACTS OR PRACTICES] and by prohibiting them.

* **Sec. 3.** AS 21.36.020 is amended to read:

**Sec. 21.36.020. Unfair methods, deceptive acts prohibited.** A person may not engage in an act or a trade practice in this state or relative to a subject resident, located, or to be performed in this state that is defined in this chapter as, or determined under this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

* **Sec. 4.** AS 21.36.070(b) is amended to read:

(b) A person providing the director with information concerning the financial condition or an act or a practice [PRACTICES] of a licensee of the division is immune from liability for defamation.

* Sec. 5. AS 21.36.125 is amended to read:

**Sec. 21.36.125. Unfair claim settlement practices.** A person may not commit [OR ENGAGE IN WITH SUCH FREQUENCY AS TO INDICATE A PRACTICE] any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) compel

(A) an insured [INSUREDS] to litigate for recovery of an amount [AMOUNTS] due under an insurance policy [POLICIES] by offering

substantially less than **an amount** [THE AMOUNTS] ultimately recovered in **an action** [ACTIONS] brought by **the insured; or**

**(B) a third-party claimant regarding a claim in which liability is not at issue to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have a reasonable basis in law and fact** [THOSE INSUREDS];

(8) attempt to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

(9) attempt to settle a claim on the basis of an application that has been altered without the consent of the insured;

(10) make a claims payment without including a statement of the coverage under which the payment is made;

(11) make known to **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] a policy of appealing from **an** arbitration **award** [AWARDS] in favor of **an insured or third-party claimant** [INSUREDS OR CLAIMANTS] for the purpose of compelling **the insured or third-party claimant** [THEM] to accept **a settlement or compromise** [SETTLEMENTS OR COMPROMISES] less than the amount awarded in arbitration;

(12) delay investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

(13) fail to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

(15) offer a form of settlement or pay a judgment in any manner prohibited by AS 21.89.030.

* Sec. 6. AS 21.36.125 is amended by adding a new subsection to read:

(b) The provisions of this section do not create or imply a private cause of action for a violation of this section.

* Sec. 7. AS 21.36 is amended by adding a new section to read:

**Sec. 21.36.212. Prohibited denial of claim for causation.** An insurer may not deny a claim if a risk, hazard, or contingency insured against is the dominant cause of a loss and the denial occurs because an excluded risk, hazard, or contingency is also in a chain of causes but operates on a secondary basis.

* Sec. 8. AS 21.36.320(g) is amended to read:

(g) In determining the penalty imposed under (d) and (e) of this section, the director shall consider the amount of loss caused by the violation and the amount of benefit derived by the person by reason of the violation and may consider other factors, including the seriousness of the violation, **whether the violation was a single act or a trade practice,** and deterrence of the violator or others.

* Sec. 9. This Act takes effect January 1, 2001.

- Labor & Commerce → CS
- met w/ Donley
- goal authority if there's a single act

Subsection 7 - problem area
b/c regardless of our
want language from (B) to
move to Sec. 4
or attached language
If they lose they're violated
The act w/ a single act.