ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672

2568 HLC HB 223 - HB 236

2568

STATE OF ALASKA

OFFICE OF LIEUTENANT GOVERNOR

DELEGATION OF AUTHORITY

IN ACCORDANCE WITH AS 44.17.010, THE AUTHORITY AND RESPONSIBILITY FOR ADOPTING REGULATIONS OF THE DEPARTMENT OF LABOR, UNDER THE ALASKA ADMINISTRATIVE PROCEDURE ACT, IS HEREBY DELEGATED TO WILLIAM E. SPEAR,

(NAME)

DEPUTY COMMISSIONER

(POSITION)

SIGNED: Edward N. Carlisle

COMMISSIONER

DEPARTMENT OF LABOR

SIGNED AND SWORN BEFORE ME THIS 23rd DAY OF March, 1978.

SIGNED: Mary Jean Smith

NOTARY PUBLIC IN AND FOR THE STATE OF ALASKA

COMMISSION EXPIRES: 2/10/80

PLEASE RETURN TO THE OFFICE OF LIEUTENANT GOVERNOR
BY MARCH 31, 1978

TITLE 8. LABOR

PART 1. INDUSTRIAL WELFARE.

CHAPTER 15. ALASKA WAGES AND HOURS.

* Editor's Note: The articles contained in this chapter, secs. 10-70, [illegible] Exemptions, and succeeding [illegible]

Publisher. Please be sure that the chapter listing for Title 8 shows the changes in the Ch. 15 headings, made in 1974.

Section
10-70. Repealed

8 AAC 15.010 SUMMARY: ALASKA WAGE AND HOUR ACT. Repealed (11/ 4/74, Reg. 52)

8 AAC 15.015 EXEMPTIONS FOR SEARCHING FOR PLACER OR HARD ROCK MINERALS. Repealed (12/ 9/78, Reg. 68)

8 AAC 15.020 EXEMPTIONS FOR INDIVIDUALS UNDER 18 WHO ARE PART TIME EMPLOYEES. Repealed (12/ 9/78, Reg. 68)

8 AAC 15.030 DETERMINING THE NUMBER OF EMPLOYEES FOR PURPOSES OF AS 23.10.060(1). Repealed (12/ 9/78, Reg. 68)

8 AAC 15.040 SMALL MINING OPERATIONS. Repealed (12/ 9/78, Reg. 68)

8 AAC 15.050 DEDUCTIONS FROM AN EMPLOYEE'S WAGES. Repealed (12/ 9/78, Reg. 68)

8 AAC 15.060 PLACE OF EMPLOYMENT FOR PURPOSES OF RECORD KEEPING. Repealed (12/ 9/78, Reg. 68)

8 AAC 15.070 DEFINITIONS OF MISCELLANEOUS TERMS USED IN AS 23.10.050 - 23.10.150. Repealed (12/ 9/78, Reg. 68)

Article

1. Minimum Wages and Overtime (8 AAC 15.100 — 8 AAC 15.105)
2. Exemptions (8 AAC 15.120 — 8 AAC 15.145)
3. Deductions from Wages (8 AAC 15.160)
4. Procedures Relating to Violations, Investigations or Hearings (8 AAC 15.175 — 8 AAC 15.180)
5. General Provisions (8 AAC 15.900 — 8 AAC 15.910)

ARTICLE 1.

MINIMUM WAGES AND OVERTIME.

Section
100. Payment for overtime
105. Minimum wage

8 AAC 15.100 PAYMENT FOR OVERTIME. (a) An employee's regular rate is the basis for computing overtime. The regular rate is an hourly rate figured on a weekly basis. Employees need not actually be hired at an hourly rate; they may be paid by piece-rate, salary, commission or any other basis agreeable to the employer and employee. However, the applicable compensation basis must be converted to an hourly rate when determining the regular rate for computing overtime compensation.

(b) The regular rate referred to in (a) is that fixed hourly amount determined from an employee's hourly wage, salary, commission, piece-rate or other basis of compensation that he is to be paid for all contract hours up to the daily or weekly maximum, established under AS 23.10.060, that he is regularly employed to work during a work week.

(c) When computing an employee's hours for the purpose of determining overtime, the employer shall count all hours the employee worked during that week including periods of "on call" and "standby or waiting time" required for the convenience of the employer which were a necessary part of the employee's performance of his employment. However, if the employee is completely relieved from all duties for a certain period during which he may use the time effectively for his own purposes, then those periods need not be counted.

(d) The following are not acceptable methods of complying with the payment of overtime provisions of AS 23.10.060:

(1) guaranteed weekly pay for variable hours plan ("Belo" contracts) established under sec. 7(f) of the Fair Labor Standards Act of 1938, as amended (29U.S.C. 207(f) as implemented in 29 C.F.R. 778-402-778.414);

(2) compensatory time off in place of payment for overtime; and

(3) flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a work-week. (Eff. 12/1/78, Register 68)

Authority: AS 23.10.060
AS 23.10.085

8 AAC 15.105. MINIMUM WAGE. As used in AS 23.10.065, "prevailing Federal Minimum Wage Law" means that rate established in Sec. 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206(a)(1)) as the minimum wage generally applicable to employees subject to that Act.
(Eff. 12/9/78, Register 68)

Authority: AS 23.10.065
AS 23.10.085

ARTICLE 3.

EXEMPTIONS.

Section
120. Minimum wage exemption for handicapped persons
125. Minimum wage exemption for student learners
130. Exemption for searching for placer or hard rock minerals
135. Exemption for individuals under 18 who are part time employees
140. Determining the number of employees for purposes of AS 23.10.060(1)
145. Small mining operations

8 AAC 15.120. MINIMUM WAGE EXEMPTION FOR HANDICAPPED PERSONS. (a) An application to employ a person at less than the minimum wage established under AS 23.10.065 must be made either on a form provided by the department or by filing an application for a special certificate to employ a handicapped person (29.C.F.R. Part 525) with the Regional Director of the Wage and Hour Division, U.S. Department of Labor, 909 First Avenue, Seattle, Washington, 98104.

(b) An application filed with the department must set out the facts showing that the person's productive capacity to do the work he is to perform is impaired by physical or mental deficiency, age, or injury. A medical certificate will be required in all cases in which the handicap is not clearly obvious. The information in the application must be complete and must be certified by a responsible person who has knowledge of the facts.

(c) If the commissioner determines, from the information provided in the application, that the person would otherwise be deprived of employment opportunity, he will, in the exercise of his discretion, approve a wage rate lower than that established under AS 23.10.065. With the exception of very extreme cases where the person is so seriously impaired that he is unable to engage in competitive employment, that rate will not be less than 50 percent of the minimum wage established under AS 23.10.065.

(d) If an approval is issued under (c) of this section, it will specify the approved wage rate and the period for which it is effective. An application for renewal of an exemption must be made in the same manner as the original but must also include an evaluation of that person's productivity, comparing the degree of productivity between the initial application and the renewal.

(e) As a general rule, approval for payment of a wage lower than that established under AS 23.10.065 to persons with a temporary handicap will not be granted.

(f) Persons undergoing rehabilitation treatment or therapy relating to narcotics or alcoholism are not considered handicapped for the purposes of AS 23.10.070 and this section. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.070(1)
AS 23.10.085

8 AAC 15.125 MINIMUM WAGE EXEMPTION FOR STUDENT LEARNERS. (a) An exemption for student learners from the minimum wage requirement of AS 23.10.065 is available when the student learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized state or local educational authority or in a substantially similar program conducted by a private school.

(b) An application for an exemption under (a) of this section must be made on a form provided by the department. The information required must be complete and must be signed by the employer and the student learner's school coordinator or principal. To qualify for the exemption, the employment must meet all the requirements set out in AS 23.10.325-23.10.370 and chapter 5 of this title relating to the employment of children.

(c) A wage rate authorized under this section will not be less than 75 percent of the minimum wage established under AS 23.10.065.

(d) The exemption from minimum wages for full-time students established by Sec. 14(b) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 214(b)) as implemented in 29 C.F.R. 519.1 - 519.2 does not apply to employment subject to the provisions of AS 23.10.065. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.070(3)
AS 23.10.085

8 AAC 15.130 EXEMPTION FOR SEARCHING FOR PLACER OR HARD ROCK MINERALS. The exemption from AS 23.10.050-23.10.150 provided by AS 23.10.055(10) applies to those activities commonly referred to as "prospecting" and does not apply once development of and production from a known mineral source has ~~been~~ begun. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055(10)
AS 23.10.085

8 AAC 15.135 EXEMPTION FOR INDIVIDUALS UNDER 18 WHO ARE PART TIME EMPLOYEES. The exemption from AS 23.10.050-23.10.150 provided by AS 23.10.055(11) does not apply during any work week in which an individual normally within the ambit of AS 23.10.055(11) is employed in excess of 30 hours. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055(11)
AS 23.10.085

8 AAC 15.140 DETERMINING THE NUMBER OF EMPLOYEES FOR PURPOSES OF AS 23.10.060(1). In determining the number of employees that an employer employs for purposes of AS 23.10.060(1), all officers of a corporation who actively engage in the business and all part time employees will be counted regardless of the number of days or hours worked. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.060(1)
AS 23.10.085

8 AAC 15.145 SMALL MINING OPERATIONS. (a) A mining season, for purposes of AS 23.10.060(5), means the cumulative period of time during which mining operations are carried on during a calendar year, but not exceeding 20 weeks.

(b) The exemption from the payment for overtime requirements of AS 23.10.060 for employers engaged in small mining operations provided by AS 23.10.060(5) is available to the employer for a maximum of 14 consecutive weeks, commencing on the first day the mine begins active operations in a calendar year. In determining the available period of exemption, periods during which the mine is not actively engaged in mining operations for such reasons as, but not limited to, assessment work and repair or construction of buildings or equipment are not part of the exemption period.

(c) During the exemption period described in (b), an employer engaged in small mining operations remains responsible for payment of overtime at the rates established by AS 23.10.060 for work performed by an employee in excess of 12 hours a day or 56 hours a week. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.060(5)
AS 23.10.085

ARTICLE 3.

DEDUCTIONS FROM WAGES.

Section
160. Deductions from an employee's wages.

8 AAC 15.160. DEDUCTIONS FROM AN EMPLOYEE'S WAGES. (a) AS 23.10.085(c) does not limit the right of an employer and employee to enter into a written agreement to provide for deductions of monetary obligations of an employee other than the cost of board and lodging. However, a written agreement for other deductions payable to the employer or person acting in the employer's behalf or interest, other than the cost of board or lodging, is not valid if it would have the effect of reducing an employee's wage rate below the statutory minimum wage or requiring an employee to reimburse the employer for any of the following:

(1) customer checks returned due to insufficient funds or any other reason ;

(2) non-payment for goods or services as a result of customers walking out or defaulting on credit;

(3) cash or cash register shortages for which the employee does not acknowledge responsibility;

(4) lost or stolen property or alleged theft by the employee for which the employee does not acknowledge responsibility;

(5) damage or breakage costs unless they are clearly due to willful conduct on the part of the employee, the responsibility for which has been acknowledged by the employee.

(b) Nothing in (a) of this section prohibits deductions from earnings based on a written agreement whereby the employer has been directed by the employee to pay a sum for the benefit of that employee to a creditor, donee, or other third party and neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction.

(c) Written agreements for deductions from earnings are not required for any lawful deduction otherwise authorized or required by state or federal law or by order of a court of competent jurisdiction.

(d) An employer subject to AS 23.10.050-23.10.150 shall furnish each person employed by him who is not exempted from the coverage of those sections by AS 23.10.055 a statement of earnings and deductions for each pay period. The statement of earnings and deductions ~~shall~~ must contain the following information:

(1) employee's rate of pay;

(2) the beginning and ending dates of the pay period and the weekly hours actually worked during the period;

(3) federal income tax deductions;

(4) federal insurance contribution act deductions;

(5) Alaska income tax deduction;

(6) Alaska school tax deduction;

(7) Alaska employment security act contributions;

(8) board and lodging costs;

(9) advances; and

(10) other authorized deductions. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.085

ARTICLE 5.

PROCEDURES RELATING TO VIOLATIONS, INVESTIGATIONS, OR HEARINGS.

Section
175. Assignment of claims
180. Investigations, conference and persuasion

8 AAC 15.175. ASSIGNMENT OF CLAIMS. (a) A person who believes that he has not been paid wages due him under AS 23.10.050 - 23.10.150 may assign his claim to the department for collection.

(b) The department will not accept an assignment of a claim under AS 23.10.050 - 23.10.150 in excess of $5,000, excluding liquidated damages. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.085
AS 23.10.110(b)

8 AAC 15.180. INVESTIGATIONS, CONFERENCES AND PERSUASION. (a) The wage and hour division will investigate potential violations of AS 23.10.050-23.10.150 on its own motion or on the assignment to it of a claim under sec. 175 of this chapter.

(b) If, after investigation, the division finds that probable cause exists for believing that a violation of AS 23.10.050 - 23.10.150 has occurred, it will attempt to correct the unlawful practice by conference and persuasion as follows:

(1) the division will provide the employer believed to have violated AS 23.10.050 - 23.10.150 with a copy of the assignment or a description of the alleged violation and inform him of the results of its investigation; and

(2) the division will schedule an informal conference with the employer to discuss the matter and attempt to eliminate the alleged violations.

(c) If the informal conference succeeds in correcting the alleged violation, no further action will be taken by the division against the employer.

(d) If an alleged violation is not rectified by the informal conference or if the employer fails to attend the conference without good cause shown, the director may, at his discretion;

(1) conduct a further investigation into the matter;

(2) enforce the claim through initiation of an adjudicative hearing under provisions of the Administrative Procedures Act (AS 44.62);

(3) enforce the claim through filing of an action in a court of competent jurisdiction.

(e) If the director determines under (d)(1) of this section that a further investigation into the matter should be conducted, he may provide that it be carried out by initiation of an investigative proceeding conducted in accordance with secs. 10 through 30 of chapter 25 of this title. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.080
AS 23.10.085
AS 23.10.090
AS 23.10.110

ARTICLE 5.

GENERAL PROVISIONS

Section
900~~195~~. Place of employment for purposes of recordkeeping
910~~200~~. Definitions

8 AAC 15.900~~195~~. PLACE OF EMPLOYMENT FOR PURPOSES OF RECORDKEEPING. For purposes of AS 23.10.100, "the place where an employee is employed" means a central office of the employer located within the state. However, the employer may keep duplicate records at the sites or premises where the work is performed. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.085
AS 23.10.100

8 AAC 15.910. DEFINITIONS. In this chapter and in AS 23.10.050 - 23.10.150, unless the context requires otherwise:

(1) "administrative employee" means an employee;

(A) whose primary duty consists of work directly related to management policies or supervising the general business operations of his employer;

(B) who customarily and regularly exercises discretion and independent judgment;

(C) who performs his work under only general supervision;

(D) who is paid on a salary or fee basis;

(E) who regularly and directly assists a proprietor or an exempt executive employee of the employer; and

(F) who performs work along specialized or technical lines requiring special training, experience or knowledge and does not devote more than 20 percent of his weekly hours to activities which are not described in this paragraph or paragraphs (7) or (11) of this section;

(2) "casual employee," as used in AS 23.10.065(15), means an employee engaged in an activity which occurs without regularity and is not in the usual course of trade, business, occupation or profession of his employer;

(3) "commissioner" means the commissioner of labor;

(4) "department" means the Alaska Department of Labor;

(5) "director" means the director of the wage and hour division of the department, or his designee;

(6) "domestic service in or about a private home" as used in AS 23.10.055(4), means a person employed in or about a private home of a person by whom he is employed and who performs such services or activities as a babysitter, a cook, a butler, a valet, a maid, a housekeeper, a governess, a janitor, a launderess, a caretaker, a handyman, a gardener, a footman, a groom, or a chauffeur of automobiles for family use;

(7) "executive employee" means an employee:

(A) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department, or subdivision of the enterprise;

(B) who customarily and regularly directs the work of two or more other employees;

(C) who has the authority to hire or fire or effect any other change of status of other employees or whose suggestions or recommendations regarding these kinds of changes are given particular weight;

(D) who customarily and regularly exercises discretionary authority;

(E) who does not devote more than 20 percent of his weekly hours to activities which are not directly and closely related to the work described in this paragraph or paragraphs (1) or (11) of this section; and

(F) who is compensated on a salary basis;

(8) "nonprofit" as used in AS 23.10.055(6), means an organization no part of the income or profit of which is distributable to its members, directors, or officers and whose status has been determined by the U.S. Internal Revenue Service as nonprofit;

(9) "on call" means time that an employee is required to remain on call on the employer's premises or other place of employment or so close to them that he cannot use the time effectively for his own purposes, but does not include the time an employee is not required to remain on or near his employer's premises or other place of employment but is merely required to leave word at his home or with the employer where he may be reached;

(10) "outside salesman" means a person who is employed for the purpose of making sales, contracts for sales, consignments, or shipments for sale or obtaining orders for services or for use of facilities for which a consideration will be paid by the client or customer and whose hours of work of a nature other than that described in this paragraph or paragraph (12) of this section do not exceed 20 percent of the hours worked in the workweek;

(11) "professional" means an employee, except for the classifications of registered nurse and licensed practical nurse,

(A) whose primary duty is:

(i) to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(ii) to perform work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

(iii) to teach, tutor, instruct, or lecture in the activity of imparting knowledge, and who is employed and engaged in this activity as a teacher certified or recognized as such in a school or other educational establishment or institution; and

(B) whose work:

(i) requires the consistent exercise of discretion and judgment in its performance;

(ii) is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized on a time basis; and

(iii) is compensated on a salary or fee basis;

(12) "salesman employed on a straight commission basis" means a person who is regularly employed on the business premise of his employer and is compensated on a straight commission basis for the purpose of making sales, contracts for sales, consignments, or shipments for sale or in obtaining orders for services or the use of facilities for which a consideration will be paid by the client or customer and whose hours of work of a nature other than that described in this paragraph or paragraph (10) of this section do not exceed 20 percent of the hours worked in the workweek;

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(13) "standby or waiting time" means time that an employee is required to be at or near his post or place of employment and is required to wait for work or an assignment, whether nor not because of shutdown or repair, and during which he cannot use the time effectively for his own purposes;

(14) "supervisory capacity" means those primary duties performed, except for the classifications of registered nurse and licensed practical nurse, by an employee who is employed solely for the purpose of regularly assigning and directing the activities of other employees, and is responsible for results of the work performed, and who does not perform duties regularly performed by the employees supervised, except for brief periods of time not to exceed 20 percent of the hours worked in the workweek; For the purpose of AS 23.10.060, it does not apply to any employee required by the employer to perform ~~such~~ these activities on an intermittent or substitute basis during the course of his employment;

(15) "workweek" means a fixed and regularly recurring period of 168 hours, i.e. seven consecutive 24 hour periods. It may begin on any day of the week and need not coincide with the calendar week; An individual employee's workweek is the statutory or contract number of hours that he is to regularly work during that period; The workweek may not be artificially adjusted for the purpose of avoiding the payment of overtime, however the workweek may be changed for any other purpose in the manner provided in AS 23.05.160. (Eff. 12/9/78, Register 68)

Authority: AS 23.10.055
AS 23.10.060
AS 23.10.085

NOTICE OF PROPOSED CHANGES IN THE
REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 - AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.

Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P. O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/21/78

Wm. Spear.

William E. Spear
Deputy Commissioner
Department of Labor

To be published August 30, 31 and September 1. 1978.

STATE OF ALASKA)
) SS.
FIRST JUDICIAL DISTRICT)

AFFIDAVIT OF NOTICE OF ADOPTION OF REGULATION

I, E.T. "Lee" Leland, W/H Investigator III, of the Department of Labor, being sworn, depose and state the following:

As required by AS 44.62.190, notice of the proposed adoption of 8 AAC 15.100-200 has been given by

(1) being published in a newspaper or trade publication

(2) being mailed to interested persons,

(3) being mailed or delivered to appropriate state officials,

(4) being furnished to the Department of Law,

(5) being furnished to incumbent state legislators.

Date: 10-3-78
Juneau, Alaska

E.T. Lee Leland
E.T. "Lee" Leland

SUBSCRIBED AND SWORN TO before me this 3rd day of October, 197___.

James J. O'Brien
Notary Public in and for Alaska

My Commission Expires: Oct 3, 78

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

AFFIDAVIT OF ORAL HEARING

I, Don Wilson, W/H Investigator II of the Department of Labor, being sworn depose and state the following:

On September 15, 1978 at 1:30 p.m., in the Division of Aviation Conference Room, 4111 Aviation Avenue, Anchorage, Alaska, I presided over a public hearing held in accordance with AS 44.62.210 for the purpose of taking testimony in connection with the adoption of 8 AAC 15.100-200.

Date: September 15, 1978
Anchorage, Alaska

Donald R. Wilson

SUBSCRIBED AND SWORN TO before me this 15th day of September, 1978.

Sherry A. Strahl
NOTARY PUBLIC IN AND FOR ALASKA

My Commission Expires: 4-5-81

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO. CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

DEPT. NO.	A.O. NO.
AO- 07	2595

PUBLISHER

Anchorage Daily News
P.O. Box 40
Anchorage, Alaska 99501

VENDOR NO. ADN 501

DATE OF A.O. August 21, 1978

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1988

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN.

FROM

Department of Labor
Wage and Hour Division
P.O. Box 630
Juneau, Alaska 99011

BILLING ADDRESS *Alaska Department of Labor
Administrative Services
Fiscal Section
P.O. Box 1149
Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
Third DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Nathalia M. Chevalier WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Legal Clerk OF THE ANCHORAGE NEWS PUBLISHED AT Anchorage IN SAID DIVISION Third AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30 DAY OF August 1978 AND THEREAFTER FOR 3 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1 DAY OF Sept. 1978 AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

3x 6½ inches $81.90

Nathalia M. Chevalier

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 1 DAY OF Sept 78.

Patricia Lundsay

NOTARY PUBLIC FOR STATE OF Alaska
MY COMMISSION EXPIRES 5/1/82

NOTICE OF PROPOSED CHANGE IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.050 — AS 23.10.150, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

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Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.
Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.
Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.
Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

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Date: 8/21/78

/s/ William E. Spear
Deputy Commissioner
Department of Labor

Pub: Aug. 30, 31, Sept. 1, 1978

L79168

REMINDER—

ATTACH INVOICES AND PROOF OF PUBLICATION.

AFFIDAVIT OF PUBLICATION

UNITED STATES OF AMERICA
STATE OF ALASKA
FOURTH DISTRICT

} ss.

Legal 13,544

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Article 1 stipulates minimum wages, maximum hours and computation of of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain emptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 14 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.

Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 11:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/21/78

William E. Spear
Deputy Commissioner
Department of Labor

PUBLISH: August 30, 31, September 1, 1978

Before me, the undersigned, a notary public, this day personally appeared FRANCES PFEIFFER, who, being first duly sworn, according to law, says that he/she is an Advertising Clerk of the Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth District and State, and that the advertisement, of which the annexed is a true copy, was published in said paper on the following day(s),

8/30/78	8/31/78
9/01/78	

, and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

Frances Pfeiffer

Subscribed and sworn to before me this 30 TH day of SEPTEMBER, 1978

Notary Public in and for the State of Alaska.

My commission expires APRIL 10, 1981

CUSNR. 11592 LEGAL NO. 13544-0

ADVERTISING ORDER

NOTICE TO PUBLISHER

INVOICE MUST BE IN TRIPLICATE SHOWING ADVERTISING ORDER NO. CERTIFIED AFFIDAVIT OF PUBLICATION (PART 2 OF THIS FORM) WITH ATTACHED COPY OF ADVERTISEMENT MUST BE SUBMITTED WITH INVOICE.

2. PUBLISHER

DEPT. NO.	A.O. NO.
AO- 07	2595

PUBLISHER:
Southeast Alaska Empire
235 2nd Street
Juneau, Alaska 99801

VENDOR NO.: SAE 734

DATE OF A.O.: August 21, 1978

DATES ADVERTISEMENT REQUIRED:
August 30, 31 and September 1, 1978

THE MATERIAL BETWEEN THE DOUBLE LINES MUST BE PRINTED IN ITS ENTIRETY ON THE DATES SHOWN

FROM:
Department of Labor
Wage and Hour Division
P.O. Box 630
Juneau, Alaska 99811

BILLING ADDRESS:
Alaska Department of Labor
Administrative Services
Fiscal Section
P.O. Box 1149
Juneau, Alaska 99811

AFFIDAVIT-OF-PUBLICATION

UNITED STATES OF AMERICA
STATE OF Alaska } ss
DIVISION.

BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC THIS DAY PERSONALLY APPEARED Jeff A. Wilson WHO, BEING FIRST DULY SWORN, ACCORDING TO LAW, SAYS THAT HE/SHE IS THE Gen. Manager OF S.E. Alaska Empire PUBLISHED AT Juneau IN SAID DIVISION AND STATE OF Alaska AND THAT THE ADVERTISEMENT, OF WHICH THE ANNEXED IS A TRUE COPY, WAS PUBLISHED IN SAID PUBLICATION ON THE 30th DAY OF August 1978, AND THEREAFTER FOR 2 CONSECUTIVE DAYS, THE LAST PUBLICATION APPEARING ON THE 1st DAY OF September 1978, AND THAT THE RATE CHARGED THEREON IS NOT IN EXCESS OF THE RATE CHARGED PRIVATE INDIVIDUALS.

Jeff A. Wilson

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25th DAY OF September 19 78

Rosemary J. Thurman

NOTARY PUBLIC FOR STATE OF
COMMISSION EXPIRES My Commission Expires September 14, 1980

—NDER—
—ES AND PROOF OF PUBLICATION.

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF LABOR

Notice is hereby given that the Alaska Department of Labor, under the authority vested by AS 23.10.085, proposes to repeal and adopt regulations in Title 8 of the Alaska Administrative Code to implement AS 23.10.160, as follows:

(1) 8 AAC 15 is amended by repealing sections 010 through 070 in their entirety and adopting and replacing with new sections as follows:

ARTICLE 1.

Article 1 stipulates minimum wages, maximum hours and computation of overtime applicable to employment in Alaska.

ARTICLE 2.

Article 2 provides certain exemptions from the payment of minimum wages or overtime.

ARTICLE 3.

Article 3 stipulates those deductions from an employee's wages that are permissable and those deductions that are prohibited.

ARTICLE 4.

Article 4 establishes the procedures for assignment of claims and/or the conduct of investigative hearings and conferences.

ARTICLE 5.

Article 5 defines miscellaneous terms as used in this chapter and AS 23.10.

Notice is also given that any interested party may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at the DIVISION OF AVIATION BUILDING CONFERENCE ROOM, 4111 AVIATION AVENUE, (next to Lake Hood) Anchorage, Alaska 99502 at 1:30 p.m. o'clock on September 15, 1978.

Copies of the regulations may be obtained by writing to: Wage and Hour Division, Alaska Department of Labor, P.O. Box 630, Juneau, Alaska 99811.

The Department of Labor upon its own motion or at the instance of any interested person, may after September 30, 1978 adopt the proposals substantially as described above without further notice or may decide to take no action on them.

Date 8/31/78

William E. Spear
Deputy Commissioner
Department of Labor

Publish: Aug. 30, 31, Sept. 1, 1978
800-82

Good afternoon Mr. Chairman, Committee members, and guests. My name is John Martin. I am the Area Manager for Dresser Atlas, a division of Dresser Industries. I have resided and have been registered as an Alaska citizen for the past six years.

I am here today, in that I strongly believe that a 1978 Alaska Department of Labor regulation prohibiting the use of the fluctuating work week pay plan has created an enormous managerial and employee compensation problem that is not conducive to a healthy business climate. This regulation has created a potentially disastrous unjust economic impact on my firm and others operating in this state.

Dresser Atlas employs the fluctuating work week plan in all of the United States where we operate. It is proven to be the best pay plan suitable to the oil and gas service business for both the employee and employer. Dresser Atlas' largest Alaskan core of operation is on the North Slope. Our employees work one week on duty and one week off. During the week on, our employees may be dispatched to a remote location where they may remain on standby waiting in a camp, sleeping, eating or relaxing for hours before they are actually called for to perform the well logging or perforating services. Often the direct true productive working time on the job is minimal compared to the unproductive waiting time. The nature of the oil and gas service business makes work hours next to impossible to predict. The

unpredictability of the Arctic weather and normal drilling problems creates actual job timing merely guess work. This inherent industry problem is fully appreciated by all that have knowledge of the business.

The fluctuating work week system lends itself perfectly to this work environment. First of all, it guarantees the employees a base steady income, even when they are off duty at their homes. Our average Senior Operator was guaranteed $530.00 per week in 1981 whether they were off duty or on duty. This enabled them to maintain standard income levels even when they were off work whether it be due to their days off or low activity periods which are inherent to our business. When they were on the job, they received a guaranteed 16 hours per day, C.O.L.A., isolated location allowance and job bonuses. In 1981, our average Operator made $60,678.00 and a Senior Operator made $67,829.00. Please keep in mind this is unskilled labor, most of which is hired in Alaska. They are also making over double what their Lower 48 counterparts make and have much more personal time off. There was also never a complaint about the fluctuating work week system and each employee was well versed on computation of his earnings.

The unpredictable nature of hours and remoteness makes it virtually impossible to hire additional personnel to spread out the total hours over more employees. As a businessman, what would you think about changing out your employees every eight

hours when the shift coming in had been sleeping in a camp for their eight hours of work? And what about the high cost of flying the personnel back and forth every eight hours and the safety implications of flying in Alaska, frankly, it is totally unacceptable; both economically and from a safety standpoint.

Through some infinite wisdom, the Alaska Department of Labor determined it should abolish the fluctuating work week system. Dresser Atlas was not asked, or any other company to my knowledge, our opinion of the use of the fluctuating work week system in determining why it should be banned. It seems incredible to me, how one state agency could make a judgement on the validity of a pay plan that is acceptable in the other forty-nine states and approved by the Federal Government. Such a gross adjustment from the normal accepted and proven way of doing things in the United States would appear to me to be a responsibility of the state legislature.

To make matters worse, the Alaska Department of Labor did not notify our company or any other company, to my knowledge, of the fluctuating work week abolishment. Dresser Atlas management and corporate management has absolutely no record or knowledge of any correspondence either written or oral from the Alaska Department of Labor informing us of such a drastic change in wage administration. Attorneys on several occasions have formally requested that the Alaska Department of Labor furnish correspondence records depicting the

Department's notices before and after the regulation. The only correspondence discovered was a short hearing notice published in the Anchorage Daily News on August 30, 31 and September 1 of 1978. It is also incredible that the words fluctuating work week were not mentioned in the small print common to public hearing notices.

This entire matter did not come to Dresser's attention until the Department of Labor filed a $4,000 suit against Dresser Swaco in 1979 for an employee who was paid under the fluctuating work week plan. Dresser chose to challenge the Department of Labor's suit regarding the validity of the regulation. When losing in the State Supreme Court, Dresser immediately had no choice but to bow down and submit to the Alaska Department of Labor's regulation prohibiting the use of the fluctuating work week pay plan. We changed pay plans seven weeks after the State Supreme Court ruling. Within one month after changing pay plans, we were served a summons in the form of a class action lawsuit. Within a very few months, four other companies were served class action suits for past use of the fluctuating work week plan. These suits are all being handled by one law firm. Two of these suits alone called for judgements in excess of thirty five (35) million dollars!

An Alaska Department of Labor spokesman has estimated that there may be up to 90 companies affected with an excess of 100 million dollars in liability.

H.B. 223 would prohibit retroactive recovery by employees who were paid under the fluctuating work week system during the period the regulatory prohibition was being appealed in the courts.

I encourage you to strongly consider the possible consequences if H.B. 223 does not pass. It would create a definite windfall profit for many past and present employees. Definite windfall, because facts prove these employees were paid fair and equitable wages, which were fully agreed upon and expected by our employees. Who else may profit? One law firm! What is 33.3% of 100 million dollars?

I cannot say I enjoy being here today. I have a business to run as you do a state government. Please keep in mind that my firm and many others have a lot to lose on this issue and the opposition has only to gain. To conclude, I must add that it is totally ironic that in the State of Alaska under the fluctuating work week plan, Dresser had the lowest turnover rate of operators in all of the United States. But yet it is the only state where this fair and just pay plan has been banned and consequently our business stands in financial jeopardy.

I feel your fair and moral judgement will lead you to support H.B. 223.

Thank you for this opportunity to testify.

HB 236

Alaska State Legislature

REPRESENTATIVE
BARBARA LACHER
P.O. BOX 478
PALMER, ALASKA 99645
(907) 376-4215

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99811
(907) 465-4894

House of Representatives

TO: Representative Walt Furnace

FROM: Representative Barbara Lacher

SUBJECT: HB 236

DATE: March 21, 1983

Unlike many other states, Alaska does not have a legal definition of "trade or commerce" which includes real property. Without the needed definition and clear legislative direction, the Alaska courts have declined to apply the existing Fair Trade and Commerce Statutes to real property transactions, particularly involving sales in subdivisions.

There are clear cases of fraud involving real property transactions in the state that the Department of Law has not prosecuted because of the absence of legislative direction. The materials you have been provided describe in detail the type of situations that this legislation will remedy.

Connie Cipe, Chief of the State Consumer Protection Division, Department of Law, and the Mat-Su Borough attorney, both of whom have been involved in trying to assist people who have been victims of fraud or misrepresentation, drafted the legislation.

I'm sure you will find HB 236 to be needed legislation and that enactment will be of major benefit to purchasers of property in subdivisions.

Matanuska-Susitna Borough

BOX B, PALMER, ALASKA 99645 • PHONE 745-3248

BOROUGH ATTORNEY'S OFFICE

February 8, 1983

The Honorable Barbara Lacher
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Barbara:

The recent Supreme Court decision of Brown v.State of Alaska, Opinion No. 2591 (December 3, 1982) effectively limits the Unfair Trade Practices and Consumer Protection Act by excluding real estate development transactions.

The Brown case involved alleged fraudulent misrepresentations to purchasers of lots in Windsong Subdivision in the Matanuska-Susitna Borough, that flooding possibilities were remote and that flood and mortgage insurance was available. Purchasers were given the second page of the Windsong Subdivision plat, but they never received the first page, which had a flood warning notation placed on it by the Platting Board. Although the Army Corps of Engineers concluded that the subdivision was in a high-hazard area, the developer represented that experts, including the Corps, had concluded the possibility of flooding was remote.

The Supreme Court ruled that the scope of the Unfair Trade Practices Act did not include the sale of real property. The decision was based on statutory interpretation. The Court noted that, unlike certain other states, Alaska did not have a definition of "trade or commerce" which includes real property. It noted that none of the list of prohibited acts in A.S. 45.50.471 mentions real property. Without clear legislative direction, the Court declined to apply the Act to real property transaction.

This does not entirely eliminate remedies for a purchaser of a lot based on fraudulent misrepresentations. The Uniform Land Sales Practices Act, A.S. 34.55.004--34.55.046 provides for individual relief. However, in the Brown case, the Court found that the State could not sue the developer directly for fraud, but had to bring suit as representative of defrauded consumers, "in the nature of a class action." This requires costly and time-consuming steps to assure individual notices to all consumers, who then may be treated as parties in the lawsuit.

Common law fraud is also a basis for suit. However, this does not provide for the clear authority of the Attorney General to prosecute fraudulent land developers and obtain injunctive relief in the manner provided by the Unfair Trade Practices Act.

The result of the Brown decision may be to eliminate any easy remedy to a homeowner who purchases a home based on knowing, fraudulent misrepresentations. The Consumer Protection Division of the Department of Law has declined to pursue a recent case in this Borough involving possible fraud in the sale of homes to consumers in this Borough. Although sympathetic, that office indicated that the problems created by the Brown decision would make it inadvisable to use its scarce legal resources on such a problem.

The attached bill has been drafted to rectify this problem. It includes a definition for "trade or commerce" similar to that in the Massachusetts consumer act of similar nature. The bill was prepared after consultation with Connie Sipe at the State Consumer Protection Division, who provided valuable comment. The bill, as proposed, would provide the legislative direction which the Supreme Court has found to be absent.

I would be happy to discuss this matter further at your convenience.

Sincerely,

Steven H. Morrissett
Borough Attorney

er

Sec. 45.50.450. Violations constituting misdemeanor. Every person, in addition to the other penalties provided in AS 45.50.330 — 45.50.460, who violates or who procures, or aids or abets in the violating of AS 45.50.330 — 45.50.460, or who conspires to make ineffectual a valid order or decision of a court in the enforcement of AS 45.50.330 — 45.50.460, or who procures, conspires with, or aids or abets any person in his failure to obey the provisions of AS 45.50.330 — 45.50.460, or to make ineffectual an order of a court in connection with the enforcement of AS 45.50.330 — 45.50.460 is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500, or by imprisonment in jail for not more than six months, or by both. (§ 35-2-100 ACLA 1949)

Sec. 45.50.460. Definition of sale for single use. The owner, holder, or person having control of a copyrighted work is considered to sell and part with the right to further restrict the use of the copyrighted work if (1) he sells the right to the single use of it; (2) its sole value is in its use for public performance for profit; and (3) he receives consideration for it, either inside or outside the state. (§ 35-2-92 ACLA 1949)

Article 4. Unfair Trade Practices and Consumer Protection.

Repeal of former article. — Section 1, ch. 246, SLA 1970, repealed former Article 4, entitled "False or Misleading Advertising." The former article consisted of §§ 45.50.470 — 45.50.510 and derived from ch. 86, SLA 1961.

Constitutionality. — Absent a history or strong likelihood of uneven application, this article cannot be said to be unconstitutionally vague. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Any defects in the constitutional sufficiency of the warning provided by this article is cured by authoritative administrative interpretations of the Federal Trade Commission which clarify obscurities or resolve ambiguities. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Liberal construction. — The provisions of this article should not be strictly construed, for it is basic that remedial civil statutes are to be accorded a liberal construction. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

This article as applied, is not a penal statute. State v. O'Neill Investigations,

Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

This article embraces independent debt collection practices. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

The exemption clause of AS 45.50.481(1) does not withdraw the activities of independent debt collection agencies from the scope of the Unfair Trade Practices and Consumer Protection Act. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Sec. 45.50.471. Unlawful acts and practices. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

(1) fraudulently conveying or transferring goods or services by representing them to be those of another;

(2) falsely representing or designating the geographic origin of goods or services;

(3) causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;

(4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(5) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, secondhand, or seconds;

(6) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(7) disparaging the goods, services, or business of another by false or misleading representation of fact;

(8) advertising goods or services with intent not to sell them as advertised;

(9) advertising goods or services with intent not to supply reasonable expectable public demand, unless the advertisement prominently discloses a limitation of quantity;

(10) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or

omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

(13) failing to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting out the name and address of the seller and the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(14) representing that an agreement confers or involves rights, remedies or obligations which it does not confer or involve, or which are prohibited by law;

(15) knowingly making false or misleading statements concerning the need for parts, replacement, or repair service;

(16) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(17) basing a charge for repair in whole or in part on a guaranty or warranty rather than on the actual value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the guaranty or warranty, if any;

(18) disconnecting, turning back or resetting the odometer of a vehicle to reduce the number of miles indicated;

(19) using a chain referral sales plan by inducing or attempting to induce a consumer to enter into a contract by offering a rebate, discount, commission, or other consideration, contingent upon the happening of a future event, on the condition that the consumer either sells, or gives information or assistance for the purpose of leading to a sale by the seller of the same or related goods;

(20) selling or offering to sell a right of participation in a chain distributor scheme;

(21) selling, falsely representing or advertising meat, fish or poultry which has been frozen as fresh food;

(22) failing to comply with AS 45.02.350;

(23) failing to comply with AS 45.45.130 — 45.45.240;

(24) counseling, consulting or arranging for future services relating to the disposition of a body upon death whereby certain personal property, not including cemetery lots and markers, will be furnished or the professional services of a funeral director or embalmer will be furnished, unless the person receiving money or property deposits the money or property and money or property is received, within five days of its receipt, in a trust in a financial institution whose deposits are insured by an instrumentality of the federal government designating the institution as the trustee as a separate trust in the name only of the person on whose behalf the arrangements are made with a

provision that the money or property may only be applied to the purchase of designated merchandise or services and should the money or property deposited and any accrued interest not be used for the purposes intended on the death of the person on whose behalf the arrangements are made, all money or property in the trust shall become part of his estate; upon demand by the person on whose behalf the arrangements are made, all money or property in the trust including accrued interest, shall be paid to him; this paragraph does not prohibit the charging of a separate fee for consultation, counseling or arrangement services if the fee is disclosed to the person making the arrangement; any arrangement under this paragraph which would constitute a contract of insurance under AS 21 is subject to the provisions of AS 21;

(25) failing to comply with the terms of the Alaska Gasoline Products Leasing Act (AS 45.50.800 — 45.50.850).

(c) The unlawful acts and practices listed in (b) of this section are in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.

(d) Repealed by § 21 ch 166 SLA 1978. (§ 2 ch 246 SLA 1970; am § 1 ch 53 SLA 1974; am § 1 ch 138 SLA 1974; am § 1 ch 183 SLA 1975; am § 2 ch 146 SLA 1976; am § 3 ch 197 SLA 1976; am § 3 ch 234 SLA 1976; am § 21 ch 166 SLA 1978)

Effect of amendments. — The first 1976 amendment added paragraph (23) of subsection (b).

The second 1976 amendment added paragraph (24) of subsection (b).

The third 1976 amendment added paragraph (25) of subsection (b).

The 1978 amendment repealed subsection (d), which read "When a person is tried under the criminal provisions of this chapter for engaging in an unlawful act or practice under this chapter, it must be shown that he acted knowingly and with intent."

Editor's note. — The paragraph added to subsection (b) by § 3, ch. 197, SLA 1976, was designated paragraph (23) in the act. The paragraph added to subsection (b) by § 3, ch. 234, SLA 1976, was designated paragraph (22) in the act.

Section 1, ch. 234, SLA 1976 provides: "Findings of the legislature. The legislature finds and declares that since the distribution and sales, through lease agreements, of gasoline in the state vitally affect the economy of the state, the public interest, welfare, and transportation, it is necessary to define the relationships and responsibilities of the parties to certain agreements pertaining to leasing."

Legislative history report. — For report on ch. 246, SLA 1970 (FCCS 2d HCS CSSB 252), see 1970 House Journal, p. 1546; 1970 House Journal Supplement No. 10; 1970 Senate Journal, p. 1295.

This statute did not chill constitutionally protected speech, where the speech in question involved communications regarding alleged debts and thus fell within the rubric of commercial speech, which enjoys a lesser first amendment protection than noncommercial speech. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Subsection (a) not vague. — The words of subsection (a) of this section have a "well-defined" meaning in the area of trade regulation and are therefore not vague. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Two elements must be proved to establish a prima facie case of unfair or deceptive acts or practices under the act: (1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred. State v. O'Neill Investigations, Inc., Sup. Ct. Op.

No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

When act or practice is deceptive or unfair. — An act or practice is deceptive or unfair if it has the capacity or tendency to deceive. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Actual injury as a result of the deception is not required. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Intent to deceive need not be proved. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Testimony of consumers that they were misled is sufficient to sustain a prima facie case of unfair and deceptive practices. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

An act or practice need not be deceptive to be unfair. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Unfairness will be determined by a variety of factors, including: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers or competitors or other businessmen. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Deceptive and unfair acts by collection agencies. — Threats by debt collection agencies of imminent legal action when no such action is actually contemplated is a deceptive act or practice. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Harassment of debtors by telephone calls to them, their relatives or their employers constitutes an unfair act or practice. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

A misrepresentation by a debt collection agency that failure to pay an alleged debt will result in impairment of one's credit rating has been held to be an unfair and deceptive act or practice. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

The use by collection agencies of simulated legal documents or collection forms labelled "Final Demand Before Legal Action" when no legal action is in fact taken constitutes a deceptive act. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Quoted in Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., Sup. Ct. Op. No. 2008 (File No. 4268), 604 P.2d 1113 (1980).

Am. Jur. 2d, ALR and C.J.S. references. — 32 Am. Jur. 2d, False Pretenses, § 1 et seq.; 37 Am. Jur. 2d, Fraud and Deceit, § 41 et seq.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 ALR3d 1008.

Scope and exemptions of state deceptive trade practice and consumer protection acts, 89 ALR3d 399.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

35 C.J.S. False Pretenses § 14; 37 C.J.S. Fraud § 154; 37 C.J.S. Fraudulent Conveyances § 469.

Sec. 45.50.472. Junk telephone calls. (a) Making a junk telephone call without the prior written consent of the person called is unlawful.

(b) In this section "junk telephone call" means a telephone call made for the purpose of advertising through the use of a recorded advertisement.

(c) The provisions of AS 45.50.481 — 45.50.561 apply to this section. (§ 1 ch 17 SLA 1978)

Sec. 45.50.481. Exemptions. Nothing in AS 45.50.471 — 45.50.561 applies to

(1) an act or transaction regulated under laws administered by the state, by any regulatory board or commission, or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471;

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

(3) an act or transaction regulated under AS 21.36 or AS 06.05 or any regulations promulgated under authority of those chapters. (§ 2 ch 246 SLA 1970: am §§ 2, 3 ch 53 SLA 1974)

Mere regulation under a separate and distinct statutory scheme satisfies only one prong of paragraph (1) of this section; unfair acts and practices are exempt from the purview of the act only where the business is both regulated elsewhere and the unfair acts and practices are therein prohibited. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

This article embraces independent debt collection practices. — See note under this catchline following the article analysis.

ALR references. — Scope and exemptions of state deceptive trade practice and consumer protection acts, 89 ALR3d 399.

Sec. 45.50.491. Regulations. The attorney general, in accordance with the Administrative Procedure Act (AS 44.62), may adopt regulations interpreting and forms necessary for administering the provisions of AS 45.50.471 — 45.50.561. (§ 2 ch 246 SLA 1970; am § 4 ch 53 SLA 1974)

Sec. 45.50.495. Investigative power of attorney general. (a) If the attorney general has cause to believe that a person has engaged in, is engaging in or is about to engage in, a deceptive trade practice under AS 45.50.471, he may

(1) request the person to file a statement or report in writing, under oath, on forms prescribed by him, setting out all facts and circumstances concerning the sale or advertisement of property by the person, and other information considered necessary;

(2) examine under oath any person in connection with the sale or advertisement of property;

(3) examine property or sample of the property, record, book, document, account or paper that he considers necessary;

(4) make true copies of records, books, documents, accounts, or papers examined under (3) of this subsection which may be offered in evidence in place of the originals in actions brought under AS 45.50.471 — 45.50.561; and

(5) under an order of the superior court, impound samples of property which are material to his investigation and retain the sample until proceedings undertaken under AS 45.50.471 — 45.50.561 are completed.

(b) The attorney general, in addition to other powers conferred on him by this section, may issue subpoenas to require the attendance of witnesses or the production of documents or other physical evidence, administer oaths, and conduct hearings to aid an investigation or inquiry. Service of an order or subpoena shall be made in the same manner as a summons in a civil action in the superior court. (§ 5 ch 53 SLA 1974)

Sec. 45.50.501. Restraining prohibited acts. (a) When the attorney general has reason to believe that a person has used, is using, or is about to use an act or practice declared unlawful in AS 45.50.471, and that proceedings would be in the public interest, he may bring an action in the name of the state against the person to restrain by injunction the use of the act or practice. The action may be brought in the superior court in the judicial district in which the person resides or is doing business or has his principal place of business in Alaska, or, with the consent of the parties, in any other judicial district in the state.

(b) The court may make additional orders or judgments that are necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful by AS 45.50.471. (§ 2 ch 246 SLA 1970)

ALR reference. — Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud, 59 ALR3d 1222.

Sec. 45.50.511. Assurances of voluntary compliance. In the administration of AS 45.50.471 — 45.50.561, the attorney general may accept an assurance of voluntary compliance with respect to any act or practice considered to be violative of AS 45.50.471 — 45.50.561 from a person who has engaged or was about to engage in such an act or practice. Such an assurance shall be in writing and shall be filed with and is subject to the approval of the superior court in the judicial district in which the alleged violator resides or is doing business or has his principal place of business in Alaska. Such an assurance of voluntary compliance is not considered an admission of violation for any purpose. Matters closed in this way may at any time be reopened by the attorney general for further proceedings in the public interest, under AS 45.50.501. (§ 2 ch 246 SLA 1970)

Sec. 45.50.521. When information and evidence confidential and nonadmissible. (a) Repealed by § 6 ch 53 SLA 1974.

(b) Subject to the provisions of AS 45.50.501(a), the attorney general may not make public the name of a person alleged to have committed an act or practice declared unlawful in AS 45.50.471 during an investigation conducted by him under AS 45.50.471 — 45.50.561, nor are the records of investigation or intelligence information of the attorney general obtained under AS 45.50.471 — 45.50.561 considered public records available for inspection by the general public. However, the attorney general is not prevented from issuing public statements describing or warning of a course of conduct or a conspiracy which constitutes or will constitute an unlawful act or practice, whether on a local, state, regional, or national basis. (§ 2 ch 246 SLA 1970; am § 6 ch 53 SLA 1974)

Sec. 45.50.531. Private and class actions. (a) A person who purchases or leases goods or services and thereby suffers an ascertainable loss of money or property, real or personal, as a result of another person's act or practice declared unlawful by AS 45.50.471, may bring a civil action in the judicial district in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200, whichever is greater. The jury or, if the action is tried without a jury, the judge may, in cases of wilful violation, award up to three times the actual damages sustained, and in all cases the court may provide equitable relief it considers necessary or proper.

(b) A person entitled to bring an action under this section may, after investigation by and approval of the attorney general, if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and if he adequately represents the similarly situated persons, bring an action on behalf of himself and other similarly injured and situated persons to recover actual damages. A person planning to bring an action under this subsection shall first submit to the attorney general a copy of his proposed complaint, and he may not file the complaint in court without the attorney general's approval. In an action brought under this subsection, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of an action brought under this section the clerk of the court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of an order or judgment in the action, shall mail a copy of the order or judgment to the attorney general.

(d) In an action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees and costs.

(e) A permanent injunction or final judgment against a person against whom an action was initiated under AS 45.50.501 is prima facie evidence in an action brought under this section that the person

used or employed an act or practice declared unlawful by AS 45.50.471.

(f) No person may commence an action under this section more than two years after he discovers or reasonably should have discovered that his loss resulted from an act or practice declared unlawful by AS 45.50.471.

(g) If the court finds for the defendant in an action brought under this section, it may award the defendant an amount equal to the actual costs and attorney fees he incurred in his defense.

(h) Manufacturers or suppliers of merchandise, the fault of which is the basis for the action under this chapter, are liable for the damages assessed to or suffered by retailers charged under this chapter. (§ 2 ch 246 SLA 1970; am § 1 ch 225 SLA 1976)

Effect of amendment. — The 1976 amendment deleted the former fourth sentence of subsection (b), which read "Also, in an action brought under this subsection, the plaintiff shall post bond of not less than $5,000 and which is sufficient to cover costs and attorney fees which may be awarded under (g) of this section."

Applied in Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., Sup. Ct. Op. No. 2008 (File No. 4288), 604 P.2d 1113 (1980).

ALR references. — Consumer class action based on fraud or misrepresentations, 53 ALR3d 534.

Right to private action under state consumer protection act, 62 ALR3d 169.

Reasonableness of offer of settlement under state deceptive trade practice and consumer protection acts, 90 ALR3d 1350.

Sec. 45.50.541. Nonnegotiability of consumer paper. (a) If a contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, the note, instrument or evidence of indebtedness shall have printed on its face the words "consumer paper," and the note, instrument or evidence of indebtedness with the words "consumer paper" printed on it is not a negotiable instrument within the meaning of Uniform Commercial Code (AS 45.01 — 45.09).

(b) Notwithstanding the absence of such a notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. An agreement to the contrary has no effect in limiting the rights of a consumer.

(c) The assignee's liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. (§ 2 ch 246 SLA 1970)

Cross reference. — As to form of negotiable instruments, see AS 45.03.104.

Sec. 45.50.542. Waiver. A waiver by a consumer of the provisions of AS 45.50.471 — 45.50.561 is contrary to public policy and is unenforceable and void. (§ 7 ch 53 SLA 1974)

Sec. 45.50.545. Interpretation. In interpreting AS 45.50.471 due consideration and great weight should be given the interpretations of sec. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)) made by the Federal Trade Commission and the federal courts. (§ 8 ch 53 SLA 1974)

The Federal Fair Debt Practices Act, 15 U.S.C. § 1692 (Supp. 1977), expands already existing Federal Trade Commission jurisdiction over unfair or deceptive acts and practices of collection agencies; it is not written on a clean slate. The Federal Trade Commission's prior exercise of jurisdiction in this area is entitled to great weight, and leads to the conclusion that the new act merely supplements the old. State v. O'Neill Investigations, Inc., Sup. Ct. Op. No. 2053 (File Nos. 4109, 4165), 609 P.2d 520 (1980).

Sec. 45.50.551. Penalties. (a) A person who violates the terms of an injunction or restraining order issued under AS 45.50.501 shall forfeit and pay to the state a civil penalty of not more than $25,000 per violation. For the purposes of this section, the superior court in a judicial district issuing an injunction retains jurisdiction, and the cause shall be continued, and in these cases the attorney general acting in the name of the state may petition for recovery of the penalties.

(b) In an action brought under AS 45.50.501, if the court finds that a person is using or has used an act or practice declared unlawful by AS 45.50.471, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than $5,000 per violation.

(c) Repealed by § 21 ch 166 SLA 1978. (§ 2 ch 246 SLA 1970; am § 9 ch 53 SLA 1974; am § 21 ch 166 SLA 1978)

Effect of amendment. — The 1978 amendment repealed subsection (c), which contained a penalty for conduct declared unlawful by AS 45.50.471.

Sec. 45.50.561. Definitions. In AS 45.50.471 — 45.50.561

(1) "advertising" includes the attempt directly or indirectly by publication, dissemination, solicitation, endorsement or circulation, display in any manner, including solicitation or dissemination by mail, telephone or door-to-door contacts, or in any other way, to induce directly or indirectly a person to enter or not enter into an obligation or acquire title or interest in any merchandise or to increase the consumption of it or to make a loan;

(2) "documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate;

(3) "examination" of documentary material includes the inspection, study, or copying of the material, and the taking of testimony under oath or acknowledgment in respect of documentary material or copy of it;

(4) "seconds" means manufactured items having flaws or consisting of a standard quantity or quality less than the manufacturer's quality standard;

(5) "chain distributor scheme" means a sales device whereby a person, upon condition that he make an investment, is granted a license or right to solicit or recruit for profit one or more additional persons who are also granted a license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted a license or right upon the condition of investment; a limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility for the license or right to solicit or recruit or the receipt of profit from these does not change the identity of the scheme as a chain distributor scheme; as used in this paragraph, "investment" means acquisition, for a consideration other than personal services, of tangible or intangible property, and includes but is not limited to franchises, business opportunities and services; "investment" does not include sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(6) "consumer" means a person who seeks or acquires goods or services by lease or purchase;

(7) "knowingly" means actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness;

(8) "fresh" means a condition of food which has never been frozen. (§ 2 ch 246 SLA 1970; am § 10 ch 53 SLA 1974; am § 2 ch 138 SLA 1974)

Article 5. Monopolies; Restraint of Trade.

Wehling

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. FIRST NATIONAL BANK OF ANCHORAGE, Appellee.	File No. 5006 O P I N I O N
GEORGE H. BROWN, JR., LAWRENCE BROUSE, JOHN LRYER and COMMONWEALTH MORTGAGE CORPORATION, Appellants, Cross-Appellees, v. STATE OF ALASKA, Appellee, Cross-Appellant.	File No. 5107 Cross-Appeal No. 5085 [No. 2591 - Decmeber 3, 1982]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, James K. Singleton, Judge.

Appearances: Michele D. Brown, Donna Dell'Olio, Connie J. Sipe, Assistant Attorneys General, Anchorage, Avrum M. Gross and Wilson L. Condon, Attorneys General, Juneau, for Appellant, State of Alaska. John R. Beard, Beard & Lawer, Anchorage, for Appellee, First National Bank. Terry C. Aglietti, John W. Sivertsen, Aglietti, Offret & Pennington, Anchorage, for Appellants, George H. Brown, Jr., Lawrence Brouse, John Dryer, and Commonwealth Mortgage Corporation.

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

MATTHEWS, Justice.
RABINOWITZ, Chief Justice, dissenting in part.

These appeals arise from an action brought by the Attorney General against George Brown, Jr. and others[1] involved in the development and sale of certain real property in this state. The basic conduct complained of consists of various misleading statements and omissions concerning the suitability of the land for residential construction. The State sought to enjoin such conduct and to obtain restitution on behalf of individual lot purchasers. After obtaining a preliminary injunction, the State joined as an

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1. The others are: Neil Hausam, Brown's engineer; John Dryer, Brown's primary Windsong lot salesman; Lawrence Brouse, hired by Brown to manage the Windsong development project; Knik River Estates, a limited partnership of which Brown is the general partner; and Commonwealth Mortgage Corporation, formed by Brown after the State instituted this action and to which Brown subsequently transferred the promissory notes and deeds of trust executed by Windsong lot purchasers. For simplicity, these defendants will frequently be referred to collectively as "Brown."

additional defendant First National Bank of Anchorage, which had financed the real estate development, seeking cancellation of purchasers' promissory notes which the Bank was holding as collateral for its loans to Brown. The lower court dismissed the State's action against First National and, after a non-jury trial, entered judgment against Brown. That judgment permanently enjoined Brown from engaging in certain conduct and adjudged him liable to the State, as trustee for individual purchasers, for $1,911,357.60.[2] Brown has appealed that judgment and the State has filed a cross-appeal. The State has also appealed the trial court's dismissal of its claim against First National.

I. BACKGROUND

A. Facts

The following facts were found by the court. They are not challenged on appeal and we therefore take them as true.

George Brown, Jr. is the general partner of Knik River Estates, a limited partnership. In the summer of 1975, he began developing some property which lies adjacent

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2. Judgment was entered jointly and severally against Brown and Commonwealth Mortgage Corporation for the full amount. Dryer was held liable for only $50,000 and Brouse for $37,500. Hausam was dismissed as a defendant earlier in the case upon prevailing on a summary judgment motion and is not a party to these appeals. Knik River Estates is not mentioned in the trial court's final judgment.

to the Knik River in the Matanuska-Susitna Borough, known as the Windsong Subdivision. He knew at that time that the land had in the past been subject to flooding. The source of that flooding is Lake George, which periodically forms when the Knik River becomes dammed by a glacier. When the ice dam breaks, water is released flooding certain downstream areas, including on occasion the Windsong Subdivision, covering it with as much as fifteen feet of water.[3]

Brown hired Neil Hausam, a civil engineer and land surveyor, to survey and plat the land. Hausam studied the possibility of flooding and concluded that a reoccurrence was unlikely. Prior to approving the plat, the Matanuska-Susitna Borough requested that the Army Corps of Engineers conduct a flood-hazard evaluation of the Windsong Subdivision. The Corps concluded that virtually all of the subdivision was in a high-hazard area. Although Hausam disagreed with that conclusion and informed the Borough of this, the Borough required that the first page of the Windsong plat contain a flood-warning notation.

In 1976, Brown commenced selling lots. To assist him, he hired a salesman, John Dryer, and a property manager, Lawrence Brouse. Although purchasers were given the second

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3. The most recent occurrence of such flooding appears to have been in 1966.

page of the Windsong plat, they never received the first page containing the flood warning. In addition, Brown represented to purchasers, among other things, that: (1) Lake George had not formed since the Good Friday earthquake of 1964; (2) it would take another earthquake of equal magnitude for the lake to form again; (3) experts, including the Army Corps of Engineers, had concluded that the possibility of flooding was remote; (4) purchasers of Windsong lots would be able to obtain flood and mortgage insurance; and (5) construction financing was readily available. None of these representations were true.

In December 1977, the Consumer Protection Section of the Attorney General's Office began investigating the sale of Windsong lots. Upon learning of that investigation, Brown sent all purchasers a letter telling them that certain unfounded complaints were being directed at the Windsong development. The purpose of that letter was to make purchasers feel secure about their investments and continue making their property payments. In late January of 1978, a meeting was held at which Brown, Brouse, Hausam and various representatives of the Attorney General's Office were present. At that meeting Brown was told that the State had received several consumer complaints regarding the sale of Windsong lots. He was also shown letters that the State had received from various experts indicating the existence of a

flood hazard at the Windsong Subdivision.

Immediately following this meeting, Brown contacted between sixty and seventy lot purchasers and induced them to sign a preprinted form affidavit entitled "Declaration and Memorandum of Understanding." This was drafted by Brown's attorneys for the purpose of lining up favorable witnesses in case of future litigation. At the time the document was presented to purchasers, Brown reassured them that the possibility of flooding was still remote and that property values had increased. Signing purchasers were not given a meaningful opportunity to study the document, and the language contained therein was not comprehensible to the average purchaser. In effect, the affidavits purported to be a vote of confidence by investors in the Windsong development. Those purchasers whom Brown knew to be dissatisfied with their investments were not offered the memorandum.

B. Proceedings Below

In February 1978, the State filed a complaint in superior court against Brown seeking injunctive relief and civil penalties. The State alleged various violations of the Alaska Unfair Trade Practices and Consumer Protection Act, AS 45.50.471-45.50.561. Brown filed his answer and later moved for summary judgment on the ground that the Consumer Protection Act did not apply to real estate transactions, or in the alternative that he was exempt from the

Act under AS 45.50.581.[4] The trial court granted Brown's summary judgment motion, but gave the State leave to amend its complaint.

In June 1978, the State filed its amended complaint, this time alleging that Brown had violated the Uniform Land Sales Practices Act ("ULSPA"), AS 34.55.004-34.55.046. Shortly thereafter, the State moved for a preliminary injunction to enjoin Brown from disposing of Windsong lots in violation of ULSPA and the administrative regulations promulgated thereunder, 3 AAC 20.010-.130.

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4. That section provides:

> Nothing in AS 45.50.471-45.50.561 applies to
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> (1) an act or transaction regulated under laws administered by the state, by any regulatory board or commission or officer acting under statutory authority of the state or of the United States, unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471; . . .

Brown argued that he was exempt under this section because the transactions at issue were regulated under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720, which, Brown claimed, prohibits the practices alleged by the State in this case to violate AS 45.50.471. Although Brown had obtained an exemption from the registration provisions of the federal act, the trial court agreed that Brown was exempt from the Consumer Protection Act and granted summary judgment to Brown on that basis. Later in the case, however, the trial court concluded that the Consumer Protection Act did not apply to real property transactions. See Part II of this opinion, infra.

After a lengthy hearing, the lower court entered a preliminary injunction against Brown ordering him to disclose fully to prospective purchasers the Windsong Subdivision's flooding potential, and enjoining him from disposing of land in violation of ULSPA and its implementing regulations. Brown was also enjoined from taking any adverse action against lot purchasers who, after being notified by the State of the court's preliminary findings, elected to rescind their land purchase contracts. Such purchasers were directed to make all future payments to the court registry. Approximately seventy purchasers indicated that they wished to rescind their contracts and obtain restitution.

In December 1978, the State amended its complaint again to add First National Bank of Anchorage as a defendant. The Bank's involvement in this case stems from loans it made to Brown to finance the Windsong development. In 1977, First National loaned $200,000 to Knik River Estates to purchase materials for constructing a sewer system in the Windsong Subdivision. In accordance with its collateral and loan agreement, Knik River Estates pledged to the Bank the promissory notes and deeds of trust executed by lot purchasers. When, in the early part of 1978, Brown formed Commonwealth Mortgage Corporation to assume ownership of the Windsong Subdivision, Commonwealth continued to pledge to

the Bank the promissory notes and deeds of trust received from the sale of Windsong lots. In August 1978, First National loaned Commonwealth $500,000 to retire the balance of the earlier loan and to install electric and telephone utilities at Windsong.

The 1977 and 1978 loan agreements were substantially identical. Neither involved actual endorsement of the promissory notes that had been pledged as security and delivered to First National. Instead, the loan agreements authorized the Bank to endorse the notes to itself on behalf of the borrower. In late November of 1978, First National endorsed over to itself all of the promissory notes in its possession. It then sent collection letters to all Windsong lot purchasers who were delinquent in their payments. First National informed these purchasers that unless all delinquent payments were paid within fifteen days, the entire balance would become due immediately. The Bank also told these purchasers that their payments to the court registry, pursuant to the preliminary injunction, would not be credited toward the amounts claimed due.

In its complaint against the Bank the State sought a declaratory judgment that First National was not a "holder in due course" as well as an order enjoining the Bank from

taking action against purchasers who were making their note payments to the court registry. The State later moved for summary judgment against First National, requesting that the court order the Bank to deliver to the court the promissory notes of purchasers who had elected to rescind their land purchase contracts. First National responded by moving for dismissal of the State's complaint against it for failure to state a claim. The lower court ultimately granted First National's motion, concluding that the Attorney General lacked standing to maintain an action against the Bank.

Trial of the case commenced on March 16, 1979. On the first day, the lower court orally granted summary judgment against the State in favor of Hausam, Brown's engineer. The basis for the court's ruling was that AS 34.55.006,[5] the

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5. AS 34.55.006 provides:

> It is unlawful for a person, in connection with the offer, sale or purchase of subdivided land directly or indirectly, to knowingly
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> (1) employ a device, scheme, or artifice to defraud;
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> (2) make an untrue statement of a material fact or omit a statement of a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or
>
> (3) engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

general antifraud section of ULSPA, could not be applied retroactively and Hausam had done nothing to affect land sales at Windsong after the effective date of that section, September 21, 1977.[6] Immediately following that ruling, in response to a question by Brown's counsel, the trial court stated:

> Well, I guess, implicit in what the court has already ruled with regard to Mr. Hausam is that any claim based upon anyone who relied -- whose actions were motivated by acts that took place prior to the effective date of the amendment must fail.

Counsel for the State interjected stating that it was the State's position that "lulling conduct" by Brown which occurred after the effective date of the ULSPA amendments could supply the basis for granting restitution to purchasers who bought lots before the amendment's effective date. The court reserved ruling on that question and allowed the case to proceed.

On October 25, 1979, the trial court entered its final judgment in the matter. That judgment permanently enjoined Brown from disposing of Windsong lots without first

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6. As originally enacted, ULSPA applied only to sales of subdivided land located outside the state. See Ch. 179, SLA 1968. In 1977, the legislature amended ULSPA to bring in-state land sales within its scope. See Ch. 138, SLA 1977. As part of the same bill, the legislature added AS 34.55.006. The effective date of these changes was September 21, 1977. Id.

obtaining a purchaser's signature on a document, drafted by the court, fully disclosing the flood risk at Windsong. It also enjoined Brown from making any statements inconsistent with those contained in that document. In addition, Brown was enjoined from engaging in certain acts and practices prohibited by the administrative regulations implementing ULSPA. With respect to the State's claim for restitution, the trial court entered judgment against Brown in favor of the State, as trustee for those purchasers who had elected to rescind, for $1,611,357.60. The basis for this award, however, was not ULSPA, upon which the State had predicated its case and upon which Brown had defended. Instead, the lower court sua sponte ordered restitution on the basis of common law fraud, and specifically declined to rule on the applicability or ULSPA. In all, the court's judgment listed seventy-one purchasers who were eligible for restitution, eighteen of whom had bought lots after and fifty-three of whom had bought lots before September 21, 1977, the effective date of the ULSPA amendments. Finally, the lower court awarded the State attorney's fees and costs of $42,000 and $1,894.24, respectively.

C. Contentions on Appeal

On appeal, Brown contends that the trial court erred in ordering restitution to Windsong lot purchasers on

the basis of common law fraud. Brown asserts that the State is without authority to pursue the common law rights of defrauded land purchasers. In essence, Brown claims that the trial court was bound to apply ULSPA, under which the lower court's restitution order would not have been proper since, Brown asserts, ULSPA cannot be retroactively applied. Brown also contends that application of ULSPA to in-state subdividers is unconstitutional, and that the administrative regulations promulgated under ULSPA are invalid as applied to him. Finally, Brown claims that the lower court erred in refusing his request for a jury trial.

The State, on the other hand, argues that the trial court did not err in granting relief on the basis of common law fraud. The State also contends that the trial court's judgment would have been proper under ULSPA, and under the Consumer Protection Act as well. The State does, however, claim that the trial court erred in dismissing its claim against First National Bank of Anchorage. The State also contends that the trial court erred when, shortly following the issuance of the preliminary injunction, it denied the State's request for prejudgment attachment of certain property belonging to Brown.

II. APPLICATION OF THE CONSUMER PROTECTION ACT TO SALES OF REAL PROPERTY

We begin by addressing the State's contention that the trial court's judgment can be affirmed under the Unfair Trade Practices and Consumer Protection Act, AS 45.50.471-45.50.561. We address this argument first because, as the State points out, AS 45.50.501 specifically authorizes the Attorney General to bring suit to enjoin violations of the Act, and expressly empowers the court in such cases to award restitutory relief.[7] As noted earlier, the State's original complaint alleged that Brown's Windsong activities violated the Consumer Protection Act. The lower court dismissed that complaint on the basis of the exemption contained in AS

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7. AS 45.50.501 provides in relevant part:

> (a) When the attorney general has reason to believe that a person has used, is using, or is about to use an act or practice declared unlawful in AS 45.50.471, and that proceedings would be in the public interest, he may bring an action in the name of the state against the person to restrain by injunction the use of the act or practice. . . .
>
> (b) The court may make additional orders or judgments that are necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of an act or practice declared to be unlawful by AS 45.50.471.

45.50.481(a).[8] Later, however, in rendering its final decision, the court held that the Act does not apply at all to the sale of real property, a conclusion which the State claims is erroneous. For the reasons discussed below, we agree with the lower court's decision.

AS 45.50.471(a) provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

Standing alone, this language could be construed as prohibiting misrepresentations made by sellers of real property. Added by way of amendment to the Act in 1974, see Ch. 53, § 1, SLA 1974, subsection (a) was intended "to make the prohibitory language . . . of the present Act more responsive to the needs of the Alaskan consuming public and the business community."[9] And, because the Act is remedial, we are mindful that its provisions are to be liberally construed. State v. O'Neill Investigations, Inc., 609 P.2d 520, 528 (Alaska 1980).

Nevertheless, we are persuaded that the entire thrust of the Consumer Protection Act is directed at regulating practices relating to transactions involving

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8. See note 4 supra.

9. Governor's Transmittal Letter, 1974 House Journal 122.

consumer goods and services. Immediately following AS 45.50.471(a) is a list of twenty-five specific acts or practices which are expressly prohibited as "unfair methods of competition" and "deceptive acts or practices." AS 45.50.471(b). Of these, thirteen concern practices relating to transactions involving "goods" or "goods and services" generally.[10] The remaining twelve deal with practices involving the sale of particular types of goods[11] or services,[12] or relate to certain types of activities commonly associated with consumer goods and services transactions.[13]

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10. See AS 45.50.471(b)(1),(2),(3),(4),(5),(6),(7),(8),(9),(11),(13) and (19).

11. AS 45.50.471(b)(10)(resetting vehicle odometers); (21)(selling frozen meat as "fresh"); (25)(failure to comply with AS 45.50.800-45.50.850, the Alaska Gasoline Products Leasing Act).

12. AS 45.50.471(b)(17)(excess charges for warranty repairs); (23)(failure to comply with AS 45.45.130-45.45.240, regulating motor vehicle repairs); (24)(prohibiting certain practices in connection with counseling, consulting or arranging for future services relating to the disposition of a body upon death).

13. AS 45.50.471(b)(10)(misrepresentations regarding price reductions); (14)(misrepresenting legal rights or obligations in an agreement); (15)(misrepresenting the need for parts, replacement or repair service); (16)(misrepresenting the authority of an agent or representative to negotiate the terms of a consumer transaction); (20)(selling or offering to sell a right of participation in a chain distributor scheme); (22)(failure to comply with AS 45.02.350, regulating the sale of goods or services by door-to-door solicitation).

While subsection (b) makes clear that this list is not exclusive, none of the enumerated prohibited acts mentions real property. Nor do any other provisions of the Act suggest that the legislature intended the sale of real property to come within the Act's purview.[14]

It is our judgment that the trial court properly invoked the rule of ejusdem generis to construe the language of AS 45.50.471(a). "[W]hen particular words are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described." Chugach Electric Ass'n v. Calais Co., 410 P.2d 508, 509-10 (Alaska 1966). The doctrine is equally applicable when, as here, specific words comprehending a class of activity follow a more general description. 2A C. Sands, Sutherland Statutory Construction § 47.17, at 103 (4th ed. 1973). In our view, real property falls outside of the class "particularly described," i.e., "goods and services." The list

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14. In this respect, Alaska's Act differs from the Acts of several states, cases from which have held that real property transactions are within the Act's scope. See, e.g. Nash v. Hoopes, 332 A.2d 411, 413 (Del. Super. 1975) (Act prohibiting deceptive merchandising practices where "merchandise" statutorily defined to include real property); Commonwealth v. DeCotis, 316 N.E.2d 748, 752 (Mass. 1974) ("trade or commerce" statutorily defined to include the sale of real property); Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 820 (Pa. 1974)("trade or commerce" statutorily defined to include the sale of real property); Woods v. Littleton, 554 S.W.2d 662, 667 n.9 (Tex. 1977) ("consumers" statutorily defined to include purchasers of real property).

of proscribed activities found in AS 45.50.471(b) suggests that the Act is directed solely at regulating transactions involving "products and services sold to consumers in the popular sense." Neveroski v. Blair, 358 A.2d 473, 480 (N.J. 1976). In Neveroski, the court was called upon to construe the word "merchandise," which was defined in the New Jersey Consumer Fraud Act to include "anything offered, directly or indirectly, to the public for sale." Id. at 479. Because that language was preceded by the words "objects, wares, goods, commodities, [and] services," the court invoked the doctrine of ejusdem generis to hold that misrepresentation by a real estate broker in connection with the sale of real property was not actionable under the New Jersey Act. Id. at 479-81. The broad language of AS 45.50.471(a), like that involved in Neveroski, "can logically be attributed to a legislative desire to incorporate other consumer transactions" which may not be regulated by the specific prohibitions found in subsection (b). Neveroski, 358 A.2d at 480.

This construction of subsection (a) also finds support in other provisions of the Act. AS 45.50.561(6) defines a "consumer" as "a person who seeks or acquires goods or services by lease or purchase." (Emphasis added). Moreover, AS 45.50.531(a) grants a private right of action only to "[a] person who purchases or leases goods or services

and thereby suffers an ascertainable loss . . . as a result of another person's act or practice declared unlawful by AS 45.50.471." (Emphasis added). That the section authorizing the Attorney General to sue to enjoin violations of AS 45.50.471 contains no comparable limitation, see AS 45.50.501, does not, in our opinion, indicate that the scope of the Act enlarges when suit is instituted by the State.

In sum, we hold that the sale of real property is not within the regulatory scope of the Consumer Protection Act. Accordingly, Brown's liability for restitution to Windsong lot purchasers could not properly be predicated on asserted violations of that Act.

III. THE UNIFORM LAND SALES PRACTICES ACT

After the trial court dismissed the Consumer Protection Act claim against Brown, the State amended its complaint to allege violations of the Uniform Land Sales Practices Act (ULSPA), AS 34.55.004-34.55.046. Throughout the remainder of the proceedings, the State consistently asserted and Brown consistently denied liability under this Act. At the conclusion of the case, the lower court declined to rule on the applicability of ULSPA, relying instead on the common law. The State contends that the judgment would have been proper under ULSPA. Brown, on the other hand, maintains that ULSPA cannot constitutionally apply to him since the 1977 amendments, which made the Act

applicable to in-state land sales, were enacted in violation of article II, section 13 of the Alaska Constitution. Brown also claims that a court is without authority to award restitution in a suit brought under ULSPA by the Attorney General. Finally, Brown argues that even if the court could award restitution, it could not do so as to those purchasers who bought their lots prior to the effective date of the ULSPA amendments.

A. The Constitutional Validity of the ULSPA Amendments.

Article II, section 13 of the Alaska Constitution[15] requires that every bill be confined to one subject which must be expressed in its title. The 1977 amendments to ULSPA find their genesis in House Bill 67, entitled "An Act Relating to the Uniform Land Sales Practices Act." 1977 House Journal 63. The bill was introduced at the Governor's request and all of its provisions related directly to ULSPA.

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15. Alaska Constitution, art. II, § 13 provides:

> Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

See Governor's Transmittal Letter, id. at 63-66. The primary impact of House Bill 67 was to amend ULSPA to bring in-state sales of subdivided land within the Act's scope and to add a general antifraud section. With only minor changes, the bill received the House's approval and was sent to the Senate for its consideration. At the instance of the Senate Rules Committee, a Senate Committee Substitute was approved. 1977 Senate Journal 1517. This version of the bill was entitled "An Act Relating to Land; And Providing for an Effective Date." Id. at 1489. The sections relating to ULSPA were essentially the same as those approved by the House, but the Senate Committee Substitute also contained various amendments to the Alaska Land Act, AS 38.05.005-38.15.370. These amendments pertain to the leasing of state-owned lands and to the Division of Lands' zoning power. It was this version of the bill that ultimately became law. Ch. 138, SLA 1977.

That every section of Chapter 138, SLA 1977 in some respect concerns land is not disputed. However, it is just as clear that many of its provisions have nothing else in common. Thus, the issue to be resolved is whether the general heading "land" can be considered "one subject" for purposes of article II, section 13. Were we writing on a clean slate, we would be inclined to find this subject impermissibly broad. Permitting such breadth under the one-

subject rule could conceivably be misconstrued as a sanction for legislation embracing "the whole body of the law." Trumble v. Trumble, 55 N.W. 869, 870 (Neb. 1893). Nevertheless, while the issue is indeed close, we are unable to say that the legislature has transgressed the limits of article II, section 13 established by prior decisions of this court.

To determine if a bill is confined to one subject,

> [a]ll that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be part of, or germane to, one general subject.[16]

Thus, "what constitutes one subject for purposes of art. II, § 13 is broadly construed."[17] And "[n]o act will be set aside for failing to comply with this provision except where the violation is both substantial and plain."[18]

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16. Gellert v. State, 552 P.2d 1120, 1123 (Alaska 1974), quoting Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1891). See Short v State, 600 P.2d 20, 24 (Alaska 1979); North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978).

17. Short v. State, 600 P.2d 20, 23 (Alaska 1979). See North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978); Gellert v. State, 522 P 2d 1120, 1122 (Alaska 1974).

18. North Slope Borough v Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978). See Short v. State, 600 P.2d 20, 23 (Alaska 1979); Suber v. State Bond Comm., 414 P.2d 546, 557 (Alaska 1966).

In Gellert v. State, 522 P.2d 1120 (Alaska 1974), we upheld a bill that provided for the issuance of bonds to finance flood control and small boat harbor projects. These two topics were found to be confined to one subject because they both pertained "to one ongoing plan for the development of water resources." Id. at 523. More recently, in North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978), we upheld "An Act Relating to Taxation; And Providing for an Effective Date." Because its various provisions, although diverse, all related to "state taxation," we found no violation of the one-subject rule. Id. at 544-46. In light of these decisions, we must likewise conclude that "land" is not an unduly broad subject for purposes of article II, section 13. Consequently, Chapter 138, SLA 1977, the provisions of which all relate to this subject, is constitutionally valid.[19]

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19. Brown also contends that Chapter 138 is defective under art. III, § 13 because the title, "An Act Relating to Land; And Providing for an Effective Date," does not adequately express its subject matter. Since we have concluded that "land" constitutes one subject, we believe that the requirement that the title express that subject is also satisfied. The purpose of the requirement is to prevent surreptitious introduction of legislation not indicated by the title. See Griffin v. Sheldon, 11 Alaska 607, 615 (1948). Chapter 138 contains no hidden provisions unrelated to its title, and "[a]nyone interested in any of the particulars of the bill would be advised by this title to look to the body of the law. . . ." Wass v. Anderson, 252 N.W.2d 131, 137 (Minn. 1977).

B. Restitution Under ULSPA in a Public Action.

Unlike the Consumer Protection Act, ULSPA does not expressly authorize the court to award restitutory relief in a suit instituted by the State. Although restitution is expressly available in a private action under ULSPA, AS 34.44.040(b), with respect to public enforcement, the Act merely provides that the State "may bring an action in the superior court . . . to enforce compliance with this chapter or a regulation or order under this chapter." AS 34.55.022(c). According to Brown, the absence of a provision authorizing restitution in a public action impliedly circumscribes the court's power to award such relief unless the State proceeds under Civil Rule 23, and the case is properly certified as a class action. While we agree that in a case of this nature the State must proceed in a representative capacity, we conclude that certification as a class action is not a prerequisite to an award of restitutory relief.

In People v. Superior Court, 507 P.2d 1400 (Cal. 1973), the California Supreme Court was confronted with substantially the same issue involved here. In that case, the California Attorney General brought suit under a statute that authorized the Attorney General to sue to enjoin misleading advertising, "but was silent as to the power of the trial court to order restitution in such a proceeding." Id. at 1402. Noting that the statute involved "did not

restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference,'" id., quoting Porter v. Warner Holding Co., 328 U.S. 395, 398, 90 L.Ed. 1332, 1337 (1946), the court held that "a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the consumers found to have been defrauded." 507 P.2d at 1402. In support of its holding the court relied on a number of analogous federal cases that had reached the same conclusion. See Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291-92, 4 L.Ed. 2d 323, 326 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 398-99, 90 L.Ed. 1332, 1336-38 (1946); Securities and Exchange Comm'n v. Texas Gulf Sulphur Co. 446 F.2d 1301, 1307-08 (2d Cir. 1971); McComb v. Frank Scerbo & Sons, 177 F.2d 137, 138-39 (2d Cir. 1949). See also Interstate Commerce Comm'n v. B & T Transportation Co., 513 F.2d 1182, 1184-85 (1st Cir. 1980). But see United States v. Parkinson, 240 F.2d 918 (9th Cir. 1956).

We find the California Supreme Court's reasoning persuasive and therefore hold that the trial court has the inherent power to order restitution in an action brought by the State under ULSPA. Nothing in that Act or in its legislative history suggests that the legislature intended to restrict the court's traditional equity powers when properly

invoked. That the legislature saw fit to provide a private right of action for restitution under ULSPA does not, in our judgment, operate to curtail the court's power to award such relief at the instance of the State. See Pierce v. Superior Court, 37 P. 460, 461 (Cal. 1934).

There remains, however, the question of how the State must proceed in a case of this nature; an issue that has received scant attention from the courts. As we perceive it, the principal difference between this case and one brought as a private class action is that the State is not a member of the class of persons whom it seeks to represent.[20] While the State here denies that it is representing anyone other than itself, asserting that its action is predominantly founded in law enforcement, it is clear that as to the restitution claim the State is attempting to enforce the rights of a class of private individuals. Thus, we believe that the State must be regarded as acting in a representative capacity. This conclusion finds support in the case of Kugler v. Romain, 279 A.2d 640 (N.J. 1971), in which the court sustained the Attorney General's authority to maintain an action for restitution on behalf of defrauded consumers

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20. By its own terms Rule 23 requires that a representative be a member of the class on behalf of which suit is brought. It states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all. . . ." Alaska R. Civ. P. 23(a). Thus, the State could not have brought this suit as a Rule 23 class action.

as a suit "in the nature of a class action." Id. at 649. Although the court did not discuss at length the procedural aspects of such a suit, it did note in passing that "guidance may be found in [New Jersey statutes] which relate generally to class actions." Id.

We likewise conclude that guidance as to the procedural aspects of a case such as this may be found in our own rule governing the maintenance of representative actions, Civil Rule 23. Of particular importance is that part of the Rule relating to notice to members of the class being represented. Subsection (c)(2) of the Rule in relevant part provides:

> [T]he court shall direct to the members of the class the best notice practicable under the circumstances, including notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Alaska R. Civ. P. 23(c)(2). Following this procedure will assure that those individuals who elect to be represented by the State will be bound by the judgment, "like any other persons whose claims are prosecuted by an authorized representative." McComb v. Frank Scerbo & Sons, 177 F.2d 137, 140 (2d

Cir. 1949)(Hand, C.J., concurring). And ensuring that the judgment has this res judicata effect will promote judicial economy by lending finality to litigation and protect the defendant from the unfair risk of being subjected to multiple lawsuits arising from the same claim. See Note, New York City's Alternative to The Consumer Class Action: The Government As Robin Hood, 9 Harv. J. Legis. 301, 345-47 (1972); California Corporations Code Section 25530(b): Government Agency Suit Versus The Private Class Action, 27 Hastings L.J. 265, 279-80 (1975).

In the instant case, the trial court instructed the State to notify all Windsong lot purchasers of the State's action against Brown. The purpose of such notice was to determine which purchasers wished to participate in any order of restitution ultimately decreed by the court. This notice, however, did not comport with the requirement discussed above that the notice state that those electing to participate will be bound by the final judgment, whether favorable or not. Consequently, whether the lower court's judgment in this case would be binding on each Windsong lot purchaser remains open to question. However we do not believe that this defect requires that the case be remanded for further proceedings. Before an individual lot purchaser receives money under a judgment ordering restitution, he

should first consent in writing to be bound by that judgment. That will, under the circumstances of this case, in large part accomplish the goals of the notice requirement of Rule 23(c)(2).

C. Brown's Liability Under ULSPA

We must now determine whether the lower court's restitution order can be upheld under ULSPA.

AS 34.55.006 provides:

> It is unlawful for a person, in connection with the offer, sale or purchase of subdivided land directly or indirectly, to knowingly
>
> (1) employ a device, scheme or artifice to defraud;
>
> (2) make an untrue statement of a material fact or omit a statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

A person who disposes of subdivided land[21] in violation of

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21. "Subdivided land" is defined in AS 34.55.044(6) as including "land which is divided or is proposed to be divided for the purpose of disposition into two or more lots, parcels, units or interests. . . ." That Brown was selling subdivided land at the time the State instituted this action is not disputed. Since Brown received an exemption from the registration provisions of the federal Interstate Land Sales Full Disclosure Act, see note 4 supra, he is also exempt from the registration provisions of ULSPA. AS 34.55.042(a)(8). This does not, however, immunize Brown from liability under AS 34.55.006. See id.; Governor's Transmittal Letter, 1977 House Journal 65.

this section is civilly liable to a purchaser

> . . . unless in the case of an untruth or omission it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing of subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission.

AS 34.55.030(a). See Stepanov v. Gavrilovich, 594 P.2d 30, 33 (Alaska 1979).

With respect to the eighteen individuals who purchased Windsong lots on or after September 21, 1977, the date when ULSPA became applicable to sales of in-state land, Brown does not seriously dispute his liability. The trial court found that Brown knew, prior to developing Windsong, of the facts relating to the flood hazard. Brown does not contest those findings, nor does he contest the trial court's findings that the facts he misrepresented or omitted to mention were material. Since Brown had ample opportunity but failed to show facts which could constitute a defense under AS 34.55.030(a), ordering restitution under ULSPA was proper as to those individuals who purchased their lots on or after September 21, 1977.

The vast majority of purchasers on whose behalf restitution was ordered bought their lots prior to this date, however. Liability as to those purchasers under ULSPA, Brown argues, would require impermissible retro-

spective application of the Act to in-state subdividers. The State contends that because ULSPA is "remedial," it can be given retroactive effect. The State further claims that liability as to the pre-September 21, 1977 purchasers can be predicated on conduct by Brown that occurred after that date, thereby avoiding retrospective application of ULSPA.

AS 10.01.090 provides that "[n]o statute is retrospective unless expressly declared therein." Chapter 138, Sections 1-8, SLA 1977, which added AS 34.55.006 and amended ULSPA to apply to in-state subdividers, contains no such express declaration. Nor does its legislative history indicate that retrospective application was intended.[22]

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22. AS 01.10.020 provides:

> The provisions of §§ 40-90 of this chapter shall be observed in the construction of the laws of the state unless the construction would be inconsistent with the manifest intent of the legislature.

In City and Borough of Juneau v. Commercial Union Ins. Co., 598 P.2d 957 (Alaska 1979), we adverted to this provision as modifying to some extent the "iron-clad language" of AS 01.10.090. Id. at 958 n.3. Thus, in Zurfluh v. State, 620 P.2d 690 (Alaska 1980), we held that AS 12.55.086, which relates to sentencing in criminal cases, could be retroactively applied for a 153-day period since "[t]he apparent intent of the legislature as [sic] that the benefits of this type of sentencing should be available to trial judges as soon as possible. . . ." Id. at 693.

Recently, we observed:

> We have heretofore closely adhered to the clear mandate expressed in the statutory language. Statutes are not to be applied retroactively unless the language used by the legislature indicates the contrary. City and Borough of Juneau v. Commercial Union Ins. Co., 598 P.2d 957, 958-59 (Alaska 1979); Davenport v. McGinnis, 522 P.2d 1140, 1142 (Alaska 1974); Stephens v. Rogers Constr. Co., 411 P.2d 205, 208 (Alaska 1966).

Matanuska Maid, Inc. v. State, 620 P.2d 182, 187 n.8 (Alaska 1980). In that case we did hold that "mere procedural changes which do not affect substantive rights are not immune from retrospective application." Id. at 187. But the broad prohibitory language of AS 34.55.006 can hardly be characterized as bringing about mere procedural changes. Thus, we hold that ULSPA cannot be retrospectively applied to hold Brown liable for conduct predating its application to in-state land sales.[23] We note that this conclusion is in accord with the construction given to the Interstate Land Sales Full Disclosure Act, ULSPA's federal counterpart. See Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045, 1048 (S.D.N.Y. 1975).

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23. The State's argument that ULSPA is "remedial" and thus deserving of retroactive application on that basis alone is, in our opinion, without merit. Even when a statute is remedial in nature, it will be construed retroactively only if the legislative intent clearly indicates that retroactive operation is intended. See 2 C. Sands, Sutherland Statutory Construction § 41.04, at 253 (4th ed. 1973).

The State alternatively argues that liability for restitution to pre-September 21, 1977 purchasers can be premised on Brown's later "lulling" activities, which, the State urges, constitute "fresh" ULSPA violations. Reference is made to the trial court's findings that Brown's letter to all Windsong lot purchasers, sent in January 1978, contained numerous misrepresentations designed to induce purchasers to continue making their property payments. According to the State, these misrepresentations were made "in connection with the offer, sale or purchase of subdivided land," thereby triggering liability under AS 34.55.006.

The State's argument in large part centers on the Act's definition of "offer."[24] AS 34.55.044(2) defines that

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24. The State also points to the word "disposition," which AS 34.55.044(1) defines as including the "sale, lease, assignment, award by lottery, or any other transaction concerning a subdivision, if undertaken for gain or profit." (Emphasis added). Noting that AS 34.55.030(a), the civil remedies section, creates liability when a person "disposes" of land in violation of AS 34.55.006, the State argues that Brown's "lulling" activities constituted "other transactions concerning a subdivision," and hence created liability under the Act. In our view, the language relied upon, preceded as it is by specific examples of "transactions," i.e., "sale, lease," etc., should be construed under the doctrine of ejusdem generis as limited to transactions involving the transfer of an interest in land. See Chugach Electric Ass'n v. Calais Co., 410 P.2d 508, 509-10 (Alaska 1966). Because Brown's "lulling" activities were not, under our construction, "transactions concerning land" within the meaning of AS 34.55.044(1), the State's reliance on that section is misplaced.

term as including "every inducement, solicitation or attempt to encourage a person to acquire an interest in land, if undertaken for gain or profit." The State reasons that Brown's "lulling" activities were "inducements" or "attempts" to get purchasers to "acquire" further interests in land.

We think it would be straining the language of the Act to hold that post-sale conduct designed to induce the continuation of payments constitutes an "offer" as that term is defined above. The continuation of payments under the land sales contracts involved here did not result in the acquisition by purchasers of further interests in land. Legal title to the property vested in the purchasers at the time the contracts were signed.[25]

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25. Under the deed of trust and promissory note arrangement used by Brown in selling Windsong lots, title to the property passed to the purchaser immediately upon signing the purchase agreement. This is not to say, however, that our conclusion would differ if the sales had been made pursuant to a conditional land sales contract in which legal title technically does not pass until the final installment is paid. For under this arrangement equitable title vests immediately in the purchaser upon execution of the contract, and the seller retains legal title only as a security interest for the unpaid portion of the purchase price. Davis v. Rio Rancho Estates, Inc., 401 F. Supp. 1045, 1048 (S.D.N.Y. 1975). In our judgment, the payment of installments by the equitable owner would not constitute further acquisitions of land under AS 34.55.044(2).

The State's reliance on Husted v. Amrep. Corp., 429 F. Supp. 298 (S.D.N.Y. 1977) is misplaced. That case involved the question whether a violation of the antifraud provisions of the federal Interstate Land Sales Full Disclosure Act could occur after the sale of land so that the plaintiff's claim would not be barred by the applicable statute of limitations. The court held that such a violation could occur, but emphasized that unlike S.E.C. Rule 10b-5, upon which the section at issue was in part modelled, the Act did not require that the violation occur "in connection with" the sale. Id. at 307. See also Fogel v. Sellamerica, Ltd., 445 F. Supp. 1269, 1274-75 (S.D.N.Y. 1978). AS 34.55.006, like the S.E.C. Rule, requires that the conduct complained of occur "in connection with" the sale.

This is not to say that fraudulent post-sale conduct could never constitute a violation of AS 34.55.006. If such conduct in fact occurred "in connection with" the offer, sale or purchase of subdivided land, then it would be actionable. Our review of federal decisions construing the scope of the "in connection with" requirement of S.E.C. Rule 10b-5 suggests that activity post-dating the time that the initial contract to purchase is signed is not necessarily immune from liability. For example, in Goodman v. Epstein, 582 F.2d 388 (7th Cir. 1978), cert. denied, 440 U.S. 939, 59

L.Ed. 2d 499 (1979), the court noted that "the crucial fact . . . is whether an investment decision remains to be made by the party from whom disclosure is withheld, and not upon when the agreement to purchase or sell was executed." Id. at 413; see also Issen v. GSC Enterprises, Inc., 508 F. Supp. 1278, 1286-87 (N.D. Ill. 1981). Goodman involved a limited partnership agreement in which the plaintiff limited partners were in an "on-going relationship" with the defendant general partners. 582 F.2d at 412. From time to time, the limited partners were called upon to make additional capital contributions based upon the partnership's performance. Although the conduct complained of occurred after the partnership agreement was signed, the court held that later nondisclosure of material facts by the general partners to induce continued payment of capital contributions by the limited partners was actionable under Rule 10b-5. However, the court was careful to distinguish the situation where

> . . . the investment decision was completed at the time the parties entered into the agreement, the contract being, in effect, a "one-shot deal." No continuing relationship was contemplated. All that was left undone was the ministerial exchange of money for the stock.

Id. at 412. In such an instance, the fraudulent conduct must occur at or before "the time when the parties to the transaction are committed to one another." Id., quoting

Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972). See also Clinton Hudson & Sons, v. Lehigh Valley Cooperative Farms, Inc., 73 F.R.D. 420, 425 (E.D. Pa.), aff'd mem., 586 F.2d 834 (3d Cir. 1977).

Applying these principles to the instant case, we conclude that Brown's post-sale "lulling" conduct directed at pre-September 21, 1977 purchasers was not "in connection with" the sales to such purchasers. Brown's relationship with these purchasers was "in effect, a 'one-shot deal,'" Goodman, 582 F.2d at 412, rather than one involving a "series of 'investment decisions.'" Id. at 413. The parties were committed at the time the contracts were executed and the continued payments required thereunder involved nothing more than a means of effectuating "the ministerial exchange of the money" for the land. Id. at 412. Accordingly, Brown's liability, if any, to pre-September 21, 1977 Windsong lot purchasers cannot be predicated on violations of ULSPA.

IV. COMMON LAW FRAUD

We must now decide whether restitution as to the fifty-three purchasers who bought lots before the effective date of the ULSPA amendments can be upheld on the basis of common law fraud. This was in fact the basis for the trial court's restitution order. Brown contends that the State was without authority to enforce the common law rights of

these purchasers. In addition, he argues that the trial court erred in applying the common law since the parties had tried the case under ULSPA.

A. The Attorney General's Common Law Powers

The duties of the Attorney General are statutorily set forth in AS 44.23.020(b). Among other things, that statute states that the Attorney General shall "perform all other duties required by law or which usually pertain to the office of attorney general in a state." AS 44.23.020(b)(7). In Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975), we stated that this language "indicates that the office of the Attorney General is to function with those powers and duties normally ascribed to it at common law." We further noted:

> Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.
>
> When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control

> or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers.

Id. (Citations omitted).

We believe that the above language forecloses any argument that the State is without authority to bring suit in the absence of express statutory authority. This view finds ample support in the decisions of other jurisdictions where the attorney general's common law powers are recognized. See, e.g., State v. Bristol-Myers Co., 470 F.2d 1276, 1278 (D.C. Cir. 1972) (construing Illinois Law); D'Amico v. Board of Medical Examiners, 520 P.2d 10, 20 (Cal. 1974); State ex rel. Shevin v. Yarborough, 257 So.2d 891, 894-96 (Fla. 1972)(Ervin, J., concurring); Lowell Gas Co. v. Attorney General, 385 N.E. 2d 240, 247-48 (Mass. 1979); Michigan State Chiropractic Ass'n v. Kelly, 262 N.W.2d 676, 677 (Mich. 1977); Gandy v. Reserve Life Insurance Co., 279 So.2d 648, 649 (Miss. 1973); Hyland v. Kirkman, 385 A.2d 284, 289-90 (N.J. Super. 1978); State ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813, 818 (Okla. 1973). This authority has been held to confer standing on the attorney general to seek redress for common law fraud. Lowell Gas Co. v. Attorney General, 385 N.E.2d 240, 247-48 (Mass. 1979); Hyland v. Kirkman, 385 A.2d 284, 289-90 (N.J. Super. 1978).

We therefore hold that the State has the authority to bring suit in the public interest on the basis of common law fraud to obtain restitution for defrauded land purchasers. While it is not the court's function to pass upon the Attorney General's determination of what is or is not in the "public interest," see Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947, 950 (Alaska 1975), we do note that the trial court in this case found:

> The State has an interest in preventing unjust enrichment by land developers based on widespread misrepresentations and nondisclosure. . . . Here the defendants advertised the land sales in local newspapers, reaching about half the population of the state. The State also has an interest in protecting the economy of the State against developers who misrepresent the desirability of the land they sell. . . . The State also has a pecuniary interest in this particular case since its resources may be called upon to aid victims of a potential flood in the Windsong Subdivision.

B. Brown's Liability For Common Law Fraud.

The State did not allege that Brown should be held liable on the basis of common law fraud. The focus of the State's case against Brown was on ULSPA. On the first day of the trial, the lower court granted summary judgment in favor of Brown's engineer, Hausam, on the theory that his involvement in the Windsong development ceased prior to the effective date of the ULSPA amendments, which could not be retroactively applied. In response to a question by Brown's

counsel, the trial court indicated that this ruling would apply to Brown as well, or in other words that Brown too could not be held liable for acts pre-dating September 1, 1977. During the trial, Brown presented evidence relating only to the defense of innocent misrepresentation provided in AS 34.55.030(a), the civil remedies section of ULSPA. Nevertheless, the trial court sua sponte relied on common law fraud to hold Brown liable for restitution to all Windsong lot purchasers who had elected to participate in the State's action, regardless of when they purchased their lots.

We agree with Brown that his right to a fair trial was jeopardized by the trial court's adoption of a new theory of the case. The focus of the pleadings, discovery, preliminary hearings, and earlier motions on ULSPA, coupled with the trial court's dismissal of Hausam from the case and assurance that the basis therefor would apply to Brown, could reasonably have led Brown to believe that his liability, if any, would be predicated on ULSPA, and ULSPA alone. Consequently, in preparing his defense, he had no notice that he was going to have to defend against fifty-three separate restitution claims based on the common law. Under these circumstances, we cannot countenance the trial court's re-engineering of the case to hold Brown liable for common

law fraud. Compare Clary Insurance Agency v. Doyle, 620 P.2d 194, 200-01 (Alaska 1980).

We conclude, therefore, that as to Brown's liability to pre-September 21, 1977 purchasers, the case must be remanded for supplemental evidentiary hearings. On remand the parties and the lower court should devote particular attention to the issue of reliance, a necessary element to a common law claim for rescission of a land sales contract. Cousineau v. Walker, 613 P.2d 608, 612 (Alaska 1980). Although the lower court here found that all Windsong lot purchasers had relied on the false information supplied them by Brown, the present record does not support this finding. In all, only twelve of the purchasers listed in the court's restitution order testified either at the hearing on the preliminary injunction or at the trial. Of these twelve, only ten bought their lots prior to September 21, 1977. Because of this evidentiary void, we believe that it would be unfair, on the present record, to hold Brown liable to the pre-September 21, 1977 purchasers on the basis of common law fraud. See Landex, Inc. v. State ex rel. List, 582 P.2d 786, 790-92 (Nev. 1978). While Brown may have had the burden of going forward to produce evidence of non-reliance in order to avoid

liability,[26] his failure to do so below may have been due to the absence of any notice that he might be held liable for common law fraud. Accordingly, on remand Brown must be afforded the reasonable opportunity to present such evidence, if any, as well as evidence tending to establish any

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26. According to Williston: "Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on." 12 Williston on Contracts § 1515, at 480 (W. Jaeger 3d ed. 1970); see also Restatement (Second) of Contracts § 167 comment b, illustration 3 (1981). In Vasquez v. Superior Court, 484 P.2d 964, 972-73 (Cal. 1971), the California Supreme Court, relying on the above-stated rule, held that issues of reliance would not preclude certification of an action as a class action because if it was shown that alleged misrepresentations were material, an inference of reliance would arise as to the entire class. See also Occidental Land, Inc. v. Superior Court, 556 P.2d 750, 754 (Cal. 1976). But see Newman v. Tualatin Development Co., 597 P.2d 800, 803-04 (Or. 1979); Johnson v. Travelers Ins. Co., 515 P.2d 68, 72 (Nev. 1974).

While we have no quarrel with the rule suggested by Williston and the Restatement, its application

> cannot be utilized to establish reliance as to the entire class without examining the facts and circumstances of each individual transaction which may establish that the misrepresentation was not the inducing factor. The defendant should be given the opportunity to examine each purchaser individually as to causation.

Hoffman v. Charnita, Inc., 58 F.R.D. 86, 91 (M.D. Pa. 1973). In our view, the absence of any notice to Brown that he was defending against common law fraud claims deprived him of a fair opportunity to rebut any inference of reliance that may have arisen.

other defenses he may have to the common law claims.[27]

We do not agree with our dissenting colleague that the State's case against Brown as to the pre-September 21, 1977 purchasers should simply be dismissed. The trial court had inherent discretionary authority to inject the theory of common law fraud into the case. A trial court's authority to require the presentation of new legal theories is implied in Alaska R. Civ. P. 16(e) authorizing amendment of a pre-trial order without limitation as to time "to prevent manifest injustice," and in the penultimate sentence of Alaska R. Civ. P. 15(b) allowing the amendment of pleadings at any time "when the presentation of the merits of the action will be subserved thereby" and no prejudice will result.

The authority to decide a case on an unplead legal theory should be sparingly exercised. In particular it should only be used when the new theory applies to the transaction in issue, is related to the theories presented by the parties, and is necessary for a proper and just disposition of the case. Here, those standards can be reasonably regarded as having been fulfilled.

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27. What we have earlier said about requiring a purchaser's written consent to be bound by the court's final judgment as a condition to participating in any restitutory relief is likewise applicable to pre-September 21, 1977 purchasers who elect, on remand, to continue being represented by the State.

Where prejudice will result a court either should not employ a new theory or should take steps to eliminate the prejudice by giving notice that the new theory will be used and affording an opportunity to the parties to present evidence and arguments relevant to it. The error committed by the trial court in this case was not in invoking the theory of common law fraud, but in failing to give the parties notice that it would do so along with an opportunity to adjust their cases accordingly.

In MacCormack v. Robins Construction, 521 P.2d 761 (Wash. App. 1974) the plaintiffs brought suit alleging that the defendants had sold them defective homes in violation of the State's Consumer Protection Act. The lower court concluded that plaintiffs were not entitled to relief under the state act but, on its own initiative, transformed the suit into a claim for damages based on common law breach of warranty. The lower court then granted the defendants' motion to reopen the case to present additional evidence. When the case was later appealed, this action by the trial court was upheld as within its discretion.

> In the case at bench, it is apparent from the record that the trial court allowed the defendants sufficient additional time and opportunity to present additional evidence and to cure any surprise defendants may have experienced as a result of the trial court's disposition of the case. . . .

Id. at 763.