

ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

10103 SENATE LABOR & COMMERCE

Department of Revenue
Income and Excise Audit Division
April 8, 1999

Multiple-Beneficiary Permittee Activity ⁽¹⁾

	1998		1997	
	Amount	% Gross Receipts	Amount	% Gross Receipts
Gross Receipts	\$ 64,875,637		\$ 63,275,329	
Less: Taxes	35,879	0.06%	35,240	0.05%
Prizes	51,154,699	78.84%	50,183,166	79.31%
Expenses	9,871,485	15.22%	9,965,011	15.75%
Net Proceeds	<u>\$ 3,813,574</u>	5.88%	<u>\$ 3,091,912</u>	4.89%
Net Proceeds Paid	<u>\$ 3,943,835</u>	6.08%	<u>\$ 2,905,653</u>	4.59%

Breakdown of Expenses

	1998		1997	
	Amount	% Expenses	Amount	% Expenses
Rental of Facility	\$ 1,914,373	19.39%	\$ 1,786,280	17.90%
Janitorial	141,495	1.43%	174,035	1.70%
Utilities	201,142	2.04%	197,963	2.00%
Building Cost	23,410	0.24%	53,658	0.50%
Building Depreciation	95,668	0.97%	- 0 -	0.00%
Equipment Repairs	126,183	1.28%	101,752	1.00%
Insurance Non-Bldg.	167,708	1.70%	149,112	1.50%
Contract Services	216,400	2.19%	217,070	2.20%
Professional Services	205,723	2.08%	165,758	1.70%
Accounting	95,113	0.96%	117,952	1.20%
Wages	3,456,078	35.01%	3,461,905	34.70%
Payroll Tax	340,125	3.45%	347,032	3.50%
Vendor Fee	104,457	1.06%	76,585	0.80%
Permit Fees	7,827	0.08%	- 0 -	0.00%
Pull-Tab Purchases	927,021	9.40%	1,029,321	10.30%
Pull-Tab Tax	312,572	3.17%	301,813	3.00%
Bingo Paper ⁽²⁾	358,258	3.63%	307,615	3.20%
Bingo Supplies	365,457	3.70%	363,587	3.60%
Printing Tickets	- 0 -	0.00%	368	0.00%
Advertising	85,771	0.87%	119,372	1.20%
Supplies Non-Bingo	87,194	0.88%	- 0 -	0.00%
Non-Alcoholic Beverage	17,916	0.18%	33,497	0.30%
Equipment Purchase	19,944	0.20%	75,232	0.80%
Other	601,650	6.09%	885,104	8.90%
Total Expenses	<u>\$ 9,871,485</u>		<u>\$ 9,965,011</u>	

(1) See Notes (1) and (2) on Page 6.

(2) 1997 Bingo Paper and Supplies Expense has been adjusted for data capture error.

Department of Revenue
Income and Excise Audit Division
April 8, 1999

Licensed Operators and Locations

<u>City</u>	<u>1998</u>	<u>1997</u>	<u>1996</u>	<u>1995</u>	<u>1994</u>	<u>1993</u>	<u>1992</u>	<u>1991</u>	<u>1990</u>	<u>1989</u>
Anchorage	6	4	6	12	12	13	13	13	11	6
Barrow	-	-	-	-	-	-	1	-	-	-
Bethel	1	1	1	1	1	1	1	-	-	-
Craig	3	3	2	2	2	1	-	-	-	-
Fairbanks	4	4	5	5	7	7	8	6	6	4
Haines	-	-	-	-	-	1	-	-	-	-
Juneau	-	-	1	1	3	5	5	3	1	-
Ketchikan	3	3	3	2	3	3	5	5	5	2
Nome	2	2	2	1	2	2	3	2	1	-
North Pole	1	2	2	2	2	2	2	-	-	-
Palmer	-	-	1	-	-	-	1	1	-	-
Petersburg	1	1	1	1	1	1	-	-	-	-
Valdez	1	1	1	1	1	1	-	-	-	-
Wasilla	-	-	-	-	1	1	-	-	-	-
Total	22	21	25	28	35	38	39	30	24	12

Licensed Distributors and Locations

<u>City</u>	<u>1998</u>	<u>1997</u>	<u>1996</u>	<u>1995</u>	<u>1994</u>	<u>1993</u>	<u>1992</u>	<u>1991</u>	<u>1990</u>	<u>1989</u>
Anchorage	5	5	6	5	5	7	9	10	12	12
Cordova	-	-	-	-	-	-	1	1	1	1
Eagle River	-	-	-	-	-	-	1	1	-	-
Fairbanks	3	3	3	3	4	2	2	3	5	5
Juneau	2	2	3	3	4	3	2	2	1	1
Ketchikan	1	1	1	1	2	2	3	2	1	1
Nome	1	1	1	1	1	1	1	1	1	1
Sitka	1	1	1	1	1	1	1	1	1	1
Soldotna	1	1	1	1	1	1	-	-	-	-
Wasilla	-	-	-	-	1	1	1	1	1	1
Total	14	14	16	15	19	18	21	22	23	23

Department of Revenue
Income and Excise Audit Division
April 8, 1999

1998 Licensed Vendors and Locations

<u>City</u>	<u>Vendors</u>	<u>City</u>	<u>Vendors</u>
Anchor Point	1	King Salmon	1
Anchorage	52	Kodiak	2
Big Lake	4	Moose Creek	1
Chickaloon	2	Naknek	3
Chugiak	2	Nenana	2
Clam Gulch	1	Nikiski	2
Clear	1	Niniichik	1
Cooper Landing	2	Nome	5
Copper Center	3	North Pole	5
Cordova	6	Palmer	4
Delta Junction	4	Salcha	3
Douglas	1	Seldovia	2
Dutch Harbor	2	Seward	1
Eagle River	3	Sitka	5
Fairbanks	36	Skagway	1
Galena	2	Soldotna	13
Glennallen	4	Sterling	1
Haines	1	Talkeetna	5
Healy	1	Tok	1
Homer	7	Trapper Creek	2
Houston	1	Tyonek	1
Juneau	12	Unalaska	4
Kasilof	2	Valdez	3
Kenai	7	Wasilla	10
Ketchikan	4	Willow	4
King Cove	1	Wrangell	2
		Yakutat	2
Sub Totals	<u>162</u>		<u>86</u>
Total Vendors in 1998			<u>248</u>
Total Vendors in 1997			<u>233</u>

Licensed Multiple-Beneficiary Permittees (MBP) and Locations

<u>City</u>	<u>1998</u>	<u>1997</u>	<u>1995</u>
Anchorage	8	7	7
Fairbanks	2	3	1
Juneau	5	5	3
Kenai	1	2	1
Total MBPs	<u>16</u>	<u>17</u>	<u>12</u>



THE LANDING

HOTEL • RESTAURANT • LOUNGE

April 9, 1999

Memo To: Sen. Robin Taylor

From: Kay Sims and Terry Wanzer

Regarding: HB 182

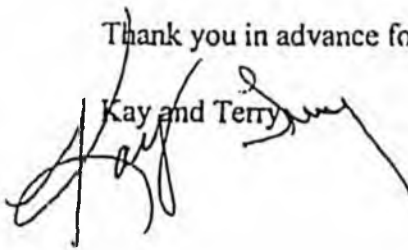
As you know we are long time business people here in Ketchikan with a major investment in this community.

We feel that passage of HB 182 video gaming, could provide a much needed revenue stream for both charities, as well as local and State Government; and could also provide extra attractions and interest for the out-of-state visitors in our Hotels. This could also give a bit of class and a lot of security to the Pull-Tab ventures.

Every year it is getting harder and harder for our communities and our non-profit groups to raise the money they need. It is also getting harder and harder to attract out of state visitors to our area and provide entertainment. Passage of HB182 would help solve all these problems.

Thank you in advance for your consideration Robin.

Kay and Terry



Ketchikan CHARR*Representing the licensed beverage industry*

P.O. Box 23320

Ketchikan AK 99901

907.225.0309 Ph or Fax

April 8, 1999

Re: Video GamingSenator Robin Taylor
Juneau, Alaska

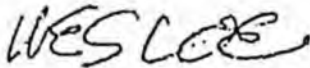
Senator Robin Taylor:

Action has now started on HB 182, which calls for reform in charitable gaming.

No one knows better than Ketchikan that charitable gaming needs serious reform. The incident here in which a man has recently been sentenced for the theft of a great sum of money from Little League has made it plain to this region and this community.

Ketchikan CHARR hopes that you will support charitable gaming legislation that benefits the state as well as local governments, and also assures charities of their full and just share of gaming proceeds that allow them to carry on their worthwhile community projects and programs.

We trust that you help us in this, as you always have in the past.

Wes Loe, President
Ketchikan CHARR

Kathy Kavanagh
2065 Old Success Hwy.
Fairbanks, AK. 99712

Dear Senator Taylor,

I strongly urge you to support the electronic gaming bill. I honestly think this could benefit both non-profit organizations in Alaska and the state coffers.

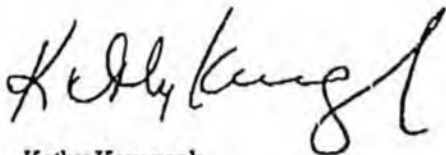
I realize there is some concern over the appearance of promoting gambling, but other states have enacted legislation allowing much more liberal gaming policies with success.

There is potential here for capturing more of the tourism dollars we seem to let slip through our hands each year.

I sincerely hope you will take my opinion into consideration when voting. I vote every election.

Thank you.

Sincerely,



Kathy Kavanagh

Tim McKay
2552 Steese Hwy. N.
Fairbanks, AK. 99712

Dear Senator Taylor,

I am strongly in favor of the electronic gaming bill. This "gambling bill" will benefit charities and non-profit organizations throughout the state even more than just having pull-tabs. I don't see where they will suffer any loss, on the contrary, I think it will provide additional opportunities to raise monies from out-of-state tourists. How can they lose?

Consider the amount of money the lawmakers are in effect sending to Dawson City every year by not acting to pass this.

All the legislature can think of is taxing the property owner. I feel that this would be a better alternative.

As far as the people with gambling problems, they are going to gamble whether it's legal or not.

Foreign tourists have shown that they want to gamble, and electronic gaming would be a great way to keep more of their money in our state. We don't manufacture the T-shirts or mugs or many of the souvenirs that these people buy in Alaska and take home, why not generate income by offering what other many other states do?

I vote in every election, and I assure you that I will remember the people who said it is better to tax the property owner than capitalize of the out-of-state tourist's disposable income.

Sincerely,



Tim McKay

SB

176

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. SB176

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor
 Title Sex Discrimination in Health Clubs BRU Commissions and Special Offices
 Component Human Rights Commission
 Sponsor Senator Pearco
 Requester Senate Labor and Commerce Committee Component No. 1

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
 To the Commission's knowledge only once has an Alaskan brought a discrimination claim against a health club alleging denial of access to the facilities because of sex, therefore there would be no fiscal impact on the agency.

Prepared by: Paula M. Haley, Executive Director *Paula M. Haley*
 Division: Human Rights Commission
 Approved by: David Ramseur *David Ramseur*
 Agency: Office of the Governor

Phone: 276-7474 ext. 241
 Date/Time: 1/12/00 9:01 AM
 Date: 1/12/00

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information, call the Governor's Legislative Office

Paula Holey
278 8588 FAX

Evelyn R

274 4692

223

X Director
Human Rts.

Commission

CS FOR SENATE BILL NO. 176(L&C)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR PEARCE

A BILL

FOR AN ACT ENTITLED

1 **"An Act permitting a physical fitness facility to limit public accommodation to**
2 **only males or only females."**

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

4 *** Section 1.** AS 18.80.230 is amended by adding a new subsection to read:

5 (b) Notwithstanding (a) of this section, a physical fitness facility may limit
6 public accommodation to only males or only females to protect the privacy interests
7 of its users if a reasonable alternative does not exist to protect those interests.

Alaska State Legislature



During Interim: (June - Dec.)
716 West 4th Avenue, Suite 500
Anchorage, Alaska 99501-2133
(907) 269-0200
Fax (907) 269-0204

During Session: (Jan. - May)
State Capitol
Juneau, Alaska 99801-1182
(907) 465-4993
Fax (907) 465-3872

Senator Drue Pearce

Sponsor Statement

SB 176 Segregation of Health Clubs

SB 176 is designed to allow gender-based health clubs to provide services to members wishing to exercise in the presence of only persons of their own gender. Under the Alaska Constitution, Article 1, Section 22, the right of the people to privacy is recognized and shall not be infringed.

The Alaska Human Rights Commission (AHRC) filed an action against the Anchorage Women's Club stating the Club unlawfully discriminates against men because the Club is a place of public accommodation. The AHRC based their decision on AS 18.80.230 which states that in places of "accommodation" it is unlawful to refuse, withhold from, or deny to a person any of its services, goods, or facilities based on sex. However, health clubs are not referenced in AS 18.80.300 (14), and are not places of accommodation.

SB 176 establishes that health clubs are not designed for public accommodation and have no public policy interests. Gender-based health clubs offer a secluded environment allowing people to feel more at ease in what is often an intimidating setting. Through this measure, Alaska will recognize the unique setting of a male-only or female-only health clubs based on membership and employment.

This bill in no way excludes any individual from the opportunity to exercise or work at a co-ed health club. SB 176 will allow private clubs to offer a comfortable environment in which individuals can work toward their personal health and wellness through exercise and sport surrounded by persons of their own gender.

MEMO TO LEGISLATORS

TO: ALL ALASKA LEGISLATORS: HOUSE AND SENATE
FROM: DAN COFFEY
Facsimile: (907) 274-4258. Phone: (907) 274-3385.
e mail: dcoffey@gci.net.
RE: WOMEN'S HEALTH CLUB
DATE: 12/14/99

My office represents The Women's Club, a health and fitness exercise facility with two locations in Anchorage. These facilities cater exclusively to women. This is the second Memo which we have sent to you concerning this issue and the legislation which is presently pending before you (SB 176). It is our understanding that a similar measure will be introduced by Representative Halcro at the beginning of this pending session.

You may recall that in our last Memo to all of you, we informed you that last year, the Alaska Human Rights Commission filed an action against the Women's Club alleging that the Club discriminated against men and that such discrimination was unlawful. The Human Rights Commission wants to require the Club to admit men to the Club. If this requirement stands, the Women's Club would be forced to shut its doors because the costs of renovating the Club to serve both men and women is prohibitively expensive.

The Club's main defense to the allegation of illegal discrimination is that gender based discrimination is not unlawful. The Constitution of Alaska, with its express right of privacy, allows for single gender health and fitness facilities. The Human Rights Commission staff disagrees. Further, the Human Rights Commission itself, on a vote of 3 no and 2 yes with two abstentions, voted not to support any change in the existing legislation to resolve this issue. Finally, we have recently been informed by the Human Rights Staff that the Commission cannot/will not consider the Constitution of the State of Alaska in reaching any decision on this alleged unlawful discrimination. The staff informs us that the Commission must rely solely on the statutes without consideration of the Constitution.

Based on these Commission positions, the Club prepared a proposed statutory amendment (SB 176). This amendment to existing law is based on the recognition that a women have legitimate gender-based privacy interests and that there is no overriding public policy that necessitates the inclusion of men in women's fitness clubs.

Alaska is not the first state to consider this issue. Many other states have allowed this type of gender-based privacy either by statute or by court decision. Attached to this Memo are five (5) articles which deal with the subject in a straight forward and informative manner. We appreciate your review and consideration of these materials as you consider the proposed amendment.

Finally, as we advised previously, you will undoubtedly be receiving comments from many of the women who are members in the Club dealing with their desire to exercise privately without men being in their Club. The Club and its members believe that the right to privacy in our Constitution allows for single gender health and fitness centers such as the Women's Club. This is the issue which the women members and the Club is presenting to the Alaska Legislature for resolution.

If you would like more information, please call Dan Coffey at the numbers listed above in the heading or Jeanie McAlister at the Women's Club (907) 276-6611. We will certainly be talking to you as the legislative session progresses.

Thank you for your consideration of this Memo.

INDEX TO ATTACHED ARTICLES

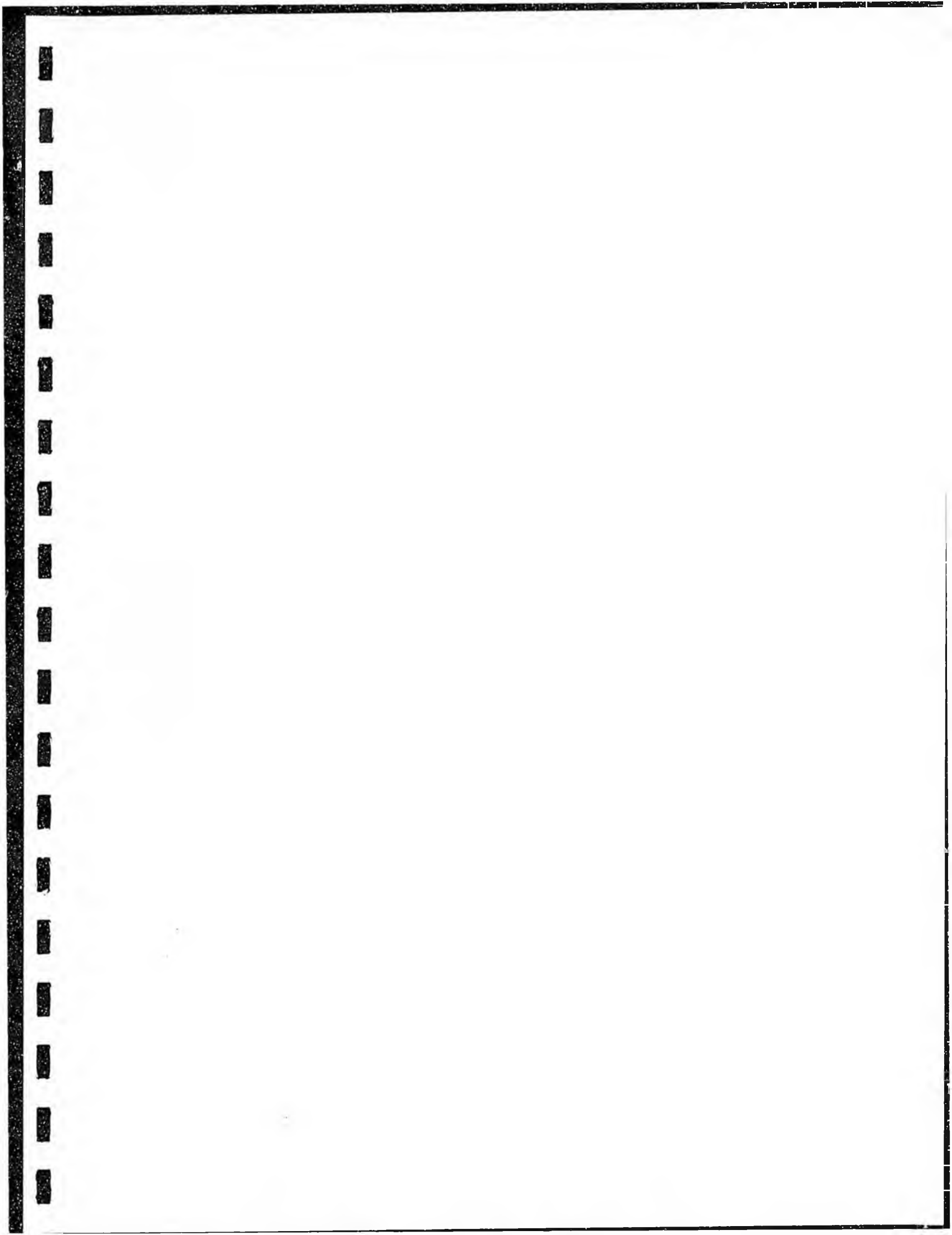
- 1) Women-Only Health Clubs: An IHRSA Position Paper

- 2) An Exercise in Equality: An Editorial from the Boston Globe, January 21, 1998

- 3) The Legal Implications of Women's Only Clubs, Briefing Paper: IHRSA.

- 4) Common Sense on Single-Gender Health Club: Representative Douglas W. Peterson (Massachusetts Legislature).

- 5) The Need for Single Sex Health and Fitness Facilities: Behavioral and Psychological Impediments to Exercise. Robert L. Tanenbaum, Ph.D.



IHRSA
263 Summer Street
Boston, MA 02210
(617) 951-0055
(800) 228-4772
Fax: (617) 951-0056
<http://www.ihrsa.org>

Women-Only Health Clubs

An IHRSA Position Paper

1. Women-only clubs should be allowed to exclude men from membership and employment because there is a legitimate gender-based privacy interest that needs to be protected and there is no overriding public policy that necessitates the inclusion of men in these types of clubs.

Courts and legislatures have recognized certain settings, including rest rooms, showers, and changing rooms, in which gender-based discrimination in public places is acceptable because a compelling and overriding privacy issue is involved. This same privacy issue extends to women-only health clubs. Court cases involving the privacy interest of women-only club members have affirmed this privacy right.

The privacy issue stems from the unique setting of a health club. In the course of normal business, members expose parts of their body about which they are very sensitive, focus on parts of their body which need improvement, wear revealing attire, assume awkward and compromising positions, move themselves in a manner which would be embarrassing to them if men were present, and are measured and touched by instructors.

The right to privacy in locker rooms, shower rooms, bathrooms, and changing rooms is well established in the courts. However, the privacy interest is not limited to those situations where there is nudity or touching of "intimate areas." It is also protected in situations involving a person's body, whether they are dressed or not.

In addition, there is no public policy interest that necessitates the admission of men into women-only clubs. In this setting, members' privacy interests are entitled to protection and override laws meant to eliminate discrimination based on gender.

2. The majority of women-only club members choose such clubs primarily because of the all-female environment. The admission of men to a women-only club would undermine the club's business operation because the majority of members would stop using the club if it became coed.

3. There is no reasonable alternative to excluding men from women-only clubs. There are no accommodations which can be made that would allow men to be members because it is impossible to have men present in the club while at the same time protecting members' privacy rights.

4. Health clubs, unlike country clubs, are purely health, recreation and sports clubs. They are not social in nature and are not places where business networking takes place. Therefore, there is no economic harm in excluding men from women-only health clubs.

IHRSA is a nonprofit trade association representing more than 4,300 health, fitness and racquet sports clubs worldwide. IHRSA clubs provide services to more than four million consumers annually.

IHRSA

International
Health, Racquet &
Sportsclub Association

*Committed to
the Profitability and
Professionalism of
Our Member Clubs*



The Surgeon General
has determined that lack
of physical activity is
detrimental to your health.



An exercise in equality

Massachusetts should allow women-only health clubs. It is a risk, with the danger that such clubs will send a legal message that discrimination is OK. And these all-women clubs could be an affront to the precious and hard-won public accommodation laws. But exceptions, when they are sincerely and vigilantly made, can succeed.

Follow the law too blindly and single-sex bathrooms could be branded as discriminatory. Except that some activities merit single-sex privacy, from dressing rooms to single-sex dormitories. Why not use this argument to gender-segregate everything from golf courses to bowling alleys? Because, like bathrooms, health clubs compel intimate types of dress and physical activities.

A glaring injustice would exist if men were systematically shut out of all health clubs. But no such pattern of pervasive discrimination exists. Just 6 to 7 percent of the country's health clubs - about 1,250 - are for women only, according to Jay Ablondi of the Boston-based International Health, Racquet & Sportsclub Association. And, the asso-

ciation says, in states that allow women-only clubs - either by statute or court ruling - there has been no retaliatory opening of men-only clubs.

Ablondi explains that the need for privacy is more pronounced among women who have had mastectomies, endured abuse, or who struggle with obesity. For many of these women, single-sex clubs aren't so much a protection against harassing or ogling male club members, but rather the only way they will use exercise facilities.

Opponents of single-sex clubs make a point that must be heard: Society cannot afford a slippery slide backwards into legal segregation. Single-sex health clubs demand scrupulous, eternal vigilance from lawmakers and the public, but a little common sense can go a long way, and a little privacy is not going to be the shoal upon which equality in public accommodation founders.

A bill to legalize single-sex clubs in Massachusetts awaits only final Senate approval and the governor's signature. It's a wise first step toward a sophisticated pursuit of fairness.

Editorial Boston Globe January 21, 1998



Briefing
Paper

**The Legal Implications of
Women's Only Clubs**

IHRSA

International
Health, Racquet &
Sportsclub Association

The Legal Implications of Women-Only Health Clubs

An IHRSA Briefing Paper

❖ Is the exclusion of men from “women-only” health clubs a violation of anti-discrimination laws?

This question raises a complicated legal issue which courts are just beginning to address. Title VII of the Civil Rights Act (the federal anti-discrimination law) as well as state laws are involved in this issue. There is no definite answer because the determination of whether or not a club is violating anti-discrimination law is based on the circumstances in each particular case.

Courts and legislatures have recognized public accommodations (including rest rooms and showers) in which gender-based discrimination is acceptable because of a compelling and overriding privacy issue. One recent court case, discussed below, has established that members' privacy interests at women-only health clubs can legally justify the exclusion of men.

A women-only policy is not discriminatory if the club can establish that the privacy right of its members is the basis for the exclusion of men. Information about the criteria required to establish a privacy-based defense of a women-only policy is discussed below.

❖ What have courts decided about women-only clubs?

Three court cases have dealt with women-only policies of health clubs. In *LivingWell (North), Inc. v. Pennsylvania Human Relations Commission*, a Pennsylvania state court ruled that a health club did not violate the state's anti-discrimination law by excluding men from its membership. *U.S. EEOC v. Audrey Sedita* dealt with the hiring policy of an Illinois health club chain. In *James J. Foster vs. Back Bay Spas, Inc., d/b/a Healthworks Fitness Center*, a Superior Court judge ruled that the exclusion of men from a health club violated Massachusetts public accommodation laws. (Massachusetts law was later amended to specifically allow for single-sex health clubs.)

LivingWell (North), Inc. v. Pennsylvania Human Relations Commission (1992)

In this case, the Pennsylvania Human Relations Commission brought a complaint against LivingWell North, alleging that the club violated the Pennsylvania Human Relations Act by refusing to admit men. LivingWell argued that its customers had a legitimate privacy interest because of the special circumstances involved in exercising, such as compromising body positions and a person's self-consciousness about her own body.

The court ruled that the club's women-only policy does not violate the state's anti-discrimination law. The Pennsylvania court found that: 1) LivingWell established that a legitimate privacy interest existed; 2) including men as members would undermine the club's business operations; and 3) there would be no other way to protect members' privacy interest besides excluding men. The court recognized that there are certain situations which “warrant the exclusion of the opposite sex for privacy reasons” and that

women-only clubs are one setting, like bathrooms and showers, in which gender-based discrimination is permissible because of privacy rights.

This case was decided in a state court and therefore the ruling is not binding in jurisdictions outside of Pennsylvania. However, other state courts can use the decision as guidance in cases with similar facts and legal questions.

U.S. EEOC v. Audrey Sedita (1990)

In this case, the U.S. Equal Employment Opportunity Commission (EEOC) brought an action against Women's Workout World in Illinois. This case addressed the issue of a women-only employment policy. The club's policy was that only women were hired for the positions of manager, assistant manager and instructor. The EEOC argued that the club was in violation of Title VII of the Civil Rights Act, which prohibits employers from discriminating against potential employees on the basis of sex except when gender is justified as a bona fide occupational qualification (a qualification which an employee must possess in order to perform the essential duties of a job).

The club argued that its hiring practice was not illegally discriminatory. It claimed that its customers prefer female personnel in the positions in question because those employees would be exposed to nudity and members in awkward positions while exercising and that those employees perform body measurements which involve intimate touching. The club submitted a petition signed by 10,000 members declaring that they would no longer patronize Women's Workout World if men were employed in the three positions in question. This was important because the livelihood of a business is one factor in determining a bona fide occupational qualification.

It is important to note that customer preference does not usually justify discrimination. However, the stakes are different when an individual's privacy rights are the issue, and this factor is at the heart of the Women's Workout World case.

The District Court initially granted summary judgment to the EEOC on procedural grounds, not on the substance of the case. However, the judge reversed herself in 1993. This case has been settled out of court.

James J. Foster vs. Back Bay Spas, Inc., d/b/a Healthworks Fitness Center (1997)

An attorney sued Healthworks, a Boston health club, because he felt the company's women-only admission policy was illegal. A Suffolk Superior Court judge ruled that Healthworks' exclusion of men was in violation of Massachusetts public accommodation laws. The judge ruled that since members are clothed when they exercise, the admission of men would not interfere with any privacy rights. The judge wrote, "While the court recognizes the impact that the admission of men may have on these women, intimidation and the assumption that all male Healthworks members will harass and leer at their exercise compatriots is still an insufficient ground on which to create a privacy exception." In early 1998, in response to this decision, the Massachusetts legislature passed a bill exempting health & wellness centers from sex discrimination law (see next question).

❖ Which states explicitly allow single-sex health clubs?

Colorado, Hawaii, Illinois, Massachusetts, New Jersey and Tennessee (as well as Pennsylvania, as discussed earlier) recognize the privacy issue involved and have exempted health clubs from laws which otherwise prohibit sex discrimination in public accommodations.

Colorado law states, "*Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of accommodation to individuals of one sex as such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation.*"

Hawaii law states, "*The provision of separate facilities or schedules for female and male patrons does not constitute a discriminatory practice when such separate facilities or schedules for female and for male patrons are bona fide requirements to protect personal rights of privacy.*"

Illinois public accommodations law states that it does not apply to "*Any facility, as to discrimination based on sex, which is distinctly private in nature such as rest rooms, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide considerations of public policy.*"

Massachusetts' public accommodation law states, "*...this section shall not apply to bona fide fitness and wellness facilities...*"

New Jersey law creates an exemption for places of public accommodation which are, by nature, "*reasonably restricted exclusively to individuals of one sex.*" The statute specifically exempts (but is not limited to) dressing rooms, swimming pools and gymnasiums.

Tennessee law states, "*Nothing in this part shall prohibit segregation on the basis of sex of bathrooms, health clubs...or other places of public accommodation the commission specifically exempts on the basis of bona fide considerations of public policy.*"

❖ What criteria could be used to establish a privacy interest that would allow women-only clubs to operate without violating the law?

Courts have used a three-part test in cases involving women-only membership and employment policies.

In the *LivingWell* case, the courts described the test as follows:

A business must establish a factual basis for believing that not excluding members of one sex would undermine its business operation; that its customers' privacy interests are entitled to protection under the law; and that no reasonable alternative exists to protect the customers' privacy interests.

This statement is analyzed below:

1) *A business must establish a factual basis for believing that not excluding members of one sex would undermine its business operation;*

Legal Opinion:

The court determined that LivingWell established such a factual basis by "offering uncontradicted testimony from customers and employees regarding the adverse effect that opening its all-female facilities to men would have on its business." Dr. Robert Tanenbaum, a psychologist specializing in "appearance matters", testified that 50% of the members interviewed stated that exercising in an all-female environment was the decisive and primary reason for choosing LivingWell.

Commentary

A club needs to show that its members feel that their privacy rights would be violated and that they would no longer use the club if men were admitted. LivingWell accomplished this through the psychologist's interviews with members and his expert testimony as well as the testimony of employees and members of the club.

2) *Customers' privacy interests are entitled to protection under the law;*

Legal Opinion

The court said that "the standard for recognizing a privacy interest as it relates to one's body is not limited to protecting one where there is an exposure of 'intimate area,' but such a right may also be recognized where one has a reasonable basis to be protected against embarrassment or suffer a loss of dignity because of the activity taking place."

"Privacy interests are not determined by the lowest common denominator of modesty that society considers appropriate. What is determinative is whether a reasonable person would find that person's claimed privacy interest legitimate and sincere, even though not commonly held."

"Although a privacy interest may exist, whether it is protected is determined by whether there is an overriding public policy that would outweigh that privacy interest." The court found that no overriding public policy issue existed.

Commentary

This is important because the court recognized a privacy right beyond bathroom settings and situations involving nudity or intimate touching. It recognized that working out in a coed setting may be embarrassing and cause a loss of dignity to some women and declared this privacy interest legitimate. The court decided that men would not be harmed by being excluded from the club.

3) *No reasonable alternative exists to protect customers' privacy rights;*

Legal Opinion

The court ruled that the club proved that no reasonable alternative to excluding men existed to protect its customers' privacy rights. It reasoned as follows: "Because it is impossible to allow men to be present while these women are exercising, and, at the same time protect their right to privacy, no reasonable alternative exists to protect LivingWell's customers' privacy interests while at the same time accommodating male members."

The International Health, Racquet & Sportsclub Association (IHRSA)

263 Summer Street • Boston, MA 02210 • (800) 228-4772 • fax (617) 951-0056 • <http://www.ihrsa.org>

Commentary

There is nothing that women-only health clubs can do to protect their members' privacy interest besides excluding men.

❖ **If laws condone single-sex health clubs, will we see a proliferation of men-only health clubs?**

No. IHRSA is confident that there is simply not the demand for men-only health clubs that there is for women-only clubs. However, this is a common concern. In fact, it is one reason that the National Organization for Women (N.O.W.) vehemently opposed Massachusetts' recent legalization of single-sex health clubs.

Christine Brooks of the University of Michigan's Fitness Research Center has researched what she calls "physique anxiety." Brooks describes this condition as anxiety about one's own body, its appearance, its vulnerability, and how others might react to it. Brooks discovered that this condition affects women far more pervasively and far more profoundly than it affects men.

Psychologist Robert Tanenbaum, Ph.D., testified before the Massachusetts legislature in 1997 that "single-sex fitness facilities provide an exercise option for women who, due to their own sense of dignity and need for privacy, would not exercise...in a coed environment." Tanenbaum explained that there are "background psycho-social influences on differences in dignity, privacy and appearance concerns. Women tend on average to be more concerned regarding their bodily privacy than men. For example, women are provided with individual stalls in bathrooms (as compared to men who generally use semi-public urinals). Frequently, schools accommodate girls by providing separate showers or changing stalls in school gyms (as compared to men who generally have little reservation about using communal showers)."

Dr. Tanenbaum stressed that this is not an issue of preference for these women. "They do not choose a single-sex facility simply because they want to exclude men...Rather, the issue is one of privacy and dignity. The notion of privacy concerns how much or how little one is willing to expose to the opposite sex, especially during rigorous exercise." He concluded, "It is psychologically unhealthy and unproductive for many women to be required to exercise in a coed environment and such a requirement is a barrier to exercise for thousands of women."

❖ **If men-only clubs are discriminatory, then why should a club be allowed to have a women-only policy?**

Not all men-only clubs are necessarily illegally discriminatory and not all women-only clubs are necessarily legally discriminatory. There are many factors involved in determining whether a policy of excluding one gender from a club is permissible or whether it is illegal discrimination.

However, there are two primary distinctions between men-only clubs and women-only health clubs. First, membership in a men-only club has traditionally had an inherent economic benefit. Men-only clubs may offer recreational activities to its members, but a large part of these clubs' function is social and business-related. This type of setting often

produces the added benefit for its members of access to employment opportunities, establishing and maintaining business contacts, and meeting prospective clients. Denying a group of people from membership in such a club also denies that group access to any inherent economic interest, thus putting one group -- or gender -- at an advantage over the other.

Women-only health clubs have traditionally been used only for health, fitness and recreational purposes. Membership in this type of club involves a privacy issue and lacks the economic interest that is often associated with membership in a men-only social club. The primary reason women exercise in an all-female environment is privacy. Social norms and attitudes about women's bodies and modesty have had a tremendous impact on women. Many women, especially older or larger ones, feel more comfortable working out in an atmosphere of all women. To them, this type of setting is more supportive and makes it easier for them to become physically fit.

In addition, the activities of a health club make it unique. Nudity, intimate touching, assuming awkward positions, having one's body measured, and wearing revealing attire are all a part of the normal activities at a health club.

As courts have stated, a customer-based privacy interest can be an occupational qualification which could allow women-only health clubs to legally discriminate, despite the Title VII prohibition against discrimination. There is also no public policy interest which would override a person's privacy interest in this case.

Laws and the courts have permitted different treatment in public accommodations based on gender where there is an obvious privacy issue, such as bathrooms or showers. However, the issue of single-sex health clubs has yet to be fully played out. To date, there are no federal precedents dealing with this issue. In a changing world of social norms, the law has some catching up to do. Until courts or legislatures send a clear message, the best thing a club can do is cover all of its bases and have solid basis for its membership and hiring policies.

DISCLAIMER: The information in this paper is intended for the general education of IHRSA members. It should not be considered legal advice. Individuals needing legal advice should consult an attorney who is competent in this area.

last modified: 3/3/98

A PROPOSAL FOR THE USE OF THE PERMANENT FUND TO FINANCE
STATE GOVERNMENT OPERATIONS

It is proposed that a constitutional amendment is placed before the voters in the coming November general election that would change the Permanent Fund Dividend Program and provide financial stability for the future of state government operations. If approved, the amendment would replace the 2001 dividend and all future dividends with a \$25,000, one time only, payment to all eligible applicants. Future earnings of the fund may be used to sustain state government programs and services for the public's well-being.

The proposal directs future earnings of the fund to its original purpose, providing a state government revenue source to offset declining oil revenues. It resolves the current deficit spending spiral and provides long term fiscal stability. It requires approval by the Alaskan public in an election vote on November 3, 2000.

It is estimated that 593,000 Alaskans will be eligible for the \$25,000 payment, costing the permanent fund \$14,825,000. The payment is equivalent to approximately 13 years of dividends averaging ~~\$2000~~ ^{1800.} each.

Eligibility for the payment is the same as the eligibility requirements for the 2001 dividend. An individual must be a resident of the state all of year 2000, or be born in year 2000, and must be in the state in year 2001 at the time of application.

With the current worth of the Permanent Fund and all its assets estimated at \$26,500,000, the corpus of the fund after the payments will be \$11,675,000.

Talking Pts.

1. Eligibility
2. One line only
3. Ward's left.
4. Timing
5. Elections

570
570

593,000

26.5

14,825

A 11.7

11.69

10.92

13.26

11.18

15 yrs

10

5

1

7%

Jan 1961

351

825

Common Sense on Single-Gender Health Club

Rep. Douglas W. Petersen

Legislation I introduced to authorize single-gender health and fitness clubs in Massachusetts has unleashed a torrent of calls to legislators from women across the state. My office has received so many calls supporting single-gender health clubs that it leads me to believe that more women are interested in preserving their privacy than I previously realized.

It is particularly interesting that the women who support this proposal have taken a position opposite that of the National Organization for Women (NOW). NOW opposes the measure because it "would legalize discrimination based upon gender." However, it's clear from the women—including many NOW members—whose calls are flooding Beacon Hill that this is not an issue of equality, but one of an individual's right of privacy.

I filed House Bill 5057, "An Act Relative to the Membership of Fitness and Wellness Facilities in the Commonwealth," in conjunction with more than 30 of my colleagues, in response to a recent court ruling that a women-only health club was in violation of the Massachusetts Public Accommodations law. The court stated that since customers "have no privacy right to be protected, the court cannot consider whether [the club's] policy is reasonable." This bill, simply put, would allow for single-gender health and fitness facilities in Massachusetts.

The court was responding to a lawsuit brought by a Boston attorney who wanted to join a downtown women's fitness center, thus requiring it to convert to a coed facility. As an aside, this lawyer had previously filed 10 or more court actions in New York State against bars which serve free drinks to women.

The court's ruling was a stunning setback for women who require a single-gender club for their fitness needs. The outcome also makes it clear that state law must be changed to maintain these health and fitness facilities throughout Massachusetts.

In Massachusetts alone, there are 30 women-only health clubs which serve more than 40,000 members. The Joint Committee on Commerce and Labor recently heard testimony from medical and fitness experts who explained that there is a real need among many women, based on legitimate privacy considerations, to engage in fitness activities at health centers without the presence of male

customers. Psychologist Robert J. Tanenbaum, Ph.D., testified that "single-sex fitness facilities provide an exercise option for women who, due to their own sense of dignity and need for privacy, would not exercise in a coed environment." This proposed legislation adopts a common sense approach in recognizing that men and women have separate and distinctive fitness needs. These women-only facilities offer their members a full range of fitness and health services which address female issues. In addition to exercise equipment, many clubs offer a variety of health classes to address situations unique to women, including prenatal fitness programs, osteoporosis prevention, breast health and menopause. These are vital services that many women members would not receive if women-only clubs were no longer available to them.

It is important that we recognize the

needs of women who, for a variety of reasons, require private fitness facilities. The members of women-only clubs include:

- Those experiencing or recovering from health or medical issues (including pregnancy) who desire a supervised fitness program in an environment that protects their privacy;

- Women who have been victims of, and are in recovery from, domestic violence and physical or sexual abuse who seek a safe, secure facility in which to rehabilitate their mental and physical fitness;

- Members of certain religions which prohibit exercising in a coed setting; and

- Seniors and other members in need of a supervised fitness and health program but who are too intimidated to exercise in a coed setting.

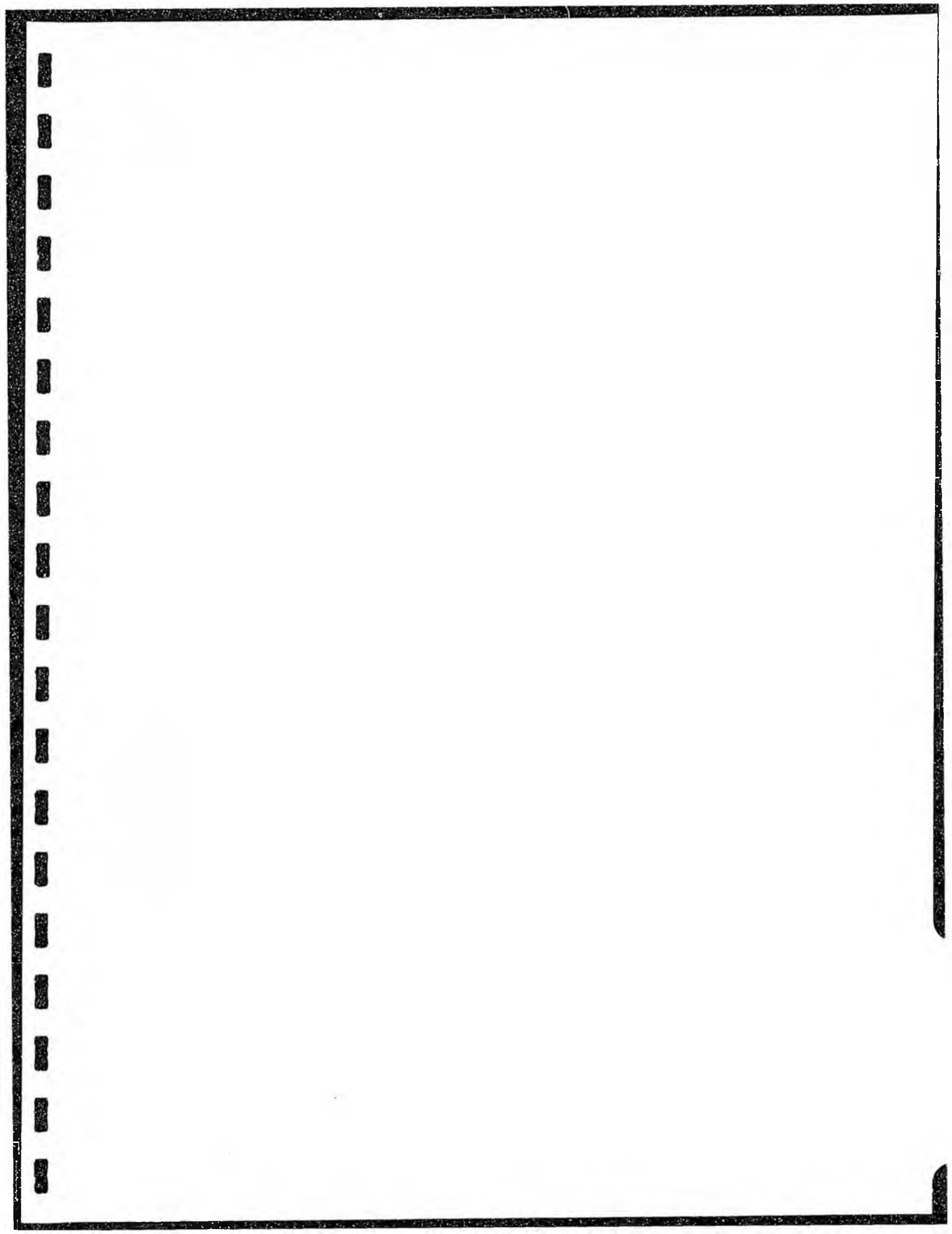
For many who join a women-only fitness club, there are no other exercise options—they will either

workout at their current club or they simply won't work out at all.

A recent survey done by the Massachusetts Department of Public Health found that 70 percent of Massachusetts residents don't get enough exercise. At a time when everyone from local physicians to the U.S. Surgeon General is urging Americans to exercise, we should not eliminate facilities that are allowing more than 40,000 Massachusetts residents the opportunity to improve their physical and mental health. It is time that Massachusetts add its name to the list of states which guarantee residents their duly deserved right of privacy.

Rep. Douglas W. Petersen, D-Marblehead, represents the Eighth Essex District.





TANENBAUM AND BERMAN ASSOCIATES

Licensed Psychologists

GSE BUILDING, SUITE 323

ONE BELMONT AVENUE

DALA CYNWYD, PENNSYLVANIA 19004

(610) 664-3442

FAX (610) 664-3749

ROBERT L. TANENBAUM, Ph.D.

MARCIE A. BERMAN, Ph.D.

KENNETH BYRNE, Ph.D.

CENTER CITY OFFICE

SUITE 60-5

232 W. RITTENHOUSE SQ.

PHILADELPHIA, PA 19102

(215) 545-5975

**THE NEED FOR SINGLE SEX HEALTH AND FITNESS FACILITIES:
BEHAVIORAL AND PSYCHOLOGICAL IMPEDIMENTS TO EXERCISE**

Legislative Testimony of Robert L. Tanenbaum, Ph.D. in Favor of House Bill 5057

I. INTRODUCTION

Good afternoon. My name is Robert Tanenbaum. I am a licensed psychologist with a doctorate in Clinical Psychology. I have provided the Committee with a copy of my curriculum vitae, which includes my professional qualifications, appointments, experience, publications and the like. I have extensive clinical experience in several relevant areas. I bring a knowledge of gender differences, body image and weight regulation and the reduction of performance anxiety in individual and group settings. In particular, I have significant experience in evaluating the need for single sex fitness facilities for individuals. My findings are based on clinically verifiable observations involving concerns for personal privacy and dignity, and individual differences in anxiety level and bodily awareness. I will note that my findings are in keeping with mainstream psychological thought.

I must stress that this is not an issue of preference for these women. They do not choose a single sex facility simply because they want to exclude men. In fact, it was clear from my study that male animus was not motivating these women. Rather, the issue is one of privacy and dignity. The notion of privacy concerns how much or how little one is willing to expose to the opposite sex, especially during rigorous exercise.

The law, as it now stands, allows only a coed setting for women who wish to exercise in a controlled environment. Under these conditions, many women will be too uncomfortable or self-conscious to exercise. It is important to recognize that such physical acts involve spreading their legs and thrusting their pelvis, and exposing their chest while bouncing up and down. They are engaging in these activities while dressed in exercise attire which typically consists of spandex shorts and a jog bra or T-shirt. Under these circumstances, the mere presence of men represents a significant intrusion, despite their actual proximity or limited verbal communication.

I have performed psychological evaluations to assess the needs of women who exercise in single sex fitness facilities. The main focus was to understand why some women cannot commit to exercise in a coed facility, thereby foregoing the regular exercise needed for good health.

My findings and conclusions are based upon the following sources of information:

- Visits to several exercise facilities in the Northeast in order to assess the physical environment.
- Interviews of over 100 members of single sex facilities.
- Review of survey responses from approximately 500 women members of single sex facilities.
- Use of background professional knowledge, as applied to the present case of understanding fitness goals and obstacles for women.

II. FINDINGS AND CONCLUSIONS

A. Overview

It is psychologically unhealthy and unproductive for many women to be required to exercise in a coed environment and such a requirement is a barrier to exercise for thousands of women.

B. Background Psycho-Social Influences on Differences in Dignity, Privacy and Appearance Concerns

There are background psycho-social influences on differences in dignity, privacy and appearance concerns. Women tend on average to be more concerned regarding their bodily privacy than men. For example, women are provided with individual stalls in bathrooms (as compared to men who generally use semi-public urinals). Frequently, schools accommodate girls by providing separate showers or changing stalls in school gyms (as compared to men who generally have little reservation about using communal showers). Contemporary healthcare facilities, such as hospitals, are being (re)designed on a gender sensitive basis which recognizes fundamental psycho-biological differences between the sexes. As one example, there are now women's hospitals where reproductive cancer care is a primary focus and a total medical/psychological treatment environment is provided. Recent articles in the health care area further acknowledge certain physiological differences between men and women, which require different exercise programming.

C. Performance Anxiety

Women experience high levels of distress about the extreme degree of bodily exposure associated with certain exercise positions and workout attire, typical of aerobic workouts and yoga exercises. As mentioned earlier, three examples of exercise positions can lead to pronounced performance anxiety as follows:

"Bouncing in place with chest exposed"

"Spreading legs with pelvic thrusts"

"Bending over with arms outstretched"

Performance anxiety is not limited to the exercise community or to women. My clinical experience with entertainers, performance artists and athletes points to the generalizability of performance anxiety.

Of significant importance was the fact that all the women interviewed and all survey responses reviewed focused on issues of personal privacy and the exposure of one's body.

D. Summary Profile

The women interviewed displayed the following relevant characteristics:

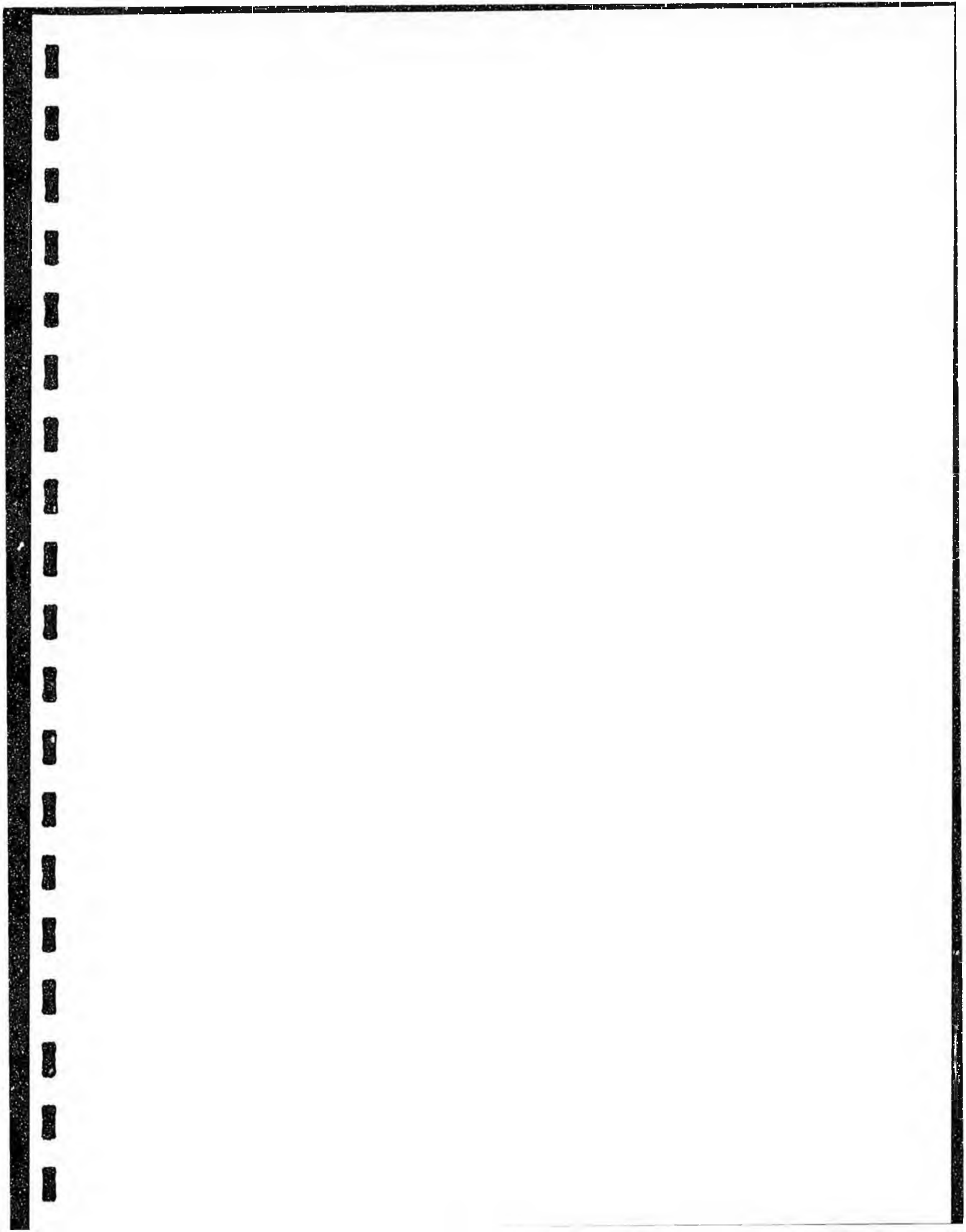
- Have limited fitness experience, goals, or success prior to joining a same sex club. These women also responded that exercising at home did not work. Self discipline was difficult to achieve, there was no peer support, no instruction, and there was interference from outside weather conditions.
- Perceive themselves as "out of shape", deconditioned.
- Experience a high level of performance anxiety (feel intimidated and anticipate difficulties) when exercising in public, especially in the presence of men.
- Join a fitness and wellness facility exclusively to improve their physical fitness, not to socialize or conduct business. Many stated that they exercise because it is prescribed by a doctor or physical therapist.
- Focused on improving their health and physical condition and do not want to be concerned with a sexualized dynamic and the concurrent emphasis on appearance. Over 80% of the members who submitted comment forms and who were interviewed said that their motivation to exercise in a same sex environment was the most important reason or the decisive reason for joining a single-sex facility; many of these women expressed concern about being observed and judged physically by members of the opposite sex, at a time when they are focused on gaining control over the function and appearance of their bodies. Unwanted exposure to members of the opposite sex has a negative effect

on the 'work environment,' limiting the amount and manner of exercise for some, preventing many from exercising at all. Women who sought a single sex environment were not motivated by a dislike of men, but by a need to control exposure of their bodies to the opposite sex while engaging in bodily positions and activities which are often viewed as having sexual associations or connotations.

Members across a wide age span, but especially those between 30 and 50 (pregnant, nursing, post-partum, menopausal, or aging) have strong feelings about exercising in the presence of the opposite sex. Many of the women have children and have experienced bodily changes associated with pregnancy and childbirth which alter their appearance. Some women have experienced the embarrassment of menstrual staining during exercise. Also, older members who have recently gone through menopause are still adjusting to the functional changes in their bodies as they go through the normal aging process. Still other women struggle with changes in their appearance due to physical problems, such as mastectomies, osteoporosis and back pain. As a result of various bodily changes, these women are much more conscious of their bodies and feel intimidated and exposed when exercising in a coed environment;

Struggling to regain stability as a result of past physical/sexual abuse or injury; many bodily concerns or vulnerabilities relate specifically to the psychology of women.

Some women, based upon their religious beliefs; are forbidden from exercising in the presence of men.



Subject: SB 176, Women's Health Club

Date: Mon, 24 Jan 2000 09:32:41 -0800

From: "Sally Schliesmann" <docsal@alaska.net>

To: Senator_Jerry_Mackie@legis.state.ak.us

CC: Senator_Tim_Kelly@legis.state.ak.us.Senator_Dave_Donley@legis.state.ak.us.Senator_Loren_I

Dear Senator Mackie and Committee:

I am writing to you regarding SB176, the Women's Health Club bill. Although I am a club member, I am contacting you in my professional capacity as a licensed clinical psychologist in private practice. I know you have received a packet of information from attorney Dan Coffey, regarding the numerous issues of SB176. I want to bring to your attention several items of importance.

Within the packet of information, you will read about the privacy issue, the legal aspects, the potential for future discrimination in other arenas, etc. What I want you to consider is what I have learned in my clinical experience of 15 years in working with women, body image and self-esteem. One area of my expertise is with eating disorders, and I am certain that many women who struggle with body image, self-esteem, and fitness-related issues have been very well served by having access to a women-only fitness club. There are numerous obstacles women face in the battle toward improved self-esteem, in the struggle climbing out of depression, in difficulties with relationships, and research is well-founded that exercise can enhance all of the above efforts toward positive mental health and self-improvement. Many women have not set foot in a gym because of their discomfort exercising with men in a coed facility. I believe the women-only gym is a very useful, if not necessary, ingredient for many women's self-improvement programs. Women focused on improving their health and physical condition do not want to be concerned with a potentially sexualized atmosphere such as can exist in a coed health club. (Some have described coed clubs as "meat markets." I'm sure most, if not all, of you have heard this term.) Some women are working to recover from physical and/or sexual abuse; for some, this recovery includes safe environments, and for most, an all-women's environment would be considered psychologically and physically safe.

In summary, I urge you to think clearly about the points I've emphasized, to read thoroughly the materials addressing other aspects of the Women's Club issue, and to allow a women's health club to exist based on privacy issues.

Please contact me if you have questions or would like to discuss this in detail.

Respectfully,

Sally Schliesmann, Ph.D.
Licensed Clinical Psychologist
2550 Denali, Suite 1507
Anchorage AK 99503
phone: 907-278-1200
email: docsal@alaska.net

POM for Senator Mackie



From: Ms. Teri A Ford
7610 Little Bend Cir

Telephone: 267-1631

Anchorage, AK 99507

NON Constituent

Registered Voter: U

Email:

Bill: SB 176 Title: SEX DISCRIMINATION IN HEALTH CLUBS
Subject:
Message:

I just can't believe why a male would want to join curves. The machines are made for the women gender, unless he wants the headlines in the paper. Let the women have their place only. We need our privacy. I support SB 176 all the way.

Entered in ANC on 1/25/00 POMID: 255

Distribution: 60

[Main Menu](#) . [Store All](#) . [Store This One](#) . [Prev POM](#) . [Next POM](#)

Message 2 out of 2.

POM for Senator Mackie



From: Ms. Karen K Naffziger
272 Grand Larry St #3

Telephone: 338-5577

Anchorage, AK 99504

NON Constituent

Registered Voter: U

Email:

Bill: SB 176 Title: SEX DISCRIMINATION IN HEALTH CLUBS
Subject:
Message:

I support SB 176.

Entered in ANC on 1/25/00 POMID: 253

Distribution: 5

[Main Menu](#)

[Store All](#)

[Store This One](#)

[Prev POM](#)

[Next POM](#)

Message 1 out of 2.



Official Business

Alaska State Legislature

SENATE LABOR & COMMERCE COMMITTEE

State Capitol
Juneau, AK 99801-1182

(907)465-3844

AGENDA

SB 176, Sex discrimination in health clubs.

Jerry,

FYI

This is

not in committee

number's packet

TONY KNOWLES, GOVERNOR**HUMAN RIGHTS COMMISSION**

800 A STREET, SUITE 204
ANCHORAGE, ALASKA 99501-3669
PHONE: (907) 274-4692 / 276-7474
TTY/TDD: (907) 276-3177
FAX: (907) 278-8588

January 11, 2000

via fax: (907) 465-3517

David Gray
Legislative Aide to
Honorable Jerry Mackie
Chair, Labor & Commerce
State Capitol
3100, Room 427
Juneau AK 99801-1182

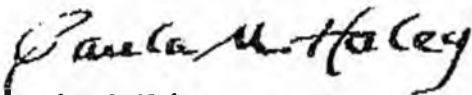
Dear Mr. Gray:

Pursuant to our discussion earlier today, please find attached a copy of my recently faxed letter to the Honorable Senator Drue Pearce.

If you decide that you would like me to answer questions during the committee's meeting at 1:30 p.m. on Thursday, January 13th, please let me know and I will make myself available by telephone.

If you have any questions, you may contact me at (907) 276-7474 ext 241.

Sincerely,



Paula M. Haley
Executive Director

enc: as noted

PMH/mak

Toll Free
In Alaska (800) 478-4692
TTY/TDD Only (800) 478-3177

TONY KNOWLES, GOVERNOR

HUMAN RIGHTS COMMISSION

800 A STREET, SUITE 204
ANCHORAGE, ALASKA 99501-3669
PHONE: (907) 274-4692 / 276-7474
TTY/TDD: (907) 276-3177
FAX: (907) 273-8588

January 11, 2000

Via Fax: (907) 465-3872

The Honorable Drue Pearce
President of the Senate
State Capitol
3100, Room 111
Juneau AK 99801-1182

Re: Senate Bill 176

Dear Senator Pearce:

Last year I spoke with your staff about the possibility of your introducing legislation to amend AS 18.80.230 to allow for single sex health clubs. As it is the Commissioners who set policy, staff brought this issue to them for their consideration at two special teleconference meetings in February 1999. I conveyed to your staff that the Commissioners decided to oppose the concept of amending the statute, but agreed to revisit the issue if legislation was in fact introduced.

After you introduced Senate Bill (SB)176, the Commissioners reviewed the bill. At their June 1999 meeting, after considerable deliberation, the Commissioners voted to oppose SB176. Commissioners discussed the issue at length and raised the following concerns: that SB176 allows segregation opposed in the past; that the language of the proposed legislation is vague; that the terms "physical fitness facility" and "gymnasium" are not defined; and that this legislation could be a slippery slope leading to other facilities being segregated. The Commissioners reaffirmed this position at their November 1999 meeting.

Please feel free to contact me at (907) 276-7474 extension 241 if you have any questions.

Sincerely,



Paula M. Haley
Executive Director

PMH/mak

Toll Free
In Alaska (800) 478-4692
TTY / TDD Only (800) 478-3177

SB

177

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. SB 177

Revision Date/Time (Note if correction) _____ Dept. Affected Community & Economic Development
 Title An Act relating to Insurance trade practices; and providing for an effective date. BRU Insurance
 Component Insurance
 Sponsor Senator Donley
 Requester S (L&C) Component No. 354

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This bill has no fiscal impact on this component.

Prepared by: Robert A. Lohr Phone 269-7900
 Division Insurance Date/Time 1/18/00 8:58 AM
 Approved by Commissioner Deborah B. Sedwick Date _____
 Agency Community & Economic Development

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE
 For further distribution information, call the Governor's Legislative Office

LESSMEIER & WINTERS

LAWYERS - LLC

431 NORTH FRANKLIN STREET
SUITE 400
JUNEAU, ALASKA 99801-1186

MICHAEL L. LESSMEIER
GREGORY W. LESSMEIER
SHELDON E. WINTERS

TELEPHONE: (907) 586-5912
FACSIMILE: (907) 463-3020
E-MAIL: l-w@gcl.net

Via Hand-Delivery
February 29, 2000

Senator Jerry Mackie
Capital Building, Room 427
Juneau, Alaska
Chairman of Senate Labor & Commerce Committee

Re: SB177

Dear Senator Mackie:

I am writing to you on behalf of State Farm regarding SB177. At the outset, I would like to give you some brief background information on State Farm's role in the Alaska marketplace. In 1998, State Farm had approximately 27.7 percent of the automobile insurance market. State Farm Fire and Casualty Company had approximately 40.4 percent of the homeowner insurance market. In 1998, State Farm Mutual returned \$6.2 million dollars to Alaska consumers. In 1997, State Farm Mutual returned \$6.6 million dollars to Alaska consumers.

In 1998, State Farm had approximately 38,095 auto claims in Alaska and of those claims, State Farm paid approximately 30,635. State Farm had approximately 7,300 homeowner claims and paid approximately 5,050 of those claims.

As you know, not every claim presented is a valid claim. Virtually every claim presents the opportunity for the exercise of judgment. Certainly every denial presents the opportunity for disagreement and ultimately a complaint to the Division. According to the Division of Insurance statistics, the Division received 52 complaints for State Farm in calendar year 1997 and 43 complaints for State Farm in calendar year 1998. Since the Division only reports the number of complaints received, we are unable to determine how many of these complaints the Division found to have merit. Nonetheless, the number of consumers unsatisfied enough to make a complaint remains incredibly low.

SB177 addresses the subject of claim settlement practices, a subject State Farm has great interest in given the number of claims it handles every year. While we have spoken to the Director of the Division of Insurance and Senator Donley's staff, the messages we have received are conflicting and we remain unclear as to exactly what problems justify this proposed legislation and what exactly it is intended to achieve. We will summarize our concerns below.

Senator Jerry Mackie
February 29, 2000
Page 2

1. Is There A Need For This Legislation?

At the outset, we are wondering what the need is for this legislation. The number of complaints handled by the Division do not appear to be increasing. While we do not know how many of the complaints the Division receives are ultimately found to have merit, the number of complaints over the last 2 years has been stable, despite a very public television campaign by the previous Director requesting those with complaints to make them.

Nor has there been testimony indicating that the type of complaint received by the Division justifies the proposed changes. We are not aware of any kind of a trend showing an increase in complaints by third party claimants. Nor are we aware of specific examples of conduct that the Director cannot reach under the statutory scheme currently in place.

We simply have not seen any evidence which indicates a need, based on what is happening in current claims practice, to support these changes. There certainly does not appear to be such a need based on the number of complaints being made with the Division.

2. The History of Alaska's Unfair Claims Settlement Act

Alaska's version of the Unfair Claims Settlement Act was introduced at the request of Governor Hammond in 1976. At the outset, two comments about the intent of Governor Hammond are important. First, he intended that the Director have the power to address both acts as well as practices. Second, Governor Hammond intended the Act to be regulatory in nature. He did not intend to create new private causes of action through this Act.

Governor Hammond's legislation was modeled after the 1971 National Association of Insurance Commissioner's Model Act. There has been a great deal of debate before your Committee regarding power of the Director of Insurance under the Act. Governor Hammond's January 14, 1976 letter to the Speaker of the House best explains his intent: "The bill gives the director of the division of insurance authority to investigate complaints and issue orders requiring persons to stop acts or practices in violation of the chapter." (Emphasis added). Clearly it was Governor Hammond's belief that this legislation allowed the director to address both individual acts as well as practices.

Just as important was Governor Hammond's belief that the Act was intended to be regulatory in nature:

"This bill is a strong, consumer-oriented measure which gives the director of the division of insurance more power to deal with unfair and deceptive practices than he presently has. The remedies in this bill provide broad relief to the insurance consumer through the insurance director."

(Emphasis added). Attachment 1. Governor Hammond's intent was not to create a new private

Senator Jerry Mackie
February 29, 2000
Page 3

cause of action through this Act, but rather to provide relief to the consumer through the insurance director.

3. The Act Itself Provides That The Director Already Has The Power to Investigate and Penalize Individual Acts.

A.S. 21.36.150 by its express terms allows the Director to take action if he believes someone in the insurance business is engaged in "an unfair or deceptive act or practice" (emphasis added). Section 21.36.320 again specifically allows a Director to conduct an investigation to determine whether a person is engaged in an "unfair or deceptive act or practice" (emphasis added.) 21.36.320(d) then allows the Director to order the person to cease and desist, order restitution and then assess a penalty of "not more than \$2,500 for each violation or \$25,000 for engaging in a general business practice". Finally, A.S. 21.36.320(e) allows the Director to impose an additional penalty in the event the person charged knew or should have known they were acting in violation of not more than "\$25,000 for each violation or \$250,000 for engaging in the general business practice."

It is crystal clear that the Director has the authority right now to take action on the basis of an individual act. Otherwise there would be no reason for the legislature to adopt the statutory scheme set forth above which expressly allows the Director to take action for an individual act or to create a different level of penalties for an individual act as opposed to a general business practice.

While we have carefully considered the legal opinion submitted by the Director, that legal opinion flies in the face of the clear and specific authority given to the Director in A.S. 21.36.320 and 21.36.150. Curiously, neither the legal opinion the Director submitted to you or his testimony addresses the very specific authority quoted above. While our new Director has evidently chosen not to utilize this authority, no one can credibly argue that it does not exist.

This very clear and specific authority should be viewed in light of the regulations adopted by the Director under the general authority given to him by A.S.21.36.150(d). For example, 3 AAC 26.010, again sets forth the same general tier of violations, depending upon whether there was a violation of a standard, or a business practice, or whether the violation occurred by someone who knew or should have known. 3 AAC 26.300(6) specifically defines a general business practice to include "violation of one standard committed on one or more percent of claims handled within a twelve month period or the repeated violation of a single standard without reasonable explanation".

There was a great deal of discussion with the Division regarding this language. The Division took the position that while it did not want to punish innocent mistakes, it did want to have a concrete definition of what a general business practice was so it could reach both the insurer with many claims as well as the insurer with only a few claims. For example, the Director expressed concern about small companies that may only write insurance or handle claims in Alaska on an occasional basis. We suggest to you that even if the Director is correct and that the language which gives him authority to take action for a "unfair or deceptive act or practice" under A.S. 21.36.150

Senator Jerry Mackie
February 29, 2000
Page 4

and 21.36.320 is insufficient, the Director would clearly have the authority under his own regulations to address the type of situation he seems to be concerned with.

3 AAC 26.300, which was adopted by a previous Director after a great deal of thought and discussion which we were personally involved in, defines "frequency as to indicate a general business practice" as "violation of any one standard committed on one or more percent of claims handled within a twelve month period or the repeated violation of a single standard without reasonable explanation". This negotiated balance was intended to provide a flexible yet meaningful definition as to what a general business practice was and to clarify the expressed intent of previous directors that their concern was not one of an innocent mistake, but of a repeated violation.

The comments regarding the statutory scheme presently in place have been at best confusing. The primary concern has been one of a perceived lack of authority where there is a single "egregious" act. No examples of such a situation were given. We would respectfully submit that in the absence of a clear need to change this statutory scheme, as evidenced by specific examples of improper conduct the Director has been unable to investigate and penalize, there is insufficient reason to change the current statutory scheme.

4. The NAIC Model Unfair Claims Settlement Act.

We have suggested to Senator Donley and the Director that if their true concern is to clarify the power of the Director, they should consider the Model Unfair Claims Settlement Practices Act adopted by the National Association of Insurance Commissioners. (Attachment 2). The Alaska Act is based on the predecessor to the NAIC Model Act. It was introduced at the request of Governor Hammond, who wrote that it was intended to be regulatory in nature.

The NAIC has now updated its Model Act in effort to recognize the proper balance between the regulator, the insurers and the public. This Model Act on the one hand would address the single act concern, which is what we understand to be the major concern of Senator Donley and the Director. On the other hand, the Model Act would address our major concern, which is to ensure that a new cause of action is not created. The Model Act strikes a balance by allowing administrative action if an act is "committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder" or if the act is "committed with such frequency to indicate a general business practice." While we believe the Director already has the power to investigate and penalize an "unfair or deceptive act" under the statutory scheme presently in effect in Alaska, if the issue needs clarification we would recommend the language of the Model Act to you. It has never been the purpose of either our Act or the Model Act to penalize a single mistake, but rather to address the more serious or repeated situation.

5. No New Cause of Action Should Be Created.

As set forth above, the Alaska Act was originally intended to be regulatory in nature. It was not intended to create a new private civil cause of action. The NAIC Model Act likewise is not

Senator Jerry Mackie
February 29, 2000
Page 5

intended to create a new private cause of action. In fact, the NAIC Model Act emphasizes this intent: "Nothing herein shall be construed to create or imply a private cause of action for violation of this Act."

We remain confused about Senator Donley's intentions in this regard. Clearly Senator Donley's original intent was to create a new private civil cause of action. In Senator Donley's Sponsor Statement, he wrote that one of the purposes of this bill was in fact to create a claim for third party bad faith: "SB 177 expands the prohibition against such bad faith actions to third party claimants". He recently expressed the same intent in a legal publication. Attachment 3.

While Senator Donley indicated to the Committee it was not his intent to create a cause of action for third party bad faith, the proposed Committee Substitute we have received from his office makes this anything but clear. The proposed Committee Substitute states only that Sections (a)(7) and (11) do not create a private cause of action against an insurer by a third-party claimant. Does Senator Donley intend to change the existing law regarding the other sections to create a private civil cause of action for violation in either the first or third-party situation? We are very concerned about anything which could be construed to create a cause of action for violation of the Alaska Act, as we believe such a cause of action would ultimately have dire consequences for Alaska insurance consumers.

The Model Act also makes it very clear that the Act should not "be construed to create or imply a private cause of action for violation". Thus far, violations of the Alaska Act have not been construed to create a private civil cause of action. Changing this language, especially in the manner proposed by Senator Donley, will increase the risk that a single violation will be construed to create such a private civil cause of action. Regardless of what changes you end up making, we strongly encourage the inclusion of language similar to the Model Act to make it clear that nothing contained in the Act is intended to create or imply a private cause of action for its violation.

6. Third Party Claimants Should Not Be The Subject of This Act.

Several sections of the proposed legislation attempts to create a relationship between an insurer and a third party claimant. The NAIC Model Act does not attempt to create such a relationship, we believe for good reason. When a third party is making a claim against an insured, the duty owed by the insurer is to the insured. Likewise, the insured owes duties to the insurer. The insured is the only person an insurer has a contractual relationship with.

Under this proposed legislation, new duties would be created by the insurer to the third party claimant. Such duties may well conflict with the duties owed to the insured. Such duties are also unilateral--no similar duty is owed by the third party claimant to the insurer.

There is no reason for the creation of such duties. The 1997 Tort Reform legislation contained new offer of judgment provisions that penalize any party to litigation for acting irresponsibly. It is both unnecessary and unfair to create a further penalty which would apply only

Senator Jerry Mackie
February 29, 2000
Page 6

to one party, but not the other.

7. The Legislature Should Not Mandate a Policy Change.

Section 7 of the proposed Committee Substitute would change existing law on policy provisions no matter how clearly a policy is written. State Farm has long opposed such legislative mandates. It strongly believes the law of free market supply and demand is ultimately the best way of determining what should and should not be covered.

The very issue advanced by Section 7 of this provision was recently before our Supreme Court in the case of State Farm Fire and Casualty Company v Bogen, 925 P.2d 1042 (Alaska 1996). Our Supreme Court there rejected the very policy arguments now being made by the proponents of this provision:

“We favor the majority rule. It is well established that ‘[t]he obligations of insurers are generally determined by the terms of their policies.’ (‘The intention of the parties as to the coverage of a policy is determined by the words which they have used.’) We have held that where an insurer ‘limits the coverage of a policy issued by it in plain language, this court recognizes the restriction.’ We can discern no sound policy reason for preventing the enforcement of the earth movement exclusion to which the parties in this case agreed. We therefore align ourselves with those courts holding that an insurer may expressly preclude coverage when damage to an insured’s property is caused by both a covered and an excluded risk.”

Bogen, 925 P.2d at 1044 (citations omitted).

The issue is not whether the policy language in question might be used to deny coverage where the excluded peril is an insignificant or trivial part of the loss. It is a well established principle of property insurance law that “remote” causes must be disregarded in determining whether or not a loss is covered. The present exclusion would not even be triggered in those cases in which the excluded peril is only incidentally involved. The exclusion is only triggered when the excluded peril is at least a substantial factor in bringing about the loss.

Aside from the policy reasons which have led most courts and states to reject the approach suggested by Section 7 of this proposed legislation, there are other practical concerns raised. The issue of determining what is “the dominant cause” is in many cases not an easy one. Such determinations are likely to be challenged and thus litigated. Even more important, is that such provisions may actually discourage people from purchasing coverage which would directly cover such risks. For example in California because of a concurrent causation ruling, it was reported that insurers paid out about 70% of the Coalinga earthquake claims even though only a relatively few Coalinga residents carried earthquake coverage.

The Alaska Supreme Court saw no sound reason to not enforce a clear policy provision

Senator Jerry Mackie

February 29, 2000

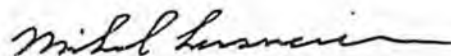
Page 7

which was agreed to by the parties. The Court's reasoning is sound and we hope you will agree with it.

Thank you for the opportunity to comment on this very important legislation.

Sincerely,

LESSMEIER & WINTERS

By: 
Michael L. Lessmeier

Enclosures: 1/4/76 Letter from Jay S. Hammond
Unfair Claims Settlement Practices Act
Alaska Bar Rag Article

cc: Senator Tim Kelly
Senator Donley
Senator Hoffman
Senator Leman

HB HOUSE BILL NO. 558 by the Rules Committee by request of
558 the Governor, entitled:

"An Act relating to the regulation of
insurance practices."

was introduced, read the first time and referred to the
Committees on Commerce and Judiciary.

"January 14, 1976

The Honorable Mike Bradner
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

In accordance with AS 24.30.060(b) and the Uniform Rules
of the Alaska State Legislature, I am transmitting a bill
to revise the insurance trade practices and frauds statute
(AS 21.36) and other insurance regulatory provisions.

This bill substantially conforms to segments of the "Model
Unfair Trade Practices Act" proposed by the National
Association of Insurance Commissioners in 1971.

Although complete understanding of the effectiveness and
potential of that model Act, as modified in this bill,
requires a careful reading, the following summary of some
of the areas with which the bill deals may be helpful.

The bill clarifies and expands the defined unfair trade
practices by persons and explicitly includes health care
service contractors in the definition of person for purposes
of the bill. The bill also defines prohibited unfair claim
settlement practices. Insurer claims practices have long
been an object of criticism and concern. However, this bill
establishes the necessary standards of unfair claim
practices by which insurers and regulators may be guided.

The bill gives the director of the division of insurance
authority to investigate complaints and issue orders requir-
ing persons to stop acts or practices in violation of the
chapter. Once an order is issued, the bill provides that
the director may also order a penalty of as much as \$10,000
for each violation of the chapter and suspend or revoke the
violator's license. In addition, the bill gives the
director authority to seek injunctive relief to aid in the
enforcement of the chapter.

This bill is a strong, consumer-oriented measure which gives
the director of the division of insurance more power to
deal with unfair and deceptive practices than he presently
has. The remedies in this bill provide broad relief to the
insurance consumer through the insurance director.

Sincerely,


Jay S. Hammond
Governor

HOUSE BILL NO.
the Governor.

"An
per

was introduced
Commerce Com

The Honorable
Speaker of the
Alaska State L
Juneau, Alaska

Dear Mr. Speaki

In accordance v
the Alaska Stat
accomplish two
of insurance ra
on deviations i

Section 1 of th
Under the prese
the Division of
filing; this pe
days. This pro
is faced with a
equally importan
for example, th
more than a weel
allow analysis c
be revised to 30
tional 30 days.

The present law
Division extends
he must not only
make a statement
is duplicative a

Finally, the sta
Division of Insu
of the waiting p
surer or rating
simple ones, req
decision as to i
that all filings
section 1, we al
initiative, he e
will avoid the n
that have been r
of the waiting p

Section 2 of the
flexibility into
Alaska is presen
based upon a mod
Insurance Commis

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

Table of Contents

Section 1.	Purpose
Section 2.	Definitions
Section 3.	Unfair Claims Settlement Practices Prohibited
Section 4.	Unfair Claims Practices Defined
Section 5.	Statement of Charges
Section 6.	Cease and Desist and Penalty Orders
Section 7.	Penalty for Violation of Cease and Desist Orders
Section 8.	Regulations
Section 9.	Severability

Prefatory Note: By adopting this model act in June 1990, the NAIC separated issues regarding unfair claims settlement practices into a free-standing act apart from the NAIC Model Unfair Trade Practices Act. This change focuses more attention on unfair claims as a function of market conduct surveillance separate and apart from general unfair trade practices. By doing so, the NAIC is not recommending that states repeal their existing acts, but states may modify them for the purpose of capturing the substantive changes. However, for those states wishing to completely rewrite their comprehensive approach to unfair claims practices, this separation of unfair claims from unfair trade practices is recommended.

Section 1. Purpose

The purpose of this Act is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurance issued to residents of [insert state]. It is not intended to cover claims involving workers' compensation, fidelity, suretyship or boiler and machinery insurance. Nothing herein shall be construed to create or imply a private cause of action for violation of this Act.

Drafting Note: A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position. The NAIC has promulgated the Unfair Property/Casualty Claims Settlement Practices and the Unfair Life, Accident and Health Claims Settlement Practices Model Regulations pursuant to this Act.

Section 2. Definitions

When used in this Act:

- A. "Commissioner" means the Commissioner of Insurance of this state;

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term "commissioner" appears.

- B. "Insured" means the party named on a policy or certificate as the individual with legal rights to the benefits provided by the policy;
- C. "Insurer" means a person, reciprocal exchange, interinsurer, Lloyd's insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and third party administrators. Insurer shall also mean medical service plans, hospital service plans, health maintenance organizations, prepaid limited health care service plans, dental, optometric and other similar health service plans as defined in Section [insert applicable section]. For purposes of this Act, these foregoing entities shall be deemed to be engaged in the business of insurance;
- D. "Person" means a natural or artificial entity, including, but not limited to, individuals, partnerships, associations, trusts or corporations;

Unfair Claims Settlement Practices Act

- E. "Policy" or "certificate" means a contract of insurance, indemnity, medical, health or hospital service, or annuity issued. "Policy" or "certificate" for purposes of this Act, shall not mean contracts of workers' compensation, fidelity, suretyship or boiler and machinery insurance.

Drafting Note: The term "policy" is intended to cover the product issued by medical, health or hospital service plans and should be changed to conform to the laws of each state.

The Federal Employee Retirement Income Security Act (ERISA) preempts certain entities and some activities of those entities from the application of state laws. The purpose of these definitions is to include within this Act and regulations issued pursuant to it, all entities and activities to the extent not preempted by ERISA.

Section 3. Unfair Claims Settlement Practices Prohibited

It is an improper claims practice for a domestic, foreign or alien insurer transacting business in this state to commit an act defined in Section 4 of this Act if:

- A. It is committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder; or
- B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

Section 4. Unfair Claims Practices Defined

Any of the following acts by an insurer, if committed in violation of Section 3, constitutes an unfair claims practice:

- A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;
- B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
- C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
- D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
- E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;
- F. Refusing to pay claims without conducting a reasonable investigation;
- G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;
- H. Attempting to settle or settling claims for less than the amount that a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;
- I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;

- J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;
- K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
- L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;
- M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;
- N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

Section 5. Statement of Charges

Whenever the commissioner has reasonable cause to believe that an insurer doing business in this state is engaging in any unfair claims practice and that a proceeding in respect thereto would be in the public interest, the commissioner shall issue and serve upon the insurer a statement of the charges in that respect and a notice of hearing, which shall set a hearing date not less than thirty (30) days from the date of the notice.

Drafting Note: If a formal hearing procedure exists, states may wish to incorporate the timeframes from that existing procedure.

Section 6. Cease and Desist and Penalty Orders

If, after hearing, the commissioner finds an insurer has engaged in an unfair claims practice, the commissioner shall reduce the findings to writing and shall issue and cause to be served upon the insurer charged with the violation a copy of the findings and an order requiring the insurer to cease and desist from engaging in the act or practice and the commissioner may, at the commissioner's discretion, order:

- A. Payment of a monetary penalty of not more than \$1,000 for each violation but not to exceed an aggregate penalty of \$100,000, unless the violation was committed flagrantly and in conscious disregard of this Act, in which case the penalty shall not be more than \$25,000 for each violation, but not to exceed an aggregate penalty of \$250,000 pursuant to hearing; and/or
- B. Suspension or revocation of the insurer's license if the insurer knew or reasonably should have known it was in violation of this Act.

Section 7. Penalty for Violation of Cease and Desist Orders

An insurer that violates a cease and desist order of the commissioner and, while the order is in effect, may, after notice and hearing and upon order of the commissioner, be subject, at the discretion of the commissioner, to:

- A. A monetary penalty of not more than \$25,000 for each and every act or violation not to exceed an aggregate of \$250,000 pursuant to hearing; and/or
- B. Suspension or revocation of the insurer's license.

Unfair Claims Settlement Practices Act

Section 8. Regulations

The commissioner may, after notice and hearing, promulgate reasonable rules, regulations and orders as are necessary or proper to carry out and effectuate the provisions of this Act. The regulations shall be subject to review in accordance with Section [insert applicable section].

Drafting Note: Insert section number providing for review of administrative orders.

Section 9. Severability

If any provision of this Act, or the application of the provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Legislative History (all references are to the Proceedings of the NAIC).

1972 Proc. I 15, 16, 443-444, 491, 495-496 (claims settlement practices made part of Unfair Trade Practices Act).

1990 Proc. II 7, 13-14, 160, 177-179 (adopted free-standing claims settlement practices act).

1991 Proc. I 9, 16, 192-193, 203-206 (amended and reprinted).

Bill allows state to investigate insurance practices

By SENATOR DAVE DONLEY

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

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

Senate Bill 177 also affords Alaskans more opportunity to pursue fair and equitable claims through arbitration. Many consumers and even insurance agents are sometimes intimidated from pursuing a fair settlement because of fear of retaliation from the insurer. This discourages claimants from pursuing a fair settlement and hinders the consumer protection ability of the Division of Insurance, as they are unable to gain access to information needed to effectively protect consumers. SB 177 provides immunity from liability for defamation for those persons who provide the division with information regarding an unfair act or practice. This provision will better

protect both agents and insurance consumers.

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

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

SB 177 expands the prohibition against such bad faith actions to third party claimants and affords them a fair arbitration claims process while also curtailing unnecessary litigation. Affording and expanding insurance claims protections to both first and third party claimants is fair, equitable and good public policy.

Injured Alaskans and insurance consumers deserve better protection from insurance company unfair claims practices. We need a Division of Insurance that has the authority necessary to protect consumers. Your support and passage of Senate Bill 177 will help provide just that.

drive) and is my personal choice—in fact. The B-2130 is really small at 8"x 10 pounds, includes a 400 megahertz DRAM, and 10.4" TFT screen with output, an internal 56K modem and Ethernet. It is the least expensive system magnesium metal case.

5. Compaq's Armada M300 is a biggie. The Armada M300 costs \$1,200. It has a large 11.3" active matrix screen plus a modem, a 4.3 gigabyte hard disk, as usual, the CD-ROM drive, which is a must for most programs, is an extra cost item.

6. Toshiba's Libretto 110 sub-notebook is the smallest Windows 98 notebook mostly for light duty work, such as some use. Some people deride the Libretto 110 as being too small for a notebook.

of (st of a CD-ROM drive) fc (ok system. It includes a p (egabytes DRAM, a 4. s (realistically, that's pr s (any of our readers are s (avorite is Toshiba's s (tem is also top pick. It' s (een, a Pentium II 30 s (AM, a 6.4 gigabyte h s (y built in, all in a high str s (CD-ROM drive is extra s (CT and IBM ThinkPar

the mid-size notebooks, s (rger external dimension s (or's choice, but is rather s (he desktop "slice" and t

OFFICE
The Alaska Bar Reg — January - February, 2000 • Page 13



Need help? Call Joe
Alaska Legal Resea
FAX 463-3055 ser

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS:

LABOR & COMMERCE COMMITTEE, CHAIRMAN
JUDICIARY COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON UTILITY RESTRUCTURING, MEMBER
SPECIAL COMMITTEE ON ECONOMIC DEVELOPMENT &
TOURISM, MEMBER

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

INTERIM:
716 WEST 4TH AVENUE, SUITE 640
ANCHORAGE, AK 99501
PHONE: (907) 269-0117
FAX: (907) 269-0119

SESSION:
ALASKA STATE CAPITOL
JUNEAU, AK 99801-1182
PHONE: (907) 465-4968
FAX: (907) 465-2040

Representative Norman Rokeberg

December 23, 1999

**The Honorable Jerry Mackie
Chairman, Senate Labor & Commerce Committee
State Capitol
Juneau, AK 99801-1182**

Dear Jerry:

Enclosed is a copy of a bill I had drafted in response to a letter from a Mr. Michael Cohn. Senator Leman sent you a copy of a letter he wrote to Mr. Cohn (dated October 6, 1999).

Jerry, while I think Mr. Cohn has some valid points concerning the situation he described, I do not want to introduce the bill either as a personal bill or a committee bill. Rep. Hudson contacted me concerning the bill but he, too, does not want to introduce the bill. I am sending the draft to you with a request to review the same. Let me know if you or your committee will introduce the bill and I will be glad to help when it comes to the House side.

Happy holidays,



**Norman Rokeberg
State Representative
House District 11**

Enclosure: LS1155\A, Ford, 10/25/99

1-LS1155A
Ford
10/25/99

OCT 26 1999

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to uninsured and underinsured motor vehicle insurance."

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

3 * Section 1. AS 28.20.445(f) is amended to read:

4 (f) If both the owner and operator of the uninsured vehicle are unknown,
5 payment under the uninsured and underinsured motorists coverage shall be made only
6 where direct physical contact between the insured and uninsured or underinsured motor
7 vehicles has occurred, or where a person other than the insured attests that a
8 motor vehicle involved in the accident left the scene without being identified. A
9 vehicle that has left the scene of the accident with an insured vehicle is presumed to
10 be uninsured if the person insured reports the accident to the appropriate authorities
11 within 24 hours.

12 * Sec. 2. AS 28.22.201(b) is amended to read:

13 (b) If both the owner and operator of a vehicle are unknown, payment under
14 the uninsured and underinsured motorists coverage may be made only where direct
15 contact between the motor vehicles has occurred, or where a person other than the

1 insured attests that a motor vehicle involved in the accident left the scene without
2 being identified. A vehicle and operator that have left the scene of an accident with
3 another vehicle are presumed to be uninsured if the insured person reports the accident
4 to the appropriate authorities within 24 hours.

LAW OFFICES
PHILLIP PAUL WEIDNER AND ASSOCIATES
A PROFESSIONAL CORPORATION
330 L STREET, SUITE 200
ANCHORAGE, ALASKA 99501

CABLE ADDRESS
JUSTICE

907/276-1200
FAX 907/278-6571

September 21, 1999

The Honorable Jerry Mackie
Alaska State Senate
Room 427
State Capitol
Juneau, Alaska 99801-1182

Dear Senator Mackie:

I am writing this letter to bring to your attention what appears to be an unintended result of AS 28.20.445(f) which states:

If both the owner and operator of the uninsured vehicle are unknown, payment under the uninsured and underinsured motorist coverage shall be made only where direct physical contact between the insured and uninsured or underinsured motor vehicle has occurred. A vehicle that has left the scene of the accident with an insured vehicle is presumed to be uninsured if the person insured reports the accident to the appropriate authorities within 24 hours.

In a case this law firm handled, the insurance company was unwilling to pay under the uninsured motorist provision of its policy as a result of an accident in which its insured, an innocent victim of an automobile accident, received injuries, utilizing AS 28.20.445(f) as its defense. In said case, the victim was proceeding east on O'Malley Road in Anchorage when she was struck by a second individual who crossed the center line heading west on O'Malley. The insurance company has claimed that the second individual crossed into the oncoming lane of traffic to avoid a collision with a third vehicle that had come out of a side street, Commodore Drive, into his lane of traffic. The third vehicle vanished during the accident. Since the vanishing vehicle did not directly strike the victim, and despite the fact that there are apparently witnesses who saw that vehicle, the insurance company took the position that under AS 28.20.445(f) it is not responsible for the actions of the third vehicle (the vehicle which had blocked the road), which allegedly caused the second driver to swerve into oncoming traffic.

As written, the statute would even preclude recovery to a victim of an uninsured vehicle in cases where the victim is at a stop light and is struck by a second vehicle which collided with the victim

The Honorable Jerry Mackie
September 21, 1999
Page 2

as a result of the actions of a third vehicle which struck the second vehicle, the third vehicle subsequently leaving the scene and not being located. In such cases, there would be no "direct" contact between the vehicle that left the scene and the victim. Under those circumstances, an insurance company could claim the uninsured or underinsured motorist provision would not apply because of AS 28.20.445(f).

Clearly, it appears that AS 28.20.445(f) was intended to prevent claims brought by individuals who are injured in one-car collisions with objects, or have an accident such as going off the road or striking a tree, and then claim that a phantom vehicle caused them to have the accident. It was not intended, or should not have been intended, to apply to a situation where there is no question but that an accident occurred, where there were witnesses who may have observed the vehicle which left the scene, and where it is undisputed that the victim was struck by another vehicle, whether the striking of the victim occurred "directly" by the vehicle that left the scene, or "indirectly" by the vehicle that created the traffic conditions which resulted in the accident and then left the scene. At a minimum, the statute should be amended to allow the insured an opportunity to prove that he or she was injured as a result of another vehicle, even if that other vehicle did not directly strike the insured, and where there is independent evidence to prove same.

Accordingly, I would request that you take steps to remedy or rectify what appears to be an unintended result of AS 28.20.445(f) before other innocent people are victimized by an unintended result of the statute.

Thanking you in advance for your attention to this matter, I remain,

Sincerely yours,

WEIDNER & ASSOCIATES, INC.
A Professional Corporation



Michael Cohn
Attorney at Law

MC/mm

cc: Governor Tony Knowles
Alaska State Senate
Alaska State House
Robert Lohr, Director, Division of Insurance



SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189
Web Site: <http://www.akrepublicans.org/Leman.htm>

Session: State Capitol, Juneau, AK 99801 (907) 465-2095
Email: Senator_Loren_Leman@legis.state.ak.us

October 6, 1999

Mr. Michael Cohn
Weidner & Associates, Inc.
330 L Street, Suite 200
Anchorage, AK 99501

Dear Mr. Cohn:

Thank you for bringing the matter of interpretation of AS 28.20.445(f) to my attention. I have not researched the intent of the original law (CCSHB 7 passed in 1984), and so cannot speak to the intent of the Legislature when the law was passed.

I suggest that you work with the chairmen of the Labor and Commerce committees. Senator Jerry Mackie chairs the Senate committee and Representative Norman Rokeberg chairs the House committee. I am a member of the Senate committee and will keep your correspondence on hand as back up to any potential legislation.

Sincerely,

A handwritten signature in cursive script that reads "Loren Lemman".

Senator Loren Lemman

cc: Senator Jerry Mackie
Representative Norman Rokeberg



Official Business

Alaska State Legislature

SENATE LABOR & COMMERCE COMMITTEE

State Capitol
Juneau, AK 99801-1182

(907)465-3844

ADDITIONAL INFORMATION FOR

SB 177

(2/29/00)

1. A proposed blank CS (LS 0902/H). It has a new section 6 and section 8. The first specifically prohibits suits by third party claimants. The latter allows the director of the division of insurance to use discretion in imposing penalties for a single occurrence of a violation.
2. AG's opinion on whether AS 21.36.150 authorizes the director of the division of insurance to determine that a single act can constitute a violation of trade practice prohibitions.
3. Letter of support for SB 177.

1-LS0902H
Ford
2/21/00

CS FOR SENATE BILL NO. 177()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR DONLEY

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (b) The provisions of (a)(7) or (11) of this section do not create a private cause
26 of action against an insurer by a third-party claimant.

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

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

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

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

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

Subject: Legal Opinion on AS 21.36.150

Date: Mon, 24 Jan 2000 16:52:24 -0900

From: Bob_Lohr@dced.state.ak.us

To: Jerald R Mackie <Senator_Jerry_Mackie@legis.state.ak.us>

CC: David D Gray <David_Gray@legis.state.ak.us>

Dear Mr. Chairman,

During last week's hearing on SB 177, the "Alaska Insurance Consumers Protection Act", Michael Lessmeier representing State Farm suggested that the division of insurance had ample authority under AS 21.36.150 to pursue a single unfair claims act. I indicated that I believed that this would be difficult to sustain. You requested a legal opinion on the question. I have attached a copy of the opinion on this question prepared by Assistant Attorney General Virginia Rusch.

Please let me know if you have any questions. Also, if you would like me to distribute this opinion to individual committee members, please let me know.

Bob Lohr, Director
Division of Insurance
269-7896

<input type="checkbox"/> 1_Legal Opinion AS 21-36-150.doc	Name: 1_Legal Opinion AS 21-36-150.doc Type: Winword File (application/msword) Encoding: base64 Download Status: Not downloaded with message
---	---

MEMORANDUM

State of Alaska Department of Law

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

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

DATE: January 25, 2000

FILE NO.:

TEL. NO.: 269-5229

SUBJECT: AS 21.36.150

In connection with a pending bill that would modify AS 21.36.010, AS 21.36.020 and AS 21.36.125 to prohibit a single unfair and deceptive act (as well as repetitive acts constituting an unfair and deceptive practice), you have asked for an interpretation of AS 21.36.150.¹ Specifically, you asked

¹ This statute provides:

Sec. 21.36.150. Procedures as to undefined practices.

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

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

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

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

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

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

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

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

This history, as well as the language of AS 21.36.150, therefore shows the statute was intended to deal with "undefined" practices. It is a procedure to determine whether questioned practices are unfair and deceptive, rather than a procedure to determine whether a person is guilty of conduct that

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

has previously been defined as unfair and deceptive. The statute incorporates due process protections, including requirements for notice of the issue to the person who is carrying on the activity, a hearing, and a written report with findings of fact. But this section gives the director no authority to order a cease and desist order or impose penalties for a violation. The director is required to apply to a court for enforcement orders. In contrast, under AS 21.36.320, the director is authorized to issue cease and desist orders and impose penalties for violations of the trade practice and frauds chapter, AS 21.36.

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

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

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

VAR:jem

LAW OFFICES

Michael J. Schneider, P.C.

880 "N" STREET, SUITE 202
ANCHORAGE, ALASKA 99501

TELEPHONE (907) 277-9306

FAXED
2/16/00

FAX (907) 274-8201

February 16, 2000

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

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

Dear Senator Donley:

I write in support of SB 177.

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

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

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

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

The Honorable Dave Donley
February 16, 2000
Page 2 of 2

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

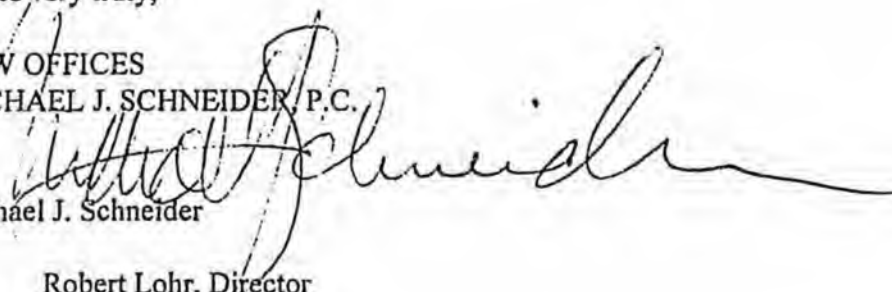
How do insurance carriers get away with it? It is really quite easy. Disputes over medical payments coverage in most auto policies are relegated to arbitration. There is nothing wrong with that. However, there is no award of attorney's fees and costs provided in these policies to the successful party.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

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

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

Yours very truly,

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.


Michael J. Schneider

cc: Robert Lohr, Director
Division of Insurance

SENATE BILL NO. 177

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY SENATOR DONLEY

Introduced: 5/16/99

Referred: Labor and Commerce

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section 1. SHORT TITLE. This Act may be known as the Alaska Insurance Consumers
5 Protection Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 (7) compel an insured or third-party claimant [INSUREDS] to
 28 litigate for recovery of an amount [AMOUNTS] due under an insurance policy
 29 [POLICIES] by offering substantially less than an amount [THE AMOUNTS]
 30 ultimately recovered in an action [ACTIONS] brought by the insured or third-party
 31 claimant [THOSE INSUREDS];

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

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

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

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

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

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

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

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

22 * Sec. 6. AS 21.36 is amended by adding a new section to read:

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

27 * Sec. 7. This Act takes effect January 1, 2000.

Tony Knowles, Governor

Alaska

Department of Community and Economic Development

Division of Insurance

P.O. Box 110805, Juneau, AK 99811-0805

Telephone: (907) 465-2515 • Fax: (907) 465-3422 • Text Telephone: (907) 465-5437

Email: Insurance@dced.state.ak.us • Website: www.dced.state.ak.us/insurance/

February 29, 2000

The Honorable Jerry Mackie
Alaska State Senate
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Mackie:

Re: SB 177—Insurance Trade and Practices Act

In response to the questions raised regarding consumer complaints at the Labor and Commerce hearing on February 8, I have enclosed information from the Division of Insurance's annual report for fiscal year 1999. In addition to a narrative report on the complaint process, there are four tables of data.

- Table I shows a comparison of complaint activity over the past five years.
- Table II shows complaints by line of coverage.
- Table III reflects the reason the complaint was filed.
- Table IV is a comparison of premiums to total complaints for companies with five or more complaints for calendar year 1998.

Please let me know if additional information is needed.

Sincerely,



For Robert A. Lohr
Director

RAL/SR/pb4351a.doc
Enclosure



SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

MEMORANDUM

To: Senator Jerry Mackie
Chair, Senate Labor & Commerce Committee

From: Senator Dave Donley

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

Date: January 10, 2000

I request that you schedule Senate Bill 177, "The Alaska Insurance Consumers Protection Act", for a hearing in your committee.

Senate Bill 177 will give injured Alaskans and insurance consumers a fairer playing field when dealing with insurance companies by allowing the Division of Insurance to investigate individual acts of unfair or deceptive trade practices.

The Alaska Division of Insurance supports SB 177.

I have included the sponsor statement for your review.

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

DD/jja

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

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595
June-December: 716 W. 4TH AVE., STE. 430 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238



SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

Sectional Analysis for Senate Bill 177 "The Alaska Insurance Consumers Protection Act"

Section #1 - Describes the short title of the legislation.

Section #2 - Specifies that the purpose of AS 21.36 is to regulate not only unfair methods or trade practices but also single acts or a deceptive practice.

Section #3 - Specifies that single or multiple trade practices that are unfair or deceptive are prohibited.

Rationale: Under existing law, the Division of Insurance does not have the jurisdiction to take administrative action concerning individual acts of unfair insurance practices. In many instances, the division will not even investigate an individual insurer until a pattern of deceptive trade practices has developed. This lack of jurisdiction promotes bad practices by insurance companies since they know that there is little enforcement to regulate their practices. This language would allow the Division of Insurance to investigate and take action relative to individual acts of unfair or deceptive trade practices and to better track patterns of abuse.

Section #4 - Specifies that a person who provides the director of the division of insurance with information regarding an act or practice of a licensee is immune from liability for defamation.

Rationale: In reported instances, consumers and even insurance agents are sometimes intimidated from pursuing a fair settlement because of fear of retaliation from the insurer. This type of activity hinders the consumer protection ability of the Division of Insurance, as they are unable to gain access to information needed to effectively protect the consumer. This section will provide increased consumer protection and better protect the insured.

Section #5 - Expands existing first party protections to third parties by specifying that neither an insured or a third-party claimant can be compelled to litigate by offering to

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

January-May: STATE CAPITOL • JUNEAU, AK • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595
June-December: 716 W. 4TH AVE., STE. 430 • ANCHORAGE, AK • 99501 • (907) 269-0234 • FAX: (907) 269-0238

settle an insurance claim for substantially less than the amount that would be entitled to recover in a civil action or arbitration.

It specifies that both an insured or a third-party claimant cannot be compelled to accept an arbitration settlement or compromise by informing the insured or third party of a policy of appealing an arbitration award in favor of the insured or third party claimant.

Rationale: In some instances, an insurer may threaten or require an injured third party to pay the costs of arbitration or mediation before the process even begins. This type of activity discourages claimants from pursuing a fair settlement, especially when the amount at issue is less than the cost of arbitration. This section prohibits such bad faith action against injured third parties and affords them a fair opportunity to pursue equitable claims.

Making these provisions applicable to both first and third party claimants is fair, equitable and good public policy.

Section #6 - Specifies that an insurer may not deny a claim if the risk insured is the dominant cause of the loss and denial occurs because an excluded risk is also in the chain of the causes but operates on a secondary basis.

Rationale: In some situations, the insurer will not cover a claim if there are multiple causes which caused the loss to occur, thus escaping liability because of a secondary cause that is not covered. This section ensures that a claim is covered when a loss has more than one cause and the dominant cause is covered.

Section #7 - Specifies the effective date of the legislation.

Rationale: Gives insurance companies the necessary time to implement the provisions enacted in this legislation.

Delete sec 6 and replace with the following:

Nothing contained herein shall be construed to create or imply a private cause of action for violation of this Act.

Amendment to CS SB 177()
LS 0982/H

To: Mr. Ford
From: D. Gray



Official Business

Alaska State Legislature

SENATE LABOR & COMMERCE COMMITTEE

State Capitol
Juneau, AK 99801-1182

(907)465-3844

ADDITIONAL INFORMATION FOR

SB 177

(2/29/00)

1. A proposed blank CS (LS 0902/H). It has a new section 6 and section 8. The first specifically prohibits suits by third party claimants. The latter allows the director of the division of insurance to use discretion in imposing penalties for a single occurrence of a violation.
2. AG's opinion on whether AS 21.36.150 authorizes the director of the division of insurance to determine that a single act can constitute a violation of trade practice prohibitions.
3. Letter of support for SB 177.

1-LS0902H
Ford
2/21/00

CS FOR SENATE BILL NO. 177()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR DONLEY

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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