ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11184 SENATE JUDICIARY

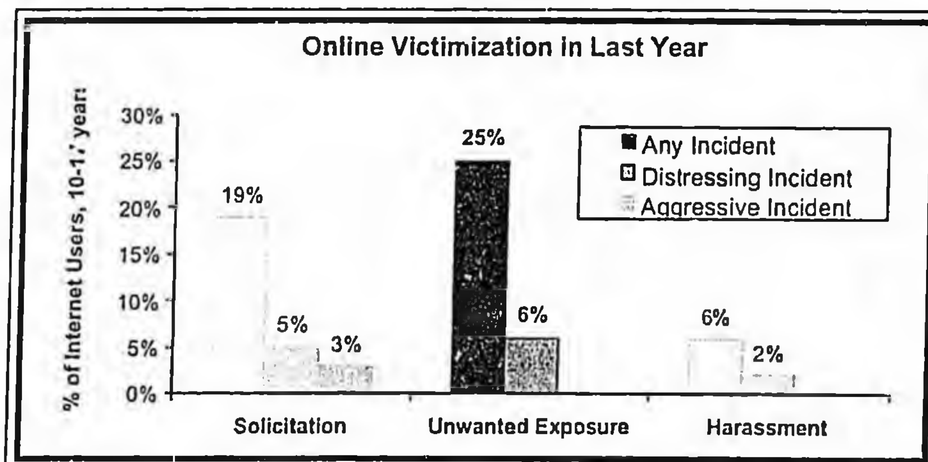
2. Unwanted Exposure to Sexual Material

While it is easy to access pornography on the Internet, what makes the Internet appear particularly risky to many parents is the impression that young people can encounter pornography there inadvertently. It is common to hear stories about children researching school reports or looking up movie stars and finding themselves subjected to offensive depictions or descriptions.

In this part of the survey, we were interested in **unwanted** exposures to sexual material, those that occurred when the youth were not looking for or expecting sexual material. We were interested in material that came up while doing searches online and surfing the world wide web, as well as material that might have appeared when a youth was opening E-mail or clicking on message links. In this section on sexual material, we focus on unwanted exposure to **pictorial images of naked people** or **people having sex.**

A quarter (25%) of the youth had at least one unwanted exposure to sexual pictures in the last year. (*See* Figure 2-1 with incidence rates for unwanted exposure to sexual material emphasized.) Seventy-one per cent of these exposures occurred while the youth was searching or surfing the Internet, and 28% happened while opening E-mail or clicking on links in E-mail or Instant Messages.

Figure 2-1



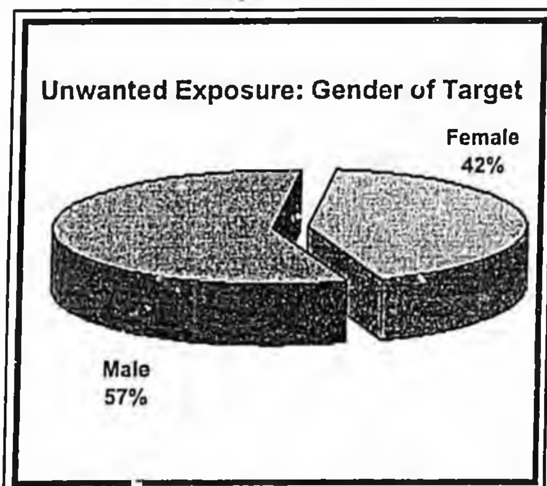
Exposure to sexual material, even when unwanted, is not necessarily upsetting to people. So we have designated a category of **distressing exposures** in which the youth said they found the exposure very or extremely upsetting. Six per cent of regular Internet users said they had a distressing exposure to unwanted sexual pictures on the Internet in the last year.

Which youth had the unwanted exposures?

- Boys outnumbered girls slightly (57% to 42%). (*See* Figure 2-2.)
- More than 60% of the unwanted exposures occurred to youth 15 years of age or older. (*See* Figure 2-3.)
- 7% of the unwanted exposures were to 11 and 12 year old youth.
- None of the 10 year olds reported unwanted exposures.

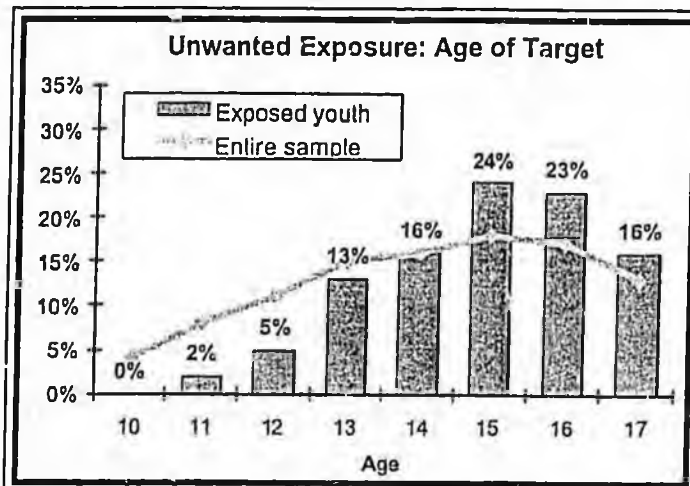
The somewhat greater exposure of boys to unwanted sexual material may reflect the reality that boys tend to allow their curiosity to draw them closer to such encounters. But the relatively small difference should not be over-emphasized. Approximately a quarter of both boys and girls had such exposures. Boys were slightly more likely than girls to say the exposure was distressing.

Figure 2-2



Note: Adds to less than 100% due to rounding and/or missing data.

Figure 2-3



Note: Adds to less than 100% due to rounding and/or missing data.

What was the content and source of the unwanted exposure?

- 94% of the images were of naked persons
- 38% showed people having sex
- 8% involved violence, in addition to nudity and/or sex
- Most of the unwanted exposures (67%) happened at home, but 15% happened at school, and 3% happened in libraries

Unfortunately, we do not know how many of the exposures involved child pornography. Important as this question is, we had decided that our youth respondents could not be reliable informants about the ages of individuals appearing in the pictures they viewed.

For the youth who encountered the material while surfing, it came up as a result of

- Searches (47%)
- Misspelled addresses (17%)
- Links in web sites (17%)

For youth who encountered the material through E-mail

- 63% of unwanted exposures came to an address used solely by the youth
- In 93% of instances, the sender was unknown to the youth

In 17% of all incidents of unwanted exposure, the youth said they did know the site was X-rated before entering. (These were all encounters described as unwanted or unexpected.) This group of episodes was not distinguishable in any fashion from the other 83% of episodes, including the likelihood of

being distressing. Almost half of these incidents (48%) were disclosed to parents. It is not clear to what extent it was some curiosity or just navigational naivete that resulted in the opening of the sites despite prior knowledge of the illicit content.

Pornography sites are also sometimes programmed to make them difficult to exit. In fact, in some sites the exit buttons take a viewer into other sexually explicit sites. In 26% of the incidents where sexual material was encountered while surfing, youth reported they were brought to another sex site when they tried to exit the site they were in. This happened in one third of distressing incidents encountered while surfing.

Testimony From Youth

- An 11-year-old boy and a friend were searching for game sites. They typed in "fun.com," and a pornography site came up.
- A 15-year-old boy looking for information about his family's car typed "escort" into a search engine, and a site about an escort service came up.
- Another 15-year-old boy came across a bestiality site while he was writing a paper about wolves for school. He saw a picture of a woman having sex with a wolf.
- A 16-year-old girl came upon a pornography site when she mistyped "teen.com." She typed "teeen" instead.
- A 13-year-old boy who loved wrestling got an E-mail message with a subject line that said it was about wrestling. When he opened the message, it contained pornography.
- A 12-year-old girl received an E-mail message with a subject line that said "Free Beanie Babies." When she opened it, she saw a picture of naked people.

How did the youth respond to the exposure?

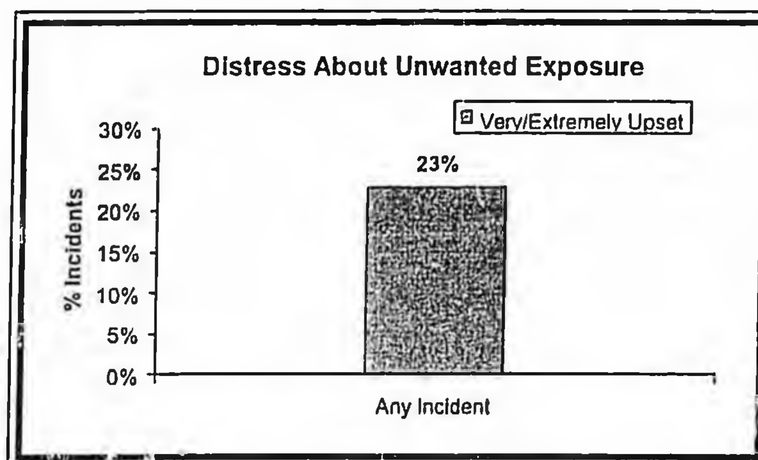
- Parents were told in 39% of the episodes.
- Youth disclosed to no one in 44% of incidents.
- In a few cases authorities were notified, most frequently a teacher or school official (3% of incidents), and Internet service providers (3%). None of these incidents were reported to a law-enforcement agency.
- Only 2% of youth who encountered sexual material while surfing said they returned later to the site of the exposure. None of the youth with distressing exposures who encountered the material while surfing returned to the site.

The fact that so many youth did not mention their exposure to anyone, even a friend, even to laugh or talk about it as an adventure, is noteworthy. It probably reflects some degree of guilt or embarrassment on the part of many youth. It might be healthier and helpful to youth if they were talking about it more.

How did the exposure affect the youth?

- 23% of youth who reported exposure incidents were very or extremely upset by the exposure. This amounts to 6% of the youth we interviewed. (*See* Figure 2-4.)
- 20% of youth were very or extremely embarrassed.
- 20% reported at least one symptom of stress.

Figure 2-4



Summary

Unwanted exposure to sexual material does appear to be widespread, occurring to a quarter of all youth who used the Internet regularly in the last year. While it is not a new thing for young people to be exposed to sexual material, the degree of sudden and unexpected exposure in an unwanted fashion may be an experience made much more common by the widespread use of the Internet. Such exposure occurs primarily to the group age 15 and older, but some youth as young as 11 had experiences to report. Even in the older group, the exposure does not merely evoke laughs or mild discomfort. About a quarter of the exposed youth, or 6% of all regular Internet users said they were very or extremely upset by an exposure. As with sexual solicitations, most exposure incidents, even the distressing ones, do not get reported to adults or authorities, although a proportion of these are disclosed to friends and siblings.

The experiences conform readily to anecdotal accounts from both youth and adult users. Unwanted exposures mostly occur when doing Internet searches, misspelling addresses, or clicking on links. More than a third of the imagery was of sexual acts, rather than simply naked people, and 8% involved some violence in addition to nudity and/or sex.

From a social-scientific view, the issues about youth exposure to unwanted sexual material are difficult to evaluate, in part, because there is almost no prior research on the matter. No one knows the effects of such exposure. The research on exposure to advertising and media violence makes it clear that media exposure can have effects. Media can affect attitudes, engender fears, and model behaviors (both pro and antisocial).

Previous research on exposure to pornography is not relevant to the many issues of concern here. That research has been done with adults and is based on an assumption of voluntary exposure. The present survey shows that in the case of unwanted exposure there are strong negative, subjective feelings for

certain youth and certain youth who manifest symptoms of stress. We do not know how long these feelings or symptoms last or what ramifications they have, but they should mobilize our concern. Questions that should be of particular interest and need attention for future investigation are

- Do any of youth so exposed have full-fledged, clinical-level traumatic reactions or other highly disturbed reactions?
- Is there any influence, traumatic or otherwise, on developing attitudes and feelings about sex?
- Do youth who have experienced unwanted exposure relate to future Internet sexual material in different ways — either more avoidant or more attracted?
- Do Internet exposures to sexual material figure negatively in family dynamics, creating conflicts or barriers in any way?

Nonetheless, for many people, the issues about youth exposure are even more basic than its effects. Whatever the effects, they would argue that people in general and young people in particular have a right to be free from unwanted intrusion of sexual material in a public forum such as the Internet. On this point, some of the constitutional debate about the Internet has concerned what kind of forum the Internet is. Is it a forum like a bookstore, where if it is signposted, people can readily stay away from the sexually explicit material if they so choose, or more like a television channel, where people are much more captive of the material that is projected at them? Clearly, the Internet has aspects of both. But the present research does suggest that, in its current form, it is not simple for those who want to avoid sexual material on the Internet to do so.

Table 2-1. Unwanted Exposure to Sexual Material (N=1,501)

Individual Characteristics	All Incidents (N=376) 25% of Youth	Distressing Incidents (N=91) 6% of Youth
Age of Youth		
• 10	——	——
• 11	2%	1%
• 12	5%	5%
• 13	13%	21%
• 14	16%	18%
• 15	24%	22%
• 16	23%	15%
• 17	16%	18%
Gender of Youth		
• Male	57%	55%
• Female	42%	45%

Episode Characteristics	All (N=393)	Distressing (N=92)
Location of Computer		
• Home	67%	61%
• School	15%	16%
• Someone Else's Home	13%	16%
• Library	3%	3%
• Some Other Place	2%	3%
Type of Material Youth Saw[1]		
• Pictures of Naked Person(s)	94%	92%
• Pictures of People Having Sex	38%	42%
• Pictures That Also Included Violence	8%	9%
How Youth Was Exposed		
• Surfing the Web	71%	72%
• Opening E-mail or Clicking on an E-mail Link	28%	30%
• Youth Could Tell Site Was X-rated Before Entering	17%	12%

Surfing Exposure	All (N=281)	Distressing (N=66)
How Web Site Came Up		
• Link Came Up as Result of Search	47%	36%
• Misspelled Web Address	17%	18%
• Clicked on Link When In Other Site	17%	24%
• Other	15%	18%
• Don't Know	3%	3%
• Youth Has Gone Back to Web Site	2%	——
• Youth Was Taken Into Another X-rated Site When Exiting the First One	26%	33%

E-mail Exposure	All (N=112)	Distressing (N=26)
• Youth Received E-mail at a Personal Address	63%	58%
• E-mail Sender Unknown	93%	96%

Episode Characteristics (Surfing & E-mail)	All (N=393)	Distressing (N=92)
Incident Known or Disclosed to[1]		
• Parent	39%	43%
• Friend and/or Sibling	30%	33%
• Another Adult	2%	2%
• Teacher or School Personnel	3%	9%
• ISP/CyberTipline	3%	4%
• Police or Other Authority	—	—
• Someone Else	1%	—
• No One	44%	39
Distress: Very/Extremely		
• Upset	23%	100%[2]
Youth With [illegible] Low Levels of Upset	76%	—
Youth Was Very/Extremely Embarrassed	20%	48%
Stress Symptoms (more than a little/all the time)[1,3]		
• **At Least One of Following**	**20%**	**43%**
• Stayed Away From Internet	17%	34%
• Thought About It and Couldn't Stop	6%	16%
• Felt Jumpy or Irritable	2%	7%
• Lost Interest in Things	1%	7%
Presence of 5 or More Depression Symptoms[4,5]	11%	15%

[1] Multiple responses possible

[2] Degree of upset was used to define this category of youth.

[3] These items were adapted from a psychiatric inventory of stress responses and represent avoidance behaviors, intrusive thoughts, and physical symptoms.

[4] In the entire sample, 8% of youth (N=117) reported 5 or more symptoms of depression.

[5] The values for this category are based on individual characteristics rather than episode characteristics.

Note: Categories that do not add to 100% are due to rounding and/or missing data.

4. Risks and Remedies

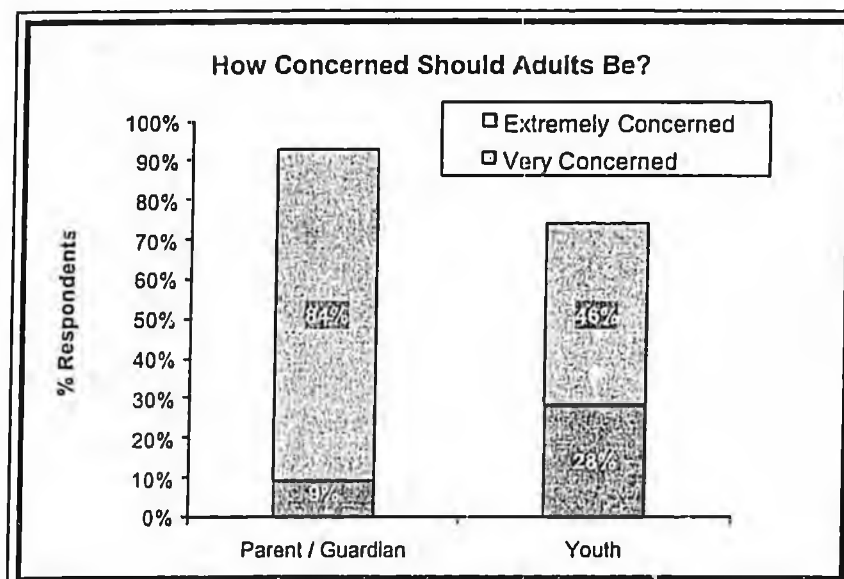
Our lack of knowledge about the dimensions and dynamics of the problems this new technology has created for young people is, of course, a barrier to devising effective solutions. But, even in the absence of knowledge, there has been no dearth of suggestions about things to do. Parents have been urged to supervise their children and talk with them about Internet perils. Youth have been urged to avoid certain risky situations. Organizations have been established to monitor and investigate suspicious episodes. Have any of these remedies been taken to heart?

The survey asked a variety of questions to find out more about the prospects for prevention. We tried to determine to what degree parents are monitoring and advising their children about Internet activities. We asked about the prevalence of Internet activities that may put youth at risk. And we asked about parent and youth knowledge about what remedies or information sources are available for them when they run into problems.

How concerned should adults be about the problem?

Parents and youth both believed that adults should be concerned about the problem of young people being exposed to sexual material on the Internet. As might be expected, parents thought adults should be more concerned than youth thought adults should be, with 84% of parents saying adults should be extremely concerned, compared to only 46% of the youth. (*See* Figure 4-1.) Some inflation of concern might be expected in a survey with this topic, but other surveys confirm that this is an issue of substantial immediacy for parents and youth.

Figure 4-1



Are parents supervising their children?

Many parents or guardians said they had supervised their child's Internet use in the past year. Most claimed to have talked to youth about such matters as giving out addresses, chatting with strangers, or going to X-rated web sites. Four out of five had rules about specific things the young person was not

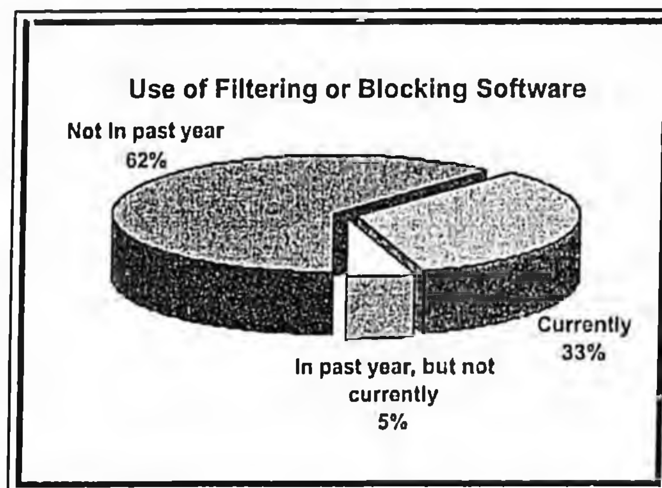
supposed to do online. Approximately four out of five also asked youth about what they did on the Internet. Since many parents might feel guilty about appearing not to have done these things, it is possible that responses to survey interviewers inflate the percentage of parents who have actually supervised their children to this extent. We also did not ask about the details or circumstances of these discussions.

Virtually all parents who had Internet access in their homes said they had looked at the computer screen on occasion to see what their child was doing. At a higher level of supervision that characterized around two-fifths of the households, parents or guardians with home Internet access reported that they checked their child's files or diskettes, required the youth to get permission before going on the Internet, or limited the amount of time the youth could spend online. In approximately three-fifths of households with home Internet access, parents or guardians checked the computer history function to find out where on the Internet the youth had been visiting.

Have families utilized blocking and filtering technology?

Thirty-three percent of households were currently using filtering or blocking software at the time of the interview. (*See* Figure 4-2.) The most common option used by far is the access control offered by America Online to its subscribers, used by 12% of the households with home Internet access, or 35% of households using filtering or blocking software. Interestingly, another 5% of the households in our sample had used some kind of filtering or blocking software during the past year, but were no longer doing so, suggesting some possible dissatisfaction with its use.

Figure 4-2



Are many youth doing *risky things* on the Internet?

We also asked questions to get a sense of how much risky behavior youth were engaging in, in spite of parental-control efforts. The percentages overall were not very large, but some of these behaviors are sensitive enough that youth may have been less than fully candid.

Only 8% admitted to going voluntarily to X-rated Internet sites. Less than 1% said they had used a credit card without permission. Only 5% had posted a picture of themselves for general viewing. Eleven percent had posted some personal information in a public Internet space, mostly their last name. Twenty-

seven percent of E-mail users had posted their E-mail address in a public place on the Internet, but this may be an underestimate since almost any posting to a bulletin board or signing on to a chat room gives a child's E-mail address this kind of exposure. Of youth who said they talked online with people they did not know in person, 12% had sent a picture to someone they met online, and 7% had willingly talked about sex online with someone they had never met in person.

Among the most common of the potentially risky behaviors was making rude or nasty comments to someone online — practiced in the past year by 14% of youth. A similar number played a joke on or annoyed someone online, mostly friends they already knew. One percent admitted to having harassed someone online.

As a measure of those who may be testing the limits most dramatically or persistently, we asked whether the youth had gotten in trouble for something they did online in the past year. Five percent had been in trouble at home, and 3% of youth who used the Internet at school had been in trouble there for online activities.

Do families and youth know about sources of help?

We noted earlier that relatively few of the Internet episodes reported by youth (solicitation, unwanted exposures to sexual material, or harassment) were reported to official sources. One possibility is that youth and their families are not familiar with places that are interested in or receptive to such reports. Almost a third of parents or guardians said they had heard of places where troublesome Internet episodes could be reported, but only approximately 10% of them could cite a specific name or authority. (*See* Figure 4-3.) Only 24% of youth stated they had heard of places to report, and only 17% could actually name a place. (*See* Figure 4-4.) Reporting the episode to an Internet service provider was the option most often thought of. For most of these households, the Internet service provider was America Online.

Figure 4-3

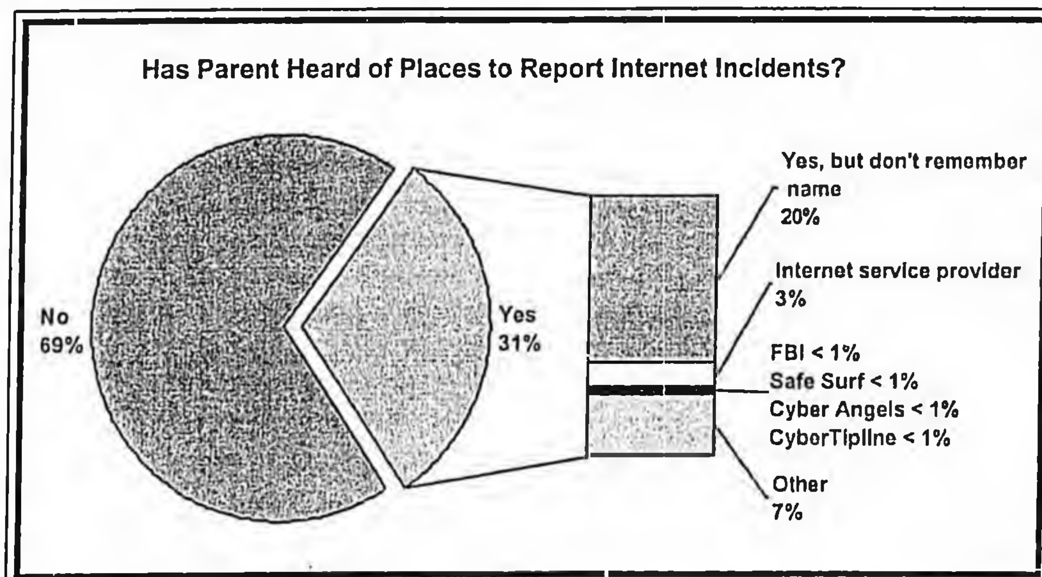
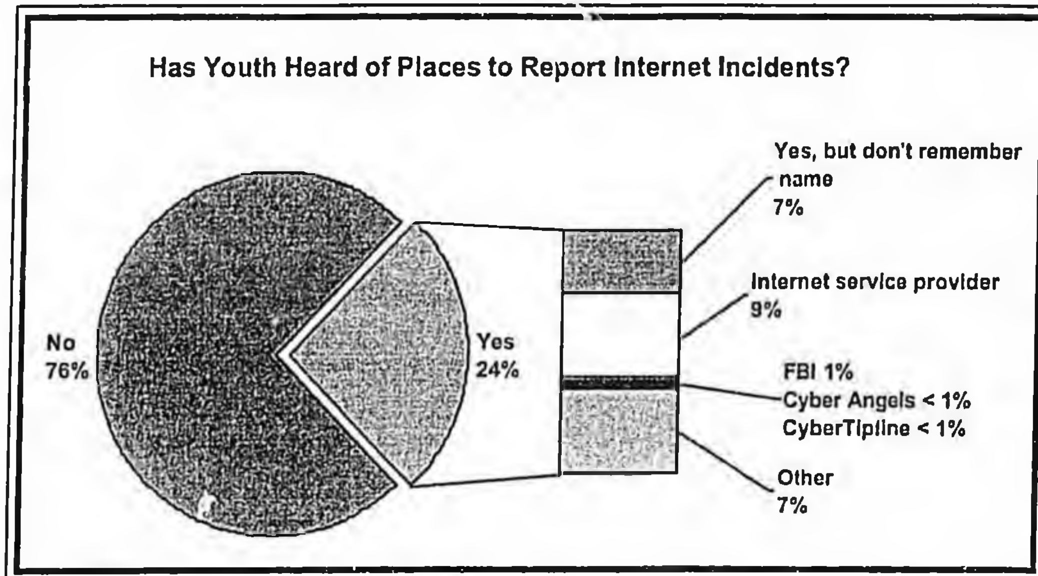


Figure 4-4



Have they heard of the CyberTipline?
Very few of the youth, parents, or guardians could think of the CyberTipline when asked a general question about possible places to report cases. When interviewers said the name "CyberTipline" and asked respondents if they knew about it, larger numbers said they had heard of it, almost 10% of the parents or guardians and 2% of the youth.

Summary

For those concerned about youth Internet safety, there is good and bad news in the survey responses about general Internet practices. While the majority of parents and guardians of Internet users say they supervise their children's online activity, there is a small segment of the population (7%) that does not. Discussions are going on in most households between adults and youth about Internet perils, but it is hard to know how detailed or effective they are. The vast majority of youth, for their part, appear to be playing it safe, and not engaging in risky online behavior. This is generally good news.

The survey, however, reveals notable problems as well. First, there does appear to be a tremendous lack of knowledge about what help sources are available to deal with offensive or disturbing Internet episodes. This may reflect the fact that parents or guardians do not feel they need to know about such sources until something bad happens. But the low level of reporting of incidents suggests that even when bad things happen, people do not make the effort to locate possible help sources. Thus, if the findings point to some area where progress needs to be made, it is in the area of alerting people about possible help sources for problematic Internet encounters.

Secondly, there is a segment of the youth population who are taking risks on the Internet such as engaging in sexual conversations, seeking out X-rated sites, posting pictures of themselves online, or harassing other Internet users. The rates are not high compared to other more conventional risky behavior like using drugs, drinking alcohol, or stealing, but they reflect a new dimension of deviance that needs to be incorporated into a larger understanding of the perils of childhood and addressed in a variety of ways.

Finally, the survey raises questions about the use of filtering and blocking software. Despite the high level of family concern about exposure to sexual material, only a minority of families had adopted the use of any software to address their concern, and some who had adopted it had discontinued its use. This may not reflect a problem. Many parents may be correct in their judgment that discussions with their children and some level of parental monitoring are adequate to manage the problem. But the lack of adoption may also reflect parental doubts about the effectiveness of the available software or a sense that its adoption would create family conflicts that they are reluctant to confront. The findings suggest we need to learn more about actual family concerns about and experiences with filtering and blocking software as a solution to their concerns about Internet safety.

Table 4-1. Parental Supervision of Internet Activities[1]

Supervision (in past year)	Parent/Guardian % Yes
Talked With Youth About (N=1,501)[2]	
• Being Careful About Chatting With Strangers on Internet	85%
• Giving Address/Telephone Number to People Meet on Internet	83%
• Going to X-rated Web Sites or Other X-rated Places	83%
• Talking Online About Very Personal Things (*e.g.*, sex)	77%
• Trying to Meet People Youth Gets to Know on Internet	73%
• Responding to Nasty/Mean Messages	72%
• None of the Above	7%
Look at Screen to See What Youth Is Doing	97%
Rules About Things Youth Is Not Supposed to Do on Internet (N=1,501)	80%
Ask Youth About What He or She Does on Internet (N=1,501)	78%
Check History Function for Sites Youth Has Visited	63%
Check Files and Diskettes	48%
Youth Must Ask Permission to Go on Internet	44%
Rule About Number of Hours Youth Can Spend on Internet	39%

[1] N=1,033 unless otherwise stated. These questions were only asked of households with home Internet access.
[2] Multiple responses possible.

Table 4-2. Risky Online Behavior (N=1,501)

Risky Online Behavior in the Past Year	All Youth % Yes
Youth Went to X-rated Sites on Purpose	8%
Talked About Sex Online With Someone Youth Never Met In Person (N=839)[1]	7%
• Youth Knew He or She Was Talking to an Adult	2%
• Adult Knew He or She Was Talking With a Minor	2%
Used Credit Card Online Without Permission	<1%
Posted Picture of Self for Anyone to See	5%
Sent Picture of Self to Someone Met Online (N=839)[1]	12%
Posted Some Personal Information for All to See	11%
• Posted Last Name	9%
• Posted Telephone Number	1%
• Posted Name of School	3%
• Posted Home Address	2%
Posted E-mail Address for Anyone to See (N=1,143)[2]	27%
Made Rude/Nasty Comments to Someone Online	14%
Played Joke or Annoyed Someone Online	14%
• Played Joke/Annoyed Someone Youth Knew	13%
• Played Joke/Annoyed Stranger	2%
Harassed/Embarrassed Someone Youth Was Mad at Online	1%
• Harassed/Embarrassed Stranger	<1%
• Harassed/Embarrassed Someone Youth Knew	1%
Youth Was In Trouble at Home for Something He or She Did Online	5%
Youth Was In Trouble at School for Something He or She Did Online (N=1,100)[3]	3%

[1] Only asked of youth who reported talking online with people they didn't know in person.
[2] Only asked of youth who reported having an E-mail address.
[3] Only asked of youth who reported using the Internet at school.

5. Major Findings and Conclusions

By providing more texture and details to our picture of the cyber-hazards facing youth, the national *Youth Internet Safety Survey* has much to contribute to current public-policy discussions about what to do to improve the safety of young people. What follows are some key conclusions based on the important findings from the survey.

1. A large fraction of youth are encountering offensive experiences on the Internet.
The percentage of youth encountering offensive experiences — 19% sexually solicited, 25% exposed to unwanted sexual material, 6% harassed — are figures for one year only. The number of youth encountering such experiences from when they start using the Internet until they are 17, a time which might include five or more years of Internet activity, would certainly be higher.

The level of offensive behavior reported in this survey might be placed in this perspective. Any workplace or commercial establishment where a fifth of all employees or clients were sexually solicited annually would be in serious trouble. What if a quarter of all young visitors to the local supermarket were exposed to unwanted pornography? Would this be tolerated? We consider these levels of offensiveness unacceptable in most contexts. But on the Internet will we simply accept it as the price for this new technology and because it is anonymous? Sadly, the Internet is not always the nice, safe, educational and recreational environment that we might have hoped for our young people.

2. The offenses and offenders are even more diverse than we previously thought.
The problem highlighted in this survey is not just adult males trolling for sex. Much of the offending behavior comes from other youth. There is also a substantial amount from females. The non-sexual offenses are numerous and quite serious too. We need to keep this diversity in mind. Sexual victimization on the Internet should not be the only thing that grabs public attention.

3. Most sexual solicitations fail, but their quantity is potentially alarming.
Based on the results of this study, it appears that several million young people ages 10 through 17 get propositioned on the Internet every year. (*See* Table 7-2.) If even some small percentage of these encounters results in offline sexual assault or illegal sexual contact — a percentage smaller than we could detect in this survey — it would amount to several thousand incidents. The good news is most young people seem to know what to do to deflect these sexual "come ons." But there are youth who may be especially vulnerable through lack of knowledge, neediness, disability, or poor judgment. The wholesale solicitation for sex on the Internet is worrisome for that reason.

4. The primary vulnerable population is teenagers.
For solicitations, as well as unwanted exposures to sexual material and harassment, most of the targets were teens, especially teens 14 and older. Thus, it is misleading to say that child molesters are moving from the playground to the living room, trading in their trench coats for digicams, as some have characterized it. Children and teenagers are different victim populations. Pre-teen children use the Internet less, in more

limited ways (Richardson, 1999; Roberts, 1999), and are less independent. It does not appear that much predatory behavior over the Internet involves conventional pedophiles targeting 8-year-old children with their modems, at least not yet. The target population for this Internet victimization is teens, and that makes prevention and intervention a different sort of challenge. Teens do not necessarily listen to what parents and other "authorities" tell them.

5. Sexual material is very intrusive on the Internet.

Large percentages of youth Internet users are exposed to sexual material when they are not looking for it, through largely innocent misspellings and opening E-mail, visiting web sites, and viewing other documents. The sex on the Internet is not segregated and signposted like in a bookstore, and it is not easy to avoid. Some heavy-duty imagery is incredibly easy to stumble upon. Apparently many people do not know this yet. They are inclined to think, "Well, I never see it, so it must be something you only get if you go looking." But youth do not have to be all that active in exploring the Internet to run across sexual material inadvertently.

6. Most youth brush off these offenses, but some are quite distressed.

Most youth are not bothered much by what they encounter on the Internet, but there is an important subgroup of youth who are quite distressed— by the exposure as well as the solicitations and harassment. We cannot assume these are just transient effects. When youth report stress symptoms like intrusive thoughts and physical discomfort, that is a warning sign. Some of this could be the psychological equivalent of a concussion, not a slight bump on the head. It may be hard to predict exactly who will get hurt. It may depend partly on things like age, prior experience — both with the Internet and sexual matters — family attitudes, the degree of surprise, and kind of exposure. Anticipating and trying to respond to negative impacts is something that needs more consideration.

7. Many youth do not tell anyone.

Nearly half of the solicitations were not disclosed to anyone. Some of this non-disclosure is certainly due to embarrassment and guilt. The higher disclosure rates for the non-sexual offenses point to that. Parents are not being informed about a lot of these episodes. They would want to know. And some youth are not even telling their friends. Thus they are not getting a chance to reflect about what happened, process it, and get ideas about how to deal with it and how to put it in perspective. It is somewhat ironic. The Internet is providing places to talk about difficult things, but at the same time, it may be increasing the number of difficult things to talk about.

8. Youth and parents do not report these experiences and do not know where to report them.

Most parents and youth did not know where to report or get help for Internet offenses, and the low rate of reporting for actual offenses confirms this lack of awareness. Even the most serious episodes were rarely reported. The Internet is a new "country" and people do not yet know who the cops or the authorities are. In fact, that seems to be part of the attraction of this territory for many, that there are not obvious cops or authorities. But people need to know how to get help, and people with antisocial tendencies need to know that there are consequences. The choice is not between anarchy and big brother, just as in most societies the choice is not between anarchy and dictatorship.

9. Internet friendships between teens and adults are not uncommon and seem to be mostly benign.

It would make prevention easier if Internet friendships between youth and adults were uniformly sinister, and we could simply say, "Don't do it." But one of the positive things about the Internet is that it allows people of diverse social statuses to congregate around common interests. We want young people to develop their skills and talents. We want them to find mentors. The existence of coaches who molest does not deter parents from signing their kids up for Little League. It will be a similarly complicated challenge to protect kids from dangerous Internet relationships without squelching the positive ones. We need to learn more about the signs and symptoms of potentially exploitative adult-youth relationships, not just on the Internet, but in face-to-face relationships too.

10. We still know little about the incidence of *traveler* cases (where adults or youth travel to physically meet and have sex with someone they first came to know on the Internet), or any completed *Internet seduction* and *Internet sexual exploitation* cases including trafficking in *child pornography.*

We know these very serious victimizations occur. Law-enforcement officials are tracking down an ever-increasing number. A recent unsystematic survey of the FBI, the National Center for Missing & Exploited Children, newspapers, and other law-enforcement sources identified almost 800 cases, confirmed or under investigation, involving adults traveling to or luring youth they first "met" on the Internet for criminal sexual activities (Ruben Rodriguez, National Center for Missing & Exploited Children, personal communication, April 3, 2000).

We did not find any in this survey of 1,501 youth, but that only means these victimizations probably occur below a certain threshold rate. We were unlikely to discover any types of incidents that occurred to fewer than 14,000 youth a year. That is still a large threshold. But it is fair to speculate that these kinds of events are probably not as common as incidents like date rape, conventional stranger sexual assault, or intrafamily sexual abuse — crimes that do tend to show up in surveys of 1,500 youth. So we will have to study these serious Internet cases in some other way, either through a very large survey, like the National Crime Victimization Survey, or through some survey of reported cases.

In the meantime, the findings of this survey should **not** be interpreted to mean that major law-enforcement initiatives focused on serious Internet crimes against children are misguided. In the last few years, specialized units from the FBI and local law-enforcement agencies have increased their activities on the Internet, often "decoying" themselves as youth to try to catch potential offenders. Given the volume of sexual solicitations and approaches young people are experiencing, the presence and publicity about these decoys is certainly a good thing. It should give potential offenders some pause before they begin their solicitations.

Law-enforcement officials are also active in investigating trafficking in child pornography. Because we judged that our youth interviewees would not be reliable informants about the ages of people appearing in sexual pictures, we have no findings relevant to the problem of child pornography on the Internet. This is nonetheless a problem that has been exacerbated by the Internet, and it is worthy of additional study.

11. Nothing in this survey should dampen enthusiasm about the potential of the Internet. Youth, families, and educators are currently riding a bandwagon of excitement about the potential of the Internet to bring new kinds of educational, recreational, interpersonal, and even therapeutic possibilities to young people. This survey should not be construed as a signal to slow the wagon down. This survey concerns what is only a small segment of Internet activity and has little to say about its broader potential.

But because the Internet is likely to become so important in our lives, it is crucial to begin to confront its potential problematic aspects as early as possible. When the automobile was first introduced, those who said it was going to kill too many people and pollute the air were dismissed as opposed to progress. The solutions that would have allowed us to have all the benefits of safer and less polluting autos might have come more quickly and at a lower social cost if these concerns had been accepted wholeheartedly from the beginning as worthy chaperones to our courtship of the car. In a similar vein, we can unleash the excitement about the Internet and the creativity it will spawn, while still making a concerted effort to monitor and rein in its potential negative effects. The sooner we start that process the better.

Limitations of the Survey

Every scientific survey has limitations and defects. Readers should keep some of these important things in mind when considering the findings and conclusions of this survey.

- We cannot be certain how candid our respondents were. Although we used widely accepted social-science procedures, our interviews involved telephone conversations with young people on a sensitive subject, factors that could contribute to less than complete candor.

- The young people we did not talk to may be different from the youth we talked to. There were parents who refused to participate or refused to allow us to talk to their children, and there were youth who refused to participate and those we could never reach. Our results might have been different if we had been able to talk to all these people.

- Our numbers are only estimates, and samples can be unusual. Population sampling is intended to produce groups representative of the whole population, but sometimes samples can be randomly skewed. For most of our major findings, statistical techniques suggest that estimates are within 2.5% or less of the true population percentage in 95 out of 100 samples like this one, but there is a small chance that our estimates are farther off than 2.5%.

6. Recommendations

1. Those concerned about preventing sexual exploitation on the Internet need to talk specifically in their materials about the diversity of hazards including threats from youthful and female offenders.

A stereotype of the adult Internet "predator" or "pedophile" has come to dominate much of the discussion of Internet victimization. While such figures exist and may be among the most dangerous of Internet threats, this survey has revealed a more diverse array of individuals who are making offensive and potentially exploitative online overtures. We should not ignore them. We have to remember that in a previous generation, campaigns to prevent child molestation characterized the threat as "playground predators" so that for years the problem of youth, acquaintance, and intra-family perpetrators went unrecognized. Today, those doing prevention work concerning the Internet need to be careful not to make, consciously or inadvertently, a characterization of the threat that fails to encompass all its forms. One of the reasons for the mistaken characterization of child molesters in an earlier era was that people extrapolated the problem entirely from what came to the attention of law-enforcement officials. A similar process could be underway in the case of Internet victimization, but it is probably early enough to reverse the trend. Thus we need to publicize the full variety of Internet offensive behavior.

2. Prevention planners and law-enforcement officials need to address the problem of non-sexual, as well as sexual victimization on the Internet.

An additional problem with the "Internet predator" stereotype just mentioned is that it does not give enough focus to non-sexual forms of Internet victimization. The current survey shows that non-sexual threats and harassment constitute another common peril for youth that can be as, or more, distressing than sexual overtures. Experience in crime prevention has shown that concerns about sexual threats often eclipse other equivalently serious crime. Concerted efforts should be made to ensure that non-sexual threats and harassment are included on educational, legislative, and law-enforcement agendas for Internet safety.

3. More of the Internet-using public needs to know about the existence of help sources for Internet offenses, and the reporting of offensive Internet behavior needs to be made even easier, more immediate, and more important to youth Internet users.

Multiple strategies are needed to increase reporting. The Internet-using public needs to be made aware of reporting options in as many ways as possible, through the Internet as well as through other media. The public also needs to be briefed on the reasons why they should make such reports including the importance of keeping the Internet a safe and enjoyable place for everyone to use. The Smokey the Bear and McGruff the Crime Dog campaigns come to mind as approaches to emulate. People often balk at being tattle-tales, but vigilance by individuals and community involvement have been traditional keys to community safety.

In reaching out to the public and Internet users on this issue of reporting, our survey suggests that Internet service providers are in a key position to help. They are the most recognized avenue for reporting. So it may make sense for them to become even more visible and pro-active on this front. What else can be done? Can chat rooms be urged to consider how to make the monitoring and reporting of offensive behavior easier and more acceptable? The Internet needs its own neighborhood crime-watch posters and more.

4. **Different prevention and intervention strategies need to be developed for youth of different ages.**

Most of the encounters reported to our survey occurred to teenagers, specifically older teens. The messages that will make sense and be taken seriously by this group and their parents are quite different from those that make sense for younger youth. This is a different problem from conventional child molestation, where we were trying to target and protect 7 to 13 year olds. Older teens have more independence, more experience, and a different relationship with adults and their families. For example, telling parents to regularly check the Internet and E-mail activity of older teens may be tantamount to saying parents should read their mail, and such privacy invasions will seem unrealistic in many families.

Too much of the discussion about Internet safety to date has been between policy makers and parents, without consultation from young people themselves. Policies crafted from such an adults-only discussion may be rejected, especially by older youth, because the policies may be seen as an effort to control rather than protect. Good protection strategies, especially for the teen group, cannot be heavy on the control dimension and need to be tied to youth aspirations, values, and culture. That requires the input of youth. If young people are becoming millionaires with their Internet ingenuity, it is likely that some of that creativity could hit the jackpot in the field of Internet safety as well. It is time to involve a cadre of young people in the development of Internet victimization prevention and intervention in order to craft messages to which youth will be receptive.

5. **Youth need to be mobilized in a campaign to help "clean up" the standards of Internet behavior and take responsibility for youth-oriented parts of the Internet.**

Like face-to-face sexual offenses, which run the gamut from harassment to rape, Internet sexual offenses cover a spectrum of behaviors. The less serious end of the spectrum should not be ignored, since it can be the fertile soil in which more serious offenses grow. The experience of those trying to prevent real-world sexual harassment has been that campaigns, particularly campaigns involving whole schools, can be successful, if they raise awareness about the problem and its effects, and help youth themselves enforce proper conduct among their peers. Such youth-oriented campaigns might have some success with at least some forms of Internet victimization as well, and they may be worth a try.

6. **We need to train mental health, school, and family counselors about these new Internet hazards and how these hazards contribute to personal distress and other psychological and interpersonal problems.**

This survey reveals that substantial numbers of young people do experience distress because of Internet encounters. And they are not getting help. Mental health and other counselors need to learn to be alert and ask questions to get young people to talk about such encounters. They need to know how young people use the Internet, so they can understand their problems. They need to be trained to treat the kinds of distress and conflicts that are connected with negative Internet experiences. We need educational packages for schools and all kinds of youth workers for their own professional development and to use with youth. Unfortunately, at the training conferences being offered today, most of the Internet education seems directed at law-enforcement officials. We need to develop workshops for educators, psychologists, and social workers as well.

Sec. 45.50.471. Unlawful acts and practices

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

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

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

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

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

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

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

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

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

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

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

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

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

(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged;

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

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

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

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

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

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

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

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

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

(22) failing to comply with AS 45.02.350 ;

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

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

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

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

(26) failing to comply with AS 45.30 relating to mobile home warranties and mobile home parks;

(27) failing to comply with AS 14.48.060 (b)(13);

(28) dealing in hearing aids and failing to comply with AS 08.55;

(29) violating AS 45.45.910 (a), (b), or (c);

(30) failing to comply with AS 45.50.473 ;

(31) violating the provisions of AS 45.45.400 ;

(32) knowingly selling a reproduction of a piece of art or handicraft that was made by a resident of the state unless the reproduction is clearly labeled as a reproduction; in this paragraph, "reproduction" means a copy of an original if the copy is

(A) substantially the same as the original; and

(B) not made by the person who made the original;

(33) violating AS 08.66 (motor vehicle dealers);

(34) violating AS 08.66.200 - 08.66.350 (motor vehicle buyers' agents);

(35) violating AS 45.63 (telephonic solicitations);

(36) violating AS 45.68 (charitable solicitations);

(37) violating AS 45.50.474 (on board promotions);

(38) referring a person to a dentist or a dental practice that has paid or will pay a fee for the referral unless the person making the referral discloses at the time the referral is made that the dentist or dental practice has paid or will pay a fee based on the referral;

(39) advertising that a person can receive a referral to a dentist or a dental practice without disclosing in the advertising that the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral if, in fact, the dentist or dental practice to which the person is referred has paid or will pay a fee based on the referral;

(40) violating AS 45.50.477 (a) - (c);

(41) failing to comply with AS 45.50.475 ;

(42) violating AS 45.35 (lease-purchase agreements);

(43) violating AS 45.25.400 - 45.25.590 (motor vehicle dealer practices);

(44) violating AS 45.66 (sale of business opportunities).

Sec. 11.41.455. Unlawful exploitation of a minor

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

Sec. 45.50.495. Investigative power of attorney general

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

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

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

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

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

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

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

Sec. 45.50.501. Restraining prohibited acts

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

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

Sec. 45.50.511. Assurances of voluntary compliance

In the administration of AS 45.50.471 - 45.50.561, the attorney general may accept an assurance of voluntary compliance with respect to any act or practice considered to be

violative of AS 45.50.471 - 45.50.561 from a person who has engaged or was about to engage in such an act or practice. The assurance shall be in writing and shall be filed with and is subject to the approval of the superior court in the judicial district in which the alleged violator resides or is doing business or has the principal place of business in the state. The assurance of voluntary compliance is not considered an admission of violation for any purpose. Matters closed in this way may at any time be reopened by the attorney general for further proceedings in the public interest, under AS 45.50.501 .

Sec. 45.50.521. When information and evidence confidential and nonadmissible

(a) [Repealed by Sec. 6 ch 53 SLA 1974].

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

Sec. 45.50.531. Private and class actions

(a) A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages or $500, whichever is greater. The court may provide other relief it considers necessary and proper. Nothing in this subsection prevents a person who brings an action under this subsection from pursuing other remedies available under other law, including common law.

(b) [Repealed, Sec. 4 ch 31 SLA 1987].

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

(d) [Repealed, Sec. 4 ch 31 SLA 1987].

(e) A permanent injunction or final judgment against a person against whom an action was initiated under AS 45.50.501 is prima facie evidence in an action brought under this section that the person used or employed an act or practice declared unlawful by AS 45.50.471 .

(f) A person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by AS 45.50.471 .

(g) [Repealed, Sec. 6 ch 96 SLA 1998].

(h) If the basis for the action is the fault of the manufacturer or supplier of the merchandise, the manufacturer or supplier who is at fault is liable for the damages awarded against the retailer under this section.

(i) If a person receives an award of punitive damages under (a) of this section, the court shall require that 50 percent of the award be deposited into the general fund of the state under AS 09.17.020 (j). This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Sec. 45.50.535. Private injunctive relief

(a) Subject to (b) of this section and in addition to any right to bring an action under AS 45.50.531 or other law, any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471 .

(b) A person may not bring an action under (a) of this section unless

(1) the person first provides written notice to the seller or lessor who engaged in the unlawful act or practice that the person will seek an injunction against the seller or lessor if the seller or lessor fails to promptly stop the unlawful act or practice; and

(2) the seller or lessor fails to promptly stop the unlawful act or practice after receiving the notice.

HB
83

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

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April 9, 2004

Honorable Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol, Room 125
Juneau, AK 99801-1182

Re: CSHB 83(JUD) -- (Revised Uniform Arbitration Act)

Dear Senator Seekins:

Under AS 44.23.030, the Department of Law has a statutory duty to promote uniform law across states on matters of common concern. Uniformity is especially important for commercial law, because many businesses operate in more than one state, and need common legal principles to operate efficiently across state lines.

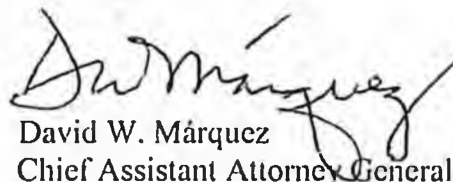
One such set of uniform laws has been proposed in CSHB 83(JUD), the revised Uniform Arbitration Act. The Act is endorsed by the American Arbitration Association, the National Academy of Arbitrators, and the National Arbitration Forum, and has been approved by the American Bar Association.

The primary purpose of the Act is to advance arbitration as a desirable alternative to litigation.

The bill is currently before your committee. The Department of Law would appreciate scheduling of a hearing on this matter.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: 
David W. Marquez
Chief Assistant Attorney General

DWM:DEB:pvp
cc: Mike Tibbles, Legislative Director
Office of the Governor

Alaska State Legislature

House of Representatives

Minority Leader

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1-907-269-0132 (fax)

Representative Ethan Berkowitz

District 13

MEMORANDUM

Date: January 22, 2004

To: Senator Ralph Seekins, Chair
Senate Judiciary Committee

From: Representative Ethan Berkowitz

Re: CSHB 83(JUD)

I respectfully request that you schedule a hearing in the Senate Judiciary Committee for CSHB 83(JUD), adoption of the Revised Uniform Arbitration Act.

A copy of the bill, a sponsor statement, sectional analysis, fiscal notes and additional background material are attached.

A teleconference site in Anchorage will likely be needed. If you have any questions or need additional information, please call Lisa Weissler at 465-3163.

Thank you.

E-mail: Representative_Ethan_Berkowitz@legis.state.ak.us

Alaska State Legislature
House of Representatives
Minority Leader

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Representative Ethan Berkowitz
District 26

SPONSOR STATEMENT

CS House Bill 83 (JUD)

"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20,21, Alaska Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska Rules of Appellate Procedure; and providing for an effective date."

This legislation updates Alaska's current arbitration statutes through adoption of the Revised Uniform Arbitration Act (RUAA). These revisions address many questions that the original uniform act did not and encourages the use of arbitration as a viable alternative to litigation.

The objective of the RUAA is to advance arbitration as a desirable alternative to litigation, but not to make arbitration another form of litigation. To this end, the RUAA endeavors to make the arbitration process more efficient, expeditious, and economical in a manner that is fair to the parties, and that promotes finality of the decision of the dispute submitted to arbitration.

Arbitration is the original "alternative dispute resolution" mechanism made legitimate under American law. The RUAA recognizes that more issues are being submitted to arbitration and that the issues are more complex, often involving higher monetary amounts. The RUAA covers a number of important issues that were not addressed in the original act and reflects aspects of arbitration practice as it has developed over the years.

Under the original version of the bill, an arbitrator could determine whether a contract containing a valid agreement to arbitrate is enforceable. This would have meant that a contract could be invalid, but the arbitration agreement could still be valid and enforced. The House Judiciary Committee Substitute provides that when a contract is ruled invalid because it was induced by fraud, an arbitration provision contained in the contract is not enforceable.

A revision of the uniform arbitration act is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area. This important advance in the law of arbitration should be enacted as soon as feasible.

23-LS0047\Q
Bannister
3/2/04

SENATE CS FOR CS FOR HOUSE BILL NO. 83( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES BERKOWITZ, Weyhrauch, Moses, Gara

A BILL

FOR AN ACT ENTITLED

1 **"An Act adopting a version of the Revised Uniform Arbitration Act; relating to the**
2 **state's existing Uniform Arbitration Act; amending Rules 3, 18, 19, 20, and 21, Alaska**
3 **Rules of Civil Procedure, Rule 601, Alaska Rules of Evidence, and Rule 402, Alaska**
4 **Rules of Appellate Procedure; and providing for an effective date."**

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

6 * **Section 1.** AS 09.43.010 is amended by adding a new subsection to read:
7 (b) Notwithstanding (a) of this section, AS 09.43.010 - 09.43.180 do not apply
8 to an agreement or a contract unless the agreement or contract is entered into before
9 the effective date of AS 09.43.300 - 09.43.595 and is not otherwise subject to
10 AS 09.43.300 - 09.43.595.
11 * **Sec. 2.** AS 09.43 is amended by adding new sections to read:
12 **Article 3. Revised Uniform Arbitration Act.**
13 **Sec. 09.43.300. Application.** (a) AS 09.43.300 - 09.43.595 govern an
14 agreement to arbitrate made on or after January 1, 2005.

1 (b) AS 09.43.300 - 09.43.595 govern an agreement to arbitrate made before
2 January 1, 2005, if all the parties to the agreement or to the arbitration proceeding
3 agree in a record that AS 09.43.300 - 09.43.595 govern the agreement.
4 (c) Except as provided by (d) of this section, AS 09.43.300 - 09.43.595 do not
5 apply to a labor-management contract unless they are incorporated into the contract or
6 their application is provided for by contract.
7 (d) AS 09.43.300 - 09.43.595 do not apply to a collective bargaining
8 agreement subject to AS 23.40.070 - 23.40.260, except as provided by AS 23.40.070 -
9 23.40.260.
10 **Sec. 09.43.310. Effect of agreement to arbitrate; nonwaivable provisions.**
11 (a) Except as otherwise provided in (b) and (c) of this section, a party to an agreement
12 to arbitrate or arbitration proceeding may waive, or the parties may vary the effect of,
13 the requirements of AS 09.43.300 - 09.43.595 to the extent permitted by law.
14 (b) Before a controversy arises that is subject to an agreement to arbitrate, a
15 party to the agreement may not
16 (1) waive or agree to vary the effect of the requirements of
17 AS 09.43.320, 09.43.330(a) or (b), 09.43.350, 09.43.440(a) or (b), 09.43.530, or
18 09.43.550;
19 (2) agree to unreasonably restrict the right under AS 09.43.360 to
20 notice of the initiation of an arbitration proceeding;
21 (3) agree to unreasonably restrict the right under AS 09.43.390 to
22 disclosure of any facts by a neutral arbitrator; or
23 (4) waive the right under AS 09.43.430 of a party to an agreement to
24 arbitrate to be represented by an attorney at a proceeding or hearing under
25 AS 09.43.300 - 09.43.595, but an employer and a labor organization may waive the
26 right to representation by an attorney in a labor arbitration.
27 (c) A party to an agreement to arbitrate or arbitration proceeding may not
28 waive, or the parties may not vary the effect of, the requirements of this section,
29 AS 09.43.300(a), (c), or (d), 09.43.340, 09.43.410, 09.43.450, 09.43.470(d) or (e),
30 09.43.490, 09.43.500, 09.43.510, 09.43.520, 09.43.560, or 09.43.570.
31 **Sec. 09.43.320. Application for judicial relief.** Except as otherwise provided

1 in AS 09.43.550, an application for judicial relief under AS 09.43.300 - 09.43.595
2 shall be made and heard in the manner provided by the court rules of this state.
3 **Sec. 09.43.330. Validity of agreement to arbitrate.** (a) An agreement
4 contained in a record to submit to arbitration an existing or subsequent controversy
5 arising between the parties to the agreement is valid, enforceable, and irrevocable
6 except upon a ground that exists at law or in equity for the revocation of a contract,
7 and except as provided by (b) of this section.
8 (b) To the extent an agreement that contains an arbitration provision is
9 invalidated on the grounds that a party was induced into entering into the agreement
10 by fraud, the arbitration provision in the agreement is not enforceable, and the party is
11 not required to prove that the party was induced into entering into the arbitration
12 provision by fraud.
13 (c) The court shall decide whether an agreement to arbitrate exists or a
14 controversy is subject to an agreement to arbitrate.
15 (d) An arbitrator shall decide whether a condition precedent to arbitrability has
16 been fulfilled.
17 (e) If a party to a judicial proceeding challenges the existence of, or claims
18 that a controversy is not subject to, an agreement to arbitrate, the arbitration
19 proceeding may continue pending final resolution of the issue by the court, unless the
20 court otherwise orders.
21 **Sec. 09.43.340. Application to compel arbitration; stay of related**
22 **proceedings.** (a) On application of a person showing an agreement to arbitrate and
23 alleging another person's refusal to arbitrate under the agreement,
24 (1) if the refusing party does not appear or does not oppose the
25 application, the court shall order the parties to arbitrate; and
26 (2) if the refusing party opposes the application, the court shall proceed
27 summarily to decide the issue and order the parties to arbitrate unless it finds that there
28 is no enforceable agreement to arbitrate.
29 (b) On application of a person alleging that an arbitration proceeding has been
30 initiated or threatened but that there is not an agreement to arbitrate, the court shall
31 proceed summarily to decide the issue. If the court finds that there is an enforceable

1 agreement to arbitrate, the court shall order the parties to arbitrate.
2 (c) If the court finds that there is not an enforceable agreement, the court may
3 not, under (a) or (b) of this section, order the parties to arbitrate.
4 (d) The court may not refuse to order arbitration because the claim subject to
5 arbitration lacks merit or because grounds for the claim have not been established.
6 (e) If a proceeding involving a claim referable to arbitration under an alleged
7 agreement to arbitrate is pending in court, an application under this section shall be
8 made in that court. Otherwise, an application under this section may be made in any
9 court as provided in AS 09.43.540.
10 (f) If a party makes an application to the court to order arbitration, the court
11 shall, on just terms, stay a judicial proceeding that involves a claim alleged to be
12 subject to the arbitration until the court renders a final decision under this section.
13 (g) If the court orders arbitration, the court shall, on just terms, stay a judicial
14 proceeding that involves a claim subject to the arbitration. If a claim subject to the
15 arbitration is severable, the court may limit the stay to that claim.
16 **Sec. 09.43.350. Provisional remedies.** (a) Before an arbitrator is appointed
17 and is authorized and able to act, the court, upon application of a party to an
18 arbitration proceeding and for good cause shown, may enter an order for provisional
19 remedies to protect the effectiveness of the arbitration proceeding to the same extent
20 and under the same conditions as if the controversy were the subject of a civil action.
21 (b) After an arbitrator is appointed and is authorized and able to act,
22 (1) the arbitrator may issue the orders for provisional remedies,
23 including interim awards, that the arbitrator finds necessary to protect the
24 effectiveness of the arbitration proceeding and to promote the fair and expeditious
25 resolution of the controversy, to the same extent and under the same conditions as if
26 the controversy were the subject of a civil action; and
27 (2) a party to an arbitration proceeding may apply to the court for a
28 provisional remedy only if the matter is urgent and the arbitrator is not able to act
29 timely or the arbitrator cannot provide an adequate remedy.
30 (c) A party does not waive a right of arbitration by making an application
31 under (a) or (b) of this section.

1 **Sec. 09.43.360. Initiation of arbitration.** (a) A person initiates an arbitration
2 proceeding by giving notice in a record to the other parties to the agreement to
3 arbitrate in the agreed manner between the parties or, in the absence of agreement, by
4 certified or registered mail, return receipt requested and obtained, or by service as
5 authorized for the commencement of a civil action. The notice must describe the
6 nature of the controversy and the remedy sought.
7 (b) Unless a person objects for lack or insufficiency of notice under
8 AS 09.43.420(c) not later than the beginning of the arbitration hearing, the person, by
9 appearing at the hearing, waives any objection to lack or insufficiency of notice.
10 **Sec. 09.43.370. Consolidation of separate arbitration proceedings.** (a)
11 Except as otherwise provided in (c) of this section, upon application of a party to an
12 agreement to arbitrate or arbitration proceeding, the court may order consolidation of
13 separate arbitration proceedings as to all or some of the claims if
14 (1) there are separate agreements to arbitrate or separate arbitration
15 proceedings between the same persons or one of them is a party to a separate
16 agreement to arbitrate or a separate arbitration proceeding with a third person;
17 (2) the claims subject to the agreements to arbitrate arise in substantial
18 part from the same transaction or series of related transactions;
19 (3) the existence of a common issue of law or fact creates the
20 possibility of conflicting decisions in the separate arbitration proceedings; and
21 (4) prejudice resulting from a failure to consolidate is not outweighed
22 by the risk of undue delay or prejudice to the rights of or hardship to parties opposing
23 consolidation.
24 (b) The court may order consolidation of separate arbitration proceedings as to
25 some claims and allow other claims to be resolved in separate arbitration proceedings.
26 (c) The court may not order consolidation of the claims of a party to an
27 agreement to arbitrate if the agreement prohibits consolidation.
28 **Sec. 09.43.380. Appointment of arbitrator; service as a neutral arbitrator.**
29 (a) If the parties to an agreement to arbitrate agree on a method for appointing an
30 arbitrator, that method shall be followed, unless the method fails. If the parties have
31 not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is

1 unable to act and a successor has not been appointed, the court, on application of a
2 party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator appointed
3 by the court has all the powers of an arbitrator designated in the agreement to arbitrate
4 or appointed under the agreed method.

5 (b) An individual who has a known, direct, and material interest in the
6 outcome of the arbitration proceeding or a known, existing, and substantial
7 relationship with a party may not serve as an arbitrator required by an agreement to be
8 neutral.

9 **Sec. 09.43.390. Disclosure by arbitrator.** (a) Before accepting appointment,
10 an individual who is requested to serve as an arbitrator shall, after making a reasonable
11 inquiry, disclose to all parties to the agreement to arbitrate and arbitration proceeding
12 and to other arbitrators any known facts that a reasonable person would consider likely
13 to affect the impartiality of the arbitrator in the arbitration proceeding, including

14 (1) a financial or personal interest in the outcome of the arbitration
15 proceeding; and

16 (2) an existing or past relationship with a party to the agreement to
17 arbitrate or arbitration proceeding, counsel for or representatives of the parties, a
18 witness, or another arbitrator.

19 (b) An arbitrator has a continuing obligation to disclose to all parties to the
20 agreement to arbitrate and arbitration proceeding and to other arbitrators any facts that
21 the arbitrator learns after accepting appointment that a reasonable person would
22 consider likely to affect the impartiality of the arbitrator.

23 (c) If an arbitrator discloses a fact required by (a) or (b) of this section to be
24 disclosed and a party timely objects to the appointment or continued service of the
25 arbitrator based on the fact disclosed, the objection may be a ground under
26 AS 09.43.500(a)(2) for vacating an award made by the arbitrator.

27 (d) If the arbitrator did not disclose a fact as required by (a) or (b) of this
28 section, upon timely objection by a party, the court may, under AS 09.43.500(a)(2),
29 vacate an award.

30 (e) An arbitrator appointed as a neutral arbitrator who does not disclose a
31 known, direct, and material interest in the outcome of the arbitration proceeding or a

1 known, existing, and substantial relationship with a party is rebuttably presumed to act
2 with evident partiality under AS 09.43.500(a)(2).
3 (f) If the parties to an arbitration proceeding agree to the procedures of an
4 arbitration organization or other procedures for challenges to arbitrators before an
5 award is made, substantial compliance with those procedures is a condition precedent
6 to an application to vacate an award on that ground under AS 09.43.500(a)(2).
7 **Sec. 09.43.400. Action by majority.** If there is more than one arbitrator, the
8 powers of an arbitrator shall be exercised by a majority of the arbitrators, but all of
9 them shall conduct the hearing under AS 09.43.420(c).
10 **Sec. 09.43.410. Immunity of arbitrator; competency to testify; attorney**
11 **fees and costs.** (a) An arbitrator or an arbitration organization acting in that capacity
12 is immune from civil liability to the same extent as a judge of a court of this state
13 acting in a judicial capacity.
14 (b) The immunity afforded by this section supplements any immunity under
15 other law.
16 (c) The failure of an arbitrator to make a disclosure required by AS 09.43.390
17 does not cause a loss of immunity under this section.
18 (d) In a judicial, administrative, or similar proceeding, an arbitrator or
19 representative of an arbitration organization is not competent to testify and may not be
20 required to produce records as to a statement, conduct, a decision, or a ruling
21 occurring during the arbitration proceeding to the same extent as a judge of a court of
22 this state acting in a judicial capacity. This subsection does not apply to
23 (1) the extent necessary to determine the claim of an arbitrator,
24 arbitration organization, or representative of the arbitration organization against a
25 party to the arbitration proceeding; or
26 (2) a hearing on an application to vacate an award under
27 AS 09.43.500(a)(1) or (2) if the applicant establishes prima facie that a ground for
28 vacating the award exists.
29 (e) If a person commences a civil action against an arbitrator, arbitration
30 organization, or representative of an arbitration organization arising from the services
31 of the arbitrator, organization, or representative, or if a person seeks to compel an

1 arbitrator or a representative of an arbitration organization to testify or produce
2 records in violation of (d) of this section, and the court decides that the arbitrator,
3 arbitration organization, or representative of an arbitration organization is immune
4 from civil liability or that the arbitrator or representative of the organization is not
5 competent to testify, the court shall award to the arbitrator, organization, or
6 representative attorney fees and expenses of litigation as determined under the court
7 rules of this state.
8 **Sec. 09.43.420. Arbitration process.** (a) An arbitrator may conduct an
9 arbitration in the manner the arbitrator considers appropriate for a fair and expeditious
10 disposition of the proceeding. The authority conferred upon the arbitrator includes the
11 power to hold conferences with the parties to the arbitration proceeding before the
12 hearing and, among other matters, determine the admissibility, relevance, materiality,
13 and weight of any evidence.
14 (b) An arbitrator may decide a request for summary disposition of a claim or
15 particular issue
16 (1) if all interested parties agree; or
17 (2) on request of one party to the arbitration proceeding if that party
18 gives notice to all other parties to the proceeding and the other parties have a
19 reasonable opportunity to respond.
20 (c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and
21 give notice of the hearing not less than five days before the hearing begins. Unless a
22 party to the arbitration proceeding makes an objection to lack or insufficiency of
23 notice not later than the beginning of the hearing, the party's appearance at the hearing
24 waives the objection. On request of a party to the arbitration proceeding and for good
25 cause shown, or on the arbitrator's own initiative, the arbitrator may adjourn the
26 hearing from time to time as necessary but may not postpone the hearing to a time
27 later than that fixed by the agreement to arbitrate for making the award unless the
28 parties to the arbitration proceeding consent to a later date. The arbitrator may hear
29 and decide the controversy on the evidence produced although a party who was
30 notified of the arbitration proceeding did not appear. The court, on request, may direct
31 the arbitrator to conduct the hearing promptly and render a timely decision.

1 (d) At a hearing under (c) of this section, a party to the arbitration proceeding
2 has a right to be heard, to present evidence material to the controversy, and to
3 cross-examine witnesses appearing at the hearing.
4 (e) If an arbitrator ceases or is unable to act during the arbitration proceeding,
5 a replacement arbitrator shall be appointed under AS 09.43.380 to continue the
6 proceeding and to resolve the controversy.
7 **Sec. 09.43.430. Representation by attorney.** A party to an arbitration
8 proceeding may be represented by an attorney.
9 **Sec. 09.43.440. Witnesses; subpoenas; depositions; discovery.** (a) An
10 arbitrator may issue a subpoena for the attendance of a witness and for the production
11 of records and other evidence at a hearing and may administer oaths. A subpoena shall
12 be served in the manner for service of subpoenas in a civil action and, on application
13 to the court by a party to the arbitration proceeding or the arbitrator, enforced in the
14 manner for enforcement of subpoenas in a civil action.
15 (b) In order to make the proceedings fair, expeditious, and cost-effective, on
16 request of a party to or witness in an arbitration proceeding, an arbitrator may permit a
17 deposition of a witness to be taken for use as evidence at the hearing, including a
18 witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator
19 shall determine the conditions under which the deposition is taken.
20 (c) An arbitrator may permit the discovery the arbitrator decides is appropriate
21 in the circumstances, taking into account the needs of the parties to the arbitration
22 proceeding and other affected persons and the desirability of making the proceeding
23 fair, expeditious, and cost-effective.
24 (d) If an arbitrator permits discovery under (c) of this section, the arbitrator
25 may order a party to the arbitration proceeding to comply with the arbitrator's
26 discovery-related orders, issue subpoenas for the attendance of a witness and for the
27 production of records and other evidence at a discovery proceeding, and take action
28 against a noncomplying party to the extent a court could if the controversy were the
29 subject of a civil action in this state.
30 (e) An arbitrator may issue a protective order to prevent the disclosure of
31 privileged information, confidential information, trade secrets, and other information

1 protected from disclosure to the extent a court could if the controversy were the
2 subject of a civil action in this state.
3 (f) All laws compelling a person under subpoena to testify and all fees for
4 attending a judicial proceeding, deposition, or discovery proceeding as a witness apply
5 to an arbitration proceeding as if the controversy were the subject of a civil action in
6 this state.
7 (g) The court may enforce a subpoena or discovery-related order for the
8 attendance of a witness within this state and for the production of records and other
9 evidence issued by an arbitrator in connection with an arbitration proceeding in
10 another state upon conditions determined by the court so as to make the arbitration
11 proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order
12 issued by an arbitrator in another state shall be served in the manner provided by law
13 for service of subpoenas in a civil action in this state and, on application to the court
14 by a party to the arbitration proceeding or the arbitrator, enforced in the manner
15 provided by law for enforcement of subpoenas in a civil action in this state.
16 **Sec. 09.43.450. Judicial enforcement of preaward ruling by arbitrator.** If
17 an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding,
18 the party may request the arbitrator to incorporate the ruling into an award under
19 AS 09.43.460. A prevailing party may apply to the court for an expedited order to
20 confirm the award under AS 09.43.490, in which case the court shall summarily
21 decide the application. The court shall issue an order to confirm the award unless the
22 court vacates, modifies, or corrects the award under AS 09.43.500 or 09.43.510.
23 **Sec. 09.43.460. Award.** (a) An arbitrator shall make a record of an award.
24 The record must be signed or otherwise authenticated by an arbitrator who concurs
25 with the award. The arbitrator or the arbitration organization shall give notice of the
26 award, including a copy of the award, to each party to the arbitration proceeding.
27 (b) An award shall be made within the time specified by the agreement to
28 arbitrate or, if not specified in the agreement, within the time ordered by the court.
29 The court may extend or the parties to the arbitration proceeding may agree in a record
30 to extend the time. The court or the parties may extend the time within or after the
31 time specified or ordered. A party waives an objection that an award was not timely

1 made unless the party gives notice of the objection to the arbitrator before receiving
2 notice of the award.
3 **Sec. 09.43.470. Change of award by arbitrator.** (a) On motion to an
4 arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct
5 an award
6 (1) on a ground stated in AS 09.43.510(a)(1) or (3);
7 (2) because the arbitrator has not made a final and definite award on a
8 claim submitted by the parties to the arbitration proceeding; or
9 (3) to clarify the award.
10 (b) A motion under (a) of this section shall be made and notice shall be given
11 to all parties within 20 days after the movant receives notice of the award.
12 (c) A party to the arbitration proceeding shall give notice of an objection to the
13 motion within 10 days after receipt of the notice.
14 (d) If an application to the court is pending under AS 09.43.490, 09.43.500, or
15 09.43.510, the court may submit the claim to the arbitrator to consider whether to
16 modify or correct the award
17 (1) on a ground stated in AS 09.43.510(a)(1) or (3);
18 (2) because the arbitrator has not made a final and definite award on a
19 claim submitted by the parties to the arbitration proceeding; or
20 (3) to clarify the award.
21 (e) An award modified or corrected under this section is subject to
22 AS 09.43.460(a) and 09.43.490 - 09.43.510.
23 **Sec. 09.43.480. Remedies; fees and expenses of arbitration proceeding.** (a)
24 An arbitrator may award punitive damages or other exemplary relief if the award is
25 authorized by law in a civil action involving the same claim and the evidence
26 produced at the hearing justifies the award under the legal standards otherwise
27 applicable to the claim.
28 (b) An arbitrator may award reasonable attorney fees and other reasonable
29 expenses of arbitration if the award is authorized by law in a civil action involving the
30 same claim or by the agreement of the parties to the arbitration proceeding.
31 (c) As to all remedies other than those authorized by (a) and (b) of this section,

1 an arbitrator may order the remedies the arbitrator considers just and appropriate under
2 the circumstances of the arbitration proceeding. The fact that the remedy could not or
3 would not be granted by the court is not a ground for refusing to confirm an award
4 under AS 09.43.490 or for vacating an award under AS 09.43.500.
5 (d) An arbitrator's expenses and fees, together with other expenses, shall be
6 paid as provided in the award.
7 (e) If an arbitrator awards punitive damages or other exemplary relief under
8 (a) of this section, the arbitrator shall specify in the award the basis in fact justifying
9 and the basis in law authorizing the award and shall state the amount of the punitive
10 damages or other exemplary relief separately.
11 **Sec. 09.43.490. Confirmation of award.** After a party to an arbitration
12 proceeding receives notice of an award, the party may apply to the court for an order
13 confirming the award, at which time the court shall issue a confirming order unless the
14 award is modified or corrected under AS 09.43.470 or 09.43.510 or is vacated under
15 AS 09.43.500.
16 **Sec. 09.43.500. Vacating award.** (a) On application to the court by a party to
17 an arbitration proceeding, the court shall vacate an award made in the arbitration
18 proceeding if
19 (1) the award was procured by corruption, fraud, or other undue
20 means;
21 (2) there was
22 (A) evident partiality by an arbitrator appointed as a neutral
23 arbitrator;
24 (B) corruption by an arbitrator; or
25 (C) misconduct by an arbitrator prejudicing the rights of a party
26 to the arbitration proceeding;
27 (3) an arbitrator refused to postpone the hearing on showing of
28 sufficient cause for postponement, refused to consider evidence material to the
29 controversy, or otherwise conducted the hearing contrary to AS 09.43.420, so as to
30 prejudice substantially the rights of a party to the arbitration proceeding;
31 (4) an arbitrator exceeded the arbitrator's powers;

1 (5) there was not an agreement to arbitrate, unless the person
2 participated in the arbitration proceeding without raising the objection under
3 AS 09.43.420(c) not later than the beginning of the arbitration hearing; or
4 (6) the arbitration was conducted without proper notice of the initiation
5 of an arbitration as required under AS 09.43.360 so as to prejudice substantially the
6 rights of a party to the arbitration proceeding.
7 (b) An application under this section shall be filed within 90 days after the
8 applicant receives notice of the award under AS 09.43.460 or within 90 days after the
9 applicant receives notice of a modified or corrected award under AS 09.43.470, unless
10 the applicant alleges that the award was procured by corruption, fraud, or other undue
11 means, in which case the application shall be made within 90 days after the ground is
12 known or, by the exercise of reasonable care, would have been known by the
13 applicant.
14 (c) If the court vacates an award on a ground other than that stated in (a)(5) of
15 this section, it may order a rehearing. If the award is vacated on a ground stated in
16 (a)(1) or (2) of this section, the rehearing shall be before a new arbitrator. If the award
17 is vacated on a ground stated in (a)(3), (4), or (6) of this section, the rehearing may be
18 before the arbitrator who made the award or the arbitrator's successor. The arbitrator
19 shall render the decision in the rehearing within the same time as that provided in
20 AS 09.43.460(b) for an award.
21 (d) If the court denies an application to vacate an award, it shall confirm the
22 award unless an application to modify or correct the award is pending.
23 **Sec. 09.43.510. Modification or correction of award.** (a) On application
24 made within 90 days after the applicant receives notice of the award under
25 AS 09.43.460 or within 90 days after the applicant receives notice of a modified or
26 corrected award under AS 09.43.470, the court shall modify or correct the award if
27 (1) there was an evident mathematical miscalculation or an evident
28 mistake in the description of a person, thing, or property referred to in the award;
29 (2) the arbitrator has made an award on a claim not submitted to the
30 arbitrator and the award may be corrected without affecting the merits of the decision
31 on the claims submitted; or

1 (3) the award is imperfect in a matter of form not affecting the merits
2 of the decision on the claims submitted.
3 (b) If an application made under (a) of this section is granted, the court shall
4 modify or correct and confirm the award as modified or corrected. Otherwise, unless
5 an application to vacate is pending, the court shall confirm the award.
6 (c) An application to modify or correct an award under this section may be
7 joined with an application to vacate the award.
8 **Sec. 09.43.520. Judgment on award.** On granting an order confirming,
9 vacating without directing a rehearing, modifying, or correcting an award, the court
10 shall enter a judgment in conformity with the order. The judgment may be recorded,
11 docketed, and enforced as any other judgment in a civil action.
12 **Sec. 09.43.530. Jurisdiction.** (a) A court of this state having jurisdiction over
13 the controversy and the parties may enforce an agreement to arbitrate.
14 (b) An agreement to arbitrate providing for arbitration in this state confers
15 exclusive jurisdiction on the court to enter judgment on an award under AS 09.43.300
16 - 09.43.595.
17 **Sec. 09.43.540. Venue.** An application to the court under AS 09.43.320 shall
18 be made in the court of the judicial district in which the agreement to arbitrate
19 specifies the arbitration hearing is to be held or, if the hearing has been held, in the
20 court of the judicial district in which it was held. Otherwise, the application may be
21 made in the court of a judicial district in which an adverse party resides or has a place
22 of business or, if no adverse party has a residence or place of business in this state, in
23 the court of any judicial district in this state. All subsequent applications shall be
24 made in the court hearing the initial application unless the court otherwise directs.
25 **Sec. 09.43.550. Appeals.** (a) An appeal may be taken from
26 (1) an order denying an application to compel arbitration;
27 (2) an order granting an application to stay arbitration;
28 (3) an order confirming or denying confirmation of an award;
29 (4) an order modifying or correcting an award;
30 (5) an order vacating an award without directing a rehearing; or
31 (6) a final judgment entered under AS 09.43.300 - 09.43.595.

1 (b) An appeal under this section shall be taken as from an order or a judgment
2 in a civil action.
3 **Sec. 09.43.560. Uniformity of application and construction.** In applying
4 and construing AS 09.43.300 - 09.43.595, consideration shall be given to the need to
5 promote uniformity of the law with respect to its subject matter among states that
6 enact the Revised Uniform Arbitration Act.
7 **Sec. 09.43.570. Relationship to Electronic Signatures in Global and**
8 **National Commerce Act.** The provisions of AS 09.43.300 - 09.43.595 governing the
9 legal effect, validity, and enforceability of electronic records or electronic signatures,
10 and of contracts performed with the use of the records or signatures shall conform to
11 the requirements of 15 U.S.C. 7002 (Electronic Signatures in Global and National
12 Commerce Act).
13 **Sec. 09.43.580. Notice.** (a) Except as otherwise provided in AS 09.43.300 -
14 09.43.595, a person gives notice to another person by taking action that is reasonably
15 necessary to inform the other person in the ordinary course of affairs, whether or not
16 the other person acquires knowledge of the notice.
17 (b) A person has notice if the person has knowledge of the notice or has
18 received notice.
19 (c) A person receives notice when the notice comes to the person's attention or
20 the notice is delivered at the person's place of residence or place of business, or at
21 another location held out by the person as a place of delivery of the communications.
22 **Sec. 09.43.590. Definitions.** In AS 09.43.300 - 09.43.595,
23 (1) "arbitration organization" means an association, agency, board,
24 commission, or other entity that is neutral and initiates, sponsors, or administers an
25 arbitration proceeding or is involved in the appointment of an arbitrator;
26 (2) "arbitrator" means an individual who is appointed to render an
27 award, alone or with others, in a controversy that is subject to an agreement to
28 arbitrate;
29 (3) "court" means a court of competent jurisdiction in this state;
30 (4) "knowledge" means actual knowledge;
31 (5) "person" means an individual, corporation, business trust, estate,

1 trust, partnership, limited liability company, association, joint venture, government;
2 governmental subdivision, agency, or instrumentality; public corporation; or another
3 legal or commercial entity;
4 (6) "record" means information that is inscribed on a tangible medium
5 or that is stored in an electronic or other medium and may be retrieved in perceivable
6 form.
7 **Sec. 09.43.595. Short title.** AS 09.43.300 - 09.43.595 may be cited as the
8 Revised Uniform Arbitration Act.
9 * **Sec. 3.** AS 09.55.535(k) is amended to read:
10 (k) The provisions of **AS 09.43.010 - 09.43.180 (Uniform Arbitration Act)**
11 **or AS 09.43.300 - 09.43.595 (Revised Uniform Arbitration Act)** [THE UNIFORM
12 ARBITRATION ACT, AS 09.43.010 - 09.43.180,] apply **as provided in**
13 **AS 09.43.010 and 09.43.300** to arbitrations under this section if they do not conflict
14 with the provisions of this section; arbitrations under this section shall be conducted in
15 accordance with procedures established by any rules of court **that** [WHICH] may be
16 adopted and according to provisions of AS 09.55.540 - 09.55.548**, 09.55.554 -**
17 **09.55.560** [AND AS 09.55.554 - 09.55.560], and AS 09.65.090.
18 * **Sec. 4.** AS 22.15.030(a) is amended to read:
19 (a) The district court has jurisdiction of civil cases, including foreign
20 judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170
21 **or 09.43.530 to the extent permitted by AS 09.43.010 and 09.43.300**, as follows:
22 (1) for the recovery of money or damages when the amount claimed
23 exclusive of costs, interest, and attorney fees does not exceed $50,000 for each
24 defendant;
25 (2) for the recovery of specific personal property, when the value of
26 the property claimed and the damages for the detention do not exceed $50,000;
27 (3) for the recovery of a penalty or forfeiture, whether given by statute
28 or arising out of contract, not exceeding $50,000;
29 (4) to give judgment without action upon the confession of the
30 defendant for any of the cases specified in this section, except for a penalty or
31 forfeiture imposed by statute;

1 (5) for establishing the fact of death or cause and manner of death of
2 any person in the manner prescribed in AS 09.55.020 - 09.55.069;
3 (6) for the recovery of the possession of premises in the manner
4 provided under AS 09.45.070 - 09.45.160 when the value of the arrears and damage to
5 the property does not exceed $50,000;
6 (7) for the foreclosure of a lien when the amount in controversy does
7 not exceed $50,000;
8 (8) for the recovery of money or damages in motor vehicle tort cases
9 when the amount claimed exclusive of costs, interest, and attorney fees does not
10 exceed $50,000 for each defendant;
11 (9) over civil actions for taking utility service and for damages to or
12 interference with a utility line filed under AS 42.20.030;
13 (10) over cases involving protective orders for domestic violence
14 under AS 18.66.100 - 18.66.180.
15 * **Sec. 5.** AS 23.40.200(b) is amended to read:
16 (b) The class in (a)(1) of this section is composed of police and fire protection
17 employees, jail, prison, and other correctional institution employees, and hospital
18 employees. Employees in this class may not engage in strikes. Upon a showing by a
19 public employer or the labor relations agency that employees in this class are engaging
20 or about to engage in a strike, an injunction, restraining order, or other order **that**
21 [WHICH] may be appropriate shall be granted by the superior court in the judicial
22 district in which the strike is occurring or is about to occur. If an impasse or deadlock
23 is reached in collective bargaining between the public employer and employees in this
24 class, and mediation has been utilized without resolving the deadlock, the parties shall
25 submit to arbitration to be carried out under AS 09.43.030 **or 09.43.480 to the extent**
26 **permitted by AS 09.43.010 and 09.43.300**.
27 * **Sec. 6.** AS 23.40.200(c) is amended to read:
28 (c) The class in (a)(2) of this section is composed of public utility, snow
29 removal, sanitation, and educational institution employees other than employees of a
30 school district, a regional educational attendance area, or a state boarding school.
31 Employees in this class may engage in a strike after mediation, subject to the voting

requirement of (d) of this section, for a limited time. The limit is determined by the interests of the health, safety, or welfare of the public. The public employer or the labor relations agency may apply to the superior court in the judicial district in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety, or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. "Total equities" includes not only the **effect** [IMPACT] of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations. If an impasse or deadlock still exists after the issuance of an injunction, the parties shall submit to arbitration to be carried out under AS 09.43.030 **or 09.43.480 to the extent permitted by AS 09.43.010 and 09.43.300**.

* **Sec. 7.** AS 23.40.200(f) is amended to read:

(f) The parties to a collective bargaining agreement may provide in the agreement a contract for arbitration to be conducted solely according to AS 09.43.010 - 09.43.180 (Uniform Arbitration Act) **or AS 09.43.300 - 09.43.595 (Revised Uniform Arbitration Act) to the extent permitted by AS 09.43.010 and 09.43.300** if **either** [THE] Act is incorporated into the agreement or contract by reference.

* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 09.43.370, enacted by sec. 2 of this Act, has the effect of changing Rules 18, 19, 20, and 21, Alaska Rules of Civil Procedure, by establishing additional specific situations where the court may order proceedings consolidated as to all or some claims, and a situation where the court is prohibited from ordering consolidation.

(b) AS 09.43.410(d) and (e), enacted by sec. 2 of this Act, have the effect of changing Rule 601, Alaska Rules of Evidence, by providing that an arbitrator and a representative of an arbitration organization are not competent to testify in certain judicial proceedings related to arbitration.

(c) AS 09.43.540, enacted by sec. 2 of this Act, has the effect of changing Rule 3, Alaska Rules of Civil Procedure, by establishing different venue rules for applications to the

1 court in arbitration proceedings.
2 (d) AS 09.43.550(a)(1) - (5), enacted by sec. 2 of this Act, have the effect of changing
3 Rule 402, Alaska Rules of Appellate Procedure, by providing that an appeal may be taken
4 from superior court interlocutory orders identified in AS 09.43.550(a).
5 * **Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to
6 read:
7 WAIVER OF EFFECTIVE DATE PROHIBITED. A person may not waive the
8 effective date of a provision of this Act, and a waiver of the effective date of a provision of
9 this Act is void.
10 * **Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to
11 read:
12 SAVING CLAUSE. This Act does not affect an action or proceeding commenced or
13 right accrued before January 1, 2005.
14 * **Sec. 11.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:
16 CONDITIONAL EFFECT. AS 09.43.370, 09.43.410(d), 09.43.410(e), 09.43.540, and
17 09.43.550(a)(1) - (5), enacted by sec. 2 of this Act, take effect only if sec. 8 of this Act
18 receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution
19 of the State of Alaska.
20 * **Sec. 12.** This Act takes effect January 1, 2005.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB83CS-ACS-TC-2-27-04
() Publish Date:

Revision Date/Time (Note if correction):
Title: Revised Uniform Arbitration Act
Sponsor: Representative Berkowitz
Requester:

Dept. Affected:
BRU: Alaska Court System
Component: Trial Courts
Component No.

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
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--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The ccurt system does not anticipate any fiscal impact from the passage of CSHB 83 (JUD).

Prepared by: Doug Wooliver Administrative Attorney
Phone: 463-4750
Division: Alaska Court System
Date/Time: 2/27/04 12:45 PM
Approved by: Stephanie Cole Administrative Director by Doug Wooliver
Date: 2/27/2004
Agency: Alaska Court System

(Revised 9/2003 OMB)

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 10, 2003

SUBJECT: Sectional summary of HB 83 relating to the Revised Uniform Arbitration Act (Work Order No. 23-LS0047\H)

TO: Representative Ethan Berkowitz
Attn: Lisa

FROM: Theresa L. Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Amends the existing Uniform Arbitration Act to indicate to which agreements and contracts it applies.

Section 2. Adds an article containing the Revised Uniform Arbitration Act (RUAA).

Sec. 09.43.300 states that the RUAA governs arbitration agreements made on or after January 1, 2004. States that the RUAA governs arbitration agreements made before January 1, 2004 if all parties agree. States that, with one exception, the RUAA does not apply to certain labor-management contracts unless incorporated into the contract or its application is provided for by contract. States that the RUAA does not apply to certain collective bargaining agreements.

Sec. 09.43.310 provides for waiver or varying the effect of the RUAA. Lists certain agreements and waivers a party to an arbitration agreement may not make before the controversy arises. Prohibits the waiver or variation of the effect of certain RUAA provisions.

Sec. 09.43.320 directs that an application for judicial relief under the RUAA, except as provided in sec. 09.43.550, will be handled as provided by the state's court rules.

Sec. 09.43.330 provides that arbitration agreements contained in a record are valid, enforceable, and irrevocable, except on a ground that exists at law or in equity for the revocation of a contract. Directs the court to decide certain issues relating to arbitration agreements. Directs an arbitrator to decide certain issues relating to arbitration

agreements. Allows an arbitration proceeding to continue while a court resolves certain challenges.

Sec. 09.43.340 directs how a court is to proceed on application of a person alleging another person's refusal to arbitrate. Directs how a court is to proceed with an application of a person alleging that an arbitration has been initiated or threatened but there isn't an agreement to arbitrate. Prohibits a court from ordering arbitration if there isn't an enforceable agreement. Prohibits a court from refusing to order arbitration because of the merits of the claim or because grounds for the claim have not been established. Directs which court to use under certain circumstance. When a party applies to a court to order arbitration, directs the court to stay a judicial proceeding that involves a claim alleged to be subject to the arbitration. Directs that if a court orders arbitration, the court shall stay a judicial proceeding that involves a claim subject to the arbitration.

Sec. 09.43.350 allows a court to order a provisional remedy to protect an arbitration proceeding before an arbitrator is appointed and can act. Allows an arbitrator to order a provisional remedy to protect the arbitration proceeding and to promote a fair and expeditious resolution. Sets limits on when a party to an arbitration proceeding may apply for a court-ordered provisional remedy. Provides that a party's application for a provisional remedy does not waive a right of arbitration.

Sec. 09.43.360 establishes how a person initiates an arbitration proceeding. Provides that a person waives a lack or insufficiency of the notice required to initiate an arbitration unless the person objects not later than the beginning of the arbitration hearing.

Sec. 09.43.370 allows a court to consolidate separate arbitration proceedings under certain listed conditions. Allows the court to consolidate some claims and allow other claims to be resolved separately. Prohibits a court from consolidating claims if the arbitration agreement prohibits consolidation.

Sec. 09.43.380 describes what method is to be used to appoint an arbitrator and under what circumstance a court is to appoint the arbitrator. Gives a court-appointed arbitrator the same powers as an arbitrator designated in the arbitration agreement or appointed by the parties. Prohibits an individual with a certain interest in the outcome or a certain relationship with a party from serving as an arbitrator if the agreement requires neutrality.

Sec. 09.43.390 requires that before accepting appointment a person disclose facts that might affect the person's impartiality as an arbitrator. Makes disclosure a continuing obligation of an arbitrator. Provides that a timely objection to the arbitrator after disclosure of these facts may be grounds for vacating an award. Allows a court to vacate an award for failure to disclose as required by (a) - (b). Establishes a rebuttable presumption that a person appointed as a neutral arbitrator acts with partiality if the person does not disclose a known, direct, and material interest in the outcome or a known, existing, and substantial relationship with a party. Requires substantial

compliance with certain agreed procedures for challenges to arbitrators in order to vacate an award on that ground under sec. 09.43.500(a)(2).

Sec. 09.43.400 requires that the powers of an arbitrator be exercised by a majority of all of the arbitrators. Requires all of the arbitrators to conduct the hearing.

Sec. 09.43.410 provides an arbitrator and an arbitration organization the same immunity from civil liability as a judge. States that this immunity supplements any other immunity provided by law. State that an arbitrator does not lose this immunity by failing to make required disclosures. States that an arbitrator or representative of an arbitration organization is generally not competent to testify or required to produce arbitration records relating to an arbitration proceeding in a judicial, administrative, or similar proceeding to the same extent as a judge. Makes certain exceptions to this rule. Awards attorney fees and costs in a civil action to an arbitrator, arbitration organization, or representative of an arbitration organization when the court determines that the arbitrator, arbitration organization, or representative is protected by this immunity.

Sec. 09.43.420 allows an arbitrator to conduct the arbitration in the manner the arbitrator considers appropriate for a fair and expeditious disposition. Allows the arbitrator to hold conferences and deal with evidence, and to handle summary dispositions of the claims and issues under certain conditions. Establishes certain procedures for the arbitration. Gives the parties certain rights at the hearing. Provides for replacing an arbitrator when an arbitrator ceases acting or is unable to act.

Sec. 09.43.430 allows a party to an arbitration proceeding to be represented by an attorney.

Sec. 09.43.440 makes various provisions for subpoenas, witnesses, the production of records and other evidence, depositions, discovery, fees, and protective orders.

Sec. 09.43.450 makes certain provisions for incorporating preaward rulings into an award and for judicial enforcement of the award.

Sec. 09.43.460 requires an arbitrator to make a record of the arbitrator's award and requires the arbitrator or arbitration organization to give notice of the award to each party. Establishes when an award must be made and provides for extension of the time. Requires a party to give notice before receiving the award of an objection that an award was not timely in order to avoid waiving objection to the non-timeliness of the award.

Sec. 09.43.470 authorizes an arbitrator to modify or correct an award as provided in the section. Establishes certain procedural requirements regarding motions for modification or correction and objections to the motion. If certain applications are pending, allows a court to submit the claim to the arbitrator to consider modification or correction for certain reasons. States that a modified or corrected award is subject to action under certain other sections.

Sec. 09.43.480 authorizes an arbitrator to award punitive damages or other exemplary relief under certain conditions. Authorizes an arbitrator to award reasonable attorney fees and arbitration expenses under certain circumstances. Authorizes an arbitrator to order other remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. States that an arbitrator's expenses and fees, together with other expenses, are to be paid as provided in the award. Requires the arbitrator who awards punitive damages or other exemplary relief to state in the award the facts and law on which these damages are based and state the amount of these damages separately.

Sec. 09.43.490 allows a party to apply for a court order confirming an award and directs the court to confirm the award unless the award is modified, corrected, or vacated under certain provisions.

Sec. 09.43.500 directs a court to vacate an award under certain described conditions. Establishes when an application to the court must be filed. Allows a court to order a rehearing if it vacates an award on certain grounds and establishes certain requirements for the rehearing. Directs a court that denies an application to vacate an award to confirm the award unless an application to modify or correct the award is pending.

Sec. 09.43.510 directs a court to modify or correct an award under certain conditions. Allows an application to modify or correct an award to be combined with an application to vacate the award.

Sec. 09.43.520 directs the court to enter judgment in conformity with its order on the arbitration award.

Sec. 09.43.530 allows a court to enforce an agreement to arbitrate if the court has jurisdiction over the controversy and the parties. States that an arbitration agreement providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under these provisions.

Sec. 09.43.540 establishes where in the state an application to the court is to be made.

Sec. 09.43.550 lists which orders and judgments can be appealed. Provides for the appeal to be taken as if from an order or judgment in a civil action.

Sec. 09.43.560 requires that the need to promote uniformity be considered when applying and construing these provisions.

Sec. 09.43.570 requires that those RUAA provisions that relate to the legal effect, validity, and enforceability of electronic records or signatures, and of contracts performed with the use of the records or signatures, conform to the federal Electronic Signatures in Global and national Commerce Act.

Sec. 09.43.580 explains what notice means in the RUAA.

Sec. 09.43.590 defines certain terms for the RUAA.

Sec. 09.43.595 provides for the new provisions to be called the Revised Uniform Arbitration Act.

Section 3. Conforming amendments.

Section 4. Conforming amendments.

Section 5. Conforming amendments.

Section 6. Conforming amendments.

Section 7. Conforming amendments.

Section 8. Describes the indirect court rule amendments made by the new provisions.

Section 9. Prohibits a person from waiving the effective date of a provision of this Act.

Section 10. Prevents this Act from affecting an action or proceeding begun or a right accrued before its effective date.

Section 11. States that the provisions that change court rules do not take effect unless sec. 8 receives the increased majority vote.

Section 12. Makes the Act effective January 1, 2004.

If I may be of further assistance, please advise.

TLB:lmb
03-070.lmb

Law Offices
of
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Tel (907) 276-1221 Fax (907) 258-7329

February 2, 2004

Hon. Ralph Seekins
Chair – Judiciary Committee
Alaska State Senate
State Capitol, Room 125
Juneau, Alaska 99801-1182

VIA 1st class mail and Facsimile: 907-465-5241

RE: HB 83 – Revised Uniform Arbitration Act

Dear Senator Seekins:

I am one of the Alaska commissioners of the National Conference of Commissioners on Uniform State Laws (NCCUSL). The other Alaska commissioners are Alaska Supreme Court Justice Alexander O. Bryner; Asst. Alaska Attorney General Deborah Behr; attorney L.S. Kurtz, Jr. of Anchorage; attorney Arthur H. Peterson of Juneau; and attorney Tamara B. Cook, Director of the Alaska Legislative Affairs Agency.

It is my understanding that HB 83 has been referred to the Senate Judiciary Committee for review. HB 83 embodies in essence the Revised Uniform Arbitration Act of the NCCUSL. My purpose in writing is to respectfully request that the Senate Judiciary Committee schedule HB 83 for hearing. It is important to the people of the State of Alaska to have Alaska's statutory law regarding arbitration brought up-to-date in light of the issues and case law that has developed on the past 49 years since the original Uniform Arbitration Act was promulgated by the NCCUSL.

I would like to provide the Senate Judiciary Committee with the following information concerning the background of the Revised Uniform Arbitration Act and the principal purposes it is intended to serve.

Background – The Uniform Arbitration Act (adopted in Alaska – 1968)

The NCCUSL promulgated the original Uniform Arbitration Act in 1955. It subsequently was adopted as law in 49 jurisdictions, including Alaska, and together with the Federal Arbitration Act has provided the fundamental substance of the law governing agreements to arbitrate in the United States.

The 1955 Uniform Arbitration Act accomplished two fundamental things. First, it reversed the common law rule that denied enforcement of a contract provision requiring arbitration of

disputes before there an actual dispute arose. Historically at common law the parties were able to agree to arbitrate only after an actual dispute arose. The common law prohibited agreements to arbitrate made in anticipation of possible disputes. Second, the 1955 Uniform Arbitration Act provided some basic procedures for the conduct of an arbitration. The Uniform Act has not mandated the arbitration of any dispute. Its function has been to let persons determine whether or not they want to use arbitration by agreement.

Arbitration is the original alternative dispute resolution (ADR) mechanism made legitimate under American law. It is an alternative to a judicial proceeding to resolve a dispute. Arbitration has traditionally been a means of resolving disputes when issues are specialized and technical. These kinds of disputes require specialist resolution and there is no desire for damage awards like those awarded by a court of law. A typical example is an arbitration that allocates costs of defects in a building project between architects, contractors and property owners. Arbitrators are chosen by the parties with construction expertise to determine responsibility for defects. The arbitration is conducted quickly. It is free of the constraints of court-room procedure, and may be tailored to adducing evidence for the specific kind of dispute. The parties all have a strong desire to avoid litigation and are normally satisfied with the results of arbitration. Construction disputes have been regularly resolved by arbitration for a long period of time.

However, provisions calling for arbitration occur in all kinds of contracts as the burgeoning caseload has slowed the civil justice process in the courts and as the costs of lawsuits have risen dramatically. As the arbitration process has been more utilized for resolving disputes that have traditionally been resolved by litigation, it has become clear that the limited procedural provisions of the Uniform Arbitration Act are no longer adequate. For that reason, the NCCUSL has now promulgated a next generation state arbitration act, the Revised Uniform Arbitration Act of 2000 (RUAA).

The Revised Uniform Arbitration Act of 2000 (RUAA)

The RUAA continues to authorize agreements to arbitrate disputes before they arise. However, the procedural side of arbitration is greatly augmented to meet modern needs. It deals with procedural issues not addressed in the 1955 Act. The effect should be more efficient and fair arbitrations as an alternative to litigation than is the case under the 1955 Act. The 1955 Act was a great advance in American law. The objective of the 2000 Act is to make the contribution of the 1955 Act even greater.

The 2000 Uniform Act has been drafted, also, against the significant and preemptive presence of the Federal Arbitration Act. The federal act applies to arbitration provisions in private contracts. The Federal Arbitration Act encourages arbitration as an alternative to

litigation. Therefore, any state law that limits the availability of arbitration risks failure as a matter of federal preemption. Although there is not complete agreement about the relationship between federal and state law on certain specific issues, the 2000 Uniform Act is drafted to avoid preemption by federal law.
It is not possible to cover all the provisions in this important revision in this letter. However, the primary purposes underlying the revisions that the RUAA seeks to implement may be fairly summarized as 1) providing more certainty in arbitration proceedings, 2) dealing with potential problems of federal preemption, and 3) addressing important issues that have arose under the original UAA as reflected in the case law throughout the country. The RUAA not only revises certain provisions of the original act, but also includes a number of new provisions.

The RUAA expressly provides that it is a default act. Most of its provisions may be varied or waived by contract. There are certain provisions that may not be waived or varied. These include the basic rule that an agreement to submit a dispute to arbitration is valid; the rules that govern disclosure of facts by a neutral arbitrator; the rules guaranteeing enforcement or appeal of the act, an arbitration agreement or an arbitration decision in a court; or, the standards for vacating an award. Declaring the RUAA a default act is important because it gives the parties an option to choose between federal or state law to govern their arbitration. Without this, the federal arbitration act is applicable by default. IN addition, restrictions on waiving or varying certain statutory requirements are important to protect parties to these agreements.

The RUAA specifically allows a court to order provisional remedies during the course of an arbitration before an arbitrator is selected. The 1955 Uniform Act has no such provision. Thus the RUAA improves upon the original act by preventing a party from delaying the selection of an arbitrator in order to delay proceedings and dissipate the effect of an arbitration award. The RUAA also gives an arbitrator, when selected, the express power to order provisional remedies, a power not expressly given in the 1955 Uniform Act. An arbitrator has the same powers as a court has in a judicial proceeding.

The RUAA allows consolidation of separate arbitration proceedings, a matter that was never contemplated in the 1955 Uniform Act. The existence of multiple parties, multiple agreements and complex litigation has made the issue of consolidation of arbitration actions very important. Courts have varied over consolidation. The RUAA expressly allows and governs consolidation.

The 1955 Uniform Act allows an award to be vacated because of an arbitrator's partiality - lack of neutrality. It does not specifically require disclosure of any interest that may give rise to a question of neutrality. The RUAA specifically addresses disclosure of known facts

that give rise to questions of neutrality. Such facts include a financial or personal interest in the outcome of the arbitration proceeding or an existing or past relationship with a party. The lack of disclosure itself may be a ground for vacating an award, and there is a presumption of partiality when non-disclosure occurs. Upon disclosure, a party has the opportunity to object to the appointment of an arbitrator intended to be neutral. If there is no objection, that may affect the ability to raise partiality as a ground for vacating an award. These provisions provide substantial express protection to parties to an arbitration proceeding that simply are not a part of the 1955 Uniform Act.

A crucial issue in arbitrations is the express immunity of arbitrators from civil liability. It is not an issue addressed in the 1955 Uniform Act, but is important to impartial and fair proceedings. An arbitrator who expects or fears a lawsuit simply because of a decision, cannot be counted upon to act fairly or competently. The RUAA provides arbitrators with immunity from civil liability "to the same extent as a judge of a court of this State acting in a judicial capacity."

An arbitrator under the RUAA may conduct the arbitration in such manner as the arbitrator considers appropriate to the fair and expeditious disposition of the proceeding. This express authority does not appear in the 1955 Uniform Act. The 1955 Uniform Act provides for subpoena of witnesses, and for depositions. Under the RUAA, an arbitrator also has the express power to make summary dispositions of claims or issues under appropriate procedures, to hold pre-arbitration proceeding meetings or to use any other discovery process (any process that adduces relevant evidence for the proceeding) applicable to resolution of the dispute. These provisions put arbitrators on the same level as judges in a judicial proceeding with respect to discovery of evidence.

The RUAA expressly permits an arbitrator to give punitive damages or other exemplary relief, "if such an award is authorized by law in a civil action involving the same claim." Attorney's fees may be awarded under the same standard. The 1955 Uniform Act does not expressly address either issue, but the case law has established the power to award punitive damages in most jurisdictions. The Federal Arbitration Act decisions also provide for punitive damages and some states have amended the 1955 Uniform Act to include attorney's fees. These new provisions put arbitrators on the same footing as judges in a court of law, and reflect the expansion of arbitration into disputes traditionally resolved in courts of law.

These are some highlights of the revision to the RUAA. The number of disputes in arbitration grows yearly. The RUAA responds to this growth with better and more complete arbitration procedures. It aligns state law with federal law, which decreases the potential for litigation on preemption grounds. Once enacted into law in Alaska, the RUAA will with

help provide Alaskans with even better alternatives for resolving disputes promptly, efficiently, and economically.

Thank you for taking the time to consider this request, and please let me know if you have any questions.

Sincerely,

W. Grant Callow

cc: Hon. Scott Organ (via facsimile - 907-465-3265)
Hon. Gene Therriault (via facsimile - 907-465-3884)
Hon. Johnny Ellis (via facsimile - 907-465-2529)
Hon. Hollis French (via facsimile - 907-465-6595)
Asst. Alaska Attorney General Deborah Behr (via email)
Tamara B. Cook, Director, Alaska Legislative Affairs Agency (via email)
L.S. Kurtz, Jr., Attorney at Law (via email)
Arthur H Peterson, Attorney at Law (via email)

WGC/rc

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

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JUNEAU, ALASKA 99811-0300
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MAR 10 2003

March 10, 2003

Representative Ethan Berkowitz
House of Representatives
State Capitol
Mail Stop 3100
Juneau, AK 99801-1182

Re: HB 83, relating to the Revised Uniform Arbitration Act

Dear Representative Berkowitz:

I have reviewed HB 83, relating to adoption of the Revised Uniform Arbitration Act, and I see no legal issues that would impact implementation of the bill. The bill follows the recommendations of the authors of "Is the Revised Uniform Arbitration Act a Good Fit for Alaska," 19 Alaska Law Review 339.

Please don't hesitate to contact me if you have any questions about specific provisions of the bill.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: Keith B. Levy
Assistant Attorney General

KBL:sro

cc: David Marquez

Home

> A Few Facts About The...

UNIFORM ARBITRATION ACT (2000)

PURPOSE:
This act revises the Uniform Arbitration Act of 1956, adopted in 49 jurisdictions. The primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.

ORIGIN:
Completed by the Uniform Law Commissioners in 2000.

APPROVED BY:
American Bar Association

ENDORSED BY:
American Arbitration Association
National Academy of Arbitrators
National Arbitration Forum

STATE ADOPTIONS:
Hawaii
Nevada
New Jersey
New Mexico
North Carolina
North Dakota
Oregon
Utah

2004 INTRODUCTIONS:

Alaska
Arizona
Colorado
Massachusetts
Vermont
West Virginia

For any further information regarding the Uniform Arbitration Act, please contact John McCabe, Katie Robinson, or Mike Kerr at 312-915-0195.

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HB
86

Representative
HUGH "BUD" FATE
Chair-Resources Committee
Energy Council
119 N. Cushman St. Suite 207
Fairbanks, Alaska 99701
(907) 452-6084
Fax: (907) 452-6096

Alaska State Legislature

While in Session
State Capitol, Room 128
Juneau, Alaska 99801-1182
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1 866-465-4976

House District 7

House of Representatives

Memorandum

To: Senator Hollis French, Senate Judiciary Committee
Fm: Representative Hugh "Bud" Fate
Cc:
Date: May 9, 2003
Re: Questions and comments regarding CS for SSHB 86am

The Committee asked several questions regarding particular case law definitions of malicious claims and bad faith. With the assistance of Legal Services, provided with this memo are three Alaska case law definitions of bad faith. You will also find attached a list of eight non-Alaskan statute references that use the term "malicious claim."

There was also an indication that testimony heard during Wednesday's hearing was also a cause for concern. I would like to address some of those comments as well as language used in a particular cited case.

As for the comments from the California Based non-profit law firm:

HB 86 is designed to require the responsible parties for malicious or bad faith claims to assume some of the responsibility. It does not have a chilling affect on anyone's ability to bring a legitimate suit against a permitted project.

Further it was stated that suits against "improper permits" would fall under the definition of the bill. Improper permits are a legitimate claim and would be filed against the permitting agency not the permittee.

This is not a free speech issue as was asserted, this is a judicial issue. Likewise, it does not prevent an individual or group from petitioning their government. It simply means that the when an appeal is filed to superior court, after exhausting the administrative procedure that the basis for the appeal must not be malicious or in bad faith.

Also addressed was liability on the part of the government. This could be true in the case of an "improper permit", beyond that, the permitting agency maintains sovereign immunity. These suits will be filed by a "quote; private individual or group against another private individual or group."

In reference to the unsigned memo you received prior to today's meeting.

Citing:
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)

HB 86 has nothing to do with "SLAPP suits." It has to do with responsibility. As stated in the memo "The right to petition the government by challenging government decisions may be limited only if the appeal or lawsuit **has no objective legal merit."** HB 86 uses the term malicious or bad faith claim rather than **objective legal merit**. While there may be some concern over those terms **objective legal merit** certainly falls into the same category and can be interpreted in even broader terms that the language in HB 86.

Unlike malicious, **objective** does not have a definition in *Black's Law, 6th Edition (1990)*

legal is defined as "conforming to the law; according to law; required or permitted by law; not forbidden or discountenanced by law…."

merit is also undefined in *Black's.*

Based on this we turn, as the Supreme Court has on occasion, to Webster's for guidance:

objective: 4. treating or dealing with facts without distortion by personal feelings or prejudices

merit: the intrinsic nature of a legal case; *also*: legal significance
(emphasis added)

In conclusion:

HB 86 has been reviewed and revised through the committee process, Legal Services, and private attorneys. That review was to assure that it met Constitutional muster. For too long working Alaska has been tied up with malicious and bad faith lawsuits. Only the courts and the attorneys benefit, as their fees are already covered in statute and rules. Currently, for the defendant a malicious or bad faith claim is an automatic loss; of income, and possible breech of contract lawsuits based on failure to perform. For the plaintiff it might cost them partial court and attorney fees.

As for the issue of the First Amendment, it is critical that this be applied to all. HB 86 will protect the defendant equally in these cases by allowing them the same right to "redress of grievances." Currently, that right is being denied because the language in this bill is not already law. HB 86 allows for a cause of action against those who would attempt to use the courts to do malicious damage.

Attachments

Attachments HB 86 Senate Judiciary Committee 05/09/03

While the term **malicious claim** seldom appears in case law it is common language in various state statute. Often it is, as in the case of HB 86 used with bad faith and frivolous which is commonly defined in case law.

Examples of statute:

South Dakota Codified Laws § 120-9-6.1 Claim of barratry

> Barratry is the assertion of a frivolous or malicious claim or defense of the filing of any doc ·ment with malice or in bad faith by a party in a civil action.

Del. C § 4382(2002) TITLE 11. CRIMES AND CRIMINAL PROCEDURE, PART II

> ...factually frivolous claims, malicious claims or legally frivolous claims and ....

Idaho Code § 20-209E (2003) PENAL CODE, TITLE 20

> ...proscribing the filing of frivolous or malicious claims. *State v. Broadway-*

Minn. Stat. § 244.035 (2002) Corrections CHAPTER 244

> ...submits a frivolous or malicious claim to a court of board or who is ....
> ...submitted a frivolous or malicious claim, testifies falsely, or submitted ....

Mont. Code Anno., § 25-10-201 (2002) TITLE 25 CIVIL PROCEDURE

> ... claims as well as frivolous or malicious claims....

57 Okl. St § 566, TITLE 57. PRISONS AND REFORMATORIES, CHAPTER 8

> ...submits a frivolus or malicious claim, on one that is intended solely or ....

Tenn. Code Ann. § 41-21-807 (2002) Title 41 CORRECTIONAL INSTITUTIONS ....

> ...filed a frivolous or malicious claim to pay filing fees ....

Tex. Civ. Prac. & Rem. Code § 13.011, (2002) CIVIL PRACTICE AND REMEDIES CODE, TITLE 2

> ...336 What constitutes frivolous or malicious claim, ...

JOHN A. HILLMAN and JANET HILLMAN, individually and JANET HILLMAN as Personal Representative of the Estate of JULIE G. HILLMAN, a deceased minor, Appellants, v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Appellee.

No. 3971, Supreme Court No. S-4555

SUPREME COURT OF ALASKA

855 P.2d 1321; 1993 Alas. LEXIS 58

July 9, 1993, Decided

PRIOR HISTORY:
[**1]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Trial Court No. 3AN-85-4613 Civil. Peter A. Michalski, Judge.

DISPOSITION:
The superior court's decision granting summary judgment on the bad faith claims is AFFIRMED. The award of attorney's fees is REVERSED and REMANDED.

COUNSEL:
Michael J. Schneider, Mestas & Schneider, P.C., Anchorage, for Appellants.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for Appellee.

JUDGES:
Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices. COMPTON, Justice, with whom BURKE, Justice, joins, dissenting in part.

OPINIONBY:
MATTHEWS

OPINION:

[*1322] OPINION

MATTHEWS, Justice.

John and Janet Hillman sued their insurer, Nationwide Mutual Fire Insurance Company (Nationwide), for bad faith in the handling of their uninsured motorist claim filed after the death of their daughter. The superior court granted Nationwide's motion to dismiss the claim, [**2] concluding that the insurer's decisions to deny coverage and to demand arbitration were reasonable. The Hillmans appeal this decision along with the trial court's designation of Nationwide as the prevailing party for attorney's fee purposes. We affirm on the merits but reverse the award of attorney's fees.

I. FACTS AND PROCEEDINGS

On August 14, 1983, while driving an ATV owned by her father, eleven-year old Julie Hillman collided with an uninsured pickup truck driven by William Amis. Julie died six days later as a result of her injuries.

Nationwide had issued an automobile insurance policy to Julie's father, John Hillman, which provided uninsured motorist coverage up to $25,000 per person or $50,000 per occurrence. However, when on August 10, 1984, Janet Hillman, Julie's mother, contacted Nationwide to inquire about coverage and claim procedures, Maury Hafford, Nationwide's local adjustor, indicated that Nationwide had no liability. This denial was based on one of the "coverage exclusions" in the uninsured motorist section. n1 On February 7, 1985, after further inquiries by Mrs. Hillman, Hafford referred the claim to Nationwide's legal counsel in order to "clarify this issue [**3] of coverage for your understanding and satisfaction," as he wrote Mrs. Hillman. When, in late March 1985, Nationwide's attorney informed Hafford that "the question of coverage appears to be a roughly 50/50 proposition," Hafford wrote Hillman "seeking ... further details with regard to Julie's accident." However, he did not relay the attorney's opinion to Mrs. Hillman.

n1 The pertinent exclusion stated that

> this Uninsured Motorists insurance does not apply as follows:
>
> . . .
>
> 4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by you or a relative living in your household, but not insured for Uninsured Motorist coverage under this policy. It does not apply to bodily injury from being hit by

any such vehicle.

(Emphasis deleted.)

On April 1, 1985, the Hillmans filed a complaint against Nationwide for bad faith. The following month Nationwide offered the Hillmans $50,000 as a "compromise payment." The Hillmans rejected the offer, claiming that they were entitled to $150,000 [**4] under the insurance policy, plus medical benefits, incidental, consequential, and puniti· e damages.

The following April Judge Katz granted Nationwide's motion for summary judgment and dismissed the Hillmans' claims. The Hillmans appealed the decision.

[*1323] On July 1, 1988, this court held that the Hillmans were covered by the Nationwide policy. *Hillman v. Nationwide Mut. Fire Ins. Co., 758 P.2d 1248, 1250 (Alaska 1988)* (Hillman I). We agreed with Nationwide's interpretation of the contractual language. However, a majority of the court refused to give effect to the uninsured owned motor vehicle exclusion contained in the policy for statutory and public policy reasons. *Id. at 1251-52.*

Once coverage was established, Nationwide chose to pursue the arbitration procedure mandated by the policy for determining liability. n2 Arbitration was held on January 30, 1989. The arbitrators concluded that Amis was 33% at fault with regard to the claims related to Julie's estate. As for John and Janet's claims for negligent infliction of emotional distress, the panel agreed that Amis' negligence accounted for 15% of the harm. The arbitrators [**5] awarded $92,500 to the Hillmans. Two weeks later Nationwide paid the Hillmans $50,000, the maximum amount of the uninsured motorist coverage provided by the policy. n3

n2 In Hillman I, we rejected the Hillmans' argument that Nationwide had waived its right to arbitration. *Hillman I, 758 P.2d at 1253.* The trial court held that although "'Nationwide acted in bad faith in failing to disclose the availability of the arbitration procedure in four separate pieces of correspondence to Mrs. Hillman,' arbitration should proceed because the Hillmans were represented by counsel who 'simply made a calculated decision to attempt to obtain relief through the court system, knowing that the policy actually required dispute resolution through arbitration.'" Id. The court added that since "'none of the litigants herein has clean hands,' 'the balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process.'" Id. We found no error in the trial court's reasoning or conclusion.

n3 On June 12, 1989, Judge Gonzalez granted Nationwide's motion for partial summary judgment and barred the Hillmans from recovering arbitration damages for emotional distress. The arbitration award was consequently reduced to $55,000.

[**6]

Following arbitration, the Hillmans' bad faith litigation began anew. On June 21, 1990, Judge Michalski granted Nationwide's motion for partial summary judgment, dismissing the bad faith claims associated with Nationwide's denial of coverage and decision to arbitrate.

After several pre-trial motions, Judge Michalski reconsidered an earlier ruling and granted Nationwide's motion for summary judgment on the remaining bad faith claims. n4 Dismissal of the claims was based on Judge Michalski's belief that the Hillmans failed to demonstrate that they could show damages. After issuing the Final Judgment, the superior court identified Nationwide as the prevailing party and awarded costs and partial attorney's fees in the amount of $154,899.57.

n4 What these claims consisted of is not brought into focus in the briefs before us.

This appeal followed.

II. DISCUSSION

A. Dismissal of the Hillmans' Bad Faith Claims

1. Denial of Coverage

In *State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152 (Alaska 1989),* [**7] we held that insurance companies could be liable for the tort of bad faith in so-called "first-party" cases — cases in which insureds seek compensation from their own insurers for losses which they have suffered. *Id. at 1156.*

We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in Nicholson; we have not done so in subsequent cases, see e.g., *State Farm Mut. Auto. Ins. Co. v. Weiford, 831 P.2d 1264 (Alaska 1992);* nor do we do so now. In recognizing the tort of bad faith in first-party cases, we aligned Alaska with those jurisdictions that have followed *Gruenberg v. Aetna Insurance Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (Cal. 1973),* apparently the first case to apply bad faith as a tort in first-party cases. n5 Gruenberg articulated the tort in a manner that seemed to require unreasonable conduct and bad [*1324] faith: "Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg, 510 P.2d at 1038.*

n5 The jurisdictions that have followed Gruenberg are listed in William N. Shernoff, et al., Insurance Bad Faith Litigation, § 5.01 at 5.3 n.4 (1984 and Supp. 1992).

[**8]

A similar double requirement was imposed in *Noble v. National American Life Insurance Co., 128 Ariz. 188, 624 P.2d 866 (Ariz. 1981),* another case on which we relied in Nicholson. The Arizona Supreme Court adopted the standard expressed by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (Wis. 1978):*

The Anderson Court states:

To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. ...

The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

271 N.W.2d at 376-77.

Under the Anderson standard an insurance company may still challenge claims which are fairly debatable. [**9] The tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a reasonable basis for such action.

Noble, 624 P.2d at 868.

A leading text has this to say about the standard in first-party bad faith cases:

In third party situations, an insurer can be liable for an excess judgment when it has failed to settle a third party action against its insured. However, courts have not agreed on the standard for imposing such liability. Some courts impose liability for a negligent failure to settle the third party action; others apply a "bad faith" test that, in practical terms, amounts to a negligence test; and a third group of courts applies a fairly strict requirement of subjective bad faith. A similar divergence of views concerning the level of wrongdoing necessary to impose tort liability on insurers for denial of benefits appears to exist among courts that have adopted the tort of first party bad faith.

Although bad faith is not fully defined in some jurisdictions, courts have consistently held that a refusal to pay benefits based on a reasonable interpretation of the insurance contract is not [**10] bad faith.

Shernoff, Insurance Bad Faith Litigation, § 5.02[1] at 5-6 (1992) (footnotes omitted).

The above authorities make it clear that while the tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive, n6 it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis. n7 Neither party takes issue with this proposition. Instead, the Hillmans argue that summary judgment should not have been granted because (a) reasonableness is always a question of fact for the jury and, alternatively, (b) under the facts and circumstances of this case there was a fact question [*1325] as to whether Nationwide had a reasonable basis for denying the claim.

n6 The Wisconsin Supreme Court may have modified the Anderson standard. In *Fehring v. Republic Insurance Co., 118 Wis. 2d 299, 347 N.W.2d 595 (Wis. 1984),* the court held that proof that a reasonable insurer would not have acted as the defendant did under the circumstances establishes bad faith.

n7 In *Loyal Order of Moose v. International Fidelity Insurance Co., 797 P.2d 622 (Alaska 1990),* a case involving the somewhat analogous relationship between a surety and its obligee, we stated: "A surety may satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear." *Id. at 628.* In a footnote, we quoted an Arizona decision, *Dodge v. Fidelity and Deposit Co. of Maryland, 161 Ariz. 344, 778 P.2d 1240 (Ariz. 1989),* which uses language mirroring the rule of law employed in today's opinion: "So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability." Loyal Order of Moose, 797 at 627 n.8.

[**11]

The Hillmans' argument that reasonableness always presents a question of fact is without merit. Although questions of reasonableness often must be resolved at trial, we have not held that they are never an appropriate subject for summary judgment procedures. If, when viewing the evidence most favorably to the opponent of a motion for summary judgment, the trial court finds that a reasonable jury could only conclude that the challenged

conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered. Schneider v. Pay ' *N Save Corp., 723 P.2d 619, 623 (Alaska 1986).*

The Hillmans also argue that the superior court tacitly accepted the standard of bad faith articulated in *National Savings Life Insurance Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982).* In Dutton, the Alabama Supreme Court held that, except in extraordinary circumstances, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim ... the [bad faith] tort claim must fail and should not be submitted to the jury." *Id. at 1362.* In short, [**12] under the Dutton test, the plaintiff must prove that plaintiff is "entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law." Id.

We need not address whether the superior court adopted the Dutton standard. Dutton does not state the Alaska rule of law. Our position is merely that where the insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

The Hillmans' alternative argument — that they presented sufficient evidence to raise a fact question as to whether Nationwide's denial of coverage had a reasonable basis — requires more discussion. The Hillmans argue that they presented evidence showing that Nationwide denied coverage before making any investigation of the facts or the law and that Nationwide made subsequent, formal denials of coverage without having conducted significant investigation. They also argue that Nationwide's agents violated its guidelines and policies, which are intended to guarantee fair, honest and reasonable claims handling. Among others, this included violating the [**13] company policy requiring local adjustors to consult with higher echelons in the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policy holder; withholding from the file any explanation for why the policy holder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policy holder with a previously promised letter from Nationwide's attorney regarding coverage; lying to the policy holder about whether that letter was available; and "stonewalling" the claim for four years because of vindictiveness towards the Hillmans' attorneys. n8 Finally, the Hillmans argue that even after Nationwide had given its personnel the authority to concede coverage and settle the underlying case for the $50,000 policy limits, its Regional Claims Attorney unilaterally decided not to do so.

n8 The Hillmans maintain that Nationwide's District claims Manager and its Regional Claim Attorney concede that Nationwide failed to follow its own policies and procedures in all these respects.

[**14]

In our view none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis. The denial was based on an explicit exclusion in the policy. The question in this case is whether Nationwide was unreasonable in treating the exclusion as valid. As to this question, the Hillmans have directed us to no evidence suggesting unreasonableness. We have found that "the only reasonable interpretation" of this exclusion was that advanced by Nationwide. *Hillman I, 758 P.2d at 1250.* We also concluded in Hillman I that the exclusion was invalid on statutory and public policy grounds. Two of the five members [*1326] of this court disagreed that the exclusion was invalid. *Id. at 1255* (dissenting opinion of Justice Burke, joined by Justice Moore). See also *State Farm Mut. Auto. Ins. Co. v. Bass, 231 Ga. 269, 201 S.E.2d 444, 445 (Ga. 1973)* (where appellate court was divided on interpretation of uninsured motorist statute, "insurer was legally justified in litigating the issue and cannot, as a matter of law, be liable for ... bad faith"). Further, as we acknowledged [**15] in Hillman I, a respectable minority of jurisdictions have reached the same conclusion as the dissent. *Hillman I, 758 P.2d at 1251.* The facts that Nationwide did not follow its standard procedures in denying coverage, that it did not forward its attorney's letter to the Hillmans, and that its $50,000 offer was conditioned on settling all of Hillmans' claims rather than their uninsured motorist claims, do not suffice to create a fact question as to whether Nationwide's decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point. We conclude, therefore, that there are no genuine issues of material fact as to whether Nationwide's denial of coverage was reasonable. n9

n9 This conclusion is consistent with *State Farm Mutual Automobile Insurance Co. v. Bass, 231 Ga. 269, 201 S.E.2d 444 (Ga. 1973)* and *Aetna Casualty & Surety Co. v. Superior Court, 161 Ariz. 437, 778 P.2d 1333 (Ariz. App. 1989).* In both cases, courts found that an insurer was not liable for bad faith when it denied coverage to an insured on the basis of an uninsured motorist exception which was later held invalid. See also *Hanson v. Prudential Insurance Co. of America, 772 F.2d 580 (9th Cir. 1985)* (applying California law).

[**16]

2. Demand for Arbitration

In the same order dismissing the bad faith claim related to coverage denial, Judge Michalski also dismissed the bad faith claim based on Nationwide's demand for arbitration. Judge Michalski found that the arbitration demand was not in bad faith because Nationwide "merely exercised its right." The court reiterated the decision in its March 7, 1991 order dismissing the Hillmans' remaining bad faith claims.

The Hillmans contend that Nationwide had no reasonable basis to demand arbitration. Instead, they argue, Nationwide's agents insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims and because of vindictiveness and aggravation with their attorneys.

However, the insurance policy covered the Hillmans "only to the extent the uninsured motorist was liable." Based on evidence from the initial police report, Nationwide could reasonably conclude that Amis was only partially responsible for the accident. n10 The subsequent findings of the arbitrators, that Julie was 66% at fault for the accident and her parents 85% at fault for their emotional distress, lend additional support to Nationwide's claim that its demand [**17] for arbitration was reasonable. See *Sullivan v. Allstate Ins. Co., 111 Idaho 304, 723 P.2d 848, 850 (Idaho 1986)* (a subsequent arbitrator's decision that a claimant was partially negligent was clear evidence that an insurer's denial of liability was not in bad faith). Consequently, Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith.

n10 The report stated that Julie had "failed to yield when entering Long Lake Road from a side road." The Hillmans note that the information available to Nationwide when it insisted on arbitration was insufficient to prove that Amis was not at all at fault. This is true but irrelevant. Nationwide was entitled to arbitration if it could reasonably maintain that Amis was not completely at fault.

B. Award of Attorney's Fees

An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or "manifestly unreasonable." *Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1138 (Alaska 1989).* [**18] Designation of the prevailing party "is committed to the broad discretion of the trial court." *Apex Control Systems, Inc. v. Alaska Mechanical, Inc., 776 P.2d 310, 314 (Alaska 1989).*

The determination will be affirmed on appeal "unless it is shown that the court abused its discretion by issuing a decision which is arbitrary, capricious, manifestly [*1327] unreasonable, or improperly motivated."

Howard S. Lease Constr. Co. & Assoc. v. Holly, 725 P.2d 712, 720 (Alaska 1986) (quoting *City of Yakutat v. Ryman, 654 P.2d 785, 793 (Alaska 1982)).*

After the Final Judgment was issued, Judge Michalski awarded Nationwide approximately $155,000 in costs and partial attorney's fees. n11 The Hillmans argue that the trial court abused its discretion when it determined that Nationwide was the prevailing party. The Hillmans claim that since they prevailed on two of the three issues in the case, coverage and liability, but not on bad faith, they were the "prevailing party."

n11 The total consisted of $44,448.57 in costs and $110,451.00 in fees. The attorney's fees award was 40% of the total amount of attorney's fees Nationwide incurred after July 1988.

[**19]

Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party. n12 "The prevailing party is the one 'who has successfully prosecuted or defended against the action, the one who is successful on the "main issue" of the action and "in whose favor the decision or verdict is rendered and the judgment entered."'" *Day v. Moore, 771 P.2d 436, 437 (Alaska 1989)* (quoting *Adoption of V.M.C., 528 P.2d 788, 795 n.14 (Alaska 1974)).*

n12 Alaska R. Civ. P. 82(a)(2) states:

In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

This court has recognized that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party." *Owen Jones & Sons, Inc. v. C.R. Lewis Co., 497 P.2d 312 313-14 (Alaska 1972).* [**20] We have been cited to two cases n13 where the party who obtained an affirmative recovery was held not to be the prevailing party by the trial court and this decision was affirmed on appeal. The cases are Owen Jones and *Hutchins v. Schwartz, 724 P.2d 1194 (Alaska 1986).* In Hutchins, the plaintiff sought $275,000 in compensatory damages. After a trial the jury returned a verdict in favor of the plaintiff, awarding some $1,900, which in turn had to be reduced by 40% because of the plaintiff's comparative negligence. *Id. at 1204.* Thus the plaintiff's affirmative award was only approximately $1,100. This recovery is so small in comparison with what was sought that it may properly be considered de minimis. The verdict

essentially was a defense verdict. n14

n13 *Buoy v. ERA Helicopters, Inc., 771 P.2d 439 (Alaska 1989),* is not a case in which the plaintiff received an affirmative recovery. The $141,676 jury verdict the plaintiff received in that case was reduced to nothing because of prior settlements which the plaintiff had made. *Id. at 441.*

[**21]

n14 In addition, in Hutchins the defendant had made an offer of judgment under Civil Rule 68 for $35,000 and therefore under that rule he was in any case entitled to attorney's fees incurred after the date of the offer. Id. at 1203.

Owen Jones may not be so easily distinguished. There, Jones-Western, a contractor, sued its subcontractor, C.R. Lewis Co., to recover approximately $120,000 in progress payments that Jones-Western had paid C.R. Lewis in connection with construction of a building that was destroyed by an earthquake before it was completed. The subcontractor counterclaimed for services rendered and materials furnished before the collapse. The trial court held that Jones-Western was not entitled to recover progress payments and that the subcontractor had a claim in quantum meruit for the reasonable value of the services and materials supplied prior to the earthquake. The trial court fixed this sum at approximately $142,000. Thus, the subcontractor would have been entitled to an affirmative recovery of some $22,000 except for the fact that it salvaged some materials [**22] from the building after the earthquake on which the court placed a value of $30,000. Because of this, Jones-Western was left with a small affirmative recovery. We described this recovery in Owen Jones as merely "incidental": "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being considered [*1328] a prevailing party." *Owen Jones, 497 P.2d at 314, n.5.* We also noted that the "main issue" in the case below was whether the subcontractor had an obligation to refund the progress payments. The subcontractor prevailed on this issue. *Id. at 314.* Accordingly, we affirmed the trial court's holding that the subcontractor was the prevailing party. Id.

In reaching our conclusion in Owen Jones, we distinguished *Buza v. Columbia Lumber Co., 395 P.2d 511 (Alaska 1964).* Buza was a suit brought for conversion of a quantity of logs. The plaintiff sought the return of the logs, worth some $8,000, plus compensatory and punitive damages of $31,000. After a trial the plaintiff [**23] was awarded the logs, but no damages. We held, nonetheless, that the plaintiff was the prevailing party, defining that term to mean the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." *Buza, 395 P.2d at 514.*

In Owen Jones we distinguished Buza as follows:

The main issue in that case was the ownership of a quantity of logs, and the plaintiff proved his right to the logs although he was not able to obtain compensating or punitive damages.

The instant case differs because the recovery of appellants was based only on an accounting for materials salvaged by the appellee. It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract ....

Owen Jones, 497 P.2d at 314 (footnote omitted).

In our view the present case more closely resembles Buza than Owen Jones. Here, as in Buza, plaintiff prevailed on the basic liability question and received an affirmative recovery [**24] based on its successful litigation of that question, which was substantial in amount. Owen Jones is distinguishable because the plaintiff's affirmative recovery there was based on a minor accounting issue, not on the liability theory which plaintiff tried unsuccessfully before the court.

In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received $50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case. We conclude therefore that the trial court erred in refusing to designate the Hillmans as the prevailing party. n15 Accordingly the award of attorney's fees must be reversed and this case remanded so that an award of reasonable attorney's fees may be made in favor of the Hillmans.

n15 The fact that Nationwide made an offer of settlement of $50,000 is irrelevant to the question of who the prevailing party is since this offer was not made under civil Rule 68 *Myers v. Snow White Cleaners & Linen Supply, Inc., 770 P.2d 750, 753 (Alaska 1989)* ("no offers not in compliance with Civil Rule 68 should be considered in determining questions of costs and attorney's fees").

[**25]

III. CONCLUSION

We affirm the decision of the superior court grant-

ing Nationwide's motion for summary judgment on the Hillmans' bad faith claims. Nationwide's decisions to deny coverage and then to demand arbitration were reasonable. In light of our decision, there is no reason to consider the damages issue. n16

n16 In addition, we decline to address the Hillmans' claim that several of the superior court's evidentiary rulings were an abuse of discretion. Even if the superior court's rulings concerning the admissibility of evidence during trial were erroneous, such error was harmless where the case was never submitted to the jury.

The superior court's designation of Nationwide as the prevailing party was an abuse of discretion. Since the Hillmans prevailed on two of the three issues central to the case and won a substantial affirmative recovery based on these issues, they were the prevailing party. The trial court [*1329] should make a new award reflecting this determination.

The superior court's decision granting summary [**26] judgment on the bad faith claims is AFFIRMED. The award of attorney's fees is REVERSED and REMANDED.

DISSENTBY:
COMPTON (In Part)

DISSENT:

COMPTON, Justice, with whom, BURKE, Justice, joins, dissenting in part.

While declining to comprehensively **define** the elements of the tort of **bad faith,** the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability regardless of any subjective bad faith. Because the court's analysis is contrary to law and not supported by policy, and because a reasonable jury could find that Nationwide acted with subjective bad faith, I dissent.

The court concludes that the tort of bad faith in the context of first party insurance claims necessarily includes a requirement that the insurer's refusal to honor the claim be made without a reasonable basis. It should be noted that the Hillmans do not accept this proposition, because contrary to the court's conclusion, the Hillmans do not accept that a reasonable basis [**27] can exist if actions are motivated by improper purposes. The Hillmans argue that because evidence was presented that shows Nationwide's denial was motivated by self serving, dishonest and improper purposes, summary judgment was inappropriate. "Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination." Thus the issue is properly before us.

Until today the covenant of good faith and fair dealing, which we have implied in every contract including insurance contracts, has imposed duties above and beyond express contractual duties. *Guin v. Ha, 591 P.2d 1281, 1291 (Alaska 1981).* The additional duties imposed by the covenant of good faith and fair dealing were not eliminated when this court accepted the argument that in insurance contracts, a breach of the covenant sounds in tort. "That responsibility is not the requirement mandated by the terms of the policy itself — to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its [**28] contractual responsibilities." *Gruenberg v. Aetna Insurance Company, 9 Cal. 3d 566, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480 (Cal. 1973).*

The covenant of good faith and fair dealing requires that the party act with both subjective good faith and objective fairness. *Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1225 (Alaska 1992).* It is objectively reasonable to rely on contractual rights. Contractual rights, therefore, provide a reasonable basis for a position. But this does not end our inquiry. The covenant of good faith and fair dealing requires that contractual rights be pursued with subjective good faith. In *Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983),* even though the employment at will contract allowed the firing of Mitford for no reason at all, "the circumstances surrounding Mitford's termination give rise to an inference that he was fired ... for the purpose of preventing him from sharing in future profits," thereby violating the duty of good faith and fair dealing. In *Loyal Order of Moose v. International Fidelity Insurance Co., 797 P.2d 622, 629 (Alaska 1990),* [**29] we noted that while the surety had a contractual right to demand arbitration, "the demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

We have declined to hold that a breach of the covenant of good faith and fair dealing sounds in tort in the context of employment contracts. However, because of the special nature of insurance contracts, a breach of the covenant of good faith and fair dealing in first party insurance claims does sound in tort. *State Farm Fire & Cas. Co. v.* [*1330] *Nicholson, 777 P.2d 1152, 1156-57 (Alaska 1989).*

The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the in-

sured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Id., quoting Louderback & Jurika, Standards for Limiting the Tort of Bad [**30] Faith Breach of Contract, *16 U.S.F.L. Rev. 187, 200-01 (1982)*. The reason for holding that such claims sound in tort is because "an action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds." Id., quoting *White v. Unigard Mutual Insurance Co., 112 Idaho 94, 730 P.2d 1014, 1017-18 (Idaho 1986)*.

Nicholson is consistent with our policy that because of the special nature of insurance contracts, they are particularly susceptible to public policy considerations. *Hillman v. Nationwide Mutual Fire Ins. Co., 758 P.2d 1248, 1250 (Alaska 1988)* (invalidating uninsured motor vehicle exclusion on the basis of public policy); *CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113 (Alaska 1993)* (granting an insured the unilateral right to select independent counsel in cases where an insurer has reserved its rights, despite the insurer's express contractual right to select counsel); *Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315 (Alaska 1989)* [**31] (concluding that a time limitation on commencement of suit will only be enforced on a showing of prejudice); *Alaska Energy Authority v. Fairmont Insurance Co., 845 P.2d 420 (Alaska 1993)* (concluding that the failure to file suit within the time limitation of the contract does not bar a claim without a showing of prejudice).

In spite of these cases, this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail regardless of any evidence of subjective bad faith. The court interprets our adoption of Gruenberg as "seeming" to require proof of both objectively unfair conduct and subjective bad faith. Gruenberg was the first case to hold that a breach of the covenant of good faith and fair dealing sounds in tort, giving the plaintiff broader remedies than those in contract. While in Gruenberg there may have been evidence of both unfair conduct and bad faith, the court clearly articulated "the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." [**32] *510 P.2d at 1037* (emphasis added).

Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim. n1

n1 This court stated in *State Farm Mutual Auto Insurance Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992)*, that an insured may bring a bad faith claim "in tort as well as in contract." The duty of good faith and fair dealing implied in every contract requires the insurer to act with subjective good faith and objective fairness, unlike the tort of bad faith which, as now defined, permits the insurer to act with subjective bad faith. If Weiford is still a correct statement of the law, then the proper disposition of this case would be to remand it to the superior court for further proceedings. The Hillmans should be permitted to proceed on a claim based on a breach of the implied covenant of good faith and fair dealing arising out of the contractual relationship, distinct from a claim based on the tort of bad faith. They have set forth specific facts which, viewed in a light most favorable to them, raise genuine issues of material fact. Contractual damages based on a breach of the implied covenant of good faith and fair dealing may be narrower in scope than tort damages, yet some relief may be available to the Hillmans. However, the correctness of the statement in Weiford is now doubtful, despite this court's assertion that it is declining to "comprehensively" define the elements of the tort of bad faith.

[**33]

[*1331] This is contrary to our previous holdings. For example, in *State Farm Mutual Auto Insurance Co. v. Weiford, 831 P.2d 1264, 1266 (Alaska 1992)*, we reaffirmed that "bad faith claims brought by insured persons against their insurance companies may be brought in tort as well as in contract." We vacated the award of punitive damages because "the $20,000 offer clearly was reasonable. While the suspect note to the file might be reflective of bad motive, since the offer in question was reasonable, the note cannot independently form the basis for a punitive damages award." *Id. at 1268*. However, we noted that "the crux of Weiford's bad faith case was the testimony of her expert, George Broatch. Broatch testified that no single act of State Farm amounted to bad faith, but that cumulatively State Farm's actions did: 'It—to me it was a matter of the company philosophy. I don't really have any quarrel with the day to day handling of the file

particularly.'" *Id. at 1267.* We concluded "that there was sufficient evidence to support a jury finding that State Farm acted in bad faith." *Id. at 1269.* [**34] The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, i.e. either objectively unfairly or with subjective bad faith.

In reviewing a grant of summary judgment we view the facts in the light most favorable to the non-prevailing party. *Loyal Order of Moose, 797 P.2d at 628.* The Hillmans presented evidence that Nationwide denied coverage before making an investigation of the facts or law. Nationwide violated its internal guidelines and policies which guarantee fair, honest and reasonable claims handling. Specifically, Nationwide: (1) failed to follow internal procedures when local adjustors failed to consult with higher echelons in the company before denying the death claim; (2) failed to resolve all reasonable doubts about coverage in favor of the policy holder; (3) failed to explain why a nonwaiver agreement was required; (4) obtained a legal opinion in order to justify denying the claim; (5) failed to provide the Hillmans with previously promised information from its attorney; [**35] (6) lied about whether a letter from its attorney was available; (7) stonewalled for four years because of alleged vindictiveness toward the Hillmans' attorneys; and, (8) even after authority to concede coverage and settle the case was granted, the Regional Claims Attorney unilaterally decided not to settle.

Taking these assertions as true, n2 a reasonable jury could conclude that by failing to investigate, lying to the policy holder and stonewalling for four years, Nationwide acted with subjective bad faith. The grant of summary judgment was improper. Yet this court concludes that as long as Nationwide had a reasonable contractual basis for denying liability, evidence of bad faith and unfair dealings "have little or no relevance."

> n2 While the Hillmans have not at this point presented convincing evidence of their assertions, they have set forth specific facts which, viewed in the light most favorable to the Hillmans, raise a genuine issue of fact.

The court applies this same standard to the question of arbitration. [**36] Again, on summary judgment we view the facts in a light most favorable to the non-prevailing party. *Loyal Order of Moose, 797 P.2d at 628.* The Hillmans claim Nationwide insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims, and because of vindictiveness and aggravation with Hillmans' attorneys. Again, a reasonable jury could conclude that Nationwide acted with subjective bad faith. Yet because Nationwide's insurance policy contained an arbitration provision, "Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith." This conclusion ignores *Loyal Order of Moose, 797 P.2d at 629,* which specifically states that even though a surety may have a right to arbitration, "the demand for arbitration may not itself be [*1332] made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim." The court's conclusion again effectively eliminates the covenant of good faith and fair dealing.

The Hillmans presented evidence from which a reasonable jury could conclude Nationwide acted with subjective bad faith. There are genuine issues [**37] of material fact which preclude summary judgment.

STATE FARM FIRE & CASUALTY COMPANY, Appellant, v. David G. NICHOLSON and Doreen C. Nicholson, husband and wife, Appellees

No. 3465, File No. S-2303

Supreme Court of Alaska

777 P.2d 1152; 1989 Alas. LEXIS 82

July 21, 1989

PRIOR HISTORY:
[**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, 3AN-85-14616 Civil, Anchorage, J. Justin Ripley, Judge.

COUNSEL:
Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellant.

Ralph B. Cushman, Anchorage, for Appellees.

JUDGES:
Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

OPINIONBY:
MOORE

OPINION:

[*1153] David and Noreen Nicholson sued State Farm Fire & Casualty Company for unreasonably and willfully breaching its duty to act in good faith. The Nicholsons alleged that State Farm did not promptly settle a claim under their homeowner's policy. The jury returned a special verdict in favor of the Nicholsons, awarding $105,700 in compensatory damages and $7,500 in punitive damages. On appeal, we address whether the breach of the implied covenant of good faith and fair dealing in "first-party" insurance cases is a tort, thereby possibly justifying an award of punitive damages, and whether the award of prejudgment interest was appropriate.

I.

In 1981, the Nicholsons purchased homeowner's insurance from State Farm, covering their residence at 1841 Early View Drive in Anchorage. In the event the Nicholsons suffered **[**2]** a loss that was covered, the policy obligated State Farm "to place the insured back in the situation they were in prior to the loss."

In February, 1983 a water main belonging to Central Alaska Utilities, Inc. broke. The water main was buried eight feet underground and ran beside the Nicholson house and other houses in the subdivision. The escaping water caused the soil underneath the house to erode and settle. More than a year later, on March 27, 1984, the Nicholsons first contacted State Farm to report the loss. On April 6, 1984 Vere Hotchkiss, claims adjuster for State Farm, made an initial on-premise inspection, and returned again on April 11, 1984 with an engineer to conduct another inspection. Relying on the Franklin & Allen engineering report issued on April 13, 1984, which stated two possibilities for the loss i.e. water alone or permafrost and earth settling, State Farm denied coverage on April 22, 1984, because its policy contained an exclusion for broad water damage and damage caused by earth movement. Furthermore, the Franklin & Allen report recommended that the Nicholson house be observed during **[*1154]** the winter of 1984-1985 to determine if any more settling would occur. Another **[**3]** consulting engineering report agreed with the Franklin & Allen report that a problem with the Nicholson house was permafrost degradation.

In the meantime, State Farm agreed to cover the Nicholsons' next door neighbor for the same loss. On June 14, 1984 State Farm now agreed to extend coverage to the Nicholsons for their loss and requested them to obtain property appraisals. On August 15, 1984 a general contractor J.B. White, Inc. inspected the premises and declined to give a repair estimate to the Nicholsons until a soil survey was performed. In September 1984, Shannon & Wilson drilled two test holes and issued two reports to the Nicholsons on October 23 and December 3, 1984. During the winter of 1985 engineers took perimeter levels around the house twice a month until March 11, 1985. During this time the Nicholsons experienced electrical and structural problems in their house. They were upset with the delay in fixing their house.

On May 29, 1985, a new State Farm adjuster, Roberta Halcro contacted the Nicholsons and requested they con-

tact David Chapman of Pac-Rim Construction Services to provide an estimate for the repair of the house by either demolition or replacement. The Pac-Rim [**4] repair report was issued on June 14, 1985 and both repair estimates exceeded $163,000, well in excess of the policy limits of $113,264.

State Farm then obtained an appraisal of the property with improvements as of September 24, 1985 for $98,200, and offered to pay that amount plus additional reimbursement for repair or replacement costs up to the policy limits. The offer was made on October 9, 1985. The Nicholsons rejected this offer and filed suit against State Farm on October 17, 1985. n1

n1 In the October 9, 1985 letter State Farm requested (1) that the Nicholsons within 60 days submit a sworn statement of proof of loss; and (2) informed the Nicholsons that they are entitled to replacement or repair cost up to the policy limits of $113,264. The Nicholsons' attorney, Ralph Cushman, made a counteroffer (1) that State Farm pay close to the policy limits, and waive subrogation rights; or (2) pay something in the $170,000 range, and pursue subrogation with the insureds. State Farm rejected these counteroffers.

At trial in March 1987, State Farm offered testimony from several witnesses that the adjustment of this claim was highly unusual, difficult, and complex. The Nicholsons [**5] offered testimony from Robert Lowe, as an expert independent claim adjuster, that State Farm's delay in deciding coverage and settlement of the claim was unreasonable and outrageous.

II.

State Farm argues that the tort of bad faith handling of insurance claims should only be recognized in the context of liability claims, also known as third-party claims, n2 and not in first-party cases, in which an insured seeks coverage for losses he or she incurred. n3 The Nicholsons argue that Alaska should recognize the tort of bad faith in first-party as well as third-party cases.

n2 Third-party cases involve an insurance company satisfying a claim against the insured by a third party. W. Shernoff, S. Gage & H. Levine, *Insurance Bad Faith Litigation* § 3.01, at 3-3 (1987) [hereinafter W. Shernoff].

n3 Jury Instruction 16 indicates that the superior court treated the breach of the implied covenant of bad faith and fair dealing as a tort. Jury Instruction 16 stated:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance or its enforcement.

An insurance company which intentionally deals in bad faith with its insured by refusing unreasonably to pay the insured for a valid claim, or settle a valid claim, covered by the policy may be found liable in tort for damages which proximately result from such conduct. Bad faith does not mean bad judgment or negligence, but means having a dishonest purpose through some motive of self-interest or ill will, or having maliciousness or hostile feelings toward its insureds, or acting with reckless indifference to the interests or rights of its insureds.

[**6] The tort of bad faith in the insurance context can be traced to the covenant of good faith and fair dealing, a contractual duty implied in all insurance policies. W. Shernoff, *supra* note 1, § 2.01. Jurisdictions [*1155] differ in their treatment of a breach of the implied covenant of good faith and fair dealing in the insurance context. Some jurisdictions characterize the cause of action as merely a breach of contract; others characterize the cause of action as a tort in third-party cases but not first-party cases; still others characterize the cause of action as a tort in both first-party and third-party cases. *Id.* §§ 2.01-2.02 (and cases cited therein); *see also* 15A R. Anderson, *Couch Cyclopedia of Insurance Law* § 58.3 (1983).

Courts first recognized the tort of bad faith in third-party cases. W. Shernoff, *supra* note 1, § 1.07[2], at 1-24 to 1-25. The California Supreme Court was the first to apply the tort of bad faith to first-party cases. *See Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).* In *Gruenberg,* after fire damaged the insured's restaurant, the insured sought to recover his loss pursuant to a fire policy. After the insurer denied liability under the [**7] policy, the insured sued for the tort of bad faith. The court extended its prior holdings, which recognized the tort of bad faith in third-party cases, n4 to the first-party case before it. *Id.* at 1037-38. The court reasoned that, in third-party cases,

we considered the duty of the insurer to act in good faith and fairly in handling the claims of third persons against the insured, described as a "duty to accept reasonable settlements"; in the case before us we consider the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. These are merely two different aspects of the same duty. That responsibility is not the requirement mandated by the terms of the policy itself — to defend, settle, or pay. It is the obliga-

tion, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action [**8] in tort for breach of an implied covenant of good faith and fair dealing.

Id. at 1037 (emphasis in original).

n4 *See generally Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958)* (tort of bad faith recognized in third-party cases).

Since *Gruenberg*, a great number of other jurisdictions have recognized the tort of bad faith in first-party cases. n5

n5 *See Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149, 151-52 (1980)* (listing jurisdictions which have adopted *Gruenberg*); Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S., 23 Tort & Ins. L.J. 812, 824-27 (1988).*

In *Noble v. National American Life Insurance Co., 128 Ariz. 188, 624 P.2d 866, 867-68 (Ariz. 1981)*, the Arizona Supreme Court, in following *Gruenberg*, noted:

We are persuaded that there are sound reasons for recognizing the rule announced in *Gruenberg*. The special nature of an insurance contract has been recognized by courts and legislatures for many years .... An insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity. In securing the reasonable [**9] expectations of the insured under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company .... Often the insured is in an especially vulnerable economic position when such a casualty loss occurs. The whole purpose of insurance is defeated if an insurance company can refuse or fail, without justification, to pay a valid claim. We have determined that it is reasonable to conclude that there is a legal duty implied in an insurance contract that the insurance company must act in good faith in dealing with its insured on a claim, and a violation of that duty of good faith is a tort.

(Citations omitted). n6 In *White v. Unigard Mutual Insurance Co., 112 Idaho 94, 730* [*1156] *P.2d 1014 (1986)*, the Idaho Supreme Court raised an additional policy justification for holding that the breach of the covenant of good faith and fair dealing sounds in tort:

An action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds .... The requirement that contract damages be foreseeable at the time of contracting, in some cases [**10] would bar recovery for damages proximately caused by the insurer's bad faith. The measurement of recoverable damages in tort is not limited to those foreseeable at the time of the tortious act; rather they include "[a] reasonable amount which will compensate plaintiff for *all* actual detriment proximately caused by the defendant's wrongful conduct."

Id. at 1017-18 (citations omitted). The Texas Supreme Court discussed both justifications in its decision to recognize a common-law cause of action for breach of the duty of good faith and fair dealing:

In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims. In addition, without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed. An insurance company has exclusive control over the evaluation, processing and denial of claims.

Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

n6 As one commentator has noted:

[A] related concern is the expectation of the insurance-consuming public which the industry has fostered itself. Allstate's slogan "You're in Good Hands," Travelers' motto of protection "Under the Umbrella," and Fireman's Fund symbolic protection beneath the "Fireman's Hat," exemplify the industry's own efforts to portray itself as a repository of the public trust. But with the public trust may be visited responsibility for a violation of such trust as evidenced by recent recognition of extra-contractual "rights" of insureds or tortious responsibility of insurers beyond the four corners of its insuring agreement — particulary in the first-party area.

McMains, *Bad Faith Claims Handling — New Frontiers: A Multi-state Cause of Action in Search of a Home, 53 J. Air L. & Com. 901, 904 (1988).* It is noteworthy that the insurance company involved in this appeal promotes itself in national advertisements with the slogan, "Like a good neighbor, State

Farm is there."

[**11] In the past, we have declined to recognize a common-law tort duty of good faith and fair dealing in other contexts. For example, in *O.K. Lumber Co. v. Providence Washington Insurance Co., 759 P.2d 523 (Alaska 1988)*, an injured claimant sued a third-party tortfeasor's insurer for failure to promptly settle a claim. We declined to recognize a common-law tort duty of good faith and fair dealing running from an insurer to an injured claimant absent a contractual relationship. However, the decision in *O.K. Lumber* is not controlling in the instant appeal because there is a contractual relationship between State Farm and the Nicholsons: the Nicholsons are both the insureds and the injured claimants.

In *ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153-54 (Alaska 1988)*, we ruled that an employer's breach of the duty of good faith and fair dealing implied in an employment contract is a breach of contract which does not constitute an independent tort. However, employment contracts are substantially different from insurance contracts. Therefore, we do not extend *Akers* to the insurance context.

We hold that, in the first-party context, an insured's cause of action against an insurer [**12] for breach of the duty of good faith and fair dealing sounds in tort. The special relationship between the insured and insurer in the insurance context justifies this result. n7 State Farm contends that such a holding turns every breach of a [*1157] commercial contract into a tort cause of action. We disagree. As commentators have noted:

The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract, 16 U.S.F. L. Rev. 187, 200-01 (1982)* (footnotes omitted).

n7 We reject the holding of *Santilli v. State Farm Insurance Co., 278 Ore. 53, 562 P.2d 965, 969 (1977)*, that the justifications supporting third-party actions do not support first-party actions. The *Santilli* court ignores the insurer's unequal bargaining power as to the insured's claim and the insurer's interest in delaying payment in order to obtain a settlement.

[**13] The availability of a tort action for breach of the duty of good faith and fair dealing will provide needed incentive to insurers to honor their implied covenant to their insureds. We reject the argument that the statutory scheme regulating the insurance industry provides sufficient incentive to insurers. n8 *See AS 21.36.010-*.420. As the Idaho Supreme Court noted in *White*, n9 the State has limited means with which to police the insurance industry. Furthermore, the statutory remedies fail to compensate the insured for damages involved in the insurer's bad faith denial of coverage. *See AS 21.36.320(d)*, (e); *O.K. Lumber, 759 P.2d at 526-27.*

n8 *See, e.g., Spencer, 611 P.2d at 158.*

n9 *White, 730 P.2d at 1019 n.3.*

In conclusion, we hold that the trial court did not err in instructing the jury that an insurer's bad faith failure to settle a first-party claim is a tort.

III.

Since State Farm's wrongful acts constituted a tort, punitive damages were also possible. The jury awarded the Nicholsons $7,500 in punitive damages. State Farm argues that the Alaska Insurance Code preempts any punitive damages claims in first-party actions. We disagree. State Farm relies [**14] on the preemption provisions in *AS 21.03.060* and the civil penalty provisions for unfair trade practices. *See AS 21.36.320*; 21.90.020. The preemption provision cited by State Farm involves political subdivisions of the state and in no way addresses the issue of damages against insurance companies in civil actions. n10 The civil penalties provisions involve unfair or deceptive practices prohibited by the code. *AS 21.36.320.*

n10 *AS 21.03.060* reads in full:

The state hereby pre-empts the field of regulating insurers and their general agents, agents and representatives. All political subdivisions of the state, including home rule boroughs or cities, are prohibited from requiring of an insurer, general agent, agent or representative regulated under this title an authorization, permit or registration of any kind for conducting transactions lawful under the authority granted by the state under this title.

Under *AS 21.36.125*, entitled "Unfair claims settlement practices," an insurance company only violates the chapter if it engages in certain proscribed acts "with such frequency as to indicate a practice." *AS 21.36.125.* Therefore, the potential $25,000 fine referred to by State [**15] Farm thus is not applicable unless the insurer is committing the unfair claim settlement practice with

considerable "frequency." The civil penalty under *AS 21.90.020* is also inapplicable absent "frequent" violations of the insurance code. At most, the Director of Insurance may impose a $1,000 penalty for an isolated act prohibited under the code. *AS 21.36.320(c)*, (d).

As the court of appeals noted in *Hugo v. City of Fairbanks, 658 P.2d 155, 161 (Alaska App. 1983)*:

Statutes or ordinances that establish rights or exact penalties that are in derogation of the common law are construed in a manner that effects the least change possible in the common law. If a statute is intended to change the common law, then "the legislative purpose to do so must be clearly and plainly expressed."

Given the limited scope and civil penalties provided by the Alaska Insurance Code, we conclude that the legislature did not intend **[*1158]** to alter a private party's right to seek punitive damages.

Next, State Farm contends that the evidence does not support an award of punitive damages. To support punitive damages, the wrongdoer's conduct must be "outrageous, such as acts done with malice or bad motives or **[**16]** reckless indifference to the interests of another." *Sturm, Ruger & Co., Inc., v. Day, 594 P2d 38, 46 (Alaska 1979), overruled on other grounds, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985)*.

Based upon the factual scenario set forth above in section I, as well as our review of the entire record, we conclude there was insufficient evidence as a matter of law to support a finding of outrageous conduct or a gross deviation from an acceptable standard of reasonable conduct in order to sustain an award of punitive damages. Thus, the trial court erred in instructing the jury on the punitive damages issue. *See Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 773-74 (Alaska 1982)*.

IV.

The jury returned a verdict for the Nicholsons in the amount of $105,700 in compensatory damages. In its final judgment, the superior court ordered State Farm to pay prejudgment interest on the $105,700. State Farm argues that the estimates upon which the jury relied in setting the compensatory damage award were current at trial, and that the trial judge should not have added prejudgment interest to that portion of the damage award.

We discussed the issue of prejudgment interest in *Farnsworth* **[**17]** *v. Steiner, 638 P.2d 181, 183-85 (Alaska 1981)*. n11 The rationale behind awarding prejudgment interest is that "judgment creditors are entitled to the time value of the compensation for their injuries [which is] recognized by this court in *all* civil cases." *Farnsworth, 638 P.2d at 184*. We categorized prejudgment interest as a "consequential injury" and held that it was "compensation and not a cost of litigation." *Id.* Since prejudgment interest is an item of compensatory damages,

[an] insurer will not be liable for prejudgment interest in excess of the applicable damage limitation[;] the insurer will be liable for any prejudgment interest which, when added to damages rendered against the insured, does not exceed the limitation on liability.

Guin v. Ha, 591 P.2d 1281, 1287 (Alaska 1979); see also American Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1343 (Alaska 1982). Prejudgment interest should be denied "in only the most unusual case," such as double recovery. *Id.*

n11 *See also Morris v. Morris, 724 P.2d 527, 529 (Alaska 1986)*.

State Farm relies on the decision in *Sebring v. Colver, 649 P.2d 932 (Alaska 1982)*, in which we discussed one situation **[**18]** when prejudgment interest was inappropriate. In *Sebring*, the jury returned a verdict of $54,000 in compensatory damages, $42,000 of which represented the cost of future repairs. *Id. at 936*. The trial court awarded prejudgment interest on the entire $54,000. Based on the fact that "the probable basis for the jury award was the estimated cost of repairs at the time of trial," *id.*, we held that prejudgment interest should not have been awarded on that portion of damages representing the cost of future repairs. We reasoned:

Since the financial impact of the passage of time was thus incorporated into the jury's damage award, any award of prejudgment interest on this amount would therefore constitute a double recovery.

Id.

State Farm misconstrues the decision in *Sebring* insofar as it contends that prejudgment interest is inappropriate as a matter of law when repair estimates are current at the time of trial. *Sebring* stands for the simple principle that prejudgment interest is not available when such an award would constitute a double recovery. In the instant case, there is no such danger; therefore, *Sebring* does not preclude an award of prejudgment interest.

State **[**19]** Farm also argues that the superior court erred by awarding prejudgment **[*1159]** interest because its policy states that the insured is not entitled to payment until thirty days after a final judgment is entered.

We disagree. In *Davis v. Criterion Insurance Co., 754 P.2d 1331, 1332 (Alaska 1988)*, we ruled that an insurer who wrongfully denies coverage has materially breached the contract and may not require its insured to comply

with other terms of the policy. In the instant case, the jury found that State Farm should have made a settlement offer in April 1985. Its failure to do so constitutes a material breach of contract. Therefore, we conclude that State Farm may not enforce the policy provision to defeat the Nicholsons' right to collect prejudgment interest on the damage award.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

LAREENE BURRECE, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-6688, No. 1618

COURT OF APPEALS OF ALASKA

976 P.2d 241; 1999 Alas. App. LEXIS 5

February 5, 1999, Decided

PRIOR HISTORY:
[1]** Appeal from the Superior Court, Third Judicial District, Anchorage, Beverly W. Cutler, Judge. Trial Court No. 3PA-S96-52CR.

DISPOSITION:
AFFIRMED.

COUNSEL:
Eugene B. Cyrus, Eagle River, for Appellant.

Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

JUDGES:
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges. COATS, Chief Judge, concurring. MANNHEIMER, Judge, dissenting.

OPINIONBY:
STEWART

OPINION:

[*241] OPINION

STEWART, Judge.

Lareene Burrece pleaded no contest to one count of fourth-degree misconduct involving a controlled substance. n1 She preserved her right to appeal the order denying her unsuccessful attack on the search warrant for her **[*242]** property in Big Lake. n2 Burrece claims that the tip supporting the warrant was stale, that evidence of electric consumption could not corroborate that tip, and that the district court's **[**2]** reliance on a trooper's telephonic testimony that supplemented his affidavit was impermissible. We conclude that all of those claims fail and affirm her conviction.

n1 *AS 11.71.040(a)(5).*

n2 See *Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974).*

Facts and proceedings

According to the affidavit filed in support of the search warrant application for Burrece's property, Alaska State Trooper Timothy L. Bleicher interviewed Troy Heaven on August 4, 1995, regarding his possession of marijuana. In that interview, Heaven told Bleicher that he stole the marijuana when he and two juveniles burglarized the Big Lake Laundry Mat. Heaven also told Bleicher that he knew of another place where marijuana was grown. That place was located on Tract D, Echo Hills Subdivision, located at about .5 mile Echo Lake Drive. Heaven knew of the place because a friend of his had lived there.

In the interview, Heaven told Bleicher that his friend had been asked to leave by the owner of the property. Heaven said he drove **[**3]** out to the property about four months before the interview and found his friend removing a large bag of marijuana from a white trailer located on the property. Heaven reported that his friend told him that there were about twelve marijuana plants inside the trailer.

Bleicher went to the property and observed several structures including a white trailer with "boarded up and covered" windows. Bleicher learned that Mike and Lareene Burrece were the owners of the property that Heaven identified.

Bleicher asked John Bogue, the Matanuska Electric Association's Energy Service Manager, about the electricity consumption for that property. He was told by Bogue that there were two accounts on the property, both in the names of Mike and Lareene Burrece. Bogue told him that the electrical consumption was suspicious and consistent with a marijuana grow because the pattern of consumption was inconsistent with the normal increase in the winter months and the normal decrease in the summer months. Bogue did not provide any data on the kilowatts used on the property but did indicate that the unusual pattern had continued after Heaven's visit to the property.