

The American Bar Association's 50-State Survey on Consumer Class Action Law

ALASKA

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A. Alaska's Unfair Trade Practices and Consumer Protection Statute

1. Statute Has Broad Application

Alaska codifies its unfair trade practices and consumer protection laws in AS § 45.50.471 –.561 (the “Statute”). AS 45.50.471(a) provides that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.” AS 45.50.471(b) enumerates 52 separate prohibited types of “[u]nfair methods of competition’ and ‘unfair or deceptive acts or practices.’” These enumerated acts are not an exclusive list of prohibited acts. The Statute provides that the “[u]nfair methods of competition’ and ‘unfair or deceptive acts or practices’ . . . ‘include, but are not limited to’” the enumerated acts.

The Alaska Supreme Court has clarified that AS 45.50.471(a) should be considered the “catch-all” provision of the Statute. *See Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007).

AS 45.50.471(c) provides that the “unlawful acts and practices listed” in this section are “in addition to and do not limit the types of unlawful acts and practices actionable at common law or under other state statutes.”

2. Private Causes of Action Are Expressly Permitted

Private causes of action are expressly permitted:

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. *See* AS 45.50.531(a)

3. Private Actions Must Be Commenced Within Two Years and Discovery Rule Applies (Except Actions Brought In The Name of Public Entities)

An action under this section may not be commenced 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 the Statute. *See* AS 45.50.531(f).

An exception exists to the two-year discovery rule for “actions in name of state, political subdivisions or public corporations.” *See City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d 1173, 1180 (Alaska 1998) (holding that statute of limitations for claims brought by public entities under the Statute are governed by AS 9.10.120 and not AS 45.50.531). AS 9.10.120 provides a statute of limitations period of “six years of the date of accrual of the cause of action. However, if the action is for relief on the ground of fraud, the limitation commences from the time of discovery by the aggrieved party of the facts constituting the fraud.”

4. **Class Actions Permitted and Governed by Alaska Civil Rule 23**

While a section of the unfair trade practices and consumer protection statute, AS 45.50.531, is entitled “Private and Class Actions,” the Statute does not mention “class actions.” Class actions are permitted instead by Alaska Civil Rule 23. *See, e.g., Turner v. Alaska Commc’ns Sys. Long Distance, Inc.*, 78 P.3d 264, 266-70 (Alaska 2003). Alaska Civil Rule 23 is modeled after Federal Rule of Civil Procedure 23. The Alaska Supreme Court has “noted that federal decisions will be ‘especially persuasive’ in interpreting Alaska Civil Rule 23.” *Bartek v. State, Dep’t of Natural Res., Div. of Forestry*, 31 P.3d 100, 102 (Alaska 2001) (*citing Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1041 (Alaska 1981)).

5. **Pro Se Litigants Cannot Represent a Class of Consumers**

A pro se litigant cannot represent a class of consumers. *See Hallam v. Alaska Airlines, Inc.*, 91 P.3d 279, 282 (Alaska 2004) (attempt to bring class action under consumer protection statute denied as court held that plaintiff, “as a pro-se litigant, could not represent the class”).

B. Standing and Exemptions: Statute Recently Extended to Commercial Claims

Until relatively recently, the Statute was thought to regulate only acts concerning “consumer goods and services.” In 2004, the Alaska Supreme Court clarified that the Statute regulates commercial transactions and generally permits claims between commercial entities, though it excludes claims involving real property and standing timber. *See W. Star Trucks v. Big Iron Equip. Serv., Inc.*, 101 P.3d 1047 (Alaska 2004).

The *Western Star* decision followed *Aloha Lumber Corp. v. University of Alaska*, 994 P.2d 991, 1002 (Alaska 1999), where the court rejected a claim under the Statute by an unsuccessful bidder for timber rights. The court in *Aloha Lumber* held no claim existed under the Statute because “standing timber is not a ‘consumer good,’ but real property.” The court explained that the “entire thrust of [Statute] is directed at regulating practices relating to transactions involving consumer goods and services.” *See also State v. First Nat’l Bank of Anchorage*, 660 P.2d 406, 412-13 (Alaska 1982) (“[W]e are persuaded that the entire thrust of the Consumer Protection Act is directed at regulating practices relating to transactions involving consumer goods and services.”). In *Western Star*, the court narrowly construed *Aloha Lumber* and *First National*, concluding that “no sufficient reason exists for departing from the literal language of the act in connection with commercial transactions not involving real estate.” 101 P.3d at 1054.

In addition to real estate and standing timber, other exemptions to the Statute are enumerated in

AS 45.50.481 for certain acts (1) involving the state or regulatory boards or commissions, (2) involving the media, or (3) regulated under the insurance, banking, or mortgage lending statutes.

C. Pleading Requirements and Substantive Elements of Proof Under the Statute

1. Alaska Is a Notice Pleading State

Alaska is a notice pleading state. Alaska Civil Rule 8 provides that the complaint must include “a short and plain statement of the claim.” “Two elements must be proved to establish a prima facie case of unfair or deceptive acts or practices under the Alaska Act: (1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred.” *State v. O’Neill Investigations, Inc.*, [609 P.2d 520, 534](#) (Alaska 1980). alleging these two elements.

2. Actual Injury Not Required

The Alaska Supreme Court has held that the allegation of actual injury is not required to make out a claim under the Statute. Only the “capacity” to “deceive” and cause injury is required. *See Odom v. Fairbanks Mem’l Hosp.*, 999 P.2d 123, 132 (Alaska 2000). In *Odom*, the court explained:

“An act or practice is deceptive or unfair if it has the capacity or tendency to deceive. Actual injury as a result of the deception is not required. . . . All that is required is a showing that the acts and practices were capable of being interpreted in a misleading way.”

Id. at 132 (quoting *O’Neill Investigations*, 609 P.2d 520 at 534-35). Though, in the absence of monetary damages, a plaintiff must produce credible evidence of prohibited acts. *See Garrison v. Dixon*, 19 P.3d 1229, 1235 (Alaska 2001) (full reasonable attorneys fees awarded against plaintiffs who alleged competitor’s advertising violated the Statute when plaintiffs could not “produce credible evidence that the central theme of the ads . . . was unfair or deceptive”).

3 Intent to Deceive Not Required

To prevail under the Statute, the plaintiff need not prove intent to deceive. In fact, a plaintiff need not prove “deception.” An act or practice “can be unfair without being deceptive.” *Kenai Chrysler*, 167 P.3d at 1255. The Alaska Supreme court explained, “it is enough to show that the acts and practices were ‘capable of being interpreted in a misleading way.’” *Id.* For example, in *Kenai Chrysler*, the court found that an auto dealer could have violated the Statute by selling a car to a developmentally disabled adult under the legal guardianship of his parents despite the dealer’s good-faith but mistaken belief that its contract was valid. *Id.* at 1245-46, 1255. The dealership had no actual knowledge of the disability or legal guardianship at the time of sale. *Id.*

4. “Unfair” Practice Can Be Determined by the Totality of the Circumstances

Where a plaintiff is suing under the “catch-all” provision of the Statute and no evidence of an intent to deceive exists, the court in *Kenai Chrysler* held that a jury can rely on the “totality of the circumstances” to determine whether an act is “unfair.” *Id.* at 1257. The court explained that the trier of fact should apply a “flexible, case-specific approach” and can consider “a variety of factors” in determining the existence of an unfair practice, including:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;

(2) whether it is immoral, unethical, oppressive, or unscrupulous; [and]

(3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Id. at 1255.

In *Kenai Chrysler*, the court appeared most disturbed that after the dealership learned of the buyer’s disability and guardianship, it continued its attempts to enforce what it should have known was an unenforceable sales contract. *Id.* The court appears to have relied on this fact to uphold the jury verdict and determine that a reasonable jury could find that “Kenai Chrysler’s attempts to enforce the sales contract blatantly disregarded the Denisons’ rights and amounted to unethical conduct.” *Id.* at 1257. The court cited favorably a Fourth Circuit opinion that “described an unfair trade practice as an ‘inequitable assertion of power or position,’ ruling that ‘[a]lthough it may be rare that the exercise of a contractual right will meet this stringent standard, it is possible for such an exercise, when it involves egregious and aggravating conduct’” to constitute an unfair act. *Id.* at 1256.

D. Damages Available Under the Statute

1. Statute Allows Recovery for Money and Property, Treble Damages, and Other Relief Allowed Under Other Law

The Statute allows recovery by private parties for “loss of money or property.” *See* AS 45.50.531(a). The Statute allows a plaintiff to bring a civil action “to recover for each unlawful act or practice three times the actual damages or \$500, whichever is greater.” The Statute also provides that “[t]he court may provide other relief it considers necessary and proper.” Further, “[n]othing in this subsection prevents a person who brings an action under this subsection from pursuing other remedies available under other law, including common law.”

2. Punitive Damages May Be Recoverable on Top of Statutory Treble Damages That Are “Automatic”

Treble damages under AS 45.50.531(a) are “automatic” and “mandatory for violations of [the Statute].” *Kenai Chrysler*, 167 P.3d at 1259 n.65. Statutory treble damages are to be awarded

by the court upon a finding of a violation of the Statute and are not a jury issue. *Id.*

Treble damages are separate and apart from punitive damages, which are also allowed under Alaska common law. Under the current state of Alaska law, a plaintiff may be able to recover both treble damages under AS 45.50.531(a) and common law punitive damages. The Alaska Supreme Court has explained that “the legislative history . . . establishes that treble damages were adopted not just to deter fraud, but also to encourage injured parties to file suits under the [Statute] and to ensure that they would be adequately compensated for their efforts.” *Kenai Chrysler*, 167 P.3d at 1260.

3. Fifty Percent of Punitive Damages (Not Statutory Treble Damages) Go to the State

AS 45.50.531(i) requires that if a plaintiff is awarded “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.” The Alaska Supreme Court has clarified that the phrase “punitive damages under (a) . . .” means only common law punitive damages and not statutory treble damages. *See Kenai Chrysler*, 167 P.3d at 1260 (“In our view, subsection .531(i)’s mention of punitive damages simply refers to punitive damages awarded as ‘other remedies available’ under subsection .531(a)’s second sentence.”).

4. Recovery of Attorney’s Fees by Prevailing Party Whether Plaintiff or Defendant

Unlike every other state in the Union, Alaska follows the “English Rule” and, as a general rule, awards attorney’s fees to the prevailing party in any civil action. *See* Alaska Civil Rule 82(a) (“Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney’s fees calculated under this rule.”). Civil Rule 82(b) provides a schedule and sliding scale for the award of attorney’s fees.

The Statute modifies the civil rule by providing that “a prevailing plaintiff shall be awarded . . . full reasonable attorney fees at the prevailing reasonable rate.” AS 45.50.537(a). This is a departure from the Civil Rule 82(b) schedule, which may not award a recovering plaintiff “full reasonable attorney fees.”

The Statute mandates recovery by a prevailing defendant of “full reasonable attorney fees” if an “action is found to be frivolous.” AS 45.50.537(b). A “frivolous” action is defined by the Statute as “(1) not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law; or (2) brought to harass the defendant or to cause unnecessary delay or needless expense.” AS 45.50.537(e). Defendants also “shall” be awarded “full reasonable attorney fees” “if the court finds that the action was brought by the plaintiff to obtain a competitive business advantage.” AS 45.50.537(c).

5. Prevailing Party Attorney’s Fees Can Be Awarded Against Named Class Members but Not Absent Class Members

As noted above, Alaska is unique in its adoption of the English Rule awarding attorney’s fees to the prevailing party. An interesting issue arises in the class context when a defendant “prevails” in a class suit. Who is responsible for paying prevailing party fees under Alaska Civil Rule 82

or AS 45.50.537? The Alaska Supreme Court has resolved this issue by deciding that “named” class members may be liable for a prevailing defendant’s attorney’s fees but that “absent” class members who are passive have “relatively small claims” may not. *See Turner*, 78 P.3d at 266-270 (holding that (1) class notice in consumer protection claims arising from changes in terms of long distance plan should not include language warning that class members who did not opt out could be liable for attorney’s fees, and (2) “absent class members in this case may not be held liable” for attorney’s fees in event defendant prevailed); *see also Catalina Yachts v. Pierce*, 105 P.3d 125, 131 (Alaska 2005) (characterizing its holding in *Turner* as holding “that absent class members with relatively small claims who remain passive throughout the litigation are not liable for their adversary’s attorneys fees . . .”).