**10.03B “UNFAIR ACT OR PRACTICE” DEFINED**

In deciding whether an act or practice is unfair, you should consider the following factors:

(1) whether the act or practice offends public policy, that is, whether it falls within some existing concept of unfairness that society has established through law or otherwise;

(2) whether the act or practice is immoral, unethical, oppressive, or unscrupulous; or

(3) whether the act or practice causes substantial injury to [consumers or competitors or businesses]. “Substantial injury” is injury that is not trivial or speculative.

Unfairness may be found because of the degree to which the act or practice meets one or more of these factors. An act or practice may be unfair even though it is not deceptive.

**Use Note**

This instruction is intended for use when the plaintiff alleges unfair or deceptive practices not specified in AS 45.50.471(b). It should be given whenever the court gives Instruction 10.01(A). This instruction should not be given with Instruction 10.01B, except as explained below.

If the plaintiff alleges that the defendant engaged in conduct that constituted a violation of 45.50.471(a) and that the defendant also engaged in conduct that violated one of the specific prohibitions listed in AS 45.50.471(b), Instruction 10.03B must be given, but it must be modified to explain that it does not apply to the claims that are based on AS 45.50.471(b).

**Comment**

The three factors are from *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 534-35 (Alaska 1980). This is commonly known as the “Cigarette Rule” or the “S&H test” following the U.S. Supreme Court decision in *Federal Trade Commission v. Sperry & Hutchinson Co.,* 405 U.S. 233, 244-45 (1972), which recognized that “unfairness” is broader than “deception.” In *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007), the Alaska Supreme Court affirmed that “’[a] variety of factors can be considered 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; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” (quoting *O’Neill Investigations, Inc.*, 609 P.2d at 534-35)).“All three Sperry factors are not necessary to a finding of unfairness.” *Alaska Tr., LLC v. Ambridge*, 372 P.3d 207, 226 (Alaska 2016). “A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser degree it meets all three.” *Id.* (quoting *Robinson v. Toyota Motor Credit Corp.*, 879, 775 N.E.2d 951, 961 (Ill. 2002)).

A definition of “substantial injury” is not found in Alaska law.