**10.03A “DECEPTIVE ACT OR PRACTICE” DEFINED**

An act or practice is deceptive if it has the capacity or tendency to deceive. Plaintiff] is not required to show that [defendant] intended to deceive anyone.

**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 plaintiff alleges that 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 10.03A 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**

This definition is taken from *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 534-35 (Alaska 1980) and *Borgen v. A & M Motors, Inc.*, 273 P.3d 575, 591 (Alaska 2012). In *Borgen*, the court noted that “whether an act is ‘deceptive’ is determined simply by asking whether it ‘has the capacity or tendency to deceive.’” *Id.* at 591 (quoting *ASRC Energy Servs. Power & Commc'ns, LLC v. Golden Valley Elec. Ass'n, Inc.*, 267 P.3d 1151, 1159–60 (Alaska 2011)).

In *ASRC Energy Services*, the court held that

the basic elements defining a deceptive practice have remained the same since our *O'Neill Investigations* decision:

To show deception under the FTC Act, intent, scienter, actual reliance or damages, and even actual deception are unnecessary. All that is required is proof that a practice has a tendency or capacity (or, under the FTC's latest formulation, is likely) to deceive even a significant minority of consumers.

*ASRC Energy Servs.*, 267 P.3d at 1163 (quoting National Consumer Law Center, Unfair & Deceptive Acts & Practices, § 4.2.3.1, at 190)*. See also Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007) (“The plaintiff need not prove that the defendant intended to deceive; it is enough to show that the acts and practices were ‘capable of being interpreted in a misleading way.’”) (quoting *O'Neill Investigations, Inc.*, 609 P.2d at 534).

An act may be unfair or deceptive, and an act can be deceptive under the UTPA while not being unfair. *Borgen*, 273 P.3d at 591 (“The two terms [unfair and deceptive] are used in the disjunctive in section .471(a), and either will suffice to give rise to liability.”) Good faith is also not a defense to a claim that conduct was deceptive under the UTPA:

[E]ven if the per se approach as to listed violations under subsection .471(b) were not employed, the prohibition on deceptive acts or practices in subsection .471(a) also encompasses innocent material misrepresentations without requiring proof of bad faith or permitting a defense of good faith. We reach this conclusion based on F.T.C. precedent to which we give great weight, as well as case law from other jurisdictions reaching the same conclusion.

*Id.* at 591.