

Washington

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Washington was the second state to pass a comprehensive consumer protection statute in 1961. It was modeled on the Federal Trade Commission Act. When it first was enacted, it was viewed principally as an antitrust statute rather than a consumer protection act. However, after it was amended in 1970 to allow a private right of action, there was a gradual increase in the number of private consumer protection suits and a corresponding rise in the number of appellate decisions interpreting the statute. Because it allows recovery of attorneys' fees and treble damages up to \$10,000, the statute has been described as the strongest consumer protection efforts among the states.

I. The Statute.

The Washington Consumer Protection Act (CPA) is found at Chapter 19.86 of the Revised Code of Washington (RCW). Section 2 of the Act declares that:

Unfair methods of competition and unfair and deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
RCW 19.86.020.

The language is identical to Section 5 of the Federal Trade Commission Act. Because only "trade" and "commerce" are defined under the Act, it has been up to the courts to determine what was unlawful. They have turned to federal law for guidance. Blewett v. Abbott Laboratories, 86 Wn. App. 782, 938 P.2d 842 (1997). Indeed, the Act mandates that "the courts be guided by final decisions of the federal courts and final orders of the federal trade commission . . ." RCW 19.86.920. Like the Federal Trade Commission Act, the Act also is an antitrust and unfair competition law. This article addresses only the consumer protection part of the statute.

The Act is frequently used by individual plaintiffs as a consumer protection law. The Act defines persons with standing to sue to include corporations and similar entities. RCW 19.86.010(1). Thus, an insurer is protected under the Act. State Farm Fire and Cas. Co. v. Huynh, 92 Wn. App. 454, 862 P.2d 854 (1998).

As originally enacted, only the attorney general could bring an action and then only for injunctive relief to prevent future violations of the Act. The act was amended in 1970 not only to allow a private right of action but to allow the attorney general to sue to enjoin past violations as

well as recover money damages. These damages take the form of restitution of any moneys or properties, real or personal, acquired by illegal means. RCW 19.86.080. A private plaintiff may also enjoin further violations and is entitled to recover his actual damages which the court may, in its discretion, increase to three times the actual damages not to exceed \$10,000. RCW 19.86.090. A successful private plaintiff also recovers his costs of suit, including a reasonable attorneys' fee. Id.

The attorney general has the power to execute a civil investigative demand requiring a person to produce relevant documentary material, to answer in writing written interrogatories or to give oral testimony if necessary to investigate a possible violation of the CPA. RCW 19.86.110.

An action must be commenced within four years after the cause of action accrues. RCW 19.86.120. This statute is suspended during the time that the attorney general brings an action based in whole or in part of a similar matter. Id. The Act provides for civil penalties ranging from two thousand dollars for each violation of the Consumer Protection Act and twenty-five thousand dollars for the violation of any injunction. RCW 19.86.140.

The Act provides that persons, who engage in conduct in violation of the chapter which has had the impact in Washington state, are deemed to have submitted themselves to the jurisdiction of the state and may be served personally outside of the state. RCW 19.86.160.

Actions permitted, prohibited or regulated under laws administered by the Insurance Commissioner, the Utilities and Transportation Commission, the Federal Power Commission or actions or transactions permitted by any other regulatory body or officer acting under statutory power of the state or the United States are exempt under the Act. RCW 19.86.170.

II. Class Actions.

Class actions under the CPA are governed by Rule 23 of the Rules for Superior Court, which is virtually identical to Rule 23 of the FRCP.

There have been a number of reported class action cases involving the CPA. For example, Whitaker v. Spiegel, Inc., 95 Wn.2d 661, 637 P.2d 235, appeal dismissed, 454 U.S. 958 (1981) was statewide consumer class action seeking a declaration that Spiegel had violated the Usury, Retail Installment Sales and Consumer Protection Acts. The Washington Supreme Court held that since Spiegel had committed usury, it also had violated the Consumer Protection Act. The Usury Act provides that entering into an usurious contract is declared to be an unfair act or practice under the CPA. RCW 19.52.036.

Numerous class action cases have been certified against insurers alleging CPA violations. For example, in Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 63 P.2d 198 (2003), the action involved an insurer's denial or limiting claims for personal injury protection benefit after medical utilization review; Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 16 P.3d 574 (2001) concerned denial of PIP benefits more than thirty (30) days after insurer had received the claim.

O'Brien v. Shearson Hayden Stone, Inc., 90 Wn.2d 680, 586 P.2d 830 (1978), reconsideration granted, 93 Wn.2d 51, 605 P.2d 779 (1980) was brought on behalf of a class of Washington residents who had margin agreements with the defendant. The Washington Supreme Court upheld the class certification but directed that the trial court divide the class into subclasses.

In Smith v. Behr Process Corp., 113 Wn. App. 306, 54 P.3d 665 (2002), the court upheld a class certification for breach of contract, breach of warranty and CPA violations for defective stain resulting in mildew damage to consumers' property. The court held that there only needs to be a single issue common to the class, the fact that each member of the class must make an individual showing of damages does not preclude class certification, and treble damages under the CPA were awardable to the class members as well as the class representatives. It rejected Behr's argument that product liability cases defy common adjudication.

III. Jury Availability.

Jury trial is available in actions under the CPA.

IV. Current Controversies.

None.

V. Case Law.

One of the most important cases on private actions under the CPA is Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986). The case modified the elements for private right of action and limited conduct actionable under the statute.

In order to establish a prima facie case under the CPA, a private litigant must establish five elements: (1) an unfair and deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his business or property; and (5) causation. The plaintiff can satisfy the first two elements by showing that the act is a per se unfair trade practice or by establishing these elements independently. Id.

The Washington Legislature has declared the violations of many statutes to be unfair and deceptive Acts and thus a per se unfair trade practice. The statute may also declare that its violation is a violation of RCW 19.86, et seq. See Exhibit A.

In order to prove a non per se violation, a plaintiff must prove that an act is unfair and deceptive. The issue whether an act or practice is unfair or deceptive is a question of law. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30, 948 P.2d 816 (1997). Generally, the two terms are synonymous. A practice is unfair if it offends public policy as expressed in statutes, is immoral, unethical, oppressive or unscrupulous, and causes substantial injury to consumers. Blake v. Federal Way Cycle Center, 40 Wn. App. 302, 310, 698 P.2d 578 (1985).

A practice is deceptive if it has the potential to deceive a substantial portion of the public. Hangman Ridge, *supra* at 785. A plaintiff need not show that he was deceived, an intent to deceive or that a defendant acted in bad faith. Testo v. Russ Dunmire Oldsmobile, 16 Wn. App. 39, 554 P.2d 349 (1976). Most of the cases involving deceptive acts or practices involve misrepresentations or failure to disclose material facts that should have been disclosed. See, e.g., Allen v. American Land Research, 95 Wn.2d 841, 631 P.2d 930 (1981); Jackson v. Harkey, 41 Wn. App. 422 P.2d 687 (1985); Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982); Robinson v. Avis Rent-a-Car, Inc., 106 Wn. App. 104, 22 P.3d 818, *rev. denied*, 145 Wn.2d 1004 (2001).

“Trade” and “commerce” are defined under the Act to include “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). This includes every person conducting unfair acts in any trade or commerce. Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987). The Washington Supreme Court has held that the “entrepreneurial aspects of the practice of law . . . fall within the sphere of “trade or commerce” under RCW 19.86 (.010)(2) and 19.86.020.” Short v. Demopolis, 103 Wn.2d 52, 66, 691 P.2d 163 (1984). This rule was extended to the medical profession in Quimby v. Fine, 45 Wn. App. 175, 724 P.2d 403 (1986). Thus, an attorney can be subject to a CPA claim for “how the price of legal services is determined, billed, and collected and the ways a law firm obtains, retains and dismisses clients” and a doctor can violate the CPA by a lack of informed consent. *Id.* Municipal corporations and political subdivisions of the state are exempt from the Act. Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County, 77 Wn.2d 94, 459 P.2d 633 (1969).

The public interest requirement has proven the greatest impediment to a private right of action. A private plaintiff may establish the public interest requirement by demonstrating violation of a statute that has a specific legislative declaration of public interest impact. Hangman Ridge, *supra* at 791. Alternatively, a plaintiff may prove an impact on the public interest. In a consumer transaction, the following factors are to be considered:

- 1) Were the acts committed in the course of the defendant’s business;
- 2) Were the acts part of a pattern or generalized course of conduct;
- 3) Were similar acts committed prior to the one involving the plaintiff;
- 4) Is there real and substantial potential of repetition;
- 5) Were many consumers affected or likely to be affected;

Hangman Ridge, *supra* at 790. Not all factors need be present and no one single factor is dispositive. *Id.*

In a private dispute, the first factor is the same. In addition, other factors include:

- 2) Did the defendant advertise to the public;

- 3) Did defendant actively solicit this plaintiff;
- 4) Did plaintiff and defendant occupy unequal bargaining positions;

Hangman Ridge, supra at 790-791.

Injury to plaintiff in his business or property includes loss of business reputation and goodwill. Nordstrom, supra at 740-741. A personal injury claim or emotional distress damages do not constitute injury to business or property and are not cognizable under the CPA. Stevens v. Hyde Athletic Industries, Inc., 54 Wn. App. 366, 369-370, 770 P.2d 671 (1989); White River Estates v. Hiltbruner, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998). Loss of use of property and loss of time and interference with business, however, are. Mason v. Mortgage America, Inc., 114 Wn.2d 842, 792 P.2d 142 (1990); Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, 64 Wn. App. 553, 825 P.2d 714 (1992).

Under the CPA, injury is distinguished from damages and no monetary damages need be proven as long as there is some injury to property or business. Sorrell v. Eagle Healthcare, Inc., 110 Wn. App. 290, 38 P.3d 1024 (2002). There is a duty to mitigate damages. Young v. Whidbey Island Board of Realtors, 96 Wn.2d 729, 638 P.2d 1235 (1982). Actual damages are required before treble damages can be awarded. Mason v. Mortgage America, supra. Attorney fees incurred do not constitute actual damages. Sign-O-Lite Signs v. DeLaurenti Florists, supra.

Reasonable attorneys fees are awardable only to a prevailing plaintiff. Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 681 P.2d 242 (1984). A thorough discussion of what constitutes reasonable fees is found in Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). Cost recoverable are limited to taxable costs under RCW 4.84.010. Nordstrom, Inc. v. Tampourlas, supra.

The final element involves proof of a causal link between the unfair or deceptive act or practices and plaintiff's injury. Hangman Ridge, supra at 792-793. One way to prove causation is to show reliance upon a misrepresentation of fact, Robinson v. Avis Rent A Car System, Inc., 106 Wn. App. 104, 22 P.2d 818, rev. denied, 145 Wn.2d 1004 (2001), or to show that the plaintiff lost money because of unlawful conduct. Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 942 P.2d 1072, rev. denied, 134 Wn.2d 1027 (1998).

Generally, if a consumer is guilty of fraud, he is barred from recovering CPA damages. Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 757 P.2d (1988). However, if the unfair practice proceeded or contributed to the fraud, the CPA claim may not be barred. Strother v. Capitol Bankers Life Ins. Co., 68 Wn. App. 224, 842 P.2d 504, rev. on other grounds, 124 Wn.2d (1994).

RCW 19.86.920 states in pertinent part:

It is, however, the intent of the legislation that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest. . . .

In Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 759 P.2d 418 (1988), the court held that defendant was entitled to a jury instruction on the reasonableness defense. See 6A Washington Practice, Washington Pattern Jury Instruction Civil, WPI 310.02. An act done in good faith under an arguable interpretation of the law is not a CPA violation. In determining whether an act is a violation, the court must weigh public interest versus a business' right to conduct its trade. Cox v. Lewiston Grain Growers, Inc., 86 Wn. App. 357, 936 P.2d 1191 (1997).

Law Review and Journal Commentaries

Attempts to Restrict Actionable Conduct Pursuant to Washington's Consumer Protection Act, 12 Gonz. L. Rev. 621 (Summer 1977).

Consumer protection: consumer relationship. 15 Gonz. L. Rev. 891 (1980).

Consumer protection in Washington: An overview. 10 Gonz. L. Rev. 391.

Implementing the Washington Consumer Protection Act. 10 Gonz. L. Rev. 593.

In the Litigation Business: Insurance company liable for acts occurring in course of litigation under Washington Protection Act, 76 Wash. L. Rev. 927 (2001).

Lawyers under the purview of the State Consumer Protection Act. 60 Wash. L. Rev. 925 (1985).

Per se violation. 10 Gonz. L. Rev. 529.

Propriety of the public interest requirement in the Washington Consumer Protection Act. 10 U. Puget Sound L. Rev. 143 (1986).

Public interest and the private litigant. 60 Wash. L. Rev. 201 (1984).

Scope of Washington Consumer Protection Act. 10 Gonz. L. Rev. 415.

Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Action, 10 Gonz. L. Rev. 457 (1975).

Washington Consumer Protection Act – Enforcement provisions and policies. 36 Wash. L. Rev. 279 (1961).

Bibliography

Lovett, Deceptive Trade Practice Legislation, 46 Tul. L. Rev. 724 (1972).

Reed, Consumer Protection in Washington: An Overview, 10 Gonz. L. Rev. 391 (1975).

Washington Antitrust and Consumer Protection Handbook, WSBA (3rd Ed. 2001).

1A Washington Practice, Chapter 46, Consumer Protection, West (Fourth Edition 1997).

6A Washington Practice, Washington Pattern Jury Instructions – Civil, West (Fourth Edition 2003).

Title 19, West's Revised Code of Washington Annotated (1999).

APPENDIX A

**CONSUMER PROTECTION ACT PER SE VIOLATIONS:
UNFAIR OR DECEPTIVE TRADE PRACTICE, VITALLY
AFFECTING THE PUBLIC INTEREST AND NOT REASONABLE
IN RELATION TO THE DEVELOPMENT
AND PRESERVATION OF BUSINESS**

SUBJECT	UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE RCW:	PUBLIC INTEREST RCW:	NOT REASONABLE RCW:
Adoption advertising	26.33.400(3)	26.33.400(3)	26.33.400(3)
Adult family home, unlicensed	70.128.058	70.128.058	70.128.058
Athletic agents	18.175.080	18.175.080	18.175.080
Auctions	18.11.260	18.11.260	
Automotive repair	46.71.070	46.71.070	46.71.070
Automatic dial answer devices	80.36.400(3)	1986 Wa. Laws ch. 281	
Bail bond agents	18.185.210		18.185.210
Business opportunity	19.110.170		
Camping Clubs	19.105.405 19.105.500		
Cemetery sales	68.05.330	68.05.900	
Centennial logos	27.60.090(1)		
Chain distributor (pyramid schemes)	19.102.020		
Charitable solicitations	19.09.340	19.09.010	
Check cashers	31.45.190	31.45.i90	
Cigarette sales	19.91.300		
Collection agencies	19.16.440		
Colleges	28B.85.180	28B.85.180	
Construction liens, coercion	60.04.035	60.04.035,	60.04.035
Consumer credit reporting agencies	19.182.150	19.182.150	19.182.150
Consumer leases ,1	65.10,050 Y	63.10:050	63.10.050
Contractor registration	18.27.350	18.27.350	
Credit service agencies	19.134.070(5)		
Debt adjusting	18.28.185		
Discrimination/Civil Rights	49.60.030(3)	49.60.030(3)	49.60.030(3)
Embalming and funerals	18.39.350		

SUBJECT	UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE RCW:	PUBLIC INTEREST RCW:	NOT REASONABLE RCW:
Employment agencies	19.31.210		
Escrow funds	18.44.070		
Escrow referral fees	18.44.145		
Franchises	19.100.190		
Going out of business	19.178.110	19.178.110	19.178.110
Health studios	19.142.100	19.142.005	
Hearing aids	18.35.180		
House-to-house-sales	49.12.310(3)	49.12.010	
Immigration assistants	19.154.090	19.154.090	
Interest/usury	19,52.036	19.52.005	
Kosher food labels	69.90.030		
Land development	58.19.270	58.19.270	58.19.270(1)
Lease purchase	63.19.110	63.19.110	63.19.110
Mobile home installation and warranty	43.22.440(3) 18.27.350	43.22.440(2) 18.27.350	
Mortgage brokers	19.146.100	19.146.005 19.146.100	19.146.100

CONSUMER PROTECTION ACT *PER SE* VIOLATIONS

SUBJECT	UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE RCW:	PUBLIC INTEREST RCW:	NOT REASONABLE RCW;
Motor vehicle broker fraud	19.116.030	19.116.010	19.116.030
Motor vehicle buyer's agent	46.70.320	46.70.320	46.70,320
Motor vehicle service contract	48.96.060	48.96.005 48.96.060	
Motor vehicle "lemon law"	19.118.041(3) 19.118,120	19.118.120	
Motor vehicle sales	46.70.310	46.70.310	
Motor vehicle dealer	46.70.021	46.70!310	
Motor vehicle used, price disclosure	46.70.125	46.70.310	
Nursing home Medicaid discrimination	74.42.055	74.42.055	

SUBJECT	UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE RCW:	PUBLIC INTEREST RCW:	NOT REASONABLE RCW.;
On-site sewage (arguable) additives	70.118.080	70:118.010	
Organic food labels	19.86.023		
Pet research theft	19.86.145		
Prizes and promotions	19.170.010	19.170.010	19.170.010(2)
Real estate equity	61.34.040	61.34.040	
Roofing/siding contractors and sales	19.186.050	19.186.005 19.186.050	
Student exchanges	19.166.100	19.166.100	19.166.100
Telefacsimile solicitation	80.36.540(5)	80.36.540(5)	80.36.540(5)
Telephone alternative operator services	80.36.530	80.36.530	80.36.530
Telephone equipment	19.130.060	19.130.010	
Telephone pay per call	19.162.010	19.162.010	19.162.010(2)
Telephone solicitation	19.158.030	19.158.010	19.158.030
Time share sales	64.36.330 64.36.170		
Travel tour operators	19.138.080 19.138.055	19.138.010 19.138.290	19.138.290
Unsolicited goods	19.56.030	19.56.030	19.56.030
Viatical settlements (life insurance)	48.102.055(1)	48.102.055(1)	48.102.055(1)
Vocational schools	28C1.10.210	28C.10.210	
Washington, Grown In	15.04.410(4)	15.04.410(4)	15.04.410(4)
Weatherization of rented residence	70.164.060	70.164.010 70.164.060	

See also the list of statutes cross-referenced to the Consumer Protection Act in the Revised Code of Washington, or Chapter 19.86, RCW.