
Judiciary Committee

HB 1683

Title: An act relating to modifying provisions relating to consumer protection act violations.

Brief Description: Modifying provisions relating to consumer protection act violations.

Sponsors: Representatives Kirby, Goodman, Nelson, Campbell, Williams, Orwall, Green, Ormsby, Moeller and Pedersen.

Brief Summary of Bill

- Modifies the common law rule for establishing a public interest impact with regard to certain violations of the Consumer Protection Act.
- Increases the maximum damages a court may award under the Consumer Protection Act from \$10,000 to the jurisdictional amount of district courts, which is currently \$75,000.

Hearing Date: 2/9/09

Staff: Kyle Gotchy (786-7119); Trudes Tango (786-7384)

Background:

Damages Under the Consumer Protection Act

Under the Consumer Protection Act (CPA), any person who is injured in his or her business or property via (1) unfair competition or practices; (2) contracts, combinations, or conspiracies in restraint of trade; (3) monopolies or attempted monopolies; (3) transactions and agreements not to use or deal in commodities or services of a competitor; or (4) acquisition of corporate stock by another corporation to lessen competition. Further, a person is considered injured if he or she refuses to accede to a proposal for an arrangement that, if consummated, would amount to an act described previously. Such injured persons may bring a civil action. The civil action may be to enjoin further violations, to recover actual damages, or both, together with the costs of the suit, including a reasonable attorney's fee. The court may, in its discretion, increase the award of

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damages to an amount not to exceed three times the actual damages sustained. However, any damage award for unfair competition or practices may not exceed \$10,000.

Hangman Ridge

In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.* (1986) the Supreme Court of Washington considered whether the defendant title insurance company could be assessed attorney fees in a private action under the CPA. The court held that to prevail in a private CPA action, and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) *public interest impact*; (4) injury to plaintiff in his or her business or property; and (5) causation.

In the absence of a per se violation of the CPA, plaintiffs prior to *Hangman* could establish the public interest element via a three-prong test announced in *Anhold v. Daniels* (1980). The *Hangman* court, however, held that the *Anhold* test was not the best vehicle for showing the public was or will be effected by the act in question. Accordingly, *Hangman* developed a new test for establishing a public interest.

Establishing Public Interest Impact—Consumer Transactions

Under *Hangman*, whether the public has an interest in any given action is to be determined by the trier of fact based on several context-dependent factors. Where the transaction was essentially a consumer transaction, the following factors are relevant to establish a public interest, but are not dispositive:

- Whether the alleged acts were committed in the course of the defendant's business.
- Whether the acts were a part of a pattern or generalized course of conduct.
- Whether the repeated acts committed prior to the act involved the plaintiff.
- Whether there is a real and substantial potential for repetition of the defendant's conduct after the act involving the plaintiff.
- If the act complained of involved a single transaction, whether there were many customers effected or likely to be effected by it.

Establishing a Public Interest Impact - Private Transactions

Hangman also acknowledged that, where a transaction is essentially a private dispute, it may be more difficult to show that the public has an interest in the subject matter. The court noted that a breach of a private contract affecting no one but the parties to the contract will not ordinarily affect the public interest. In such cases, however, it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest. Thus, the factors indicating a public interest in this context include:

- Whether the alleged acts were committed in the course of the defendant's business.
- Whether the defendant advertised to the public in general.
- Whether the defendant actively solicited the particular plaintiff, thereby indicating potential solicitation of others.
- Whether the plaintiff and defendant occupied unequal bargaining positions.

As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present for a trier of fact to reasonably find public interest impact.

Summary of Bill:

In any non per se civil action for a CPA violation, in order to collect damages, the injured person must show that the injurious acts or practices:

1. Were unfair and deceptive;
2. Occurred in the conduct of trade or commerce;
3. Were a substantial factor in causing injury to the plaintiff; and
4. Fulfill the public interest impact requirement. The requirement is fulfilled where the injurious acts:
 - were part of a pattern or generalized course of conduct;
 - were the same or similar to prior acts or practices in their capacity to mislead; and
 - have a substantial potential for repetition, or if only one transaction is complained of, the injurious acts or practices affect or have a substantial potential to affect other customers.

Whether the injurious acts or practices have the required "substantial potential" for repetition must be determined by a trier of fact.

Damages

A court may award the following remedies:

- actual damages together with the costs of the suit, including reasonable attorney's fee; or
- treble damages.

Additionally, the court may enjoin the defendant or defendants from any future conduct that is similar to the acts or practices in the underlying action.

Maximum Damages for Unfair Practices and Competition

The maximum award of treble damages for unfair practices and competition is increased from \$10,000 to the jurisdictional amount of district court, which is \$75,000.

Appropriation: None.

Fiscal Note: Requested on February 6, 2009

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.