

HOUSE BILL REPORT

SHB 1683

As Passed House:

March 6, 2009

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

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

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Kirby, Goodman, Nelson, Campbell, Williams, Orwall, Green, Ormsby, Moeller and Pedersen).

Brief History:

Committee Activity:

Judiciary: 2/9/09, 2/19/09 [DPS].

Floor Activity

Passed House: 3/6/09, 59-36.

Brief Summary of Substitute Bill

- Modifies the common law rule for establishing a public interest impact with regard to certain violations of the Consumer Protection Act.
- Increases the amount of treble damages a court may award under the Consumer Protection Act from \$10,000 to \$25,000.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Flannigan, Kelley, Kirby, Ormsby and Roberts.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Ross and Warnick.

Staff: Kyle Gotchy (786-7119)

Background:

Damages Under the Consumer Protection Act.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Under the Consumer Protection Act (CPA), a person may bring a civil action in court if the person 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 may be 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. 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 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 in superior court. If the action is brought in district court, the statute allows for an increased damage award not to exceed the jurisdictional limit of civil cases in district court.

Hangman Ridge.

In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.* (1986) the Washington Supreme Court considered whether the defendant title insurance company could be assessed an attorney's fee in a private action under the CPA. The court held that to prevail in a private CPA action, and therefore be entitled to attorney's fee, a plaintiff must establish the following 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 affected 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; and
- if the act complained of involved a single transaction, whether there were many customers affected or likely to be affected 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, the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion 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; and
- 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 Substitute Bill:

In a private action in which an unfair or deceptive act or practice is alleged under the CPA, a claimant may establish that the act or practice is injurious to the public interest because it:

1. violates a statute which incorporates the CPA;
2. violates a statute which contains a specific legislative declaration of public interest impact; or
3. injured other persons, had the capacity to injure other persons, or has the capacity to injure other persons.

The maximum award of treble damages for unfair practices and competition is increased from \$10,000 to \$25,000.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) The framework of the CPA has existed since 1971 even though times have certainly changed since then. A report released this year ranked Washington in the bottom quintile of states with regard to the private remedies provided for consumers. Washington's complicated and convoluted public interest test is one of the foremost reasons why the state fared so poorly. The bill's simplified form of the test rectifies much of this confusion and allows victimized consumers to achieve proper redress.

(Opposed) The Supreme Court has repeatedly clarified that punitive damages are not favored under state law. By raising the maximum treble damages to \$75,000, the Legislature would

effectively impose punitive damages. The proposed substitute bill would eviscerate the *Hangman Ridge* test and that test's requirement of repetition. Also, the bill would grant the Office of the Attorney General too much latitude with regard to action that is presumed to have a public interest impact. The bill would have a chilling effect on small businesses—especially due to its discriminatory nature. Small businesses already face an intimidating number of regulations; now, if they accidentally violate the CPA, they will face a potentially fatal fine of \$75,000. In contrast, a larger business' economic stance effectively insulates it from the severity of such an inflated penalty.

Persons Testifying: (In support) Larry Shannon, Washington State Association for Justice; Bev Spears, Washington Community Action Network; and Yuh-Line Niou, Statewide Poverty Action Network.

(Opposed) Mel Sorensen, Washington Defense Trial Lawyers; and Cliff Webster, Washington Liability Reform Coalition.

Persons Signed In To Testify But Not Testifying: None.