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SUPREME COURT  
STATE OF WASHINGTON

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHKE, a Washington resident; and KELLY LEMONS, a California resident; individually and on behalf of all the members of the class of persons similarly situated,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

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**MEMORANDUM OF *AMICUS CURIAE*  
ATTORNEY GENERAL OF WASHINGTON  
ON RECONSIDERATION**

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## I. INTEREST OF AMICUS

Amicus curiae is the Attorney General of Washington.<sup>1</sup> The Attorney General previously filed an amicus curiae brief in this case before it was argued. The Attorney General submits this amicus curiae memorandum to address the soundness of the legal principles announced by the Court in its opinion. RAP 12.4(i). The Court's opinion is a significant departure from the Legislature's direction mandating liberal construction of the Consumer Protection Act (CPA), RCW 19.86, as well as this Court's precedent. The decision in this case also could jeopardize the Attorney General's ability to enforce the CPA.

## II. ARGUMENT

The Court's opinion signals a dramatic change in CPA jurisprudence. For over 35 years this Court has interpreted the CPA liberally to serve its beneficial purposes. *See, e.g., Hockley v. Hargitt*, 82 Wn.2d 337, 350-51, 510 P.2d 1123 (1973). The Court's opinion upsets that jurisprudence and drastically narrows the construction—and applicability—of the CPA in three crucial respects:

- (1) The opinion confines the CPA's applicability to Washington's borders. Slip. Op. at 16-17;
- (2) The opinion holds that a private plaintiff claiming injury because of a misrepresentation or omission must prove actual reliance on

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<sup>1</sup> The Attorney General may appear as amicus curiae in matters affecting the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). The Attorney General has express authority to enforce the CPA, RCW 19.86.080, and an interest in the development of CPA law. RCW 19.86.095.

the defendant's misrepresentation or omission to satisfy the causation element of a private CPA claim. *Id.* at 18-23.

(3) By requiring individualized proof of reliance, the opinion effectively precludes class actions under the CPA, despite this Court's recent holdings in *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853-54, 161 P.3d 1000 (2007) and *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396-98, 191 P.3d 845 (2008) that consumer class actions are a critical piece of CPA enforcement.

**A. The CPA Applies to All Unfair and Deceptive Acts in Washington, Whether or Not Washington Residents are Directly Victimized.**

In its opinion, the Court held that the CPA does not apply beyond Washington's borders. Slip Op. at 16-18. This narrow reading of the CPA's scope is contrary to the public interest; it does not benefit Washington consumers, competitors, or the marketplace.

The Court appears to have limited the Attorney General's authority to bring CPA actions only on behalf of Washington residents. Slip Op. at 16-17. If so, then the Court also has prohibited the Attorney General from bringing CPA actions against Washington-based businesses that direct unfair and deceptive practices to out-of-state residents only. Such limitations are not contemplated by the CPA and defeat its primary purpose.

Indeed, the CPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or

commerce. RCW 19.86.020. “Trade” and “commerce” are defined broadly 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) (emphasis added). The word “person” also is broadly defined to include “natural persons, corporations, trusts, unincorporated associations and partnerships.” *Id.* Rather than construe the CPA liberally, as directed by RCW 19.86.920, the Court interprets the words “affecting the people of the state of Washington” narrowly to limit the “jurisdictional and geographic” reach of the CPA to Washington’s borders. Slip. Op. at 16-17.

The Court also interprets RCW 19.86.080(1) to mean that the Attorney General is authorized to enforce the CPA only on behalf of persons residing in the state. Slip Op. at 17 (citing RCW 19.86.080). This interpretation misapprehends RCW 19.86.080(1). RCW 19.86.080(1) provides, in relevant part: “The attorney general may bring an action in the name of the state, *or as parens patriae on behalf of persons residing in the state*, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful . . .” (italics added). The Legislature added the italicized language in 2007 to permit the Attorney General to sue on behalf of indirect purchasers of goods or services sold in violation of the CPA. Laws of 2007, ch. 66, § 1; House Bill Report on Substitute Senate Bill 5228, 60th Leg., at 2 (2007) (copies attached). The amendment was necessary to repeal the effect of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L. Ed. 2d 707 (1977), which held

that indirect purchasers of goods could not bring an action under federal antitrust law. House Report on SSB 5228, at 2. The language was added to enhance the Attorney General's antitrust enforcement authority; not to limit the reach of the CPA or constrain the Attorney General's authority to stop unfair and deceptive practices under RCW 19.86.020 and .080.

Furthermore, since 1961, RCW 19.86.080 has provided, "The Attorney General may bring an action in the name of the state against any person to restrain and prevent doing of any act herein prohibited or declared unlawful[.]" *See* Laws of 1961, ch. 216, § 8 (emphasis added). The Court should liberally construe this broad grant of power to the Attorney General. RCW 19.86.920.

If the Court intended to hold that the Attorney General is not authorized to bring CPA actions against Washington entities that direct unfair and deceptive practices only to out-of-state residents, then it has created an opportunity for unscrupulous entities to easily avoid liability under the CPA. For example, a Washington business that engages in unfair or deceptive direct mail marketing practices could escape liability under the CPA by sending its material only to consumers with out-of-state zip codes. Further, under the Court's new rule, a private litigant from Idaho who was injured by the deceptive conduct of a Spokane business would not be able to bring a private CPA action, even if the Idaho resident sought injunctive relief that would benefit Washington consumers.

This result is contrary to RCW 19.86.920, which provides that the purpose of the CPA is to protect the public and foster fair and honest

competition. Allowing Washington businesses to engage in unfair and deceptive practices, so long as Washington residents are not directly injured, does not foster fair and honest competition. To the contrary, honest businesses would be placed at a competitive disadvantage competing against a business that generates revenue from unlawful acts that victimize out-of-state consumers.

The Court's decision also is contrary to precedent established in 1972 that the CPA's reach extends beyond Washington's boundaries. In *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 501 P.2d 290 (1972), this Court rejected an interpretation of RCW 19.86.170 that would have limited the applicability of the CPA to prohibit unfair and deceptive practices to Washington's borders:

[R]espondent's interpretation of RCW 19.86.170 would limit the application of RCW 19.86.020 strictly to intrastate commerce . . . . Such a result would require us to ignore RCW 19.86.920 which provides that in determining the relative market or effective area of competition we should not be limited to the boundaries of this state.

*Id.* at 279-80.

In sum, this Court's decision to limit the jurisdictional and geographical reach of the CPA is not consistent with the Legislature's direction that the CPA be liberally construed to effect its beneficial purposes. RCW 19.86.920. The decision will impact and perhaps preclude the Attorney General's ability to stop unfair and deceptive practices occurring in the state of Washington. The Attorney General

respectfully requests that the Court reconsider and withdraw its extraterritoriality decision.

**B. The Court Should Revise Its Analysis Regarding the Causation Requirement in Private CPA Actions.**

In its opinion, the Court misapprehends the causation analysis in *Indoor Billboard v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007). The Court cited *Indoor Billboard* as having “clearly established that proximate cause in a class action cannot be established by the ‘mere payment’ of an allegedly injurious charge...” Slip Op. at 18-19 (citing *Indoor Billboard*, 162 Wn.2d at 83). However, *Indoor Billboard* held that payment of an invoice “may or may not” be sufficient to establish causation. *Indoor Billboard*, 162 Wn.2d at 84. In *Indoor Billboard*, the Court declined to adopt a rule that mere payment of an invoice is per se sufficient to establish causation; the Court was not willing to go that far. *Id.* However, the Court plainly held that under certain facts, payment of an invoice might be sufficient to establish causation:

We reject *Indoor Billboard*’s per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff’s damages. Proximate cause is a factual question to be decided by the trier of fact. Payment of an invoice may or may not be sufficient to establish a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause.

*Id.* at 84 (emphasis added).

In its opinion, the Court relied on a mischaracterization of *Indoor Billboard* contained in a footnote to *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009) to support a reliance requirement. Slip Op. at 19 (citing *Panag*, 166 Wn.2d at 59 n.15). In the *Panag* footnote, the Court said, “Depending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*.” *Panag*, 166 Wn.2d at 59 n.15. The trouble here is that *Indoor Billboard* did not hold that a plaintiff may need to prove reliance to establish causation. Rather, *Indoor Billboard* adopted the proximate cause standard for causation:

We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.

*Id.* at 84.

In addition, the opinion in this case retreats from the Court’s policy choice in *Indoor Billboard* to reject the voluntary payment doctrine as an affirmative defense to a CPA claim where the plaintiff alleges that the defendant has misrepresented the price or other payment terms. *See Indoor Billboard*, 162 Wn.2d at 88 (“[T]he voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.”). By requiring reliance, the Court permits a defendant to assert an affirmative defense that the plaintiff knew the billing misrepresentation was false when he or she paid the bill, and therefore, the defendant’s

misrepresentation was not the cause of plaintiff's injury. The opinion thereby permits the voluntary payment defense in such cases, despite *Indoor Billboard's* unequivocal rejection of it.

Requiring plaintiffs to prove reliance on a misrepresentation or omission is inconsistent with the Legislature's mandate that the CPA be liberally construed. RCW 19.86.920. The Court should reconsider and withdraw its opinion that private plaintiffs must prove reliance on the misrepresentation or omission.

**C. Class Actions Are an Important Vehicle for Enforcing the CPA.**

The Court's opinion effectively prevents class certification for consumers alleging misrepresentations by requiring each consumer to submit individualized proof that he or she had no knowledge of the truth of the misrepresentation, whether the class seeking certification is a nationwide or statewide class. Slip Op. at 21, 22. By doing so, this Court has removed the ability of Washington consumers to effectively challenge unfair and deceptive conduct that causes small but widespread injuries.

In 1971, the Legislature authorized private actions to enforce the CPA. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). The purpose for allowing a private action was to enlist the aid of private individuals in the enforcement of the CPA. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976). As this Court held in *Scott*, class actions play a critical role in the enforcement of the CPA:

[W]e conclude that without class actions, consumers would have far less ability to vindicate the CPA. . . . [B]y mandating that claims be pursued only on an individual basis, the class arbitration waiver undermines the legislature's intent that individual consumers act as private attorneys general by dramatically decreasing the possibility that they will be able to bring meritorious suits.

*Scott*, 160 Wn.2d at 853 (citations omitted).

In addition to enforcing the CPA to benefit the public, private class actions guard against exculpation from wrongdoing. Many consumer class actions involve unquestionably deceptive tactics designed to extract small amounts of money from millions of consumers. Requiring individuals to bring cases for such small amounts exculpates the defendant from liability because “only a lunatic or a fanatic sues for \$30.” *Id.* at 855 (citing *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)); accord *McKee*, 164 Wn.2d at 396-97. Further, “[w]ithout access to class-wide relief, competent counsel would not be available to redress many meritorious claims.” *McKee*, 164 Wn.2d at 397. The Court's opinion in this case does what *Scott* tried to prevent—it removes the ability of consumers to effectively challenge unfair and deceptive conduct that causes “small but widespread injuries.” *Scott*, 160 P.3d at 855.

The Court's opinion in this case has the effect of undoing the Court's recent rulings in *Scott* and *McKee*. The Attorney General respectfully asks the Court to reconsider and withdraw its opinion in light of its impact on the important public policies served by *Scott* and *McKee*.

**D. The Court Should Reconsider and Withdraw the Decision Because the Case Has Settled and Is Now Moot.**

The underlying dispute in this case has settled. Respondents' Motion for Reconsideration, at 1. Because the case has settled, and given the important public policy implications of the decision, the Court should reconsider and withdraw the opinion.

**III. CONCLUSION**

The Attorney General respectfully requests that the Court reconsider and withdraw the decision.

RESPECTFULLY SUBMITTED this 16th day of February, 2010.

ROBERT M. MCKENNA  
Attorney General



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SHANNON E. SMITH  
WSBA No. 19077  
Senior Counsel  
Counsel for *Amicus Curiae*  
Attorney General of Washington

**APPENDIX**

# HOUSE BILL REPORT

## SSB 5228

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**As Passed House:**

April 4, 2007

**Title:** An act relating to actions under chapter 19.86 RCW, the consumer protection act.

**Brief Description:** Revising provisions concerning actions under the consumer protection act.

**Sponsors:** By Senate Committee on Judiciary (originally sponsored by Senators Kline, McCaslin and Weinstein; by request of Attorney General).

**Brief History:**

**Committee Activity:**

Judiciary: 3/23/07 [DP].

**Floor Activity:**

Passed House: 4/4/07, 95-0.

**Brief Summary of Substitute Bill**

- Allows the Attorney General to sue on behalf of indirect purchasers of goods or services sold in violation of the Unfair Business Practices - Consumer Protection Act.

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**HOUSE COMMITTEE ON JUDICIARY**

**Majority Report:** Do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

**Staff:** Bill Perry (786-7123).

**Background:**

Under the state's Unfair Business Practices - Consumer Protection Act (CPA), various business practices are declared unlawful. These practices include:

- engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce, including contracts, trusts or conspiracies in restraint of trade;
- monopolizing or attempting to monopolize trade;

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*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.*

- entering agreements not to purchase from the competitors of a particular seller when the agreement substantially lessens competition or tends to create a monopoly; and
- acquiring corporate stock when the acquisition substantially lessens competition or tends to create a monopoly.

Several statutes elsewhere in the code also declare violations of their provisions to be violations of the CPA.

A party injured by a violation of the CPA may bring an action for damages. Recovery may include the trebling of actual damages (not to exceed \$10,000 for some violations) and reasonable attorneys' fees. For some violations, civil penalties of up to \$100,000 in the case of an individual, and up to \$500,000 in the case of a corporation, may also be imposed. A civil penalty of up to \$2,000 per violation may be imposed for each violation amounting to an unfair method of competition or an unfair or deceptive act in the conduct of commerce. In addition, the Attorney General may bring an action to restrain a person from violating the CPA.

The CPA's grant of authority to the Attorney General is expressly for the purposes of bringing an action "in the name of the state." Such an action by the Attorney General may seek to prevent or restrain violations of the CPA and may seek restoration for persons injured by violation of the CPA. As an outgrowth of federal court rulings, a question has arisen as to whether the authority of the Attorney General extends to bringing an action for a CPA violation on behalf of persons who are themselves "downstream" or "indirect" purchasers of goods or services. An example of an indirect purchaser might be the ultimate consumer of a product that was bought from a retailer who bought from a producer who violated the CPA. The retailer would be the direct purchaser, and the consumer would be the indirect purchaser of the product.

The U.S. Supreme Court in *Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977), held that under federal antitrust law, indirect purchasers may not bring an action. Only a party who directly purchases from the violator can sue. However, *Illinois Brick* left open the possibility of states enacting their own laws to allow indirect purchasers to sue for unfair business practices. Many states have enacted so-called "Illinois Brick Repealer" laws. Some of these laws allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers.

Washington has not enacted an "Illinois Brick Repealer." However, based in part on dicta from the state Court of Appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae*. In *Blewett v. Abbott Laboratories*, while the court rejected a CPA suit by indirect purchasers by citing *Illinois Brick*, the court noted that some of the CPA's restrictive language with respect to suits brought by indirect purchasers does not extend to suits brought by the Attorney General. The common law *parens patriae* doctrine allows the state to bring legal actions or seek remedies on behalf of individuals in order to protect them from harm. The Attorney General reports, however, that in at least one

multistate case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

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**Summary of Bill:**

The Attorney General is given explicit authority to bring parens patriae actions under the CPA on behalf of persons residing in the state.

In cases in which the Attorney General has brought an antitrust action under the CPA, the court is authorized to order restoration for an injured party regardless of whether the injury was the result of a direct or indirect purchase of goods or services.

The ability of the state itself to sue for damages under the CPA is expressly made applicable to cases in which the state is indirectly injured by an antitrust violation of the CPA.

Courts are required to prevent duplicate recoveries for a single CPA violation and are encouraged to consolidate cases where practicable.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:**

(In support) The bill explicitly reinstates a right that has been assumed for many years under the common law. Because of a court decision in another state, doubt has been raised as to the Attorney General's ability to bring law suits on behalf of Washington residents. The bill provides statutory authority for these suits. Eighty percent of the other states already have some form of this authority.

(Opposed) None.

**Persons Testifying:** Senator Kline, prime sponsor; and Mark Brevard, Office of the Attorney General.

**Persons Signed In To Testify But Not Testifying:** None.

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE SENATE BILL 5228**

Chapter 66, Laws of 2007

60th Legislature  
2007 Regular Session

INDIRECT PURCHASERS

EFFECTIVE DATE: 04/17/07

Passed by the Senate March 7, 2007  
YEAS 47 NAYS 2

BRAD OWEN

\_\_\_\_\_  
President of the Senate

Passed by the House April 4, 2007  
YEAS 95 NAYS 0

FRANK CHOPP

\_\_\_\_\_  
Speaker of the House of Representatives

Approved April 17, 2007, 9:58 a.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5228** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

\_\_\_\_\_  
Secretary

FILED

April 17, 2007

Secretary of State  
State of Washington

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**SUBSTITUTE SENATE BILL 5228**

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Passed Legislature - 2007 Regular Session

**State of Washington                      60th Legislature                      2007 Regular Session**

**By Senate Committee on Judiciary (originally sponsored by Senators Kline, McCaslin and Weinstein; by request of Attorney General)**

READ FIRST TIME 02/22/07.

1            AN ACT Relating to actions under chapter 19.86 RCW, the consumer  
2 protection act; amending RCW 19.86.080 and 19.86.090; and declaring an  
3 emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            **Sec. 1.** RCW 19.86.080 and 1970 ex.s. c 26 s 1 are each amended to  
6 read as follows:

7            (1) The attorney general may bring an action in the name of the  
8 state, or as parens patriae on behalf of persons residing in the state,  
9 against any person to restrain and prevent the doing of any act herein  
10 prohibited or declared to be unlawful; and the prevailing party may, in  
11 the discretion of the court, recover the costs of said action including  
12 a reasonable attorney's fee.

13            (2) The court may make such additional orders or judgments as may  
14 be necessary to restore to any person in interest any moneys or  
15 property, real or personal, which may have been acquired by means of  
16 any act herein prohibited or declared to be unlawful.

17            (3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or  
18 19.86.060, the court may also make such additional orders or judgments  
19 as may be necessary to restore to any person in interest any moneys or

1 property, real or personal, which may have been acquired, regardless of  
2 whether such person purchased or transacted for goods or services  
3 directly with the defendant or indirectly through resellers. The court  
4 shall exclude from the amount of monetary relief awarded in an action  
5 pursuant to this subsection any amount that duplicates amounts that  
6 have been awarded for the same violation. The court should consider  
7 consolidation or coordination with other related actions, to the extent  
8 practicable, to avoid duplicate recovery.

9       **Sec. 2.** RCW 19.86.090 and 1987 c 202 s 187 are each amended to  
10 read as follows:

11       Any person who is injured in his or her business or property by a  
12 violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or  
13 19.86.060, or any person so injured because he or she refuses to accede  
14 to a proposal for an arrangement which, if consummated, would be in  
15 violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may  
16 bring a civil action in the superior court to enjoin further  
17 violations, to recover the actual damages sustained by him or her, or  
18 both, together with the costs of the suit, including a reasonable  
19 attorney's fee, and the court may in its discretion, increase the award  
20 of damages to an amount not to exceed three times the actual damages  
21 sustained: PROVIDED, That such increased damage award for violation of  
22 RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER,  
23 That such person may bring a civil action in the district court to  
24 recover his or her actual damages, except for damages which exceed the  
25 amount specified in RCW 3.66.020, and the costs of the suit, including  
26 reasonable attorney's fees. The district court may, in its discretion,  
27 increase the award of damages to an amount not more than three times  
28 the actual damages sustained, but such increased damage award shall not  
29 exceed the amount specified in RCW 3.66.020. For the purpose of this  
30 section, "person" shall include the counties, municipalities, and all  
31 political subdivisions of this state.

32       Whenever the state of Washington is injured, directly or  
33 indirectly, by reason of a violation of RCW 19.86.030, 19.86.040,  
34 19.86.050, or 19.86.060, it may sue therefor in the superior court to  
35 recover the actual damages sustained by it, whether direct or indirect,  
36 and to recover the costs of the suit including a reasonable attorney's  
37 fee.

1        NEW SECTION.    **Sec. 3.** This act is necessary for the immediate  
2 preservation of the public peace, health, or safety, or support of the  
3 state government and its existing public institutions, and takes effect  
4 immediately.

Passed by the Senate March 7, 2007.

Passed by the House April 4, 2007.

Approved by the Governor April 17, 2007.

Filed in Office of Secretary of State April 17, 2007.