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Supreme Court No. 87105-1

Court of Appeals No. 66252-0-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

CLERK

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DIANNE KLEM, as the administrator of the estate of Dorothy Halstien,

Petitioner,

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a  
Washington corporation; and QUALITY LOAN SERVICE  
CORPORATION, a California corporation,

Respondents.

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**SUPPLEMENTAL BRIEF OF PETITIONER DIANNE KLEM**

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**ORIGINAL**

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## I. INTRODUCTION

The Court should answer two questions.

### A. Are trustees merely “repo agents?”

The parties have two distinct trains of thought about the duties of foreclosure trustees in Washington, and this Court’s guidance is needed so that homeowners, trustees, and lenders know which train is on the right track.

On one track are Dianne Klem, the administrator of the estate of Dorothy Halstien, and like-minded trustees who believe trustees must act in “good faith,” act “impartially,” and “take reasonable and appropriate steps to avoid the sacrifice of the debtor’s property.” *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985); RCW 61.24.010(4); RP 244-46.

On the other track is Quality Loan Service Corporation, which argues it did nothing wrong by selling Dorothy Halstien’s home for less than \$84,000, even though it knew the home would sell for \$235,000 if the foreclosure was postponed for a few weeks. RP 215-17, 303-05. Quality argues a trustee is merely a “repo agent,” whose “sole purpose under a deed of trust is to enforce the lender’s obligation.” RP 474. Rather than acting impartially, and considering a borrower’s request for a short postponement of the sale, Quality maintains that “[i]f a beneficiary [bank]

gives a trustee a standing order that it may not postpone the sale without permission, that is the beneficiary's right." Brief of Appellants, p. 42.

Quality is on the wrong track. If the legislature intended that banks could use a "repo agent" to handle home foreclosures, like they use for the repossession of automobiles and refrigerators, the Deed of Trust Act, like the Uniform Commercial Code, would have provided the lenders with self-help remedies, but it does not. *Compare* RCW 61.24.010(4), *and* RCW 61.24.020, *with* RCW 62A.9A-609.

**B. Does the CPA cover unfair practices?**

The second question this Court should answer concerns the scope of the Consumer Protection Act. Most courts have held that the CPA covers "unfair" practices, whether or not those practices are also "deceptive" or constitute per se CPA violations of other statutes.<sup>1</sup> This interpretation, with which Klem and the trial court agree, flows from the statute, which provides the Act "... shall be liberally construed that its beneficial purpose may be served," and which broadly prohibits "[u]nfair

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<sup>1</sup> As noted in footnotes 3 and 4 in the Petition for Review, and by the National Consumer Law Center, federal courts, and courts in other states with CPA statutes similar to Washington's, have held unfairness can be established independent of deception or per se statutes. National Consumer Law Center, *Unfair and Deceptive Practices* (7th ed. 2008) at §4.3.3.1 (attached at App 1). In addition, the Washington Court of Appeals, in a case other than this one, found practices to be unfair under the CPA even though none of the unfair practices were statutory per se violations. *State v. Kaiser*, 161 Wn. App. 705, 254 P.3d 850 (2011).

methods of competition and *unfair or deceptive* acts or practices in the conduct of any trade or commerce.” RCW 19.86.920 and 19.86.020 (emphasis added). While “deceptive” acts exploit a consumer’s misunderstanding of a transaction, “unfair” acts exploit a consumer’s necessitous circumstances or inability to bargain for better terms.

The Court of Appeals in the instant case came to a different conclusion than Klem, the trial court and other appellate courts because it read the CPA too narrowly. Court of Appeals’ Opinion at p. 18.<sup>2</sup> The Court of Appeals treated the “or” between the words “unfair” and “deceptive” as if it were an “and” and incorrectly ruled that unless an act constitutes a per se violation of the CPA, the plaintiff must allege the act was deceptive to have a viable CPA claim.<sup>3</sup> Klem asks this Court to correct that error, and provide guidance about what constitutes an unfair act or practice.

## II. SUMMARY OF ARGUMENT

Dianne Klem, on behalf of the estate of Dorothy Halstien, obtained a jury verdict and a judgment for \$151,912.23 against Quality Loan Service Corporation and its sister company on her CPA and contract

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<sup>2</sup> The Court of Appeals’ decision in this case is not published but can be found as an appendix to the Petition for Review and at 2011 WL 6382147.

claims.<sup>4</sup> CP 1488, 1582; RP 191-92. This Court should affirm the trial court because Quality engaged in practices that were unfair and contrary to the parties' deed of trust contract, and but for those unfair practices Ms. Halstien's home, which was the sole product of her life's savings, would have sold for \$235,000 – not \$83,087.67. App 8, 9; RP 98-108; Ex 49.

Quality's unfair practices include: (1) refusing the borrower's request for a short postponement of the foreclosure sale because it does only what it is told to do by the bank (RP 357-58); (2) sacrificing Ms. Halstien's equity by selling her home for \$83,087.67 when a \$235,000 offer was on the table (RP 303-305); and (3) falsely notarizing the notice of sale in order to speed up the foreclosure process (RP 198).

Finally, this Court should remand the case to the trial court to issue an injunction to prevent Quality from continuing its unfair practices. The Deed of Trust Act provides that trustees owe a duty of good faith to both the bank and the borrower; however, Quality, unlike other trustees, continues with its practice of refusing to postpone a foreclosure sale unless the bank gives it permission to do so. RCW 61.24.010(4); RP 303-305.

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<sup>3</sup> The Court of Appeals failed to mention Klem showed that Quality's secret agreement with WaMu and Quality's predating of documents were deceptive acts. RP 215-17, 353.

<sup>4</sup> Quality Loan Service Corporation and Quality Loan Service Corporation of Washington are jointly referred to as "Quality."

### III. STATEMENT OF CASE

#### A. Factual background.

In 2004, Ms. Halstien obtained a \$73,000 loan from Washington Mutual Bank (“WaMu”) secured by a deed of trust against her Whidbey Island home. Exs 9, 50. In 2006, Ms. Halstien was seventy-five years old, suffered from dementia, and was moved to a care facility in Everett, Washington. Ex 67. Puget Sound Guardians was appointed as her guardian by the Snohomish County Superior Court. Ex 67.

The cost of Ms. Halstien’s care did not leave her enough money for her guardian to make the home loan payments. She subsequently fell behind on the home loan and WaMu caused Quality, as the successor trustee for the deed of trust, to start a home foreclosure. Ex 3. All foreclosure notices were prepared in Quality’s San Diego, California office. RP 168, 341; Exs 8, 18.

Ms. Halstien’s home was valued at \$256,804 in 2007 by the Island County Assessor’s office. Ex 9. To preserve Ms. Halstien’s equity of more than \$150,000, the guardian obtained court approval to sell Ms. Halstien’s home. Ex 60.

By February 18, 2008, 11 days prior to the scheduled foreclosure sale, the guardian had a signed sale agreement for Ms. Halstien’s home that provided for a \$235,000 cash price and a closing on or before March

18, 2008. Ex 24. On February 19, 2008, Mr. David Greenfield, an employee of Puget Sound Guardians, told Quality about the \$235,000 sale agreement and asked for a short postponement of the foreclosure sale. RP 303-304. Quality refused the request and told Mr. Greenfield that only WaMu could postpone the foreclosure sale. RP 304.

After the call, and on at least seven occasions, Mr. Greenfield asked WaMu to authorize Quality to postpone the foreclosure sale. RP 306-07. However, neither WaMu nor Quality postponed the foreclosure sale, and Quality conducted it on February 29, 2008. RP 103. On behalf of WaMu, Quality bid \$83,086.67. Ex 16; RP 131. The bid was equal to the amount owed to WaMu plus all of Quality's fees and costs. Ex 18.

The only person to bid, other than Quality's representative, was an investor from outside of Whidbey Island. RP 131-32. The investor's bid was one dollar more than Quality's opening bid. Ex 24. Quality accepted the \$83,087.67 bid. RP 131. Within months of the foreclosure sale, the buyer re-sold the property for \$235,000. RP 132; Ex 69.

Evidence was introduced about the probable result if the foreclosure sale had been postponed for as little as one week. When Dianne Klem, the Director of Puget Sound Guardians, was asked if the \$235,000 sale could have closed if the scheduled foreclosure sale was postponed by one week, she answered:

It's very possible. The closing date was on or before a certain date, and if we knew we had an extra week, it's possible we could have contacted the buyer's financing company and see if it was possible to close earlier.

RP 131.

Puget Sound Guardians commenced suit in King County Superior Court in May 2008 to recover the loss of Ms. Halstien's equity. CP 16. Quality and WaMu were named as defendants, but WaMu became insolvent and was not an active party at trial. CP 161. Ms. Halstien died and Dianne Klem was appointed as the representative of the estate and became the substitute plaintiff. RP 62, 66.

In discovery, Klem learned that Quality conducts hundreds of foreclosures in Washington each year and always seeks the bank's permission before postponing a sale. RP 217. Quality had a confidential written agreement with WaMu, as it has with other banks, prohibiting it from postponing a sale without first getting the lender's permission. RP 215-17; Ex 12. Quality's practice of deferring to the banks diverges from the practice of trustees who retain their impartiality and who exercise their discretion to postpone sales in appropriate circumstances. RP 237-46.

Klem also discovered that Quality systematically pre-dated and falsely notarized notices. RP 196-99, 254-57, 354-55. A notary employed by Quality falsely swore that the notice of sale for Ms. Halstien's home

was signed in San Diego, California on Monday, November 26, 2007, which was the first weekday the notice could issue under RCW 61.24.030(8). Ex 8; RP 392. However, the notice was signed and sent out of Quality's office on November 19, 2007 – one week earlier. RP 162, 384-88; Ex 73. Had Quality waited until the 26<sup>th</sup> so the notice could be honestly dated and notarized before sending it to Washington, and if that week delayed recording the notice in Island County by just four days, the foreclosure could not have been conducted until March 7, 2008. RP 388; RCW 61.24.040(5). This one week is important because it would have been “very possible” to close the \$235,000 sale by March 7<sup>th</sup>. RP 131.

**B. Procedural background.**

Klem's claims included negligence, CPA violations, and breach of the deed of trust contract. CP 561-76. Klem argued that Quality's abrogation of the discretion to postpone the foreclosure sale was an unfair practice and violated Quality's obligation, as a trustee, to “act impartially” and “take reasonable and appropriate steps to avoid sacrifice of the homeowner's property.” CP 1417-18. Klem also claimed that Quality acted unfairly by pre-dating and falsely notarizing the notice of sale so the foreclosure sale could be conducted earlier than otherwise possible. CP 1160-91. Finally, Klem claimed that Quality breached the deed of trust contract, including paragraph 16, which states “[a]ll rights and obligations

contained in this Security Instrument are subject to any requirements and limitations of Applicable law,” paragraph 22, which states the trustee “may postpone sale of the Property” as permitted by “Applicable law,” and the implied covenant of good faith. CP 1160-91, 1436; Ex 51.<sup>5</sup>

In its answer, Quality alleged that Ms. Halstien’s claims were waived because her guardian did not seek to enjoin the sale. CP 29-36. But the trial court rejected the waiver argument and Klem proceeded to trial on the negligence, CPA, and breach of contract claims. CP 270-71.<sup>6</sup>

The trial commenced on January 13, 2010. As agreed by the parties, the Court instructed the jury that:

The law relating to Washington deeds of trust, in effect at the time of the foreclosure of Ms. Halstien’s home, includes the following: ...

- c. The trustee may, for any cause the trustee deems advantageous, postpone the foreclosure sale.
- d. The trustee is a fiduciary for both the borrower and the lender, it must act impartially between them, and it is bound by its office to present the sale under every possible advantage to the borrower as well as the lender.
- e. The trustee of a deed of trust is not required to obtain the best possible price for the trust property. Nonetheless, the trustee must take reasonable and appropriate steps to

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<sup>5</sup> Pertinent paragraphs of the contract are attached at App 8 and 9.

<sup>6</sup> Rejection of the waiver argument is consistent with the opinion of this Court. *Albice v. Premier Mortgage Services of Washington, Inc.*, \_\_\_ Wn.2d \_\_\_, 276 P.3d 1277 (2012).

avoid sacrifice of the homeowner's property.

CP 1417-18, attached at App 10, and CP 1303-12. The instructions also provided that Quality was a party to the deed of trust contract and Quality's contractual obligations included a "duty of good faith and fair dealing." CP 1417, attached at App 10, and CP 1436, attached at App 12.

After listening to all of the witnesses, the jury rendered a verdict against Quality for \$151,912.33 on the CPA and contract claims. CP 1491-92. On the negligence claim, the jury found Quality responsible for half of the \$151,912.33 of damages suffered by Ms. Halstien. CP 1489.

Consistent with the jury's verdict on the CPA and contract claims, the trial judge entered a judgment against Quality for \$151,912.33 with prejudgment interest of \$36,633.58, attorney's fees of \$41,635.00, and costs of \$1,265.88. CP 1582. The judge did not enter an injunction because she assumed that after the trial Quality now "understands its obligations under the law, and that it will in the future fulfill its duty of good faith to borrowers, lest it face endless litigation." CP 1588.

On appeal, Quality argued that the trial court should have ruled that Klem's claims were waived. Brief of Appellants pp. 8-17, 26-38. Klem argued, in a cross appeal, that the trial court should have issued an injunction. Brief of Respondent/Cross Appellant pp. 23-26, 41-48.

The Court of Appeals affirmed that Klem's claims were not waived. Opinion at p. 15. In addition, the Court of Appeals affirmed the verdict on the negligence claim because it agreed that Quality's refusal to postpone the sale violated its trustee's duty to Ms. Halstien and caused her damages. Opinion at pp. 10-15, 20-24. But on the CPA and breach of contract claims, and "for different reasons" than those raised by Quality on appeal, the Court of Appeals reversed the trial court. Opinion at p. 18.

The parties' treatment of the CPA claim in the Court of Appeals focused on whether Quality's deferral of discretion to the bank was an "unfair" practice covered by the CPA. Nevertheless, the Court of Appeals reversed the jury's verdict because it stated that Klem had not argued that Quality's acts had a "capacity to deceive." Opinion at p. 18. Moreover, even though Quality never raised the argument, the Court of Appeals reversed the verdict on the breach of contract claim by concluding *sua sponte* that there was no "contract term that made it a breach of the deed of trust for either party to 'not follow' Washington law." Opinion at p. 16. Because the verdict on the negligence claim was half of the amount awarded on other claims, the Court of Appeals remanded the case for re-entry of judgment.

Klem petitioned this Court to review the Court of Appeals' decision to reverse the jury's verdict on the CPA and contract claims, and

the Court of Appeals' refusal to order the issuance of an injunction. Quality did not petition for review of the Court of Appeals' decision to affirm the verdict on the negligence claim. This Court entered an order granting Klem's petition for review on June 6, 2012.

#### IV. ARGUMENT

##### A. **Quality Loan Service Corporation owed a duty of good faith to Ms. Halstien and continues to owe a duty of good faith to other homeowners.**

The "good faith" requirement existed in 2008 and is relevant to Klem's damage claim; it exists today and is relevant to her injunction demand.<sup>7</sup> At the time of the Halstien foreclosure, this Court stated that trustees were "bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike" and were required to "take reasonable and appropriate steps to avoid sacrifice of the debtor's property." *Cox*, 103 Wn.2d at 389. After the Halstien foreclosure, which

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<sup>7</sup> "Good faith" is commonly defined as "honesty and lawfulness of purpose." *St. Paul Fire and Marine Insurance Company v. Oniva, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008). However, the best way to determine if Quality's practices meet that standard is to see if Quality acted in "bad faith." Actions are in bad faith if they are "unreasonable, frivolous, or unfounded." *Mutual of Enumclaw Insurance Company v. Dan Paulson Construction, Inc.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007). Moreover, given that this Court has held, in *Albice v. Premier Mortgage Services of Washington, Inc.*, \_\_\_, Wn.2d \_\_\_, 276 P.3d 1277 (2012) and *Udall v. T.D. Escrow Servs. Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007), that the Deed of Trust Act must be construed in the borrower's favor, "good faith" should imply a "broad obligation of fair dealing and responsibility to give equal consideration" to the parties' interests as it does in the context of insurance contracts. See *St. Paul Fire*, 165 Wn.2d at 129.

occurred on February 29, 2008, the legislature reiterated that trustees must treat borrowers in good faith. *See* Laws of 2009, ch. 292 § 7 (which became effective on July 6, 2009). RCW 61.24.010(4) currently states:

The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

Quality violated its duty of good faith when it pre-dated and falsely notarized notices in order to transmit them earlier than allowed by statute. Moreover, a trustee that acts as a “repo agent,” instead of acting as an impartial trustee concerned with avoiding the sacrifice of the borrower’s equity, does not act in good faith. The worst part – particularly for the many other homeowners to whom Quality currently owes a duty of good faith – is that Quality continues to do only as directed by the banks.

**B. Quality’s breach of the duty of good faith is an unfair practice that caused Ms. Halstien to suffer \$151,912.33 of damages.**

The parties agree there are five elements of a CPA claim.<sup>8</sup> CP 1307, 1430. Quality contested only the first and fifth of these elements – whether Quality committed an unfair practice, and, if so, whether that practice caused Ms. Halstien’s damages. *See* Court of Appeals’ Opinion

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<sup>8</sup> The five elements are: (1) Quality engaged in an unfair or deceptive act or practice; (2) the act or practice occurred in the conduct of Quality’s trade or commerce; (3) the act or practice affected the public interest; (4) Ms. Halstien was injured; and (5) Quality’s act or practice caused Ms. Halstien’s injury. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d at 778, 784-93, 719 P.2d 531 (1986).

at p. 17. The jury and trial court, after listening to the testimony and reviewing the exhibits, correctly concluded that both contested elements were satisfied because Quality's failure to treat Ms. Halstien in good faith is an unfair practice that caused her damages. CP 1430, 1491, 1582-84.

### **1. Quality engaged in unfair practices.**

The Federal Trade Commission has defined an unfair act or practice as one that causes or "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).<sup>9</sup> The FTC's definition is instructive because in enacting the CPA, the Washington legislature stated that it intended for "courts [to] be guided by final decisions of the federal courts and final orders of the federal trade commission." RCW 19.86.920.

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<sup>9</sup> Some courts follow the similar *S&H* standard. *Federal Trade Commission v. Sperry & Hutchinson Company (S&H)*, 405 U.S. 233, 244-45, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972); *see also* National Consumer Law Center, *Unfair and Deceptive Practices* (7th ed. 2008) at §4.3.3.3 (attached at App 2). In the *S&H* case, the United States Supreme Court found unfairness to be a broader standard than deception and noted with approval the use of the following criteria for determining whether a practice is unfair:

- Whether the practice offends public policy. Is it within at least the penumbra of some common law, statutory, or other established concept of some common law, statutory, or other established concept of unfairness?
- Whether the practice is immoral, unethical, oppressive, or unscrupulous.
- Whether the practice causes substantial injury to consumers.

Courts applying the *S&H* test have held that the consumer need not establish all three prongs. *See* App 2 at n.597. While a court may consider all three prongs, evidence concerning just one prong may be sufficient to show a practice is unfair. App 3 at n.598.

When applying the three parts of the FTC standard, Quality's practices are "unfair." First, the practices caused a consumer to suffer a substantial injury; Quality sold Ms. Halstien's home for \$151,912.33 less than it was worth. Second, the consumer had no reasonable opportunity to avoid the harm; Ms. Halstien did not know about Quality's secret contract with WaMu, or about its practice of falsely dating notices, before she signed the deed of trust. Finally, there is no countervailing benefit that flows from Quality's unfair practices. Had Quality treated Ms. Halstien in good faith and postponed the foreclosure sale, which was reasonably necessary to "avoid sacrifice of the debtor's property" as required by this Court's ruling in *Cox*, WaMu's loan would have been satisfied, all of Quality's fees would have been paid, and Ms. Halstien's \$151,912.33 of equity would have been preserved. *Cox*, 103 Wn. 2d at 389.

**2. Quality's unfair practices caused Ms. Halstien to suffer \$151,912.33 of damages.**

But for Quality's refusal to postpone the sale, which is the result of Quality's unfair practice of doing only what it is told to do by the banks, Ms. Halstien's home would have been sold for \$235,000 and not \$83,087.67. Therefore, the jury was correct to conclude that Quality's unfair practice was the proximate cause for Ms. Halstien's \$151,912.33 of damages. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of*

*Washington, Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (proximate cause in CPA claims is a factual question to be decided by the trier of fact).

Another unfair practice that caused Ms. Halstien's damages was Quality's pre-dating and false notarization of the notice of sale. Taken together, the facts show: (i) the foreclosure, which took place on February 29, 2008, could not have occurred until March 7, 2008 but for the fact Quality pre-dated the notice of sale; and (ii) Ms. Halstien's guardian could have closed the \$235,000 sale if the scheduled foreclosure was postponed by only one week.<sup>10</sup>

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<sup>10</sup> The following facts show that Quality's pre-dating of the notice caused the damages:

- (1) The Deed of Trust Act provides that a Notice of Trustee's Sale cannot be issued until thirty days have expired after the posting of the Notice of Default (RP 162 and RCW 61.24.030(8));
- (2) The Notice of Default in the Halstien foreclosure was posted on October 25, 2007 (Ex 81);
- (3) The first business day that was at least thirty days after the posting of the Notice of Default was Monday, November 26, 2007;
- (4) The Notice of Trustee's Sale for Ms. Halstien's home was dated November 26, 2007 (Ex 8);
- (5) Contrary to the date that Quality put on the Notice of Sale, and contrary to the sworn statement of the notary employed by Quality, the Notice of Trustee's Sale for Ms. Halstien's home was actually signed and sent out of Quality's office in San Diego, California, on November 19, 2007, which is one week earlier than the date that appears on its face and one week earlier than when the notice could have been properly issued in accordance with the Deed of Trust Act (RP 385-86 and RCW 61.24.040(1));
- (6) Quality uses a multi-step process to get Notices of Sale out of its San Diego office and recorded in the county where the subject property is located (RP 172-175);
- (7) It took eight days from when the Notice of Sale left Quality's San Diego, California, office until it was recorded in Island County, Washington on November 27, 2007 (Ex 8);
- (8) Quality admitted that if the recording of the Notice of Sale would have been delayed by just four days, the foreclosure sale, which occurred

**C. Quality's breach of contract is an alternative basis upon which the Supreme Court can affirm the jury's verdict.**

Affirming the jury's verdict on the contract claim is appropriate because the plaintiff satisfied all five elements.<sup>11</sup> First, the deed of trust is a contract and Quality conceded it is a party to that contract. CP 1305, 1417.

Second, the deed of trust contract expressly required that any foreclosure be conducted in accordance with Washington law. Paragraph 16 provides "[a]ll rights contained in this Security Instrument [including the right to foreclose] are subject to any requirements and limitations of Applicable law." Ex 51; App 8.

Third, Quality breached the contract: Quality did not conduct the foreclosure under the "...requirements and limitations of Applicable law;"

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- on Friday, February 29, 2008, could not have been scheduled until Friday, March 7, 2008 (RP 385-88 and RCW 61.24.040(5));
- (9) Quality produced no evidence at trial to support an argument that, if it waited one week to honestly date and notarize the Halstien Notice of Sale before sending it out for recording, it could have caused the notice to be recorded in Island County in time to schedule a sale prior to March 7, 2008; and
  - (10) Klem testified at trial that it would have been "very possible" to close the \$235,000 sale, and thereby preserve \$151,912.33 of equity, if the foreclosure sale had been scheduled for March 7, 2008, instead of February 29, 2008 (RP 131).

<sup>11</sup> The five elements, as set forth in agreed jury instruction No. 21, are: (1) Quality entered into a contract; (2) the terms of the contract provide that any foreclosure of Ms. Halstien's home would be conducted in a manner defined by Washington law; (3) Quality breached the contract; (4) Ms. Halstien or Puget Sound Guardians offered to perform Ms. Halstien's obligations under the contract; and (5) Ms. Halstien suffered damages as a result of Quality's breach. App 13, CP 1435. See 6 Washington Practice, Washington Pattern Jury Instructions: Civil, WPI 300.02 (5th Ed. 2005).

it falsified the notice of sale and failed to take reasonable steps to avoid sacrificing Ms. Halstien's equity in her home. Even the Court of Appeals acknowledged that Quality did not comply with Washington law in the foreclosure process, noting at footnote 15 of its opinion: "The instruction in the Attorney Expectation Document appears to violate RCW 61.24.040(6)." In addition, Quality breached the covenant of good faith that the parties agreed was part of the contract. CP 1309, 1436. While the covenant of good faith is not a free-floating provision unattached to the underlying legal document, it nevertheless requires the parties to perform their contractual obligations in good faith. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

Fourth, Puget Sound Guardians offered to fully perform all of Ms. Halstien's obligations secured by the deed of trust. The proceeds from the \$235,000 sale arranged by the guardian would have satisfied WaMu's claim, covered all of Quality's fees and costs, and saved over \$150,000 of equity for Ms. Halstien. RP 76-78, 102-03, 108.

Fifth and finally, but for Quality's failure to foreclose the deed of trust "subject to any requirements and limitations of Applicable law," as is required by paragraph 16 of the contract, Ms. Halstien's home would have been sold for \$235,000, not \$83,087.67.

**D. An injunction is necessary to stop Quality from continuing with its unfair business practices.**

An injunction is necessary because Quality is steadfast in its refusal to postpone a foreclosure sale unless the beneficiary/bank authorizes it to do so.<sup>12</sup> Moreover, the Court should issue an injunction because Quality falsely notarized documents. Although Quality now says it has stopped its practice of falsely notarizing foreclosure notices, the voluntary cessation of an unlawful practice does not prohibit a CPA injunction barring that practice.<sup>13</sup>

When taken as a whole, the cases and statutes supporting the issuance of an injunction demonstrate that injunctive relief is fundamental to the CPA's goal of protecting the public interest. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973); RCW 19.86.920. Therefore, as authorized by the CPA, Quality should be enjoined from continuing with its unfair business practices. RCW 19.86.090.

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<sup>12</sup> In contradiction to RCW 61.24.010(4), which requires a trustee to treat both the borrower and the beneficiary in "good faith," Quality maintains its position that "[i]f a beneficiary [the bank] gives a trustee a standing order that it may not postpone the sale without permission, that is the beneficiary's right." Brief of Appellants, at p. 43.

<sup>13</sup> *State v. Ralph Williams' North West Chrysler Plymouth (Ralph Williams II)*, 87 Wn.2d 298, 553 P.2d 423 (1976) (the Court enjoined defendant from future violations even when the business was closed at the time of the injunction); *Oregon-Washington Plywood Co. v. Federal Trade Commission*, 194 F.2d 48, 50 (9th Cir. 1952) ("It is of course well settled that discontinuance of an illegal practice does not of itself render inappropriate the entry of a cease and desist order.")

## V. ATTORNEY FEES

Pursuant to the CPA, this Court should affirm the trial court's award of attorney fees and award Klem additional attorney fees on appeal. RCW 19.86.090; *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993).

## VI. CONCLUSION

This Court should affirm the trial court's judgment, remand the case for the issuance of an injunction, and award Klem additional attorney fees. Klem's request is consistent with the objective of the Deed of Trust Act to "provide an adequate opportunity for interested parties to prevent wrongful foreclosure." *Cox*, 103 Wn. 2d at 387.<sup>14</sup>

DATED this 4<sup>th</sup> day of July, 2012.

NORTHWEST JUSTICE PROJECT

By Frederick P. Corbit  
Frederick P. Corbit, WSBA #10999  
Attorney for Petitioner, Dianne Klem

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<sup>14</sup> Moreover, Klem's request does not run afoul of the two other objectives of the Deed of Trust Act that are to make the nonjudicial foreclosure process "efficient and inexpensive" and to "promote the stability of land titles." *Id.* Klem does not argue for anything that would require the banks or trustees to suffer from additional expenses or delay. As demonstrated at trial, the cost of postponing the Halstien foreclosure would have only been \$50, and that cost, and the interest accruing on the loan during the duration of the postponement, would have been paid out of the homeowner's proceeds from the sale. RP 262-63. Finally, Klem never attempted to revoke the deed issued to the purchaser at the foreclosure sale.

CERTIFICATE OF SERVICE

I certify I will cause to be mailed a copy of the SUPPLEMENTAL BRIEF OF PETITIONER DIANNE KLEM postage prepaid, via U.S. mail on the 5<sup>th</sup> day of July, 2012, to the following counsel of record at the following addresses:

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On or before July 6, 2012, I certify I will cause a PDF copy SUPPLEMENTAL BRIEF OF PETITIONER DIANNE KLEM to be emailed to Kenneth W. Masters at [ken@appeal-law.com](mailto:ken@appeal-law.com).

SIGNED at Seattle, Washington, this 5<sup>th</sup> day of July, 2012.

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## APPENDIX

App 1-7	Section 4.3.3 of National Consumer Law Center's manual titled Unfair and Deceptive Acts and Practices (7th ed. 2008).
App 8	Paragraph 16 of the deed of trust contract that is part of Ex 51.
App 9	Paragraph 22 of the deed of trust contract that is part of Ex 51.
App 10-11	Jury Instruction No. 5 (on the deed of trust foreclosure process), CP 1417.
App 12	Jury Instruction No. 22 (on the implied duty of good faith), CP 1436.
App 13	Jury Instruction No. 21 on breach of contract claims, CP 1435.

### 4.3.3 Unfairness Standards under State UDAP Statutes

#### 4.3.3.1 Unfairness Broader Than Deception

Unfairness, for purposes of state UDAP statutes (as it is for purposes of the FTC Act<sup>576</sup>) is not limited to traditional notions of deception or fraud, but encompasses other types of wrongful business conduct.<sup>577</sup> A defendant may violate a UDAP prohibition of unfair practices without making any misrepresentations.<sup>578</sup> It is not necessary to show intent to deceive.<sup>579</sup> Unfairness is not limited to “unfair methods of competition,” that is, anti-competitive conduct.<sup>580</sup> Conduct can be unfair even though it is permitted by statute or common law principles.<sup>581</sup> Determining what is unfair is highly fact-specific and generally inappropriate for summary judgment.<sup>582</sup>

One definition of unfairness is any conduct that a court of equity would consider unfair.<sup>583</sup> This broad definition “infuse[s] flexible equitable principles into consumer protection law so that it may respond to the myriad of unscrupulous business practices modern consumers face.”<sup>584</sup>

In Hawaii, the legislative committee recommending enactment of an unfairness standard<sup>585</sup> quoted from the legislative history of the FTC standard for unfair methods of competition:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.<sup>586</sup>

A small aberrant line of cases has developed in one jurisdiction. The Illinois Supreme Court ruled in *Laughlin v. Evanston Hospital*<sup>587</sup> that the UDAP prohibition of unfair acts and practices cannot be used as a means of enforcing federal antitrust legislation. The court stated that the reach of the UDAP statute was intended to be limited to “conduct that defrauds or deceives consumers or others.”<sup>588</sup> Two federal district courts have taken this language out of context and ruled that unfair acts are no longer actionable under the Illinois UDAP statute unless deception is shown also.<sup>589</sup>

This conclusion ignores other language in *Laughlin* that the Illinois UDAP statute prohibits overreaching as well as fraudulent conduct. Most Illinois appellate courts have continued to apply the “S&H” unfairness definition in UDAP cases,<sup>590</sup> and have confined *Laughlin* to antitrust cases.<sup>591</sup>

576 Federal Trade Comm’n v. Sperry & Hutchinson Co., 405 U.S. 233, 244–245 (1972) (unfairness is broader than deception). See § 3.3.4, *supra*.

577 *Cima v. Wellpoint Healthcare Networks, Inc.*, 2006 WL 1914107, at \*13 (N.D. Ill. July 11, 2006); *State v. O’Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972); *Cherick Distribs., Inc. v. Polar Corp.*, 41 Mass. App. Ct. 125, 669 N.E.2d 218 (1996); *Farm Bureau Fed’n v. Blue Cross*, 403 Mass. 722, 532 N.E.2d 660 (1989); *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 487 N.E.2d 520 (1986); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 322 N.E.2d 768 (1975); *Patterson v. Beall*, 19 P.3d 839 (Okla. 2000) (unfair act was a UDAP violation even though not deceptive). Cf. *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184 (S.D. 2007) (unfair conduct does not violate South Dakota UDAP statute, which prohibits only deception).

578 *S. Atl. Ltd. P’ship v. Riese*, 284 F.3d 518, 535 (4th Cir. 2002) (plaintiff need only show unfairness or deception); *Oshana v. Coca-Cola Co.*, 2005 WL 1661999, at \*5 (N.D. Ill. July 13, 2005); *State ex rel. Hartigan v. Commonwealth Mortgage Corp.*, 732 F. Supp. 885 (N.D. Ill. 1990); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 973 P.2d 527 (1999) (prohibition in § 17200 against fraudulent, unfair, or unlawful practices is disjunctive); *People ex rel. Hartigan v. Knecht Servs.*, 216 Ill. App. 3d 843, 575 N.E.2d 1378 (1991); *State ex rel. Miller v. Cutty’s Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005) (practice is actionable if it is either unfair or deceptive).

579 *Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 652 A.2d 496 (1995) (but finding no UDAP violation in light of unique circumstances of particular case, including defendant’s lack of bad faith or willfulness).

580 *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972); *HM Distribs. of Milwaukee, Inc. v. Department of Agriculture*, 55 Wis. 2d 261, 198 N.W.2d 598 (1972).

581 *Broadway Theatre Corp. v. Buena Vista Pictures Distribution*, 2002 WL 32502100 (D. Conn. Sept. 19, 2002) (a practice that is not outlawed by antitrust laws does not necessarily preclude that practice from UDAP statute’s reach as “unfair”); *Schubach v. Household Fin. Corp.*, 375 Mass. 133, 376 N.E.2d 140 (1978).

582 *State ex rel. Miller v. Cutty’s Des Moines Camping Club, Inc.*,

694 N.W.2d 518, 525, 529 (Iowa 2005).

583 *Id.*; *S. Atl. Ltd. P’ship v. Riese*, 284 F.3d 518, 535 (4th Cir. 2002). See also *Barquis v. Merchants Collection Ass’n*, 101 Cal. Rptr. 745, 496 P.2d 817, 829–830 (1972).

584 *State ex rel. Miller v. Cutty’s Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 525 (Iowa 2005) (can be based on equitable principles such as laches and estoppel that recognize the unfairness of unreasonable delay in enforcing rights).

585 Conf. Rep. No. 267, 3d Leg., Reg. Sess., House Journal at 600 (1965), cited in *Robert’s Waikiki U-Drive v. Budget Rent-A-Car*, 491 F. Supp. 1199 (D. Haw. 1980).

586 H.R. Conf. Rep. No. 1142, 63 Cong., 2d Sess. at 19 (1914).

587 133 Ill. 2d 374, 550 N.E.2d 986 (1990).

588 *Id.* at 550 N.E.2d 993. This holding that UDAP antitrust actions must involve deception is clearly in the minority. See, e.g., *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. Dist. Ct. App. 1996).

589 *Cobb v. Monarch Fin. Co.*, 913 F. Supp. 1164 (N.D. Ill. 1995); *Kedziora v. Citicorp Nat’l Servs., Inc.*, 780 F. Supp. 516 (N.D. Ill. 1991).

590 *Perez v. Citicorp Mortgage, Inc.*, 301 Ill. App. 3d 413, 703 N.E.2d 518 (1998); *Saunders v. Michigan Ave. Nat’l Bank*, 278 Ill. App. 3d 307, 662 N.E.2d 602 (1996); *Griffin v. Universal Cas. Co.*, 274 Ill. App. 3d 1056, 654 N.E.2d 694 (1995).

591 *Sullivan’s Wholesale Drug v. Faryl’s Pharmacy Inc.*, 214 Ill. App. 3d 1073, 573 N.E.2d 1370 (1991).

### 4.3.3.2 Precedential Effect of Congress' 1994 Definition of Unfairness in Interpreting State UDAP Statutes

The definition of unfairness under a state UDAP statute is primarily guided by that statute's own definition (if any), by the state's legislative intent in enacting the UDAP statute, and by state regulations promulgated under the UDAP statute. Only secondarily does the FTC's definition of unfairness have precedential value in interpreting a state UDAP statute.

To the extent that the FTC's definition of unfairness is relevant to state definitions, a key question is the impact of the FTC's 1994 Reauthorization Act, which defines those unfair practices that the FTC can declare unlawful.<sup>592</sup> The implication of this amendment for court interpretations of the unfairness standard under state UDAP statutes is far from clear, since the 1994 amendment limits the FTC's authority to challenge certain practices, but does not define the term "unfairness" generally.

Moreover, the legislative history takes pains to indicate that the amendment to the FTC Act should have no effect on the development of the unfairness concept under state statutes:

The Committee is aware that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960s, virtually every State has enacted statutes prohibiting deceptive practices, while many States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts, including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decisionmaking. Sound prin-

ciples of federalism limit the impact of this section to the FTC only.<sup>593</sup>

As described at § 4.3.3.4, *infra*, most state courts have seemed uninterested in adopting the FTC's 1980 unfairness definition, which the 1994 Reauthorization Act incorporates. Instead, courts interpreting state UDAP statutes mostly rely on the FTC's older "S&H" standard,<sup>594</sup> discussed in the next subsection, or on their own jurisprudence.

### 4.3.3.3 The "S&H" Standard

#### 4.3.3.3.1 Description of the "S&H" standard

The "S&H" standard, which most state courts use in interpreting unfairness under their state UDAP statutes, is described in the landmark 1972 United States Supreme Court case, *Federal Trade Comm'n v. Sperry and Hutchinson Company (S&H)*. There, the court found unfairness to be a broader standard than deception.<sup>595</sup> The court noted with approval the FTC's use<sup>596</sup> of the following criteria for determining whether a practice is unfair:

- Whether the practice offends public policy. Is it within at least the penumbra of some common law, statutory, or other established concept of unfairness?
- Whether the practice is immoral, unethical, oppressive, or unscrupulous.
- Whether the practice causes substantial injury to consumers.

State and federal courts applying this standard have held that the consumer need not establish all three prongs of the standard.<sup>597</sup> Instead, while the court may consider all three prongs, evidence concerning just one prong may be suffi-

593 Sen. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1788.

594 This standard is described in § 4.3.3.3.1, *infra*.

595 405 U.S. 233, 244-245, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972).

596 See Statement of Basis and Purpose of the FTC Trade Regulation Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. Part 408, 29 Fed. Reg. 8355 (1964), since rescinded.

597 *Fabri v. United Technologies Int'l, Inc.*, 387 F.3d 109, 123 (2d Cir. 2004); *Cima v. Wellpoint Health Networks, Inc.*, 2006 WL 1914107 (S.D. Ill. July 7, 2006) ("cigarette rule;" insurer used merger, market withdrawal and misrepresentations to regulators to evade Illinois insurance law); *Costa v. Mauro Chevrolet, Inc.*, 390 F. Supp. 2d 720 (N.D. Ill. 2005) (failure to post payments, wrongful repossessions; discussing "immoral, unethical" prong of test); *Votto v. Am. Car Rental, Inc.*, 871 A.2d 981 (Conn. 2005); *Journal Publishing Co. v. Hartford Courant Co.*, 261 Conn. 673, 804 A.2d 823 (2002); *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 804 A.2d 180 (2002); *Cheshire Mortgage Servs., Inc. v. Montes*, 223 Conn. 80, 612 A.2d 1130 (1992); *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 775 N.E.2d 951 (2002).

592 See § 4.3.2, *supra*.

cient to show a practice is unfair.<sup>598</sup> A practice may thus be a UDAP violation if it violates public policy.<sup>599</sup> A practice need not be prohibited by other law to be unfair.<sup>600</sup>

#### 4.3.3.3.2 Differences between the “S&H” and the current FTC standard

To some extent, distinctions between the “S&H” standard and the current FTC definition of unfairness may have little practical effect. Unfairness is a question of fact for the jury or, in a non-jury case, the judge.<sup>601</sup> The facts of a case will be more dispositive than the standard utilized.

In addition, the three prongs of the “S&H” definition are not that much different from the current FTC definition. The “S&H” definition looks at three factors: whether the practice is within the penumbra of common law, statutory, or other established concepts of fairness; whether it is immoral, unethical, oppressive, or unscrupulous; and whether

it causes substantial injury. The first factor is somewhat akin to the current FTC definition’s acknowledgment of public policy concerns.<sup>602</sup>

The second factor, whether conduct is immoral, unethical, oppressive, or unscrupulous, has proven to be largely duplicative of the other two unfairness criteria. Unethical or oppressive conduct almost always injures consumers or violates public policy.<sup>603</sup> The third factor in the “S&H” definition (substantial injury) is identical to the current FTC definition.

The FTC definition explicitly considers whether consumers can avoid the injury and whether there are countervailing benefits to competition, while these factors are not explicitly included in the “S&H” definition. Nevertheless, courts are unlikely to ignore these factors even under the “S&H” definition.<sup>604</sup>

#### 4.3.3.4 State UDAP Use of “S&H” Unfairness Definition in Lieu of the Current FTC Definition

At the time of the early development of state UDAP case law in the 1960s and 1970s, the FTC utilized the “S&H” definition of unfairness: whether the practice is within the penumbra of common law, statutory, or other established concepts of fairness; whether it is immoral, unethical, oppressive, or unscrupulous; and whether it causes substantial injury.<sup>605</sup> In 1980, the FTC amended this definition to adopt the standard that is essentially codified now in the FTC Act.<sup>606</sup>

Nevertheless, most courts in interpreting state UDAP statutes do not apply this current FTC unfairness definition. Instead, they continue to use the “S&H” standard.<sup>607</sup>

598 See *Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. 1025 (D. Conn. 1990); *Sorisio v. Lenox, Inc.*, 701 F. Supp. 950 (D. Conn.), *aff’d*, 863 F.2d 195 (2d Cir. 1988); *Carpentino v. Transport Ins. Co.*, 609 F. Supp. 556 (D. Conn. 1985); *Jacobs v. Healey Ford-Subaru, Inc.*, 231 Conn. 707, 652 A.2d 496 (1995); *Normand Josef Enters. v. Connecticut Bank*, 230 Conn. 486, 646 A.2d 1289 (1994); *Daddonna v. Liberty Mobile Home Sales, Inc.*, 209 Conn. 243, 550 A.2d 1061 (1988); *McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, 473 A.2d 1185 (1984); *Meyers v. Cornwell Quality Tools, Inc.*, 41 Conn. App. 19, 674 A.2d 444 (1996); *Prishwalko v. Bob Thomas Ford, Inc.*, 33 Conn. App. 575, 636 A.2d 1383 (1994); *Krawiec v. Blake Manor Dev. Co.*, 26 Conn. App. 601, 602 A.2d 1062 (1992); *Gibbs v. Mase*, 11 Conn. App. 289, 526 A.2d 7 (1987); *McClendon v. Metropolitan Mortgage Co.*, Clearinghouse No. 43,703G (Fla. Cir. Ct. Dade Cty. May 20, 1988).

599 *Costa v. Mauro Chevrolet, Inc.*, 390 F. Supp. 2d 720 (N.D. Ill. 2005) (failure to provide copy of contract, errors in posting of payments, wrongful repossessions); *Bruce v. Home Depot*, 308 F. Supp. 2d 72 (D. Conn. 2004) (focus on public policy prong; violations of Creditors Collection Practices act were probative; here, vigorous efforts to collect for work not performed); *Vezina v. Nautilus Pools, Inc.*, 27 Conn. App. 810, 610 A.2d 1312 (1992); *Johnson v. Matrix Fin. Servs.*, 820 N.E.2d 1094 (Ill. App. Ct. 2004) (discussion of public policy prong; strong public policy against kickbacks; kickback that violates RESPA is also UDAP violation, but not shown here); *State ex rel. Cooper v. NCCS Loans, Inc.*, 624 S.E.2d 371 (N.C. Ct. App. 2005) (attempt to disguise high-interest payday loan as Internet service contract violated strong public policy against usury).

600 *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 2d 399 (App. 2001).

601 *Krawiec v. Blake Manor Dev. Co.*, 26 Conn. App. 601, 602 A.2d 1062 (1992); *DeMotes v. Leonard Schwartz Nissan*, 22 Conn. App. 464, 578 A.2d 144 (1990); *Edart Truck Rental v. B. Swirsky & Co.*, 23 Conn. App. 137, 579 A.2d 133 (1990). See also *Patterson v. Beall*, 19 P.3d 839 (Okla. 2000) (whether specific conduct meets broad statutory definition of unfairness is a fact question to be decided by courts on case-by-case basis). *But see Francoline v. Klatt*, 26 Conn. App. 203, 600 A.2d 8 (1991) (in some cases, facts found may be so egregious as to require a conclusion that as a matter of law, they violate public policy).

602 See § 4.3.2.5, *supra*.

603 *Reauthorization of the Federal Trade Commission Before the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2d Sess. 23, 28 (1982).

604 See *Sadowski v. Med1 Online, L.L.C.*, 2008 WL 2224892, at \*6-7 (N.D. Ill. May 27, 2008) (working lack of meaningful choice into analysis of whether practice is oppressive); *Tudor v. Jewel Food Stores, Inc.*, 681 N.E.2d 6 (Ill. App. Ct. 1997) (considering whether consumer lacked meaningful choice as part of analysis of unfairness).

605 See § 4.3.3.3.1, *supra*.

606 See § 4.3.2, *supra*.

607 *ALASKA: State v. Grogan*, 628 P.2d 570 (Alaska 1981).

*CALIFORNIA: See § 4.3.3.5, infra.*

*FLORIDA: Hanson Hams, Inc. v. HBH Franchise Co.*, 2003 WL 22768687 (S.D. Fla. Nov. 7, 2003); *Kelly v. Nelson, Mullins, Riley & Scarborough*, 2002 U.S. Dist. LEXIS 6430 (M.D. Fla. Mar. 20, 2002); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773 (Fla. 2003); *McClendon v. Metropolitan Mortgage Co.*, Clearinghouse No. 43,703G (Fla. Cir. Ct. Dade Cty. May 20, 1988).

*HAWAII: Roberts’ Waikiki U-Drive v. Budget Rent-A-Car*, 491 F. Supp. 1199 (D. Haw. 1980); *Balthazar v. Verizon Hawaii, Inc.*, 123 P.3d 194 (Haw. 2005); *Hawaii Cmty. Fed. Credit*

Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000); Ai v. Frank Huff Agency Ltd., 61 Haw. 607, 607 P.2d 1304 (1980); Rosa v. Johnson, 651 P.2d 1228 (Haw. Ct. App. 1982); Eastern Star, Inc. v. Union Bldg. Materials, 712 P.2d 1148 (Haw. Ct. App. 1985).

**ILLINOIS:** Sadowski v. Med1 Online, L.L.C., 2008 WL 2224892, at \*6 (N.D. Ill. May 27, 2008); Cima v. Wellpoint Health Networks, Inc., 2006 WL 1914107 (S.D. Ill. July 7, 2006); Costa v. Mauro Chevrolet, Inc., 390 F. Supp. 2d 720 (N.D. Ill. 2005); Johnson v. Matrix Fin. Servs., 820 N.E.2d 1094 (Ill. Ct. App. 2004); Case v. Ameritech Servs., 2004 WL 73524 (Ill. Cir. Ct. 2004) (unethical and oppressive for phone company to delete information when sending accounts to collection, making it difficult to verify billing errors; substantial injury where threat of bad credit caused consumers, being dunned for bills of persons with same name but different identifying information, to pay bills not owed); Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951 (2002); Ekl v. Knecht, 585 N.E.2d 156 (Ill. App. Ct. 1991); People *ex rel.* Hartigan v. Knecht Servs., 216 Ill. App. 3d 843, 575 N.E.2d 1378 (1991); Elder v. Coronet Ins. Co., 201 Ill. App. 3d 733, 558 N.E.2d 1312 (1990); People *ex rel.* Fahner v. Walsh, 122 Ill. App. 3d 481, 461 N.E.2d 78 (1984). *Accord* Thomas v. Arrow Fin. Servs., L.L.C., 2006 WL 2438346, at \*7 (N.D. Ill. Aug. 17, 2006). *See also* Tudor v. Jewel Food Stores, Inc., 681 N.E.2d 6 (Ill. App. Ct. 1997) (to be unfair, defendant's conduct must violate public policy, be so oppressive that consumer has little alternative but to submit, and substantially injure the consumer); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1909–1916 (Winter 2000).

**LOUISIANA:** Surgical Care Ctr. v. Hospital Serv. Dist., 309 F.3d 836 (5th Cir. 2002); Specialty Diving v. Master Builders, Inc., 2003 WL 22416381 (E.D. La. Oct. 22, 2003); Tyler v. Rapid Cash, L.L.C., 930 So. 2d 1135 (La. Ct. App. 2006) (violation of public policy and “unethical, oppressive, unscrupulous or substantially injurious to consumers”; shown here by sham sale of motor vehicle to secure high-cost loan, followed by self-help repossession); Harris v. Poche, 930 So. 2d 165 (La. Ct. App. 2006) (violation of public policy and unethical or substantially injurious; shown here where realtor failed to communicate buyer's offer to seller); Wood v. Collins, 725 So. 2d 531 (La. Ct. App. 1998); Thomas v. Busby, 670 So. 2d 603 (La. Ct. App. 1996); Camp, Dresser & McKee, Inc. v. Steimle & Assocs., Inc., 652 So. 2d 44 (La. Ct. App. 1995); Vercher v. Ford Motor Co., 527 So. 2d 995 (La. Ct. App. 1988); Gautreau v. Southern Milk Sales, Inc., 509 So. 2d 495 (La. Ct. App. 1987); Moore v. Goodyear Tire & Rubber Co., 364 So. 2d 630 (La. Ct. App. 1978).

**MASSACHUSETTS:** Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 243 (1st Cir. 2005); States Res. Group v. The Architectural Team, Inc., 433 F.3d 73 (1st Cir. 2005) (citing Massachusetts precedent for use of *S&H* rule; unfairness not sufficiently alleged here); Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985) (Massachusetts law); Berenson v. Nat'l Fin. Servs., L.L.C., 403 F. Supp. 2d 133 (D. Mass. 2005); Farm Bureau Fed'n v. Blue Cross, 403 Mass. 722, 532 N.E.2d 660 (1989); Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980); PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975); Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 672 N.E.2d 979 (1996); Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 497 N.E.2d 19 (1986); Piccunro v. Gaitenby, 20 Mass. App. Ct. 286, 480 N.E.2d 30 (1985). *See also* Michael M. Greenfield, *Unfairness Under*

*Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1924–1930 (Winter 2000).

**MINNESOTA:** State *ex rel.* Humphrey v. Directory Publishing Servs., Inc., 1996 Minn. App. LEXIS 62 (Jan. 9, 1996).

**NEBRASKA:** Reinbrecht v. Walgreen Co., 742 N.W.2d 243, 249 (Neb. Ct. App. 2007) (approving trial court's definition of unfair trade practice as “one that is immoral, unethical, oppressive, or unscrupulous”).

**NEW HAMPSHIRE:** Curtis Mfg. Co. v. Plastic-Clip Corp., 888 F. Supp. 1212 (D.N.H. 1994); Becksted v. Nadeau, 926 A.2d 819, 823 (N.H. 2007) (citing *S&H* standard as guide in determining whether practice not enumerated in UDAP statute is violation); State v. Moran, 861 A.2d 763 (N.H. 2004) (*S&H* definition provides guidance); Milford Lumber Co. v. RCB Realty, 780 A.2d 1259 (N.H. 2001).

**NORTH CAROLINA:** South Atl. Ltd. P'ship v. Riese, 284 F.3d 518 (4th Cir. 2002) (N.C. law); Blis Day Spa, Inc. v. Hartford Ins. Group, 427 F. Supp. 2d 621 (W.D.N.C. 2006) (*S&H* criteria or “inequitable assertion of power or position;” not shown where insurer promptly paid undisputed claims and accurately explained reasons for disputing others); McDonald Bros. Inc. v. Tinder Wholesale, L.L.C., 395 F. Supp. 2d 255 (M.D.N.C. 2005) (simple breach of warranty not enough, but here bad faith breach after repeated assurances that warranty would be honored was unfair); Basnight v. Diamond Developers, Inc., 146 F. Supp. 2d 754 (M.D.N.C. 2001); *In re* Bozzano, 183 B.R. 735 (Bankr. M.D.N.C. 1995); Nelson v. Hartford Underwriters' Ins. Co., 630 S.E.2d 221 (N.C. Ct. App. 2006); State *ex rel.* Cooper v. NCCS Loans, Inc., 624 S.E.2d 371 (N.C. Ct. App. 2005) (*S&H* criteria or inequitable assertion of power or position; attempt to disguise payday loan as Internet service contract violated strong public policy against usury); Dean v. Hill, 615 S.E.2d 699 (N.C. Ct. App. 2005) (unfairness shown: refusal to repair and continued collection of rent for property that violated building code and implied warranty of habitability); Eley v. Mid/East Acceptance Corp., 614 S.E.2d 555 (N.C. Ct. App. 2005) (inequitable assertion of power shown where borrower prevented from removing perishable cargo from repossessed truck); Pierce v. Reichard, 593 S.E.2d 787 (N.C. Ct. App. 2004) (charging full rent, while refusing to repair defects that made half the house uninhabitable); Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Lake Mary Ltd. P'ship v. Johnston, 551 S.E.2d 546 (N.C. Ct. App. 2001); Murray v. Nationwide Mut. Ins. Co., 472 S.E.2d 358 (N.C. Ct. App. 1996); Wachovia Bank & Trust v. Carrington Dev. Assocs., 459 S.E.2d 17 (N.C. Ct. App. 1995); Torrance v. AS&L Motors, 459 S.E.2d 67 (N.C. Ct. App. 1995); Creekside Apartments v. Poteat, 446 S.E.2d 826 (N.C. Ct. App. 1994); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1993); Process Components, Inc. v. Baltimore Aircoil Co., 89 N.C. App. 649, 366 S.E.2d 907, *aff'd*, 323 N.C. 620, 374 S.E.2d 116 (1988); Morris v. Bailey, 358 S.E.2d 120 (N.C. Ct. App. 1987); Lee v. Payton, 313 S.E.2d 247 (N.C. Ct. App. 1984). *See also* Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704 (2001) (defining unfair as “unethical or unscrupulous”).

**RHODE ISLAND:** Ames v. Oceanside Welding & Towing Co., 767 A.2d 677 (R.I. 2001).

**SOUTH CAROLINA:** Isom v. Ford Motor Credit Co., 2007 WL 1074947 (D.S.C. Apr. 5, 2007); Wright v. Craft, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006) (“practice which is offensive to public policy or which is immoral, unethical, or oppressive”);

Maine represents an exception to the general adherence to the “S&H” rule, having adopted the newer FTC standard by judicial decision.<sup>608</sup> Some intermediate appellate cases from Tennessee also adopt the FTC’s current standard.<sup>609</sup>

A number of Connecticut UDAP cases either utilize the current FTC unfairness definition or use that definition as a refinement of the term “substantial injury” under the “S&H” definition.<sup>610</sup> But Connecticut courts more often apply the “S&H” definition with no mention of the current FTC definition.<sup>611</sup> The Connecticut Supreme Court has taken

note of the FTC’s revised standard but has not found it necessary to address it.<sup>612</sup> Outside of Connecticut, Maine,

- DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 536 S.E.2d 399 (App. 2000).
- 608 Searles v. Fleetwood Homes of Pennsylvania, 878 A.2d 509 (Me. 2005) (substantial injury shown: manufacturer unreasonably delayed repair of leaky windows, failed to remediate resulting mold infestation); State v. Weinschenk, 868 A.2d 200 (Me. 2005) (Maine uses § 45(n) definition of unfairness; shoddy construction substantially injurious to homebuyers; developer’s misrepresentations at time of sale prevented initial purchasers from avoiding injury); Tungate v. MacLean-Stevens Studios, 1998 ME 162, 714 A.2d 792 (Me. 1998) (relying on FTC’s new standard to bar UDAP claim where amount of damage was small); Bangor Publishing Co. v. Union Street Mkt., 706 A.2d 595 (Me. 1998) (Maine standard for unfairness requires that injury not be reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or competition). See also Hamlin v. Pine State Tobacco and Candy Co., 2006 WL 1144342 (D. Me. Apr. 28, 2006) (substantial injury not alleged with claim that products sold in prison vending machines were overpriced and inadequately labeled).
- 609 Tucker v. Sierra Builders, 180 S.W.3d 109 (Tenn. Ct. App. 2005) (Tennessee statute, which must be interpreted in accordance with FTC and federal precedent, requires use of § 45(n) definition); Roberson v. West Nashville Diesel, 2006 WL 287389 (Tenn. Ct. App. Feb. 3, 2006) (unpublished) (Tennessee uses § 45(n) definition of unfairness; substantial unavoidable injury not shown where no showing that truck owner willing and able to pay repair bill if unauthorized storage charges eliminated). Cf. Bennett v. Visa USA, Inc., 198 S.W.3d 747 (Tenn. Ct. App. 2006) (citing § 45(n) definition, but deciding case on other ground).
- 610 Dow & Condon, Inc. v. Anderson, 203 Conn. 475, 525 A.2d 935 (1987); Webb Press Servs. v. New London Motors, Inc., 205 Conn. 479, 533 A.2d 1211 (1987); McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 473 A.2d 1185 (1984); Hudson United Bank v. Cinnamon Ridge Corp., 81 Conn. App. 557, 845 A.2d 417 (Conn. App. Ct. 2004); Calandro v. Allstate Ins. Co., 63 Conn. App. 602, 778 A.2d 212 (2001); Vezina v. Nautilus Pools, Inc., 27 Conn. App. 810, 610 A.2d 1312 (1992). See also United States *ex rel.* Balf v. Casle Corp., 895 F. Supp. 420 (D. Conn. 1995); Chem-Tek, Inc. v. General Motors Corp., 816 F. Supp. 123 (D. Conn. 1993); Carpentino v. Transport Ins. Co., 609 F. Supp. 556 (D. Conn. 1985); *In re Kellogg*, 166 B.R. 504 (Bankr. D. Conn. 1994); Williams-Ford v. Hartford Courant Co., 232 Conn. 559, 657 A.2d 212 (1995) (contributory negligence bars UDAP unfairness claim in business case).
- 611 Fabri v. United Technologies Int’l, Inc., 387 F.3d 109, 120 (2d Cir. 2004); Bruce v. Home Depot, 308 F. Supp. 2d 72 (D. Conn. 2004) (focus on public policy prong; violations of Creditors Collection Practices act were probative; here, vigorous efforts to collect for work not performed); Locascio v. Imports Unlimited, Inc., 309 F. Supp. 2d 267 (D. Conn. 2004); De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 269 Conn. 424, 433–434,

849 A.2d 382 (2004); Updike, Kelly & Spellacy, P.C. v. Beckett, 269 Conn. 613, 655–656, 850 A.2d 145 (2004); Journal Publishing Co. v. Hartford Courant Co., 261 Conn. 673, 804 A.2d 823 (2002); Macomber v. Travelers Prop. & Cas. Corp., 261 Conn. 620, 804 A.2d 180 (2002); Willow Springs Condo. Ass’n v. Seventh BRT Dev. Corp., 245 Conn. 1, 717 A.2d 77 (1998); Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 656 A.2d 1009 (1995); Jacobs v. Healey Ford-Subaru, Inc., 231 Conn. 707, 652 A.2d 496 (1995); Normand Josef Enters. v. Connecticut Bank, 230 Conn. 486, 646 A.2d 1289 (1994); Associated Inv. Co. v. Williams Assocs., 230 Conn. 148, 645 A.2d 505 (1994); Cheshire Mortgage Servs., Inc. v. Montes, 223 Conn. 80, 612 A.2d 1130 (1992); A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 579 A.2d 69 (1990); Sanghavi v. Paul Revere Life Ins. Co., 214 Conn. 303, 572 A.2d 307 (1990); Daddonna v. Liberty Mobile Home Sales, Inc., 209 Conn. 243, 550 A.2d 1061 (1988); Pinette v. McLaughlin, 901 A.2d 1269 (Conn. App. Ct. 2006) (applying S&H criteria, including public policy prong, without discussion); Monetary Funding Group, Inc. v. Pluchino, 867 A.2d 841 (Conn. App. Ct. 2005); Hudson United Bank v. Cinnamon Ridge Corp., 845 A.2d 417 (Conn. App. Ct. 2004) (applying “cigarette rule”; breach of contract here neither substantial nor unavoidable enough); Norwich Sav. Soc. v. Caldrello, 38 Conn. App. 859, 663 A.2d 415 (1995); Prishwalko v. Bob Thomas Ford, Inc., 33 Conn. App. 575, 636 A.2d 1383 (1994) (Connecticut follows “S&H” standard, but any ascertainable loss satisfies injury requirement); Lester v. Resort Camplands Int’l, Inc., 27 Conn. App. 59, 605 A.2d 550 (1992); Krawiec v. Blake Manor Dev. Co., 26 Conn. App. 601, 602 A.2d 1062 (1992); Francoline v. Klatt, 26 Conn. App. 203, 600 A.2d 8 (1991); Edart Truck Rental v. B. Swirsky & Co., 23 Conn. App. 137, 579 A.2d 133 (1990); Noble v. Marshall, 23 Conn. App. 227, 579 A.2d 594 (1990); Siudyla v. Chemexec Relocation Sys., Inc., 23 Conn. App. 180, 579 A.2d 578 (1990); DeMoses v. Leonard Schwartz Nissan, 22 Conn. App. 464, 578 A.2d 144 (1990); A-Right Plumbing, Sewer and Water Main Co. v. Aquarian Operating Servs., 2006 WL 1230058 (Conn. Super. Ct. Apr. 18, 2006) (applying “cigarette rule”; substantial injury not shown where regulated water companies’ offer of prepaid repair plans had countervailing benefit of offering consumers more choices), *aff’d*, 282 Conn. 612, 922 A.2d 1084 (2007) (plaintiff failed to allege deception, thus no issue as to UDAP violation); Yale New Haven Hosp., Inc. v. Mitchell, 662 A.2d 178 (Conn. Super. Ct. 1995); Moran, Shuster, Carignan & Knierim v. August, 43 Conn. Supp. 431, 657 A.2d 736 (1994), *aff’d on other grounds*, 232 Conn. 756, 657 A.2d 229 (1995) (former law partner’s denial that he owed a debt was not an unfair practice). See also Omega Eng’g, Inc. v. Eastman Kodak Co., 908 F. Supp. 1084 (D. Conn. 1995); Brandewiede v. Emery Worldwide, 890 F. Supp. 79 (D. Conn. 1994), *aff’d without op.*, 66 F.3d 308 (2d Cir. 1995); Retail Serv. Assocs. v. Conagra Pet Prods. Co., 759 F. Supp. 976 (D. Conn. 1991); Aurigemma v. Arco Petroleum Prods. Co., 734 F. Supp. 1025 (D. Conn. 1990); Gibbs v. Southeastern Invest. Corp., 705 F. Supp. 738 (D. Conn. 1989); McKeown Distribs., Inc. v. Gyp-Crete Corp., 618 F. Supp. 632 (D. Conn. 1985); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 Wayne L. Rev. 1869, 1915–1923 (Winter 2000).

- 612 Edmands v. Cuno, Inc., 892 A.2d 938 (Conn. 2006) (noting question about continuing validity of “cigarette rule”; not decided here, because conduct not unfair by any definition); Glazer v. Dress Barn, 873 A.2d 929 (Conn. 2005) (noting in

and Tennessee, only a few courts apply the current FTC unfairness definition to state UDAP statutes.<sup>613</sup>

#### 4.3.3.5 Alternative State Definitions

A few state UDAP statutes or regulations explicitly define unfairness. Oklahoma has enacted a statutory definition of unfairness that is similar to the *S&H* rule: “any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”<sup>614</sup> Missouri’s UDAP regulations adopt a definition of unfairness that requires both substantial injury and acts that are unethical, unscrupulous, oppressive, or offensive to public policy.<sup>615</sup>

Iowa has codified a definition of unfairness that paraphrases the FTC’s current standard: “an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.”<sup>616</sup> The Iowa Supreme Court has interpreted this definition in light of traditional principles of equity in a case involving a club created by a membership campground, into which all campground members were automatically enrolled by the terms of their contract.<sup>617</sup> Reversing summary judgment for the club, the court held that the club may have violated the members’ rights by retaining a number of memberships as non-dues paying memberships, which meant that each member paid a larger portion of the club’s expenses than might have been anticipated. The club also may have acted unfairly by

delaying up to sixteen years before attempting to collect unpaid dues, leading members to believe that their memberships had terminated. The court also noted that the documents presented to consumers at the time of sale were ambiguous and did not clearly alert consumers that they were entering into what the club considered lifetime contracts.

In addition, courts in a few states have developed their own law as to unfairness. Prior to 1999, most California courts adopted the “*S&H*” standard<sup>618</sup> or a similarly broad definition of unfairness<sup>619</sup> for consumer cases. In 1999, in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, the California Supreme Court held that, for antitrust purposes, any finding of unfairness under section 17200 must be “tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.”<sup>620</sup> The court held that, in the antitrust context, the word “unfair” means “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.”<sup>621</sup> Since 1999, California courts have differed as to whether the “*S&H*” standard,<sup>622</sup> the FTC’s 1980 formulation,<sup>623</sup> some version of the *Cel-Tech* standard,<sup>624</sup> or some other stan-

footnote that, although Connecticut courts have consistently applied the “cigarette rule,” there is serious question about its continuing validity because Connecticut decisions must be guided by FTC and Federal interpretations of FTC Act); *Votto v. Am. Car Rental, Inc.*, 871 A.2d 981, 984 n.3 (Conn. 2005); *Am. Car Rental v. Comm’r of Consumer Prot.*, 869 A.2d 1198, 1206 n.6 (Conn. 2005).

613 *Legg v. Castruccio*, 100 Md. App. 748, 642 A.2d 906 (1994) (relying on the FTC’s current unfairness standards to bar private causes of action for injuries that were insubstantial, reasonably avoidable, or outweighed by countervailing benefits to consumers, but recognizing that a private cause of action would exist for violation of a clear public policy, even if consumer injury were unclear); *Swiger v. Terminix Int’l Co.*, 1995 Ohio App. LEXIS 2826 (June 28, 1995) (reciting current FTC unfairness definition as part of analysis of nondisclosure); *Blake v. Federal Way Cycle Ctr.*, 40 Wash. App. 302, 698 P.2d 578 (1985). See generally § 4.3.3.5, *infra*.

614 Okla. Stat. Ann. tit. 15, § 752(14). See *Patterson v. Beall*, 19 P.3d 839 (Okla. 2000).

615 Mo. Code Regs. Ann. tit. 15, § 60-8.020. See *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228 (Mo. Ct. App. 2006); *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237 (Mo. 2001) (violation of statute prohibiting price-cutting not a UDAP violation despite regulation because it protects competition, not consumers).

616 Iowa Code § 714.16(1)(n).

617 *State ex rel. Miller v. Cutty’s Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005).

618 *People v. Casa Blanca Convalescent Homes*, 206 Cal. Rptr. 164 (Ct. App. 1984) (applying “*S&H*” standard).

619 *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996) (court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim); *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839, 33 Cal. Rptr. 2d 438 (1994) (“unfair” means any practice whose harm to the victim outweighs its benefits).

620 20 Cal. 4th 163, 186–187, 973 P.2d 527 (1999).

621 *Id.*

622 *Searle v. Wyndham Int’l, Inc.*, 102 Cal. App. 4th 1327, 126 Cal. Rptr. 2d 231 (2002) (applying *S&H* standard, but hotel’s failure to disclose to guests that 17% room service charge was paid to the server is not unfair); *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463, 470 (2002) (discussing *Cel-Tech* standard; a deceptive or sharp practice is unfair); *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718–720, 113 Cal. Rptr. 2d 399 (2001) (*S&H* standard remains in effect after *Cel-Tech*).

623 See *Camacho v. Automobile Club of S. Cal.*, 48 Cal. Rptr. 3d 770 (App. 2006) (explicitly choosing § 45(n) definition); *In re Firearm Cases*, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005) (noting narrowing of previously “amorphous” definition of unfairness; choosing § 45(n) definition and emphasizing need to show causation; not shown here with sales of firearms to allegedly “high risk” dealers). See generally § 4.3.2, *supra*.

624 *Buller v. Sutter Health*, 160 Cal. App. 4th 981, 74 Cal. Rptr. 3d 47 (2008) (unfair practice in consumer case must be tethered to some legislatively declared policy or have actual or threatened impact on competition); *Belton v. Comcast Cable Holdings, L.L.C.*, 60 Cal. Rptr. 3d 631 (Cal. Ct. App. 2007) (adopting view that unfair business practice must be “tethered” to a legislatively declared policy or must have actual or threatened impact on competition); *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th 917, 134 Cal. Rptr. 2d 101, 116 (2003) (where

standard<sup>625</sup> applies to consumer cases.<sup>626</sup>

Massachusetts adopts the “S&H” standard when a consumer sues a business, but some courts utilize a more restrictive standard where one business sues another business. These courts require a showing that the objectionable conduct attained “a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.”<sup>627</sup> North Carolina recognizes the “S&H” standard, but also holds that a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.<sup>628</sup>

claim of unfair act is based on public policy, the public policy must be tethered to a specific constitutional, statutory, or regulatory provision; note that case, while brought by consumers, also included antitrust claims, so there may have been more reason to follow *Cel-Tech*; *Testan v. Carlsen Motor Cars, Inc.*, 2002 WL 234737 (Cal. Ct. App. Feb. 19, 2002) (unpublished) (applying *Cel-Tech* standard to consumer claim; concept of unfairness must be tethered to some legislatively declared policy).

625 *Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283 (N.D. Cal. 1996); *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 3d 634 (Cal. Ct. App. 2006) (suggesting a balancing test not tied to either FTC definition, but finding conduct here, use of inferior materials in vehicle, not unfair under any standard); *Progressive West Ins. Co. v. Yolo Cty. Superior Ct.*, 37 Cal. Rptr. 3d 434 (Cal. Ct. App. 2005) (rejecting “narrowing interpretations” and choosing “balancing test;” here, unethical and oppressive for insurance company to claim subrogation rights to 100% of amount paid out, notwithstanding California’s make-whole and common fund rules).

626 See also *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 39 Cal. Rptr. 3d 634 (2006) (discussing split among appellate courts, but finding it unnecessary to decide the question); *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 121 Cal. Rptr. 2d 79 (2002) (finding it unnecessary to decide the question; under either standard, imposing fees on homeowners for drive-by inspections of home after mortgage default not unfair in light of usefulness of inspections); *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 128 Cal. Rptr. 2d 463, 470 n.4 (2002) (analyzing California Supreme Court unfairness definition).

627 See, e.g., *Suzuki of W. Mass., Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40 (D. Mass. 2001); *General Elec. v. Lyon*, 894 F. Supp. 544 (D. Mass. 1995); *Mass Cash Register, Inc. v. Comtrex Sys. Corp.*, 901 F. Supp. 404 (D. Mass. 1995); *Credit Data of Cent. Massachusetts, Inc. v. TRW, Inc.*, 37 Mass. App. Ct. 442, 640 N.E.2d 499 (1994); *Doliner v. Brown*, 21 Mass. App. Ct. 692, 489 N.E.2d 1036 (1986); *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 396 N.E.2d 149 (1979). But see *Mass. Employees Ins. Exch. v. Propac-Mass., Inc.*, 420 Mass. 39, 648 N.E.2d 435 (1995) (terming the rascality formulation “uninstructive”). See generally § 2.4.5.2, *supra*.

628 *South Atl. Ltd. P’ship v. Riese*, 284 F.3d 518 (4th Cir. 2002) (N.C. law); *Walker v. Sloan*, 137 N.C. App. 387, 529 S.E.2d 236 (2000). See also § 4.3.3.4, *supra*.

## 4.3.4 Application of Unfairness to Adhesion Contracts

### 4.3.4.1 FTC Credit Practices Rule

The most important application of the FTC’s current unfairness analysis to adhesion contracts is found in the Statement of Basis and Purpose of the FTC’s Credit Practices Rule.<sup>629</sup> The FTC begins with its three-step analysis: an unfair practice is one that (1) causes substantial injury; (2) that is not outweighed by any countervailing benefits to consumers or competition; and (3) that consumers themselves could not reasonably have avoided. The Statement of Basis and Purpose then details how this three-part test applies to certain provisions commonly found in consumer credit contracts.

Taking the third element first, the FTC concludes that consumers cannot reasonably avoid creditor remedies found in standard form credit agreements:

The economic exigencies of extending credit to large numbers of consumers each day make standardization a necessity. . . .

Consumers have limited incentives to search out better remedial provisions in credit contracts. The substantive similarities of contracts from different creditors mean that search is less likely to reveal a different alternative. Because remedies are relevant only in the event of default, and default is relatively infrequent, consumers reasonably concentrate their search on such factors as interest rates and payment terms. Searching for credit contracts is also difficult, because contracts are written in obscure technical language, do not use standardized terminology, and may not be provided before the transaction is consummated. Individual creditors have little incentive to provide better terms and explain their benefits to consumers, because a costly education effort would be required with all creditors sharing the benefits. Moreover, such a campaign might differentially attract relatively high risk borrowers. [Footnote omitted]

For these reasons, the Commission concludes that consumers cannot reasonably avoid the remedial provisions themselves. Nor can consumers, having signed a contract, avoid the harsh consequences of remedies by avoiding default. When default occurs, it is most often a response to events such as unemployment or illness that are not within the borrower’s control. Thus consumers cannot reasonably avoid the substantial injury these creditor remedies may inflict.<sup>630</sup>

629 49 Fed. Reg. 7744 (Mar. 1, 1984). The Credit Practices Rule is codified at 16 C.F.R. § 444, reprinted at Appx. B.1, *infra*, and analyzed at § 6.11, *infra*.

630 *Id.*



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Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. **Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. Borrower shall pay such other charges as Lender may deem reasonable for services rendered by Lender and furnished at the request of Borrower, any successor in interest to Borrower or any agent of Borrower. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.



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NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence. If Borrower or any successor in interest to Borrower files for has filed against Borrower or any successor in interest to Borrower a bankruptcy petition under Title 11 or any successor title of the United States Code which provides for the curing of prepetition default due on the Note, interest at a rate determined by the Court shall be paid to Lender on post-petition arrears.

If Lender invokes the power of sale, Lender shall give written notice to Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee and Lender shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication and posting of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of the Property for a period or periods permitted by Applicable Law by public announcement at the time and place fixed in the notice of sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the clerk of the superior court of the county in which the sale took place.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Lender or the Trustee (whether or not the Trustee is affiliated with Lender) may charge such person or persons a fee for reconveying the Property, but only if the fee is not prohibited by Applicable Law.

1  
2 Instruction No. 5.

3 This instruction on the Deed of Trust Foreclosure Process is to be considered together with  
4 the other instructions. It is neither more nor less important than the other instructions. You  
5 should consider this instruction along with all of the instructions.

6 Deeds of trust are three-party contracts that are commonly used in Washington in connection  
7 with securing home loans. The three parties to the deed of trust that is the subject of this case are  
8 Washington Mutual Bank, which was the creditor that made the home loan, Ms. Halstien who  
9 was the borrower and homeowner, and Quality Loan Service Corporation of Washington who  
10 was the trustee.

11 In the event a homeowner is in default on the terms of a loan, a trustee, pursuant to the terms  
12 of the deed of trust and applicable Washington law, may sell the home at a foreclosure sale in  
13 order to pay the lender what it is owed. Mortgages and deeds of trust differ in some respects, but  
14 they are both used to secure a home loan. (Deeds of trust, which are now more frequently used  
15 than mortgages, are commonly referred to as mortgages.)

16 Quality Loan Service Corporation of Washington replaced Stewart Title which was initially  
17 named as the trustee in the deed of trust.

18 The law relating to Washington deeds of trust, in effect at the time of the foreclosure of Ms.  
19 Halstien's home, includes the following:

- 20 a. At least thirty days before the Notice of Trustee's Sale shall be recorded, transmitted  
21 or served, written notice of default shall be (i) transmitted to the borrower and (ii)  
22 posted on the subject property or personally served on the borrower.  
23  
24

- 1 b. At least ninety days before the foreclosure sale, the trustee must record in the county  
2 records, and provide to the homeowner, a Notice of Trustee's Sale that provides  
3 details about how the foreclosure will take place.
- 4 c. The trustee may, for any cause the trustee deems advantageous, postpone the  
5 foreclosure sale.
- 6 d. The trustee is a fiduciary for both the borrower and the lender, it must act impartially  
7 between them, and it is bound by its office to present the sale under every possible  
8 advantage to the borrower as well as the lender.
- 9 e. The trustee of a deed of trust is not required to obtain the best possible price for the  
10 trust property. Nonetheless, the trustee must take reasonable and appropriate steps to  
11 avoid sacrifice of the homeowner's property.
- 12 f. Any person with an interest in the property may, on any proper ground, and with at  
13 least five days of advance notice to the trustee, apply to the Washington Superior  
14 Court for an order restraining the foreclosure sale. The court shall require as a  
15 condition of granting the restraining order or injunction that the applicant pay to the  
16 clerk of the court the sums that would be due on the obligation secured by the deed of  
17 trust if the deed of trust was not being foreclosed.
- 18 g. If the trustee has not exercised its discretion to postpone the sale, and the sale has not  
19 been enjoined, the trustee shall sell the property to the highest bidder.
- 20  
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24

Instruction No. *22*

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of its contract.

1  
2 Instruction No. 21  
3 Instruction on Breach of Contract Claims

4 The plaintiff has the burden of proving each of the following propositions on the claim of  
5 breach of contract:

6 (1) That the defendant entered into a contract with Ms. Halstien and/or Puget Sound  
7 Guardians;

8 (2) That the terms of the contract included that the defendant would insure that any  
9 foreclosure of Ms. Halstien's home would be conducted in a manner defined by Washington law;

10 (3) That the defendant breached the contract;

11 (4) That Ms. Halstien and/or Puget Sound Guardians performed or offered to perform the  
12 obligations under the contract; and

13 (5) That Ms. Halstien sustained damages as a result of a defendant's breach.

14 If you find from your consideration of all the evidence that each of these propositions has  
15 been proved, your verdict should be for the plaintiff on the breach of contract claim. On the  
16 other hand, if any of these propositions has not been proved, your verdict should be for the  
17 defendant on the breach of contract claim.