

No. 87674-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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PATTY J. GANDEE, individually and on behalf of a Class of similarly  
situated Washington residents,

Plaintiffs/Respondents,

vs.

LDL FREEDOM ENTERPRISES, INC. a/k/a LDL FREEDOM, INC.  
d/b/a FINANCIAL CROSSROADS, a California corporation; DALE  
LYONS, individually; BETTE J. BAKER a/k/a LIZ BAKER,  
individually; NATIONWIDE SUPPORT SERVICES, INC., a California  
corporation; and JOHN AND JANE DOES 1-5,

Defendants/Appellants.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of  
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## TABLE OF CONTENTS

	<b>Pages</b>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUE PRESENTED	3
IV. SUMMARY OF ARGUMENT	3
V. ARGUMENT	4
A. After <i>Concepcion</i> , Arbitration Agreements Remain Subject to Unconscionability Defenses That Are Consistent With The Fundamental Attributes Of Proceedings In An Arbitral Forum.	4
B. Freedom’s “Prevailing Party” Fee Shifting Requirement Is Substantively Unconscionable And Unenforceable Under Washington Law, And Is Not Otherwise Subject To <i>Concepcion</i> Obstacle Preemption.	6
C. Given The Public Interest That Underlies The CPA Remedial Scheme And Fair Warning To Freedom That This Type Of Prevailing Party Fee Shifting Requirement Is Unconscionable, Severance Should Not Be Allowed, And The Entire Arbitration Provision Should Be Voided.	9
VI. CONCLUSION	12
Appendix	

## TABLE OF AUTHORITIES

	Pages
<b>Cases</b>	
<u>Adler v. Fred Lind Manor</u> , 153 Wn.2d 331, 103 P.3d 773 (2004)	7-8, 10-11
<u>AT&amp;T Mobility LLC v. Concepcion</u> , 131 S.Ct. 1740 (2011)	passim
<u>Discover Bank v. Superior Court</u> , 113 P.3d 1100 (Cal. 2005)	5
<u>Doctor's Associates, Inc. v. Casarotto</u> , 517 U.S. 681 (1996)	4
<u>Gilmer v. Interstate/Johnson Lane Corp.</u> , 500 U.S. 20 (1991)	6, 12
<u>Manteufel v. Safeco Ins. Co.</u> , 117 Wn. App. 168, 68 P.3d 1093, <i>review denied</i> , 150 Wn.2d 1021 (2003)	7
<u>Marmet Health Care Ctr., Inc. v. Brown</u> , 132 S. Ct. 1201 (2012)	4, 9
<u>McKee v. AT&amp;T Corp.</u> , 164 Wn.2d 372, 191 P.3d 845 (2008)	8, 12
<u>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</u> , 473 U.S. 614 (1985)	6
<u>Scott v. Cingular Wireless</u> , 160 Wn. 2d 843, 161 P.3d 1000 (2007)	8
<u>Walters v. A.A.A. Waterproofing, Inc.</u> , 151 Wn.App. 316, 211 P.3d 454 (2009), <i>review denied</i> , 167 Wn.2d 1019 (2010)	8
<u>Zuver v. Airtouch Communications</u> , 153 Wn.2d 293, 103 P.3d 753 (2004)	7-8, 10

**Statutes**

9 U.S.C. §§ 1 <i>et seq.</i>	1
9 U.S.C. § 2	4
Ch. 18.28 RCW	1
Ch. 19.86 RCW	1
Ch. 49.60 RCW	7
RCW 4.84.185	7
RCW 18.28.185	7
RCW 19.86.090	7
RCW 19.86.093	7
RCW 19.86.093(1)	7
RCW 19.86.920	8
RCW 49.60.030(2)	7

**Other Authorities**

Restatement (Second) of Contracts § 208 (1981)	11
--	----

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the extent to which the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, preempts Washington state law.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the first opportunity for this Court to address the scope of preemption based on the FAA after AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), and to determine the extent to which that decision impacts court challenges to arbitration agreements based upon substantive unconscionability. The case arises out of a putative class action on behalf of Washington residents initiated by Patty J. Gandee (Gandee) against LDL Freedom Enterprises, Inc., and others (Freedom) for alleged predatory debt adjustment practices in violation of the Washington Consumer Protection Act, Ch. 19.86 RCW (CPA), and the Washington Debt Adjusting Act, Ch. 18.28 RCW (DAA). The underlying

facts are set forth in the briefing of the parties. See Freedom Br. at 1, 4-7; Gandee Br. at 1-4; Freedom Reply Br. at 1-6.

In this action, Gandee seeks actual damages, exemplary damages, attorney fees and costs, and permanent injunctive relief. Freedom moved the superior court to compel arbitration, pursuant to the "Debt Settlement Agreement" between the parties. Freedom Br. at 4. This agreement provides in part:

**11. Arbitration.** All disputes or claims between the parties related to this Agreement shall be submitted to binding arbitration in accordance with the rules of American Arbitration Association within 30 days from the dispute date or claim. Any arbitration proceedings brought by Client shall take place in Orange County, California. Judgment upon the decision of the arbitrator may be entered into any court having jurisdiction thereof. The prevailing party in any action or proceeding related to this Agreement shall be entitled to recover reasonable legal fees and costs, including attorney's fees which may be incurred.

Freedom Br. at 5 (quoting CP 75). The agreement also contains a severability provision:

**15. Severability.** If any of the above provisions are held to be invalid or unenforceable, the remaining provisions will not be affected.

Id.

The superior court denied Freedom's motion to compel arbitration on two grounds: (1) the demand for arbitration was untimely; and (2) the arbitration provision was substantively unconscionable under Washington law, insofar as it venued the proceeding in California, shortened the applicable limitations period, and altered the CPA fee shifting provision.

The superior court declined to sever the unconscionable aspects of the arbitration provision, apparently denying the motion to compel on grounds that the arbitration provision is void.

Freedom appealed to the Court of Appeals, Division II, which certified the appeal to this Court.

### III. ISSUE PRESENTED

To what extent does AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), and related United States Supreme Court case law interpreting the FAA, impact the Court's power to strike down an arbitration agreement, in whole or in part, based upon substantive unconscionability?

### IV. SUMMARY OF ARGUMENT

The “prevailing party” fee shifting requirement of Freedom’s arbitration provision is substantively unconscionable and unenforceable because it substantially alters the fee shifting provision of the CPA to the detriment of Washington consumers. In particular, this requirement undermines the CPA’s goal of protecting the public interest against unfair and deceptive acts and practices through enforcement by citizens serving as private attorneys general. Neither Concepcion, with its obstacle preemption analysis, nor other U.S. Supreme Court cases interpreting the FAA dictate that this result is beyond the reach of the Court based upon federal preemption.

The Court should not sever the offending prevailing party fee shifting requirement, but instead conclude the entire arbitration provision is unenforceable. To allow severance in this instance would only encourage dominant parties who draft adhesion contracts affecting

consumers to continue overreaching, despite the public interest in private CPA enforcement and prior indications from the Court that this type of agreement is unconscionable. The State's sovereign interests are disserved by severance under these circumstances.

## V. ARGUMENT

### A. **After *Concepcion*, Arbitration Agreements Remain Subject to Unconscionability Defenses That Are Consistent With The Fundamental Attributes Of Proceedings In An Arbitral Forum.**

Section 2 of the FAA makes arbitration agreements “valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. § 2 (emphasis added).<sup>1</sup> The highlighted language is known as the FAA’s “saving clause.” As recently explained by the U.S. Supreme Court in Concepcion:

This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

131 S. Ct. at 1746 (quoting Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). Generally, state law of unconscionability is just as much of a defense to enforcement of an arbitration agreement after Concepcion as it was before. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012) (post-Concepcion per curiam opinion, reversing West Virginia Supreme Court and remanding for determination

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<sup>1</sup> The full text of the current version of 9 U.S.C. § 2 is reproduced in the Appendix to this amicus curiae brief.

of whether arbitration agreements are unconscionable on state law grounds other than hostility to arbitration).

State laws that prohibit arbitration of certain types of claims have commonly been understood to be preempted by the FAA. See Concepcion at 1747. In striking down a state law requirement imposing class arbitration despite contrary language in the arbitration agreement, Concepcion simply clarifies that the FAA preempts state law mandating procedures antithetical to arbitration (at least in the absence of agreement regarding such procedures). The particular state law was held to constitute an “obstacle to the accomplishment of the FAA’s objectives,” and thus preempted. Id. at 1748; accord id. at 1753.<sup>2</sup>

Under Concepcion, what constitutes an “obstacle” is defined by reference to the purposes of the FAA. The primary purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. See Concepcion at 1748 (cataloging FAA references to “terms of the agreement”). A secondary purpose of the act is to promote the efficient resolution of disputes. See id. at 1749.

Obstacle preemption under Concepcion is confined to procedural aspects of arbitration that are imposed by state law contrary to the parties’ agreement and the efficient nature of arbitration. See Concepcion at 1747 (discussing formal discovery and evidentiary rules); id. at 1751-52

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<sup>2</sup> Concepcion involved a California rule that deemed class-action waivers unconscionable in most circumstances. See Concepcion at 1746 (discussing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005)). While the rule did not necessarily require class arbitration, it had the effect of allowing any party to demand class arbitration. See id. at 1750.

(discussing class arbitration). Otherwise, substantive unconscionability retains its vitality as a defense to enforcement of an arbitration agreement.

Equally important, Concepcion leaves undisturbed the guiding principle that the FAA does not alter the substantive law governing the dispute between the parties:

“[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

Under the foregoing analysis, the question then becomes whether Freedom’s arbitration provision, in particular its “prevailing party” fee shifting requirement, is substantively unconscionable under Washington law in a manner that falls outside of the obstacle preemption of Concepcion.

**B. Freedom’s “Prevailing Party” Fee Shifting Requirement Is Substantively Unconscionable And Unenforceable Under Washington Law, And Is Not Otherwise Subject To *Concepcion* Obstacle Preemption.**

The “prevailing party” fee shifting requirement of Freedom’s arbitration provision alters the remedial scheme of the CPA (and DAA). The arbitration provision provides that “the prevailing party in any action or proceeding related to this Agreement *shall* be entitled to recover reasonable legal fees and costs.” Freedom Br. at 5 (quoting CP 75; emphasis added). This mandatory bilateral fee shifting provision is

markedly different from the CPA remedial scheme, under which only a consumer who prevails is entitled to recover fees and costs. See RCW 19.86.090.<sup>3</sup> Under the CPA, Freedom can only recover fees and costs against Gandee if her claims are found to be frivolous. Cf. Manteufel v. Safeco Ins. Co., 117 Wn. App. 168, 172-73, 175-77, 68 P.3d 1093 (imposing sanctions under CR 11 for frivolous suit including CPA claim), *review denied*, 150 Wn.2d 1021 (2003); RCW 4.84.185 (regarding recovery of fees and costs for frivolous action or defense).

Freedom's fee shifting requirement is substantively unconscionable under this Court's holding in Adler v. Fred Lind Manor, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004), where an arbitration agreement provided that each party shall bear their own fees and costs, when the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD)—governing the discrimination claims subject to arbitration—provides plaintiffs with the right to recover fees and costs. This Court concluded the arbitration provision was substantively unconscionable because it “effectively undermines a plaintiff's rights to attorney fees under RCW 49.60.030(2),” unduly favoring the party with the stronger bargaining position and more resources. Adler, 153 Wn.2d at 355.<sup>4</sup>

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<sup>3</sup> The full text of the current version of RCW 19.86.090 is reproduced in the Appendix to this brief. A violation of the DAA is a per se unfair or deceptive act or practice in trade or commerce, giving rise to CPA remedies, see RCW 18.28.185, and implicating the public interest, see RCW 19.86.093(1). The full text of the current versions of RCW 18.28.185 and 19.86.093 are also reproduced in the Appendix to this brief.

<sup>4</sup> Adler is distinguishable from the holding in Zuver v. Airtouch Communications, 153 Wn.2d 293, 300, 310-12, 103 P.3d 753 (2004), where the arbitration agreement provided the arbitrator *may* award fees and costs to the prevailing party. In finding no substantive unconscionability in Zuver, the Court held there was no reason to believe the arbitrator

The Freedom prevailing party fee shifting requirement is at least equally egregious, if not more than the provision struck down in Adler, given the unique nature of the CPA and its purposes. As recently explained by this Court, under the CPA:

Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

Scott v. Cingular Wireless, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007)

(citations omitted).<sup>5</sup>

The prevailing party fee requirement in Freedom's arbitration provision should be declared substantively unconscionable under Washington law.<sup>6</sup> This analysis does not apply solely to arbitration, and it does not derive meaning from the fact that an arbitration agreement is at issue. The Freedom prevailing parties requirement would be equally

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would ignore the dictates of the relevant statutory fee shifting provision under the WLAD. See also Walters v. A.A.A. Waterproofing, Inc., 151 Wn.App. 316, 321-25, 211 P.3d 454 (2009) (explicating distinction between Adler and Zuver, and finding arbitration agreement substantively unconscionable based on one-way fee shifting provisions of Washington wage and hour statutes), *review denied*, 167 Wn.2d 1019 (2010); McKee v. AT&T Corp., 164 Wn.2d 372, 399-400, 191 P.3d 845 (2008) (finding aspects of arbitration attorney fees provision substantively unconscionable in case involving CPA claims, independent of substantive unconscionability determination regarding class action waiver, now likely eclipsed by Concepcion).

<sup>5</sup> The principal holding in Scott, that class action waivers are substantively unconscionable (and the portion of McKee, *supra* that relies on Scott) is now likely eclipsed by Concepcion. See Scott, 160 Wn.2d at 851-60; McKee, 164 Wn.2d at 396-98. However, this does not diminish the Court's characterization of the CPA, and its unique purposes. See also RCW 19.86.920 (stating purposes of CPA and providing for liberal construction). The full text of the current version of RCW 19.86.920 is reproduced in the Appendix to this brief.

<sup>6</sup> Under Washington law, "substantive unconscionability alone can support a finding of unconscionability," regardless of whether a provision is also procedurally unconscionable. Adler, 153 Wn.2d at 347.

unconscionable if it were in an agreement that purported to alter or displace the CPA fee-shifting provision in any court action. Furthermore, preserving the enforceability of the CPA fee provision does not undermine in any respect the efficiencies that normally accompany an arbitration proceeding. Consequently, the foregoing unconscionability analysis is not anti-arbitration or an obstacle to the accomplishment of the purposes underlying the FAA, and it is not preempted under Conception. See Marmet, 132 S. Ct. at 1204 (remanding to state court for determination whether arbitration agreement may be “unenforceable under state common law principles that are not specific to arbitration”).

The remaining question is whether the prevailing parties requirement should be severed, or the entire arbitration provision voided.

**C. Given The Public Interest That Underlies The CPA Remedial Scheme And Fair Warning To Freedom That This Type Of Prevailing Party Fee Shifting Requirement Is Unconscionable, Severance Should Not Be Allowed, And The Entire Arbitration Provision Should Be Voided.**

Freedom argues that any unconscionable portions of the arbitration provision, including the prevailing party fee shifting requirement, should be severed, rendering the balance of the arbitration provision enforceable.

See Freedom Br. at 25-26; Freedom Reply Br. at 5, 20.<sup>7</sup> In response, Gandee contends that the plain language of the freestanding severability provision in Freedom's Debt Adjustment Agreement only allows for voiding the arbitration provision in its entirety. See Gandee Br. at 27-28. Alternatively, Gandee argues that under governing case law, if unconscionable provisions pervade the arbitration agreement, it is unenforceable in its entirety. See id. at 28-32 (identifying three separate arbitration provision requirements that are substantively unconscionable, including the prevailing party fee shifting requirement).<sup>8</sup>

In determining whether severance is appropriate, Gandee correctly argues that the Court should take into account whether persons reading the arbitration provision would be deterred from invoking arbitration by the unconscionable aspects of the provision. See Gandee Br. at 30. This factor should be dispositive here, notwithstanding a tendency in this Court's recent opinions favoring severance. See Adler, 153 Wn.2d at 358-60;

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<sup>7</sup> Alternatively, Freedom offers to waive part or all of the arbitration provision requirements challenged by Gandee. In its opening brief, Freedom offers to "waive some of the provisions of the arbitration agreement." Freedom Br. at 1; see also id. at 3 (referring to offer to waive venue provision); id. at 20 (same); Freedom Reply Br. at 2 & 13 (offering to waive all provisions to which the Gandeas object or complain). Elsewhere, the offer appears to be conditional upon the Court first finding the particular arbitration requirement unconscionable. See Freedom Reply Br. at 5 n.3, 11, 14 & 20.

In any event, the offer also appears to be limited to this case, and not to other instances, present or future, involving application of the same or similar requirements to Washington citizens.

<sup>8</sup> The other two provisions are the venue requirement and the limitations period for invoking arbitration. See Gandee Br. at 31. The substantive unconscionability of these requirements is beyond the scope of this brief, and may not have to be reached depending upon the Court's resolution of the challenge to the prevailing party fee shifting requirement.

Zuver, 153 Wn.2d at 319-21.<sup>9</sup> Freedom's arbitration provision should be held invalid because it undermines a state consumer protection remedial scheme grounded in the private attorney general concept. This result is further warranted because four years before this arbitration agreement was executed the Court clearly signaled that this type of provision would be unconscionable under Washington law. See Adler, supra (decided in 2004); Freedom Br. at 4 (indicating agreement executed May, 2008).

If severance is granted here, it will encourage dominant parties who draft adhesion contracts affecting consumers to continue overreaching. Further, granting severance here will not require Freedom to discontinue using the prevailing party fee shifting requirement in its arbitration provision. If this occurs, the prospect of liability for Freedom's fees and costs will likely deter some consumers from invoking arbitration. For those who do choose arbitration, they will assume the risk that the prevailing party requirement might be given effect by an arbitrator on contractual grounds. Even where the requirement is successfully challenged in court, Freedom may again plead severability (or offer to waive the provision), although the deterrent effect of the requirement may have already had an adverse effect on other consumers' decision-making process. These concerns should give the Court pause in applying

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<sup>9</sup> While Adler and Zuver, supra, would appear to support severance of the prevailing party fee shifting requirement, they are distinguishable and hence not controlling to the extent that they involve the WLAD rather than the CPA. Moreover, the Court has authority to void the entire arbitration provision. See Adler, 153 Wn.2d at 358-59 (quoting and applying Restatement (Second) of Contracts § 208 (1981)).

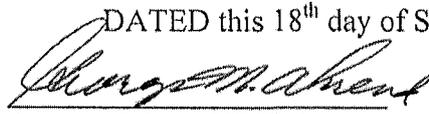
severance principles here, given the ongoing threat to the CPA enforcement scheme and the common good.<sup>10</sup>

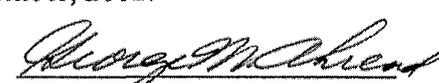
Any suggestion that this severability analysis itself may implicate obstacle preemption under Concepcion should be rejected. The CPA remedial scheme, including its fee-shifting provision, is grounded in the State of Washington's sovereign right to fashion and enforce its substantive law, which has nothing to do with forum selection or disfavoring arbitration. See Gilmer, 500 U.S. at 26; Concepcion, 131 S. Ct. at 1747.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 18<sup>th</sup> day of September, 2012.

  
GEORGE M. AHREND

  
FOR BRYAN P. HARNETIAUX, WSTCA AUTHORITY

On Behalf of WSAJ Foundation

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<sup>10</sup> The reasoning of McKee, which dealt with multiple unconscionable terms, is apt: Permitting severability as requested by AT&T in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

164 Wn.2d at 403.

# Appendix

**9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

**RCW 18.28.185. Violations--Unfair practice under chapter 19.86 RCW**

A violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under chapter 19.86 RCW.

[1979 c 156 § 10.]

**RCW 19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities**

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand

dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

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

[2009 c 371 § 1, eff. July 26, 2009; 2007 c 66 § 2, eff. April 17, 2007; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

**RCW 19.86.093. Civil action--Unfair or deceptive act or practice--  
Claim elements**

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

[2009 c 371 § 2, eff. July 26, 2009.]

**RCW 19.86.920. Purpose--Interpretation--Liberal construction--  
Saving--1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216**

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end

this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

**OFFICE RECEPTIONIST, CLERK**

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**To:** George Ahrend  
**Cc:** Bryan P Harnetiaux; rowlm@foster.com; Mack Mayo  
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Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is submitted for filing in the above-referenced case. A letter application to appear as amicus curiae was submitted on behalf of the Foundation via email yesterday. Counsel for the parties are being served simultaneously by copy of this email, by prior agreement.

Respectfully submitted,

--

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