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**SUPREME COURT OF THE STATE OF WASHINGTON**

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DIANNE KLEM, as administrator of the estate of Dorothy Halstein,  
Plaintiff-Petitioner,

v.

QUALITY LOAN SERVICE CORP. OF WASHINGTON, et al.,  
Defendants-Respondents.

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**BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF STATE  
OF WASHINGTON IN SUPPORT OF PETITIONER  
DIANNE KLEM**

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## I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General previously filed briefs in this case supporting Plaintiff Dianne Klem's Appeal and her Petition for Review. We now submit this amicus brief to urge this Court to reject the legal standard for unfairness under the Consumer Protection Act<sup>1</sup> that was applied by the Court of Appeals and advocated for by Quality Loan Service Corporation.

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest.<sup>2</sup> This case presents the issue of what constitutes "unfairness" under Washington's Consumer Protection Act (CPA), RCW 19.86. This issue affects the public interest because it impacts the extent to which the CPA protects Washington consumers from unfair practices that occur in trade or commerce. The Attorney General enforces the CPA on behalf of the public,<sup>3</sup> and has an interest in the development of CPA case law.<sup>4</sup>

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<sup>1</sup> RCW 19.86.020.

<sup>2</sup> See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

<sup>3</sup> RCW 19.86.080.

<sup>4</sup> RCW 19.86.095.

## II. ARGUMENT

The CPA prohibits trade practices that are either unfair or deceptive.<sup>5</sup> By design, neither term is defined in the statute. The Court of Appeals and Quality Loan Service Corporation (QLS) use a legal standard for “unfairness” that would drastically shrink the coverage of the CPA to only those practices that are a misrepresentation or that violate a specific statute incorporating the CPA. If this standard is adopted by this Court, the CPA will no longer apply universally to any unfair conduct in trade or commerce, but will apply only to those practices that the Legislature has had the foresight to anticipate and the will to address.

The Court of Appeals examined two of QLS’s business practices: 1) its practice of deferring solely to the lender when deciding whether to postpone a foreclosure; and, 2) its practice of falsely executing notices required by the Deeds of Trust Act, RCW 61.24. According to the Court of Appeals, under no circumstances could a court have found QLS’s practices unfair under the CPA.<sup>6</sup> The Court states that the only way a private plaintiff or the Attorney General can meet their burden and prove that these practices are unfair under RCW 19.86 is to show that:

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<sup>5</sup> RCW 19.86.020 (“[U]nfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

<sup>6</sup> The issue was raised on a Motion for Judgment Notwithstanding the Verdict. *Klem v. Washington Mut. Bank*, No. 66252-0-1, slip op. at 16 (Wash. Ct. App. Dec 19, 2011).

[T]he alleged act constitutes a per se unfair trade practice.... A 'per se unfair trade practice' occurs when a party violates a statute declared by the Legislature to constitute an unfair or deceptive act in trade or commerce.<sup>7</sup>

Respondent QLS asks this Court to adopt the Court of Appeals' narrow standard because "neither [the Deed of Trust Act] nor any other statute makes the alleged acts a per se violation." QLS Supplemental Brief at 3.<sup>8</sup>

This exclusively *per se* standard would narrow the CPA's prohibitions to only those particular business practices that the Legislature had anticipated would occur in the marketplace and only in the precise way the Legislature drafted the particular statute. As an example, a business that used an "automatic dialing and announcing device" (a "robodialer") that delivers a recorded sales pitch to a consumer's telephone would be engaging in an unfair practice under the CPA.<sup>9</sup> The Legislature passed a statute specifically outlawing that practice and incorporated its prohibition into the CPA.<sup>10</sup> However, under the Court of Appeals' standard, any slight deviation from the statutory language would allow the business to engage in the practice without fear of it being

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<sup>7</sup> *Klem*, No. 66252-0-1, slip op. at 18.

<sup>8</sup> Other decisions using a strict *per se* unfairness standard include: *Henery v. Robinson*, 67 Wn. App. 277, 290-291, 834 P.2d 1091 (1992); *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179 (W.D. Wash. 2010); *Smale v. Cellco P'ship*, 547 F. Supp. 2d 1181 (W.D. Wash. 2008). Decisions not using *per se* language include *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) and *Blake v. Federal Way Cycle Ctr.*, 40 Wn. App. 302, 698 P.2d 578 (1985).

<sup>9</sup> RCW 80.36.400.

<sup>10</sup> RCW 80.36.400 (4).

declared unfair. For example, a business that had a practice of using an automatic dialing device to make repeated sales calls to the same number on the same day, but used a live voice once the phone was answered, would not be engaging in an unfair trade practice because it would not fit the statutory definition of using a recorded message.<sup>11</sup> Although the Attorney General or a private plaintiff might attempt to bring a CPA claim for this plainly unfair barrage of phone calls, a court could not find a CPA violation because there was no deception involved and no *per se* violation of a statute.

A recent foreclosure rescue case demonstrates what courts can accomplish when they follow the literal wording of the CPA, *i.e.* where they apply unfairness as a freestanding prohibition just like deception. The Legislature had passed a statute specifically aimed at stopping foreclosure rescues, the Equity Skimming Act (ESA).<sup>12</sup> However, foreclosure rescue perpetrators routinely avoided the statute through a few changes to their practices.<sup>13</sup> When one of these rescue perpetrators was

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<sup>11</sup> An unpublished 9<sup>th</sup> Circuit federal Court of Appeals decision is a vivid example of this. *Williams v. MCIMetro Access Transmission Servs. Inc.*, 363 Fed.Appx. 518, 519, 2010 WL 331475 (9<sup>th</sup> Cir. 2010) (robodialing with a live voice is permitted under the statute).

<sup>12</sup> RCW 61.34.

<sup>13</sup> See Zachary E. Davies, *Rescuing the Rescued: Stemming the Tide of Foreclosure Rescue Scams in Washington*, 31 Seattle U. L. Rev. 353, 363 (2008) (“Although at first blush the ESA would appear to be directly applicable in [foreclosure rescue] cases, most [ ] scenarios actually fall outside its narrow definition of equity skimming.”).

challenged using the CPA, the Court of Appeals did not apply the *per se* unfairness standard. Instead, it found that such practices were simply unfair under the CPA without reference to any other statute.<sup>14</sup> By analyzing unfairness in accordance with caselaw standards the Court was able to respond to an identified unfair practice that had been altered to avoid a statutory prohibition. These cases allow the Attorney General, other enforcement agencies, and private consumer plaintiffs to achieve justice despite business use of regulatory arbitrage to prevent enforcement of fact-specific statutes.<sup>15</sup>

The CPA is intended to be comprehensive, covering all acts in trade or commerce unless specifically excluded.<sup>16</sup> As the Washington Supreme Court stated in an early CPA case, the Legislature did not specifically define prohibited acts because:

There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and

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<sup>14</sup> *State v. Kaiser*, 161 Wn. App. 705, 722, 254 P.3d 850 (2011) (defendant's tax foreclosure rescue transactions held unfair under the CPA); *see also Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 920, 32 P.3d 250 (2001) (Plaintiff may prove that an act is unfair under the CPA even where the conduct was found to not violate a discrimination statute incorporating the CPA.).

<sup>15</sup> *AT&T Commc'ns of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 984 (9<sup>th</sup> Cir. 2011) (“‘Regulatory arbitrage’ is a pejorative term referring to the practice of operating a business to take maximum advantage of the prevailing regulatory environment (as opposed to delivering the maximum amount of value to the business's customers), usually at the expense of consumers, competitors, or taxpayers, as the case may be.”).

<sup>16</sup> RCW 19.86.020; “Trade” and “commerce” are defined to “include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2).

prohibited, it would be at once necessary to begin over again.<sup>17</sup>

The Court went on to say that the process of “defining and proclaiming of the bounds of [the CPA’s] terms falls upon the courts.” Courts should therefore consider the factual pattern before them and “let [CPA] law develop on a case-by-case basis.”<sup>18</sup> If the *per se* unfairness standard is upheld this Court will be limiting the CPA’s scope to only those practices that have been “specifically defined and prohibited” by the Legislature, contrary to the Legislature’s intent in drafting this comprehensive statute.<sup>19</sup>

### III. CONCLUSION

Currently, there are contradictory standards for finding unfairness under the CPA. This Court should resolve the contradiction and liberally construe the CPA by holding that courts may declare trade practices to be unfair without reference to a *per se* statute. This holding would provide

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<sup>17</sup> *Ivan’s Tire Serv., Inc. v. Goodyear Tire & Rubber Co.*, 10 Wn. App. 110, 122, 517 P.2d 229 (1973) *aff’d*, 86 Wn.2d 513 (1976), (quoting *Federal Trade Comm’n v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 204, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)).

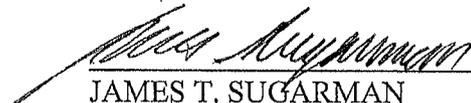
<sup>18</sup> *Id.* at 123.

<sup>19</sup> The CPA “shall be liberally construed that its beneficial purposes may be served.”

clarity to courts and support the CPA's goal of providing comprehensive protection to consumers as they face constantly changing marketplace malfeasance.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of September, 2012.

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**Case Number:** 87105-1

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