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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**

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ROBERT M. MCKENNA  
Attorney General

JAMES T. SUGARMAN  
Assistant Attorney General  
WSBA #39107  
800 5th Avenue, Suite 2000  
Seattle, WA 98109  
(206) 389-2514

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## I. INTEREST OF AMICUS

*Amicus Curiae* is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.<sup>1</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>2</sup> and has an interest in the development of CPA case law.<sup>3</sup>

## II. INTRODUCTION

The Court of Appeals applied an erroneous standard for determining whether conduct is prohibited by the CPA because it is unfair. The CPA broadly prohibits "unfair or deceptive acts or practices in trade or commerce" without further definition of these terms.<sup>4</sup> However, the Court's decision adds a limitation to the prohibition against unfair acts that is not found in the statute or case law. The Court of Appeals held that a court may find an act or practice "unfair" under the CPA only if the act or

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<sup>1</sup> See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

<sup>2</sup> RCW 19.86.080.

<sup>3</sup> RCW 19.86.095.

<sup>4</sup> RCW 19.86.020.

practice is a statutory per se violation, *i.e.* that it also violates a statute that specifically incorporates the CPA.<sup>5</sup> This limitation contradicts decisions that find acts unfair without reference to another statute or that reference an independent unfairness standard. It also defeats the very premise of the CPA, which is to apply the CPA broadly so that it may respond to new and inventive abuses.<sup>6</sup> Furthermore, the Court of Appeals' limitation of the unfairness standard is contrary to the Legislature's direction that the CPA should be liberally construed to serve its beneficial purposes. RCW 19.86.910. Therefore, this Court should accept review under RAP 13.4(b)(2) because the Court of Appeal's decision conflicts with another Court of Appeal's decision, and under RAP 13.4(b)(4) because of the substantial public interest in the proper analysis of CPA unfairness actions.

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<sup>5</sup> An example of this would be the Deed of Trust Act which specifically incorporates the CPA when prohibiting bad faith mediation practices and collusive bidding at foreclosure. RCW 61.24.135.

<sup>6</sup> *Ivan's Tire Service v. Goodyear Tire*, 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, 240, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)) (The CPA's prohibitions are stated broadly because "[i]t is impossible to frame definitions which embrace all unfair practices.")

### III. ARGUMENT

#### A. **This Court Should Accept Review Under RAP 13.4(b)(2) Because the Decision Conflicts With Other Court of Appeals Decisions.**

In its decision, the Court of Appeal examined Quality Loan Services' practice of deferring solely to the lender when deciding whether to postpone a foreclosure, despite the legal duties it owed to both parties.<sup>7</sup>

The Court of Appeals held that the jury did not properly find this practice unfair because there was no authority for the proposition that the practice violated another statute. The court was correct that Plaintiff never claimed the act violated another statute that incorporates the CPA and was thus per se unfair. However, plaintiff did plead, argue, and present evidence to the jury that the Quality Loan Service's practice was unfair in and of itself and therefore was a violation of RCW 19.86.020.

In reaching its decision, the Court of Appeals looked to this Court's decision in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Relying on *Hangman Ridge*, the Court of Appeals held that there are only two ways to meet the first two *Hangman Ridge* elements (that an act is unfair or deceptive; and that the act occurred in trade or commerce):

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<sup>7</sup> The current duty is in RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.")

The first two elements of *Hangman Ridge* may be established in one of two ways: (1) showing that an act or practice that has a capacity to deceive a substantial portion of the public has occurred in the conduct of any trade or commerce, or (2) showing that the 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.

*Klem v. Washington Mut. Bank*, No. 66252-0-1, slip op. at 18 (Wash. Ct. App. Dec 19, 2011) (emphasis added). The Court then states that the Plaintiff “cites no authority for the proposition that acting impartially or breaching a fiduciary duty constitutes a per se unfair or deceptive act or practice” and therefore Plaintiff offered no grounds for the jury finding a violation of the CPA. *Id.* at 9. By this analysis, if the act or practice is not a per se violation of the CPA, it cannot be unfair.

This faulty analysis is unfortunately widespread. It appears in *Henery v. Robinson*, 67 Wn. App. 277, 290-291, 834 P.2d 1091 (1992), where the Court states:

Since they cannot show a per se violation, the Henerys must establish that the defendants engaged in an unfair act or practice which has a capacity to deceive a substantial portion of the public.

*Id.* (failing to mention that the Henereys’ could establish the act was simply unfair.) Federal courts are even more unwilling to find a stand

alone “unfairness” violation. In *Minnick v. Clearwire US, LLC*, 683 F.

Supp. 2d 1179, 1186 (W.D. Wash. 2010) the Court states:

*Hangman Ridge* ... plainly requires the Legislature to make determinations of unfairness. 105 Wash.2d at 786-87, 719 P.2d 531. Plaintiffs have not identified a Legislatively-recognized per se unfair practice that would state a claim and, as such, the claim is incompatible with CPA jurisprudence.”

Also, in *Alvarado v. Microsoft Corp.*, No. C09-189, 2010 WL 715455,

\*3 (W.D. Wash. 2010) the Court states:

Plaintiff states expressly that her “CPA claim is not predicated on consumers being deceived; rather it is predicated on the unfairness of Microsoft’s business practice.” Plaintiff’s CPA claim thus fails to satisfy the first required CPA element and is dismissed.

The *Alvarado* court felt compelled to dismiss because it believed that *Hangman Ridge* stands for the proposition that only the Legislature may designate acts unfair, and that plaintiffs cannot establish unfairness without reference to another statute. *Id.*<sup>8</sup>

The root of this widespread failure to recognize unfairness as a stand-alone prohibition is the misinterpretation of a paragraph from *Hangman Ridge*. In *Hangman Ridge*, this Court stated that the first two

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<sup>8</sup> See also, *May v. Honeywell Intern., Inc.* 331 Fed.Appx. 526, 529, 2009 WL 2488936, 2 (9th Cir. 2009) (“There are two methods of establishing the first element, .... First, if an act violates a statute defining an unfair or deceptive act in trade or business, it is a per se unfair trade practice... Alternatively, if a per se unfair trade practice cannot be shown, an act is unfair or deceptive if it has the “capacity to deceive a substantial portion of the public.”); *Smale v. Cellco Partnership*, 547 F. Supp. 2d 1181 (W.D. Wash. 2008).

elements of a CPA claim are: 1) the challenged act is unfair or deceptive, and 2) the act occurred in trade or commerce. 105 Wn.2d at 785. The Court then discussed these two elements together:

The above two elements may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce. Alternatively, these two elements may be established by a showing that the alleged act constitutes a per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.

*Id.* at 785-86. This Court did not hold that the only way to prove an unfair trade practice is to show it is per se unfair, *i.e.* statutorily designated. Instead, this Court held that per se statutes allow a plaintiff to establish both of the first two elements, “unfairness” and “in trade or commerce,” together. There is nothing in *Hangman Ridge* that prevents a court from finding an act unfair without reference to another statute.

The very purpose of the CPA is to fill in the blanks between statutes to account for new or previously unchallenged practices.<sup>9</sup> This Court has recognized that defining unfairness under the CPA must account for the endless variety of possible unfair practices:

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<sup>9</sup> In *Ivan's Tire Service v. Goodyear Tire*, 10 Wn. App. 110, 122, 517 P.2d 229 (1973) *aff'd*, 86 Wn.2d 513 (1976), the Court states that the process of “defining and proclaiming of the bounds of [the CPA's] terms falls upon the courts.” *Id.* at 123. Courts should therefore consider the factual pattern before them and “let [CPA] law develop on a case-by-case basis.” *Id.*

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 unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again.

*Panag v. Farmer's Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914)). Thus, if “it is impossible to frame definitions which embrace all unfair practices,” then clearly the CPA is not limited by definitions contained in other legislation. The CPA is a broad net to trap any malfeasance that injures consumers or the marketplace, including malfeasance that has managed to evade the Legislature’s attention. The CPA is not merely an enforcement structure for other statutes.

The Court of Appeals’ analysis also contradicts the decision in *State v. Kaiser*, 161 Wn. App. 705, 254 P.3d 850 (2011). There, the Court found many of the defendant’s business practices to be unfair under the CPA and none of them were statutory per se violations. The court found that the defendant’s practices were “grossly unfair or unconscionable contracts” and therefore violated the CPA’s prohibition against unfairness. *Id.* at 718. The court applied common law unconscionability standards to analyze CPA unfairness:

Grossly unfair or unconscionable contracts also violate the CPA. *See Ralph Williams*, 87 Wash.2d at 309, 553 P.2d 423.

. . . In determining whether the agreements were unconscionable and unfair, we examine “[t]he manner in which the contract was entered,’ whether [a party] had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print.’” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 347, 103 P.3d 773 (2004) (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)).

*Id.* at 722. Another Court of Appeals decision discussed a stand-alone unfairness test but did not find a practice unfair under that standard. In *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537, 545 (1983) the Court states:

[T]here has been no judicial definition of unfair in Washington. We may look to federal interpretation of federal legislation; however, to determine a meaning of unfair. RCW 19.86.920.

In determining whether something is unfair, the court may look to see “(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).”

*Id.* (quoting *Federal Trade Comm’n v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 240, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)). Two years later, in *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 698 P.2d 578 (1985), the Court of Appeals found no statutory per se unfairness but also

looked to the elements of the Federal Trade Commission Act<sup>10</sup> and the Federal Trade Commission's interpretation of the Act. *Id.* at 310-311. Thus, the court recognized that even if an act was not a statutory per se violation, it may still be unfair. Unfortunately, these decisions pre-date *Hangman Ridge*, which is the source of the Court of Appeal's and several federal courts' confusion.

**B. This Court Should Accept Review Under RAP 13.4(b)(4) Because There is Substantial Public Interest in Preserving the CPA's Protection Against Unfair Practices.**

The Court's failure to recognize stand-alone unfairness denies consumers substantial protections under the CPA and has stopped the development of consumer protection law regarding unfair practices in Washington. Other states have multiple decisions interpreting CPA-like statutes that contain the same disjunctive language as our CPA, i.e. they prohibit unfair or deceptive practices. These courts have all confirmed that unfairness may be proven independent of deception or per se statutes.<sup>11</sup>

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<sup>10</sup> 15 U.S.C. § 45.

<sup>11</sup> *Pennsylvania. Dep't of Banking v. NCAS of Delaware, LLC*, 995 A.2d 422, 442 (Pa. Comm. Ct. 2010); *Demitro v. General Motors Acceptance Corp.*, 902 N.E.2d 1163 (Ill. 2009); *Barquis v. Merchants Collection Assn.*, 496 P.2d 817 (Cal. 1972); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980); *Cherick Distributors, Inc. v. Polar Corporation.*, 669 N.E.2d 218 (Mass. 1996); *State ex rel. Miller v. Cutty's Camping*, 694 N.W.2d 518 (Iowa 2005); *Jacobs v. Healey Ford-Subaru, Inc.*, 652 A.2d 496 (Conn. 1995).

The result is fully-developed unfairness principles that can be applied to business practices that are abusive without being deceptive.<sup>12</sup>

#### IV. CONCLUSION

This Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2012.

ROBERT M. MCKENNA  
Attorney General

  
JAMES T. SUGARMAN  
Assistant Attorney General  
WSBA #39107  
Attorneys for Amicus Curiae  
Attorney General of Washington

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<sup>12</sup> A popular treatise on consumer law lists hundreds of unfairness cases in other states while citing only one Washington decision, *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 698 P.2d 578, (1985); National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.3.3 (2008).