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SUPREME COURT OF THE STATE OF WASHINGTON

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Washington Supreme Court No. 91263-7

THE STATE OF WASHINGTON,

Respondent,

v.

KONINKLIJKE PHILIPS ELECTRONICS N.V., PHILIPS  
ELECTRONICS NORTH AMERICA CORPORATION, TOSHIBA  
CORPORATION, TOSHIBA AMERICA ELECTRONIC  
COMPONENTS, INC., LG ELECTRONICS, INC., LG  
ELECTRONICS U.S.A., INC., HITACHI, LTD., HITACHI  
DISPLAYS, LTD. (N/K/A JAPAN DISPLAY INC.), HITACHI  
ELECTRONICS DEVICES (USA)  
INC., AND HITACHI ASIA, LTD.

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

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## A. INTRODUCTION

The question in this case is whether any statute of limitations applies when the State brings antitrust *parens patriae* claims that seek private compensation for private harm to private individuals. The legislature provides a precisely delimited exemption from limitations periods, one that covers claims brought “in the name or for the benefit of the state.” In the statute at issue here, the legislature differentiated between claims brought “in the name of the state,” and thus covered by that exemption, from those brought “as *parens patriae* on behalf of persons residing in the state.” A claim brought “on behalf of” private state residents is textually and logically distinct from a claim “for the benefit of the state.” The legislature thus spoke clearly on its intention to exclude antitrust *parens patriae* claims from the statutory limitations exemption.

This case is over at that point. If antitrust *parens patriae* claims do not fall within the statutory exemption from limitations, then *some* statute of limitations must apply. Here, it matters not which one applies because the State brought these claims more than four years after the last alleged unlawful act, and thus they must be dismissed under all of the potentially applicable statutes of limitations. The four-year *antitrust* statute of limitations should apply to these *antitrust* claims, just as a four-year statute of limitations governs a state’s *parens patriae* claim under federal antitrust law. But the shorter two- and three-year catch-all statutes of limitations would yield the same result on these facts. No matter which one governs, the State’s claims are untimely and must be dismissed.

## B. ISSUES

1. Whether the court of appeals erred by holding that an antitrust *parens patriae* action seeking monetary relief for private persons under RCW 19.86.080 is an action “in the name or for the benefit of the state” under RCW 4.16.160, thereby exempting it from all statutes of limitations.
2. Whether the court of appeals erred by failing to align the limitations period for such a claim with the four-year limitations period that applies to state-law antitrust claims for damages under RCW 19.86.090 and to Sherman Act *parens patriae* claims brought by state attorneys general under 15 U.S.C. § 15b.

## C. STATEMENT OF THE CASE

The State filed this action on May 1, 2012. CP 1-28. It alleged that Petitioners violated the Consumer Protection Act (“CPA”) by “conspiring to suppress and eliminate competition by agreeing to raise prices . . . in the market for cathode ray tubes, commonly referred to as CRTs” in violation of RCW 19.86.030 (attached as Appendix A), the Washington antitrust provision that parallels 15 U.S.C. § 1 (attached as Appendix B). CP 2, 27. CRTs are a component of the bulky televisions and monitors that once dominated the marketplace, but flat-screen innovations in those products have rendered CRTs largely obsolete.

The State brought, *inter alia*, a *parens patriae* antitrust claim under RCW 19.86.080 (attached as Appendix C) “on behalf of persons residing in the State.” CP 2. That is one of the statutory provisions authorizing

actions for violations of RCW 19.86.030, and it allows the attorney general to bring *parens patriae* claims seeking restitution and injunctive relief. All restitution awarded must be “restore[d] to . . . [the] person[s] [who] purchased or transacted for goods or services.” RCW 19.86.080(3). The State sought “restitution . . . on behalf of its . . . residents” and “appropriate injunctions to prohibit illegal activity.” CP 28. Apparently cognizant that limitations were running, the State executed a tolling agreement with several Defendants (but not Petitioners). CP 30-31, 47.

Petitioners filed a motion to dismiss on limitations grounds, arguing that the *parens patriae* claims were untimely under RCW 19.86.120 (attached as Appendix D), the four-year antitrust statute of limitations, or any other potentially applicable statute of limitations. CP 29-37. RCW 19.86.120 provides that “[a]ny action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues.” RCW 19.86.090 (attached as Appendix E) is another provision authorizing an action for violations of RCW 19.86.030, and it empowers private and governmental plaintiffs to seek damages and injunctive relief. The decades-old alleged conspiracy to raise CRT prices ended on November 25, 2007, more than four years before the State filed suit. CP 2.

The superior court denied Petitioners’ motion to dismiss. CP 95. Upon certification, the court of appeals affirmed the superior court in its December 22, 2014 opinion. *State v. LG Electronics, Inc.*, 185 Wn. App. 123, 340 P.3d 915 (2014) (attached as Appendix F). It held that RCW

19.86.120 does not apply to RCW 19.86.080 *parens patriae* claims. *Id.* at 131-45. The court also held that RCW 4.16.160 (attached as Appendix G), which provides that “there shall be no limitation to actions brought in the name or for the benefit of the state,” exempts those claims from all statutes of limitations. *Id.* at 146-51.

#### D. ARGUMENT

**1. Washington law does not exempt *parens patriae* claims seeking private restitution from all statutes of limitations.**

The court of appeals vastly expanded civil liability in Washington by exempting *parens patriae* claims seeking private restitution from all statutes of limitations. Its decision contravenes the plain text of the statutes and this Court’s precedents.

a. RCW 4.16.160, the source of the exemption applied by the court of appeals, provides that “there shall be no limitation to actions brought in the name or for the benefit of the state.” The scope of this exemption is precisely drawn: to qualify, an action must be brought (1) “in the name” of the state or (2) “for the benefit of the state.” RCW 4.16.160.

A *parens patriae* restitution claim does not fall within either of those categories. Instead, by its plain terms, the attorney general brings a *parens patriae* claim “on behalf of persons residing in the state.” RCW 19.86.080(1). The ‘080 statute itself differentiates a *parens patriae* action from one brought “in the name of the state”: “The attorney general may bring an action in the name of the state, *or* as *parens patriae* on behalf of persons residing in the state.” *Id.* (emphasis added).

In enacting '080, the legislature thus identified two distinct types of state-initiated antitrust claims: those brought "in the name of the state" and those brought "on behalf of persons residing in the state." *Id.* The '160 exemption was on the books at the time and specified the elimination of a limitations period for the former, while just as clearly providing no similar exemption for the latter. It is not the province of the courts to fashion a limitations exemption for '080 *parens patriae* claims where the legislature saw fit not to do so: "Where a statute provides for a stated exception, no other exceptions will be assumed by implication." *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977).

The statutory text also reflects the legislature's recognition that *parens patriae* restitution claims are not "for the benefit of the state" as a whole; instead, they are brought on behalf of particular "persons residing in the state." That understanding is consistent with the common-law and statutory development of *parens patriae* claims. Traditional *parens patriae* actions seek to "halt injury to a quasi-sovereign state interest," such as by seeking an injunction to stop illegal activity. *State of Cal. v. Frito-Lay, Inc.*, 474 F.2d 774, 775 (9th Cir. 1973). The notion that a state can "sue in a representative capacity as *parens patriae* to recover for [private] injur[ies]," however, represents a "substantial departure" from the common-law understanding of the *parens patriae* power. *Id.* Indeed, Congress first authorized the new and different species of *parens patriae* claim at issue here precisely because it was not available under the common law. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d

418, 427 n.5 (5th Cir. 2008); *see also* 15 U.S.C. § 15c. It “created a new procedural device[—]parens patriae actions by States on behalf of their citizens”—with the goal of enforcing private rights and seeking private recovery. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733 n.14 (1977). The Washington legislature did the same. RCW 19.86.080(1).

Despite the legislature’s careful crafting of ‘080 to differentiate claims brought in the name or for the benefit of the state (and thus exempted from limitations under ‘160) from parens patriae claims brought on behalf of certain individuals (which are nowhere mentioned in the ‘160 exemption), the court of appeals effectively inserted ‘080 restitution parens patriae claims into ‘160’s exemption provision. There is nothing inherent in parens patriae restitution claims that justifies this judicial rewriting of the statute. Indeed, federal law and states across the country apply statutes of limitations to similar antitrust parens patriae claims. Federal law limits the time state attorneys general have to file parens patriae claims under the Sherman Act. *See* 15 U.S.C. § 15b.<sup>1</sup> A number of states that grant their attorneys general statutory antitrust parens patriae authority—including many that do so for indirect-purchaser claims—do the same.<sup>2</sup> Thus, the court of appeals’ override of the legislative

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<sup>1</sup> The relevant text of the federal statute is virtually identical to RCW 19.86.080(1): “Any attorney general of a State may bring a civil action . . . as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation [of the Sherman Act].” 15 U.S.C. § 15c.

<sup>2</sup> *See* Alaska Stat. Ann. §§ 45.50.577(b), 45.50.588; Ark. Code Ann. §§ 4-75-315(b), 4-75-320(a); Cal. Bus. & Prof. Code §§ 16750.1, 16760(a)(1); Colo. Rev. Stat. Ann. §§ 6-4-111, 6-4-118(1); Del. Code Ann. tit. 6, §§ 2108, 2111; D.C. Code §§ 28-4507(b), 28-

framework to stretch the '160 exemption well beyond its textual reach isolates Washington as an outlier jurisdiction on this issue.

The provisions in '080 permitting indirect purchaser actions offer no support for so startling a departure from statutory text and context. To be sure, they demonstrate that Washington allows *parens patriae* recovery for some private harms that federal law does not. But the key aspects of the claims remain the same. *Parens patriae* restitution claims—whether on behalf of direct or indirect purchasers—seek *private* compensation for *private* harm. That is why, in Washington, these claims are brought not “in the name or for the benefit of the state,” RCW 4.16.160, but rather “on behalf of persons residing in the state,” RCW 19.86.080(1). There is no more reason under Washington law to remove such claims from limitations constraints than in the many other states that authorize *parens patriae* claims for indirect purchasers, but only if timely pursued.

b. The court of appeals defended its holding by retreating from the statutory text. It could not gainsay that a *parens patriae* claim is brought on behalf of individual persons within the state rather than the state as a whole. *LG*, 185 Wn. App. at 135. Yet the court ignored '160's mandate that an action must be “brought in the name or for the benefit of the state” if it is to be free of limitations. It instead focused on whether

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4511(b); Fla. Stat. Ann. §§ 542.22(2), 542.26(1); Haw. Rev. Stat. §§ 480-14(b), 480-24(a); Idaho Code Ann. §§ 48-108(2), 48-115(1); 740 Ill. Comp. Stat. Ann. 10/7(2); Md. Code Ann., Com. Law § 11-209; Mass. Gen. Laws Ann. ch. 93, §§ 9, 13; Nev. Rev. Stat. Ann. §§ 598A.160(1), 598A.220; R.I. Gen. Laws Ann. §§ 6-36-12(a), 6-36-23; Utah Code Ann. §§ 76-10-3108(1), 76-10-3117(1); W. Va. Code Ann. §§ 47-18-11, 47-18-17.

bringing a *parens patriae* claim is “sovereign in nature,” reasoning that, if so, such an action is necessarily “for the benefit of the state” and thus falls under the ‘160 exemption. *Id.* at 146-51. That exercise is wholly unnecessary here because, as explained above, the statute’s plain text specifies that an ‘080 claim is distinct from the two types of actions covered by ‘160. The court of appeals nevertheless reasoned that the instant action falls under ‘160 because “there is no need to look beyond the face of the action itself to recognize its sovereign nature,” for “[a]uthority to bring a *parens patriae* action is rooted in the notion of state sovereignty.” *Id.* at 151.

The lower court misunderstood this Court’s use of the “sovereignty” concept. To be sure, this Court has in the past used the “sovereignty” concept to determine whether ‘160 applies, and rightly so, for the touchstone for the limitations exemption is whether the claim is being pursued “in the name of” the sovereign, or “for the benefit of the [sovereign].” RCW 4.16.160. But this Court has delved into the “sovereignty” issue only when there is no clear textual indicator whether the cause of action falls within ‘160 (unlike here). And the relevant “sovereignty” question has never been whether the *cause of action itself* is sovereign in character; it instead asks whether the cause of action arises out of a *governmental function* “inherent in the notion of sovereignty or embodied in the state constitution.” *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 689, 202 P.3d 924 (2009) (“*MLB*”).

This Court has held that even a breach of contract claim—certainly not typically regarded as inherently sovereign—can qualify for the ‘160 exemption in the right context. *See MLB*, 165 Wn.2d at 685-86. In *MLB*, it was not the nature of the cause of action that this Court found dispositive, but rather the underlying interest being vindicated—asking “whether the activity or its purpose is normally associated with private or sovereign acts” and whether the activity “involves a duty and power inherent in the notion of sovereignty.” *Id.* at 687, 689. The breach of contract action there came within ‘160 because it arose from the construction of a baseball field, which “involve[s] the traditional sovereign function of providing public recreational benefits.” *Id.* at 693. Notably, the legislature had also exclusively delegated to the state entity the responsibility to construct and operate Safeco Field. *Id.* at 692, 694.<sup>3</sup>

Further demonstrating the primacy of the underlying interest over the type of action or claim, this Court has reached the opposite result on the same type of claim at issue in *MLB*. *See Wash. Pub. Power Supply Sys. v. Gen. Elec. Co.*, 113 Wn.2d 288, 296-301, 778 P.2d 1047 (1989). That case involved breach of contract and other claims arising out of an electrical production arrangement. *Id.* at 291. This Court recognized that the “‘for the benefit of the state’ language in RCW 4.16.160 is properly

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<sup>3</sup> *See also Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 115-16, 691 P.2d 178 (1984) (school district’s breach of contract action fell under ‘160 because it was brought to vindicate state’s authority to provide public education, a power exclusively delegated to school districts by the state legislature).

understood to refer to the character or nature of the . . . conduct.” *Id.* at 296. Finding “no indication in the constitution or in the statutes that supplying electric energy is a sovereign function of the State” and reasoning that “the production of electricity has not traditionally been considered a power or duty which is inherent in the sovereign,” this Court concluded that the underlying activity was not a “sovereign power” and that Washington Public Power was not acting “for the benefit of the state.” *Id.* at 301. Therefore, the RCW 4.16.160 exemption did not apply. The divergent results of *MLB* and *Washington Public Power*—despite the same type of claim being at issue in both—leave no doubt that the focus is on the underlying interest and not the type of claim or action when determining whether the RCW 4.16.160 exemption applies.

c. The teachings of *MLB* are instructive. At issue here is compensating private citizens injured by antitrust violations, and there is nothing inherently sovereign about pursuing private recompense. Congress recognized as much when it applied a four-year statute of limitations to state *parens patriae* claims under the Sherman Act. 15 U.S.C. §§ 15b-15c (attached as Appendix H). And, as discussed *supra* at pp. 5-6, courts have recognized that seeking private restitution for antitrust harm is not an inherently sovereign power. Nor is the antitrust enforcement function exclusively delegated to the State. The legislature empowers private individuals to enforce antitrust laws as well, encouraging them to do so with treble damages. *See* RCW 19.86.090.

Nor does the fact that injunctive relief is also available under '080 change the essentially private nature of parens patriae claims seeking restitution. The 2007 amendments to '080 added to the injunctive relief already available, codifying the ability to bring claims as “parens patriae on behalf of persons residing in the state” and authorizing restitution for direct and indirect purchasers. Laws of 2007, ch. 66, § 1. The evident purpose of those amendments was to codify a right of action to obtain compensation for wrongs visited upon myriad private citizens. Any restitutionary recovery goes not into the state treasury, but rather must be “restore[d] to” the “person[s] in interest.” RCW 19.86.080(3). Restitution for potentially thousands of individual purchasers—not injunctive relief—is certainly the driving force here, because the alleged conspiracy has long ended and the CRT technology at issue is outdated. Indeed, the State admitted as much in the trial court: “The meat of our case is—are 080 parens claims. Under 080, the State represents all consumer indirect purchasers in the State as parens patriae seeking restitution.” Hr’g Tr. 23 (attached as Appendix I).

In every material respect, this is an action brought by the state “for the enforcement of some private or individual right.” *Herrmann v. Cissna*, 82 Wn.2d 1, 4, 507 P.2d 144 (1973) (quoting *Wasteney v. Schott*, 51 N.E. 34, 58 Ohio St. 410 (1898)). In such circumstances, this Court has declared that “the statute [of limitations] may be interposed.” *Id.*

d. The court of appeals went further astray by relying on a collection of inapposite cases arising under the pre-2007 version of '080.

*LG*, 185 Wn. App. at 138, 144 (citing *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976); *Seaboard Sur. Co. v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 504 P.2d 1139 (1973); *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 510 P.2d 233 (1973)). The court incorrectly gleaned from those cases “that the legislature intended to exclude [‘080 parens patriae] claims . . . from a statutory limitation period” because such claims are “brought primarily for the benefit of the public.” *Id.* at 145.

Contrary to the State’s claims (at Answer 14), none of the cited cases involve parens patriae claims, and none address ‘160’s exemption from limitations. They instead involve actions in the name of the state for injunctive relief “to protect the public from the kinds of business practices which are prohibited by the statute.” *Seaboard*, 81 Wn.2d at 746; accord *Ralph Williams’*, 82 Wn.2d at 277 (“[P]rotection of the public from unlawful business practices . . . is the primary purpose of this action . . .”). Restitution was involved only as “*incidental to* and in aid of the relief asked *on behalf of the public.*” *Seaboard*, 81 Wn.2d at 746 (emphasis added).

Stopping unlawful activity is neither the thrust nor the essential purpose of the parens patriae claims involved here. Rather, they are first and foremost seeking to vindicate the private interests of thousands of individual citizens through a restitution remedy to redress private antitrust wrongs. That is precisely the action codified by the 2007 amendments to

'080, and neither the character nor the nature of the *parens patriae* claims asserted here merits a limitations exemption under '160.

**2. Washington's antitrust statute of limitations applies to antitrust *parens patriae* claims seeking private restitution.**

a. The court of appeals further erred by holding that the antitrust statute of limitations in RCW 19.86.120 does not apply to '080 *parens patriae* restitution claims. It reasoned that '120 facially applies only to "claims for damages under RCW 19.86.090," and therefore cannot govern '080 claims as well. *LG*, 185 Wn. App. at 139-40. The court used that holding to propel its conclusion that such claims must be exempted by '160. This approach puts the cart before the horse.

Unless '160 itself exempts '080 claims from limitations, *some* statute of limitations must apply to those claims. That is the necessary implication of the legislature's exempting certain types of state-initiated claims from limitations in '160. Claims beyond the scope of that express exemption cannot garner the same protection. Inferring from the CPA's silence that *no* statute of limitations applies to '080 claims inverts this legislative design. *See Jepson*, 89 Wn.2d at 404.

The proper question, then, is not *if* any statute of limitations applies, but *which* statute of limitations applies. There are three candidates: the four-year RCW 19.86.120 antitrust statute of limitations, the catch-all three-year RCW 4.16.080(2) statute of limitations for actions seeking recovery for "any other injury to the person or rights of another,"

and the even broader catch-all two-year limitations period under RCW 4.16.130 for “[a]n action for relief not hereinbefore provided.”

Here, whichever choice is made, the result is the same: the State’s claims are time-barred. The most recent alleged unlawful acts occurred more than four years ago. Thus, disposing of the claims as untimely under the ‘120 four-year antitrust statute of limitations—the option offering the most generous temporal terms—ends the inquiry for the other limitation options as well. It helps, of course, that the ‘120 *antitrust* statute of limitations is in fact the best fit for these *antitrust* claims.

b. This Court outlined the process for choosing the correct statute of limitations in the face of legislative silence in *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986). A false light invasion of privacy claim was the question there, and this Court proceeded by finding the most similar claim for which the legislature had provided a specific statute of limitations. *Id.* at 469-74. In concluding that the defamation statute of limitations should govern, the Court looked past the “theoretical difference” between the two claims and focused instead on the “overlap” between them. *Id.* at 471.

The court of appeals rejected this roadmap on the grounds that the *Eastwood* Court “was not required to seek to ascertain legislative intent” because false light is a common-law cause of action. *LG*, 185 Wn. App. at 140 n.29. But courts always look to legislative intent when ascertaining *statutes* of limitations. And just as the *Eastwood* Court analogized the two

common-law causes of action to determine the legislature's intent, the court of appeals should have done the same with the statutory claims here.

Applying the *Eastwood* analysis leaves little doubt that the '120 antitrust statute of limitations must apply to an action under '080. While the '120 statute facially applies to an "action to enforce a claim for damages under RCW 19.86.090," there is significant "overlap" between '090 and '080 claims.

Most importantly, the '080 *parens patriae* claim challenges *identical* conduct by *identical* defendants as would an '090 damages claim expressly governed by the '120 limitations period. Both offer remedies for violations of RCW 19.86.030. Indeed, the State brought claims under both '080 and '090 for the identical conduct in this case. CP 27-28. It is anomalous to treat those claims so differently for limitations purposes.

Also similar is the available relief. '090 allows private individuals to recover "actual damages" and "the costs of the suit, including a reasonable attorney's fee." '080 empowers a court to "restore to any person in interest any moneys or property, real or personal, which may have been acquired" and provides for recovery of "the costs of said action including a reasonable attorney's fee." RCW 19.86.080(1), (3). Indeed, '080 even recognizes that individual restitution in a *parens patriae* claim is "monetary relief" that often "duplicates amounts that have been awarded for the same violation" in private damages suits under '090. *Id.*

What is more, there are affirmative indications that the legislature expected '080 and '090 claims to be proceeding during the same four-year

limitations period. '080 itself instructs courts to “coordinat[e] [‘080 claims] with other related actions, to the extent practicable, to avoid duplicate recovery.” RCW 19.86.080(3). Perhaps even more telling, '120 provides that the four-year limitations period for bringing '090 claims is “suspended” while an '080 claim is pending, strongly suggesting that it was fully anticipated that '080 claims would be brought in the same time period as '090 claims, if not before.

To be sure, there are a few differences between '080 and '090 claims: '090 claims seeks damages while '080 claims seek restitution; the attorney general alone brings '080 claims; and '080 allows recovery for indirect purchasers. But the considerable “overlap” outweighs those differences under the *Eastwood* framework. The bottom line is that both claims challenge the same antitrust violations and seek essentially the same measure of monetary relief for private individuals.<sup>4</sup> It makes scant sense to hold that a defendant who allegedly violates '030 finds repose from individual damages claims after four years, but faces the threat of a massive *parens patriae* restitution action over the same conduct for decades into the future. *See Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 364, 247 P.3d 816, *review denied*, 171 Wn.2d 1033 (2011) (applying analogous limitations period to ensure “consistency and predictability” and avoid “inherently unfair and . . . unreasonable results”).

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<sup>4</sup> Whether denominated as damages or restitution, the recovery would be the same: the amount overcharged as a result of the antitrust violation.

**3. The statutory directive to maintain harmony between Washington and federal antitrust law further supports a temporal bar of four years.**

a. In enacting the CPA, the legislature explicitly directed the courts to construe the act in harmony with the federal antitrust statutes. It stated its “intent . . . that, in construing this act, the courts be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters . . .” RCW 19.86.920 (attached as Appendix J). The goal is to “minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct.” *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 788, 938 P.2d 842 (1997), *review denied*, 133 Wn.2d 1029 (1988). Honoring this statutory directive, “Washington courts have uniformly followed federal precedent in matters described under the [CPA].” *Id.* at 787.

Until now, federal law is crystal clear on the question presented here: a four-year statute of limitations applies to claims brought by “[a]ny attorney general of a State . . . as *parens patriae*.” 15 U.S.C. §§ 15b-15c. The court of appeals acknowledged as much. *LG*, 185 Wn. App. at 137. Yet it refused to obey the legislature’s command to seek uniformity with federal antitrust law. Instead, the court cited the lack of federal cases “interpret[ing] . . . the analogous federal statute of limitation,” as a reason to depart from federal law. *Id.* at 141. But the paucity of court interpretation of language so plain it calls for no judicial clarification

hardly signals a reason to reject the obvious; rather, it is a testament to embracing it.

The State protests that federal law permits only direct-purchaser claims, while '080 allows *parens patriae* claims to vindicate the rights of both direct *and* indirect purchasers. Answer at 16-17. True enough. But that just means the State is openly seeking a conflict between Washington and federal law as it pertains to *parens patriae* claims brought on behalf of direct purchasers. The legislature has counselled against creating such conflicts, and the fact that additional remedies are available under Washington law does not justify flouting that mandate.<sup>5</sup> Further, that discrepancy hardly alters the fundamentally private nature of *parens patriae* restitution claims, whether they are vindicating the rights of direct purchasers, indirect purchasers, or both. In other words, there is no reason to believe that the additional *substantive* rights conferred by Washington law signal a radically different approach to *limitations*. If anything, the much greater liability imposed by Washington law cuts against allowing the State to pursue such remedies forever.

b. The State's backup argument fares no better. It points to the Federal Trade Commission Act's three-year statute of limitations as a

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<sup>5</sup> Indeed, until the Supreme Court's 1977 decision in *Illinois Brick*, many federal courts allowed indirect purchasers to recover, and the same four-year limitations period necessarily would have applied to *parens patriae* claims on behalf of such purchasers. See 15 U.S.C. §§ 15b-15c (applying the four-year statute of limitations to "any cause of action under section . . . 15c," which authorizes state *parens patriae* claims). Thus, there is no reason to presume that Washington's allowance of such claims signals a drastic departure from the federal approach to limitations.

potentially analogous federal statute of limitations. Answer at 18. But that cannot be right. The federal antitrust statute of limitations applies specifically to *parens patriae* claims by state attorneys general. *See* 15 U.S.C. § 15b. The Federal Trade Commission Act's statute of limitations applies only to actions by the Commission. *See* 15 U.S.C. § 57b(d). While the State is certainly correct that the CPA covers more than antitrust violations, that is no reason to countenance a square conflict between state and federal law in choosing which limitations period governs *parens patriae* antitrust claims. And, in any event, dismissal would be appropriate here under the FTC Act's three-year statute of limitations as well.

The court of appeals could offer no satisfactory explanation either. It defended its rejection of federal antitrust law by noting that the legislature departed from federal antitrust law when it authorized the attorney general to bring *parens patriae* actions on behalf of indirect purchasers. *LG*, 185 Wn. App. at 141-42. But that cuts the *other* way, because it establishes that the legislature makes its intentions unmistakably clear when it seeks to depart from federal antitrust law. The lack of any similarly clear statement that no limitations period should apply to '080 claims demonstrates that the legislature *did not* intend to break from federal law on this issue.

In this instance, as earlier discussed, the 2007 amendments created an '080 *parens patriae* claim on behalf of indirect purchasers that is private in nature, and thus not entitled to the limitations exemption found in '160. There being no clearly articulated departure from the federal statute of

limitations traditionally applicable to *parens patriae* antitrust claims on behalf of injured purchasers generally, borrowing that four-year time limit to pursue such claims under '080 is a time-honored practice that the court of appeals should have followed. *See, e.g., Blewett*, 86 Wn. App. at 787.

c. In breaking with federal antitrust law and judicially removing all time bars to state *parens patriae* antitrust claims seeking restitution for wronged purchasers, the court of appeals' decision opens a Pandora's box that is not easily closed. It is well recognized that "[r]epose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations." 2 Areeda & Hovenkamp, *Antitrust Law* ¶ 320a (3d ed. 2007). Yet, while Washington businesses may continue to enjoy repose from federal *parens patriae* antitrust claims after four years, that will henceforth be small comfort because Washington state law will leave those businesses vulnerable to the same claims decades later—claims brought on behalf of the same purchasers and seeking restitution for the same conduct. A far clearer and more precise direction should come from the legislature before so troubling a result takes effect.

#### **E. CONCLUSION**

For the reasons above, Petitioners request that this Court reverse the court of appeals. Petitioners further request that this Court dismiss the State's claims as untimely.

Dated this 3rd day of August, 2015.

s/ Robert D. Stewart

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**Subject:** Supreme Court No. 91263-7 - Koninklijke Philips Electronics, et al. v. State of Washington

Attached is the *Supplemental Brief of Petitioners* for filing and service in the above-referenced matter. The Appendices are not attached due to size and will be sent to the Court via U.S. Mail today.

Case Name:

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Case Number:

91263-7

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91263-7

APPENDICES TABLE

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# APPENDIX A

**RCW 19.86.030**

**Contracts, combinations, conspiracies in restraint of trade declared unlawful.**

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[1961 c 216 § 3.]

**Notes:**

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.

# APPENDIX B

## 15 USCS § 1

### **§ 1. Trusts, etc., in restraint of trade illegal; penalty**

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Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

# APPENDIX C

## **RCW 19.86.080**

### **Attorney general may restrain prohibited acts — Costs — Restoration of property.**

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

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

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

[2007 c 66 § 1; 1970 ex.s. c 26 § 1; 1961 c 216 § 8.]

#### **Notes:**

**Effective date -- 2007 c 66:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2007]." [2007 c 66 § 3.]

# APPENDIX D

## **RCW 19.86.120**

### **Limitation of actions — Tolling.**

Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.

[1970 ex.s. c 26 § 5; 1961 c 216 § 12.]

#### **Notes:**

Action to enforce claim for civil damages under chapter 19.86 RCW must be commenced within six years.  
Unfair motor vehicles business practices act: RCW 46.70.220.

Limitation of actions: Chapter 4.16 RCW.

# APPENDIX E

## **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; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

#### **Notes:**

**Application -- 2009 c 371:** "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

**Effective date -- 2007 c 66:** See note following RCW 19.86.080.

**Intent -- 1987 c 202:** See note following RCW 2.04.190.

**Short title -- Purposes -- 1983 c 288:** "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

# APPENDIX F

## State v. LG Elecs., Inc.

Court of Appeals of Washington, Division One

November 12, 2014, Oral Argument; December 22, 2014, Filed

No. 70299-8-1

### Reporter

185 Wn. App. 123; 340 P.3d 915; 2014 Wash. App. LEXIS 3021

THE STATE OF WASHINGTON, *RESPONDENT*, v. LG ELECTRONICS, INC., ET AL., *PETITIONERS*.

**SUBSEQUENT HISTORY:** DECISION REACHED ON APPEAL BY, REMANDED BY STATE V. LG ELECS., INC., 185 WN. APP. 394, 341 P.3D 346, 2015 WASH. APP. LEXIS 14 (2015)  
REVIEW GRANTED BY STATE V. LG ELECS., 2015 WASH. LEXIS 619 (WASH., JUNE 3, 2015)

**PRIOR HISTORY:** [\*\*\*1] Appeal from King County Superior Court. Docket No: 12-2-15842-8. Judge signing: Honorable Richard D Eadie. Judgment or order under review. Date filed: 03/28/2013.

### Core Terms

parens patriae, attorney general, limitations period, discretionary, restitution, four-year, purchasers, antitrust, statute of limitations, sovereign, issues, federal law, indirect, courts, authorizes, provisions, exemption, legislative intent, individuals, residents, actual damage, Petitioners', injunctive relief, purposes, damages, claim for damages, trial court, delegated, statutory limitation, cause of action

### Case Summary

#### Overview

**HOLDINGS:** [1]-The Attorney General's Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86, parens patriae action under Wash. Rev. Code § 19.86.080 brought against several corporate entities for their alleged participation in a worldwide conspiracy to raise prices and set production levels for cathode ray tubes was not time barred under Wash. Rev. Code § 19.86.080 because the legislature did not intend for such actions to be subject to the statutory time limitation; [2]-The Attorney General's parens patriae action under the CPA also was exempt from any otherwise applicable

statutory limitation period under Wash. Rev. Code § 4.16.160 because the authority for the action inheres in the notion of state sovereignty by virtue of being brought for the "benefit of the state."

#### Outcome

Trial court's denial of the motion to dismiss the Attorney General's complaint was affirmed.

### LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN1** When the Washington legislature authorized the Washington Attorney General to bring an action to enforce the Consumer Protection Act, Wash. Rev. Code ch. 19.86, as parens patriae, it did not intend for such actions to be subject to the limitation period set forth in Wash. Rev. Code § 19.86.120. Also, it was the legislature's intent that such actions, the authority for which inheres in the notion of state sovereignty, be exempted from any otherwise applicable statutory limitation period.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

**HN2** Pursuant to Wash. R. App. P. 2.3(e), an appellate court may specify the issue or issues as to which discretionary review is granted.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

**HN3** The Washington legislature did not intend for Wash. Rev. Code § 19.86.120 to be applied to parens patriae claims brought by the Washington Attorney General. Consequently, a parens patriae claim is not time-barred by operation of § 19.86.120.

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

**HN4** Questions of statutory interpretation are reviewed de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

**HN5** A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under Wash. Super. Ct. Civ. R. 12(b)(6) is a question of law and is reviewed de novo.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Statutory Construction

**HN6** Whether a statutory limitation period applies to bar a claim is reviewed de novo.

Governments > Legislation > Interpretation

**HN7** A court's primary duty in interpreting a statute is to discern and implement legislative intent. If a statute's meaning is plain on its face, then a court must give effect to that plain meaning as an expression of legislative intent. The plain meaning of a statute may be discerned from all that the legislature has said in the statute and in related statutes which disclose legislative intent about the provision in question.

Governments > Legislation > Interpretation

**HN8** While a court may, in seeking to perceive the plain meaning of a statute, examine the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole, a court must not add words where the legislature has chosen not to include them and must construe a statute such that all of its language is given effect.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

**HN9** The Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86, which was modeled on federal antitrust statutes, is meant 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. Wash. Rev. Code § 19.86.920. While enactment of the CPA in 1961 postdated the advent of federal antitrust legislation in 1890, it is well settled that the federal legislation was intended to supplement, not displace, state antitrust remedies.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

**HN10** In enacting the Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86, the Washington legislature made clear its intent for Washington courts to be guided

by federal court and Federal Trade Commission (FTC) interpretations of federal statutes dealing with the same or similar matters. It is the intent of the legislature that, in construing the CPA, the courts be guided by final decisions of the federal courts and final orders of the FTC 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 the CPA shall be liberally construed so that its beneficial purposes may be served. Wash. Rev. Code § 19.86.920.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Courts > Judicial Precedent

**HN11** While not bound by federal precedents, in practice Washington courts have uniformly followed federal precedents in matters described under the Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86, when their reasoning is found persuasive. Where the CPA provision being construed has been taken verbatim from its federal analog, the Washington Supreme Court has relied on federal court interpretations to reach its conclusions. Washington courts have followed federal precedent in order to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct. Consequently, departure from federal law must be for a reason rooted in Washington's own statutes or case law and not in the general policy arguments that a Washington court would weigh if the issue came before the court as a matter of first impression.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

**HN12** Wash. Rev. Code § 19.86.030 provides that every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared unlawful. As with section 1 of the federal Sherman Act, 15 U.S.C.S. §§ 1-7, § 19.86.030 does not itself establish a cause of action or authorize particular parties to enforce its provisions. Rather, in separate provisions, the Consumer Protection Act,

Wash. Rev. Code ch. 19.86, authorizes specific causes of action and identifies the individuals or entities permitted to bring those actions.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Remedies > Injunctions > General Overview

**HN13** Wash. Rev. Code § 19.86.080 authorizes the Washington Attorney General to bring an action in the name of the state of Washington or as *parens patriae* on behalf of Washington residents. Wash. Rev. Code § 19.86.080(1). The Attorney General is authorized to seek injunctive relief, and courts are permitted, at their discretion, to award restitution that is necessary to restore to any person in interest any moneys or property acquired by means of any act prohibited by the Consumer Protection Act, Wash. Rev. Code ch. 19.86. Wash. Rev. Code § 19.86.080(1)-(3). There are limitations, however, to a court's discretion in awarding restitution pursuant to § 19.86.080. Courts shall exclude from the amount of restitution awarded in an action pursuant to Wash. Rev. Code § 19.86.080(3) any amount that duplicates amounts that have been awarded for the same violation and should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery. Section 19.86.080(3).

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Damages > Compensatory Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

**HN14** Wash. Rev. Code § 19.86.090 authorizes both certain persons and the State to bring a cause of action seeking injunctive relief, actual damages, or both for violations of certain Consumer Protection Act (CPA),

Wash. Rev. Code ch. 19.86, provisions. Similarly, federal law authorizes both certain persons and the United States to bring a cause of action seeking injunctive relief and actual damages for violations of certain federal antitrust laws. 15 U.S.C.S. §§ 15, 15a, 25, 26. Section 19.86.090 authorizes the state of Washington to seek actual damages as either a direct or indirect purchaser; however, in most instances, neither federal law nor the CPA permits "persons" who are considered indirect purchasers to seek actual damages.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Local Governments > Claims By & Against

**HN15** "Person" for purposes of the Consumer Protection Act, Wash. Rev. Code ch. 19.86, includes the counties, municipalities, and all political subdivisions of the state of Washington. Wash. Rev. Code § 19.86.090.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Procedural Matters

**HN16** The sole statute of limitation in the Consumer Protection Act, Wash. Rev. Code ch. 19.86, is found in Wash. Rev. Code § 19.86.120. Only claims for damages brought pursuant to Wash. Rev. Code § 19.86.090 are expressly made subject to this limitation period. Section 19.86.120 (any action to enforce a claim for damages under § 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues).

Governments > Legislation > Statute of Limitations > General Overview

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Local Governments > Claims By & Against

**HN17** In 1961, as part of the bill that created the Consumer Protection Act, Wash. Rev. Code ch. 19.86, the Washington legislature authorized the Washington Attorney General to bring, pursuant to Wash. Rev. Code § 19.86.080, an action in the name of the state of Washington, seeking to enjoin certain behavior. 1961 Wash. Laws ch. 216, § 8. The legislature also authorized certain persons and the state of Washington to bring an action for injunctive relief and damages pursuant to Wash. Rev. Code § 19.86.090. 1961 Wash. Laws ch. 216, § 9. While actions seeking damages were made subject to the four-year limitation period contained in Wash. Rev. Code § 19.86.120, actions brought by the Attorney General seeking injunctive relief were not. 1961 Wash. Laws ch. 216, § 12.

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > General Overview

**HN18** In 1970, Wash. Rev. Code § 19.86.080 was amended so as to give courts discretion to award restitution when necessary to restore to any person in interest any moneys or property acquired by means of any act prohibited or declared to be unlawful under the Consumer Protection Act, Wash. Rev. Code ch. 19.86. 1970 Wash. Laws ch. 26, § 1. While both Wash. Rev. Code § 19.86.090 and Wash. Rev. Code § 19.86.120 were also amended at this time, the limitation period in § 19.86.120 was not expressly extended to encompass actions brought pursuant to § 19.86.080. 1970 Wash. Laws ch. 26, §§ 1, 5. Since 1970, § 19.86.120 has not been amended.

Civil Procedure > Remedies > Damages > Compensatory Damages

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

**HN19** Even in the event that private individuals are to receive restitution as a result of an action brought by the

Washington Attorney General pursuant to Wash. Rev. Code § 19.86.080, such actions nonetheless are meant to benefit the public. The Attorney General's responsibility in bringing cases pursuant to § 19.86.080 is to protect the public. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public. Suits for injunctive relief and restitution enforce the laws of the particular jurisdiction in the public interest by restoring the status quo.

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Remedies > Damages > Compensatory Damages

**HN20** In 2007, the Washington legislature amended both Wash. Rev. Code § 19.86.080 and Wash. Rev. Code § 19.86.090. 2007 Wash. Laws ch. 66, §§ 1-2. In amending § 19.86.080, the legislature authorized the Washington Attorney General to bring *parens patriae* claims on behalf of Washington residents, and expressly permitted recovery in the form of restitution on behalf of both direct and indirect purchasers who have been injured. 2007 Wash. Laws ch. 66, § 1. In amending § 19.86.090, the legislature expressly authorized the state of Washington to seek actual damages as either a direct or indirect purchaser. 2007 Wash. Laws ch. 66, § 2.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > General Overview

**HN21** The words in Wash. Rev. Code § 19.86.120 suggest that the legislature intended its four-year limitation period to apply only to damages claims brought pursuant to Wash. Rev. Code § 19.86.090. Wash. Rev. Code § 19.86.120 (any action to enforce a claim for damages under § 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues).

Governments > Legislation > Interpretation

**HN22** Conventional wisdom holds that when the legislature expresses one thing in a statute, omissions are deemed to be exclusions.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

**HN23** When the Washington legislature authorized the Washington Attorney General to bring *parens patriae* claims on behalf of both direct and indirect purchasers under the Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86, it unmistakably departed from federal law. The effect of this departure was to ensure that when the Attorney General exercises authority as *parens patriae* pursuant to the CPA, the resultant protections afforded to Washington residents will be more robust than those offered by federal law.

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > Governmental Entities

**HN24** A court will not presume that the Washington legislature acted in a negligent fashion when it authorized the bringing of *parens patriae* claims on behalf of direct and indirect purchasers under the Consumer Protection Act, Wash. Rev. Code ch. 19.86, yet did not expressly subject such claims to the four-year limitation period in Wash. Rev. Code § 19.86.120. Instead, in recognition of the fact that a departure from both the "purchaser proximity" and temporal restrictions imposed by federal law is consistent with the general goal of outstripping the protections afforded by federal law, the legislature's silence with regard to temporal restrictions reveals an intent to keep *parens patriae* claims unbridled by § 19.86.120.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > Remedies > Damages > Compensatory Damages

**HN25** Under Wash. Rev. Code § 19.86.080, individuals must rely on the Washington Attorney General to file suit on their behalf, and then must rely on the court to exercise its discretion and award restitution. In contrast, under Wash. Rev. Code § 19.86.090, individuals may bring suit if they wish and courts are not given discretion to refuse to award damages—if proved—for a successful claim. In view of the passive role for individuals, it is reasonable to conclude that the Washington legislature's primary objective in creating § 19.86.080 was not to ensure that those individuals harmed by anticompetitive behavior were made whole. Instead, as the Washington Supreme Court has recognized, claims brought pursuant to § 19.86.080 are intended to redound primarily to the benefit of the public.

Civil Procedure > Remedies > Damages > Compensatory Damages

Civil Procedure > Remedies > Injunctions > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**HN26** Suits for injunctive relief and restitution enforce the laws of the particular jurisdiction in the public interest by restoring the status quo. Hence, the Washington Supreme Court has recognized that when the Washington Attorney General brings an action under the Consumer Protection Act, Wash. Rev. Code ch. 19.86, the Attorney General acts for the benefit of the public. Even if, as a result of such an action by the Attorney General, relief is provided for private individuals by way of restitution, the Washington Supreme Court has characterized such relief as only incidental to and in aid of the relief asked on behalf of the public. Aid to individuals is not absolutely prohibited under the law but is only improper where public money is used solely for private purposes.

Governments > Legislation > Statute of Limitations > Governmental Entities

Civil Procedure > Remedies > Damages > Compensatory Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Procedural Matters

**HN27** Any private benefit conferred upon Washington residents through an award of restitution is subordinate to the benefit to the public. Although it is true that individuals who bring damages claims pursuant to Wash. Rev. Code § 19.86.090 may act as private attorneys general and do not merely vindicate their own rights but also represent the public interest, there is no indication that the primary purpose of such claims is to benefit the public. Rather, it is reasonable to conclude that any benefit to the public is incidental to a successful damages claim. In view of this, it is entirely conceivable that the Washington legislature intended to exclude claims brought primarily for the benefit of the public from a statutory limitation period, while still imposing the limitation period on damages claims brought by individuals.

Antitrust & Trade Law > Procedural Matters

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > State & Territorial Governments > Claims By & Against

**HN28** The Washington legislature, as evidenced by the plain meaning of Wash. Rev. Code § 19.86.120, did not intend for its four-year limitation period to apply to parens patriae claims brought by the Washington Attorney General on behalf of Washington residents pursuant to Wash. Rev. Code § 19.86.080.

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

Governments > Local Governments > Claims By & Against

## Administrative Law &gt; Sovereign Immunity

**HN29** Wash. Rev. Code § 4.16.160 exempts certain claims brought in the name or for the benefit of the state of Washington from otherwise applicable statutory limitation periods. Under § 4.16.160, the limitations prescribed in Wash. Rev. Code ch. 4.16 shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi-municipality of the state of Washington, in the same manner as to actions brought by private parties, provided that, except as provided in Wash. Rev. Code § 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state of Washington, and no claim of right predicated upon the lapse of time shall ever be asserted against the state. Section 4.16.160. This provision reflects a facet of sovereign immunity under the old English common law doctrine, "nullum tempus occurrit regi," meaning "no time runs against the king."

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Governments > Legislation > Statute of Limitations > Governmental Entities

Constitutional Law > State Sovereign Immunity > General Overview

**HN30** An action is "for the benefit of the state" of Washington under Wash. Rev. Code § 4.16.160 where it involves a duty and power inherent in the notion of sovereignty or embodied in the state constitution. The "for the benefit of the state" language in § 4.16.160 is properly understood to refer to the character or nature of the activity rather than its effect. The courts have never sought to define "benefit of the state" in terms of a beneficial effect. In determining whether an action is sovereign or proprietary, a court may look to constitutional or statutory provisions indicating the sovereign nature of the power and may also consider traditional notions of powers that are inherent in the sovereign. Each case is determined in light of the particular facts involved.

Constitutional Law > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Governments > Courts > Common Law

Governments > Legislation > Statutory Remedies & Rights

**HN31** Parens patriae authority, which, like the exemption in Wash. Rev. Code § 4.16.160, was borrowed from English law, is itself a defining feature of sovereignty. As the English constitutional system developed from its feudal beginnings, the king retained certain duties and powers, which were referred to as the "royal prerogative" and which were said to be exercised by the king in his capacity as "father of the country." The royal prerogative included the right or responsibility to take care of persons who are legally unable, on account of mental incapacity, whether it proceed from nonage, idiocy, or lunacy, to take proper care of themselves and their property.

Governments > Courts > Common Law

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Legislation > Statutory Remedies & Rights

**HN32** While the United States rejected England's king, it retained the king's paternal privilege, albeit in the form of a legislative prerogative inherent in the power of every state. Each state was permitted to exercise its parens patriae authority for, among other things, the prevention of injury to those who cannot protect themselves. Washington has embraced the exercise of parens patriae authority, in certain scenarios, as both a power and duty of the State.

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

**HN33** The Washington Attorney General's parens patriae action under the Consumer Protection Act, Wash. Rev. Code ch. 19.86, is sovereign in nature and, hence, is brought for the benefit of the state of Washington.

Constitutional Law > State Sovereign Immunity > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Statute of Limitations > Governmental Entities

**HN34** Authority to bring a *parens patriae* action is rooted in the notion of state sovereignty, which is itself a byproduct of the royal prerogative held by England's king. As in England, where it was said that no time runs against the king, it is apparent that in Washington—given the legislature's adoption of a slightly modified version of "*nullum tempus occurrit regi*"—no time runs against the Washington Attorney General when he brings an action as *parens patriae* pursuant to the Consumer Protection Act (CPA), Wash. Rev. Code ch. 19.86. In view of this, an Attorney General's claim under the CPA is brought for the benefit of the state of Washington and is, thus, exempted from any otherwise applicable statute of limitation by Wash. Rev. Code § 4.16.160.

Governments > Courts > Authority to Adjudicate

Governments > Courts > Rule Application & Interpretation

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

**HN35** An appellate court determines the scope of discretionary review. Wash. R. App. P. 2.3(e). While Rule 2.3(e) vests discretion in appellate courts to delimit the scope of discretionary review, the courts have been indisposed to consider issues for which discretionary review was not granted.

## Headnotes/Syllabus

### Summary

#### WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** Acting on behalf of the State and as *parens patriae* on behalf of persons residing in Washington, the Attorney General brought suit against more than 20 foreign corporate entities, alleging that the corporate entities violated the Consumer Protection Act by participating in a worldwide conspiracy to raise

prices and set production levels in the market for cathode ray tubes, thereby causing Washington residents and state agencies to pay supracompetitive prices for cathode ray tube products (such as television sets and computer monitors).

**Superior Court:** The Superior Court for King County, No. 12-2-15842-8, Richard D. Eadie, J., on March 28, 2013, denied a CR 12(b)(6) motion to dismiss the complaint brought by 10 of the defendants on the basis of their claim that the action was statutorily time barred. The trial court subsequently certified the denial order for discretionary review under RAP 2.3(b)(4) and certified two questions for appellate review: (1) whether the four-year limitation period of RCW 19.86.120 applies to the Attorney General's complaint brought pursuant to its *parens patriae* authority under RCW 19.86.080 seeking actual damages for violations of RCW 19.86.030 and (2) whether RCW 4.16.160 should be applied to the Attorney General's *parens patriae* action antitrust lawsuit seeking actual damages and restitution for the citizens of Washington.

**Court of Appeals:** Holding that the Attorney General's Consumer Protection Act *parens patriae* action was not time barred under RCW 19.86.080 because the legislature did not intend for such actions to be subject to the statutory time limitation and that the Attorney General's *parens patriae* action also was exempt from any otherwise applicable statutory time limitation under RCW 4.16.160 because the authority for the action inheres in the notion of state sovereignty by virtue of being brought for the "benefit of the state," the court *affirms* the trial court's order denying the motion to dismiss.

### Headnotes

#### WASHINGTON OFFICIAL REPORTS HEADNOTES

##### WA[1] [1]

Appeal > Discretionary Review > Scope > Determination by Appellate Court.

Under RAP 2.3(e), an appellate court may specify the issue or issues for which discretionary review is granted.

##### WA[2] [2]

Statutes > Construction > Review > Standard of Review.

Questions of statutory interpretation are reviewed *de novo*.

##### WA[3] [3]

Dismissal and Nonsuit > Failure To State Claim > Question of Law or Fact > Review > Standard of Review.

A motion to dismiss an action under CR 12(b)(6) for failure to state a claim on which relief can be granted presents a question of law that an appellate court reviews de novo.

**WA[4]** [4]

Limitation of Actions > Statutory Provisions > Applicability > Review > Standard of Review.

A question of whether a statutory time limitation applies to bar a claim is reviewed de novo.

**WA[5]** [5]

Statutes > Construction > Legislative Intent > In General.

A court's primary duty in interpreting a statute is to discern and implement the legislature's intent.

**WA[6]** [6]

Statutes > Construction > Legislative Intent > Statutory Language > Plain Meaning > Determination.

If a statute's meaning is plain on its face, then a court must give effect to that plain meaning as an expression of legislative intent. In seeking to perceive the plain meaning of a statute, a court may examine the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole, but a court must not add words where the legislature has chosen not to include them and must construe the statute in a way that all of its language is given effect.

**WA[7]** [7]

Antitrust > Consumer Protection > Statutory Provisions > Federal Law > Relationship.

The Consumer Protection Act (ch. 19.86 RCW) is modeled on the federal antitrust statutes and, under RCW 19.86.920, is meant 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.

**WA[8]** [8]

Antitrust > Consumer Protection > Statutory Provisions > Federal Law > Effect.

Although the enactment of the Consumer Protection Act (ch. 19.86 RCW) in 1961 postdated the advent of

federal antitrust legislation in 1890, the federal legislation is intended to supplement, not displace, state antitrust remedies. Despite the expansion of antitrust regulation at the federal level in the wake of the Sherman Act (15 U.S.C. §§ 1-7) (such as the Clayton Act of 1914, 15 U.S.C. §§ 12-27, and the Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58), the basic federalism calibration has remained, for the most part, unchanged.

**WA[9]** [9]

Consumer Protection > Statutory Provisions > Construction > Similar Federal Law > In General.

Under RCW 19.86.920, the courts are to be guided by federal court and Federal Trade Commission interpretations of federal statutes when addressing the same or similar matters under the Consumer Protection Act. While not bound by such interpretations, Washington courts have uniformly followed federal precedents in matters described under the Consumer Protection Act.

**WA[10]** [10]

Consumer Protection > Statutory Provisions > Construction > Similar Federal Law > Purpose.

Washington courts follow federal precedents when ruling on matters under the Consumer Protection Act (ch. 19.86 RCW) in order to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct. Consequently, departure from federal law must be for a reason rooted in Washington statutes or case law and not in the general policy arguments that a court would weigh if the issue came before the court as a matter of first impression.

**WA[11]** [11]

Limitation of Actions > Consumer Protection > Action for Damages > Limitation Period.

The four-year limitation period of RCW 19.86.120 is the sole statutory time limitation found in the Consumer Protection Act and applies only to claims for damages brought pursuant to RCW 19.86.090.

**WA[12]** [12]

State > Consumer Protection > State Enforcement > Parens Patriae Action > In General.

Under RCW 19.86.080, the Attorney General is authorized to bring parens patriae claims on behalf of

Washington residents and to obtain recovery in the form of restitution on behalf of both direct and indirect purchasers who have been injured by violations of the Consumer Protection Act.

**WA[13]** [13]

Statutes > Construction > Exclusion and Inclusion > In General.

When the legislature expresses one thing in a statute, omissions are deemed to be exclusions.

**WA[14]** [14]

State > Consumer Protection > State Enforcement > Parens Patriae Action > Relationship to Federal Law.

The authority granted to the Attorney General by RCW 19.86.080 to bring parens patriae claims on behalf of Washington residents and to obtain recovery in the form of restitution on behalf of both direct and indirect purchasers who have been injured by violations of the Consumer Protection Act constitutes a departure from federal law. The effect of this departure is to ensure that when the Attorney General exercises the parens patriae authority, the resultant protections afforded to Washington residents will be more robust than those offered by federal law.

**WA[15]** [15]

State > Consumer Protection > State Enforcement > Parens Patriae Action > Nature of Relief.

A consumer protection parens patriae action brought by the Attorney General under RCW 19.86.080 is intended to redound primarily to the benefit of the public. A parens patriae action for injunctive relief and restitution enforces the laws in the public interest by restoring the status quo. Even if, as a result of such an action by the Attorney General, relief is provided for private individuals by way of restitution, such relief is only incidental to and in aid of the relief asked on behalf of the public; i.e., any private benefit conferred on Washington residents through an award of restitution is subordinate to the benefit to the public.

**WA[16]** [16]

Limitation of Actions > Consumer Protection > State Enforcement > Parens Patriae Action > Limitation Period > Consumer Protection Act Provision > Applicability.

The four-year limitation period of RCW 19.86.120 does not apply to Consumer Protection Act parens patriae

actions brought by the Attorney General under RCW 19.86.080 on behalf of persons residing in Washington.

**WA[17]** [17]

State > Limitation of Actions > State Exemption > Nature of Provision.

The provision of RCW 4.16.160 that exempts actions brought in the name or for the benefit of the State from any statutory time limitation reflects a facet of sovereign immunity under the old English common law doctrine, "nullum tempus occurrit regi," which means that "no time runs against the king."

**WA[18]** [18]

State > Limitation of Actions > State Exemption > "For the Benefit of the State" > What Constitutes.

For purposes of RCW 4.16.160, which exempts actions brought in the name or for the benefit of the State from any statutory time limitation, an action is "for the benefit of the state" if it involves a duty and power inherent in the notion of sovereignty or embodied in the state constitution. The "for the benefit of the state" language is properly understood to refer to the character or nature of the activity rather than its effect. In determining whether an action is sovereign or proprietary, a court may look to constitutional or statutory provisions indicating the sovereign nature of the power and may also consider traditional notions of powers that are inherent in the sovereign. Each case is determined in light of the particular facts involved.

**WA[19]** [19]

Limitation of Actions > Consumer Protection > State Enforcement > Parens Patriae Action > Limitation Period > Statutory Exemption > Applicability.

Under RCW 4.16.160, Consumer Protection Act (ch. 19.86 RCW) parens patriae actions brought by the Attorney General under RCW 19.86.080 on behalf of persons residing in Washington are exempt from any otherwise applicable statutory time limitation. The authority for a parens patriae action under RCW 19.86.080 inheres in the notion of state sovereignty by virtue of being brought for the "benefit of the state"; i.e., the Attorney General's parens patriae action constitutes an inherently sovereign duty and power.

**WA[20]** [20]

Appeal > Discretionary Review > Scope > Issues For Which Discretionary Review Not Granted.

In a case before an appellate court on a motion for discretionary review, the court may decline to consider issues for which discretionary review was not granted.

*Robert W. Ferguson, Attorney General, and David M. Kerwin, Assistant, for respondent.*

Dwyer, J., delivered the opinion for a unanimous court.

**Judges:** Authored by Stephen J. Dwyer. Concurring: Michael S. Spearman, Ronald Cox.

Consumer Protection > Statutory Provisions > Federal Law > Relationship.

**Opinion by:** Stephen J. Dwyer

Consumer Protection > Statutory Provisions > Federal Law > Effect.

**Opinion**

Consumer Protection > Action for Damages > Limitation Period.

[\*127] [\*\*916]

Consumer Protection > State Enforcement > Parens Patriae Action > In General.

¶1 DWYER, J. — Resolution of this matter, which comes before us on discretionary review, requires us to ascertain the legislature's intent in enacting and amending certain provisions of the Washington Consumer [\*\*\*2] Protection Act (CPA).<sup>1</sup> Two questions have been certified for review. First, when, pursuant to the CPA, the Attorney General of Washington [\*128] brings an action as parens patriae<sup>2</sup> on behalf of Washington residents, is his action subject to the four-year limitation period contained within RCW 19.86.120? Second, is his action an “inherently sovereign” one that, by virtue of being brought for the “benefit of the state,” is exempted from any other statutory limitation period by RCW 4.16.160?

Consumer Protection > State Enforcement > Parens Patriae Action > Relationship to Federal Law.

Consumer Protection > State Enforcement > Parens Patriae Action > Nature of Relief.

[\*\*917]

Consumer Protection > State Enforcement > Parens Patriae Action > Limitation Period > Consumer Protection Act Provision > Applicability.

¶2 We hold that **HN1** when the legislature authorized the Attorney General to bring an action to enforce the CPA as parens patriae, it did not intend for such actions to be subject to the limitation period set forth in RCW 19.86.120. Further, we hold that it was the legislature's intent that such actions, the authority for which inheres in the notion of state sovereignty, be exempted from any otherwise applicable statutory limitation period. Given the manner in which we resolve these certified questions, we are satisfied that the trial court did not err in denying the petitioners' motion to dismiss the Attorney General's complaint. Accordingly, we affirm.

Limitation of Actions > State Exemption > Nature of Provision.

Consumer Protection > State Enforcement > Parens Patriae Action > Limitation Period > Statutory Exemption > Applicability.

Limitation of Actions > State Exemption > “For the Benefit of the State” > What Constitutes.

**Counsel:** *David C. Lundsgaard (of Graham & Dunn PC); Robert D. Stewart (of Kipling Law Group PLLC); Mathew L. Harrington and Bradford J. Axel (of Stokes Lawrence PS); and Molly A. Terwilliger (of Summit Law Group) (Hojoon Hwang and Laura Sullivan of Munger Tolles & Olson; John M. Taladay, Charles Malaise, Erik T. Koons, Tiffany B. Gelott, and Aaron Streett of Baker Botts LLP; Dana E. Foster and Lucius B. Lau of White & Case LLP; and Andrew Wiener, Eliot A. Adelson, and James M. Cooper of Kirkland & Ellis, of counsel), for petitioners.*

<sup>1</sup> Ch. 19.86 RCW.

<sup>2</sup> Literally, “parent of his or her country.” BLACK’S LAW DICTIONARY 1287 (10th ed. 2014).

¶3 On May 1, 2012, [\*\*\*3] the Attorney General,<sup>3</sup> acting on behalf of the State and as *parens patriae* on behalf of persons residing in Washington, brought suit against more than 20 foreign corporate entities.<sup>4</sup> While geographically diffuse, the defendants had a common characteristic—past participation in the global market for cathode ray tubes (CRTs).<sup>5</sup> The Attorney General alleged that the defendants [\*\*\*129] had, in violation of the CPA, participated in a worldwide conspiracy to raise prices and set production levels in the market for CRTs, which caused Washington State residents and state agencies to pay supracompetitive prices for CRT products.<sup>6</sup> The Attorney General averred that the defendants had engaged in such anticompetitive conduct beginning, at the latest, on March 1, 1995, and ending, at the earliest, on November 25, 2007. By way of relief, the Attorney General requested, among other things, that the trial court (1) issue appropriate injunctions to prohibit illegal activity, (2) award any and all civil penalties permitted by law, and (3) award damages and restitution to the State on behalf of its agencies and residents.

¶4 Upon receiving service of process, 10 of the defendants (hereinafter Petitioners<sup>7</sup>) jointly filed a motion to dismiss the complaint pursuant to CR 12(b)(6).<sup>8</sup> Therein, the Petitioners contended that the Attorney General's claims were time barred by operation of a four-year limitation period contained within the CPA. In order to avoid the preclusive effect of this limitation period, the Petitioners asserted, the complaint needed to be filed by November 25, 2011. As noted, the complaint was not filed until May 1, 2012.

¶5 The Attorney General opposed the Petitioners' motion to dismiss, arguing that the causes of action pleaded in his complaint were not time barred by the limitation period in [\*\*\*130] the CPA or by any otherwise applicable statutory limitation period.

¶6 On March 28, 2013, King County Superior Court Judge RICHARD EADIE denied the Petitioners' motion to dismiss.

WA[1][1] ¶7 Thereafter, pursuant to RAP 2.3(b)(4),<sup>9</sup> the Petitioners sought and obtained from the [\*\*\*918] trial court a certification for discretionary review of the order

<sup>3</sup> At the time that the complaint was filed, the Attorney General of Washington was Robert M. McKenna. [\*\*\*4] The current Attorney General is Robert W. Ferguson.

<sup>4</sup> These entities were scattered across four continents and 10 different countries, including South Korea, Taiwan, China, Japan, Malaysia, Singapore, the United States of America, Mexico, Brazil, and the Netherlands.

<sup>5</sup> A "cathode ray tube" is a display technology used in televisions, computer monitors, and other specialized applications. According to the Attorney General, CRTs, until recently, represented the "dominant technology for manufacturing televisions and computer monitors."

<sup>6</sup> The Attorney General defined CRT products as "CRTs and products containing CRTs, such as televisions and computer monitors."

<sup>7</sup> Koninklijke Philips Electronics NV; [\*\*\*5] Philips Electronics North America Corporation; Toshiba Corporation; Toshiba America Electronic Components, Inc.; LG Electronics, Inc.; LG Electronics U.S.A., Inc.; Hitachi, Ltd.; Hitachi Displays, Ltd.; Hitachi Electronic Devices (USA) Inc.; and Hitachi Asia, Ltd.

<sup>8</sup>

**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted ... .

<sup>9</sup>

**(b) Considerations Governing Acceptance of Review.** Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

....

denying their dispositive motion. Finding that the criteria for [\*\*\*6] certification pursuant to RAP 2.3(b)(4) had been satisfied, the trial court certified for immediate review the following two questions:<sup>10</sup>

(1) Whether the four-year statute of limitations under RCW 19.86.120 applies to the Washington's Attorney General's Complaint brought pursuant to its *parens patriae* authority under RCW 19.86.080 that seeks actual damages<sup>[11]</sup> for violations of RCW 19.86.030?

(2) Whether RCW 4.16.160 should be applied to the Washington Attorney General's *parens patriae* antitrust lawsuit seeking actual damages<sup>[12]</sup> and restitution for citizens of Washington?

[\*131]

¶8 On August 2, 2013, finding that the “trial court’s certification is well taken,” a commissioner of this court granted discretionary review of the preceding questions. Neither the Petitioners nor the Attorney General moved to modify the commissioner’s order granting discretionary review.

¶9 Separately, the [\*\*\*8] Attorney General, in response to a trial court order dismissing his claims for lack of personal jurisdiction over certain defendants, filed a notice of appeal in this court.<sup>13</sup> That appeal is to be

resolved by separate opinion. The underlying litigation has been stayed.

II

¶10 As to the first question for which discretionary review was granted, the Petitioners insist that, under any potentially applicable statute of limitation, the Attorney General's *parens patriae* claim brought pursuant to RCW 19.86.080 was untimely filed. They misperceive the appropriate inquiry—our mandate was not so unconstrained. Instead, our narrow task is to determine whether a *specific* statute of limitation, RCW 19.86.120, applies to the Attorney General's *parens patriae* claim. In resolving the first certified question, we hold that **HN3** the legislature did not intend for RCW 19.86.120 to be applied to *parens patriae* claims brought by the Attorney General and, consequently, [\*\*\*9] that the *parens patriae* claim in this matter is not time barred by operation of RCW 19.86.120.

[\*132]

**WA[2-4]** [2-4] ¶11 Our review is de novo. See *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 946, 247 P.3d 18 (2011) (**HN4** “Questions of statutory interpretation are reviewed de novo.”); see also *Cutler v. Phillips Petrol. Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (**HN5** “A trial court’s ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is

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(4) The superior court has certified, or that all parties to litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

<sup>10</sup> These questions were identical to those that had been proposed by the Petitioners.

<sup>[11]</sup> We consider only whether the limitation period applies to the cause of action brought by the Attorney General in his capacity as *parens [\*\*\*7] patriae*.

<sup>[12]</sup> The formulation of this second question could be construed as an invitation to consider whether RCW 4.16.160 exempts the Attorney General's claim for actual damages pursuant to RCW 19.86.090 from the four-year limitation period set forth in RCW 19.86.120. To the extent that this invitation was, in fact, extended, we decline to accept it.

The focal cause of action on discretionary review, as evidenced by the trial court record and by the merits briefing submitted by the parties, is the *parens patriae* claim. Although the parties' litigation strategy does not dictate the scope of discretionary review, for purposes of our review in this matter, we choose to address only the issue of whether RCW 4.16.160 exempts the *parens patriae* cause of action from any otherwise applicable statute of limitation. See *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010) (noting that, **HN2** pursuant to RAP 2.3(e), the appellate court may specify the issue or issues as to which discretionary review is granted), *aff'd* 172 Wn.2d 223, 257 P.3d 648 (2011).

<sup>13</sup> Five of the Petitioners in this matter were found not to be subject to the Attorney General's attempt to exercise personal jurisdiction over them: Koninklijke Philips Electronics NV; Hitachi Displays, Ltd.; Hitachi Asia, Ltd.; Hitachi Electronic Devices (USA), Inc.; and LG Electronics, Inc.

reviewed de novo.”); *Bennett v. Computer Task Grp., Inc.*, 112 Wn. App. 102, 106, 47 P.3d 594 [\*\*\*919] (2002) (**HN6** whether a statutory limitation period applies to bar a claim is reviewed de novo).

**WA[5,6]** [5, 6] ¶12 Familiar interpretive principles guide our construction of legislative enactments. **HN7** “Our primary duty in interpreting a statute is to discern and implement legislative intent.” *Johnson*, 159 Wn. App. at 946 (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). If a “statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 9-10. “The plain meaning of a statute may be discerned ‘from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.’” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Campbell & Gwinn*, 146 Wn.2d at 11). **HN8** While we may, in seeking to perceive the plain meaning of a statute, examine “the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme [\*\*\*10] as a whole,” we “must not add words where the legislature has chosen not to include them,” and “must ‘construe statutes such that all of the language is given effect.’” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

**WA[7,8]** [7, 8] ¶13 **HN9** The CPA, which was modeled on the federal antitrust statutes, is meant “to complement the body of [\*133] 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.” RCW 19.86.920; *accord Blewett v. Abbott Labs.*, 86 Wn. App. 782, 786-87, 938 P.2d 842 (1997). While enactment of the CPA in 1961 postdated the advent of federal antitrust legislation in 1890, it is well settled that the latter was “intended ... to supplement, not displace, state antitrust remedies.” *California v.*

*ARC Am. Corp.*, 490 U.S. 93, 101 n.4, 102, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) (noting that 21 states had enacted their own antitrust laws by the time that the Sherman Act<sup>14</sup>—the inaugural effort to regulate antitrust at the federal level—became effective). Tellingly, the titular author of the Sherman Act—Senator John Sherman of Ohio—explained that it “does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (quoting 21 CONG. REC. 2456 (Mar. 21, 1890)); *accord ARC*, 490 U.S. at 101 (“it is [\*\*\*11] plain that this is an area traditionally regulated by the States”). These authorities, both dated and contemporary, reveal that, despite the expansion of antitrust regulation at the federal level in the wake of the Sherman Act,<sup>15</sup> the basic federalism calibration has remained, for the most part, unchanged.<sup>16</sup>

**WA[9,10]** [9, 10] ¶14 Nevertheless, **HN10** in enacting the CPA, our legislature made clear its intent for Washington courts to be guided by federal court and Federal Trade Commission [\*134] interpretations of federal statutes dealing with the same or similar matters.

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 [\*\*\*12] restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market [\*\*\*920] 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.

RCW 19.86.920.

¶15 **HN11** While not bound by these interpretations, “in practice Washington courts have uniformly followed

<sup>14</sup> 15 U.S.C. §§ 1-7.

<sup>15</sup> Examples of this expansion include the Clayton Act of 1914 (codified as amended at 15 U.S.C. §§ 12-27) and the Federal Trade Commission Act of 1914 (codified as amended at 15 U.S.C. §§ 41-58).

<sup>16</sup> Commenting on the interplay between state and federal law, the California Supreme Court observed, “[T]he coordination of federal and state antitrust enforcement has become a prime example of ‘cooperative federalism.’” *Younger v. Jensen*, 26 Cal. 3d 397, 405, 605 P.2d 813, 161 Cal. Rptr. 905 (1980).

federal precedent in matters described under the Consumer Protection Act.” *Blewett*, 86 Wn. App. at 787; accord *State v. Ralph Williams’ Nw. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 271, 510 P.2d 233 (1973) (“Although we are not conclusively bound by the relevant federal cases, we find their reasoning persuasive.”); *State v. Black*, 100 Wn.2d 793, 676 P.2d 963 (1984) (where the CPA provision being construed had been taken verbatim from its federal analog, our Supreme Court relied on federal court interpretations to reach its conclusion). Washington courts have followed federal precedent in order “to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct.” *Blewett*, 86 Wn. App. at 788. Consequently, “departure from federal law ... must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh [\*\*\*13] if the issue came before us as a matter of first impression.” *Blewett*, 86 Wn. App. at 788.

¶16 In this matter, the Attorney General alleged that the defendants violated **HN12** RCW 19.86.030, which provides that “[e]very contract, combination, in the form of trust or [\*\*\*135] otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.” As with section 1 of the Sherman Act,<sup>17</sup> however, RCW 19.86.030 does not itself establish a cause of action or authorize particular parties to enforce its provisions. Rather, in separate provisions, the CPA authorizes specific causes of action and identifies the individuals or entities permitted to bring those actions. Two of these separate provisions—RCW 19.86.080 and 19.86.090—warrant examination in some detail.

¶17 The first provision, **HN13** RCW 19.86.080, authorizes the Attorney General to bring an action in the

name of the State or as *parens patriae* on behalf of Washington residents.<sup>18</sup> RCW 19.86.080(1). The Attorney General is authorized to seek injunctive relief, and courts are permitted, at their discretion, to award restitution that is “necessary to restore to any person in interest [\*\*\*14] any moneys or property ... acquired by means of any act” prohibited by the CPA. RCW 19.86.080(1)-(3). There are limitations, however, to a court’s discretion in awarding restitution pursuant to RCW 19.86.080. Courts “shall exclude from the amount of” restitution “awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation” and “should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.” RCW 19.86.080(3).

¶18 Similarly, federal law authorizes state attorneys general to bring suit as *parens patriae* on behalf of persons residing in their state. 15 U.S.C. § 15c. However, while RCW 19.86.080 permits an award of restitution on behalf of both [\*\*\*136] direct and indirect purchasers,<sup>19</sup> 15 U.S.C. § 15c prohibits any monetary recovery on behalf of indirect purchasers.<sup>20</sup> Compare RCW 19.86.080(3), [\*\*\*921] and *State v. AU Optronics Corp.*, 180 Wn. App. 903, 927, 328 P.3d 919 (2014), and *Blewett*, 86 Wn. App. at 789-90, with 15 U.S.C. § 15c, and *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990), and *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).<sup>21</sup>

¶19 The second provision, **HN14** RCW 19.86.090, authorizes both certain persons<sup>22</sup> and the State to bring a cause of action seeking injunctive relief, actual damages, or both for violations of certain CPA provisions. Similarly, federal law authorizes both certain

<sup>17</sup> “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1

<sup>18</sup> Washington’s legislature was not alone in creating this type of claim. Many other states have authorized their attorneys general to bring a claim as *parens patriae* on behalf of their residents seeking damages or restitution. Jonathan T. Tomlin & Dale J. Giall, *Federalism and the Indirect Purchaser Mess*, 11 GEO. MASON L. REV. 157, 163 (2002).

<sup>19</sup> Indirect purchasers are those who are not “immediate [\*\*\*15] buyers” from the antitrust defendant. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990).

<sup>20</sup> Two exceptions to this prohibition have been recognized: the “cost-plus” exception and the “control” exception. See, e.g., *In re Wyo. Tight Sands Antitrust Cases*, 866 F.2d 1286, 1290 (10th Cir. 1989). Neither exception is at issue herein.

<sup>21</sup> The United States Supreme Court has held squarely that the “indirect purchaser rule” of *Illinois Brick* does not preempt state law. *ARC*, 490 U.S. at 101.

<sup>22</sup> **HN15** “Person” includes “the counties, municipalities, and all political subdivisions of this state.” RCW 19.86.090.

persons<sup>23</sup> and the United States to bring a cause of action seeking injunctive relief and actual damages<sup>24</sup> for violations of certain federal antitrust laws. See 15 U.S.C. §§ 15, 15a, 25, 26. RCW 19.86.090 authorizes the State to seek actual damages as either a direct or an indirect purchaser; however, in most instances,<sup>25</sup> neither federal law nor the CPA permits “persons” who are considered [\*137] indirect purchasers to seek actual damages.<sup>26</sup> Compare RCW 19.86.090, with *Ill. Brick*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, and *Blewett*, 86 Wn. App. 782, 938 P.2d 842.

**WA[11] [11] ¶20 HN16** The CPA's sole statute of limitation is found in RCW 19.86.120. Only claims for damages brought pursuant to RCW 19.86.090 are expressly made subject to this limitation period. See RCW 19.86.120 (“Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues.” (emphasis added)). Similarly, federal law contains a four-year statutory limitation period. See 15 U.S.C. § 15b. However, while RCW 19.86.120 does not purport to make subject to its four-year limitation period *parens patriae* claims brought by the Attorney General pursuant to RCW 19.86.080, 15 U.S.C. § 15b does, in fact, expressly make its four-year limitation period applicable to *parens patriae* claims brought by state attorneys general pursuant to 15 U.S.C. § 15c.

¶21 The description of the aforesaid CPA provisions reflects their current status. Each provision, [\*\*\*17] however, has been amended at least once. In order to place in context the content of and the interrelationship between these provisions, a brief account of the manner in which the legislature has molded the provisions since the enactment of the CPA bears mentioning.

¶22 **HN17** In 1961, as part of the bill that created the CPA, the legislature authorized the Attorney General to bring, pursuant to RCW 19.86.080, an action in the name of the State, seeking to enjoin certain behavior. LAWS OF 1961, ch. 216, § 8. The legislature also authorized certain persons and the State to bring an action for injunctive relief and damages pursuant to

RCW 19.86.090. LAWS OF 1961, ch. 216, § 9. While actions seeking damages were made subject to a [\*138] four-year limitation period contained in RCW 19.86.120, actions brought by the Attorney General seeking injunctive relief were not. LAWS OF 1961, ch. 216, § 12.

¶23 **HN18** In 1970, RCW 19.86.080 was amended so as to give courts discretion to award restitution when necessary “to restore to any person in interest any moneys or property ... acquired by means of any act herein prohibited or declared to be unlawful.” LAWS OF 1970, ch. 26, § 1. While both RCW 19.86.090 and RCW 19.86.120 were also [\*\*922] amended at this time, the limitation period in RCW 19.86.120 was not expressly extended to encompass [\*\*\*18] actions brought pursuant to RCW 19.86.080. LAWS OF 1970, ch. 26, §§ 1, 5. Since 1970, RCW 19.86.120 has not been amended.

¶24 Not long after these 1970 amendments, our Supreme Court announced that actions brought by the Attorney General pursuant to the CPA were for the public benefit. See, e.g., *Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976). As a result, the court concluded that, **HN19** even in the event that private individuals were to receive restitution as a result of an action brought by the Attorney General pursuant to RCW 19.86.080, such actions nonetheless were meant to benefit the public. *Seaboard Sur. Co. v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973) (“The Attorney General's responsibility in bringing cases [pursuant to RCW 19.86.080] is to protect the public ... . Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.”); see also *Ralph Williams'*, 82 Wn.2d at 277 (“Suits for injunctive relief and restitution enforce the laws of the particular jurisdiction in the public interest by restoring the status quo.”).

<sup>23</sup> “Person” includes “corporations and associations existing under or authorized by the laws of either the United States, the laws of [\*\*\*16] any of the Territories, the laws of any State, or the laws of any foreign country.” 15 U.S.C. § 12.

<sup>24</sup> “Any person, firm, corporation, or association” may also seek injunctive relief pursuant to federal law. 15 U.S.C. § 26.

<sup>25</sup> As noted, *supra* note 20, exceptions to this rule exist.

<sup>26</sup> Many states have, unlike Washington, enacted legislation that allows indirect purchasers to recover actual damages pursuant to state antitrust statutes. Tomlin & Giali, *supra*, at 161.

**WA[12]**[12] ¶25 **HN20** In 2007, the legislature amended both RCW 19.86.080 and RCW 19.86.090.<sup>27</sup> LAWS OF 2007, ch. 66, [\*139] §§ 1-2. In amending RCW 19.86.080, the legislature authorized the Attorney General to bring *parens patriae* claims on behalf of Washington residents and expressly permitted recovery in the form of restitution on behalf of both direct [\*\*\*19] and indirect purchasers who had been injured. LAWS OF 2007, ch. 66, § 1. In amending RCW 19.86.090, the legislature expressly authorized the State to seek actual damages as either a direct or indirect purchaser.<sup>28</sup> LAWS OF 2007, ch. 66, § 2.

**WA[13-16]** [13-16] ¶26 We turn, now, to our task of ascertaining the legislature's intent. Specifically, we were asked to determine whether the legislature intended for the four-year limitation period in RCW 19.86.120 to apply to *parens patriae* claims brought by the Attorney General pursuant to RCW 19.86.080. We hold that this was not the legislature's intent.

¶27 We begin with **HN21** the [\*\*\*20] words in RCW 19.86.120, which suggest that the legislature intended its four-year limitation period to apply only to damages claims brought pursuant to RCW 19.86.090. See RCW 19.86.120 (“Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues.” (emphasis added)). **HN22** Conventional

wisdom holds that when the legislature expresses one thing in a statute, “[o]missions are deemed to be exclusions.” *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Here, the legislature expressly made claims for damages under RCW 19.86.090 subject to the four-year limitation period; it did not mention claims brought pursuant to RCW 19.86.080. Moreover, despite its willingness to [\*140] amend each of the foregoing provisions—including RCW 19.86.120—the legislature has not seen fit to include actions brought pursuant to RCW 19.86.080 within the ambit of RCW 19.86.120. While not necessarily dispositive of the issue, these facts are problematic for the Petitioners' theory, which relies on an assumption that the legislature unintentionally did not subject *parens patriae* claims to the CPA's limitation period.

¶28 Nonetheless, the Petitioners maintain that—the text of RCW 19.86.120 notwithstanding—the legislature did, in fact, intend to make *parens patriae* claims subject to [\*\*923] RCW 19.86.120. This unspoken intent, they posit, may be [\*\*\*21] ascertained by considering analogous federal antitrust provisions, understanding the animating purposes of RCW 19.86.120, and observing the structure and context of the CPA as a whole.<sup>29</sup>

[\*141]

¶29 The Petitioners first assert that, in order to maintain conformity with federal antitrust law—which, as

<sup>27</sup> These amendments were, at least in part, in response to the following observation made by this court in *Blewett*: although “a private plaintiff must ‘be injured in his or her business or property’ in order to bring *any* suit under the Act, this requirement does not exist in [RCW 19.86.080],” meaning that “the indirect purchaser is not entirely without a remedy.” 86 Wn. App. at 790; LAWS OF 2007, ch. 66, § 1.

<sup>28</sup> RCW 19.86.090 was amended twice between 1970 and 2007, and again following the 2007 amendment. LAWS OF 1983, ch. 288, § 3; LAWS OF 1987, ch. 202, § 187; LAWS OF 2009, ch. 371, § 1. However, given that the content of these amendments have no impact on our analysis, we do not further dwell on them.

<sup>29</sup> As an initial matter, the Petitioners argue that two Washington cases, *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 247 P.3d 816 (2011), and *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986), establish that “there is no basis to conclude that the legislature intended to give [the Attorney General] an infinite period of time in which to file” his *parens patriae* claim. Petitioners' Opening Br. at 29-31. As we explained, our inquiry as to the first certified question is not whether the legislature intended to establish an infinite period of time in which the Attorney General may file a *parens patriae* claim. Instead, we must discern whether the legislature intended RCW 19.86.120 to apply to *parens patriae* claims brought pursuant to RCW 19.86.080. Neither case cited by the Petitioners is useful in seeking to discern the legislature's intent.

In *Imperato*, the plaintiff filed an unfair labor practices claim in superior court and argued that because the six-month statute of limitation otherwise applicable to his claim only explicitly applied when the claim was filed before the Public Employees Relations Commission (PERC), the six-month limitation period did not [\*\*\*22] bar his claim. 160 Wn. App. at 360-62. The issue before Division Three was whether the plaintiff could avoid the statute of limitation by filing his complaint in superior court instead of before PERC. Given that, in resolving this issue, Division Three sought to discern whether the legislature intended for a statute of limitation to apply for the same claim but in a different venue, the precedential value of its decision is limited to its observation that “[w]hen interpreting a statute, a court's fundamental objective is to ascertain and carry out the legislature's intent.” *Imperato*, 160 Wn. App. at 361.

explained, imposes a four-year limitation period on *parens patriae* claims—RCW 19.86.120 must be applied to the Attorney General's *parens patriae* claim brought pursuant to RCW 19.86.080. Despite pressing for “conformity,” the Petitioners fail to direct us to any interpretations of the analogous federal statute of limitation, whether in the form of a final decision by a federal court or a final order of the Federal Trade Commission. By this omission, it would seem that the Petitioners wish for us to harmonize facially distinct state and federal statutory provisions, which were authored and enacted by different legislative bodies, each of which is beholden to a different electorate.<sup>30</sup> This approach is incompatible with both our legislature's directive in RCW 19.86.920 and the meaning that has subsequently been ascribed to it by Washington appellate courts.

¶30 In any event, even had the Petitioners cited to relevant federal precedent, we would still have reason rooted in the CPA to depart from it. There is a noteworthy difference between the manner in which the United States Congress and our legislature have chosen to regulate anticompetitive behavior. **HN23** When our legislature authorized the Attorney General to bring *parens patriae* claims on behalf of both direct and indirect purchasers, it unmistakably departed from federal law. The effect of this departure was to ensure that when the Attorney General exercises his authority as *parens patriae* pursuant to the CPA, the [\*142] resultant protections afforded to Washington residents will be more robust than those offered by federal law.<sup>31</sup> [\*\*924]

¶31 The Petitioners do not dispute that it was our legislature's intent to surpass the protections afforded by federal law. Rather, they [\*\*\*25] insist that although our legislature departed from federal law vis-à-vis the

“purchaser proximity” restrictions, it nevertheless intended to retain the temporal restrictions imposed by federal law. Because, however, the legislature did not expressly impose these temporal restrictions, the Petitioners have been forced to maintain, in effect, that our legislature was absent minded in failing to expressly subject *parens patriae* claims to the four-year limitation period in RCW 19.86.120.

¶32 **HN24** We do not presume that the legislature acted in a negligent fashion when it authorized the bringing of *parens patriae* claims on behalf of direct and indirect purchasers, yet did not expressly subject such claims to the four-year limitation period in RCW 19.86.120. Instead, in recognition of the fact that a departure from *both* the “purchaser proximity” and temporal restrictions imposed by federal law is consistent with the general goal of outstripping the protections afforded by federal law, we conclude that the legislature's silence with regard to temporal restrictions reveals an intent to keep *parens patriae* claims unbridled by RCW 19.86.120.

¶33 The Petitioners next assert that, in order to realize the purposes of RCW 19.86.120, the four-year limitation period [\*\*\*26] must be applied to the Attorney General's *parens patriae* claim. If the limitation period is not applied, they warn, a class action lawsuit brought by direct purchasers represented by private counsel would be subject to the four-year limitation period, whereas the identical class [\*143] represented by the Attorney General would have an unlimited period in which their rights could be asserted. The Petitioners argue that this result would undermine the goal of RCW 19.86.120, which is to provide repose, grant finality, and shield defendants and the judicial system from stale claims.

¶34 It is true that, in many instances, the justifications for statutory limitation periods are consistent with those identified by the Petitioners. Yet, rather than identifying

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In *Eastwood*, our Supreme Court considered whether a false light invasion of privacy claim was governed by the two-year statute of limitation for libel and slander or the three-year statute of limitation for injury to the person or rights of another. 106 Wn.2d at 469. In concluding that the two-year limitation period applicable to libel and slander applied, the court was “persuaded that because of the duplication inherent in false light and defamation claims ... the same statute of limitations is applicable to both actions.” *Eastwood*, 106 Wn.2d at 474. However, because the court was dealing with common law causes of action, it was not required to seek to ascertain legislative intent. [\*\*\*23] Therefore, its decision does not inform ours.

<sup>30</sup> While this could be construed as an argument that the indirect purchaser rule of *Illinois Brick* preempts the CPA, the Petitioners do not purport to be maintaining such a position and, in any event, that position has been rejected [\*\*\*24] by the United States Supreme Court. *ARC*, 490 U.S. at 101.

<sup>31</sup> It is apparent, given our recent observation that “modern economic structures” will, in at least some cases, make it “unreasonable to expect” that antitrust defendants “would target Washington consumers directly,” that these augmented protections are more than just a gloss on the federal regulatory regime. *AU Optronics*, 180 Wn. App. at 928.

*specific* purposes animating RCW 19.86.120, the Petitioners treat these conventional justifications as unassailable proof that, in order to vindicate the purposes of RCW 19.86.120, its limitation period must be applied to the Attorney General's *parens patriae* claim. Given that the legislature, in amending RCW 19.86.080 so as to authorize *parens patriae* claims,<sup>32</sup> did not expressly subject such claims to the limitation period in RCW 19.86.120, these general policy goals are not probative of the legislature's specific [\*\*\*27] intent concerning the applicability of RCW 19.86.120 to *parens patriae* claims.

¶35 The Petitioners next assert that “absurd results” and “discord within the CPA” would follow from treating an identical class of direct purchasers differently depending on whether suit was filed pursuant to RCW 19.86.080 or RCW 19.86.090. However, the Petitioners overlook the significance of the distinct relief available under RCW 19.86.080 and 19.86.090. A class action would seek injunctive relief and actual damages, whereas a suit brought by the Attorney General as *parens patriae* on behalf of the same class would seek injunctive relief and, at the discretion of the [\*144] trial court, restitution.<sup>33</sup> In the context of the CPA, the differences between damages and restitution are significant.

¶36 At the outset, it is important to note that individuals desirous of restitution are subject to both the discretion of the Attorney General and the court. Indeed, **HN25** under RCW 19.86.080, individuals must rely on the Attorney [\*\*925] General to file suit on their behalf, and then must rely on the court to exercise its discretion and award restitution. In contrast, under RCW 19.86.090, individuals may bring suit if they wish and courts are not given discretion to refuse to award damages—if proved—for a successful claim. In view of the passive role for individuals, it is reasonable to conclude that the legislature's primary objective in creating RCW 19.86.080 was not to ensure that those individuals harmed by anticompetitive behavior were made whole. Instead, as our Supreme Court has recognized, claims brought pursuant to RCW 19.86.080 were intended to redound primarily to the benefit of the public.

¶37 **HN26** “Suits for injunctive relief and restitution enforce the laws of the particular jurisdiction in the public interest by restoring the status quo.” *Ralph Williams*, 82 Wn.2d at 277. Hence, our Supreme Court has “recognized that when the Attorney General brings an action under [the CPA], he acts [\*\*\*29] for the benefit of the public.” *Lightfoot*, 86 Wn.2d at 334. Even if, as a result of such an action by the Attorney General, “relief is provided for private individuals by way of restitution,” our Supreme Court has characterized such relief as “only incidental to and in aid of the relief asked on behalf of the public.” *Seaboard*, 81 Wn.2d at 746 (emphasis added); cf. *Ralph Williams*, 82 Wn.2d at 277 (“Aid to individuals is not absolutely prohibited under our law but is only improper where public money is used solely for private purposes.”).

[\*145]

¶38 Our Supreme Court has concluded that **HN27** any private benefit conferred on Washington residents through an award of restitution is subordinate to the benefit to the public. Although it is true that individuals who bring damages claims pursuant to RCW 19.86.090 may “act as private attorneys general” and “do not merely vindicate their own rights” but also “represent the public interest,” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007), there is no indication that the *primary* purpose of such claims is to benefit the public. Rather, it is reasonable to conclude that any benefit to the public is incidental to a successful damages claim. In view of this, it is entirely conceivable that the legislature intended to exclude claims brought primarily for the benefit of the public from a statutory limitation [\*\*\*30] period, while still imposing the limitation period on damages claims brought by individuals.

¶39 Nevertheless, the Petitioners assert that “an infinite limitations period” for RCW 19.86.080 claims “is inconsistent with [its] directive that courts reviewing such claims ‘consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.’” Petitioners' Opening Br. at 37 (quoting RCW 19.86.080(3)). It bears repeating that our only concern in resolving the first certified question is

<sup>32</sup> It is clear that, in amending RCW 19.86.080 in 2007, the legislature considered the CPA's structure. This is evidenced, in part, by its added directive that courts consider consolidation or coordination with other related actions to avoid duplicate recovery.

<sup>33</sup> “[Restitution] differs in its goal or principle from damages.” 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES* § 4.1(1), at 555 (2d ed. 1993). Whereas “[r]estitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain,” damages “measures the [\*\*\*28] remedy by the plaintiff's loss and seeks to provide compensation for that loss.” 1 DOBBS, *supra*, § 4.1(1), at 555.

whether RCW 19.86.120 applies to *parens patriae* claims brought pursuant to RCW 19.86.080. To that end, we conclude that the directive identified by the Petitioners reveals only that the legislature envisioned the possibility that claims based on RCW 19.86.080 and 19.86.090 could be brought within the same time period. However, the phrasing does not, under any reasonable construction, suggest that the legislature understood or intended that all claims would necessarily be brought during the same four-year limitation period.

¶40 In sum, we hold that **HN28** the legislature, as evidenced by the plain meaning of RCW 19.86.120, did not intend for its four-year limitation period to apply to *parens patriae* claims brought by the Attorney General on behalf of Washington [\*\*\*31] residents pursuant to RCW 19.86.080.

### [\*146] III

¶41 With regard to the second question for which discretionary review was granted, the Petitioners contend that the trial court erred by holding that RCW 4.16.160 exempts the Attorney General's *parens patriae* claim from any otherwise applicable statute of limitation. This is so, they maintain, because—given that the enforcement of the CPA is not solely delegated to the Attorney General—the Attorney General's *parens patriae* action does not constitute an inherently sovereign duty and power. We disagree.

**WA[17,18]** [17, 18] ¶42 [\*\*926] **HN29** RCW 4.16.160 exempts certain claims “brought in the name or for the benefit of the state” from otherwise applicable statutory limitation periods.

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: *PROVIDED, That, except*

*as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state ...*

RCW 4.16.160 (emphasis added).<sup>34</sup> “This provision reflects a facet of sovereign immunity under [\*\*\*32] the old English common [\*147] law doctrine, ‘*nullum tempus occurrit regi*,’ meaning ‘no time runs against the king.’” *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 686, 202 P.3d 924 (2009) (hereinafter *MLB*) (quoting Sigmund D. Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi—The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 ME. L. REV. 373, 374 (2003)). In construing this provision, our Supreme Court has “found **HN30** an action to be ‘for the benefit of the state’ under RCW 4.16.160 where it involves a duty and power inherent in the notion of sovereignty or embodied in the state constitution.” *MLB*, 165 Wn.2d at 689-90 (listing examples of sovereign action, including construction and maintenance of public parks, swimming pools, and merry-go-rounds, as well as the power of taxation and the design and construction of educational facilities). “The ‘for the benefit of the state’ language in RCW 4.16.160 is properly understood to refer to the *character or nature* of the activity “rather than its effect.” *MLB*, 165 Wn.2d at 686; *accord Wash. Pub. Power Supply Sys. v. Gen. Elec. Co.*, 113 Wn.2d 288, 293, 778 P.2d 1047 (1989) (hereinafter *WPPSS*) (“We have never sought to define ‘benefit of the state’ in terms of a beneficial effect.”). “In determining whether an action is sovereign or proprietary, we may look to constitutional or statutory provisions indicating the sovereign nature of the power and may also consider [\*\*\*33] traditional notions of powers that are inherent in the sovereign.” *MLB*, 165 Wn.2d at 687. “Each case is determined in light of the particular facts involved.” *MLB*, 165 Wn.2d at 687.

<sup>34</sup> Initially, the Petitioners argue that this exemption applies only to limitations prescribed within chapter 4.16 RCW. This is so, they assert, because the prefatory clause restricts application of the exemption to that of “limitations prescribed in this chapter.” Petitioners’ Opening Br. at 16. Thus, they argue, it has no application with regard to a cause of action subject to a statute of limitation set forth in a different chapter of the RCW. They are incorrect.

The prefatory clause applies the limitations on actions brought by private parties in chapter 4.16 RCW to actions brought in the name or for the benefit of certain political subdivisions of the State. The State itself, acting through the Attorney General does not, however, fall within the enumerated political subdivisions. Consistent with this observation, our Supreme Court has applied the exemption set forth in the proviso to a limitation period prescribed in a different chapter of the RCW in an action brought by the State. See *State v. Miller*, 32 Wn.2d 149, 156, 201 P.2d 136 (1948) (applying the provision now codified at RCW 4.16.160 to exempt a certain cause of action from application [\*\*\*34] of a statute of limitations located in a different code chapter).

¶43 **HN31** Parens patriae authority, which, like the exemption in RCW 4.16.160, was borrowed from English law, is itself a defining feature of sovereignty. As the English constitutional system “developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the ‘royal prerogative’” and which “were said to be exercised by the King in his capacity as ‘father of the’ [\*148] country.” *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) (quoting Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193, 197 (1970)). “The royal prerogative included the right or responsibility to take care of persons who ‘are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.’” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 102 S. Ct. 3260, 73 L. Ed. 2d 995 [\*927] (1982) (quoting JOSEPH CHITTY, A TREATISE ON THE LAW OF PREROGATIVES OF THE CROWN 155 (1820)).

¶44 **HN32** While the United States rejected England's King, it retained his paternal privilege, albeit in the form of a legislative prerogative inherent in the power of every state. *Snapp*, 458 U.S. at 600; *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S. Ct. 792, 34 L. Ed. 478 (1890). Each state was permitted to exercise its parens patriae authority for, among other things, “the prevention of injury to those who cannot protect [\*35] themselves.” *Snapp*, 458 U.S. at 600 (quoting *Latter-Day Saints*, 136 U.S. at 57). Washington has embraced the exercise of parens patriae authority, in certain scenarios, as both a power and duty of the State. See, e.g., *In re Dependency of B.R.*, 157 Wn. App. 853, 864, 239 P.3d 1120 (2010) (“[W]hen parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a parens patriae right and responsibility to intervene to protect the child.” (alteration in original) (quoting *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980))).

**WA[19]** [19] ¶45 In this matter, the Attorney General brought an action as parens patriae on behalf of

Washington residents. Therefore, in determining the effect, if any, of RCW 4.16.160 on the Attorney General's claim, we must consider whether the character or nature of the action is such that it involves a duty and power inherent in the notion of sovereignty. The [\*149] authorities examined herein reveal that the exercise of parens patriae authority is itself a defining feature of state sovereignty, with roots that extend far back beyond not only the inception of statehood but also the formation of the Union. Consequently, we conclude that **HN33** the Attorney General's parens patriae action is indeed sovereign in nature<sup>35</sup> and, hence, is brought for the benefit of the State.

¶46 The Petitioners disagree. They assert that, as a prerequisite to concluding that the parens patriae action is inherently sovereign, we must find that the enforcement of the CPA has been exclusively delegated to the Attorney General. In arguing that such a delegation has not occurred, the Petitioners contend that, because the legislature envisioned private plaintiffs acting “as private attorneys general,” *Scott*, 160 Wn.2d at 853, it believed that private plaintiffs are “equally capable”<sup>36</sup> of advancing the purposes of the CPA. Therefore, according to the Petitioners, it is clear that the enforcement of the CPA has not been exclusively delegated to the Attorney General.

¶47 The Petitioners misconstrue our Supreme Court's treatment of RCW 4.16.160. The Petitioners' primary contention, which is that the Attorney General's parens patriae action is not brought for the benefit of the State because the enforcement of the CPA has not been exclusively delegated to him, finds no support in the decisions of Washington appellate courts. While the decisions relied on by the Petitioners have involved some examination of the nature of the underlying activity from which the cause of action arose, none have announced (or otherwise indicated) that [\*150] an exclusive delegation of power is required in order for an action to be “brought for the benefit of the State.”

¶48 In the decisions relied on by the Petitioners, our Supreme Court was obliged to examine the nature of

<sup>35</sup> Conversely, it is our understanding that when the State seeks [\*36] damages pursuant to RCW 19.86.090, it is acting not in a sovereign capacity but, rather, as a consumer. Counsel for the Attorney General, during oral argument, conceded that, when the State seeks to recover actual damages, it is not exercising a sovereign function. Counsel also conceded that the CPA does not authorize the State to act as parens patriae on behalf of itself.

<sup>36</sup> Not only is it speculative to suggest that the legislature perceived private plaintiffs to be “equally capable” of furthering the purposes of the CPA, it is irrelevant to the resolution of [\*37] this issue.

the underlying activity in order to determine whether the resulting actions—which were premised on the underlying activity but did not, ostensibly, exhibit the familiar trappings of sovereignty—were inherently sovereign for purposes of RCW 4.16.160. See *MLB*, 165 Wn.2d 679 (after concluding that the legislature delegated its sovereign function of [\*\*928] providing for public recreation to a municipal corporation for the purpose of building a professional [\*\*\*38] baseball stadium, the court held that a subsequent breach of contract action was brought for the benefit of the State), *WPPSS*, 113 Wn.2d 288 (after concluding that the legislature had not delegated sovereign authority to a municipal corporation charged with delivering electricity within the State, the court held that a contract action brought by the corporation was not for the benefit of the State); *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 691 P.2d 178 (1984) (after concluding that the legislature delegated to a school district its sovereign function of providing for public education for the purpose of building and maintaining a school, the court held that a subsequent breach of contract action was brought for the benefit of the State); cf. *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973) (after concluding that the insurance commissioner was an officer of the State, the court held that an action brought by the commissioner for breach of fiduciary duties against former officers and directors of a defunct insurer was brought for the benefit of the public).<sup>37</sup>

[\*151]

¶49 Considering the particular facts herein, there is no need to look beyond the face of the action itself to recognize its sovereign nature. **HN34** Authority to bring a *parens patriae* action is rooted in the notion of state sovereignty, which is itself a byproduct of the royal prerogative held by England's king. As in England, where it was said, “[N]o time runs against the king,” it is apparent that in Washington—given our legislature's adoption of a slightly modified version of “*nullum tempus occurrit regi*”—no time runs against the Attorney General when he brings an action as *parens patriae* pursuant to the CPA. In view of this, we conclude that

the Attorney General's claim is brought for the benefit of the State and, thus, exempted from any otherwise applicable statute [\*\*\*40] of limitation by RCW 4.16.160.

IV

¶50 The Petitioners seek consideration of issues for which discretionary review was not granted. They contend that because the Attorney General's claim for damages pursuant to RCW 19.86.090 is subject to the four-year statute of limitation within RCW 19.86.120, and because the Attorney General's claim for civil penalties pursuant to RCW 19.86.140 is not subject to the exemption contained in RCW 4.16.160, we must hold that both of these claims were untimely filed. However, because these issues are beyond the scope of the certified questions for which review was granted, we decline to reach them.

**WA[20][20] ¶51 HN35** “This court determines the scope of discretionary review.” *Emily Lane Homeowners Ass'n v. Colonial Dev., LLC*, 139 Wn. App. 315, 318, 160 P.3d 1073 (2007), *aff'd in part, rev'd in part sub nom. Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009); RAP 2.3(e). While RAP 2.3(e) vests discretion in appellate courts to delimit the scope of discretionary review, we have been [\*152] indisposed to consider issues for which discretionary review was not granted. See *Johnson*, 159 Wn. App. at 959 n.7 (“Because discretionary review was not granted on this issue, we will not reach it.”); see also *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010) (“We granted review on a single, narrow issue. Accordingly, we decline to address other issues for which discretionary review [\*\*929] was not granted.”), *aff'd*, 172 Wn.2d 223, 257 P.3d 648 (2011); cf. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (“[I]f an issue raised for the first time on appeal is ‘arguably related’ to issues raised [\*\*\*41] in the trial court, a court may exercise its discretion to consider newly-articulated

<sup>37</sup> The Petitioners also cite to our decision in *State v. Pacific Health Center, Inc.*, 135 Wn. App. 149, 157 n.7, 143 P.3d 618 (2006). They argue that a footnote contained in the procedural history demonstrates that a limitation period has previously been applied to a RCW 19.86.080 restitution claim. [\*\*\*39] This footnote, which describes a trial court's ruling, states, “The [trial] court found appellants had committed 9,426 separate violations within the statute of limitations' allowable period on the State's claim.” *Pac. Health*, 135 Wn. App. at 157 n.7. Given that, at the time of our decision, the legislature had not yet expressly authorized *parens patriae* actions to be brought pursuant to RCW 19.86.080, this observation is not pertinent to the resolution of the issue presented herein.

theories for the first time on appeal.”), *aff'd*, 166 Wn.2d 264, 208 P.3d 1092 (2009).<sup>38</sup> [\*153]

¶52 In *Barnhart*, we explained our reasons for demurring when urged to consider issues for which discretionary review was not granted.

The city contends that we should affirm despite the commission of constitutional error because *Barnhart* failed to exercise peremptory challenges and failed to show anything other than harmless error. However, discretionary review of those issues was neither sought nor granted, and the city did not seek to modify the order granting discretionary review. In addition, the city acknowledged at oral argument that it had not raised these contentions in the courts below.

...

Further, it would be imprudent for us to address those complex issues for the first time on discretionary review without the benefit [\*\*\*42] of full development of the issues and complete briefing.

156 Wn. App. at 538 n.2.

¶53 In this case, as in *Barnhart*, discretionary review of the additional issues was neither sought nor granted, and the Petitioners did not seek to modify the order granting discretionary review. Moreover, while the Petitioners correctly note that their motion to dismiss targeted all of the Attorney General's claims, only the certified questions have been fully developed and completely briefed. Given the scant treatment of the additional issues, and in view of the Petitioners' failure to seek to modify the order granting discretionary review, we decline to consider these issues.<sup>39</sup> Because discretionary review was taken from an interlocutory order and because this matter has not been reduced to judgment, the Petitioners may, if they wish, litigate these issues more fully in the superior court.

¶54 Affirmed.

SPEARMAN, C.J., and COX, J., concur.

## References

Washington Rules of Court Annotated (LexisNexis ed.) Annotated Revised Code of Washington by LexisNexis

<sup>38</sup> Citing to *Lunsford*, the Petitioners argue that because the additional issues are arguably related to issues raised in the trial court, we should consider them for the first time “on appeal.” Petitioners' Reply Br. at 25. To the contrary, this matter comes before us on discretionary review, not on appeal. Thus, *Lunsford* is inapposite.

<sup>39</sup> The Petitioners contend, without supporting citation, that because a commissioner of this court, “[d]uring the hearing on this motion, ... discussed the applicability of” RCW 19.86.120 to claims brought pursuant to RCW 19.86.090, her subsequent grant of discretionary review, which “is simply silent on this issue,” creates an “ambiguity in [her] order” that “renders Plaintiff's [\*\*\*43] authorities inapposite.” Petitioners' Reply Br. at 24. We are unpersuaded by this unsupported contention.

# APPENDIX G

## **RCW 4.16.160**

### **Application of limitations to actions by state, counties, municipalities.**

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

[1986 c 305 § 701; 1955 c 43 § 2. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 §§ 34, 35; 1869 p 10 §§ 34, 35; 1854 p 364 § 9; RRS § 167, part.]

#### **Notes:**

**Preamble -- 1986 c 305:** "Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." [1986 c 305 § 100.]

**Report to legislature -- 1986 c 305:** "The insurance commissioner shall submit a report to the legislature by January 1, 1991, on the effects of this act on insurance rates and the availability of insurance coverage and the impact on the civil justice system." [1986 c 305 § 909.]

**Application -- 1986 c 305:** "Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986." [1986 c 305 § 910.]

**Severability -- 1986 c 305:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 305 § 911.]

# APPENDIX H

15 USCS § 15b-15c

**§ 15b. Limitation of actions**

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Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS § 15, 15a, or 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

**§ 15c. Actions by State attorneys general**

---

(a) Parens patriae; monetary relief; damages; prejudgment interest.

- (1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act [15 USCS §§ 1 et seq.]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.
- (2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only--
  - (A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;
  - (B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
  - (C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Notice; exclusion election; final judgment.

- (1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct,

cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

- (2) Any person on whose behalf an action is brought under subsection (a)(1) may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.
  - (3) The final judgment in an action under subsection (a)(1) shall be res judicata as to any claim under section 4 of this Act [15 USCS § 15] by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.
- (c) Dismissal or compromise of action. An action under subsection (a)(1) shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.
- (d) Attorney's fees. In any action under subsection (a)--
- (1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court;  
and
  - (2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

# APPENDIX I

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----  
 3 WASHINGTON STATE, )  
 PLAINTIFF, ) CASE NO.  
 4 )  
 4 VERSUS ) 12-2-15842-8SEA  
 5 )  
 5 LG ELECTRONICS, et al., )  
 6 DEFENDANTS. )  
 6 -----

7 Proceedings Before Honorable RICHARD D. EADIE  
8 -----

8 KING COUNTY COURTHOUSE  
9 SEATTLE, WASHINGTON

10 DATED: NOVEMBER 15, 2012

11  
12 A P P E A R A N C E S:

13 FOR THE PLAINTIFF:

14  
15 BY: ASSISTANT ATTORNEY GENERAL:  
16 DAVID KERWIN, ESQ.,  
17 JONATHAN MARK, ESQ.,  
18  
19  
20  
21  
22  
23  
24  
25

## A P P E A R A N C E S :

FOR THE DEFENDANTS:

LG ELECTRONICS:

BY: DAVID LUNDSGAARD, ESQ.,  
HOJOON HWANG, ESQ.,

PHILIPS ELECTRONICS, ET AL.,

BY: DAVID EMANUELSON, ESQ.,  
TIMOTHY MORAN, ESQ.

HITACHI LTD., ET AL.,

BY: MICHELLE PARK CHIU, ESQ.,  
MOLLY TERWILLIGER, ESQ.,

SAMSUNG, ET AL.,

BY: ARIC JARRETT, ESQ.,  
JOHN R. NEELEMAN, ESQ.,  
LARRY S. GANGES, ESQ.,

TOSHIBA CORPORATION, ET AL.,

BY: MATHEW HARRINGTON, ESQ.,  
DANA E. FOSTER, ESQ.,

PANASONIC CORPORATION:

BY: DAVID YOLKUT, ESQ.

## 1 P R O C E E D I N G S

2 (Open court.)

3  
09:02:13 4 THE BAILIFF: All rise, court is in session.  
09:02:13 5 The Honorable Richard D. Eadie presiding in the  
09:02:13 6 Superior Court in the State of Washington in and for  
09:02:13 7 King County.

09:06:43 8 THE COURT: Please be seated. Thank you.  
09:06:56 9 We only have two hours this morning and two  
09:06:59 10 hours this afternoon. We have to squeeze it all in  
09:07:04 11 during that time.

09:07:05 12 I have gone over the materials. I am open  
09:07:10 13 to any order of proceeding that you think is going to  
09:07:16 14 work the best. But it occurred to me that it may be  
09:07:20 15 best to take the statute of limitations issue first  
09:07:24 16 and address that, because that was the first one that  
09:07:33 17 I came to -- that was developed, and not everyone  
09:07:39 18 raised that issue, and it was raised by the Hitachi  
09:07:43 19 parties.

09:07:44 20 So, would it make sense to hear from the  
09:07:48 21 Hitachi parties on the statute of the limitations?

09:07:54 22 MR. KERWIN: I think that it would make  
09:07:57 23 sense; David Kerwin for the State.

09:07:59 24 I think that probably makes sense, when we  
09:08:02 25 get into the motions on the summary judgment. I think

09:08:06 1 that there is probably more efficient ways that we can  
09:08:08 2 handle -- for instance, the State only needs to reply  
09:08:11 3 once to all of the motions for personal jurisdiction,  
09:08:15 4 but we can tackle that one.

09:08:17 5 THE COURT: All right,

09:08:21 6 Mr. Kerwin, I think that I misspoke to you  
09:08:24 7 earlier about citation form. I think that I was  
09:08:28 8 meaning to speak to the Kipling firm lawyer. All  
09:08:31 9 right. My apologies.

09:08:33 10 MR. KERWIN: All right; Your Honor.

09:08:35 11 THE COURT: All right.

09:08:37 12 I think that -- let's just do the statute  
09:08:41 13 of the limitations first. And then my question to you  
09:08:45 14 is does the rest of the case really turn on the stream  
09:08:58 15 of commerce argument?

09:09:01 16 Is that the dispositive issue for virtually  
09:09:05 17 every other case?

09:09:06 18 MR. KERWIN: David Kerwin, Your Honor, the  
09:09:08 19 State's position is that it almost entirely does, yes.

09:09:12 20 THE COURT: All right.

09:09:13 21 Connected with that, there is really no  
09:09:18 22 general jurisdiction issue being raised.

09:09:20 23 MR. KERWIN: David Kerwin, Your Honor. The  
09:09:23 24 State concedes that we do not have general  
09:09:25 25 jurisdiction in this case.

09:09:26 1 THE COURT: We are down to the long-arm, or  
09:09:35 2 personal jurisdiction, based on the stream of commerce  
09:09:39 3 issue. That seems to be the dispositive issue. All  
09:09:44 4 right.

09:09:44 5 So, then, we will talk about how to address  
09:09:56 6 that after we address the statute of limitations. Let  
09:09:58 7 me get my note pad.

09:10:04 8 Hitachi is going to do the statute of  
09:10:07 9 limitations argument?

09:10:09 10 MR. EMANUELSON: David Emanuelson for the  
09:10:11 11 Phillips entities.

09:10:13 12 The statute of limitations argument, all of  
09:10:16 13 the defendant are similarly situated.

09:10:18 14 THE COURT: But not all of them raised it.

09:10:21 15 MR. EMANUELSON: Correct. The entities  
09:10:22 16 that raised are the Phillips entities, Hitachi  
09:10:26 17 entities, Toshiba entities and the LG entities.  
09:10:30 18 Myself, as well as my colleague, Dana Foster, with  
09:10:34 19 White & Case will be arguing.

09:10:36 20 THE COURT: Why don't you argue that and  
09:10:38 21 then I am going to ask if any one has anything to add  
09:10:41 22 to your argument. How is that?

09:10:42 23 MR. EMANUELSON: That sounds great, Your  
09:10:44 24 Honor.

09:10:44 25 THE COURT: On the statute of limitations I

09:10:46 1 would tell you that the two cases that I have in front  
09:10:49 2 of me are State of Nevada versus the Bank of America  
09:10:54 3 Corporation, and the Major League Baseball case.

09:10:57 4 All right.

09:10:58 5 MR. EMANUELSON: Thank you, Your Honor.

09:11:00 6 THE COURT: The other thing that I would  
09:11:01 7 say for all of you, you don't have to stand when you  
09:11:05 8 speak. You may, probably 50 percent of lawyers, when  
09:11:10 9 we talk about that choose to, but it is not required.  
09:11:13 10 As long as we can hear you, as long as everybody can  
09:11:16 11 hear you, that is all we need.

09:11:17 12 MR. EMANUELSON: All right.

09:11:19 13 Your Honor, this case involves an attempt  
09:11:27 14 by the State of Washington, Attorney General, to  
09:11:31 15 repackage and save an antitrust damages claim under  
09:11:36 16 the Washington Consumer Protection Act, or CPA, that  
09:11:40 17 through its own inactivity the Attorney General has  
09:11:43 18 allowed to become stale.

09:11:45 19 The Attorney General admits that it has not  
09:11:49 20 filed -- failed to file suit within over four and a  
09:11:54 21 half years, since first receiving notice of its  
09:11:58 22 claims.

09:11:58 23 It further admits that it has no tolling  
09:12:00 24 argument against the particular moving defendants.

09:12:04 25 THE COURT: Right.

09:12:05 1 MR. EMANUELSON: Because of this, its claim  
09:12:08 2 violates the CPA's four-year statute of the  
09:12:12 3 limitations. For the simple reason that the CPAs  
09:12:17 4 limitation provision provides a four-year limitations  
09:12:22 5 for any action that seeks damages under Section 90 of  
09:12:27 6 the CPA.

09:12:28 7 And the Attorney General brings a claim for  
09:12:30 8 damages on -- full damages on behalf of both State  
09:12:35 9 agencies and under its parens patriae authority for  
09:12:40 10 representing Washington consumers. The Attorney  
09:12:45 11 General claims that there are two arguments in  
09:12:48 12 response to that.

09:12:49 13 First, that its single cause of action  
09:12:52 14 should actually be split into two. That only its  
09:12:57 15 State claim on behalf of State agencies is subject to  
09:13:01 16 the CPA four-year limited provision, but the other  
09:13:06 17 request on behalf of the consumer is not subject to  
09:13:11 18 any provision. Then they also assert that there is  
09:13:14 19 another statute that immunizes them from the  
09:13:19 20 limitations.

09:13:20 21 Before I explain why that is an incorrect  
09:13:24 22 reading of the law, Your Honor, I would just like to  
09:13:26 23 provide a little bit of an overview of road map of how  
09:13:29 24 we got here today.

09:13:30 25 In November of 2007 news broke of an

09:13:36 1 international investigation by the United States  
09:13:40 2 Department of Justice and the European Commission into  
09:13:44 3 actions by manufacturers of cathode tubes or CRTs that  
09:13:51 4 go into television and monitors.

09:13:53 5 Immediately, private action claims,  
09:13:55 6 literally, within a week of the news breaking brought  
09:13:58 7 various federal claims in various federal courts.  
09:14:01 8 Those claims have now been consolidated into the  
09:14:04 9 Northern District of California and they are pending,  
09:14:07 10 and being litigated by the same parties here today.

09:14:10 11 Overtime other parties got involved in the  
09:14:14 12 action. Many are large purchasers of products contain  
09:14:19 13 CRTs opted out of the claims, for example, Costco  
09:14:23 14 which is a Washington based company and also the State  
09:14:26 15 Attorney General got involved. California brought a  
09:14:28 16 claim, and of course, the State of Washington. The  
09:14:32 17 State of Washington actually started its investigation  
09:14:34 18 in February of 2009. It issued a series of CIDs to  
09:14:40 19 many of defendants in this room. They also obtained  
09:14:43 20 tolling agreements with some of the defendants in this  
09:14:45 21 case.

09:14:46 22 However, they did not obtain any tolling  
09:14:48 23 agreements with any of the defendants that are  
09:14:50 24 bringing this motion. That is critical. Because it  
09:14:54 25 was not until May 1st of 2012, four and a half years

09:15:00 1 after receiving notice, that they brought their case.

09:15:01 2 That case mirrors the federal private cases  
09:15:05 3 in both substance and style. It alleges the same  
09:15:11 4 parties as the private federal cases. Essentially, it  
09:15:15 5 is the same substantive violation, even though that  
09:15:20 6 the Washington case is under the State Act. It is the  
09:15:23 7 same -- the language which prohibits conspiracy and  
09:15:26 8 the restraint of trade is parrots the language of the  
09:15:29 9 Federal Sherman Act.

09:15:31 10 The claim actually goes so far as to copy  
09:15:34 11 and paste many of the allegations in the private class  
09:15:39 12 action complaints. In response to that the defendants  
09:15:42 13 here filed a motion to dismiss on the statute of the  
09:15:45 14 limitations grounds.

09:15:46 15 So first, Your Honor, I would like to talk  
09:15:49 16 about why the Attorney General's claims violate the  
09:15:55 17 four-year limitations provision of the CPA. Just to  
09:16:01 18 provide an overview of the CPA. There are several  
09:16:04 19 sections of it that, again, substantively mirror  
09:16:09 20 federal law. Section 30 mirrors the Section 1 of the  
09:16:12 21 Sherman Act. Section 40 prohibits monopolization,  
09:16:18 22 mirrors another section of the federal law. That is  
09:16:20 23 substantive layout of the CPA.

09:16:22 24 Beyond that there are two sections in the  
09:16:25 25 CPA that give the Attorney General authority to bring

09:16:28 1 a lawsuit.

09:16:29 2           The first is Section 80, which explicitly  
09:16:32 3 refers to their parens patriae authority. However,  
09:16:36 4 that section only allows the Attorney General to bring  
09:16:39 5 a claim for injunctive relief or restitution.

09:16:43 6           It is only Section 90 of the CPA that  
09:16:47 7 allows the Attorney General to bring a claim for  
09:16:50 8 damages. It also allows private parties to bring a  
09:16:53 9 claim for damages, but it allows -- it specifically  
09:16:59 10 invokes the AG's right to bring a claim. There is  
09:17:03 11 nothing in that statute that would preclude  
09:17:06 12 application of that statute to parens patriae suits.

09:17:10 13           Finally, Section 120 of the CPA, which  
09:17:14 14 provides, I quote, a four-year limitation provision to  
09:17:20 15 "any action to enforce a claim for damages under  
09:17:23 16 Section 90." So any action that enforces Section 90.

09:17:29 17           So, three points on why the CPA should  
09:17:32 18 apply here.

09:17:33 19           First, just an application of the CPA to  
09:17:37 20 the plain language, plain reading of the Attorney  
09:17:40 21 General's complaints.

09:17:42 22           THE COURT: Do I have a copy of the  
09:17:44 23 attorney general's complaint any of the attachments  
09:17:50 24 that any of you filed?

09:17:51 25           MR. KERWIN: We didn't file it as an

09:17:53 1 attachment, Your Honor. It is in the underlying file,  
09:17:55 2 but we didn't file it as attachment.

09:17:58 3 MR. EMANUELSON: I have one. Would you like  
09:18:00 4 one, Your Honor?

09:18:01 5 THE COURT: I can't tell you, in general,  
09:18:04 6 summary judgment type cases how useful that can be.  
09:18:08 7 Not in every case, but in general it is very useful  
09:18:11 8 for judge reading that to be able to see the complaint  
09:18:15 9 -- sometimes the answer, but the complaint --

09:18:18 10 MR. EMANUELSON: Would you like.

09:18:20 11 THE COURT: I have finished my studying  
09:18:22 12 now. I was just wondering if I missed that some  
09:18:24 13 where. I didn't want to miss that opportunity to beat  
09:18:28 14 that drum a little.

09:18:30 15 Go ahead.

09:18:31 16 MR. EMANUELSON: Thank you, Your Honor.

09:18:32 17 Again, our first argument is a plain  
09:18:37 18 language, plain application of the language of the CPA  
09:18:40 19 to the language of the complaint.

09:18:42 20 The second, is that even if this court were  
09:18:45 21 to accept the Attorney General's construction of his  
09:18:49 22 complaints, that it alleges only damages for State  
09:18:52 23 agencies and does not allege -- seek damages on behalf  
09:18:58 24 of parens patriae authority. It is still incumbent  
09:19:03 25 upon there court to apply a four-year limitation

09:19:07 1 provision across the board.

09:19:08 2 Then, finally, if there were any doubts,  
09:19:11 3 ambiguity in this court's interpretation of the  
09:19:15 4 statute, this court should look to guidance to the  
09:19:17 5 federal law and as provided under the language of the  
09:19:21 6 statute and the Blewett case, which is cited by both  
09:19:24 7 parties in their papers.

09:19:28 8 So starting with the plain language  
09:19:32 9 argument, Your Honor. The only logical reading of the  
09:19:35 10 Attorney General's complaint is that the complaint  
09:19:44 11 itself brings a damages action, on behalf of State  
09:19:49 12 agencies and under its parens patriae authority.

09:19:54 13 The complaint alleges a single cause of  
09:19:56 14 action in violation of Section 30 of the CPA. There  
09:20:00 15 is no citation or delineation of its claims by  
09:20:04 16 reference to Section 80 or Section 90. The claim, in  
09:20:10 17 the request for relief, I am quoting here, the AG asks  
09:20:16 18 the court "to award full damages and restitution to  
09:20:22 19 the State of Washington, on behalf of its state  
09:20:24 20 agencies and residents."

09:20:27 21 Any normal construction of that request  
09:20:31 22 should be that it is -- the State AG is requesting  
09:20:35 23 damages both for the State agencies and on behalf of  
09:20:39 24 its residents. Because of that, it brings an action  
09:20:45 25 in Section 90 and in the CPA applies and it should be

09:20:48 1 subject to the four-year limitations provision.

09:20:50 2 Now, the Attorney General in their response  
09:20:56 3 brief have essentially disavowed their pleadings.  
09:20:59 4 They actually want to split their single cause of  
09:21:02 5 action into two causes of action.

09:21:04 6 First, a claim on behalf of the State  
09:21:07 7 agencies. That is subject to Section 90 and the  
09:21:14 8 four-year limitations provision. Then its claim on  
09:21:17 9 behalf of the consumers that is not subject to Section  
09:21:21 10 90, only under Section 80, and should not have any  
09:21:24 11 limitations provision applied to it at all.

09:21:27 12 As a threshold matter, if that is truly the  
09:21:31 13 Attorney General's intent, then its complaint does not  
09:21:35 14 meet the basic standards for notice pleading. Because  
09:21:38 15 it does not provide notice to the defendants on the  
09:21:41 16 relief that it is requesting for its claims.

09:21:44 17 However, even if this court accepted the  
09:21:47 18 Attorney General's construction, four-year statute of  
09:21:51 19 limitations provision should apply across the board.  
09:21:56 20 That is because you would have an absurd result where  
09:22:00 21 one single cause of action has two different  
09:22:03 22 limitations provisions -- limitations periods applied  
09:22:06 23 to it.

09:22:07 24 Just to go back to Section 120, that  
09:22:11 25 section applies to any action to enforce a claim for

09:22:15 1 damages. Well, even if only a portion of their action  
09:22:18 2 is seeking damages, it still invokes the statute of  
09:22:22 3 limitations provision under Section 120.

09:22:27 4 Then, finally, Your Honor, the final point  
09:22:30 5 under the CPA is why there court should look to  
09:22:33 6 federal law for guidance.

09:22:35 7 As, again, in Section 92 of the CPA, the  
09:22:43 8 Washington legislature explicitly makes clear that the  
09:22:47 9 CPA is designed to compliment the federal body of law  
09:22:50 10 and that court should look to it for guidance.

09:22:52 11 The Blewett court, which is Appellate Court  
09:22:56 12 decision in the first district division, puts some  
09:23:00 13 color on that. Held that the intent of the  
09:23:04 14 legislature here was to "minimize the conflict between  
09:23:07 15 the enforcement of the State and federal antitrust  
09:23:10 16 laws and avoid subjecting Washington businesses to  
09:23:14 17 divergent regulatory approaches for the same conduct."

09:23:18 18 So, by construing the statute here, in  
09:23:25 19 opposition to how the federal law applies the statutes  
09:23:30 20 of limitations, would be a violation to the policies  
09:23:37 21 behind both the statute itself and the reasoning of  
09:23:40 22 the Blewett court. Here the federal law is clear.

09:23:43 23 There is a single provision under the  
09:23:46 24 federal law at Section 15 (b) of the Clayton Act. It  
09:23:51 25 subjects "any type of action brought any by party to

09:23:54 1 the same four-year limitation provision. That would  
09:24:00 2 be by a private party, a federal government or State  
09:24:03 3 Attorney General that are bringing claims under the  
09:24:05 4 federal law.

09:24:06 5 So, just to add a little bit of spin on  
09:24:10 6 that, it is not a situation where we are asking the  
09:24:15 7 court to -- the Washington legislature has spoken and  
09:24:20 8 we are saying, "no, you need to construct your laws  
09:24:23 9 differently and change the construction of the CPA to  
09:24:26 10 an accord with the federal law."

09:24:29 11 At the very least, this is an open question  
09:24:31 12 of construction. The legislature has not spoken.  
09:24:35 13 There is no precedent on it. The idea that you should  
09:24:38 14 apply -- the legislator has spoken that there should  
09:24:41 15 be a four-year limitation provision to the damages  
09:24:45 16 claims.

09:24:45 17 Then to say, "we will have a four-year  
09:24:50 18 limitation provision for that. But the other claim is  
09:24:51 19 not going to be subject to any limitation provision"  
09:24:54 20 would be certainly a divergent regulatory approach as  
09:24:58 21 opposed to the federal law.

09:24:59 22 THE COURT: All right. Go ahead.

09:25:02 23 MR. EMANUELSON: I am finished on the CPA  
09:25:05 24 portion of the argument.

09:25:07 25 THE COURT: All right. Go ahead.

09:25:10 1 MR. EMANUELSON: Given that the CPA applies  
09:25:12 2 here, Your Honor, the Attorney General's only option  
09:25:16 3 here is to turn to a different provision of the  
09:25:19 4 Washington code, and that is section, RCW 4.16.160. I  
09:25:26 5 will refer to it as Section 160 for ease of  
09:25:31 6 application, Your Honor.

09:25:32 7 That provision applies to:

09:25:35 8 "Actions brought in the name of or for the  
09:25:37 9 benefit of the State."

09:25:40 10 However, as the Major League Baseball  
09:25:45 11 Facilites case held, and as clear under other line of  
09:25:47 12 precedent, it does not -- Section 160 does not apply  
09:25:52 13 to actions that are normally associated with private  
09:25:58 14 X.

09:25:58 15 If you look at the cases overtime here,  
09:26:07 16 this is quite an old statute dates back to 1864. It  
09:26:12 17 typically applied to taxing actions by the government,  
09:26:17 18 involvement of maintaining parks, buildings, schools,  
09:26:20 19 or in the Major League Baseball case a public  
09:26:23 20 corporations construction of a baseball stadium.

09:26:26 21 It has never been and the Attorney General  
09:26:29 22 cites no case where Section 160 has been applied to a  
09:26:33 23 parens patriae action. That is for good reason.

09:26:38 24 This action, which is a representative  
09:26:41 25 action, on behalf of private individuals, is clearly

09:26:45 1 associated with a private act.

09:26:49 2 As kind of, I explained in the background,  
09:26:52 3 Your Honor, the private acts have been ongoing. They  
09:26:56 4 have been ongoing for now upwards of five years. This  
09:27:00 5 case is a follow-on action. It is a representative  
09:27:03 6 action, representing the same injury to consumers that  
09:27:06 7 those private actions bring. It involves the same  
09:27:10 8 parties and the same substantive facts.

09:27:13 9 So, Your Honor, it would be a perverse  
09:27:15 10 application to allow the Attorney General -- I am  
09:27:18 11 sorry, perverse application of Section 160 to allow  
09:27:21 12 the Attorney General a limited time for copycat  
09:27:26 13 damages claims based on a purported sovereign  
09:27:35 14 interest.

09:27:35 15 Your Honor, what does the State the  
09:27:39 16 Attorney General cite in support of his claim?

09:27:43 17 They cite the Cissna case, Hermann versus  
09:27:48 18 Cissna, Your Honor, which is the only case that they  
09:27:50 19 bring to its support in their argument or under 160.  
09:27:56 20 In that case actually involved the highly regulated  
09:28:01 21 insurance industry, where an insurance commissioner  
09:28:04 22 actually took over a defunct company as its  
09:28:07 23 rehabilitator and brought an action -- brought an  
09:28:11 24 action against the prior management of the insurance  
09:28:15 25 company.

09:28:15 1 In that case, essentially, the insurance  
09:28:20 2 company was the State. It was not bringing a case on  
09:28:22 3 behalf of private interests. It actually was the  
09:28:27 4 insurance company at that point.

09:28:31 5 THE COURT: Well, is that really so?

09:28:34 6 I mean, the insurance commissioner is the  
09:28:36 7 receiver, essentially, of an insolvent insurance  
09:28:41 8 company.

09:28:41 9 We have an insurance indemnity fund, which  
09:28:47 10 pays claims on an insolvent insurance company. Is it  
09:28:51 11 really the State or really the indemnity fund that is  
09:28:54 12 the party there?

09:28:55 13 It doesn't make any difference. Maybe not.

09:29:00 14 MR. EMANUELSON: Your Honor, I probably was  
09:29:03 15 a little bit loose with my language there in terms  
09:29:06 16 of -- certainly indemnity fund. But in terms of, it  
09:29:11 17 had taken over a company. It was not suing on behalf  
09:29:14 18 of a company as an outside third-party.

09:29:14 19 THE COURT: Right.

09:29:20 20 MR. EMANUELSON: That circumstance the  
09:29:23 21 insurance industry is very similar to the banking  
09:29:25 22 industry, the company is insolvent. It is not about  
09:29:27 23 the company itself. It is about all of the  
09:29:30 24 policyholders that if the State cannot restore  
09:29:34 25 solvency or provide some type of indemnity then all of

09:29:39 1 those policyholders are out. It is not applicable  
09:29:43 2 here to what is essentially a private action in a  
09:29:46 3 different form.

09:29:46 4 THE COURT: I am not aware that it is a  
09:29:48 5 general charge, though, that the claims against the  
09:29:50 6 insolvent insurance company are generally charged  
09:29:52 7 against the State rather than against the indemnity  
09:29:55 8 fund. I don't know that for sure. But I am certainly  
09:29:58 9 not aware that it becomes a State obligation.

09:30:01 10 MR. EMANUELSON: All right, Your Honor.  
09:30:02 11 I did not mean that it would be a State  
09:30:04 12 obligation.

09:30:07 13 THE COURT: All right.

09:30:09 14 MR. EMANUELSON: So, finally, the State --  
09:30:14 15 the Attorney General, what they do and as you  
09:30:19 16 mentioned you read the -- you are familiar with the  
09:30:22 17 Nevada case.

09:30:22 18 THE COURT: I have it before me the Nevada  
09:30:24 19 case, which says in part, it is the 9th Circuit case,  
09:30:28 20 apparently, there is some agreement that we should  
09:30:30 21 refer to federal law at some point in this.

09:30:33 22 It says at one point "the States,  
09:30:36 23 California and Washington, are the real parties in the  
09:30:38 24 interest" -- that is the issue there, apparently --  
09:30:40 25 "because both States have a sovereign interest in the

09:30:44 1 enforcement of the Consumer Protection and antitrust  
09:30:48 2 laws."

09:30:48 3 That is the point that I picked up out of  
09:30:50 4 the arguments on that.

09:30:53 5 MR. EMANUELSON: Sure, exactly, Your Honor.

09:30:55 6 THE COURT: Isn't this about whether the  
09:30:57 7 State is bringing this, and as a sovereign, is  
09:31:00 8 pursuing a sovereign interest, and if it is a  
09:31:03 9 sovereign interest, aren't they except under  
09:31:08 10 41.16.160?

09:31:09 11 MR. EMANUELSON: Your Honor, if the  
09:31:10 12 standard was the real party in interest, or whether  
09:31:13 13 the State had a sovereign interest in enforcing its  
09:31:16 14 laws, then there would be no --

09:31:18 15 THE COURT: Actually, the State Supreme  
09:31:21 16 Court case refers to it as the State's sovereign  
09:31:25 17 powers. It was an exercise of the State's sovereign  
09:31:28 18 powers.

09:31:29 19 MR. EMANUELSON: Your Honor, if that was  
09:31:32 20 the standard -- first of all, that case is not the  
09:31:36 21 standard. That is a case that applies a very specific  
09:31:42 22 jurisdictional issue, whether a case is a mass action  
09:31:46 23 under the federal legislation. It is not an  
09:31:52 24 application of the act here.

09:31:55 25 If it was an application, there would be no

09:31:56 1 limiting principle. Any action by any State agency,  
09:32:01 2 to enforce any law would ultimately fall under Section  
09:32:07 3 160. That is not what the actual case law of Section  
09:32:11 4 160 says. So, it has to be more than that. It has to  
09:32:11 5 be more than that.

09:32:15 6 Just because the State is bringing a  
09:32:16 7 lawsuit they have an interest in the lawsuit, does not  
09:32:20 8 make it a sovereign act within the meaning of Section  
09:32:23 9 160.

09:32:23 10 THE COURT: My understanding is that would  
09:32:25 11 be a correct statement.

09:32:30 12 MR. EMANUELSON: Your Honor, to conclude,  
09:32:39 13 this action it is untimely. It applies under the  
09:32:44 14 plain language of the CPA. Section 160 does not  
09:32:47 15 exempt it from the application. Therefore, the claim  
09:32:50 16 should be dismissed.

09:32:51 17 THE COURT: All right.

09:32:53 18 I think that I have a general agreement  
09:32:55 19 that this was going to be the primary, at least,  
09:32:57 20 argument on the statute of limitations on behalf of  
09:33:00 21 the defendants. Does any -- I hope that was an  
09:33:03 22 understanding that we all had.

09:33:04 23 Is there any other party representing or  
09:33:10 24 any other party that wants to be heard on this  
09:33:15 25 statute? Any other defendant who wants to be heard on

09:33:18 1 this statute of limitations argument, basically?

09:33:22 2 I would ask if you have anything to add to  
09:33:24 3 the argument that has already been made? All right.

09:33:27 4 For the record, no response.

09:33:31 5 We will proceed then. I will do that on  
09:33:34 6 the same on the reply, when we come around to the  
09:33:35 7 reply.

09:33:36 8 Go ahead, Mr. Kerwin.

09:33:37 9 MR. KERWIN: Thank you, Your Honor, David  
09:33:40 10 Kerwin for the State.

09:33:41 11 No matter how much you squint at the RCW  
09:33:44 12 you can't find a statute of limitation that applies to  
09:33:48 13 the 080 parens claims brought by the State. RCW  
09:33:56 14 19.86.030 is Washington basic antitrust statute.

09:34:06 15 There are three types of claims that can be  
09:34:08 16 brought under 030, that the State can bring under 030,  
09:34:12 17 080 claims and 090 claims and 140 claims.

09:34:16 18 140 authorizes the State to seek civil  
09:34:18 19 penalties. 090 authorizes two types of suits for  
09:34:23 20 violating -- for violations of the Consumer Protection  
09:34:26 21 Act.

09:34:26 22 The first is a suit brought by the private  
09:34:29 23 plaintiffs. The second is a suit brought by the State  
09:34:31 24 for damages incurred by itself, such as, by State  
09:34:34 25 agencies.

09:34:36 1                   080, on the other hand, allows the State to  
09:34:40 2 bring suit of the parens patriae, when the residents  
09:34:44 3 and citizens of the state are injured. Two sections  
09:34:46 4 compliment each other, but they represent two distinct  
09:34:49 5 types of claims. The State could seek restitution  
09:34:52 6 under any three of these statutes, without necessarily  
09:34:54 7 implicating the other. It is worth stressing how  
09:34:57 8 different the claims are under 080 and 090.

09:35:00 9                   Under 090, the State seeks damages for  
09:35:03 10 State purchases. For instance, in an over-charge that  
09:35:07 11 say to the Department of Transportation, that the  
09:35:09 12 plaintiff incurred when bought a CRT television at  
09:35:13 13 some point.

09:35:13 14                   The meat of our case is -- are 080 parens  
09:35:20 15 claims. Under 080, the State represents all consumer  
09:35:22 16 indirect purchasers in the State as parens patriae  
09:35:26 17 seeking restitution. 080 claims include equitable  
09:35:31 18 claims. There is no case law on this, Your Honor.

09:35:34 19                   This is the first time that we know of that  
09:35:36 20 the defendants have attempted to take the statute of  
09:35:40 21 the limitations from 120 and apply it to 080 claims.  
09:35:44 22 That is accurate. There is no case law on this that  
09:35:47 23 we could look at.

09:35:48 24                   The defendants, obviously, believe strongly  
09:35:50 25 that there should be a statute of limitations on a 080

09:35:53 1 claims. But that doesn't make it so in this case.  
09:35:55 2 The analysis for this court is really quite  
09:35:58 3 straightforward.

09:35:58 4 The defendants don't point to a statute of  
09:36:01 5 limitations that lists 080 -- that claims 080.

09:36:06 6 120 contains the four-year statute of  
09:36:10 7 limitations on 090 claims. The argument seems to be  
09:36:13 8 that because the State brought 080 and 090 claims that  
09:36:18 9 the statute of limitations somehow applies to both.

09:36:20 10 I would submit, Your Honor, this defies  
09:36:23 11 common sense. If the court were to decide that our  
09:36:27 12 090 claims, or our 140 claims, were barred by the  
09:36:30 13 statute of limitations and 140 and 120, they could  
09:36:33 14 quite easily allow the 080 claims to go forward.

09:36:37 15 In the most simple terms, in the statute of  
09:36:40 16 the limitations of 120 in the clearest possible  
09:36:42 17 language it applies to the 090 claims. 080 parens  
09:36:46 18 claims are very different than the 090 claims. There  
09:36:48 19 is no reason to believe that 120 applies to 080.

09:36:51 20 There is several straw men that the  
09:36:55 21 defendants raise and we could address those quickly.  
09:36:59 22 First, this motion that the State might pick and  
09:37:02 23 choose, that it might bring a 080 claim or a 090  
09:37:05 24 claim, depending upon when it brought it, in order to  
09:37:08 25 avoid the statute of limitations.

09:37:10 1           There is really no reasonable argument  
09:37:13 2 because there is no overlap between 080 and 090 claims  
09:37:16 3 in a way that makes this a concern.

09:37:18 4           These are entirely different statutes  
09:37:21 5 covering entirely different claims. They claim that  
09:37:23 6 there is some inequity, because the statute of  
09:37:26 7 limitations would apply to a private party, when it is  
09:37:29 8 bringing its claims, but not to the State, when it is  
09:37:31 9 bringing the same exact claim on behalf of the same  
09:37:33 10 exact party.

09:37:34 11           Again, Your Honor, this ignores the  
09:37:36 12 difference in 080 and 090 claims, indirect purchasers,  
09:37:39 13 indirect purchasers in Washington cannot bring their  
09:37:42 14 own claims. Only the State can bring those claims for  
09:37:45 15 those purchasers under 080.

09:37:47 16           I know that there is no way around it.  
09:37:52 17 Sounds like a broken record between 080 and 090  
09:37:54 18 claims, but there is absolutely the key here.

09:37:57 19           I think that we could trust if the  
09:38:00 20 legislature wanted 120 to apply to 080, it would have  
09:38:03 21 said that in 120.

09:38:07 22           Defendants make much of the fact that in  
09:38:09 23 our complaint, while we do layout the restitution that  
09:38:14 24 we seek, we don't necessarily link it directly to  
09:38:18 25 Sections 080 and 090 and 140. I don't think that

09:38:22 1 anybody here had any trouble discerning which claim  
09:38:28 2 went back to which statute. But we would be happy to  
09:38:32 3 add the -- to amend our complaint and add that, if  
09:38:35 4 that would somehow save us from the statute of  
09:38:38 5 limitations. I don't think that that is the issue  
09:38:40 6 here.

09:38:41 7 THE COURT: All right.

09:38:43 8 MR. KERWIN: Defendants argue that the  
09:38:44 9 tolling provision found in 120 would somehow be  
09:38:47 10 meaningless, if 120 statute of limitations isn't  
09:38:50 11 extended to cover 080 parens claims.

09:38:52 12 Your Honor, it is the simple reading of 120  
09:38:55 13 shows that the private claims brought pursuant to the  
09:38:58 14 090 would be stayed pending any state action which  
09:39:01 15 relates to the same subject matter. That is what 120,  
09:39:03 16 the tolling in 120 does.

09:39:05 17 We all know that the anti-trust cases --  
09:39:08 18 direct claims, indirect claims -- are quite distinct,  
09:39:11 19 but they also deal with the same general subject  
09:39:13 20 matter. There is a ton of overlap there. It makes  
09:39:17 21 perfect sense that the legislature would want to  
09:39:21 22 choose to toll private claims, while the same subject  
09:39:26 23 matter is being litigated by the State as well as the  
09:39:29 24 parens.

09:39:29 25 I think that this is just what you see when

09:39:32 1 the legislature seeks judicial efficiency and you  
09:39:35 2 avoid duplicative litigation. It gives the State the  
09:39:41 3 first crack at the case for benefit of the privates.

09:39:43 4 The defendants say that there is a public  
09:39:45 5 policy issue that the court must address. Your Honor,  
09:39:49 6 I would submit that this is not the case.

09:39:50 7 Cases where we see the courts bring public,  
09:39:54 8 decides that there is a public policy or a judicial  
09:39:57 9 policy questions, that needs to be decided. There is  
09:40:00 10 cases where there is a statute of limitations  
09:40:02 11 involved. The question involved is has it started to  
09:40:05 12 run, has it been tolled or what is the timing  
09:40:08 13 involved?

09:40:08 14 There is simply no statute of limitation  
09:40:11 15 that applies to 080 parens claims, Your Honor. There  
09:40:15 16 is no issue. There is no policy issue here.

09:40:17 17 The defendants argument at its basic is  
09:40:20 18 that the statute of limitations in 120 applies to 090  
09:40:23 19 claims.

09:40:24 20 The State 080 claims are mixed in. And  
09:40:26 21 they kind of look the same, therefore, the statute of  
09:40:30 22 limitations must apply to 080 as well.

09:40:33 23 Each is clear and have distinct differences  
09:40:36 24 through the 080 and 090 claims. The court's analysis  
09:40:39 25 of 080 and our parens claims of 080 doesn't need to go

09:40:43 1 any further than this.

09:40:45 2           However, if the court was to consider the  
09:40:49 3 statute of limitations, or to consider the State's 090  
09:40:51 4 claims, or 140 claims separately, something that the  
09:40:55 5 defendants haven't necessarily argued, but if the  
09:40:57 6 court were to do that, I think that it would also find  
09:41:00 7 that RCW 4.16.160 provides an obvious exception to the  
09:41:06 8 statute of limitations on those claims.

09:41:07 9           Of course, 160 is -- it says, "there should  
09:41:10 10 be no limitation to actions brought in the name of or  
09:41:12 11 for the benefit of the State."

09:41:15 12           Of course, this doesn't mean literally that  
09:41:17 13 any action where the State is the plaintiff is exempt  
09:41:19 14 from the statute of limitations.

09:41:22 15           But it does mean that where the State  
09:41:25 16 actions is for the primary benefit of the public that  
09:41:28 17 160 does apply. This case is the perfect example of  
09:41:31 18 that kind of an action.

09:41:32 19           The State seeks restitution and injunctive  
09:41:35 20 relief on behalf of the public. It brings these  
09:41:37 21 claims that only the State can bring in its role as a  
09:41:41 22 parens. We know from the 9th Circuit and others, very  
09:41:44 23 recently, in these parens cases the State is the real  
09:41:47 24 party in interest. This is the very definition of the  
09:41:49 25 purely State function being carried out.

09:41:52 1           The best example of the court applying 160,  
09:41:55 2 I think, is Hermann v Cissna. The Hermann case is an  
09:41:59 3 insurance case. And the State Supreme Court  
09:42:03 4 considered whether the action brought by the State  
09:42:06 5 Insurance Commissioner is for the benefit of the State  
09:42:08 6 under 160. It decided that it was, also, the statute  
09:42:13 7 of limitations do apply.

09:42:14 8           In holding that the State actions benefit  
09:42:16 9 the State, the court declared that the statute, under  
09:42:19 10 the State -- under which the State brought the action  
09:42:21 11 is for the benefit of the public and the legislature  
09:42:23 12 clearly had in mind in enacting the insurance code  
09:42:26 13 that such actions on the part of the commissioner  
09:42:28 14 would benefit the public generally.

09:42:29 15           The CPA, we have this language: "The CPA  
09:42:33 16 is to protect the public and Foster fair and honest  
09:42:35 17 competition in bringing its claims under the CPA, that  
09:42:38 18 is what the State seeks to do."

09:42:42 19           There is no question, like as in Hermann,  
09:42:45 20 that there are a set of potentially -- as a part of  
09:42:49 21 the claims -- private individuals that are going to  
09:42:51 22 benefit. It is an only a subset of the case. But as  
09:42:56 23 in Hermann, you could argue, obviously, that there are  
09:43:00 24 certain sets of private individuals that would  
09:43:02 25 benefit. But that doesn't change the fact that the

09:43:05 1 case is brought for the -- primarily for the public  
09:43:07 2 interests.

09:43:09 3 As we outlined in our brief, as Your Honor  
09:43:12 4 discussed, the 9th Circuit fundamentally answered this  
09:43:17 5 question, in Washington v. Chimei and in Nevada V.  
09:43:25 6 Bank of America.

09:43:26 7 The question that the court was considering  
09:43:28 8 there, as you discussed, was removal under the CAFA.  
09:43:32 9 But the question was much the same. Is the State the  
09:43:35 10 real party in the interest, or is it merely  
09:43:38 11 representing private parties, and should be treated as  
09:43:40 12 any other private party or class representative?

09:43:43 13 The 9th Circuit said that the State is the  
09:43:46 14 real party in interest, because it is a sovereign  
09:43:49 15 interest in the supporting of the Consumer Protection  
09:43:52 16 and Antitrust Laws in securing an honest marketplace  
09:43:55 17 and the economic well being.

09:43:58 18 Your Honor, there is no statute that  
09:44:00 19 applies to the 080 parens claims.

09:44:05 20 THE COURT: Reply is generally brief.

09:44:09 21 MR. EMANUELSON: Yes, Your Honor.

09:44:11 22 First of all, Your Honor, the Attorney  
09:44:17 23 General -- much of his argument under the opposition  
09:44:21 24 to our CPA argument was a policy based argument. We  
09:44:24 25 are not making a policy based argument here. That is

09:44:28 1 only -- I think that is our secondary argument.

09:44:32 2 THE COURT: Let me ask you. Is this issue  
09:44:37 3 resolved in determining whether the State is  
09:44:40 4 exercising the sovereign power agreement in bringing  
09:44:44 5 this action?

09:44:45 6 Because it seems to me that from your  
09:44:48 7 opening arguments, it is my understanding that any  
09:44:50 8 action brought by the State exercising its sovereign  
09:44:53 9 power has no statute of limitations, is that correct?  
09:44:56 10 Is that your understanding?

09:44:57 11 MR. EMANUELSON: That would -- if you found  
09:45:00 12 it that way, that would resolve it.

09:45:02 13 THE COURT: The question is is this a  
09:45:04 14 sovereign power?

09:45:05 15 MR. EMANUELSON: That is the question. It  
09:45:06 16 is not a sovereign power.

09:45:08 17 THE COURT: Then how do we deal with the  
09:45:10 18 Nevada case?

09:45:13 19 There is language -- let me make clear.  
09:45:16 20 That there is language also in the baseball case that  
09:45:20 21 says that "the principal test for determining  
09:45:24 22 whether" -- that was in the municipality. A  
09:45:28 23 municipality in that case that was acting under a  
09:45:31 24 delegated power that the court, the Supreme Court,  
09:45:35 25 determined to be an exercise of the sovereign power of

09:45:38 1 the State. It is a sovereign power of the State issue  
09:45:41 2 analysis.

09:45:42 3 The principal test is determining whether  
09:45:45 4 ones acts involve a sovereign or proprietary function  
09:45:51 5 the court said, "is whether the act is for the common  
09:45:55 6 good or whether it is for the specific benefit or  
09:45:59 7 profit of the corporate entity."

09:46:01 8 The corporate entity being in that case the  
09:46:03 9 municipal corporation of the State.

09:46:06 10 Then lay that over the Nevada case, which  
09:46:14 11 is not a controlling authority, but which we look to  
09:46:22 12 -- you all agreed that we look to that -- That the  
09:46:24 13 State has sovereign interests, specifically Washington  
09:46:27 14 State has a sovereign interest in the enforcement of  
09:46:29 15 its Consumer Protection and Antitrust Law.

09:46:32 16 So does that make it a sovereign matter?

09:46:35 17 If it is a sovereign matter? Doesn't that  
09:46:40 18 fall outside of the statute of limitations?

09:46:42 19 MR. EMANUELSON: It does not, Your Honor.  
09:46:43 20 Just by using the word sovereign does not all of a  
09:46:46 21 sudden make -- just because the case used the word  
09:46:50 22 sovereign, does not make it an action that falls under  
09:46:53 23 the definition.

09:46:54 24 THE COURT: But if the Washington Supreme  
09:46:56 25 Court defines it, then we do.

09:46:58 1 MR. EMANUELSON: Sure, but that case  
09:47:00 2 involved an actual construction of a facility for the  
09:47:04 3 public interest.

09:47:04 4 THE COURT: Right.

09:47:05 5 MR. EMANUELSON: This involves run of the  
09:47:06 6 mill, antitrust damages action that follows on the  
09:47:11 7 private action.

09:47:12 8 Your Honor, if I may I would like to point  
09:47:15 9 the court's attention to the Washington Power case and  
09:47:17 10 also the Pacific Northwest Bell case that the  
09:47:21 11 defendants provided in the reply brief.

09:47:23 12 Both of those cases involved a government  
09:47:26 13 action to enforce laws. So, again, they are the real  
09:47:29 14 party in the interest. They have some type of  
09:47:33 15 interests in enforcing their laws. But in both of  
09:47:36 16 those cases the court said that the Section 160 did  
09:47:39 17 not apply.

09:47:40 18 THE COURT: Right.

09:47:41 19 MR. EMANUELSON: The first one, Pacific  
09:47:44 20 Northwest Bell case, said that the State's interest is  
09:47:49 21 "merely derivative of the private interests."

09:47:51 22 They were just suing, they had tried to  
09:47:55 23 propagate a law that, essentially, stood in the shoes  
09:48:00 24 of private parties. That is very similar to the  
09:48:02 25 representative action that the Attorney General is

09:48:05 1 here.

09:48:06 2           The second one, I think that the Washington  
09:48:08 3 Power case is even more instructive. Because the  
09:48:11 4 court looked and that involves a municipal corporation  
09:48:17 5 bringing a breach of contract action against General  
09:48:23 6 Electric. The municipal corporation made the power.

09:48:25 7           The court looked at what did the municipal  
09:48:30 8 corporation do?

09:48:30 9           They said, yes, the municipal corporation  
09:48:33 10 has -- the State, in general, over all, has an  
09:48:36 11 interest in energy policy, in clean and efficient use  
09:48:41 12 of energy. But what the specific task that was  
09:48:44 13 delegated to the entity that was bringing the suit  
09:48:46 14 there did not fall under the sovereign interest.  
09:48:50 15 Because the State in that capacity was not acting in  
09:48:52 16 any way different than a private entity, who made its  
09:48:55 17 power would act.

09:48:56 18           The State here, similarly, is bringing a  
09:49:00 19 lawsuit. Sure, they have some aspects of it that they  
09:49:07 20 can ask for civil penalties.

09:49:10 21           However, the injunctive relief and the --  
09:49:14 22 most importantly -- the damages is what makes this no  
09:49:20 23 different and at its core no different than a private  
09:49:23 24 right of action.

09:49:24 25           THE COURT: Thank you.

09:49:25 1 Any further parties subject to this motion  
09:49:29 2 wants to add anything to the reply? All right. I did  
09:49:33 3 it.

09:49:34 4 I do focus on the baseball case, which the  
09:49:40 5 language of the baseball case is taken from the Public  
09:49:45 6 Power Supply System, which we use today refer to  
09:49:49 7 somewhat unfortunately as WOOPS, the WPPS versus  
09:49:55 8 General Electric case. It relies on that.

09:49:58 9 In determining the State's sovereign  
09:50:03 10 powers, it goes on to say -- it seems to me an  
09:50:07 11 important in this case:

09:50:08 12 "The principal test is whether it is  
09:50:13 13 sovereign or proprietary function is whether the act  
09:50:15 14 is for the common good or whether it is for the  
09:50:19 15 specific benefit of the corporate agency like a  
09:50:24 16 contract, like a construction contract."

09:50:26 17 If somebody, if the State contracts, it  
09:50:29 18 seems to me, for a highway, and then seeks to bring a  
09:50:36 19 suit against the contractor -- breach of contract  
09:50:38 20 suit -- that would be subject to the statute of  
09:50:43 21 limitations in that case, because that is for the  
09:50:47 22 specific benefit or profit of the corporate agency,  
09:50:50 23 which is the State in that case, or a city, or  
09:50:53 24 anything else such as that.

09:50:55 25 But in this case, I am persuaded that this

09:51:00 1 is a case that is brought for whatever other reasons  
09:51:05 2 is one that would fall under the definition that the  
09:51:08 3 Supreme Court gives us as for the act or action  
09:51:12 4 brought for the common good.

09:51:13 5 I think that is how our Supreme Court would  
09:51:15 6 view this. I think that the Supreme Court would say  
09:51:17 7 that this is a 4.16.160 case.

09:51:22 8 I am going to deny the motions, all of the  
09:51:24 9 motions, then, for dismissal under the statute of  
09:51:29 10 limitations.

09:51:29 11 That brings us on to part two.

09:51:31 12 Part two is the issue with respect to --  
09:51:42 13 narrowing it down to the stream of commerce analysis  
09:51:46 14 issue. So, a couple of things, I want to tell you, I  
09:51:50 15 have a group coming in at 11 o'clock. But I will keep  
09:51:53 16 them here until 11:30 and give you until 11:30, if you  
09:51:58 17 wish. We will hold them off a little bit, any way.

09:52:04 18 Then I have, not previously scheduled, but  
09:52:10 19 kind of an emergency thing came up on a sentencing,  
09:52:15 20 which we will do at 1 o'clock. Very likely we will be  
09:52:20 21 through at 1:30 or very close to 1:30. We would be  
09:52:24 22 able to resume at 1:30, if you are not finished this  
09:52:27 23 time.

09:52:28 24 We have statutory requirements for breaks.  
09:52:35 25 We will honor those statutory requirements. I will

09:52:38 1 check with the court reporter, because reporting oral  
09:52:41 2 argument is often more demanding than in a trial,  
09:52:47 3 where there are a lot more pauses and instances like  
09:52:50 4 that. I am going to confer on that. I don't set any  
09:52:54 5 time limit. I haven't set any time limit. I don't  
09:52:57 6 generally. Although, when I generally have a summary  
09:53:00 7 judgment motion, we consider it an hour. But this was  
09:53:04 8 an extraordinary setting, because of the number of the  
09:53:06 9 parties involved. So we haven't set time limits. I  
09:53:10 10 have never done that in closing arguments or opening  
09:53:13 11 statements in cases. And it has never stung me until  
09:53:17 12 a month or so ago in which a closing argument that was  
09:53:22 13 estimated at an hour was 2 1/2. But still it usually  
09:53:29 14 works out. I don't put any time limits on that, but  
09:53:32 15 that is the schedule that we will have. That is the  
09:53:34 16 schedule that you will have. If you want to try to  
09:53:37 17 fit this in this morning, then it is on you to do  
09:53:43 18 that.

09:53:44 19 How are you doing? We will just take a  
09:53:49 20 short break and then we will resume.

09:53:54 21 THE BAILIFF: All rise. Court is in recess.

09:53:55 22 (Court was recessed.)

10:00:56 23 THE BAILIFF: All rise. Court is in  
10:00:57 24 session.

10:00:57 25 THE COURT: Please be seated. Have you

10:00:59 1 decided who is going to speak?

10:01:00 2 I take it that was a little disagreement  
10:01:03 3 with my suggestion. Did you decide who was going to  
10:01:07 4 present your argument?

10:01:39 5 MR. HWANG: Yes, we are ready, Your Honor,  
10:01:44 6 Hojoon Hwang for the LG entities.

10:01:44 7 THE COURT: Which are the entities that you  
10:01:46 8 represent?

10:01:46 9 MR. HWANG: LG Electronics, Inc., and LG  
10:01:51 10 USA.

10:01:52 11 THE COURT: All right.

10:01:53 12 MR. HWANG: Your Honor, just to respond to  
10:01:59 13 your comments regarding the scheduling, barring any  
10:02:02 14 unforeseen, and frankly, from my perspective  
10:02:05 15 undesirable development, we should be done by 11:30.

10:02:08 16 THE COURT: All right.

10:02:11 17 MR. HWANG: Your Honor, to address the  
10:02:14 18 personal jurisdiction motion that LG Electronics has  
10:02:18 19 brought, I will note at the outset that the facts are  
10:02:21 20 undisputed.

10:02:23 21 We have submitted an affidavit affirming  
10:02:26 22 that LG Electronics, Inc., has conducted no business  
10:02:30 23 in Washington, has no customers, offices or employees  
10:02:34 24 in Washington.

10:02:36 25 It has no contacts to speak of with the

10:02:42 1 State of Washington. The State has conceded this  
10:02:44 2 morning that general jurisdiction is not being  
10:02:47 3 asserted over any of the defendants. So that we are  
10:02:49 4 really down to specific jurisdiction based on the  
10:02:53 5 stream of commerce. I will turn to that.

10:02:57 6 THE COURT: All right.

10:02:58 7 MR. HWANG: So based on the record, Your  
10:03:01 8 Honor, because of the facts that are undisputed, it  
10:03:04 9 doesn't much matter from my perspective whether this  
10:03:07 10 is a summary judgment or a pleading motion.

10:03:10 11 But, we have a record that shows no  
10:03:13 12 particular activity by LG Electronics, or any other  
10:03:17 13 defendant that it is directed to Washington State. So  
10:03:24 14 close to serving the United States market as a whole,  
10:03:28 15 indifferent as to which State the product might end  
10:03:32 16 up, or even for that matter, which country the product  
10:03:35 17 might go to.

10:03:36 18 Under those facts, or any conceivable  
10:03:40 19 standard for finding specific jurisdiction, those  
10:03:43 20 facts are just not good enough.

10:03:45 21 Unless you take the most extreme reading of  
10:03:52 22 Justice Brennan's concurrence in the Hitachi Metal  
10:03:56 23 case that once a retailer places goods in commerce,  
10:04:00 24 that retailer is subject to jurisdiction anywhere and  
10:04:04 25 everywhere those products might end up in.

10:04:07 1 Now, that standard is no longer the law, I  
 10:04:11 2 would submit, because that is exactly what the Supreme  
 10:04:15 3 Court emphatically rejected in the most recent case on  
 10:04:19 4 the specific jurisdiction the McIntyre Machinery case.

10:04:23 5 In that case, the defendant British  
 10:04:29 6 manufacturer had conducted marketing campaigns in the  
 10:04:34 7 United States, held trade shows in San Diego, San  
 10:04:38 8 Francisco, New Orleans, et cetera. So some of their  
 10:04:41 9 products ended up in the State of New Jersey, where it  
 10:04:45 10 gave rise to the cause of action.

10:04:47 11 The New Jersey Supreme Court said that  
 10:04:50 12 there was personal jurisdiction and articulated the  
 10:04:53 13 standard as follows. They said:

10:04:56 14 "Whenever a manufacturer knows or  
 10:04:59 15 reasonably should know that its products are  
 10:05:02 16 distributed through a nationwide distribution  
 10:05:06 17 system, that might lead to those products being sold  
 10:05:09 18 in any of the 50 states, then all of the 50 states  
 10:05:14 19 do have personal jurisdiction."

10:05:15 20 That standard was rejected. Specifically,  
 10:05:21 21 was also rejected not only in the plurality opinion,  
 10:05:26 22 which adopted a fairly strict standard, but also  
 10:05:30 23 Justice Briar and Justice Oleado concurrent at 130.124  
 10:05:35 24 and 27.93. Supreme Court Justice Briar quotes that  
 10:05:38 25 language that I just quoted and said "that is not the

10:05:40 1 law."

10:05:41 2 Why is that significant?

10:05:43 3 Because, of course, this court is bound by  
10:05:46 4 the ground of the decision that commanded a majority  
10:05:49 5 of the United States Supreme Court.

10:05:51 6 Here we have a plural opinion, concurring  
10:05:54 7 opinion, both agreeing that it is just simply not  
10:05:57 8 enough for the manufacturer to have known or  
10:06:00 9 reasonably should have known that a product put into a  
10:06:04 10 national system of distribution may end up in a wrong  
10:06:07 11 State and the manufacturer would be amenable to the  
10:06:10 12 jurisdiction there. That is exactly what we have in  
10:06:12 13 this case.

10:06:16 14 The Attorney General, having put no facts  
10:06:18 15 in dispute, and in its response, the entirety of their  
10:06:24 16 allegation, the prima facie case for the personal  
10:06:27 17 jurisdiction that they need to make when they admit  
10:06:30 18 that burden is that "the defendants knew, or expected  
10:06:35 19 that the products contained their CRTs would be sold  
10:06:39 20 in the United States and in the Washington," that is  
10:06:41 21 paragraph 5 of their complaint.

10:06:43 22 This is exactly the kind of  
10:06:46 23 undifferentiating national marketing of the products,  
10:06:52 24 indifference to which state it might end up in, with  
10:06:55 25 no particular activity directed at the State of

10:06:58 1 Washington that the courts have including both in the  
10:07:02 2 McIntyre Machinery and in the plurality is that the  
10:07:06 3 courts have said is not enough.

10:07:07 4 THE COURT: May I ask you a question?

10:07:10 5 I don't remember if it was in your  
10:07:11 6 briefing. I was looking and I couldn't see it. It  
10:07:14 7 was in one of the defendants briefing, that  
10:07:16 8 criticized, if I understood it correctly, the State  
10:07:19 9 for relying on Grange, our State case in Grange  
10:07:26 10 Insurance Company.

10:07:28 11 MR. HWANG: I believe that more than one  
10:07:30 12 defendant has said that, Your Honor.

10:07:31 13 THE COURT: That is why I remember it.

10:07:33 14 It caused me, based on my reading of that,  
10:07:36 15 to wonder why -- what is it about Grange that you  
10:07:41 16 think is inconsistent?

10:07:42 17 I look at the Grange decision and I see in  
10:07:45 18 the Grange decision this language:

10:07:53 19 "A retailer's mere placing of the product  
10:07:56 20 into interstate commerce is not by itself sufficient  
10:07:59 21 basis to infer the existence of purposeful minimum  
10:08:04 22 contacts."

10:08:05 23 Isn't that what you just argued?

10:08:07 24 MR. HWANG: Yes, Your Honor, I have that  
10:08:08 25 highlighted in my copy of Grange. I was going to

10:08:11 1 bring that up.

10:08:12 2 I think that our criticism of the State's  
10:08:15 3 argumentation on this, at least the way that -- when I  
10:08:18 4 wrote the reply brief was not so much that they rely  
10:08:21 5 on Grange, because, in fact, I believe that Grange  
10:08:23 6 supports our point of view. But that they didn't  
10:08:26 7 deal with McIntyre Machinery at all --

10:08:28 8 THE COURT: All right. Fine.

10:08:31 9 MR. HWANG: -- which is the more recent  
10:08:33 10 authority.

10:08:34 11 But in Grange, too -- I would, the State  
10:08:37 12 relies on various parts of the language from the  
10:08:40 13 Grange case. It is dicta, in fact, because the court  
10:08:47 14 ultimately said that there was no personal  
10:08:49 15 jurisdiction on some different grounds.

10:08:50 16 THE COURT: Correct.

10:08:51 17 MR. HWANG: But even in Grange itself, at  
10:08:53 18 the page 761 and 762, the court says exactly what Your  
10:08:58 19 Honor just read.

10:08:59 20 "A retailer's mere placing of the product  
10:09:01 21 into interstate commerce is not by itself sufficient  
10:09:05 22 basis to infer the existence and purposeful minimum  
10:09:09 23 contact."

10:09:10 24 On that basis, too, the motion should be  
10:09:12 25 granted, because that is exactly what we have here and

10:09:15 1 nothing more.

10:09:16 2 Other than the allegation that the  
10:09:19 3 defendants have placed products into commerce, there  
10:09:22 4 is nothing alleged, nothing shown, that goes  
10:09:26 5 specifically to the State of Washington as a target,  
10:09:32 6 or as a -- some activity directed to the State of  
10:09:36 7 Washington, as opposed to the State of New Jersey.

10:09:39 8 The McIntyre Machinery court said, clearly,  
10:09:42 9 that that's not enough. There is a distinction  
10:09:45 10 between our national campaign and purposefully  
10:09:49 11 availing oneself of a particular forum.

10:09:51 12 I was looking for, you know, some of the  
10:09:55 13 lower court's discussions of that concept and we cited  
10:10:00 14 in the IG papers the Opticon case from the District of  
10:10:04 15 New Jersey. It doesn't yet have a Federal Supplement  
10:10:08 16 number.

10:10:09 17 But in that case, Judge Wolfson said,  
10:10:12 18 "looking at both the plurality opinion and  
10:10:15 19 concurrence, one thing that really comes out clear  
10:10:18 20 is that the national marketing campaign is not  
10:10:21 21 enough."

10:10:21 22 That is ultimately what Judge Inveen of  
10:10:23 23 this court said with respect to the LTD Powell  
10:10:27 24 defendants in the AUO Electronics case. She said she  
10:10:29 25 recognized correctly that she needs to look at both

10:10:32 1 the plurality and the concurrence and says that there  
10:10:35 2 has to be something more.

10:10:37 3 She read Judge Briar's opinion saying that:  
10:10:40 4 "There has to be something more that distinguishes  
10:10:43 5 the situation from the under differentiated national  
10:10:50 6 market and places one in a category them of  
10:10:52 7 purposefully directing their activities in the State  
10:10:55 8 of Washington."

10:10:55 9 Therefore, she granted the motion to  
10:10:59 10 dismiss. We think that it should be applied here.

10:11:02 11 THE COURT: She commented that she had gone  
10:11:04 12 through the entire complaint and couldn't find more  
10:11:07 13 there or the --

10:11:09 14 MR. HWANG: Right. I am sure that Your  
10:11:10 15 Honor has, or will, but I would submit to you that the  
10:11:12 16 paragraph that I read is the entirety.

10:11:15 17 THE COURT: I understand that you cited  
10:11:18 18 fairly the portions that you think are appropriate.

10:11:21 19 So go ahead, I didn't mean to interrupt.

10:11:24 20 MR. HWANG: With that, we will end, Your  
10:11:26 21 Honor.

10:11:27 22 THE COURT: Any of the other defendants  
10:11:30 23 wish to be heard on the rest of the issues in this  
10:11:39 24 case, now dealt with issue?

10:11:42 25 MS. CHIU: For the Hitachi defendants,

10:11:44 1 Michele Park Chiu. We join in the argument that  
10:11:49 2 Mr. Hwang has submitted on behalf of his clients. We  
10:11:51 3 would like to highlight a couple of other facts that  
10:11:56 4 the State raised in their reply to the motion that the  
10:11:59 5 Hitachi defendants raised.

10:12:02 6 In particular, in response to the AUO  
10:12:07 7 Electronics decision, the State noted that extensive  
10:12:09 8 discovery had been taken in that case, which permitted  
10:12:12 9 them -- or excuse me, permitted the judge to make the  
10:12:15 10 decisions that she had at that point.

10:12:17 11 The Hitachi defendants would like to note  
10:12:19 12 that extensive discovery has also taken place in this  
10:12:22 13 matter. Since December 30, 2011 to the present the  
10:12:27 14 Hitachi defendants alone have produced over 319,000  
10:12:32 15 pages of discovery to the State.

10:12:35 16 This is discovery that was produced in the  
10:12:37 17 multi-district litigation in the Federal Court. The  
10:12:42 18 State has had access to those documents. No where in  
10:12:45 19 their papers have the State been able to raise any  
10:12:49 20 facts or documents that were produced to indicate that  
10:12:52 21 there is any facts to support personal jurisdiction in  
10:12:56 22 this case.

10:12:56 23 In fact, the facts -- excuse me, the  
10:12:59 24 affidavits that were submitted by the Hitachi  
10:13:02 25 defendants, substantiating the fact that there are no

10:13:06 1 substantial contacts between the Hitachi defendants  
10:13:08 2 and the Washington State have been un rebutted by  
10:13:11 3 anything that was produced by the Hitachi defendants.

10:13:14 4 So, we would like to note that there should  
10:13:18 5 be nothing regarding the discovery that would prevent  
10:13:20 6 this court from also granting the motions to dismiss  
10:13:23 7 in this case. And we believe that, in addition to the  
10:13:26 8 Hitachi defendants, other defendants also have  
10:13:29 9 produced the essential discovery to the State as well.

10:13:34 10 THE COURT: All right.

10:13:35 11 Is that it?

10:13:36 12 MS. CHIU: Yes, Your Honor.

10:13:44 13 MR. YOLKUT: David Yolkut, on behalf of  
10:13:45 14 Panasonic Corporation. I, too, would like to join in  
10:13:48 15 Mr. Hwang's and Ms. Chiu's argument.

10:13:50 16 We believe that the Panasonic Corporation  
10:13:53 17 is situated from similar to the LG defendant, and the  
10:13:57 18 Hitachi defendant.

10:13:58 19 We would also like to point out that  
10:14:00 20 Panasonic Corporation is only the one of three  
10:14:05 21 Panasonic defendants to have moved on personal  
10:14:08 22 jurisdiction grounds. Panasonic Corporation of North  
10:14:11 23 America is another defendant, and Toshiba Picture  
10:14:15 24 Display Code, LTD., is also a defendant. They have  
10:14:19 25 both answered the complaint and they don't contest the

10:14:21 1 personal jurisdiction.

10:14:22 2 But as to the Panasonic Corporation, which  
 10:14:24 3 is a foreign entity, headquartered in Osaka, Japan and  
 10:14:29 4 incorporated in the laws of Japan. We have submitted  
 10:14:32 5 the evidence that the Panasonic corporation does not  
 10:14:35 6 manufacture anything, including CRT tubes, or products  
 10:14:38 7 containing CRT tubes, to this State, or directed to  
 10:14:41 8 its any of its consumers.

10:14:43 9 That Panasonic Corporation has had no CRT  
 10:14:47 10 television or computer monitor sales in this State.

10:14:51 11 Additionally, although jurisdiction has not  
 10:14:54 12 been contested, Panasonic Corporation last no office,  
 10:14:58 13 no facility, no records, no bank accounts, no assets  
 10:15:01 14 or mailing address here.

10:15:02 15 On these facts, which remain unrebutted and  
 10:15:05 16 unchallenged by the State, Panasonic Corporation, too,  
 10:15:11 17 would like to stress that the State has wholly failed  
 10:15:15 18 to site or distinguish the G. McIntyre decision from  
 10:15:21 19 the Supreme Court. We would rest on that authority.

10:15:23 20 Thank you, Your Honor.

10:15:24 21 THE COURT: Thank you. Any further  
 10:15:25 22 parties?

10:15:28 23 MR. NEELEMAN: John Neeleman for Samsung  
 10:15:32 24 SDI companies.

10:15:33 25 We would reiterate that the Samsung is,

10:15:35 1 also -- the Samsung entities are also parties in the  
10:15:39 2 multi district in California, have made substantial  
10:15:42 3 discovery. And other than that we would join in the  
10:15:45 4 prior argument and would reserve the reply.

10:15:50 5 MR. EMANUELSON: David Emanuelson, again,  
10:15:52 6 for the Phillips entities.

10:15:53 7 Specifically, in this part of the motion,  
10:15:57 8 Phillips Electronics, a Dutch corporation and Phillips  
10:16:04 9 electronics Industries, in Taiwan limited, a Taiwanese  
10:16:06 10 Corporation. Again, we join in the motion.

10:16:10 11 The Taiwanese corporation is similarly  
10:16:13 12 situated to the defendants in the fact that it has no  
10:16:17 13 sales or contacts in Washington.

10:16:20 14 I will refer it as KPE.

10:16:22 15 It does not have any sales at all. It is a  
10:16:24 16 wholly company, and again, we would refer to the  
10:16:28 17 brief, to the affidavits attached to our briefs.

10:16:31 18 THE COURT: I read your papers.

10:16:33 19 MR. YOLKUT: David Yolkut, on behalf of  
10:16:35 20 Panasonic Corporation.

10:16:37 21 This is certainly not a game of one  
10:16:41 22 up-mannship.

10:16:42 23 Ms. Chiu referenced 319,000 pages. I would  
10:16:46 24 also note that the Panasonic defendants have produced  
10:16:49 25 over two million pages of the discovery to the

10:16:52 1 Attorney General. They have not cited any discovery  
10:16:54 2 in their opposition papers that would warrant any  
10:16:58 3 further discovery in this matter.

10:17:06 4 THE COURT: Any other defendant parties  
10:17:08 5 that want to be heard at this point?

10:17:11 6 All right. The State's reply?

10:17:15 7 MR. KERWIN: Thank you, Your Honor.

10:17:18 8 Your Honor, we are not talking here about  
10:17:23 9 mere foreseeability or possibility. We are talking  
10:17:26 10 about inevitability. We are talking about a huge  
10:17:29 11 volume of commerce here. We are not talking about a  
10:17:31 12 huge inevitability. We are talking about knowing and  
10:17:35 13 intentional inevitability.

10:17:37 14 If there is a stream of commerce to be had  
10:17:39 15 in State of Washington, this is it. This notion, I  
10:17:43 16 have a little bit of trouble getting my mind around  
10:17:45 17 the notion if you target State of Washington and  
10:17:49 18 other states, there is probably jurisdiction. If you  
10:17:51 19 target State of Washington and 40 others states there  
10:17:55 20 might be jurisdiction. If you target Washington State  
10:17:55 21 and 49 states, all of a sudden it can have a statute of  
10:17:59 22 limitation as to four years.

10:18:00 23 THE COURT: My understanding is that there  
10:18:01 24 is no targeting of Washington, period.

10:18:04 25 And that in my understanding is that the

10:18:06 1 argument includes that part of the law that refers to  
10:18:15 2 putting the product into interstate commerce is not,  
10:18:19 3 by itself, sufficient.

10:18:20 4 Now, if you take that as a proper statement  
10:18:22 5 of the law, and in terms of the specific jurisdiction,  
10:18:31 6 then -- isn't there -- it just seems to me that  
10:18:38 7 logically there has got to be something more there,  
10:18:42 8 something more than putting it into the stream of  
10:18:47 9 commerce.

10:18:48 10 MR. KERWIN: Under the stream of commerce  
10:18:50 11 analysis, I think it defies logic that at some point  
10:18:57 12 you aren't saturating a market so much, and putting so  
10:19:00 13 many -- I will make two points on this.

10:19:02 14 The first is that you are saturating the  
10:19:04 15 market so much and putting so many products into the  
10:19:09 16 stream of commerce, that it is not possible for you  
10:19:12 17 not to know that your products are reaching Washington  
10:19:16 18 State.

10:19:16 19 Also, we plead in this case that the  
10:19:19 20 defendants knowingly and intentionally did reach  
10:19:22 21 Washington State with their products.

10:19:24 22 Now, they sold through middle-men. They  
10:19:27 23 didn't send advertisements to the State of Washington.  
10:19:30 24 They didn't set up offices in the Washington State.  
10:19:33 25 We are not arguing that the physical minimal contacts

10:19:37 1 generally existed, although some defendants did admit  
10:19:39 2 to some amounts of actual physical contacts.

10:19:43 3 THE COURT: There is some other language in  
10:19:45 4 a couple of cases that I want to share with you, if  
10:19:48 5 you will give me a second.

10:19:49 6 But one, if we go back to Grange again.  
10:19:53 7 Grange said that "extending jurisdiction is justified,  
10:19:56 8 only if the defendant has purposefully availed itself  
10:20:00 9 of the forum State's markets."

10:20:04 10 Your argument, I take it, on that is  
10:20:06 11 saturation in that there is nothing in your response  
10:20:10 12 to that that says that there was a specific targeting  
10:20:15 13 of Washington State. It is just the saturation of the  
10:20:20 14 entire country.

10:20:21 15 MR. KERWIN: That is my shorthand for it,  
10:20:23 16 yes, Your Honor.

10:20:24 17 THE COURT: All right.

10:20:24 18 MR. KERWIN: Now, we do make the allegation  
10:20:27 19 that the defendants knowingly targeted Washington  
10:20:30 20 State. We expect, during the discovery, to find  
10:20:33 21 evidence that they targeted all 50 states, including  
10:20:37 22 Washington State.

10:20:38 23 The concept that they didn't intend to sell  
10:20:42 24 television and monitors containing their price fixed  
10:20:45 25 products in Washington State, just defies logic.

10:20:53 1 If the State were to take a pass on a case  
10:20:55 2 like this, we would say to the large corporations, go  
10:20:58 3 ahead and pump your CPA violated products into  
10:21:02 4 Washington State, as fast as you want. Just be  
10:21:04 5 careful not to set up any offices here. Be careful  
10:21:07 6 not to have too many physical contacts. Don't drive  
10:21:10 7 through Washington State on your way to somewhere  
10:21:13 8 else. You want plausible deniability for your clients  
10:21:16 9 in court here to argue about it.

10:21:16 10 Go ahead and do that, and you cannot be  
10:21:18 11 held responsible for your actions and victimization of  
10:21:21 12 Washington State consumers.

10:21:23 13 THE COURT: You just described something to  
10:21:25 14 me that sounds a little bit about the distinction  
10:21:29 15 between general jurisdiction and specific  
10:21:31 16 jurisdiction, if that is the term that you are using  
10:21:33 17 here.

10:21:35 18 MR. KERWIN: Your Honor, let me say that  
10:21:38 19 the stream of commerce analysis satisfies the element  
10:21:43 20 of personal jurisdiction in its analysis.

10:21:46 21 THE COURT: You all cited, but nobody has  
10:21:48 22 argued the Worldwide Volkswagen case.

10:21:52 23 MR. KERWIN: Yes, Worldwide Volkswagen is  
10:21:55 24 the law in Washington State. That is what controls.

10:21:58 25 THE COURT: When they talk about the due

10:21:59 1 process part of specific jurisdiction there, the part  
10:22:02 2 that I am looking at is at page 297, and it talks  
10:22:06 3 about foreseeability.

10:22:07 4 The court says at 297:

10:22:15 5 "But the foreseeability that is critical to  
10:22:18 6 due process analysis is not the mere likelihood that  
10:22:21 7 a product will find its way into the forum State,  
10:22:25 8 rather it is that the defendant's conduct and  
10:22:29 9 connection with the forum State are such that he  
10:22:34 10 should reasonably anticipate being hailed into the  
10:22:37 11 court there." End of quotation.

10:22:40 12 They go on with a number of examples, like  
10:22:43 13 the tire manufacturer, who sells tires, or the -- I  
10:22:50 14 don't know if it is a manufacturer or the dealer, who  
10:22:52 15 sells tires in the California and you have a flat tire  
10:22:54 16 in Pennsylvania. Can you bring the California party,  
10:23:01 17 who sold the tire, to trial in Pennsylvania?

10:23:05 18 They talk about soda pop from California to  
10:23:08 19 Alaska, things -- a number of situations like that,  
10:23:11 20 where you get a product one place and it causes a  
10:23:15 21 problem some place else.

10:23:16 22 They said, "no, that doesn't -- that  
10:23:18 23 doesn't meet the standard."

10:23:20 24 MR. KERWIN: Right.

10:23:21 25 THE COURT: You get here and in the part of

10:23:22 1 this, when I hear your argument, that raised the  
10:23:27 2 question in my mind it is not the likelihood that the  
10:23:32 3 product is going to be in the Washington State. That  
10:23:36 4 is not the test of the foreseeability, when we talk  
10:23:40 5 about the due process part of the special  
10:23:45 6 jurisdiction.

10:23:45 7 The court says:

10:23:45 8 "Rather it is the defendant's conduct and  
10:23:49 9 connection with the forum State, if there are such  
10:23:56 10 that he should reasonably anticipate being hailed  
10:24:02 11 into court."

10:24:04 12 There that seems -- that language seems to  
10:24:09 13 implicitly require that there would be some  
10:24:12 14 defendants' conduct in connection with the forum  
10:24:14 15 State. That seems to be absent in all of this, other  
10:24:18 16 than your saturation argument.

10:24:20 17 MR. KERWIN: I see what you are saying,  
10:24:22 18 Your Honor.

10:24:22 19 I would say, first, that the conduct is  
10:24:26 20 putting this massive amount of products in this stream  
10:24:30 21 of commerce and knowingly targeting all 50 States.  
10:24:33 22 The connection comes through the stream of commerce  
10:24:36 23 argument that we have.

10:24:37 24 In this case, Worldwide Volkswagen, the  
10:24:40 25 cases that it cites, this highlights the transition

10:24:43 1 that we see from the older cases, where you have a car  
10:24:46 2 purchased in New York that is driven to, you know,  
10:24:51 3 McIntyre, Ford products brought into the State of New  
10:24:51 4 Jersey.

10:24:57 5 In Grange the court says "look Worldwide  
10:25:03 6 Volkswagen is the law here in Washington."

10:25:04 7 THE COURT: Right.

10:25:05 8 MR. KERWIN: Asai isn't; for the same  
10:25:09 9 reasons that would I argue that McIntyre isn't. The  
10:25:11 10 language on Worldwide Volkswagen anticipates a larger  
10:25:15 11 and more purposeful stream of commerce bringing  
10:25:19 12 jurisdiction to the State.

10:25:20 13 They say:

10:25:21 14 "If the State does not violate the due  
10:25:23 15 process, if it asserts personal jurisdiction  
10:25:26 16 over the company, that delivers the products into  
10:25:28 17 the stream of commerce, the expectation that they  
10:25:30 18 will be purchased by the consumers in the forum  
10:25:33 19 State."

10:25:34 20 THE COURT: That is not enough; is it?

10:25:37 21 MR. KERWIN: I believe that stream of  
10:25:40 22 commerce analysis, it is, Your Honor.

10:25:42 23 When you have this volume of commerce --

10:25:46 24 THE COURT: All right.

10:25:47 25 MR. KERWIN: -- if there is such thing as

10:25:48 1 stream of commerce in Washington State, this is it.  
10:25:54 2 That connection to the State in a case like this is  
10:25:59 3 satisfied by -- Your Honor, I want to be clear.

10:26:01 4 We are pleading that these companies  
10:26:04 5 intentionally targeted Washington State, just as they  
10:26:09 6 did every other state.

10:26:11 7 We see the court adopt the standard from  
10:26:13 8 Worldwide Volkswagen in Grange.

10:26:15 9 THE COURT: Yes.

10:26:16 10 MR. KERWIN: It said that:

10:26:18 11 "Purposeful minimum contacts are  
10:26:27 12 established, when an out-of-state manufacturer  
10:26:29 13 places its products in the stream of the interstate  
10:26:33 14 commerce, because under those circumstances it is  
10:26:35 15 fair to charge the manufacturer with knowledge that  
10:26:37 16 its conducts might have consequences in another  
10:26:40 17 State."

10:26:41 18 It is undoubtable that these defendants  
10:26:44 19 knew that their products would be purchased by  
10:26:48 20 consumers in Washington State and that Washington  
10:26:51 21 State consumers would be harmed by their price fixing  
10:26:55 22 activities.

10:26:55 23 THE COURT: We seem to have a law that  
10:26:57 24 says, just put it into the stream of commerce  
10:26:59 25 throughout the country is not enough.

10:27:02 1 MR. KERWIN: I think -- when applied to  
10:27:07 2 those earlier cases, where you had a limited number of  
10:27:11 3 products and a lot more -- I think that the language  
10:27:17 4 of these cases anticipates that there can be more,  
10:27:21 5 that there can be a stream of commerce.

10:27:23 6 THE COURT: You are really advocating for  
10:27:26 7 an expansion, or a change in the law, to reflect  
10:27:30 8 current business practices, that result in a  
10:27:33 9 saturation that should put any one on notice.

10:27:36 10 MR. KERWIN: I don't believe that this is  
10:27:39 11 in any kind of a way a new law, or a change in the  
10:27:42 12 law.

10:27:43 13 I think that, absolutely, when you look at  
10:27:45 14 Worldwide Volkswagen, even when you look at cases like  
10:27:47 15 Asai and McIntyre that don't apply here, that you see  
10:27:51 16 the court anticipating that there would be the stream  
10:27:58 17 of commerce situation that will grant -- but those  
10:28:00 18 cases aren't it. They aren't quite there yet. Those  
10:28:03 19 facts fall short.

10:28:06 20 THE COURT: I hate to go off on a tangent  
10:28:08 21 and but let me try it. It is products liability law.  
10:28:13 22 When products liability -- talking specifically about  
10:28:17 23 asbestos products. Our courts have said a couple of  
10:28:21 24 times recently -- very recently, that manufacturer,  
10:28:26 25 who creates a product that is safe, which later

10:28:30 1 becomes unsafe because of asbestos being put on it,  
10:28:34 2 that the original manufacturer has no liability; that  
10:28:40 3 is, cannot be held responsible to warn of the dangers  
10:28:45 4 because they haven't provided the dangers even --  
10:28:49 5 unless they put that into the stream of commerce.  
10:28:51 6 That is getting to that point, the stream of commerce,  
10:28:54 7 that you have an innocent product, even though that it  
10:28:56 8 goes in the stream of commerce at some point and  
10:28:59 9 becomes a kind of a product that requires warnings  
10:29:05 10 that there is no liability on that initial  
10:29:10 11 manufacturer, even though that they end up in the  
10:29:14 12 stream of commerce where there may be some.

10:29:16 13 It just -- that sounded to me a little bit  
10:29:23 14 like this this case or the issues in this case.

10:29:28 15 MR. KERWIN: I think that it is on --

10:29:30 16 THE COURT: If you can have a product that  
10:29:32 17 goes into market in this State of Washington, sold in  
10:29:38 18 the State of Washington and may be harmful and require  
10:29:42 19 or products, such as these, which are over-priced.

10:29:47 20 But that that doesn't reach back to the  
10:29:53 21 original manufacturer, or in this -- in our context,  
10:29:58 22 with our cases, that the original entity that puts it  
10:30:03 23 into a national kind of a market rather than targeting  
10:30:09 24 the State of Washington, but that seemed to repeat or  
10:30:14 25 reinforce.

10:30:15 1 MR. KERWIN: There are certainly  
10:30:16 2 similarities. The key difference there is liability  
10:30:21 3 versus jurisdiction. It also reminds me here that a  
10:30:24 4 big part of the analysis and a big part of the minimum  
10:30:27 5 contact analysis is fairness. The second step that we  
10:30:32 6 have to take to get jurisdiction would this defendant  
10:30:35 7 traditional claims of fair play and substantial  
10:30:40 8 justice.

10:30:41 9 THE COURT: It sounds like -- I don't  
10:30:43 10 recall reading anywhere in any brief -- but it sounds  
10:30:46 11 like virtually all of the defendants in this case are  
10:30:53 12 subject to federal action, as well; is that correct?

10:30:59 13 MR. KERWIN: They are subject to all types  
10:31:00 14 of actions every where. It is an oppressive list.

10:31:04 15 THE COURT: When you talk about --

10:31:05 16 MR. KERWIN: But the Washington State  
10:31:08 17 indirect consumers, this is their only avenue for  
10:31:12 18 restitution. This is it. If they don't have  
10:31:13 19 jurisdiction here, millions of consumers in Washington  
10:31:17 20 State go without restitution.

10:31:18 21 THE COURT: -- is there federal  
10:31:20 22 jurisdiction over this alleged conspiracy and price  
10:31:25 23 fixing?

10:31:26 24 MR. KERWIN: If they were to bring suit?

10:31:28 25 THE COURT: No. With the suits that are

10:31:29 1 presently -- I don't want to get into factual matters  
10:31:31 2 that aren't in the record here.

10:31:34 3 But if these folks are subject to the  
10:31:36 4 federal lawsuit, because it certainly involves -- may  
10:31:41 5 involve interstate commerce -- aren't they subject to  
10:31:49 6 whatever damages that the law provides for their  
10:31:53 7 wrongful action?

10:31:54 8 MR. KERWIN: Not in terms of Washington  
10:31:58 9 State and direct consumers and indirect purchasers,  
10:32:02 10 no.

10:32:03 11 They are not represented in any of the  
10:32:06 12 NBLs, or any of the actions going on. They can't be.  
10:32:10 13 The Attorney General is the lone representative of the  
10:32:14 14 millions of citizens, Your Honor.

10:32:16 15 The CPA intends that cases should be  
10:32:19 16 brought by the Attorney General to represent those  
10:32:22 17 plaintiffs.

10:32:22 18 THE COURT: So, the more -- when you are  
10:32:27 19 looking for whatever more is there, the more is a  
10:32:32 20 saturation. That is the kind of a term that I think  
10:32:35 21 that you used and I grabbed on to, because I think  
10:32:38 22 that it is a good term to describe what you were  
10:32:41 23 saying.

10:32:42 24 MR. KERWIN: I think that it is, Your  
10:32:43 25 Honor. I don't necessarily think that you need the

10:32:45 1 more in this case. But if you do need the more, that  
10:32:49 2 is absolutely it.

10:32:50 3 THE COURT: All right.

10:32:52 4 MR. KERWIN: Talking a little bit about how  
10:32:57 5 this is their only venue, this is the only form for  
10:33:01 6 purchaser of CPA, CRT products in the Washington  
10:33:05 7 State, the State is their only representative, that  
10:33:08 8 equity element weighs very heavy for the jurisdiction  
10:33:12 9 here. The defendants lists all of the contacts that  
10:33:14 10 they don't have all with the State offices and the FAX  
10:33:18 11 numbers.

10:33:18 12 What they don't do is they don't deny that  
10:33:21 13 they fix the prices. They don't deny that maybe they  
10:33:24 14 would profit from Washington State's citizens  
10:33:26 15 purchasing these products.

10:33:28 16 THE COURT: But in this case, we have this  
10:33:31 17 case, we have, apparently, some other defendants that  
10:33:34 18 aren't here.

10:33:35 19 MR. KERWIN: Yes, Your Honor.

10:33:36 20 THE COURT: At this motion, are those  
10:33:39 21 distributors to this case those persons have more  
10:33:42 22 direct connection with distributing the products in  
10:33:45 23 this State?

10:33:46 24 MR. KERWIN: I don't think that I can say  
10:33:47 25 that in a blanket manner.

10:33:50 1 THE COURT: Why aren't they here in this  
10:33:52 2 motion?

10:33:52 3 MR. KERWIN: I couldn't answer that, Your  
10:33:54 4 Honor. To some varying degree the defendants  
10:33:57 5 participated in the actual production and distribution  
10:34:01 6 of these products.

10:34:01 7 THE COURT: I did hear a concession by one  
10:34:05 8 party that they -- some of their subsidiaries and  
10:34:09 9 related organizations did have those kinds of contacts  
10:34:12 10 that they were contesting.

10:34:14 11 MR. KERWIN: Right.

10:34:15 12 THE COURT: They were contesting the  
10:34:16 13 specific jurisdiction.

10:34:18 14 MR. KERWIN: The State pleads that all of  
10:34:20 15 the defendants engaged in the price fixing, engaged in  
10:34:23 16 some way in the distribution of these products and  
10:34:27 17 knew and intended that they are products would reach  
10:34:31 18 Washington State. We have made a prima facie case for  
10:34:33 19 that, Your Honor.

10:34:34 20 THE COURT: Are the other defendants still  
10:34:35 21 in the case that are not contesting specific  
10:34:38 22 jurisdiction, do they represent all of the products  
10:34:43 23 that were alleged that were distributed in this State?

10:34:48 24 MR. KERWIN: They do not, Your Honor, not  
10:34:50 25 even close. I think that the burden for the State is

10:34:52 1 a humble one. I think that it is one that we have met  
10:34:55 2 in the pleadings. This is not a summary judgment  
10:34:57 3 motion. The State need only make a prima facie case  
10:35:01 4 that the jurisdiction is proper.

10:35:02 5 The defendants pointed out everything that  
10:35:05 6 they have in their declarations. We have looked  
10:35:08 7 forward to finding out who these people might be, what  
10:35:10 8 these executives -- what else they have to say about  
10:35:13 9 the price fixing that they engaged in their companies  
10:35:15 10 and how they might have profited from it from  
10:35:18 11 Washington citizens.

10:35:19 12 But at this point, they don't contest the  
10:35:22 13 fact that they fix prices. They don't contest the  
10:35:27 14 facts that these products intentionally reached  
10:35:30 15 Washington State.

10:35:31 16 THE COURT: They probably don't admit it  
10:35:34 17 either.

10:35:34 18 MR. KERWIN: No, they don't admit it  
10:35:36 19 either. But that is important, because the State has  
10:35:38 20 made its prima facie case in its pleadings. We  
10:35:41 21 deserve to take discovery on this, Your Honor.

10:35:45 22 I completely reject the notion that there  
10:35:49 23 has been extensive discovery in this case.

10:35:52 24 CID is a different animal, treated  
10:35:54 25 different ly, handled differently.

10:35:57 1                   What number of documents were produced,  
10:36:01 2                   what number of useful document were produced, we have  
10:36:07 3                   -- the State shouldn't be held to a double standard  
10:36:12 4                   that the other parties wouldn't be held to. I don't  
10:36:15 5                   think that we need to get deeply into that. But, Your  
10:36:18 6                   Honor, we certainly deserve to take discovery in this  
10:36:21 7                   matter.

10:36:24 8                   THE COURT: On that, are we just talking  
10:36:26 9                   about the discovery part now?

10:36:27 10                  You have concluded your argument on the  
10:36:31 11                  stream of commerce?

10:36:31 12                  MR. KERWIN: Yes, Your Honor.

10:36:32 13                  THE COURT: Except for the -- I want to ask  
10:36:36 14                  you about the discovery part.

10:36:39 15                  I am trying to get my rule books so I don't  
10:36:43 16                  embarrass myself. But the CR 56, I believe that it is  
10:36:49 17                  56 (f) that provides for continuance for discovery, if  
10:36:57 18                  I have got that letter wrong, I am sorry. It is in CR  
10:37:03 19                  56.

10:37:05 20                  MR. KERWIN: Under the summary judgment  
10:37:07 21                  rule.

10:37:07 22                  THE COURT: You put my mind at rest. There  
10:37:10 23                  are some specific requirements under CR 56 (f) that  
10:37:15 24                  say that in terms of getting a deferral of a judgment  
10:37:22 25                  on the summary judgment for further discovery -- I

10:37:25 1 didn't see any reflection of any of those.

10:37:28 2 MR. KERWIN: Your Honor, we don't think --  
10:37:30 3 we certainly don't think that we are arguing the  
10:37:32 4 summary judgment here.

10:37:33 5 THE COURT: No.

10:37:34 6 MR. KERWIN: There is obfuscation on the  
10:37:36 7 defendant's part on what rule they were filing under  
10:37:39 8 we assumed that it was 12 (b) (2).

10:37:42 9 THE COURT: I don't mean that this is a  
10:37:44 10 summary judgment motion. I am not trying to convert  
10:37:46 11 this into a summary judgment motion.

10:37:48 12 I am saying, when you get a dispositive  
10:37:50 13 motion to come up, and then, which is often summary  
10:37:56 14 judgment rather than CR 12 motion, or a motion to  
10:38:03 15 dismiss for lack of jurisdiction, I am not sure that  
10:38:06 16 you have to characterize that as a CR 12 motion or  
10:38:12 17 not, but any way, no jurisdiction. We see those, if  
10:38:17 18 there is that request, I think, what about that?

10:38:20 19 I look just for comparison purposes and to  
10:38:25 20 guide me somewhat about how it is handled in the  
10:38:28 21 summary judgment motion. In the summary judgment  
10:38:30 22 motion there is usually some showing of exactly what  
10:38:32 23 you would do, exactly what you have done.

10:38:35 24 We have talked about millions of documents.  
10:38:43 25 You weigh benefits and the burdens of a continuing for

10:38:47 1 discovery. You do take into consideration somewhat  
10:38:51 2 the costs and the expense of discovery before you put  
10:38:58 3 something over just for discovery.

10:39:01 4 MR. KERWIN: In terms of cost of the  
10:39:02 5 discovery, there is already quite a bit of litigation  
10:39:08 6 going on, not that we are involved in, but the  
10:39:11 7 defendants are involved in.

10:39:13 8 A great deal of discovery have been  
10:39:16 9 produced duplicate discovery can be produced easily, I  
10:39:21 10 would guess, from those -- that litigation.

10:39:25 11 It is certainly something that we would  
10:39:28 12 request. It is certainly -- we would expect to  
10:39:31 13 develop our case, you know, against the assertion that  
10:39:35 14 is we see in the declarations that have been provided  
10:39:38 15 by the defendants.

10:39:40 16 THE COURT: All right. Thank you. Hold on  
10:39:45 17 for a second before I get replies. I want to get my  
10:39:50 18 cases in front of me. All right.

10:40:41 19 Reply.

10:40:41 20 MR. HWANG: Your Honor, with respect to the  
10:40:43 21 discovery, it is interesting that the State now says  
10:40:46 22 that they want to test the assertions in the  
10:40:48 23 affidavits, because earlier today we heard they don't  
10:40:52 24 contest any of those facts.

10:40:53 25 They don't think that it matters that we

10:40:55 1 didn't have offices; we didn't have employees or  
10:40:57 2 customers in the Washington State. They think that  
10:41:00 3 the saturation theory is where they are going with it.  
10:41:02 4 I don't see how that discovery is relevant.

10:41:06 5 As we were noting in the previous motion --  
10:41:09 6 argument on the previous motion, the State has known  
10:41:12 7 about these allegations for four and a half years.  
10:41:15 8 They have the CID power and they have been  
10:41:19 9 coordinating in the discovery, as my colleague has  
10:41:25 10 pointed out. We don't see that there is any basis for  
10:41:28 11 discovery. I don't think that the State has  
10:41:30 12 articulated any reasons for that.

10:41:32 13 The next point that I want to make is that  
10:41:34 14 the State's argument that it is just not fair that  
10:41:37 15 these defendants arguably, allegedly conspired to fix  
10:41:41 16 prices, they are not subject to jurisdiction.

10:41:44 17 The fair play, the motions, the notions of  
10:41:49 18 fairness that is additional requirement in that two  
10:41:52 19 step test under the Worldwide Volkswagen, the first  
10:41:54 20 has to be purposeful availment. They don't get over  
10:41:58 21 that, because we, they have alleged no facts. They  
10:42:01 22 have shown no facts that says that the defendants at  
10:42:04 23 issue in this motion targeted Washington State.

10:42:08 24 Now, whether or not it defies logic to say  
10:42:14 25 that a State doesn't have personal jurisdiction over a

10:42:17 1 defendant that conducts an undifferentiated marketing  
10:42:20 2 campaign for the entire United States, that is a law.  
10:42:23 3 Worldwide Volkswagen, I would suggest, supports us,  
10:42:27 4 but it has to be read in conjunction with McIntyre  
10:42:30 5 Machinery.

10:42:30 6 This court is actually bound and it  
10:42:34 7 cannot -- it has to follow the position taken by those  
10:42:40 8 justices who concurred in the judgment of the Supreme  
10:42:44 9 Court in the McIntyre case on the narrow case, the  
10:42:48 10 State versus Higman case in the Washington Supreme  
10:42:51 11 Court. But it comes from the Marks versus The United  
10:42:53 12 States case about how you deal with the plurality of  
10:42:56 13 the opinions.

10:42:56 14 The law is now that -- perhaps, it has  
10:43:00 15 always been -- that the mere knowledge or expectation,  
10:43:05 16 while they must have known that the products were  
10:43:09 17 going to wind up in Washington, that is not the test.  
10:43:12 18 The test is it has to be more than target the  
10:43:14 19 Washington State. That is exactly what the Supreme  
10:43:16 20 Court said.

10:43:17 21 Finally, I would note that there would be  
10:43:21 22 entities, who have not moved with respect to LG, we  
10:43:25 23 have moved with respect to LG Electronics, Inc., the  
10:43:29 24 Korean Corporation. We have not moved with respect to  
10:43:32 25 the LG Electronics USA, the American Corporation. By

10:43:37 1 no means do we mean to suggest that they have any  
10:43:40 2 liability.

10:43:40 3           However, that is going to be determined in  
10:43:42 4 this case, regardless of how you Your Honor rules on  
10:43:46 5 the jurisdiction issue.

10:43:47 6           THE COURT: Thank you.

10:43:48 7           MS. CHIU: Michele Park Chiu for the  
10:43:50 8 Hitachi defendants.

10:43:51 9           In addition, we would also like to rebut  
10:43:55 10 the State's comment earlier during their argument that  
10:43:59 11 there is inevitability that the products, these moving  
10:44:02 12 defendants were manufacturing would end up in the  
10:44:06 13 Washington State.

10:44:08 14           The State is making broad brush arguments  
10:44:11 15 without applying the specifically them to the moving  
10:44:13 16 defendant. For example, Hitachi Asia, which is one of  
10:44:17 17 the Hitachi defendants moving here today, in the  
10:44:20 18 affidavit that they submitted, never sold anything  
10:44:24 19 into the United States. So there could be no  
10:44:26 20 inevitability or foreseeability that those products  
10:44:29 21 would end up in State of Washington, as opposed to the  
10:44:34 22 even the greater national market.

10:44:36 23           It further exposes the fact that the  
10:44:38 24 Attorney General is making very broad brush statements  
10:44:40 25 about the defendants without looking to specific

10:44:44 1 facts. But more importantly, and more relevant, is  
10:44:47 2 that the foreseeability, even if it were true, which  
10:44:50 3 it is not for all of the defendants, simply is not  
10:44:53 4 enough to establish the personal jurisdiction,  
10:44:55 5 specific personal jurisdiction notice required.

10:44:58 6 We also joined in the statements made by IG  
10:45:01 7 counsel that the law always has been as seen in  
10:45:04 8 Worldwide Volkswagen and further narrowed in the Jay  
10:45:09 9 McIntyre case that mere foreseeability and entrance to  
10:45:13 10 the stream of commerce specifically cannot support  
10:45:17 11 specific and personal jurisdiction.

10:45:17 12 We submit on that, Your Honor.

10:45:20 13 MR. YOLKUT: Your Honor, I think that your  
10:45:22 14 question.

10:45:22 15 THE COURT: You start with your name.

10:45:25 16 MR. YOLKUT: Sorry, David Yolkut, on behalf  
10:45:27 17 of Panasonic.

10:45:28 18 Your question to Mr. Kerwin got it exactly  
10:45:31 19 right. They are looking for an expansion in the law.  
10:45:33 20 For all of the reasons that my colleagues have noted,  
10:45:36 21 McIntyre and the plurality opinion in the McIntyre  
10:45:39 22 combined with Justice Briar's concurrence is indeed  
10:45:43 23 the law that foreseeability is not enough.

10:45:45 24 Furthermore, with respected to the State's  
10:45:48 25 invocation of equitable principals, Mr. Hwang is

10:45:53 1 absolute correct that you don't need to reach that,  
10:45:55 2 third, or second test in Volkswagen, because there is  
10:45:57 3 no purposeful availment here. There is no something  
10:46:01 4 more.

10:46:02 5 In the concurrence in the Asai, justice --  
10:46:07 6 the concurrence looked to the designing the product,  
10:46:09 7 advertising the product, that is the type of something  
10:46:12 8 more that is wholly absent here.

10:46:14 9 With respect to the equitable principles,  
10:46:16 10 even if you want to consider them as I noted, with  
10:46:19 11 respect to the Panasonic, there are two other  
10:46:21 12 defendants that answered the complaints, they  
10:46:23 13 certainly do deny the price fixing of the State. That  
10:46:27 14 is news to me. There is certainly isn't denial to  
10:46:31 15 each and every one of those allegations. They will be  
10:46:35 16 denied. The State is not being being deprived of a  
10:46:38 17 forum here.

10:46:39 18 Your Honor is correct, and my clients are  
10:46:41 19 in the MDL as well.

10:46:43 20 With that I will submit.

10:46:47 21 MR. NEELEMAN: John Neeleman for Samsung.  
10:46:50 22 We have nothing more to add at this time.

10:46:52 23 MR. EMANUELSON: Your Honor, David  
10:46:57 24 Emanuelson, again, for the Phillips entities.

10:46:59 25 I just wanted to add as it applies to us

10:47:04 1 that the same point about the only -- we are only  
10:47:09 2 moving to dismiss on behalf of KPE, and the entities,  
10:47:13 3 Phillips Electronics North America has not joined in  
10:47:17 4 this motion, other all of the other statements would  
10:47:19 5 apply to us.

10:47:21 6 Really what this goes to a respected and  
10:47:23 7 corporate forum, the State's personal jurisdiction you  
10:47:28 8 cannot blur the forum. You have to look at each  
10:47:33 9 entity specifically in their context in the State.

10:47:36 10 THE COURT: All right.

10:47:39 11 Anything further?

10:47:40 12 MR. KERWIN: Your Honor, if I may.

10:47:41 13 THE COURT: At a great risk, we can't go on  
10:47:44 14 forever. But go ahead, briefly, if there is something  
10:47:47 15 very specific. Everybody else will get an opportunity  
10:47:49 16 to reply. We have a few minutes.

10:47:50 17 MR. KERWIN: Very briefly respond to what  
10:47:52 18 they satisfied. McIntyre is not binding law here in  
10:47:55 19 Washington. This is a plurality opinion. There is  
10:47:59 20 not any narrowest grounds between the plurality and  
10:48:03 21 the concurrence.

10:48:04 22 The very point of concurrence was that the  
10:48:08 23 commerce was changing. That these facts aren't taken  
10:48:12 24 into consideration, there is no broad new rule that  
10:48:14 25 was going to be announced.

10:48:16 1 This is very similar to Asai, a fractured  
10:48:19 2 ruling from the Supreme Court on this exact issue  
10:48:21 3 Asai. Our Supreme Court said, "no, this is Worldwide  
10:48:26 4 Volkswagen applies."

10:48:27 5 We absolutely have not conducted any  
10:48:30 6 discovery. We have not conducted discovery. CID is  
10:48:36 7 different. I would wholly reject the argument that  
10:48:40 8 our indirect purchasers have some forum in the  
10:48:43 9 federal. They are not represented in the MDL. This  
10:48:46 10 is -- we are their only representative. This is the  
10:48:49 11 only way that our indirect purchasers can seek relief.

10:48:55 12 THE COURT: I have said it in the cases and  
10:49:00 13 quoted from them, Worldwide Volkswagen in particular  
10:49:05 14 at 440 US 297 that:

10:49:17 15 "The foreseeability that is critical to due  
10:49:19 16 process analysis is not mere likelihood that a  
10:49:23 17 product will find its way into a forum State.  
10:49:26 18 Rather it is that the defendant's conduct in  
10:49:28 19 connection with the forum State are such that he  
10:49:32 20 should reasonably anticipate being hailed into  
10:49:37 21 court."

10:49:39 22 There is more language in that case. The  
10:49:45 23 basis for that kind of a determination, the  
10:49:48 24 foreseeability, because it gives a degree of  
10:49:52 25 predictability, allows potential defendants to

10:49:55 1 structure their conduct so that they will know where  
10:49:59 2 they are subject to lawsuits and then provide for  
10:50:03 3 insurance and those kinds of avenues in those  
10:50:07 4 jurisdictions. There is a reason, I think, that the  
10:50:12 5 court in Worldwide Volkswagen reached those  
10:50:16 6 conclusions. But in fact, they did. I think that  
10:50:19 7 those conclusions are reinforced by Grange Insurance  
10:50:21 8 Association, 110 Wn.2nd 752.

10:50:27 9 I read that and sometimes I get on a  
10:50:31 10 defining issue. There may be a distinction that would  
10:50:33 11 be drawn between what is dicta and what is a holding  
10:50:40 12 in a case. I tell you, when I read clear language  
10:50:44 13 from the Supreme Court saying that this is a standard  
10:50:48 14 to be applied, I will give deference to that. I will  
10:50:50 15 pay attention to that, whether it is a holding or not.  
10:50:55 16 I will not ignore it.

10:50:57 17 Perhaps if it is not fully binding, but I  
10:51:00 18 will certainly recognize that the Supreme Court does  
10:51:04 19 not speak casually or carelessly about any legal  
10:51:08 20 issues.

10:51:09 21 I have that in mind, when I read that  
10:51:12 22 Supreme Court saying that a retailer's mere placement  
10:51:16 23 of the product placed in the intrastate commerce is  
10:51:19 24 not, by itself, sufficient.

10:51:23 25 I think then they go on to say that "the

10:51:25 1 standing jurisdiction is justified only if the  
10:51:28 2 defendant has purposefully availed itself of the forum  
10:51:31 3 State's markets," that has been purposefully availing  
10:51:36 4 has been described elsewhere.

10:51:37 5 I do think that in this case that there has  
10:51:44 6 been no showing of these moving defendants having  
10:51:49 7 purposefully availing themselves of markets in the  
10:51:53 8 State of Washington.

10:51:55 9 They are entitled to their motion. I will  
10:51:58 10 grant the motion to dismiss for all of the defendants  
10:52:05 11 here on the jurisdictional grounds.

10:52:08 12 I am not going to order or continue this  
10:52:15 13 for a discovery. I think that there has been no clear  
10:52:20 14 indication of what discovery would actually be.

10:52:22 15 In a CR 56 motion we require that. I think  
10:52:26 16 that we require it for a good reasons that there would  
10:52:29 17 be some indication, both of what the discovery would  
10:52:32 18 be, the materiality of the discovery, what the  
10:52:34 19 evidence would show, and why it hadn't been done  
10:52:38 20 before this time.

10:52:39 21 So, I think for all of those are, perhaps  
10:52:43 22 not directly binding on this motion, under this Rule  
10:52:46 23 12, but they are considerations that guide the court  
10:52:51 24 in making the decision on whether to continue this  
10:52:53 25 motion to allow allow discovery in their case.

10:52:55 1 I will deny your motion for further  
10:52:57 2 discovery.

10:52:58 3 Is there anything further that needs to be  
10:53:03 4 addressed with these motions?

10:53:04 5 MR. YOLKUT: Yes, David Yolcut on behalf of  
10:53:07 6 Panasonic corporation. We also move for our  
10:53:09 7 attorneys' fees as the long arm statute 4.28.185. We  
10:53:14 8 have included that in our proposed order. We would  
10:53:17 9 ask for an award of the attorneys' fees.

10:53:18 10 THE COURT: My understanding is under  
10:53:24 11 motions such as this, there is an issue about your  
10:53:26 12 entitlement to the attorneys' fees. As you may well  
10:53:29 13 be, and as you have cited -- but that comes as a post  
10:53:42 14 hearing motion.

10:53:42 15 Unless you show me that there is something  
10:53:46 16 that would impair your rights to attorneys' fees by  
10:53:52 17 requiring you to make those as a post hearing motion,  
10:53:56 18 I am not going to make award of attorneys' fees at  
10:54:01 19 this time.

10:54:01 20 MR. YOLKUT: Thank you, Your Honor. We will  
10:54:02 21 reserve our rights.

10:54:03 22 THE COURT: All right. Do we have orders?

10:54:08 23 Is that going to be a problem?

10:54:10 24 You will have to look at them.

10:54:12 25 MR. KERWIN: I haven't seen them yet. If I

10:54:14 1 did, I missed it. I am sorry.

10:55:58 2 THE COURT: I have what I believe are -- I  
10:56:06 3 am trying to make sure that I don't give you my, your  
10:56:09 4 brief with my notes on it. I will give you everything  
10:56:12 5 else that you gave me. That is one. You might check  
10:56:19 6 there.

10:56:22 7 THE BAILIFF: Yes, Phillips needs his  
10:56:25 8 papers, because they don't have a copy of their  
10:56:29 9 orders.

10:56:33 10 THE COURT: I don't see that I have  
10:56:35 11 anything more from Phillips than that.

10:56:41 12 MR. MORAN: We will send one later.

10:56:43 13 MR. HWANG: Your Honor, LG will send an  
10:56:46 14 order in later as well,.

10:56:48 15 MS, CHIU: As well as Hitachi, Your Honor.

10:56:51 16 THE COURT: All right. Thank you.

11:00:09 17 MR. KERWIN: Your Honor, do you have an  
11:00:10 18 order for the statute of limitations ruling?

11:00:14 19 THE COURT: I don't think so. I haven't  
11:00:16 20 seen one.

11:00:17 21 MR. KERWIN: We will send you one, Your  
11:00:18 22 Honor.

11:00:18 23 THE COURT: Thank you.

11:02:09 24 THE BAILIFF: All rise. Court is in  
11:02:10 25 session.

# APPENDIX J

## **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.]

#### **Notes:**

**Reviser's note:** "This act" originally appears in 1961 c 216.

**Short title -- Purposes -- 1983 c 288:** See note following RCW 19.86.090.