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NO. 66252-0-1

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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

Respondent/Cross-Appellant,

v.

WASHINGTON MUTUAL BANK, a Washington corporation,

Defendant,

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

Appellants/Cross-Respondents.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF STATE OF WASHINGTON IN
SUPPORT OF CROSS-APPELLANT**

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.¹ This case presents the issue of what considerations a court should undertake when deciding whether to award injunctive relief under Washington's Consumer Protection Act (CPA), RCW 19.86. This issue affects the public interest because it impacts the extent to which the CPA protects Washington consumers from unfair or deceptive practices that occur in trade or commerce. The Attorney General enforces the CPA on behalf of the public,² and has an interest in the development of CPA case law. The Legislature has given the Attorney General a statutory role in private CPA cases by providing that the Attorney General shall be served with CPA complaints and appeals.³

II. INTRODUCTION

The CPA empowers courts to declare a particular business practice unlawful and to enjoin its use. The Trial Court refused to exercise these powers for reasons that are contrary to the language and goals of the CPA. Broadly stated, the Court recognized that certain of defendant's practices were unfair but denied injunctive relief because the language of plaintiff's proposed order was too vague to enforce, because defendant voluntarily

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

² RCW 19.86.080.

³ RCW 19.86.095.

stopped using the unfair acts, and because the court believed that injunctive relief would result in increased litigation.

The Attorney General's Office respectfully submits that the CPA is designed so that trial courts may declare specific acts unfair or deceptive; that voluntary cessation of unlawful practices alone is inadequate grounds for denying injunctive relief; and, that by defining and enjoining particular acts courts will avoid additional suits and conserve judicial resources because they will have clearly stated what acts are unfair or deceptive.

III. ISSUES ADDRESSED BY AMICUS

Did the Trial Court liberally construe the CPA when it denied injunctive relief to a prevailing plaintiff under RCW 19.86.090 for the following reasons:

1. The proposed language was too vague to enforce;
 2. The defendant voluntarily stopped the unlawful practice;
- and,
3. Injunctive relief will increase the burden on the docket?

IV. STATEMENT OF THE CASE

Plaintiff Diane Klem won a CPA claim against defendant Quality Loan Service Corporation (QLS). QLS was the foreclosing trustee under the deed of trust securing a loan made to the borrower, Dorothy Halstein, who is Plaintiff Diane Klem's ward. The jury found that "Quality Loan Service Corporation of Washington violate[d] the Consumer Protection Act." CP 1446. The Verdict Form did not specify the acts that violated the

CPA.⁴ Klem established at trial that QLS deferred solely to the beneficiary of the deed of trust and foreclosed on Klem despite knowing that Klem had a sale arranged that would have fully satisfied the loan and netted the borrower's estate substantial equity. Klem also established that QLS forged dates on foreclosure notices. Although Klem won her CPA claims, the Court denied her request for injunctive relief. CP 1585-88. The Court's denial was based on several findings including:

1. There is "little case law on injunctions pursuant to the Consumer Protection Act"; CP 1586,
2. Plaintiff's proposed language was "overly broad and unenforceable" because a trustee's duty of "good faith" is not defined in the statute or by caselaw, RCW 61.24.010(4); CP 1586-87,
3. There was no evidence that the defendants were still participating in one of the practices deemed to violate the CPA, falsely dating or notarizing documents; *id.*,
4. The Court "assume[d] QLS will follow the law" in future. CP 1588.

A. Injunctive and Declaratory Relief Are the Essential Mechanisms for Enforcing the Consumer Protection Act.

The Trial Court's reasons for denying the injunction run counter to the plain language and goals of the CPA. While the Court is correct that there is "little case law" on the standards for injunctions under the CPA,

⁴ Although the parties used a verdict form that simply asked the jurors to determine whether the defendant violated the CPA, this question should have been directed to the court. Once an act is determined to occur, the question of whether that act is an unfair or deceptive trade practice under the CPA is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

CP 1586, there is a clear policy favoring injunctions that is pronounced in the statute itself.

The CPA first states that injunctions are as favored a remedy for violations as are money damages:

Any person who is injured...may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both,

RCW 19.86.090. This language demonstrates that, unlike non-CPA actions, the Court may award injunctive relief for a violation of the CPA without further findings of irreparable harm, or absence of a remedy at law. This is equally true for enforcement actions brought by the Attorney General:

The attorney general may bring an action ... against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful.

....
(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.

RCW 19.86.080.

The CPA provides for active injunctive relief, such as restraining orders and restitution, but also assumes declaratory relief in the form of a court order declaring a particular act or business practice unfair or deceptive. The Court is specifically authorized to provide relief for any

act it has “declared to be unlawful.” RCW 19.86.080(1) and (2). This provision presumes the Court’s authority to make such a declaration.⁵

The CPA promotes the use of injunctive relief by creating a specific and unique process for enforcing injunctions once they are ordered. The statute requires courts to retain jurisdiction over a CPA claim for purposes of determining defendant’s compliance with the injunction. RCW 19.86.140. Injunction violators are subject to enhanced financial penalties of up to \$25,000, RCW 19.86.140, and/or corporate dissolution or suspension of franchise. RCW 19.86.150 (for violations of RCW 19.86.030 or 19.86.040). The statute also gives private parties additional means to enforce the court’s declaration that a practice is unlawful under the CPA. Any violation of an injunction obtained in an Attorney General action is *prima facie* evidence in subsequent private lawsuits against the party restrained. RCW 19.86.130. In *State v Ralph Williams’ North West Chrysler Plymouth, Inc. (Ralph Williams I)*, 82 Wn.2d 265, 510 P.2d 233 (1973) the Court recognized that the purpose of obtaining an injunction was to define a prohibited practice “and a resulting decree for use in private litigation.” *Id.* at 275. Further, the CPA encourages the Attorney General to participate with private litigants in the formulation of injunctive relief by requiring private litigants to serve the

⁵ *Girard v Myers*, 39 Wn. App. 577, 589, 694 P.2d 678 (1985) states that the CPA does not provide for declaratory relief. However, the Court of Appeals was discussing the plaintiff’s failure to prove injury and that therefore the CPA does not provide remedies to persons not actually injured. The Court did not discuss the portion of the remedies section that refers to practices declared by the Court to be unlawful. RCW 19.86.080(1) and (2).

Attorney General with a copy of any complaint that specifically requests injunctive relief. RCW 19.86.095.

Thus, the provisions of the CPA, taken as a whole, demonstrate that injunctive relief is fundamental to the CPA's goal of protecting consumers and fostering fair and honest competition, RCW 19.86.920, rather than something only available if a remedy at law is inadequate. *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973). The CPA sets forth the Legislature's policy to permit and encourage private litigants to police the marketplace through court orders. The CPA authorizes the courts to declare an act unlawful under the CPA, enjoin a defendant from engaging in that act and enforce that injunctive relief through ongoing jurisdiction, RCW 19.86.140, enhanced penalties, RCW 19.86.140 and a reduced evidentiary burden in subsequent matters, RCW 19.86.130.

B. The Legislature Intended the CPA's Broad Language To Be Refined by Court Decisions.

The CPA's prime directive, that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful," RCW 19.86.020, is purposely comprehensive so that it may be applied to whatever new tactic is used by defendants. As the Washington Supreme Court stated in an early CPA action, the legislature did not specifically define prohibited acts because:

There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again.

Ivan's Tire Service v. Goodyear Tire, 10 Wn. App. 110, 122, 517 P.2d 229 (1973) *aff'd*, 86 Wn.2d 513 (1976), (quoting *Federal Trade Comm'n v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 204, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)). The *Ivan's Tire* court further states that although the Federal Trade Commission Act, 45 U.S.C. § 45 (a)(1), and the CPA, RCW 19.86.020, use the same language, the FTC Act created agency powers to interpret and adjudicate its meaning while the CPA did not. Therefore the process of "defining and proclaiming of the bounds of [the CPA's] terms falls upon the courts." *Id.* at 123. Courts should therefore consider the factual pattern before them and "let the law develop on a case-by-case basis." *Id.*

The U.S. Supreme Court came to a similar conclusion stating that the meaning of unfair business practices in the FTC Act "must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 1324 (1931); *see also Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965) (meaning of unfair and deceptive is "to be defined with particularity by the myriad of cases from the field of business....The words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction.")

This is why court declarations regarding individual practices are so essential under the CPA. To give concrete meaning to the CPA, trial courts must necessarily declare whether specific practices are unfair or

deceptive. The CPA, more than most statutes, is reliant on judicial decisions to achieve its purpose.

C. The Trial Court Failed To Consider the Value of Declaring Specific Acts Unlawful Under the CPA and Enjoining Those Acts.

The parties used a verdict form that asked simply whether QLS violated the CPA. The verdict form did not require the jury to specify which of QLS' acts violated the CPA. Given that the question of whether an act or practice is unfair or deceptive is a matter of law, the Court had the opportunity to declare which act did or did not violate the CPA. *Leingang*, 131 Wn. 2d at 150. The Court denied the proposed injunctive relief because it considered the language of the proposed order "overly broad and unenforceable." CP 1586-87. The Court finds, for example, that because the foreclosing trustee's duty of good faith to the borrower and the lender is not defined by the Deed of Trust Act, RCW 61.24.010(4), or by caselaw, the Court was not willing to enjoin the defendant's actions or declare its practices to be unfair or deceptive. CP 1586-87. However, the Court does suggest that "a contract with a lender that prohibits QLS from exercising its discretion to postpone a sale, even when it believes a situation so warrants, could be a violation of the 'good faith' to the borrower requirement of the Deed of Trust Act." CP 1588.

While the Court could properly decide that Plaintiff's proposed language was "overly broad and unenforceable," that does not prevent it

from declaring QLS' specific conduct an unfair trade practice under the CPA and thus providing guidance to future trustees. The Court has a statutory duty to construe the CPA liberally so that its beneficial purposes may be served. RCW 19.86.920. The Court could have declared that because the foreclosing trustee has a duty of good faith to both parties to the foreclosure, RCW 61.24.010(4), it is an unfair trade practice for a trustee to have a policy of always, and without regard to circumstances, deferring to the lender when deciding whether to postpone a foreclosure sale.⁶ This would fulfill the court's role in "defining and proclaiming the bounds" of the CPA's prohibition against unfair and deceptive practices and provide specific deterrence to QLS in its future practices.⁷ RCW 19.86.020.

D. A Defendant's Voluntary Cessation of an Unlawful Practice Does Not Prohibit a CPA Injunction Barring That Practice.

The Trial Court denied injunctive relief because it found no evidence that the defendants were still participating in one of the practices deemed to violate the CPA, and because it assumed that in the future QLS would follow the law. CP 1586-88. The Court failed to consider the value of prospectively enjoining the defendant to deter future violations and provide guidance to the industry.

⁶ During a hearing on her Motion for Injunctive Relief, Plaintiff asked the Court to enjoin QLS from deferring solely to the lender. 31:10-24.

⁷ QLS still maintains on appeal that it may always defer to the lender on whether to postpone a foreclosure. It does not explain how a trustee with a duty of good faith towards two parties may in all circumstances defer to only one of the parties.

A defendant's voluntary cessation of an unlawful activity does not prevent a Court from prospectively enjoining that activity. *Goodman v. Federal Trade Comm'n*, 244 F.2d 584, 593 (9th Cir. 1957) (“[A]s one of the aims of the [FTC Act] is to prevent unfair and deceptive practices, orders will be sustained even when it is clearly shown that the practices have actually been abandoned. The cogent and obvious reason is that there is no guarantee that the practice might not be resumed.”); *Oregon-Washington Plywood Co. v. Federal Trade Comm'n*, 194 F.2d 48, 50 (9th Cir. 1952) (“It is of course well settled that discontinuance of an illegal practice does not of itself render inappropriate the entry of a cease and desist order.”)⁸ In *State v. Ralph Williams' NW Chrysler Plymouth (Ralph Williams II)*, 87 Wn.2d 298, 553 P.2d 423 (1976) the Court enjoined defendant from future violations even when the business was closed at the time of the injunction. The Washington Supreme Court set a high standard for finding that injunction would not be appropriate. The Court stated that injunctive relief is only moot if “events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Ralph Williams I*, 82 Wash.2d at 272.

Prospective relief is called for in the statute because it is not uncommon for CPA defendants to return to lucrative practices once attention has faded. As an example, in *State v. Lee*, 144 Wn. App. 462,

⁸ The prohibition against unfair or deceptive acts or practices in the FTC Act is virtually identical to the CPA. Compare 15 U.S.C. § 45 (a)(1) with RCW 19.86.020. The legislature intended that courts be guided by federal court decisions and FTC Orders interpreting similar federal statutes. RCW 19.86.920.

182 P.2d 1008 (2008), *review denied* 165 Wn.2d 1017 (2009), the defendant sold investments in a device called the Hummingbird Motor, an engine that defendant claimed actually produced more energy than it consumed. The State obtained an Order in 2002 that, among other things, enjoined defendant from making scientific claims without independent peer-reviewed tests. In 2006, the Defendant made the same claims while promoting investments, without the peer-reviewed tests, and the State successfully petitioned to enforce the 2002 Injunctive Order. Similarly, in *State v. Black*, 100 Wn.2d 793, 676 P.2d 963 (1984) a realtor had entered a Consent Order in 1974 enjoining him from fixing sales commissions. In 1977, he engaged in a variation of the price fixing scheme. The Court held that while his new practices did not violate the CPA they did violate the Consent Decree and the price fixing was therefore unlawful. *Id.* at 803. *See also Irwin v. Mascot*, 370 F.3d 924 (9th Cir. 2004) (debt collector violates three times).

Legal scholars, noting this phenomenon, believe injunctive relief is an effective deterrent to repeat unlawful behavior:

One of the potentially most effective UDAP [unfair or deceptive act or practice] remedies against widespread marketplace misconduct is for a private individual to seek a court-ordered injunction preventing the seller from engaging in specified conduct in the future. A merchant may treat occasional damage awards ... as an acceptable cost of business, not deterring future conduct. But a properly framed and monitored injunction can eliminate the seller's use of the challenged practice against all future customers.

...

While an injunction can be an effective remedy it need not be an onerous one. It does not penalize a business for its conduct, but solely orders the seller not to repeat the practice, putting the company on clear notice of specifically defined prohibited practices. In theory, judges should enjoin future conduct even if they are unwilling to order a company to pay for past conduct that was not clearly deceptive.

National Consumer Law Center, *Unfair and Deceptive Acts and Practices*

§ 13.6.1, at 862 (7th ed. 2008). The case of *Hockley v. Hargitt* pronounces

this principle in Washington law:

[The CPA's] broad public policy is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual's own private rights.

...

If each consumer victim were limited to injunctive relief tailored to his own individual interest, the fraudulent practices might well continue unchecked while a multiplicity of suits developed. On the other hand, if a single litigant is allowed to represent the public and consumer fraud is proven, the multiplicity of suits is avoided and the illegal scheme brought to a halt. Both results are in the public interest and consistent with the liberal construction of our consumer protection act.⁹

82 Wn.2d at 350-51.

Here, the trial court denied injunctive relief in part because it did not want to be “asked to intervene any time a borrower requested

⁹ See also *Agliori v. Metropolitan Life Ins. Co.*, 879 A.2d 315, 321-22 (Pa. Super. Ct. 2005) (Interpreting Pennsylvania’s consumer protection statute the court states: “[d]ecisions by our Supreme Court and this Court have stressed time and again the deterrence function of the statute... the intent and purpose of the [Unfair Trade Practices Law] are to curb and discourage . . . future fraudulent behavior in consumer-type cases... If the court permits the appellee-defendants simply to repay what is owed the consumer under the fraudulently induced contract, the deterrence value of the statute is weakened, if not lost entirely. We cannot accept such an evisceration of the statutory goals.”) (*citations omitted*).

[foreclosure sale] postponement.” CP 1587, 88. However, *Hockley* stands for the proposition that CPA injunctions prevent “a multiplicity of suits,” not encourage them. *Hockley*, 82 Wn. 2d at 350-51. If the Court does not declare the practice unlawful and enjoin it under the CPA when the practice first comes before it, then it foregoes tremendous deterrence powers and allows for repeat litigation. The unlawful nature of an act must be re-litigated entirely rather than obtaining the *prima facie* evidentiary standard allowed by RCW 19.86.130. Also, the defendant will not be subject to enhanced penalties or possible loss of charter or franchise for violating an injunction. Potential defendants can therefore better quantify the cost and risk of another lawsuit versus the immediate profits to be gained from repeating the practice. RCW 19.86.140 and .150. These are all factors that the Trial Court should consider before denying an injunction simply because the practice has not been shown to be ongoing.

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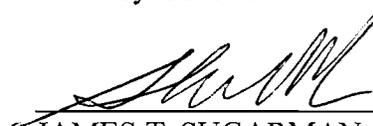
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V. CONCLUSION

This Court should remand this matter for reconsideration of whether injunctive relief should be awarded given the language and goals of the CPA.

RESPECTFULLY SUBMITTED this 11 day of March, 2011.

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