

67629-6

67629-6

No. 676296-I  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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BRIAN A. HEBERLING,

Appellant,

v.

JPMORGAN CHASE BANK,

Respondent,

and

WASHINGTON MUTUAL BANK, FA; and BANK OF AMERICA,  
NA,

Defendants.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

This is a *de novo* appeal from a summary judgment in favor of defendant JPMorgan Chase Bank (“Chase”) on a Consumer Protection Act claim. Appellant Brian Heberling (“Heberling”) alleges that Chase committed unfair and deceptive acts and practices in connection with a real estate loan modification. The trial court initially denied summary judgment on the Consumer Protection Act claim and then denied a motion for reconsideration. Chase then effectively filed the same motion a second time, and the trial court granted it.

The trial court was right the first time when it denied summary judgment on the Consumer Protection Act claim. This Court should reverse the order granting the second motion and remand for trial.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred when it granted Defendants’ Second Motion for Summary Judgment (CP 1003-04) and denied Heberling’s Motion for Reconsideration (CP 1005-06)

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. When a national bank takes unfair and deceptive action pursuant to its practices and procedures, is the public interest element under RCW 19.86.093 satisfied?

2. Did Appellant present material issues of fact regarding his Consumer Protection Act claim?

#### **IV. FACTUAL BACKGROUND**

For fifteen months Heberling worked with Washington Mutual and then Chase on loan modifications, was promised that his modifications were approved, and then lost his property to foreclosure. Heberling had three separate loans secured by three separate properties. The loans were initially with Washington Mutual, but transferred to Chase when Washington Mutual was closed by the FDIC. CP 675-76 at ¶ 11 (Heberling Declaration). The amount of these three loans was approximately \$4,000,000.00. CP 674 at ¶¶ 3-5.

Despite Heberling's compliance with its demands, Chase sold one of the properties in a foreclosure auction. The foreclosure concerned a deed of trust and promissory note executed in the amount of \$1,800,852.59 on real property commonly described as 1660 W. Lake Sammamish Parkway NE, Bellevue, WA 98008 ("the subject property"). *Id.* at ¶ 5.

In 2008, Heberling recognized that he faced potential difficulties with servicing the debt loads on three of his properties. CP 674-75 at ¶¶ 7-8. In July of 2008, Heberling elected to take a proactive approach to work out a modification plan with Washington Mutual. *Id.* at ¶¶ 7-8. At

the time of the initial contact Heberling was current on all three loans. *Id.* at ¶ 8.

Heberling contacted the bank, and on July 31, 2008, Christie Long of Washington Mutual informed Heberling of the requirements and types of loan modifications available to him. CP 675 at ¶ 9; CP 693. On September 18-19, 2008- Heberling contacted Long and informed her that he would like to submit a loan modification package for all three loans. CP 675 at ¶ 10. Long stated that a negotiator who is authorized to modify the three loans would contact him in 4-5 business days. *Id.* Heberling submitted a loan modification package to Washington Mutual. CP 675 at ¶ 10; CP 695-96.

That process was interrupted on September, 25, 2008, when Washington Mutual was seized by the federal bank regulators in the largest bank failure in the United States and simultaneously sold to JPMorgan Chase. CP 675-76 at ¶ 11. The terms of Chase's purchase are set forth in a Purchase and Assumption Agreement that unequivocally states that Chase "specifically assumes all servicing rights and obligations of the Failed Bank". CP 624 at ¶ 2.1 (Agreement to Purchase Washington Mutual). At its CR 30(b)(6) deposition, Chase did not dispute that it is obligated to perform the servicing obligations. CP 663 at pp. 41-42.

Nearly a month later on October 14, 2008, Long contacted Heberling and apologized for the delay, stating that it was due to her failure to forward the loss mitigation package to the appropriate person. CP 676 at ¶ 12. She further advised that all of the files had been assigned to another department and apologized for the inconvenience. *Id.* Finally, she stated that the Buyer Price Opinions have been ordered and a negotiator was moving forward with the request for loan modifications. CP 676 at ¶ 12; CP 698-99.

A week later, Heberling called and was told that employee Michael Lemon had been assigned as negotiator for the loans. CP 676 at ¶ 13. The bank would not provide direct contact information for Lemon. CP 676 at ¶ 13; CP 698-99.

The following week, Heberling attempted to make loan payments at a local Washington Mutual branch in Silverdale, WA, but the payment was refused. CP 677 at ¶ 14. Heberling was advised that his loans and accounts had been locked down and that the system would not allow for payments due to the pending loan modification. CP 677 at ¶ 14; CP 701-05.

In early November 2008, Heberling received a message from Michael Lemon asking him to call regarding the modification of the loans. CP 677 at ¶ 15. Heberling left a message at the number given by Lemon

and also requested that other bank representatives send an internal e-mail to Lemon asking him to contact Heberling. *Id.*

On November 10, 2008, Heberling received a phone call from Lemon with a specific modification proposal that included interest rates on each loan as follows:

	1660 Property	1090 Property	Manzanita Prop
Year 1	3.53%	3.0%	3.51%
Year 2	3.99%	3.69%	4.26%
Year 3-5	4.46%	4.38%	5.02%

CP 677-78 at ¶ 16. Heberling inquired about refusal of payments on two of the loans, and Lemon stated that it is customary for the lender to stop taking payments on the accounts while a loan modification is in process. *Id.* He advised Heberling that payments would not be accepted during the process. *Id.*

When Heberling expressed his concerns about possible foreclosure for non payments, Lemon stated that Heberling should not worry because all three of his loans were being modified and that the missed payments will be rolled into the terms of the new loan. *Id.* Finally, Heberling was informed that he should receive the modification paperwork by Thanksgiving. *Id.*; CP 705.

Heberling did not receive the paperwork by Thanksgiving, and on December 15, 2008, Lemon called Heberling to inform him of a hold up due to title report issues with all three properties. CP 678-78 at ¶ 19. Lemon also stated that the modification terms had changed slightly and provided the following revised modification terms to Heberling:

	1660 Property	1090 Property	Manzanita Prop.
Year 1	3.22%	1.0%	1.0%
Year 2	3.78%	3.0%	3.0%
Years 3-5	5.0%	5.0%	5.0%

*Id.* Heberling confirmed that he was not making payments and was advised again that his payment will not be accepted by the bank until the modification was complete. CP 678-78 at ¶ 19; CP 712.

The following day, Heberling sent documentation showing lien releases as requested to address the title report issues on two of the properties. CP 678 at ¶ 18. The third title issue was being resolved by the bank as it showed two liens for the same loan. CP 678 at ¶ 18.

Over the following months, Heberling dealt with the bank regarding title issues. CP 678-80 at ¶¶ 18-26. Heberling sent Lemon the paperwork to resolve the issues. CP 678 at ¶ 18. However, other bank representatives later told Heberling that the paperwork still had not been received. CP 679-80 at ¶¶ 22-24. Heberling again sent the paperwork to

Lemon and to “Rita,” a representative in California. CP 679-80 at ¶ 24. In order to resolve the issues, Heberling offered to work with Chase to clear up the title issues and was provided with a lender’s copy of the title reports. CP 680 at ¶ 25. Heberling worked with Seattle and Tillamook County, Oregon First American Title offices to resolve the title issues. CP 680-81 at ¶¶ 26-27; CP 714-54.

The title reports that Chase sent to Heberling also included internal Chase documents confirming Lemon’s statement that Heberling had been “Offered Step Rate IO Balloon per manager approval” and identifying the specific terms of the offer. CP 750-52; CP 665-66 at pp. 96-101 (Chase deposition). In March, Heberling called and faxed Lemon to verify that the title issues holding up the loan modifications had been resolved. CP 681-82 at ¶¶ 28-34; CP 756-57.

On March 23, 2009, Heberling was advised that the title issues on two of the properties had been cleared as of March 19, 2009. CP 680-81 at ¶¶ 26-28. On March 24, 2009, Lemon told Heberling that the title issues on the final property house had been cleared, that the modification terms outlined on December 15, 2008, were approved, and that the files were being transferred so that the appropriate paperwork could be drawn up. CP 681 at ¶ 30.

However, later that day, Heberling learned that a tenant in one of the properties had just been served a Notice of Trustee Sale. CP 681-82 at ¶ 31. Heberling left a voice mail for Lemon stating his disbelief since he had been informed earlier in the day that the modifications for all three loans had been approved. CP 681-82 at ¶¶ 31-32; CP 770-71.

Over the following week, Heberling attempted to call the contact numbers provided on the Notice of Trustee Sale and the named representative, Helen Galloway, but found only full voicemail boxes that would not accept new messages. CP 682 at ¶¶ 33-34; CP 773-74.

On April 13, 2009- Heberling received collection notices stating that one of the properties was in default and heading for foreclosure sale despite the modification approval. CP 683 at ¶¶ 36-37; CP 776-77. When Heberling tried to obtain an explanation, he was told that the loans had been reassigned to a new negotiator named Kelley Veals. CP 683 at ¶¶ 38-39; CP 779-84. He then was told that two of the files had been reassigned back to the Jacksonville, Florida office, and that the third was assigned to a different office. CP 683 at ¶ 37.

At the end of April, 2009, Heberling received Trial Plan Agreement Modifications for two of the loans. CP 683 at ¶ 39. He also received updated agreements for those properties later that summer. CP 683-84 at ¶¶ 41-42; CP 786-90. Heberling has made the payments

pursuant to the letters he received on the two properties, and no collection actions are pending. CP 684 at ¶ 44; CP 686 at ¶ 51.

Heberling did not receive the promised paperwork for the third property. He called and inquired about the loan, and was repeatedly told that the documents were in the works and would be coming. CP 683-84 at ¶¶ 40, 42. This continued throughout the summer of 2009. CP 684 at ¶ 43.

In the fall of Fall 2009, Heberling received a Notice of Default and Notice of Trustee Sale for the third property. CP 684 at ¶ 44. He immediately contacted Washington Mutual and was told to submit a new hardship letter. *Id.* He prepared and sent the requested documents. *Id.*; CP 792-836. He also expressed concerns about the foreclosure notices, but was told not to worry, that they were automatically generated, and that, similar to his other property, it took time to get through the system. CP 684 at ¶ 44. Since he had received such notices for the other two properties during the modification process, he accepted that explanation. *Id.*

In late September 2009, Heberling received a letter dated September 21, 2009 stating that his loan modification for the third property had been denied. CP 685 at ¶ 47. He immediately called the

bank and learned that the denial was based on mistaken information, which he corrected. *Id.*

A few days later, Heberling received a second letter stating that his modification was still pending and that additional information was requested. CP 685-86 at ¶¶ 47-48; CP 838-46. Heberling sent the requested information. *Id.* Heberling then made every conceivable effort to reach the bank and clarify the situation. CP 686 at ¶ 49; CP 848.

Despite the fact that its last correspondence requested information for the modification, and despite the fact that Heberling provided it, no one at the bank responded until October 20, 2009, when a customer service representative called to say that the modification was denied, and that the property would be sold unless Heberling paid more than \$100,000 in the next two days. CP 687 at ¶ 52. When he was unable to do so, the bank sold the property at foreclosure on October 23, 2009. CP 686 at ¶ 50.

## **V. LEGAL ANALYSIS**

### **A. Standard of Review.**

The standard of review on an order granting summary judgment is, of course, *de novo*. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Heberling is entitled to the benefit of the evidence and all reasonable inferences that can be drawn from it. CR 56.

**B. The Trial Court Erred in Granting Summary Judgment.**

This is precisely the kind of case that should be brought under the Consumer Protection Act. Chase engaged and engages in a pattern of conduct that causes ruinous harm to consumers, but staves off common law claims on technicalities. It deals with consumers by phone so that no written promise to modify a loan exists. It transfers files from person to person, making it all but impossible to enforce oral commitments. It hides behind federal laws and regulations whether they apply or not. This pattern of conduct does not fit easily into any tort claim, but it does have the capacity to deceive a substantial portion of the public and therefore constitutes an unfair or deceptive act under the Consumer Protection Act. *State v. Pacific Health Center, Inc.*, 135 Wn.App. 149, 170, 143 P.3d 618, 628 (2006); *see Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885, 894 (2009) (“Whether a particular act or practice is ‘unfair or deceptive’ is a question of law.”).

In its first summary judgment motion, Chase argued that “there is no evidence that defendants engaged in unfair or deceptive conduct that affects the public interest.” CP 26. The entire argument on the Consumer Protection Act was just over a page long. CP 26-27. Chase’s reply brief also contains a page a conclusory statements, but no considered argument. CP 336-37. It is no surprise that the trial court dismissed the motion on

the Consumer Protection Act because Chase never made any serious arguments in the first place. CP 341.

Chase's second summary judgment motion contains just over two pages on the consumer protection act and seems to argue that causation and the public interest impact. CP 385-87. Chase also included the Consumer Protection Act in its request for summary judgment on damages. CP 388-92. That argument was primarily based on the fact that Heberling did not know what his long term plans for the property were. CP 391.

In his response, Heberling pointed out that Chase was relying on case law for the public interest impact when the legislature had replaced the existing test with a statutory one. CP 601-02. Chase was not even making a relevant argument on the public interest element. On damages, Heberling explained that he lost the property and had invested substantial sums in reliance on Chase's assurances. CP 603; *see* CP \_\_\_ (evidence of \$400K).

In its reply brief, Chase essentially just pointed out that Heberling's case was "based solely on his own subjective recollection of the facts; Plaintiff lacks evidence otherwise supporting this erroneous view," which is another way of saying that Heberling testified to those facts in his declaration. That declaration must be accepted as true for

purposes of summary judgment, but Chase repeatedly argues that the declaration should be ignored because it would be “contrary to logic” or “illogical” for it to act in the manner described. CP 27, 858. The fact that Chase’s actions made no sense is not a defense.

**C. Heberling Has Presented Material Issues of Fact.**

The Consumer Protection Act has five elements, and Heberling has presented evidence to support all of them.

To prevail in a private action brought under the Consumer Protection Act, RCW 19.86.090, the plaintiff must establish that: (1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury in his or her business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered.

*Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288, 296 (1997). Chase has disputed only elements 1, 3 and 5.

**1. Unfair or Deceptive Act or Practice.**

An act or practice is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *State v. Pacific Health Center, Inc.*, 135 Wn.App. 149, 170, 143 P.3d 618, 628 (2006). Whether an act occurred is a question of fact, but whether it is unfair or deceptive is a question of law. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885, 894 (2009).

For purposes of summary judgment, it is established that Chase told Heberling not to make payments, to ignore the foreclosure notices, and that he had been approved for a loan modification. Chase then acted contrary to those statements by foreclosing on Heberling's property. In *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 212-213, 194 P.3d 280, 289 (2008), this Court held that a builder's failure to disclose defects in a single home was unfair and deceptive. In *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn.App. 553, 825 P.2d 714 (1992), this Court held that an employee's misrepresentation of contract documents was an unfair or deceptive act. A misrepresentation made to only one person has the capacity of deceive a substantial portion of the public if made in a standard form. *Edmonds v. John L. Scott Real Estate, Inc.* 87 Wn.App. 834, 845, 942 P.2d 1072, 1078 (1997); *Henery v. Robinson*, 67 Wn.App. 277, 291, 834 P.2d 1091 (1992) (review denied, 120 Wn.2d 1024, 844 P.2d 1018 (1993)).

Here, Chase's standard form said that the loan modification was approved. CP 671-71. Heberling was dealing with Chase's established programs for loan modifications, and he was deceived pursuant to them. Chase's conduct had the capacity to deceive a substantial portion of the public and therefore was unfair and deceptive.

## **2. Public Interest Impact.**

Chase has never even acknowledged that the legislature codified this element at RCW 19.86.093. Under that statute, the public interest is affected if the unfair or deceptive act “had the capacity to injure other persons” or “has the capacity to injure other persons.” RCW 19.86.093(3). Chase’s conduct in the loan modification process affects every single homeowner who seeks a modification. Because that process results in foreclosures contrary to the statements and assurance of Chase employees, it has the capacity to injure other persons and will continue to injure other persons until Chase is deterred by a Consumer Protection Act judgment.

**3. Damages and Causation.** Heberling was told that he was approved for a loan modification that would allow him to retain his property and avoid foreclosure. He ran the gauntlet and did what Chase demanded of him, but he still lost his property. The loss or forfeiture of a property interest has been recognized as damages under the Consumer Protection Act. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593, 675 P.2d 193, 201 (1983).

Chase argues that this damage was not caused by its conduct, but instead by a proper foreclosure. Chase says that there is no evidence of “but for” causation (CP 390-91), but that evidence is found in paragraph

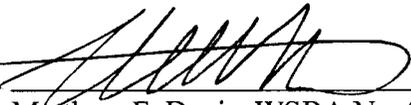
51 of Heberling's declaration in opposition to the second summary judgment motion,. CP 686.

**VI. CONCLUSION**

This case presents the question whether Washington law will provide any remedy at all to a homeowner who is misled by a bank in the loan modification process. Neither the common law nor the post-sale remedies set forth in RCW 61.24.127 give homeowners relief when they lose their homes after navigating the byzantine procedures banks have created. Judge Spector correctly denied summary judgment the first time the motion was brought, and this Court should reverse her order granting the second summary judgment on the Consumer Protection Act claim against Chase.

DATED this 16<sup>th</sup> day of January, 2012.

DEMCO LAW FIRM, P.S.



Matthew F. Davis, WSBA No. 20939  
Attorneys for appellant

DECLARATION OF SERVICE

I, Linda Fierro, state: On this day I caused to be delivered by ABC Messenger for same day service to the Court of Appeals Division I the BRIEF OF APPELLANT and via email and ABC messenger service for delivery on January 18, 2012 to:

Joshua Schaer

Routh Crabtree Olsen, P.S.

13555 SE 36th St., Ste 300

Bellevue, WA 98006

I certify under penalty of perjury under the laws of the State Washington that the foregoing is true and correct.

Dated this 17th day of January, 2012 at Seattle, Washington.

  
\_\_\_\_\_  
Linda Fierro

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