COMMENTS

Dispensing with the Public Interest Requirement in Private Causes of Action under the Washington Consumer Protection Act

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I. INTRODUCTION

It has been more than eighteen years since the Washington Supreme Court handed down its landmark decision in *Hangman Ridge Training Stables v. Safeco Title Insurance Company*.[1] This was the final decision in a string of cases in which the court attempted to resolve problems arising from the application and interpretation of the right to a private cause of action under Washington's Consumer Protection Act ("CPA").[2] *Hangman Ridge* changed the face of private causes of action under the CPA by establishing a stringent five-part test that a private party must meet in order to establish a CPA violation. In addition, the *Hangman*

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1. 105 Wash. 2d 778, 719 P.2d 531 (1986).

2. Washington's Consumer Protection statutes are codified in WASH. REV. CODE § 19.86. § 19.86.090 (West, WESTLAW through 2005 legislation) confers a private cause of action under the CPA:

> Any person who is injured in his or her business or property by a violation of [Wash. Rev. Code] 19.86.020 . . . may bring a civil action in the 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, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained . . . .

Ridge court reaffirmed the requirement that private litigants bringing a CPA claim must show that their action affects the public interest,[3] and it established a set of general threshold questions to aid courts in determining whether a particular unfair or deceptive act touches upon the public interest.[4] After the *Hangman Ridge* decision, Washington remained in the minority of states with a judicially-imposed public interest requirement for private causes of action.[5]

The *Hangman Ridge* court's motivating force was to address significant judicial misinterpretation of the CPA's private cause of action statute.[6] It was also an opportunity to reevaluate Washington's highly debated and criticized judicially-imposed public interest requirement.[7] However, in the years since *Hangman Ridge*, the legal significance of the

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3. 105 Wash. 2d at 788, 719 P.2d at 537.

4. *Id.* at 790, 719 P.2d at 538. The Washington Supreme Court first construed WASH. REV. CODE § 19.86.090 (2005) to require a showing that the conduct in question affected the public interest in *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 334, 544 P.2d 88 (1976) ("It follows that an act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General under the act.").

5. Most states that permit private causes of action do not specifically require a public interest showing. Where the public interest element is required, it is generally the result of judicial interpretation. *See, e.g., Marrale v. Gwinnett Place Ford*, 609 S.E.2d 659, 664 (Ga. Ct. App. 2005) (noting that suits brought under GA. CODE ANN. §§ 10-1-390–407 (West, WESTLAW through 2005 Leg. Sess.) must serve the public interest) (citing *Zeeman v. Black*, 273 S.E.2d 910 (Ga. Ct. App. 1980)); Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000) (requiring litigants bringing a cause of action under Minnesota's Private Attorney General Statute, MINN STAT. § 8.31 (1998), to demonstrate that a cause of action is of benefit to the public); Oswego Laborer's Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741 (N.Y. 1995) (interpreting N.Y. GEN. BUS. LAW § 349(h) (McKinney 2004)).

6. The CPA private right of action, as created by the legislature, consists of four specific elements: (1) the defendant must have committed an unfair or deceptive act or practice; (2) the act or practice must have occurred "in the conduct of any trade or commerce"; (3) the plaintiff must have suffered injury to "his business or property"; and (4) there must exist a causal relationship between the defendant's act or practice and plaintiff's injury. WASH. REV. CODE § 19.86.090 (West, WESTLAW through 2005 legislation). However, shortly before *Hangman Ridge*, Washington courts had created three other tests to bring private causes of action under the CPA, each with its own differing set of elements. *See* discussion *infra* Part II.B.; *see* Milton G. Rowland, *The Consumer Protection Act Private Right of Act: A Reevaluation*, 19 GONZ. L. REV. 673, 675–77 (1984).

7. The gist of criticism surrounding the public interest requirement stemmed from the fact that the public interest requirement actually disserved the purposes of the CPA because it actually made recovery more difficult. Rowland, *supra* note 6, at 688. In addition, a public interest requirement seemed an impractical requirement for a statute conferring *private* causes of action for individuals seeking compensatory damages, rather than large public agencies that were more likely to see injunctive relief. For other law review articles discussing the public interest requirement see David J. Dove, *Washington Consumer Protection Act – Public Interest and the Private Litigant*, 60 WASH. L. REV. 201 (1984); Susan K. Storey, Note, *On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act*, 10 U. PUGET SOUND L. REV. 143 (1986); Rowland, *supra* note 6 at 673; Carol S. Gown, *Private Suits Under Washington Consumer Protection Act: Public Interest Requirement*, 54 WASH. L. REV. 795 (1979).

public interest requirement has diminished in light of the development of the law of unfair or deceptive acts. Specifically, the manner in which courts interpret what constitutes an unfair or deceptive act has, to a large degree, subsumed the independent legal significance of the public interest requirement, rendering it a duplicative and time-consuming element that should no longer be necessary to bring a private cause of action. In practical terms, the standard for unfair or deceptive acts in Washington largely dispenses with the need for a separate inquiry into whether the public interest element has been satisfied. Ultimately, either the Washington Supreme Court or the Washington Legislature should eliminate the public interest requirement as a threshold condition necessary to bring a private cause of action under the Washington CPA.

This Article explores the application of the public interest requirement since the decision in *Hangman Ridge* and considers whether the tests devised by the *Hangman Ridge* court to determine public interest are still necessary in light of current interpretations of what constitutes an unfair or deceptive act. Part II provides general background information regarding the development of consumer protection laws in Washington leading up to the *Hangman Ridge* decision. Part III discusses the *Hangman Ridge* decision. Finally, Part IV argues, through representative cases, statutory language, and a comparison with other jurisdictions, that unfair or deceptive acts are misconduct that necessarily touches the public interest, and that the public interest requirement no longer retains any independent legal significance.

II. EVOLUTION OF THE PRIVATE LAW OF CONSUMER RIGHTS

The evolution of the private law of consumer rights necessarily begins with a discussion of the rise and fall of the doctrine of caveat emptor as well as a brief recounting of the formation of the Federal Trade Commission ("FTC"). This section will then examine the state of consumer protection law in Washington prior to the *Hangman Ridge* decision and how this backdrop shaped the court's decision.

A. From the Doctrine of Caveat Emptor to the Federal Trade Commission

Before commissions, statutes, and attorney's fees, the earliest consumer protection for civil wrongs was found in the non-statutory

body of commercial tort law.[8] An injured party had to show that a merchant had breached some duty owed to the plaintiff, and that this breach of duty proximately caused the plaintiff to suffer injury.[9] One of the products of this strict form of commercial law was the doctrine of caveat emptor.[10] Originally applied to the transfer of real property, the doctrine of caveat emptor required buyers to "fend for themselves" because it was assumed that sellers and purchasers occupied equal bargaining positions and shared an equal opportunity to inspect the quality of the property and to discover defective conditions before the transfer of title occurred.[11]

Caveat emptor was a substantial obstacle to judicial recourse if a consumer discovered defects after the transaction. The combined effect of burdens of proof and sellers' defenses virtually eliminated effective enforcement of a consumer's rights through an action in tort for deceit.[12] Buyers faced the high burden of proving that the seller has intentionally misrepresented a material fact, and sellers defended on the grounds that they had engaged in "mere puffery."[13] Moreover, an action for breach of a common law warranty was often foreclosed by lack of contractual privity.[14]

Caveat emptor survived in this country well into the middle of the twentieth century, but changing market forces and new movements to protect the consumer ultimately spelled its demise.[15] The rapid development of a complex, ever-expanding market of goods meant that an unregulated market could no longer deliver economically efficient

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8. NAT'L CONSUMER LAW CTR, A LAWYER'S GUIDE TO RCW 19.86: THE WASHINGTON UNFAIR BUSINESS PRACTICES – CONSUMER PROTECTION ACT 2 (1970).

9. *Id.*

10. *Id.* The English common law first adopted the doctrine of caveat emptor in the celebrated case of *Chandelor v. Lopus*, 79 Eng. Rep. 3, Cro. Jac. 4 (Ex. Ch. 1603).

11. Alan M. Weinberger, *Let the Buyer Be Well Informed? – Doubting the Demise of Caveat Emptor*, 55 MD. L. REV 387, 390 (1996). At the time, it was believed these assumptions were justified because improvements to products were generally non-complex, and discerning buyers were capable of investigating the quality of the goods for themselves. These were truly arms-length transactions. *Id.* at 392.

12. NAT'L CONSUMER LAW CTR, *supra* note 8, at 3.

13. NAT'L CONSUMER LAW CTR, *supra* note 8, at 3.

14. Thomas J. Holdych, *A Seller's Responsibilities to Remote Purchasers for Breach of Warranty in the Sales of Goods Under Washington Law*, 28 SEATTLE U. L. REV. 239, 240–41 (2005).

15. For an account of the replacement of caveat emptor in sales law with warranties, *see generally* Karl N. Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 737–44 (1936). The evolution away from caveat emptor has been most dramatic in the context of residential real estate. *See generally* George Lefcoe, *Property Condition Disclosure Forms: How The Real Estate Industry Eased The Transition From Caveat Emptor To "Seller Tell All,"* 39 REAL PROP. PROB. & TR. J. 193 (2004).

outcomes.[16] Products were no longer the sole factor to consider in evaluating quality; goods could easily be differentiated through advertising, packaging, and other "tricks of contemporary merchandising" that amounted to a deluge of information that consumers could no longer be expected to evaluate reasonably in making optimal decisions.[17]

The development of the law of deceptive trade practices is also an important step on the road towards private causes of action for consumers. Perhaps the most widely recognized authority in this area is the Federal Trade Commission ("FTC" or "Commission"), one of the oldest regulatory agencies in the United States, which was established by the Federal Trade Commission Act in 1914.[18] Although originally intended to regulate trade and monopolistic business practices, a 1938 amendment to the Act gave the Commission broad authority to prohibit "unfair or deceptive acts or practices" in or affecting commerce, thus cementing the Commission's authority over consumer-related issues.[19]

While the Commission's authority appears plenary, there is one important jurisdictional obstacle to a Commission action. The FTC Act states that the Commission shall issue a complaint whenever it has reason to believe that an unfair or deceptive trade practice has been committed, and "if it shall appear to the Commission that a proceeding . . . would be to the interest of the public."[20] The nature of this limitation was first explored in the Supreme Court decision *FTC v. Klesner*,[21] in which the Court held that the scope of the FTC's authority is "strictly

16. Babette B. Barton, *Private Recourse for Consumers: Redress or Rape?*, *in* PROTECTING CONSUMER INTERESTS: PRIVATE INITIATIVE AND PUBLIC RESPONSE 183, 184 (Robert N. Katz ed., 1976).

17. Richard J. Barber, *Government and the Consumer*, 64 MICH. L. REV 1203, 1226 (1966). Other factors that distinguished the market in the 1960s from previous years included the flood of new technologically advanced products, the alleged power of corporations to exert unprecedented control over the market, the difficulties associated with buying with freely available credit, and the plight of the consumer left out of mainstream affluence. *See also* CONSUMER PROTECTION 140 (Lester A. Sobel et al. eds., 1976).

18. 15 U.S.C. §§ 41–58; *see generally* ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION HANDBOOK 37–39 (2004).

19. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45(a)(1)). The Commission had, for many years prior, issued cease and desist orders against the practice of deceiving consumers, recognizing this as an unfair method of competition and within the purview of the commission. The FTC faced a setback, however, in *FTC v. Raladam Co.*, 283 U.S. 643 (1931), in which the Supreme Court refused to find that a seller's failure to reveal certain safety hazards in advertisements for an obesity cure constituted "unfair competition." It should also be noted that the provisions of the FTC Act were primarily intended to abolish the doctrine of caveat emptor. *See* NAT'L CONSUMER LAW CTR, *supra* note 8, at 15.

20. 15 U.S.C. § 45(b) (1992).

21. 280 U.S. 19 (1929).

limited" by the public interest requirement, that the public interest must be "specific and substantial," and that the Commission's determination that a proceeding met the public interest prerequisite was subject to judicial review. [22] This brief history of the modernization of consumer protection law evinces a unique spirit of empowerment which overrode the doctrine of caveat emptor. In no uncertain terms, the trend has been towards greater consumer protection, and is thus a relevant and necessary backdrop for the discussion of the public interest element in Washington.

B. Consumer Protection Law in Washington before Hangman Ridge

Sharing the concerns of the federal government, many states' authorities also began the process of passing new laws and amending old ones to enhance the position of consumers. In 1961, in direct response to the growing inadequacy of existing state laws and remedies, the Washington Legislature passed an act similar to the FTC Act, which permitted the Attorney General to seek redress for unfair or deceptive trade practices.[23] In 1970, the CPA was amended to create a private cause of action for individuals under the Act.[24] Under the new language, there were four elements: (1) The defendant must have committed an unfair or deceptive act or practice; (2) the act or practice must have occurred "in the conduct of any trade or commerce"; (3) the plaintiff must have suffered injury to his "business or property"; and (4) a causal relationship must exist between the defendant's act or practice and the plaintiff's injury.[25]

The law that developed subsequent to this amendment, however, became incongruous and conflicting. Rather than following the language of the statute, Washington courts devised an entirely different approach to private causes of action.[26] Litigants wishing to bring a private cause of action could proceed by one of two alternate methods.

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22. *Id.* at 27–30; *see also* DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW 548 (2003) (discussing *Klesner*).

23. *See* 1961 Wash. Sess. Laws 1956; *see also* NAT'L CONSUMER LAW CTR, *supra* note 8, at 14. In a report to Governor Albert D. Rosellini in 1960, then Attorney General John J. O'Connell and a special consumer advisory council noted rampant escalation in consumer protection concerns in five areas: false advertising, home improvement, retail installment sales, restraints of trade, and automobile sales. WASHINGTON CONSUMER ADVISORY COUNCIL, CONSUMER PROTECTION IN THE STATE OF WASHINGTON: A REPORT TO GOVERNOR ALBERT D. ROSELLINI, 5 (1960).

24. *See* 1970 Wash. Sess. Laws 202 (codified in WASH. REV. CODE § 19.86.090 (West, WESTLAW through 2005 legislation)).

25. Rowland, *supra* note 6, at 675.

26. *See* discussion *supra* Part II.B; *see also supra* note 6.

First, a CPA claim could be based on deceptive practices that were unregulated by statute but involved the public interest.[27] Such violations for unfair or deceptive acts or practices in trade or commerce were governed by the holding in *Ahnold v. Daniels*.[28] In *Ahnold*, the Washington Supreme Court held that, in order for an individual to bring an action under Washington's private causes of action statute, the conduct complained of must (1) be unfair or deceptive, (2) be within the sphere of trade or commerce, and (3) impact the public interest.[29]

Regarding the public interest element, the *Ahnold* court repealed the earlier holding in *Lightfoot*, in which the court held that in order for conduct to affect the public interest it must be "vulnerable to a complaint by the Attorney General."[30] The *Ahnold* court rejected this rule, holding that it was too restrictive and too all-inclusive.[31] It was too restrictive because it limited causes of action to the most egregious cases which the Attorney General would otherwise pursue. It was too all-inclusive because it could potentially encompass so many cases that the Act would become a remedy for virtually all private wrongs.[32] Departing from *Lightfoot*, the *Ahnold* court refined the public interest inquiry into a three-part test, holding that an impact on the public interest is demonstrated when the proof establishes that:

> (1) the defendant, by unfair or deceptive acts or practices in the conduct of trade or commerce, has induced the plaintiff to act or refrain from acting;
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> (2) the plaintiff suffers damage brought about by such action or failure to act; and
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> (3) the defendant's deceptive acts have the potential for repetition.[33]

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27. *See* Ahnold v. Daniels, 94 Wash. 2d 40, 45–46, 614 P.2d 184, 188 (1980) (discussing private causes of action under the CPA). These types of violations have also been referred to as "de facto violations."

28. 94 Wash. 2d 40, 614 P.2d 184 (1980).

29. *Id.* at 45, 614 P.2d at 188. This was an apparent aberration from the plain language of the statute. *See supra* text accompanying note 6.

30. *Ahnold*, 94 Wash. 2d at 45, 614 P.2d at 188. The *Ahnold* court also noted that the "'Attorney General' test for sufficiency of public interest appears to have been little utilized or understood and has yielded conflicting results." *Id.* at 43, 614 P.2d at 186 (citing to Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 52, 554 P.2d 349, 358 (1976)).

31. *Id.*

32. *Id.*

33. *Id.* at 46, 614 P.2d at 188.

Second, a CPA claim could be based on what courts generally referred to as a "per se violation." The Washington Supreme Court first expounded on the per se method in *State v. Reader's Digest Association*,[34] in which the court held that an act which (1) violated another statute and (2) was against public policy was a "per se unfair trade practice" within the meaning of the CPA.[35] Six years later, in *Salois v. Mutual of Omaha Ins. Co.*,[36] the court elaborated on the public policy element in the *Reader's Digest* opinion by holding that the violation of a statute containing language regarding the public interest constituted a violation of public policy under the *Reader's Digest* test and a "per se violation" of the CPA.[37] In addition, the court held that either the legislature or the judiciary could declare that the violation of a given statute was against public policy.[38] Thus, after *Salois*, the violation of a statute which stated that it was in the public interest, rather than one stating its violation was an unfair or deceptive act, could also constitute a per se unfair trade practice.[39] In so holding, the *Salois* court implicitly equated the *Reader's Digest* public policy requirement for per se violations with the public interest requirement contained in the *Ahnold* test.[40]

Adding to the confusion, the Washington Supreme Court subsequently introduced two additional uses for the term "per se." First, in *Haner v. Quincy Farm Chemicals*,[41] the court held that in order to satisfy the per se public interest impact requirement, the legislature had to specifically declare the public interest of a violated statute.[42] Second, in *McRae v. Bolstad*,[43] the court used per se in a third manner by

34. 81 Wash. 2d 259, 270, 501 P.2d 290, 298 (1972).

35. *Id.*

36. 90 Wash. 2d 355, 581 P.2d 1349 (1978).

37. *Id.* at 359, 581 P.2d at 1351 (concluding that the defendant's actions were a "per se violation" of WASH. REV. CODE § 19.86.020 (West, WESTLAW through 2005 legislation)).

38. *Id.* at 358, 581 P.2d at 1351 (citing language in *Reader's Digest Ass'n.*, 81 Wash. 2d 259, 501 P.2d 290). As many commentators have noted, the development of the public interest requirement in per se violations was marred by overlapping terms and tests which provided part of the impetus for the *Hangman Ridge* decision. *See also* Susan C. Lybeck, *New Consumer Protection Private Action Test: Clarification or Further Confusion?—Hangman Ridge Training Stables v. Safeco Title Insurance Co*, 62 WASH. L. REV. 277, 279–281 (1986) (discussing per se violations). The discussion in this Article focuses primarily on the public interest requirement in deceptive practices unregulated by statute, but will address to some degree legislative declarations of public interest impact which permits individuals to allege per se violations.

39. Lybeck, *supra* note 38, at 280.

40. Lybeck, *supra* note 38, at 280.

41. 97 Wash. 2d 753, 649 P.2d 828 (1982).

42. *Id.* at 762, 649 P.2d at 833.

43. 101 Wash. 2d 161, 676 P.2d 496 (1984).

referring to findings of unfair trade practices as "per se violations" of the CPA.[44] By the end of this line of cases, a private cause of action based on a per se violation arose in three different contexts: (1) per se unfair trade practices; (2) per se public interest impact; and (3) per se violations.[45]

The Washington Court of Appeals also devised its own test for determining whether a plaintiff had successfully alleged a per se violation.[46] Under this test, plaintiffs had to prove: (1) the existence of a pertinent statute; (2) its violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were within the class of people the statute sought to protect.[47]

The relationship between the *Ahnold* deceptive practices test and the various per se formulations contributed to a substantial lack of clarity in the law of private actions under the CPA. The court's contradictory holdings precluded the establishment of a clear definition of the public interest test which could standardize the determination of what precisely would constitute public interest in a given case. Without clear guidance as to the relationship between the *Ahnold* deceptive practices test and the other per se tests, courts did not have a uniform set of guidelines to determine precisely what was necessary to bring a private cause of action, which lead to inconsistent and unpredictable results.[48] This was the state of the law of private rights under the CPA prior to the *Hangman Ridge* decision.

III. HANGMAN RIDGE TRAINING STABLES V. SAFECO TITLE INSURANCE

In *Hangman Ridge*, the Washington Supreme Court responded to the unsettled state of the law of private causes of action by establishing a new test for litigants seeking to bring a private cause of action under Washington's CPA and by substantially revising the public interest element. The decision's primary purpose, to provide litigants and courts with guidelines for structured analysis of private causes of action, has largely been borne out.[49] This section first summarizes the facts of

44. *Id.* at 165–166, 676 P.2d at 499–500; *see also* Lybeck, *supra* note 38.

45. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 105 Wash. 2d 778, 792, 719 P.2d 531, 538-39 (1986).

46. Dempsey v. Joe Pignataro Chevrolet, Inc., 22 Wash. App. 384, 589 P.2d 1265 (1979).

47. *Id.* at 393, 589 P.2d at 1269.

48. As commentators have pointed out, the similar and overlapping terminology in CPA decisions often made it very difficult for practitioners to determine whether a case involved a per se unfair trade practice or per se public interest impact, or involved an unfair or deceptive act unregulated by statute, such as in *Ahnold*. Rowland, *supra* note 6, at 691.

49. *Hangman Ridge*, 105 Wash. 2d at 792, 719 P.2d at 538–39. Most, if not all cases interpreting CPA claims cite to *Hangman Ridge* and its discussion regarding the public interest element, though there has been at least one case since the *Hangman Ridge* decision which appears to

Hangman Ridge. It then discusses the elements of the five-part test the court formulated, and concludes with a discussion of the public interest element under the five-part test.

A. The Facts of Hangman Ridge

The dispute in *Hangman Ridge* arose when the plaintiffs, sole shareholders in the Hangman Ridge Training Stables Corporation, applied for a loan to ease financial pressures that resulted from their failure to file individual and corporate tax returns for several years.[50] As a condition of the loan, the plaintiffs were required to give a security interest in real estate that their corporation was purchasing and to transfer title of the property to themselves individually.[51] Safeco Title Insurance Company ("Safeco"), the designated escrow closer, prepared a quitclaim deed for the conveyance from Hangman Ridge to the plaintiffs.[52] At the closing, Safeco's agent informed the plaintiffs that she was not an attorney, but provided no information regarding the need to consult independent counsel to obtain tax advice regarding the conveyance.[53]

One year after closing, the plaintiffs learned that they had incurred $3500 in tax liability resulting from the transfer of the deed.[54] Believing this tax liability could have been prevented if Safeco's agent had informed them of the potential tax consequences, they brought suit against Safeco, alleging that the loan closing and deed preparation constituted the unauthorized practice of law and that such conduct supported both a CPA and legal malpractice claim.[55]

B. The Analysis in Hangman Ridge

This setting was the groundwork for the Washington State Supreme Court's redefinition of private causes of action in Washington. Noting the irregular developments of different standards in the lower appellate courts,[56] and its own misinterpretation of the statutory language,[57] the

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have omitted a discussion of the public interest element entirely. *See, e.g.*, Evergreen Collectors v. Holt, 50 Wash. App. 151, 154–55, 803 P.2d 10, 12 (1991). This is likely an isolated case, however.

50. *Hangman Ridge*, 105 Wash. 2d at 781, 719 P.2d 531 at 533.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 784, 719 P.2d at 535 ("Since the *Lightfoot* decision, the confusion surrounding the private rights of action under the CPA has steadily increased.").

57. *Id.* As noted earlier, prior to *Hangman Ridge*, there were at least three different tests formulated for private causes of action in Washington. *See* discussion *supra* Part II.B; *see supra* text accompanying note 6.

court adopted a five-part test for bringing private causes of action that replaced all previous articulations of the appropriate standard:

> To prevail in a private CPA action and therefore be entitled to attorneys fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.[58]

The *Hangman Ridge* decision provided a detailed explanation of each of these elements.[59] Regarding the first element, an unfair or deceptive act or practice, the court reaffirmed that the proper inquiry was not whether the act in question was *intended* to deceive, but whether the alleged act had the *capacity* to deceive a substantial portion of the public.[60] Regarding the second element, occurring in trade or commerce, the court accepted the legislature's broad definition of "trade" and "commerce" that included "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."[61] The court provided two methods by which these elements could be satisfied: (1) by showing an act or practice that has the capacity to deceive a substantial portion of the public has occurred in the conduct of trade or commerce,[62] or, alternatively, (2) by showing that the alleged act has constituted a "per se unfair trade practice."[63]

The most significant departure from the previous legal framework came in the court's reformulation of the public interest requirement. The court noted that while forty-two states allow a private right of action, only six of them have required a public interest showing.[64] The court also acknowledged the general criticism various commentators and others had voiced regarding the insistence on a public interest requirement.[65] However, the court declined to dispense with the public interest

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58. *Id.* at 784–85, 719 P.2d 531, 535. As used throughout this article, the phrase "the first prong" refers to whether an act is an unfair or deceptive practice, and the phrase "the third prong" refers to the public interest requirement.

59. *Id.*

60. *Id.* at 785, 719 P.2d at 535.

61. *Id.* ("The CPA . . . bring[s] within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.").

62. *Id.*

63. *Id.* at 786, 719 P.2d at 535. The court was very specific as to how a per se unfair trade practice may be shown. Only in cases where the legislature has specifically declared the violation of a statute to constitute "an unfair or deceptive act in trade or commerce," or "unfair trade practices," will the court deem an alleged violation a per se unfair trade practice under the statute. *Id.*

64. *Id.* at 787, 719 P.2d at 536 ("Of [the 42 states allowing a private right of action] only 6 have ever required a public interest showing of a private plaintiff under any circumstances.").

65. *Id.* at 788.

requirement for two reasons. First, it noted that maintaining a public interest requirement was consistent with the purpose section of the CPA.[66] Construing the statute as a whole, the court concluded that, although it does not specifically mention public interest, the Legislature nevertheless intended that "even a private plaintiff should be required to show that the acts complained of affect the public interest."[67] Second, the court noted that in the ten years since it first construed the CPA to require a public interest showing in *Lightfoot*, the legislature had taken no action to eliminate such a requirement, which indicated legislative approval of the public interest requirement.[68]

In addition to reaffirming the necessity of the requirement, the court redefined the methods by which a plaintiff could demonstrate a public interest impact.[69] In order to determine whether an unfair or deceptive act affected the public interest, the court stated it is first necessary to determine whether the underlying transaction more closely resembled a consumer transaction or a private dispute.[70] Where the underlying transaction is more aptly characterized as a consumer transaction, the court listed five factors for consideration:

> (1) whether the alleged acts were committed in the course of defendant's business;
>
> (2) whether the acts are part of a pattern or generalized course of conduct;

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66. The purpose section of WASH. REV. CODE § 19.86.920 (West, WESTLAW through 2005 legislation) states in full the following:

> The legislature hereby declares that the purpose of this Act is to complement the body of federal law governing restraints on 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, or to be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

WASH. REV. CODE § 19.86.920 (West, WESTLAW through 2005 legislation).

67. *Hangman Ridge*, 105 Wash. 2d at 788, 719 P.2d at 537.

68. *Id.*

69. *Id.* at 789–90, 719 P.2d at 537–38.

70. *Id.*

(3) whether repeated acts were committed prior to the act involving the plaintiff;

(4) whether there is a real and substantial potential for repetition of defendant's conduct after the act involving the plaintiff; and

(5) if the act complained of involved a single transaction, whether many consumers were affected or were likely to be affected by it.[71]

On the other hand, when the underlying transaction essentially constitutes a private dispute, the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion is sufficient to change a private dispute into one that affects the public interest.[72] In this case, the relevant factors to consider are the following:

(1) whether the alleged acts were committed in the course of defendant's business;

(2) whether the defendant advertised to the public in general;

(3) whether the defendant actively solicited this particular plaintiff; and

(4) whether the plaintiff and defendant occupied unequal bargaining positions.[73]

In addition to establishing public interest impact through these multi-factor tests, the court held that public interest may be satisfied per se, by pointing to the violation of a statute which contains a specific legislative declaration of a public interest impact.[74]

Hangman Ridge was a much-needed substantial clarification of what litigants must show in order to bring a private cause of action under the CPA. While it was initially subject to some criticism,[75] it has

71. *Id.* at 790, 719 P.2d at 538.

72. *Id.*

73. *Id.* at 790–91, 719 P.2d at 538.

74. *Id.* The *Hangman Ridge* court specifically addressed the various iterations of "per se" that had evolved over the years. *See* discussion *supra* Part II.B; *see supra* text accompanying note 6. The court noted that the term "per se" is imprecise and "should be replaced by 'per se public interest' or 'per se unfair trade practice,' thus eliminating the phrase 'per se violations'". *Hangman Ridge*, 105 Wash. 2d at 792, 719 P.2d at 538–39. The "per se violation" phrase, however, has seen a slow removal from the CPA lexicon. *See generally* Anderson v. Valley Quality Homes, Inc., 84 Wash. App. 511, 928 P.2d 1143 (1997).

75. *See* Lybeck, *supra* note 38, at 287. Lybeck points out that the court (1) did not draw adequate distinctions between consumer transactions and private disputes, (2) failed to assign weight to the various factors that are used to determine whether a dispute is a consumer transaction or a

remained unmodified in the eighteen years since its inception. However, though the *Hangman* decision indisputably brought a necessary curative effect in an area of law that had been marred by a lack of uniformity, because that lack of uniformity no longer plagues the law of private causes of action, we are now in a position to evaluate the necessity of the public interest requirement in light of the development of the law of unfair or deceptive acts. Specifically, given the manner in which Washington courts define an unfair or deceptive act, the primary justifications for the public interest element upon which the *Hangman Ridge* decision relied are no longer controlling, and abandonment of the public interest requirement is entirely justifiable.[76]

IV. THE SUBSUMPTION OF THE PUBLIC INTEREST REQUIREMENT[77]

The following section presents four primary arguments to support the contention that the independent legal significance of the public interest requirement has been severely diminished since the *Hangman Ridge* decision: (1) unfair or deceptive acts necessarily affect the public interest; (2) acts that are "unfair" necessarily affect the public interest; (3) the capacity to deceive test serves as an adequate barrier to frivolous CPA claims; and (4) equating unfair or deceptive acts with acts that have the capacity to deceive a substantial portion of the public is consistent with the language of the CPA.

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private dispute, and (3) did not address language in other statutes that reference the CPA as a whole, rather than unfair or deceptive practices, or public interest impact alone.

76. *See* discussion *infra* Part IV.A–D.

77. At one end of the spectrum, the law strives to create multi-pronged tests with distinct elements that, in theory, upon application to fact, yield the correct result; *Hangman Ridge* can be viewed as creating this type of situation. On the other end, there are cases where distinct multi-prong approaches to questions of fact do not lend themselves to the type of nuanced and delicate approach that certain determinations may require. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (rejecting "rigid" two-pronged *Aguilar-Spinelli* test for probable cause determinations in favor of a "totality of the circumstances" inquiry). Between these two extremes lies the present case, where there are elements that can be distinguished in certain circumstances, but practically speaking, it serves no purpose to draw these distinctions. A good example of a typical "subsumption" debate can be seen in the opinions regarding whether, under the Delaware General Corporations Law, there is a duty of "good faith" that is analytically separate from the duty of loyalty. *Compare* Orman v. Cullman, 794 A.2d 5, 14 n.3 (Del. Ch. 2002) (arguing the duty of good faith is subsumed within the duty of loyalty) *with* McMullin .v Beran, 765 A.2d 910, 917 (Del. 2000) (insisting the duty of good faith is a separate duty).

A. Unfair or Deceptive Acts Necessarily Affect the Public Interest Because the Capacity-to-Deceive Test Equates Unfair or Deceptive Acts to En-Masse Repetition of Harmful Conduct

An act that is defined as "unfair or deceptive" necessarily affects the public interest because an unfair or deceptive act in Washington must exhibit the capacity to deceive a substantial portion of the public. As a result of this formulation, the analysis a court must employ to determine whether a defendant's acts were unfair or deceptive is essentially identical to that required to determine whether the public interest requirement has been met. Necessarily, then, the independent legal significance of the public interest requirement is significantly diminished under this formulation of an unfair or deceptive act.

The same year the court in *Lightfoot v. MacDonald* construed the private remedy statute to require a showing of public interest,[78] Washington courts adopted a new interpretation of an unfair or deceptive act from federal courts interpreting 15 U.S.C. § 45(a)(1).[79] For conduct to be unfair or deceptive, a plaintiff need not show that the act in question was *intended* to deceive, but only that the alleged act had the *capacity* to deceive a substantial portion of the public.[80] This comports with FTC decisions regarding deceptive practices that allow the FTC to enforce its consumer protection mandate under a strict liability regime.[81] The reasons underlying this lack of scienter requirement reflect the assumption that any unfair or deceptive act that misleads should be stopped, regardless of the intent of the perpetrator. [82] Whether a plaintiff

78. 86 Wash. 2d 331, 334, 544 P.2d 88, 90 (1976).

79. This is the codification of the FTC Act, and specifically provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." Washington's unfair or deceptive trade practices statute is modeled from this provision. *See supra* note 2 and accompanying text. In addition, the Legislature has provided that courts are to be instructed by final decisions of the federal courts. *See supra* note 66.

80. *See* Fisher v. World-Wide Trophy Outfitters, 15 Wash. App. 742, 748, 551 P.2d 1398, 1403 (1976) (citing Exposition Press, Inc. v. FTC, 295 F.2d 869, 873 (2d Cir. 1961)). Under the FTC formulation, a practice is unlawful merely for being *likely* to mislead consumers. Letter from James C. Miller III, FTC Chairman, to John D. Dingell, Chair of House Comm. On Energy & Commerce (Oct. 14, 1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm. These standards are essentially the same.

81. Most consumer protection statutes do not include a scienter element. *See, e.g.*, 15 U.S.C. § 45(a)(1) (West, WESTLAW through 2005) (no mention of scienter requirement); WASH. REV. CODE § 19.86.020 (West, WESTLAW through 2005 legislation) (same). Thus, the FTC and state enforcement agencies enforce these consumer protection statutes under what is essentially a strict liability regime. *See* ABA SECTION OF ANTITRUST, *supra* note 18, at 4.

82. *See* Brandt Consol., Inc. v. Agrimar Corp., 801 F. Supp. 164, 174 (C.D. Ill. 1992).

has actually been deceived is irrelevant;[83] the purpose of the capacity to deceive test is to deter deceptive conduct before injury occurs.[84] Therefore, implicit in this test is a command that the court consider the seller's conduct not only as it affected the plaintiff in one particular case, but also as it affected individuals similarly situated to the plaintiff.[85]

The capacity to deceive test addresses those same concerns that the legislature intended the public interest requirement to address.[86] When a party has engaged in deceptive conduct that has the capacity to deceive a substantial portion of the public, this necessarily speaks to the possibility of repetition of that unfair or deceptive conduct. The relevant factors in determining if there is a public interest impact essentially constitutes an inquiry into whether deceptive conduct has been repeated, or exhibits the possibility of repetition.[87] Thus, conduct exhibiting the capacity to deceive a substantial portion of the public necessarily subsumes the public interest requirement because the conduct entails en-masse repetition of unfair or deceptive acts; a court therefore acts in the public interest when it awards damages as a result of that conduct.[88] Although the *Hangman Ridge* court never explicitly equated these elements with one another, the opinion can be interpreted to that effect.[89]

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83. Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 51, 554 P.2d 349, 358 (1976).

84. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 105 Wash. 2d 778, 785, 719 P.2d 531, 535 (1986).

85. This does not mean, of course, that plaintiffs can bring private causes of action under the CPA on behalf of others. The statute still requires that a plaintiff sustain damage to "his or her business or property." WASH. REV. CODE § 19.86.090 (West, WESTLAW through 2005 legislation).

86. If the acts are *part of a generalized course of conduct*, if there is a *real and substantial potential for repetition*, and if *many consumers were affected or likely to be affected* by the seller's misconduct, courts are more likely to find that the public interest requirement has been met in a consumer transaction. In private disputes, the likelihood that plaintiffs would be injured in *exactly the same fashion* would constitute public interest. *Hangman Ridge*, 105 Wash. 2d at 790, 719 P.2d at 538 (emphasis added). Courts continually return to the possibility of repetition as indicia of public interest impact. *See* discussion Part IV.A.1 and cases cited therein.

87. *See* Nancy E. Brasel, *Ad Hoc Deceptions In Private Disputes: When Does a Private Plaintiff Confer A Public Interest Under Minnesota's Private Attorney General Statute?*, 29 WM. MITCHELL. L. REV. 321, 336–37 (2002) (discussing *Hangman Ridge*).

88. *See Hangman Ridge*, 105 Wash. 2d at 785, 719 P.2d at 535 (citing Haner v. Quincy Farm Chems., Inc., 97 Wash. 2d 753, 759, 649 P.2d 828, 831 (1982)).

89. For example, in discussing the public interest requirement with respect to private transactions, the court noted, "it is the likelihood that additional plaintiffs have been or *will be* injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Id.* at 790, 719 P.2d at 538 (emphasis added). In addition, the court also noted that a relevant inquiry in cases of single transactions is whether many consumers were affected or *likely* to be affected. *Id.* Among the relevant factors to establish public interest in a consumer transaction is whether there is a real and substantial potential for *repetition* of defendant's conduct after the act involving the plaintiff. *See id.*

As an example of how the capacity to deceive test subsumes the public interest requirement, consider a standard form contract. Courts have suggested that use of a standard form contract containing fraudulent terms could constitute an unfair or deceptive act.[90] Because a seller will reuse a form contract in each of its dealings with members of the public as a standard business practice, each use would essentially lead to the same deception. Inherent in the use of form contracts is the potential for repetition, because every time someone engages in business with that seller, they will be deceived by a contract with fraudulent terms. The same holds true for false advertising; if the false advertising is permitted to continue undeterred, members of the public will continue to be deceived by it. It is the en-masse repetition of deceptive conduct which vitally affects the public interest.[91]

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90. Henery v. Robinson, 67 Wash. App. 277, 291, 834 P.2d 1091, 1098 (1992), *review denied*, 120 Wash. 2d 1024, 844 P.2d 1018 (1993).

91. Further support for this is found in *Potter v. Wilbur-Ellis Co.*, 62 Wash. App. 318, 327–28, 814 P.2d 670, 674–75 (1991). In *Potter*, the issue on appeal was whether the trial court had erred in dismissing the plaintiffs' claim that because the defendant had made only one misrepresentation to the plaintiff, they had failed to show that the seller's conduct had the capacity to deceive a substantial portion of the public. The court of appeals reversed, noting that although in some cases, particularly in sales presentations, misrepresentations may only be heard by one party, a seller's representations are not intended to make sales to only one customer; it is the fact that they "*[have] the capacity to effect* a multitude of customers that is dispositive." *Id.* (emphasis added). It is the subsequent communication of misrepresentation to other potential buyers that this element prohibits. These are considerations very much geared towards the public interest. *See also* Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wash. App. 732, 744–45, 935 P.2d 628, 635 (1997) (noting that in regards to unfair or deceptive acts, the acts must have the capacity to deceive a substantial portion of the public, and that in regards to the public interest requirement, there must be a likelihood that additional persons have or *will be* injured in the same fashion) (emphasis added); Evergreen Int'l, Inc. v. Am. Cas. Co., 52 Wash. App. 548, 761 P.2d 964 (1988) (relying on WASH. REV. CODE § 48.30.010 (West, WESTLAW through 2005 legislation) which states that "[t]he business of insurance is one affected by the public interest" and WASH. ADMIN. CODE §284-30-330(6) (West, WESTLAW through 2005 amendments), providing that "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims" constitutes an unfair trade practice, to hold insurer liable for insured's property damages). In addition, there are a number of statutes the violation of which constitutes an unfair or deceptive practice in trade or commerce, and that the Legislature has declared as vitally affecting the public interest. Some of these include the following: WASH. REV. CODE § 9.35.040 (West, WESTLAW through 2005 legislation) (identity crimes), § 15.04.410 (West, WESTLAW through 2005 legislation) (restrictions on "Washington State Grown"), § 18.11.260 (West, WESTLAW through 2005 legislation) (auctioneers), § 18.27.350 (West, WESTLAW through 2005 legislation) (registration of contractors), § 18.44.450 (West, WESTLAW through 2005 legislation) (referral fees under the Escrow Agent Registration Act), § 19.56.030 (West, WESTLAW through 2005 legislation) (unsolicited goods), § 19.138.290 (West, WESTLAW through 2005 legislation) (sellers of travel), § 19.146.100 (West, WESTLAW through 2005 legislation) (Mortgage Broker Practices Act), § 19.154.090 (West, WESTLAW through 2005 legislation) (Immigration Assistant Practices Act), § 19.160.020 (West, WESTLAW through 2005 legislation) (business telephone listings), § 19.162.010 (West, WESTLAW through 2005 legislation)) (pay-per-call information delivery services), § 19.166.100 (West, WESTLAW through

1. Early Cases Applying the Five-Part *Hangman Ridge* Test Demonstrate the Inherent Similarity between the Capacity to Deceive Test and the Public Interest Requirement.

In many early cases applying the new *Hangman Ridge* five-part test, the analysis of the unfair or deceptive act element was substantially identical to that of the public interest requirement.[92] These cases suggest that some courts have, indeed, come to view conduct that has the capacity to deceive a substantial portion of the public as exhibiting the potential for repetition that the public interest requirement is designed to prevent. For example, in *Nordstrom Inc., v. Tampourlos*, Tampourlos, a beauty salon owner, had been operating beauty salons in four of Nordstrom's stores.[93] Nordstrom decided to relocate one of these stores and did not wish to continue its salon operation in the new location.[94] Tampourlos decided to open his own salon under the name "Nostrum" and used the same typeface as the Nordstrom logo.[95] Nordstrom brought suit for trade name infringement and unfair competition, alleging a violation of the CPA.[96] Nordstrom was initially awarded an injunction on the use of Nordstrom's logo, and another trial was held the following year to determine whether the use of the name "Nostrum" constituted a trade name infringement and was an unfair method of competition.[97] The trial court found that there was a trade name infringement and enjoined Tampourlos from using it in connection with his salon.[98] On appeal, however, the Court of Appeals vacated the award on the grounds that there had not been a proper showing of public interest and, therefore, the CPA had not been violated.[99]

The Washington Supreme Court accepted review, writing an opinion that exemplifies the blending of the first and third elements of

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2005 legislation) (international student exchange), § 19.170.010 (West, WESTLAW through 2005 legislation) (promotional advertising of prizes), § 19.178.110 (West, WESTLAW through 2005 legislation) (going out of business sales), § 19.182.150 (West, WESTLAW through 2005 legislation) (Fair Credit Reporting Act), § 19.186.050 (West, WESTLAW through 2005 legislation) (roofing and siding contractors and salespersons), § 19.190.030 (West, WESTLAW through 2005 legislation) (commercial electronic mail), § 19.220.030 (West, WESTLAW through 2005 legislation) (international matchmaking organizations), § 26.33.400(3) (West, WESTLAW through 2005 legislation) (adoption).

92. *See, e.g.*, Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987); *Evergreen Int'l, Inc.*, 52 Wash. App. 548, 761 P.2d 964.

93. 107 Wash. 2d at 737, 733 P.2d at 209.

94. *Id.*

95. *Id.*

96. *Id.* at 737–38, 733 P.2d at 209.

97. *Id.* at 738, 733 P.2d at 209.

98. *Id.*

99. *Id.*, 733 P.2d at 210.

the *Hangman Ridge* five-part test. The court began its analysis by finding that an action for trade name infringement met the first, second, fourth, and fifth prongs of the test.[100] In regards to its determination that trade name infringement was an unfair or deceptive act, it noted that "the appropriation of Nordstrom's name tends to and does deceive or mislead persons of ordinary caution into the belief that they are dealing with one concern when in fact they are dealing with the other."[101] The *Nordstrom* court also found that the public interest requirement had been met, although it reached that result in a haphazard manner. The court struggled with the determination of whether the underlying transaction was more aptly characterized as a consumer dispute or a private dispute, and, although it noted that no clear distinction was workable, it ultimately found that the cause of action more closely resembled a private dispute.[102] In holding the public interest requirement was met, the court found that "the public was integrally involved" because the use of the name "Nostrum tended to deceive and mislead persons of ordinary caution that they were dealing with one concern when in fact they were dealing with another." [103] This language is essentially identical to the language the court used in determining whether the conduct was an unfair or deceptive act. Thus, in *Nordstrom*, the dispositive factor for satisfying both the unfair or deceptive act element as well as the public interest element was whether there was a tendency for the act complained of to deceive the public.[104]

Another example of the capacity to deceive test subsuming the role of the public interest requirement is found in *Travis v. Washington Horse Breeders Ass'n.*[105] In *Travis,* the plaintiff purchased a colt for $25,000, relying on statements from a sales agent that the horse was "a fine athlete" and "in very good condition."[106] Various advertisements appearing both on television and in magazines had also characterized the

100. *Id.* at 739–40, 733. P.2d 210–11.

101. *Id.* at 740, 733 P.2d at 210.

102. *Id.* at 741–42, 733 P.2d at 211.

103. *Id* at 742, 733 P.2d at 211–12. The court also noted that "[a] necessary component of trade name infringement is that the plaintiff must establish that the name used is likely to confuse the public." *Id.* at 742–43, 733 P.2d at 212.

104. The court attempted to dispel any speculation that it had judicially created a per se violation. It also seemed to have justified its public interest analysis, partially, on the necessity of the plaintiff establishing that the name used is likely to confuse the public in order to prove trade name infringement. It is conceivable that *Nordstrom* was an isolated case, distinguishable by the nature of a trade name infringement cause of action; however, future cases do not bear out this proposition. *See infra* Part IV.A.2.

105. 111 Wash. 2d 396, 759 P.2d 418 (1988).

106. *Id.* at 399, 759 P.2d at 419.

horse as "truly outstanding" and "bound to run."[107] A week after the sale, medical examinations revealed that the horse had a heart murmur.[108] The plaintiff immediately contacted the sellers and attempted to rescind the sale,[109] and eventually sued under the CPA.[110]

The Washington Supreme Court's decision in *Travis* is noteworthy for its consideration of the plaintiff's CPA claim. The court found, contrary to the defendant's arguments, that the sale of the colt with a heart murmur was an unfair or deceptive act because the sellers had represented the colt as a horse in healthy condition, both to the plaintiff individually and to the public at large, through its advertisements.[111] Furthermore, the plaintiff had introduced evidence that it was not common practice for the sellers to examine their horses, and as a result many unsound horses had been sold to the public.[112]

The court did not devote a significant amount of time to the public interest element. After characterizing the transaction as a private dispute, the court noted that all five of the relevant factors were present in the case, particularly given that the seller's practices were longstanding and had not changed.[113] Although the court did not elaborate on how these elements were satisfied, its analysis appears to be based on the same conclusions it reached when it addressed whether the seller's conduct had the capacity to deceive a substantial portion of the public.[114] Thus, the *Travis* court's analysis regarding the public interest element mirrored the analysis in *Nordstrom* by treating the underlying facts that give rise to an unfair or deceptive act exhibiting the capacity to deceive a substantial portion of the public as sufficient to give rise to the public interest requirement.

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107. *Id.* at 398, 759 P.2d at 419. According to the court, the seller did in fact use the language "bound to run."

108. *Id.* Although many fit and healthy horses have heart murmurs, apparently the plaintiff in *Travis* believed this was more than a temporary complication.

109. *Id.*

110. *Id.* The plaintiff also brought claims for breach of express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose.

111. *Id.* at 406, 759 P.2d at 423.

112. *Id.*

113. *Id.* at 407, 759 P.2d at 423. The court also noted that although the act involved a single transaction, other consumers were likely to be affected by the purchase of a defective horse, such as jockeys and the betting public.

114. After all, if the sellers were engaged in active advertising, there is certainly a real and substantial potential for repetition because other consumers may be fooled by the fraudulent ads. These would also represent acts committed prior to the act involving the present plaintiff. Both of these conclusions are inferences one can easily draw from acts or practices that have the capacity to deceive a substantial portion of the public.

2. Later Decisions have been More Explicit about the Inherent Similarity between an Unfair or Deceptive Act and the Public Interest Requirement

Later decisions have been more explicit in equating the capacity to deceive test with the public interest requirement, and some courts have even recognized a functional equivalence between the two elements.[115]

The potential for substantial deception was also substantively equated with repetition in *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*[116] In *Sign-O-Lite Signs*, the florist, in need of a new sign for her floral shop, was solicited by the sign maker.[117] The vendor informed her that the total price for the sign, including installation, would be $2,901.60.[118] The florist subsequently entered into a contract with the sign vendor for the installation of a new sign, believing that she would only be responsible for the difference between the sale price and her down payment.[119] However, she later discovered that the document she signed was an extended lease agreement, obligating her to pay $305 per month for the rental of the sign, which totaled over $21,000.[120] The sign company never informed her of these terms, nor instructed her as to precisely what she was signing.[121] A collection suit was subsequently initiated against the florist, and the florist counterclaimed, alleging fraud and violation of the CPA.[122]

The *Sign-O-Lite Signs* court readily found that the seller's conduct constituted an unfair or deceptive act that was poised to deceive a substantial portion of the public because the buyer had been patently misled as to the terms of the contract, and had entered into the agreement in reliance on the seller's statements both before and during the consummation of the transaction.[123] In addition, because it was routine business for the seller to make "cold calls" by soliciting business owners in their own stores, and representing that it was in the sign business, the court found the seller's style of soliciting business compelling evidence

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115. *See* discussion *supra* Part IV.A.

116. 64 Wash. App. 553, 825 P.2d 714 (1992).

117. *Id.* at 556, 825 P.2d at 716.

118. *Id.*

119. *Id.* at 557, 825 P.2d at 716–17.

120. *Id.* at 558, 825 P.2d at 717. The estimated value of the installed sign was $3,950. *Id.* at 558 n.3, 825 P.2d 717 n.3.

121. *Id.* at 557, 825 P.2d at 717.

122. *Id.* at 553, 825 P.2d at 714.

123. *Id.* at 561–62, 825 P.2d at 719.

that the potential existed for a substantial portion of the public to be deceived.[124]

Again, the court looked to the underlying facts giving rise to the unfair or deceptive practices to satisfy the public interest element, thereby giving it only cursory examination.[125] While acknowledging that the dispute in question was more aptly characterized as a private dispute,[126] the court essentially treated the relevant factors as a whole and broadly concluded that, given the method in which the seller solicited business in the present case, there was sufficient evidence to conclude that the defendant's conduct touched the public interest.[127] The *Sign-O-Lite Signs* court thus considered the seller's style of soliciting business as the primary consideration for whether it had engaged in unfair or deceptive acts and whether those acts affected the public interest.[128] Thus, in *Sign-O-Lite Signs*, once again, the seller's unfair or deceptive act essentially acted as a proxy for public interest impact.

Although no court has gone so far as to explicitly equate the capacity to deceive test with the public interest element, the court in *Hiner v. Bridgestone, Inc.*[129] stopped just short of this declaration by recognizing that conduct constituting an unfair or deceptive act necessarily affects the public interest.[130] In *Hiner*, the plaintiff, who was injured in a car accident after she slid into a truck on the highway, brought suit against Bridgestone under the Product Liability Act.[131] Her claim alleged that Bridgestone had failed to warn that the snow tires

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124. *Id.*

125. *Id.* at 562–63, 825 P.2d at 719–20.

126. *Id.* Although the court did not second guess its conclusion, it is at least open to argument that the consumer transaction/private dispute distinction was not so easily satisfied in the present case. Although the contract entailed a promise to render services, the plaintiff was essentially bargaining to acquire a sign, which would characterize the transaction as a consumer transaction.

127. *Id.* The court also noted that in addition to the defendant's acknowledgment that it routinely solicited other businesses, "the circumstances" in the case also supported a finding that the public interest element had been met. The treatment of the public interest requirement is so minimal in this case, this portion of the opinion can be reproduced here:

> Sign acknowledges that its agent was acting in the course of Sign's business and actively solicited DeLaurenti (criteria 1 and 3). Under the circumstances of this case and Sign's own acknowledgment that it routinely solicits other businesses, the evidence here was sufficient to show that Sign's acts or practices impact the public interest.

Id. at 562–63, 825 P.2d at 719–20. The court's refusal to elaborate further on the satisfaction of the public interest factors is further indication that the analysis would essentially repeat what the court had stated earlier in finding the defendant's conduct was unfair or deceptive.

128. *Id.*

129. 91 Wash. App. 722, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wash. 2d 248, 978 P.2d 505 (1999).

130. *Id.* at 729, 959 P.2d at 1162.

131. WASH. REV. CODE. § 7.72 (West, WESTLAW through 2005 legislation).

would not provide adequate traction if installed only on the front wheel axels.[132] (She later amended her complaint by adding claims for damages to her business and property pursuant to the CPA).[133] Although the court did not discuss at length the plaintiff's CPA claim,[134] in discussing the five-part test for private causes of action the court noted that, "if the failure to warn constitutes an unfair or deceptive act, it meets the public interest element because many consumers were likely affected by it."[135] The court's remark, although dicta, speaks volumes regarding the connection between unfair or deceptive acts and the public interest. The court indicated that if the act complained of was found to be unfair or deceptive, it would necessarily meet the public interest, because the failure to warn of a defect would affect a substantial portion of the public. Though not necessary to its holding, this brief discussion of the public interest element strongly suggests that litigants who successfully show that a defendant's unfair or deceptive acts had the capacity to deceive a substantial portion of the public have also essentially made the requisite public interest showing.

A recent Washington Court of Appeals decision also recognized the inherent similarity between the unfair or deceptive practices element and the public interest requirement.[136] In *Burbo*, the court stated, in reference to a CPA claim brought by a purchaser of real property after learning of certain material defects on the property, "[t]he analysis of [the deceptive practices and public interest element] is inherently circular."[137] The court also noted, in finding that there were genuine issues of material fact as to whether the seller had actual knowledge of the defects in the property, that "[i]f [the seller sold the property] with knowledge of the defect, then both disputed elements of deceptive practice and public impact are satisfied."[138] This case follows precisely the pattern demonstrated in the *Nordstrom*, *Travis*, and *Sign-O-Lite* decisions which engaged in nearly identical analyses with respect to the deceptive practices and public

132. *Hiner*, 91 Wash. App. at 726, 959 P.2d at 1161.

133. *Id.* at 727, 959 P.2d at 1161.

134. The court noted that the CPA does not cover actions for personal jury. *Id.* at 728, 959 P.2d at 1162 (citing Stevens v. Hyde Athletic Indus., Inc., 54 Wash. App. 366, 773 P.2d 871 (1989)).

135. *Hiner*, 91 Wash. App. at 729, 959 P.2d at 1162. The court ultimately went on to dismiss the CPA claim because the plaintiff had failed to show that Bridgestone knew of the danger but nevertheless misrepresented the safety of the snow tires, which would constitute a deceptive act for purposes of the CPA. *Id.* at 730. Furthermore, the plaintiff's requested relief in the form of reimbursement for lost wages, earning capacity, medical expenses, and damage to her car, arose from personal injuries that were not recoverable under the Act. *Id.*

136. Burbo v. Harley C. Douglass, Inc., 125 Wash. App. 684, 106 P.3d 258 (2005).

137. *Id.* at 700, 106 P.3d at 266.

138. *Id.* at 700–01.

interest elements, and further demonstrates the diminishing analytical distinctions courts can adequately draw between these two similar elements.

3. The Definition of the Public Interest Requirement in Other Jurisdictions Suggests that the Capacity to Deceive Test and the Public Interest Element are Functionally Equivalent

Jurisdictions outside of Washington State have also noted that the determination of whether an unfair or deceptive act touches the public interest is essentially an inquiry into the number of consumers who have been or may be affected by the deceptive conduct.[139]

Washington has treaded a thin analytical line by separating unfair acts that have a capacity to deceive a substantial portion of the public from the public interest element itself. The language used by other jurisdictions with a judicially-imposed public interest element to define public interest illustrates this fine distinction. For example, South Carolina, like Washington, also requires plaintiffs to allege that a defendant's actions adversely affected the public interest in order to bring a private cause of action under the state's Unfair Trade Practices Act. [140] It also explicitly states what constitutes public interest,[141] and has expressly equated public interest impact with an unfair or deceptive practice that has the potential for repetition.[142] The potential for repetition may be proved by showing that either (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) the defendant's procedures created a *potential* for repetition of the unfair and deceptive acts.[143] South Carolina's formulations of the public interest element are thus grounded on the premise that deceptive acts having the capacity to deceive a substantial portion of the public are treated as necessarily touching the

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139. Brasel, *supra* note 88, at 337.

140. Noack Enters., Inc. v. Country Corner Interiors, 351 S.E.2d 347 (S.C. Ct. App. 1986). S.C. CODE ANN. § 39-5-140 (West, WESTLAW through 2004 Reg. Sess.) is similar to Washington's private cause of action statute, and states: "[a]ny person who suffers any ascertainable loss of money or property, real, or personal, as a result of the use or employment by another person of an unfair or deceptive methods, act or practice . . . may bring an action individually . . . to recover actual damages."

141. South Carolina's public interest requirement is fashioned after, albeit in a modified form, the *Ahnold* formulation of public interest. *Compare* text accompanying note 30, *with* Daisy Outdoor Adver. Co. v. Abbott, 473 S.E.2d 47, 49 (S.C. 1996).

142. Crary v. Djebelli, 496 S.E.2d 21, 23 (S.C. 1998) (noting that an impact on the public interest may be shown if the acts or practices have the potential for repetition).

143. *Id.* (emphasis added).

public interest.[144] Notably, this language substantially mirrors the language Washington courts use to describe the test for unfair or deceptive acts that have the capacity to deceive a substantial portion of the public.[145] Therefore, an unfair or deceptive act that occurs in Washington would be found necessarily to affect the public interest in South Carolina. Thus, the fact that the tests for the public interest element in South Carolina are nearly identical to Washington's capacity to deceive test for unfair or deceptive practices suggests that an unfair or deceptive act that has the capacity to deceive a substantial portion of the public necessarily answers whether a cause of action affects the public interest, rendering a separate inquiry into the public interest unnecessary and duplicative.

Representing an even larger affront to the significance of the public interest requirement in private causes of action, the public interest requirement in FTC actions is no longer viewed as a strict restriction on the Commission's ability to initiate action. In fact, federal courts now assume that actions brought by the Commission are automatically in the public interest when it is seeking to prevent practices that have the *tendency or capacity to mislead*, regardless of the extent of actual injury to consumers.[146] By way of comparison, the *Hangman Ridge* court stated that the "purpose of capacity to deceive test is to deter harmful conduct *before* injury occurs,"[147] a purpose closely analogous to *Ford Motor's* preventative remedy language. Thus, to the extent that the capacity to deceive test for unfair or deceptive acts in Washington is designed to deter deceptive conduct before injury occurs,[148] recognition that this necessarily encompasses acts that affect the public interest would more closely comport with federal law and FTC decisions. In fact, the purpose section of the CPA suggests that, given this formulation of the public interest requirement in FTC actions, it is entirely appropriate for Washington courts to recognize that acts that have the capacity to deceive a substantial portion of the public necessarily affect the public

144. The conceptual connection here is that a potential for repetition is in fact conduct that has the potential to deceive the public.

145. At bottom, the purpose of the public interest element in South Carolina is to preclude the repetition of *potentially* harmful acts. The purpose of Washington's capacity-to-deceive test is to deter deceptive conduct *before* injury occurs. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 105 Wash. 2d 778, 785, 719 P.2d 531, 535 (1986).

146. PRIDGEN, *supra* note 22, at 549 (emphasis added) (discussing Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941), which noted the FTCA was intended to afford a preventative remedy, not a compensatory one).

147. *Hangman Ridge*, 105 Wash. 2d at 785, 719 P.2d at 535 (emphasis in original).

148. *Id.*

interest.[149] Currently, federal courts exercise great deference to the Commission's actions, concluding that the finding of public interest is a matter within the broad discretion of the FTC.[150]

B. Acts that are "Unfair" Necessarily Touch the Public Interest

An alternative way of viewing unfair or deceptive acts as necessarily touching the public interest is to view the conduct simply in regards to whether it is "unfair." Washington courts generally do not address the unfairness element separately, but the definition of an unfair act indicates that it is not necessarily synonymous with a deceptive act. The Federal Trade Commission has established the following three criteria to determine whether an act or practice is unfair, and the Washington Court of Appeals has adopted these elements in full.[151] The elements are:

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).[152]

Included in this definition for "unfair practices" is a prohibition on acts that violate public policy; an act that does so can rise to the level of "unfair," and be susceptible to a CPA claim.

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149. The purpose section of the CPA specifically provides, "[i]t 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." WASH. REV. CODE § 19.86.920 (West, WESTLAW through 2005 legislation).

150. PRIDGEN, *supra* note 22 at 549 (citing Slough v. F.T.C., 396 F.2d 870, 872 (5th Cir. 1968)). Although Washington's unfair competition statute is nearly identical to the FTCA, and the Legislature has provided that Washington courts are to follow federal rules of decision in similar matters as guidance for enforcement of its private cause of action statute, in many ways the FTCA, which is a statute aimed primarily at preventing deceptive conduct, is significantly different in nature than a statute conferring a private cause of action to individuals. Still, much of the reasoning for the public interest requirement was drawn from the FTCA, and the Commission's implicit recognition that acts which have the capacity to mislead necessarily touch the public interest, is persuasive authority.

151. *See* Blake v. Federal Way Cycle Ctr., 40 Wash. App. 302, 310, 698 P.2d 578, 583 (1985); Magney v. Lincoln Mut. Sav. Bank, 34 Wash. App. 45, 57, 659 P.2d 537, 545 (1983).

152. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

Concern for violations of public policy, in regards to CPA claims, first appeared in *Reader's Digest Association.*[153] There, the Washington Supreme Court considered whether a promotional sweepstakes constituted a lottery and an unfair method of competition in violation of the CPA. After concluding that the sweepstakes constituted a lottery,[154] the court stated "[w]hat is illegal and against public policy is per se an unfair trade practice," and, referring to article II, section 24 of the Washington State Constitution which expressly prohibits lotteries,[155] quickly concluded the lottery was a violation of the CPA.[156] Later, the *Hangman Ridge* court modified the *Reader's Digest's* interpretation of public interest by acknowledging that, "the use of the term 'public policy' is a reference to 'public interest,'" and that "public policy in the context of an 'unfair trade practice' has been replaced by a separate public interest requirement."[157]

The link between public policy and public interest, expressly stated in the *Hangman Ridge* opinion, is important in the context of what constitutes unfair conduct. Among the many definitions of what constitutes an unfair act are acts that "offend[] public policy." Thus, because the public interest element has subsumed the "illegal and against public policy" test for deceptive conduct, this subsumption suggests that unfair conduct may also per se satisfy the public interest requirement. The *Hangman Ridge* court suggests that the prohibition of unfair acts and the public interest requirement are both edifices of "public policy."[158]

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153. 81 Wash. 2d 259, 501 P.2d 290 (1972).

154. *Id.* at 259, 501 P.2d at 298.

155. WASH. CONST. art. II, § 24 ("Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.").

156. *Reader's Digest Ass'n.*, 81 Wash. 2d at 270, 501 P.2d at 298.

157. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 105 Wash. 2d 778, 786, 719 P.2d 531, 535–36 (1986).

158. The FTC has stated that where courts rely heavily on this factor to support a finding of unfairness, the policy "should be clear and well-established." ABA SECTION OF ANTITRUST LAW, *supra* note 18, at 28. Potential sources for what constitutes public policy may be statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than relying on vague notions of national values. *Id.* Considerations for public policy have been codified in 15 U.S.C. § 45(n), which describes the standard of proof for public policy considerations, providing in pertinent part:

> The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with

Because they embrace a common element, there must necessarily be some overlap between them. Thus, where a court proceeds to analyze a CPA claim on the premise that a seller has engaged in a deceptive act, to the extent a deceptive act may also be considered an unfair act,[159] the requirement to establish independently that the claim is in the public interest is duplicative.

C. The Capacity to Deceive Test can Serve as a Barrier to Frivolous CPA Claims.

The public interest element's intended purpose was to eliminate frivolous claims and prevent purely private disputes from consuming precious judicial resources.[160] However, these conceptual underpinnings are not wedded to the public interest element, and to the extent Washington courts continue to apply the capacity to deceive test in evaluating whether an unfair or deceptive act has occurred, frivolous and wasteful claims can still be eliminated on the basis that they do not have the capacity to deceive a substantial portion of the public.

1. The Public Interest Element is a Bar to CPA Claims

The public interest element is generally viewed as a method to prevent the CPA from becoming a private remedy statute,[161] and courts may dismiss cases because the plaintiff has failed to demonstrate the requisite public interest impact.[162] For example, in *Campbell* the plaintiff had purchased a rebuilt engine from the defendant that included a "Limited Engine Assembly Warranty," which provided parts and labor for correction of defects in materials and workmanship for a specified period of time.[163] Shortly after installing the engine, and within the warranty period, the engine failed, and Campbell immediately contacted the defendant to resolve the problem.[164] After inspection, the defendant concluded that the engine failure was due to owner abuse and was not covered by the warranty.[165] The plaintiff refused to pay for service and labor, and, after the defendant threatened to assert a possessory lien on

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all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

159. This topic is beyond the scope of this comment.

160. *See* Gown, *supra* note 7, at 805–06.

161. *See* Gown, *supra* note 7, at 805–06.

162. *See, e.g.*, Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc., 75 Wash. App. 89, 96–97, 876 P.2d 948, 953 (1994).

163. *Id.* at 90, 876 P.2d at 949–50.

164. *Id.*

165. *Id.* at 91, 876 P.2d at 950.

the vehicle, filed a complaint for damages, alleging breach of contract, violations of the Automotive Repair Act ("ARA"), and violation of the CPA.[166] The trial court held that the defendant had violated the ARA by wrongfully asserting a possessory lien on the plaintiff's car, but dismissed plaintiff's CPA claim, concluding that the plaintiff had failed to show that the public interest element was met.[167]

The Court of Appeals, following the language in *Hangman Ridge*, rejected the plaintiff's argument that, while the ARA did not specifically include a statement of public interest impact, a violation of the ARA amounts to a per se violation of the CPA because the concept of the public interest was incorporated throughout the text of the ARA.[168] The court held that the plaintiff had failed to establish the public interest impact factually, and that because the ARA did not include a "specific legislative declaration of public interest impact" the court was required, under *Hangman Ridge*, to affirm the dismissal of the CPA claim.[169]

The *Campbell* court, while dismissing the plaintiff's CPA claim, seemed willing to admit this was an unfair result.[170] In the final footnote of the *Campbell* decision, the court noted that the Legislature had in fact amended the ARA, subsequent to commencement of the action, to provide the clear legislative declaration of public interest contemplated by the *Hangman Ridge* court.[171] Yet the court felt bound to ignore this amendment and to consider the statute as it was drafted at the time the action was commenced. The hyper-technical result in *Cambpell* is, unfortunately, not far-fetched, given the nature of the public interest inquiry. The later amendment reflects the notion that the ARA is a comprehensive body of law regulating the business conduct that affects, on a regular basis, the entire population. Clearly a violation of the ARA is, as confirmed by the subsequent amendment, sufficient to give rise to a CPA cause of action. Had the court been willing to consider the

166. *Id.*

167. *Id.* at 91–92, 876 P.2d at 950.

168. *Id.* at 96, 876 P.2d at 952–953.

169. *Id.* at 97, 876 P.2d at 953. Obviously this court did not consider the fact that there was a per se unfair trade practice as indicative of any per se public interest element, which on some level disputes the point this Article is attempting to make. However, per se unfair trade practice and per se public interest are different "animals" under the CPA private cause of action, and the court's decision not to view one as affecting the other is explainable on these grounds.

170. *Id.* at 97 n.5.

171. WASH. REV. CODE § 46.71.070 (West, WESTLAW through 2005 legislation) provides: "The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the Consumer Protection Act."

deceptive nature of the conduct and its potential for repetition, this absurd result might have been avoided.[172]

While the public interest element is often a formidable barrier to overcome, it does not follow that eliminating the public interest element will open the floodgates of litigation. As of the time of this writing, Washington is the only state that has adopted the "capacity to deceive a substantial portion of the public" unfair or deceptive acts analysis.[173] The decision to include this language in the unfair or deceptive acts test suggests that this standard is not, or should not, be considered a lenient standard. To the extent Washington courts have regarded this standard as toothless, its subsumption of the public interest element indicates that this test can and does raise the level of proof for unfair or deceptive acts and the capacity to deceive test should be regarded as a barrier to frivolous claims. Therefore, requiring litigants to show that conduct has risen to the level of an unfair or deceptive act that has the capacity to deceive a substantial portion of the public prevents the CPA from becoming a tool for "opportunistic, vexatious private suits."[174] While the public interest requirement serves an important role of limiting the broad language in the unfair practice section, particularly when a victory for the plaintiff may entail the possibility of attorney's fees and punitive damages,[175] the relevant cases demonstrate that merely showing that an act is unfair or deceptive *is not* sufficient to satisfy the first element of the *Hangman Ridge* test unless the plaintiff can also demonstrate that the act had the capacity to deceive a substantial portion of the public.[176] The

172. There is actually a substantial list of statutes the violation of which is legislatively declared as both constituting an unfair or deceptive practice in or affecting commerce, and vitally affecting the public interest. *See supra* note 91. This is by no means an equation of the two standards, but it supports the argument that many unfair or deceptive acts, because of their deceptive nature, will affect the public interest. One can at least accept this as implicit legislative recognition of the similarity between these two standards. Along these lines, statutes that declare their violation to constitute an unfair or deceptive practice in or affecting trade or commerce should at the very least be a consideration in establishing whether that misconduct affects the public interest. Where litigants cannot factually demonstrate public interest impact and are attempting to make a per se showing, all too often courts have considered the lack of a legislative declaration of public interest impact as necessarily implicating *lack* of public interest and grounds for dismissal. This need not necessarily be the case, yet a strict reading of *Hangman Ridge* seems to instruct courts to do just this. This is, as *Campbell* demonstrates, an extremely limited scope of interpretation.

173. This author's search has not revealed any other jurisdictions that formulate their unfair or deceptive standards in this way.

174. Gown, *supra* note 7, at 806.

175. Gown, *supra* note 7, at 806–07.

176. This has been described as a lenient standard, WASHINGTON STATE BAR ASSOCIATION, WASHINGTON ANTITRUST AND CONSUMER PROTECTION HANDBOOK, 88 (David J. Dadoun ed., 2001), and, to the extent that courts do consider this a lenient standard, this Article suggests this proposition should be re-evaluated.

"capacity to deceive a substantial portion of the public" language is a barrier to meretricious lawsuits that are essentially private disputes outside the intended scope of the CPA.

2. The Capacity to Deceive Test can be Used as a Device to Bar Frivolous and/or Purely Private Disputes

Cases do exist in which a plaintiff has successfully demonstrated that an unfair or deceptive act has occurred, yet has failed to demonstrate the requisite public interest impact. In these cases, the plaintiff's failure to demonstrate public interest impact is not based on the *Hangman Ridge* public interest formulations, but rather a failure to meet the capacity to deceive test, and is thus a failure to demonstrate that an unfair or deceptive act has occurred.

One such case is *Reeves v. Teuscher*,[177] in which the defendant, Teuscher, along with his broker, sold interest in 2,400 acres of property to twelve unsophisticated real estate investors who were seeking low-risk investments. The plaintiffs eventually brought suit against Teuscher, alleging that he had misrepresented the value and investment potential of the land, and asserted, among other claims, that Teuscher had violated the CPA.[178] The trial court found in favor of the plaintiffs on all their claims, and on appeal, Teuscher argued there was insufficient evidence to support a CPA claim. [179]

The *Teuscher* court found that there was ample evidence that Teuscher and his broker had engaged in unfair or deceptive acts that had the capacity to deceive a substantial portion of the public.[180] Specifically, Teuscher had represented the property as being an excellent, low-risk investment, and had made these representations and solicitations to many investors in the hopes of luring investors with large amounts of cash.[181] With regard to the public interest requirement, the court characterized the transaction as a private dispute, and held that there was sufficient evidence of public interest impact because the defendant was engaged in *active solicitation*, and was in a superior bargaining position.[182] Again, the very acts which led to the potential for widespread deception of the

177. 881 F.2d 1495 (9th Cir. 1989) (applying Washington law).

178. *Id.* at 1497–98. The plaintiffs alleged violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Washington and Oregon securities acts.

179. *Id.*

180. *Id.*at 1502.

181. *Id.* The court concluded that "these actions had the capacity to deceive, and *did so*." (emphasis added) *Id.*

182. *Id.* (emphasis added).

public were the dispositive factors in holding that the public interest requirement was met.

In addition to the twelve investors, there was another plaintiff in *Teuscher*, Sadri, who was a seasoned investor with ten to fifteen years of experience selling and developing residential and commercial real estate.[183] Sadri and Teuscher, after months of negotiation, consolidated their assets to form a limited partnership with plans to develop the 2,400 acres.[184] Emphasizing that Sadri did not occupy a different bargaining position than Teuscher, the court held that Sadri had not made a sufficient showing of public interest impact.[185] However, in determining that Sadri had failed to demonstrate public interest impact, the court noted that, unlike the case of the twelve unsophisticated investors, Teuscher had not actively advertised to or solicited Sadri.[186] Thus, regardless of the fact that Sadri and Teuscher appeared to have dealt at arm's length and occupied equal bargaining positions, the adverse judgment on Sadri's claims can be justified on the basis that the unfair or deceptive acts about which Sadri complained did not exhibit the capacity to deceive a substantial portion of the public, and thus were materially different from those made to the twelve unsophisticated investors.[187]

Another case that demonstrates that a lack of public interest showing, *Aubrey's R.V. Center, Inc v. Tandy Corp.*,[188] can also be explained based on the plaintiff's failure to show that the unfair or deceptive act did not exhibit the capacity to deceive a substantial portion of the public. In *Tandy*, the plaintiff brought breach of contract and CPA claims against Tandy after a computer system the plaintiff had purchased from Tandy failed to perform as represented.[189] Tandy supplied all of the hardware and some of the software, which he carried, and referred the plaintiff to a resource book that catalogued software programmed by

183. *Id.* at 1503.

184. *Id.*

185. *Id.*; *cf. Pac. Northwest Life Ins. Co. v. Turnbull*, 51 Wash. App. 692, 703, 754 P.2d 1262, 1268–69 (1988) (rejecting a CPA claim on grounds that plaintiffs had a "history of business experience" and were not representative of bargainers subject to exploitation and unable to protect themselves, but failing to state whether the acts complained of reached the level of unfair or deceptive acts).

186. *Id.*

187. These differences are offered as a potential explanation for why, in the case of the inexperienced investors, the public interest element was clearly satisfied, yet in Sadri's case it was not. While a misrepresentation is certainly is an unfair or deceptive act, misrepresentations to one individual, who happened to be an individual with extensive experience in real estate investment, without advertisement or solicitations, likely would not deceive a substantial portion of the public.

188. 46 Wash. App. 595, 731 P.2d 1124 (1987).

189. *Id.* at 598, 731 P.2d at 1126.

third parties that would be compatible on Tandy's systems.[190] Tandy had a policy of not supporting or servicing these programs and, although this policy was printed on the resource book, Tandy's agent failed to verbally notify the plaintiff of the policy.[191] Ultimately, both Tandy's and the third-party's software failed to perform as represented, and the plaintiff sued to rescind the entire contract.[192] The trial court found in favor of the buyer.[193]

On appeal, the court first found that Tandy's action did constitute an unfair or deceptive act because its "fail[ure] to inform potential buyers of Source Book software that those programs were not backed by Tandy has the 'capacity to deceive'" satisfied the first prong of the *Hangman* test.[194] It nevertheless reversed the trial court's decision awarding the plaintiff damages under the CPA on grounds that the public interest requirement was not met.[195] Characterizing the dispute as a consumer transaction, the court noted that, although the act did occur within the course of the seller's business, there was little likelihood of repetition because the plaintiff had failed to show that it was part of a generalized course of conduct, and there was no showing that other consumers had in fact been deceived.[196]

The court, however, could have easily dismissed the plaintiff's CPA claim for failure to show an unfair or deceptive act, and its failure to do so is best explained by pointing to the various shortcomings of the *Tandy* court's analysis. First, although the court properly stated that unfair or deceptive acts must have the capacity to deceive a substantial portion of the public, the court ultimately concluded that Tandy's conduct was unfair or deceptive because it "had the capacity to deceive," and apparently omitted the substantial capacity portion of the test. Thus, it is not clear whether the court addressed this portion of the test.[197] Even if the court is given the benefit of the doubt, however, its decision is still problematic because it overlooked the fact that there was, printed on the resource book itself, a warning that third-party software was not supported.[198] Thus, while the plaintiff in this particular case may not

190. *Id.* at 597, 731 P.2d at 1126.

191. *Id.*

192. *Id.* at 599, 731 P.2d at 1127.

193. *Id.*

194. *Id.* at 609, 731 P.2d at 1132.

195. *Id.* at 609–10, 731 P.2d at 1132.

196. *Id.*

197. *Id.*

198. The court noted that a disclaimer was printed in the source book. Furthermore, whether the agent had in fact notified the plaintiff was an issue at trial.

have received a verbal warning, the fact that there was a printed warning on the resource book itself would militate against a finding of a capacity to deceive a substantial portion of the public.

Moreover, the *Tandy* court's reasoning is contradictory. While holding that Tandy's conduct was deceptive because it failed to inform *potential* buyers that the resource book software was not backed by any guaranty,[199] it also held that because there was no evidence that other consumers had actually been affected by Tandy's conduct, there was likely no affect on the public interest.[200] This was a misapplication of the test because actual deception is not dispositive in determining whether public interest has been shown.[201] In addition, the court seemed to implicitly acknowledge that if other buyers had been deceived, the plaintiff might have been able to satisfy the public interest requirement.[202] This is an inquiry a court would be required to make in determining whether unfair or deceptive acts have the capacity to deceive a substantial portion of the public.

D. Interpreting Unfair or Deceptive Acts that have the Capacity to Deceive a Substantial Portion of the Public as Satisfying the Public Interest Requirement is Consistent with the Language of the CPA

Eliminating the public interest requirement is not inconsistent with the purpose section of the CPA because the capacity to deceive test will still prevent private litigants from bringing causes of action that are not injurious to the public. In addition, the language of the purpose section can be interpreted to suggest that unfair acts necessarily touch the public interest.

Proponents of the public interest requirement, including the *Hangman Ridge* court, have drawn much support from the language of the purpose section of the CPA, which states that "this act shall not be construed to prohibit practices which . . . are not injurious to the public interest."[203] However, as the preceding discussion demonstrates, many

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199. Aubrey's R.V. Ctr., Inc v. Tandy Corp., 46 Wash. App. 595, 609, 731 P.2d 1124, 1132 (1987) (emphasis added).

200. *Id.* at 610.

201. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., 105 Wash. 2d 778, 785, 719 P.2d 531, 535 (1986).

202. In particular, the court focused on the fact that the acts were not shown to be part of a particularized course of conduct, that there was no showing of repeated acts, that there was little likelihood of repetition, and that mere speculation is insufficient to show a potential for repetition. *Tandy*, 46 Wash. App. at 609–610, 731 P.2d at 1132. However, the conduct in *Nordstrom*, *Travis*, and *Sign-O-Lite Sign*, was found to have had the capacity to deceive a substantial portion of the public precisely because it exhibited a generalized course of conduct and the potential for repetition.

203. *See supra* note 67.

courts have implicitly recognized a functional equivalence between acts that have the capacity to deceive a substantial portion of the public and acts that affect the public interest. Therefore, the capacity to deceive test can act as a mechanism for eliminating CPA claims are that not injurious to the public, and is precisely consistent with the language of the purpose section. Because there is no functional distinction between an act that has the capacity to deceive a substantial portion of the public and an act that affects the public interest, the public interest element can be dispensed with as a prerequisite to a private cause of action consistent with the language in the purpose section of the CPA.

Furthermore, because an unfair or deceptive act is one that has the capacity to deceive a substantial portion of the public, the language of the CPA can be interpreted as lending support to the proposition that, in conferring upon the public a private cause of action for violations of Wash. Rev. Code § 19.86.020, the legislature recognized that acts which are unfair or deceptive and have the capacity for repetition implicitly satisfy the public interest element. The judicially-imposed public interest requirement is based on two key phrases in the purpose section of the Act,[204] which state that the purpose of the CPA is to "complement the body of federal law governing restraints on trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public,"[205] and that the Act should not be interpreted to "prohibit acts or practices that are not injurious to the public interest."[206] The first section discusses unfair and deceptive acts together with protecting the public in the same sentence, however, the second sentence refers merely to acts that are not injurious to the public interest. While this statement can be read as affirmatively requiring private parties to demonstrate a public interest in addition to conduct that was unfair or deceptive, it is also equally plausible that the purpose section essentially equates unfair acts with those that necessarily affect the public interest. Thus, where a court determines that an unfair or deceptive act has the capacity to deceive a substantial portion of the public, the purpose section can be read as suggesting that deterring this conduct is necessarily in the public's interest.[207]

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204. *See supra* note 67.

205. *See supra* note 67.

206. *See supra* note 67.

207. Although there are no cases in Washington that have directly interpreted the purpose section in this manner, cases such as *Nordstrom*, *Travis*, *Sign-O-Lite*, *Hiner*, and *Burbo*, discussed in Section IV.A.1–2 *supra*, implicitly lend support to this interpretation because they essentially treat an act that has the capacity to deceive a substantial portion of the public as necessarily satisfying the public interest requirement. In addition, the references to "public policy" that underlie both the

V. CONCLUSION

Private causes of action under Washington's CPA have come a long way since *Lightfoot*. Although the *Hangman Ridge* court did reaffirm the public interest element, the debate over the vitality of the public interest requirement must again resurface because the standard for proving unfair or deceptive acts or practices in Washington has evolved to the extent that it has subsumed the function of the public interest requirement. The primary reason why the public interest element has lost its independent legal significance is because deceptive conduct that has the capacity to deceive a substantial portion of the public is harmful behavior that necessarily affects the public interest. Washington state court opinions nearly equate the function of the capacity to deceive test and the public interest requirement.[208] Thus, given the direction in which the law for unfair or deceptive acts or practices has developed in Washington, as well as the way the public interest requirement is treated in other jurisdictions, the public interest requirement should be abolished as immaterial to the analysis of a Washington CPA claim.

Furthermore, private actions that have been dismissed on grounds that the plaintiff failed to make the requisite public interest showing are just as easily dismissed on grounds that the plaintiff failed to demonstrate that an unfair or deceptive act exhibited the capacity to deceive a substantial portion of the public. The capacity to deceive test is a unique formulation found only in Washington, and, as the language suggests, should not be interpreted as an easy burden to carry. To this extent, it serves as an adequate barrier to frivolous and purely private disputes.

The most effective way to retract the public interest element would be a judicial decision recognizing the inherent similarity between unfair or deceptive acts and the public interest requirement. Alternatively, the Legislature could amend Washington's private causes of action statute to state affirmatively that no public interest showing is necessary to sustain a private cause of action.[209]

The public interest requirement has become an unnecessary and duplicative element of private causes of action under the Washington CPA. Because its independent legal significance has diminished through time, continued attempts to apply the public interest element are a hollow

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public interest element and an "unfair" act also suggest that unfair acts necessarily affect the public interest. *See* discussion *supra* Part IV.B.

208. *See supra* Part IV.A.

209. A simple, effective statement to the effect of: "Proof of public interest or public injury shall not be required in any action brought under this section." This language is borrowed from CONN. GEN. STAT. § 42-110g(a) (2004).

exercise that can only serve, once again, to muddy the waters of private causes of action under the CPA.