NOTE

On The Propriety of the Public Interest Requirement in the Washington Consumer Protection Act

I. INTRODUCTION

As a general rule, the purpose of a private cause of action is to redress some injury that the defendant has allegedly caused the plaintiff. The Washington Supreme Court deviates from this general rule in its current interpretation of the Washington Consumer Protection Act.1 While the Washington Consumer Protection Act allows a private consumer to sue for redress of an injury,2 a suit under the Act, as judicially interpreted, must be based on more than an isolated individual injury.3 This judicial interpretation is based on two phrases in the purpose section of the Act.4 The first states that the pur-

1. WASH. REV. CODE § 19.86 (1985) was first enacted in 1961.
2. WASH. REV. CODE § 19.86.090 (1985) states: "Any person who is injured in his business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060 . . . may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him, 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: Provided, That such increased award for violation of RCW 19.86.020 may not exceed ten thousand dollars . . . ." WASH. REV. CODE § 19.86.020 (1985) states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."
4. The purpose section of WASH. REV. CODE § 19.86.920 (1985) reads as follows: The legislature hereby declares that the purpose of this Act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the
pose of the Act is to "protect the public and foster fair and honest competition." The second phrase indicates that an action under the Act must not prohibit acts or practices that are not injurious to the public interest. The Washington Supreme Court has interpreted the above two phrases to mean that a private action under the Act must serve the public interest. As a result, showing "public interest" has become a necessary element of a private consumer protection case.

This Note discusses first, whether the judicially created public interest element can be justified by the language of the Consumer Protection Act and, second, assuming some justification for the element can be found, whether the public interest test, as delineated in Anhold v. Daniels and Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., serves a purpose intended by the legislature. This Note concludes that the public interest element is unnecessary because it hinders and often prevents consumer litigation of private damage actions under the Act. Moreover, the public interest element

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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. To this end this Act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this Act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor to be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

6. Id.
7. Lightfoot v. MacDonald, 86 Wash. 2d 331, 544 P.2d 88 (1976). Lightfoot involved an employment contract between the plaintiff and her attorney, MacDonald. Lightfoot alleged negligence and malpractice in MacDonald's handling of her affairs. She also alleged that MacDonald's actions were deceptive and unfair within the meaning of § 19.86.020 of the Consumer Protection Act. Id. at 331-32, 544 P.2d at 88-89. The only issue decided by the Washington Supreme Court was whether the particular facts of the case were sufficient to allow a consumer protection action. Stating that the purpose of the Consumer Protection Act is to protect the public generally, and that an action on a contract between the two parties did not alone operate to protect the public generally, the court barred Lightfoot's suit.
11. The focus of this Note is restricted to an analysis and criticism of the public interest test as developed by Anhold v. Daniels, 94 Wash. 2d 40, 614 P.2d 184 (1980), and applied in subsequent cases. The Washington Supreme Court has also applied a "per se" public interest test, first discussed in State v. Readers Digest Ass'n, Inc., 81 Wash. 2d 259, 270, 501 P.2d 290, 298 (1972). This test has been analyzed in other articles and is beyond the scope of this paper.
cannot be justified by any other policy reason. The legislature should take action to clarify, for the courts and the public, what elements of proof are to be required of a private consumer who brings a suit under the Washington Consumer Protection Act. Specifically, the legislature should eliminate the judicially created public interest requirement and legislate clear criteria for determining whether a particular consumer's cause of action will fall within the Consumer Protection Act.12

II. CREATION OF THE PUBLIC INTEREST ELEMENT

In Lightfoot v. MacDonald,13 the court first determined that a private consumer's suit must serve the public interest if it is to fall within the scope of the Washington Consumer Protection Act. The court briefly discussed the purpose section of the Act, stating:

It is the obvious purpose of the Consumer Protection Act to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally.14

The court further explained that "[w]here relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public."15 Referring to the purpose section of the statute for authority, the court concluded that the legislature's purpose was to "enlist the aid of private individuals damaged by acts or practices which were forbidden in the acts, to assist in the enforcement of the laws."16

Thus, the court reasoned that, in bringing a private suit under the Act, the consumer acts as a private attorney gen-

14. Id. at 333, 544 P.2d at 89.
15. Id. at 334, 544 P.2d at 90 (citing Seaboard Surety Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc., 81 Wash. 2d 740, 746, 504 P.2d 1139, 1143 (1973)).
16. Lightfoot, 86 Wash. 2d at 335-36, 544 P.2d at 91.
eral. In this role, consumer suits under the Act were originally limited to those that "also would be vulnerable to a complaint by the Attorney General under the Act." This has been called the "Attorney General test." 

Although the court has subsequently recognized difficulties in applying the Attorney General test, it has not retreated from requiring the finding of a public interest element. Since the legislature did not define the term "public interest" as used in the purpose section of the Act, the interpretation and application of this judicially created public interest element is left to the courts.

A recently developed test for determining whether a consumer suit under the Act serves the public interest is found in Anhold v. Daniels. There the court stated:

The presence of 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; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.

The phrase "potential for repetition" was defined in a subsequent case to mean a "protracted course of conduct" or a "general pattern of deceptive acts." It is not sufficient to

17. Id. at 334, 544 P.2d at 90. See also Anhold, 94 Wash. 2d at 43, 614 P.2d at 186-87 (citing Salois v. Mutual of Omaha Insurance Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978)). The Washington Supreme Court had previously stated in Lightfoot that when the attorney general brings an action under the Consumer Protection Act, he acts for the benefit of the public.

18. Lightfoot, 86 Wash. 2d at 334, 544 P.2d at 90.

19. Anhold, 94 Wash. 2d at 43, 614 P.2d at 187.

20. Id. at 43-45, 614 P.2d at 186-187.


22. Id. at 46, 614 P.2d at 188. This "test" does not comport with traditional definitions of the public interest. Public interest is defined in Black's law dictionary as "[s]omething in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." A business is not clothed with the public interest merely because it deals with the public. There must be a peculiarly close relation between the public and those engaged in the business to raise implications of a public interest. Black's Law Dictionary 1106 (5th ed. 1979); see also 3 Bouvier's Law Dictionary at 2765 (Rawle's 3d rev. 1914); State ex rel. Freeling v. Lyon, 63 Okla. 285, 286, 165 P. 419, 420 (1917).

23. Id. at 46, 614 P.2d at 188. This "test" does not comport with traditional definitions of the public interest. Public interest is defined in Black's law dictionary as "[s]omething in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." A business is not clothed with the public interest merely because it deals with the public. There must be a peculiarly close relation between the public and those engaged in the business to raise implications of a public interest. Black's Law Dictionary 1106 (5th ed. 1979); see also 3 Bouvier's Law Dictionary at 2765 (Rawle's 3d rev. 1914); State ex rel. Freeling v. Lyon, 63 Okla. 285, 286, 165 P. 419, 420 (1917).

24. Burton, 105 Wash. 2d at 350, 715 P.2d at 113 (1986). Despite the additional definitive language in Burton, the question still exists as to what proof the court
show that the repetition of an isolated act is hypothetically possible.\textsuperscript{25} It is sufficient to show a single isolated transaction only if many other consumers have been or are likely to be affected.\textsuperscript{26}

requires of the consumer. Must a "protracted course or general pattern" of deceptive conduct be proven point by point, or will the court infer a pattern? If the pattern will be inferred, upon what will the inference be based? In McRae v. Bolstad, 101 Wash. 2d 161, 676 P.2d 496 (1984), the court inferred a pattern from the nature of the defendant's business, while in a similar case, Rouse v. Glascam Builders, Inc., 101 Wash. 2d 127, 677 P.2d 125 (1984), the court refused such an inference. \textit{Burton} does little to clear up this conflict. The defendant in \textit{McRae} was a real estate agent who had sold the property in the conduct of trade or commerce, after having listed the property before the general public, but without full disclosure about the property. The defendant had sold thirty homes in the vicinity and had sold this particular house once before. Even though the particular house in this case was unique because of chronic drainage problems, and was not susceptible to sale after sale as are market products, the court was convinced that a potential for repetition existed such that additional buyers were likely to be injured in exactly the same fashion as the plaintiffs. There was no actual evidence that the defendant was engaged in a general pattern of deceptive conduct.

The plaintiff in \textit{Rouse} owned a condominium unit in a development project built by defendants. When plaintiff's patio began breaking away from her condominium, she complained to defendant Glascam and finally sued under the Consumer Protection Act. She presented evidence of her particular injury and of three years of broken promises and delays on the part of the defendant Glascam. The court stated that "[t]his case fails to satisfy the public interest requirement in that it presents a single isolated act and does not have the potential for repetition necessary to impact the public interest. There is no evidence in the record to indicate that Glascam has acted unfairly or deceptively toward any other condominium owners in the development."

101 Wash. 2d at 134-35, 677 P.2d at 130.

\textit{25. See Burton, supra note 24.}

\textit{26. This rule is reflective of the combined rulings in Hangman Ridge, 105 Wash. 2d at 790, 719 P.2d at 540; Rouse, 101 Wash. 2d 127, 677 P.2d 125 (1984); Sato v. Century 21 Ocean Shores Real Estate, 101 Wash. 2d 599, 681 P.2d 242 (1984); Brown v. Safeway Stores, Inc., 94 Wash. 2d 359, 617 P.2d 704 (1980). Hangman Ridge} merely clarifies the rules previously stated in these cases, that isolated transactions are not sufficient to prove that the public interest requirement is met. The court dismissed the plaintiff's Consumer Protection Act action in \textit{Sato} because it was based on a single isolated transaction not likely to affect other consumers. There, the Satos had been shown a piece of property, made a purchase, and began clearing the land, only to discover that they had purchased the adjacent lot. Another couple who had purchased a lot on the same block at the same time and from the same salesperson as the Satos had no problem with their lot. At trial, the Satos presented no evidence of methods, practices, conduct or intentions of the sales person. The court stated that it did not know whether this case involved a deceptive practice or simply an isolated mistake. Therefore, the Satos proved no Consumer Protection Act claim.

In \textit{Brown}, Brown's cause of action against Safeway arose from a contract for a lease arrangement that Brown alleged Safeway had breached. Brown argued that this breach, and Safeway's establishment of a new store at a nearby location, constituted unfair and deceptive practices because, as a result of Safeway's conduct, "the public was literally scared away . . . ." 94 Wash. 2d at 374, 617 P.2d at 712. Brown did not offer to prove that this alleged breach arose out of the contract itself. The court found that this was not sufficient evidence to satisfy the public interest requirement.
Recently, in *Hangman Ridge*, the Washington Supreme Court attempted to clarify what a private consumer is required to show under the Act. Post-*Hangman Ridge* plaintiffs are now required to show the following elements:

(1) unfair or deceptive act or practice—which has a capacity to deceive a substantial portion of the public; (2) the act or practice must occur in trade or commerce which includes the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Washington; (3) public interest impact; (4) plaintiff was injured in his or her "business or property"; (5) causation—or inducement.

These five elements do little more than restate the previously quoted three-part *Anhold* test. The greatest contribution *Hangman Ridge* makes to this area of the law is to clarify and bring together what already has been held in previous cases. New concepts, rules, elements, or theories are conspicuously missing. For example, the "factors," which the court has declared to be "relevant to establish public interest," all require some degree of proof that the defendant's conduct is potentially repetitious or part of a "general pattern of dece-

27. 105 Wash. 2d 778, 719 P.2d 531 (1986). The court stated, as its motive for this rather thorough decision, that "since the *Lightfoot* decision, the confusion surrounding private rights of action under the CPA has speedily increased." *Id.* at 784, 719 P.2d at 535.

28. *Id.* at 785, 719 P.2d at 535. The court stated that the purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs. However, since each plaintiff must prove not only injury particular to plaintiff but also injury to prior consumers as well, the purpose of this test is not fulfilled. Injury has already occurred.

29. *Id.* WASH. REV. CODE § 19.86.010(2) (1985). Although the per se test is not the focus of this comment, see *supra* note 11, it may be noted that in lieu of elements one and two, the plaintiff may prove violation of a statute which has declared the act in question to constitute an unfair or deceptive act in trade or commerce. *Id.* at 786, 719 P.2d at 535.

30. *Id.* at 787-792, 719 P.2d at 536-39. Note that in lieu of proving this element, the plaintiff may prove that the act or practice violated a statute that declares the act or practice to be against the public interest. *Id.* at 791-92, 719 P.2d at 538-39.

31. *Id.* at 792, 719 P.2d at 539 (citing WASH. REV. CODE § 19.86.090 (1985)).

32. *Id.* (citing WASH. REV. CODE § 19.86.020 (1985)).

33. *Id.* at 784, 719 P.2d at 535. The court's explanation for the reworking of *Anhold* is that "[i]t has become clear that this 'inducement-damage-repetition' test is not the best vehicle for showing that the public was or will be affected by the act in question." *Id.* at 787, 719 P.2d at 537. The court noted that *Anhold* and the line of cases following it have resulted in steadily increasing confusion surrounding private rights of action under the Consumer Protection Act. See *supra* note 23 and accompanying text.

34. *Id.* at 790, 719 P.2d at 538.
tive acts." Further, each of the five "factors" which the *Hangman Ridge* case lists is drawn directly from the court’s ruling in prior consumer protection cases. The factors in a consumer transaction are:

(1) Were the alleged acts committed in the course of defendant’s business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected?

This judicially created element significantly enlarges the plaintiff’s burden and has so far deviated from the legislature’s enactment that it has rendered the private cause of action under the Act nearly useless. More importantly, it has substantially impaired the effectuation of the legislative purpose behind the private cause of action under the Act.

III. STATUTORY ANALYSIS AND THE LEGISLATURE’S PURPOSE

The legislative history of the Washington Consumer Protection Act is sparse and sheds little light upon the legislature’s purpose in allowing the private cause of action. However, the timing of the Act’s enactment, a close analysis of the Act itself, and a comparison to the most comparable federal law, the Federal Trade Commission Act, provide a relatively complete picture of the legislative intent.

A. Timing

The legislature first enacted the Washington Consumer Protection Act in 1961. At that time, the legislature gave a "person" authority to bring a lawsuit under all but one of the violation sections of the Act. In 1970 the legislature extended

35. See supra note 24, 25, 26 and accompanying text.
36. *Hangman Ridge*, 105 Wash. 2d at 790, 719 P.2d at 538. Additionally, where the transaction was "essentially a private dispute" the court states four additional factors to be examined: "(1) Were the alleged acts committed in the course of defendant’s business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?" Id.
37. "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships. WASH. REV. CODE § 19.86.010(1) (1985).
that authority to include all violation sections.\textsuperscript{38}

The 1960's through the early 1970's was a period of heightened consumer protection activity.\textsuperscript{39} Legislatures around the country were taking note of the consumer climate and enacting legislation "aimed at safeguarding the consumer's right to be informed, to choose, to be heard, and to be protected from injury."\textsuperscript{40} Like other legislatures around the country, the Washington legislature responded to the consumerism of the 1960's and early 1970's by enacting the Washington Consumer Protection Act and providing for a private cause of action thereunder.\textsuperscript{41} Thus, contrary to the court's understanding, the timing of the Act's enactment indicates that consumer actions are not allowed merely to "enlist the aid of private individuals . . . in the enforcement of the laws."\textsuperscript{42} Neither is the relief provided in the Act for private individuals "only incidental to and in aid of the relief asked on behalf of the public."\textsuperscript{43}

\textbf{B. Language and Format}

An analysis of the language and overall format of the Act further reveals the goal and collective mind of the legislature when applied to a private cause of action. When the legislature

\textsuperscript{38} The legislature amended WASH. REV. CODE § 19.86.090 in 1970 to add WASH. REV. CODE § 19.86.020 to the list of violations that an individual damaged by the violation may litigate under the Consumer Protection Act. 1970 Wash. Laws, 1st ex. sess., ch. 26, § 20. See supra note 2, for the language of WASH. REV. CODE § 19.86.020 and WASH. REV. CODE § 19.86.090.

Although the legislature has authorized private litigation for any violation of the Act, the bulk of private litigation has employed WASH. REV. CODE § 19.86.020. See also Long v. Chiropractic Society of Washington, 93 Wash. 2d 757, 613 P.2d 124 (1980) (under WASH. REV. CODE § 19.86.040 (1985), which prohibits monopolies, reciprocal fees for relicensing symposia between related professional groups held not unlawful price fixing).


\textsuperscript{40} Private Suits, supra note 12, at 804.

\textsuperscript{41} All fifty states now have enacted some form of consumer protection act. Most were enacted in the 1960's and early 1970's (except Alabama which waited until 1981). Sheldon, supra note 39, at 6 and Supp. at 15; Consumer Protection Special Report, supra note 39, at 1.

\textsuperscript{42} Lightfoot, 86 Wash. 2d 331, 335-36, 544 P.2d at 91.

\textsuperscript{43} Id. at 334, 544 P.2d at 90 (quoting Seaboard Surety Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc., 81 Wash. 2d 740, 746, 504 P.2d 1139, 1143 (1973)).
enacted the Washington Consumer Protection Act in 1961, it clearly and unambiguously delineated five types of activity constituting a violation of the Act.\textsuperscript{44}

The violation sections of the Act further indicate that the legislature did not intend the "public interest" to be an element of a private consumer action under the Act. In each violation section, the legislature was careful to separate types of activity that violate the Act. It provided a separate and complete violation section for each type of activity and fully described each, including all elements necessary to show a violation of the Act in the respective sections. For example, sections 19.86.020, .030, and .040 of the Revised Code of Washington each specifically include the phrase "trade or commerce" as an element of a violation of each of those sections.\textsuperscript{45}

The term "public interest" is not found in any of the violation sections. The only place in the Act where the term "public interest" is found is in the purpose section.\textsuperscript{46} The primary purpose of the Consumer Protection Act is to protect the public interest. Thus, the legislature implicitly recognized each of the activities constituting a violation of the Act as violations of

\textsuperscript{44} The violation sections are WASH. REV. CODE § 19.86.020-060. Pursuant to WASH. REV. CODE § 19.86.090 private individuals have the right to litigate damage actions for violations of all violation sections of the Act.

WASH. REV. CODE § 19.86.020 states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." (emphasis added).

WASH. REV. CODE § 19.86.040 states in part: "It shall be unlawful for any person to monopolize . . . or attempt to monopolize any part of trade or commerce." (Emphasis added).

WASH. REV. CODE § 19.86.050 states: "It shall be unlawful for any person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged therefore or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not deal in the goods, wares, merchandise, machinery, supplies, or other commodity or services of a competitor of competitors or the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

WASH. REV. CODE § 19.86.060 states in part: "It shall be unlawful for any corporation to acquire, directly or indirectly, the whole or any part of the stock or assets of another corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

\textsuperscript{45} See supra note 44.

\textsuperscript{46} WASH. REV. CODE § 19.86.920 is the Act's purpose section. See supra note 4 for language.
the public interest.\footnote{47} Additionally, considering the care with which the legislature drafted each of the violation sections, together with the rule of statutory interpretation that the expression of one thing in a statute excludes others not expressed,\footnote{48} the legislature clearly had no intent whatsoever of creating a public interest element in a consumer's private damage suit under the Act.

The legislature's intent is further evidenced by a direct comparison of the Act's consumer remedies section to the section authorizing the attorney general to litigate violations of the Act.\footnote{49} The legislature was just as careful with regard to

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\item[49] WASH. REV. CODE \S\ 19.86.080 states:

The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

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

WASH. REV. CODE \S\ 19.86.090 states:

Any person who is injured in his business or property by a violation of WASH. REV. CODE \S\ 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of WASH. REV. CODE \S\ 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him, 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: \textit{Provided},

That such increased damage award for violation of WASH. REV. CODE \S\ 19.86.020 may not exceed ten thousand dollars: \textit{Provided further}, That such person may bring a civil action in the justice court to recover his actual damages, except for damages which exceed the amount specified in WASH. REV. CODE \S\ 3.66.020, and the costs of the suit, including reasonable attorney's fees.
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these two authorization and remedy sections as it was with the violation sections. Each section is, like the violation sections, entirely distinct from the other: Revised Code of Washington section 19.86.080 relates only to attorney general causes of action and remedies, and Revised Code of Washington section § 19.86.090 relates only to private causes of action and remedies.50

In the section giving the attorney general a cause of action under the Act, the legislature provided that the remedy be an injunction and that attorneys' fees be awarded to the prevailing party in the court's discretion.51 On the other hand, the section that provides for individual civil litigation under the Act provides for actual damages, costs of the suit including a reasonable attorney's fee, and, in the discretion of the court, treble damages.52 If the legislature had intended the purpose of consumer actions to be vindication of the public interest, then the focus of a consumer action would be like that of an action by the attorney general. In other words, the consumer would litigate "to restrain and prevent the doing of any act herein prohibited or declared unlawful"53 in addition to requesting damages. Although the consumer may request an injunction against further violations of the Act, nothing in the Act requires the consumer to do so.54 The legislature, instead, provided the consumer with a remedy for a violation of the Act and the means by which to achieve that remedy, i.e., attorneys'

The justice court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in WASH. REV. CODE § 3.66.020. For the purpose of this section "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured by reason of a violation of WASH. REV. CODE §§ 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefore in the superior court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee.

50. Neither section makes use of the term "public interest" or any similar term or phrase.

51. WASH. REV. CODE § 19.86.080 (1985), see supra note 49.

52. WASH. REV. CODE § 19.86.090 (1985), see supra note 2.

53. WASH. REV. CODE § 19.86.080 (1985) states in part:
The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

54. See WASH. REV. CODE § 19.86.090 (1985), supra note 2. Additionally, WASH. REV. CODE § 19.86.095 (added in 1983) provides that if the consumer elects to request injunctive relief, the attorney general must be notified. The clear implication is that the consumer is not expected to request an injunction. See also infra note 120.
fees and up to three times the amount of damages.  

The language in these two sections indicates that the legislature focused upon providing a remedy to the consumer. The provision for attorney fees and damages to the consumer is not, as the Lightfoot court asserts, "only incidental to and in aid of the relief asked on behalf of the public." Nor is that provision included merely as a carrot to encourage the consumer to use the Act. To the contrary, had this been the legislature's intent, there would be a more direct correlation between the two sections. Private individuals litigating under the Act would be required to request an injunction or to join the attorney general in a private cause of action. Further, civil monetary penalties, which would be provided for in actions brought by either the attorney general or the consumer, would be more similar to treble damages.

The differences that do exist between these two sections of the Act indicate that the legislature did not intend the consumer to act as a private attorney general. Rather, these differences indicate that the legislature's intent was to provide a remedy to consumers who, without attorneys' fees and the possibility of treble damages, would rarely find themselves in a position to litigate and recover damages from violators of the Consumer Protection Act.

The Act's statute of limitations is also strongly indicative of the legislature's intent. The legislature was so intent on

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55. Specifically, suits made feasible by the Consumer Protection Act are those in which the injury to the individual consumer, in terms of dollars, is not as great as the cost of litigating the injury. Examples are deceptive advertising and unkept promises regarding small home appliances. As the Act is set up, attorney's fees, filing fees and miscellaneous costs of the suit cannot earn into the damage award.

56. Lightfoot, 88 Wash. 2d at 334, 544 P.2d at 90.

57. Injunctive relief is the primary purpose of an attorney general's cause of action under WASH. REV. CODE § 19.86.080 (1985). See supra note 49. An injunctive order is, logically, the best and most direct way of benefitting the public as a whole.

58. See WASH. REV. CODE § 19.86.095 (1985) and supra note 54.

59. WASH. REV. CODE § 19.86.140 provides in part: "Every person who violates RCW § 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation . . . ." This statute does not distinguish between actions brought by the Attorney General (where damages, attorney's fees and civil penalties constitute the total possible monetary order), and those brought by private citizens (where, in addition, the defendant faces the possibility of treble damages).

60. See supra note 55.

61. WASH. REV. CODE § 19.86.120 (1985) states:

Any action to enforce a claim for damages under RCW § 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues: Provided, That whenever any action is brought by the attorney
providing a remedy to consumers that it suspended the running of the statute of limitations "with respect to every private right of action for damages under WASH. REV. CODE § 19.86.090 which is based in whole or part on any matter complained of in . . . [an action brought] by the attorney general . . . during the pendency thereof." 62

This language does not indicate a legislative intent to use consumers to act as private attorney generals in vindicating the public interest. Were that the case, consumer actions under the Act would be precluded if the attorney general had already prosecuted an action on a substantially similar matter. It is the duty of the attorney general to bring actions in service to the general public interest. 63 Thus, when the attorney general brings an injunctive cause of action under the Consumer Protection Act, the purpose of the Act, to further the public interest, has been served. Nevertheless, the legislature still allows a consumer action by tolling the statute of limitations on private rights of action based on any matters complained of in actions by the attorney general. 64 This approach can only be viewed as a means to provide the injured consumer with a direct remedy, solely for remedial purposes.

This statute of limitations section does not, therefore, support the court's view that the private cause of action exists merely so that injured citizens can assist the attorney general in enforcing the law. The public does not benefit twice where two substantially similar actions are prosecuted. Under such circumstances, one injunction, obtained by the attorney gen-

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62. WASH. REV. CODE § 19.86.120 (1985); see supra note 61.
63. State v. Gattavara, 182 Wash. 325, 47 P.2d 18 (1935) (The attorney general, in the absence of express legislation, may exercise all such power and authority as the public interest may require); Gold Seal Chinchillas v. State, 69 Wash. 2d 828, 420 P.2d 698 (1966) (The attorney general, as an elected officer of cabinet rank in State government has the implicit duty by virtue of his position to inform the people of the state of actions taken in his official capacity); State v. District Court, 22 Mont. 25, 55 P. 916 (1899) (attorney general's authority is coextensive with the public legal affairs of the whole community. His advice often affects the rights of all persons within the state, and his opinions control public interests more largely than do the acts of any other official of the state).
64. WASH. REV. CODE § 19.86.120 (1985); see supra note 61.
eral, is no different and provides no more relief to the consumer than the second injunction obtained by the injured consumer.

Perhaps the strongest indication of legislative intent is not where the legislature failed to refer to the public interest, but where it actually did refer to the public interest. The term "public interest" appears only in the purpose section of the Act, as a declaration of policy. While the term serves as an important guide for determining the intended effect of operative sections of the Act, the term is not, itself, operative in any way. The purpose section of the Act begins: "The legislature hereby declares that the purpose of this Act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." It is obvious that when the legislature drafted the Consumer Protection Act, it focused on the concerns of the public as a whole. Certainly, had the legislature intended the public interest to be an element of an individual's cause of action, it could have explicitly stated so. It did not, and the only reasonable interpretation of the legislature's statement of purpose is that, by making the activity delineated in each of the violation sections unlawful, it was protecting the public and fostering fair and honest competition. Any additional "public interest" element is therefore superfluous.

The rest of the purpose section of the Act bears this out. Immediately following the legislature's indication that the purpose of the Act is to protect the public, the legislature directed the court to 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 matter." The legislature clarified this directive by adding, "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 . . . ."
The legislature's intent and the basis for this language becomes clear upon analysis of Federal Trade Commission litigation prior to and during the 1960's.70 Like the Washington Consumer Protection Act, the Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce.71 Prior to 1963, the Federal Trade Commission had adopted and adhered to a subjective consumer standard in its regulation of advertising.72 Reviewing courts and the Federal Trade Commission have placed much reliance on the Supreme Court's language in Federal Trade Commission v. Standard Education Society to support the proposition that all consumers, reasonable and unreasonable, are to be protected from deceptive advertising.73

This line of reasoning led to absurd results. For example, in one case the Federal Trade Commission sought to regulate a hair coloring product advertisement that claimed that the product permanently changed hair color.74 The Federal Trade Commission found the advertisement misleading and deceptive because the product did not change the color of hair not yet grown out.75 The reviewing court relied on the reasoning of Standard Education Society and deferred to the Federal Trade Commission's finding of deception.76 However, the court could not resist adding the following: "It seems scarcely possible that any user of the preparation could be so credulous as to suppose that hair not yet grown out would be colored by an application of the preparation to the head."77

70. "To ascertain legislative intent, one must imagine oneself 'in the position of the legislature enacting the statute,' assuming that legislators were 'reasonable men pursuing reasonable purposes reasonably' and drawing upon the 'general public knowledge of what was considered to be the mischief that needed remedying.'" Private Suits, supra note 12, at 804 n.66. (citing H. HART AND A. SACKS, THE LEGAL PROCESS 1413, 1414-15 (Tentative ed. 1958) (Harvard Univ.); MacCallum, Legislative Intent, 75 YALE L.J. 754 (1966); Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930)).

71. "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful." 15 U.S.C. § 45 (1982).


73. See, e.g., Gulf Oil Corp. v. Fed. Trade Comm'n, 150 F.2d 106, 109 (5th Cir. 1954); Charles of the Ritz Distrib. Corp. v. Fed. Trade Comm'n, 143 F.2d 676, 679 (2d Cir. 1944); Gelb v. Fed. Trade Comm'n, 144 F.2d 580, 582 (2d Cir. 1944); General Motors Corp. v. Fed. Trade Comm'n, 114 F.2d 33, 36 (2d Cir. 1940).

74. Gelb, 144 F.2d at 582 (2d Cir. 1944).

75. Id.

76. Id.

77. Id.
This line of cases applying the unreasonable consumer standard led to such substantial controversy that the Commission finally reversed itself in 1963.78 In a case that has subsequently come to represent the Commission’s official position,79 the Federal Trade Commission stated:

[A]s has been reiterated many times, the Commission’s responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable . . . . This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feebleminded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim . . . A representation does not become ‘false and deceptive’ merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.80

During the decades in which the Federal Trade Commission used the unreasonable consumer standard it also attempted to regulate advertising, which may have deceived some, but did not prejudice or injure and did not result in detriment to the purchasing public.81 In one such case, the defendant manufactured articles made from material resembling glass and sold its products under the brand name “Elasti-Glass.”82 The Federal Trade Commission alleged that because the products were not made entirely from silica glass, use of the word “glass” in advertising constituted an unfair and deceptive trade practice. The reviewing court disagreed. Although the product had been broadly advertised and there was an impact on the public interest, the Federal Trade Commission had not made any showing that the practices sought to

78. Heinz v. Kirchner, 63 F.T.C. 1282 (1963) (where swimming aid manufacturer advertised a device as rendering user unsinkable and the F.T.C. ruled that it should not be advertised as a life preserver), aff’d sub. nom. Kirchner v. Fed. Trade Comm’n, 337 F.2d 751 (9th Cir. 1964); G. ROSEN, THE LAW OF ADVERTISING, § 18.02(1), (1985).
80. Heinz, 63 F.T.C. at 1290; see also In re Papercraft Corp. 63 F.T.C. 1965 (1963).
82. Id.
be proscribed were detrimental to the public interest.\textsuperscript{83} There was no evidence of injury to any dissatisfied customer, nor even of any dissatisfied customers.\textsuperscript{84} The court adopted this requirement of detriment even though it recognized that no proof of actual deception was required.\textsuperscript{85} Thus, if the deceptive advertising does not injure the public interest, then it is not within the Federal Trade Commission's purview to regulate it.

These actions by the Federal Trade Commission against activity which was not detrimental to the public interest, combined with the Commission's use of the unreasonable consumer standard, were of concern to the Washington legislature.\textsuperscript{86} This last section of the Act can only be interpreted as a direct response to these concerns. It is the state legislature's directive to the court to use a reasonable consumer standard rather than an unreasonable consumer standard. The Act is thereby limited: it is not meant to prohibit acts or practices which are "reasonable" and "not injurious to the public interest."\textsuperscript{87}

IV. ANALYSIS AND CRITICISM OF THE WASHINGTON PUBLIC INTEREST REQUIREMENT

A statutory argument that the judicially created public interest element does not fit the legislature's purpose is insufficient to support a plea for legislative amendment if the action which the court has taken is supported by sound policy. Such is not the case here. Neither federal statutes, the common law, nor common sense can justify the judicially created public interest element.

The legislature provided that the court is to be guided in its interpretation and construction of the Act by comparable federal law.\textsuperscript{88} The federal law most comparable is the Federal Trade Commission Act.\textsuperscript{89} As judicially interpreted, the Federal Trade Commission Act requires that an action brought by

\textsuperscript{83} Id. at 123.

\textsuperscript{84} Id. The court recognized that this particular deception was atypical in that the product actually turned out to be of better quality than the consumer supposed.

\textsuperscript{85} Id. See also infra notes 106.


\textsuperscript{87} WASH. REV. CODE § 19.86.920 (1985), supra note 4.

\textsuperscript{88} See supra note 68 and accompanying text.

\textsuperscript{89} At least insofar as WASH. REV. CODE § 19.86.020, the unfair and deceptive acts or violation section, is concerned. Lightfoot, 86 Wash. 2d at 333, 544 P.2d at 90.
the Federal Trade Commission serve the public interest.\textsuperscript{90} The Federal Trade Commission Act does not, however, provide for a private cause of action.\textsuperscript{91} Nevertheless, analysis of the Federal Trade Commission Act is helpful. Similarly, analysis of common-law deceit or constructive fraud actions can provide some insight into the court's approach to the Consumer Protection Act and into the soundness of any policy reasons behind the public interest element.

\section*{A. Resemblance to the Common Law}

In some respects, elements of the \textit{Anhold} and \textit{Hangman Ridge} test resemble elements of the common law action of deceit or constructive fraud.\textsuperscript{92} Damage and inducement, combined with a representation by one party to another, usually in the context of a business transaction (which is similar to an act or practice within trade or commerce), are actionable at common law as deceit or constructive fraud. Early Washington case law found "actionable fraud" when the defendant had made representations, as of his or her own knowledge, of material and inducing facts, susceptible of knowledge but made by the defendant in ignorance of the facts, and with knowledge that the hearer is relying upon the representation as true.\textsuperscript{93} Even where such representations were made through honest mistake, if they induced the hearer to act or refrain from acting, they were actionable as "deceit"\textsuperscript{94} or, to use a more modern term, "constructive fraud."\textsuperscript{95}

\begin{enumerate}
\item Klesner, 280 U.S. at 25.
\item \textit{See Prosser and Keaton on Torts} § 105-07 (5th ed. 1984); \textit{Restatement (Second) of Torts} § 552(c) (1981).
\item Jacquot v. Farmers Straw Gas Produce Co., 140 Wash. 482, 249 P. 984 (1926); Pratt v. Thompson, 133 Wash. 218, 233 P. 637 (1925); May v. Roberts, 126 Wash. 645, 219 P. 55 (1923); Grant v. Huschke, 74 Wash. 257, 133 P. 447 (1913); West v. Carter, 54 Wash. 236, 103 P. 21 (1909); Sears v. Stinson, 3 Wash. 615, 29 P. 205 (1892); Hanson v. Tompkins, 2 Wash. 508, 27 P. 73 (1891).
\item Actual fraud is not proven because no fraudulent intent is shown. The representor may have made an honest and innocent mistake. Nevertheless, the court has allowed an action for constructive fraud on the ground that the results to the injured party are the same, regardless of whether the misrepresentation involved
\end{enumerate}
Similarly, Anhold and Hangman Ridge speak in terms of deceptive acts or practices that may be innocent or honest, but that induce the plaintiff to act or refrain from acting to the plaintiff’s damage.\textsuperscript{96} As to these elements—deceptive acts or practices, inducement, and damages—the common law is in accord. Each of these elements can be justified by analogy to common-law constructive fraud.

Basic rules of statutory construction assist in clarifying this point. The legislature is presumed to enact laws with full knowledge of existing laws and to be familiar with the rules, prior legislation, and prior court decisions pertaining to the effect of legislation that it is currently enacting.\textsuperscript{97} Further, if a term has a common-law meaning, the legislature is presumed to intend such a meaning.\textsuperscript{98} Thus, the Washington Supreme Court acted appropriately in determining the application of the term “deceptive” in the Washington Consumer Protection Act.\textsuperscript{99}

The public interest requirement under the Washington Consumer Protection Act is distinguished, however, from common-law actions. The deceptive act must have “potential for repetition” and must occur in the “conduct of trade or commerce” and must cause damages to the plaintiff.\textsuperscript{100} The elements of the test concerning “conduct of trade or commerce” and “potential for repetition” are most closely analogous to the

\textsuperscript{96} McRae v. Bolstad, 101 Wash. 2d 161, 676 P.2d 496, 498-500 (1984). In McRae, the Anhold public interest test was met, in part because the defendant’s real estate agent had failed to disclose significant facts about the property sold to the McRaes, and the McRaes had relied on the agent and been damaged as a result.


\textsuperscript{99} Although the common law causes of action are validly relied upon to determine the meaning of the term “deceptive,” those causes of action alone do not represent satisfactory avenues for injured consumers to obtain a remedy. See, e.g., supra note 55. The Washington Consumer Protection Act (absent the judicially created public interest requirement) solves this problem by providing for attorney fees and, in the discretion of the court, treble damages.

\textsuperscript{100} Hangman Ridge, 105 Wash. 2d at 790, 719 P.2d at 540; Anhold, 94 Wash. 2d at 45, 614 P.2d at 188. All five Hangman Ridge factors require some degree of proof that repetitive conduct is involved. See supra note 35 and accompanying text.
federal courts' analysis of the public interest requirement in actions brought by the Federal Trade Commission.

B. Resemblance to Federal Law

The Federal Trade Commission Act, as amended by the Wheeler-Lea Act in 1938, directs the Federal Trade Commission to prevent persons subject to the Act from using "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." The terms "trade" and "commerce" were well defined prior to the Wheeler-Lea Act and generally do not pose an issue in Federal Trade Commission cases. Likewise, these terms are defined in the Washington Consumer Protection Act and have not been a source of confusion in private actions brought under the state Consumer Protection Act. Although the Federal Trade Commission Act does not provide a private remedy, and all enforcement is left in the hands of the Federal Trade Commission, its basic purpose, like the Washington Consumer Protection Act, is to protect the public from unfair and deceptive practices.

Unlike the Washington courts' interpretation of the Washington Consumer Protection Act, however, the federal courts have stated that furtherance of the public interest does not require actual proof of repeated instances of conduct or of a pattern of activity. This interpretation of the federal Act is

103. None of the Federal cases cited in this comment, or decided in recent years, deal with the issue of whether commerce was affected. What constitutes "commerce" has been broadly defined: "Traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed, every species of commercial intercourse. . . ." Adair v. United States, 208 U.S. 161 (1908).
104. WASH. REV. CODE § 19.86.010(2) (1985) states: " 'Trade' and 'Commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."
105. Lightfoot, 86 Wash. 2d at 341, 544 P.2d at 90.
106. Because the Federal Trade Commission, as a regulatory agency, has broad discretion to determine what is in the public interest, the courts will interfere only when the agency has abused its discretion. Fed. Trade Comm'n v. Klesner, 280 U.S. 19, (1929) (in which the defendant used misleading advertising on signs, letterheads, and work vehicles); Fed. Trade Comm'n v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir. 1951) (in which the Commission brought action for an injunction restraining dissemination of false information regarding arthritis medication); Exposition Press,
consistent with the express language of the Act and with general rules of statutory construction. Notably, the Washington Consumer Protection Act employs the same language. In both the federal and state acts the activity that is made unlawful is "unfair and deceptive acts or practices. . . ." Common rules


As a result of this deference to the agency, the federal courts have not developed a clear test for determining whether the public interest is served in a number of cases. The courts have stated only that, under the Federal Trade Commission Act, proof of the public interest requires some showing that the practices sought to be proscribed are detrimental or potentially detrimental to the general public. Buchsbaum & Co. v. Fed. Trade Comm'n, 160 F.2d 121, 123 (7th Cir. 1947) (in which the Commission issued a cease and desist letter to a manufacturer and seller of goods made of synthetic resin, and not glass). There need not, however, be proof of actual deception as "[o]ne of the objects of the Act was to [prevent potential injury] by stopping the conduct in its incipiency." Fed. Trade Comm'n v. Raladam Co., 316 U.S. 149, 152 (1941); Trans World Accounts, Inc. v. Fed. Trade Comm'n, 594 F.2d 212 (9th Cir. 1979) (in which the Commission issued order against debt collection agency prohibiting certain practices used in its collection operations).

Therefore, in a Federal Trade Commission case, actual consumer testimony of harm or testimony on the issue of intent, is not needed to support an inference of deception of the general public. Bear Mill Manufacturing Co. v. Fed. Trade Comm'n, 98 F.2d 67 (2d Cir. 1938) (in which the Commission issued an order requiring seller to cease using language indicating that he is the manufacturer of the offered clothing); Koch v. Fed. Trade Comm'n, 206 F.2d 311, 317 (6th Cir. 1953) (in which the Commission issued an order to drug company to cease distribution of false sales literature to both doctors and lay persons); Charles of the Ritz Distrib. Corp. v. Fed. Trade Comm'n, 143 F.2d 676, 680 (2d Cir. 1944) (in which the Commission issued an order to seller to cease false advertisements of cosmetics). That the deceptive act or practice was done in good faith or innocently or that little harm has occurred is irrelevant. See also Fed. Trade Comm'n v. Raladam Co., 283 U.S. 643 (1930); Raladam Co. v. Fed. Trade Comm'n, 123 F.2d 34 (6th Cir. 1941), rev'd, 316 U.S. 149 (1942) (misleading advertising and testimony of drug store owners that the public was purchasing the drug from store shelves); Ostler Candy Co. v. Fed. Trade Comm'n, 106 F.2d 962 (10th Cir. 1939), cert. denied, 309 U.S. 675 (1940) (established business marketing practice); Thomas v. Fed. Trade Comm'n, 116 F.2d 347 (10th Cir. 1940) (deceitful advertising causing inference that many purchasers were misled and deceived to their damage); Koch v. Fed. Trade Comm'n, 206 F.2d 311 (6th Cir. 1953) (pattern of advertising of false and deceptive claims led to inference that the public had been deceived); Standard Distrib. v. Fed. Trade Comm'n, 211 F.2d 7 (2d Cir. 1954) (nine years of deceptive door-to-door sales activity and proof that many sales had involved deception; over thirty witnesses called); Fed. Trade Comm'n v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951) (advertising deceived consumers; evidence consisted of affidavits of experts who had talked with injured and deceived consumers); Exposition Press, Inc. v. Fed. Trade Comm'n, 295 F.2d 869 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962) (misleading advertising led to inference that the public had been misled).

of statutory construction provide that the legislature is presumed to use no superfluous language,\textsuperscript{108} and that the term "or" is disjunctive,\textsuperscript{109} expressing mutually exclusive alternatives. Therefore, under both Acts, "act" should constitute a violation as well as a "practice."

The federal approach is consistent with these rules. While an act must constitute a detriment to the public and not merely an isolated personal injury, no proof of a protracted course of conduct is required.\textsuperscript{110} The Washington Supreme Court has ruled differently as to the Washington Consumer Protection Act. The plaintiff is required to prove that the activity complained of is part of a general pattern or a protracted course of deceptive conduct.\textsuperscript{111} Not only is this rule a deviation from the express language of the Act and from the federal law from which the state court is bound to take guidance,\textsuperscript{112} it is an unreasonable requirement of the consumer, it serves no policy interest, and it does not further the legislative intent under the Consumer Protection Act.

\textbf{C. Criticism of the Public Interest Requirement}

Even if the Federal Trade Commission were required to prove a pattern or practice of deceptive activity, the vital dissimilarity between a private individual and an agency distinguishes the two actions and raises questions about the reasonableness of requiring the private individual to prove potential for repetition as part of a public interest element of a suit for damages. Government agencies have a general duty to serve the public,\textsuperscript{113} but private citizens are not bound by such a duty.

Further, in showing that the public interest is served, the

\textsuperscript{108} Rainer National Park Co. v. Martin, 23 F.Supp. 60, 62 (W.D. Wash. 1937), aff'd, 302 U.S. 661 (1938) ("It was very early announced that Congress is not presumed to have used words for no purpose; that a legislature is presumed to have used no superfluous words." (Citation omitted.)); Automobile Drivers and Demonstrations Union Local No. 882 v. Dept. of Retirement Systems, 92 Wash. 2d 415, 598 P.2d 379 (1979), appeal dismissed, cert. denied, 444 U.S. 1040 (1980) (court held port police officers were not law enforcement officers under the act); State v. Lundquist, 60 Wash. 2d 397, 400, 374 P.2d 246, 249 (1962) (in which the court construed a firearms statute).

\textsuperscript{109} State v. Tiffany, 44 Wash. 602, 604, 87 P. 932, 933 (1906) (in which court construed a statute on water and irrigation).

\textsuperscript{110} See supra note 106.

\textsuperscript{111} Burton, supra note 3; Hangman Ridge, supra notes 27-36 and accompanying text.


\textsuperscript{113} See supra note 63.
agency, unlike the individual, has much greater access to information and evidence such as business practices or continuous patterns of deceit. As a general rule the agency also has much greater financial resources than the individual. These points lead to one conclusion: if the public interest must be proved, the plaintiff who is in the position to do so is the government agency, not the private individual.\textsuperscript{114}

While plaintiffs are required to show other instances of deceptive activity, defendants, like those in \textit{McRae}\textsuperscript{115} and \textit{Eastlake Construction v. Hess},\textsuperscript{116} defend only against the damages alleged by the plaintiff's particular suit. If found liable, the defendant will be required to pay, at most, ten thousand dollars in damages, costs, and attorney fees.\textsuperscript{117} This ten thousand dollar limit is seldom approached because many judges are reluctant to grant large awards in cases involving relatively small damage amounts.\textsuperscript{118} Thus, even if a consumer is able to meet his or her burden of proof, the defendant is at little risk. Under the Act as currently interpreted, consumer actions provide little deterrent effect because plaintiffs rarely are able to meet the judicially created public interest test. As such, the public interest requirement adds nothing to the stated legislative purpose that the Act "protect the public and foster fair and honest competition."\textsuperscript{119} In fact, the requirement is detrimental to that policy. More importantly, however, the public interest requirement negates the legislature's intent to provide a remedy to consumers who are injured by violations of the Consumer Protection Act.

Further, there is little incentive for a plaintiff under the

\textsuperscript{114} When a plaintiff is required to prove that his or her cause of action serves the public interest, he or she must then prove not only 1) injury, 2) that the act or practice was deceptive, and 3) that it occurred in the conduct of trade or commerce, but must also discover other consumers who have been similarly injured and produce their testimony, or find some other means of convincing the court that the defendant has engaged in a protracted course of deceptive conduct. \textit{See Burton, supra} notes 3 and 24 and \textit{Hangman Ridge, supra} notes 33-35 and accompanying text.

\textsuperscript{115} \textit{See supra} note 96.

\textsuperscript{116} 102 Wash. 2d 30, 50-52, 686 P.2d 465, 476-77 (1984) (in which Hess offered to produce five witnesses who would testify that they were injured in substantially the same manner as Hess and who would also testify that five other lawsuits were pending against Eastlake which also arose out of allegedly improper performance of construction contracts).

\textsuperscript{117} \textit{WASH. REV. CODE} \textsect 19.86.090 (1985).


\textsuperscript{119} \textit{WASH. REV. CODE} \textsect 19.86.920, \textit{supra} note 4.
Washington Consumer Protection Act to seek injunctive remedies. Because of the scope of agency actions and the injunctive order typically requested, agency actions are likely to make a greater impact on a defendant's business than an action by an individual who litigates a suit for relief of his own injury and is not required to seek injunctive remedies.

V. WASHINGTON'S PRIVATE LITIGANT PUBLIC INTEREST REQUIREMENT IS UNIQUE

Forty-five states outside of Washington allow private consumers to litigate under their own versions of consumer protection legislation. In only a few of those states have courts attempted to limit the consumer's cause of action. Almost all such limitations are clearly justified by the language of the states' statutes. None, however, limit the consumer's cause of action as severely as the Washington courts do.

Two states, Georgia and Connecticut, use the phrase "public interest" to limit private causes of action. When the Connecticut court followed more or less the same track as the Washington court, requiring the plaintiff to prove the public interest as an element, the Connecticut legislature amended its Act to state that "proof of public interest or public injury shall not be required in any action" brought under the Act.

120. In fact, WASH. REV. CODE § 19.86.095 could very well work as a disincentive to consumers who contemplate requesting an injunction. That section complicates the consumer suit by requiring that, where an injunction is requested, the attorney general be served as a party. WASH. REV. CODE § 19.86.095 provides: "In any proceeding in which there is a request for injunctive relief under RCW § 19.86.090, the attorney general shall be served with a copy of the initial pleading alleging a violation of this chapter. In any appellate proceeding in which an issue is presented concerning a provision of this chapter, the attorney general shall, within the time provided for filing the brief with the appellate court, be served with a copy of the brief of the party presenting such issue."


122. See annotations, WASH. REV. CODE ANN. § 19.86.090 (1985) and supra note 57, and accompanying text.

123. Sheldon, supra note 39, at 3.

124. Id. at 6-7.

125. Id. Illinois appears to be the sole exception. In Grass v. Homann, 130 Ill. App. 3d 874, 879, 474 N.E.2d 711, 715 (1984), the court stated that "the Act should not be construed to apply to a controversy which involved nothing more than an isolated breach of a contract." (The defendant was a partnership engaged in the business of inspecting premises for termites.)


127. CONN. GEN STAT. ANN. § 42-110g(a) (West Supp. 1986); see also Carpentino v.
In Georgia, protection of the public interest is determined by an examination of whether the act or practice occurred in "trade or commerce."\footnote{Transport Insurance Co., 609 F.Supp. 556, 563 (D. Conn. 1985) (explaining that Public Act 84-468, enacted June 8, 1984, could be applied retroactively to annul the public interest requirement under the Connecticut's Unfair Trade Practices Act, but holding that the public interest requirement was satisfied under existing case law because three critical factors were met: (1) the practice injured consumers; (2) the practice violated established public policy; and (3) the practice was unethical or unscrupulous).}

Some of the difference between Washington's interpretation of the state Consumer Protection Act and other state court interpretations of their respective consumer protection state acts must be attributed to differences in statutory language in the acts.\footnote{Zeeman v. Black, 156 Ga. App. 82, 89, 273 S.E.2d 910, 915 (1980) (construing the language of GA. CODE ANN. § 106-1203(a) (1980), "in the conduct of any trade or commerce," to mean that the alleged wrongful act in a "consumer transaction" must occur in the context of the ongoing business in which the defendant holds himself out to the public). Other states have held that the state act does not apply to "strictly private causes of action." However, this language is generally applied in situations in which the seller was a private individual and the transaction was not taking place in a trade or business context. This is not meant to be a complete analysis of other jurisdictions. Rather, the purpose here is merely to provide a few examples. For a complete analysis of all jurisdictions, see Sheldon, supra note 39.} For example, Hawaii gives the private consumer a choice: the consumer must prove \textit{either} a public interest element or that the defendant is a merchant as defined in the Uniform Commercial Code.\footnote{See generally HAWAII REV. STAT. § 490:2-104 (1976) (1) defining "merchant" as follows: "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out a having such knowledge or skill"; Ai v. Frank Huff Agency, Ltd., 607 P.2d 1304, 1310 (Hawaii 61, 607, 615 (1982)).} In New York, treble damages are allowed when the plaintiff can prove that the violation was intentional,\footnote{N.Y. GENERAL BUSINESS LAW § 350-d(3) (McKinney Supp. 1986); Beslity v. Manhattan Honda, 120 Misc.2d 848, 467 N.Y.S.2d 471 (1983) (holding that treble damages will not be awarded when damage to plaintiff was the result of an inadvertent error by a third party who drafted the seller's advertisement). Texas distinguishes between innocent and intentional deceit and allows treble damages only when there is proof that the deceit was intentional. TEX. BUS. & COM. CODE ANN. § 17.50(b) (i) (Vernon Supp. 1986); see also Pennington v. Singleton, 606 S.W.2d 682, 690-91 (1980) (imposition of treble damages on seller who knowingly made misrepresentations is not unconstitutionally harsh); Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (1985) (two of the legislative goals behind the 1979 amendments to the Deceptive Trade Practices Act (DTPA) were to eliminate mandatory treble damages against sellers who make innocent misrepresentations and to give the trier of fact the discretion to award treble damages for knowing violations} and in North Dakota the plaintiff...
must prove that the act was done with the intent that others would rely on it.\textsuperscript{132} In any case, it is clear that the Washington court stands alone in its creation of the public interest element\textsuperscript{133} and the included requirement that the plaintiff prove that the act complained of is part of a general practice or protracted course of conduct.\textsuperscript{134}

VI. THE REMEDY: ELIMINATION OF THE PUBLIC INTEREST REQUIREMENT

If the private individual’s cause of action under the Washington Consumer Protection Act is to mean anything, the public interest requirement must be eliminated. The \textit{Hangman Ridge} test does not serve the legislature’s purpose of providing remedies to consumers who are damaged by violations of the Consumer Protection Act. Further, the public interest requirement does nothing to further the legislature’s stated intent to “protect the public and foster fair and honest competition.”\textsuperscript{135} Rather, the \textit{Hangman Ridge} test makes the individual consumer’s cause of action much more difficult to prove because the test is unclear\textsuperscript{136} and because, unlike a federal agency, the individual does not have ready access to information that would prove the “potential for repetition.”\textsuperscript{137} The public interest requirement in its present form should therefore be eliminated.

Simple elimination is not, as we have seen, unheard of.\textsuperscript{138} The legislature has provided the court with valid alternative methods of determining whether a cause of action should come under the Act. For example, the activity must occur in the conduct of “trade or commerce.”\textsuperscript{139} Other states’ courts have

\textsuperscript{132} N.D. CENT. CODE ANN. § 51-15-01 (Smith 1981).

\textsuperscript{133} But see Sheldon, supra note 39, at 83 (explaining that a few states do have a public interest requirement). The states mentioned by Sheldon have been examined in this comment and none have been found to hold that the public interest is a required element of the consumer’s cause of action. See supra notes 123-132 and accompanying text. It is in this sense that Washington is alone in its public interest requirement for the consumer’s cause of action.

\textsuperscript{134} Burton supra note 3; Hangman Ridge, supra notes 34-36 and accompanying text.

\textsuperscript{135} WASH. REV. CODE § 19.86.920 (1985), supra note 4.

\textsuperscript{136} See supra notes 24, 33-36 and accompanying text.

\textsuperscript{137} See supra notes 113-114 and accompanying text.

\textsuperscript{138} See supra note 127 and accompanying text.

\textsuperscript{139} WASH. REV. CODE § § 19.86.020, 030, 040 (1985).
successfully used this language to accomplish the legislative goal of protecting the public interest.140

Trade or commerce, as defined by the Washington legislature, includes "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington."141 This definition could be fleshed out by the court, for example, by requiring that the transaction complained of was not "purely private" in the sense that the defendant does not make a business of the complained activity.142

Another approach is to develop the trade or commerce definition by analogy to the definition of "merchant" in the Uniform Commercial Code.143 For example, the court could validly require the plaintiff to show that the defendant is a merchant or manufacturer who (1) deals directly or indirectly with the public; (2) in goods or services of the kind that damaged the consumer, or who otherwise by his or her occupation holds him or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction; and (3) the allegedly deceptive act or practice occurred in the conduct of the merchant's or manufacturer's business affairs.145

A merchant test would meet the legislature's purpose of protecting the public and fostering fair and honest competition. This alteration in the private individual's cause of action under the Consumer Protection Act encompasses all of those defendants to whom the legislature originally directed itself, i.e., those who deal in trade or commerce and who, by the nature of their business, have the potential ability to deceive large numbers of consumers. The merchant test would exclude actions that do not serve this purpose such as actions against persons selling goods at garage sales or other one-time sellers of goods. Further, this test would also serve the legislature's

140. See supra note 128 and accompanying text.
141. See supra note 104.
142. It is in this sense that the first public interest factor in Hangman Ridge asks: 'Did the act occur within defendant's business?' This question should, however, determine the trade or commerce element, not the public interest element.
144. Note that, because the Act limits the individual plaintiff's award to ten thousand dollars (after damages have been trebled), damage actions for greater amounts are not covered by this provision. See WASH. REV. CODE § 19.86.920, supra note 4.
145. A rule similar to this appears to be working in Hawaii. See supra note 130. Note also that the Washington court suggested a merchant test in Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 359-60, 581 P.2d 1349, 1351 (1978).
purpose of providing a remedy to consumers who are injured by violations of the Act. 146

Additionally, this proposed modification to the Consumer Protection Act gives the consumer a better bargaining position when he or she is damaged by a violation of the Act. As the public interest test is currently stated, merchants are not threatened by consumer litigation under the Act and, consequently, have no incentive to settle disputes or remedy damages suffered by the consumer. 147 Because consumers using the merchant standard can be expected to win consumer protection litigation more often, the proposed modification serves to give merchants incentive to settle disputes that arise and to conduct their businesses such that disputes are avoided altogether.

This modification also provides litigants with enough guidance to critically weigh the strength of their cases. The modification does not open the floodgates for an overwhelming number of frivolous private cases under the Consumer Protection Act. Although this proposed modification to the Consumer Protection Act may cause attorneys to be more inclined to accept consumer protection cases, attorneys must still weigh the strength of each case and proceed according to established ethical standards. Thus, if there is a substantial increase in the number of private consumer protection cases, it is because consumers are being injured by violations of the Act.

VII. CONCLUSION

In short, the public interest requirement should be eliminated and the Consumer Protection Act modified as suggested in this Note. This proposal serves both the legislature's purpose to provide a remedy to consumers who are damaged by violations of the Act and its purpose to "protect the public and foster fair and honest competition." Because the court's interpretation of the Act is distant from the legislature's intended meaning, the legislature should take action to set the record straight.

146. The plaintiff could still be required to prove damage and deception (as justified by the common-law of deceit), but there would be no additional limitation excluding "single transactions," and the consumer would not be required to present evidence of other similar injuries caused by the defendant. The courts should be directed to use the reasonable consumer standard.

147. See supra notes 115-117 and accompanying text.
Even as the Washington Supreme Court was deciding *Hangman Ridge*, it appeared to be asking the legislature to take action. For example, the court noted, "we are mindful that we follow a minority view. We are also aware of the general criticism that a public interest requirement is unnecessarily restrictive as to private plaintiffs."\(^{148}\) Nevertheless, the court continued to adhere to its position in requiring proof of the public interest, explaining that it was "compelled" to do so because it viewed legislative inaction as acquiescence.\(^{149}\)

Clearly, the time for legislative action and amendment on this issue is ripe. Both the court and litigants need the legislature's final clear word on how the Consumer Protection Act is to be applied, what specific criteria the private consumer litigating civil violations of the Act must meet, and whether the public interest requirement should be eliminated.

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149. *Id.* at 789, 719 P.2d at 540.