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PRIVATE SUITS UNDER WASHINGTON’S CONSUMER PROTECTION ACT: THE PUBLIC INTEREST REQUIREMENT

I. INTRODUCTION

In 1970 the Washington legislature amended the Consumer Protection Act,1 conferring upon private parties standing to sue2 for unfair or deceptive business practices.3 The Washington Supreme Court, construing this provision in *Lightfoot v. MacDonald,*4 significantly narrowed the apparent scope of the private remedy.5 Relying on the purpose section of the statute,6 the court noted that the Act did not grant “an additional remedy for private wrongs which do not affect the public generally.”7 It held that in order for a private party to recover for the proscribed unfair or deceptive acts, the conduct complained of must be “vulnerable to a complaint by the Attorney General under the Act.”8 In other words, the act or practice must affect the public interest.9

This comment discusses the current state of the law in the area of private remedies for unfair business practices and focuses on two questions: (1) Is the public interest requirement for private suits under the Act justified? (2) What are the appropriate tests for finding an effect on the public interest? The comment concludes that the statutory purpose and historical context justify the public interest requirement but that the Washington

2. “Any person who is injured in his business or property by a violation of RCW 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 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 damage award for violation of RCW 19.86.020 may not exceed one thousand dollars.” *Wash. Rev. Code* § 19.86.090 (1976).
3. “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” *Wash. Rev. Code* § 19.86.020 (1976).
7. 86 Wn. 2d at 333, 544 P.2d at 89.
8. *Id.* at 334, 544 P.2d at 90.
9. The *Lightfoot* court noted that the attorney’s acts in that case did not have “a sufficient impact upon the public to qualify it as one of those acts or practices which are prohibited under RCW 19.86.” *Id.* at 338–39, 544 P.2d at 92–93.
courts have not yet developed a sufficiently specific test for determining when the requirement has been met. A specific test is therefore suggested to fulfill the appropriate function of the private remedy. The proposed test requires the presence of (1) unequal bargaining power, (2) solicitation or public offering, and (3) the probability of repetition of the transaction which forms the basis of the complaint.

This three-part test explains the results in the Washington cases and adheres to the proper scope of the private remedy. The specificity of this test should aid both courts and private litigants in their determination whether a given transaction sufficiently affects the public interest to bring it within the Act's protection.

II. CURRENT STATE OF THE PUBLIC INTEREST REQUIREMENT FOR PRIVATE REMEDIES UNDER THE WASHINGTON CONSUMER PROTECTION ACT

A. The Cases Considering Public Interest

On its face, Washington's Consumer Protection Act does not require that a private party show an effect on the public interest to bring a successful action for injunction or damages. The private remedy section appears to require only that the plaintiff suffer injury as a result of unfair or deceptive acts or practices in the conduct of any trade or commerce. However, in the purpose section of the Act, the Washington legislature declared that although it intended the Act to be "liberally construed that its beneficial purpose may be served," it intended also 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."11

In Lightfoot v. MacDonald,12 the Washington Supreme Court considered an allegation that an attorney's failure to act on a threatened mortgage foreclosure, which resulted in the loss of the plaintiff's property, constituted a violation of the unfair practices section of the Act. Relying on the purpose section's mandate that in construing the Act the courts should "look to [the interpretation given by the federal courts to] 'the various federal statutes dealing with the same or similar matters,' "13 the Lightfoot court considered federal case law involving the private treble

10. See notes 2 and 3 supra.
13. Id. at 335, 544 P.2d at 90 (quoting Wash. Rev. Code § 19.86.920 (1976)).
damage antitrust remedy.\textsuperscript{14} It concluded that both the federal and state provisions were designed to enlist private citizens' aid in enforcement of the laws, "[w]hich is desirable only if it serves the public interest and implements the purpose of the statute."\textsuperscript{15} Consequently, the court incorporated the public interest language from the purpose section into the section proscribing unfair practices,\textsuperscript{16} and decided that since the plaintiff had not shown that the attorney's acts were "injurious to the public,"\textsuperscript{17} she could not recover under the Act's private remedy.\textsuperscript{18}

Later Washington cases show when the public interest is sufficiently affected to satisfy the Lightfoot requirement. In \textit{Fisher v. World-Wide Trophy Outfitters},\textsuperscript{19} the court of appeals held that the placement of deceptive advertisements in a magazine of general circulation was privately actionable. The court did not address the question of public interest involvement but did note that because "[p]laintiffs, members of the general public to whom the advertising was directed, were damaged as a result of defendants' advertisements," the advertisements constituted "unfair or deceptive acts within the meaning of RCW 19.86.020."\textsuperscript{20}

A second court of appeals opinion, \textit{Testo v. Russ Dunmire Oldsmobile},\textsuperscript{21} found sufficient public interest involvement where defendant car dealer offered to the public and sold to the plaintiff a used car which the salesperson knew had been extensively modified as a racing vehicle, without informing the buyer who did not desire to purchase a race car.

The Washington Supreme Court ruled that an insurance company committed an unfair act when it added an exclusion eliminating coverage for a medical condition discovered in the plaintiff after she had purchased the policy and paid the premium. The original policy contained no special exclusions. In this case, \textit{Salois v. Mutual of Omaha Insurance Co.},\textsuperscript{22}

\begin{footnotes}
\footnotetext{15}{86 Wn. 2d at 336, 544 P.2d at 91.}
\footnotetext{16}{The \textit{Lightfoot} court held that "the alleged conduct of the respondent was not an unfair or deceptive act or practice in the conduct of any trade or commerce as those terms are employed in the Consumer Protection Act." \textit{Id.} at 333, 544 P.2d at 89. This conclusion must be read with the court's finding that the respondent's behavior did not sufficiently affect the public to fall within the Act's prohibitions. \textit{See note 9 supra}. The result of \textit{Lightfoot} is that if an act is (1) unfair or deceptive, (2) occurs in the conduct of trade or commerce, and (3) adversely affects the public interest, either the attorney general or a private party may bring an action.}
\footnotetext{17}{86 Wn. 2d at 336, 544 P.2d at 91.}
\footnotetext{18}{\textit{Id.} at 338–39, 544 P.2d at 92–93.}
\footnotetext{19}{15 Wn. App. 742, 551 P.2d 1398 (1976).}
\footnotetext{20}{\textit{Id.} at 748, 551 P.2d at 1403.}
\footnotetext{21}{16 Wn. App. 39, 554 P.2d 349 (1976).}
\end{footnotes}
the requisite public interest involvement was founded upon the declaration, in a statute other than the Consumer Protection Act itself, that "the business of insurance is one affected by the public interest."23 The court also found that the defendant insurance company had breached its duty of good faith and fair dealing mandated by the same statute.24 Combining its findings of illegality and violation of public policy, the court concluded that the insurance company's conduct constituted a per se violation of the Consumer Protection Act.25

The cases where no public interest involvement was found and where recovery was denied are especially useful in defining the public interest requirement. The court of appeals case of Allen v. Anderson26 involved the sale by the builder-owner of an apartment building with various structural defects. The trial court found that the seller had originally planned to occupy one unit and rent the others. He had not listed the building for sale and the particular buyer had approached him on his own initiative. That court characterized the transaction as possessing an "isolated qual-

23. The relevant section of the statute reads: "The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters." \textit{WASH. REV. CODE} § 48.01.030 (1976).

24. 90 \textit{Wn.} 2d at 359, 581 P.2d at 1351.

25. \textit{Id}. at 359, 581 P.2d at 1351. The concept of a per se violation of the Act was first announced in State v. Readers' Digest Ass'n., 81 \textit{Wn.} 2d 259, 501 P.2d 290 (1972). This case held that a sweepstakes lottery, which was illegal and against public policy, was "per se unfair within the meaning of RCW 19.86.020." \textit{Id}. at 276, 501 P.2d at 302. In so holding, the court rejected the position advanced by the Attorney General that a per se violation may be found if an act is illegal or against public policy. Rather, the court propounded a dual standard, requiring that for an act to be per se unfair, it must be illegal and against public policy. See Comment, \textit{State v. Readers' Digest Association—a Knockout Punch to Unfair or Deceptive Ads or Practices in Washington?}, 10 \textit{GONZ. L. REV.} 529, 535 & n.21 (1975). As the Salois court applied the concept, once a per se violation of the unfair practices section is found, no further inquiry into public interest is required. A per se violation is not an "exception to the public interest requirement," as argued by appellants in \textit{Salois}. Appellants' Reply Brief at 11, \textit{Salois} v. Mutual of Omaha Ins. Co., 90 \textit{Wn.} 2d 355, 581 P.2d 1349 (1978), but rather represents an additional way for the courts to find public interest involvement.

The per se doctrine was applied more narrowly in Dempsey v. Joe Pignataro Chevrolet, Inc., 22 \textit{Wn. App.} 384, 589 P.2d 1265 (1979). In an action alleging failure of defendant car dealer to honor its new vehicle warranty, the Dempsey court noted that a per se violation of the Consumer Protection Act might be founded upon a violation of the unfair motor vehicles practices law, R.C.W ch. 46.70. \textit{Id}. at 392–93, 589 P.2d at 1270. The court stated that "[u]nder the per se doctrine, an infringement of a statute designed to protect the public is considered inimical to the public interest and, therefore, on that basis is by itself an unfair or deceptive practice condemned by the [A]ct." \textit{Id}. at 392, 589 P.2d at 1270 (emphasis added). This narrow view of the per se doctrine is not warranted by the \textit{Salois} holding.

The second holding of \textit{Salois}, overruling Johnston v. Beneficial Management Corp. of America, 85 \textit{Wn.} 2d 637, 538 P.2d 510 (1975), which held that the Consumer Protection Act covers only those acts designed to effect a sale, is outside the scope of this comment.

ity." 27 The court of appeals quoted the public interest language of *Lightfoot* and affirmed the dismissal of the claim.

In *Pilch v. Hendrix*, 28 the court of appeals held that the failure of defendant-builder to replace concrete steps at plaintiff’s residence in a “workmanlike manner” did not “support a remedy under the Consumer Protection Act.” 29 Citing *Lightfoot* to support its decision, the court concluded that the facts of the case “establish[ed] nothing more than a breach of a private contract not affecting the public interest.” 30

Another court of appeals opinion, *Lookebill v. Mom’s Mobile Homes, Inc.*, 31 involved a mobile home dealer’s violation of the Retail Installment Sales Act 32 by failing to include the date and seller’s name and address on the Conditional Sales Security Agreement and by four separate violations in the Notice to Buyer. 33 The plaintiffs sought to prove that these violations constituted unfair or deceptive practices under the Consumer Protection Act. Again citing *Lightfoot*, the court held that the evidence was insufficient to establish injury to the public and refused to reach the merits of plaintiffs’ argument. 34

The Washington Supreme Court, in *Brown v. Charlton*, 35 refused to find public interest involvement where a subdivision’s domestic water system was not maintained, and the individual lot owners brought an action against the developer and his successor-in-interest, relying in part on the Consumer Protection Act’s private remedy. The court cited the Salois finding of legislatively determined public interest in the insurance business. It found the converse situation with the water system involved: “In the instant case, the legislature has determined that certain small-scale water providers are not subject to public interest regulation.” 36 The court

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27. *Id.* at 447, 557 P.2d at 25.
29. *Id.* at 532, 591 P.2d at 826.
30. *Id.* at 533, 591 P.2d at 826.
33. 16 Wn. App. at 820–21, 559 P.2d at 603.
34. *Id.* at 823, 559 P.2d at 604–05. Similarly, the court of appeals in *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 589 P.2d 1265 (1979), decided that since the facts showed that the deception involved in a car dealer’s failure to honor its new car warranty related only “to the transaction between the dealer and the purchasers,” the public interest requirement was not satisfied. *Id.* at 392, 589 P.2d at 1270. However, the *Dempsey* court noted that a cause of action might be based on the per se doctrine and remanded for findings on that question. See note 25 supra.
36. *Id.* at 368, 583 P.2d at 1192. The statute referred to identifies businesses which are subject to public regulation. “Water company” is defined to exclude “any water system serving less than sixty customers where the average annual gross revenue per customer does not exceed one hundred twenty dollars per year.” *Wash. Rev. Code* § 80.04.010 (1976).
concluded that because there was no proof that "the private dispute af-
acted the public interest," the Consumer Protection Act failed to pro-
vide plaintiffs with a cause of action.

B. Problems with the Public Interest Requirement as Stated by the
Courts

Since the courts have not specified the requisite degree or type of ef-
fect on public interest, neither courts nor litigants have guidance in deter-
mining when the requirement is met. Liberally construed, an effect on
the public interest can be found in virtually any transaction. Conversely,
the minimum effect required may be set so high as to eliminate from the
sphere of the Act's protection all but a few transactions. Confusion re-
garding the meaning of the requirement is manifested by an apparent
conflict among the courts of appeals. Both Lookebill, the mobile home
case, and Testo, the used car case, involved a consumer injured by a
particular act of a dealership. Although both cases seemed to involve an
effect on the public interest, the court found such an effect in the latter
case but not in the former. This inconsistency of results suggests the need
for the development of a more definite test.

A second problem with the requirement as it is currently used is that,
in seeking to prove public interest involvement, both courts and litigants
often resort to counting how many others have been similarly injured by

37. 90 Wn. 2d at 368, 583 P.2d at 1192.
38. Construction of statutory requirements of public interest in other areas of the law has not
clarified the problem. One example comes from the area of state police power. The United States
Supreme Court, discussing a Kansas statute which declared the food preparation industry to be af-
ected with a public interest and sought to regulate wages in that industry, noted:
It is very difficult under the cases to lay down a working rule by which to readily determine
when a business has become 'clothed with a public interest.' All business is subject to some
kinds of public regulation, but when the public becomes so peculiarly dependent upon a particu-
lar business that one engaging therein subjects himself to a more intimate public regulation is
only to be determined by the process of exclusion and inclusion and to gradual establishment of
a line of distinction.
The Wolff court gave what has been termed "the most succinct and . . . inclusive statement of
the criteria for determining when a property is affected with a public interest." Hertz Drivursel
"The circumstances which clothe a particular kind of business with a public interest, . . . must be
such as to create a peculiarly close relation between the public and those engaged in it, and raise
implications of an affirmative obligation on their part to be reasonable in dealing with the public."
262 U.S. at 536.
39. See notes 31-34 and accompanying text supra.
40. See note 21 and accompanying text supra.
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the contested practice.\textsuperscript{41} This approach originated in the \textit{Lightfoot} court’s suggestion that, for the public interest to be affected, multiple injuries must flow from the deceptive conduct,\textsuperscript{42} even though the Act requires only that consumers be affected indirectly.\textsuperscript{43} The court of appeals sought to deal with this apparent inconsistency by explaining that the supreme court in \textit{Lightfoot} did not intend to place such a “constrictive interpretation on the act” and “did not intend to limit private consumer protection actions to only those situations where defendant’s actions cause actual injury to numerous consumers.”\textsuperscript{44} Unfortunately, the supreme court has not clarified its holding in \textit{Lightfoot}. Consumer litigants continue to count heads to prove public interest involvement.\textsuperscript{45} This approach is both impractical and theoretically unsound. The first injured consumer must be allowed a cause of action. Even if the public interest requirement can be justified, it must be redefined.

III. JUSTIFICATION FOR THE PUBLIC INTEREST REQUIREMENT

The requirement of public interest involvement for a private recovery under the Consumer Protection Act is justified by reference to the purpose section of the Act, to analogous federal statutory and case law, to the historical context of the Act’s passage, and to policy considerations.

A. \textit{The Purpose Section}

The Washington Consumer Protection Act contains a purpose section\textsuperscript{46} which should be followed by the court if it is intended to guide interpr-

\textsuperscript{41} In arguing that the insurance company’s act in \textit{Salois} was per se unfair, the appellant argued that an injured consumer seeking to prove public interest involvement would have to engage in extensive and costly pre-trial discovery to locate other consumers subjected to the same practice. She further urged that “[i]f public interest or harm must be established as a matter of ‘fact’ in a case such as this, then, \textit{Lightfoot} literally requires that a consumer have the makings of a class action before a private remedy can be obtained under the Consumer Protection Act.” Appellants’ Reply Brief at 13, \textit{Salois v. Mutual of Omaha Ins. Co.}, 90 Wn. 2d 355, 581 P.2d 1349 (1978).

\textsuperscript{42} “A breach of a private contract affecting no one but the parties to the contract... is not an act or practice affecting the public interest.” 86 Wn. 2d at 334, 544 P.2d at 90.

\textsuperscript{43} “ ‘Trade’ and ‘commerce’ shall include the sales of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” \textit{Wash. Rev. Code} § 19.86.010 (1976). The proscriptions in the unfair practices section of the Act relate to acts occurring “in the conduct of any trade or commerce.” \textit{Id.} at § 19.86.020.


\textsuperscript{45} The appellant in \textit{Salois} asked “how many consumers would have Salois have had to have called to establish public harm? Ten? Twenty? One Hundred?” Appellants’ Reply Brief at 13, \textit{Salois v. Mutual of Omaha Ins. Co.}, 90 Wn. 2d 355, 581 P.2d 1349 (1978).

\textsuperscript{46} \textit{Wash. Rev. Code} § 19.86.920 (1976).
tation, is consistent with the words and context of the statute, and is relevant to the question in issue.\textsuperscript{47} The purpose section was enacted in 1961 as part of the original Act, along with the unfair practices section and the other sections which contain antitrust provisions.\textsuperscript{48} The private remedy section, as originally enacted, granted private parties standing to sue only for a violation of the antitrust sections.\textsuperscript{49} A private cause of action for a violation of the unfair practices section was added to the private remedy section by a 1970 amendment.\textsuperscript{50} Under the general rule of statutory construction that a statute be read as a whole, the amended section and the unaltered sections of the Act should be considered together.\textsuperscript{51} Accordingly, the purpose section of the Act may be viewed as a broad interpretive guide to the statute, both as originally enacted and as amended, and the \textit{Lightfoot} court was justified in relying on the 1961 purpose section to clarify the 1970 enactment.\textsuperscript{52}

\textbf{B. Analogous Federal Statutes and Case Law}

Following the purpose section's mandate to be guided by federal law dealing "with the same or similar matters,"\textsuperscript{53} the \textit{Lightfoot} court looked to the Federal Trade Commission Act\textsuperscript{54} and the federal antitrust laws\textsuperscript{55} for guidance. The unfair practices section of Washington's Consumer Protection Act was patterned after Section 5 of the FTC Act.\textsuperscript{56} That section of the federal act "was designed to prohibit conduct similar to that

\begin{footnotes}
\item[47] H. Hart \& A. Sacks, \textit{The Legal Process} 1413 (Tentative ed. 1958) (Harvard Univ.).
\item[48] 1961 Wash. Laws ch. 211.
\item[49] Section 19.86.030 declares contracts, combinations or conspiracies in restraint of trade or commerce unlawful; section 19.86.050 declares agreements not to use or to deal in a competitor's commodities or services unlawful; section 19.86.060 declares the acquisition of one corporation's stock by another to lessen competition unlawful.
\item[52] The \textit{Lightfoot} court stated: "Since the purpose of the act is to protect the public interest, it is natural to assume that the legislature, in granting a private remedy in RCW 19.86.090, intended to further implement the protection of that interest." 86 Wn. 2d at 334, 544 P.2d at 90.
\end{footnotes}

As originally enacted, § 5 of the FTC Act outlawed "unfair methods of competition," which the
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prohibited by the Sherman Act, and, like the Clayton Act, . . . to prohibit practices which do not measure up to the proportions of a restraint of trade or monopolization."57 Since antitrust and consumer protection legislation share common historical roots58 and related goals,59 the Lightfoot court was justified in looking to them as "similar" federal statutes.60

As one basis for its finding of a public interest requirement, the Lightfoot court relied on the United States Supreme Court ruling that to justify a complaint by the FTC, "the public interest must be specified and substantial."61 However, the FTC Act is enforced solely by the Federal Trade Commission; it provides no private remedy for a violation of its unfair practices section although both legislative reform62 and judicial interpretation63 have been attempted to redress this omission. The court in

United States Supreme Court construed to apply only where the FTC found injuries to competition. FTC v. Raladam, 283 U.S. 643 (1931). In 1938 Congress amended § 5 to include as unlawful "unfair or deceptive acts or practices," extending the reach of the Act to those practices affecting consumers without necessarily affecting competition. Act of March 21, 1938, Pub. L. No. 447, § 3, 52 Stat. 111 (Wheeler-Lea Amendments).

58. "That both the Congress and the Washington Legislature have seen fit to codify 'antitrust' law with 'consumer protection' law is evidence of their clear intentions to base these laws upon the same public policy and to treat them similarly." Comment, Reasonable Attorneys' Fees and Treble Damages—Balancing the Scale of Consumer Justice, 10 Gonz. L. Rev. 593, 597 (1975).
59. The goal of federal antitrust law has been construed as the prevention "of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods or services, all of which had come to be regarded as a special form of public injury." Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 225 (9th Cir. 1958) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940)). The Lightfoot court determined that the antitrust laws are "relevant in that they also deal with problems of business practices, regulating, as they do, monopolies and combinations in restraint of trade." 86 Wn. 2d at 335, 544 P.2d at 90.
60. 86 Wn. 2d at 335, 544 P.2d at 90.
62. Several bills have been introduced in Congress to amend the FTC Act to provide for private remedies. Their failure has been linked to the inability of the nation's legislators "to agree on the exact nature of the private remedy." Note, Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication, 67 Nw. U.L. Rev. 413, 420 & nn.36, 38 & 39 (1972).
Lightfoot recognized that this requirement that the public interest be specific and substantial applies only to public agencies, and thus it looked for further guidance to the private treble damage remedy afforded antitrust violations. The federal courts, in construing this remedy, have consistently held that it was intended as an “additional means” of enforcing the act and that it also depended on a finding of public interest involvement. Thus, both the FTC Act and federal antitrust legislation support the Lightfoot court’s conclusion that the public interest requirement may be applied to the private remedy afforded for violations of the unfair practices section of Washington’s Consumer Protection Act.

C. Historical Context

Examination of the consumer climate at the time the Act was passed illuminates the intent of the Washington legislators in enacting a consumer protection statute. Both the Act and its amendments should be viewed in the context of the heightened consumer protection activity that occurred in the 1960’s. A combination of factors, including questionable marketing practices, accelerating technological change, and an increasingly aware and vocal populace, caused an increase in legislative activity on both the federal and state levels aimed at safeguarding the consumer’s right to be informed, to choose, to be heard, and to be protected from injury. Practices which were most responsible for victimiz-

64. “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15 (1976).
66. To ascertain legislative intent, one must imagine oneself “in the position of the legislature enacting the statute,” assuming that the 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.” H. Hart & A. Sacks, supra note 47, at 1414–15. See generally MacCallum, Legislative Intent, 75 Yale L.J. 754 (1966); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).
ing American consumers included offering an item at a phony special low price,70 "bait and switch" advertising,71 chain referral sales,72 free-gimmick sales,73 and the "fear-sell."74 Other deceptive schemes included charity swindles for nonexistent churches and hospitals, business-opportunity rackets, mailing of unsolicited merchandise, phony home improvements, land-fraud sales, and substandard correspondence and vocational schools.75 Most of these injurious practices do not occur in isolation.76 To prevent excessive harassment of businesses, the Washington legislators may have sought to eliminate only those practices which present a substantial hazard to the public, i.e., those which do not occur in isolation. Although the public interest requirement lacks predictability in its current form, at least it directs the court's attention toward this legislative concern. With an adequately specific definition, the requirement may more effectively advance the legislative purpose.

D. Policy Factors

The legal problems of consumers arise in one of two possible ways: "[t]hey may be purely relational in that a particular controversy with a seller is only a single transactional dispute" or they may be "the consequence of a more generalized course of conduct by the seller."77 By requiring public interest involvement for the private remedy, the Washington courts are limiting the consumer's legal remedies to the latter situation. A remedy granting standing to the consumer for every individual transactional dispute, regardless of its public impact, would be most concerned with compensating the injured consumer. In contrast, a remedy available only when many consumers are threatened stresses not individual compensation but rather enlistment of private efforts in the enforcement of the Act's broader purposes. Certainly the Act's private rem-

71. Id. at 9-12.
72. Id. at 13-16.
73. Id. at 17-21.
74. Id. at 21-23.
75. Id. at 24-25. Other categorizations of the most serious consumer abuses echo these lists. See, e.g., O'Connell, Consumer Protection in the State of Washington, 39 St. Gov't. 230, 231-32 (1966) (National Better Business Bureau's list of "America's Ten Most Widespread Consumer Gyps"); National Association of Attorneys General, Committee on the Office of Attorney General, State Programs for Consumer Protection 19 (Dec. 1973) (list of the most common types of complaints received by state consumer protection agencies).
77. Id. at 564.
edy section is designed to "make the victim financially whole," but the public interest requirement serves to narrow the class of victims to those whose suits further the enforcement function of the Act, which the Lightfoot court concluded was the legislature's primary purpose in allowing private remedies.

The court's stress on enforcement over compensation is consistent with the legislature's inclusion of an award of reasonable attorney's fees and exemplary damages in the private remedy section. Both provisions are designed to induce private persons to undertake legal action. The legislature apparently recognized that without the prospect of recovering attorney's fees and exemplary damages, the disproportion between the small amount of compensation and the substantial attorney's fees common in many cases of consumer fraud would make private redress financially impractical.

In addition, the public interest requirement was one way the Washington courts sought to safeguard against opportunistic, vexatious private suits which could result from the combination of the broad language in

78. Comment by Donald L. Navoni, Consumer Protection Subcommittee of the Young Lawyers Section of the Seattle-King County Bar Association, quoted in Consumer-Protection Bill Adds Money-Back Promise, Seattle Times, Jan. 25, 1970, at B-1, col. 3 (copy of article located in University of Washington Law Library's legislative clippings file). R.C.W. § 19.86.090 provides a means, in part, for the injured party to recover his actual damages. See note 2 supra (text of R.C.W § 19.86.090 (1976)).

79. "We think the evident purpose of the legislature in providing a private remedy ... was much the same as that which Congress expressed in providing for treble damage actions under the antitrust laws. Its 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."

80. Section 19.86.080 empowers the attorney general to enforce the Act. WASH. REV. CODE § 19.86.080 (1976).

81. The Washington Supreme Court came closest to viewing the plaintiff as a private attorney general under the Act in Hockley v. Hargitt, 82 Wn. 2d 337, 510 P.2d 1123 (1973). The court upheld an injunction against future deceptive practices of defendant, a seller of "total divorce service" franchises, and held that the Act's "broad public policy," as expressed in § 19.86.920, "is best served by permitting an injured individual to enjoin future violations of RCW 19.86, even if such violations would not directly affect the individual's own private rights." Id. at 350, 510 P.2d at 1133. It further explained that "if a single litigant is allowed to represent the public and consumer fraud is proven, the multiplicity of suits is avoided and the illegal scheme brought to a halt." Id. at 350-51, 510 P.2d at 1133. However, in Hockley the court still required past injury to the plaintiff. Under a private attorney general theory, the plaintiff need only have "minimal individual interests" to bring suit.

82. One commentator notes that "the initiation of numerous suits ... would be costly either to litigate or to settle." Rice, Exemplary Damages in Private Consumer Actions, 55 IOWA L. REV. 307,
the unfair practices section\textsuperscript{83} and the possibility of an award of attorney's fees and punitive damages. Sensitivity to the possibility of harassment of the "state's legitimate businessmen"\textsuperscript{84} and a concomitant reluctance to overregulate commerce were evidenced in the final report of the consumer advisory council which recommended the remedial legislation.\textsuperscript{85} When it required public interest involvement for private recovery under the Act, the Lightfoot court reflected this council's belief that "[f]reedom rather than restraint [of business] is the rule."\textsuperscript{86} Furthermore, Washington's Consumer Protection Act lacks certain statutory safeguards, such as a requirement of intentional violation, which, in other states, provide the same protections as the public interest requirement.\textsuperscript{87}
The Act has various advantages over other traditional common law and statutory remedies,\textsuperscript{88} which make it easier and more attractive to use. For example, the Consumer Protection Act's statute of limitations is four years\textsuperscript{89} as contrasted with three years for tort actions.\textsuperscript{90} In addition, attorney's fees can seldom be recovered under the other remedies available to consumers,\textsuperscript{91} but can be recovered under the Act. The tension between these liberalizing provisions in the Act and the legislative aversion to overregulation warrants the limitation of private enforcement achieved by the public interest requirement.

IV. SUGGESTED ANALYSIS FOR FINDING PUBLIC INTEREST

Although the public interest requirement for private suits under the Act is justifiable, the courts have applied it in ways which provide little guidance for knowing when it is satisfied. If the public interest requirement is viewed as directed at those practices in trade or commerce\textsuperscript{92} which present a substantial risk of harm to the public, the elements of the requirement may be defined to reflect the goals of consumer protection legislation.

A. The Three-Part Test for Public Interest Involvement

A normative ideal behind consumer protection activity in this country

punitive damages to cases where a greater degree of culpability (i.e., purpose, intent, or knowledge) accompanies the violation. This would be in keeping with the theoretical underpinnings of punitive damages and codifications in other states.

88. The traditional legal theories upon which an injured consumer can rely are: (1) common law tort action for deceit which requires proof of false representation, knowledge by defendant of its falsity, and justifiable reliance by plaintiff on the misrepresentation; (2) strict-liability tort action confined to use in cases of personal injury resulting from product use; (3) contract action for rescission and restitution for material misrepresentation as limited by the parol evidence rule and the defense of mere "puffing;" (4) breach of warranty action with the same limitations as (3) above; and (5) unconscionability under § 2-302 of the UCC. S. Oppenheim & G. Weston, Unfair Trade Practices and Consumer Protection 513-15 (3d ed. 1974). See also 2 D. Rothschild & D. Carroll, Consumer Protection § 20.03 (1978). The Washington courts have recognized that the Act's private remedy is in addition to those otherwise available. MacCormack v. Robins, 11 Wn. App. 80, 521 P.2d 761, 762 (1974) (holding breach of warranty action could still be maintained by a plaintiff who failed to satisfy the requirements of the Act).

89. WASH. REV. CODE § 19.86.120 (1976).
90. WASH. REV. CODE § 4.16.080 (1976). It appears that the longer statute of limitations under the Act was one reason that plaintiff in Lightfoot sought to use it. 86 Wn. 2d at 332, 544 P.2d at 89.
91. See Comment, supra note 58, at 607 n.63.
92. See note 43 supra.
is the encouragement of the free enterprise system.93 One objective of consumer protection legislation is to maximize the consumer's freedom of choice by reducing the usual disparity in bargaining power between the seller and the buyer.94 This goal was expressed in the report of the consumer advisory council which recommended the Washington legislation.95 Therefore one part of the test for a sufficient effect on the public interest is possession by the seller of superior bargaining power to that of the buyer.

The second part of the test for the public interest requirement can be gleaned from the "trade or commerce" provision of the Act. In noting that the Lightfoot holding was correct on its facts, the supreme court in Salois explained that in the earlier case "there was a failure to show that the private dispute affected the public interest or was within the sphere of trade or commerce as required by the statute."96 When coupled with the Lightfoot court's finding that "[t]here is no suggestion that the respondent advertised his services or solicited the appellant or others to become his client,"97 this dictum in Salois suggests that a seller engages in the requisite trade or commerce only when he solicits customers or by some means of public offering holds himself open to the public for business.

The third part of the test, that the transaction in question be recurring in nature, is derived from the conclusion in Allen,98 the apartment building case, that the Consumer Protection Act does not apply to an isolated sale of real estate,99 and from an intuitive sense of the proper scope of such a statutory remedy.100

The Uniform Commercial Code's concept of "merchant" illustrates how the three-part test for the public interest requirement may be met. The Code defines merchant as "a person who deals in goods of the kind

95. "Freedom of commerce . . . should not be permitted to result in license to exploit and abuse the relatively unequal bargaining relationship between supplier and consumer that exists in today's complex market place." Washington Consumer Advisory Council, supra note 85, at 46.
96. 90 Wn. 2d at 361, 581 P.2d at 1352.
97. 86 Wn. 2d at 336, 544 P.2d at 91.
98. 16 Wn. 2d at 446, 557 P.2d at 24.
99. Id. at 447, 557 P.2d at 25.
100. See last paragraph, Part IV-B infra.
or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." As thus defined, the concept of merchant may include the unequal bargaining power requirement, for the merchant possesses specialized knowledge or skill. It also encompasses the solicitation/public offering component; a merchant is someone who "holds himself out" to the public. Furthermore, the UCC definition demonstrates how the requirement of repeatability may be satisfied: if an unfair act is done to one person by a "merchant" in the course of "his occupation," it is very likely repeatable. The "merchant" need not have already injured others. If the act was committed within the scope of the merchant's occupation, the risk of further harm to the public is substantial.

For each transaction forming the basis of a complaint, the courts should ask whether these three criteria existed: unequal bargaining power, solicitation/public offering, and repeatability. The presence of these components indicates that the acts of the defendant present a substantial risk to the public which is sufficient to justify a private recovery under the Act.

B. Application of the Proposed Test to Washington Cases and Hypotheticals

This proposed analysis is consistent with the decisions of the Washington courts under the Act. In the case of a used car dealer, as in Testo v. Russ Dunmire Oldsmobile, Inc., the three components of the public interest requirement are clearly present. A car dealer possesses greater bargaining power than an individual consumer. By virtue of operating a "store" which is visible and open to the public he satisfies the solicitation/public offering component, and because the questionable act occurred in the course of selling used cars, which was the business of the defendant, the act is repeatable. Similarly, in the other cases where private recovery was allowed under the Consumer Protection Act, the three-part test for an effect on the public interest is also satisfied.

101. U.C.C. § 2–104. This broad definition of merchant may include professionals such as lawyers or doctors.


103. These criteria are also met in Lookebill v. Mom's Mobile Homes, 16 Wn. App. 817, 559 P.2d 600 (1977), whose result is inconsistent with that of Testo. Under the proposed test, Lookebill would have been decided differently. See text accompanying notes 31–34 supra (discussion of Lookebill).

Those cases in which the public interest was found not to be affected provide a greater challenge for the validity of the proposed analysis. In *Allen v. Anderson*, the three components of the test were either missing or extremely weak. The isolated nature of the sale of the apartment building made repetition improbable; the fact that the buyer approached the seller, who initially had no intention to sell, points out the absence of the solicitation/public offering component; and the bargaining power relationship between the seller and the buyer, if not equal, was not greatly disproportionate. Thus, under this test, the *Allen* court was correct in finding no effect on the public interest.

In *Brown v. Charlton*, the court of appeals case involving the private water system, the conclusion that the public interest requirement was not met can also be explained with the suggested tests. While the elements of unequal bargaining power and repeatability were present in *Brown*, that of solicitation/public offering was not, since the water system was operated for only a small, delimited, private group.

In *Lightfoot* the attorney possessed greater bargaining power than his client and, since his failure to act in her interest was within the scope of his ordinary law practice, the act was repeatable. However, the element of solicitation/public offering was very weak as evidenced by the *Lightfoot* court’s finding that the respondent attorney did not advertise for or solicit clients. The opinion elaborated: “The appellant approached the respondent voluntarily, and with expectations based upon his reputation, which she had learned from others whose opinions she apparently respected.” Thus, according to the proposed analysis, public interest involvement was absent in *Lightfoot* because the requisite solicitation/public offering component was absent.

The problem with explaining the *Lightfoot* result in this way is that it raises the question of when a professional engages in conduct which can be construed as solicitation or public offering. A supermarket chain that advertises clearly meets this test, but so does a local drug store that does not advertise and only identifies itself by a sign above the window. Anal-

106. More facts are needed to determine if Pilch v. Hendrix, 22 Wn. App. 531, 590 P.2d 370 (1979) was correctly decided. See text accompanying notes 28–30 supra. It is unclear from the opinion whether appellant, who did faulty construction work on respondent’s residence, was a builder by profession, or whether he advertised or solicited his services. Without answers to these questions, the test for an effect on the public interest cannot be applied.
109. Id. at 336, 544 P.2d at 91.
ogously, both a storefront legal clinic that operates a high volume, non-
complex service and a practitioner who advertises his services in a news-
paper are engaged in public offering or solicitation. The practitioner
whose sole means of public offering consists of a shingle outside her of-
office or a listing in the yellow pages presents a more difficult case. The
Lightfoot court seems to be saying that some more active, aggressive
form of solicitation is required of a professional than of other businesses
in order to find public interest involvement. While this is a plausible re-
result, it is difficult to see why the standard of solicitation/public offering
should be applied differently to merchants than it is to professionals.

Perhaps a more satisfactory explanation of the Lightfoot decision is
simply that the attorney’s conduct did not constitute an unfair or decep-
tive act. A professional may perform an unfair or deceptive act causing
liability under theConsumer Protection Act\textsuperscript{110} by, for example, falsely
portraying himself as a licensed specialist or preparing a deceptive col-
lection letter and authorizing its use by a company.\textsuperscript{111} However, it is dif-
ficult to construe mere negligent conduct as unfair or deceptive.\textsuperscript{112} The
attorney’s behavior in Lightfoot may be characterized as mere negligence, and as such falls short of being an unfair or deceptive act or
practice.

The proposed three-part test for finding public interest involvement is
also consistent with those hypotheticals for which one would intuitively
expect a consumer protection act to provide a private remedy and those
for which no extrastatutory private remedy seems appropriate. For ex-
ample, one would not expect a private remedy for a consumer who
bought a secondhand piano from a private party who placed a classified
ad in the newspaper. Applying the test, it is clear that although the solici-
tation/public offering component is satisfied, those of unequal bargaining
power and repeatability are not. However, if the purchase were made at
an auction, the Act should apply because the three requirements would
be met.

V. CONCLUSION

The public interest requirement for private suits under the Washington
Consumer Protection Act is justified by reference to the purpose section
of the Act and to the historical context in which those abuses arose which

\textsuperscript{110} See, e.g., Comment, The Washington Consumer Protection Act v. The Learned Profes-

\textsuperscript{111} [1971] 2 Trade Reg. Rep. (CCH) ¶ 7527.41.

\textsuperscript{112} Comment, supra note 110, at 452.
the Act was designed to correct. The Washington courts added the requirement to limit the scope of the private remedy to those actions which present a substantial risk to the public, a function served in other states by other types of statutory provisions. This approach is designed to balance freedom for individual businesspersons from excessive regulation and litigation against compensation for injured consumers. It results in emphasizing the enforcement function of the private remedy over the compensation function.

The main problem with the courts' public interest requirement is that it is difficult to apply. This vague and undefined term has been interpreted by many courts and litigants as requiring a cumbersome and rather meaningless counting of heads to prove the requisite effect on the public interest. The meaning of the public interest requirement can be clarified with a three-part test. For any transaction complained of, the following questions must be answered affirmatively before the public interest may be deemed affected: (1) Did the seller possess bargaining power disproportionate to that of the buyer? (2) Did the seller engage in conduct which may be characterized as either solicitation or public offering? (3) Is the act likely to recur? This test explains the Washington decisions involving private suits under the Act and is consistent with hypothetical situations where a statutory private consumer remedy seems appropriate.

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