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Washington Adopts Market Share Liability for DES Producers—*Martin v. Abbott Laboratories*, 102 Wn. 2d 581, 689 P.2d 368 (1984)

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WASHINGTON CONSUMER PROTECTION ACT— PUBLIC INTEREST AND THE PRIVATE LITIGANT

Under Washington's Consumer Protection Act,¹ a private individual has standing to sue² for unfair or deceptive business practices. The private litigant may not, however, use the Act as a vehicle to remedy those wrongs that impact only the private individual,³ because the Act's declared purpose is to protect the public interest.⁴ The public interest requirement thus imposes a restriction on the otherwise liberal construction of the Act.⁵ The Washington Supreme Court has established two tests by which the public interest requirement may be met: (1) the *per se* test⁶ and (2) the *Anhold v. Daniels* test.⁷

I. BACKGROUND

The court first construed the legislative grant of a private remedy in *Lightfoot v. MacDonald*.⁸ The court narrowed the potential scope of the private litigant's remedy⁹ by holding that a prerequisite to such a remedy

1. WASH. REV. CODE § 19.86.020 (1984) declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

2. *Id.* § 19.86.090 (1984).

3. *Lightfoot v. MacDonald*, 86 Wn. 2d 331, 333, 544 P.2d 88, 89 (1976) (it is not the purpose of the Act “to provide an additional remedy for private wrongs which do not affect the public generally”).

4. WASH. REV. CODE § 19.86.920 (1984) (“It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest.”).

5. *Lightfoot*, 86 Wn. 2d at 334, 544 P.2d at 90. Although the Act on its face requires only that plaintiff prove injury, the court imposes a requirement that plaintiff also prove that defendant's acts affect the public interest. *See also Anhold v. Daniels*, 94 Wn. 2d 40, 614 P.2d 184 (1980) (relying on *Lightfoot* to impose a public interest requirement).

6. The state supreme court stated the elements of the *per se* test in *Salois v. Mutual of Omaha*, 90 Wn. 2d 355, 581 P.2d 1349 (1978). The elements are: “(1) is the action illegal, i.e., is it unlawful? and (2) is it against public policy as declared by the legislature or the judiciary?” *Id.* at 358, 581 P.2d at 1351. For a discussion of the *per se* test, see *infra* notes 25–53 and accompanying text.

7. The public interest test developed by the court in *Anhold v. Daniels*, 94 Wn. 2d 40, 614 P.2d 184 (1980) is

(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.

Id. at 46, 614 P.2d at 188. For a discussion of the *Anhold* test, see *infra* notes 54–67 and accompanying text.

8. 86 Wn. 2d 331, 544 P.2d 88 (1976) (plaintiff's claim of legal malpractice not a violation of the Consumer Protection Act).

9. *See Note, Private Suits Under Washington's Consumer Protection Act: The Public Interest*

was a showing that the conduct complained of would be "vulnerable to a complaint by the Attorney General,"¹⁰ that is, the conduct affects the "public interest."¹¹

The public interest restriction reflected the basic position that not every unfair or deceptive act in the conduct of trade or commerce affects the public, thereby giving rise to a cause of action under the Act.¹² Beyond this, however, a more elaborate justification for the requirement exists.¹³ First, the purpose section of the Act clearly limits the Act's application to only those practices that injure the public interest.¹⁴ Second, the context in which the Consumer Protection Act was passed demonstrates that the goal of the Act was only to limit those actions that presented a substantial hazard to the public, rather than to limit isolated transactions.¹⁵ Finally, the legislative goal of the 1970 amendment¹⁶ creating a private right of action under the Act was to insure more effective enforcement¹⁷ within the context of the marketplace.¹⁸ Therefore, the primary purpose for providing a private cause of action for unfair and deceptive acts was to protect the public from a "generalized course of conduct"¹⁹ without overregulation of the state's businesses.²⁰ In order to effectuate this policy, the court in *Lightfoot* properly concluded that a restrictive public interest requirement was necessary. In so holding, however, the court did not indicate a criterion that would define the public interest and thereby standardize the determination of when an injury to a private party would constitute a threat to the public interest.²¹

Requirement, 54 WASH. L. REV. 795 (1979); Comment, *Attempts to Restrict Actionable Conduct Pursuant to Washington's Consumer Protection Act*, 12 GONZ. L. REV. 621 (1977).

10. 86 Wn. 2d at 334, 544 P.2d at 90.

11. *Id.*

12. *Id.* ("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.").

13. See Note, *supra* note 9, at 801-08.

14. WASH. REV. CODE § 19.86.920 (1984).

15. See Note, *supra* note 9, at 804, 805 (consumer and legislative concern over questionable marketing practices, such as "bait and switch" advertising, free gimmick sales, and "fear-sell," which presented threats to the public at large).

16. Act of Feb. 20, 1970, ch. 26, § 2, 1970 Wash. Laws 203 (codified as amended at WASH. REV. CODE § 19.86.090 (1984)).

17. See *Lightfoot*, 86 Wn. 2d at 334, 544 P.2d at 90.

18. For a general discussion, see *Anhold v. Daniels*, 94 Wn. 2d 40, 45, 614 P.2d 184, 187-88 (1980).

19. See *Eastlake Const. Co. v. Hess*, 102 Wn. 2d 30, 51, 686 P.2d 465, 476 (1984).

20. See Note, *supra* note 9, at 805.

21. *Anhold*, 94 Wn. 2d at 45, 614 P.2d at 187 ("Neither the legislature nor this court, in *Lightfoot* or elsewhere, has otherwise formulated criteria for determining when a private suit may be brought under the act.").

II. THE PUBLIC INTEREST STANDARD TODAY

The Washington Supreme Court resolved the problem created by *Lightfoot* by developing the per se test²² and the *Anhold* test.²³ Compliance with either of these tests guarantees the effectuation of the underlying purpose of the Act, as declared by the supreme court, which is solely the protection of the public interest.²⁴

A. *The Per Se Test*

The per se test involves two issues: (1) is the action illegal? and (2) is it against public policy as declared by the legislature or the judiciary?²⁵ The supreme court stated the per se test in *Salois v. Mutual of Omaha*.²⁶ In *Salois* the trial court found that the defendant insurance company had breached its duty of good faith and fair dealing.²⁷ The supreme court held that in so doing the defendants had not only violated a statute regulating insurance²⁸ but had also acted against public policy, thereby violating the Consumer Protection Act.²⁹ To reach this conclusion the court relied on the declaration of public interest clearly contained within the statute.³⁰

After *Salois* a question emerged that centered on when the judiciary could construe a statute as containing a declaration of public interest.³¹ In *Haner v. Quincy Farm Chemicals, Inc.*,³² the supreme court settled the issue by tightening the interpretation of what could constitute a legislative

22. See *supra* note 6 & *infra* notes 25–53 and accompanying text.

23. See *supra* note 7 & *infra* notes 54–67 and accompanying text.

24. See *supra* notes 14–20 and accompanying text.

25. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn. 2d 355, 358, 581 P.2d 1349, 1351 (1978) (relying on *State v. Readers Digest Ass'n*, 81 Wn. 2d 258, 501 P.2d 290 (1972)); see *supra* note 6.

26. 90 Wn. 2d 355, 581 P.2d 1349 (1978).

27. *Id.* at 357, 581 P.2d at 1350.

28. WASH. REV. CODE § 48.01.030 (1984) requires anyone involved in the insurance business to deal fairly and in good faith.

29. 90 Wn. 2d at 359, 581 P.2d at 1351; WASH. REV. CODE § 48.01.030 (1984). This does not mandate that a violation of that statute constitutes a violation of the Consumer Protection Act. If such a mandate were present, the illegal act clearly would be against public policy, and would violate the Consumer Protection Act per se. For examples of such a mandate, see *id.* §§ 19.16.440 (governing collection agencies), 46.71.070 (governing automotive repair).

30. *Salois*, 90 Wn. 2d at 359 & n.1, 581 P.2d at 1351 & n.1 (relying on statute's language that "[t]he business of insurance is one affected by the public interest").

31. Compare *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) (holding that the regulation and licensing provisions of WASH. REV. CODE § 18.85 were designed to protect public interest even though there was no specific legislative declaration) with *Symposium, A Real Estate Broker's Duty to His Purchaser: Washington State's Position and Some Projections for the Future*, 17 GONZ. L. REV. 79, 115 (1981) (author declines to find legislative declaration in § 18.85 since intent not specifically stated); see also *Comment, The Developing Law of Consumer Protection*, 10 GONZ. L. REV. 79 (1975).

32. 97 Wn. 2d 753, 649 P.2d 828 (1982).

declaration of public interest. The court rejected the argument that any violation of a valid state statute in the conduct of trade or commerce is a per se violation,³³ requiring instead “a ‘specific legislative declaration’ of a public interest.”³⁴ This rule prevents a court from inferring that a particular statute relates to the public interest.³⁵ The rule also standardizes the per se test to insure consistent results through the preservation of the two-step analysis of *Salois*.³⁶

The ruling in *Haner* is proper in light of the underlying justification of the public interest requirement.³⁷ The court recognized that a specific legislative declaration is assurance that a particular practice has been noted by the legislature as a danger to the public interest. This holding eliminates the possibility that a legislative declaration could be manufactured without the proper legislative intent.

In the period between *Salois* and *Haner* the court of appeals attempted to provide some guidance on the problem of when a sufficient legislative declaration of public interest is present. In *Dempsey v. Pignataro Chevrolet*,³⁸ the court formulated a four-step test: (1) existence of a “pertinent statute”, (2) its violation, (3) causation, and (4) that the plaintiff was a member of the class the statute was intended to protect.³⁹ While this standard was relied upon by the lower courts, it did not help to create predictability in the determination of the presence of a legislative declaration.⁴⁰

The *Haner* decision forced a modification of the *Dempsey* test, as demonstrated by *Crane & Crane v. C & D Electric*.⁴¹ In *Crane & Crane*, the court of appeals equated the “pertinent statute” requirement of *Dempsey* with the “specific legislative declaration” of *Haner*, and held that there must be a specific legislative declaration before a statute could be considered pertinent.⁴² This holding clearly restates *Dempsey* in light of *Haner* and casts doubt on the *Dempsey* test.

The current status of the *Dempsey* test is weakened by a number of factors. It was limited from its inception by its failure to clarify which

33. *Id.* at 762, 649 P.2d at 833. The rejected argument was based on dicta in *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 324 n.19, 553 P.2d 423, 440 n.19 (1976).

34. *Haner*, 97 Wn. 2d at 762, 649 P.2d at 833.

35. The rule thus limits the courts' ability to make judicial pronouncements of public policy. See *infra* notes 44–53 and accompanying text.

36. See *supra* note 25 and accompanying text.

37. See *supra* notes 15–21 and accompanying text.

38. 22 Wn. App. 384, 589 P.2d 1265 (1978).

39. *Id.* at 393, 589 P.2d at 1270.

40. See *Saint Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 656 P.2d 1130 (1983); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 33 Wn. App. 129, 652 P.2d 962 (1982); *Lidstrand v. Silvercrest Industries*, 28 Wn. App. 359, 623 P.2d 710 (1981).

41. 37 Wn. App. 560, 683 P.2d 1103 (1984).

42. *Id.* at 565, 683 P.2d at 1107.

statute contained a legislative declaration of public policy. Rather, the *Dempsey* requirement did nothing more than restate the problem. Moreover, it ignored the possibility of the judicial declaration of public policy, which *Salois* allowed.⁴³ Thus to apply the test is only to increase the checklist without illuminating those matters that impact the public interest.

One question that the court did not address in *Haner* was whether a judicial declaration of public policy could still comply with the second step of the per se test. The court said nothing about a judicial declaration in *Haner*,⁴⁴ nor did it incorporate such a possibility within the framework provided by *Anhold*.⁴⁵ Rather, in each case the court advocated the use of the public interest test of *Anhold* when there was “no direct legislative declaration.”⁴⁶ The court of appeals in *Dempsey*⁴⁷ and *Crane*⁴⁸ also made no mention of a judicial declaration in their discussion of the per se test. Nevertheless, the supreme court in the recent case of *Sato v. Century 21*⁴⁹ indicated that a judicial declaration of public policy can satisfy the second element of the *Salois* test, but that “compelling reasons”⁵⁰ are necessary for such a declaration.

In light of these developments it is likely that a judicial pronouncement of public policy would be used only in the limited situation in which there was no legislative declaration and the elements of *Anhold* could not be met. Moreover, such a pronouncement should only be made in a case where the public interest was not sufficiently protected by other remedies provided by law.⁵¹ *Haner* demonstrates that a remedy for a per se

43. See *supra* note 6.

44. 97 Wn. 2d 753, 649 P.2d 828 (1982).

45. See *supra* note 7; *infra* notes 54–67 and accompanying text.

46. *Anhold*, 94 Wn. 2d at 43, 614 P.2d at 187; *Haner*, 97 Wn. 2d at 762, 649 P.2d at 833.

47. 22 Wn. App. 384, 589 P.2d 1265 (1978).

48. 37 Wn. App. at 565, 683 P.2d at 1107.

49. 101 Wn. 2d 599, 681 P.2d 242 (1984).

50. *Id.* at 602, 681 P.2d at 244 (court acknowledged the power to declare public policy but could “discern no compelling reasons . . . to establish a public policy prohibiting the practice in this isolated transaction”).

51. Such a case is most likely to arise in an area of law traditionally under the state supreme court’s control, such as the unauthorized practice of law. No such judicial declaration of public policy emerged, however, from the two cases in which the courts of this state have dealt with the unauthorized practice of law as a violation of the Consumer Protection Act. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 675 P.2d 193 (1983); *Hangman Ridge Training Stable, Inc., v. Safeco Title Ins. Co.*, 33 Wn. App. 129, 652 P.2d 962 (1982). Still, considering the supreme court’s statement that the unauthorized practice of law concerns the public interest, *Washington State Bar Assoc. v. Great Western Union Fed’l Savings & Loan Assoc.*, 91 Wn. 2d 48, 61, 586 P.2d 870, 878 (1978), and the supreme court’s leadership in the policing of the practice of law, *Hagan v. Kassler Escrow, Inc.*, 96 Wn. 2d 443, 635 P.2d 730 (1981), it is possible that the court may add the Consumer Protection Act to its enforcement mechanism. And the recent holding that the application of the CPA to entrepreneurial aspects of the practice of law does not interfere with the constitutional power of the court. *Short and Cressman v. Demopolis*, No. 49617-0 (Wash. Nov. 6, 1984). It is possible that the

violation under the Consumer Protection Act should not be added unless the legislature has opened the door by declaring that the public interest is involved.⁵² The corollary to this rule is that a judicial declaration should not add a remedy that the legislature was presumably unwilling to adopt, because such action would be inconsistent with the restriction the *Haner* court placed on liberal construction, and would yield unpredictable results.⁵³

B. *The Anhold Test*

The alternative to a per se violation is to establish impact to the public interest by showing that the defendant's acts induced the plaintiff to act, that the plaintiff was damaged as a result, and that the defendant's acts "have the potential for repetition."⁵⁴ Inducement refers to inducement of the individual as a member of the public. The potential for repetition must be real.⁵⁵ This interpretation of these two elements insures an effective bar to those acts that result from an isolated transaction, thereby insuring that the purpose of the Act is effectuated.

In *Anhold v. Daniels*,⁵⁶ the court held that the Consumer Protection Act was violated by the false representations that induced the plaintiff into a joint venture. In evaluating this claim the court stated "that in order for a private individual to bring an action under RCW 19.86, the conduct complained of must: (1) be unfair or deceptive;⁵⁷ (2) be within the sphere of trade or commerce;⁵⁸ and (3) impact the public interest."⁵⁹ The court went on to elaborate on the public interest requirement by stating that the public interest was composed of the elements of (1) inducement, (2) damage resulting, and (3) potential for repetition.⁶⁰

court may establish the public interest through judicial declaration there by adding the CPA to its enforcement mechanisms.

52. *Haner v. Quincy Farm Chemical, Inc.*, 97 Wn. 2d 753, 649 P.2d 828 (1982).

53. For an example of a mistaken application of a judicial declaration under *Salois*, see Comment, *Real Estate Broker's Duty*, *supra* note 31, at 115 (1981); *cf.* *Sato v. Century 21*, 101 Wn. 2d 599, 681 P.2d 242 (1984).

54. *Anhold*, 94 Wn. 2d at 46, 614 P.2d at 188.

55. *Eastlake Const. Co. v. Hess*, 102 Wn. 2d 30, 52, 686 P.2d 465, 477 (1984).

56. 94 Wn. 2d 40, 614 P.2d 184 (1980).

57. In *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 675 P.2d 193 (1983), the court elaborated on the unfair and deceptive requirements. The court said "[f]or conduct to be unfair or deceptive it is not necessary that an intent to deceive be shown, so long as the action has the capacity to deceive a substantial portion of the public." *Id.* at 592, 675 P.2d at 200-01.

58. WASH. REV. CODE § 19.86.010(2) (1984) provides that: "'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." See *Short and Cressman v. Demopolis*, No. 49617-0 (Wash. Nov. 6, 1984) (entrepreneurial aspects of the practice of law are covered by the definition of "trade or commerce").

59. *Anhold*, 94 Wn. 2d at 45, 614 P.2d at 188.

60. See *supra* note 7. For other cases in which the Supreme Court has utilized the public interest

The definition of public interest provided in *Anhold* has become central to the supreme court's analysis of the Consumer Protection Act. The *Anhold* test covers transactions in which no illegal practices are alleged⁶¹ as well as those transactions in which illegal acts are present but the applicable statute lacks a legislative declaration of public policy.⁶² Moreover, it provides assurance that the public interest is impacted.

This fact was highlighted in the recent case of *Eastlake Construction v. Hess*,⁶³ in which the court characterized the purpose of the public interest requirement as the exclusion of actions arising from a single transaction while allowing a cause of action for acts that arise from a "generalized course of conduct."⁶⁴ The court limited the inducement element to those actions that "concern direct or indirect solicitation of the consuming public."⁶⁵ To insure that the public interest was not compromised, however, the court hinted that a pattern of deceptive practices would establish the element of inducement.⁶⁶ The court further insured that the public interest was present by requiring that there "be shown a real and substantial potential for repetition."⁶⁷ It is apparent that the court will tailor the application of the public interest test to reflect the underlying purpose of the Act. Therefore, lower courts should be certain that the acts in question constitute a course of conduct and not an individual act resulting only in a private wrong.

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test of *Anhold*, see *Eastlake Const. v. Hess*, 102 Wn. 2d 30, 686 P.2d 465 (1984); *Sato v. Century 21*, 101 Wn. 2d 599, 681 P.2d 242 (1984); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 675 P.2d 193 (1983); *Haner v. Quincy Farm Chem., Inc.*, 97 Wn. 2d 753, 649 P.2d 828 (1982).

61. See, e.g., *Anhold v. Daniels*, 94 Wn. 2d 40, 614 P.2d 184 (1982).

62. *Haner v. Quincy Farms Chem., Inc.*, 97 Wn. 2d 753, 649 P.2d 828 (1982).

63. 102 Wn. 2d 30, 686 P.2d 465 (1984).

64. *Id.* at 51, 686 P.2d at 476.

65. *Id.*

66. *Id.* at 52, 686 P.2d at 477 ("Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices.").

67. *Id.*