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## New Limits to the Application of the Consumer Protection Act—*State v. Schwab*, 103 Wn. 542, 693 P.2d 108 (1985)

Lora L. Pesto

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**NEW LIMITS TO THE APPLICATION OF THE CONSUMER PROTECTION ACT—*State v. Schwab*, 103 Wn. 2d 542, 693 P.2d 108 (1985).**

In *State v. Schwab*,<sup>1</sup> the Washington Supreme Court removed residential landlord-tenant transactions from the purview of the Washington Consumer Protection Act (CPA).<sup>2</sup> Under *Schwab*, litigants may no longer invoke the generous remedial provisions of the CPA to enforce tenants' rights granted by the Residential Landlord-Tenant Act.<sup>3</sup> *Schwab* also eliminated state prosecution of residential landlord-tenant actions.<sup>4</sup> The reasoning used by the court could prevent the application of the CPA to new areas of commerce, and may also limit its application in areas where it previously has been considered fully applicable.

## I. BACKGROUND

The Washington Consumer Protection Act prohibits unfair or deceptive practices in trade or commerce.<sup>5</sup> The CPA authorizes both the attorney general and private citizens to bring actions for relief under the Act.<sup>6</sup> Actions under the CPA are based upon conduct which is unfair or deceptive as defined either by statute or by consumer protection case law.<sup>7</sup> The conduct also must be within trade or commerce,<sup>8</sup> and not specifically exempted from the CPA.<sup>9</sup> In addition, private plaintiffs must satisfy a

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1. 103 Wn. 2d 542, 693 P.2d 108 (1985).

2. *Id.* at 553, 693 P.2d at 113-14; WASH. REV. CODE ch. 19.86 (1983).

3. *Schwab*, 103 Wn. 2d at 553, 693 P.2d at 113-14; WASH. REV. CODE ch. 59.18 (1983).

4. Landlord-tenant complaints are consistently among the top five categories of complaints received by the state attorney general's office. Interview with John R. Ellis, Deputy Attorney General, Chief of the Consumer and Business Fair Practices Division of the Washington Attorney General's Office, in Seattle, Washington (October 18, 1985) (notes on file with the *Washington Law Review*). Prior to *Schwab*, the state assumed that it had jurisdiction under the CPA to handle landlord-tenant cases. *Id.* The Attorney General's office intends to seek legislation during the 1986 Legislative session to reinstate the state's jurisdiction over landlord-tenant issues. *Id.*

5. WASH. REV. CODE § 19.86.020 (1983) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ."

6. WASH. REV. CODE § 19.86.080 (1983) allows the attorney general to bring an action under the CPA for injunctive relief, attorney's fees, consumer restitution, and any additional relief that the court deems necessary. WASH. REV. CODE § 19.86.090 (1983) allows any person who is injured in his business or property to bring an action under the CPA for injunctive relief, actual damages, discretionary treble damages (up to \$10,000), court costs, and attorney's fees.

7. *Cordell v. Stroud*, 38 Wn. App. 861, 864, 690 P.2d 1195, 1197-98 (1984).

8. WASHINGTON STATE BAR ASS'N, III WASHINGTON COMMERCIAL LAW DESKBOOK § 27.4(b), at 27-7 to 27-9 (1982). See WASH. REV. CODE § 19.86.010(2) for the statutory definitions of "trade" and "commerce."

9. WASH. REV. CODE § 19.86.170 (1983) states:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or

public interest requirement.<sup>10</sup>

In consumer protection actions based upon statutory violations, most plaintiffs utilize the per se doctrine.<sup>11</sup> As originally expressed in *State v. Reader's Digest*,<sup>12</sup> the doctrine provides that conduct which is both illegal and against public policy is per se an unfair trade practice within the meaning of the CPA.<sup>13</sup> The public policy requirement is met by showing that the illegal conduct violates public policy as declared by the legislature or the judiciary.<sup>14</sup> The supreme court has held that violation of a statute which contains a "specific legislative declaration" of public interest establishes that the prohibited conduct is against public policy,<sup>15</sup> and that the action involves the public interest.<sup>16</sup>

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regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . . .

See generally Comment, *The Scope of the Regulated Industries Exemption Under the Washington Consumer Protection Act*, 10 GONZ. L. REV. 415 (1975).

10. The Washington Supreme Court developed a three-part test for meeting the public interest requirement in *Anhold v. Daniels*, 94 Wn. 2d 40, 614 P.2d 184 (1980). The plaintiff must show: (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. The public interest requirement may also be satisfied if there is a "specific legislative declaration" of public interest. *Haner v. Quincy Farm Chemicals*, 97 Wn. 2d 753, 762, 649 P.2d 828, 833 (1982). See also Comment, *The Consumer Protection Act Private Right of Action: A Reevaluation*, 19 GONZ. L. REV. 673 (1983/84); Comment, *Washington Consumer Protection Act—Public Interest and the Private Litigant*, 60 WASH. L. REV. 201 (1984); Comment, *Private Suits Under Washington's Consumer Protection Act: The Public Interest Requirement*, 54 WASH. L. REV. 795 (1979).

11. In the consumer protection context, the phrase "per se" has been used in connection with three distinct concepts. The supreme court originally introduced the per se doctrine to define "per se unfair or deceptive practices." *State v. Reader's Digest*, 81 Wn. 2d 259, 270, 276, 501 P.2d 290, 298, 301-02 (1972). Next, in *Haner v. Quincy Farm Chemicals*, 97 Wn. 2d 753, 762, 649 P.2d 828, 833 (1982), the court developed a per se public interest doctrine. Finally, in *McRae v. Bolstad*, 101 Wn. 2d 161, 165, 676 P.2d 496, 499 (1984), the court used the phrase "per se violation" in conjunction with the *Reader's Digest* test. The *McRae* opinion, however, does not indicate a relationship between the phrase "per se violation" and the doctrines defining per se unfair practices and per se public interest. This Note uses the phrase "per se" only to signify "per se unfair or deceptive practices."

12. 81 Wn. 2d 259, 501 P.2d 290 (1972).

13. *Id.* at 270, 276, 501 P.2d at 298, 301-02. A successful per se action under the CPA also requires showing (1) the existence of a pertinent statute; (2) the violation of that statute; (3) that such violation was the proximate cause of damages sustained; and (4) that the plaintiff was in the class of people the statute was designed to protect. *Magney v. Lincoln Mutual Savings Bank*, 34 Wn. App. 45, 57, 659 P.2d 537, 544 (1983).

14. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn. 2d 350, 358, 581 P.2d 1349, 1351 (1978).

15. *Id.* at 359, 581 P.2d at 1351.

16. *Haner*, 97 Wn. 2d at 762, 649 P.2d at 833. Because the *Reader's Digest* public policy requirement and the private litigant's public interest requirement can be established by the same legislative declaration, the courts occasionally have failed to distinguish the two requirements. See, e.g., *Crane & Crane v. C & D Electric*, 37 Wn. App. 560, 683 P.2d 1103 (1984). In *Crane*, the court

Since the language used to express public policy varies between statutes, courts have applied the per se doctrine unpredictably.<sup>17</sup> The legislature has provided some clarification by incorporating into selected statutes provisions which directly link the violation of the statute to the CPA.<sup>18</sup> While the language of these provisions also varies, most declare that violations of the statute constitute unfair or deceptive practices for the purpose of applying the CPA. Under *Schwab*, this type of provision may become a prerequisite to the application of the CPA.

## II. THE SCHWAB DECISION

Anthony Schwab owned and rented several submarginal residential housing units.<sup>19</sup> Schwab prepared handwritten rental agreements which generally provided that the tenant would take the premises on an “as is” basis and would not receive landlord services.<sup>20</sup> In response to complaints from tenants, the Consumer and Business Fair Practices Division of the

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stated that the electrical installations statute, WASH. REV. CODE ch. 19.28 (1983), did not contain a specific declaration of public interest and therefore could not be used to meet the public policy requirement of the *Reader's Digest* test. 37 Wn. App. at 566, 683 P.2d at 1107-08.

17. Compare *Wilkinson v. Smith*, 31 Wn. App. 1, 639 P.2d 768 (1982), and *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982) (holding that the violation of the Real Estate Brokers Act, WASH. REV. CODE ch. 18.85 (1983), will support a per se consumer protection action) with *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn. 2d 599, 681 P.2d 242 (1984) and *Cordell v. Stroud*, 38 Wn. App. 861, 690 P.2d 1195 (1984) (holding that the violation of the Real Estate Brokers Act, WASH. REV. CODE ch. 18.85 (1983), will not support a per se consumer protection action). The ruling that the Real Estate Brokers Act will not support a per se consumer protection action has been applied retroactively. *Harstad v. Frol*, 41 Wn. App. 294, 300, 704 P.2d 638, 642 (1985).

18. E.g., the Telephone Buyer's Protection Act, WASH. REV. CODE §§ 19.130.060-.901 (1984), declares violations of that statute to be a violation of the CPA.

Several statutes merely declare that violations constitute unfair or deceptive practices under the CPA, including: WASH. REV. CODE § 18.28.185 (1983) (debt adjusting); WASH. REV. CODE § 18.35.180 (1983) (hearing aids); WASH. REV. CODE § 18.39.350 (1983) (embalmers and funeral directors); WASH. REV. CODE § 19.09.340 (1983) (charitable solicitations); WASH. REV. CODE § 19.52.036 (1983) (interest rates); WASH. REV. CODE § 19.102.020 (1983) (chain distributor schemes); WASH. REV. CODE § 19.110.170 (1983) (business opportunities); WASH. REV. CODE § 28B.05.230 (1983) (educational institutions); WASH. REV. CODE § 46.71.070 (1983) (auto repair); WASH. REV. CODE § 58.19.270 (1983) (land development); WASH. REV. CODE § 63.10.050 (1983) (consumer leases); WASH. REV. CODE § 64.36.170 (1983) (time share offerings); and WASH. REV. CODE § 68.46.210 (1983) (prearrangement contracts).

In addition, several statutes only declare that selected violations constitute unfair or deceptive acts under the CPA including: WASH. REV. CODE § 19.16.440 (1983) (collection agencies); WASH. REV. CODE § 19.100.190(1) (1983) (franchise investments); WASH. REV. CODE § 19.105.500 (1983) (camping clubs); WASH. REV. CODE § 43.22.440(2) (1983) (mobile home installation); and WASH. REV. CODE § 49.60.030(3) (1983) (discrimination).

19. *State v. Schwab*, 103 Wn. 2d 542, 544, 693 P.2d 108, 109 (1985).

20. *Id.*

State Attorney General's office investigated Schwab's rental practices and filed suit under the CPA.<sup>21</sup>

The trial court found that Schwab's rental practices were in direct violation of the CPA.<sup>22</sup> The trial court also found that Schwab had repeatedly violated the Residential Landlord-Tenant Act,<sup>23</sup> and that those violations constituted per se violations of the CPA.<sup>24</sup> Schwab appealed, and at the request of the Attorney General the case was certified to the Washington Supreme Court.<sup>25</sup>

The supreme court reversed the trial court and dismissed the action.<sup>26</sup> The court held that residential landlord-tenant transactions were not within the scope of the CPA, either directly through that act or indirectly through the Residential Landlord-Tenant Act and the per se doctrine.<sup>27</sup> The court specifically rejected the argument that the violation of any consumer-oriented statute constitutes a per se violation of the CPA.<sup>28</sup> Instead, the court adopted a legislative history analysis to determine whether landlords would be regulated under the CPA.

The court's analysis focused on three factors. First, the court found nothing in the legislative history of the CPA to indicate that the act was intended to regulate landlord-tenant issues.<sup>29</sup> Second, the court found the Residential Landlord-Tenant Act to be a comprehensive and well-considered statute containing extensive remedial provisions.<sup>30</sup> Third, the court identified several statutes which, unlike the Residential Landlord-Tenant Act, explicitly link the violation of the statute to the CPA.<sup>31</sup> The court emphasized that the legislature had rejected a proposed amendment to the Residential Landlord-Tenant Act which would have provided that any violation of the act would constitute an unfair or deceptive practice under the CPA.<sup>32</sup> The court concluded that these three factors clearly indicated a legislative intent not to regulate landlord-tenant transactions under the CPA.

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21. *Id.*

22. *State v. Schwab*, No. 80-2-14524-0, slip op. at 6-7 (Wash. Super. Ct. King Co. Feb. 1, 1983).

23. *Schwab*, 103 Wn. 2d at 544, 693 P.2d at 109.

24. *State v. Schwab*, No. 80-2-14524-0, slip op. at 6-7 (Wash. Super. Ct. King Co. Feb. 1, 1983).

25. *Schwab*, 103 Wn. 2d at 543, 693 P.2d at 109. The Attorney General's office requested certification to the supreme court and stated that "because of the significant impact that a ruling on any issue adverse to the state would have, it is probable that legislative changes would need to be sought." *Id.* See *supra* note 4.

26. *Schwab*, 103 Wn. 2d at 554, 693 P.2d at 114.

27. *Id.* at 553, 693 P.2d at 113-14.

28. *Id.* at 548-49, 693 P.2d at 111-12.

29. *Id.* at 549, 693 P.2d at 112.

30. *Id.* at 550, 693 P.2d at 112.

31. *Id.* at 546-47, 693 P.2d at 110-11.

32. *Id.* at 552, 693 P.2d at 113.

### III. ANALYSIS

The court in *Schwab* departed from precedent to establish new limits to the application of the CPA. Although both the court and the legislature had declared that conduct in violation of the Residential Landlord-Tenant Act was against public policy,<sup>33</sup> the *Schwab* court refused to allow a per se consumer protection action. The court disregarded the *Reader's Digest* per se doctrine and claimed to exercise the process of judicial inclusion and exclusion.<sup>34</sup> The phrase “judicial inclusion and exclusion,” also introduced in *Reader's Digest*, was coined to describe the process used by the court to define what practices are unfair or deceptive.<sup>35</sup> The court extended the application of this process by using it to define the areas of commerce that should be regulated under the CPA. This analysis in effect supplements the legislature’s exemption provision<sup>36</sup> with a judicially created exemption for landlord-tenant conduct. The courts and the legislature now are faced with the task of defining the limits of this new analysis.

#### A. *Effect of Schwab on the Per Se Application of the CPA*

After years of modifying and redefining the per se doctrine, the court again has failed to establish a clear standard for the application of the doctrine. Litigants must continue to guess at exactly what characteristics a statute must possess in order to provide the basis for a per se consumer protection action.

##### 1. *Schwab's Legislative Intent Analysis*

Extracting a clear standard from the *Schwab* decision is difficult since the court failed to indicate the relative importance of each factor upon which the decision was based.<sup>37</sup> The court indicated that the lack of legislative history showing an intent to link the Residential Landlord-Tenant Act with the CPA was, in itself, insufficient to cause the exclusion of landlord-tenant conduct from the CPA.<sup>38</sup> In addition, the court previously

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33. WASH. REV. CODE § 59.18.230(1) (1983) provides that “[a]ny provision of a lease or other agreement, whether oral or written, whereby any section or subsection of this chapter is waived . . . shall be deemed against public policy and shall be unenforceable.” In *Foisy v. Wyman*, 83 Wn. 2d 22, 515 P.2d 160 (1973), the court stated that public policy requires that disadvantaged tenants not be placed in the position of agreeing to live in uninhabitable premises. *Id.* at 28, 515 P.2d at 164.

34. *Schwab*, 103 Wn. 2d at 548, 693 P.2d at 111.

35. *State v. Reader's Digest*, 81 Wn. 2d 259, 275, 501 P.2d 290, 301 (1972).

36. *See supra* note 9.

37. *See supra* text accompanying notes 29–32.

38. *Schwab*, 103 Wn. 2d at 550, 693 P.2d 112.

had indicated that an area of conduct would not be excluded from the CPA based solely upon the existence of other remedies at law.<sup>39</sup> Apart from these two narrow guidelines, however, the court has not indicated whether some other combination of the factors identified in *Schwab* would be sufficient to preclude the use of a given statute as the basis for a consumer protection action. In fact, the court left open the possibility that the third factor, the legislature's rejection of an amendment linking the statute with the CPA, may be sufficient by itself to prevent the use of a statute in a consumer protection action.

One hazard of relying upon the *Schwab* analysis of legislative intent is the general inaccessibility of comprehensive state legislative history.<sup>40</sup> Furthermore, the legislative history that is available may fail to provide any clear indication of legislative intent on the narrow question of whether per se consumer protection actions are authorized. For example, in early 1985, a bill<sup>41</sup> was introduced which would have explicitly linked the CPA with the Residential Landlord-Tenant Act,<sup>42</sup> the Mobile Home Landlord-Tenant Act,<sup>43</sup> the Real Estate Brokers and Salesmen Act,<sup>44</sup> and the Retail Installment Sales Act.<sup>45</sup> The bill did not become law, and the reasons for its rejection are unknown to the public. Yet, under the *Schwab* analysis, the failure of that bill could prevent the use of any of those statutes in per se consumer protection actions.

The court compounded the problems inherent in the *Schwab* analysis by relying upon the comprehensive nature of the Residential Landlord-Tenant Act to justify finding that the legislature did not intend the act to support a per se consumer protection action. This reliance contradicts the principle that the remedial provisions of the CPA are supplemental to other remedies available at law.<sup>46</sup> Furthermore, commentators have questioned whether the Residential Landlord-Tenant Act alone provides an adequate remedy to individual tenants subjected to a pattern of violations by the landlord.<sup>47</sup>

If the court intends to prevent the use of a statute under the per se doctrine simply because the statute is comprehensive in nature, the *Schwab* decision

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39. *Short v. Demopolis*, 103 Wn. 2d 52, 65, 691 P.2d 163, 170 (1984).

40. See Comment, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571 (1984).

41. S. 4159, 49th Leg., Reg. Sess. §§ 1-4 (1985).

42. WASH. REV. CODE ch. 59.18 (1983).

43. WASH. REV. CODE ch. 59.20 (1983).

44. WASH. REV. CODE ch. 18.85 (1983).

45. WASH. REV. CODE ch. 63.14 (1983).

46. *Short v. Demopolis*, 103 Wn. 2d 52, 65, 691 P.2d 163, 170 (1984); *MacCormack v. Robins Constr.*, 11 Wn. App. 80, 82, 521 P.2d 761, 762 (1974).

47. See Clocksin, *Washington's Residential Landlord-Tenant Act of 1973*, WASH. ST. BAR NEWS, July 1973, at 4; Stoebuck, *The Law Between Landlord and Tenant in Washington—Part I*, 49 WASH. L. REV. 291, 296 (1974); Comment, *Washington Tenant Remedies and the Consumer Protection Act*, 10 GONZ. L. REV. 559, 561-63 (1975).

will limit the number of statutes which can be applied in per se actions. The court's reliance upon the comprehensive nature of a statute to help justify the dismissal of a per se consumer protection action also creates uncertainty concerning the continued application of the per se doctrine to violations of other similarly comprehensive consumer-oriented statutes. For example, the extremely comprehensive insurance code has been relied upon as a basis for a per se action.<sup>48</sup> Under *Schwab*, however, violations of the insurance code may be insufficient to allow the per se application of the CPA.

## 2. Schwab's New Per Se Standard

The effect of *Schwab* on the traditional *Reader's Digest* standard<sup>49</sup> is unclear. In response to a perceived legislative intent that the Residential Landlord-Tenant Act not be used to support per se consumer protection actions, the court developed a new analysis without mentioning the prior standard. In so doing, the court failed to provide clear guidance as to what the per se doctrine will require in the future.

Analytically, the factors found determinative in *Schwab* were unrelated to whether the defendant's conduct was illegal and against public policy. *Schwab* thus appears to supplement the *Reader's Digest* standard and add a new requirement to the establishment of a per se consumer protection action. After *Schwab*, the revised per se standard might require not only conduct that is illegal and against public policy, but also an indication from the legislature that the statute violated provides an appropriate basis for per se actions.

The court appears to be reluctant to find that conduct is per se unfair or deceptive absent an explicit legislative declaration that the statute will support per se consumer protection actions.<sup>50</sup> Such a requirement, however, contradicts the court's position that the insurance code, which does not contain an explicit reference to the CPA, provides an appropriate basis for per se consumer protection actions.<sup>51</sup> The court has even suggested that a per se action may be based upon the violation of regulations promulgated by the insurance commissioner, even though such regulations do not

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48. See, e.g., *Transamerica Title Ins. Co. v. Johnson*, 103 Wn. 2d 409, 693 P.2d 697 (1985); *Federated American Ins. Co. v. Strong*, 102 Wn. 2d 665, 689 P.2d 68 (1984); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn. 2d 355, 581 P.2d 1349 (1978).

49. See *supra* notes 12–13 and accompanying text.

50. The *Schwab* opinion provided a list of statutes containing an express link with the CPA. See *infra* note 54 and accompanying text. The court then implied that where the legislature intended to regulate other activities under the CPA, such regulation would have been provided through the enactment of similar provisions. *Schwab*, 103 Wn. 2d at 546–47, 693 P.2d at 110–11.

51. See *supra* note 48 and accompanying text.

contain an explicit link with the CPA or any declaration of the legislature's intent.<sup>52</sup> If an explicit link is required under *Schwab*, the insurance code and regulations may no longer be considered an appropriate basis for a per se action.

While implying that an explicit link is now required, the court failed to define exactly what type of link must be provided. In dicta, the court provided a list of thirteen statutes<sup>53</sup> which include "designated activities within the ambit of the CPA."<sup>54</sup> Nine of the thirteen provisions listed,<sup>55</sup> and at least four others not listed,<sup>56</sup> not only include the regulated activities within the CPA, but also declare violations of the statute to be unfair or deceptive practices under the CPA. Other provisions listed by the court simply select the violations which might be used to support a per se action.<sup>57</sup> In contrast, one of the provisions listed merely authorizes attorney general enforcement under the CPA.<sup>58</sup> While each statutory variation goes beyond including the activities regulated within the scope of the CPA, the mere authorization of attorney general enforcement falls far short of declaring that conduct in violation of the statute constitutes a violation of the CPA or is per se unfair or deceptive. By stating that these provisions accomplish only the inclusion of the activity within the CPA, the court disregarded the differing language and intent of the provisions, and failed to indicate which declarations will be considered sufficient to allow a per se action.

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52. *Federated American Ins. Co. v. Strong*, 102 Wn. 2d 665, 676, 689 P.2d 68, 75 (1984).

53. WASH. REV. CODE § 18.28.185 (1983) (debt adjusting); WASH. REV. CODE § 18.35.180 (1983) (hearing aids); WASH. REV. CODE § 18.39.350 (1983) (embalming and funerals); WASH. REV. CODE § 19.09.340 (1983) (charitable solicitations); WASH. REV. CODE § 19.52.036 (1983) (usurious contracts); WASH. REV. CODE § 19.102.020 (1983) (chain distributor schemes); WASH. REV. CODE § 19.105.100 (1983) (camping clubs); WASH. REV. CODE § 19.130.060 (1984) (telephone equipment); WASH. REV. CODE § 46.70.220 (1983) (motor vehicle practices); WASH. REV. CODE § 49.60.030(3) (1983) (discrimination); WASH. REV. CODE § 58.19.270 (1983) (land development); WASH. REV. CODE § 63.10.050 (1983) (consumer leases); WASH. REV. CODE § 64.36.170 (1983) (time share activities).

54. *Schwab*, 103 Wn. 2d at 546, 693 P.2d at 110.

55. WASH. REV. CODE § 18.28.185 (1983) (debt adjusting); WASH. REV. CODE § 18.35.180 (1983) (hearing aids); WASH. REV. CODE § 18.39.350 (1983) (embalming and funerals); WASH. REV. CODE § 19.09.340 (1983) (charitable solicitations); WASH. REV. CODE § 19.52.036 (1983) (usurious contracts); WASH. REV. CODE § 19.102.020 (1983) (chain distributor schemes); WASH. REV. CODE § 58.19.270 (1983) (land development); WASH. REV. CODE § 63.10.050 (1983) (consumer leases); WASH. REV. CODE § 64.36.170 (1983) (time share activities).

56. WASH. REV. CODE § 19.110.170 (1983) (business opportunity fraud); WASH. REV. CODE § 28B.05.230 (1983) (educational services); WASH. REV. CODE § 46.71.070 (1983) (auto repair); WASH. REV. CODE § 68.46.210 (1983) (prearrangement contracts).

57. WASH. REV. CODE § 19.105.100 (1983) (camping clubs); WASH. REV. CODE § 49.60.030(3) (1983) (discrimination). The list provided by the court failed to include three statutes which also provide that selected violations will support a per se consumer protection action: WASH. REV. CODE § 19.16.440 (1983) (collection agencies); WASH. REV. CODE § 19.100.190(1) (1983) (franchise investment); WASH. REV. CODE § 43.22.440(2) (1983) (mobile home installation).

58. WASH. REV. CODE § 46.70.220 (1983) (motor vehicle practices).

### 3. *The Effect of the Schwab Standard*

If the legislature has specifically defined the exact relationship between a statute and the CPA, the court should acknowledge that relationship. If, however, the legislature has not explicitly defined the relationship, the court now appears to be unwilling to find that conduct is per se unfair or deceptive. In *Schwab*, the court put the legislature on notice that future per se application of the CPA may be dependent upon explicit legislative approval. While requiring an explicit declaration should enhance consistency and predictability, this standard has two disadvantages. First, some delay is inevitable before the legislature can fully react to the new standard. Second, the political cost of amending all consumer-oriented statutes to provide an express link to the CPA may be excessive. Until the legislature has reacted to the new standard, litigants under the consumer protection act can expect difficulty in establishing a per se consumer protection action based upon any statute not containing an express link to the CPA.

#### B. *Effect of Schwab on the Application of the CPA to Unfair and Deceptive Practices Unregulated by Statute*

In addition to modifying the per se doctrine, the *Schwab* court held that all residential landlord-tenant conduct is excluded from the direct application of the CPA, including misconduct not addressed by the Residential Landlord-Tenant Act.<sup>59</sup> This unprecedented exception created by the court for landlord-tenant transactions is not justified by the court's analysis and conflicts with the language of the CPA,<sup>60</sup> Washington precedent,<sup>61</sup> and the

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59. *Schwab*, 103 Wn. 2d at 553, 693 P.2d 113-14.

60. Although the CPA contains a provision which specifically states the legislative exemptions to the act, no specific exemption is provided for landlord-tenant transactions. WASH. REV. CODE § 19.86.170. "Where a statute provides for a stated exception, no other exceptions will be assumed by implication." *Jepson v. Department of Labor & Industries*, 89 Wn. 2d 394, 404, 573 P.2d 10, 16 (1977). Furthermore, in WASH. REV. CODE § 19.86.920 the court is instructed to liberally construe the terms of the CPA.

61. The court failed to discuss the analysis applied in *Short v. Demopolis*, 103 Wn. 2d 52, 691 P.2d 163 (1984), a case decided just three months prior to *Schwab*. In determining whether the CPA might properly be applied to attorneys, the court in *Short* first looked for language in the CPA which expressly included or excluded attorneys. *Id.* at 56, 691 P.2d at 165. Finding no express indication, the court focused on whether the practice of law constituted trade or commerce. *Id.* at 60, 691 P.2d at 168. *See, Note, Washington Lawyers Under the Purview of the State Consumer Protection Act—the "Entrepreneurial Aspects" Solution*, 60 WASH. L. REV. 923 (1985).

In *Schwab*, the trial court expressly found the rental of residential premises to be an activity in commerce. *State v. Schwab*, No. 80-2-14524-0, slip op. at 6 (Wash. Super. Ct. King Co. Feb. 1, 1983). Therefore, under the *Short* analysis, the direct application of the CPA would be allowed since the conduct was within trade or commerce.

result reached in other jurisdictions which have considered the issue.<sup>62</sup>

The court apparently intended to create a blanket exception for landlord-tenant conduct.<sup>63</sup> This exception, however, could create difficulties that the court may not have foreseen. Exempting landlord-tenant transactions from the CPA produces the illogical result that practices recognized as unfair or deceptive are prohibited by the CPA unless those practices are utilized in the rental of residential housing. For example, bait-and-switch advertising<sup>64</sup> is prohibited by the CPA.<sup>65</sup> Under *Schwab*, however, bait-and-switch advertising is now permitted in the rental of residential housing since the CPA may not be applied to landlords. *Schwab* leaves residential tenants less protected than commercial tenants since unfair or deceptive conduct is actionable under the CPA in a commercial lease transaction, but such conduct apparently is not actionable under *Schwab* if a residential lease is involved. Yet it may be the less sophisticated residential tenant who is in need of greater protection.

The landlord-tenant exception to the CPA also may cause problems for antitrust regulation under the act. In addition to prohibiting unfair or deceptive practices, the CPA also implements the Washington Constitution's prohibition of monopolies and other conduct in restraint of trade.<sup>66</sup> Application of the landlord-tenant exception in an antitrust action would exclude landlords from these antitrust prohibitions, thus tacitly authorizing landlord monopolies, price agreements, and other trade restraints under state law. This result is obviously contrary to the legislature's intent and undesirable as a matter of public policy.

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62. *Schwab*, 103 Wn. 2d at 559, 693 P.2d at 116-17 (Dore, J., dissenting); see *Conaway v. Prestia*, 191 Conn. 484, 464 A.2d 847 (1983); *People ex rel. Fahner v. Hedrich*, 108 Ill. App. 3d 83, 438 N.E.2d 924 (1982); *McGrath v. Mishara*, 286 Mass. 74, 434 N.E.2d 1215 (1982); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1978); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 812 (1974).

63. The state's motion for reconsideration of the exclusion of landlord-tenant conduct from the direct application of the CPA was denied March 5, 1985. Interview with John R. Ellis, Deputy Attorney General, Chief of the Consumer and Business Fair Practices Division of the Washington Attorney General's Office, in Seattle, Washington (Oct. 18, 1985) (notes on file with the *Washington Law Review*).

64. Bait-and-switch advertising is a practice designed to lure customers into the business by advertising particular items which the business has no genuine intention of offering for sale. For example, the court found bait-and-switch advertising in *State v. Ralph Williams' North West Chrysler Plymouth*, 87 Wn. 2d 298, 306, 553 P.2d 423, 430 (1976), when the defendant advertised cars which were not available for sale.

65. *Id.* at 309, 553 P.2d at 432.

66. WASH. CONST. art. XII, § 22. "When originally passed in 1961, the Act was viewed primarily as an antitrust statute incorporating the basic provisions of federal antimonopoly legislation." Boeder, *Consumer Case Indexing Project*, WASH. ST. B. NEWS, June 1974, at 9. In addition, WASH. REV. CODE §§ 19.86.030-.050 (1983) prohibit monopolies, price fixing agreements, and other conduct in restraint of trade. See generally, O'Connell, *Washington Consumer Protection Act—Enforcement Provisions and Policies*, 36 WASH. L. REV. 279 (1961).

The analytical and practical difficulties with this aspect of the decision require legislative or judicial modification of the court's holding. Without proper modification, the court's use of the legislative history analysis to exclude landlord-tenant transactions gives the court the power to exempt unpredictably and at will selected classes of businesses from the application of the CPA. Pending modification, a cautious plaintiff may need to show not only that the conduct complained of is within the scope of the CPA, but also that it would be inappropriate for the court to exclude that conduct.

#### IV. CONCLUSION

The *Schwab* decision almost demands a legislative response. The court's opinion obscures the per se standard to the point where a litigant cannot reasonably expect the court to allow a per se action unless the legislature has provided a clear link with the CPA. In response, the legislature must evaluate the merits of incorporating such a link into each consumer-oriented statute. In addition, the legislature needs to remind the court that blanket exceptions to the CPA are drafted and enacted by the legislature, not by the court. Consumer protection and antitrust regulation in Washington will be severely limited if the courts continue to arbitrarily exclude entire classes of business from the CPA.

*Lora L. Petso*