
Susan Clyatt Lybeck

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In Hangman Ridge Training Stables v. Safeco Title Insurance Co., the Washington Supreme Court established a new test for plaintiffs to meet in pursuing a private right of action under Washington's Consumer Protection Act (CPA). The court set forth a substantially revised method for establishing public interest impact for private CPA actions. In addition, the court abolished its earlier distinction between per se and de facto CPA violations. All private plaintiffs must now meet the same test.

This Note examines the legal background for private CPA actions prior to Hangman Ridge. The Note observes that the Hangman Ridge test is consistent with the statutory language creating a private CPA action. The Note then analyzes the court's attempt to clarify the means of establishing private actions under the CPA in two areas: First, the new method for proving public interest; and second, the modification of the use of the term "per se" in the context of the CPA. The Note concludes that the court's new factors for establishing public interest are inconsistent and confusing. The court's modification of the use of the term "per se," however, provides clarity and certainty by deferring to legislative intent. The Note recommends that the court redefine the public interest factors in the new test to increase certainty for plaintiffs and defendants. The court's modification of the term "per se," however, should remain as set forth in Hangman Ridge, with some clarification.

I. LEGAL BACKGROUND PRIOR TO HANGMAN RIDGE

A. Creation of the Private Right of Action

In 1970, the Washington legislature amended the CPA to create an individual's right to bring a private action under the Act. By adding this
provision, the legislature intended to enlist the aid of individuals in the enforcement of the CPA. The private right of action provision encourages individual plaintiffs damaged by unfair or deceptive acts to bring actions for CPA violations, despite the potential high cost of litigation, by allowing for the award of attorneys’ fees and treble damages. Contrary to clear statutory wording, the CPA private action tests developed by the court before Hangman Ridge did not explicitly include all of the elements required by statute.

B. Establishing Private CPA Actions Before Hangman Ridge

Prior to Hangman Ridge, Washington courts interpreted the CPA to allow private actions for de facto and per se violations of the statute. Plaintiffs could demonstrate de facto violations by showing that particular facts satisfied a judicially-established test. Proof of violation of another statute in contravention of public policy could support per se violations.

1. De Facto Violations

A plaintiff had to meet the requirements of the test set forth in Anhold v. Daniels in order to sue successfully for a de facto violation before Hangman Ridge. The Anhold test required proof of an unfair or deceptive act in trade or commerce and public interest impact. Three considerations determined an act’s unfairness: First, whether the act offended public policy as established by statute or common law; second, whether the act was immoral, unethical, oppressive or unscrupulous; and third, whether the act caused substantial injury to consumers. An act was deceptive if a plaintiff

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4. Lightfoot v. MacDonald, 86 Wn. 2d 331, 335–36, 544 P.2d 88, 91 (1976). The Lightfoot court stated that a private individual could bring an action under the CPA only if the act or practice complained of was one which would also be vulnerable to complaint by the attorney general. Id. at 334, 544 P.2d at 90.
5. Wash. Rev. Code § 19.86.090 (1985); see Leaffer & Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521, 531–32 (1980) (“The attorneys’ fee award provisions are intended . . . to provide an incentive for consumers to engage in litigation to protect their rights so that the statutes will be fully enforced.”); Lovett, Private Actions for Deceptive Trade Practices, 23 Admin. L. Rev. 271, 285 (1971) (“At least double or treble damages . . . would probably be necessary . . . to enable such consumer action, and in addition, the consumer would have to recover his attorneys [sic] fees and costs of suit.”).
7. Anhold, 94 Wn. 2d at 45, 614 P.2d at 188.
could show that it had the capacity to deceive consumers. Finally, the CPA broadly defined trade and commerce to include the sale of assets or services and any commerce directly or indirectly affecting the people of the state.

To prove public interest impact, the Anhold test required a showing that the defendant's unfair or deceptive act induced the plaintiff to act or refrain from acting and caused the plaintiff to suffer damages. In addition, the defendant's act had to have the potential for repetition. The court never established the exact meaning of "potential for repetition." Later cases suggested that a plaintiff could prove potential for repetition by showing that the defendant engaged in a protracted course of unfair or deceptive conduct, utilized widespread advertising, or injured consumers other than the plaintiff.

2. Per Se Violations

The history of the term "per se" in Washington CPA cases is confusing. As the Hangman Ridge court acknowledged, the court had previously used per se in three contexts: First, per se unfair trade practices; second, per se public interest impact; and third, per se violations. The uses sometimes overlapped, leading to confusion in distinguishing among them.

9. Haner v. Quincy Farm Chem., 97 Wn. 2d 753, 759, 649 P.2d 828, 831 (1982) ("For the conduct to be . . . deceptive does not require that intent be shown if the action has the capacity to deceive a substantial portion of the purchasing public.").

10. WASH. REV. CODE § 19.86.010(2) (1985). The language of the statute states: "'Trade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." Id.

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

12. Id.

13. In Eastlake Constr. Co. v. Hess, 102 Wn. 2d 30, 52, 686 P.2d 465, 477 (1984), the court stated that the potential for repetition must be real and substantial, as opposed to a hypothetical possibility that the defendant's act would be repeated.

14. See, e.g., Id. (proof that contractor engaged in pattern of untimely, erratic, inadequate, and defective performance of construction contracts might be enough to show potential for repetition).


16. Cf. Rouse v. Glascam Builders, 101 Wn. 2d 127, 135, 677 P.2d 125, 130 (1984) (court found no potential for repetition of a condominium builder's unfair acts toward one of the condominium owners because there was no evidence that the builder had acted unfairly or deceptively toward any other owner in the development).

17. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn. 2d 778, 792, 719 P.2d 531, 538–39 (1986). While the supreme court at times found per se unfair trade practices and at other times per se public interest impact, the court of appeals (Division I) developed its own test for per se violations of the CPA. In Dempsey v. Joe Pignataro Chevrolet, 22 Wn. App. 384, 392–93, 589 P.2d 1265, 1270 (1979), the court set forth a four-part test for determining whether the violation of a specific statute was
The court first recognized a per se unfair trade practice in *State v. Reader’s Digest Association.* The *Reader’s Digest* court stated that an act which violated another statute and was against public policy was per se an unfair trade practice within the meaning of the CPA.

Later, in *Salois v. Mutual of Omaha Insurance Co.*, the court developed the public policy element of the *Reader’s Digest* unfair trade practice test. According to *Salois*, either the legislature or the judiciary could declare that the violation of a given statute was against public policy. Thus, the violation of a statute which stated that it was in the public interest, instead of one which stated that its violation was an unfair or deceptive act, could constitute a per se unfair trade practice. The *Salois* court also implicitly equated the public policy requirement necessary to establish an unfair trade practice with the public interest impact requirement contained in the de facto test for private actions. As such, the case was an early warning of the confusion to follow from the court’s failure to indicate whether the de facto and per se tests were independent alternatives to each other or were instead interrelated.

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19. *Reader’s Digest*, 81 Wn. 2d at 270, 501 P.2d at 298. In *Reader’s Digest*, the court held defendant’s actions to be per se unfair without looking at the specific language of the laws violated. Defendant’s sweepstakes violated article 2, § 24 of the Washington constitution, which prohibited lotteries, and § 9.59.010 of the Revised Code of Washington, which made the operation of a lottery a criminal offense. *Id.* Neither the constitutional provision nor the statute stated that operating a lottery constituted an unfair or deceptive act. WASH. CONST. art. 2, § 24 (1889, amended 1972); WASH. REV. CODE § 9.59.010 (repealed 1973).
21. *Salois*, 90 Wn. 2d at 358, 581 P.2d at 1351. The *Salois* court stated the test as follows: “(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.*
22. The *Hangman Ridge* court recognized this inconsistency and stated that the new test’s requirement of public interest impact replaced the public interest/public policy element of the *Reader’s Digest* test. *Hangman Ridge*, 105 Wn. 2d at 786, 719 P.2d at 535–36. For the elements of the new *Hangman Ridge* five-part test, see infra text accompanying notes 43–46.
23. *Salois*, 90 Wn. 2d at 359, 581 P.2d at 1351. In *Salois*, the specific statute which the defendant violated was a provision of the Washington Insurance Code requiring that insurance brokers and agents act in good faith. WASH. REV. CODE § 48.01.030 (1985). Since that statute states “[t]he business of insurance is one affected by the public interest,” the court found defendant’s actions violating it to be against public policy. *Salois*, 90 Wn. 2d at 359, 581 P.2d at 1351.
Haner v. Quincy Farm Chemicals\textsuperscript{24} introduced a second use of the term "per se," a per se finding of public interest impact.\textsuperscript{25} In order to satisfy per se the public interest impact requirement, the legislature had to declare specifically the public interest of the violated statute.\textsuperscript{26} This was contrary to the Salois court's statement that either the legislature or the judiciary could declare that a statute impacted the public interest.\textsuperscript{27} The Haner court also stated that either a specific legislative declaration of public interest or satisfaction of the Anhold public interest test must be shown in order to establish a CPA violation even if a per se unfair trade practice existed under Reader's Digest.\textsuperscript{28} Thus, the Haner court's requirement of specific statutory public interest language created an additional burden for plaintiffs pursuing per se actions. It was also a further intermingling of the per se and de facto tests.

In McRae v. Bolstad,\textsuperscript{29} the court used per se in a third manner when it referred to findings of per se unfair trade practices as per se violations of the CPA.\textsuperscript{30} The court treated the Reader's Digest and Anhold tests as alternative ways to establish a private right of action and required a showing of public interest only under Anhold.\textsuperscript{31} The treatment of the two tests as alternatives is inconsistent with Haner, and it illustrates the court's inability to take a clear stance on private actions under the CPA.

II. THE HANGMAN RIDGE DECISION

A. Facts

The Hangman Ridge decision arose from a suit alleging unauthorized practice of law in connection with a loan closing and property transfer. Arthur and Lois McNeil, the sole shareholders of Hangman Ridge Training Stables, Inc. and the plaintiffs in this action, applied for a loan.\textsuperscript{32} As a condition of granting the loan, the lender required a transfer of certain real estate held by the Hangman Ridge corporation to the McNeils personally.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{24} 97 Wn. 2d 753, 649 P.2d 828 (1982).
\item \textsuperscript{25} Haner, 97 Wn. 2d at 761, 649 P.2d at 833.
\item \textsuperscript{26} Id. at 762, 649 P.2d at 833.
\item \textsuperscript{27} See supra note 21 and accompanying text.
\item \textsuperscript{28} Haner, 97 Wn. 2d at 762, 649 P.2d at 833.
\item \textsuperscript{29} 101 Wn. 2d 161, 676 P.2d 496 (1984).
\item \textsuperscript{30} McRae, 101 Wn. 2d at 165, 676 P.2d at 499.
\item \textsuperscript{31} Id.
\item \textsuperscript{33} Hangman Ridge, 105 Wn. 2d at 781, 719 P.2d at 533.
\end{itemize}
Safeco Title Insurance Company closed the escrow, and at closing Safeco's agent informed the McNeils that she was not an attorney. She did not, however, advise them to seek independent legal counsel or tax advice.

One year after the loan closing and accompanying conveyance of real estate, the McNeils' attorney discovered that the conveyance resulted in a $3,500 tax liability. The McNeils contended that the tax liability could have been avoided if the Safeco closing agent had warned them of the potential tax ramifications. As a result, the McNeils and Hangman Ridge sued Safeco for unauthorized practice of law in preparing the deed, legal malpractice in failing to advise them of possible tax liability, and violation of the CPA.

The trial court found that Safeco's deed preparation and loan closing constituted the unauthorized practice of law, and on remand the court held this to be a per se violation of the CPA. The supreme court took the case

34. Id.
35. Id. Prior to closing, the lender told the McNeils that they might need legal assistance regarding the transaction, but despite retaining both an attorney and an accountant on a regular basis, the McNeils did not seek independent advice. Id.
36. Id.
37. Id.
39. Hangman Ridge, 105 Wn. 2d at 782, 719 P.2d at 533. This case was tried twice. At the first trial, the court held that Safeco's actions constituted the unauthorized practice of law. Id. The court also found, however, that Safeco's closing agent did not violate the standard of care for attorneys who prepare deeds and close real estate transactions. Id. Thus, Safeco did not breach any duty owed to the McNeils, and the McNeils could not successfully pursue a legal malpractice action. Id. The trial court also found no CPA violation. Id. Consequently, it did not award the requested injunction or attorneys' fees. Id.

The court of appeals affirmed the lower court's decision. Hangman Ridge, 33 Wn. App. at 137, 652 P.2d at 967. The McNeils petitioned the supreme court for review. Hangman Ridge, 105 Wn. 2d at 782, 719 P.2d at 533. This petition was granted and then was continued pending the decision in Bowers v. Transamerica Title Ins. Co., 100 Wn. 2d 581, 675 P.2d 193 (1983), a case which also involved an allegation of unauthorized practice of law by an escrow agent. Id.

Bowers involved a suit for alleged unlawful practice of law by an escrow closer in preparing the closing documents and escrow instructions for the sale of real estate. 100 Wn. 2d at 583–84, 675 P.2d at 196–97. In Bowers, the supreme court found that those actions constituted the unauthorized practice of law and that they were unfair and deceptive under the capacity-to-deceive standard set forth in Haner v. Quincy Farm Chem., 97 Wn. 2d 753, 649 P.2d 828 (1982). Bowers, 100 Wn. 2d at 591–92, 675 P.2d at 200–01. The court stated without discussion that the facts satisfied all elements of the Anhold test and thus constituted a CPA violation. Id. at 592, 675 P.2d at 201.


40. Hangman Ridge, 105 Wn. 2d at 782–83, 719 P.2d at 534. The trial court found a per se violation of the CPA because Safeco violated § 2.48.180 of the Revised Code of Washington, which
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"as a vehicle for clarification of the private right of action under the CPA." The supreme court applied a new test for private rights of action and held that the McNeils failed to establish a CPA violation.

B. Changes in Legal Guidelines for CPA Violations

In *Hangman Ridge*, the supreme court replaced the earlier tests for both de facto and per se CPA violations with a single test. The court also reformulated the method for establishing public interest impact and modified the meaning of the term "per se" as used in the context of the CPA.

1. New Five-Part Test

The new test for all private actions under the CPA requires the plaintiff to prove five elements: One, an unfair or deceptive act or practice; two, occurring in trade or commerce; three, public interest impact; four, injury to plaintiff's business or property; and five, causation. Although all makes the unauthorized practice of law a misdemeanor, *Hangman Ridge*, 33 Wn. App. at 136, 652 P.2d at 967. Although the trial court found that the McNeils had sustained no damages, it enjoined Safeco from the unauthorized activity and awarded the McNeils approximately $45,000 in attorneys' fees, expert witness fees, and costs. *Hangman Ridge*, 105 Wn. 2d at 783, 719 P.2d at 534. Safeco then appealed the finding of a CPA violation and the award of attorneys' fees. *Id.*

41. *Hangman Ridge*, 105 Wn. 2d at 783, 719 P.2d at 534. Safeco filed a notice of appeal to Division III of the Washington Court of Appeals, and the McNeils cross-appealed to the supreme court. Opening Brief of Appellant at 10, *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 719 P.2d 531 (1986) (No. 51213-2). Division III then referred the case to the supreme court pursuant to Rule of Appellate Procedure 5.3(g), which treats all notices of appeal as being directed to the supreme court whenever notices in the same case are directed to both the court of appeals and the supreme court. *Id.*

42. *Hangman Ridge*, 105 Wn. 2d at 783, 719 P.2d at 539–40. The supreme court accordingly reversed the trial court's award of attorneys' fees. *Id.*

43. The *Hangman Ridge* court retained the "capacity-to-deceive" standard set forth in *Haner v. Quincy Farm Chem.*, 97 Wn. 2d 753, 649 P.2d 828 (1982), as the measure of an act's deceptiveness, thus requiring neither intent to deceive on the part of the seller nor actual deception or reliance on the part of the buyer. *Hangman Ridge*, 105 Wn. 2d at 785, 719 P.2d at 535. This appears to be inconsistent with requiring proof of injury and causation as the fourth and fifth elements of the test since the purpose of the capacity-to-deceive test, as stated by the court in *Hangman Ridge*, is "to deter deceptive conduct before injury occurs." *Id.* The capacity-to-deceive standard has been applied to CPA enforcement by the attorney general who does not need to prove causation. *See*, e.g., *Nuttall v. Dowell*, 31 Wn. App. 98, 110, 639 P.2d 832, 840, review denied, 91 Wn. 2d 1015 (1982). Despite the logical inconsistency, however, the standard is appropriate as a threshold requirement for private actions since it is a lower standard more easily met than a standard requiring the plaintiff to prove actual intent to deceive on the part of the seller and actual reliance on the part of the buyer.

44. The requirement that the injury be to plaintiff's business or property is consistent with earlier case law. *See*, e.g., *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 1077, 1083–84 (1982) (only injury to plaintiff's business or property is compensable under the CPA; damages for mental distress, embarrassment, and inconvenience which do not entail pecuniary loss are not recoverable).

45. *Hangman Ridge*, 105 Wn. 2d at 780, 719 P.2d at 533. The *Hangman Ridge* court did not specify the level of causation which will be required under the new test, but in earlier cases the court
potential private action plaintiffs must now meet the same test, certain elements of the new test may be satisfied per se.\textsuperscript{46}

2. \textit{Public Interest Impact Under Hangman Ridge}

In conjunction with its new five-part test, the court in \textit{Hangman Ridge} established two sets of factors to determine public interest impact.\textsuperscript{47} The court established one set of factors for what it termed consumer transactions and another set for private disputes.\textsuperscript{48} The court did not state general rules for determining whether a given transaction is consumer or private. Instead, the decision listed cases which would serve as examples for each type of transaction. Consumer transactions include sales of wheat seed, new and used automobiles, and mobile homes.\textsuperscript{49} Private disputes include those between attorneys and clients, insurers and insureds, real estate agents and property purchasers, and escrow closers and clients.\textsuperscript{50}

To find public interest impact in a consumer transaction, the trier of fact should consider five factors: First, whether the alleged act was committed in the course of the defendant’s business; second, whether it was part of a pattern or generalized course of conduct; third, whether repeated acts were committed prior to the act involving the plaintiff; fourth, whether there is a real and substantial potential for repetition of the defendant’s conduct following the act involving the plaintiff; and fifth, if the act involved a single transaction, whether many consumers were affected or are likely to be affected by it.\textsuperscript{51}

To find public interest impact in a private dispute, the trier of fact should look to four factors: First, whether the alleged act was committed in the

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\textsuperscript{46} \textit{Hangman Ridge}, 105 Wn. 2d at 785-86, 791, 719 P.2d at 535, 538.
\textsuperscript{47} \textit{Id.} at 790-91, 719 P.2d at 537-38.
\textsuperscript{48} \textit{Id.}
\textsuperscript{51} \textit{Hangman Ridge}, 105 Wn. 2d at 790, 719 P.2d at 537-38.
course of the defendant’s business; second, whether the defendant advertised to the public in general; third, whether the defendant actively solicited the plaintiff; and fourth, whether the plaintiff and the defendant occupied unequal bargaining positions. The court stated that no single factor is dispositive under either set of factors, nor do all factors need to be present in order to show that a defendant’s action has public interest impact.

3. Use of Per Se Under Hangman Ridge

In Hangman Ridge, the court abolished “per se violations” of the CPA, noting its previous conflicting and confusing use of the term. The court attempted to resolve this confusion by allowing plaintiffs to satisfy some of the elements of the new five-part test per se by showing the violation of another statute. If a statute states that its violation constitutes either an unfair trade practice or a violation of section 19.86.020 of the Revised Code of Washington, then a plaintiff may use the defendant’s violation of that statute to establish per se the first two elements of the Hangman Ridge test, unfair or deceptive act occurring in trade or commerce. The third element of the Hangman Ridge test, public interest impact, can be met by showing that the defendant violated a statute which the legislature has declared to be

52. Id. at 790–91, 719 P.2d at 538.
53. Id. at 791, 719 P.2d at 538.
54. Id. at 792, 719 P.2d at 538–39. The Hangman Ridge test is a significant departure from the earlier tests for per se violations. The Hangman Ridge test will limit the plaintiff’s ability to establish a per se finding of unfair or deceptive conduct. See infra notes 87–88 and accompanying text. The Reader’s Digest and Salois tests simply required a showing that another statute with public interest impact had been violated in order to find a per se unfair trade practice. See supra notes 18–23 and accompanying text. Under Hangman Ridge, the plaintiff must show that the other statute explicitly states either that its violation is an unfair or deceptive practice or that its violation is a violation of § 19.86.020 of the Revised Code of Washington. Hangman Ridge, 105 Wn. 2d at 786–87, 719 P.2d at 535–36.
55. Hangman Ridge, 105 Wn. 2d at 786–87, 791, 719 P.2d at 535, 538. Aside from the statutes which the court listed as examples of those giving rise to a per se showing of an unfair or deceptive act in trade or commerce, violation of other statutes containing language similar to those listed by the court will also probably constitute an unfair trade practice. See Wash. Rev. Code §§ 18.11.260 (1986) (auctioneers); 18.35.180 (1985) (hearing aids); 19.16.440 (1985) (collection agencies); 19.52.036 (1985) (usurious contracts); 19.100.190 (1985) (franchise investment protection); 19.134.070(5) (1986) (credit services); 19.138.080 (1986) (travel charter and tour operators); 288.05.230 (1985) (educational services); 46.71.070 (1985) (automotive repairs); 49.60.030(3) (1985) (discriminatory practices); 68.46.210 (1985) (cemetery prearrangement contracts).
56. Hangman Ridge, 105 Wn. 2d at 785–86, 719 P.2d at 535–36. Through the statutes it used as examples, the supreme court made clear that a violation of a statute which references § 19.86.020 is a per se unfair trade practice. The court, however, did not discuss statutes which make a general reference to the CPA as a whole. Thus, it is unclear whether a violation of such a statute gives rise solely to a per se unfair trade practice or whether it also satisfies per se the public interest impact requirement. See infra notes 93–96 and accompanying text.
III. ANALYSIS

In formulating the new test for private actions under the CPA, the Hangman Ridge court's goal was to clarify this "highly confused area of the law."59 The court was only partly successful. The new five-part test closely follows the statutory language found in the CPA's private action provision. Despite that fact, the court's new sets of factors for satisfying the public interest impact requirement are as confusing as earlier public interest impact tests. The court was successful, however, in its clarification and redefinition of the term "per se" as used in the context of the CPA.

A. Consistency With Statutory Language

For the first time since the Washington legislature adopted the CPA, the court closely followed the statute in creating a test for private actions. Requirements for unfair or deceptive acts in trade or commerce appear in section 19.86.020.60 The statutory provision creating the private right of action requires causation and damages.61 The public interest impact requirement was derived from the purpose section of the Act.62 Thus, the


58. Hangman Ridge, 105 Wn. 2d at 792, 719 P.2d at 539.

59. Id. at 783, 719 P.2d at 534. All of the elements required by the Hangman Ridge test were present, either explicitly or implicitly, in earlier private action tests, and many of the elements retain the meaning and application developed in earlier decisions. For example, the requirements of an unfair or deceptive act and that the act occur in trade or commerce were present in the Anhold test. See supra text accompanying note 7. Presumably, the Hangman Ridge decision will not change the way those elements are applied. The public interest impact requirement was also present in the Anhold test, but its form, effect, and application will be different under Hangman Ridge. See supra notes 11-16 and accompanying text. The last two elements of the Hangman Ridge test, injury and causation, were implicit in the public interest impact requirement of the Anhold test since the plaintiff had to prove that the defendant's action induced the plaintiff's action or inaction and that damages resulted. See supra text accompanying note 11.

60. WASH. REV. CODE § 19.86.020 (1985) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." (emphasis added)). This provision is incorporated into the CPA private right of action. See id. § 19.86.090.

61. Id. § 19.86.090 ("Any person who is injured in his business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . ." (emphasis added)).

62. The public interest impact requirement was originally derived from the purpose section of the CPA: "It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or
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*Hangman Ridge* test is consistent with legislative directives, and in that sense, it is an improvement over the tests set forth in prior cases.  

**B. Criticism of the New Method for Determining Public Interest Impact**

One significant difference between the *Hangman Ridge* test and earlier tests for establishing a private CPA action is in proving public interest impact. The new factors do not adequately clarify the requirements for a showing of public interest impact. Instead, the factors create additional confusion and uncertainty. The court failed to adequately distinguish between types of transactions, made consumer factors more difficult to prove than private factors, and provided no guidance in assigning weight to the factors.

1. **Failure to Adequately Distinguish Between Consumer Transactions and Private Disputes**

The first problem with the public interest element of the *Hangman Ridge* test is the court’s division of transactions into consumer and private categories without definite guidelines for distinguishing between the categories. Rather than specifying a dividing line, the court provided a limited number of examples of each type of transaction.  

64 Such a finite list will create difficulties for a potential plaintiff whose injury does not fall into any of the transaction categories listed as examples. The limited list will likely lead to disputes over and inconsistency in the classification of transactions.

In dividing cases into consumer transactions and private disputes, the court apparently distinguished between cases involving sales of goods and those involving the provision of services.  

Although this is a valid practices . . . which are not injurious to the public interest . . . . "Id. § 19.86.920 (emphasis added). The legitimacy of the public interest impact requirement has been extensively discussed elsewhere and is outside the scope of this Note. For a history of the development of the requirement, see Comment, Washington Consumer Protection Act—Public Interest and the Private Litigant, 60 WASH. L. REV. 201 (1984). For analyses of the arguments for and against requiring public interest impact, see Note, On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act, 10 U. PUGET SOUND L. REV. 143 (1987); Comment, The Consumer Protection Act Private Right of Action: A Reevaluation, 19 GONZ. L. REV. 673 (1983); Comment, Private Suits Under Washington’s Consumer Protection Act: The Public Interest Requirement, 54 WASH. L. REV. 795 (1979).

63 The Anhold test, for example, did not explicitly require causation and damages, although they were implicit in the public interest element. See supra notes 7, 11 and accompanying text.

64 *Hangman Ridge*, 105 Wn. 2d at 789–91, 719 P.2d at 537–38. See supra notes 49–50 and accompanying text for a list of the court’s example cases.

65 For instance, the court listed sales of wheat seed, new and used automobiles, and mobile homes as consumer transactions. See supra note 49 and accompanying text.

66 The court listed private disputes as including the services of attorneys, insurance and real estate agents, and escrow closers. See supra note 50 and accompanying text.
distinction in some contexts, it has no place in the context of the CPA. If the goal of the CPA is to protect consumers whenever a transaction has public interest impact, this protection should apply equally whether the consumer purchased a car from a car dealership or a tract of land through a real estate brokerage. The meaningful distinction would be between buying a car from a dealership and buying a car from a private party, between buying a house through a real estate agent and buying a house directly from a private citizen. The dealership and agent transactions are clearly consumer in nature, while the transactions involving individual sellers are private. Indeed, the court has already recognized such a distinction under both sets of factors by requiring that the transaction occur in the course of the defendant’s business. A further distinction on the basis of selling goods or providing services is confusing and unnecessary.

2. Consumer Factors More Difficult to Prove Than Private Factors

Assuming the court can be persuaded to adopt the course of business distinction between consumer and private transactions, the court’s intention of making public interest impact easier to establish in consumer transactions is proper. Consumer transactions by their very nature are more likely to be repeated than are private transactions. Therefore, unfair or deceptive practices which occur in consumer transactions are similarly more susceptible to repetition.

Contrary to the court’s intent, however, the proposed factors make it more difficult to establish public interest impact in consumer transactions than in private disputes. For consumer transactions, the Hangman Ridge test requires a showing that individuals besides the plaintiff have been or are likely to be injured by the defendant’s unfair or deceptive acts. Proof of injury to consumers other than the plaintiff may be difficult, especially since the court offers no guidance as to the proof sufficient to support a potential for repetition of the unfair or deceptive act. In contrast, the factors

68. See supra note 62 and accompanying text.
69. See supra text accompanying notes 51-52.
70. In Hangman Ridge, the court stated: Where the transaction was essentially a private dispute . . . it may be more difficult to show that the public has an interest in the subject matter. Ordinarily, 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. 105 Wn. 2d at 790, 719 P.2d at 538.
71. For example, individuals in private transactions normally have only one car to sell at any given time. Automobile dealers, on the other hand, may sell hundreds each year.
72. Hangman Ridge, 105 Wn. 2d at 790, 719 P.2d at 538.
listed for private transactions include advertising, solicitation, and unequal bargaining power.73 Proof of advertisement or unequal bargaining power is relatively easy to demonstrate.74 Thus, it is easier to prove that a private dispute has public interest impact.

A possible explanation for this inconsistency may be found by looking at the cases which the Hangman Ridge court cited as examples under the two types of transactions. The court seems to have listed the factors exactly backwards: the factors derived from consumer transaction cases are listed as private dispute factors, and vice versa. For example, Haner v. Quincy Farm Chemicals,75 which is listed as a consumer transaction case, decided that no public interest impact existed on the basis of lack of advertising or other inducement.76 Whether other customers had been or could be injured by false labeling was not mentioned. Testo v. Russ Dunmire Oldsmobile,77 another consumer transaction case,78 found a CPA violation based on the unequal bargaining power between the parties,79 a factor listed by the Hangman Ridge court as relevant to private disputes.80 On the other hand, Bowers v. Transamerica Title Insurance Co.,81 which the Hangman Ridge court listed as an example of a private dispute, found public interest impact based on the defendant’s generalized course of conduct and the potential for repetition of the unfair and deceptive practice.82 However, the Hangman Ridge court listed generalized course of conduct and potential for repetition as consumer transaction factors.83

This transposition of the consumer transaction and private dispute factors is a major weakness of the Hangman Ridge decision. It frustrates both the court’s attempt to clarify the private action requirements and the court’s intent to make public interest impact easier to prove in consumer transactions than in private disputes.

73. Id. at 790–91, 719 P.2d at 538.
74. For example, the plaintiff can simply show the court a copy of a newspaper advertisement.
75. 97 Wn. 2d 753, 649 P.2d 828 (1982).
76. The Haner court quoted with approval from Judge Roe’s lower court opinion: “Here there was no showing that there were any inducements, deceptive advertisements, sales techniques or false representations which induced the sale.” Id. at 759–60, 649 P.2d at 832 (quoting Haner v. Quincy Farm Chem., 29 Wn. App. 93, 107, 637 P.2d 571, 580 (1981) (Roe, J., concurring in part, dissenting in part)).
78. Hangman Ridge, 105 Wn. 2d at 790, 719 P.2d at 537.
79. Testo, 16 Wn. App. at 51, 554 P.2d at 358.
80. Hangman Ridge, 105 Wn. 2d at 791, 719 P.2d at 538.
82. Bowers, 100 Wn. 2d at 592, 675 P.2d at 201.
83. Hangman Ridge, 105 Wn. 2d at 790, 719 P.2d at 538. The court stated “it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” Id. Yet the court listed factors relating to that issue under the test for consumer transactions. Id.; see supra text accompanying note 51.
3. Failure to Assign Weight to Factors

An additional problem with the public interest impact element in *Hangman Ridge* is that no single factor is dispositive and not all factors need be present under either type of transaction.\(^84\) This leaves a trier of fact with no indication of the relative importance of the factors. Whether the factors are exclusive is also unclear. If additional, overlooked indications of public interest impact were present, would they also go toward satisfying the public interest element? This lack of guidance as to the weight and exclusivity of the factors prohibits, short of trial, a conclusive determination of the public interest impact element of the *Hangman Ridge* test. Because the decision stated that the factors’ relevance is for the trier of fact, the court’s flexible standard may foreclose the possibility of summary judgment on the public interest element.\(^85\) Potential plaintiffs will have difficulty ascertaining the viability of their cases. It may be unclear whether a case falls into the private dispute or consumer transaction category, how many of the factors must be met, the weight to give each factor, and whether the listed factors are exclusive. The only testing ground will be in the courtroom through litigation. This is an inefficient use of an already overburdened legal system. Moreover, litigation is costly to parties in time and money, and its effect may be to dissuade injured persons from bringing CPA actions.

C. Modification of Use of Per Se in New Test

The court’s modification of its previous use of the term “per se”\(^86\) is significant because it clarified a confusing and ambiguous aspect of private actions. Although the court’s clarification will restrict the number of plaintiffs who can satisfy the first two elements of the new test per se,\(^87\) the test’s benefits outweigh this disadvantage.\(^88\)

\(^84\) *Hangman Ridge*, 105 Wn. 2d at 791, 719 P.2d at 538.

\(^85\) Id.

\(^86\) *Id.* at 792, 719 P.2d at 538–39.

\(^87\) The court’s decision limits the abilities of plaintiffs to satisfy the first two elements of the new test by showing that a statute other than the CPA has been violated. To show a per se unfair trade practice under *Hangman Ridge*, a plaintiff must prove the violation of a statute which states that its violation is an unfair or deceptive act in trade or commerce or that its violation is a violation of § 19.86.020. *See supra* note 56 and accompanying text. Specific statutory language indicating an unfair trade practice was not necessary before the decision in *Hangman Ridge*; requiring it creates an additional burden for potential plaintiffs to meet. For a foreshadowing of the court’s treatment of per se in *Hangman Ridge*, see Note, *New Limits to the Application of the Consumer Protection Act*, 61 WASH. L. REV. 275, 281 (1986).

\(^88\) The restriction on plaintiffs’ abilities to bring CPA actions may be inconsistent with the private action’s purpose to enlist injured parties’ aid in enforcing the CPA. *See supra* text accompanying note 4. However, the limit on plaintiffs’ abilities to bring actions is outweighed by increased certainty and consistency with legislative intent provided by the court’s redefinitions.
1. Consistency With Legislative Intent

In redefining per se, the court looked to legislative intent as expressed by the language in many statutes linking the statutes either to section 19.86.020 or to the public interest impact requirement. Because of the court's deference to statutory language, a plaintiff's ability to bring CPA private actions arising from violations of other statutes is now solely in the legislature's hands. The Hangman Ridge court clearly stated the language it will recognize as satisfying certain elements of the test. Consequently, the legislature can depend on the court's reading of that language and can create new statutory provisions with the knowledge that the court will interpret them as the legislature intends. If the legislature does not agree with the Hangman Ridge court's redefinition of per se actions or wishes to expand plaintiffs' abilities to bring private CPA actions, the legislature can specifically overrule the decision in this area.

2. Failure to Address Statutory Language Variations

The Hangman Ridge court's treatment of per se is ambiguous because the court failed to address language in other statutes referencing the CPA as a whole, rather than either section 19.86.020 or public interest impact alone. At least two statutes do not limit their connection with the CPA to a particular provision; instead they specify that their violation constitutes a violation of the entire CPA. Although the court stated at the end of its discussion of per se unfair trade practices that it would recognize the connection between a statute and the CPA when the statute so specified, the next sentence of the opinion listed the additional requirement of public interest impact. The decision is therefore ambiguous. The court may read statutes referencing the CPA as a whole as satisfying per se the requirements of unfair trade practice and public interest impact. Alternatively, the court may treat the violation of such a statute as giving rise to a CPA action.

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89. Hangman Ridge, 105 Wn. 2d at 786, 719 P.2d at 536; see supra note 56 and accompanying text.
90. Hangman Ridge, 105 Wn. 2d at 791, 719 P.2d at 538–39; see supra note 57 and accompanying text.
91. Hangman Ridge, 105 Wn. 2d at 787, 719 P.2d at 536.
92. Id. at 791, 719 P.2d at 538–39.
93. See, e.g., WASH. REV. CODE § 43.22.440(2) (1985) (mobile homes) (“failure to remedy any breach . . . is a violation of the consumer protection act, chapter 19.86 RCW, and subject to the remedies provided in that chapter”); id. § 19.130.060 (telephone equipment sales) (“Violation of this chapter constitutes a violation of chapter 19.86 RCW, the consumer protection act.”).
94. Hangman Ridge, 105 Wn. 2d at 787, 719 P.2d at 536 (“Where the Legislature specifically defines the exact relationship between a statute and the CPA, this court will acknowledge that relationship.”).
95. Id. (“The third element is that of a public interest showing.”).
brought by the attorney general and might still require a private plaintiff to separately show public interest impact. The court at some point will have to clarify this ambiguity.

**D. Proposed New Directions for the Court**

For establishing the public interest element, the court should abolish the distinction between consumer transactions and private disputes based on the nature of the product sold. A division on the basis of whether an act occurred in the course of the defendant’s business would be more meaningful. If an act occurs in the course of business, then it may have public interest impact and thus fall within the CPA’s provisions; if it does not occur in the course of business, then it is a private dispute and should be excluded from CPA actions altogether. Once a plaintiff shows that a defendant’s actions occurred in the course of business, the court should consider whether there is a chance that other people besides the plaintiff have been or will be injured by the actions. This could be shown by proving direct solicitation, advertising, a pattern of unfair or deceptive conduct, or prior or subsequent injury to other consumers. The substance of many of the factors listed by the court should therefore be maintained. The proposed test for public interest impact would thus have two parts: First, a showing that the act occurred in the course of defendant’s business; and second, a showing of potential for injury to others beside the plaintiff.

Because the new test is more certain, it would provide stability in evaluating and litigating CPA actions. The test would afford a simple checklist for potential plaintiffs to use in determining whether a CPA violation has occurred and would provide enough certainty for a court to grant summary judgment on this issue in appropriate cases.

The court should retain the modification of per se set forth in *Hangman Ridge*. The modification provides clarity and certainty and gives the legislature the power specifically to declare per se unfair trade practices and per se public interest impact. However, the court should clarify the application

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96. Whether the court would also require a showing of causation and damages in such a case is uncertain. However, as proof of causation and damages is required under the private right of action provision of the CPA, the court should also require such proof even when the plaintiff can show violation of another statute linked to the CPA.

97. See supra text accompanying notes 65–69.

98. Course of business should be defined broadly enough to include repeated sales or provisions of services by people not ordinarily considered to be in business.

99. Potential for injury would be similar to the potential for repetition element of the *Anhold* public interest impact test. See supra notes 12–16 and accompanying text. The new test would be more certain, however, because showing any one of the facts listed in the next sentence in text would satisfy the potential for injury requirement.
of its new definition to statutes with varying language. In order to be consistent and treat all plaintiffs equally, a private CPA action should require a showing of public interest impact even when the plaintiff can prove violation of a statute which by its language is a violation of the CPA as a whole. Requiring public interest impact in this setting would resolve the current decision’s ambiguity toward certain statutes. The requirements for a plaintiff attempting to satisfy per se any of the first three elements of the Hangman Ridge test would also be clarified.

IV. CONCLUSION

The Hangman Ridge court’s new five-part test follows the statutory language of the provision creating the private right of action. Its basic structure is an improvement over prior private action tests and should be retained. The new public interest impact factors, however, confuse rather than clarify the public interest element of the test. They should be replaced with simpler guidelines which would allow parties to assess the viability of their actions at an early stage and avoid costly litigation. The Hangman Ridge court successfully clarified the role of most other statutory violations as a way to satisfy certain elements of the five-part test, and that aspect of the decision should be followed. Aside from the public interest impact factors, the Hangman Ridge test for private actions is an important reformulation of a significant area of Washington law.

Susan Clyatt Lybeck

100. The plaintiff, of course, could show public interest impact by meeting the elements of the test proposed above or by showing a specific legislative declaration of public interest in the statute violated. See supra note 56 and accompanying text.

101. See supra notes 93–96 and accompanying text.