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IN THE LITIGATION BUSINESS: INSURANCE COMPANY LIABILITY FOR ACTS OCCURRING IN THE COURSE OF LITIGATION UNDER THE WASHINGTON CONSUMER PROTECTION ACT

Kasey D. Huebner

Abstract: Insurance companies generally have much greater bargaining power and resources than individual insureds. When a claim by an insured against an insurance company fails to settle amicably and is followed by a lawsuit, the insured has few options should the insurance company behave unfairly or deceptively in the course of the litigation. The Washington Consumer Protection Act protects consumers from deceptive and bad faith acts by businesses, including insurance companies. Although Washington courts have created a general exception disallowing CPA suits for acts occurring in the course of litigation, Washington case law has not directly or clearly addressed whether this litigation exception applies in the insurance context. This Comment argues that the CPA allows for a cause of action by insureds against insurance companies for bad acts occurring after a suit has been filed. The rationale behind the litigation exception to the CPA does not apply to the insurance industry, and Washington statutes, regulations, and case law support allowing CPA suits for unfair or deceptive acts by an insurance company occurring in the course of litigation.

Dana was driving alone in her car when another motorist, Tom, hit her from behind while driving at 35 miles per hour.¹ As a result, Dana suffered a broken sternum, knee injuries, and a concussion, and her car was totaled. Tom admitted to Dana that he was uninsured, so Dana made a claim with her insurance company under her uninsured motorist policy. The insurance company denied Dana's claim, alleging in good faith that Tom was insured at the time of the accident. Dana continued to assert that Tom was uninsured and sued her insurance company under her uninsured motorist policy. After Dana's suit had been filed, but before final verdict or settlement, the insurance company discovered that Tom was indeed uninsured, but continued to argue against Dana's uninsured motorist claim. Dana later discovered that the insurance company had knowledge that Tom was uninsured while it continued to fight her claim. Should Dana be able to assert a claim against her insurance company under the Consumer Protection Act (CPA)?

Washington courts have not addressed whether or not Dana would have a claim against her insurance company under the CPA for deceptive acts occurring in the course of litigation. The Washington State Legislature enacted the CPA to protect consumers from unfair and

1. Hypothetical created by the author.

deceptive business practices.² Under the CPA, consumers can bring private suits against individuals and businesses that engage in unfair or deceptive business practices that affect the public.³ These private CPA suits allow for recovery of up to treble damages, as well as attorney's fees.⁴ Both the Insurance Commissioner of Washington, pursuant to a legislative grant of authority,⁵ and Washington courts have determined that private CPA suits may be brought against insurance companies.⁶

However, the Washington Court of Appeals has characterized litigation between a consumer and a business as a private dispute between individuals.⁷ The court has held that because litigation is a private dispute, acts by a business occurring after a consumer has filed a suit cannot subject the business to liability under the CPA.⁸ The court has also held that there is an exception to the litigation exception for acts that the Legislature has determined to be per se unfair or deceptive.⁹ In many cases in which a business acts deceptively during litigation, consumers must rely upon Court Rule 11 (CR 11) to provide a means for recovery.¹⁰

This Comment discusses whether insureds should be able to bring CPA claims against insurance companies for acts occurring in the course of litigation and argues that the litigation exception to the CPA should not apply in the insurance context. Legislative and judicial findings specific to the insurance industry suggest that an insured should be able to fulfill the requirements of a CPA cause of action against an insurance company for acts occurring in the course of litigation.¹¹ Even assuming that the litigation exception does apply in the insurance context, insureds should still be able to bring suit against insurance companies under the exception to the litigation exception because the Insurance Commissioner has outlined specific acts which are per se unfair or deceptive in the business of insurance.¹² Judicially and legislatively created policies regarding the insurance industry,¹³ and the fact that CR

2. 1961 WASH. LAWS 216 (codified at WASH. REV. CODE §§ 19.86.010–.920 (2000)).

3. See *infra* notes 26–35 and accompanying text.

4. WASH. REV. CODE § 19.86.090. Treble damages, however, are capped at \$10,000. *Id.*

5. *Id.*

6. See *infra* Part III.B.1.

7. Blake v. Federal Way Cycle Ctr., 40 Wash. App. 302, 312, 698 P.2d 578, 584 (1985).

8. *Id.*

9. Evergreen Collectors v. Holt, 60 Wash. App. 151, 156, 803 P.2d 10, 13 (1991).

10. See *infra* Part II.B.

11. See *infra* Part IV.A.

12. See *infra* Part IV.B.

13. See *infra* Part IV.C.

11 does not provide insureds with sufficient remedies,¹⁴ lend further support to the argument that insurance companies should be liable under the CPA for their acts occurring in the course of litigation.

This Comment argues that the CPA establishes a cause of action against insurance companies for deceptive acts occurring after a suit has been filed by an insured. Part I describes the history of the CPA and includes a discussion of the five requirements for a private claim under the Act. Part II discusses the litigation exception to CPA causes of action and alternate means of recovery for deceptive acts occurring after a suit has been filed. Part III explains how the CPA applies to the insurance industry. Part IV argues that the litigation exception to the CPA should not apply to the insurance industry because the justification for the exception does not apply in the insurance context, current policies regarding the insurance industry support allowing suit in this situation, and current remedies under CR 11 are not sufficient.

I. THE WASHINGTON STATE CONSUMER PROTECTION ACT

The Legislature enacted the Consumer Protection—Unfair Competition and Acts forty years ago to protect consumers from unfair or deceptive business practices.¹⁵ In 1986, the Washington Supreme Court established the current five-part test for a private cause of action under the CPA.¹⁶ This test requires a complainant to show an unfair or deceptive act or practice, occurring in the course of trade or commerce that affects the public interest and causes harm to the consumers' business or property.¹⁷ Subsequent cases have acknowledged the liberal construction afforded the CPA¹⁸ due to the substantial public interests involved.¹⁹

14. *See infra* Part IV.D.

15. *See* 1961 WASH. LAWS 216 (codified at WASH. REV. CODE §§ 19.86.010–.920 (2000)) (these regulations are now titled the Washington State Unfair Business Practices—Consumer Protection Act).

16. *See* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780, 719 P.2d 531, 532–33 (1986).

17. *Id.*

18. *See infra* notes 36–40 and accompanying text.

19. *See infra* notes 61–64 and accompanying text.

A. *The Enactment, Purpose, and Application of the CPA*

In 1960, when the Attorney General of the United States held a national conference on consumer protection for state attorneys general,²⁰ few states had promulgated any significant systems of consumer protection laws.²¹ Estimates in Washington at the time determined that consumers in the state lost approximately \$40 million per year to unfair and deceptive business practices.²² Washington Governor Albert D. Rosellini established the Citizen's Advisory Council on Consumer Protection (the Council) to aid the government of Washington in establishing consumer protection legislation.²³ Relying upon the Council's study and recommendations,²⁴ the Washington State Legislature enacted the CPA in 1961 to deter deceptive and fraudulent acts by businesses and to encourage fair competition.²⁵

The CPA provides a means of recovery against companies for unfair business practices.²⁶ The CPA regulates all businesses in Washington, unless another governing board directly exempts specified business acts from coverage.²⁷ Under the CPA, unfair or deceptive business practices and unfair competition are unlawful.²⁸ The Legislature limited the business acts subject to the CPA by declaring that reasonable business acts and practices and business acts that do not injure the public interest are not prohibited by the CPA.²⁹

Either the State Attorney General³⁰ or private individuals³¹ may bring a CPA suit against a business that employs unfair or deceptive practices,

20. WASHINGTON CONSUMER ADVISORY COUNCIL, CONSUMER PROTECTION IN THE STATE OF WASHINGTON: A REPORT TO GOVERNOR ALBERT D. ROSELLINI 1 (1960).

21. *Id.* at 2 (finding that California, New York, Texas, and Wisconsin were among the few states with strong and comprehensive consumer protection laws in place at the time).

22. Governor Rosellini's Press Files, July 1, 1960 (on file with the Washington Law Review) [hereinafter *Press Files*]. The Governor's historical files were searched by staff in Olympia; the resulting documents were sent to the author labeled only as "Governor's Rosellini's Press Files" with the date.

23. *Id.*

24. *See id.* at 1-2.

25. 1961 WASH. LAWS 216 (codified at WASH. REV. CODE §§ 19.86.010-.920 (2000)).

26. *See* D. Roger Reed, *Consumer Protection in Washington: An Overview*, 10 GONZ. L. REV. 391, 393-94 (1975).

27. WASH. REV. CODE § 19.86.170; *see also* Jeffrey M. Koontz, Note, Recent Development, *Washington Lawyers Under the Purview of the State Consumer Protection Act—The "Entrepreneurial Aspects" Solution*, 60 WASH. L. REV. 925, 938 (1985).

28. WASH. REV. CODE § 19.86.020.

29. *Id.* § 19.86.920.

30. *Id.* § 19.86.080.

in order to enjoin the business from further unfair practices and to recover damages from the business.³² The CPA allows plaintiffs to recover from companies that engage in unfair or deceptive business practices.³³ A consumer suing under the CPA may receive attorney's fees and up to ten thousand dollars in treble damages.³⁴ The Legislature implemented the attorney's fees and treble damages provisions in an attempt to encourage private citizens to bring suit under the CPA.³⁵

When the CPA was enacted, the Legislature directed courts to interpret its provisions liberally.³⁶ Courts in Washington have repeatedly applied this legislative mandate to support a variety of claims under the CPA.³⁷ Due to this liberal construction, courts have allowed CPA suits between a variety of parties, including an insurance company against a chiropractor involved in insurance fraud,³⁸ a physician against a drug company,³⁹ and a class of consumers against a cruise line.⁴⁰

31. *Id.* § 19.86.090.

32. *Id.* §§ 19.86.080–.090.

33. See Susan Clyatt Lybeck, Note, Recent Development, *New Consumer Protection Private Action Test: Clarification or Further Confusion?*, 62 WASH. L. REV. 277, 278 (1987); see generally Comment, *Reasonable Attorney's Fees and Treble Damages—Balancing the Scales of Consumer Justice*, 10 GONZ. L. REV. 593 (1975) (discussing general provisions of the CPA, including attorneys' fee and treble damages provisions).

34. WASH. REV. CODE § 19.86.090 (providing that plaintiffs may recover "reasonable attorney's fee[s], and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained"); see also *Press Files*, *supra* note 22, March 20, 1961 ("[P]rivate parties may recover damages for injury caused by violations. The measure gives the court discretion to award triple damages.").

35. See Lybeck, *supra* note 33, at 278; Koontz, *supra* note 27, at 937.

36. WASH. REV. CODE § 19.86.920 (2000) (requiring the CPA to be "liberally construed that its beneficial purposes may be served"); see also *Press Files*, *supra* note 22, March 20, 1961 ("The act is to be liberally construed to compliment the judicial interpretation of the federal acts It will not forbid reasonable business practices.") (internal quotation marks omitted).

37. See, e.g., *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 317, 858 P.2d 1054, 1063 (1993) (allowing CPA suit by physician against pharmaceutical company for failing to warn that drug could harm patients); *Dwyer v. J. I. Kislak Mortgage Corp.*, 103 Wash. App. 542, 547–48, 13 P.3d 240, 243 (2000) (finding that CPA allowed suit for misleading wording of mortgage payoff statement); *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wash. App. 901, 915–21, 6 P.3d 63, 70–73 (2000), *review granted*, 143 Wash. 2d 1001, 20 P.3d 944 (2001) (reinstating class for CPA class action suit against cruise line for misleading passengers by calling passenger fees port charges); *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wash. App. 602, 611–12, 971 P.2d 953, 957–58, (1999), *review denied*, 138 Wash. 2d 1009, 989 P.2d 1136 (1999) (allowing excess insurer to bring CPA claim against primary insurer); *State Farm Fire & Cas. Co. v. Huynh*, 92 Wash. App. 454, 459–62, 962 P.2d 854, 857–58 (1998) (permitting business to bring suit under CPA). *But see Short v. Demopolis*, 103 Wash. 2d 52, 61–62, 691 P.2d 163, 168–69 (1984) (holding, despite liberal construction, that the practice of law falls outside the CPA).

38. *Huynh*, 92 Wash. App. at 458, 962 P.2d at 856–57.

39. *Wash. State Physicians*, 122 Wash. 2d at 317, 858 P.2d at 1063.

B. *The Five Elements of a CPA Cause of Action*

In *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*,⁴¹ the Washington Supreme Court determined that to establish a CPA claim, a complainant must prove the following: (1) the business engaged in an “unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.”⁴² Failure to demonstrate any of the five necessary requirements precludes a cause of action under the CPA.⁴³

To demonstrate the first element of a CPA claim—an unfair or deceptive act or practice—the complainant must establish that an act or practice has the capacity to deceive the general public or, alternatively, that the act is per se unfair or deceptive.⁴⁴ Courts do not require a showing of an intent to deceive in order to establish an unfair or deceptive act or practice;⁴⁵ rather, a complainant may show that an act or practice has the “capacity to deceive” a significant portion of the general public.⁴⁶ In the alternative, if a statute or regulation describes an act or practice as unfair or deceptive, a complainant can establish the unfair or deceptive requirement per se.⁴⁷ For example, the Insurance Commissioner has declared specific acts by insurance companies in the

40. *Pickett*, 101 Wash. App. at 915–21, 6 P.3d at 70–73.

41. 105 Wash. 2d 778, 719 P.2d 531 (1986).

42. *Id.* at 780, 719 P.2d at 533. For cases employing the five requirements for a CPA cause of action established in *Hangman Ridge*, see *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash. 2d 55, 62, 1 P.3d 1167, 1171 (2000); *Sing v. John L. Scott, Inc.*, 134 Wash. 2d 24, 30, 948 P.2d 816, 819 (1997); *Leingang v. Pierce County Med. Bureau*, 131 Wash. 2d 133, 149, 930 P.2d 288, 296 (1997); *Trask v. Butler*, 123 Wash. 2d 835, 845–46, 872 P.2d 1080, 1086 (1994); *Seattle Endeavors v. Mastro*, 123 Wash. 2d 339, 349, 868 P.2d 120, 126 (1994); *Wash. State Physicians*, 122 Wash. 2d at 312, 858 P.2d at 1061; *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wash. 2d 382, 393, 842 P.2d 473, 478 (1992); *Schmidt v. Cornerstone Invest., Inc.*, 115 Wash. 2d 148, 166, 795 P.2d 1143, 1152 (1990); *Indus. Indem. Co. v. Kallevig*, 114 Wash. 2d 907, 920–21, 792 P.2d 520, 528 (1990); *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 852, 792 P.2d 142, 147 (1990); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wash. 2d 42, 57, 785 P.2d 815, 823 (1990); *Saunders v. Lloyd’s of London*, 113 Wash. 2d 330, 343, 779 P.2d 249, 256 (1989); *Travis v. Wash. Horse Breeders Ass’n*, 111 Wash. 2d 396, 405, 759 P.2d 418, 422 (1988); *Nordstrom, Inc. v. Tampourlos*, 107 Wash. 2d 735, 739, 733 P.2d 208, 210 (1987).

43. *Hangman Ridge*, 105 Wash. 2d at 780, 719 P.2d at 532–33.

44. *Id.* at 785–86, 719 P.2d at 535–36.

45. *Id.*

46. *Id.* (emphasis omitted).

47. *Id.*

course of claim settlement to be per se unfair or deceptive acts for purposes of the CPA.⁴⁸

In cases where the consumer demonstrates that the business used a standardized contract that has a capacity to deceive, a single act between an individual consumer and a business can fulfill the unfair or deceptive act requirement.⁴⁹ In *Nelson v. National Fund Raising Consultants, Inc.*,⁵⁰ the court held that the failure of a company to disclose full contract terms to a single consumer until after the contract was executed had the capacity to deceive the general public.⁵¹ In *Nelson*, the operator of a business failed to disclose the percentage of markup to be paid to the business until after the consumers were contractually bound.⁵² The court found that this failure to disclose the full terms of the contract inherently had the capacity to deceive.⁵³

When evaluating the second element of a private CPA claim, courts have found myriad activities to constitute trade or commerce under the CPA.⁵⁴ The Legislature defined trade or commerce as “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.”⁵⁵ When applying the statutory definition of trade or commerce, courts have generally held that the definition should

48. WASH. ADMIN. CODE § 284-30-330 (2001).

49. See *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wash. 2d 382, 392–93, 842 P.2d 473, 478 (1992); see also *Potter v. Wilbur-Ellis Co.*, 62 Wash. App. 318, 327–28, 814 P.2d 670, 674–75 (1991) (determining that deceptive information communicated to single individual through standardized sales presentation has capacity to deceive general public and fulfills unfair or deceptive act requirement of CPA).

50. 120 Wash. 2d 382, 842 P.2d 473 (1992).

51. *Id.* at 392–93, 842 P.2d at 478.

52. *Id.* at 393, 842 P.2d at 478.

53. *Id.*

54. See, e.g., *Anhold v. Daniels*, 94 Wash. 2d 40, 47, 614 P.2d 184, 188 (1980) (deciding that solicitation to invest in venture is trade or commerce); *Dick v. Attorney General*, 83 Wash. 2d 684, 686, 512 P.2d 702, 704 (1974) (determining that practice of “drugless healing” fulfills trade or commerce requirement of CPA); *State Farm Fire & Cas. Co. v. Huynh*, 92 Wash. App. 454, 469, 962 P.2d 854, 862 (1998) (finding that acts taken to increase profits constitute “trade or commerce” under CPA); *Styrk v. Comerstone Invs. Inc.*, 61 Wash. App. 463, 471–72, 810 P.2d 1366, 1371 (1991) (defining acts of attorney during escrow proceedings as trade or commerce); *Thomas v. French*, 30 Wash. App. 811, 815–16, 638 P.2d 613, 616–17 (1981), *rev'd on other grounds*, 99 Wash. 2d 95, 105, 659 P.2d 1097, 1102 (1983) (concluding that sales contract between individuals that is not exempted from CPA occurs in trade or commerce). *But see Short v. Demopolis*, 103 Wash. 2d 52, 65–66, 691 P.2d 163, 170–71 (1984) (finding that only “entrepreneurial aspects” of legal practice are trade or commerce under CPA).

55. WASH. REV. CODE § 19.86.010(2) (2000).

be construed liberally.⁵⁶ For example, in *Salois v. Mutual of Omaha Insurance Co.*,⁵⁷ the court determined that the phrase “trade or commerce” was intended to encompass more than just acts aimed at inducing a sale and held that the term also includes post-sale acts by businesses.⁵⁸ In addition to acts meeting the statutory definition of trade or commerce, the Washington Supreme Court has held that any act or practice that is per se unfair,⁵⁹ as defined by statute or regulation, also fulfills the trade or commerce element of a CPA claim.⁶⁰

A complainant can establish the third element—that the acts affect the public interest—either by finding a per se public interest or by using the test established in *Hangman Ridge*.⁶¹ A legislative declaration that an act is illegal or affects the public interest fulfills the public interest requirement per se.⁶² If plaintiffs do not meet per se the public interest requirement, they can meet this requirement by finding a pattern of business conduct likely to be repeated or with the potential of affecting more than one member of the public.⁶³ Courts use a five-part test to establish whether the public interest requirement is met by a pattern of business conduct. Courts look to whether the conduct was part of the defendant’s business, whether the acts are part of a general course of conduct, whether the repeated acts took place prior to the act involving the plaintiff, whether there is real potential that the act will be repeated after the act involving the plaintiff, and whether, if the act was a single transaction, many consumers were harmed.⁶⁴

The fourth and fifth elements for a private CPA claim, the injury to property or business and causation requirements, are closely linked. The

56. See, e.g., *Short*, 103 Wash. 2d at 56, 691 P.2d at 165–66; *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash. 2d 355, 358, 581 P.2d 1349, 1350 (1978); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wash. App. 90, 93, 605 P.2d 1275, 1277 (1979)

57. 90 Wash. 2d 355, 581 P.2d 1349 (1978).

58. *Id.* at 359–60, 581 P.2d at 1351.

59. See *supra* notes 44–48 and accompanying text. An act is per se unfair or deceptive when it is specifically defined as an unfair or deceptive act by a state statute or regulation. *Hangman Ridge Training Stables, Inc v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 785–86, 719 P.2d 531, 535–36 (1986).

60. *Hangman Ridge*, 105 Wash. 2d at 785–86, 719 P.2d at 535.

61. See generally David J. Dove, *Washington Survey: Washington Consumer Protection Act—Public Interest and the Private Litigant*, 60 WASH. L. REV. 201 (1984) (discussing per se test, as well as the *Anhold* test, precursor to the *Hangman Ridge* test).

62. *Id.* at 203; see also *Hangman Ridge*, 105 Wash. 2d at 791, 719 P.2d at 538.

63. See *Hangman Ridge*, 105 Wash. 2d at 790–91, 719 P.2d at 538.

64. *Id.* at 790, 719 P.2d at 537–38.

injury or harm element⁶⁵ requires that the plaintiff demonstrate some degree of actual damage to his or her business or property.⁶⁶ Emotional damages associated with business or property damage are not recoverable under the CPA.⁶⁷ Finally, the plaintiff must prove that the defendant's deceptive or misleading acts caused the damage to the plaintiff.⁶⁸ The defendant need not directly contact, solicit, or have business dealings with the complainant to establish causation.⁶⁹

II. THE CONSUMER PROTECTION ACT GENERALLY DOES NOT APPLY TO ACTS OCCURRING IN THE COURSE OF LITIGATION

The Washington Court of Appeals has found acts occurring in the course of litigation to be private acts that do not support a CPA cause of action. Courts recognize an exception, however, where an individual act constitutes a per se violation. Although courts do not allow CPA claims for non-per se acts occurring after a suit has been filed, courts may sanction the party under CR 11 for deceptive acts occurring in the course of litigation.

A. *The Litigation Exception to the CPA*

Washington courts have held that, because litigation is a dispute between private parties, actions occurring during litigation generally cannot support a cause of action under the CPA.⁷⁰ Acts occurring purely between private parties do not demonstrate three of the five necessary elements of a CPA cause of action: (1) the unfair or deceptive act requirement; (2) the requirement that the act occur during trade or commerce; and (3) the public interest requirement.⁷¹ Consumers cannot

65. WASH. REV. CODE § 19.86.020 (2000).

66. *Hangman Ridge*, 105 Wash. 2d at 792, 719 P.2d at 539.

67. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 317–18, 858 P.2d 1054, 1063–64 (1993).

68. *Schmidt v. Cornerstone Invest., Inc.*, 115 Wash. 2d 148, 167–68, 795 P.2d 1143, 1152 (1990).

69. *See id.*

70. *See, e.g., Blake v. Federal Way Cycle Ctr.*, 40 Wash. App. 302, 312, 698 P.2d 578, 584 (1985).

71. *See id.* (holding that private litigation fails to establish unfair or deceptive, trade or commerce, and public interest elements of CPA cause of action); *Hangman Ridge*, 105 Wash. 2d at 794, 719 P.2d at 539–40 (finding that private acts support neither the unfair or deceptive nor the public interest requirements).

show that a private act had the “capacity to deceive” members of the general public because private acts, by definition, affect private individuals rather than the public at large.⁷² Private acts, therefore, fail to satisfy the unfair or deceptive act requirement.⁷³ The consumer also cannot establish that the trade or commerce element extends to individualized acts aimed at a particular consumer.⁷⁴ Finally, the consumer cannot satisfy the public interest requirement because generally no public impact follows from a private act.⁷⁵ If, however, the unfair or deceptive act, trade or commerce, and public interest requirements can be established as per se violations, a consumer can establish a suit under the CPA for acts occurring in the course of litigation.⁷⁶

Washington’s Court of Appeals confronted the problem of a non-per se CPA suit in the litigation context in *Blake v. Federal Way Cycle Center*.⁷⁷ *Blake* concerned acts by the defendant corporations Federal Way Cycle Center (FWCC) and Yamaha Motor Corporation (Yamaha) that occurred after the plaintiffs, Mr. and Ms. Blake, had filed suit regarding a Yamaha motorcycle they had purchased from FWCC.⁷⁸ FWCC and Yamaha requested a continuance.⁷⁹ The court granted the continuance upon the condition that FWCC and Yamaha deposit the amount that the Blakes had paid for the motorcycle into an interest-bearing account.⁸⁰ The Blakes alleged that failure to make this deposit violated the CPA.⁸¹

The *Blake* court determined that acts occurring in the course of litigation were private disputes that could not support the unfair or deceptive act, trade or commerce, and public interest requirements of the CPA.⁸² In *Blake*, the actions of FWCC and Yamaha did not violate the CPA until litigation was commenced.⁸³ The court determined that the

72. See *Hangman Ridge*, 105 Wash. 2d at 794, 719 P.2d at 539–40; *Blake*, 40 Wash. App. at 310–12, 698 P.2d at 582–84.

73. See *Blake*, 40 Wash. App. at 310, 698 P.2d at 582–83.

74. *Id.* at 312, 698 P.2d at 584.

75. *Hangman Ridge*, 105 Wash. 2d at 794, 719 P.2d at 539–40.

76. *Evergreen Collectors v. Holt*, 60 Wash. App. 151, 156, 803 P.2d 10, 13 (1991).

77. 40 Wash. App. 302, 698 P.2d 578 (1985).

78. *Id.* at 304–05, 698 P.2d at 579–80.

79. *Id.* at 305, 698 P.2d at 580.

80. *Id.*

81. *Id.*

82. See *id.* at 312, 698 P.2d at 584.

83. See *id.* at 311, 698 P.2d at 583.

acts of FWCC and Yamaha occurring after the complainants had filed suit did not fulfill the unfair or deceptive act requirement because the actions were aimed directly at the Blakes, did not substantially harm the Blakes, did not have the capacity to deceive a significant portion of the general public, and did not appear to have the potential for repetition.⁸⁴ The plaintiffs could not meet the trade or commerce requirement because, once they filed suit, the matter was controlled by the courts and constituted a private dispute between the parties.⁸⁵ The court further held that the complainants did not meet the public interest requirement as the alleged acts did not have potential for repetition.⁸⁶ Because the plaintiffs in *Blake* could not establish three of the five elements of a CPA claim, the court determined that they did not have a valid cause of action for a non-per se violation of the CPA.⁸⁷

In contrast, the Court of Appeals has held that per se violations of the CPA occurring after litigation has begun can support a CPA cause of action. In *Evergreen Collectors v. Holt*,⁸⁸ the court created an exception to the rule established in *Blake* that acts occurring after a suit has been filed could not give rise to a CPA claim.⁸⁹ *Evergreen Collectors* involved a collection agency that filed suit against a consumer for costs associated with collecting money from him.⁹⁰ Evergreen Collectors threatened to sue Holt for attorney's fees if he did not settle the case before it went to trial.⁹¹ Holt then filed a CPA claim against Evergreen Collectors for threatening to sue in an attempt to force settlement of the case.⁹² The court determined that the complained of acts affected the public interest because Evergreen Collectors engaged in acts that were statutorily defined as unfair or deceptive acts in trade or commerce.⁹³

The court further reasoned that because the business of collection agencies involves bringing suit against consumers, actions occurring in the course of litigation should subject collection agencies to CPA claims.⁹⁴ *Evergreen Collectors* held that where the Legislature has

84. *See id.*

85. *See id.* at 312, 698 P.2d at 584.

86. *See id.*

87. *Id.*

88. 60 Wash. App. 151, 803 P.2d 10 (1991).

89. *Id.* at 156-57, 803 P.2d at 13.

90. *Id.* at 152-54, 803 P.2d at 11-12.

91. *Id.* at 153-54, 803 P.2d at 12.

92. *Id.* at 154, 803 P.2d at 12.

93. *Id.* at 156-57, 803 P.2d at 13.

94. *Id.*

determined particular acts to be per se unfair or deceptive for purposes of the CPA, a consumer can fulfill the unfair or deceptive act, trade or commerce, and public interest requirements even if the business participates in such acts in the course of litigation.⁹⁵ Thus, under *Evergreen Collectors*, consumers can bring per se CPA suits against businesses for acts occurring in the course of litigation.⁹⁶

B. Alternative Recovery Used for Misleading Acts Occurring in the Course of Litigation

As recovery is frequently unavailable under the CPA for acts occurring in the course of litigation, a consumer can instead request sanctions under Court Rule 11 (CR 11).⁹⁷ CR 11 requires that the attorney and the client certify that they have a reasonable and good faith belief that “pleadings, motions and legal memoranda” are truthful and are not being filed to harass, delay, or needlessly increase litigation costs.⁹⁸ Because its provisions apply to both attorneys and clients who sign court documents,⁹⁹ CR 11, like the CPA, allows for recovery against businesses for dishonest acts.

The purpose of CR 11 is very different than that of the CPA. While the CPA protects consumers from unfair and deceptive business acts, CR 11 protects the judicial system from abuse by attorneys and litigants.¹⁰⁰ The usual target of sanctions demonstrates this purpose. Although sanctions can be brought under CR 11 against both the party and the attorney, courts have determined that CR 11 sanctions serve to deter attorneys, rather than parties, from abusing the judicial system.¹⁰¹ As a result, courts frequently impose sanctions against only the attorney, and not the party to the action.¹⁰²

95. *Id.* at 155–57, 803 P.2d at 12–13.

96. *Id.*

97. *See* WASH. CR 11 (2001).

98. *Id.*

99. *Id.*; *see also* Rhinehart v. Seattle Times Co., 51 Wash. App. 561, 581, 754 P.2d 1243, 1254–55 (1988) (holding that an attorney, a party, or both may be held liable for CR 11 violations).

100. Neigel v. Harrell, 82 Wash. App. 782, 787, 919 P.2d 630, 632 (1996).

101. Ibarra v. Mount, No. 37383-8-I, 1998 Wash. App. LEXIS 1154, at *19–21 (Wash. App. Aug. 3, 1998); Suarez v. Newquist, 70 Wash. App. 827, 833, 855 P.2d 1200, 1204 (1993).

102. *See, e.g.*, Bryant v. Joseph Tree, Inc., 119 Wash. 2d 210, 223–25 829 P.2d 1099, 1106–07 (1992). *But cf.*, State *ex rel.* Quick-Ruben v. Verharnen, 136 Wash. 2d 888, 903–05, 969 P.2d 64, 71–73 (1998).

The theory behind CR 11 sanctions for violation of court rules stands in stark contrast to the theory of liberally construing and applying damages under the CPA. While CR 11 provides for sanctions for failure to have a reasonable, good faith belief in signed pleadings, motions, and legal memoranda,¹⁰³ the CPA allows recovery for unfair or deceptive business acts.¹⁰⁴ Although courts are given a certain amount of discretion in determining the dollar amount of a CR 11 sanction, judges must follow court-imposed guidelines to arrive at that amount.¹⁰⁵ In contrast to the liberal allowance of treble damages allowed under the CPA, sanctions under CR 11 must be the smallest amount possible to deter the bad act.¹⁰⁶

III. THE CPA AND THE INSURANCE INDUSTRY

Insurance relationships are contracts between insurance companies and their insureds. Commentators have recognized, however, that there is a differential in the bargaining power between insurance companies and the individuals they insure. The Legislature empowered the Insurance Commissioner to develop administrative rules declaring particular insurance company acts and practices to be per se unfair or deceptive under the CPA. The resulting regulations, along with other legislative determinations, combine to enable consumers to establish the five elements of a CPA claim against insurance companies.

A. *The Business of Insurance*

The nature of an insurance contract is a promise, on the part of the insurance company, to provide future benefits to the insured¹⁰⁷ upon the occurrence of a contingency.¹⁰⁸ Although courts recognize no single definition of what constitutes the insurance business,¹⁰⁹ the standard relationship between an insured and an insurance company is based upon

103. WASH. CR 11.

104. WASH. REV. CODE § 19.86.020 (2000).

105. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 355–56, 858 P.2d 1054, 1085 (1993).

106. *Id.* at 356, 858 P.2d at 1085.

107. PETER M. LENCIS, *INSURANCE REGULATION IN THE UNITED STATES: AN OVERVIEW FOR BUSINESS AND GOVERNMENT*, viii (1997).

108. EMERIC FISCHER & PETER N. SWISHER, *PRINCIPLES OF INSURANCE LAW*, xxi (1986).

109. See 1 ERIC MILLS HOLMES & MARK S. RHODES, *HOLMES'S APPLEMAN ON INSURANCE* 2D §1.4 (1996); FISCHER & SWISHER, *supra* note 108, at xxi.

risk allocation.¹¹⁰ Claims by insureds for benefits may not settle amicably and litigation may ensue to enforce payment by the insurance company.¹¹¹

Insureds and insurance companies resolve conflicts through litigation with such frequency that litigation is seen as a normal part of the insurance industry.¹¹² Washington courts have determined that the insurance industry, like the collection business, includes litigation in the ordinary course of business.¹¹³ For example, the Washington Supreme Court has declared that it is nearly impossible to determine whether or not a document was prepared in anticipation of litigation for purposes of the work-product doctrine, because so much of an insurance company's normal course of business includes litigation.¹¹⁴

Some commentators argue that the insurance industry lends itself to unfair business practices because insurance policies are often long and complex, include terms standardized throughout the industry, and offer insureds little opportunity to negotiate.¹¹⁵ As insurance companies have such great power compared to insureds, the possibility of bad faith acts by insurance companies is great.¹¹⁶ Therefore, regulations such as the CPA¹¹⁷ ensure that insurance companies deal with their insureds fairly and honestly.¹¹⁸

110. See HOLMES & RHODES, *supra* note 109, §1.4.

111. See TASK FORCE OF THE COMMITTEE ON INSURANCE COVERAGE LITIGATION, SECTION OF LITIGATION, AMERICAN BAR ASS'N, MANUAL FOR COMPLEX INSURANCE COVERAGE LITIGATION §5.01 (1993). Such disputes often settle before trial. See *id.*

112. See, e.g., *Heidebrink v. Moriwaki*, 104 Wash. 2d 392, 399, 706 P.2d 212, 216 (1985); see also TASK FORCE OF THE COMMITTEE ON INSURANCE COVERAGE LITIGATION, *supra* note 111, §5.01.

113. See *Heidebrink*, 104 Wash. 2d at 399, 706 P.2d at 216. For further support of the proposition that litigation is part of the insurance business, see also Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 383 (1998) ("[L]itigation is the bread and butter of insurance companies. In large part, litigation is their business.").

114. *Heidebrink*, 104 Wash. 2d at 399, 706 P.2d at 216.

115. See, e.g., HOLMES & RHODES, *supra* note 109, §3.4.

116. See FISCHER & SWISHER, *supra* note 108, at 485.

117. See *infra* notes 120-79 and accompanying text.

118. See LENCISIS, *supra* note 107, at viii.

B. *Establishing a CPA Cause of Action Against Insurance Companies*

The Legislature empowered the Insurance Commissioner to enact regulations governing the insurance industry.¹¹⁹ Pursuant to that authority, the Insurance Commissioner enacted a regulation that identifies particular claim settlement acts or practices as unfair or deceptive in the business of insurance.¹²⁰ Violation of this regulation by an insurance company establishes per se both the unfair or deceptive act and trade or commerce requirements of a CPA cause of action.¹²¹ In addition, the Legislature has determined that the insurance industry affects the public interest,¹²² which automatically fulfills the public interest requirement of a CPA claim.¹²³ Finally, courts have established a presumption of the harm and causation elements when insurance companies act in bad faith.¹²⁴

1. *Pursuant to Statutory Authority, the Insurance Commissioner Has Promulgated Regulations that Govern the Insurance Industry Under the CPA*

The Insurance Commissioner has expansive authority to regulate the insurance industry.¹²⁵ A primary duty of the Insurance Commissioner's office is to protect and inform consumers in their dealings with insurance companies.¹²⁶ To achieve the goal of consumer protection, the Insurance Commissioner's office supervises the drafting and revision of the insurance code and also proposes and enforces insurance regulations.¹²⁷ Regulations enacted by the Insurance Commissioner establish acts and practices that are per se unfair and deceptive under the CPA in the business of insurance with regard to the settlement of claims.¹²⁸ By establishing these per se unfair and deceptive acts and practices, the

119. WASH. REV. CODE § 48.30.010 (2000).

120. WASH. ADMIN. CODE § 284-30-330 (2001).

121. *See infra* notes 136-44, 150-52 and accompanying text.

122. WASH. REV. CODE § 48.01.030 (2000).

123. *See Haner v. Quincy Farm Chem., Inc.*, 97 Wash. 2d 753, 762, 649 P.2d 828, 833 (1982).

124. *See infra* notes 167-178 and accompanying text.

125. *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 386, 393, 715 P.2d 1133, 1136, 1140 (1986).

126. WASH. ADMIN. CODE § 284-02-020(2)-(3) (2001).

127. *Id.* § 284-02-020(2).

128. *Id.* § 284-30-330.

Insurance Commissioner promotes the goal of consumer protection embodied by the CPA.

Courts in Washington have upheld the Insurance Commissioner's authority to promulgate regulations that make specific acts by insurance companies per se unfair or deceptive.¹²⁹ In *Leingang v. Pierce County Medical Bureau*,¹³⁰ the Washington Supreme Court found that the Legislature vested valid rule-making authority in the Insurance Commissioner to determine which insurance company acts and practices were deceptive.¹³¹ The court also discussed the rule-making authority of the Insurance Commissioner in *Tank v. State Farm Insurance & Casualty Co.*,¹³² and found that the Commissioner had the authority to determine that a breach of good faith was a deceptive act within the insurance industry.¹³³ In spite of the broad authority of the Insurance Commissioner to promulgate rules, courts have retained the power to interpret and refine the application of those rules.¹³⁴

2. *Fulfilling the Unfair or Deceptive and Trade or Commerce Requirements in Suits Against Insurance Companies*

The Washington Administrative Code (WAC) provisions promulgated by the Insurance Commissioner outline acts that are per se "unfair or deceptive acts or practices in the business of insurance" for purposes of claim settlement.¹³⁵ The Insurance Commissioner and courts, however, have not provided a definition of "claim settlement."¹³⁶ The prohibitions

129. See, e.g., *Leingang v. Pierce County Med. Bureau*, 131 Wash. 2d 133, 151, 930 P.2d 288, 297 (1997); *Tank*, 105 Wash. 2d at 386, 715 P.2d at 1136; *Starczewski v. Unigard Ins. Group*, 61 Wash. App. 267, 272-73, 810 P.2d 58, 61 (1991); *Neigel v. Harrell*, 82 Wash. App. 782, 786, 919 P.2d 630, 632 (1986).

130. 131 Wash. 2d 133, 930 P.2d 288 (1997).

131. *Id.* at 151-52, 930 P.2d at 297-98 (stating the general rule "that violations of insurance regulations are subject to the Consumer Protection Act").

132. 105 Wash. 2d 381, 715 P.2d 1133 (1986).

133. *Id.* at 386, 715 P.2d at 1136.

134. See, e.g., *id.* at 393, 715 P.2d at 1140 (finding that regulations do not apply to third party claimants); *Neigel*, 82 Wash. App. at 786-87, 919 P.2d at 632 (1986) (adopting holding from *Tank* that third party claimants cannot recover under CPA).

135. WASH. ADMIN. CODE § 284-30-330 (2001).

136. See *id.*; see also *id.* at § 284-30-320 (listing insurance code definitions). For examples of cases that have applied the WAC without defining "claims settlement" see *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 276, 961 P.2d 933, 935 (1998); *Leingang*, 131 Wash. 2d at 150-53, 930 P.2d at 297-98; *Indus. Indem. Co. of the N.W. v. Kallevig*, 114 Wash. 2d 907, 920-25, 792 P.2d 520, 528-30 (1990); *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686, 698-702, 17 P.3d 1229, 1234-36 (2001).

listed in the WAC concern misrepresentations by insurance companies,¹³⁷ unreasonable acts by insurance companies when dealing with insureds,¹³⁸ lack of good faith on the part of insurance companies,¹³⁹ and inappropriate or coercive actions taken by insurance companies during the course of claims investigation.¹⁴⁰ Courts have interpreted these regulations to mean that any act by an insurance company specified in the WAC automatically fulfills the unfair or deceptive act or practice element of the CPA.¹⁴¹ For a per se violation, an insured need not establish that the insurance company has a pattern of violating the WAC.¹⁴² A single violation is sufficient to establish an unfair trade practice.¹⁴³

Although most cases brought against insurance companies allege per se deceptive acts or practices in violation of the WAC, insureds can bring suits for acts that have the capacity to deceive.¹⁴⁴ The CPA explains that actions by insurance companies are subject to the CPA, unless state insurance law expressly allows or requires the acts.¹⁴⁵ In *Bowers v. Transamerica Title Insurance Co.*,¹⁴⁶ the court held that an insurance company practicing law without a license had the “capacity to deceive” the general public.¹⁴⁷ As the acts of the insurance company constituted a deceptive act or practice in their own right, the court did not need to rely upon the WAC to establish a claim under the CPA.¹⁴⁸ Therefore, the Insurance Commissioner need not define a specific act as deceptive in order for the act to be subject to the CPA.

Any act described in the WAC as per se unfair or deceptive fulfills not only the unfair or deceptive requirement of the CPA, but also the trade or

137. WASH. ADMIN. CODE § 284-30-330(1).

138. *Id.* § 284-30-330(2)–(5), (16).

139. *Id.* § 284-30-330(6), (18).

140. *Id.* § 284-30-330(7)–(15), (17), (19).

141. See, e.g., *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash. 2d 55, 62–63, 1 P.3d 1167, 1171 (2000); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash. App. 323, 331–32, 2 P.3d 1029, 1034–35 (2000), *reconsideration denied*, No. 44597-9-I, 2000 Wash. App. LEXIS 1477 (Wash. App. Aug. 3, 2000), *and review denied, motion granted*, 142 Wash. 2d 1017, 20 P.3d 945 (2001).

142. *Indus. Indem. Co. of the N. W. v. Kalleveg*, 114 Wash. 2d 907, 922–25, 792 P.2d 520, 529–30 (1990).

143. *Id.*

144. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 785, 719 P.2d 531, 535 (1986).

145. WASH. REV. CODE § 19.86.170 (2000).

146. 100 Wash. 2d 581, 675 P.2d 193 (1983).

147. *Id.* at 591–92, 675 P.2d at 200–01.

148. *Id.*

commerce requirement.¹⁴⁹ The WAC describes acts or practices occurring in the “business of insurance” that are per se unfair.¹⁵⁰ Washington courts have held that any act that is legislatively determined to be an unfair trade practice fulfills per se both the unfair or deceptive and trade or commerce requirements.¹⁵¹

In addition to meeting per se the trade or commerce requirement for violations of the WAC, the trade or commerce requirement can also be established without use of the WAC. The Legislature has broadly defined trade or commerce to include “any commerce directly or indirectly affecting the people of the state of Washington.”¹⁵² In *Salois v. Mutual of Omaha Insurance Co.*,¹⁵³ the court expanded the definition of trade or commerce as applied to insurance companies to include deceptive acts beyond those aimed at inducing a sale.¹⁵⁴ The *Salois* court held that the Legislature intended for insurance companies to be held liable even where the act was not deceptive at the time the insurance policy was sold.¹⁵⁵ The court reasoned that the CPA created liability for deceptive actions and bad faith in settling insurance claims as part of the trade or commerce of the insurance business.¹⁵⁶

3. *Determining that the Insurance Industry Is Affected by the Public Interest*

In 1982, the Washington Supreme Court determined that the public interest requirement is met per se when there is a “specific legislative declaration” of a public interest.¹⁵⁷ The insurance code declares that “the business of insurance is one affected by the public interest, requiring that

149. See, e.g., *Hangman Ridge*, 105 Wash. 2d at 785–86, 719 P.2d at 535.

150. WASH. ADMIN. CODE § 284-30-330 (2001).

151. See, e.g., *Hangman Ridge*, 105 Wash. 2d at 785–86, 719 P.2d at 535–36.

152. WASH. REV. CODE § 19.86.010 (2000).

153. 90 Wash. 2d 355, 581 P.2d 1349 (1978).

154. *Id.* at 360–61, 581 P.2d at 1351–52.

155. *Id.* at 359–61, 581 P.2d at 1351–52.

156. *Id.* at 360–61, 581 P.2d at 1351–52. The court stated:

The defendant was not unfair or deceptive in the sale of its policy. But what the plaintiffs purchased was not the pieces of paper constituting the policy. They purchased the potential benefits and security of coverage. When defendant should have rendered those benefits, it, according to the special verdict, engaged in acts of bad faith and breached its duty of fair dealing.

Id.

157. *Haner v. Quincy Farm Chem., Inc.*, 97 Wash. 2d 753, 762, 649 P.2d 828, 833 (1982).

all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.”¹⁵⁸ Washington courts have adopted the statutory assertion that the insurance business directly concerns the public interest.¹⁵⁹

The Washington Supreme Court has also determined that a quasi-fiduciary relationship exists between an insured and an insurance company¹⁶⁰ that requires the insurance company to give the insured’s interests the same consideration it gives its own interests in all matters.¹⁶¹ Consequently, an insurance company has a duty to “disclose all facts that would aid its insureds” in asserting a claim for insurance benefits.¹⁶² The quasi-fiduciary and good faith duties owed by an insurance company to an insured exist at an even higher level in the context of a first-party insured, where the interests of the insured are directly opposed to the interests of the insurance company.¹⁶³ In this context, the insured is especially susceptible to harm should the insurer fail to act in good faith.¹⁶⁴ The good faith and fiduciary duties insurers owe their insureds¹⁶⁵ further the legislative goal of protecting the general public from deceptive insurance company business practices.¹⁶⁶

4. *Establishing the Causation and Harm Elements in CPA Cases Against Insurance Companies*

In *Safeco Insurance Co. of America v. Butler*,¹⁶⁷ the court recognized a rebuttable presumption of harm when an insurance company acts in bad

158. WASH. REV. CODE § 48.01.030 (2000).

159. See, e.g., *Lenzi v. Redland Ins. Co.*, 140 Wash. 2d 267, 277, 996 P.2d 603, 607–08 (2000); *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 276, 961 P.2d 933, 935 (1998); *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 560, 951 P.2d 1124, 1125 (1998); *Indus. Indem. Co. of the N.W. v. Kallevig*, 114 Wash. 2d 907, 917, 792 P.2d 520, 526 (1990); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 386–87, 715 P.2d 1133, 1136–37 (1986).

160. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash. 2d 784, 791–92, 16 P.3d 574, 578 (2001). *But see id.* at 798–800, 16 P.3d at 582–83 (Talmadge, J., concurring) (finding no fiduciary duty in first-party insurance context).

161. See *id.* at 791–92, 16 P.3d 578; *Coventry Assocs.*, 136 Wash. 2d at 280, 961 P.2d at 937–38; *Tank*, 105 Wash. 2d at 385–86, 715 P.2d at 1136.

162. *Van Noy*, 142 Wash. 2d at 791, 16 P.3d at 578. *But see id.* at 799–800, 16 P.3d 582–83 (Talmadge, J., concurring) (declaring that no such duty exists).

163. *Id.* at 793 n.2, 16 P.3d at 578 n.2.

164. *Id.*

165. *Id.*

166. See *supra* notes 120–60 and accompanying text.

167. 118 Wash. 2d 383, 823 P.2d 499 (1992).

faith toward an insured.¹⁶⁸ The *Butler* court determined that the insureds would have a nearly impossible burden of proving that they were “demonstrably worse off” as a result of the bad faith without this presumption.¹⁶⁹ In addition, the court found the rebuttable presumption to be the best means to protect the societal interests implicated by the insurance industry, such as the fiduciary duty of an insurer to an insured.¹⁷⁰ Courts apply the rebuttable presumption of harm when an insurance company acts in bad faith in defending an insured under a reservation of rights,¹⁷¹ in failing to provide a defense for an insured,¹⁷² or in delaying in the reservation of rights for an insured.¹⁷³

Although there are many instances when an insurance company’s bad faith leads to a rebuttable presumption of harm, this rebuttable presumption does not apply in all situations. There is no rebuttable presumption of harm when an insurance company, as a result of a bad faith investigation, refuses to provide coverage to an insured, if it is eventually determined that the coverage denial was correct.¹⁷⁴ In this instance, harm can be established only if the insured can show that he or she incurred expenses as a result of the bad faith investigation.¹⁷⁵ Additionally, an insurer that is eventually found liable on an insurance policy is not presumed to have acted in bad faith.¹⁷⁶

The courts have not discussed directly the causation requirement of a CPA claim as it relates to the WAC. Generally, a consumer who uses the WAC to fulfill the unfair or deceptive act and trade or commerce requirements must establish a causal link between the company’s deceptive act or practice and the harm suffered by the consumer.¹⁷⁷ In

168. *Id.* at 390, 823 P.2d at 504.

169. *Id.* (quoting A. WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED* § 2.09, at 40–41 (2d ed. 1988)); accord R. KEETON & A. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 9.1(c), at 993 (1988).

170. *See id.* at 389–92, 823 P.2d at 503–05.

171. *Id.* at 390–92, 823 P.2d at 504–05.

172. *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 562–63, 951 P.2d 1124, 1127 (1998).

173. *Austin Mut. Ins. Co. v. Goodlett*, No. 17682-7-III, 1999 Wash. App. LEXIS 2155, at *13 (Dec. 21, 1999), *cert. denied*, 140 Wash. 2d 1024, 10 P.3d 403 (2000).

174. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 281–83, 961 P.2d 933, 938–39 (1998).

175. *Id.*

176. *Ellwein v. Hartford Accident & Indem. Co.*, 95 Wash. App. 419, 425, 976 P.2d 138, 142 (1999).

177. *See supra* notes 168–77 and accompanying text; *see also* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 792–93, 719 P.2d 531, 539 (1986); *Strother v.*

cases where a rebuttable presumption of harm exists, courts also seem to imply a rebuttable presumption of causation,¹⁷⁸ which fulfills the causation requirement of a CPA claim.

IV. THE CPA EXCEPTION FOR ACTS OCCURRING IN THE COURSE OF LITIGATION SHOULD NOT APPLY TO THE INSURANCE INDUSTRY

Insureds should be able to bring suit under the CPA against their insurance companies for acts occurring in the course of litigation. The litigation exception to the CPA should not apply to insurance companies due to distinctive Washington case law, statutes, and regulations governing the insurance industry. Even assuming, *arguendo*, that the litigation exception does apply to the insurance industry, Washington courts have recognized that acts meeting per se the unfair or deceptive, trade or commerce, and public interest requirements of the CPA are excluded from the litigation exception to the CPA. As previously noted, a specialized statutory and regulatory system governs the insurance industry; therefore, all unfair and deceptive insurance company acts outlined in the WAC should be exempted from the CPA's litigation exception. In addition, established Washington policy regarding insurance companies lends further support to the argument that insurance companies can be sued under the CPA for their unfair and deceptive acts occurring in the course of litigation. Finally, CPA claims, as opposed to CR 11 sanctions, are necessary to provide an insured with sufficient incentive to bring suit and protect the public interest.

A. *The Reasoning of Blake v. Federal Way Cycle Center Is Inapplicable in the Insurance Context*

The court in *Blake v. Federal Way Cycle Center*¹⁷⁹ determined that the unfair or deceptive, trade or commerce, and public interest requirements

Capitol Bankers Life Ins. Co., 68 Wash. App. 224, 244, 842 P.2d 504, 514 (1992), *rev'd on other grounds*, 124 Wash. 2d 1, 873 P.2d 1185 (1994).

178. See, e.g., *Coventry Assocs.*, 136 Wash. 2d at 285, 961 P.2d at 940 (holding that there is sufficient causation for a CPA claim due to presumption of harm for bad faith investigation by insurance company, even though policy excluded coverage); *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 562-64, 951 P.2d 1124, 1126-28 (1998) (arguing that in insurance context courts must "set aside traditional rules regarding harm and contract damages because insurance contracts are different" and finding that bad faith of insurance companies "causes harm" due to bad faith breach of contract).

could not be met to establish a CPA claim for acts occurring in the course of litigation.¹⁸⁰ Nevertheless, this litigation exception should not apply in the insurance context. In *Blake*, the court reasoned that litigation was a private conflict between two parties that could not support a CPA claim.¹⁸¹ In the insurance company context, however, an insured should be able to establish, without fulfilling per se any of the categories, the unfair or deceptive, trade or commerce, and public interest requirements for acts occurring in the course of litigation.¹⁸² As such, an insured should be able to sustain a cause of action for acts by an insurance company occurring during litigation. In addition, Washington courts have already established a rebuttable presumption of harm, and impliedly causation, in the insurance context,¹⁸³ thus enabling an insured to satisfy all five elements of a CPA cause of action.

The *Blake* court's reasoning—that the unfair or deceptive requirement is not met by acts occurring during litigation—should not apply in the context of insurance litigation because an insurance company's failure to honor a standardized contract creates the capacity to deceive the general public. Washington courts have held that a single deceptive act between a consumer and a business can support a CPA cause of action if the act involves a standardized sales presentation or form contract.¹⁸⁴ Most insurance transactions include the use of standardized contracts employed throughout the industry and offering the same promise: to provide benefits to the insured in the case of a contingent occurrence.¹⁸⁵ Therefore, the failure of an insurance company to provide benefits to an insured, as promised in a standardized insurance contract, creates a capacity to deceive the general public and satisfies the unfair or deceptive requirement of the CPA.

The *Blake* court's reasoning that the trade or commerce element cannot be met for acts occurring during the course of litigation should not apply to insurance companies given the distinctive nature of the insurance business. The *Blake* court held that acts occurring after a suit is filed are under the domain of the courts and, thus, are no longer in the

179. 40 Wash. App. 302, 698 P.2d 578 (1985).

180. *Id.* at 312, 698 P.2d at 584.

181. *Id.*

182. *See supra* Part III.B.2.

183. *See supra* Part III.B.4.

184. *See, e.g.,* Nelson v. Nat'l Fund Raising Consultants, Inc., 120 Wash. 2d 382, 392-93, 842 P.2d 473, 477-78 (1992).

185. *See* HOLMES & RHODES, *supra* note 109, §3.4, at 159.

realm of trade or commerce.¹⁸⁶ In the insurance industry, however, disputes frequently arise between insureds and insurers that cannot be or are not settled before a suit is filed.¹⁸⁷ This occurs to such an extent that Washington courts have declared litigation to be part of the usual business of insurance.¹⁸⁸ As litigation is a part of the insurance business, acts by insurance companies occurring in the course of litigation satisfy the liberally-construed Washington definition of trade or commerce, which includes acts beyond those aimed at inducing a sale.¹⁸⁹

Blake's reasoning that acts occurring in the course of litigation cannot fulfill the public interest requirement is less persuasive in the insurance context, because the insurance industry has been determined by statute to affect the public interest. The business in *Blake*, selling motorcycles, has no impact on the public interest beyond the general purview of the CPA.¹⁹⁰ In contrast, the Legislature has statutorily defined the insurance business as an industry that affects the public interest.¹⁹¹ Furthermore, Washington courts have consistently upheld the Legislature's determination that the insurance industry affects the public interest.¹⁹² Therefore, an insured should be able to establish the third element of a CPA cause of action.

The *Blake* court does not directly address whether a consumer can fulfill the harm and causation requirements of a CPA cause of action when the company's acts occur in the course of litigation.¹⁹³ Other Washington court decisions, however, indicate that an insured can establish the harm and causation requirements against insurance companies for acts occurring in the course of litigation.¹⁹⁴ The Washington Supreme Court has established a rebuttable presumption of harm when an insurance company acts in bad faith.¹⁹⁵ This rebuttable

186. *Blake*, 40 Wash. App. at 312, 698 P.2d at 584.

187. See *supra* notes 107–14 and accompanying text.

188. See, e.g., *Heidebrink v. Moriwaki*, 104 Wash. 2d 392, 399, 706 P.2d 212, 216 (1985).

189. See *supra* notes 54–60 and accompanying text.

190. See generally *Blake*, 40 Wash. App. 302, 698 P.2d 578.

191. WASH. REV. CODE § 48.01.030 (2000).

192. See, e.g., *Lenzi v. Redland Ins. Co.*, 140 Wash. 2d 267, 277, 996 P.2d 603, 607–08 (2000); *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 276, 961 P.2d 933, 935 (1998); *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 560, 951 P.2d 1124, 1125 (1998); *Indus. Indem. Co. of the N.W. v. Kallevig*, 114 Wash. 2d 907, 917, 792 P.2d 520, 526 (1990); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 386–87, 715 P.2d 1133, 1136–37 (1986).

193. See generally *Blake*, 40 Wash. App. 302, 698 P.2d 578.

194. See *supra* note 167–78 and accompanying text.

195. *Safeco Ins. Co. v. Butler*, 118 Wash. 2d 383, 390, 823 P.2d 499, 503–04 (1992).

presumption of harm has been used by courts to imply a rebuttable presumption of causation.¹⁹⁶ Therefore, proof of bad faith insurance company acts in the course of litigation would satisfy both the harm and causation requirements of a CPA claim.¹⁹⁷

B. The WAC Allows Insureds to Use the Per Se Exception of Evergreen Collectors v. Holt To Bring Suit Against Insurance Companies for Acts Occurring During Litigation

Assuming, *arguendo*, that the insurance industry does fall under the purview of *Blake*'s litigation exception to the CPA, the *Blake* exception would not apply to the insurance industry for acts that the Legislature or an administrative agency has determined to be per se unfair or deceptive.¹⁹⁸ Like the collection business addressed in *Evergreen Collectors v. Holt*,¹⁹⁹ Washington regulations and statutes establish per se the unfair or deceptive act, trade or commerce, and public interest requirements to a CPA cause of action.²⁰⁰ Thus, in the insurance context, a complainant could satisfy per se the required elements of a CPA claim when the insurance company's acts occur during litigation.

The WAC outlines specific acts by insurance companies, for purposes of "the settlement of claims" that fulfill per se the unfair or deceptive and trade or commerce requirements of the CPA.²⁰¹ The WAC does not provide a definition for "the settlement of claims,"²⁰² and courts that have applied the WAC have not attempted to explain what acts constitute claim settlement.²⁰³ As a result, no controlling definition of claim settlement has been established in Washington.

196. *See supra* notes 177–178 and accompanying text.

197. The individual attorney must decide whether it would be in the best interests of the client to amend the current complaint by adding a CPA claim for the acts occurring in the course of litigation or to file a separate CPA claim against the insurer.

198. *See Evergreen Collectors v. Holt*, 60 Wash. App. 151, 156–57, 803 P.2d 10, 13 (1991).

199. 60 Wash. App. 151, 803 P.2d 10 (1991).

200. *See supra* Part III.B.2–3.

201. WASH. ADMIN. CODE § 284-30-330 (2001); *see also supra* Part III.B.2.

202. WASH. ADMIN. CODE § 284-30-330; *see also id.* at § 284-30-320 (listing insurance code definitions).

203. *See, e.g.*, *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 276, 961 P.2d 933, 935 (1998); *Leingang v. Pierce County Med. Bureau*, 131 Wash. 2d 133, 150–53, 930 P.2d 288, 297–98 (1997); *Indus. Indem. Co. of the N. W. v. Kallevig*, 114 Wash. 2d 907, 920–21, 792 P.2d 520, 528 (1990); *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686, 698–702, 17 P.3d 1229, 1234–36 (2001).

Although the Washington courts and Legislature have been silent on the issue of claim settlement, commentators have indicated that insurance claims frequently result in litigation.²⁰⁴ Because an insurance policy is based in contract, the insured pays the insurer consideration, so that, if a contingent event occurs, an insured can make a claim against the insurer to perform the contract.²⁰⁵ In addition to regular contractual duties, insurers owe their insureds a duty of good faith and fair dealing as part of the insurance agreement,²⁰⁶ which requires the insurance company to settle an insurance claim when liability to the insured is apparent.²⁰⁷ However, instead of settling claims when they are clearly liable, insurance companies often consider litigation just another step in the cost-benefit analysis used in the settlement of claims by insureds.²⁰⁸ In other words, for insurance companies, litigation is merely an alternate form of claim settlement.

If claim settlement encompasses litigation, the regulation of claim settlement practices should apply to acts occurring in the course of litigation. An insurance company should not be able to avoid its duties to its insureds simply because the insured has filed suit against the insurance company and the insurance company's acts occur in the course of litigation. Thus, insureds involved in a lawsuit against their insurance companies are owed the same duties as those who are involved in informal settlement negotiations.²⁰⁹ Therefore, because settlement in the insurance industry carries over into litigation, the WAC's description of unfair or deceptive acts in "the settlement of claims"²¹⁰ should include acts occurring in the course of litigation.

Because filing a suit does not terminate the duties of an insurance company, the WAC may be used to establish a cause of action against an

204. See Anderson & Fournier, *supra* note 113, at 382–83, 398; Roger C. Henderson, *The Tort of Bad-Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 21 (1992); Hugh A. Linstrom, *Unfair Claims Settlement Practices: A Summary of California Law*, 15 WHITTIER L. REV. 691, 696–97 (1994); Alan I. Widiss, *Obligating Insurers to Inform Insureds About the Existence of Rights and Duties Regarding Coverage for Losses*, 1 CONN. INS. L.J. 67, 90 (1995).

205. See Linstrom, *supra* note 204, at 696–97; Anderson & Fournier, *supra* note 113, at 379–81; see also *supra* notes 107–108 and accompanying text.

206. See Anderson & Fournier, *supra* note 113, at 379–80.

207. See Henderson, *supra* note 204, at 21.

208. See Anderson & Fournier, *supra* note 113, at 382–83, 398.

209. See Alan I. Widiss, *supra* note 204, at 90 (“The involvement of an attorney on behalf of an insured does not, and should not, affect [the] responsibilities of an insurance company.”).

210. WASH. ADMIN. CODE § 284-30-330 (2001).

insurance company for acts occurring in the course of litigation. The WAC establishes, per se, both the unfair or deceptive act²¹¹ and the trade or commerce requirements,²¹² even in cases where a single deceptive act occurs between an insurance company and an individual insured.²¹³ Insureds can also rely upon the legislative pronouncement that insurance affects the public interest²¹⁴ to establish the third CPA element in suits against insurance companies in the litigation context. By demonstrating an insurer's bad faith during litigation, an insured could prove a violation of the WAC, thereby establishing per se the first three elements of a CPA claim. Fulfilling per se the first three elements of a CPA cause of action would allow the insured to bring suit under *Evergreen Collectors*.²¹⁵ Thereafter, insureds would need only demonstrate the causation and harm requirements²¹⁶ to bring suit under the CPA for acts committed in the course of litigation.

C. *Established Washington Policy Regarding Insurance Companies Supports Allowing CPA Claims for Acts Occurring After a Suit Has Been Filed*

Permitting CPA suits for acts occurring once a suit has been filed would recognize the enhanced duty of good faith and quasi-fiduciary duties insurance companies owe their insureds. The Washington Supreme Court has broadly defined the duty of good faith on the part of insurance companies and has not limited this duty to events prior to the development of an adversarial relationship between the insurer and the insured.²¹⁷ The Legislature has determined that the duty of good faith applies in *all* insurance matters.²¹⁸ During litigation, the interests of the insurance company and the interests of the insured are at odds; however, the duty of good faith still applies due to the public interests affecting the insurance industry.²¹⁹ Washington courts have not excused insurance

211. See *supra* notes 135–44 and accompanying text.

212. See *supra* notes 149–51 and accompanying text.

213. *Indus. Indem. Co. of the N.W. v. Kallevig*, 114 Wash. 2d 907, 922–25, 792 P.2d 520, 529–30 (1990).

214. WASH. REV. CODE § 48.01.030 (2000).

215. *Evergreen Collectors v. Holt*, 60 Wash. App. 151, 154–57, 803 P.2d 10, 12–13 (1991).

216. See *supra* Part III.B.4.

217. *Van Noy v. State Farm Mut. Automobile Ins. Co.*, 142 Wash. 2d 784, 791, 16 P.3d 574, 578 (2001). *But see id.* at 799–800, 16 P.3d 582–83 (Talmadge, J., concurring).

218. WASH. REV. CODE § 48.01.030.

219. See *supra* Part III.B.3.

companies from acting in good faith toward their insureds, even in the adversarial relationship of litigation.²²⁰

Not only have courts recognized a duty of good faith in all insurance dealings, they have also found that this duty is enhanced when applied to insurance company actions directed against their insureds.²²¹ This enhanced duty requires that, in all insurance matters, insurance companies give the interests of their insureds the same consideration they would give their own interests.²²² Allowing insureds to bring suit against their insurance companies for unfair and deceptive acts occurring in the course of litigation would serve to support the enhanced duty of good faith owed by insurance companies.

The quasi-fiduciary duty of insurance companies to insureds applies to acts in the course of litigation and a breach of such duty should allow for suit to be brought against the insurance company under the CPA. In addition to requiring that insurance companies give the interests of their insureds the same consideration that they would give their own interests,²²³ this duty also requires insurance companies to give insureds access to all information that would aid the insured in making a claim for benefits under an insurance policy.²²⁴ Courts have not determined that these quasi-fiduciary requirements apply only prior to the filing of a suit by an insured.²²⁵ Therefore, if an insurance company were to withhold vital information in the course of litigation, the company would violate its duty to insureds and should be liable under the CPA.

D. The Recovery Available Under the CPA is Necessary To Give Insureds an Incentive To Protect the Public from Insurance Companies that Act in Bad Faith

Remedies under the CPA for deceptive acts occurring after litigation commences against an insurance company would serve to protect the

220. *See, e.g.*, Kirk v. Mt. Airy Ins. Co., 134 Wash. 2d 558, 562, 951 P.2d 1124, 1126–27 (1998); Tank v. State Farm Fire & Cas. Co., 105 Wash. 2d 381, 386, 715 P.2d 1133, 1136 (1986).

221. *Tank*, 105 Wash. 2d at 385–86, 715 P.2d at 1136–37.

222. *Id.*

223. *See* Coventry Assocs. v. Am. States Ins. Co., 136 Wash. 2d 269, 280, 961 P.2d 933, 937–38 (1998); *Tank*, 105 Wash. 2d at 385–86, 715 P.2d at 1135–36.

224. Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wash. 2d 784, 791, 16 P.3d 574, 578 (2001). *But see id.* at 799–800, 16 P.3d 582–83 (Talmadge, J., concurring).

225. *See, e.g., id.* at 793 n.2, 16 P.3d at 579 n.2 (finding that duty of insurer to insured may be heightened when interests of the two parties are at odds). *But see id.* at 799–800, 16 P.3d 582–83 (Talmadge, J., concurring).

public from future harm by insurance companies. The Washington Legislature established the CPA to protect consumers,²²⁶ but CR 11 sanctions protect only the judicial system.²²⁷ Allowing suits under the CPA against insurance companies for bad acts occurring in the course of litigation would provide greater protection for the public than CR 11 sanctions alone provide.

CR 11 sanctions do not allow individuals the same liberal recovery as the CPA. CR 11 allows recovery only of the smallest amount possible to deter the bad act,²²⁸ as the rule was not enacted to deter future harm to the public at large. In addition, the language of CR 11 does not require courts to impose sanctions payable to the opposing party,²²⁹ so the insured may not receive any recovery from CR 11 sanctions. In addition, CR 11 sanctions are often payable by the attorney, rather than the represented business,²³⁰ so such fines may not provide insurance companies with an incentive to curb bad acts during the course of litigation.

Recovery under the CPA for deceptive acts occurring during litigation is more likely to have a deterrent effect upon insurance companies than are CR 11 sanctions. Under a private CPA claim, the insurance company may have to pay as much as treble damages and reasonable attorneys' fees directly to the consumer.²³¹ Also, the offending insurance company, rather than the attorney, pays recovery for acts taken during litigation that violate the CPA, as the insurance company is the party to the action.²³² When an insurance company's bad faith occurs only in the course of litigation, recovery under the CPA ensures that an insurance company will be liable to the same degree, and with the same deterrent

226. See generally Dove, *supra* note 61.

227. Neigel v. Harrell, 82 Wash. App. 782, 787, 919 P.2d 630, 632 (1996).

228. See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 355-56, 858 P.2d 1054, 1085 (1993).

229. WASH. CR 11 (2001) (“[T]he court, upon motion or upon its own initiative, *may* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which *may* include an order to pay to the other party or parties the amount of the reasonable expenses incurred.”) (emphasis added).

230. See, e.g., Bryant v. Joseph Tree, Inc., 119 Wash. 2d 210, 223-24, 829 P.2d 1099, 1106 (1992). *But cf.*, State ex rel. Quick-Ruben v. Verharnen, 136 Wash. 2d 888, 905, 969 P.2d 64, 73 (1998) (requiring party who filed a premature action to pay attorneys' fees of opposing party).

231. WASH. REV. CODE § 19.86.090 (2000). Treble damages, however, are capped at \$10,000. *Id.*

232. See Loveridge v. Fred Meyer, Inc., 125 Wash. 2d 759, 764, 887 P.2d 898, 900 (1995) (“[A] judgment is binding upon parties to the litigation and persons in privity with those parties.”).

effect, that the company would have been liable for deceptive acts occurring prior to litigation.

The CPA is needed, in addition to CR 11 sanctions, to protect the public from harm that occurs when insurance companies act unfairly or deceptively during litigation. The Washington Legislature has noted,²³³ and the courts have repeatedly affirmed,²³⁴ that the business of insurance greatly affects the public interest. The CPA provides financial recovery substantial enough for individual insureds to bring suit against insurance companies that act unfairly and dishonestly in the course of litigation, which serves to protect the public from these harmful acts. Allowing these suits supports the policies behind the CPA,²³⁵ and provides a mechanism to enforce the duties owed by insurance companies to their insureds.²³⁶ By themselves, CR 11 suits are insufficient for this purpose.²³⁷

V. CONCLUSION

The litigation exception to the CPA should not apply to the insurance industry. Therefore, insureds should be able to sue their insurance companies under the CPA for its bad faith acts occurring in the course of litigation. *Blake* should not bar suits by insureds against insurance companies for acts occurring in the course of litigation, as the unfair or deceptive, trade or commerce, and public interest requirements should be able to be fulfilled in the insurance context. Alternatively, a cause of action may lie under the CPA where specific deceptive acts of an insurance company fall into one of the categories outlined in the WAC. Established Washington policies regarding insurance companies warrant a CPA cause of action for deceptive acts occurring during litigation. If the claim of an insured is denied due to an insurance company's deception in the course of litigation, the insured has little recourse against the insurance company. The CPA was enacted to protect consumers in situations where they had little power and little recourse.

233. WASH. REV. CODE § 48.01.030 (2000).

234. See, e.g., *Lenzi v. Redland Ins. Co.*, 140 Wash. 2d 267, 277, 996 P.2d 603, 607-08 (2000); *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash. 2d 269, 276, 961 P.2d 933, 935 (1998); *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 560, 951 P.2d 1124, 1125 (1998); *Indus. Indem. Co. of the N. W. v. Kallevig*, 114 Wash. 2d 907, 917, 792 P.2d 520, 526 (1990); *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 386-87, 715 P.2d 1133, 1136-37 (1986).

235. See *supra* Part IV.C.

236. See *supra* Part III.B.3.

237. See *supra* Part IV.D.

Therefore, the purpose of the CPA would best be served—and the interests of the public would best be protected—by allowing insureds to bring CPA suits against insurance companies for unfair or deceptive acts occurring in the course of litigation.