The American Bar Association's 50-State Survey on Consumer Class Action Law

WASHINGTON

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A. Washington's Consumer Protection Act

The Washington Consumer Protection Act ("CPA") is codified in RCW 19.86.010 *et seq*. Section 2 of the CPA provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. Section 3 prohibits contracts, combinations, or conspiracies in restraint of trade or commerce. RCW 19.86.030 ("Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."). Section 4 prohibits monopolization, attempted monopolization, and conspiracy to monopolize. RCW 19.86.040 ("It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce."). The Act is modeled after federal statutes, primarily the Federal Trade Commission Act, the Sherman Act, and sections of the Clayton Act. The purpose of the CPA is "to protect the public and foster fair and honest competition." RCW 19.86.910. The CPA is "a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce." *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984) (emphasis in original). It is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920.

1. Proper Plaintiffs Under the CPA

The CPA contemplates a vast realm of potential plaintiffs. The Act broadly defines a "person" as "natural persons, corporations, trusts, unincorporated associations and partnerships." RCW 19.86.010(1). Washington courts have held that the Act goes beyond protecting merely consumers. *See Stephens v. Omni Ins. Co.*, 159 P.3d 10, 23 (Wash. App. 2007) (noting that the CPA "does not identify the 'consuming public' as the entity to be protected;" *any person* may bring a civil action under the Act).

In addition to private plaintiffs, the CPA authorizes actions initiated by the Washington Attorney General. *See* RCW 19.86.080(1) ("The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.").

2. Standing Under the CPA

Consistent with the Washington legislature's mandate to liberally construe the CPA, *see* RCW 19.86.920, standing under the Act is quite broad. "Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods

or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1061 (Wash. 1993). Additionally, as a general rule, privity of contract is not required to bring a CPA claim alleging an unfair or deceptive act or practice. *Stephens v. Omni Ins. Co.*, 159 P.3d 10, 23 (Wash. App. 2007).

a. The "Injury" Component of Standing

Under the provision of the CPA authorizing the filing of a civil action for damages, "[a]ny person who is injured in his or her business or property" by a violation of the Act may bring a civil action. RCW 19.86.090. The Washington Supreme Court has recognized that the use of the term "injured" in this statutory provision "makes clear that no monetary damages need be proven" to have a cognizable claim under the CPA, and that "nonquantifiable injuries, such as loss of goodwill[,] would suffice. . . ." *Nordstrom, Inc. v. Tampourlos*, 733 P.2d 208, 211 (Wash. 1987).

In *Blewett v. Abbott Labs.*, 938 P.2d 842, 844 (Wash. App. 1997), the Washington Court of Appeals was faced with the question of whether indirect purchasers of price-fixed goods are "injured" by anticompetitive activity and have standing under the CPA. Because Washington courts look to federal precedent in interpreting the CPA, the court relied on the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), to hold that indirect purchasers are not "injured" by anticompetitive activity and therefore lack standing to sue under RCW 19.86.090.

In *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1060 (Wash. 1993), the Washington Supreme Court held that "a physician whose reputation is injured has standing to sue a drug company which engaged in an unfair or deceptive trade practice by failing to warn the physician of the dangers of its drug about which it had knowledge."

b. The Effect of the Learned Intermediary Doctrine on CPA Claims

In a prescription pharmaceutical case, the Washington Supreme Court considered the learned intermediary doctrine in determining whether a physician had standing to prosecute a CPA claim against a pharmaceutical company that allegedly failed to warn the physician of the dangers of its drug. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993). The court held that the physician had standing. *Id*. at 1060. In reaching this conclusion, the court remarked that, under the learned intermediary doctrine, "a drug company fulfills its duty by giving warning regarding prescription drugs to the physician rather than to the patient. This unique relationship results in the physician being comparable to the ordinary consumer in other settings." *Id*. at 1061. Because of this relationship, the court held that the physician "is a logical person to be the 'private attorney general'" under the CPA. *Id*.

3. Elements of Proof Under the CPA

The seminal case articulating the elements of proof in an action for damages under the CPA is *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531 (Wash. 1986). The Washington Supreme Court held in *Hangman* that, in an action for damages under the CPA, a private party must prove (1) an unfair or deceptive act or practice, (2) in the conduct of trade or

commerce, (3) that has an impact on the public interest, (4) injury to the plaintiff in their business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered. *Id*. at 533.

4. Pleading Requirements Under the CPA

The CPA does not articulate specific pleading requirements. Case law, however, informs that "[a] litigant must plead more than general facts in a complaint to properly allege a CPA cause of action." *Trask v. Butler*, 872 P.2d 1080, 1086 (Wash. 1994). In order to obtain damages for violation of the CPA, the cause of action under the Act must be stated in the pleading. *Id*. *See also Michael v. Mosquera-Lacy*, 165 P.3d 43, 47 (Wash. App. 2007) (holding that, given Washington's notice pleading requirements under CR 8(a), there is no requirement that a plaintiff asserting a CPA claim "completely detail the damages that [they] suffered within the complaint.").

5. Defendants and Activities Exempt from the Scope of the CPA

The CPA explicitly exempts certain organizations from liability. *See* RCW 19.86.070 (labor, agricultural, or horticultural organizations). Additionally, some actions or transactions that are "specifically permitted" by a regulatory agency may qualify for exemption from the CPA. *See* RCW 19.86.170; *Singleton v. Naegeli Reporting Corp.*, 175 P.3d 594, 598 (Wash. App. 2008) ("[a]n action or transaction is not exempt from the CPA merely because it is regulated generally or merely because a regulating agency complies with it. Instead, the agency must take overt affirmative actions specifically to permit the actions or transactions engaged in by the person or entity involved in a [CPA] complaint." (internal citations and quotations omitted). Municipal corporations and political subdivisions of the state also are exempt from operation of the CPA. *Wash. Nat. Gas Co. v. Public Utility Dist. No. 1 of Snohomish County*, 459 P.2d 633, 635-36 (Wash. 1969).

6. Damages Available Under the CPA

Recovery of damages under the CPA is governed by RCW 19.86.090, which provides that "[a]ny person who is injured in his or her business or property by a violation of [the Act] . . . may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both. . . ." Washington courts have recognized that damages under the CPA are liberally interpreted. *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 656 P.2d 1130, 1133 (Wash. App. 1983) ("Damages, for purposes of the Consumer Protection Act, must be broadly construed so that the beneficial purpose of the Act may be served."). For instance, Washington courts have held that damages such as those for loss of reputation are recoverable under the CPA "so long as the damages are supported by the evidence." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1064 (Wash. 1993). The CPA does not provide any statutory minimum damages.

a. Personal Injury and Emotional Distress Damages

A personal injury is not an injury to business or property and will not sustain a claim for violation of the CPA. *Stevens v. Hyde Athletic Indus., Inc.*, 773 P.2d 871, 872-73 (Wash. App. 1989). Likewise, emotional distress damages, standing alone, cannot be recovered under the

CPA. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1064 (Wash. 1993) (damages for mental pain and suffering are not recoverable for a violation of the CPA because the statute, by its terms, only allows recovery for harm to "business or property"); *Keyes v. Bollinger*, 640 P.2d 1077, 1084 (Wash. App. 1982) (holding that mental distress, embarrassment, and inconvenience, "without more, are not compensable under the Consumer Protection Act" but recognizing that pecuniary losses may be claimed if they are caused by injury such as mental distress, embarrassment, and inconvenience).

b. Multiple or Punitive Damages

Under RCW 19.86.090, a court has the discretion to increase an award of damages to an amount not to exceed three times the actual damages sustained, provided that such a discretionary increased damage award for violation of RCW 19.86.020 does not exceed $10,000. Actual damages are required before treble damages may be awarded. *Mason v. Mortgage Am., Inc.*, 792 P.2d 142, 149 (Wash. 1990). Note also that where more than one CPA violation results in a single harm, multiple awards of exemplary damages are not authorized by the CPA. *Edmonds v. John L. Scott Real Estate, Inc.*, 942 P.2d 1072, 1080 (Wash. App. 1997). The CPA does not authorize an award for punitive damages apart from the treble damage award up to $10,000 provided in RCW 19.86.090.

c. Costs and Attorney Fees

Recovery of the "costs of the suit, including a reasonable attorney's fee" is authorized under RCW 19.86.090. Actual monetary damages are not a prerequisite to recovery of attorney fees. *Mason v. Mortgage Am., Inc.*, 792 P.2d 142, 149 (Wash. 1990) (noting that "[a]n injury cognizable under the Act will sustain an award of attorneys' fees, while treble damages are based upon 'actual' damages awarded.").

d. Successor Corporate Liability

There are no reported decisions from Washington courts addressing successor corporate liability in the context of a CPA claim. In general, under Washington law, a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation by reason of the asset purchase. Washington law recognizes four exceptions to this general rule and has developed a successor liability test for product liability claims. *See generally* 16 Wash. Prac., Tort Law and Practice § 16.34 (3d ed.).

B. Class Actions Under the CPA

The CPA does not expressly permit claims to be brought as class actions, but it likewise does not expressly prohibit class actions. Washington courts have certified class actions under the CPA, and such certification decisions are governed by Rule 23 of the Superior Court Civil Rules ("CR").

1. Class Certification Requirements

The CPA does not expressly address class certification requirements. Rather, class certification is governed by CR 23(a) and (b). Although it is necessary to strictly comply with

CR 23's requirements, Washington courts give liberal interpretation to the rule to serve the policy behind the class action device. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1007 (Wash. 2007).

Under CR 23(a), there are four prerequisites for any class action: (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy of representation. To qualify for class action treatment, an action must also satisfy any one of three additional requirements articulated in CR 23(b). A court may certify a class under CR 23(b)(1) if the prosecution of separate actions would create a risk of (i) "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class," or (ii) "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest." CR 23(b)(2) allows certification of a class seeking injunctive or declaratory relief against a party who has acted on grounds generally applicable to the class. Certification of a class under CR 23(b)(3) is proper only if "questions of law and fact common to the members of the class predominate over any questions affecting only individual members" and if a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

CR 23(c)(1) provides that the determination of whether an action is to be maintained as a class action should be made "[a]s soon as practicable after commencement of an action brought as a class action."

Class actions brought in King County Superior Court also must comport with the detailed King County Local Rule 23. This local rule governs, among other things, the timing of the class certification motion, the form of class action pleadings, and procedures for settlement hearings and judgments. For instance, King County Local Rule 23(b) requires that the motion for class certification be made within 90 days after all parties have answered or been ordered in default unless the period is extended on motion for good cause.

2. Class Action Notice Requirements

Because the CPA has no provisions governing class actions, class action notice requirements likewise are governed by CR 23, specifically CR 23(c)(2) and (d)(2). CR 23(c)(2) requires that "the best notice practicable under the circumstances" be given to the members of any class certified under CR 23(b)(3) (including individual notice to all members who can be identified "through reasonable effort"). Notice under CR 23(c)(2) must advise each member (i) of the opportunity to opt out of the class, (ii) that the judgment will include all members who do not request exclusion, and (iii) that any member who does not request exclusion may enter an appearance through his counsel. Additionally, the court has discretion under CR 23(d)(2) to require notice "of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate."

3. National Class Action Suits in Washington Courts

Class action suits with nationwide classes involving CPA claims have been allowed to proceed in Washington courts. For example, in *Schnall v. AT & T Wireless Servs., Inc.*, 161 P.3d

395 (Wash. App. 2007), the Washington Court of Appeals reversed the trial court's denial of class certification in a case involving a nationwide class and alleging breach of contract and violation of the CPA. The plaintiffs alleged the defendant violated the CPA by charging a "universal connectivity charge" without disclosing it in advertisements and misleading its customers by categorizing the charge as a tax, surcharge, or regulatory fee. *Id*. at 397. The Washington Court of Appeals held, among other things, that conflicts of law principles mandated that the CPA applied to the plaintiffs' nationwide claims. *Id*. at 402-03.

4. Federal Preemption and Removal

Recent decisions from Washington courts and federal courts sitting in Washington have addressed issues of federal preemption of state-law claims (including CPA claims) in class action suits. In *McCurry v. Chevy Chase Bank, F.S.B.*, ___ P.3d ____, 2008 WL 2231460 (Wash. App. June 2, 2008), plaintiffs filed a putative class action suit alleging that certain fees charged by the defendant bank in connection with the payoff of a home loan resulted in a breach of contract, unjust enrichment, and violation of the CPA. *Id*. at *1. The trial court dismissed the complaint under CR 12(b)(6) because regulations issued by the federal Office of Thrift Supervision, pursuant to its authority under the federal Home Owners' Loan Act, result in field preemption. *Id.* The Washington Court of Appeals affirmed on the grounds that the federal regulations preempted the state-law claims. In *McKee v. AT & T Corp*, 191 P.3d 845 (Wash. 2008), the plaintiff filed a class-action suit alleging, among other things, violations of the CPA based on defendant's improper charging of city utility surcharges and usurious late fees. *Id*. at 848. The Washington Supreme Court rejected the defendant's arguments that the (i) Federal Communications Act of 1934 and (ii) Federal Arbitration Act preempted plaintiffs' state-law claims. *Id*. at 853-57.

With respect to removal of class action suits alleging CPA violations filed in Washington state courts, a recent decision from the U.S. District Court for the Western District of Washington held that a putative class action alleging, among other things, violations of the CPA, was properly removed from state court under the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"). *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646 (W.D. Wash. 2007). CAFA's minimal diversity and $5 million amount in controversy requirements were satisfied based on the allegations in plaintiff's complaint. *Id*.

5. The Effect of Class-Action Waiver Clauses

The Supreme Court of Washington recently invalidated a class-action waiver in an arbitration clause of a contract for cellular telephone service, explaining that "without class actions, consumers would have far less ability to vindicate the CPA." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007). The court also noted that Washington's policy favors "aggregation of small claims for purposes of efficiency, deterrence, and access to justice." *Id*. at 1005.