Unfair-But-Not-Deceptive: Confronting the Ambiguity in Washington State's Consumer Protection Act

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ABSTRACT

This Comment will argue that Washington state courts must promulgate a new, workable definition of "unfair-but-not-deceptive" under Washington's Consumer Protection Act. Washington courts have acknowledged that a business act or practice can be unfair but not deceptive, but a simple recognition does not fulfill the liberal intentions of the Consumer Protection Act. By continuously declining to define unfair-but-not-deceptive, Washington courts have left consumers vulnerable and without recourse. This Comment will highlight the approaches developed by the federal government and other state governments on how to confront the ambiguity of unfair-but-not-deceptive and will propose a concrete definition for the term.

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INTRODUCTION

On Saturday, August 27, 2011, Neil Rush parked his car on a private property easement, with permission, but his car was towed by Top Notch Towing Company. In response, Neil filed an impound hearing request form, and notice was served onto Top Notch and its owner, William Blackburn. At the impound hearing in November, the district court found that Neil's car had been illegally towed and that Neil was entitled to damages and to redeem his vehicle from Top Notch without the payment of any costs. However, William Blackburn had sold Neil's car to himself at an auction for $1 in October and did not contact Neil, even though he had Neil's contact information. Neil then sued Top Notch and William Blackburn for violation of his state's local consumer protection law, alleging that the sale of his car while the impound hearing was pending was an unfair act. The judge granted summary judgment in favor of Top Notch. The court held that Top Notch and William Blackburn's actions were not unfair under the law because (1) it was not a situation that was likely to be repeated and (2) William Blackburn's action of selling Neil's car to himself was not illegal. Consequently, Neil could not recover his car, although another court said he was entitled to because it was not clear how an act or practice is unfair in his state.[1]

Consumer protection enforcement on the state level has seen a rise as of late, particularly in Washington. Since taking office in 2013, Washington State Attorney General, Bob Ferguson, has focused the Attorney General's efforts on the Consumer Protection Division, doubling the size of the division[2] and returning more than $17 million to the state and Washington consumers during the 2016 fiscal year alone.[3] But despite this increase in state enforcement, and Washington law's broad prohibition

1. Facts based on *Rush v. Blackburn*, 361 P.3d 217 (Wash. Ct. App. 2015).

2. *About Bob Ferguson*, BOB FERGUSON: ATT'Y GEN., https://www.electbobferguson.com/about/ [https://perma.cc/PR2K-77DU].

3. ATTORNEY GENERAL OF WASHINGTON: 2016 ANNUAL REPORT 6 (2017), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/2016%20AR%20Print.pdf [https://perma.cc/DU6U-UBSB].

of "unfair and deceptive acts, and violations of many other consumer protection laws . . . ,"[4] Washington courts have avoided deciding how an act or practice can be unfair but not deceptive. Many other states and the federal government have addressed this ambiguity through court decisions. It is imperative, now more than ever, that Washington courts conduct statutory interpretation to address this hole in Washington's consumer protection law.

Part I of this Comment will address the federal consumer protection regime and the need for local consumer protection laws. Part II will discuss the current Washington Consumer Protection Act and the pitfalls of leaving unfair-but-not-deceptive undefined. Part III will explore how sister jurisdictions have confronted the unfair-but-not-deceptive ambiguity. Part IV will argue that the Washington courts should affirmatively act in promulgating a definition.

I. THE FEDERAL TRADE COMMISSION AND A NEED FOR LOCAL CONSUMER PROTECTIONS

Federal consumer protection law is not uniform, and its coverage is not comprehensive. For example, in response to increased telemarketing, robocalls, and consumer harassment, Congress passed the Telemarketing Consumer Protection Act of 1991[5] and the Telemarketing Consumer Fraud and Abuse Prevention Act[6] in 1994, with the Federal Trade Commission (FTC or the Commission) promulgating its own telemarketing rules, called the "Telemarketing Sales Rule," in 1995.[7] Robocalls still evaded federal regulation, and, consequently, Congress created the Do Not Call Registry in 2003.[8] But Federal Communications Commission (FCC) data as of February 2019 shows that there were over 232,000 consumer complaints just on robocalls to the FCC in 2018 alone.[9] Despite Congress's best

4. CAROLYN CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 64 (2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf [https://perma.cc/P46W-TT2X] (analyzing the strengths and weaknesses of the laws in each state and the District of Columbia that prohibit deceptive and unfair practices in consumer transactions). *See* WASH. REV. CODE § 19.86.020 (1961).

5. 47 U.S.C. § 227.

6. Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 (2006).

7. 16 C.F.R. §§ 310.1–310.9 (2010).

8. Do-Not-Call Implementation Act, 15 U.S.C. §§ 6151–6155 (2003). *See generally* Maria G. Hibbard, *Hanging Up Too Early: Remedies to Reduce Robocalls*, 5 CASE W. RES. J.L. TECH. & INTERNET 79, 85–96 (2014) (describing the statutory and regulatory structure that addresses robocalling and the detrimental effect of inconsistent regulation).

9. FED. COMMC'NS COMM'N, REPORT ON ROBOCALLS CG DOCKET NO. 17-59, at 4 (2019) https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf [https://perma.cc/4UZB-NRD6].

efforts in the early 2000s,[10] no uniform federal framework exists for consumer protection and its enforcement. Each federal law deals with a discrete area, usually in a unique way. The Consumer Credit Protection Act (CCPA), for instance, requires that credit terms be disclosed to borrowers and that lenders not discriminate when granting credit.[11] The CCPA also governs consumer leases,[12] debt collection,[13] and electronic fund transfers,[14] among other consumer issues. Whether consumers are protected depends largely on the type of institution with whom the consumer is doing business. Commentators have noted, for example,

> The federal law regulating debt collectors applies only to third party collectors. While a national bank is subject to many federal regulations, check cashing operations and the Internet lender PayPal are subject to state money transmitter laws that provide far less consumer protection. A national bank is subject to regulations issued by the Office of the Comptroller of the Currency (OCC), while a state chartered bank is subject to Federal Deposit Insurance Corporation (FDIC) regulations.[15]

A chaotic uncertainty exists in consumer protection laws at the federal level, as evidenced by the area of consumer lending. Each federal statute regulates a specific industry, resulting in ambiguity as to when a consumer's rights have been violated.

The FTC is the sole enforcement body for federal consumer protection. The FTC has the greatest discretion to provide guidance on the FTC Act provisions that prohibit unfair and deceptive acts or practices but has not vigorously enforced these federal statutes. For example, in the 1970s, the FTC sought to resolve consumer problems by issuing regulations that applied to an entire sector, covering a wide breadth of practices.[16] However, during the Reagan administration, the FTC began to review unfair and deceptive practices solely on a case-by-case basis;[17] the change resulted in the FTC review only affecting the target company, rather than an entire industry. While it may appear that other companies within the same industry as the target company would be on notice that

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10. *See* Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 666–68 (2008).

11. Truth-in-Lending Act, 15 U.S.C. § 1631 (2010); 15 U.S.C. § 1691(a)–(c) (2010).

12. 15 U.S.C. §§ 1667–1667(f) (2010).

13. 15 U.S.C. §§ 1692–1692(o) (2010).

14. 15 U.S.C. §§ 1693–1693(r) (2010).

15. Budnitz, *supra* note 10, at 670 (footnotes omitted).

16. *Id.* at 670–71. Examples of these 1970s-era rules include the following: The Door-to-Door Sales Rule, 16 C.F.R. § 429.1 (2020); Credit Practices Rule, 16 C.F.R. § 444.2 (2020); Holder-In-Due-Course Rule, 16 C.F.R. § 433.2 (2020).

17. Budnitz, *supra* note 10, at 671.

similar actions may be subject to FTC enforcement action, Mark Budnitz has argued that the FTC often does not act against other companies in the same sector for a number of reasons:[18]

> [The FTC] may not be aware of other companies that are engaging in that conduct. Even if it is aware, it may not have the resources to act. . . . Other abusive practices may take priority, requiring the FTC to direct its efforts elsewhere. Finally, a company may structure its act or practice in a way that is somewhat different from that of the business against which the FTC acted, giving the company the argument that its conduct should be distinguished from that which the FTC found illegal. The FTC may choose to act instead against companies where such distinctions cannot be made because they are easier to win.[19]

The FTC's sporadic enforcement of federal laws to single actors minimizes consumer rights, rather than expanding protections.

Moreover, the actual consumers who are harmed by unfair and deceptive practices have no private right of action under the FTC Act.[20] Injured consumers may submit a consumer complaint to the FTC, but the FTC itself cannot resolve individual complaints.[21] Returning to Neil, our injured consumer whose car was towed by Top Notch; Under a federal regime, Neil could not sue Top Notch for a violation of consumer protection law because the FTC has exclusive enforcement. Neil could only file a complaint to the FTC about the unfair practice, but any proceeding brought by the FTC would not settle Neil's individual issues with Top Notch. Thus, in terms of federal consumer protection, consumers are underrepresented and powerless. They may file complaints with the FTC but cannot bring an action under federal law. As such, injured consumers must turn to their states' consumer protection laws to resolve their injuries. A separate state consumer protection regime allows for consumers to be proactive in protecting their rights, rather than waiting for the FTC to potentially act against one offender.

Consumers can fully exercise their political powers by passing local statutes that address their specific grievances. The doctrine of federalism is necessary to give the consumer political power to redress the limitations of the chaotic federal consumer protection laws. Washington has thusly responded to the federal chaos.

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18. *Id.*

19. *Id.* at 671 n.39 (citation omitted).

20. *Id.* at 675.

21. *FTC Complaint Assistant*, FED. TRADE COMM'N, https://www.ftccomplaintassistant.gov/#crnt&panel1-1 [https://perma.cc/AJG8-KXMW].

II. THE WASHINGTON CONSUMER PROTECTION ACT

In 1961, the Washington State Legislature passed RCW 19.86.020, commonly known as the Consumer Protection Act (CPA or the Act).[22] The Act declares: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby . . . unlawful."[23] The CPA states that the Legislature's intent and purpose was "to protect the public and foster fair and honest competition," mandating that the CPA "be liberally construed [so] that its beneficial purposes may be served."[24] The Washington Supreme Court has liberally construed the CPA in the past to fulfill the Act's legislative purpose, holding that there can be per se violations of the CPA.[25] A per se violation allows for plaintiffs to show unfair methods of competition or unfair or deceptive acts or practices through alleging the violation of another statute.[26] There are two types of statutory declarations that might constitute a per se violation of the CPA: (1) when a statute has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce or an unfair trade practice and (2) when a statute has a separate public interest declaration.[27] Statutes with both an "unfair or deceptive act in trade or commerce" declaration and a "public interest" declaration include statutes on personal wireless numbers,[28] adoption advertising,[29] credit reporting,[30] consumer leases of motor vehicles,[31] discrimination and civil rights,[32] advertising prizes and promotions,[33] and commercial telephone solicitation.[34] Statutes with only an "unfair or deceptive act or practice" declaration include laws on bail bond agents,[35] business opportunity fraud,[36] pyramid schemes,[37] collection agencies,[38] credit service

22. 1961 Wash. Sess. Laws 1956–64; *see also* Jonathan A. Mark, *Dispensing with the Public Interest Requirement in Private Causes of Action Under the Washington Consumer Protection Act*, 29 SEATTLE U. L. REV. 205, 207–14 (2005) (providing a more detailed history of the early years of the CPA).

23. WASH. REV. CODE § 19.86.020 (1961).

24. WASH. REV. CODE § 19.86.920 (1985).

25. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 535–36 (Wash. 1986).

26. *Id.*

27. *Id.*

28. WASH. REV. CODE § 19.250.040 (2008).

29. WASH. REV. CODE § 26.33.400(3) (2006).

30. WASH. REV. CODE § 19.182.150 (1993).

31. WASH. REV. CODE § 63.10.050 (1995).

32. WASH. REV. CODE § 49.60.030(3) (2009).

33. WASH. REV. CODE § 19.170.010 (1991).

34. WASH. REV. CODE §§ 19.158.010 (1989), 19.158.030 (1989).

35. WASH. REV. CODE § 18.185.210 (1993).

36. WASH. REV. CODE § 19.110.170 (1981).

37. WASH. REV. CODE § 19.275.040 (2006).

38. WASH. REV. CODE § 19.16.440 (1994).

agencies,[39] and franchises.[40] The Washington Courts have played an active role in realizing the purpose of the CPA and expanding consumer rights in Washington, and should continue.

Under the original iteration of the CPA, the State Attorney General possessed sole enforcement power. The State Legislature amended the CPA in 1970 to allow for a private right of action, in response to the need for additional enforcement capabilities.[41] The burdens on the State as a plaintiff versus a private citizen are notable. To succeed on a CPA claim, the State must prove (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; and (3) that has a public interest impact.[42] Conversely, a private plaintiff must show five distinct elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) which has a public interest impact; (4) an injury to the plaintiff's business or property; and (5) causation.[43] Common to both types of plaintiffs is the essential requirement for a CPA claim: an unfair or deceptive act. Because the CPA does not define unfair or deceptive, the onus is on the courts to define these critical words "through a gradual process of judicial inclusion and exclusion."[44] The meaning of deceptive has been well litigated.[45] Deception exists if a representation, omission, or practice that is likely to mislead a reasonable consumer occurs.[46] Washington courts have noted, however, that the "or" between unfair and deceptive is disjunctive and that "an act or practice can be unfair without being deceptive."[47]

But what does it mean for an act to be unfair without being deceptive? When pressed on this issue, Washington courts have largely deferred to federal interpretation and have not created any meaningful jurisprudence that allows for either the State or an individual plaintiff to concretely know what is required to succeed on an unfair-but-not-deceptive CPA claim. The Washington Court of Appeals has provided some guidance on what constitutes unfairness under the CPA. For

39. WASH. REV. CODE § 19.134.070(5) (1986).

40. WASH. REV. CODE § 19.100.190 (2011).

41. WASH. REV. CODE § 19.86.090 (2009). *See generally* Susan Clyatt Lybeck, Recent Developments, *New Consumer Protection Private Action Test: Clarification or Further Confusion?—* Hangman Ridge Training Stables v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986)*, 62 WASH. L. REV. 277 (1987) (for a contemporaneous response to the 1970 amendment allowing for a CPA private right of action).

42. State v. Kaiser, 254 P.3d 850, 858 (Wash Ct. App. 2011).

43. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 533 (Wash. 1986).

44. Saunders v. Lloyd's of London, 779 P.2d 249, 256–57 (Wash. 1989).

45. *See* Panag v. Farmers Ins. Co. of Wash., 204 P.3d 885, 885 (Wash. 2008); *Hangman Ridge Training Stables*, *Inc.*, 719 P.2d at 535; Behnke v. Ahrens, 294 P.3d 729, 734–76 (Wash. Ct. App. 2012).

46. State v. Mandatory Poster Agency, Inc., 398 P.3d 1271, 1276 (Wash. Ct. App. 2017).

47. Klem v. Wash. Mut. Bank, 295 P.3d 1179, 1187 (Wash. 2013).

example, the court held in *Magney v. Lincoln Mutual Savings Bank* that an act can be unfair under the CPA if it offends public policy in a general sense, is immoral, unethical, oppressive, unscrupulous, or causes substantial injury to consumers, competition, or other businesses, relying on a United States Supreme Court ruling.[48] But, another case in the Washington Court of Appeals held that unfair is an act or practice that is "not regulated by statute but in violation of public interest."[49] And the Washington Supreme Court noted in dicta that an act can be unfair without being deceptive, relying on a different federal law, 15 U.S.C. § 45(n), which states a practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits."[50] While in *Klem* the Washington Supreme Court noted that the federal law could have an impact on the meaning of the CPA, the Court also said that what that means "must wait for another day."[51]

That day has come. The uncertainty in what makes an act unfair and deference to federal interpretations can no longer stand. If the CPA is to fulfill its purpose to protect the public and foster fair and honest competition, amidst the growing rise of blue state federalism, Washington courts should create its own jurisprudence and not rely on a federal interpretation of unfair but not deceptive.

The case of *State v. Arlene's Flowers* illustrates the dilemma. Washington sued Arlene's Flowers, a florist located in Richland, who refused to provide services for a same-sex wedding in 2013.[52] The owner of Arlene's Flowers rejected the Attorney General's request to comply with Washington law prohibiting businesses from discriminating on the basis of sexual orientation.[53] Subsequently, the State filed suit claiming a per se CPA violation under Washington's Law Against Discrimination (WLAD) and a CPA violation for an unfair practice in trade or commerce.[54] The trial court found that Arlene's Flowers violated the CPA as an unfair or deceptive act, even if the florist had not committed a per se violation of the Act.[55] In a unanimous decision, the Washington Supreme

48. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); Magney v. Lincoln Mut. Sav. Bank, 659 P.2d 537, 545 (Wash. Ct. App. 1983).

49. Folweiler Chiropractic, PS v. Am. Fam. Ins. Co., 429 P.3d 813, 818 (Wash. Ct. App. 2018) (quoting *Klem*, 295 P.3d at 1187) (internal quotations omitted).

50. *Klem*, 295 P.3d at 1187.

51. *Id.*

52. Complaint for Injunctive and Other Relief Under the Consumer Protection Act, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 13-2-00871-5), 2013 WL 10257916 [hereinafter Arlene's Flowers State Complaint].

53. AG ANNUAL REPORT, *supra* note 3.

54. Arlene's Flowers State Complaint, *supra* note 52.

55. State v. Arlene's Flowers, Inc., 389 P.3d 543, 567 n.23 (Wash. 2017).

Court upheld the trial court's decision, holding that Arlene's Flowers discriminated on the basis of sexual orientation[56] and that the owner's sale of floral arrangements was not expressive conduct protected by the First Amendment.[57]

While the trial court's finding of the unfair CPA violation was not an issue on appeal,[58] the United States Supreme Court vacated the Washington Supreme Court ruling and remanded for further consideration in light of its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[59] *Masterpiece Cakeshop* is a strikingly similar case in which a Colorado baker refused to create a wedding cake for a same-sex couple.[60] The United States Supreme Court declared that the Colorado Civil Rights Commission, acting pursuant to the Colorado Anti–Discrimination Act, violated the Free Exercise Clause and that religious and philosophical objections to gay marriage are protected views and may be forms of expression.[61]

Arlene's Flowers' act of denying flowers to a same-sex couple was an unfair-but-not-deceptive act. The Washington Supreme Court on remand, and in reviewing *Arlene's Flowers* in light of *Masterpiece Cakeshop*, did not hold that Arlene's Flowers' objections to gay marriage are protected views.[62] But again, Arlene's Flowers has filed a writ of certiorari to the United States Supreme Court to review the Washington Supreme Court's decision from the perspective of *Masterpiece Cakeshop*.[63] While Justice Anthony Kennedy—the author of the majority opinion in *Masterpiece*—has retired, it is entirely possible for the increasingly conservative Supreme Court to side with Arlene's Flowers.[64]

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56. *Id.* at 552.

57. *Id.* at 556–60. The owner of Arlene's Flowers argued that her floral arrangements are artistic expressions protected by both the state and federal constitutions and that the state discrimination law impermissibly compelled her to speak in favor of same-sex marriage. *Id.* at 556. The Court found that the owner did not carry her burden to prove her floral arrangements constituted speech. *Id.*

58. *Id.* at 567 n.23.

59. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.).

60. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

61. *Id.* at 1731–32.

62. *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019) (finding that WLAD was neutrally applied to the owner of Arlene's Flowers and that the application of WLAD neither violated her First Amendment protections against compelled speech nor violated her right to religious free exercise).

63. Petition for Writ of Certiorari, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.) (No. 17-108), 2017 WL 3126218.

64. Following the retirement of Justice Kennedy, President Trump appointed another conservative justice to the Court—Brett Kavanaugh. Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/3B7F-SATM]. Justice Kavanaugh is a well-respected member of the Federalist Society, an influential conservative legal group, and has spoken at Federalist Society events, even after his confirmation to the Supreme Court.

If that is the case, the state's attorney general would not succeed on its per se CPA violation claim through WLAD; but it is unclear whether this would impact the consumers, a same-sex couple who have been together since 2004 and who simply wanted to purchase flowers for their wedding,[65] and their private right of action.

What is clear is that, in *Arlene's Flowers*, both the State and the private consumers[66] alleged a CPA violation of an unfair-but-not-deceptive practice.[67] And no reliable jurisprudence exists for the State or consumers to utilize. If Washington is to fulfill the promise and purpose of the CPA, the court must define when an act is unfair-but-not-deceptive.

III. SISTER JURISDICTIONS CONFRONT THE AMBIGUITY

A. Federal: Unfair Consumer Injury

Relying on *FTC v. Sperry and Hutchinson Co.*, the Washington Court of Appeals held in *Magney* that an act can be unfair under the CPA if it (1) offends public policy in a general sense, (2) is immoral, unethical, oppressive, or unscrupulous, or (3) causes substantial injury to consumers, competition, or other businesses.[68] In *FTC v. Sperry and Hutchinson Co.*, the United States Supreme Court adopted the three factor test that the FTC considers in determining whether a practice is unfair.[69] The *Sperry* three factor test is specific to Section 5 of the Federal Trade Commission Act (FTC Act) that prohibits, in part, "unfair . . . acts or practices in or affecting commerce."[70] The federal statute also notes, however, that public policy "may not serve as a primary basis" for a determination of

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See Adam Liptak, *Kavanaugh Recalls His Confirmation at Conservative Legal Group's Annual Gala*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html [https://perma.cc/6WFJ-7RYS]. Justice Kavanaugh's addition to the Supreme Court has only contributed to the growing conservative trend of the Roberts Court. *See* Amelia Thomson-DeVeaux, *Is the Supreme Court Heading for a Conservative Revolution?*, FIVETHIRTYEIGHT (Oct. 7, 2019), https://fivethirtyeight.com/features/is-the-supreme-court-heading-for-a-conservative-revolution [https://perma.cc/Z9PK-6ZXN]. It is therefore very likely, in the author's opinion, that the current makeup of the Supreme Court would side with the florist in this case and extend *Masterpiece Cakeshop*'s ruling.

65. ACLU, Ingersoll v. Arlene's Flowers–*Complaint*, https://www.aclu.org/legal-document/ingersoll-v-arlenes-flowers-complaint [https://perma.cc/QH65-G9DV] [hereinafter Arlene's Flowers Ingersoll Complaint].

66. The couple, Robert Ingersoll and Curtis Freed, filed a private lawsuit against Arlene's Flowers, which the trial court consolidated with the State's case. State v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017).

67. Arlene's Flowers State Complaint, *supra* note 52; Arlene's Flowers Ingersoll Complaint, *supra* 65, at 5.

68. Magney v. Lincoln Mut. Sav. Bank, 659 P.2d 537, 545 (Wash. Ct. App. 1983).

69. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) [hereinafter *Sperry* test].

70. 15 U.S.C. § 45(a)(1) (2006).

unfairness.[71] In addition, federal courts have relied on a Commission policy statement promulgated in 1980[72] that contained an abstract definition of "unfairness."[73] The Commission's policy statement asserts that unjustified substantial consumer injury is the primary focus of the FTC Act and is the most important of the three *Sperry* factors.[74]

Accordingly, Congress has since enacted 15 U.S.C. § 45(n).[75] The statute states that an act or practice that causes consumer injury is unfair when the injury satisfies three elements: (1) the injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) it must be an injury that consumers themselves could not reasonably have avoided.[76] In addition to these elements, it also appears that federal courts are interpreting 15 U.S.C. § 45(n) to include an element of causation.[77]

1. Substantial Injury

First, a federal court has held that the FTC can satisfy substantiality by establishing consumers "were injured by a practice for which they did not bargain."[78] An act or practice can also create a substantial injury by doing a small harm to a large class of people or if it raises a significant risk of concrete harm.[79] These type of injuries generally refer to consumer injuries that were monetary in nature and affected a wide range of individuals. But federal and FTC administrative court decisions have also found substantial consumer injury where the injury was physical, concrete harm or risk of such harm.[80]

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71. *Id.* at § 45(n).

72. Letter from Michael Pertschuk, Chairman, FTC to Hon. Wendell H. Ford, Chairman, Senate Consumer Subcomm. on Commerce, Sci. & Transp., and Hon. John C. Danforth, Ranking Minority Leader, Senate Consumer Subcomm. on Commerce, Sci. & Transp. (Dec. 17, 1980), reprinted in Int'l Harvester Co., 104 F.T.C. 949 app. at 1070–76, 1071 (1984) [hereinafter F.T.C. Unfairness Policy Statement], https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness [https://perma.cc/E6B3-PT46].

73. *See* Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1364 (11th Cir. 1998); *see also* FTC v. Windward Mktg., Inc., No. Civ.A 1:96–CV–615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997).

74. F.T.C. Unfairness Policy Statement, *supra* note 72.

75. 15 U.S.C. § 45(n) (2006).

76. *Id.*

77. *See infra* Part III.a.iv.

78. FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010).

79. Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 972 (D.C. Cir. 1985).

80. *See* Int'l Harvester Co., 104 F.T.C. 949 (1984) (explaining that consumers were injured by a defect in defendant's tractors, which caused hot fuel to shoot or geyser up to twenty feet); Philip Morris, Inc., 82 F.T.C. 16 (1973) (stating consumers were at a risk of harm because razor blades were distributed for a promotion without any warning labels). *Cf.* FTC v. Raladam Co., 283 U.S. 643 (1931) (showing that prior to the Section 5 amendments discussed above, the Supreme Court rejected the FTC's assertion that a diet pill manufacturer violated Section 5 because the agency failed to

In *International Harvester*, the FTC found through the defendant company's documents that out of roughly 1.3 million tractors sold, "twelve are known to have been involved in geysering accidents involving bodily injury. This is an accident rate of less than .001 percent, over a period of more than 40 years."[81] The FTC therefore knew the specific individuals who had been physically injured by the unfair practice and had even taken their depositions.[82] Thus, it appears that when the unfair practice causes a physical consumer injury, it helps prove the injury when the FTC has identified actual injured consumers. In contrast, the FTC administrative court in *Philip Morris* held that the risk of physical injury to small children, because of a corporation's actions in distributing razor blades for a promotion, amounted to an unfair act or practice.[83] The mere risk of injury because of an unsafe marketing technique was sufficient for the administrative court to hold that Philip Morris had engaged in an unfair act. *Philip Morris*, and even *International Harvester*, represent exceptions to the norm, as most of the FTC's actions under 15 U.S.C. § 45(n) involve a substantial, monetary injury.

2. Balancing

Second, the federal statute also prohibits finding a practice to be unfair if the allegedly unfair act is outweighed by countervailing benefits to consumers or to competition.[84] In probing the limits of balancing, *FTC v. Windward Marketing Inc.* held that when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or benefits to competition, then the unfairness of the practice is not outweighed.[85]

3. Consumer Avoidance

Finally, consumers must act to avoid injury before it occurs if they "have reason to anticipate the impending harm and the means to avoid it, or if consumers were aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact."[86] When determining if consumers reasonably could have avoided any injury, the

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demonstrate harm to competition; however, the Court found that the FTC did present evidence that the practices could be harmful to the consumers).

81. *Int'l Harvester Co.*, 104 F.T.C. at 1063.

82. *Id.* at 1017.

83. Philip Morris, Inc., 82 F.T.C. 16 (1973).

84. 15 U.S.C. § 45(n) (2006).

85. FTC v. Windward Mktg., Inc., No. Civ.A 1:96–CV–615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997).

86. Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1168–69 (9th Cir. 2012).

federal circuit focuses on "whether the consumers had a free and informed choice that would have enabled them to avoid the unfair practice."[87]

4. Causation?

Federal courts have also recently held that a causation element must be shown by the FTC in proving an unfair consumer injury claim. In *FTC v. Neovi, Inc.*, the Ninth Circuit analyzed, on an appeal from a summary judgment grant for the FTC, specifically whether the FTC had met the causation requirement.[88] The complaint merely pled that the defendants' "actions have resulted in financial losses to victims," and then proceeded to list out the consumer's injuries.[89] In the District of New Jersey, ruling on a defendant's motion to dismiss, the court held that the "FTC's allegations also permit the Court to reasonably infer that [the Defendant's] data-security practices *caused* theft of personal data, which ultimately *caused* substantial injury to consumers."[90] It, therefore, appears that the federal courts allow for basic level causation to satisfy the consumer injury unfairness test, but causation must nonetheless be alleged.

When all three, potentially four, elements are met for an unfairness claim, the unfairness cases brought by the FTC generally fall into one of four categories: (1) use of coercion or high pressure selling; (2) withholding material information; (3) making claims without substantiation; or (4) post-purchase rights and remedies.[91] The Commission may exercise its unfairness jurisdiction over practices that do not fit into one of the listed categories, but the FTC is still limited to only pursuing unfair acts or practices that cause consumer injury.[92]

B. Illinois: Consumer Fraud and Deceptive Business Practices Act

Illinois's version of the CPA is the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) and is intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices.[93] Like the Washington CPA, the Illinois Consumer Fraud Act is to be liberally

87. *Windward Mktg.,* 1997 WL 33642380, at *11. *See also* FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010).

88. *Neovi, Inc.*, 604 F.3d at 1155.

89. Complaint for Injunctive and Other Equitable Relief at 4, FTC v. Neovi, Inc., 604 F.3d 1150 (9th Cir. 2010) (No. 06-CV-1952-R-JMA).

90. FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602, 624 (D. N.J. 2014).

91. PETER C. WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE § 5.04 (2018).

92. *Id.*

93. 815 ILL. COMP. STAT. 505/2 (1992).

construed to effectuate its purpose.[94] The Consumer Fraud Act differs from the CPA, however, in the elements required to bring a successful claim. Illinois requires (1) a deceptive act or practice by the defendant; (2) that the defendant intended for the plaintiff to rely on the deception; and (3) that the deception occurred during a course of conduct involving trade or commerce.[95]

Illinois courts have similarly held that a business practice can be unfair-but-not-deceptive and have stated that whether a practice is unfair must be determined on a case-by-case basis.[96] The Consumer Fraud Act actually mandates that "consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act"[97] when an Illinois court determines whether an act is unfair under the Consumer Fraud Act. Similar to the Washington Courts, the Illinois Courts have acknowledged the FTC's three factor test promulgated in *Sperry and Hutchinson*; however, the Illinois Courts—unlike the Washington Courts—have actually applied the test in order to construe the Consumer Fraud Act to effectuate its purpose liberally.

For example, in *Saunders v. Michigan Avenue National Bank*, the plaintiff brought suit under the Consumer Fraud Act alleging that the Bank engaged in an unfair practice, and, on appeal, the Illinois Court of Appeals reviewed her claim using the *Sperry* test.[98] The court, in this case, failed to find that the Bank's overdraft fee practice violated the *Sperry* test; the court held that for the defendant's conduct to be unfair, the conduct must violate public policy, be so oppressive as to leave the consumer with little alternative except to submit to it, and injure the consumer.[99] This holding suggests that all three factors of the *Sperry* test must be met to establish an unfair-but-not-deceptive claim in Illinois. In *Jones v. Universal Casualty Co.*, the Illinois court rejected an unfair-but-not-deceptive claim subsequent to initially adopting the *Sperry* test that failed to plead all three factors.[100]

In response, the Illinois Supreme Court explicitly held that a plaintiff does not bear the burden of establishing all three factors.[101] The Illinois Supreme Court turned to the Connecticut Supreme Court to support its

94. Cripe v. Leiter, 703 N.E.2d 100, 191 (Ill. 1998).

95. *Id.*

96. *See* Scott v. Ass'n for Childbirth at Home, Int'l, 430 N.E.2d 1012, 1018 (Ill. 1981); Elder v. Coronet Ins. Co., 558 N.E.2d 1312, 1316 (Ill. App. Ct. 1990).

97. 815 ILL. COMP. STAT. 505/2 (1992).

98. Saunders v. Mich. Ave. Nat'l Bank, 662 N.E.2d 602, 608 (Ill. App. Ct. 1996).

99. *Id.* (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 250 n.5 (1972)).

100. *See* Jones v. Universal Cas. Co., 630 N.E.2d 94, 103 (Ill. App. Ct. 1994).

101. Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 961 (Ill. 2002).

ruling, evidencing that other state courts turn to sister jurisdictions in confronting the unfair-but-not-deceptive ambiguity.[102] The Illinois Supreme Court adopted the Connecticut ruling from *Cheshire* as its own: "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three."[103]

1. Immoral, Unethical, Oppressive, or Unscrupulous

Under the Consumer Fraud Act, a practice is considered immoral, unethical, oppressive, or unscrupulous "if it imposes a lack of meaningful choice or an unreasonable burden on the consumer."[104] In one such case, a plaintiff brought suit under the Consumer Fraud Act alleging an unfair practice when his car was wrongfully repossessed.[105] In *Demitro v. General Motors Acceptance Corp.*, an employee of General Motors discovered that the plaintiff's car had been wrongfully repossessed; rather than returning the vehicle to the plaintiff and allowing the plaintiff to bring his account current by paying a little over $2,000, the employee decided to keep the vehicle until the plaintiff could pay off the outstanding balance of $39,695.04.[106] While the court found this act caused substantial injury to the plaintiff by damaging his credit rating, it ultimately held that the defendant engaged in an unfair business practice because its act was oppressive.[107] The defendant left the plaintiff with only two options: pay the entire outstanding balance of nearly $40,000 or lose his vehicle.[108] When Illinois courts find oppressive conduct in an unfair-but-not-deceptive claim, it appears they also find substantial consumer injury.[109] Illinois courts often, if not exclusively, require a financial injury when finding that an act was oppressive.

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102. *Id.* (citing Cheshire Mortg. Serv., Inc. v. Montes, 612 A.2d 1130, 1143 (Conn. 1992)).

103. *Cheshire*, 612 A.2d at 1143–44.

104. Stonecrafters, Inc. v. Foxfire Printing and Packaging, Inc., 633 F. Supp. 2d. 610, 614 (N.D. Ill. 2009) (quoting W. Ry. Devices Corp. v. Lusida Rubber Prods., Inc., No. 06 C 0052, 2006 WL 1697119, at *6 (N.D. Ill. June 13, 2006)); *see also Robinson*, 775 N.E.2d at 962; *W. Ry. Devices Corp.*, 2006 WL 1697119, at *6.

105. Demitro v. Gen. Motors Acceptance Corp., 902 N.E.2d 1163, 1168 (Ill. App. Ct. 2009).

106. *Id.*

107. *Id.*

108. *Id.* at 1168–69.

109. *See id.*; Dubey v. Pub. Storage, Inc., 918 N.E.2d 265, 278 (Ill. App. Ct. 2009) (holding that the defendant's conduct was oppressive where the plaintiff was never served with a notice of lien or notice as to the auction sale of her property and that, as a result, the plaintiff suffered substantial injury by the permanent loss of property).

2. Public Policy

Claiming unfair-but-not-deceptive under the public policy *Sperry* factor can present a more challenging claim for plaintiffs. In Illinois, a practice can offend public policy if it violates an existing statute or common law doctrine that typically applies to such a situation.[110] In allowing a public policy violation to prove an unfair-but-not-deceptive claim through a violation of an existing statute, Illinois has effectively allowed plaintiffs to predicate their Consumer Fraud Act claims on other statutes or regulations that do not allow for private enforcement.[111] This definition of a public policy violation allows individual consumers to challenge unfair business practices when the government has failed to regulate or bring its own action against the perpetrator. In essence, Illinois has acknowledged that a regulatory violation, even if the violation itself is not a per se violation of the Consumer Fraud Act, offends public policy and is an unfair-but-not-deceptive practice. But this means that a plaintiff must also prove the elements of the additional statutory or regulatory violation in addition to the elements required to prove a Consumer Fraud Act claim.

If a plaintiff fails to identify a violation of a particular statute that contains a standard of conduct, he or she can still allege a violation of a common law doctrine that typically applies in the situation. For instance, in *Boyd v. U.S. Bank*, a plaintiff alleged an unfair-but-not-deceptive Consumer Fraud Act violation under two statutory violations and a violation of the defendants' common law duty of good faith and fair dealing.[112] While the defendants moved to dismiss the unfair practice claim under the public policy statute prong, the defendants did not seek to dismiss the unfair-but-not-deceptive claim under the theory of common law violation.[113] Illinois courts have thus strengthened consumer protection by incorporating common law violations as wrongs.

Both the statutory and common law definitions of public policy for an unfair-but-not-deceptive claim expand the Consumer Fraud Act to

110. *See* Ekl v. Knecht, 585 N.E.2d 156, 163 (Ill. App. Ct. 1991) (holding that the defendant's conduct was offensive to public policy because it implicates the common law doctrine that contracts which are the product of duress will be voided); Elder v. Coronet Ins. Co., 558 N.E.2d 1312, 1314, 1316 (Ill. App. Ct. 1990) (finding that an insurer requiring a claimant take a polygraph test to "speed up investigation and settlement of [his] claim" violated public policy because of an Illinois statutory prohibition against requiring a party to submit to a polygraph test in a civil trial or a pre-trial proceeding).

111. *See* Gainer Bank, N.A. v. Jenkins, 672 N.E.2d 317, 318–19 (Ill. App. Ct. 1996) (holding that a plaintiff may predicate a Consumer Fraud Act claim on the Illinois Motor Vehicle Retail Installment Sales Act, though this act does not create a private right of action).

112. Boyd v. U.S. Bank, N.A., *ex rel.* Sasco Aames Mortg. Loan Tr., Series 2003-1, 787 F. Supp. 2d 747, 752 (N.D. Ill. 2011).

113. *Id.*

reach most aspects of a business's duties—duties it holds not just to consumers—within Illinois. While the public policy *Sperry* factor seems to be a catch-all for the Consumer Fraud Act, what happens when an unfair-but-not-deceptive public policy claim cannot meet the requirements of a statutory or common law violation? A federal court in the Northern District of Illinois, when reviewing a Consumer Fraud Act claim, suggested that when such a situation occurs, "the determination of public policy is primarily a legislative function."[114]

In sum, a consumer in Illinois can bring an unfair-but-not-deceptive claim under the Consumer Fraud Act. The Illinois courts have liberally construed the Consumer Fraud Act to include unfair-but-not-deceptive claims and have also adopted the *Sperry* factor test. When applying the *Sperry* test in Illinois, a consumer does not need to prove all three factors, thus increasing the likelihood the consumer will succeed on his or her claim, and the liberal purpose of the Consumer Fraud Act will be fulfilled.

IV. WASHINGTON'S SOLUTION

If the CPA is to fulfill the intentions of Washington's legislature,[115] Washington courts must define unfair-but-not-deceptive. By simply holding that an act or practice *can* be unfair-but-not-deceptive but not providing a definition, the Washington courts ignore the CPA's purpose and leave consumers vulnerable when they should be protected. I call upon the courts to define unfair-but-not-deceptive and fill this hole to protect Washington's consumers.

Legislators foresaw that gaps in the CPA would exist and dictated that "the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters" when making unprecedented decisions.[116] Washington courts have acknowledged the *Sperry* test,[117] as well as the consumer injury statute,[118] in connection to the CPA mandate. But when we look to the application of federal law, the federal definition of unfair-but-not-deceptive falls short of the protections needed in Washington. While the United States Supreme Court acknowledged the three factors that make an act or practice unfair in

114. City of Chicago v. Purdue Pharma L.P., 211 F. Supp. 3d 1058, 1075 (N.D. Ill. 2016) (quoting Coleman v. E. Joliet Fire Prot. Dist., 46 N.E.3d 741, 757 (Ill. 2016)) (internal citations omitted).

115. *See* WASH. REV. CODE § 19.86.920 (2020).

116. *Id.*

117. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); Magney v. Lincoln Mut. Sav. Bank, 659 P.2d 537, 545 (Wash. Ct. App. 1983).

118. *See* Klem v. Wash. Mut. Bank, 295 P.3d 1179, 1187 (Wash. 2013).

Sperry,[119] the FTC has almost exclusively pursued unfair-but-not-deceptive acts or practices involving unjustified substantial consumer injury, pursuant to the FTC's 1980 policy statement.[120] If Washington courts were to look to the FTC solely for guidance to define unfair-but-not-deceptive, the federal definition would fall short in protecting Washington consumers.

First, not all unfair practices involve consumer injury. Consumer injuries, as pursued by the FTC, are usually monetary or concrete physical harm.[121] The unfair-but-not-deceptive claim brought against Arlene's Flowers by the Washington State Attorney General did not involve such a consumer injury; sexual orientation discrimination, on its face, is neither an injury that is monetary nor physical.[122] While the per se CPA violation against Arlene's Flowers did not fail on remand in light of the *Masterpiece Cakeshop*'s ruling, the growing conservative trend of the United States Supreme Court could remove WLAD per se CPA violations.[123] Defining unfair-but-not-deceptive only as a substantial consumer injury still inhibits the Washington Attorney General from pursuing similar claims to protect vulnerable consumers.

Second, defining unfair-but-not-deceptive as exclusively a substantial consumer injury imports an element of causation to the CPA.[124] While private plaintiffs must allege causation to succeed on a CPA claim,[125] the State does not.[126] If Washington courts only use the federal approach, they will have to import the causation element. It is at the State's advantage to only have to prove three elements for the CPA, and including causation through defining unfair-but-not-deceptive as exclusively an act or practice that causes substantial consumer injury would restrict the State rather than expand consumer rights and protections. Importing the federal definition of unfair-but-not-deceptive is not fatal to the CPA, but exclusively defining unfair-but-not-deceptive in Washington as exclusively an act or practice that causes substantial consumer injury does not fulfill the intentions of the CPA.

Washington courts should follow federal guidance for the substantial consumer injury factor of the *Sperry* test, but the courts should also allow

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119. *Sperry*, 405 U.S. at 244.

120. F.T.C Unfairness Policy Statement, *supra* note 72.

121. *See* discussion *supra* Section III.A.1 and accompanying notes.

122. *See* Arlene's Flowers State Complaint, *supra* note 52; Arlene's Flowers Ingersoll Complaint, *supra* 65.

123. *See supra* text accompanying note 64.

124. *See* FTC v. Neovi, Inc., 604 F.3d 1150, 1155–57 (9th Cir. 2010).

125. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 533 (Wash. 1986).

126. State v. Kaiser, 254 P.3d 850, 858 (Wash. Ct. App. 2011).

the other two *Sperry* factors to serve as a basis for an unfair-but-not-deceptive CPA claim. Washington courts have recognized the *Sperry* test,[127] but have not held that the test can be disjunctive as other states, like Illinois and Connecticut, have done.[128] Illinois's early unfair-but-not-deceptive jurisprudence serves as an example of how the *Sperry* test can limit consumer protections when courts require that a plaintiff meet all three factors of the test. Recognizing that the *Sperry* test follows federal consumer protection guidelines and applying it in the disjunctive allows state courts to expand beyond the limitations of the FTC Act and develop readily needed consumer protections at the state level. Washington should follow in the path of other state courts, like Illinois and Connecticut, to recognize that an act or practice can be unfair-but-not-deceptive to the degree that the act or practice meets *one* of the *Sperry* test factors.

The Washington courts should hold that oppressive conduct is conduct that leaves consumers no other choice but to submit to the unfair practice as it is defined in the *Sperry* opinion.[129] Oppressive conduct that can amount to an unfair-but-not-deceptive business practice does not have to be monetary in nature since monetary injuries to plaintiffs can also fall under the substantial injury prong of the *Sperry* test. Washington courts need not follow Illinois unfair-but-not-deceptive jurisprudence exactly. Illinois courts have found oppressive conduct under the *Sperry* test to mean acts or practices that have monetary effects on consumers.[130] Connecticut courts, on the other hand, see oppressive conduct to mean "[a] trade practice that is undertaken to maximize the defendant's profit at the expense of the plaintiff's rights[.]"[131] Washington courts can then find that conduct that does not have drastic monetary effects on consumers is oppressive. When considering this prong of the *Sperry* test to find an unfair-but-not-deceptive act or practice, a Washington court should ask whether the consumer had any choice in agreeing to the business's conduct.

An act or practice that offends public policy, the final *Sperry* factor, serves as a catch-all for unfair-but-not-deceptive claims in Illinois, and it should in Washington. Following Illinois's precedent for an unfair-but-not-deceptive public policy violation provides a private right to action for

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127. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); Magney v. Lincoln Mut. Sav. Bank, 659 P.2d 537, 545 (Wash. Ct. App. 1983).

128. *See* Cheshire Mortg. Serv., Inc. v. Montes, 612 A.2d 1130, 1143 (Conn. 1992); Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 961 (Ill. 2002).

129. *Sperry*, 405 U.S. at 244 n.5.

130. *See* discussion *supra* Section III.B.1 and accompanying notes.

131. David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. B. J. 247, 287 (2006) (quoting Votto v. Am. Car Rental, Inc., 871 A.2d 981, 985 (Conn. 2005)).

statutes that do not have a private right to action.[132] The public policy definition allows individual consumers to hold businesses responsible for violations of statutes and regulations when the state or federal government fails to intervene. Some may argue that such a definition for an unfair-but-not-deceptive act or practice would disempower the State in its own enforcement actions. I argue that defining public policy violations in such a way enhances the regulations and statutes. Businesses must follow such regulations and statutes or face enforcement from the State as well as from harmed consumers. While defining public policy in this way would require the State and private plaintiffs to establish the elements of the regulatory or statutory violation, this requirement is no different than the requirements of a per se CPA violation.[133] Additionally, importing the Washington legislature's definitions of public policy allows consumers and the legislature to provide additional definitions of unfair-but-not-deceptive public policy violations.

Washington courts must hold that any of the three *Sperry* factors can serve as the basis of an unfair-but-not-deceptive CPA claim. Doing so will both fulfill the legislative purpose of the CPA, which is to be liberally construed, and expand consumer protection rights in Washington.

CONCLUSION

Washington State has a comprehensive consumer protection law and a dedicated consumer advocate as State Attorney General. But the CPA as it stands today is insufficient to protect consumers from acts or practices that are unfair-but-not-deceptive. By continuously declining to define unfair-but-not-deceptive, Washington courts have left consumers vulnerable and without recourse. If a business practice is not deceptive by being either a representation, omission, or practice that is likely to mislead a reasonable consumer,[134] but causes consumer harm, that practice is still harmful. For example, the consumer harmed in *Arlene's Flowers* was not misled, but was denied services because of his sexual orientation: a patently unfair act.[135] If the U.S. Supreme Court grants the petition for writ of certiorari, and the per se violation of the CPA fails, such a consumer is left vulnerable to such abhorrent business practices because Washington courts have failed to define unfair-but-not-deceptive.

Washington's sister jurisdictions demonstrate that it is possible to confront the ambiguity of unfair-but-not-deceptive. Washington courts

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132. *See generally* Ekl v. Knecht, 585 N.E.2d 156 (Ill. App. Ct. 1991); Elder v. Coronet Ins. Co., 558 N.E.2d 1312 (Ill. App. Ct. 1990).

133. *See supra* text accompanying notes 25–40.

134. State v. Mandatory Poster Agency, Inc., 398 P.3d 1271, 1276 (Wash. Ct. App. 2017).

135. Arlene's Flowers State Complaint, *supra* note 52.

should actively promulgate the CPA's definition of unfair-but-not-deceptive. Washington courts must acknowledge that consumers are harmed without being deceived, and individuals will be empowered and stand against business practices that are unfair but not deceptive. Anything less fails to effectuate the law's protective purpose.