CONSUMER PROTECTION ACT

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Consumer Protection Act (CPA)

- RCW 19.86, "Unfair Business Practices-Consumer Protection Act"
- Protects the marketplace from unfair, deceptive, and anti-competitive practices
- The Attorney General is the primary enforcer of the CPA
- The CPA affords a private right of action

Elements of a CPA Violation

AGO Enforcement

1. Unfair or deceptive act or practice;
2. Occurs in trade or commerce; and
3. Public interest impact

Private Enforcement

1. Unfair or deceptive act or practice;
2. Occurs in trade or commerce;
3. Public interest impact;
4. Injury; and
5. Causation

Hangman Ridge Training Stables v. Safeco Ins. Co. (1986)

Elements of a CPA Violation

- Actual deception is not required; capacity to deceive a substantial portion of the public is all that is necessary
- Intent to deceive is not required
- But, private plaintiffs must prove injury and causation

Hangman Ridge Training Stables v. Safeco Ins. Co. (1986)

Relief for CPA Violation

Attorney General Action

- Injunctions
- Consumer restitution
- Civil penalties of up to $2000 per violation
- Prevailing party (including defendant) can obtain costs and attorney's fees

Private Action

- Injunctions
- Actual damages suffered
  - Court can treble damages up to $25,000
- Plaintiff can obtain costs and attorney's fees

Exemptions to CPA

- "Reasonable acts" that do not injure the public are not violations
- Conduct "otherwise regulated" does not violate the CPA
- Statute-by-statute exemptions can swallow important protections

AGO Enforcement

- **Consumer Protection Division** enforces the provision prohibiting unfair or deceptive practices (UDAPs)
- The **Antitrust Division** enforces the antitrust provisions that prohibit anticompetitive conduct
- The **Civil Rights Division** may enforce the CPA in situations involving discrimination
- The **Environmental Protection Unit** may enforce the CPA regarding environmental issues

AGO Enforcement

- AG brings actions for the benefit of the public, not individual consumers
  - Focus on defendant's conduct
  - Individual consumer restitution important, but incidental to public relief
    - Restitution is different from damages
- Deters unlawful acts or practices

AGO Enforcement – Challenges

- Civil penalties limited to $2000 per violation
- Trial courts have imposed a two-year statute of limitations on civil penalties
- Restitution means "restore" what has been "unlawfully acquired"
- AGO may have to pay defendant's attorneys' fees if case is not successful
- In privacy and tech, defendants are overseas

Consumer Protection Division – Enforcement

- Cases filed by Consumer Protection Division:
  - 2019: 53
  - 2018: 41
- Includes voluntary assurances, consent decrees, and lawsuits
- CP Division has 90-120 investigations per year; can take weeks or years to complete

Consumer Protection Division – Enforcement

- There are **no** enforcement thresholds
- No formal criteria for cases, but factors include:
  - Consumer harm
    - Dollar amounts; pervasiveness; scope; impact
  - Vulnerable consumers
  - Other enforcers
  - Local actors
  - More effective alternatives to litigation
  - Risk of negative outcome and payment of defendant's attorneys' fees

Consumer Protection Division – Enforcement

- The CPA does not require proof of harm
- The AGO is not required to prove that any consumer suffered monetary loss
- Currently, the AGO can bring actions under the CPA for failure to reasonably secure data or failing to keep information private without proof that any consumer was harmed
- Failing to secure data and protect privacy are unfair or deceptive practices under the CPA

Private Enforcement

- CPA was enacted in 1961
- Private right of action was added in 1971 in response to a need for additional enforcement capabilities
- The CPA encourages private actions to enlist the aid of private individuals in enforcing the law for the benefit of the public
- There must be a public interest impact
- Deters unlawful acts or practices

Private Enforcement

- Consumers must prove injury caused by the unfair or deceptive practice
- Consumers often include other causes of action, such as breach of contract, negligent misrepresentation, or other actions
- The quality of the private action varies, as is usual in all litigation
- Most states have a private right of action, and many require proof of injury and/or causation

AGO Enforcement vs. Private Enforcement

AGO Enforcement

- Action brought for benefit of public
- Consumer restitution is incidental to public relief
- Restitution is limited to money or property acquired through unlawful acts

Private Enforcement

- Action brought for benefit of consumer, but must have a public interest impact
- Individual injury and causation required
- Damages not limited to what was acquired by unlawful acts

AGO Enforcement vs. Private Enforcement

- The AGO does not represent consumers individually
  - We cannot act as private counsel for individual consumers or groups of consumers
  - Individual interests cannot override public benefit
  - Consumer injury and desired remedy can vary among consumers
- The public interest is the real party in interest, not individuals

CPA Enforcement of Privacy Interests

- AGO restitution remedy is inadequate to protect privacy interests:

  "To restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful."

- In many situations, privacy interests are violated without an exchange of money or property
- AGO cannot obtain damages for injury to privacy interests

CCPA vs. WA Privacy Proposals

CCPA

- Affords a private right of action for a data breach with failure to reasonably secure data; sets statutory damages
- Does not preempt local laws and ordinances
- Requires notice to third-parties
- Does not treat facial recognition separately

WA Privacy Proposals

- No private right of action
- Preempts local laws and ordinances
- No notice required to third-parties regarding consumer rights (*e.g.* requests to delete)
- Heavy focus on facial recognition