

63111-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH KAISER and HEIDI M. KAISER, husband and wife, G. HOBUS
INVESTMENTS, LLC; BOBO BUYS REAL ESTATE, LLC; PRE FLOP
LLC; and UNCLAIMED FUNDS, INC., a Washington Corporation,

Appellants.

OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv
I. ASSIGNMENTS OF ERROR	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
A. Issues Pertaining to Order Granting Summary Judgment	2
B. Issues Pertaining to Findings of Fact and Conclusions of Law	4
III. STATEMENT OF THE CASE	4
1. General background on Kaiser and his business activities	4
2. The origins of this lawsuit	6
3. Additional claims arising during litigation	8
4. Decisions in the trial court	9
IV. SUMMARY OF THE ARGUMENT	10
V. ARGUMENT	11
1. The State Must Show Three Essential Elements for Each Consumer Protection Act (“CPA”) Violation	11
2. The Standard of Review	12

3. As a matter of law, Kaiser’s overage transactions did not violate RCW 84.64.080, and even if they had, this would not constitute a <i>per se</i> violation of the CPA	13
4. There are genuine issues of material fact concerning whether Kaiser’s overage transactions were deceptive, unfair, or unconscionable under the CPA	15
5. The trial court erred both in the manner and substance of its holding that Kaiser’s partial interest transactions do not result in homeowners keeping their homes	29
6. There are at least genuine issues of material fact as to whether Kaiser’s advertisements and solicitations were deceptive under the CPA	31
7. Kaiser’s use of limited powers of attorney in connection with the overage transactions did not violate the CPA	36
8. Kaiser’s use of attorneys in connection with the overage transactions did not violate the CPA	37
9. Kaiser’s restitution fund solicitations lacked the capacity to deceive the public	38
10. Kaiser’s manner of executing real estate excise tax forms also lacked the capacity to deceive the public	40
11. The trial court erred as a matter of law when it concluded that Kaiser violated the CPA simply by <i>being</i> both the trustee and a beneficiary of the partial interest trusts	41
12. The trial court erred as a matter of law when allowing participants in partial interest deals to repudiate their signatures on written deeds and disclaimers	43
13. The trial court erred as a matter of law in concluding that the partial interest deals were unfair	45

14. The trial court failed to make findings regarding the public interest element in connection with the “four other deals” discussed in the Findings and Conclusions	47
15. Errors in the trial court’s determinations on summary judgment and in its Findings and Conclusions require vacation or revision of the remedies imposed	48
16. Kaiser requests his attorney’s fees on appeal pursuant to RAP 18.1(b) and RCW 19.86.080(1)	49
VI. CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2005).....	25, 26, 27
<i>Carlstrom v. Hanline</i> , 98 Wn. App. 780, 990 P.2d 986 (2000).....	44
<i>Charvat v. Farmers Insurance Columbus, Inc.</i> , 178 Ohio App.3d 118, 897 N.E.2d 167 (2008).....	36
<i>Com. By Corbett v. People’s Benefit Services, Inc.</i> , 923 A.2d 1230, (Pa. 2007).....	32
<i>Com. By Packel v. Tolleson</i> , 14 Pa.Cmwlt. 72, 321 A.2d 664 (Pa.1974).....	35
<i>Edmonds v. John L. Scott Real Estate, Inc.</i> , 87 Wn. App. 834, 942 P.2d 1072 (1997).....	42
<i>Fisher v. World Wide Trophy Outfitters, Ltd.</i> , 15 Wn. App. 742, 551 P.2d 1398 (1976).....	31
<i>Floorsheim v. FTC</i> , 411 F.2d 874 (9 th Cir. 1969).....	35
<i>FTC v. Sperry & Hutchinson Co.</i> , 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)).....	22
<i>Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.</i> , 86 Wn. App. 732, 935 P.2d 628 (1997).....	22
<i>Gossett v. Farmers Ins. Co. of Washington</i> , 133 Wn.2d 954, 948 P.2d 1264 (1997).....	43
<i>Gray v. Reeves</i> , 69 Wash. 374, 125 P. 162 (1912)	21
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	13, 15, 34, 41

<i>Henery v. Robinson</i> , 67 Wn. App. 277, 834 P.2d 1091 (1992)	38
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 91 Wn. App. 722, 959 P.2d 1158 (1998).....	19
<i>Holiday Resort Community Ass'n v. Echo Lakes Assocs., LLC</i> , 134 Wn. App. 210, 135 P.3d 499(2006).....	34
<i>Howell v. Kraft</i> , 10 Wn. App. 266, 517 P.2d 203 (1974)	48
<i>In the Matter of the Estate of Drinkwater</i> , 22 Wn. App. 26, 587 P.2d 606 (1978).....	42
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	12, 19
<i>Jeffery v. Weintraub</i> , 32 Wn. App. 536, 648 P.2d 914 (1982)	24
<i>Laidlaw v. Organ</i> , 15 U.S. 178, 4 L.Ed. 214, 2 Wheat. 178 (1817).	18, 19
<i>Leingang v. Pierce County Medical Bureau</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	31
<i>Liebergesell v. Evans</i> , 93 Wn.2d 881, 613 P.2d 1170 (1980).....	19, 20, 21
<i>Luna v. Household Finance Corp. III</i> , 236 F.Supp.2d 1166 (W.D. Wa. 2002)	25
<i>M.A. Mortenson Co. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000).....	25
<i>Magney v. Lincoln Mutual Savings Bank</i> , 34 Wn. App. 45, 659 P.2d 537 (1983).....	22
<i>McCutcheon v. Brownfield</i> , 2 Wn. App. 348, 467 P.2d 868 (1970).....	21
<i>McGary v. Westlake Investors</i> , 99 Wn.2d 280, 661 P.2d 971 (1983).....	44
<i>McGowan v. Pillsbury Co.</i> , 723 F.Supp. 530 (W.D. Wash. 1989).....	22

<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002).....	25
<i>Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002)).....	38
<i>Nagrampa v. MailCoups, Inc.</i> , 469 F.3d 1257 (9 th Cir. 2006),.....	27
<i>Nat'l Bank of Wash. v. Equity Investors</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	10, 11, 43, 44
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 896 P.2d 1258 (1995).....	23, 24
<i>Pardee v. Jolly</i> , 163 Wn.2d 558, 182 P.3d 967 (2008).....	13
<i>Pilcher v. Dep't of Rev.</i> , 112 Wn. App. 428, 49 P.3d 947 (2002).....	13
<i>Presidential Estates Apartment Assoc. v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996).....	29
<i>Robel v. Roundup Corporation</i> , 148 Wn.2d 35, 59 P.3d 611 (2003).	48
<i>Robinson v. Avis Rent a Car</i> , 106 Wn. App. 104, 22 P.3d 818 (2001).....	9, 12, 19, 38
<i>Salter v. Heiser</i> , 36 Wn.2d 536, 219 P.2d 574 (1950).....	21
<i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn.2d 256, 544 P.2d 20 (1975)....	23
<i>Scott v. Trans-Sys., Inc.</i> , 148 Wn.2d 701, 64 P.3d 1 (2003).....	13, 42
<i>State Farm Fire and Casualty Co. v. Huynh</i> , 92 Wn. App. 454, 962 P.2d 854 (1998).....	26
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984).....	49
<i>State v. Burlison</i> , 38 Wn. App. 487, 685 P.2d 1115 (1984)	32
<i>State v. Greco</i> , 57 Wn. App. 196, 787 P.2d 940 (1990)	48
<i>State v. Kay</i> , 115 N.H. 696, 350 A.2d 336 (N.H. 1975)	35

<i>State v. State Credit Ass'n., Inc.</i> , 33 Wn. App. 617, 657 P.2d 327 (1983).....	50
<i>Steinike v. Russi</i> , 154 Wn. App. 544, 190 P.3d 60 (2008).....	17
<i>Stephenson v. Pleger</i> , 150 Wn. App. 658, 208 P.3d 583 (2009).....	13, 14, 15, 36
<i>Stienike v. Russi</i> , 154 Wn. App. 544, 190 P.3d 60 (2008).....	17
<i>Swartz v. KPMG LLC</i> , 401 F.Supp.2d 1146, (W.D. Wa. 2004)	38
<i>United States v. Dial</i> , 757 F.2d 163, (7 th Cir. 1984).....	20, 23
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	13
<i>Van Noy v. State Farm Mutual Automobile Ins. Co.</i> , 142 Wn.2d 784, 16 P.3d 574 (2001).....	20
<i>Williams Electronics Games, Inc. v. Garrity</i> , 366 F.3d 569, (7 th Cir. 2004).....	18

Statutes

Chapter 82.45 RCW	41
RCW 7.04A.070.....	25
RCW 19.86.020	11, 29, 43
RCW 19.86.080	49
RCW 19.86.920.	47
RCW 61.34.060	27
RCW 84.64.080	passim

Rules

CR 56	12, 24
CR 60	4, 29
RAP 18.1(b)	49

Other Authorities

37 <i>Am. Jur. 2d</i> Fraud and Deceit § 34	21
57 <i>Am. Jur. 2d</i> Name § 64	35
George G. Bogart, <i>The Law of Trusts and Trustees</i> (2 nd Ed., 1993).....	42
William F. Fratcher, II <i>Scott on Trusts</i> , § 99.3 (4 th ed. 1987).....	42
Jack Hirschleifer <i>et al.</i> , <i>Price Theory and Applications</i> , p. 203, 410 (7 th ed., 2005)	10
Anthony T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts," 7 <i>Journal of Legal Studies</i> 1 (1978).....	19

I. ASSIGNMENTS OF ERROR

1. The trial court erred by making the holdings in Paragraph 1 of its Order Granting Plaintiff's Motion for Partial Summary Judgment ("Order on Summary Judgment"). CP 1036-37, ¶ 1(a)-(l).
2. The trial court erred by making the holdings in Paragraph 2 of the Order on Summary Judgment. CP 1037-38, ¶ 2.
3. The trial court erred by making the holdings in Paragraph 3 of the Order on Summary Judgment. CP 1038, ¶ 3.
4. The trial court erred by making the holdings in Paragraph 4 of the Order on Summary Judgment. CP 1038, ¶4.
5. The trial court erred by making the holdings in Paragraph 5 of the Order on Summary Judgment. CP 1038, ¶ 5.
6. The trial court erred by making the holdings in Paragraph 6 of the Order on Summary Judgment. CP 1038, ¶ 6.
7. The trial court erred by making the holdings in Paragraph 7 of the Order on Summary Judgment. CP 1038, ¶ 7.
8. The trial court erred by making the holdings in Paragraph 9 of the Order on Summary Judgment. CP 1038-39, ¶ 9(a)-(c).¹
9. The trial court erred by making the holdings in Paragraph 10 of the Order on Summary Judgment. CP 1039, ¶ 10.
10. The trial court erred by making the holdings in Paragraph 11 of the Order on Summary Judgment. CP. 1039, ¶ 11.

¹ The Order on Summary Judgment has no Paragraph 8.

11. The trial court erred by entering Finding of Fact/Conclusion of Law (“FOF/COL”) No. 3.² CP 1277.
12. The trial court erred by entering FOF/COL No. 12.
13. The trial court erred by entering FOF/COL No. 13.
14. The trial court erred by entering FOF/COL No. 14.
15. The trial court erred by entering FOF/COL No. 18.
16. The trial court erred by entering FOF/COL No. 21.
17. The trial court erred by entering FOF/COL No. 23.
18. The trial court erred by entering FOF/COL No. 24.
19. The trial court erred by failing to make any finding on the public interest element of a CPA claim regarding the “four other deals” listed in the Findings and Conclusions, CP 1281- 1283, ¶¶ 24- 28.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Order Granting Summary Judgment (reviewed *de novo*)

1. Are there issues of law and fact that prevent summary judgment on the issue of the alleged deceptive nature of Kaiser’s advertisements and solicitations? (Assignment of Error No. 1).
2. If Kaiser had no fiduciary duties to the persons from whom he purchased parcels of real property, did he have the right to withhold deliberately acquired information about market conditions? (Assignment of Error No. 2)

² In its Findings of Fact and Conclusions of Law (“Findings and Conclusions”) the trial court did not separately identify findings of fact and distinguish them from conclusions of law. CP 1276-1285. Hence in these assignments of error, the trial court’s holdings after trial are referred to with the acronym “FOF/COL.”

3. Are there at least genuine issues of material fact concerning whether Kaiser had fiduciary duties to the persons from whom he purchased parcels of real property for “overage plays”? (Assignment of Error No. 2)
4. Can the question of unconscionability be resolved on summary judgment in favor of the party asserting unconscionability? (Assignment of Error No. 2)
5. Does RCW 84.64.080 vest the record owner of the property with an inalienable right to any tax overage? (Assignment of Error No. 3)
6. Did Kaiser’s use of attorneys to facilitate transactions with regard to which the person represented by the attorney had no current interest violate any fiduciary duty? (Assignment of Error No. 4)
7. Did Kaiser’s use of limited powers of attorney to facilitate transactions with regard to which the person represented by the limited power of attorney had no current interest violate any fiduciary duty? (Assignment of Error No. 5)
8. Do solicitations directed toward a handful of people have the capacity to deceive a substantial portion of the public? (Assignments of Error Nos. 8 and 9)
9. Are there genuine issues of material fact that bar granting summary judgment to the State? (Assignments of Error Nos. 6, 7, 9, and 10).

B. Issues Pertaining to Findings of Fact and Conclusions of Law (factual issues reviewed for substantial evidence; legal issues reviewed de novo; implicit application of CR 60(a) reviewed for abuse of discretion)

10. Did the trial court accurately summarize its prior holding on summary judgment, or in the alternative abuse its discretion in under CR 60(a) by correcting its decision without prior notice to Kaiser?

(Assignment of Error No. 11)

11. Did the trial court fail to apply the proper standard of proof for allowing parties to written contracts and deeds to repudiate such documents, thus leading to a lack of substantial evidence in support of the trial court's findings of fact? (Assignments of Error Nos. 13-15).

12. Did the trial court err as a matter of law in determining that Kaiser's partial interest deals were unfair? (Assignments of Error Nos. 12, 16 and 17).

13. Did the trial court fail to make findings regarding the public interest element of the CPA claims involving the "four other deals," thus necessitating remand? (Assignment of Error No. 20)

III. STATEMENT OF THE CASE

1. General background on Kaiser and his business activities

Joseph Kaiser (Kaiser) is a real estate investor who specializes in properties facing foreclosure for failure to pay taxes. CP 821. Beginning in the late 1990s, he collaborated with former co-defendant Walter Scamehorn ("Scamehorn") to found and operate Fiscal Dynamics, Inc. ("Fiscal") and Cumulative, LLC ("Cumulative"). CP 837-38, ¶¶ 41-42. Working through these companies, Kaiser, Scamehorn, and a small

number of other associates offered several different types of services to property owners facing tax foreclosure sales.

One of the services Kaiser and his associates offered was the outright purchase of properties on the verge of foreclosure. CP 823, ¶ 9. Although properties confronting an imminent tax foreclosure sale all share the characteristic that their owners have failed to pay property taxes, the properties are otherwise unique. Some contain the residence of their owner, others do not. Some appear to have potential value in excess of the taxes due, others are “junk” properties that face significant barriers to profitable development. CP 822, ¶¶ 5-6; CP 824, ¶ 10. Because of this variety in the properties at issue, it is not surprising that some of the owners simply want to sell the properties and get them off their hands. When such owners were willing to sell for what Kaiser considered a reasonable price, he was willing to buy. CP 824, ¶ 10, CP 831-32, ¶ 27.

For persons who wanted to remain living in a residence located on a property facing tax foreclosure, Kaiser offered a different set of services. Although each such transaction tended to have unique attributes, Kaiser’s “partial interest deals” all involved his paying the taxes due in exchange for taking a partial interest (ranging from 25 to 50 percent) in the property. CP 832-33, ¶ 30. Typically, Kaiser’s partial interest deals involved placing the property in a trust, for which Kaiser or one of his associated entities would serve as trustee. CP 632-33. Because the original owner was able to remain living in their home, and was not evicted as would have normally occurred if the property had proceeded to the foreclosure

sale, Kaiser and his associates sometimes referred to this sort of transaction as a “foreclosure rescue.” CP 866, lns. 13-14 (original owners not evicted), CP 832, ln. 24 (“foreclosure rescue”).

Kaiser advertised his various services by sending letters and postcards to persons shown by county public records to be confronting a tax foreclosure sale. CP 122-137. Because Kaiser could not know in advance the particular circumstances of each recipient, his solicitation letters were quite general. The point of his letters was not to propose any particular type of deal, but to convey that Kaiser was knowledgeable about foreclosures, competent at helping the owner deal with them, and non-threatening. CP 825, ¶ 13. In addition to mailing solicitations, Kaiser performed some telephone solicitations, using an automatic dialing device to leave voice mail messages with potential customers. RP (12/10/08, afternoon), p. 64 ln. 21 to p. 67 ln. 1. Kaiser also markets various educational tools (seminars, newsletters, and web-sites) for paying customers interested in learning about foreclosure investment techniques. RP (12/10/08, afternoon) p. 3.

2. The origins of this lawsuit.

Kaiser estimates that between 1998 and 2008, he and his associates engaged in approximately 400 transactions with owners of parcels facing tax foreclosure. CP 821. Kaiser is proud of his record of doing deals that generated benefits for all parties, as evidenced by a paucity of consumer complaints about his activities. CP 821. *Cf.* CP 865-66 (citing only four

“non-lawsuit complaints,” and listing Kaiser or an affiliated entity as the plaintiff in 12 of the 15 lawsuits).

However, some of Kaiser’s actions were controversial, at least for county auditors and treasurers. In particular, when Kaiser bought a property outright, he sometimes would simply let the property proceed to the tax sale, as was his right. CP 824. If the property sold at the tax sale for more than the amount of taxes due, Kaiser would claim the excess (the “overage”). *Id.* County officials often resisted paying on Kaiser’s claims, asserting that RCW 84.64.080 required them to pay the overage to the record owner of the property at the time the tax delinquency was declared. CP 838, ¶ 42. Kaiser believes this resistance of county officials to paying his claims for tax overages is what initially attracted the attention of the Washington State Attorney General. CP 838, lns. 13-17.

The State of Washington filed its first complaint against Kaiser and his associates on March 14, 2007. CP 41-57. Shortly thereafter, Scamehorn, Fiscal, Cumulative, and the other individual defendants apart from the Kaisers entered a Consent Decree with the State. CP 593-606. The State subsequently filed first and second amended complaints against Kaiser and entities that remained under his control, alleging that various aspects of the overage transactions and partial interest deals violated the Washington State Consumer Protection Act (“CPA”). CP 76-92, CP 98-113. Kaiser answered and counterclaimed. CP 93-97, 666-82.³

³ Kaiser’s counterclaims were eventually dismissed with prejudice. CP 1108. Kaiser does not assign error to this dismissal.

3. Additional claims arising during litigation

One of the items regulated by the Consent Decree was the distribution and use of certain restitution funds contributed by Kaiser's former colleague Walter Scamehorn. The Consent Decree explicitly stated that "[a]ny consumer restitution funds remaining undistributed two hundred and seventy days (270) following entry of this Consent Decree shall be paid to the Attorney General" CP 599, Ins 12-13.

Because of his work with tax overages, Kaiser had experience with local governments claiming moneys by virtue of escheat rules. CP 813.⁴ As time passed after May 11, 2007 without any apparent effort by the State to contact the purported "victims," Kaiser became concerned that the State would keep the money pursuant to the express terms of the Consent Decree. CP 836-37. Accordingly, in late 2007 and early 2008, he used a new entity he had created, Unclaimed Funds, Inc., to send letters to a small number of persons he believed were entitled to a share of the restitution funds. CP 812, Ins. 14-15, CP 837.⁵ The letters offered help in claiming "unclaimed funds" in exchange for a contingent percentage fee. CP 612, 614, 616. Upon learning of these letters, the State amended its Complaint to allege that they constituted separate violations of the CPA. CP 107-08. At the same time, the State also amended its Complaint to bring in certain new entities through which Kaiser continued to do

⁴ The facts in Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment were attested to under penalty of perjury by Joseph Kaiser. CP 818.

⁵ The sources cited do not directly establish the number of such solicitations sent. However, Kaiser stated under penalty of perjury that there were exactly eight persons who fit the criteria for reimbursement set by the state. CP 812, Ins 14-15, CP 818.

business: Unclaimed Funds, Inc., G. Hobus Investments, LLC, Bobo Buys Real Estate, LLC, and Pre Flop, LLC. CP 99-100. Later, the trial court allowed the State to amend its Complaint a third time to add a claim about Kaiser's phone solicitations. CP 1226-27.⁶

4. Decisions in the trial court

During the summer of 2008, Kaiser and the State stipulated that the upcoming trial could be bifurcated into a liability phase and a damages phase. CP 114-16. The State then filed a Motion and Memorandum of Authorities in Support of Partial Summary Judgment ("Motion for Summary Judgment") that focused primarily on Kaiser's overage transactions. CP 625-65. Kaiser effectively prepared his response to the Motion for Summary Judgment on his own, without meaningful assistance of counsel. CP 934-43, 1019-28.

Superior Court Judge Palmer Robinson granted the State's summary judgment motion in full on November 26, 2008. CP 1035-40. The matter then proceeded to trial before Superior Court Judge Michael Trickey on December 8th -11th, 2008, and January 12th -13th, 2009. Trial testimony focused on Kaiser's alleged liability for CPA violations based on his partial interest deals, as well as for four "other deals" that did not fit within the partial interest framework. Judge Trickey entered the Findings and Conclusions proposed by the State on February 2, 2009. CP 1276-85.

⁶ The trial court found after trial that Kaiser's use of automatic dialing devices constituted a violation of the CPA. CP 1284, ¶¶ 34-35. Kaiser does not assign error to this conclusion.

The State was granted injunctive relief on February 11, 2009 (CP 1286-89), orders establishing penalties and restitution and awarding fees and costs were entered on May 6, 2009 (CP 2211-14, 2209-10), and final judgment was entered on May 29, 2009, 2009 (CP 2215-17). This appeal followed.

IV. SUMMARY OF THE ARGUMENT

Voluntary trades are mutually beneficial. Jack Hirschleifer *et al.*, *Price Theory and Applications*, p. 203, 410 (7th ed., 2005).⁷ This basic economic insight not only explains how making profits and helping one's trading partners can go hand in hand; it also underpins the entire law of contracts. Critically, the law will enforce voluntary contracts even though one of the parties later changes her mind and wishes that she had struck a different or more advantageous deal. *See, e.g., Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (noting that "[o]ne cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand").

The Washington State Consumer Protection Act ("CPA"), under which the State has proceeded against Kaiser, does not deny the insight that voluntary trade is mutually beneficial, nor does it repeal the law expressed in *Nat'l Bank of Wash.* Instead, the CPA attempts to penalize or prevent trades that are not truly voluntary, without giving parties *carte-*

⁷ Copies of the cited pages are attached to this Brief as Appendix A.

