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Jennifer Rust Muray

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PROVING CAUSE IN FACT UNDER WASHINGTON'S CONSUMER PROTECTION ACT: THE CASE FOR A REBUTTABLE PRESUMPTION OF RELIANCE

Jennifer Rust Murray

Abstract: Under Washington's Consumer Protection Act (CPA), parties must prove proximate cause to prevail in a private cause of action for damages. Proximate cause requires proof of cause in fact and legal causation. Traditionally, in a case in which a person has disseminated an affirmative representation in an attempt to induce a consumer to purchase a product, reliance provides evidence of cause in fact. Washington courts have not decided, however, which party has the burden of proving or disproving reliance. They also have not decided whether indirect proof of reliance is sufficient for proving cause in fact. This Comment argues that Washington courts should adopt a rebuttable presumption of causation in affirmative misrepresentation cases under the CPA on proof that a misrepresentation is material, widely disseminated, and that the consumer bought the product following the misrepresentation. The rebuttable presumption of causation best furthers the intent of the legislature because it is the test that federal courts use, it protects consumers, and it does not burden trade or commerce.

The Washington Consumer Protection Act (CPA) prohibits unfair or deceptive acts in trade and commerce.¹ The CPA's purpose is to complement federal law that protects consumers from the unfair acts of businesses.² In 1970, the Washington State Legislature authorized a private cause of action under the CPA.³ To prevail on a private CPA claim, a claimant must prove that the unfair or deceptive act or practice proximately caused the claimant's injuries.⁴ Proximate cause requires proof of two elements: cause in fact and legal causation.⁵ Proving cause

1. WASH. REV. CODE § 19.86.020 (2004). The CPA does not contain a definition of "unfair or deceptive acts or practices." See Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1621 n.1 (1983) [hereinafter *Toward Greater Equality*]. The author cites H.R. REP. NO. 63-1142, at 19 (1914) for the idea that "it is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." *Id.*

2. See WASH. REV. CODE § 19.86.920 (2004).

3. Unfair Business Practices and Consumer Protection, ch. 26, sec. 2, § 9, 1970 Wash. Laws 203-04 (codified as WASH. REV. CODE § 19.86.090 (2004)).

4. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 314, 858 P.2d 1054, 1062 (1993).

5. See *Hartley v. State*, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985). This Comment adopts the *Hartley* court's terminology, which defines "proximate cause" as the combination of "legal causation" and "cause in fact."

in fact, however, is very difficult in affirmative misrepresentation cases, and requiring such proof often thwarts the purpose of consumer protection statutes.⁶

Reliance traditionally provides proof of causation in an affirmative misrepresentation case.⁷ However, Washington courts have not adopted a uniform standard for proving cause in fact in cases where unfair or deceptive acts induce consumers to act to their detriment.⁸ While some courts require claimants to show that they relied on the defendant's deceptive act,⁹ others require only evidence that an injury resulted from a deceptive act.¹⁰ In 2001, the Washington State Supreme Court acknowledged that Washington lacks a clear standard of proof for causation and concluded that whether the CPA requires a showing of reliance in cases of affirmative misrepresentation is "a debatable question without a clear answer under Washington law."¹¹

This Comment argues that Washington courts should not require strict proof of reliance in a private CPA action in which the plaintiff claims the defendant made an affirmative misrepresentation designed to induce a sale. Instead, Washington courts should adopt the approach of the United States Court of Appeals for the Ninth Circuit and allow a rebuttable presumption of reliance on proof that (1) the misrepresentation was material, (2) it was widely disseminated, and (3) the consumer bought the product.¹² Part I discusses the purpose of the

6. See *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

7. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 105, at 714 (4th ed. 1971).

8. See *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 196–98, 35 P.3d 351, 360 (2001) (noting that the court in the seminal case *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 719 P.2d 531 (1986), did not elaborate on the level of proof required to show causation).

9. See, e.g., *Transamerica Title Ins. Co. v. Johnson*, 103 Wash. 2d 409, 414–15, 693 P.2d 697, 700–01 (1985) (holding that where it cannot be shown that the noninsured relied upon the search and disclosure of a title insurance company and that this reliance was foreseeable, no liability based on a duty to search and disclose may be imposed); *Nuttall v. Dowell*, 31 Wash. App. 98, 111, 639 P.2d 832, 840 (1982) (holding that a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied on it).

10. See, e.g., *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wash. App. 901, 916–20, 6 P.3d 63, 70–72 (2000), *overruled by* 145 Wash. 2d 178 (2001) (holding that to show causation in a CPA case the claimant must show only that the claimant lost money because of an unfair or deceptive practice).

11. *Pickett*, 145 Wash. 2d at 197, 35 P.3d at 360.

12. See *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). This Comment discusses only affirmative misrepresentations designed to induce a sale and does not address the causation issue as it relates to unfair conduct outside of the inducement context.

CPA and describes the role that private causes of action play in advancing that purpose. Part II establishes that the CPA requires proof of causation to prevail in a private cause of action. Part III describes the “rebuttable presumption of reliance” test used by federal courts in cases decided under the Federal Trade Commission Act (FTCA). Part IV argues that Washington courts should adopt the approach of the Ninth Circuit in *Federal Trade Commission v. Figgie International, Inc.*¹³ and presume causation in cases in which a business widely disseminated a material misrepresentation and the consumer bought the product.¹⁴ This approach provides a clear test that honors the legislature’s intent that the CPA complement federal consumer protection law, furthers the CPA’s goal of protecting consumers, and does not burden trade and commerce.

I. THE LEGISLATURE INTENDED COURTS TO CONSTRUE THE CPA IN ACCORDANCE WITH FEDERAL GOALS

Washington’s state legislature enacted the CPA to further the goals of federal consumer protection statutes like the FTCA, the Sherman Antitrust Act, and the Clayton Act.¹⁵ The legislature expressly advised courts to construe the statute broadly and in conformance with federal law in order to further the purpose of the federal acts at the state level.¹⁶ Moreover, the stated primary purpose of the CPA is identical to the purpose of these federal statutes: to protect consumers from unfair and deceptive practices without unreasonably restraining trade or commerce.¹⁷

13. 994 F.2d 595 (9th Cir. 1993).

14. *See id.* at 605–06.

15. *See Tradewell Stores, Inc. v. T.B. & M., Inc.*, 7 Wash. App. 424, 431, 500 P.2d 1290, 1295 (1972). The CPA’s wording is nearly identical to that of the FTCA. *Compare* WASH. REV. CODE § 19.86.020 (2004) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”), with 15 U.S.C. § 45(a)(1) (2000) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

16. WASH. REV. CODE § 19.86.920 (2004).

17. *Id.*; *see also* Wheeler Lea Act of 1938, ch. 49, § 3, 15 U.S.C. § 45 (2000) (expressing a clear intent that the Federal Trade Commission pursue trade practices that have a detrimental effect on consumers); Sherman Act of 1890, ch. 674, § 1, 15 U.S.C. § 1 (2004) (prohibiting any contract or conspiracy that restrains trade or commerce); Clayton Act, 15 U.S.C. § 12 (2002) (protecting trade and commerce from unlawful restraints and monopolies); Federal Trade Commission Act of 1914, ch. 311, § 5, 15 U.S.C. § 45 (2000) (combating uncompetitive behavior).

A. *The Washington State Legislature Modeled the CPA After Federal Consumer Protection Statutes*

In 1961, the Washington State Legislature enacted the CPA to promote fair competition and protect consumers from deceptive or misleading business practices.¹⁸ The legislature modeled the CPA after the FTCA, which Congress originally adopted in 1914 to promote competition in trade and commerce.¹⁹ Congress revised the FTCA in 1938 to prohibit unfair or deceptive acts against consumers.²⁰ In the 1960s, courts and commentators realized that traditional common law remedies and federal regulation insufficiently protected consumers from unfair or deceptive business practices.²¹ The common law tort of deceit and fraud required plaintiffs to prove that the defendant knowingly made a false statement with the intent to deceive.²² Because this made proving fraud difficult, consumers did not have an adequate remedy against deceptive businesses practices.²³ The FTCA also did not provide consumers with adequate protection because it did not authorize a private cause of action.²⁴ For these reasons, the Washington State Legislature enacted the CPA to complement the FTCA and provide for broader enforcement of the FTCA at the state level.²⁵

18. Unfair Business Practices and Consumer Protection, ch. 216, § 2, 1961 Wash. Laws 1956 (codified as WASH. REV. CODE § 19.86.020 (2004)). The purpose of the CPA is to “protect the public and foster fair and honest competition.” *Id.* § 20, 1961 Wash. Laws 1964.

19. 15 U.S.C. § 45(a)(1).

20. *See Toward Greater Equality*, *supra* note 1, at 1621.

21. *See Toward Greater Equality*, *supra* note 1, at 1621.

22. *See, e.g.*, *Baertschi v. Jordan*, 68 Wash. 2d 478, 482, 413 P.2d 657, 660 (1966). The court stated:

It is well-settled law in this state that in order to recover for fraud, the following must be proved: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the misrepresentation; (8) his right to rely on it; (9) his consequent damage.

Id.

23. *See William A. Lovett, State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 725 n.4 (1924) (discussing the inadequacy of common law tort remedies for deceptive trade practices).

24. *See Toward Greater Equality*, *supra* note 1, at 1621–22.

25. *See Tradewell Stores, Inc. v. T.B. & M., Inc.*, 7 Wash. App. 424, 431, 500 P.2d 1290, 1295 (1972); *see also Toward Greater Equality*, *supra* note 1, at 1621–22 (noting that the FTC encouraged states to provide consumers with a private cause of action against unfair or deceptive acts).

B. The CPA Expressly Advises Courts to Construe It in Accordance with Federal Law

In keeping with the FTCA, the CPA expressly advises courts to construe its language in accordance with federal law and the final orders of the Federal Trade Commission (FTC).²⁶ In the past, courts have taken this advice seriously and have consistently followed federal precedent.²⁷ By keeping state law consistent with federal law, the legislature intended to “avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct.”²⁸ Further, by advising courts to construe the statute’s language broadly in accordance with federal law, the legislature provided guidance for courts faced with divergent opinions on matters of state law.²⁹

C. The Legislature Authorized a Private Cause of Action Under the CPA to Further the Consumer Protection Goals of the Statute

The CPA requires plaintiffs to show that a claim affects the public interest.³⁰ Like the FTCA, Washington’s CPA authorizes the Washington State Attorney General to enforce the provisions of the CPA

26. WASH. REV. CODE § 19.86.920 (2004). The statute states:

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, 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 and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

Id.

27. *See* *Blewett v. Abbott Labs.*, 86 Wash. App. 782, 787, 938 P.2d 842, 846 (1997) (“The directive to be ‘guided by’ federal law does not mean we are bound to follow it. But neither are we free to ignore it, and indeed in practice Washington courts have uniformly followed federal precedent in matters described under the Consumer Protection Act.”); *see also* *Short v. Demopolis*, 103 Wash. 2d 52, 60–61, 691 P.2d 163, 168 (1984) (relying on federal law to determine whether the practice of law occurs in trade and commerce).

28. *Blewett*, 86 Wash. App. at 788, 938 P.2d at 846.

29. *See Short*, 103 Wash. 2d at 59–60, 691 P.2d at 167–68 (resolving a state appellate court split by looking to federal law); *Ballo v. James S. Black Co.*, 39 Wash. App. 21, 26, 692 P.2d 182, 186 (1984) (adopting the tests used by federal courts to determine whether conduct violates antitrust laws).

30. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 787, 719 P.2d 531, 536 (1986) (noting that Washington is “very clearly in the minority in requiring a public interest showing of a private plaintiff”).

for the benefit of *all* Washington State consumers.³¹ In 1970, the Washington legislature amended the CPA to provide for private causes of action by individual consumers.³² The amendment allows successful plaintiffs to recover attorney fees and treble damages,³³ which makes litigation affordable. The legislature intended the private cause of action under the CPA to both provide a remedy for individual consumers and help protect the general public from deceptive business practices.³⁴ Thus, courts have construed the statute to require private causes of action to serve the public interest instead of merely providing a vehicle for individual damage recovery.³⁵

D. The Legislature Did Not Intend the CPA to Unreasonably Restrain Trade

While the overall purpose of the statute is to protect consumers,³⁶ the CPA specifically limits courts' discretion to achieve that purpose.³⁷ Courts cannot "prohibit acts or practices which are reasonable in relation to the development and preservation of business."³⁸ Courts must balance the interests of businesses in promoting trade and commerce with the interests of consumers in fairness and honesty.³⁹

In sum, the legislature enacted the CPA in order to complement

31. See WASH. REV. CODE § 19.86.080 (2004).

32. See Unfair Business Practices and Consumer Protection, ch. 26, § 2, 1970 Wash. Laws 203-04 (codified at WASH. REV. CODE § 19.86.090 (2004)).

33. See *id.*

34. See *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 334-35, 544 P.2d 88, 90.

It follows that an act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General under the act. A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest.

Id.

35. See *Hangman Ridge*, 105 Wash. 2d at 787-88, 719 P.2d at 536-37. Washington is one of the few states that require private claimants to prove that their claims affect the public interest. *Id.*

36. See WASH. REV. CODE § 19.86.920 (2004).

37. *Id.* The statute states:

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

Id.

38. *Id.*

39. *Id.*

federal consumer protection law.⁴⁰ To that end, the legislature specifically advised courts to interpret the CPA in accordance with federal law.⁴¹ Courts should therefore protect the interests of consumers without stifling trade and commerce.⁴²

II. THE CPA REQUIRES PROOF OF CAUSATION IN PRIVATE ACTIONS

Plaintiffs prevail in private actions under the CPA only when they can show causation.⁴³ Since *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*,⁴⁴ the Washington State Supreme Court has held that plaintiffs must show that the deceptive act proximately caused their injuries.⁴⁵ Proximate cause requires plaintiffs to show both cause in fact and legal causation.⁴⁶ Generally, a plaintiff in an affirmative misrepresentation case may prove cause in fact in one of three ways: affirmative proof of reliance,⁴⁷ an inference of causation from a deceptive act,⁴⁸ or a rebuttable presumption of reliance.⁴⁹ The

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* § 19.86.090. A plaintiff may sue only if he or she has been injured "in his or her business or property by a violation of RCW 19.86.020." *Id.* (emphasis added); *see also* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 793, 719 P.2d 531, 539 (1986) (holding that plaintiffs must show a "causal link . . . between the unfair or deceptive acts and the injury suffered by plaintiffs").

44. 105 Wash. 2d 778, 719 P.2d 531 (1986).

45. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 314, 858 P.2d 1054, 1062 (1993) (interpreting *Hangman Ridge* to require that the jury find that the unfair or deceptive act was a proximate cause of the injury suffered).

46. *Hartley v. State*, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985).

47. *See, e.g., Nuttall v. Dowell*, 31 Wash. App. 98, 110–11, 639 P.2d 832, 840 (1982) (holding that a party has not established a causal relationship with a misrepresentation of fact where the party does not convince the trier of fact that he or she relied on it); *see also* *Zekman v. Direct Am. Marketers*, 675 N.E.2d 994, 998 (Ill. App. Ct. 1997) (holding that the concept of reliance is "ambiguously present within the parameters of the concept of proximate cause"). The *Nuttall* court's approach to the causation requirement is identical to that of a common law deceit action. *See* PROSSER, *supra* note 7, at 685–86. At common law, reliance is the behavior that provides evidence that a misrepresentation or nondisclosure "induce[d] the plaintiff to act or to refrain from action" PROSSER, *supra* note 7, at 685–86. Similarly, in a case for "fraud in the inducement," a plaintiff must show reliance. BLACK'S LAW DICTIONARY 686 (8th ed. 2004).

48. *See, e.g., Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 702–03 (Fla. Dist. Ct. App. 2000) (holding that reliance and damages were sufficiently shown by the fact that passengers parted with money for what should have been a "pass-through" port charge, but the cruise line kept the money).

Washington State Supreme Court has not yet decided which level of proof is necessary to demonstrate cause in fact in a private action brought under the CPA.⁵⁰

A. *The Hangman Ridge Court Held that the CPA Requires Proof of a Causal Link Between the Unfair or Deceptive Act and the Injury*

The *Hangman Ridge* court concluded that causation is one of the five elements necessary to maintain a CPA claim.⁵¹ The plaintiffs tried to show that an escrow agent had caused their injuries by offering proof that the agent had failed to advise them to get individual counsel and to explain the detrimental tax consequences of a real estate transaction.⁵²

49. The United States Supreme Court adopted a rebuttable presumption of reliance in securities nondisclosure cases in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152–54 (1972). The Court recognized that unfair or deceptive practices can create a “fraud on the market” phenomenon in which omissions or misrepresentations artificially inflate the market price of a stock. *Id.* at 153; see also *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975). The Ninth Circuit stated:

A purchaser on the stock exchanges may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations. Requiring direct proof from each purchaser that he relied on a particular representation when purchasing would defeat recovery by those whose reliance was indirect, despite the fact that the causal chain is broken only if the purchaser would have purchased the stock even had he known of the misrepresentation. We decline to leave such open market purchasers unprotected.

Id.

Washington courts allow a rebuttable presumption of causation in securities fraud cases and Franchise Investment Protection Act cases on a showing that a deceptive omission was material to the consumer’s decision to purchase a product or security. See, e.g., *Morris v. Int’l Yogurt Co.*, 107 Wash. 2d 314, 328–31, 729 P.2d 33, 40–42 (1986) (applying the Franchise Investment Protection Act, WASH. REV. CODE § 19.100 (2004)); *Guarino v. Interactive Objects, Inc.*, 122 Wash. App. 95, 114–23, 86 P.3d 1175, 1185–90 (2004) (applying the Securities Act of Washington, WASH. REV. CODE § 21.20 (2004)). The rationale behind the materiality test for omissions is that it is virtually impossible to prove reliance in cases in which the plaintiff alleges nondisclosure of material misrepresentations. See Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 590 (1975) [hereinafter *Reliance*]. Requiring proof of reliance in such cases would require plaintiffs to prove reliance “on the negative” and thus would require them to demonstrate that they had in mind the converse of the omitted acts. See *id.*

50. See *Pickett v. Holland Am. Lines-Westours, Inc.*, 145 Wash. 2d 178, 196–97, 35 P.3d 351, 360 (2001).

51. See *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 784–85, 719 P.2d 531, 535 (1986). A CPA claim requires: (1) an unfair or deceptive act or practice, (2) occurring in the conduct of trade or commerce, (3) affecting the public interest, (4) injuring the plaintiff in his or her business or property, and (5) caused by the defendant. *Id.*

52. See *id.* at 781, 719 P.2d at 533.

The court determined that the link between the failure to advise the plaintiffs to seek tax advice and the actual detrimental tax consequences was “too tenuous” to establish causation.⁵³

The *Hangman Ridge* court held only that the CPA requires causation; the court did not provide a standard for proving causation.⁵⁴ To support its holding, the court cited six decisions that discussed the CPA's causation element.⁵⁵ While all six opinions cited in *Hangman Ridge* stated that the CPA requires proof of causation,⁵⁶ only *Nuttall v. Dowell*⁵⁷ directly addressed the reliance issue.⁵⁸ In *Nuttall*, the court of appeals held that “a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it.”⁵⁹ Distinguishing private causes of action from CPA actions brought by the Washington State Attorney General on behalf of all consumers,⁶⁰ the *Nuttall* court reasoned that a stricter standard for proof of cause in fact is necessary in private actions because the public interest is less compelling.⁶¹

The *Nuttall* court acknowledged that federal courts use a more lenient standard for causation in cases brought under federal consumer

53. *Id.* at 795, 719 P.2d at 540. According to the court, the plaintiffs did not show that, had they been advised, they would have sought counsel from a tax attorney and heeded the attorney's advice. *Id.* Moreover, substantial evidence existed to support the conclusion that the plaintiffs could not have avoided the tax liability with or without the advice of a tax attorney. *Id.* Because tax liability was inevitable, it “could not have been caused by the acts of the closing agent.” *Id.*

54. *See id.* at 792–93, 719 P.2d at 539.

55. *Id.* at 792–93, 719 P.2d at 540 (citing *Smith v. Olympic Bank*, 103 Wash. 2d 418, 425, 693 P.2d 92, 96 (1985); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash. 2d 409, 418, 693 P.2d 697, 702 (1985); *Anhold v. Daniels*, 94 Wash. 2d 40, 46, 614 P.2d 184, 188 (1980); *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wash. App. 653, 663, 656 P.2d 1130, 1136 (1983) (Roe, C.J., concurring in part, dissenting in part); *Nuttall v. Dowell*, 31 Wash. App. 98, 110–11, 639 P.2d 832, 840 (1982); *Lidstrand v. Silvercrest Indus.*, 28 Wash. App. 359, 368, 623 P.2d 710, 716 (1981)).

56. *See Smith*, 103 Wash. 2d at 425, 693 P.2d at 96; *Transamerica Title*, 103 Wash. 2d at 418, 693 P.2d at 702; *Anhold*, 94 Wash. 2d at 46, 614 P.2d at 188; *St. Paul Fire & Marine*, 33 Wash. App. at 663, 656 P.2d at 1136 (Roe, C.J., concurring in part, dissenting in part); *Nuttall*, 31 Wash. App. at 110–11, 639 P.2d at 840; *Lidstrand*, 28 Wash. App. at 368, 623 P.2d at 716.

57. 31 Wash. App. 98, 639 P.2d 832 (1982).

58. *Id.* at 110–11, 639 P.2d at 840.

59. *Id.* at 111, 639 P.2d at 840. In *Nuttall*, the plaintiff was a purchaser of real estate who had accused the real estate agent/seller of misrepresenting the boundary lines of the property. *Id.* at 104, 639 P.2d at 836–37. *Nuttall* purchased the property and constructed an easement road in reliance on the seller's representations only to find that the true property line placed the road wholly on his neighbor's property. *See id.* at 101–03, 639 P.2d at 835–36.

60. *See id.* at 110, 639 P.2d at 840.

61. *See id.*

protection statutes.⁶² The court reasoned that this lesser burden was justified at the federal level because of the public policies that the federal statutes serve.⁶³ Because Congress enacted the federal consumer protection statutes in order to “induce private persons to act as enforcing agents,” the court reasoned that these statutes do not require persons suing for damages to offer strict proof of individual reliance.⁶⁴

B. The Washington State Supreme Court Has Held that the CPA Requires Proof of Proximate Causation

Since its decision in *Hangman Ridge*, the Washington State Supreme Court has expanded its analysis of the causation requirement.⁶⁵ In *Washington State Physicians Insurance & Exchange Ass'n v. Fisons Corp.*,⁶⁶ the court held that the causation element of the CPA requires a finding of proximate cause.⁶⁷ Proximate cause requires proof of two elements: cause in fact and legal cause.⁶⁸

To prove “cause in fact,” the plaintiff must show that “but for” the deceptive act or practice his or her injury would not have occurred.⁶⁹ Proof of cause in fact thus requires constructing a counterfactual.⁷⁰ For example, but for the real estate agent in *Nuttall* telling the plaintiff that the property was ten acres, the plaintiff would not have bought the property.⁷¹ Proof of cause in fact is usually a question for the trier of fact.⁷² Sometimes, however, cause in fact may be a question of law.⁷³ The kind of proof required to show cause in fact will vary depending upon the type of unfair or deceptive practice addressed in the litigation.⁷⁴

62. *See id.* at 111, 639 P.2d at 840.

63. *See id.*

64. *Id.*

65. *See, e.g.,* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 314, 858 P.2d 1054, 1062 (1993) (holding that proof of causation under the CPA requires proof of proximate cause).

66. 122 Wash. 2d 299, 858 P.2d 1054 (1993).

67. *See id.* at 314, 858 P.2d at 1062.

68. *Hartley v. State*, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985).

69. *See City of Seattle v. Blume*, 134 Wash. 2d 243, 251–52, 947 P.2d 223, 227 (1997).

70. *See Robert N. Strassfeld, If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 345 (1992).

71. *See generally* *Nuttall v. Dowell*, 31 Wash. App. 98, 639 P.2d 832 (1982).

72. *Hartley*, 103 Wash. 2d at 778, 698 P.2d at 83.

73. *See Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 142, 727 P.2d 655, 664 (1986).

74. Different kinds of deceptive acts “cause” injury in different ways. A misrepresentation, for

In addition to showing cause in fact, a claimant must prove legal cause. When determining legal cause, a court asks “whether liability should attach as a matter of law given the existence of cause in fact.”⁷⁵ The court thus determines, based on policy considerations, “how far the consequences of defendant’s acts should extend.”⁷⁶ To prove legal cause, a plaintiff must convince the court that logic, common sense, justice, policy, or precedent demands that the defendant be found liable for the consequences of his or her actions.⁷⁷

C. In an Affirmative Misrepresentation Case, There Are Three Ways of Proving Cause in Fact

In inducement cases, courts have accepted three methods of proving cause in fact. Some courts have required affirmative proof that the plaintiff knew about the statement and relied upon it.⁷⁸ Other courts have allowed the jury to infer causation from proof of a deceptive act and an injury.⁷⁹ Still other courts have adopted a rebuttable presumption of reliance on proof of materiality.⁸⁰ If the plaintiff proves that the

example, must induce purchase to cause an injury: *See Johnston v. Beneficial Mgmt. Corp.*, 85 Wash. 2d 637, 643, 538 P.2d 510, 515 (1975). However, some deceptive conduct in trade or commerce does not induce a sale. *See, e.g., Salois v. Mut. of Omaha Ins. Co.*, 90 Wash. 2d 355, 359–60, 581 P.2d 1349, 1351 (1978) (holding that an insurer’s actions, in breaching its duty of good faith and fair dealing by refusing to pay insureds’ claim for benefits, were unlawful and against public policy, and thus constituted a per se “unfair trade practice” within the ambit of the CPA). In *Salois*, the insurance company caused the harm by depriving the insureds of benefits; it did not induce a person to purchase an insurance policy. *Id.*

75. *Hartley*, 103 Wash. 2d at 779, 698 P.2d at 83 (emphasis omitted).

76. *Id.*

77. *See id.*

78. *See, e.g., Nuttall v. Dowell*, 31 Wash. App. 98, 110–11, 639 P.2d 832, 840 (1982) (holding that a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied on it); *see also Zekman v. Direct Am. Marketers*, 675 N.E.2d 994, 998 (Ill. App. Ct. 1997) (holding that the concept of reliance is “ambiguously present within the parameters of the concept of proximate cause”).

79. *See, e.g., Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 702–03 (Fla. Dist. Ct. App. 2000) (holding that reliance and damages were sufficiently shown by the fact that passengers parted with money for what should have been a “pass-through” port charge, but the cruise line kept the money).

80. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152–54 (1972) (adopting a rebuttable presumption of reliance in omissions cases); *see also Morris v. Int’l Yogurt Co.*, 107 Wash. 2d 314, 328–31, 729 P.2d 33, 40–42 (1986) (applying the Franchise Investment Protection Act, WASH. REV. CODE § 19.100 (2004)); *Guarino v. Interactive Objects, Inc.*, 122 Wash. App. 95, 114–23, 86 P.3d 1175, 1185–90 (2004) (applying the Securities Act of Washington, WASH. REV. CODE § 21.20 (2004)).

misrepresentation was material, then the court will presume reliance unless the defendant can produce evidence in rebuttal.⁸¹

D. The Washington State Supreme Court Has Not Decided What Proof Is Required to Show Cause in Fact in Inducement Cases Under the CPA

Washington courts dispute whether the CPA requires proof of reliance to show cause in fact in affirmative misrepresentation actions.⁸² In 2001, the Washington State Supreme Court addressed the disagreement in *Pickett v. Holland America Line-Westours, Inc.*⁸³ In *Pickett*, a group of cruise ticket purchasers sued the cruise ship line for a violation of the CPA.⁸⁴ The plaintiffs accused Holland America of representing that “port charges and taxes” were mandatory government fees, when in fact Holland used the fees for other purposes.⁸⁵ The trial court denied the group’s motion for class certification and conditionally approved a settlement negotiated between the plaintiffs and Holland America.⁸⁶ An objecting passenger intervened and sought court disapproval of the settlement.⁸⁷ Despite the objections, the trial court

81. See *Morris*, 107 Wash. 2d at 330, 729 P.2d at 42; see also KARL B. TEGLAND, 5 WASHINGTON PRACTICE SERIES: EVIDENCE LAW & PRACTICE § 301.8 (4th ed. 2004). The procedural effect of a defendant’s rebuttal is unclear under Washington law. The Washington State Supreme Court has acknowledged several types of presumptions. *State v. Johnson*, 100 Wash. 2d 607, 615, 674 P.2d 145, 151 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wash. 2d 1, 8, 711 P.2d 1000, 1005 (1985). The court stated:

There are four basic types of presumptions The first is the “conclusive” presumption, which requires the trier of fact to infer some fact from some supporting fact. The second type of presumption is the “persuasion-shifting” presumption, which shifts the burden of persuasion and requires the trier of fact to draw a certain inference unless the defendant proves otherwise by some specified quantum of evidence, usually a preponderance of the evidence. The third type of presumption is the “production-shifting” presumption, which does not alter the burden of persuasion but does not require the trier of fact to draw a certain inference unless the defendant produces some evidence to the contrary. Each of these first three types of presumptions is “mandatory” in that the trier of fact is required in at least some cases to draw the inference. In contrast, the fourth type of presumption, the “permissive inference,” never requires, but only permits, the trier of fact to draw the inference.

Id. While federal courts have adopted a “production-shifting” presumption, Washington courts have neither adopted nor recommended this rule. See FED. R. EVID. 301; TEGLAND, *supra*, § 301.8.

82. See *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 196–97, 35 P.3d 351, 360 (2001).

83. 145 Wash. 2d 178, 35 P.3d 351 (2001).

84. See *id.* at 182, 35 P.3d at 353.

85. *Id.*

86. See *id.*

87. *Id.*

approved the settlement, finding that it was “fair, adequate, and reasonable.”⁸⁸ Division I of the Washington State Court of Appeals reversed the trial court’s approval of the settlement.⁸⁹ In turn, the Washington State Supreme Court reversed the decision and reinstated the settlement.⁹⁰

At issue in the case was whether the settlement was “fair, adequate, and reasonable.”⁹¹ To determine whether a settlement is “fair, adequate, and reasonable,” a court looks at a number of factors, including the possibility of the class’s success at trial.⁹² The trial court found that the class faced insurmountable difficulties at trial because the class would have to prove individual reliance for each plaintiff.⁹³ Division I, on the other hand, held that a party could satisfy the causation prong of the *Hangman Ridge* test by showing only that he or she lost money because of unlawful conduct.⁹⁴ Thus, Division I adopted a test for cause in fact that allows an inference of causation from proof of the deceptive act and proof of injury.⁹⁵

In drawing this conclusion, Division I relied on two Washington cases:⁹⁶ *Edmonds v. John L. Scott Real Estate, Inc.*,⁹⁷ and *Mason v. Mortgage America, Inc.*⁹⁸ The court also relied on several out-of-state cases to support its holding.⁹⁹ In *Amato v. General Motors Corp.*,¹⁰⁰ for

88. *Id.*

89. *Id.* at 182–83, 35 P.3d at 353.

90. *Id.*

91. *See id.* at 188, 35 P.3d at 356.

92. *See id.* at 192, 35 P.3d at 358.

93. *See id.* at 196, 35 P.3d at 360.

94. *See Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wash. App. 901, 916, 6 P.3d 63, 70 (2000).

95. *See id.* at 920, 6 P.3d at 72.

96. *Id.* at 916, 6 P.3d at 70; *see also* *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 854, 792 P.2d 142, 148 (1990) (holding that a claimant meets the injury element of a CPA claim if the consumer’s property interest or money is diminished because of unlawful conduct); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash. App. 834, 847, 942 P.2d 1072, 1079 (1997) (holding that injury and causation are established under the CPA if the plaintiff loses money because of unlawful conduct).

97. 87 Wash. App. 834, 942 P.2d 1072 (1997).

98. 114 Wash. 2d 842, 792 P.2d 142 (1990).

99. *See Pickett*, 101 Wash. App. at 917–19, 6 P.3d at 71–72; *see also* *Latman v. Costa Cruise Line, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000) (holding that reliance and damages were sufficiently shown by the fact that people parted with their money); *Dix v. Am. Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (holding that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations); *Amato v. Gen. Motors Corp.*, 463 N.E.2d 625, 629–31 (Ohio Ct. App. 1982)

example, the Ohio State Court of Appeals refused to require reliance in a consumer class action because such a requirement “would result in the utter negation of the fundamental objectives of class-action procedure.”¹⁰¹ Division I found these cases persuasive¹⁰² and held that Holland America “[could not] impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees.”¹⁰³ The court also held that the Washington CPA “should be liberally construed to protect the public and foster honest competition.”¹⁰⁴

The Washington State Supreme Court rejected Division I’s analysis.¹⁰⁵ According to the Supreme Court, neither of the two Washington cases cited by Division I were appropriate.¹⁰⁶ In *Edmonds*, the plaintiff had relied on the defendant’s representations.¹⁰⁷ In *Mason*, the issue of causation never arose because the court’s discussion was limited to injury.¹⁰⁸ The Washington State Supreme Court, refusing to accept the out-of-state cases,¹⁰⁹ noted that the only Washington authority “directly on point” was *Nuttall v. Dowell*, which had found that the CPA requires reliance.¹¹⁰ The court concluded that “it is enough to say that this is a debatable question without a clear answer under Washington law.”¹¹¹ Because the court needed to find only that the plaintiffs faced an uncertain outcome at trial, it did not need to decide how to prove reliance.¹¹²

(adopting a rebuttable presumption of reliance in misrepresentation class action cases).

100. 463 N.E.2d 625 (Ohio Ct. App. 1982).

101. *Id.* at 628.

102. *Pickett*, 101 Wash. App. at 918–20, 6 P.3d at 71–72.

103. *Id.*

104. *Id.*

105. *See Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 197, 35 P.3d 351, 360 (2001).

106. *Id.*

107. *Id.* (summarizing *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash. App. 834, 841–42, 942 P.2d 1072, 1076–77 (1997)).

108. *Id.* (summarizing *Mason v. Mortgage Am., Inc.*, 114 Wash. 2d 842, 854, 792 P.2d 142, 148 (1990)).

109. *Id.* at 196–97, 35 P.3d at 360.

110. *Id.*; *see also Nuttall v. Dowell*, 31 Wash. App. 98, 110–11, 639 P.2d 832, 840 (1982) (holding that in a private cause of action for damages under the CPA a plaintiff must convince the trier of fact that he relied on a vendor’s misrepresentation).

111. *Pickett*, 145 Wash. 2d at 197, 35 P.3d at 360.

112. *See id.*

After *Pickett*, it is thus unclear what kind of proof a CPA plaintiff must present to show cause in fact in a case in which an unfair or deceptive act has induced consumers to act to their detriment.¹¹³ The CPA requires parties to show that the inducement was a cause in fact of their injuries,¹¹⁴ and the behavior that normally evidences such an occurrence is reliance.¹¹⁵ However, Washington courts have not decided whether to require plaintiffs to prove reliance affirmatively, to allow an inference of cause in fact, or to create a rebuttable presumption of reliance on proof of materiality.¹¹⁶

III. FEDERAL COURTS HAVE ADOPTED A REBUTTABLE PRESUMPTION OF RELIANCE IN DISCLOSURE AND NONDISCLOSURE CASES

While Washington courts have not determined the level of proof required to show cause in fact in affirmative misrepresentation cases under the CPA,¹¹⁷ many federal courts have adopted the rebuttable presumption of reliance standard in consumer protection actions brought under Sections 13 and 19 of the FTCA.¹¹⁸ Sections 13(b) and 19 of the FTCA authorize the FTC to bring actions for redress on behalf of groups of consumers harmed by violations of the FTCA's prohibition against unfair or deceptive acts.¹¹⁹ In *Federal Trade Commission v. Figgie*

113. *See id.*

114. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 314, 858 P.2d 1054, 1062 (1993).

115. *See Nuttall*, 31 Wash. App. at 111, 639 P.2d at 840.

116. *Pickett*, 145 Wash. 2d at 197, 35 P.3d at 360 (noting that whether the CPA requires reliance is a debatable question under Washington law).

117. *Id.*

118. The following courts have adopted a rebuttable presumption of reliance in consumer protection cases: *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. 1263523 Ontario, Inc.*, 205 F. Supp. 2d 218, 223 (S.D.N.Y. 2002); *FTC v. Gill*, 183 F. Supp. 2d 1171, 1185-86 (C.D. Cal. 2001); *FTC v. Int'l Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,709 (N.D. Cal. 1983).

119. *See Federal Trade Commission Act*, § 19, tit. II, § 206(a), Pub. L. No. 93-637, 88 Stat. 2183, 2201 (1975) (codified as amended at 15 U.S.C. § 57b(a)-(b) (2000)) (authorizing the FTC to bring an action on behalf of injured consumers for any relief the court finds necessary to redress injury to consumers resulting from deceptive acts or practices); *see also Federal Trade Commission Act*, § 13(b), tit. IV, § 408(f), Pub. L. No. 93-153, 87 Stat. 576, 592 (1973) (codified as amended at 15 U.S.C. § 53(b) (2000)) (authorizing the monetary equivalent of rescission). Not all violations of 15 U.S.C. § 45 qualify for treatment under these sections. To qualify for a redress action, the FTC must prove that a reasonable person should have known that the alleged misrepresentation would

International, Inc., the Ninth Circuit adopted an evidentiary standard for determining when a court can presume reliance in an action by the FTC under these sections of the FTCA.¹²⁰ The *Figgie International* court determined that a rebuttable presumption of reliance in affirmative misrepresentation cases exists if (1) the misrepresentation is material, (2) the misrepresentation is widely disseminated, and (3) there is proof that the claimant bought the product.¹²¹

A. *Evidence that an Affirmative Misrepresentation or Nondisclosure Is Material Supports a Presumption of Reliance*

The first element of the *Figgie International* test requires a material misrepresentation.¹²² The *Figgie International* materiality test is similar to the materiality standard used by courts in securities fraud actions under Securities Exchange Commission (SEC) Rule 10b-5.¹²³ In *Affiliated Ute Citizens v. United States*,¹²⁴ the United States Supreme Court held that in a nondisclosure case under Rule 10b-5, “positive proof of reliance is not a prerequisite to recovery.”¹²⁵ Like the CPA, Rule 10b-5 prohibits deceptive acts designed to induce people to make a

deceptively induce a consumer to act to his or her detriment. *See Figgie Int'l*, 994 F.2d at 603. The court commented:

Figgie correctly argues that the Commission’s findings describing an “unfair or deceptive” trade practice under Section 5 do not necessarily describe a “dishonest or fraudulent” one under Section 19. Section 19 liability must not be a rubber stamp of Section 5 liability. Figgie appears to argue, however, that the Commission’s findings alone can never be the basis of Section 19 liability. We disagree. When the findings of the Commission in respect to the defendant’s practices are such that a reasonable person would know that the defendant’s practices were dishonest or fraudulent, the district need not engage in further fact finding other than to make the ultimate determination that a reasonable person would know. This is such a case.

Id. In *Figgie International*, the court held that the FTC satisfied this threshold requirement by showing that the defendant “misled customers about ‘the single most useful piece of information’ they could have used.” *See id.*

120. *See Figgie Int'l*, 994 F.2d at 605; *see also Gill*, 183 F. Supp. 2d at 1185 (applying the *Figgie Int'l* test in an action brought under Section 13(b) and holding that proof of reliance by each individual consumer is not necessary under the FTCA). The *Figgie International* court held that a rebuttable presumption of causation is appropriate under both Section 19, which authorizes monetary damage awards to consumers, and Section 13, which limits the remedy to injunctive relief. *Figgie Int'l*, 994 F.2d at 603.

121. *See Figgie Int'l*, 994 F.2d at 605–06.

122. *See id.* at 605.

123. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972); 17 C.F.R. § 240.10b-5 (2004).

124. 406 U.S. 128 (1972).

125. *Id.*

purchase.¹²⁶ Rule 10b-5 prohibits any device, scheme, or artifice to defraud in connection with securities transactions.¹²⁷ In *Ute Citizens*, the Court held that the “obligation to disclose and the withholding of a material fact establish the requisite element of causation in fact.”¹²⁸

While the *Ute Citizens* Court limited its holding to omissions cases, the Ninth Circuit adopted a similar rule in *Figgie International*, a case brought under the FTCA in which an affirmative misrepresentation fraudulently induced consumers to act to their detriment.¹²⁹ The Ninth Circuit reasoned that, as in omissions cases, evidence that a misrepresentation is material also supports a presumption of reliance.¹³⁰ If an affirmative misrepresentation or omission is “material,” then it is likely that a reasonable person relied upon it in making his or her decision to purchase the product.¹³¹ For example, in *Figgie International* the defendant represented to consumers that its heat detector product was a reliable life-saving fire warning device.¹³² Using the *Figgie International* test, the court could presume reliance if the FTC showed that the reliability of heat detectors as life-saving fire warning devices was material to a reasonable person's purchase.¹³³

B. Evidence that a Business Widely Disseminated a Material Misrepresentation Is Evidence of Reliance

The second element of the *Figgie International* test requires wide dissemination of the misrepresentation.¹³⁴ Like materiality, evidence of wide dissemination is evidence of reliance.¹³⁵ If a misrepresentation is widely disseminated, it is more likely that the business intended the

126. *See id.* at 151.

127. *See id.*; 17 C.F.R. § 240.10b-5.

128. *Ute Citizens*, 406 U.S. at 154.

129. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993).

130. *See id.*

131. *Id.*

132. *Id.* at 605.

133. *See id.*

134. *See id.* at 605–06.

135. *See FTC v. Int'l Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,709 (N.D. Cal. 1983); *see also FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) (adopting a rebuttable presumption of reliance in a case brought under section 13 of the FTCA on proof that the alleged fraudulent practices were the type of misrepresentation on which a reasonably prudent person would rely, that they were widely disseminated, and that the injured consumers actually purchased the product).

misrepresentation to induce customers to buy a product.¹³⁶ An intention to induce is also strong circumstantial evidence that the customer relied on the misrepresentation.¹³⁷ As one court held, “where numerous consumers are exposed to the same dubious practice by the same seller, proof of the prevalence of the practice would provide proof to all.”¹³⁸

C. *Evidence that the Consumer Bought a Product that Was the Subject of a Material, Widely Disseminated Misrepresentation Is Evidence that the Consumer Relied on the Misrepresentation*

The final element of the *Figgie International* test requires the plaintiff to provide evidence that consumers have bought the product.¹³⁹ Evidence of purchase is not direct evidence that the consumer knew about the misrepresentation or relied upon it, but is instead indirect evidence of the consumer’s reliance.¹⁴⁰

Thus, the Ninth Circuit’s three-prong test describes the type of evidence that will establish causation in an affirmative misrepresentation case.¹⁴¹ Once a plaintiff provides evidence of materiality, wide dissemination, and purchase, the court presumes reliance.¹⁴² A defendant then may rebut the presumption by providing evidence that the consumer did not rely.¹⁴³ Because Congress intended Sections 13 and 19 to serve a public purpose by authorizing the FTC to seek redress on behalf of

136. See *Int’l Diamond*, 1983-2 Trade Cas. (CCH) at 69,709.

137. See *id.*

138. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971) (holding that individual proof of reliance is not necessary in a class action fraud claim seeking rescission of installment contracts); see also *Int’l Diamond*, 1983-2 Trade Cas. (CCH) at 69,709 (citing *Vasquez* in a case brought under section 13 of the FTCA).

139. See *Figgie Int’l*, 994 F.2d at 605–06.

140. See *FTC v. 1263523 Ontario, Inc.*, 205 F. Supp. 2d 218, 223 (S.D.N.Y. 2002) (discussing the kind of evidence sufficient to establish a presumption).

141. See *Figgie Int’l*, 994 F.2d at 605–06.

142. See *id.*

143. See *id.* at 606. The *Figgie International* opinion is unclear about the precise procedural effect of rebutting the presumption. Federal Rule of Evidence 301 provides that a presumption merely shifts the burden of producing evidence to the defendant, but does not shift the burden of persuasion. FED. R. EVID. 301. At the federal level, then, a plaintiff establishes an element of his or her claim by producing evidence of the basic fact (in this case, materiality, wide dissemination, and product purchase). If the defendant rebuts the presumption, the defendant is entitled to a directed verdict. In *Figgie International*, the defendant failed to rebut the presumption, and thus the court did not reach the question of what would happen procedurally if a defendant rebuts the presumption. *Figgie Int’l*, 994 F.2d at 606.

consumers, the presumption is justified.¹⁴⁴ The test is grounded in the idea that the party guilty of wrongdoing should bear the risk resulting from his or her acts.¹⁴⁵

IV. WASHINGTON COURTS SHOULD ADOPT THE *FIGGIE INTERNATIONAL* TEST

Washington should adopt the *Figgie International* court's approach to show cause in fact in CPA affirmative misrepresentation cases. Where a defendant has deceived a large number of consumers through an affirmative misrepresentation, courts should presume reliance if the claimants can show that the misrepresentation was material and that they bought the product. Courts then should allow the defendant to rebut the presumption by showing that the consumers did not rely on the misrepresentation.¹⁴⁶ There are three reasons for adopting the *Figgie International* test. First, the test honors the legislature's intent that courts construe the statute in accordance with federal law.¹⁴⁷ Second, the test furthers the legislature's intent that courts broadly construe the statute to protect consumers.¹⁴⁸ Finally, the test does not unfairly burden trade and commerce and thus complies with the statute's requirements.¹⁴⁹

A. *A Rebuttable Presumption of Causation Honors Legislative Intent by Creating Consistency Between State and Federal Law*

One purpose of the CPA is to complement federal law.¹⁵⁰ The

144. See *FTC v. Int'l Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,709 (N.D. Cal. 1983) (noting that Sections 13 and 19b of the FTC Improvement Act "serve a public purpose by authorizing the Commission to seek redress on behalf of injured consumers. It would be inconsistent with that statutory purpose for the court to stifle effective prosecution of large consumer redress actions by requiring proof of subjective reliance by each individual consumer."); see also *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) (adopting the approach of the *International Diamond Corp.* court).

145. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

146. The question of the procedural effect of the presumption on the proceedings is beyond the scope of this Comment. Washington courts have not taken a uniform approach to the law of presumptions. See *supra* note 81. Because the law is not clear on this issue, each court must decide as a matter of policy what effect to give the presumption and the kind of evidence required to rebut it.

147. See *infra* Part IV.A.

148. See *infra* Part IV.B.

149. See *infra* Part IV.C.

150. WASH. REV. CODE § 19.86.920 (2004).

legislature expressly declared that the final decisions of federal courts and final orders of the FTC should guide Washington State courts.¹⁵¹ The legislature authorized private causes of action to further this purpose.¹⁵² State courts have also looked to federal law in the past to resolve disputed issues of law under the CPA.¹⁵³ Therefore, it is appropriate to look to federal standards when determining the amount and kinds of evidence required by the statute to prove causation.

Adopting the Ninth Circuit's test creates a consistent approach to proving causation under state and federal law. Businesses are subject to both federal and state law. The FTC can sue in federal court to deter businesses from engaging in unfair or deceptive business practices,¹⁵⁴ and the Washington State attorney general and private citizens can sue in state court for the same reason.¹⁵⁵ The Washington State Court of Appeals has stated that the legislature wished state courts to look to federal law in order to create consistency and avoid exposing businesses to two different sets of rules for liability.¹⁵⁶ Adopting the federal rebuttable presumption of causation furthers this goal because it creates a uniform rule for causation in state and federal courts.¹⁵⁷

The CPA does not require state courts to follow federal rules.¹⁵⁸ If federal rules conflict with established state precedent, then state courts may decline to follow federal rules.¹⁵⁹ In this case, however, no state rule requires affirmative evidence of reliance to prove cause in fact. As the Washington State Supreme Court concluded in *Pickett*, the only case "directly on point" on this issue is *Nuttall v. Dowell*, in which the court held that individuals must prove reliance to prevail in a private cause of action under the CPA.¹⁶⁰

151. *Id.*

152. WASH. REV. CODE § 19.86.090 (2004).

153. *See, e.g.*, *Blewett v. Abbott Labs.*, 86 Wash. App. 782, 788, 938 P.2d 842, 846 (1997) (applying federal law in an antitrust action brought under the CPA).

154. 15 U.S.C. § 45(a)(1) (2000) (allowing suits by FTC for injunctive relief); *id.* § 57(b) (allowing suits by FTC for damages).

155. WASH. REV. CODE § 19.86.020 (2004); *id.* § 19.86.090.

156. *See Blewett*, 86 Wash. App. at 788, 938 P.2d at 846.

157. *See id.* ("In directing courts to be 'guided by' federal law, the Legislature presumably intended to minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct.")

158. *See id.* at 787–88, 938 P.2d at 846.

159. *See id.*

160. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 197, 35 P.3d 351, 360 (2001) (citing *Nuttall v. Dowell*, 31 Wash. App. 98, PP, 639 P.2d 832, PP (1982)).

The *Nuttall* court, however, did not reach the question of whether proof of materiality and wide dissemination may establish a rebuttable presumption of reliance.¹⁶¹ The *Nuttall* court merely held that the CPA requires proof of reliance.¹⁶² Yet evidence of materiality is strong evidence that consumers relied on the misrepresentation in their decision to purchase a product.¹⁶³ As one commentator noted, the materiality test does not “abolish the causation requirement”; instead, it establishes “an alternative means of proving ‘the requisite element of causation in fact’ in appropriate cases.”¹⁶⁴

Moreover, in *Nuttall*, federal consumer protection statutes were not relevant authority for the standard of proof of causation because they do not authorize private causes of action.¹⁶⁵ The *Nuttall* court suggested that the standard of proof required under the federal statutes was less stringent “in recognition of the importance of the public policy that the federal statutes seek to serve and the desire to induce private persons to act as enforcing agents.”¹⁶⁶ Given these differences, state courts might be reluctant to import federal standards into cases involving private actions under the CPA.

However, the differences between actions brought by the FTC and those brought by private individuals are minimal when the FTC sues on behalf of consumers.¹⁶⁷ In such cases, courts may “grant such relief as . . . necessary to redress injury to consumers” that resulted from dishonest or fraudulent trade practices.¹⁶⁸ The FTC must show causation when suing for sanctions under 15 U.S.C. § 57b(b).¹⁶⁹ In *Figgie International*, the court established an appropriate standard for determining what evidence sufficiently shows causation.¹⁷⁰ There is no reason for state courts not to adopt this standard in similar cases.¹⁷¹

161. *Nuttall*, 31 Wash. App. at 110–11, 639 P.2d at 840.

162. *Id.*

163. *See id.*

164. *Reliance*, *supra* note 49, at 588.

165. *See Nuttall*, 31 Wash. App. at 110–11, 639 P.2d at 840.

166. *Id.* at 111, 639 P.2d at 840.

167. *See McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000).

168. 15 U.S.C. § 57b(b) (2000).

169. *Id.*; *see McGregor*, 206 F.3d at 1388.

170. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993).

171. One could argue that an action brought under Sections 13 and 19 of the FTCA is different from one brought under the CPA because the FTCA sections require a showing that the unfair or deceptive practice was dishonest or fraudulent. *See id.* at 603. Given the *Figgie* court's interpretation of this threshold requirement, however, a court should find that any material

The *Nuttall* court's analysis also fails to consider that plaintiffs must establish a public interest in order to prevail under the CPA.¹⁷² There is no evidence that the public interest is less compelling when the FTC sues than when a private actor sues to enforce a provision of the CPA. The fact that the legislature established the private cause of action to induce private citizens to help enforce the statute further supports the contention that a major purpose of private actions under the CPA is to protect the interests of consumers generally.¹⁷³ Therefore, there is no reason for state courts to adopt a stricter standard of proof than federal courts. To do so would thwart the intent of the legislature to complement federal law and to use the holdings of federal courts as guidance for construing the CPA's language.¹⁷⁴

Washington courts thus should adopt the Ninth Circuit's approach. The CPA expressly advises courts to look to federal case law when interpreting the CPA.¹⁷⁵ Adopting a rebuttable presumption of reliance does not conflict with established state law, but instead establishes a test that preserves the intent of the CPA.¹⁷⁶

B. Adopting the Figgie International Test Promotes the Legislature's Intent by Protecting Consumers

The legislature established a private cause of action under the CPA in order to protect consumers.¹⁷⁷ Private actors may bring private suits that are in the public interest.¹⁷⁸ While private claimants must prove cause in

misrepresentation also is dishonest or fraudulent. *See id.* In *Figgie International*, the court held that a practice was dishonest or fraudulent if the practice "misled customers about 'the single most useful piece of information' they could have used." *Id.* Moreover, the *Figgie International* court held that a rebuttable presumption of causation is necessary so that the purposes of an action for damages are not thwarted by a standard of causation that is too strict. *See id.* at 605. The *Figgie International* court did not hold that the more lenient causation standard is justified because of the requirement that the misrepresentation be "dishonest or fraudulent." *See id.*

172. *See* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 787, 719 P.2d 531, 536 (1986).

173. *Id.* at 784, 719 P.2d at 535. Thus, the *Nuttall* court failed to distinguish federal actions from state actions on the basis that "the federal statutes seek to induce private persons to act as enforcing agents." *Nuttall v. Dowell*, 31 Wash. App. 98, 111, 639 P.2d 832, 840 (1982). The Washington State Legislature also intended the CPA to enlist private persons as enforcing agents. *See id.*

174. *See* WASH. REV. CODE § 19.86.920 (2004).

175. *Id.*

176. *See supra* Part I.C.; *infra* Part IV.B.

177. *See supra* Part I.C.

178. *See* *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 787, 719 P.2d 531, 536 (1986).

fact to maintain a CPA claim,¹⁷⁹ a strict reliance requirement runs counter to the interests of consumers and thus counter to the intent of the legislature.¹⁸⁰ First, requiring affirmative proof of reliance would not allow consumers whose reliance was indirect to recover under the statute.¹⁸¹ The rule thus creates an “unreasonable and irrelevant evidentiary burden.”¹⁸² Second, placing the burden of proof on the party that has committed the deceptive act or practice makes it easier for consumers to maintain a private cause of action.¹⁸³ The *Figgie International* test thus protects the interests of the consumers, and adopting the test would further the goal of protecting consumers.¹⁸⁴

C. *Adopting the Federal Test Would Not Unreasonably Restrain Trade*

Adopting the *Figgie International* test would not unreasonably burden defendants or unreasonably constrain trade because it allows defendants to rebut the presumption of causation.¹⁸⁵ The CPA specifically limits the lengths to which courts may go in order to protect consumers.¹⁸⁶ Courts cannot “prohibit acts or practices which are reasonable in relation to the development and preservation of business.”¹⁸⁷ By allowing defendants to rebut the presumption of reliance, the *Figgie International* test allows defendants to avoid liability for those practices that do not actually induce reliance.¹⁸⁸ The defendant can simply show that the plaintiff did not rely on the misrepresentation to his or her detriment.¹⁸⁹ The rule thus does not impose liability for those harms caused by something other than

179. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 312, 858 P.2d 1054, 1061 (1993).

180. See *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993) (holding that a strict reliance requirement runs counter to the intent of a statute designed to protect the interests of consumers).

181. See *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975).

182. *Id.*

183. See *FTC v. Int'l Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,709 (N.D. Cal. 1983) (implying that effective prosecution of large consumer redress actions “would be stifled” if courts required proof of subjective reliance by each individual consumer).

184. See *Figgie Int'l*, 994 F.2d at 605.

185. *Id.* at 606.

186. See WASH. REV. CODE § 19.86.920 (2004).

187. *Id.*

188. See *Reliance*, *supra* note 49, at 598.

189. See *Reliance*, *supra* note 49, at 598.

the unfair or deceptive act.¹⁹⁰

For example, it is possible that in *Pickett* some consumers might not have read the advertising and cruise contract clauses that attributed part of the cruise cost to “port charges and taxes.”¹⁹¹ The rebuttable presumption would allow defendants the opportunity to offer proof that the consumers did not rely on the misrepresentations.¹⁹² For example, the defendants in *Pickett* might have offered evidence that they sent a letter to each purchaser that communicated a correction to the misleading statements and that the consumers bought the tickets anyway. The rebuttable presumption thus preserves the reliance element, but places the burden of proving reliance on the party who allegedly has violated the CPA.¹⁹³

Adopting the *Figgie International* test thus would not unreasonably restrain trade. A rebuttable presumption of causation protects defendants by preserving the CPA’s causation requirement,¹⁹⁴ but also lessens the evidentiary burden on the injured consumer.¹⁹⁵ By forcing the defendant to rebut the plaintiffs’ evidence of reliance, the burden of production rightfully falls on the party who has committed the deceptive act.¹⁹⁶

V. CONCLUSION

Washington courts should adopt a rebuttable presumption of reliance. Neither the language of the CPA nor case law interpreting it requires strict proof of reliance. The legislature intended that the statute be liberally construed to protect consumers. By adopting the *Figgie International* test for proving reliance, Washington courts would honor the intent of the CPA by creating consistency between state and federal law and by promoting the interests of consumers. Moreover, the *Figgie International* test appropriately puts the burden of proving causation on

190. See *Reliance*, *supra* note 49, at 598.

191. See *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wash. 2d 178, 183–84, 35 P.3d 351, 353–54 (2001).

192. *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993).

193. See *Morris v. Int’l Yogurt Co.*, 107 Wash. 2d 314, 329, 729 P.2d 33, 41 (1986) (“[S]ince it is the defendant’s nondisclosure that has made proof difficult, it is proper to require the defendant to bear such difficulties.”)

194. See *Reliance*, *supra* note 49, at 598.

195. See *Morris*, 107 Wash. 2d at 329, 729 P.2d at 41.

196. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

Cause in Fact Under Washington's CPA

the party that has allegedly committed a deceptive act in trade or commerce.

