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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. The CPA’s purpose is to complement federal law that protects consumers from the unfair acts of businesses. In 1970, the Washington State Legislature authorized a private cause of action under the CPA. 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. Proximate cause requires proof of two elements: cause in fact and legal causation.

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.
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."

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

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6. See FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th Cir. 1993).
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).
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.
Cause in Fact Under Washington’s CPA

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. and presume causation in cases in which a business widely disseminated a material misrepresentation and the consumer bought the product. 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. 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. 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.

13. 994 F.2d 595 (9th Cir. 1993).
14. See id. at 605–06.
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.\footnote{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.} The legislature modeled the CPA after the FTCA, which Congress originally adopted in 1914 to promote competition in trade and commerce.\footnote{15 U.S.C. § 45(a)(1).} Congress revised the FTCA in 1938 to prohibit unfair or deceptive acts against consumers.\footnote{See Toward Greater Equality, supra note 1, at 1621.} In the 1960s, courts and commentators realized that traditional common law remedies and federal regulation insufficiently protected consumers from unfair or deceptive business practices.\footnote{See Toward Greater Equality, supra note 1, at 1621.} 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.\footnote{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.} Because this made proving fraud difficult, consumers did not have an adequate remedy against deceptive businesses practices.\footnote{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).} The FTCA also did not provide consumers with adequate protection because it did not authorize a private cause of action.\footnote{See Toward Greater Equality, supra note 1, at 1621–22.} 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.\footnote{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). In the past, courts have taken this advice seriously and have consistently followed federal precedent. By keeping state law consistent with federal law, the legislature intended to "avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct." 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.

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. 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).


for the benefit of all Washington State consumers. In 1970, the Washington legislature amended the CPA to provide for private causes of action by individual consumers. The amendment allows successful plaintiffs to recover attorney fees and treble damages, 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. 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.

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

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

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

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.
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.\textsuperscript{40} To that end, the legislature specifically advised courts to interpret the CPA in accordance with federal law.\textsuperscript{41} Courts should therefore protect the interests of consumers without stifling trade and commerce.\textsuperscript{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.\textsuperscript{43} Since \textit{Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.},\textsuperscript{44} the Washington State Supreme Court has held that plaintiffs must show that the deceptive act proximately caused their injuries.\textsuperscript{45} Proximate cause requires plaintiffs to show both cause in fact and legal causation.\textsuperscript{46} Generally, a plaintiff in an affirmative misrepresentation case may prove cause in fact in one of three ways: affirmative proof of reliance,\textsuperscript{47} an inference of causation from a deceptive act,\textsuperscript{48} or a rebuttable presumption of reliance.\textsuperscript{49} The

\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See id.
\textsuperscript{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”).
\textsuperscript{44} 105 Wash. 2d 778, 719 P.2d 531 (1986).
\textsuperscript{45} Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wash. 2d 299, 314, 858 P.2d 1054, 1062 (1993) (interpreting \textit{Hangman Ridge} to require that the jury find that the unfair or deceptive act was a proximate cause of the injury suffered).
\textsuperscript{46} Hartley v. State, 103 Wash. 2d 768, 777, 698 P.2d 77, 82 (1985).
\textsuperscript{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 \textsc{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 . . . .” \textsc{Prosser, supra} note 7, at 685–86. Similarly, in a case for “fraud in the inducement,” a plaintiff must show reliance. \textsc{Black’s Law Dictionary} 686 (8th ed. 2004).
\textsuperscript{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.  

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. 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.

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. See 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 causational 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.


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. Dowell57 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.


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 40, 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.


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. The court reasoned that this lesser burden was justified at the federal level because of the public policies that the federal statutes serve. 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.

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. In Washington State Physicians Insurance & Exchange Ass'n v. Fisons Corp., the court held that the causation element of the CPA requires a finding of proximate cause. Proximate cause requires proof of two elements: cause in fact and legal cause.

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. Proof of cause in fact thus requires constructing a counterfactual. 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. Proof of cause in fact is usually a question for the trier of fact. Sometimes, however, cause in fact may be a question of law.

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.

62. See id. at 111, 639 P.2d at 840.
63. See id.
64. Id.
67. See id. at 314, 858 P.2d at 1062.
72. Hartley, 103 Wash. 2d at 778, 698 P.2d at 83.
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."\(^7\) The court thus determines, based on policy considerations, "how far the consequences of defendant's acts should extend."\(^7\) 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.\(^7\)

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.\(^7\) Other courts have allowed the jury to infer causation from proof of a deceptive act and an injury.\(^7\) Still other courts have adopted a rebuttable presumption of reliance on proof of materiality.\(^8\) If the plaintiff proves that the

\(^{75}\) *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 "ambiguous 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).

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
approved the settlement, finding that it was "fair, adequate, and reasonable."\(^8\) Divison I of the Washington State Court of Appeals reversed the trial court's approval of the settlement.\(^8\) In turn, the Washington State Supreme Court reversed the decision and reinstated the settlement.\(^9\)

At issue in the case was whether the settlement was "fair, adequate, and reasonable."\(^9\) 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.\(^9\) The trial court found that the class faced insurmountable difficulties at trial because the class would have to prove individual reliance for each plaintiff.\(^9\) 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.\(^9\) 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.\(^9\)

In drawing this conclusion, Division I relied on two Washington cases: \(\text{Edmonds v. John L. Scott Real Estate, Inc.}^7\) and \(\text{Mason v. Mortgage America, Inc.}^8\) The court also relied on several out-of-state cases to support its holding.\(^9\) In \(\text{Amato v. General Motors Corp.}^1\) for

88. \text{Id.}
89. \text{Id.} at 182–83, 35 P.3d at 353.
90. \text{Id.}
91. \text{See id.} at 188, 35 P.3d at 356.
92. \text{See id.} at 192, 35 P.3d at 358.
93. \text{See id.} at 196, 35 P.3d at 360.
95. \text{See id.} at 920, 6 P.3d at 72.
96. \text{Id.} at 916, 6 P.3d at 70; \text{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).
98. 114 Wash. 2d 842, 792 P.2d 142 (1990).
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." Division I found these cases persuasive 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." The court also held that the Washington CPA "should be liberally construed to protect the public and foster honest competition."

The Washington State Supreme Court rejected Division I's analysis. According to the Supreme Court, neither of the two Washington cases cited by Division I were appropriate. In Edmonds, the plaintiff had relied on the defendant's representations. In Mason, the issue of causation never arose because the court's discussion was limited to injury. The Washington State Supreme Court, refusing to accept the out-of-state cases, noted that the only Washington authority "directly on point" was Nuttall v. Dowell, which had found that the CPA requires reliance. The court concluded that "it is enough to say that this is a debatable question without a clear answer under Washington law." 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.

(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.
103. Id.
104. Id.
106. Id.
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*

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113. *See id.*


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.*


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. 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.

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. 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. In Affiliated Ute Citizens v. United States, 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." Like the CPA, Rule 10b-5 prohibits deceptive acts designed to induce people to make a

decievously 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 court 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.


125. Id.
purchase. Rule 10b-5 prohibits any device, scheme, or artifice to defraud in connection with securities transactions. 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."

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. The Ninth Circuit reasoned that, as in omissions cases, evidence that a misrepresentation is material also supports a presumption of reliance. 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. For example, in Figgie International the defendant represented to consumers that its heat detector product was a reliable life-saving fire warning device. 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.

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. Like materiality, evidence of wide dissemination is evidence of reliance. 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.
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.\textsuperscript{136} An intention to induce is also strong circumstantial evidence that the customer relied on the misrepresentation.\textsuperscript{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."\textsuperscript{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 \textit{Figgie International} test requires the plaintiff to provide evidence that consumers have bought the product.\textsuperscript{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.\textsuperscript{140}

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

\begin{itemize}
  \item \textsuperscript{136} See \textit{Int’l Diamond}, 1983-2 Trade Cas. (CCH) at 69,709.
  \item \textsuperscript{137} See id.
  \item \textsuperscript{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 \textit{Int’l Diamond}, 1983-2 Trade Cas. (CCH) at 69,709 (citing \textit{Vasquez} in a case brought under section 13 of the FTCA).
  \item \textsuperscript{139} See \textit{Figgie Int’l}, 994 F.2d at 605–06.
  \item \textsuperscript{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).
  \item \textsuperscript{141} See \textit{Figgie Int’l}, 994 F.2d at 605–06.
  \item \textsuperscript{142} See id.
  \item \textsuperscript{143} See id. at 606. The \textit{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. \textit{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 \textit{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. \textit{Figgie Int’l}, 994 F.2d at 606.
\end{itemize}
Cause in Fact Under Washington’s CPA

consumers, the presumption is justified.\textsuperscript{144} The test is grounded in the idea that the party guilty of wrongdoing should bear the risk resulting from his or her acts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147} Second, the test furthers the legislature’s intent that courts broadly construe the statute to protect consumers.\textsuperscript{148} Finally, the test does not unfairly burden trade and commerce and thus complies with the statute's requirements.\textsuperscript{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.\textsuperscript{150} The

\textsuperscript{144} See FTC v. Int’l Diamond Corp., 1983-2 Trade Cas. (CCH) \textsection 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).

\textsuperscript{145} See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946).

\textsuperscript{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.

\textsuperscript{147} See infra Part IV.A.

\textsuperscript{148} See infra Part IV.B.

\textsuperscript{149} See infra Part IV.C.

\textsuperscript{150} WASH. REV. CODE \textsection 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.\textsuperscript{151} The legislature authorized private causes of action to further this purpose.\textsuperscript{152} State courts have also looked to federal law in the past to resolve disputed issues of law under the CPA.\textsuperscript{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,\textsuperscript{154} and the Washington State attorney general and private citizens can sue in state court for the same reason.\textsuperscript{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.\textsuperscript{156} Adopting the federal rebuttable presumption of causation furthers this goal because it creates a uniform rule for causation in state and federal courts.\textsuperscript{157}

The CPA does not require state courts to follow federal rules.\textsuperscript{158} If federal rules conflict with established state precedent, then state courts may decline to follow federal rules.\textsuperscript{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 \textit{Pickett}, the only case "directly on point" on this issue is \textit{Nuttall v. Dowell}, in which the court held that individuals must prove reliance to prevail in a private cause of action under the CPA.\textsuperscript{160}

\textsuperscript{151} \textit{Id.}.
\textsuperscript{152} \textit{WASH. REV. CODE} § 19.86.090 (2004).
\textsuperscript{155} \textit{WASH REV. CODE} § 19.86.020 (2004); \textit{id.} § 19.86.090.
\textsuperscript{156} \textit{See Blewett}, 86 Wash. App. at 788, 938 P.2d at 846.
\textsuperscript{157} \textit{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.").
\textsuperscript{158} \textit{See id.} at 787–88, 938 P.2d at 846.
\textsuperscript{159} \textit{See id.}
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.\(^{171}\)

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162. *Id.*
163. *See id.*
166. *Id.* at 111, 639 P.2d at 840.
169. *Id.*; *see McGregor*, 206 F.3d at 1388.
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.*


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.*


175. *Id.*

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

177. *See supra* Part I.C.

fact to maintain a CPA claim, a strict reliance requirement runs counter to the interests of consumers and thus counter to the intent of the legislature. First, requiring affirmative proof of reliance would not allow consumers whose reliance was indirect to recover under the statute. The rule thus creates an "unreasonable and irrelevant evidentiary burden." 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. The Figgie International test thus protects the interests of the consumers, and adopting the test would further the goal of protecting consumers.

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. The CPA specifically limits the lengths to which courts may go in order to protect consumers. Courts cannot "prohibit acts or practices which are reasonable in relation to the development and preservation of business." 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. The defendant can simply show that the plaintiff did not rely on the misrepresentation to his or her detriment. The rule thus does not impose liability for those harms caused by something other than

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.
187. Id.
188. See Reliance, supra note 49, at 598.
189. See Reliance, supra note 49, at 598.
the unfair or deceptive act.\textsuperscript{190}

For example, it is possible that in \textit{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."\textsuperscript{191} The rebuttable presumption would allow defendants the opportunity to offer proof that the consumers did not rely on the misrepresentations.\textsuperscript{192} For example, the defendants in \textit{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.\textsuperscript{193}

Adopting the \textit{Figgie International} test thus would not unreasonably restrain trade. A rebuttable presumption of causation protects defendants by preserving the CPA's causation requirement,\textsuperscript{194} but also lessens the evidentiary burden on the injured consumer.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{Figgie International} test appropriately puts the burden of proving causation on

\textsuperscript{190} See \textit{Reliance}, supra note 49, at 598.


\textsuperscript{192} FTC v. \textit{Figgie Int'l}, Inc., 994 F.2d 595, 605–06 (9th Cir. 1993).

\textsuperscript{193} See \textit{Morris} v. \textit{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.")

\textsuperscript{194} See \textit{Reliance}, supra note 49, at 598.

\textsuperscript{195} See \textit{Morris}, 107 Wash. 2d at 329, 729 P.2d at 41.

\textsuperscript{196} See \textit{Bigelow} v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946).
the party that has allegedly committed a deceptive act in trade or commerce.