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SUPREME COURT OF THE STATE OF WASHINGTON

INDOOR BILLBOARD/WASHINGTON, INC.,
a Washington corporation, individually and on behalf of a class of persons
and/or entities similarly situated,

Appellant/Cross-Respondent,

v.

INTEGRA TELECOM OF WASHINGTON, INC.,
a Washington corporation,

Respondent/Cross-Appellant.

**BRIEF OF *AMICUS CURIAE*
ATTORNEY GENERAL OF WASHINGTON**

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of *amicus curiae* briefs on matters affecting the public interest.¹ This case concerns two issues vital to the effectiveness of the Consumer Protection Act (CPA), RCW 19.86. First, whether it is an unfair or deceptive practice to mislead consumers about whether a charge added to the price of goods or services is mandated or regulated by government; and second, whether consumers must show actual reliance on a deceptive practice in order to establish the causation element of a CPA claim. These questions affect the public interest because they will influence the extent to which the CPA protects consumers from unfair or deceptive practices in the marketplace.

The Attorney General is authorized to protect consumers from unfair or deceptive acts or practices in trade or commerce.² As the agency charged with enforcing the CPA, the Attorney General has an interest in the development of CPA case law. The Legislature intends that the Attorney General have the opportunity to participate in private CPA cases, as evidenced by the statutory requirements that the Attorney General be

¹ See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

² RCW 19.86.080 (copies of cited statutes, administrative rules, and jury instructions are attached in the Appendix for ease of reference).

served with any complaints and appellate briefs addressing the CPA.³

This appeal also addresses whether consumers may bring CPA claims against competitively classified telecommunications companies (*i.e.* competitive local exchange carriers or "CLECs"), despite the contention that such claims are within the exclusive jurisdiction of the Washington Utilities and Transportation Commission (WUTC). While the WUTC has pervasive regulatory authority over most utilities, in 1985 the Legislature authorized the WUTC to classify some telecommunications companies as competitive, and thereby subject to minimal regulation.⁴ Among other things, minimal regulation means that the WUTC does not establish or regulate CLEC rates as it does for incumbent companies. The Legislature also expressly made the CPA applicable to CLECs.⁵ Therefore, the WUTC does not have exclusive jurisdiction over claims against CLECs, including claims that a CLEC's practices or rates are unfair or deceptive.

II. ISSUES PRESENTED BY AMICUS

(1) Whether it is an unfair or deceptive act or practice under

³ RCW 19.86.095.

⁴ In 1985, the Legislature passed the Regulatory Flexibility Act, Laws of 1985, ch. 450, p. 1976 (codified at several places in Title 80 RCW), which provided, in part, that CLECs shall be subject to minimal regulation by the WUTC.

⁵ RCW 80.36.360 (actions or transactions of competitively classified telecommunications companies are not deemed "otherwise permitted, prohibited or regulated" by the WUTC for purposes of the general exemption from the CPA for regulated utilities set forth in RCW 19.86.170).

RCW 19.86.020 to represent, either directly or by implication, that a charge is mandated by government when it is not?

(2) Whether consumers must prove actual reliance in order to establish causation under RCW 19.86.090 and *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986), when bringing private actions under the CPA?

(3) Whether consumers may bring private CPA actions against competitively classified telecommunications companies?

III. STATEMENT OF THE CASE

Plaintiff/Appellant/Cross-Respondent, Indoor Billboard/Washington, Inc., (Indoor Billboard) entered into a three-year service agreement to receive local telephone service from Defendant/Respondent/Cross-Appellant Integra Telecom of Washington, Inc. (Integra).⁶ Integra is a CLEC.⁷

In addition to its monthly service charge, Integra imposed a monthly surcharge of \$4.21 per line, which it labeled a “presubscribed interexchange carrier charge” or “PICC.”⁸ Integra included the PICC in the price quote it gave to Indoor Billboard before Indoor Billboard signed the service agreement.⁹ Indoor Billboard paid the PICC.¹⁰

⁶ See CP 156-61.

⁷ CP 108.

⁸ CP 108; 47, 54-56.

⁹ CP 176.

¹⁰ CP 147.

As the term is used in the telecommunications industry, a PICC is a charge the Federal Communications Commission (FCC) allows certain incumbent local exchange carriers to impose on end-users' presubscribed interexchange (long-distance) providers.¹¹ The FCC designed the PICC as a means by which those incumbent carriers (such as Qwest and Verizon) can recover the full cost of the local loop.¹² The FCC permits long-distance providers to pass through this charge to their end-users and allows incumbents to charge their end-users a PICC only if the end-users do not presubscribe to a long-distance carrier.¹³ The FCC establishes the maximum monthly PICC an incumbent may charge.¹⁴ The FCC does not regulate the charge of a PICC by a CLEC because the charge has no application to a CLEC, only to an incumbent.

CLECs, like Integra, are not within the class of carriers to which the PICC is designed to apply. Unlike an incumbent, Integra, as a CLEC, has the flexibility to design and organize its service charges in any way that suits its business objectives.¹⁵ Integra decided to lower its monthly business line rates and make up the difference in revenue through its PICC

¹¹ 47 C.F.R. § 69.153.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* CP 420.

to gain an advantage over its competitors.¹⁶ Integra included its PICC in the “Taxes and Surcharges” section of its invoice, along with government imposed taxes and regulatory fees,¹⁷ even though its PICC was not a government mandated or regulated charge.¹⁸

IV. ARGUMENT

A. The Court Should Reverse the Trial Court’s Summary Judgment in Favor of Integra.

1. Private Consumer Actions Under the CPA Further an Important Public Interest.

The CPA’s purpose “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.”¹⁹ Washington courts shall liberally construe the CPA to serve its beneficial purposes.²⁰

When the CPA was enacted in 1961, the Attorney General had sole authority to enforce its provisions.²¹ In 1971, the Legislature responded to the need for additional enforcement capabilities by providing for “a

¹⁶ *Id.*

¹⁷ CP 385. The “network access fee” is not a government tax or fee. Business and occupation tax is imposed on businesses, not end-users. RCW 82.04.500; *see Nelson v. Appleway Chevrolet, Inc.*, No. 77985-6 (Wash. April 26, 2007).

¹⁸ CP 88.

¹⁹ RCW 19.86.920; *see also Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976)(purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices).

²⁰ RCW 19.86.920.

²¹ *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986).

private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.”²² That private right of action is set forth in RCW 19.86.090. This Court has held that the purpose of the private right of action is “to enlist the aid of private individuals to assist in the enforcement of the [CPA].”²³ In order to prevail in a private right of action under the CPA, consumers must show that the acts or practices complained of affect the public interest.²⁴ Thus, the CPA is not a vehicle for resolving purely private disputes.²⁵ When consumers bring a private CPA action, they represent the public interest.

This Court has held that a private consumer may obtain injunctive relief in addition to recovering damages in a private CPA action, even if the injunction would not directly affect the consumer’s private interests.²⁶ The Court also held that allowing private consumers to enjoin future violations of the CPA served the public interest by preventing fraudulent practices from continuing unchecked.²⁷

The private consumer action is a vital feature of the CPA. Courts should refrain from interpreting the CPA in ways that would impair consumers’ ability to bring private CPA actions because doing so would

²² *Id.* at 784.

²³ *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976).

²⁴ *Hangman Ridge*, 105 Wn.2d at 788.

²⁵ *Id.* at 790.

²⁶ *Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973).

²⁷ *Id.* at 350.

undermine the dual enforcement scheme the Legislature intended and the efficacy of the CPA as a means to foster a fair and honest market place.

2. A Direct or Indirect Misrepresentation That a Fee or Charge is Mandated or Regulated By the Government Is an Unfair or Deceptive Practice Under the CPA.

The CPA allows any person whose property or business is injured by an unfair or deceptive practice in violation of RCW 19.86.020 to bring a civil action for damages or injunctive relief.²⁸ In *Hangman Ridge*, this Court held that consumers must establish five elements in order to prevail on a private CPA claim.²⁹ The elements are: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) injures the plaintiff or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.³⁰ This appeal involves the first and fifth elements.

In meeting the first element, a consumer is not required to prove that the defendant intended to deceive or defraud the consumer, only that the practice had the capacity to deceive a substantial portion of the

²⁸ RCW 19.86.090.

²⁹ 105 Wn.2d at 784-85.

³⁰ *Id.*

public.³¹ Whether an act or practice is unfair or deceptive is a question of law.³²

This appeal involves Integra's decision to charge end-users an additional \$4.21 per line, per month as a PICC. Integra is not an incumbent company, so it has no reason to charge a PICC to recover the costs of the local loop facility, as contemplated by the FCC. Rather, Integra decided to *lower* its monthly line charge and make up that lost revenue through the PICC "to better address the competitive environment and to help us manage our cost components."³³ Integra wanted to be able to "sell lines at competitive rates (without the PICC costs built in)."³⁴

The practice of separating the price of goods or services into discrete charges that are designed to look like government mandated or regulated fees has the capacity to deceive a substantial number of consumers in violation of RCW 19.86.020. This practice makes it difficult for consumers to effectively compare service prices among different providers when some providers disguise a portion of their service price as government mandated or regulated fees. The practice has further capacity to deceive because where the PICC is presented as a "tax or surcharge,"

³¹ *Hangman Ridge*, 105 Wn.2d at 785.

³² *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 309, 698 P.2d 578, review denied, 104 Wn.2d 1005 (1985).

³³ CP 420.

³⁴ *Id.*

consumers are left with the impression that the PICC is a government imposed fee that cannot be avoided by obtaining service from another carrier. Integra's practice of disclosing that a PICC will be added to the rate as a tax or surcharge does not cure this false impression.

In *Dwyer v. J.I. Kislak Mortgage*, the Court of Appeals held that the practice of including miscellaneous service charges, such as fax fees, on a mortgage payoff statement has the capacity to deceive because it creates the misleading appearance that the mortgage cannot be released unless the mortgagee pays the miscellaneous charges, which are unrelated to the mortgage.³⁵ Similarly, when a CLEC camouflages part of its price as a government mandated or regulated fee, it leaves consumers with the misleading impression that the charge is outside the CLEC's control and obscures the actual price of the service, making it difficult for consumers to choose among competing service providers.³⁶

This case is factually distinguishable from *Robinson v. Avis Rent A Car System*.³⁷ In *Robinson*, the rental car companies charged an airport concession recovery fee to consumers who rented cars at Sea-Tac Airport,

³⁵ *Dwyer v. J.I. Kislak Mortgage*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000).

³⁶ See also WAC 480-120-161(5), which prohibits misleading charges on a bill for telephone service, and requires those charges that actually are imposed by the FCC be set out separately, so that consumers can determine whether the charges accurately reflect the service provided. This rule applies to all telephone companies, including CLECs.

³⁷ *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 22 P.3d 818, review denied, 145 Wn.2d 1004 (2001).

which was added to the rental invoice as a separate line item charge, in addition to the rental rate.³⁸ The plaintiffs contended that the practice of unbundling the concession fee from the rental rate was unfair or deceptive, and that the rental car companies had misrepresented that the concession recovery fee was a tax.³⁹ The court held that the practice was not unfair or deceptive because the rental companies accurately represented the fee—they told consumers they would be charged a 10 percent concession recovery fee to recover the concession the rental car companies *paid to the airport authority*.⁴⁰ This Court should hold, as a matter of law, that it is an unfair or deceptive practice to misrepresent, directly or by implication, that part of the price for goods or services is a government mandated or regulated charge or fee.

3. Consumers Are Not Required to Prove Actual Reliance to Satisfy the Causation Element.

Consumers bringing a private CPA case must prove a causal link between the unfair or deceptive practices and their injury.⁴¹ Integra contends that Indoor Billboard must prove that it actually relied on a misrepresentation made by Integra in order to establish the causation

³⁸ *Id.* at 108.

³⁹ *Id.* at 109.

⁴⁰ *Id.* at 108-10.

⁴¹ RCW 19.86.090; *Hangman Ridge*, 105 Wn.2d at 784-85.

element of the CPA claim.⁴² This contention fails because reliance is not required to prove the causation element under the CPA.⁴³

By asking this Court to require Indoor Billboard to prove that it “actually relied on any misrepresentation made by Integra to Indoor Billboard regarding the PICC surcharge in deciding to purchase Integra’s services,”⁴⁴ Integra asks the Court to interpret the causation requirement narrowly, not liberally, as directed by RCW 19.86.920.

Washington courts consistently have rejected overly narrow interpretations of the CPA and have instead interpreted it liberally, as the Legislature intended. For example, actual deception is not required; rather, the CPA requires only that the act or practice has a capacity to deceive a substantial portion of the public.⁴⁵ Likewise, the CPA does not require a plaintiff to prove monetary damages in order to satisfy the injury element; rather, a plaintiff may prevail on a more broadly defined injury,

⁴² See Integra’s Br. at 28.

⁴³ See, e.g., *Hangman Ridge*, 105 Wn.2d 792-93; *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993); *Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 916-20, 6 P.3d 63 (2000), reversed on other grounds, *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351, cert. denied sub nom., *Bebchick v. Holland America Line-Westours, Inc.*, 536 U.S. 941, 122 S. Ct. 2624, 153 L. Ed. 2d 806 (2002).

⁴⁴ Integra’s Br. at 33.

⁴⁵ *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992).

however minimal.⁴⁶ Requiring consumers to prove actual reliance on deceptive acts or practices would frustrate the purpose of the CPA.

In *Hangman Ridge*, this Court confirmed what had been foreshadowed in earlier decisions—that a private plaintiff must show some degree of causation between the defendant’s unfair or deceptive act and the plaintiff’s injury.⁴⁷ The Court, however, did not elaborate on the level of proof necessary to show causation.

Prior to *Hangman Ridge*, courts had reasoned that some showing of causation was necessary for a private plaintiff to recover under the CPA.⁴⁸ In one of the pre-*Hangman Ridge* cases, *Nuttall v. Dowell*, the Court of Appeals held that a plaintiff must prove reliance, under the facts of that case.⁴⁹ Rather than adopt the *Nuttall* court’s reliance requirement for proving causation, this Court in *Hangman Ridge* required only a “causal link.”⁵⁰

This Court has not since held that consumers must prove reliance in order to establish causation. To the contrary, in *Washington State*

⁴⁶ *Hangman Ridge*, 105 Wn.2d at 792; see *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)(loss of title to real property); *Nordstrom, Inc., v. Tampourlos*, 107 Wn.2d 735, at 740, 733 P.2d 208 (1987)(loss of goodwill); *Sorrell v. Eagle Healthcare*, 110 Wn. App. 290, 298-99, 38 P.3d 1024, review denied, 147 Wn.2d 1016, 56 P.3d 992 (2002)(loss of possession of funds for two weeks).

⁴⁷ *Hangman Ridge*, 105 Wn.2d at 793.

⁴⁸ See *id.*

⁴⁹ *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832, review denied 97 Wn.2d 1015 (1982).

⁵⁰ *Hangman Ridge*, 105 Wn.2d at 793 (requiring a causal link and noting *Nuttall* as a prior case that had required a causal link between the deceptive acts and the injury).

Physicians Insurance Exchange v. Fisons, this Court held that a plaintiff can satisfy the CPA causation element by proving that the defendant's unfair or deceptive practice was the "proximate cause" of the plaintiff's injury.⁵¹

Drawing on *Fisons*, 6A Washington Pattern Jury Instruction: Civil 310.07, at 274-275 (5th ed. 2005), states that a plaintiff in a private CPA case must prove that the defendant's unfair or deceptive act or practice was the proximate cause of the plaintiff's injury. The instruction further defines "proximate cause" as "a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened."⁵²

In this case, Indoor Billboard can prove causation by showing that Integra's practice of charging a PICC, and including the PICC on the invoice under the heading "Taxes and Surcharges," proximately caused Indoor Billboard injury (paying Integra's PICC).⁵³ Indeed, there is no likely alternative explanation for Indoor Billboard's (or any other customer's) remittance of payment of the PICC surcharge other than Integra's invoicing of the PICC surcharge. And where, as here, the Indoor

⁵¹ *Fisons*, 122 Wn.2d at 314, ("the jury was properly instructed that it had to find '[t]hat Fisons Corporation's unfair or deceptive act or practice was a proximate cause of the injury to plaintiff[s] . . . business or property.'").

⁵² WPI 310.7

⁵³ CP 51 (Indoor Billboard's alleged injury was payment of the PICC).

Billboard invoiced the charge in an unfair and deceptive manner, the causal link between the unfair act and practice and the customer's injury is apparent.

Integra contends that *Nuttall* and *Robinson* are valid precedent requiring Indoor Billboard to prove actual reliance.⁵⁴ Integra is wrong. As an initial matter, the *Robinson* court did not analyze causation; it cited the reliance analysis from *Nuttall*.⁵⁵ The *Nuttall* case is not persuasive authority that Indoor Billboard must prove reliance. First, the facts of *Nuttall* are distinguishable from the facts of this case; and second, applying the *Nuttall* reasoning in the consumer transaction context⁵⁶ is contrary to the public policies underpinning the CPA.

Nuttall involved a private real estate transaction between a single purchaser (the plaintiff) and seller. The real estate broker and the sellers

⁵⁴ Integra's Br. at 29-30.

⁵⁵ *Robinson*, 106 Wn. App. at 119 (citing *Pickett*, 101 Wn. App. at 916 (citing *Nuttall*, 31 Wn. App. at 111)).

⁵⁶ The CPA applies to both "consumer transactions" and "private disputes." In *Hangman Ridge*, this Court held that whether a deceptive act or practice was committed in the context of a consumer transaction or a private dispute affects the analysis of whether the consumer has satisfied the public interest element in a private CPA action. 105 Wn.2d at 789-90. The Court did not define either of the terms, but gave examples of each. The Court said purchases of defective seed, mobile homes, and vehicles are consumer transactions; and characterized private disputes as those between an attorney and client, an insurer and its insured, a realtor and a purchaser, and an escrow agent and its client. *Id.* The transactions at issue in this appeal are consumer transactions.

Although the *Nuttall* decision predated the *Hangman Ridge* decision, it is plain that the plaintiff in *Nuttall* would not have satisfied the public interest element had the case been filed after *Hangman Ridge* because there was little likelihood that the defendant's conduct would have injured other consumers. *See Hangman Ridge*, 105 Wn.2d at 790.

(defendants) had represented that two parcels of land for sale were five acres each, and had staked out what they believed to be the correct boundary line of the parcels.⁵⁷ Prior to purchasing the two parcels, the plaintiff had questioned the broker about the accuracy of the boundaries, and the broker told the plaintiff that the property had not been surveyed, but that he believed the boundaries to be correctly staked out.⁵⁸ The broker further suggested that the plaintiff inquire of the prior owners about the accuracy of the boundaries, which the plaintiff did before purchasing the parcels.⁵⁹ The property was later surveyed and it was determined that plaintiff's total acreage for the two parcels was less than what was presented prior to sale.⁶⁰ As a result, the plaintiff's well and home site were located on his neighbor's property.⁶¹

The plaintiff sued the broker and the sellers, and included a CPA claim based on misrepresentations about the boundary. In affirming the trial court's dismissal of the claim after trial, the Court of Appeals determined that because the plaintiff had investigated the boundary on his own, he did not rely on the misrepresentation so there was no causal

⁵⁷ *Nuttall*, 31 Wn. App. at 100-02.

⁵⁸ *Id.* at 102.

⁵⁹ *Id.*

⁶⁰ *Id.* at 103-04.

⁶¹ *Id.* at 103.

relationship between the misrepresentation and the plaintiff's injury.⁶²

The *Nuttall* court acknowledged that it had reached its conclusion, in part, because the case involved a single land transaction where the boundary location was misrepresented, but the plaintiff independently had investigated the boundary before buying the property.⁶³ Unlike *Nuttall*, this case involves Integra's practices affecting all subscribers, not a single transaction.⁶⁴

The facts in this appeal are similar to the facts in *Pickett v. Holland America Line*.⁶⁵ The plaintiffs in *Pickett* were cruise ship passengers who alleged that the defendant cruise line had misrepresented the nature of a fee that was imposed in addition to the cruise price.⁶⁶ Unlike *Nuttall*, the *Pickett* decision was decided after *Hangman Ridge*, and the court applied the *Hangman Ridge* factors to the facts of that case.⁶⁷

In *Pickett*, the court analyzed how consumers must prove the necessary causal link between the deceptive acts and injury. In *Pickett*, the deceptive act was that the cruise line had informed passengers that they were responsible for government fees and taxes imposed on the

⁶² *Id.* at 111.

⁶³ *Id.* at 106.

⁶⁴ See CP 420 (PICC will be assessed on all business lines).

⁶⁵ 101 Wn. App. 901, 6 P.3d 63 (2000), *reversed on other grounds*, *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351, *cert. denied sub nom.*, *Bebchick v. Holland America Line-Westours, Inc.*, 536 U.S. 941, 122 S. Ct. 2624, 153 L. Ed. 2d 806 (2002).

⁶⁶ *Id.* at 906.

⁶⁷ *Pickett*, 101 Wn. App. at 916.

cruise line, which the cruise line passed through to the consumers, but the cruise line retained a portion of the charges instead of remitting the entire amount to the port, thereby overcharging the consumers.⁶⁸ The court held that causation was shown by the fact that the consumers had purchased the tickets and the cruise line retained a portion of the charges it had represented as port charges or taxes, and not by reliance on the representations.⁶⁹ The court explained:

Causation inheres in the fact that the plaintiffs purchased cruise tickets. Holland America overstated and retained a portion of the funds it had misrepresented were the amount of pass through charges for port charges and taxes. We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees – pass-through charges – when they are not.⁷⁰

The causation analysis in *Pickett* is a better fit with the CPA's intent to protect the public and foster fair and honest competition, than the reliance analysis set forth by the *Nuttall* court in a single, private transaction case.

This Court overruled *Pickett* on other grounds.⁷¹ In its decision, the Court specifically did not overrule the Court of Appeals' causation

⁶⁸ *Id.* at 905, 917.

⁶⁹ *Id.* at 920.

⁷⁰ *Id.*

⁷¹ *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351, cert. denied sub nom., *Bebchick v. Holland America Line-Westours, Inc.*, 536 U.S. 941, 122 S. Ct. 2624, 153 L. Ed. 2d 806 (2002).

analysis. Rather, in the context of holding that the Court of Appeals erred by deciding the merits of the trial court's denial of class certification, rather than confining itself to the question of whether the class settlement was reasonable, the Court said that the issue of whether the plaintiffs were required to prove actual reliance was "a debatable question."⁷²

This Court should hold that consumers bringing private CPA claims in the context of a deceptive billing practice prove causation by paying the deceptive charge, and are not required to prove reliance on the defendant's unfair or deceptive practice. Such a holding will be consistent with the Legislature's direction to liberally construe the CPA.

B. The Court Should Affirm the Superior Court's Order Denying Integra's Motion to Dismiss Because the WUTC Does Not Have Exclusive Jurisdiction over Indoor Billboard's Claim.

Integra contends that the trial court erred by denying its motion to dismiss because the WUTC has exclusive jurisdiction over Indoor Billboard's complaint pursuant to RCW 80.04.240. This contention fails.

Generally, utilities regulated by the WUTC are exempt from the CPA. RCW 19.86.170 provides: "Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by . . . the [WUTC][.]" However, in 1985, the Legislature made it the policy of the state to allow for competition in the

⁷² *Id.* at 199.

local telephone market and flexible regulation of competitively classified telecommunications companies.⁷³ Rates of competitively classified companies are determined by the market, not the WUTC.⁷⁴

At the same time, the Legislature also expressly applied the CPA to competitively classified companies: “For purposes of RCW 19.86.170, actions or transactions of competitively classified telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited, or regulated by the [WUTC].”⁷⁵ This reflects the policy that the market largely will control the actions and transactions (including rates) of competitive companies.

In addition, the WUTC broad rulemaking authority to implement the regulatory provisions of Title 80 RCW.⁷⁶ In exercising that authority, the WUTC has interpreted RCW 80.04.230 and 80.04.240 as not limiting other remedies available to consumers.⁷⁷

By making competitive telecommunications companies subject to the CPA, the Legislature gave the superior courts jurisdiction over claims alleging that competitive companies engaged in unfair or deceptive acts or practices in violation of RCW 19.86.020. The WUTC retains jurisdiction

⁷³RCW 80.36.300(5), (6)

⁷⁴ RCW 80.36.320 (1); *see also* CP 420 (Integra states it has the flexibility to set rates according to market conditions).

⁷⁵ RCW 80.36.360

⁷⁶ RCW 80.01.040(4)

⁷⁷ WAC 480-120-163

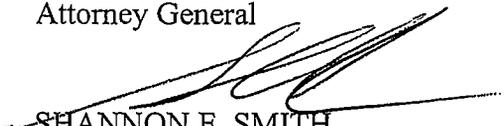
to hear complaints regarding competitive companies that arise under Title 80, but that jurisdiction is not exclusive for complaints against competitively classified companies.

V. CONCLUSION

This Court should hold, as a matter of law, that it is an unfair or deceptive practice to represent, directly or by implication, that a charge is mandated by the government when it is not. The Court also should hold that consumers bringing private actions for enforcement of the CPA are not required to prove actual reliance in order to establish causation. Finally, the Court should hold that the WUTC does not have exclusive jurisdiction over claims against competitively classified telecommunications companies, like Integra. For these reasons, the Court should reverse the superior court's summary judgment in favor of Integra and affirm superior court's order denying Integra's motion to dismiss.

RESPECTFULLY SUBMITTED this 30 day of April, 2007.

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APPENDIX

Washington Practice Series TM
Current Through the 2005 Update

Washington Pattern Jury Instructions--Civil
Washington Supreme Court Committee On Jury Instructions

Part XIV. Consumer Protection
Chapter 310. Consumer Protection Actions

WPI 310.07 Causation in Consumer Protection Act Claim

(Insert name of plaintiff) has the burden of proving that (name of defendant's) unfair or deceptive act or practice was a proximate cause of (name of plaintiff's) injury.

“Proximate cause” means a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.

[There may be one or more proximate causes of an injury.]

Note on Use

Use this instruction when intervening causation is an issue. If multiple causation is an issue, see the Comment below. Use bracketed material as applicable.

Comment

In Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993), the court stated that, “[h]ere, the jury was properly instructed that it had to find ‘[t]hat Fisons Corporation's unfair or deceptive act or practice was a proximate cause of the injury to plaintiff Dr. Klicpera's business or property’” See also Guijosa v. Wal-Mart Stores, 144 Wn.2d 907, 917, 32 P.2d 250 (2001).

Whether individual reliance is required for causation under the CPA is a “debatable question without a clear answer under Washington law.” Pickett v. Holland Am. Line-Westours, Inc., 145

Wn.2d 178, 197, 35 P.3d 351 (2001) (approving class action settlement as fair in part because this question posed a risk to the class claim), cert. denied in Bebchick v. Holland America Line-Westours, Inc., 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002).

The traditional definition of “proximate cause” in WPI 15.01, Proximate Cause—Definition, 6 Washington Practice, Washington Pattern Jury Instructions: Civil (5th ed.), is incorporated in this instruction. For alternative definitions of “proximate cause,” see WPI Chapter 15, Proximate Cause, in 6 Washington Practice, *supra*.

In negligence cases, when there is evidence of more than one proximate cause, use of the article “a” is insufficient to inform the jury on the law of concurring negligence and multiple proximate causes, and it is error to use WPI 15.01 without the bracketed sentence stating that an event may have one or more proximate causes. Jonson v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 24 Wn.App. 377, 380, 601 P.2d 951 (1979).

In Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 167, 795 P.2d 1143 (1990), the court rejected the argument of one defendant, who had ordered an inflated real estate appraisal but had not had contact with the plaintiffs, that a “causal link must exist between plaintiffs [to whom another defendant later showed the appraisal] and himself,” stating “This is incorrect. Instead, the causal link must exist between the *deceptive* act (the inflated appraisal) and *injury suffered*.” (Emphasis in original.)

See the Comment to WPI 15.01, Proximate Cause—Definition, in 6 Washington Practice, *supra*. In particular, note that an instruction setting forth the legal effect of multiple proximate causes has been held to be necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power and Light Co., Inc., 100 Wn.2d 204, 667 P.2d 78 (1983). See also WPI 15.04, Negligence of Defendant Concurring With Other Causes, 6 Washington Practice, *supra*, for suggestions regarding the wording of an instruction on multiple causation. [Current as of April 2004.]

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6A WAPRAC WPI 310.07

RCW 19.86.020 Unfair competition, practices, declared unlawful. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. [1961 c 216 § 2.]

RCW 19.86.170 Exempted actions or transactions — Stipulated penalties and remedies are exclusive. Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW 9A.20.010(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein. [1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.]

RCW 80.01.040 General powers and duties of commission. The utilities and transportation commission shall:

(1) Exercise all the powers and perform all the duties prescribed therefor by this title and by Title 81 RCW, or by any other law.

(2) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging in the transportation by whatever means of persons or property within this state for compensation, and related activities; including, but not limited to, air transportation companies, auto transportation companies, express companies, freight and freight line companies, motor freight companies, motor transportation agents, private car companies, railway companies, sleeping car companies, steamboat companies, street railway companies, toll bridge companies, storage warehousemen, and wharfingers and warehousemen.

(3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies, gas companies, irrigation companies, telecommunications companies, and water companies.

(4) Make such rules and regulations as may be necessary to carry out its other powers and duties. [1985 c 450 § 10; 1961 c 14 § 80.01.040. Prior: (i) 1949 c 117 § 3; Rem. Supp. 1949 § 10964-115-3. (ii) 1945 c 267 § 5; Rem. Supp. 1945 § 10459-5. (iii) 1945 c 267 § 6; Rem. Supp. 1945 § 10459-6. Formerly RCW 43.53.050.]

RCW 80.04.220 Reparations. When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount. [1961 c 14 § 80.04.220. Prior: 1943 c 258 § 1; 1937 c 29 § 1; Rem. Supp. 1943 § 10433.]

RCW 80.04.230 Overcharges — Refund. When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge. [1961 c 14 § 80.04.230. Prior: 1937 c 29 § 2; RRS § 10433-1.]

RCW 80.04.240 Action in court on reparations and overcharges. If the public service company does not comply with the order of the commission for the payment of the overcharge within the time limited in such order, suit may be instituted in any superior court where service may be had upon the said company to recover the amount of the overcharge with interest. It shall be the duty of the commission to certify its record in the case, including all exhibits, to the court. Such record shall be filed with the clerk of said court within thirty days after such suit shall have been started and said suit shall be heard on the evidence and exhibits introduced before the commission and certified to by it. If the complainant shall prevail in such action, the superior court shall enter judgment for the amount of the overcharge with interest and shall allow complainant a reasonable attorney's fee, and the cost of preparing and certifying said record for the benefit of and to be paid to the commission by complainant, and deposited by the commission in the public service revolving fund, said sums to be fixed and collected as a part of the costs of the suit. If the order of the commission shall be found to be contrary to law or erroneous by reason of the rejection of testimony properly offered, the court shall remand the cause to the commission with instructions to receive the testimony so proffered and rejected and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may in its discretion remand any cause which is reversed by it to the commission for further action. Appeals to the supreme court shall lie as in other civil cases. All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues, and the suit to recover the overcharge shall be filed in the superior court within one year from the date of the order of the commission.

The procedure provided in this section is exclusive, and neither the supreme court nor any superior court shall have jurisdiction save in the manner hereinbefore provided. [1961 c 14 § 80.04.240. Prior: 1943 c 258 § 2; 1937 c 29 § 3; Rem. Supp. 1943 § 10433-2.]

RCW 80.36.300 Policy declaration. The legislature declares it is the policy of the state to:

- (1) Preserve affordable universal telecommunications service;
- (2) Maintain and advance the efficiency and availability of telecommunications service;
- (3) Ensure that customers pay only reasonable charges for telecommunications service;
- (4) Ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;
- (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state; and
- (6) Permit flexible regulation of competitive telecommunications companies and services.

[1985 c 450 § 1.]

RCW 80.36.320 Classification as competitive telecommunications companies, services —

Factors considered — Minimal regulation — Reclassification. (1) The commission shall classify a telecommunications company as a competitive telecommunications company if the services it offers are subject to effective competition. Effective competition means that the company's customers have reasonably available alternatives and that the company does not have a significant captive customer base. In determining whether a company is competitive, factors the commission shall consider include but are not limited to:

- (a) The number and sizes of alternative providers of service;
- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- (d) Other indicators of market power which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

The commission shall conduct the initial classification and any subsequent review of the classification in accordance with such procedures as the commission may establish by rule.

(2) Competitive telecommunications companies shall be subject to minimal regulation. The commission may waive any regulatory requirement under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation. The commission may waive different regulatory requirements for different companies if such different treatment is in the public interest. A competitive telecommunications company shall at a minimum:

- (a) Keep its accounts according to regulations as determined by the commission;
- (b) File financial reports with the commission as required by the commission and in a form and at times prescribed by the commission; and
- (c) Cooperate with commission investigations of customer complaints.

(3) The commission may revoke any waivers it grants and may reclassify any competitive telecommunications company if the revocation or reclassification would protect the public interest.

(4) The commission may waive the requirements of RCW 80.36.170 and 80.36.180 in whole or in part for a competitive telecommunications company if it finds that competition will serve the same purpose and protect the public interest. [2006 c 347 § 3; 2003 c 189 § 3; 1998 c 337 § 5; 1989 c 101 § 15; 1985 c 450 § 4.]

RCW 80.36.360 Exempted actions or transactions. For the purposes of RCW 19.86.170, actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited, or regulated by the commission. [1985 c 450 § 8.]

WAC 480-120-161 Form of bills. (1) Bill frequency. Companies must offer customers, at a minimum, the opportunity to receive billings on a monthly interval, unless subsection (11) of this section applies.

(2) **Length of time for payment of a bill.** Bill due dates must reflect a date which at a minimum allows a customer fifteen days from the date of mailing for payment.

(a) Upon showing of good cause, a customer may request and the company must allow the customer to pay by a date that is not the normally designated payment date on their bill. Good cause may include, but not be limited to, adjustment of the billing cycle to parallel receipt of income.

(i) A company may not assess late payment fees for the period between the regularly scheduled due date and the customer-chosen due date so long as the customer makes payment in full by the customer-chosen due date.

(ii) A company may refuse to establish a preferred payment date that would extend the payment date beyond the next normally scheduled payment or due date.

(b) If a company is delayed in billing a customer, the company must offer arrangements upon customer request or upon indication that a payment arrangement is necessary, that are equal to the length of time the bill is delayed beyond the regularly scheduled billing interval (e.g., if the bill includes two months delayed charges, the customer must be allowed to pay the charges over two months).

Companies may not charge a customer late payment fees on the delayed charges during the extended payment period.

(3) **Form of bill.** With the consent of the customer, a company may provide regular billings in electronic form if the bill meets all the requirements of this rule. The company must maintain a record of the customer's request, and the customer may change from electronic to printed billing upon request.

(4) **Bill organization.** Telephone bills must be clearly organized, and must comply with the following requirements:

(a) Bills may only include charges for services that have been requested by the customer or other individuals authorized to request such services on behalf of the customer, and that have been provided by the company;

(b) The name of the service provider associated with each charge must be clearly and conspicuously identified on the telephone bill;

(c) Where charges for two or more companies appear on the same telephone bill, the charges must be separated by service provider;

(d) The telephone bill must clearly and conspicuously identify any change in service provider, including identification of charges from any new service provider; and

(e) The telephone bill must include the internet address (uniform resource locator) of the web site containing the service provider's tariff or price list, if the service provider is a telecommunications company required to publish its tariff or price list on a web site pursuant to WAC 480-80-206(2) (Price list availability to customers) or WAC 480-120-193 (Posting of

tariffs for public inspection and review). This requirement may be satisfied by including the address of a web site other than that of the telecommunications company itself, if the web site provides access to the tariff or price list that applies to the service being billed.

For purposes of this subsection, "new service provider" means a service provider that did not bill the customer for service during the service provider's last billing cycle. This definition includes only providers that have continuing relationships with the customer that will result in periodic charges on the customer's bill, unless the service is subsequently canceled.

For purposes of this subsection, "clearly and conspicuously" means notice that would be apparent to a reasonable customer.

(5) Descriptions of billed charges.

(a) The bill must include a brief, clear, nonmisleading, plain language description of each service for which a charge is included. The bill must be sufficiently clear in presentation and specific enough in content so that the customer can determine that the billed charges accurately reflect the service actually requested and received, including individual toll calls and services charged on a per-occurrence basis.

(b) The bill must identify and set out separately, as a component of the charges for the specific service, any access or other charges imposed by order of or at the direction of the Federal Communications Commission (FCC).

(c) The bill must clearly delineate the amount or the percentage rate and basis of any tax assessed by a local jurisdiction.

(6) Charges for which service can be discontinued. Where a bill contains charges for basic service, in addition to other charges, the bill must distinguish between charges for which nonpayment will result in loss of basic service. The bill must include telephone numbers by which customers may inquire or dispute any charges on the bill. A company may list a toll-free number for a billing agent, clearinghouse, or other third party, provided such party possesses sufficient information to answer questions concerning the customer's account and is fully authorized to resolve the customer's complaints on the company's behalf. Where the customer does not receive a paper copy of the telephone bill, but instead accesses that bill only by e-mail or internet, the company may comply with this requirement by providing on the bill an e-mail or web site address. Each company must make a business address available upon request from a customer.

(7) Itemized statement. A company must provide an itemized statement of all charges when requested by a customer, including, but not limited to:

(a) Rates for individual services;

(b) Calculations of time or distance charges for calls, and calculations of any credit or other account adjustment; and

(c) When itemizing the charges of information providers, the name, address, telephone number, and toll-free number, if any, of the providers.

(8) Methods of payment.

(a) Companies must, at a minimum, allow the following methods of payment: Cash, certified funds (e.g., cashier check or money order), and personal checks.

(b) Upon written notice to a customer, companies may refuse to accept personal checks when that customer has tendered two or more nonsufficient-funds checks within the last twelve months.

(9) **Billing companies.** A company may bill regulated telecommunications charges only for companies properly registered to provide service within the state of Washington or for billing agents. The company must, in its contractual relationship with the billing agent, require the billing agent to certify that it will submit charges only on behalf of properly registered companies; and that it will, upon request of the company, provide a current list of all companies for which it bills, including the name and telephone number of each company. The company must provide a copy of this list to the commission for its review upon request.

(10) **Crediting customer payments.** Unless otherwise specified by the customer, payments that are less than the total bill balance must be credited first to basic service, with any remainder credited to any other charges on the bill.

For purposes of this subsection, basic service includes associated fees and surcharges such as FCC access charges. Basic service does not include ancillary services such as caller identification and custom calling features.

(11) **Exemptions from this rule.** Prepaid calling card services (PPCS) are exempt from subsections (1) through (10) of this section. [Statutory Authority: RCW 80.01.040 and 80.04.160. 05-03-031 (Docket No. UT 040015, General Order No. R-516), § 480-120-161, filed 1/10/05, effective 2/10/05; 03-01-065 (Docket No. UT-990146, General Order No. R-507), § 480-120-161, filed 12/12/02, effective 7/1/03.]

WAC 480-120-163 Refunding an overcharge. A company must refund overcharges to the customer with interest, retroactive to the time of the overcharge, up to a maximum of two years, as set forth in RCW 80.04.230 and 80.04.240. This rule does not limit other remedies available to customers.