No. 101389-2
Court of Appeals No. 82529-1-I

**IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

CLA USA INC. and CLA ESTATE SERVICES, INC.,

Petitioners,

vs.

STATE OF WASHINGTON

Respondent.

# PETITION FOR REVIEW

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# I. INTRODUCTION

The Court of Appeals adopted an exceptionally broad and legally erroneous view of the Estate Distribution Documents Act (EDDA), which no court had ever adopted, and which the Attorney General's Office (AGO) had never announced or enforced.

To reach this result, the Court of Appeals misread the EDDA's text and refused to consider crucial context. When the EDDA was adopted, existing law distinguished between what Defendants did—obtain basic information which Defendants *provided to independent lawyers*—and what was the unauthorized practice of law—providing individualized advice about, or preparing, estate distribution documents. The EDDA did not change that longstanding distinction. It codified existing law and declared unauthorized practice of law relating to estate planning to be a *per se* violation of the Consumer Protection Act (CPA). That is all it did. Nothing in the EDDA's text suggests that gathering information *without preparing or intending to*

*prepare estate documents* is now the exclusive province of lawyers. The legislative record confirms the Legislature's intent. In fact, when the Legislature was considering the EDDA, the AGO told the Legislature "the only thing" the EDDA would create was "a per-se violation of the [CPA]."

The Court of Appeals refused to consider contemporary unauthorized practice of law case law, or legislative history, because it believed the EDDA "does not mention, define, or regulate the unauthorized practice of law." App. 26. The EDDA, however, bans conduct "unless the person is *authorized to practice law*." RCW 19.295.020 (emphasis added). Regardless, because the EDDA's text at a minimum does not clearly make gathering information—divorced from the practice of law—illegal, the Court of Appeals was required to consult the EDDA's history and context.

The Legislature could not have intended the EDDA to mean what the Court of Appeals construed it to mean. Under that construction, any child, spouse, friend, or assistant who gathers

or offers to gather information to help someone prepare to consult an attorney for the preparation of a will or trust violates the EDDA. This will "limit consumers from obtaining legitimate estate planning documents … from those authorized to practice law"—an outcome the Legislature explicitly did "not intend[]." RCW 19.295.005. Further, the EDDA, as construed, would conflict with the First Amendment, which protects the right to ask questions and receive information.

The lower courts' expansive misreading warrants this Court's attention. An EDDA violation is a *per se* violation of the CPA, and, according to its terms, addresses "matters vitally affecting the public interest." RCW 19.295.030. EDDA violations therefore come with substantial liability, as this case shows. Due to the construction below, the AGO obtained its "highest ever trial award in a Washington state consumer protection case."[1] Absent this Court's correction, the AGO will

[1] *Consumer Protection Week*, WASH. STATE OFFICE ATT'Y GEN. (Mar. 10, 2022), https://www.atg.wa.gov/news/news-

obtain even more egregious awards for conduct which has long been treated as permissible. The Legislature recently increased available penalties by nearly 300%.

The Court of Appeals compounded its error by affirming excessive restitution and penalties. The restitution awarded represents *all* of Defendants' revenues plus *all* commissions earned, although Defendants' customers received and retained value: CLA provided the services it offered and sold undisputedly lawful annuities which customers still own. Under Washington law, restitution is therefore inappropriate. The civil penalties awarded were duplicative of restitution and unlawful in their own right.

The award is particularly troubling because the AGO caused it to grow by sitting by, aware of CLA's decades-old business practices, for years—a "delay" the Court of Appeals found "concern[ing]" and "incongruous" with the AGO's

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releases/consumer-protection-week-attorney-general-ferguson-announces-recoveries.

purported concerns about petitioners' business. App. 31. The AGO's adoption of a new interpretation (which departed from what it previously told the Legislature), its refusal to inform petitioners, and its delay, resulted in unfair surprise inconsistent with due process. *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Certainly, the AGO's actions preclude penalties based on a finding that petitioners acted in bad faith. These serious errors warrant review.

## II. IDENTITY OF PETITIONERS

Petitioners, CLA USA Inc. and CLA Estate Services Inc. (together, "CLA"), ask the Court to grant review of the published opinion designated in Part III.

## III. OPINION BELOW

On August 22, 2022, the Court of Appeals issued its opinion, which appears at pages 6 through 33 of the Appendix, affirming the King County Superior Court's judgment. The Superior Court's opinion appears at pages 34 through 101 of the

Appendix. On September 22, 2022, the Court of Appeals denied petitioners' motion for reconsideration.

## IV. ISSUES PRESENTED FOR REVIEW

(1) Whether the EDDA prohibits nonlawyers from gathering or offering to gather information which attorneys may use in preparing estate distribution documents, even when the nonlawyer provides no legal advice, is not involved in the preparation of an estate distribution document, and does not represent that he or she will provide legal advice regarding or prepare any estate distribution document.

(2) Whether penalizing CLA under a construction of the EDDA which the AGO had never announced or enforced, which departs from what the AGO previously stated, which the AGO did not enforce against CLA for years despite awareness of CLA's business practices, and which the AGO refused to inform CLA of, violates due process.

(3) Whether an award which includes restitution based on total disgorgement of revenue and substantial civil penalties is unlawful and excessive where consumers received the benefit of their bargain and multiple penalties were awarded for the same acts, and where CLA sought guidance from the AGO but received none, while the AGO delayed in bringing an action for years, allowing penalties and restitution to accrue.

## V. STATEMENT OF THE CASE

The AGO first investigated CLA in 2013 after issuing a Civil Investigative Demand (CID). App. 9. CLA cooperated fully, providing copious information about its business. CP 121, 125-26; RP 867:12-869:16. CLA repeatedly asked to meet with the AGO and requested guidance "to ensure that it is fully compliant with all applicable laws." CP 7949; *see also* CP 7931-7956; App. 31. The AGO refused to meet, provide guidance, or even express misgivings. CP 7944; CP 7955; App. 31.

In 2014, the AGO retained a legal expert to opine on whether CLA's business was lawful. CP 4183-4330, 4185 ¶¶ 5-8, 5744-5763, 5744-45 ¶¶ 4-8. The expert provided an opinion to the AGO in 2014 that certain CLA materials misstated Washington probate law. CP 4185-86 ¶¶ 5-6, 8. The expert did not address the EDDA. *See id.* The AGO took no action, and did not even inform CLA of the expert's conclusion. CLA continued to operate its business as it has done for many years in more than 20 states.

Years later, in 2017, the AGO issued a new CID. App. 31. The AGO consulted the same expert, who offered a virtually identical opinion. CP 4185-86, ¶¶ 5, 7, 9. This time, the AGO initiated this action, asserting, among other things, that CLA's longstanding practices violated the EDDA.

The AGO alleged that CLA violated the EDDA by offering to gather information at informational seminars and then receiving basic information—such as name, address, and value of estate—through a "Client Information Form," which CLA

entered into a database. A licensed attorney could later consult the database if the customer retained an attorney and decided to have the attorney prepare a document, and the attorney elected to consult the database. CP 18-20 ¶¶ 5.31, 5.33, 5.40. At follow-up meetings, the AGO alleged, CLA "asked a series of questions to determine if any changes or corrections were needed to the [customer's] documents, such as the names of trustees, successor trustees and beneficiaries, or to the terms of the trust." AGO Br. 15. And at annual check-in meetings, CLA would again "ask[] the customer a series of questions" to assess whether updates were needed. *Id.* at 16. If so, CLA would provide updated information to the customer's attorney. *Id.* at 16-17. The AGO did not allege that CLA offered legal advice or prepared legal documents and acknowledged that sometimes "attorneys chose not to rely on the information CLA gathered." *Id.* at 43.

The trial court agreed that CLA violated the EDDA. App. 80. "[T]he EDDA prohibits gathering, or offering to gather, information," the court found, without regard to whether the

person who gathers or offers to gather it does anything else. App. 80. And, under the EDDA "it does not matter … whether the information [was] ultimately used by an attorney." App. 80.

The court awarded $6,162,913.93 in restitution, representing *all* of CLA's revenues plus *all* commissions earned on any sales of insurance products. App. 86. The court also awarded $6,546,000 in civil penalties. First, the court assessed one $2,000 penalty under the EDDA—the maximum penalty for each violation—for each of the 210 Client Information Forms consumers completed. Second, the court assessed one $2,000 penalty under the EDDA for each of the 1,478 follow-up and check-in meetings CLA had with customers (only 94 of which resulted in CLA sending update forms to clients' attorneys). App. 90. Finally, the court assessed three penalties totaling $2,000 for each of petitioners' 1,765 informational seminars—one penalty for "offer[ing] to gather [information]" under the EDDA and two for supposed misrepresentations under the CPA. App. 96. In determining that penalties were appropriate, the court

determined that CLA "did not act in good faith." App. 92. The court did not address CLA's attempts to obtain guidance from the AGO in a good faith attempt to comply with the law.

The Court of Appeals affirmed. It found the EDDA's text "clear," and refused to consider "legislative history and contemporary case law indicating the EDDA was passed with the intent of regulating the unauthorized practice of law." App. 25-26. The court reasoned that it "need not evaluate these materials" at all "because" it believed the EDDA "does not mention, define, or regulate the unauthorized practice of law." App. 26.

The Court of Appeals also affirmed the record-setting award of restitution and penalties. It "share[d] CLA's concern about the AGO's delay in prosecuting the case," finding it "incongruous" with the AGO's assertion that CLA "exploited Washington senior citizens." App. 31-32. The court noted that CLA "offered multiple times to meet with the AGO"—offers which "[t]he AGO declined." App. 31. Nonetheless, the court found the trial court did not err in concluding CLA did not act in

good faith, reasoning that the EDDA did not "allow for more than one reasonable interpretation." App. 31. (quoting *Safeco Ins. Co. of America* v. *Burr*, 551 U.S. 47, 70 n.20 (2007)). The court refused to consider CLA's argument that total disgorgement is inappropriate where consumers retain the benefit of their bargain. App. 30.

## VI. ARGUMENT

### A. The Court of Appeals's Unprecedented Construction Departs From the EDDA's Terms and Intent.

The EDDA makes it a *per se* violation of the CPA for a nonlawyer to engage in the unauthorized practice of law (UPL) by offering individualized advice regarding estate distribution documents, preparing such documents, or, as relevant here, gathering information for the purpose of *themself* offering such advice or preparing such documents.

The EDDA thus codified preexisting UPL case law, and clarified that UPL in this context is a *per se* "unfair or deceptive act" under the CPA. RCW 19.295.030. The EDDA did not change the law to ban nonlawyers from asking questions or

receiving information which a lawyer may later use. The Court of Appeals's contrary decision is inconsistent with the statute's text and the Legislature's intent.

1. The Court of Appeals misinterpreted the EDDA's text.

Under a natural reading of the EDDA's text, it is unlawful for a nonlawyer to gather information, or offer to gather information, only if the nonlawyer prepares or intends to prepare the estate distribution document or legal advice.

The EDDA makes it unlawful "for a person to market estate distribution documents … unless the person is authorized to practice law." RCW 19.295.020(1). "Market" includes "every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document." RCW 19.295.010(4). And an "[e]state distribution document" is a legal document, such as a will or trust, "prepared, or intended to be prepared, for a specific person or as marketing materials for distribution to any person." RCW 19.295.010(1).

These provisions make it unlawful for a nonlawyer to gather information relevant to a legal document *which the nonlawyer prepares or intends to prepare*. Gathering information is only unlawful if it is done for a particular purpose, namely, "*for the preparation of*" individualized advice about a legal document "*prepared, or intended to be prepared*, for a specific person or as marketing materials for distribution to any person." RCW 19.295.010(1), (4) (emphasis added).

The Court of Appeals found the statute ambivalent as to who—nonlawyer or lawyer—prepares the document. App. 25. That is not "[t]he most natural reading of [the text]." *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1169 (2021). And it makes little sense. Under that construction, whether gathering information is lawful sometimes depends on the intention of a third party. If somebody else—even an attorney—at some point intends to prepare the document, that transforms the nonlawyer's receipt of information into a violation. This is not how the law generally works. "[A] violation of the [law] cannot be made out on the

basis of someone other than the violator's knowledge." *Levas & Levas* v. *Antioch, Ill.*, 684 F.2d 446, 453 (7th Cir. 1982); *see Letchworth* v. *Gay*, 874 F. Supp. 107, 109 (E.D.N.C. 1995).

The Court of Appeals's reading contradicts the Legislature's stated intent "not … to limit consumers from obtaining legitimate estate planning documents … from those authorized to practice law." RCW 19.295.005; *see Thompson* v. *Hanson*, 168 Wn.2d 738, 751, 239 P.3d 537 (2009) (the legislature is presumed not to act "contrary to the overriding purpose of the statute"). It impedes access to legitimate, lawyer-prepared documents by making it illegal for "*any* natural person, corporation, partnership, limited liability company, firm, or association" to gather, or offer to gather, information to help a person obtain legal advice. RCW 19.295.010(5) (emphasis added). A daughter who offers to help her father fill out a probate form would be just as liable as a corporation selling trusts; there is no exception for "family members … engaging in non-commercial discussions." *Contra* AGO Br. 45. The EDDA

should be construed to "avoid [this] unlikely, absurd, or strained consequence[]." *State* v. *Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

Further, the court's conclusion that gathering or offering to gather information is illegal whenever an independent attorney *may* use it (App. 24), is contrary to the EDDA's requirement that the document is gathered "for the preparation of" a document "prepared or intended to be prepared." This was a crucial error. The court found EDDA violations for *every* attendee at *every* seminar, many of whom never hired lawyers or obtained documents, and *every* follow-up and check-in meeting, although documents had already been prepared, and meetings rarely resulted in CLA sending update forms to attorneys.

2. The Court of Appeals wrongly refused to consider legislative history and case law.

The EDDA's focus on "individualized advice" and preparation of documents "for a specific person" incorporates preexisting UPL case law. At a minimum, the EDDA is ambiguous about when a nonlawyer may gather information.

Thus, courts should turn to "legislative history, and relevant case law to assist … in discerning legislative intent." *Cockle* v. *Dep't of Lab. & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *see also State Dep't of Transp.* v. *James River Ins. Co.*, 176 Wn.2d 390, 396-97, 292 P.3d 118 (2013); *Ysletta Del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1940 (2022) ("Even if fair questions remain after a look at the ordinary meaning of the statutory terms … important contextual clues [the contemporary legal context and legislative history] resolve them.").

The EDDA's terms are drawn from case law. The Legislature "is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it." *Price* v. *Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). At the time of the EDDA, Washington case law established that "a person begins to practice law by either directly or indirectly … giving advice," for example, through the "selection of

appropriate [estate distribution] documents." *In re Estate of Knowles*, 135 Wn. App. 351, 365-66, 143 P.3d 864 (2006).

Under the common law, in other words, nonlawyers gathering information for the preparation of estate distribution documents are not practicing law unless they prepare individualized advice about, or an estate distribution document, themselves. *Compare In re Disciplinary Proceeding Against Shepard*, 169 Wn.2d 697, 710, 239 P.3d 1066 (2010) ("[Nonlawyer] practiced law by *choosing* living trust documents for customers.") (emphasis added)), *and In re Marks*, 91 Wn. App. 325, 335, 957 P.2d 235 (1998) ("[Nonlawyer's] activities in selecting a will kit, discussing the distribution of assets and whether it was fair; obtaining the inventory of investments, typing the will, and arranging for the signing and witnessing of the will constituted the unauthorized practice of law."), *with Knowles*, 135 Wn. App. at 365-66 (no UPL where there was "no evidence that [nonlawyer] selected the will form or advised [his father] about his dispositions").

The EDDA draws the same distinction. It makes it a CPA violation for a nonlawyer to collect information to give "*individualized advice* about an estate distribution document." RCW 19.295.010(4) (emphasis added). It thus targets only those who do "work of a legal nature" by "giv[ing] legal advice to those *for whom [they] draw[] instruments*." *Paul* v. *Stanley*, 168 Wash. 371, 376-77, 12 P.2d 401 (1932) (emphasis added), *overruled on other grounds by Wash. State Bar Ass'n* v. *Wash. Ass'n of Realtors*, 41 Wn.2d 697, 251 P.2d 619 (1952).

The legislative history confirms the Legislature intended to codify existing law regarding UPL. The "[l]egislative history serves an important role in divining legislative intent." *State* v. *Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). The EDDA's Final Bill Report makes clear that the Legislature was focused on existing UPL caselaw: "The practice of law as construed by Washington courts includes not only legal representation of a client in court, but also legal advice and counsel as well as the preparation of legal instruments and contracts by which legal

rights are secured." H.R. B. Rep., Reg. Sess. H.B. 1114 (Wash. 2007). It was already unlawful for nonlawyers to market or sell living trusts; the AGO recognized that "you c[ould] use [current] law to get to that conclusion." House Judiciary Committee Tr. at 19 (Statement of Cheryl Kringle, AGO Spokesperson) (2007).

The problem was that the AGO was struggling to combat "trust mill" schemes. Connecting UPL to the CPA was "a multi-stepped approach" which was "based on case law" alone, creating "hurdle[s]" such as the need to prove that the specific instance of UPL "was deceptive or unfair." *Id.* at 19, 27, 34. So the Legislature enacted the EDDA to "make[] clear what a violation of the law is and create[] a *per se* violation of the [CPA]." H.R. B. Rep., Reg. Sess. H.B. 1114 (Wash. 2007).

The sole new law "create[d]" by the EDDA—a *per se* violation—was critical because, while courts had found UPL to sometimes violate the CPA, UPL was not a *per se* CPA violation. *Compare Bowers* v. *Transamerica Title Ins. Co.*, 100 Wn.2d 581, 583, 675 P.2d 193 (1983), *with Hangman Ridge Training*

*Stables, Inc.* v. *Safeco Title Ins. Co.*, 33 Wn. App. 129, 136, 652 P.2d 962 (1982).

In fact, when the EDDA was adopted, the AGO agreed that it did not change the scope of what was unlawful for nonlawyers. The EDDA was "request[ed]" by the AGO. House Judiciary Committee Tr. at 9 (Statement of Representative Rodney) (2007). And when the Legislature was considering the EDDA, the AGO explained that "the only thing that you would be creating that's not in existence right now is a per-se violation of the [CPA]." House Judiciary Committee Tr. at 34 (2007). One year later, the AGO reiterated that the EDDA simply made it easier to penalize "those who would engage in the unauthorized practice of law." House Judiciary Committee Tr. at 11 (Statement of Doug Walsh) (2008). The Act accomplished this by providing that "unless [persons] are authorized to sell [estate distribution] documents and engage in the practice of law, [they] should not do so." *Id.* In short, as everyone previously agreed,

the Legislature intended to make it easier to punish a preexisting offense, not to create a new one.

The Court of Appeals ignored all of this. It recognized that CLA presented "legislative history and contemporary case law indicating that the EDDA was passed with the intent of regulating the unauthorized practice of law." App. 25-26. But the court believed it "need not evaluate these materials" because the EDDA, "does not mention, define, or regulate the unauthorized practice of law." App. 26.

But the EDDA on its face targets UPL. It forbids conduct unless a person "is authorized to practice law." RCW 19.295.020(1). And, regardless of whether the EDDA is a UPL statute, when a statute is susceptible to differing interpretations, courts must always "turn to other indicators of legislative intent—[*i.e.*,] statutory context, case law, and legislative history." *Brown* v. *Wash. State Dep't of Com.*, 184 Wn.2d 509, 535, 359 P.3d 771 (2015) (en banc). As explained above, the text of the EDDA is at least susceptible to differing interpretations.

There is no legal basis for the Court of Appeals's conclusion that the absence of the phrase "unauthorized practice of law" from the EDDA excused the court from looking at context and history *of the EDDA*.

3. The Court of Appeals's construction renders the EDDA unconstitutional.

The Court of Appeals's interpretation "render[s] [the] statute unconstitutional" and should have been "avoid[ed]." *In re Ways' Marriage*, 85 Wn.2d 693, 703, 538 P.2d 1225 (1975).

The First Amendment, of course, protects the right to speak—including the rights to make offers, *Nordyke* v. *Santa Clara Cnty.*, 110 F.3d 707, 710 (9th Cir. 1997), and "receive information," *Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020). The overbroad construction adopted below causes the EDDA to sweep in substantial amounts of speech that the government has no interest in banning, in violation of the First Amendment. *See Kitsap Cnty.* v. *Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005); *State* v. *Padilla*, 190 Wn.2d 672, 678, 416 P.3d 712 (2018). The court

refused to address this issue, App. 27-28, despite CLA raising it. CLA Br. 75-77.

## B. CLA Was Not Given Fair Notice.

The state "must give fair notice of conduct that is forbidden or required." *Fox Television Stations, Inc.*, 567 U.S. at 253. Where the "text and relevant court and agency guidance allow for more than one reasonable interpretation," *Burr*, 551 U.S. at 70 n.20, the state cannot refuse to offer guidance and then use a novel interpretation of the law "to impose potentially massive liability on [defendants] for conduct that occurred well before that interpretation was announced," *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012).

In the 15 years since the EDDA was enacted, neither the judiciary nor the AGO has stated that it prohibits the conduct at issue.[2] And the AGO did not enforce the EDDA against such conduct, despite being fully aware of it. In fact, the AGO

[2] *See AGO Opinions By Year*, WASH. STATE OFFICE ATT'Y GEN. (last visited Oct. 11, 2022), https://www.atg.wa.gov/ago-opinions-year.

previously represented that the EDDA did not "create[] any … new cause of action" and "only" made a violation of existing law "a *per-se* violation of the [CPA]." House Judiciary Committee Tr. at 33-34 (2007). It is patently unfair for the state to change its position for the first time in an enforcement action. *See Fox Television Stations*, 567 U.S. at 256-57.

The AGO further lulled CLA into a belief that its actions were lawful by not enforcing the AGO's current interpretation for years. When, as here, enforcement is preceded by a "period of conspicuous inaction, the potential for unfair surprise is acute." *SmithKline Beecham*, 567 U.S. at 158. The AGO investigated CLA, took no action, and declined CLA's requests for guidance. The AGO sat on its hands even after receiving its legal expert's opinion, never informing CLA whether "it thought [CLA] was acting unlawfully." *Id.* at 157. Only years later, after initiating this investigation, did the AGO announce its new view. The Court of Appeals acknowledged that this delay was "concern[ing]." App. 31. It was in fact outrageous.

During the AGO's years of silence, CLA's "violations" accrued.[3] To punish CLA now because of the State's own hesitation "would result in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned." *SmithKline Beecham*, 567 U.S. at 156-57.

At a minimum, civil penalties are not appropriate. Courts consider "whether defendants acted in good faith" when determining whether to award, and the amount of, civil penalties. *See, e.g.*, *State* v. *LA Investors*, 2 Wn. App. 2d 524, 545-46, 410 P.3d 1183 (cleaned up). Here, the court awarded penalties—including the maximum penalty for each Client Information Form and follow-up and check-in meeting—based on its conclusion that CLA did not act in good faith. App. 30-32.

CLA's conduct was not the kind of "flagrant[] and intentional[]" violation that could support this finding. *See State* v. *Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298,

[3] The penalties are based on conduct after November 3, 2015, when the statute of limitations began to run. App. 90.

309, 553 P.2d 423 (1976). In the face of an, at most, ambiguous statute, CLA attempted to understand the AGO's position. The AGO refused. CLA thus had no notice, and could not have acted in bad faith. *See Burr*, 551 U.S. at 70 n.20 ("[I[t would defy history and current thinking to treat a defendant who merely adopts one [reasonable] interpretation as a knowing or reckless violator").

### C. The Court of Appeals Awarded Excessive and Duplicative Restitution and Civil Penalties.

"[E]xemplary damages imposed on a defendant should reflect the enormity of his offense." *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) (cleaned up). Courts must "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 426 (2003). The Court of Appeals affirmed unreasonable and disproportionate restitution and penalties, disregarding these principles and the CPA's text.

*First*, total disgorgement is inappropriate where consumers receive the benefit of their bargain. When calculating "restitution," the notion "that the wrongdoer should not profit by his own wrong" must be balanced against "the countervailing equitable principle that the wrongdoer should not be punished by paying more than a fair compensation to the person wronged." *Liu* v. *SEC*, 140 S. Ct. 1936, 1943 (2020) (cleaned up). Thus, courts must ensure restitution does not "provide[] a potential windfall to consumers." *FTC* v. *Noland*, 2021 WL 5493443, at *4 (D. Ariz. Nov. 23, 2021); *see also FTC* v. *Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (requiring consumers to decide whether they would "keep [valuable products sold by defendants] instead of returning them for refunds"). The restitution award here created a windfall because it included all of CLA's earnings, although consumers received what they paid for: assistance with maintaining their estate documents and lawful annuities.

The Court of Appeals said the restitution award was proper to "deter[] CPA misconduct." App. 29. But the CPA allows restitution only for the equitable goal of *restoration*, not *deterrence*. Restitution under the CPA is a non-punitive remedy to "restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any [prohibited] act." RCW 19.86.080(2). And a "civil sanction that … can only be explained as also serving either retributive or deterrent purposes, is punishment." *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1645 (2017).

*Second*, the civil penalties are duplicative of restitution and based on an overcount of "violations," and therefore exceed the maximum penalty available under the CPA. As noted above, the restitution awarded was punitive. Awarding civil penalties in addition caused punitive damages to far exceed the maximum penalty available under the CPA. *See* RCW 19.86.140 (prior to July 2021). Further, under the CPA, "[e]ach deceptive *act* is a separate violation." *LA Investors*, 2 Wn. App. 2d at 545-46

(emphasis added). Violations do not multiply based on the number of supposed misrepresentations within each act. *See id.* at 541-546. Awarding three penalties (per attendee) for each CLA seminar again multiplied the damages contrary to the CPA's terms.

### D. <u>These Important Issues Require Review.</u>

The EDDA is addressed to "matters vitally affecting the public interest," and its proper construction is crucial to that interest. RCW 19.295.030. Until now, the EDDA had never been given such a sweeping construction. The AGO's new interpretation gives the AGO virtually unfettered discretion to bring cases against "any" person who gathers, or offers to gather, information to help a person obtain legitimate legal advice relating to estate planning. RCW 19.295.010(5). Such a broad assertion of authority should be subject to this Court's scrutiny.

Punishments for violating the EDDA are severe. The award here shows just how powerful the AGO's expansive view of the EDDA is. But the AGO may seek even larger awards if the

Court does not intervene. The Legislature recently tripled the maximum civil penalty available, from $2,000 to $7,500 per violation. RCW 19.86.140 (2021).

This Court should address the Court of Appeals's unprecedented and untenable interpretation of the EDDA and the resulting historic penalties.

## VII. CONCLUSION

This Court should grant review.

Respectfully submitted this 21st day of October, 2022.

*We certify that the foregoing Petition is 4,947 words in compliance with RAP 18.17(c)(10).*

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*ATTORNEYS FOR PETITIONERS CLA ESTATE SERVICES, INC., AND CLA USA INC.*

## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing PETITION FOR REVIEW to be served on the following persons:

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by causing the document to be delivered by the following indicated method or methods

☑ by Washington State Appellate Courts' Portal electronically mailed notice from the Court on the date set forth below.

☐ by mailing full, true and correct copies thereof in sealed, first class postage prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or attorneys, and deposited on the United States Postal Service at Portland, Oregon, on the date set forth below.

DATED: October 21, 2022

*s/ David J. Elkanich*
David J. Elkanich

## APPENDIX

# APPENDIX 1

Chapter 19.295 RCW
ESTATE DISTRIBUTION DOCUMENTS

**RCW 19.295.005 Findings—Intent.** The legislature finds the practice of using "living trusts" as a marketing tool by persons who are not authorized to practice law, who are not acting directly under the supervision of a person authorized to practice law, who are not a financial institution, or who are not properly credentialed and regulated professionals as specified under RCW 19.295.020 (5) and (6) for purposes of gathering information for the preparation of an estate distribution document to be a deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens. The legislature further finds that this practice endangers the financial security of consumers and may frustrate their estate planning objectives. Therefore, the legislature intends to prohibit the marketing of services related to preparation of estate distribution documents by persons who are not authorized to practice law or who are not a financial institution.

This chapter is not intended to limit consumers from obtaining legitimate estate planning documents, including "living trusts," from those authorized to practice law; but is intended to prohibit persons not licensed to engage in the practice of law from the unscrupulous practice of marketing legal documents as a means of targeting senior citizens for financial exploitation. [2009 c 113 § 1; 2007 c 67 § 1.]

**RCW 19.295.010 Definitions.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Estate distribution document" means any one or more of the following documents, instruments, or writings prepared, or intended to be prepared, for a specific person or as marketing

materials for distribution to any person, other than documents, instruments, writings, or marketing materials relating to a payable on death account established under *RCW 30.22.040(9) or a transfer on death account established under chapter 21.35 RCW:

(a) Last will and testament or any writing, however designated, that is intended to have the same legal effect as a last will and testament, and any codicil thereto;

(b) Revocable and irrevocable inter vivos trusts and any instrument which purports to transfer any of the trustor's current and/or future interest in real or personal property thereto;

(c) Agreement that fixes the terms and provisions of the sale of a decedent's interest in any real or personal property at or following the date of the decedent's death.

(2) "Financial institution" means a bank holding company registered under federal law, a bank, trust company, mutual savings bank, savings bank, savings and loan association or credit union organized under state or federal law, or any affiliate, subsidiary, officer, or employee of a financial institution.

(3) "Gathering information for the preparation of an estate distribution document" means collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document, but does not include the collection of such information for clients in the customary and usual course of financial, tax, and associated planning by a certificate holder or licensee regulated under chapter 18.04 RCW.

(4) "Market" or "marketing" includes every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document.

(5) “Person” means any natural person, corporation, partnership, limited liability company, firm, or association. [2009 c 113 § 2; 2008 c 161 § 1; 2007 c 67 § 2.]

**RCW 19.295.020 Marketing of estate distribution documents— Exemptions from chapter.**

(1) Except as provided in subsection (2) of this section, it is unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state.

(2) A person employed by someone authorized to practice law in this state may gather information for, or assist in the preparation of, estate distribution documents as long as that person does not provide any legal advice.

(3) This chapter applies to any person who markets estate distribution documents in or from this state. Marketing occurs in this state, whether or not either party is then present in this state, if the offer originates in this state or is directed into this state or is received or accepted in this state.

(4) This chapter does not apply to any financial institution.

(5) This chapter does not apply to a certificate holder or licensee regulated under chapter 18.04 RCW for purposes of gathering information for the preparation of an estate distribution document.

(6) This chapter does not apply to an individual who is an enrolled agent enrolled to practice before the internal revenue service pursuant to Treasury Department Circular No. 230 for

purposes of gathering information for the preparation of an estate distribution document. [2009 c 113 § 3; 2007 c 67 § 3.]

**RCW 19.295.030 Violations—Application of consumer protection act.** The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for purposes of applying the consumer protection act, chapter 19.86 RCW. [2007 c 67 § 4.]

# APPENDIX 2

FILED
8/22/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CLA ESTATE SERVICES, INC., and CLA USA INC.,<br><br>Appellants,<br><br>MITCHELL REED JOHNSON, individually and in his marital community,<br><br>Defendant. | No. 82529-1-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

SMITH, A.C.J. — CLA Estate Services, Inc. (CLA ESI) and CLA USA, Inc. (CLA USA) (collectively, CLA) began offering free estate-planning seminars for seniors in Washington in 2008. These seminars stressed to consumers that "Revocable Living Trusts" (RLTs) were a superior means of estate distribution relative to probate, and offered a "Lifetime Estate Plan," wherein nonlawyer CLA agents would come to consumers' houses and gather information about the consumers' assets to assist the consumers' lawyers in preparing their estate distribution documents. The Office of the Attorney General (AGO) sued CLA for violations of the Consumer Protection Act (CPA), ch. 19.86 RCW, and "Estate Distribution Documents Act" (EDDA), RCW 19.295. After motions for summary judgment and a bench trial, the court concluded that CLA unlawfully

misrepresented the benefits of RLTs compared to probate, misrepresented the CLA agents' intentions in coming to consumers houses, and violated the EDDA by gathering information for the preparation of estate distribution documents. The court ordered CLA to pay restitution for all of the commissions it received from the sales of the Lifetime Estate Plan and annuities sold at in-home meetings, and imposed a civil penalty of $2,000 per violation. CLA appeals. Finding no error, we affirm.

FACTS

CLA ESI and CLA USA are Texas corporations that began offering free estate-planning seminars in Washington in 2008, offering a free meal to seniors to encourage attendance. At these seminars, CLA's presenters, who were not lawyers, distributed and taught from a workbook titled "CLA 'Lifetime Estate Plan.' " The presenters followed scripts promoting the Lifetime Estate Plan and "focus[ing] on the supposed dangers associated with probate that could be avoided with a living trust." The plan was "tout[ed] as a full-service estate planning package in which CLA would assist consumers in estate planning to protect their assets and heirs, ensure their estate passes to their heirs, provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys." As part of the plan, CLA would gather information about the consumers' estates and enter it into its "Road of Retirement" proprietary software, and share this information with the consumers' independent attorneys for the preparation of estate distribution documents. CLA would then send an agent to the consumers' house in a "delivery meeting" to deliver and notarize the

legal documents. Then, three months later and every year thereafter, CLA would send an agent to review the client's information and check if any changes were needed.

Although these agents were presented as being "financial planners" who could offer a wide variety of advice and help, the agents were insurance salespeople whose primary compensation for these visits was commissions from selling annuities. And "[a]lthough CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road [of] Retirement as a sales tool, to gather lists of assets that could be moved into annuity products." The insurance products that CLA sold were "extraordinarily complex" and "opaque," included an "extraordinarily" high commission relative to other insurance products, and were calculated by an expert as having a substantially lower value than the purchase price.

The AGO issued a Civil Investigative Demand (CID) to CLA in 2013, when it began to investigate whether CLA's business model complied with the CPA and EDDA. In October 2017, the AGO provided CLA with notice of its intent to sue for violations of these acts.[1] The court decided several motions for partial summary judgment and ultimately entered findings of facts and conclusions of law following a bench trial. It concluded that CLA violated the CPA by misrepresenting the relative benefits of RLTs and probate in Washington and by being deceitful about the intentions of the CLA agents sent to in-home visits. It

[1] The record does not establish why the AGO's investigation took 4 years.

also concluded that CLA violated the EDDA by offering to gather, and gathering, information from clients for the preparation of estate distribution documents. It ordered CLA to return all revenue from sales of the Lifetime Estate Plan and insurance products to consumers in Washington and imposed civil penalties of $666 to $2,000 for each CPA and EDDA violation. It also entered extensive injunctive restraints against CLA and awarded attorney fees to the AGO.

CLA appealed.

## ANALYSIS

### Standard of Review

We review the court's findings of fact to determine if they are supported by substantial evidence in the record. Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 8 n.5, 206 P.3d 1255 (2009). We then determine whether the findings of fact support the conclusions of law. Id. Whether a certain action constitutes a violation of the CPA is a question of law that we review de novo. Id. at 12.

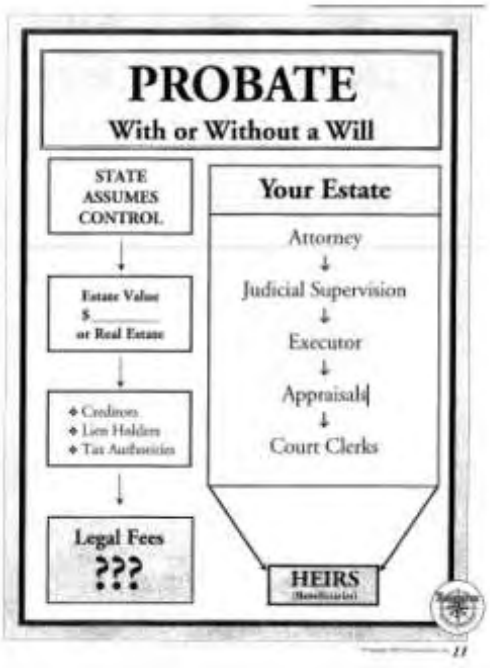
"A trier of fact has discretion to award damages which are within the range of relevant evidence." Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990). "An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice." Id.

Representations about Trusts and Probate

CLA contends that the court erred when it concluded that CLA misrepresented estate law and that these misrepresentations violated the CPA. It challenges several individual findings[2] about the contents of CLA's workbooks and challenges the court's legal conclusions about the net impression made by CLA at the seminar. These issues are discussed in turn.

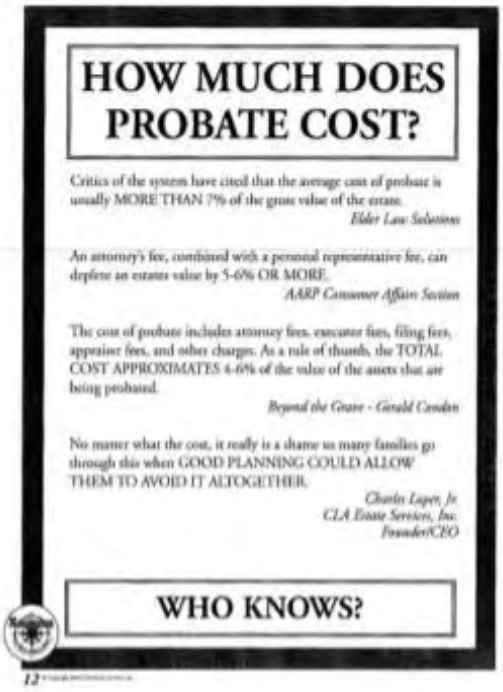
1. Challenged Findings

CLA challenges the portion of the court's Finding of Fact 12(d) that states that page 11 of the CLA workbook "graphically represent[s] that the probate process significantly reduces the estate value available to distribute to heirs." Page 11, which is titled "PROBATE" depicts a large box labeled "Your Estate," with several enumerated costs ("Attorney → Judicial Supervision → Executor → Appraisals → Court Clerks"), and then depicts arrows pointing at a significantly smaller box labeled "HEIRS." This is substantial evidence supporting the court's finding.[3]




[2] In its reply brief, CLA also contends for the first time that the court uncritically accepted the State's proposed findings and conclusions and that we should therefore closely scrutinize those findings. But the court did not adopt verbatim the State's proposed findings and its findings stand up to scrutiny.

[3] CLA challenges this finding rather disingenuously by omitting the word



HOW MUCH DOES PROBATE COST?

Critics of the system have cited that the average cost of probate is usually MORE THAN 7% of the gross value of the estate.
*Elder Law Solutions*

An attorney's fee, combined with a personal representative fee, can deplete an estates value by 5-6% OR MORE.
*AARP Consumer Affairs Section*

The cost of probate includes attorney fees, executor fees, filing fees, appraiser fees, and other charges. As a rule of thumb, the TOTAL COST APPROXIMATES 4-6% of the value of the assets that are being probated.
*Beyond the Grave - Gerald Condon*

No matter what the cost, it really is a shame so many families go through this when GOOD PLANNING COULD ALLOW THEM TO AVOID IT ALTOGETHER.
*Charles Loper, Jr.*
*CLA Estate Services, Inc.*
*Founder/CEO*

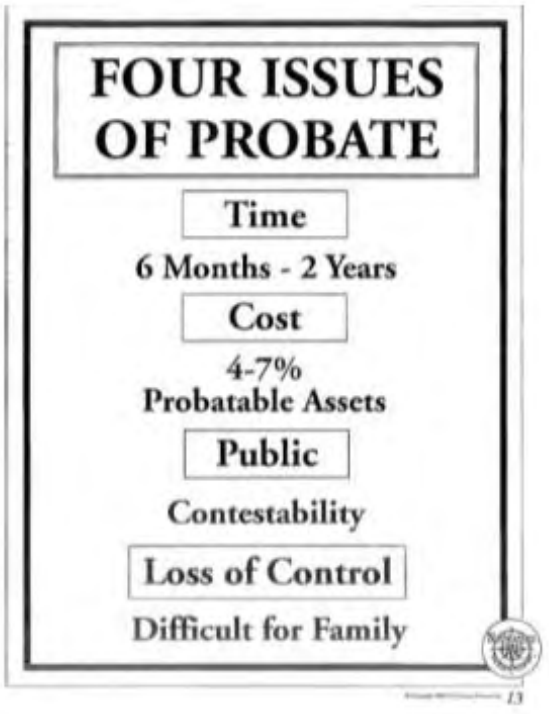
WHO KNOWS?

12

CLA challenges Finding of Fact 12(e)'s characterization of the quotes on page 12 of the workbook as "vastly overstat[ing] the general cost of probate administration in Washington." CLA makes its argument by characterizing the court's finding as referring to CLA's statements, and then contending that CLA's only claim about the cost of probate was "who knows." But the court's finding plainly concerns the "statements" providing specific numbers, ranging from 4 to 6 percent of an estate to "MORE THAN 7%." And the court cites a declaration from the State's expert that the page "both wrongly implies that Washington does have a percentage-based statutory fee schedule and, in my experience, dramatically overstates the cost of probate administration." Additional evidence indicates that the workbook's actual dollar estimate of the cost of probate "is far in excess of the typical cost of probate." Rather than challenging the reliability of this evidence, CLA points to its own expert's declaration highlighting the uncertainties of probate costs, but ultimately presenting evidence that the average probate cost in 100 probate cases in Western Washington was 3.77 percent of the estate value. Given that the page's first estimation of probate

"graphically" from its assignment of error and then protesting that page 11 does not "state or imply a dramatic reduction."

costs is "MORE THAN 7%" of the estate value, we conclude that substantial evidence supports the court's finding that this "vastly overstate[s]" the cost of probate.




Page 13 of the workbook characterizes probate cost as being "4-7%" of probatable assets. We therefore similarly uphold Finding of Fact 12(g), that this characterization "significantly overestimates" the cost of probate in Washington.

CLA challenges Findings 12(f), (h), and (i), which discuss the claims on Page 13 about the time, public nature, and amount of control involved with probate. It claims that, whereas the court's findings indicate that revocable living trusts suffer from the same potential problems as probate, (1) the page "stands on its own," (2) the information on the page is correct, and (3) RLTs are superior to probate in those areas. But the first two points do not contradict anything in the court's findings. And to make the third point, CLA relies only on its own expert's testimony, failing to engage with the evidence cited by the court or to explain why it is insufficient. CLA therefore

necessarily fails to show that the findings are unsupported by substantial evidence.[4]

CLA is correct in its challenge to Finding 12(k), that "CLA's workbook does not mention the use of durable powers of attorney," because the workbook does in fact do so. However, the workbook mentions it only in the context of a list of documents it will prepare and in explaining why it is not as effective as a revocable living trust. Finding 12(k) as a whole challenges the accuracy of CLA's claim that a revocable living trust will avoid guardianship and notes that durable powers of attorney are "the most common means of avoiding guardianship." Although the workbook does in fact mention the use of durable powers of attorney, it still paints revocable living trusts as the only effective way to avoid guardianship. We conclude that the challenged portion of Finding 12(k) is unsupported by substantial evidence but that this does not affect the trial court's conclusions of law. State v. Coleman, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)) ("Even if a trial court relies on erroneous or unsupported findings of fact, immaterial findings that do not affect its conclusions of law are not prejudicial and do not warrant reversal.").

Finally, CLA challenges the court's Finding 13, that the workbook offers to "assist consumers in estate planning to protect their assets and heirs, . . . provide access to attorneys to draft estate documents, and support and coordinate the

[4] CLA's challenge to findings 12(l)-(n) follows the same logic as its challenge to these comparisons, and fails for the same reason.

work of the attorneys." CLA protests that it did not "coordinate or have any control over the work of attorneys" and "*never* promised to assist in estate planning to protect assets/heirs." But the workbook's explicit claims that CLA "[c]oordinates non-legal services along with legal services provided by independent attorneys into a Lifetime Estate Planning Package," "[c]oordinate[s], through an independent attorney, the implementation of the client's Estate Planning documents," and "[p]rovide[s] legacy planning solutions allowing client to transfer their estate to their heirs at life's end" all provide substantial evidence for this finding.

We hold that the court's finding in Paragraph 12(k), that "CLA's workbook does not mention the use of durable powers of attorney," is unsupported by substantial evidence but that this does not affect the conclusions of law. And we determine that all the other challenged findings are supported by substantial evidence.

2. Net Impression Generated by the Workbook

Next, CLA contends that the court misapplied the "net impression" doctrine and that its estate planning seminars were not deceptive. We disagree.

Under the CPA, "unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. RCW 19.86.020. "By broadly prohibiting 'unfair or deceptive acts or practices in the conduct of any trade or commerce,' the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation." Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 49, 204 P.3d 885 (2009) (citation omitted) (quoting

RCW 19.86.020). When "the Attorney General brings a CPA enforcement action on behalf of the State, it must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

"While the CPA does not define the term 'deceptive,' the implicit understanding is that 'the actor misrepresented something of material importance.' " Id. (emphasis omitted) (quoting Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998)). The question is whether "the alleged act had the capacity to deceive a substantial portion of the public." Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). "Even accurate information may be deceptive 'if there is a representation, omission or practice that is likely to mislead.' " Kaiser, 161 Wn. App. at 719 (quoting Panag, 166 Wn.2d at 50).

In Panag, insurance companies covered the expenses of their insureds after car accidents and then sought to pursue subrogation claims against the other drivers. 166 Wn.2d at 32-35. Rather than pursue these claims in court, they retained a collection agency that sent the drivers official-looking "collection notices," representing that there was an "AMOUNT DUE," advising the driver to "[a]ct immediately," and taking "increasingly urgent tone[s]" before threatening legal action. Id. at 35-36. The court concluded that the notices "were deceptive because they look[ed] like debt collection notices and may [have] induce[d] people to remand payment in the mistaken belief they [had] a legal obligation to do so." Id. at 47-48. This was despite the fact that the notices "accurately

state[d] the demand was related to a subrogation claim." Id. at 49-50. The court explained that "a communication may be deceptive by virtue of the 'net impression' it conveys, even though it contains truthful information." Id. at 50 (quoting Fed. Trade. Comm'n v. Cyberspace.Com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006).

Here, the presentations and workbooks at CLA's seminar gave the deceptive net impression "that a revocable trust is preferable regardless of individual circumstances." The court found that the workbook gives the impression that wills lead to "WORRY," while trusts lead to "PEACE OF MIND," based on the workbook's representation that wills are subject to court control, are public, take a long time to resolve, and leave families vulnerable, while trusts avoid all these issues. The court found that this impression was deceptive because it "misrepresents Washington law, the Washington probate process, and the relative benefits of revocable living trusts in Washington." As discussed above, these findings are supported by substantial evidence. We therefore hold that the court correctly concluded that this practice on CLA's part was deceptive.

CLA disagrees and contends that Panag is inapposite because that case "dealt with facial falsehoods qualified by an inconspicuous disclaimer." It claims that the trial court here "made no finding that *any* CLA-ESI statement was objectively false" because the findings "concede" that CLA's claims "about RLTs and wills may be true depending on the individual circumstances." But the court did indeed find that CLA's representations were "not accurate" and "materially misleading." This is a clearer case than in Panag, where the court reasoned that

the notices contained truthful information but that an ordinary consumer would not understand the meaning of the truthful disclaimer.

CLA claims it clearly disclaimed that RLTs "were not for everyone" because of a statement on page 39 of the workbook: "If you own titled assets and want your loved ones (spouse, children or parents) to avoid court interference at your death or incapacity, consider a revocable living trust." Even if this disclaimer actually indicated that RLTs might not be the best choice for everyone in attendance at CLA's seminars, it is one sentence in a series of small questions on page 39. We conclude that this does not affect the net impression given by CLA, and we affirm the trial court's conclusion that CLA's representations were deceptive.

Disclosure about CLA Insurance Salespeople

CLA challenges the court's conclusion that CLA's marketing of its Lifetime Estate Plan created "a deceptive net impression that [consumers] were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents." We hold that this conclusion is supported by substantial evidence.

Unchallenged findings establish that CLA told consumers that the Lifetime Estate Plan involved a "CLA financial planner" providing in-home meetings "to ensure [the] plan is kept up to date with tax, financial and family changes" and that the planner could "help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning." CLA described in detail how this planner would go over the documents and the client's assets to

ensure "everything is going smoothly" and "help you keep your planning on the right track." A CLA seminar presenter "testified that he did not discuss the sale of annuities when he was discussing any of these workbook pages related to CLA's services." Two brief mentions of insurance in the workbook indicated that CLA offered insurance products but "embed[ded] the mention of insurance in a broad list of estate planning services and present[ed] it only as something that can be offered if needed, not as something that must occur for CLA's agents to make a living." Consumers who attended the seminars testified that insurance and annuities were not referenced at the seminars and that they did not understand that CLA sold insurance or that the in-home review meetings would be conducted by insurance agents. But in fact, the CLA representatives were paid only $25 for delivery meetings and only $10 for review meetings, and only received additional compensation through commissions from annuities sales, indicating that "the sale of annuity products to CLA's clients was CLA's overriding objective." And the fact that CLA agents "assist[ed] with and deliver[ed] consumers' estate documents caused consumers to place their trust in [the agents], which in turn allowed [them] to sell them insurance products."

We conclude that this constitutes a deceptive practice. CLA indicated to consumers that its purpose at the in-home meetings was to assist them with their estate planning process, when in fact its purpose was to "gather lists of assets that could be moved into annuity products" and then to sell them these products. This deception provided CLA with trusting, amenable clients to visit, making these visits particularly desirable from a sales perspective.

CLA disagrees. It points first to the references to insurance in CLA's workbook, and again contends that court erred by relying on Panag because Panag supposedly "did not address the adequacy of true and correct disclosures." This is inaccurate. Panag discussed the adequacy of disclosures that "accurately state[d] the demand was related to a subrogation claim." Id. at 49-50. CLA contends that accepting the court's conclusion that the workbooks did not "adequately disclose" that CLA agents would try to sell insurance would have drastic impacts on every salesperson who sells multiple products in conjunction with a sale. But most salespeople do not mislead consumers as to their intentions in order to create a warm and trusting environment for the sale of additional products. We are not persuaded.

CLA next points to disclosures in their consumer information and disclosure agreement and welcome letters, which clients received upon purchasing a service package, indicating that CLA agents might discuss insurance products. The court relied on Robinson v. Avis Rent A Car Sys., Inc., 106 Wn. App. 104, 116, 22 P.3d 818 (2001), for the proposition that "a practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract." The court in Robinson concluded that a rental car company engaged in a deceptive practice by "quoting a car rental price that does not include a concession fee that is also charged," even though it disclosed the concession fee "later at the airport car rental counter when customers sign[ed] the car rental agreement." 106 Wn. App. at 115-16. CLA contends that this case is distinguishable from Robinson

because its clients "were offered annuities they had no obligation to purchase." But the point is that CLA clients purchased the Lifetime Estate Plan under false pretenses, and the nature of the in-home visits they were purchasing was not disclosed until they made the decision to purchase the plan. We are not persuaded.

Lastly, CLA cites to seminar admission tickets, promotional flyers and postcards, and "CLA's Promise to customers," that all contain mentions of insurance. But there is no evidence about who received these materials, and the latter two items involve no cite to the record whatsoever. Moreover, it is unlikely that any of these disclosures would cure the deceptive net impression, given that they do not explain that CLA agents' goal is to sell insurance and consumers did not understand that CLA sold insurance.[5]

We hold that the court correctly concluded that CLA's marketing of its Lifetime Estate Plan created "a deceptive net impression that [consumers] were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents."

EDDA Violations

CLA contends that the court erred by concluding that its business model violated the EDDA. We disagree.

[5] CLA also contends that the court erred in concluding that "CLA created the opportunity for its agents to market insurance products to consumers in their homes . . . [y]et CLA made little effort to provide safeguards to protect its clients from being taken advantage of by overly aggressive or improper sales tactics." CLA contends that "this conduct does not rise to the level of unfair or deceptive." But the court did not conclude that this practice was unfair or deceptive or that it constituted a CPA violation, so we need not address this contention.

The EDDA declares it "unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state," with certain exceptions for financial institutions, accountants, and tax agents. RCW 19.295.020(1), (4)-(6). "Marketing" is defined as "includ[ing] every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document." RCW 19.295.010(4). And " '[g]athering information for the preparation of an estate distribution document' means collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document." RCW 19.295.010(3). A violation of the EDDA is a violation of the CPA. RCW 19.295.030.

The legislature's explicit intention in enacting the EDDA was "to prohibit the marketing of services related to preparation of estate distribution documents by persons who are not authorized to practice law or who are not a financial institution." RCW 19.295.005. This was based on its finding that "the practice of using 'living trusts' as a marketing tool [by unauthorized individuals] for purposes of gathering information for the preparation of an estate distribution document [is] a deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." RCW 19.295.005.

Here, the plain language of the EDDA supports the court's conclusion that CLA's practices violated the EDDA. CLA routinely offered to gather, and gathered, financial information from its clients, and it represented that it was

gathering this information so that the clients' attorneys could prepare estate distribution documents. The trial court's unchallenged findings note that when a consumer purchased CLA's Lifetime Estate Plan, the CLA representative "worked with the client to complete a Client Information Form that identified the client's name, contact information, emergency contacts, reasons for purchasing the Lifetime Estate Plan, value of the estate, and number of real estate holdings." CLA then "continued to gather information for use in the preparation of a client's estate distribution documents after its agents completed the Client Information forms," such as copies of deeds and information about assets and beneficiaries. CLA continued this conduct throughout its relationship with its clients. Because CLA represented that it was gathering this information to enable the preparation of estate distribution documents, and the CLA agents were not authorized to practice law, this conduct violated the EDDA.

CLA makes several arguments to explain why this outcome is incorrect, disputing factual, statutory, constitutional, and policy issues. We are not persuaded.

1. CLA's Factual Characterizations of its Activities

First, CLA claims that it did not gather information for the preparation of estate distribution documents, but instead gathered the information "for [its] own business and sale purposes." While this may be a more candid statement of CLA's business model than it gave to consumers, unchallenged findings and the record as a whole clearly establish that CLA represented, and its clients understood, that it was gathering information for the preparation of estate

distribution documents. CLA also did indeed share the information it gathered with the consumers' attorneys. Because the EDDA is targeted at preventing the "gathering [of] information for the preparation of an estate distribution document [as] *a deceptive means of obtaining personal asset information* and of developing and generating leads for sales to senior citizens," the fact that CLA had hidden motives for gathering information cannot prevent it from being liable under the EDDA. RCW 19.295.005. (Emphasis added.) We hold that under the EDDA, the test of whether information is gathered for the preparation of estate distribution documents turns on the purpose that is presented to and understood by the consumer.

Next, CLA appears to contend that it used revocable living trusts as a marketing tool but did not market revocable living trusts themselves, and that the court erred by conflating the two. But to make this argument, CLA focuses on its actions in advocating the benefits of revocable living trusts at seminars. This line of reasoning fails because those acts are not what the court concluded violated the EDDA—the EDDA violations were offering to gather, and gathering, information from specific consumers for the preparation of estate distribution documents.

Finally, CLA also contends that because not all the information it gathered was ultimately used by attorneys to prepare estate distribution documents, it did not violate the EDDA. But as discussed above, what matters is the purpose for gathering the information, and here the purpose was unambiguously presented

and understood as enabling the preparation of estate distribution documents. We therefore remain unpersuaded.

2. Statutory Construction

CLA next contends that the EDDA should be read as only prohibiting gathering information for the preparation of an estate distribution document where both the information gathering and the actual preparation of the document are done by a non-lawyer. But "a court must not add words where the legislature has chosen not to include them." Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003). The EDDA makes it unlawful for a non-lawyer to gather information for the preparation of an estate distribution document. RCW 19.295.020(1); RCW 19.295.010(4). This simple construction is in line with the legislature's concern about people using estate planning as an excuse to "obtain[ ] personal asset information and . . . develop[ ] and generat[e] leads for sales to senior citizens." RCW 19.295.005. And, indeed, "[a]lthough CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road [of] Retirement as a sales tool." CLA's business model therefore falls squarely within the realm of the EDDA's prohibited conduct, as expressed by the legislature's statement of intent and the plain language of the statute.

3. Unlawful Practice of Law

CLA contends that the trial court's construction of the statute would broaden the definition of the practice of law, thereby violating the court's power to define and regulate the practice. It relies on legislative history and contemporary

case law indicating that the EDDA was passed with the intent of regulating the unauthorized practice of law. But we need not evaluate these materials because the EDDA, as enacted, does not mention, define, or regulate the unauthorized practice of law. RCW 19.295.005-030. We need not look beyond the plain meaning of the statute, which by its terms defines a violation of the CPA, not the unauthorized practice of law.

4. Vagueness and Fair Notice

CLA contends that the EDDA is void for vagueness.[6] We disagree.[7]

"Vagueness in a statute raises an issue of procedural due process. The crucial question is whether the statute provides fair notice of the conduct prohibited." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 11, 721 P.2d 1 (1986). "Under the Fourteenth Amendment,[8] a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." Id. But if it is clear what the statute as a whole prohibits, the statute is not vague. Id. And "[a]

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[6] CLA raises this issue in its challenge to the penalties imposed by the court, but it is discussed here for clarity.

[7] The State contends that the void for vagueness doctrine does not apply to this case because it is primarily a criminal doctrine. But due process considerations apply here because CLA is being deprived of property. See Yim v. City of Seattle, 194 Wn.2d 682, 688, 451 P.3d 694 (2019), as amended (Jan. 9, 2020) ("The procedural component [of due process] provides that '[w]hen a state seeks to deprive a person of a protected interest,' the person must 'receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.' " (quoting Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006))).

[8] U.S. CONST. amend. XIV.

statute's announced purpose can provide the clarity necessary to establish what a statute prohibits." Id.

CLA's only real contention about a possible alternate interpretation of the EDDA is that it "did not understand that filling out a form that *might* later be used by a lawyer to create estate planning documents for his or her own client would violate the statute." But as discussed above, the EDDA clearly prohibits nonlawyers gathering information *for the purpose of* preparing estate distribution documents. Where CLA told consumers it was gathering the information for that exact purpose, nothing in the language of the EDDA indicates that it would matter whether that purpose was ever effected. Nor is it true that under the trial court's interpretation of the EDDA, "nearly every type of service or paperwork that mentions estate planning documents would come within the purview of the EDDA." The trial court concluded that CLA's offers to gather information for the purpose of preparing estate planning documents were violations of the EDDA; this is a narrow and proper interpretation of the EDDA that does not affect services or paperwork that merely mention estate planning documents.

We conclude that the EDDA is unambiguous and not vague.

5. First Amendment

Finally, CLA makes mention in passing to a violation of its First Amendment[9] rights, citing Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005). However, it makes no attempt to analyze the test articulated in that case for whether a commercial speech restriction is

[9] U.S. CONT. amend. I.

permissible. We therefore need not address this issue. Health Ins. Pool v. Health Care Auth., 129 Wn.2d 504, 511, 919 P.2d 62 (1996) (" 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion' " (internal quotation marks omitted) (quoting State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992))).

Penalties and Restitution

CLA then challenges the trial court's award of restitution and civil penalties on several bases. We find no error.[10]

1. Proof of Causation and Damages

CLA first contends that the court erred by concluding that the State need not prove causation and damages for restitution. We disagree.

RCW 19.86.080(1) permits the AGO to sue to restrain and prevent CPA violations. RCW 19.86.080(2) provides that the court may also "make such additional orders or judgments as may be necessary to restore to any person in interest any moneys . . . which may have been acquired by means" of a CPA violation. When "the Attorney General brings a CPA enforcement action on behalf of the State, it must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." Kaiser, 161 Wn. App. at 719. "Unlike in a private cause of action under the CPA, the State is not required to prove causation or injury, nor must it prove intent to deceive or actual deception." Id.

[10] As discussed above, we reject CLA's contention that the court's award of penalties for EDDA violations violates the principle of fair notice because the statute is not vague.

The private cause of action under the CPA is established in RCW 19.86.090, which permits "[a]ny person who is injured in his or her business or property" by a CPA violation to sue "to recover the actual damages sustained by him or her." Our Supreme Court clarified the elements of a private cause of action under the CPA in Hangman Ridge. The Court specified that private plaintiffs must make a "showing of injury . . . in [their] business or property" and must establish "a causal link . . . between the unfair or deceptive act complained of and the injury suffered." 105 Wn.2d at 785. The Court relied on the specific language in RCW 19.86.090 as rationale for establishing both of these elements.

Under Kaiser, the AGO was not required to prove causation or damages for the restitution awards to private consumers. The statutory requirement for proving causation and damages is located only in the private cause of action section, which is not at issue here. CLA cites Nuttall v. Dowell, 31 Wn. App. 98, 110, 639 P.2d 832 (1982), for the proposition that the AGO "must establish some causal link between a defendant's unfair act and a consumer's injury." But Nuttall specifically provides that such a causal link is only required in "a private action in which plaintiff seeks recovery of damages," and that in an attorney general action "which seeks to enjoin *or otherwise deter* CPA misconduct," no consumer reliance on the deception must be shown. 31 Wn. App. at 110 (emphasis added). Requiring a company to pay restitution deters CPA misconduct.

CLA does not challenge the court's findings that it received $2,565,626 in revenue from sales of the Lifetime Estate Plan and $3,597,287.93 in commissions from the sale of insurance products. The court did not err by concluding that this money should be restored to CLA's clients, given that it was "acquired by means of any act" prohibited by the CPA. RCW 19.86.080(2).

2. Calculation of Restitution

Relatedly, CLA contends that the court erred by awarding restitution based on disgorgement of illegal gains, rather than consumer loss. But as noted, RCW 19.86.080(2) permits the court to "restore to any person . . . *any moneys . . . which may have been acquired"* by a CPA violation. (Emphasis added). This is in contrast to RCW 19.86.090's provision that a private plaintiff may only seek "the actual damages sustained." CLA cites no law in support of its contention that the court should have awarded restitution based only on net damages to the clients. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

3. Guidance from the Office of the Attorney General

CLA contends that the court erred by finding that CLA did not act in good faith, and awarding significant penalties on that basis, because CLA sought guidance from the AGO and it implicitly approved of CLA's business model. But CLA's characterization of the relevant facts and law is misleading.

The AGO first issued a CID to CLA in 2013. CLA cooperated in the investigation and offered multiple times to meet with the AGO to "help your office understand what exactly CLA ESI and CLA USA do before you speak to consumers." The AGO declined to meet: "for [our] purposes, a meeting to have your client discuss and identify how CLA operates is not necessary." In August 2014, the AGO again declined an offer to meet, saying, "At this time, [we] will decline the opportunity because [our] office is still in an investigative stage in this matter." The AGO did not indicate to CLA that its investigation was over or that it had made any determinations about the legality of CLA's actions. In February 2017, it issued a second CID against CLA, and in October 2017, it provided CLA with notice of its intent to file the present action.

These facts do not include any explicit or tacit indication from the AGO that it had concluded CLA's business model was lawful. And the case law CLA cites to support its theory refers to a situation in which "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 70 n.20, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). This is not such a case: neither statutory text, court guidance, nor agency guidance indicate that CLA's interpretation of the law was reasonable.

We share CLA's concern about the AGO's delay in prosecuting the case, even though we acknowledge the complexity inherent in this type of litigation. The delay is incongruous to the AGO's strong statement that CLA "exploited Washington senior citizens through a deceptive scheme designed to manipulate

them into purchasing expensive estate-planning packages and annuities," especially given that such delay allowed for more consumers to be subjected to CLA's practices. However, the AGO's delay in prosecuting this case did not lead to a presumption that CLA's business model was appropriate. And the court entered multiple other findings and conclusions—addressing CLA's use of scare tactics, lack of oversight for agents, admissions that CLA valued sales over standards, CLA's practices of taking advantage of consumers who placed their trust in CLA—supporting its conclusion that CLA did not act in good faith. We conclude that the court did not err by finding that CLA did not act in good faith.

4. Civil Penalties

Finally, CLA broadly contends that the court abused its discretion by imposing excessive civil penalties. CLA examines the penalties imposed in other King County Superior Court trust mill cases and contends that the sum of civil penalties and restitution here is "more than $60,500 per customer—*i.e.*, more than 60 times the next closest sanction" imposed in an estate-related CPA case.[11] CLA gives no justification for its comparison of these values on a "per customer" basis as opposed to a "per violation" basis. See State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 317, 553 P.2d 423 (1976) ("This statute vests the trial court with the power to assess a penalty for each violation."). CLA does not challenge the court's analysis of the public injury

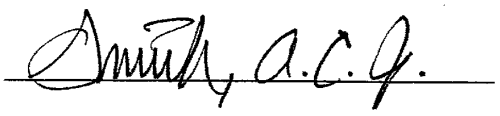
[11] The State notes in its response that these awards were all settlements or default judgments. Because the parties did not submit any of the relevant orders to us, we cannot confirm the award amounts or how the judgments were obtained.

caused by its actions or its ability to pay. Former RCW 19.86.140 (1983) permits the court to award penalties of up to $2,000 for a violation of the CPA.[12] We conclude that the court did not abuse its discretion in imposing the maximum penalty for many of CLA's CPA violations.

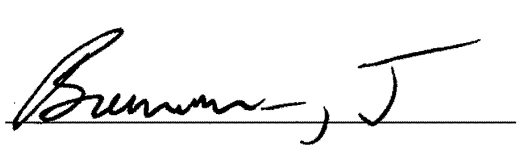
Attorney Fees

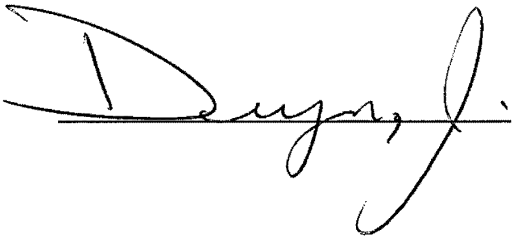
The State requests attorney fees and costs on appeal under RCW 19.86.080(1), which provides that the prevailing party in a CPA case "may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." Because the State prevails on appeal, we award it fees on appeal.

We affirm.



WE CONCUR:





[12] As of July 2021, the statute permits sanctions of up to $7,500 for the same violations. RCW 19.86.140.

# APPENDIX 3

**STATE OF WASHINGTON**
**KING COUNTY SUPERIOR COURT**

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff,<br>v.<br><br>CLA ESTATE SERVICES, INC.; CLA USA INC.; and MITCHELL REED JOHNSON, individually and in his martial community,<br><br>Defendants. | NO. 18-2-06309-4 SEA<br><br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

THIS MATTER came before the Court for trial on November 16, 2020. The Plaintiff, State of Washington appeared by and through Assistant Attorneys General Cynthia L. Alexander, Audrey L. Udashen, Aaron J. Fickes, and Daniel T. Davies. The Defendants, CLA Estate Services, Inc. and CLA USA Inc. appeared by and through David Elkanich and Calon Russell of Holland & Knight LLP and Robert McKenna of Orrick, Herrington & Sutcliffe LLP.

The Court heard testimony from the following individuals:

1. Nyren Compton
2. Caroline Suissa-Edmiston
3. Alan Gammel
4. Craig J. McCann, Ph.D.
5. Robert Schmidt



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6. Christopher A. Benson

7. John L. Olsen

The Court reviewed portions of the deposition testimony of:

1. Susan Atwood

2. James Bradshaw

3. Dorothy Clawson

4. Michael Clawson

5. Chris Conger

6. Edward Corcoran

7. Judy Corcoran

8. Diane Fogelman

9. Chris Garrett

10. Mitchell Johnson

11. Myrna Lindenthal

12. John Long

13. Charles Loper III (in his capacity as a CR 30(b)(6) witness on behalf of CLA USA, Inc.)

14. Chares Loper III (in his capacity as a CR 30(b)(6) witness on behalf of CLA Estate Services, Inc.)

15. Joel Martin

16. David Nelson

17. James Ottosen

18. Robert Schmidt

19. David Van Winkle

20. Janice Ward

The Court admitted approximately 141 exhibits.

Based upon the court file and records and the evidence and testimony presented at trial, the Court makes the following Findings of Fact and Conclusions of Law.

## I. FINDINGS OF FACT

1. The Plaintiff State of Washington brought this action against Defendants seeking injunctive and declaratory relief, restitution, civil penalties, and its attorneys' fees and costs under the Consumer Protection Act (CPA), RCW 19.86, pursuant to the enforcement authority of the Attorney General of the State of Washington under RCW 19.86.080 and RCW 19.86.140. Plaintiff also seeks relief under the Estate Distribution Documents Act (EDDA), RCW ch. 19.295.

2. Defendants CLA Estate Services, Inc. (CLA ESI), and CLA USA, Inc. (CLA USA) (collectively, CLA or Defendants) are Texas corporations registered to do business in Washington.

### A. Estate Planning Seminars

3. CLA began offering free estate-planning seminars for seniors in Washington in 2008. Answer ¶¶ 5.11-5.13; Ex. 454. CLA promoted its seminars to seniors at or near retirement age or older and included a free meal as an enticement. Answer ¶¶ 5.9-5.13.

4. CLA's estate-planning seminars were led by CLA representatives who were not licensed to practice law. Answer ¶ 5.19; Compton Testimony (Nov. 16, 2020).

5. At its estate-planning seminars, CLA's presenters distributed to attendees and taught from a workbook titled "CLA 'Lifetime Estate Plan.'" Answer ¶ 5.15; Compton Testimony (Nov. 16, 2020); Joel Martin Dep. at 35:25-36:1; *see* Ex. 421.

6. CLA provided its presenters with a script to follow at CLA's estate-planning seminars. Ex. 483. CLA expected its presenters to follow the script and use the workbook as an outline in making their presentations, and the presenters did so. Compton Testimony (Nov. 16, 2020); Schmidt Testimony (Nov. 24, 2020); Joel Martin Dep. at 35:20-36:11.

7. CLA's workbook and accompanying script promoted CLA's Lifetime Estate Plan and focused on the supposed dangers associated with probate that could be avoided with a living trust. Ex. 421.

8. CLA's seminar presenters received no salary from CLA and relied entirely for compensation on the commissions they received from selling the Plans. Compton Testimony (Nov. 16, 2020).

9. CLA expected its presenters to sell a minimum of three Lifetime Estate Plans per week, and preferred six sales per week. *Id.*; Ex. 417 at CESI 031993. Seminar presenters could lose their positions if they did not meet these sales expectations. Compton Testimony (Nov. 16, 2020). Accordingly, CLA presenters were highly motivated to sell as many Lifetime Estate Plans as possible at each workshop.

10. CLA admits that 1,765 consumers attended CLA's estate-planning seminars in Washington since November 3, 2015. Ex. 454.

**1. Deception Regarding Probate and Trust Law**

11. The Court previously granted Plaintiff's motion for partial summary judgment, Dkt. No. 135, regarding CLA's representations relating to trusts and probate. The Court ruled that CLA violated the CPA during its estate-planning seminars and one-on-one meetings with consumers by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and by creating a deceptive net impression that a

revocable trust is necessary to protect assets and heirs. Dkt. No. 171 (Order dated July 19, 2019). The Court also determined that "[e]ach deceptive act or practice is a separate violation of the CPA." *Id.*

12. The misrepresentations presented in Plaintiff's motion for partial summary judgment included:[1]

a. CLA does not accurately portray the probate process in Washington at its workshops. Dkt. No. 66 at ¶¶ 15-48; Dkt. No. 56 (Declaration of Jamie Clausen) at ¶¶ 7-22

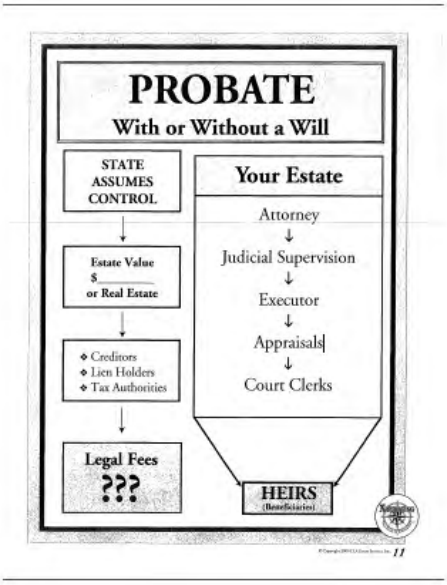
b. Although probate procedures in some states may be complicated and expensive, Washington has one of the simplest and most efficient probate processes in the country. Dkt. No. 66 (Declaration of Steven Schindler) at ¶ 10. Courts in Washington may appoint an executor and grant letters testamentary with modest fees and no waiting period or hearing, and can grant an executor broad authority to administer estates without prior court approval. RCW 11.68.011(1); RCW 11.68.041(1); Dkt. No. 66 at ¶ 11.

c. Unlike some other states, Washington does not impose probate administration fees based on a statutory fee schedule. Dkt. No. 66 at ¶ 13. Instead, it entitles the personal representative to fees approved by the decedent or to reasonable fees. *Id.*; RCW 11.48.210. This is similar to the process that applies to the fiduciary fees for the trustee of a revocable trust, who is entitled either to

[1] The facts presented in Plaintiff's motion for partial summary judgment are recited in this paragraph and its subparts for their relevance to the Court's remedies determination, as the Court has already made its liability findings regarding these facts.

the fee set in the trust agreement or reasonable fees subject to court approval. Dkt. No. 66 at ¶ 13; RCW 11.98.070(26); RCW 11.97.010.

d. Each CLA workbook contains a page identical or substantially similar to the image below right, graphically representing that the probate process significantly reduces the estate value available to distribute to heirs, and that in probate, the state assumes control; creditors, lien holders, and tax authorities are paid first; the process requires attorneys, judicial supervision, an executor, appraisals, and court clerks; and heirs come last. Ex. 421 at CESI 000031. But this image is misleading with regard to probate in Washington, where most estates have little or no involvement of judges or court clerks. Dkt. No. 66 at ¶¶ 16, 33. Washington probate does not require appraisals, but they may be used to establish a stepped-up basis for assets whether the estate is administered in probate or with a revocable living trust. Dkt. No. 56 at ¶ 12. Whether appraisals are necessary depends on the nature of the assets and beneficial interests, not whether a will or revocable trust is employed. Dkt. No. 66 at ¶¶ 16, 33. Executors in probate serve effectively the same function that trustees of revocable trusts serve, and either may be advised by attorneys whose fees are determined on a similar basis. *Id*. The statement "STATE ASSUMES CONTROL" in all capital letters on this page is not accurate in Washington, where there is no state intervention or involvement in settling a will in probate. Dkt. No. 56 at ¶ 12.



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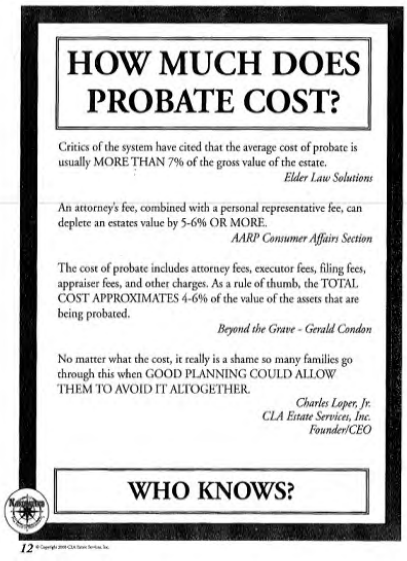
e. CLA's workbook also contains a page posing the question (in all capital letters) "HOW MUCH DOES PROBATE COST?" and answering "WHO KNOWS?" at the bottom of the page. Ex. 421 at CESI 000032. The page contains quotes that purport to be from authorities such as "Elder Law Solutions" and "AARP Consumer Affairs Section" stating that the cost of probate is "MORE THAN 7% of the gross value of the estate," that an attorney's fee combined with a personal representative's fee "can deplete an estate[']s value by "5-6% percent OR MORE," and that the "TOTAL COST APPROXIMATES 4-6% of the value of the assets that are being probated." *Id*. These statements are followed by a quote from CLA's founder that "GOOD PLANNING COULD ALLOW THEM TO AVOID IT ALTOGETHER," *id.*, presumably referring to the probate process or its costs. These statements vastly overstate the general cost of probate administration in Washington. Dkt. No. 66 at ¶ 36. While some states have statutory fee schedules based on a percentage of estate assets, Washington does not follow that approach. Dkt. No. 66 at ¶¶ 17, 36; Dkt. No. 56 at ¶ 13. Most of the fees that contribute to the cost of probate administration in Washington, such as tax return preparation fees, legal fees, fiduciary fees, and appraisal fees, cannot be avoided with revocable trust planning. Dkt. No. 66 at ¶¶ 17, 36; Dkt. No. 56 at ¶ 13. CLA's materials nowhere indicate that such costs are involved when a consumer sets up a revocable trust.



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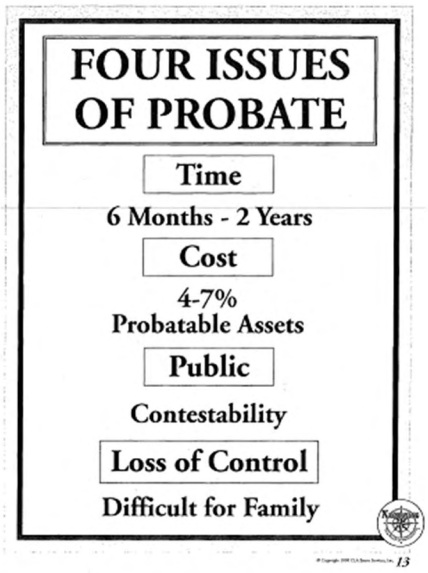
f. CLA's workbook also includes a page titled "FOUR ISSUES OF PROBATE." Ex. 421 at CESI 000033. The first issue is "time," and the workbook indicates that probate takes six months to two years. *Id.* In Washington, revocable living trusts are not necessarily administered in less time than probate because both trust and probate administration require the same time-consuming tasks of resolving debts, paying taxes, and collecting, valuing, managing and distributing property. 26 U.S.C. § 6012(b)(1), (4); RCW 19.36.020; RCW 11.42.085(1); RCW 11.44.015; RCW 11.48.020; RCW 83.100.050; RCW 11.68; Dkt. No. 66 at ¶ 12; Dkt. No. 56 at ¶¶ 17-18. The two primary reasons for delay in distribution of an estate are resolving the decedent's debts and resolving estate tax liabilities. Dkt. No. 66 at 19. Both estate executors and trustees of revocable trusts may make interim distributions of estate assets before these matters are resolved, but both do so at the risk of personal liability. *Id.*




g. The workbook identifies cost as the second "issue of probate," and indicates that the cost will be 4 to 7 percent of probatable assets. For the reasons explained above, this significantly overestimates the cost of probate in Washington.

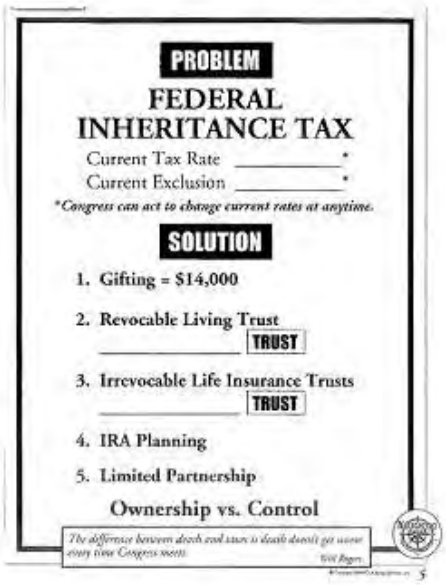
h. The page lists "public" as the third issue of probate and suggests probate raises "contestability" concerns. However, revocable living trusts are not necessarily more private, nor are they invulnerable to challenge. Dkt. No. 56 at ¶ 15. In Washington, little is publicly disclosed in probate except the terms of the will. Dkt. No. 66 at ¶¶ 21, 41. Estate inventories are not required to be filed

publicly. *Id*. An inventory must be provided only to specific parties such as heirs, beneficiaries and creditors, and only upon written request. Dkt. No. 56 at ¶ 19. Similarly, a trustee must provide a copy of a revocable living trust to beneficiaries and immediate family members after a trustor's death and provide an inventory or accounting if requested. *Id*. Both probate and revocable trust administration are "contestable" in the sense that beneficiaries or creditors may object to a component of the probate or trust administration, in which case some aspects may become public in litigation proceedings. Dkt. No. 66 at ¶¶ 21, 41. Regardless of whether an estate is administered through a revocable trust or probate, some aspects may become public if beneficiaries or creditors contest the administration. Dkt. No. 66 at ¶¶ 21-22; Dkt. No. 56 at ¶¶ 15-16.

i. CLA's workbook identifies "loss of control" as the fourth issue of probate, which is purportedly "difficult for family." Ex. 421. This is contrasted with revocable living trusts on a subsequent workbook page, which states in large capital letters "REVOCABLE LIVING TRUST," "YOU CONTROL DISTRIBUTION," and "YOUR SUCCESSOR TRUSTEE (distributes as per your direction)." *Id.* In Washington, the probate process does not strip a family of any more control than the appointment of a successor trustee of a revocable trust. Dkt. No. 66 at ¶¶ 22, 42. The decedent may designate family members or independent fiduciaries as either personal representatives in a will or trustees in a revocable trust. Just as a personal representative controls the probate administration, a trustee controls the administration of revocable trusts, and each owes the same fiduciary duties to a decedent. *Id*. Indeed, probate may be easier rather than more difficult for families than administration of a revocable trust because the personal representative typically obtains letters testamentary shortly after filing that may be presented to a bank or other financial institution to manage the asset or

account. Dkt. No. 56 at ¶ 16. These institutions often require the trustee administering a revocable trust to use the institution's forms, which may require the trustee to consult an attorney. *Id.*

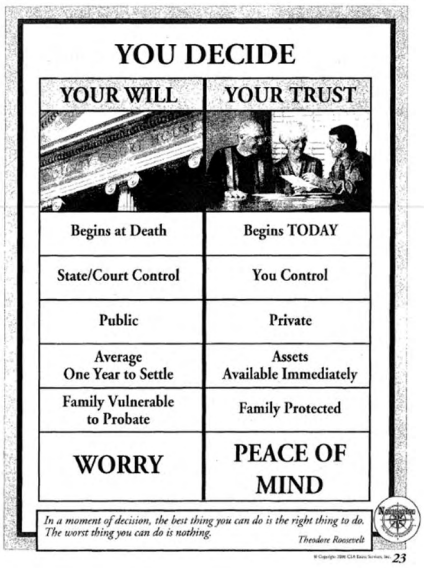
j. CLA's workbook also inaccurately suggests a revocable trust is a "SOLUTION" to the "PROBLEM" of federal inheritance tax. Ex. 421 at CESI 000025. There is no tax on the inheritance of assets (hence no federal inheritance tax). Both Washington and federal law provide for an estate tax, and there are several estate planning techniques to reduce the tax burden on an estate. Dkt. No. 66 at ¶¶ 25, 44. Some of these techniques, such as annual exclusion gift planning and planning with irrevocable trusts, are mentioned on the page, but revocable trust planning to avoid probate offers no meaningful tax savings that cannot also be attained using a will. Dkt. No. 66 at ¶ 25.



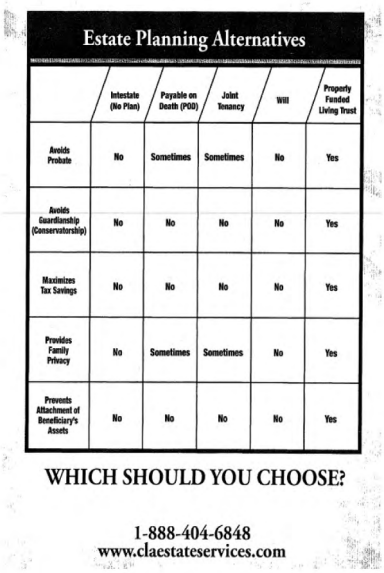

k. CLA's workbook also indicates that a revocable living trust will avoid guardianship in the event of incapacity and "eliminate[s] court control." Ex. 421 at CESI 000029. In actuality, revocable trusts alone do not fully protect one who becomes incapacitated or avoid guardianship. Dkt. No. 66 at ¶¶ 44-46; Dkt. No. 56 at ¶ 11. Indeed, a revocable living trust may be a poor vehicle for avoiding guardianship because it does not allow the trustee to manage all of the incapacitated individual's income (such as income from social security or a pension) or assets (such as individual retirement accounts or 401(k) accounts, which cannot be put into a revocable trust during the trustor's lifetime). Dkt. No. 56 at ¶ 11. CLA's workbook does not mention the use of durable powers of

attorney, which are the most common means of avoiding guardianship. Dkt. No. 66 at ¶¶ 28, 45-46; Dkt. No. 56 at ¶ 11.

l. CLA repeats and summarizes the inaccuracies discussed above on a page titled "YOU DECIDE" that consists of a table comparing wills and trusts. Ex. 421 at CESI 000043. According to the chart, a will results in state/court control, is public, takes an average of one year to settle, and leaves the family "vulnerable to probate." A trust, in contrast, is represented as being controlled by the consumer, private, allowing assets to become available immediately, and leaving the family protected. The word "WORRY" in large type summarizes the will column, while "PEACE OF MIND" in large type summarizes the trust column. The following quote, purporting to be from Theodore Roosevelt, appears at the bottom of the page: "In a moment of decision, the best thing you can do is the right thing to do. The worst thing you can do is nothing." *Id*. CLA's workbook leaves consumers with the net impression that a revocable trust is preferable regardless of individual circumstances.




m. Another type of summary appears toward the end of the workbook. Ex. 421 at CESI 000060. This summary page contains a table comparing estate planning alternatives (intestate, payable on death, joint tenancy, will, properly funded living trust) on whether they avoid probate,



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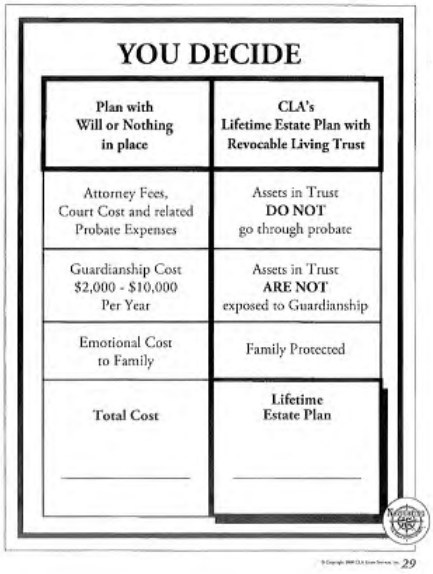
avoid guardianship, maximize tax savings, provide family privacy, and prevent attachment of beneficiary's assets. With the words "Yes," "No," and "Sometimes," the table purports to indicate which of these benefits applies to each estate planning alternative. The word "Yes" appears in the table only in relation to a "Properly Funded Living Trust," and indicates that every listed benefit applies only to living trusts and is always available with a living trust. As explained above, this table misrepresents Washington law, the Washington probate process, and the relative benefits of revocable living trusts in Washington.

n. Finally, the workbook offers a decision point. On a page with "YOU DECIDE" at the top, the characteristics of planning with a will and planning with CLA's Lifetime Estate Plan with a revocable living trust are compared. Ex. 421 at CESI 000049. According to CLA, a will entails attorney fees, court costs and related probate expenses, guardianship costs of $2,000 to $10,000 per year, and emotional cost to the family. In contrast, planning with a revocable living trust means that assets do not go through probate, assets are not exposed to guardianship, and the family is protected. These descriptions of the relative benefits of revocable living trusts are not accurate and are materially misleading for the reasons set forth above. CLA used these deceptive tactics to induce attendees at its seminars to purchase a CLA Lifetime Estate Plan with a revocable living trust.



YOU DECIDE

| Plan with Will or Nothing in place | CLA's Lifetime Estate Plan with Revocable Living Trust |
|---|---|
| Attorney Fees, Court Cost and related Probate Expenses | Assets in Trust DO NOT go through probate |
| Guardianship Cost $2,000 - $10,000 Per Year | Assets in Trust ARE NOT exposed to Guardianship |
| Emotional Cost to Family | Family Protected |
| Total Cost | Lifetime Estate Plan |

29



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### 2. Offering to Gather, and Gathering, Information for Estate Distribution Documents

13. After alarming consumers about probate and the necessity of revocable living trusts during its estate-planning seminars, CLA marketed and sold its Lifetime Estate Plan as the solution, touting it as a full-service estate planning package in which CLA would assist consumers in estate planning to protect their assets and heirs, ensure their estate passes to their heirs, provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys. Ex. 421 at CESI 000021, 000023, 000045-47.

14. CLA's workbook states that CLA's Lifetime Estate Plan includes regular meetings with CLA representatives to review and update estate distribution documents, including a three-month review and annual reviews "throughout [the] lifetime of the Estate Plan to ensure the plan is kept up to date with tax, financial and family changes." Ex. 421 at CESI 000046.

15. Page 1 of CLA's workbook represents that CLA "[c]oordinates non-legal services along with legal services provided by independent attorneys into a Lifetime Estate Planning Package," and that CLA "[c]oordinate[s], through an independent attorney, the implementation of the client's Estate Planning documents." Ex. 421 at CESI 000021. CLA ESI Vice President John Long testified that CLA's coordination of the non-legal aspects of a client's estate plan included gathering the information the attorney needed to create "a good estate plan." Long Dep. at 49:9-49:18.

16. CLA's workbook states on page 25 that CLA's "independent" referral attorneys will provide the following services: (1) "Evaluate client needs and recommend appropriate documents i.e. (*Will, Revocable Living Trust, Etc.*)," (2) "Preparation of client's legal documents to include all legal changes within the

first year," (3) "Deed preparation for two in-state properties," (4) "Document preparation," and (5) "Lifetime consultation regarding client's Estate Planning documents." Ex. 421 at CESI 000046.

17. The script that CLA's presenters follow for page 25 of the workbook states: "I want to show you the Legal Services Provided By Estate Planning Attorneys as a part of this plan." Ex. 483 at CLA_ESI001391. The script directs agents to explain:

> As a part of your Complete Estate Plan, your attorney, in addition to basic document preparation, will include the following Extended Legal Services. You will receive lifetime consultation concerning Estate Planning documents. That means that anytime in the future, if you have questions or concerns about your plan, your consultation is done at no charge. Any changes to your documents within the first year are done at no cost to the client. Folks, this is a great benefit.

*Id.*

18. The script directs agents to tell clients that "the attorney does the legal work . . . CLA does the leg work." Ex. 483 at CLA_ESI001393.

19. After the seminar presentation, the CLA's presenter, who is also CLA's sales representative, would offer to meet one-on-one with each workshop attendee for a "complimentary review of your personal situation," either immediately following the workshop or shortly after the workshop at the consumer's home. Ex, 421 at CESI 000053.

20. When a consumer decided to purchase CLA's Lifetime Estate Plan, the CLA sales representative reviewed and completed a series of forms with the consumer that CLA later provided to the referral attorney. First, the sales representative worked with the client to complete a Client Information Form that identified the client's name, contact information, emergency contacts, reasons for

purchasing the Lifetime Estate Plan, value of the estate, and number of real estate holdings. *E.g.*, Exs. 135, 176.

21. CLA sales representatives also reviewed and completed with consumers a disclosure form that identified CLA's services and authorized CLA to provide the consumer's information to the referral attorney, an authorization form allowing the referral attorney to contact the client, and a form identifying the consumer's workshop salesperson, client services coordinator, and referral attorney. *E.g.* Exs. 135, 663.

22. CLA charged approximately $2,500 to $3,000 for the Lifetime Estate Plan after a "discount" CLA typically provided to seminar attendees to encourage them to promptly purchase the Plan. *See* Answer ¶ 5.29.

23. As detailed in Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 135, CLA continued to gather information for use in the preparation of a client's estate distribution documents after its agents completed the Client Information forms. This included gathering additional information and documents needed by referral attorneys to prepare consumers' estate distribution documents, such as copies of deeds or more detailed information about assets and beneficiaries throughout the referral attorney's representation of the client.

24. The Court has already determined that CLA's conduct as established in Plaintiff's first motion for partial summary judgment violated the Estate Distribution Documents Act, RCW ch. 19.295, and the Consumer Protection Act, RCW ch. 19.86. This conduct included (1) offering to gather information for the preparation of estate distribution documents when CLA represented that would support and coordinate with consumers' attorneys by collecting information for the attorneys' use in preparing consumers' estate distribution documents; (2) gathering information for the preparation of estate distribution documents

after consumers purchased CLA's Lifetime Estate Plan through the completion of Client Information forms; and (3) gathering information during in-home delivery and review meetings about changes needed to the client's estate documents, and preparing Change Forms for attorneys describing these changes. Dkt. No. 135 (State's Motion for Partial Summary Judgment); Dkt No. 171 (Order dated July 19, 2019). Violations of the EDDA are *per se* violations of the CPA. RCW 19.295.030. The Court ruled that each EDDA violation is a separate violation of the CPA. Dkt. No. 171 (Order dated July 19, 2019).

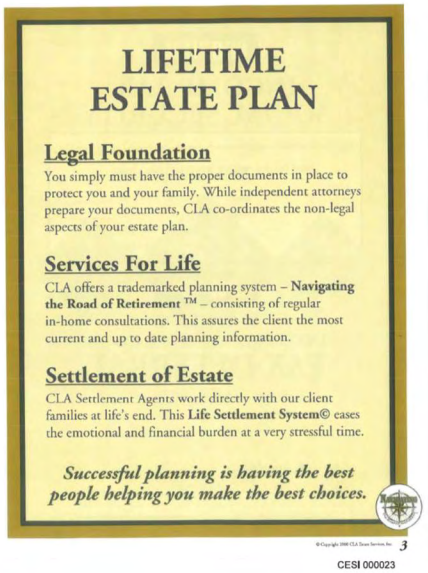
25. CLA was put on notice that its practices could violate Washington law by attorney Caroline Suissa-Edmiston, who declined to receive referrals after attending a CLA workshop and concluded that CLA's business model could violate Washington law. Suissa-Edmiston Testimony (Nov. 16, 2020). After making this determination, the attorney sent a letter to Chris Conger, then Senior Director for CLA Estate Services, recommending that CLA "check into RCW 19.295 to make sure that you are in compliance with Washington Law." Ex. 485. Mr. Conger testified that he did not recall any changes being made to CLA practices after he received the letter. Conger Dep. at 101:4-101:13.

26. CLA sold 210 Lifetime Estate Plans in Washington since November 3, 2015. Ex. 454. CLA received $2,565,626 in revenue from sales of its Lifetime Estate Plan during the time it did business in Washington from 2008 to 2018. *Id.* Accordingly, CLA completed at least 210 Client Information Forms.

**3. Deceptive Marketing of In-Home Meetings**

27. CLA did not clearly explain to seminar attendees that CLA representatives who conducted promised in-home review meetings were licensed insurance agents, working on commission, who, in addition to gathering information to ensure the estate plan was up to date, would use the in-home

consultations to learn about consumers' assets and market annuities to them. Compton Testimony (Nov. 16, 2020); *see* Dkt. No. 23 (Answer) ¶¶ 5.40-5.44 (admitting CLA insurance agents discussed consumers' financial planning, changes to estate plans, and whether the estate plan was up to date at review meetings).


LIFETIME ESTATE PLAN

Legal Foundation

You simply must have the proper documents in place to protect you and your family. While independent attorneys prepare your documents, CLA co-ordinates the non-legal aspects of your estate plan.

Services For Life

CLA offers a trademarked planning system – **Navigating the Road of Retirement** ™ – consisting of regular in-home consultations. This assures the client the most current and up to date planning information.

Settlement of Estate

CLA Settlement Agents work directly with our client families at life's end. This **Life Settlement System**© eases the emotional and financial burden at a very stressful time.

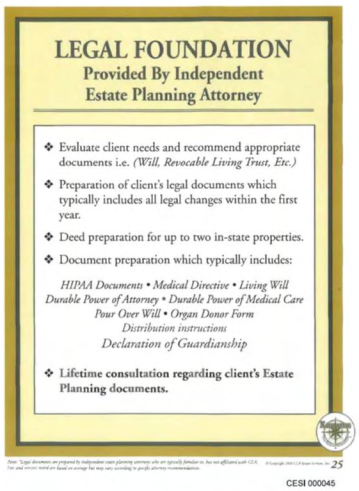
***Successful planning is having the best people helping you make the best choices.***

3

CESI 000023

28. CLA's workbook contains several pages describing the robust estate planning services CLA promised to provide through the Lifetime Estate Plan. Page 3 introduces the Plan as including a "Legal Foundation," "Services for Life," and "Settlement of Estate." Ex. 421 at CESI 000023.

29. Pages 25, 26 and 27 of the workbook describe in more detail each of these services. The "Legal Foundation Provided By Independent Estate Planning Attorney" included evaluating client needs and recommending appropriate


LEGAL FOUNDATION
Provided By Independent Estate Planning Attorney

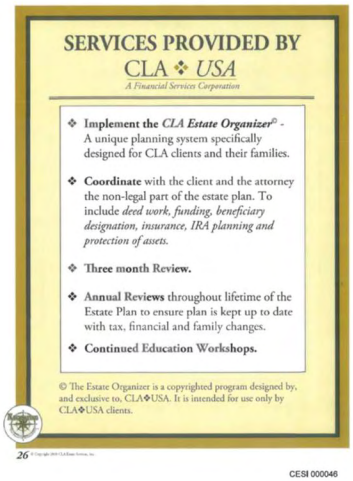
- Evaluate client needs and recommend appropriate documents i.e. *(Will, Revocable Living Trust, Etc.)*
- Preparation of client's legal documents which typically includes all legal changes within the first year.
- Deed preparation for up to two in-state properties.
- Document preparation which typically includes:

*HIPAA Documents • Medical Directive • Living Will Durable Power of Attorney • Durable Power of Medical Care Pour Over Will • Organ Donor Form Distribution instructions Declaration of Guardianship*

- **Lifetime consultation regarding client's Estate Planning documents.**

25

CESI 000045

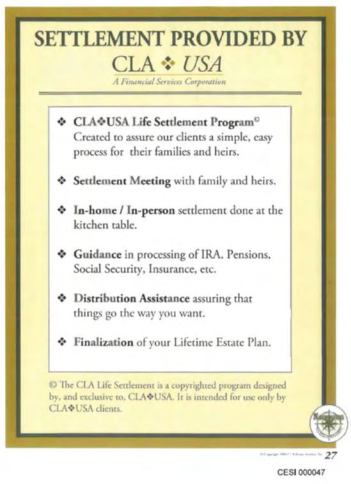

SERVICES PROVIDED BY CLA ❖ *USA*
*A Financial Services Corporation*

- **Implement the *CLA Estate Organizer*©** - A unique planning system specifically designed for CLA clients and their families.
- **Coordinate** with the client and the attorney the non-legal part of the estate plan. To include *deed work, funding, beneficiary designation, insurance, IRA planning and protection of assets.*
- **Three month Review.**
- **Annual Reviews** throughout lifetime of the Estate Plan to ensure plan is kept up to date with tax, financial and family changes.
- **Continued Education Workshops.**

© The Estate Organizer is a copyrighted program designed by, and exclusive to, CLA❖USA. It is intended for use only by CLA❖USA clients.

26

CESI 000046


SETTLEMENT PROVIDED BY CLA ❖ *USA*
*A Financial Services Corporation*

- **CLA❖USA Life Settlement Program**© Created to assure our clients a simple, easy process for their families and heirs.
- **Settlement Meeting** with family and heirs.
- **In-home / In-person** settlement done at the kitchen table.
- **Guidance** in processing of IRA. Pensions, Social Security, Insurance, etc.
- **Distribution Assistance** assuring that things go the way you want.
- **Finalization** of your Lifetime Estate Plan.

© The CLA Life Settlement is a copyrighted program designed by, and exclusive to, CLA❖USA. It is intended for use only by CLA❖USA clients.

27

CESI 000047

documents, preparation of legal documents, deed preparation, document preparation and Lifetime consultation regarding the client's estate planning

documents. Ex. 421 at CESI 000045. The "Services Provided By CLA USA" included implementing the CLA Estate Organizer, coordinating with the client and the attorney the non-legal part of the estate plan, three month review meetings, annual review meetings throughout the lifetime of the estate plan "to ensure plan is kept up to date with tax, financial and family changes," and continued education workshops. Ex. 421 at CESI 000046. The "Settlement Provided by CLA" included a life settlement program, settlement meeting with family and heirs, "in-home/in-person settlement done at the kitchen table," "guidance in processing of IRA, pensions, social security, insurance, etc.," distribution assistance, and finalization of the Lifetime Estate Plan. Ex. 421 at CESI 000047.

30. The workbook script associated with page 26 of the workbook describes the person who will come to consumers' homes as "a CLA financial planner" who can "help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning." Ex. 483 at CLA_ESI001393. The script makes no mention that the person who will come to consumers' homes will be an insurance agent coming to sell annuities.

31. The script for page 26 also offered to gather information for the preparation of estate distribution documents at delivery, 90-day and review meetings:

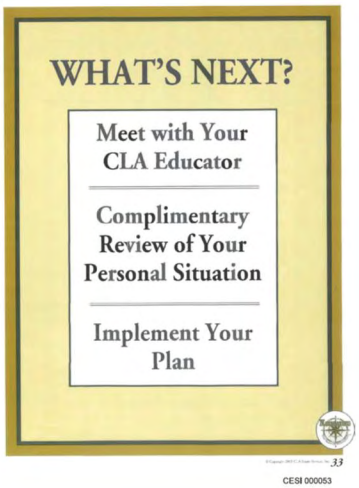
> [Y]our CLA Planner will be coordinating the legal work done by your attorney. If you have chosen a Revocable Living trust as your legal foundation we will bring it to your home, notarize it, and go over everything with you. This will be done under the direction of the estate planning attorney who prepared the documents. I like to put it this way. The attorney does the legal work. CLA does the leg work. Does that make sense? Do you remember earlier when I told you about how important it is to get your assets funded into your trust[?] Your CLA planner will do that work with you. We will help you with the deed work done by your attorney. We will

> help with all your financial accounts, your insurance, your IRAs and any other things that are included in your estate. By the way. Do you think a typical document preparing attorney will do all of this for you? Of course not.
>
> Three months after we deliver your documents we are going to come back out to your home for a Review. Why do you think we do that? Just to make sure nothing was left out and everything is going smoothly. Also, you might need to fine tune your wishes and directions at that time. Does that make sense?
>
> Finally, there is a[n] Annual Review. Many of our clients feel that this might be the most important thing CLA does for them. This annual review will be conducted in your home, every year, by a CLA financial planner. These folks can help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning. They will help you keep your planning on the right track.

Ex. 483 at CLA_ESI001392-93.

32. CLA seminar presenter Nyren Compton testified that he did not discuss the sale of annuities when he was discussing any of these workbook pages related to CLA's services. Testimony of Nyren Compton (Nov. 16, 2020).

33. The workshop script used by CLA's presenters ended with page 33 of the workbook, a page entitled "What's Next?" Ex. 421 at CESI 000053; Ex. 483 at CLA_ESI001399. The script concludes with the presenter stating for those ready to get started: "I will gather some basic information on behalf of the estate planning attorney in order for him to start the process. Is everybody with me? OK. Let's pull out that sheet we looked at right before our break." Ex. 483 at CLA_ESI001399.



34. CLA's workbook contains only two references to insurance. The seventh of eight bullet points on page 1 of the workbook mentions that CLA "[o]ffers full line of insurance and related products to assist client in the protection and preservation of their estate." Ex. 421 at CESI 000021. But the script for this page of the workbook describes the CLA agents who will conduct in-home meetings as "financial professionals that perform the service work and settlement assistance for my clients" and does not disclose that they are insurance agents working on commission. Ex. 483 at CLA_ESI001378. In addition to performing service work and settlement assistance, the script states that these financial professionals will "work with the attorneys to implement your plan," "give you a complete review of your financial situation including things like budgeting, income planning, and asset protection," "can offer you a full line of insurance products if you have a need," "[t]hings like long-term care insurance, life insurance, final expense insurance, and various type of annuity products," and "also provide all manners of legacy planning and end of life guidance to our clients' families." *Id.* Like the workbook page, the script embeds the mention of insurance in a broad list of estate planning services and presents it only as something that can be offered if needed, not as something that must occur for CLA's agents to make a living.

35. The second reference to insurance in the workbook is on page 34, after the last page addressed in the workshop script. Ex. 421 at CESI 000054. But this page simply lists purported benefits of annuities under the title "Asset Preservation Provided by CLA." and says nothing that would alert a consumer that the CLA representative conducting in-home meetings would be an insurance agent working almost exclusively on commission.

36. Nyren Compton testified that he typically spent 30 seconds or less on this page, out of the 2.5-3 hours that the seminars typically lasted, and that it was the only time he would mention annuities during the seminar. Compton Testimony (Nov. 16, 2020). Mr. Compton testified that he never told consumers that CLA USA agents would try to sell them insurance at the in-home meetings. *Id.*

37. Consumers testified that insurance and annuities were not discussed at the seminars. *E.g.*, Ottosen Dep. at 15:25-16:2 ("Q. Was there any reference during the seminar to insurance or annuities? A. No."); Clawson Dep. at 24:24-25:1 ("Q. On that point during the seminar, was there any reference to insurance or annuities? A. No.").

38. Consumers did not understand that CLA sold insurance. Instead, they believed CLA was offering estate plans that would avoid probate. *E.g.*, Ottosen Dep. at 27:6-12 ("Q. What was your understanding of the services that CLA was offering at the seminar? A. Just keep our children from going through probate and have a will. Q. Is there anything else that you understood CLA to be offering? A. No."); Lindenthal Dep. at 92:6-93:10 ("[W]hen my husband and I signed up for this we thought we were getting just say a trust, things put in a trust. We never thought we would be changing anything as far as our investments.").

39. Consumers also did not understand that the in-home review meetings CLA provided as part of the Lifetime Estate Plan would be conducted by an insurance agent who would attempt to sell them annuities. *E.g.*, Ottosen Dep. at 21:5-22:1 ("Q. Did you understand that CLA USA would talk to you about insurance products? A. No."); D. Clawson Dep. at 33:22-34:9 ("Q. Is [offering a full line of insurance and related products] consistent with your understanding of

what CLA USA was offering? A. No."); Fogelman Dep. at 33:10-13 ("Q. Based on information you received from CLA, did you expect the CLA agents who came to your home to sell annuities to you? A. No.").

40. Only after consumers participated in the hours-long estate-planning seminar and received CLA's marketing materials and workbook that promised robust estate planning services did CLA have consumers sign a Consumer Information and Disclosure Agreement that stated in fine print that CLA agents "may discuss insurance solutions that would benefit planning" at in-home meetings. *See* Ex. 1005.

41. When shown the disclosure agreements they had signed, some consumers testified that this provision was not consistent with their expectations. Consumer James Ottosen, was asked whether a portion of a paragraph titled "Coordination of Services" in the disclosure form, which states "After your attorney completes your estate planning documents a CLA USA agent, who are licensed insurance representative [*sic*], will come to your home to assist you in implementing your estate plan, including notarization of necessary documents," was consistent with his understanding. He testified "Didn't know that." Ottosen Dep. at 32:23-33:6. Similarly, when consumer Myrna Lindenthal was asked if the "Coordination of Services" paragraph was consistent with her understanding of CLA's services, she testified "I – if you – I mean, when my husband and I signed up for this we thought we were getting just say a trust, things put in a trust. We never thought we would be changing anything as far as our investments." Lindenthal Dep. at 92:6-93:10.

42. CLA USA's Regional Manager David Nelson acknowledged that "no client bought a [Lifetime Estate Plan] to buy insurance or annuity; they bought it .

. . because they love someone, and they want to make sure their kids are fine." Nelson Dep. at 36:21-36:24.

**B. In-home Meetings**

**1. Delivery Meetings**

43. After a consumer purchased a Lifetime Estate Plan, a CLA referral attorney prepared a revocable living trust and other estate documents. Benson Testimony (Nov. 30, 2020). One of CLA's insurance salespeople (none of whom were attorneys) contacted the client to set up a delivery meeting to review and notarize the estate documents and help the client transfer assets into the trust. Gammel Testimony (Nov. 17, 2020).

44. CLA hired insurance agents who were not required to have any expertise in estate planning, securities, or financial planning to conduct its in-home meetings with consumers. Bradshaw Dep. at 23:16-24:11; Nelson Dep. at 21:3-21:14.

45. CLA's agents conducted 219 delivery meetings since November 3, 2015. Ex. 455 (CR 30(b)(6) Supplemental Responses stating number of delivery meetings was 221); Dkt. No. 188 at 4 (adjusting number of delivery meetings to 219).

46. CLA prepared a Delivery and Review Outline for its agents, which listed tasks to perform and questions to ask clients at delivery and review meetings. The information to be gathered from the clients was for the preparation of their estate distribution documents. Ex. 397.

47. At delivery meetings, CLA agents reviewed estate documents with the clients, inquired whether any changes or corrections were needed to the trust documents, such as the names of trustees, successor trustees and beneficiaries, or the terms of the trust, and notarized the trust documents. Gammel Testimony

(Nov. 17, 2020); Van Winkle Dep. at 71:17-73:10; Garrett Dep. at 72:14-73:11; Conger. Dep. at 106:22-108:17; Bradshaw Dep. at 25:14-26:15. The agents also asked clients to identify all assets comprising their estates, representing that this information was needed to assist funding their trusts. Gammel Testimony (Nov. 17, 2020); Van Winkle Dep. at 71:17-73:10; Conger Dep. at 106:22-108:17; Bradshaw Dep. at 25:14-26:15. If the attorney requested information and the client was delaying in getting it to them, CLA agents would help collect the information for the attorney. Conger Dep. at 83:19-83:25, 87:1-87:12.

48. Former CLA USA agent Alan Gammel testified that agents could make some changes to trust documents on the spot, such as changing a name if a fiduciary got married. Gammel Testimony (Nov. 17, 2020). For other changes, agents completed a Change Form. *Id.*; *see, e.g.*, Ex. 492.

49. At delivery meetings, CLA's agents completed a Delivery Receipt that required them to confirm that they had offered to gather or gathered various information for the preparation of the client's estate distribution documents. The Delivery receipt required the agent and client to sign a page confirming that they had "verified that all applicable documents have been properly signed by all parties, dated, initialed, and notarized," that all assets to be transferred to the trust had been disclosed, that the client had received living trust warranty deeds on all property to be placed in the trust, that any changes needed had been submitted to CLA on a Change Form for processing, and that a deed request form, if needed, had been filled out and submitted to CLA for processing. *E.g.*, Ex. 177.

50. CLA's agents used CLA's proprietary Road of Retirement software to collect and discuss the client's asset information at each delivery and review meeting. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Garrett Dep. at 78:12-78:16; Gammel Testimony (Nov. 17, 2020). CLA's training script

stated that the Road of Retirement enabled "CLA to confirm the assets funded to the trust, to inspect the titles and beneficiaries on insurance and IRAs, and to make sure everything is titled correctly to protect your family." Ex. 414 at CUSA 000802. It produced a detailed profile of the consumer's financial circumstances and assets. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Gammel Testimony (Nov. 17, 2020).

51. Although CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road to Retirement as a sales tool, to gather lists of assets that could be moved into annuity products the agents sold to clients. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Gammel Testimony (Nov. 17, 2020).

52. CLA agent Mitchell Johnson testified that assisting with and delivering consumers' estate documents caused consumers to place their trust in him, which in turn allowed him to sell them insurance products. Johnson Dep. at 128:3-129:6; 130:9-130:12.

53. CLA's customers confirmed that they put their trust in CLA. Clawson Dep. 85:22-86:1; Fogelman Dep. at 18:4-12; Lindenthal Dep. at 39:2-7, 40:8-17.

54. No customers requested information about insurance products during delivery meetings. Johnson Dep. at 130:17-130:21. CLA Regional Manager David Nelson testified that: "No -- no client bought a service package to buy insurance or annuity. They bought it to make sure – because they love someone, and they want to make sure their kids are fine." Nelson Dep. 36:17-36:24; *see also* Fogelman Dep. at 33:10-33:13; Lindenthal Dep. at 15:17-16:3, 93:6-10; Clawson Dep. 38:23-39:4.

55. Consumers did not always understand that agents at delivery meetings were acting as both estate planning agents and insurance sale representatives. Johnson Dep. at 130:22-131:6.

56. CLA USA agent Mitchell Johnson testified that, in his experience, clients sometimes assumed he was the attorney who prepared estate documents because "to them, notarizing a legal document is a complicated thing and . . . you'd have to explain . . . what [a] durable power of attorney was, health care directive. . . . [s]o from their perspective, you were very knowledgeable and professional regarding the legal documents and finances." Johnson Dep. at 129:7-130:5.

57. Insurance agents benefited from CLA's business model because it provided "warm clients to visit." Nelson Dep. at 36:9-36:24. In other words, according to CLA Regional Manager David Nelson, CLA had clients expecting to be seen every year, and "[t]he likelihood of them saying no to you once they've paid for your free – your continued services is slim, so it's a much easier call-to-appointment ratio. . . ." Nelson Dep. at 52:3-52:14.

58. CLA agent Mitchell Johnson found delivery meetings to be the most desirable meetings from a sales perspective. Johnson Dep. at 141:20-142:14. He estimated that 65 percent of the "money generated" occurs at the delivery meeting and within two weeks afterwards. Johnson Dep. at 143:6-143:12.

59. CLA paid its agents only $25 to conduct delivery meetings. Ex. 189 at WA-AG 0001841; Ex. 514 at CLA 002842; Van Winkle Dep. at 36:2-36:5; Johnson Dep. at 143:19-143:21; Garrett Dep. at 56:16-56:25. At times, CLA's agents would spend hours driving to and from delivery and review meetings. Van Winkle Dep. at 40:19-42:6. Any additional compensation an agent received was only through commissions earned by selling annuities or other insurance products to the CLA

clients whose homes they visited. Van Winkle Dep. at 42:7-42:14; Conger Dep. at 28:3-28:9.

60. The clear and strong inference to be drawn from this compensation scheme, coupled with the fact the CLA's agents were not required to have any expertise in estate planning or financial planning, is that the sale of annuity products to CLA's clients was CLA's overriding objective.

**2. Review Meetings**

61. CLA's Lifetime Estate Plan provided that approximately 90 days after the delivery meeting, and annually thereafter, CLA representatives would meet with clients in their homes with the stated purpose of determining whether the client's trust had been properly funded and whether any changes were needed to the client's estate distribution documents. Ex. 421 at CESI 000046; Ex. 483 at CLA_ESI001392-93.

62. CLA's agents conducted 1,259 review meetings since November 3, 2015. Ex. 455 (CR 30(b)(6) Supplemental Responses stating number of review meetings was 1,258); Dkt. No. 188 at 4 (adjusting number of review meetings to 1,259).

63. At 90-day and annual review meetings, CLA agents reviewed clients' estate distribution documents and inquired about any changes that had occurred regarding their estate documents or assets since the previous review meeting. Garrett Dep. at 74:13-75:4; Bradshaw Dep. at 32:10-34:4; Gammel Testimony (Nov. 17, 2020).

64. At each review meeting, CLA agents offered to gather, or gathered, information for the preparation of the client's estate distribution documents. This included completing a Periodic Review Form (Ex. 416) at each meeting. Gammel Testimony (Nov. 17, 2020); Van Winkle Dep. at 45:14-46:3; Nelson Dep. at 77:5-

77:17. Agents completed this form even when a review meeting took place by phone. Van Winkle Dep. at 45:14-46:3.

65. The Periodic Review Form identified the CLA agent as an "Estate plan review agent," and contained an acknowledgement stating that "CLA Estate Services reviewed my estate plan on ____." Ex. 416. When completing the Periodic Review Form, the CLA agent asked the consumer a series of questions about estate documents, property, beneficiary status and assets. Gammel Testimony (Nov. 17, 2020); *see* Exs. 265, 266, 416, 515, 664. Specifically, completing the Periodic Review Form required the agent to answer the following questions: (1) Are all of the names in the documents spelled correctly? If no, change/correction form attached? (2) Has all of the property, that the client wants transferred, been transferred to the trust? (3) Have all of the financial documents, that the client wants retitled, been retitled into the trusts? (4) Are all the beneficiaries correct on every insurance policy? (5) Are there any changes in beneficiary status (death or disassociation)? (6) Did any trustee die since initial application? If yes, whom? Settlement assistance provided or requested? (7) Has any property been purchased, sold, inherited, or gifted since last review? (8) Have any CDs, Mutual Funds, IRAs, Pension Plans, Stock Funds, or Insurance policies been cashed in? (9) How does the client plan on funding their long term care needs?

66. If the client or agent identified a change that was needed to the client's estate distribution documents during a review or delivery meeting, CLA agents would either call the attorney to provide the information needed for the change, or collect the information on a Change Form and submit the change request to the referral attorney. Ex. 492; Garret Dep. at 85:9-85:25; Conger Dep. at 109:18-110:1; Van Winkle Dep. at 81:1-82:1.

67. According to CLA, it collected 94 written requests for changes, corrections, or amendments to clients' estate distribution documents since November 3, 2015. Ex. 455.

68. Agents were paid only $10 to conduct a review meeting. They obtained the bulk of their compensation through insurance sales at the meetings. Ex. 189 at WA-AG 0001841; Ex. 514 at CLA 002842; Van Winkle Dep. at 36:17-36:25; Johnson Dep. at 143:15-143:18; Garrett Dep. at 57:1-57:6.

**3. Insurance Products Sold by CLA**

69. CLA USA agents sold Washington consumers fixed indexed annuities from a limited number of insurance carriers. *See* Conger Dep. at 36:6-36:13.

70. The parties presented testimony of expert witnesses to opine on the characteristics of the equity indexed or fixed indexed annuities ("indexed annuities") CLA marketed and sold to Washington consumers. The State presented the testimony of Dr. Craig J. McCann. Dr. McCann is a Chartered Financial Analyst with 30 years of experience as a financial economist. McCann Testimony (Nov. 18, 2020). The Court finds the testimony of Dr. McCann credible. CLA presented the testimony of John L. Olsen. Mr. Olsen holds certification related to the selling of insurance products, including indexed annuities, which he did for a number of years. Olsen Testimony (Dec. 1, 2020).

71. Indexed annuities, like those marketed and sold by CLA in Washington, are deferred annuities that are derivative contracts that can be tied to external equity indices, such as the S&P 500. McCann Testimony (Nov. 18, 2020).

72. Dr. McCann testified that indexed annuities like those marketed and sold by CLA pay a "very high commission that is not disclosed" to consumers, which he described as "extraordinary" compared to other financial products.

McCann Testimony (Nov. 18, 2020). For example, Dr. McCann testified that other financial products, such as bonds, mutual funds, or variable annuities typically charge 0 to 4.5 percent commissions, whereas indexed annuities charge 10 to 12 percent. *Id.*

73. Dr. McCann further testified that the commission rate is important because issuers of indexed annuities recoup the commissions from consumers who purchase the products. He testified: "It creates a conflict of interest where the agents selling these products are motivated or incentivized to sell products that pay high commissions since they are not disclosed. That's a conflict in part because those commissions are paid by the investor. They come out of the investor's funds. Not directly, but indirectly, with absolute certainty they do." McCann Testimony (Nov. 18, 2020). Mr. Olsen also acknowledged that commissions are "recouped over a period of years," if the purchaser does not incur surrender penalties, and that such penalties can also be a way the commissions are recouped. Olsen Testimony (Dec. 1, 2020).

74. Mr. Olsen also acknowledged that, for the CLA-offered annuity contracts he reviewed, surrender charges and market value adjustments can invade a consumer's principal, meaning that the principal is not inviolate. Olsen Testimony (Dec. 1, 2020).

75. According to Dr. McCann, indexed annuities like those marketed and sold by CLA in Washington are also notable for their illiquidity. This illiquidity stems from various aspects of the annuity, but especially due to the fact that the annuities have lengthy surrender-charge periods, such as 10 years. McCann Testimony (Nov. 18, 2020); *see also* Ex. 145 at WA-AG 170851 (reflecting a 10-year surrender-charge period, with a 10% charge rate for the first year of the annuity).

76. Dr. McCann testified that the riders on CLA customers' contracts are "insurance-like features" of annuity contracts that "add zero value" to the contracts. McCann Testimony (Nov. 18, 2020).

77. Dr. McCann testified that indexed annuities are derivative contracts that are "extraordinarily complex." McCann Testimony (Nov. 18, 2020). He also described the annuities CLA marketed and sold to Washington consumers as "opaque" to such a degree that even someone with a math Ph.D. would have difficulty understanding the likely future payoffs of the annuities. *Id.*

78. Dr. McCann opined that the indexed annuities CLA marketed and sold to Washington consumers are "the most complex investments that I believe I have ever observed." McCann Testimony (Nov. 18, 2020).

79. Dr. McCann testified that "market value adjustments" that issuers can make under the annuity contracts operate to shift the risk of the annuity from the issuer to the consumer. McCann Testimony (Nov. 18, 2020). Indeed, Dr. McCann testified that the consumer "bears all the risk," whereas the issuer "bears no risk." *Id.*

80. According to Dr. McCann, the lack of disclosure of the "true underlying economics, covered over by this Rube Goldberg machine of crediting formulas and insurance-like features, ensures . . . that no investor would ever understand these products." McCann Testimony (Nov. 18, 2020).

81. Dr. McCann's opinions regarding the complexity of the indexed annuities that CLA marketed and sold is support by consumer testimony. When asked whether she is familiar with annuities, Washington resident Dorothy Clawson answered, "No. I still don't know how they work. I just know that I lose money on them." Clawson Dep. at 70:24-71:2. With regard to surrender penalties, Mrs. Clawson testified that the CLA USA agent who sold her indexed annuities,

Mitchell Johnson, "did not describe that there is a penalty on them if you draw your money out." Clawson Dep. at 71:3-13.

82. Dr. McCann's opinions are further supported by the testimony of CLA USA agents operating in Washington. Agent David Van Winkle testified that the average customer, and even the average agent, would not understand how the policies "are put together and made." Van Winkle Dep. at 98:2-98:5. He continued, "if you ask the average customer if they understood a rider, they won't. And the average agent probably wouldn't either." Van Winkle Dep. at 98:6-98:8. Likewise, CLA USA agent Alan Gammel, when asked about his impression of consumers' general understanding of indexed annuities, testified, "I found that they often did not understand very well." Gammel Testimony (Nov. 17, 2020). This included, Mr. Gammel testified, consumers conflating a percentage cap on returns with a guaranteed minimum rate of return. *Id.*

83. Dr. McCann also valued the annuity contracts CLA marketed and sold to Washington consumers. Employing the "risk neutral valuation" technique, which he testified is a standard set of methodologies for valuing derivative contracts like indexed annuities, Dr. McCann found that the value of the contracts is not more than 73 to 86 cents on the dollar when purchased. McCann Testimony (Nov. 18, 2020). According to Dr. McCann, the actual value is "substantially less than that" when "the extreme illiquidity in these contracts" is taken into account. *Id.* CLA's expert did not attempt to provide a valuation to any of the annuity contracts that he reviewed and conceded that he is not qualified to employ the risk neutral valuation to value indexed annuity contracts. Olsen Testimony (Dec. 1, 2020).

84. Dr. McCann opined that the likely returns of the indexed annuities that CLA marketed and sold to Washington consumers "are far less than the

likely returns of [more liquid] diversified portfolios of stocks and bonds. McCann Testimony (Nov. 18, 2020). Dr. McCann also stated that even for a risk-adverse investor, it would be preferable to purchase short and intermediate-term treasury securities, or a mix of such securities with some amount allocated to a stock portfolio. *Id.*

85. Dr. McCann ultimately concluded that "[n]o fully informed consumer who understood [the type of indexed annuity CLA sold Washington consumers] would ever purchase it," and that he "feel[s] confident that there is zero chance that a fully informed investor would ever purchase one of these." McCann Testimony (Nov. 18, 2020).

86. CLA and its agents received commissions for every annuity they sold. CLA retained 65% to 70% of the commission, and the CLA agent received the remainder. See Ex. 189 at WA-AG 0001841; *see also* Ex. 455.

87. Since it began operating in Washington in 2008, CLA's review and delivery meetings resulted in the sale of hundreds of financial products to consumers, with commissions to CLA of $3,597,287.93 and to its agents of $1,826,163.16. Pl. Ex. 455.

**4. CLA's Sales Requirements**

88. CLA USA agents were evaluated based on the amount of insurance premiums they sold. Conger Dep. at 45:21-45:23; Garret Dep. at 62:16-63:11; Ex. 189 at WA-AG 0001841.

89. As of February 2014, sales agents had a minimum sales quota of $300,000 per month, which was communicated to the agents on a weekly basis. Ex. 417 at CUSA 037268.

90. CLA USA Regional Director David Nelson was also compensated in part based on sales that the agents he supervised made. Nelson Dep. at 111:6-111:8.

**5. CLA's Oversight of Agents**

91. CLA provided little training to or oversight of its agents who conducted in-home meetings with consumers. CLA USA Regional Manager David Nelson, who supervised CLA's Washington agents, testified that CLA's agents were independent insurance agents who did not receive training from CLA. Nelson Dep. at 36:5-36:13, 37:13-37:21.

92. Mr. Nelson testified that he believed insurance companies provided training for CLA's agents, Nelson Dep. at 36:9-36:13, but CLA's expert John Olsen testified that insurance companies rarely provided such training. Olsen Testimony (Dec. 1, 2020). There is no evidence that any of CLA's Washington sales agents received training from any insurance company.

93. The EMC2 Ethics Handbook that CLA offered into evidence, Ex. 1210, bears a date of 2010, but CLA's Washington agents, Mitchell Johnson, David Van Winkle, and Michael Kelly began working for CLA in 2009 (Johnson Dep at 8:17-8:23; Exs. 1208, 1209) , before Ex. 1210 was created. None of these agents testified that they received ethics training from CLA, nor did any CLA employee testify that they witnessed any Washington agent being so trained.

94. Although CLA created the opportunity and motivation for its agents to aggressively market insurance products to seniors in their homes and derived significant financial benefit from the sales of these products, CLA took few steps to ensure that consumers were not taken advantage of or subjected to coercive sales tactics.

95. David Nelson, the CLA USA Regional Manager who supervised CLA's insurance agents in Washington, testified that he oversaw the service part of the CLA agents' work, but he did not exercise any oversight over the annuities sales part of the agents' work because he believed they were independent contractors responsible for their own behavior. Nelson Dep. at 112:19-113:9.

96. CLA did not take any steps to investigate allegations of Washington-agent misconduct, including the following:

a. Two CLA USA agents, David Van Winkle and Michael Kelly, had their contracts with the insurance carrier Forethought terminated for engaging in templating, or submitting multiple applications with identical information with just the name changed. Ex. 407. Their manager, David Nelson, did not take any disciplinary action against them or take any steps to determine whether they engaged in templating with any other carrier's contracts. Nelson Dep. at 100:23-101:23, 103:15-104:1. Nor did Mr. Nelson investigate whether any other agents were engaged in templating after learning about Forethought's termination of CLA's agents. Nelson Dep. at 101:24-102:1.

b. While he was a CLA USA agent, Alan Gammel reviewed an annuity sale made by CLA USA agent Mitchell Johnson that Mr. Gammel believed was unsuitable for the client because of penalties the client had incurred to move money into the account and would incur in the future to access the funds. Gammel Testimony (Nov. 17, 2020). Accordingly, Mr. Gammel suggested that the client cancel the contract. *Id.* Mr. Gammel also provided unrebutted testimony that the sales application contained incorrect information. *Id.* When he sent a detailed letter with an attached spreadsheet, Ex. 194, to his supervisor, Mr. Nelson, explaining why the sale was improper, Mr. Nelson did not investigate Mr. Johnson or the sale, and instead told Mr. Gammel to "back off," Ex. 196. Mr.

Nelson admitted that, rather than investigate Mr. Johnson, he investigated the whistleblower, Mr. Gammel. Nelson Dep. at 123:14-123:20.

c. CLA USA agent David Van Winkle complained to his manager, David Nelson, that CLA USA agent Mitchell Johnson was engaged in the unethical practice of churning: "With Mitch [c]hurning his old book of CLA clients this is also cutting the dollars available for the few reviews assigned to me." Ex. 517. Churning, according to CLA USA National Director Chris Garrett, is "when you replace business just for the purpose of commission." Garrett Dep. at 102:19-102:24. Mr. Nelson admitted that he took no action to investigate the validity of Mr. Van Winkle's claim. Nelson Dep. at 119:19-120:24. Instead he chastised Mr. Van Winkle for sending the email. Ex. 517. Mr. Nelson was the Regional Manager in charge of supervising CLA's Washington insurance sales agents, but he believed that taking steps to ensure that the agents he managed were not churning "was not part of my responsibility."[2] Nelson Dep. at 41:23-41:25.

d. CLA USA agent Michael Kelly would attempt to preserve his sales by instructing customers to tell their brokerage company that they did not want their advisor or anyone else with the brokerage firm to speak with them, thus giving Mr. Kelly full control over the client's knowledge. Ex. 516. Mr. Nelson was aware of this conduct and did not seek to stop it. Nelson Dep. at 96:22-97:8

96. CLA received a disproportionately large number of complaints about its Washington and Oregon agents. Ex. 401. CLA's National Sales Director noted that it was baffling "how agents can have so many clients upset enough to call and complain." Ex. 401.

[2] Although Mr. Nelson testified that he believed an employee in "new business" would notify him if there was evidence of churning, Nelson Dep. at 145:7-145:10, no "new business" employee testified in this matter about CLA's processes and procedures.

97. Mr. Nelson testified that he never investigated any agents for churning, for submitting inaccurate information in annuities applications, or for failing to disclose material terms in insurance contracts like surrender penalties; and that he investigated only one instance of templating. Nelson Dep. at 147:4-147:12, 147:25-148:13.

98. On the other hand, Mr. Nelson admitted that he investigated every instance of "selling away," that is, selling products not offered by CLA, thus depriving CLA of commissions. Nelson Dep. at 149:3-149:4. Both Mr. Nelson and National Sales Director Chris Garrett testified that the only times they terminated sales agents was when they sold non-CLA products to CLA customers or did not meet sales requirements. Nelson Dep. at 47:4-47:8, 137:9-138:21; Garret Dep. at 67:21-68:3.

99. Washington CLA clients Dorothy Clawson, Janice Ward, James Ottosen, Myrna Lindenthal, and Diane Fogelman all credibly testified that CLA agents engaged in improper sales practices or misconduct when selling them annuities:

a. Ms. Clawson testified that Mitchell Johnson failed to disclose material terms of the annuity he was selling her, including that should would be charged a surrender penalty if she drew funds out of her annuity. Clawson Dep. at 70:21-71:13; 122:11-123:1. Ms. Clawson ultimately needed to draw money from the annuity causing her to pay a penalty. Clawson Dep. at 78:18-79:7. Ms. Clawson also testified that Mr. Johnson falsely promised that her annuity would make seven percent interest per year. Clawson Dep. at 77:15-77:19, 123:23-124:1, 213:12-214:3. The Court finds the testimony of Ms. Clawson credible.

b. Ms. Lindenthal testified that CLA USA agent Mitchell Johnson sold her an annuity that was not suitable for her family's needs, that she

lost sleep over the sale, and that she ultimately cancelled it. Lindenthal Dep. 26:22-28:16. She further testified that she lost $16,000 as a result of another annuity she purchased from CLA. Lindenthal Dep. at 49:5-49:10. The Court finds the testimony of Ms. Lindenthal credible.

c. Ms. Fogelman testified that CLA's agent failed to adequately disclose that she would pay a rider fee for her annuity and that she lost retirement savings as a result of purchasing the annuity. Fogelman Dep. 37:25-38:5; 45:4-45:24. The Court finds the testimony of Ms. Fogelman credible.

d. Mr. Ottosen testified that CLA's sales agent engaged in high pressure sales tactics, Ottosen Dep. at 44:23-45:5, 48:1-48:10, 120:24-121:17, and signed him up for a Lifetime Income Benefit Rider without his knowledge, Ottosen Dep. at 60:24-62:4. The Court finds the testimony of Mr. Ottosen credible.

e. Ms. Ward testified that many of the signatures on her annuities applications were not hers. Ward Dep. 55:1-16, 57:19-58:1, 58:11-58:17, 87:11-87:20, 93:11-94:4. She further testified that information concerning her assets that CLA USA agent Mitchell Johnson included on her annuities applications was incorrect. Ward Dep. 89:15-90:11, 91:16-93:4. The Court finds the testimony of Ms. Ward credible on this subject.

97. CLA USA's President, James Bradshaw admitted that "sadly I think the Executive Leadership (me included) SAY that we value behaviors/standards more than sales results but we really value SALES results first and handle behavior/culture issues reactively rather than proactively." Ex. 417 at CUSA 037270.

98. CLA did not have any procedures established to ensure that agents did not sell financial products to clients with diminished cognitive abilities. Nelson Dep. at 38:18-39:6.

99. The client deposition testimony submitted as evidence, including the testimony cited in the preceding paragraphs, establishes that many of the seniors to whom CLA marketed its products were financially unsophisticated and unequipped to understand the complex and opaque insurance products CLA sold them.

**C. Eagle Financial Group and Eagle Estate Services**

100. Since this litigation began, CLA USA has rebranded itself as Eagle Financial Group. When asked if the services Eagle offers are different from those offered by CLA USA, former CLA USA Regional Manager (now Eagle Regional Manager) David Nelson testified: "No. Some of the verbiage is different, so we use 'Eagle' now. We don't – we only call them – we may call them to tell them that we're the folks at CLA USA, you know, but when we get there, we have a flyer that we give them and explain that we've rebranded." Nelson Dep. at 19:16-19:22. Eagle Financial Group does not currently operate in Washington. Bradshaw Dep. at 14:2-14:12. Elsewhere in the country, Eagle Financial Group now performs the in-home reviews for the clients who purchased Lifetime Estate Plans from CLA ESI. Bradshaw Dep. at 17:11-17:16.

101. Similarly, CLA ESI no longer exists, and its former executives hold similar or identical posts in a new company called Eagle Estate Services. Former CLA ESI Vice President John Long (now Eagle Estate Services Vice President) testified that the services Eagle Estate Services offers are similar to those formerly offered by CLA ESI with "some changes and things in the way we market . . . and acquire clients, and meet people. Long Dep. at 12:1-12:19.

## II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter at issue in this case.

2. King County is the appropriate venue for this action.

**A. Consumer Protection Act**

3. The Consumer Protection Act (CPA), RCW 19.86, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. To establish liability under the CPA, a plaintiff must show the existence of: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518, 398 P.3d 1271 (2017).

4. For a private plaintiff, Washington courts apply two additional requirements for showing liability under the CPA: injury and causation. These additional elements do not apply, however, to a CPA action brought by the Attorney General. *Id.* ("Unlike a private plaintiff under the CPA, the State is not required to prove causation or injury."); *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (same). Thus, no showing of injury or causation is required to establish liability in this case.

5. The plaintiff in a CPA action, whether brought by the Attorney General or a private party, may establish liability on the basis of either "unfair" or "deceptive" acts, or both. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

6. The terms "unfair" and "deceptive" are not defined under the CPA. The Washington Supreme Court, accordingly, "has allowed the definitions to evolve through a gradual process of judicial inclusion and exclusion." *Id.* at 785.

7. In *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009), the Supreme Court held that, for purposes of the CPA, deception

exists "if there is a representation, omission or practice that is likely to mislead a reasonable consumer."

8. "[A] communication may be deceptive by virtue of the *net impression*" it conveys. *Panag*, 166 Wn.2d at 50 (emphasis added); *Mandatory Poster*, 199 Wn. App. at 519 ("A deceptive act or practice is measured by the net impression on a reasonable consumer."). This means that a communication may be deceptive, for purpose of the CPA, "even though it contains truthful information." *Panag*, 166 Wn.2d at 50; *see also F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").[3]

9. A CPA plaintiff "need not show the act in question was intended to deceive, only that it had the *capacity to deceive* a substantial portion of the public." *Panag*, 166 Wn.2d at 47 (emphasis added).

10. In evaluating capacity to deceive, the Court should look not to the most sophisticated consumers, but rather to the least. *Id*. at 50.

11. "The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs." *Hangman Ridge*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

12. Whether an act had the capacity to deceive a substantial portion of the public is a question of law. *State v. LA Investors, LLC*, 2 Wn. App. 2d 524, 538-39, 410 P.3d 1183 (2018); *Mandatory Poster*, 199 Wn. App. at 519-20.

13. The State is not required to prove that the unfair or deceptive acts actually injured consumers or that consumers relied on deceptive acts. *State v.*

[3] In construing and applying the CPA, Washington courts may look to, but are not bound by, federal court decisions interpreting the Federal Trade Commission Act. *Panag*, 166 Wn.2d at 47; RCW 19.86.920.

*Living Essentials, LLC*, 8 Wn. App. 2d 1, 15, 436 P.3d 857 (2019); *cert. denied*, No. 19-988, 2020 WL 5882220 (U.S. Oct. 5, 2020).

14. Because a CPA claim does not require a finding of an intent to deceive or defraud, "good faith on the part of the seller is immaterial." *Id.* at 15-16.

15. Unfair acts or practices violate the CPA, even if they are not deceptive. *See Klem*, 176 Wn.2d at 787. An act may be "unfair" if it offends public policy, as established by statutes, the common law, or otherwise; is immoral, unethical, oppressive, or unscrupulous; or causes substantial injury to consumers. *Rush v. Blackburn*, 190 Wn. App. 945, 962-63, 361 P.3d 217 (2015).

16. "Trade" and "commerce" are defined in the CPA and include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2).

17. In determining whether unfair or deceptive conduct affects the public interest, courts look to the following factors: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether there was a pattern or generalized course of conduct; (3) whether the acts were repeated; (4) whether there is a real and substantial potential for repetition of defendant's conduct; and (5) if the act complained of involved a single transaction, whether many consumers were affected or likely to be affected by it. *See Hangman Ridge*, 105 Wn.2d at 790; *see also* RCW 19.86.093 (setting forth elements of public interest in private CPA actions). No factor is dispositive, nor is it necessary that all be present to establish public interest impact. *Hangman Ridge*, 105 Wn.2d at 791.

18. "[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Stephens v. Omni Ins. Co.*, 138 Wn.

App. 151, 178, 159 P.3d 10 (2007), *aff'd sub nom. Panag*, 166 Wn.2d 27 (2009) (quoting *Hangman Ridge*, 105 Wn.2d at 790). Even a deceptive act that affects only one consumer may impact the public interest, if it is capable of repetition. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988).

19. The Court granted the State's motion for partial summary judgment on July 19, 2019, finding that CLA violated the CPA during its estate-planning seminars and one-on-one meetings with consumers by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and by creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs. Dkt. No. 171 (Order dated July 19, 2019). The Court also determined that "[e]ach deceptive act or practice is a separate violation of the CPA." *Id.*

20. The Court now finds that CLA's marketing of its Lifetime Estate Plan at its estate-planning seminars was unfair and deceptive, and violated the CPA. CLA deceptively promoted its Lifetime Estate Plan as a robust package of estate-planning services that included in-home meetings with CLA agents to review consumers' estate plans to ensure they were up to date. CLA's marketing failed to disclose in any meaningful way that the agents conducting the in-home meetings would be licensed insurance agents working on commission who would use the meetings as opportunities to learn about seniors' finances and aggressively market annuities and insurance products to them. CLA's failure to adequately disclose these facts left consumers with the deceptive net impression that they were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents. *Panag*, 166 Wn.2d at 50 (deception

exists "if there is a representation, omission or practice that is likely to mislead" a reasonable consumer).

21. Two ambiguous references to insurance in CLA's workbook, which discusses estate planning on nearly every page, are insufficiently prominent and unambiguous to cure the multiple hours' worth of deceptive representations CLA made to consumers at its estate planning seminars. *LA Investors*, 2 Wn. App. 2d at 544 (disclosures do not cure potential for deception unless they are "sufficiently prominent and unambiguous to change the apparent meaning of [misleading impressions] and to leave an accurate impression."). Even if these references were noticed by consumers, they did not adequately disclose that CLA agents would use review meetings as opportunities to market insurance products to them and would be compensated only if they succeeded in doing so.

22. It was only after consumers participated in the hours-long estate-planning seminar and received CLA's marketing materials and workbook that promised robust estate planning services that CLA had consumers who decided to purchase a Lifetime Estate Plan sign a densely worded Consumer Information and Disclosure Agreement. The Disclosure Agreement stated in fine print that CLA agents "may discuss insurance solutions that would benefit planning" at in-home meetings. *See* Ex. 1005. This language is not sufficient to cure the potential for deception created at CLA's estate planning seminars. *See LA Investors*, 2 Wn. App. 2d at 543-44 (holding that numerous disclosures in all capital letters on a two-page mailer were insufficient to cure the mailer's capacity for deception); *Mandatory Poster*, 199 Wn. App. At 523-24 (holding that numerous disclaimers in a mailer stating it was not a government document not did not cure the misleading net impression that the sender was associated with a government agency). Moreover, the timing of the disclosure in the agreement renders it

insufficient. *Robinson v. Avis Rent a Car System, Inc.*, 106 Wn. App. 104, 116 (2001) ("[A] practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract.").

23. CLA created the opportunity for its agents to market insurance products to consumers in their homes, stood to benefit financially from its agents' sales, and created a compensation system that ensured its agents would have to sell its clients annuities to make a living. Yet CLA made little effort to provide safeguards to protect its clients from being taken advantage of by overly aggressive or improper sales tactics.

24. CLA's marketing and sales of Lifetime Estate Plans and insurance products to Washington consumers represent "trade or commerce" under the CPA.

25. CLA's conduct affected the public interest. The conduct occurred in the course of CLA's business, was part of a pattern or generalized course of conduct, was repeated, and affected thousands of consumers.

**B. The Estate Distribution Documents Act**

26. The Estate Distribution Documents Act, RCW ch. 19.295, makes it is unlawful to use "living trusts" as a marketing tool by non-lawyers to generate sales leads. It expressly prohibits persons not licensed to practice law from the "unscrupulous practice of marketing legal documents as a means of targeting senior citizens for financial exploitation." The legislature prohibited the practice because it endangers consumers' financial security and may frustrate their estate-planning objectives. RCW 19.295.005.

27. The EDDA prohibits a person from marketing estate distribution documents, directly or indirectly, unless the person is authorized to practice law in Washington.

28. "'Market' or 'marketing' includes every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide individualized advice about an estate distribution document." RCW 19.295.010(4).

29. "Gathering information" means "collecting data, facts, figures, records and other particulars about a specific person or persons for the preparation of an estate distribution document." RCW 19.295.010(3).

30. Because the EDDA prohibits gathering, or offering to gather, information, it does not matter for purposes of establishing liability whether the information is ultimately used by an attorney in preparing estate documents. The EDDA contains no provision releasing a party who gathered or offered to gather information in violation of the statute from liability if an attorney later decides to use or not to use the information.

31. Violations of the EDDA are *per se* violations of the CPA. RCW 19.295.030.

32. In its ruling on Plaintiff's motion for partial summary judgment, Dkt. No. 135, the Court found that CLA violated the EDDA by (1) offering, at its estate-planning seminars, to coordinate with consumers' referral attorneys by gathering information for the preparation of consumers' estate distribution documents; (2) gathering information for the preparation of estate distribution documents on Client Information Forms when consumers purchased a Lifetime Estate Plan; and (3) gathering information about changes needed to the client's estate documents and submitting Change Forms to attorneys describing these changes. Dkt. No. 171 (Order dated July 19, 2019).

33. The Court now finds that CLA violated the EDDA by offering to gather (at CLA estate-planning seminars), and by gathering (at in-home

meetings), information for the preparation of estate distribution documents at each of the delivery and review meetings it held with Washington consumers.

34. At its estate-planning seminars, CLA offered to gather information for the preparation of estate distribution documents in violation of the EDDA by promoting, as part of its Lifetime Estate Plan delivery and review meetings to ensure estate plans are kept up to date with any necessary changes. The workbook CLA used at estate-planning seminars marketed the Lifetime Estate Plan by offering "Annual Reviews throughout lifetime of the Estate Plan to ensure plan is kept up to date with tax, financial and family changes." Ex. 421 at CESI 000046. The script that workshop agents followed at the seminars also contained offers to gather information for the preparation of estate distribution documents at delivery, 90-day, and review meetings:

> [Y]our CLA Planner will be coordinating the legal work done by your attorney. If you have chosen a Revocable Living trust as your legal foundation we will bring it to your home, notarize it, and go over everything with you. This will be done under the direction of the estate planning attorney who prepared the documents. I like to put it this way. The attorney does the legal work. CLA does the leg work. Does that make sense? Do you remember earlier when I told you about how important it is to get your assets funded into your trust[?] Your CLA planner will do that work with you. We will help you with the deed work done by your attorney. We will help with all your financial accounts, your insurance, your IRAs and any other things that are included in your estate. By the way. Do you think a typical document preparing attorney will do all of this for you? Of course not.
>
> Three months after we deliver your documents we are going to come back out to your home for a Review. Why do you think we do that? Just to make sure nothing was left out and everything is going smoothly. Also, you might need to fine tune your wishes and directions at that time. Does that make sense?
>
> Finally, there is a[n] Annual Review. Many of our clients feel that this might be the most important thing CLA does for them. This annual review will be

> conducted in your home, every year, by a CLA financial planner. These folks can help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning. They will help you keep your planning on the right track.

Ex. 483 at CLA_ESI001392-93.

35. After offering to gather information for the preparation of estate distribution documents in marketing the Lifetime Estate Plan, CLA offered to gather, and gathered, information for the preparation of estate distribution documents at each of the delivery and review meetings it held with Washington consumers who purchased the Plan.

36. At each delivery meeting, CLA's agents completed a Delivery Receipt that required them to confirm that they had offered to gather or gathered various information for the preparation of the client's estate distribution documents. The Delivery receipt required the agent and client to sign a page confirming that they had "verified that all applicable documents have been properly signed by all parties, dated, initialed, and notarized," that all assets to be transferred to the trust had been disclosed, that the client had received living trust warranty deeds on all property to be placed in the trust, that any changes needed had been submitted to CLA on a Change Form for processing, and that a deed request form, if needed, had been filled out and submitted to CLA for processing. *E.g.*, Ex. 177.

37. At each 90-day and annual review meeting, CLA agents offered to gather, or gathered, information for the preparation of estate distribution documents by reviewing clients' estate distribution documents and inquiring about any changes that had occurred regarding their estate documents or assets since the previous review meeting. At each meeting, agents completed a Periodic Review Form that required them to ask the consumer a series of specific questions about whether estate documents were up to date, whether all property had been

transferred to the trust, whether all financial documents were retitled into the trust, whether all beneficiaries were correct, whether there were any changes in beneficiary status, whether any trustee had died, whether any property or investments had been sold, and how the consumer planned to fund long-term care needs.

38. CLA also gathered information for the preparation of estate distribution documents when a client or agent identified a change that was needed to the client's estate distribution documents during a review or delivery meeting. In that event, CLA agents would either call the attorney to provide the information needed for the change, or collect the information on a Change Form, and submit the change request to the referral attorney.

39. CLA used living trusts as a marketing tool for purposes of gathering information for estate distribution documents, which the legislature has deemed a "deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." RCW 19.295.005. CLA's conduct in delivery and review meetings is precisely the type of unfair or deceptive conduct the EDDA prohibits. CLA's EDDA violations created the opportunity for it to sell annuities to consumers, which is the culmination of CLA's scheme and the precise outcome the legislature intended the EDDA to prevent.

40. As the Court has already recognized, each EDDA violation is a separate violation of the CPA. Dkt. No. 171 (Order dated July 19, 2019).

**C. Remedies**

41. The CPA provides for a range of remedies for CLA's violations of the CPA, including injunctive relief, restitution, costs and fees, and civil penalties of up to $2,000 per violation. RCW 19.86.080(1)-(2); RCW 19.86.140. These remedies are complementary components that, together, comprehensively address unfair

and deceptive practices: civil penalties deter such practices; injunctive relief prevents such practices from continuing; and restitution restores money or property acquired unlawfully from such practices. Thus, this array of remedies broadly protects and benefits the public by deterring future violations of the CPA, halting current violations, and restoring the status quo after past violations.

**1. Restitution**

42. The CPA confers broad equitable powers upon Washington trial courts to fashion appropriate equitable remedies, including authorizing restitution of "moneys or property which may have been acquired by means of any act declared unlawful or prohibited" by the Act. RCW 19.86.080(2).

43. Disgorgement of illegal gains, rather than consumer loss, is the usual measure of restitution under the CPA and analogous Federal Trade Commission Act case law. *See State v. LG Electronics, Inc.*, 185 Wn. App. 123, 144 n.33, 340 P.3d 915 (2014) (distinguishing between damages and restitution, and recognizing the latter "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain"), *aff'd*, 186 Wn.2d 1, 375 P.3d 636 (2016); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016).

44. Illegal or unjust gains are measured by the defendant's net revenues, which is the amount consumers paid for the product or service minus refunds and chargebacks, not by net profits. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 374-75 (2d Cir. 2011) ("[I]t is well established that defendants in a disgorgement action are 'not entitled to deduct costs associated with committing their illegal acts.'"); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-16 (1st Cir. 2010).

45. No statute of limitations applies to claims for restitution brought by the Attorney General under the CPA. *State v. LG Electronics, Inc.*, 186 Wn.2d 1, 9-12, 375 P.3d 636 (2016).

46. The Court rejects Defendants' argument that the amount of restitution should be reduced to account for alleged (largely hypothetical) value Defendants claim that consumers received from the Lifetime Estate Plan. Even if Defendants could establish that their services provided some value to consumers, it is "the fraud in the selling, not the value of the thing sold" that informs a restitution award. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (explaining that customers who purchase rhinestones sold as diamonds should get all of their money back, not only the difference between what they paid and a fair price for rhinestones because the seller's misrepresentations tainted the customers' purchasing decisions; if told the truth, perhaps they would not have purchased rhinestones at all). CLA sold the Lifetime Estate Plan, and ultimately gained access to seniors' living rooms to sell annuities to them, only by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington and creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs in violation of the CPA; by creating a deceptive net impression regarding the nature of the in-home meetings included in the Plan and failing to adequately disclose those meetings would be conducted by insurance agents paid by commission in violation of the CPA; and by promising to gather information for the preparation of estate distribution documents in violation of the EDDA. Moreover, a restitution award cannot be reduced by any alleged value provided by in-home meetings when Defendants violated the EDDA at each meeting by offering to gather, and gathering information for the preparation of estate distribution documents.

47. Moreover, "the existence of some satisfied customers does *not* constitute a bar to liability or an award of restitution." *FTC v. Inc21.com Corp.*, 745 F. Supp.2d 975, 1011 (N.D. Cal. 2010) (emphasis in original).

48. CLA ESI received $2,565,626 in revenue from sales of the Lifetime Estate Plan (also referred at certain times during this trial as a "Service Package"). Ex. 454.

49. CLA USA received $3,597,287.93 in commissions for the sale of insurance products in Washington. Ex. 455. This figure does not include the $1,826,163.16 CLA USA agents received in commissions in Washington. *Id.*

50. "An award of prejudgment interest is appropriate where a party retains funds rightly belonging to another party and thereby denies the party the use value of the money." *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 595, 355 P.3d 286 (2015). Here, CLA's sales data and amounts are readily ascertainable. Ex. 456. Accordingly, the Court orders that CLA shall pay prejudgment interest on the restitution it provides at a rate of 12% per annum. *See Public Utility Dist. No. 2 of Pacific Co. v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 80-81, 336 P.3d 65 (2014)

51. The Court orders Defendants to pay $2,565,626 in restitution to who purchased CLA's Lifetime Estate Plan (or Service Package) in Washington, plus prejudgment interest at a rate of 12% per annum. Defendants shall pay to each consumer who purchased a Lifetime Estate Plan the amount of revenue CLA ESI received from the sale plus prejudgment interest at a rate of 12% per annum.

52. The Court also orders Defendants to pay $3,597,287.93 in restitution to each consumer to whom they sold insurance products in Washington, plus prejudgment interest at a rate of 12% per annum. Defendants shall pay to each consumer who purchased such a product the total amount of commission CLA USA received for the sale plus prejudgment interest at the rate of 12% per annum.

53. In the event that Defendants are unsuccessful after diligent attempts to locate and compensate any consumer to whom they are required to pay

restitution under this Order, the funds due to that consumer shall go to the State. Any such amount distributed to the State shall be used for future monitoring and enforcement of this Order, future enforcement of RCW 19.86 and RCW 19.295, or for any lawful purpose in the discharge of the Attorney General's duties at the sole discretion of the Attorney General.

**2. Civil Penalties**

**a. Number of CPA Violations Subject to Penalties**

54. The CPA mandates that "[e]very person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation."

RCW 19.86.140.

55. The CPA does not limit the possible number of violations to the number of aggrieved consumers; rather, each unfair or deceptive act is a separate violation. *Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 316-17, 553 P.2d 423 (1976) ("We decline to follow the one-violation-per-consumer rule."); *LA Investors*, 2 Wn. App. 2d at 545-46 (holding that "[e]ach deceptive act is a separate violation").

56. The Court has previously determined that CLA engaged in "unfair and deceptive practices in its estate-planning seminars and one-on-one meetings with consumers by (a) misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington in its estate-planning seminars; and (b) creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs." Dkt. No. 171.

57. The Court has now also determined that CLA's marketing of its Lifetime Estate Plan at its estate-planning seminars was unfair and deceptive, and violated the CPA. CLA deceptively promoted its Lifetime Estate Plan as a

robust package of estate-planning services that included in-home meetings with CLA agents to review consumers' estate plans to ensure they were up to date, and failed to disclose in any meaningful way that the agents conducting the in-home meetings would be licensed insurance agents working on commission who would use the meetings as opportunities to learn about seniors' finances and aggressively market annuities and insurance products to them. CLA's failure to adequately disclose these facts left consumers with the deceptive net impression that they were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents.

58. Accordingly, CLA's CPA violations include: (1) its misrepresentations regarding probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and its creation of a deceptive net impression that a revocable trust is necessary to protect assets and heirs, at estate planning seminars which collectively were attended by 1,765 consumers since November 3, 2015; (2) its deceptive marketing of the Lifetime Estate Plan and creation of a deceptive net impression that consumers were purchasing robust estate planning services (rather than in-home visits from insurance agents) at estate planning seminars, which collectively were attended by 1,765 consumers since November 3, 2015.[4]

59. The Court has already found that CLA violated the EDDA at its estate planning seminars by (1) offering at estate-planning seminars to coordinate with consumers' referral attorneys; (2) gathering information for the preparation of estate distribution documents on Client Information Forms when consumers purchased a Lifetime Estate Plan; and (3) gathering information about changes

[4] The State does not seek penalties for acts and practices that occurred prior to November 3, 2015, the date on which the parties entered a tolling agreement. Limiting penalties to conduct occurring after November 3, 2015 renders moot any argument that penalties should be reduced based on the timing of the State's lawsuit.

needed to the client's estate documents on Change Forms for attorneys describing these changes. Dkt No. 171 (Order dated July 19, 2019).

60. The Court has now also determined that CLA also violated the EDDA by offering at estate-planning seminars to conduct regular review meetings to review consumers' estate distribution documents for needed changes if consumers purchased CLA's Lifetime Estate Plan, and by gathering such information at each review meeting with consumers who purchased the Plan.

61. Accordingly, CLA's EDDA violations include (1) its offers to gather information for the preparation of estate documents at its estate-planning seminars, which collectively were attended by 1,765 consumers since November 3, 2015; (2) each of the 210 instances in which CLA agents gathered information on the Client Information Forms that agents completed when CLA sold Lifetime Estate Plan since November 3, 2015; (3) each of the 94 instances in which CLA agents gathered information on Change Forms indicating to referral attorneys changes needed to client's estate documents since November 3, 2015; and (4) each of the 219 delivery meetings and 1,259 review meetings since November 3, 2015 at which CLA agents reviewed consumers' estate documents or financial information.

62. CLA distributed its workbook, which (1) contained the misrepresentations regarding probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington that violated the CPA, and created a deceptive net impression that a revocable trust is necessary to protect assets and heirs, also in violation of the CPA; (2) contained the deceptive marketing of the Lifetime Estate Plan that created a deceptive net impression that consumers were purchasing robust estate planning services and not in-home

visits from insurance agents; and (3) offered to gather information for estate distribution, to every seminar attendee.

63. CLA's seminar presenters further repeated the workbook's contents to every seminar attendee by following the workbook and a CLA script to guide their presentations.

64. CLA also offered to gather, or gathered, information for the preparation of estate distribution documents at each of the 1,478 delivery meetings and review meetings it conducted in Washington.

65. Accordingly, CLA violated the CPA the following number of times within the November 3, 2015 statute of limitations period:

| **Violation** | **Calculation Method** | **Total** |
|---|---|---|
| Deceptive probate and trust representations | 1 per seminar attendee | 1,765 |
| Offer to gather information for estate distribution at seminars | 1 per seminar attendee | 1,765 |
| Deceptive Marketing of In-Home Meetings | 1 per seminar attendee | 1,765 |
| Client Information Forms | 1 per Lifetime Estate Plan sale | 210 |
| Delivery and review meetings | 1 per meeting | 1,478 (includes 94 instances when Change Forms were completed) |

**b. Amount Per Violation**

66. The penalty amount for each CPA violation, and the factors to consider in making the determination, are within the Court's discretion. *Living Essentials*, 8 Wn. App. 2d at 17 ("While RCW 19.86.140 provides that a statutory penalty for violating the CPA is mandatory, it leaves the amount of the penalty and the factors to consider within the trial court's discretion.").

67. The CPA does not specify the factors to be considered in determining the size of a civil penalty, but elimination of the benefits of noncompliance with the law is an "essential element" of a penalty award, so that there is no incentive to violate the law. *U.S. Department of Justice v. Daniel Chapter One*, 89 F. Supp. 3d 132, 152-53 (D.D.C. 2015); *Living Essentials*, 8 Wn. App. 2d at 36 ("[N]o one should be permitted to profit from unfair and deceptive conduct."). "[T]he need to eliminate any benefits a defendant received from the violation[s] . . . is completely separate from any consumer redress or disgorgement ordered by the Court." *Daniel Chapter One*, 89 F. Supp. 3d at 152 (internal citations and quotation marks omitted). To have any deterrent effect, a penalty "must be large enough to be more than just an acceptable cost of doing business," and therefore "should be higher than the amount the defendants benefitted and the amount of any consumer redress award." *Id.* at 152-53.

68. In addition to deterrence, courts may consider factors such as a lack of good faith, public injury, ability to pay, and necessity of vindicating the government's authority when assessing penalties. *See, e.g.*, *U.S. v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 967 (3d Cir. 1981).

69. A penalty of four times the amount of restitution awarded is "clearly reasonable" under Washington law. *State v. WWJ Corp.*, 138 Wn.2d 595, 600, 980 P.2d 1257 (1999). When restitution is also awarded, Washington courts have commonly awarded penalties in the amount of two to five times the amount of restitution. *See, e.g.*, *Mandatory Poster*, 199 Wn. App. at 513 ($793,540 penalty, $362,625 restitution); *LA Investors*, 2 Wn. App. 2d at 530, 535 ($2,569,980 penalty, $862,855 restitution); *Ralph Williams*, 87 Wn.2d at 309 ($857,500 total penalties, $142,000 total restitution).

70. CLA's conduct warrants a significant penalty award. CLA did not act in good faith, it caused public injury, it has not demonstrated an inability to pay, and a significant penalty is necessary to deter further misconduct.

i. **Lack of Good Faith**

71. The Court finds that CLA did not act in good faith because its violations of the CPA and EDDA were not isolated instances or the result of occasional poor judgment, but represented a deliberate scheme to develop and exploit leads for the sale of annuities. CLA used scare tactics to instill fear in seniors that they would be left vulnerable and their families unprotected unless they purchased CLA's Lifetime Estate Plan and set up revocable living trusts, which in turn gave CLA agents access to their living rooms and their assets to aggressively market complex annuities.

72. CLA failed to provide any meaningful oversight for its agents, and ignored repeated complaints of agent misconduct, including churning allegations, templating allegations, and issues with falsified information on annuities sales applications. CLA was aware that its Washington agents in particular were the subject of a disproportionately high number of complaints.

73. CLA USA's President admitted that "sadly I think the Executive Leadership (me included) SAY that we value behaviors/standards more than sales results but we really value SALES results first and handle behavior/culture issues reactively rather than proactively." Ex. 417 at CUSA 037270.

74. CLA USA represented itself as a "financial services" company, but the only financial services it provided was the sale of a narrow range of high-commission insurance products. The annuities CLA sold were incomprehensively complex, so consumers placed their full trust in CLA to have their best interests in mind. CLA took advantage of the trust relationship they established through

ostensibly assisting consumers with their estate affairs in order to market annuities that, according to Plaintiff's expert, no fully informed consumer would ever purchase.

75. CLA was on notice of the EDDA's requirements no later than 2009, when it received a letter from attorney Caroline-Suissa Edmiston bringing the EDDA to the attention of CLA's executives and encouraging them to consider whether their practices were in compliance with the law, but CLA did not change any practices after receiving the letter. *See* Ex. 485.

76. CLA likewise ignored trust mill concerns of its own agent, Michael Kelly. *See* Ex.395

77. The Washington Supreme Court's holding in *WWJ* is particularly relevant here. In *WWJ*, 138 Wn.2d at 604-05, the Supreme Court considered the trust relationship that the defendant created with consumers as pertinent factor in determining that the maximum penalty of $2,000 per violation was warranted. Here, as in *WWJ*, the Court finds that CLA's conduct abused the trust of seniors, a class of consumers who are particularly vulnerable to financial harm.

ii. **Public Injury**

78. Another factor courts have considered in awarding penalties is harm to the public. *Daniel Chapter One*, 89 F. Supp. 3d at 149-150. Injury to the public may be found when consumers have lost money due to the defendant's unfair and deceptive conduct. *Id.* at 151. Courts also find injury to the public when deceptive materials reach the public. *Id.*; *Reader's Digest*, 662 F.2d at 969. Neither consumer confusion nor actual deception is required, as the CPA is intended to prevent material having a capacity to deceive consumers from reaching the public. *See Reader's Digest*, 662 F.2d at 969.

79. This factor also weighs in favor of substantial civil penalties. CLA and its agents gained $7,989,077.09 in revenue in Washington from sales of Lifetime Estate Plan and the commissions it received from annuity sales. Consumers who purchased CLA's Lifetime Estate Plan paid money for the opportunity to have CLA insurance agents review their private asset information and aggressively sell them annuities at meetings the consumers believed were to review and update their estate plans. Moreover, the public was harmed each and every time CLA distributed its workbooks, which the Court has determined were deceptive, to consumers at its estate-planning seminars. CLA created a compensation system that incentivized aggressive sales, but exercised little oversight over its agents' sales practices. The annuities CLA sold Washington consumers at the culmination of the scheme were complex, opaque, and illiquid products that were difficult for consumers to understand and that typically included significant surrender penalties and lengthy surrender periods.

iii. **Ability to Pay**

80. From 2013 through 2017, CLA ESI had gross national receipts or sales of $24,027,334. CLA ESI 30(b)(6) Dep. (Oct. 30, 2020). During that same time period, CLA USA collected $82,198,126 in gross national sales. CLA USA 30(b)(6) Dep. (Oct. 30, 2020). CLA collected $6,162,913.93 in net revenues in Washington. Exs. 454, 455. To the extent CLA's balance sheets reflect a loss, it is due to CLA paying over $39 million in "management fees" between 2013 and 2017 to a company that has the same ownership as CLA. *See* CLA ESI 30(b)(6) Dep. of Charles Loper III at 10:10-11: 20; *see generally* CLA ESI 30(b)(6) Dep. of Charles Loper III (Oct. 30, 2020); CLA USA 30(b)(6) Dep. of Charles Loper III (Oct. 30, 2020). CLA did present any evidence regarding its financial position in 2018, 2019, or 2020, and has not demonstrated an inability to pay a significant penalty.

### iv. Total Penalties

81. Taking all of the above factors into consideration, the Court finds that a substantial penalty award is warranted to ensure that CLA does not profit from its numerous violations of Washington law, and to protect the public.

82. The Court awards penalties as follows:

| | Number of Violations | Amount Per Violation | Total |
|---|---|---|---|
| **Estate Planning Seminars:** | | | |
| Probate/Trust Misrepresentations (CPA) | 1,765 | $667 | $1,177,255 |
| Deceptive Marketing of LEP & In-Home Meetings (CPA) | 1,765 | $667 | $1,177,255 |
| Offering to gather information for EDD (EDDA) | 1,765 | $666 | $1,175,490 |
| **Sale of Lifetime Estate Plans:** | | | |
| Client Information Forms (EDDA) | 210 | $2,000 | $420,000 |
| **In-Home Meetings:** | | | |
| In-Home Delivery Meetings (EDDA) | 219 | $2,000 | $438,000 |
| In-Home Review Meetings (EDDA) | 1,259 | $2,000 | $2,158,000 |
| **TOTAL** | | | **$6,546,000** |

### 3. Injunctive Relief

83. The CPA empowers the Attorney General to bring an action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful." RCW 19.86.080.

84. The Court finds that injunctive terms are needed to ensure that CLA's violations do not reoccur.

85. Although CLA represents that it has largely ceased operating in Washington and Nationwide since this Court entered a preliminary injunction, Dkt. No. 83 (Order dated Aug. 24, 2018), "[v]oluntary cessation of allegedly illegal conduct does not moot the need for injunctive relief because there is still a likelihood of the illegal conduct recurring." *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973). "A heavier burden is placed on parties alleging abandonment of practices where the practices

are discontinued subsequent, rather than prior, to institution of suit." *Id.* Here, CLA did not cease doing business in Washington until the State filed its lawsuit and the Court issued a preliminary injunction. Defendants' principals still engage in the marketing and sale of estate plans and insurance products in other states through Eagle Financial Group and Eagle Estate Services, Inc., demonstrating a potential for ongoing misconduct.

86. Accordingly, the Court hereby orders that Defendants and their successors, assigns, employees, contractors, representatives, officers, directors, principals, owners, and all others who are acting or have acted in concert or active participation with Defendants shall permanently engage in or refrain from engaging in the following acts and practices:

a. Defendants shall not engage in the following acts or practices without being authorized to practice law or without a statutory exemption:

i. Marketing estate distribution documents, as defined by RCW 19.295.010, in Washington or to Washington consumers;

ii. Providing individualized advice about a will, a trust, or an estate distribution document as defined by RCW 19.295.010 in Washington or to Washington consumers;

iii. Gathering or offering to gather data, facts, figures, records, or other particulars about a specific person or persons for the preparation of an estate distribution document as defined by RCW 19.295.010 in Washington or with regard to Washington consumers; or

iv. Engaging in any other conduct in violation of RCW ch. 19.295.

b. Defendants shall not collect financial, asset, or estate information from any Washington consumer for use to develop or generate leads

for sales of annuities, insurance, or any other financial product to consumers, or use such information collected by another person or entity to develop or generate such leads.

c. Defendants shall not make, directly or by implication, any material misrepresentations or omissions about Washington probate law, trust law, federal law, or the relative advantages of estate distribution mechanisms to consumers.

d. Defendants shall not attempt to dissuade any Washington consumer from consulting with a financial advisor, attorney, family member, or other advisor regarding estate planning.

e. Defendants shall not misrepresent the purpose of, nor deceptively market any meeting with Washington consumers or any meeting that takes place, including but not limited to delivery meetings, 90-day review meetings, annual review meetings, death settlement meetings, or any other meetings with Washington consumers or that take place in Washington.

f. Defendants shall not collect financial or asset information from any Washington consumer without clearly disclosing the reasons for the collection of such information and obtaining the consumer's express consent for each use of the consumer's data.

g. Defendants shall not attempt to sell annuities or any other insurance products to Washington consumers at any meeting that Defendants represent as being for any other purpose, including but not limited to estate planning or settlement.

h. Defendants shall not attempt to sell annuities or other insurance products to a Washington consumer at any meeting, in the consumer's home or elsewhere, without first taking the following steps:

i. At the time of scheduling a meeting with a Washington consumer, and again at least one week prior to the meeting if no response has been received, Defendants shall transmit a written notice to the consumer that clearly, conspicuously, and unambiguously explains the following:

1. If the consumer consents in writing, Defendants will market and/or discuss annuities and other insurance products at the meeting;

2. If the consumer does not consent in writing, Defendants will refrain from marketing or discussing annuities and other insurance products at the meeting;

3. The consumer is welcome to invite others to the meeting, including but not limited to family members, advisors, and financial planners;

4. The consumer may end the meeting at any time.

ii. The notice must contain the name, license number, mailing address and phone number of all persons who will attend the meeting. The notice must also contain a signature line on which the consumer may sign to indicate consent to having Defendants market and/or discuss annuities and other insurance products at the meeting.

iii. Defendants may contact a consumer to whom they have sent the notice but from whom they have not received written consent by phone to ask whether the consumer wishes to discuss annuities or other financial products during the meeting. During the call, Defendants must clearly and unambiguously provide the consumer oral notice of each item listed in paragraph (h)(i) and ask the consumer whether he or she wishes to sign the written notice.

iv. Defendants shall refrain from marketing or discussing annuities or other financial products during any meeting with a consumer who has not provided the written notice described in this paragraph.

i. Defendants shall use due diligence to ensure that each application for an insurance product it submits on behalf of a Washington consumer contains complete and accurate information about the consumer, including but not limited to the consumer's assets and financial information.

j. Defendants shall not misrepresent, directly or by implication or omission, to Washington consumers any material term of a sale, including but not limited to surrender periods, surrender penalties, income rider fees, and commissions that will be paid on the sale of any product.

k. Defendants shall provide clear, conspicuous and unambiguous notification in writing to Washington consumers about each and every material term in any insurance products marketed to such consumers. Such notification shall be provided in addition to any information provided to the consumer in the insurance company's materials.

l. Defendants shall not provide investment advice to Washington consumers without being properly registered with the Washington Department of Financial Institutions, and shall not misrepresent their credentials to Washington consumers.

**4. Costs and Fees**

87. The CPA provides that "the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080(1). A plaintiff becomes a "prevailing party," for this purpose, "if the plaintiff has succeeded on any significant issue in litigation which achieved

some of the benefit the parties sought in bringing suit." *State v. Living Essentials, LLC*, 8 Wn. App. 2d at 38.

88. In addition, "[c]entral to the calculation of an attorney fees award is the underlying purpose of the statute authorizing the attorney fees." *Id.* Applying that principle here, "[a]warding the State its fees and costs after a CPA action will encourage an active role in the enforcement of the CPA, places the substantial costs of these proceedings on the violators of the act, and will not drain the State's public funds." *Id.* at 38-39 (*quoting Ralph Williams*, 87 Wn.2d at 314-15).

89. The Court finds that the State is the prevailing party in this matter and CLA shall pay the State's costs and fees incurred in this matter. The State shall provide the Court and CLA its petition for costs and fees within twenty-one (21) days of the entry of these findings and conclusions.

DATED this 21st day of December, 2020.

*Electronic signature appended*

JUDGE MICHAEL R. SCOTT



JUDGE MICHAEL R. SCOTT
MALENG REGIONAL JUSTICE CENTER
401 4TH AVENUE NORTH, COURTROOM 3H
KENT, WASHINGTON 98032

King County Superior Court
Judicial Electronic Signature Page

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| Case Number: | 18-2-06309-4 |
| Case Title: | STATE OF WASHINGTON VS CLA ESTATE SERVICES INC ET AL |
| Document Title: | FINDINGS OF FACT AND CONCLUSIONS OF LAW |

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| Signed By: | Michael R. Scott |
| Date: | December 21, 2020 |

Judge: Michael R. Scott

This document is signed in accordance with the provisions in GR 30.

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**Transmittal Information**

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| **Appellate Court Case Number:** | Case Initiation |
| **Appellate Court Case Title:** | CLA Estate Services, Appellant v. State of Washington, Respondent (825291) |

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