

RECEIVED No. 79977-6
SUPREME COURT
STATE OF WASHINGTON

2007 MAY 1 A 7: 59
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

CLERK

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

Plaintiff/Appellant and Cross-Respondent,

vs.

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

Defendant/Respondent and Cross-Appellant.

FILED
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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of persons seeking legal redress in the civil justice system, including an interest in the rights of persons seeking recovery under the Consumer Protection Act, Ch. 19.86 RCW (CPA).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the question of the proof necessary to show causation in a private action under the CPA, and particularly whether reliance must be shown by the consumer plaintiff in order to recover. Indoor Billboard/Washington, Inc. (Indoor Billboard) commenced this CPA action against Integra Telecom of Washington, Inc. (Integra), contending that the telephone company committed an unfair and deceptive act or practice in violation of the CPA by misrepresenting the nature of a surcharge contained on bills paid by Indoor Billboard.¹ The underlying facts are set forth in the briefing of the parties. See Indoor Billboard Br. at 3-20; Integra Br. at 3-14.

Integra moved for summary judgment on several grounds, including that Indoor Billboard failed to prove causation under the CPA,

¹ Although this action was commenced as a class action, Indoor Billboard's motion for class certification has yet to be decided. See Indoor Billboard Br. at 1; Integra Br. at 13.

because there was no evidence it relied upon Integra's alleged misrepresentations in subscribing to its services and paying the subject surcharge. See Integra Br. at 15-16. The superior court granted Integra's motion. Id. at 16.²

Indoor Billboard appealed to Division I of the Court of Appeals contending, *inter alia*, that a genuine issue of material fact exists regarding the causation element of the CPA claim. It urges that it is not necessary to establish reliance upon a deceptive act or practice in order to meet the causation requirement. See Indoor Billboard at 41-42. In turn, Integra argues that Indoor Billboard's CPA claim fails because "Washington courts have consistently required that a plaintiff establish actual reliance on the allegedly unfair or deceptive act or practice." Integra Br. at 32.

After completion of the briefing in the Court of Appeals, the case was transferred to this Court for direct review, pursuant to RAP 4.4.

III. ISSUE PRESENTED

In meeting the causation element for a private cause of action under the CPA, must a plaintiff prove actual reliance on the deceptive act or practice in order to recover damages?

² The superior court did not indicate in its summary judgment order the specific reasons for its determination, other than to note that its decision was not based upon the "voluntary payment doctrine," which Integra had argued as part of its challenge regarding whether causation was met under the CPA. See Indoor Billboard Br. at 5-6. Indoor Billboard's motion for reconsideration, which focused on the causation issue, was denied. Id. at 6.

Indoor Billboard also argues that, even if reliance is required, there is a triable issue of fact on causation. See Indoor Billboard Br. at 2, 44-47. This question and other legal issues raised by Indoor Billboard and Integra on cross-review are not addressed in this amicus curiae brief.

IV. SUMMARY OF ARGUMENT

Under the CPA, the causation element of the five-part Hangman Ridge test is met by proving the unfair act or practice was a cause-in-fact of the plaintiff's injury. There is no requirement that the plaintiff show actual reliance on the deceptive act or practice as a basis for recovery of damages under the act. Thus, if a plaintiff suffers injury as a proximate result of a deceptive act or practice, a prima facie case of causation is established.

Imposition of a reliance component to prove causation would be inconsistent with the text of the CPA and its mandated liberal construction, and undermine the remedial purposes of the act. To the extent Nuttall v. Dowell, 31 Wn.App. 98, 649 P.2d 832, *review denied*, 97 Wn.2d 1015 (1982), and subsequent Court of Appeals decisions relying on Nuttall hold otherwise, they must be disapproved.

V. ARGUMENT

Introduction.

The question before the Court is what proof of causation is required in a private suit under the CPA, particularly whether the consumer plaintiff must prove reliance upon the defective act or practice in order to recover under the act. While there may be something intuitively appealing about turning to reliance in assessing whether the necessary link exists between a deceptive act or practice and injury to the consumer, neither the CPA nor this Court's jurisprudence *requires* such

proof. Instead, this Court has interpreted the CPA as only imposing on plaintiff an obligation to prove cause-in-fact. However, as will be seen, in certain types of CPA cases evidence of reliance may be relevant to a cause-in-fact analysis.

A. Overview Of Washington Law Regarding Treatment Of Causation In Private Actions Under The CPA, Before *Hangman Ridge*.

The CPA itself neither specifies the type of causation analysis required, nor expressly imposes a reliance requirement. See RCW 19.86.020 (declaring unfair or deceptive acts or practices unlawful); RCW 19.86.090 (authorizing private suits by consumers for “actual damages” sustained by the person); RCW 19.86.920 (describing legislative intent underlying the act, and requiring that it be “liberally construed” to effectuate its purposes).³ Early case law of this Court interpreting the CPA did not address causation in any detail. See Hangman Ridge v. Safeco Title, 105 Wn.2d 778, 784, 719 P.2d 531 (1986) (describing initial 3-part test for private CPA action). This Court noted in Anhold v. Daniels, 94 Wn.2d 40, 44, 614 P.2d 184 (1980), that “[o]n its face, the act demands no more than that a litigant sustain injury as a result of unfair or deceptive acts or practices in the conduct of any trade or commerce.”

While the Court did not specifically address causation during this period of time, it did impose a “public interest” proof requirement for

³ These statutes are reproduced in the Appendix to this brief, for the convenience of the Court.

private suits under the CPA, not found in the act itself. See Lightfoot v. MacDonald, 86 Wn.2d 331, 334-36, 544 P.2d 88 (1976); Anhold, 94 Wn.2d at 44-47. Regarding the proof for establishing public interest, the Court required that the unfair or deceptive acts or practices be relied upon by the plaintiff to his or her detriment. Anhold at 47 (deceptive acts must “induce” plaintiff’s conduct and result in damage). This would later be referred to as part of the “inducement-damage-repetition” test. See Hangman Ridge, 105 Wn.2d at 789.

Although the discussion of inducement/reliance in Anhold only related to the public interest requirement, the Court of Appeals in Nuttall v. Dowell, 31 Wn.App. 98, 639 P.2d 832, *review denied*, 97 Wn.2d 1015 (1982), read Anhold as imposing a reliance requirement in conjunction with proof of causation:

We hold that a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it.

31 Wn.App. at 111. Nuttall involved, among other contentions, a claim that the defendant had misrepresented a particular boundary line. See id. at 109-10. The Court of Appeals denied relief under the CPA because the plaintiff “did not rely upon defendant’s representations relating to the western boundary but investigated the boundary independently.” Id. at 111.

This holding in Nuttall, incorporating reliance into causation analysis, was carried forward in later Court of Appeals cases. See e.g.

Pickett v. Holland America Line, 101 Wn.App. 901, 916, 6 P.3d 63, *rev'd on other grounds*, 145 Wn.2d 178, 35 P.3d 351 (2001), *cert. denied sub nom.*, Bebchick v. Holland America Line-Westour's, Inc., 531 U.S. 941 (2002); Robinson v. Amos Rent A Car Sys., 106 Wn.App. 104, 119, 22 P.3d 818, *review denied*, 145 Wn.2d 1004 (2001); Mayer v. Sto Indus., Inc., 123 Wn.App. 443, 458-59, 98 P.3d 116 (2004), *reversed on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006).

Although the view expressed in Nuttall has persisted to this day, the opinion was issued before this Court's 1986 watershed decision in Hangman Ridge v. Safeco Title, which reformulated the proof requirements for private CPA actions in light of what it perceived as significant confusion in the case law. See 105 Wn.2d at 783, 784. As discussed below, Hangman Ridge substantially altered the approach to private litigation of CPA claims, and effectively eclipsed the Nuttall causation analysis.⁴

B. When Hangman Ridge Reformulated The Elements For CPA Liability It Did Not Impose A Reliance Requirement, And Only Contemplated Proof Of Cause-In-Fact In Order To Meet The Causation Element.

In Hangman Ridge, this Court recognized that its CPA jurisprudence to date was confusing, and much in need of clarification.

⁴ Though this Court is not bound by Nuttall, it is slender precedent in any event. The Court of Appeals in Nuttall issued three separate opinions: The lead opinion imposed reliance on the causation analysis, based upon its reading of Anhold. See Nuttall, 31 Wn.App. at 111 (Pearson, J.); the concurrence agreed, but only because it felt bound by the law of the case, and otherwise voiced its opinion that the CPA should not apply in this type of case, id. at 116 (Reed, C.J., concurring specially); the dissent was of the view that reliance is not required to prove causation under the CPA, id. at 116-17 (Petrie, J., dissenting).

See 105 Wn.2d at 783, 784. To eliminate this confusion, it formulated a new test for establishing liability in private suits under the act:

We hold that to prevail in a private CPA action and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

Id. at 780.

The Court discussed aspects of each of these elements, clarifying or modifying existing law. Importantly, with respect to the “public interest” element, it acknowledged the “inducement-damage-repetition” test developed in Anhold, but determined that this test was “not the best vehicle for showing that the public was or will be affected by the act in question.” 105 Wn.2d at 789. The Court then announced a new analysis for measuring “public interest,” designed to replace the Anhold test. The new analysis did not carry forward an inducement/reliance component. Id. at 790-91. It is *gone*.

Regarding causation, the Court did not identify with particularity the type of proof required to establish the “causal link” contemplated by the CPA, noting:

A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff. This causation element, like the injury element, has been foreshadowed by our previous opinions. The *Anhold* “inducement” prong hints at a causation requirement.

Id. at 793.

Notwithstanding this reference to Anhold, the Court did not impose a reliance requirement for establishing causation. Id. Instead, when determining whether the causation element was met under the particular facts, the Court applied what appears to be a straightforward cause-in-fact analysis. See id. at 795 (determining that the tax liability forming the basis for the damage claim was unavoidable, and thus could not have been caused by the acts of the defendant's representative).

This view of Hangman Ridge, as establishing a cause-in-fact test for meeting the causation requirement under the CPA, is now embodied in the Washington Pattern Jury Instructions - Civil, 6A Wash. Prac. (Fifth Ed. 2005). WPI 310.07 provides:

**CAUSATION IN CONSUMER PROTECTION
ACT CLAIM**

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

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

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

6A Wash. Prac. at 274.⁵ This formulation of causation under the CPA is substantially similar to the cause-in-fact test in Washington common law

⁵ The text of this WPI, and its "NOTE ON USE" and "COMMENT," is reproduced in the Appendix, for the convenience of the Court. Chapter 310 of Vol. 6A Wash. Prac. includes a pattern instruction for the 5-element Hangman Ridge test, WPI 310.01, along with pattern instructions for each of the five elements. See e.g. WPI 310.04 & 310.05 (regarding proof of the public interest element in consumer disputes and private disputes, respectively). WPIs 310.01, 310.04, and 310.05, with their notes and comments, are also reproduced in the Appendix, for the convenience of the Court.

governing tort liability. See 6 Wash. Prac., WPI 15.01, and NOTE ON USE & COMMENT.⁶

As the comment to WPI 310.07 indicates, in two cases post-dating Hangman Ridge this Court has used a cause-in-fact analysis in determining liability under the CPA. See 6 Wash. Prac. at 274-75; see also Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (employing cause-in-fact analysis in upholding liability for drug company's deceptive act resulting in injury to plaintiff's business and property); Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 167-68, 795 P.2d 1143 (1990) (applying cause-in-fact analysis in upholding liability for defendant's deceptive acts resulting in plaintiff's loss of investment funds). Neither Fisons nor Schmidt address causation in terms of plaintiff's "reliance" upon unlawful acts or practices of the defendants. Id. Instead, the Court undertakes the traditional "but for" cause-in-fact analysis. It has not departed from this approach.⁷

Notwithstanding this Court's cause-in-fact analysis in Hangman Ridge, Schmidt and Fisons, some Court of Appeals decisions continue to

⁶ WPI 15.01, and accompanying "NOTE ON USE" and "COMMENT," is reproduced in the Appendix, for the convenience of the Court.

⁷ In the Court's opinion in Pickett, supra, reversing the Court of Appeals disapproval of a superior court CPA-based class action settlement, the Court allowed that under Washington case law, including Nuttall, the proper test for causation is "debatable." See 145 Wn.2d at 197. However, this comment must be viewed in the unique context in which it was made, *viz.* abuse of discretion review of whether a superior court class settlement was "fair, adequate, and reasonable" in light of uncertainties as to the law and facts at the time the settlement occurred. See id. at 188-97. It was not for the Court to resolve uncertainties about the law of causation in private litigation under the CPA, but only to note that such uncertainties existed. Thus, Pickett cannot be read as repudiating the Hangman Ridge approach to causation, now embodied in WPI 310.07.

apply the Anhold-based reliance notion of causation, relying upon Nuttall, supra. See Robinson, 106 Wn.App. at 119; Mayer, 123 Wn.App. at 458-59; see also Pickett, 101 Wn.App. at 916-20 (recognizing reliance test, but also separately allowing for recovery under a cause-in-fact analysis when plaintiff loses money because of unlawful conduct). These cases must be disapproved, to the extent they are inconsistent with Hangman Ridge and its progeny.

Under this analysis, if Integra's description of the nature of the surcharge in question had the capacity to deceive, and Indoor Billboard paid the surcharge, then it has established a prima facie case of causation. Cf. Pickett, 101 Wn.App. at 920 (concluding causation established by plaintiff's purchase of cruise tickets where cost breakdown has capacity to deceive). Proof of reliance is not required.

C. Requiring Reliance To Prove Causation Is Inconsistent With The Text Of The CPA, The Mandated Liberal Construction Of The Act, And Its Underlying Remedial Purpose.

Undeniably evidence of reliance *may* be relevant to the issue of cause-in-fact in some CPA cases, but imposition of a reliance requirement generally is inconsistent with the act and its purpose.

As indicated in §A., supra, in contrast to other state's consumer statutes, Washington's CPA does not contain an explicit reliance element. See Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 U. Kan. L. Rev. 1, 18 & n. 86 (2005) (noting only a few state consumer protection acts expressly require proof

of reliance); see also RCW 19.86.020; 090. Moreover, the Washington Legislature has mandated liberal construction of the CPA, RCW 19.86.920, which this Court has recognized is broader than restrictive common law doctrines based on fraud or deceit, requiring rigorous proof of actual reliance. See McRae v. Bolstad, 101 Wn.2d 161, 167, 676 P.2d 496 (1984).⁸

A recent comment advocates fashioning a “rebuttable presumption” of reliance under Washington’s CPA, drawing in part on other contexts in which this Court has recognized such a presumption to meet a reliance requirement. See Jennifer Rust Murray, Comment, Proving Cause In Fact Under Washington’s Consumer Protection Act: The Case For A Rebuttable Presumption Of Reliance, 80 Wash. L.Rev. 245, 252 n.49 (2005) (noting case law involving claims under the state Franchise Investment Protection Act, Ch. 19.100 RCW, and private actions under the federal Securities and Exchange Commission rule 10b-5, 17 C.F.R. §240.10b-5). There is some intuitive appeal to this proposal, given the recognized difficulty of proving actual reliance in cases of

⁸ While this Court has rejected elements of common law fraud as necessary to a CPA private action, commentators and courts advocating a reliance requirement generally premise their analysis on finding an affinity between common law claims such as fraud and consumer protection acts. See Schwartz & Silverman, supra at 57 (arguing “consumer fraud” statutes are rooted in common law fraud); Sheila B. Scheuerman, The Consumer Fraud Class Action: Reining In Abuse By Requiring Plaintiffs To Allege Reliance As An Essential Element, 43 Harv. J. on Legis. 1, 25-27, 42-26 (2006) (advocating for statutory reliance element similar to that required for common law claims); see also Seth W. Goren, A Pothole On The Road To Recovery: Reliance And Private Class Actions Under Pennsylvania’s Unfair Trade Practices And Consumer Protection Law, 107 Dick. L. Rev. 1 (2002) (criticizing Pennsylvania case law requiring proof of common law fraud in order to establish violation of state consumer protection act).

nondisclosure, rather than affirmative misrepresentation. See e.g. Morris v. International Yogurt, 107 Wn.2d 314, 327-30, 729 P.2d 33 (1986) (imposing rebuttable presumption to meet reliance element of Franchise Investment Protection Act). In Morris, the Court observed:

[I]t is virtually impossible to prove reliance in cases alleging nondisclosure of material facts. The inquiry that would normally be made in a case of affirmative misrepresentation – did the plaintiff believe the defendant’s representation, and did that belief cause the plaintiff to act – does not apply in a case of nondisclosure.

107 Wn.2d at 328 (citation omitted).⁹ To the extent a defendant cannot rebut this presumption with evidence of how the plaintiff would have acted had the defendant disclosed all material information, the Court concluded: “since it is the defendant’s nondisclosure that has made proof difficult, it is proper to require the defendant to bear such difficulties.” Morris at 329 (citation omitted); see also Note, The Reliance Requirement In Private Actions Under SEC Rule 10b-5, 88 Harv. L.Rev. 584, 591 (1975) (noting reliance plays no rational role in cases of nondisclosure, and relaxation of proof standards “is necessary to implement the deterrent purpose of the private action”).

Notwithstanding the reasoning in Morris, the solution of imposing on the defendant a rebuttable presumption does not fit in the context of the CPA. Unlike the statutes discussed in Morris, and relied upon in the

⁹ The Court in Morris looked to federal law interpreting the reliance requirement for a private cause of action under the Securities and Exchange Commission rule 10b-5, 17 C.F.R. §240.10b-5. Morris at 328-29; see Affiliated Ute Citizens v. United States, 406 U.S. 128, 31 L.Ed.2d 741, 92 S.Ct. 1456 (1972).

Washington comment, the CPA does not contain a reliance-type requirement as part of its causation element. Since Hangman Ridge this Court has maintained a clear, simple and workable causation standard, without requiring reliance in order to show cause-in-fact. See Hangman Ridge at 795; Fisons at 314; Schmidt at 167-68; see also WPI 310.07. It is designed to apply in a myriad of CPA contexts, extending far beyond misrepresentation or non-disclosure cases.

Rejection of a reliance requirement under the CPA does not weaken the causation requirement. Where evidence of reliance helps establish cause-in-fact, it will undoubtedly be offered. Where it is not germane to causation – as is generally true in cases involving nondisclosure of material information – it is simply irrelevant. A defendant may still overcome a prima facie case of cause-in-fact, most directly by disputing the plaintiff's evidence. Defendant's evidence may also include proof that the plaintiff's conduct amounted to a waiver of any claim of wrongdoing, such as under the "voluntary payment doctrine," apparently asserted here as a defense. See Integra Br. at 47-48; see generally Speckert v. Bunker Hill Arizona Mining Co., 6 Wn.2d 39, 52, 106 P.2d 602 (1940) (noting doctrine relieves defendant of liability where person pays an unlawful demand with full knowledge of its nature).

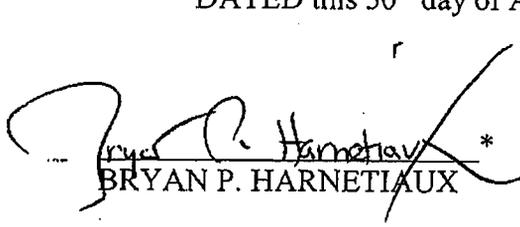
Whatever the evidence may be, the element of causation should not be expanded beyond the simple and workable cause-in-fact framework that this Court has articulated. Imposing a reliance requirement is

inconsistent with the CPA and its mandated liberal construction, and would undermine its remedial purpose.

VI. CONCLUSION

The Court should adopt the reasoning advanced in this brief and resolve the causation issue accordingly.

DATED this 30th day of April, 2007.


BRYAN P. HARNETIAUX *


DEBRA L. STEPHENS *

On Behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

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APPENDIX

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

RCW 19.86.090

Civil action for damages -- Treble damages authorized -- Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section "person" shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in the superior court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee.

[1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

RCW 19.86.920

Purpose -- Interpretation -- Liberal construction -- Saving -- 1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar

matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

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

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

WPI 310.01

ELEMENTS OF A VIOLATION

OF THE CONSUMER PROTECTION ACT

(Insert name of plaintiff) claims that (name of defendant) has violated the Washington Consumer Protection Act. To prove this claim, the plaintiff has the burden of proving each of the following propositions:

- (1) That (name of defendant) engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of (name of defendant's) trade or commerce;
- (3) That the act or practice affected the public interest;
- (4) That (name of plaintiff) was injured in either [its] [his] [her] business or [its] [his] [her] property, and
- (5) That (name of defendant's) act or practice caused [was a proximate cause of] (name of plaintiff's) injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction with WPI 21.01, Meaning of Burden of Proof—Preponderance of Evidence. Use this instruction with WPI 310.02, Reasonableness Defense to Consumer Protection Act Claim, if appropriate.

If the first two or the first three propositions may be proved by violation of a statute (for example, a Washington statute that makes a violation of that statute a *per se* violation of the Consumer Protection Act), use WPI 310.03, *Per Se* Violation of Consumer Protection Act.

For a definition of the first proposition, when a statutory violation is not alleged, use WPI 310.08, Definition—Unfair or Deceptive Act or

Practice. For an explanation of trade or commerce in the second proposition, use WPI 310.09, Definition—Trade or Commerce.

Use optional WPI 310.06, Injury in Consumer Protection Act Claim, if further explanation of "injured" in the fourth element is necessary or helpful.

If there is a proximate cause issue, as for example if there is an intervening cause, use the bracketed phrase in the fifth proposition in place of "caused," together with WPI 310.07, Causation in Consumer Protection Act Claim.

COMMENT

In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986), the court set forth the five elements of a Consumer Protection Act claim: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) public interest; (4) injury to business or property; and (5) causation.

The term "unfair or deceptive" is not otherwise defined in the Act. RCW 19.86.020. In many cases, however, the first element will be met by a statutory violation. See WPI 310.03, *Per Se* Violation of Consumer Protection Act. Regarding the requirements of a factual proof, see the Comment to WPI 310.08, Definition—Unfair or Deceptive Act. No intentional deception need be proved, only a capacity or tendency to deceive. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 50, 802 P.2d 1353 (1991); *Hangman Ridge*, 105 Wn.2d at 785, 719 P.2d 531.

In almost all cases it will be undisputed that the "trade or commerce" element is satisfied. See RCW 19.86.010; 19.86.020; *Hangman Ridge*, 105 Wn.2d at 785, 719 P.2d 531. In such cases the parties should stipulate that the element is met or the court should so rule, and the jury should be so instructed. If there is an issue regarding this element, give instruction WPI 310.09, Definition—Trade or Commerce.

The third element, "public interest," may be met in either of two ways: (1) violation of a statute that contains a legislative declaration of "public interest," see WPI 310.03, *Per Se* Violation of Consumer Protection Act, or (2) factual proof sufficient to satisfy the factors of a "private dispute" (e.g., attorney-client, insurer-insured, realtor-property purchaser) or a more typical "consumer" dispute, as appropriate. See WPI 310.04, Public Interest Element in Consumer Disputes, or WPI 310.05, Public Interest Element in Private Disputes. In the absence of a *per se* violation, "whether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed." *Hangman Ridge*, 105 Wn.2d at 789-90, 719 P.2d 531.

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The "business or property" injury in the fourth element may need the additional explanation of optional WPI 310.06, Injury in a Consumer Protection Act Claim.

The causation in the fifth element is proximate causation. *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993); see also *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001). In many cases causation will not be an issue and optional WPI 310.07, Causation in Consumer Protection Act Claim, need not be given. However, if the jury would benefit from an explanation of causation (for example, that causation is proximate), the optional instruction should be given.

These instructions are intended for "unfair or deceptive acts or practices" cases; they may not be suitable for "unfair methods of competition" cases. RCW 19.86.020. Compare *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), with *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987) (differing as to whether *Hangman Ridge* should be applied to unfair competition cases).

The Consumer Protection Act must be liberally construed to protect the public. RCW 19.86.920. However, the CPA is not intended to prohibit acts or practices that are "reasonable in relation to the development and preservation of business." RCW 19.86.920. See WPI 310.02, Reasonableness Defense to Consumer Protection Act Claim, and its Comment.

[Current as of April 2004.]

WPI 310.04

PUBLIC INTEREST ELEMENT
IN CONSUMER DISPUTES

In deciding whether (name of defendant's) acts or practices "affect the public interest," you may consider the following factors, among other things:

- (1) whether the acts or practices were done in the course of (name of defendant s) business;
- (2) whether the acts or practices were part of a pattern or general course of conduct of business;
- (3) whether (name of defendant) did similar acts or practices prior to the act or practice involving (name of plaintiff) ;
- (4) whether there is a real and substantial potential for repetition of (name of defendant's) conduct after the act involving (name of plaintiff) ; or
- (5) if only one transaction is complained of, whether many customers were affected or likely to be affected by it.

In reaching your decision you are not required to find any one particular factor, nor are you limited to considering only these factors.

NOTE ON USE

Use this instruction in cases alleging a violation of the Consumer Protection Act when there exists a *consumer transaction* dispute as opposed to a *private* dispute. For private disputes, use WPI 310.05, Public Interest Element in Private Disputes.

COMMENT

The distinction between "consumer transactions" and "private dispute" was created in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Although *Hangman Ridge* does not specifically define "consumer transaction," the term tends to involve sellers who are more sophisticated than the buyer due to

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their large volume of transactions. Examples of such cases given in *Hangman Ridge* were *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 649 P.2d 828 (1982) (plaintiff farmer purchased defective wheat); *Lidstrand v. Silvercrest Indus.*, 28 Wn.App. 359, 623 P.2d 710 (1981) (plaintiff purchased defective mobile home); *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn.App. 384, 589 P.2d 1265 (1979) (plaintiff purchased new automobile with defective paint job); *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn.App. 39, 554 P.2d 349 (1976) (plaintiff purchased defective used automobile).

"Private disputes," on the other hand, tend to be single transactions in which a unique relationship exists between the parties involved. Examples of cases given in *Hangman Ridge* were: *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976) (attorney-client); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978) (insurer-insured); *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984) (realtor-property purchaser); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (escrow agent-client). See *Hangman Ridge*, 105 Wn.2d at 789-91, 719 P.2d 531.

The factors in the instruction are taken from *Hangman Ridge*, 105 Wn.2d at 790-91, 719 P.2d 531:

Where the transaction was essentially a consumer transaction ... these factors are relevant to establish public interest: (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Regarding the role of these factors in the decision-making process, the court said "not one of these factors is dispositive, nor is it necessary that all be present. The factors ... represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." 105 Wn.2d at 791, 719 P.2d 531. With regard to a private dispute, the court introduced the list of factors with the phrase "Factors indicating a public interest in this context include ..." suggesting that the lists are not intended to be exclusive. 105 Wn.2d at 791, 719 P.2d 531.

[Current as of April 2004.]

WPI 310.05

PUBLIC INTEREST ELEMENT
IN PRIVATE DISPUTES

In deciding whether or not (name of defendant's) acts or practices affect the public interest, you may consider, among other things:

- (1) whether the acts or practices were done in the course of (name of defendant's) business;
- (2) whether (name of defendant) advertised to the public in general;
- (3) whether (name of defendant) actively solicited (name of plaintiff) , indicating potential solicitation of others;
- (4) whether (name of defendant) and (name of plaintiff) had unequal bargaining positions.

In reaching your decision you are not required to find any one particular factor, nor are you limited to considering only these factors.

NOTE ON USE

Use this instruction in cases alleging a violation of the Consumer Protection Act when there exists a *private* dispute rather than a *consumer transaction* dispute. For consumer transaction disputes, use WPI 310.04, Public Interest Element in Consumer Disputes.

COMMENT

See the Comment to WPI 310.04, Public Interest Element in Consumer Disputes for a discussion of the distinction between consumer disputes and private disputes made in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790-791, 719 P.2d 531 (1986).

According to the court in *Hangman Ridge*:

Where the transaction was essentially a private dispute ... it may be more difficult to show that the public has an interest in the subject matter. Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice

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affecting the public interest. . . . However, it 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. . . . Factors indicating a public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the "consumer" and "private dispute" contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

105 Wn.2d at 790-91, 719 P.2d 531.

[Current as of April 2004.]

WPI 310.07

**CAUSATION IN CONSUMER PROTECTION
ACT CLAIM**

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

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

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

NOTE ON USE

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

COMMENT

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

Whether individual reliance is required for causation under the CPA is a "debatable question without a clear answer under Washington law." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 197, 35 P.3d 351 (2001) (approving class action settlement as fair in part because this question posed a risk to the class claim), cert. denied in *Bebchick v. Holland America Line-Westours, Inc.*, 536 U.S. 941, 122 S.Ct. 2624, 153 L.Ed.2d 806 (2002).

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

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WPI 310.07

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

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

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

[Current as of April 2004.]

CHAPTER 15

PROXIMATE CAUSE

Analysis of Instructions

Instruction Number

- 15.01 Proximate Cause—Definition.
- 15.01.01 Proximate Cause—Definition—Alternative.
- 15.02 Proximate Cause—Substantial Factor Test.
- 15.03 [Reserved.]
- 15.04 Negligence of Defendant Concurring With Other Causes.
- 15.05 Negligence—Intervening Cause.

WPI 15.01

PROXIMATE CAUSE—DEFINITION

The term "proximate cause" means a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

NOTE ON USE

This instruction is the standard definition of proximate cause. For an alternative wording of this instruction, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

Use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01 when the substantial factor test of proximate causation applies.

Use bracketed material as applicable.

The last sentence in brackets should be given only when there is evidence of a concurring cause. In the event the last sentence is used, consideration should be given to WPI 15.04, Negligence of Defendant Concurring with Other Causes.

COMMENT

Elements of Proximate Cause. Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See *Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) and cases cited therein. Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. WPI 15.01 describes proximate cause in this factual sense. *Hartley v. State*, 103 Wn.2d at 778, 698 P.2d 77. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Schooley*, 134 Wn.2d at 478–79, 951 P.2d 749. This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” See *Hartley v. State*, 103 Wn.2d at 779, 698 P.2d 77; *Tyner v. DSHS*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (see *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), “[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established.” *Schooley*, 134 Wn.2d at 479–80, 951 P.2d 749.

There have been many attempts to define “proximate cause.” In Washington it has been defined both as a cause which is “natural and proximate,” *Lewis v. Scott*, 54 Wn.2d 851, 341 P.2d 438 (1959), and as a cause which in a “natural and continuous sequence” produces the event. *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950). Some jurisdictions, in an effort to simplify the concept of proximate cause for jurors, have substituted the term “legal cause.” See California's BAJI instructions (BAJI 3.75 and 3.76) and Restatement (Second) of Torts § 9 (1965). However, the “direct sequence” and “but for” definition adopted in this instruction is firmly entrenched in Washington law. See *Alger v. Mukilteo*, 107 Wn.2d 541, 730 P.2d 1333 (1987) (“direct sequence”); *Tyner v. DSHS*, 141 Wn.2d at 82, 1 P.3d 1148 (“but for”).

Substantial Factor Test. Section 431 of Restatement (Second) of Torts sets forth the substantial factor test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected this approach in favor of the "but for" definition contained in WPI 15.01 for general negligence actions. For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see WPI 15.02, Proximate Cause—Substantial Factor Test.

Multiple Proximate Causes. Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause. *Jonson v. Milwaukee Railroad Co.*, 24 Wn.App. 377, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985); *Brashear v. Puget Sound Power and Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983). Failure to give WPI 15.04, Negligence of Defendant Concurring With Other Causes, may be reversible error even though WPI 15.01 is given including the bracketed last paragraph. WPI 15.01 does not inform the jury that the act of another person does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's injuries. *Brashear v. Puget Sound Power and Light Co., Inc.*, supra (failure to give WPI 15.04 was reversible error); *Jones v. Bayley Construction*, 36 Wn.App. 357, 674 P.2d 679 (1984), overruled on other grounds, 102 Wn.2d 235, 684 P.2d 73 (1984) (failure to give WPI 15.04 was error, but harmless given the jury's special verdict findings).

Foreseeability. It is error to add to WPI 15.01 the words "even if such injury is unusual or unexpected." *Blodgett v. Olympic Savings and Loan Association*, 32 Wn.App. 116, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. *State v. Giedd*, 43 Wn.App. 787, 719 P.2d 946 (1986); *Blodgett v. Olympic Savings and Loan Association*, supra.

Special Instructions on Proximate Cause. In *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 107-08, 431 P.2d 969 (1967), and *Young v. Group Health Cooperative of Puget Sound*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975), the Washington Supreme Court held that, when proximate cause was a central issue in the case and experts called for both sides differed as to what actually caused the plaintiff's claimed injury, an instruction was warranted to inform the jury that the causal relationship must be established by evidence which rises above speculation, conjec-

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ture, or mere possibility. The *Young* court affirmed the trial court's giving of the following instruction:

You are instructed that the causal relationship of the alleged negligence of the defendants to the resulting condition of the child must be established by medical testimony beyond speculation and conjecture.

The evidence must be more than that the alleged act of the defendants "might have," "may have," "could have," or "possibly did" cause the physical condition.

It must rise to the degree of proof that the resulting condition probably would not have occurred but for the defendants' conduct, to establish a causal relationship.

See also *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 277-78, 796 P.2d 737 (1990), (affirming the trial court's giving of an instruction that stated: "The evidence must rise to the degree of proof that any injury plaintiffs claim . . . probably would not have occurred but for the defendants' conduct, to establish a causal relationship").

The Court of Appeals in *Ford v. Chaplin*, 61 Wn.App. 896, 899-901, 812 P.2d 532 (1991), while affirming the giving of an instruction worded similarly to that approved in *Young*, cautioned that:

[T]he rather argumentative phraseology of the challenged instruction reads much more like an outmoded advocacy instruction than the neutral format favored in current trial practice. The instruction does not appear to be necessary where proper instructions are given on the issues, standard of care and burden of proof. If such an instruction is given at all, it would be preferable to avoid this style.

[Current as of May 2002.]

Rec. 5-1-07

-----Original Message-----

From: Roberta Homoki [mailto:rhomoki@winstoncashatt.com] **On Behalf Of** WSTLA Foundation
Sent: Monday, April 30, 2007 4:54 PM
To: OFFICE RECEPTIONIST, CLERK; WSTLA Foundation
Cc: JDStahl@mundtmac.com; lreichman@perkinscoie.com; ShannonS@ATG.WA.GOV; sestest@kbmlawyers.com
Subject: RE: Indoor Billboard v. Integra Telecom (S.C. #79977-6) - application for amicus curiae status and acceptance of amicus curiae brief

Please see attached brief which should open in Adobe.

From: OFFICE RECEPTIONIST, CLERK [mailto:SUPREME@COURTS.WA.GOV]
Sent: Monday, April 30, 2007 4:52 PM
To: WSTLA Foundation
Subject: RE: Indoor Billboard v. Integra Telecom (S.C. #79977-6) - application for amicus curiae status and acceptance of amicus curiae brief

We are not able to open the second attachment please resend.

-----Original Message-----

From: WSTLA Foundation [mailto:wstla@winstoncashatt.com]
Sent: Monday, April 30, 2007 4:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: JDStahl@mundtmac.com; lreichman@perkinscoie.com; Smith, Shannon (ATG); sestest@kbmlawyers.com; Stephens, Debra
Subject: Indoor Billboard v. Integra Telecom (S.C. #79977-6) - application for amicus curiae status and acceptance of amicus curiae brief

Regarding Indoor Billboard v. Integra Telecom (S.C. #79977-6), please find the following from WSTLA Foundation:

1. letter request for amicus curiae status; and
2. proposed amicus curiae brief, with Appendix

These documents are being served by this email on counsel of record, and representatives of the Attorney General's Office and the Washington Defense Trial Lawyers, as previously arranged with counsel.

Confirmation of receipt is appreciated.

Should you have any difficulty in opening the attached files, please call Debra Stephens at 509-465-5702, or Bryan Harnetiaux at 509-230-3890.

Thank you.