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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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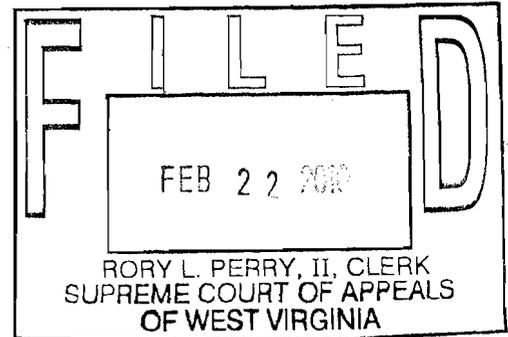
**WYETH, F/K/A AMERICAN HOMES PRODUCTS,  
D/B/A WYETH-AYERST LABORATORIES,  
KETCHUM, INC., and DANNEMILLER  
MEMORIAL EDUCATIONAL FOUNDATION,**

**Defendants/Petitioners,**

v.

**SHIRLEY WHITE, CATHY DENNISON, AND JENNY L. TYLER,  
ON BEHALF OF THEMSELVES AND A CLASS  
OF OTHERS SIMILARLY SITUATED,**

**Plaintiffs/Respondents.**



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Question Certified by  
The Circuit Court of Putnam County, West Virginia  
Hon.O.C. Spaulding, Chief Judge

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**BRIEF OF THE WEST VIRGINIA ATTORNEY GENERAL  
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS/RESPONDENTS**

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STATE OF WEST VIRGINIA ex rel.  
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## TABLE OF CONTENTS

Table of Authorities .....	iii
I. Introduction .....	1
II. Statement of Facts .....	5
III. Argument .....	5
A. West Virginia Code § 46A-6-106(a) must be interpreted according to its plain terms. ....	5
1. Words in a statute will be given their common, ordinary, and accepted meanings. ....	7
2. Under the plain meaning of W. Va. Code § 46A-6-106(a), a consumer may bring a private cause of action if he or she has suffered an ascertainable loss as a consequence of a business violating the WVCCPA. ....	8
3. West Virginia Code § 46A-6-106(a) requires a nexus between the defendants' conduct and the plaintiffs' loss; not a nexus between the defendants' conduct and the plaintiffs' purchase. ....	9
B. If this Court finds W. Va. Code § 46A-6-106(a) ambiguous, the statute must be interpreted using the rules of statutory construction. ....	12
1. An ambiguous statute must be construed consistently with the intent of the Legislature. ....	13
2. The legislative intent that a consumer can bring a private cause of action, whether or not he was deceived by the business's unlawful act, is apparent when W. Va. Code § 46A-6-106(a) is read in pari materia with the definition of an unfair or deceptive act or practice. ....	14
3. When it enacted the WVCCPA, the Legislature intended for it to complement the body of federal law governing UDAPS. ....	16
4. The Court has consistently construed the WVCCPA liberally and to benefit and protect consumers. ....	18

5. This Court must give the Attorney General’s interpretation of the statute that he enforces “great weight” unless clearly erroneous. ....20

IV. Conclusion .....22

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

FTC v. Figgie International, Inc.,  
994 F.2d 595 (9th Cir. 1993) ..... 17

FTC v. Freedom Communications, Inc.,  
401 F.3d 1192 (10th Cir. 2005) ..... 16

FTC v. Security Rare Coin & Bullion Corp.,  
931 F.2d 312 (1991) ..... 17

In Re Duncan,  
182 Bankr. R. 156 (W.D. Va. 1995) ..... 9

McGregor v. Cherico,  
206 F.3d 1378 (11th Cir. 2000) ..... 16

Mulford v. Altria Group, Inc.,  
242 F.R.D. 615 (D.N.M. 2007) ..... 11

Pelman v. McDonald's Corp.,  
396 F.3d 508 (2d Cir. 2005) ..... 10

The Kinetic Co. v. Medtronic,  
\_\_\_ F. Supp. 2d \_\_\_, 2009 WL 4547624 (D.Minn.) ..... 12

Thompson Medical Co v. FTC,  
791 F.2d 189 (D.C. Cir.1986) ..... 17

**STATE CASES**

Anderson v. State Workers Compensation Commissioner,  
327 S.E.2d 385 (W. Va. 1985) ..... 12

Artie's Automobile Body, Inc. v. The Hartford Fire Insurance Co.,  
947 A.2d 320 (Conn. 2008) ..... 11, 12

Banker v. Banker,  
474 S.E.2d 465 (W. Va. 1996) ..... 13

<u>Clendenin Lumber &amp; Supply Co., Inc. v. Carpenter,</u> 305 S.E.2d 332 (W. Va. 1983) .....	8, 18
<u>Davis v. Powertel,</u> 776 So. 2d 971 (Fla. 2001) .....	17
<u>Dix v. America Bankers Life Assurance Co. of Florida,</u> 415 N.W.2d 206 (Mich. 1987) .....	17
<u>Evans v. Hutchinson,</u> 214 S.E.2d 453 (W. Va. 1975) .....	20, 21
<u>Ewing v. Board of Education,</u> 503 S.E.2d 541 (W. Va. 1998) .....	12
<u>Farley v. Buckalew,</u> 414 S.E.2d 454 (W. Va. 1992) .....	12
<u>Fenton Art Glass Company v. W. Va. Office of the Insurance Commission,</u> 664 S.E.2d 761 (W. Va. 2008) .....	8
<u>Fowler v. Lewis, Administrator,</u> 14 S.E. 447 (W. Va. 1892) .....	18
<u>Fruehauf Corp. v. Huntington Moving &amp; Storage Co.,</u> 217 S.E.2d 907 (W. Va. 1975) .....	14
<u>HN Corp. v. Cypress Kanawha Corp.,</u> 465 S.E.2d 391 (W. Va. 1995) .....	12
<u>Hardy County Board of Education v. W. Va. Division of Labor,</u> 445 S.E.2d 192 (W. Va. 1994) .....	20
<u>Hinchliffe v. American Motors Corp.,</u> 440 A.2d 810 (Conn. 1981) .....	10
<u>Huntington Human Relations Commission ex rel. James v. Realco, Inc.,</u> 330 S.E.2d 682 (W. Va. 1985) .....	15
<u>Iannacchino v. Ford Motor Co.,</u> 888 N.E.2d 879 (Mass. 2008) .....	10
<u>International Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck &amp; Co.,</u> 929 A.2d 1076 (N.J. 2007) .....	10

<u>Manchin v. Dunfee,</u> 327 S.E.2d 710 (W. Va. 1984) .....	15
<u>Martin v. Smith,</u> 438 S.E.2d 318 (1993) .....	18
<u>McJunkin Corp. v. W. Va. Department of Tax &amp; Revenue,</u> 457 S.E.2d 123 (W. Va. 1995) .....	20
<u>Mitchell v. Cline,</u> 412 S.E.2d 733 (W. Va. 1991) .....	15
<u>Neighborhood's Builders, Inc. v. Town of Madison,</u> 2010 WL 308786 (Conn.) .....	12
<u>Odom v. Fairbanks Mem'l Hospital,</u> 999 P.2d 123 (Alaska 2000) .....	17
<u>Plubell v. Merck &amp; Co.,</u> 289 S.W.3d 707 (Mo. 2009) .....	12
<u>Plymale v. Adkins,</u> 429 S.E.2d 246 (W. Va. 1993) .....	18
<u>Rhodes v. Workers' Compensation Division,</u> 543 S.E.2d 289 (W.Va. 2001) .....	6
<u>Smith v. Board of Education,</u> 452 S.E.2d 412 (W. Va. 1994) .....	20
<u>Smith v. State Workmen's Compensation Commissioner,</u> 219 S.E.2d 361 (W. Va. 1975) .....	15
<u>Smoot v. Physicians Life Insurance Co.,</u> 87 P.3d 545 (N.M. App. 2003) .....	9, 10
<u>Soto v. Hope Natural Gas Co.,</u> 95 S.E.2d 769 (1956) .....	6
<u>Sowa v. Huffman,</u> 443 S.E.2d 262 (1994) .....	6
<u>State ex rel. McGraw v. Imperial Marketing,</u> 506 S.E.2d 799 (W. Va. 1998) .....	13, 14, 19

<u>State ex rel. McGraw v. Scott Runyon Pontiac-Buick,</u> 462 S.E.2d 516 (W. Va. 1996) .....	20
<u>State ex rel. McGraw v. Telecheck Services, Inc.,</u> 582 S.E.2d 885 (W. Va. 2003) .....	18, 19
<u>State ex rel. Miller v. Locke,</u> 253 S.E.2d 540 (W. Va. 1979) .....	15
<u>State ex rel. Simpkins v. Harvey,</u> 305 S.E.2d 268 (W. Va. 1983) .....	6
<u>State ex rel. Thompson v. Morton,</u> 84 S.E.2d 791 (W. Va. 1954) .....	21
<u>State Farm Mutual Automobile Insurance Co. v. Norman,</u> 446 S.E.2d 720 (W. Va. 1994) .....	18
<u>State v. C.H. Musselman Co.,</u> 59 S.E.2d 472 (W. Va. 1950) .....	5
<u>State v. Epperly,</u> 65 S.E.2d 488 (W. Va. 1951) .....	6
<u>State v. NCCS Loans, Inc.,</u> 624 S.E.2d 371 (N.C. 2005) .....	17
<u>Thomas v. Firestone Tire &amp; Rubber Co.,</u> 226 S.E.2d 905 (W. Va. 1980) .....	6
<u>Thomas v. Morris, Syl. pt. 4,</u> ____ S.E.2d ____, 2009 WL 4059067 (W. Va.) .....	6
<u>Tug Valley Recovery Ctr. v. Mingo County Commission,</u> 261 S.E.2d 165 (W. Va. 1979) .....	6
<u>W. Va. Department of Health v. Blankenship,</u> 431 S.E.2d 681 (W. Va. 1993) .....	20
<u>W. Va. Division Environmental Protection v. Kingwood Coal Co.,</u> 490 S.E.2d 823 (W. Va. 1997) .....	12
<u>W. Va. Human Rights Commission v. Garretson,</u> 468 S.E.2d 733 (W. Va. 1996) .....	13

<u>In re West Virginia Rezulin Litigation,</u> 585 S.E.2d 52 (W. Va. 2003) .....	12
<u>Whitney v. Ralph Myers Contracting Corp.,</u> 118 S.E.2d 622 (W. Va. 1961) .....	9
<u>Williams v. W. Va. Department of Motor Vehicles,</u> 419 S.E.2d 474 (W. Va. 1992) .....	8
<u>Zirkle v. Elkins Road Public Serv. District,</u> 655 S.E.2d 155 (W. Va. 2007) .....	8

**FEDERAL STATUTES**

Class Action Fairness Act of 2005, PL 109-2(S5), § 2(a)(1) .....	3
--	---

**STATE STATUTES**

Private Right of Action for Consumer Frauds Act, Iowa Code 714h .....	2, 3
W. Va. Code § 46A-2-102 .....	20
W. Va. Code § 46A-2-122 .....	7, 8, 9
W. Va. Code § 46A-6-101(1) .....	13, 16, 18
W. Va. Code § 46A-6-102(7) .....	15, 22
W. Va. Code § 46A-6-104 .....	19
W. Va. Code § 46A-6-106(a) .....	<i>passim</i>
W. Va. Code § 46A-7-102(b) .....	21
W. Va. Code § 46A-7-108 .....	19, 21
W. Va. Code § 46A-7-110 .....	19
W. Va. Code § 46A-7-111 .....	13, 14, 19, 20

MISCELLANEOUS

17 M.J. § 34 (1994) ..... 6

BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1990) ..... 9

CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER  
PROTECTION IN THE STATES, A 50 STATE REPORT ON UNFAIR OR DECEPTIVE  
ACTS AND PRACTICES STATUES (FEB. 2009) ..... 1, 2, 3, 5

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 1.1 ..... 2

NORMAN B. SINGER, 2B SUTHERLAND STATUTES AND  
STATUTORY CONSTRUCTION § 51:3 (7<sup>th</sup> ed. 2009) ..... 15

WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 2004) ..... 9

## I. INTRODUCTION

Unfair and Deceptive Acts and Practices, or UDAP statutes, provide the basic protections for the millions of transactions that consumers in the United States enter into each year. Although UDAP statutes vary widely from state to state, their basic premise is that unfair or deceptive tactics in the marketplace are unlawful.

“Before the adoption of state UDAP statutes in the 1970s and 1980s, neither consumers nor state agencies had effective tools against fraud and abuse in the consumer marketplace.” CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES, A 50 STATE REPORT ON UNFAIR OR DECEPTIVE ACTS AND PRACTICES STATUTES (FEB. 2009), p. 5. In most states, there was no state agency with a mandate to root out consumer fraud and abuse, much less tools to pursue fraud artists.” Id.

Consumers had even fewer tools at their disposal. A consumer who was defrauded often found the fine print in the contract immunized the seller or creditor. A consumer’s only recourse was to file a lawsuit alleging common law fraud, which required him to prove that the misrepresentation or omission was material and that he justifiably relied upon it. These requirements are significant impediments to fraud claims, particularly in class actions. Id. Even in cases where a consumer actually filed a private cause of action and won, very few states had statutes that allowed the consumer to recover attorney fees. As a result, even if a consumer won his case, he was rarely made whole.

“UDAP statutes were passed in recognition of these deficiencies.” Id. at 6. Today, all fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one

statute aimed at preventing consumer deception and abuse in the marketplace. NATIONAL CONSUMER LAW CENTER, *Unfair and Deceptive Acts and Practices* § 1.1 (2001 5th ed. & Supp. 2003). Many of these statutes, including West Virginia's, are patterned after the language found in Section 5(a)(1) of the Federal Trade Commission (FTC) Act which prohibits "unfair or deceptive acts or practices."

UDAP statutes are particularly important because, while the FTC Act is often viewed as sharply limiting the doctrine of *caveat emptor*, it limits enforcement to actions brought by the Commission and does not provide for state enforcement actions or lawsuits brought by consumers. In contrast, UDAP statutes "all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all but one also provide remedies that consumers who have been cheated can invoke." CONSUMER PROTECTION IN THE STATES at p. 6.<sup>1</sup>

A key element in a strong and effective UDAP statute is the consumer's right to bring a lawsuit on his own behalf. Why is this right so essential to effective enforcement of UDAP statutes -- because limited state consumer protection enforcement budgets are not able to police the marketplace fully. "Fundamentally, there are so many businesses, transactions and practices, and the day-to-day economic activity of the country is so immense, that public enforcement cannot do the job no matter how well-funded. The market can never be policed adequately from above. Consumers must be able to protect themselves -- and that ability is crucial for a well-functioning marketplace." *Id.* at 18. Enforcement of a regulatory statute through individual actions serves a deterrent effect, curbing impermissible conduct by unscrupulous businesses.

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<sup>1</sup>In July, 2009, the Iowa Legislature passed the Private Right of Action for Consumer Frauds Act, Iowa Code 714h, becoming the last state to give consumers a private cause of action.

Even more essential for a consumer protection statute to be effective is the consumer's right to bring a class action. Class actions are an efficient way for consumers to obtain redress when an unfair or deceptive practice affects many people and the dollar amount lost per person is small. Id. at p. 19. Indeed, the importance of class action lawsuits was recognized by the United States Congress in 2005 when it passed the Class Action Fairness Act (CAFA). In section 2(a)(1) of the CAFA, the United States Congress specifically found the following:

Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that allegedly caused harm.

Class Action Fairness Act of 2005, PL 109-2(S5), § 2(a)(1).

The right of consumers to file private causes of action is vital in West Virginia. The Attorney General's mandate is to enforce the WVCCPA and is not, as many consumers believe, to represent them individually. Although it is true that the Consumer Protection Division often seeks restitution when it files a lawsuit against a business for violating the WVCCPA, its ability to effectively stamp out illegal conduct is severely limited because of its scarce resources. The Consumer Protection Division is staffed with only six attorneys. These six attorneys must sift through over 10,000 written complaints the Division receives each year and decide which ones merit further scrutiny by a lawyer. In other words, the Division has to pick and choose its battles. Hence, the consumer's right to bring a private cause of action under the Act is an integral component of its enforcement.

When it enacted the WVCCPA, the Legislature recognized how important it was for consumers to have a private cause of action, so they explicitly provided for this right in W. Va. Code

§ 46A-6-106(a). This provision provides in its entirety:

Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action in the circuit court of the county in which the seller or lessor resides or has his principal place of business or is doing business, or as provided for in sections one and two, article one, chapter fifty-six of this Code, to recover actual damages or two hundred dollars, whichever is greater. The court may, in its discretion, provide such equitable relief as it deems necessary or proper.

W. Va. Code § 46A-6-106(a) (emphasis added).

In 2004, in the Circuit Court of Putnam County, three named plaintiffs filed a class action lawsuit pursuant to W. Va. Code § 46A-6-106(a) alleging that the defendants had violated the WVCCPA in the marketing and sale of Wyeth's hormone replacement prescription drugs. The defendants filed a motion to dismiss, and in the alternative, a motion for summary judgment on the grounds that the plaintiff class had not alleged that each one of them, or their doctor, had personally relied upon a deceptive representation made by Wyeth when they purchased Wyeth's hormone replacement therapy drugs. In essence, Wyeth urged the trial court to ignore the plain language of W. Va. Code § 46A-6-106(a) and read into it a reliance requirement. In contrast, the plaintiffs argued that all a consumer would have to allege and prove is a causal relationship between the defendant's unlawful conduct and a plaintiff's ascertainable loss in order to bring a private cause of action under the statute.

The Circuit Court of Putnam County denied Wyeth's motions and held that W. Va. Code § 46A-6-106(a) does not require the consumer to allege and prove reliance. Because the issue was a question of first impression, the circuit court decided to certify the following question to this Court:

Does the “as a result of” language in Section 46A-6-106(a) of the West Virginia Consumer Credit and Protection Act require a plaintiff, in a private cause of action under the Act, to allege and prove that he or she purchased a product because of and in reliance upon an unlawful deceptive act?

The answer to this certified question can easily be resolved by applying the age old rules of statutory construction – – all of which lead to one inevitable conclusion – – reliance is not a requirement of W. Va. Code § 46A-6-106(a). The Legislature made its intention crystal clear with the words they chose in providing this right. To find otherwise, and hold that reliance is a requirement before a consumer can assert a private cause of action under the WVCCPA would impair “the consumers’ ability to stop practices before they cause widespread consumer harm.”<sup>2</sup> It also leads businesses to try to evade consequences for their deceptive practices by inserting clauses in the fine print of their contracts stating that the consumer did not rely on what the salesperson said.” CONSUMER PROTECTION IN THE STATES at p. 20.

## II. STATEMENT OF FACTS

The Attorney General’s office adopts and incorporates the factual statement in plaintiff White’s brief.

## III. ARGUMENT

### A. **West Virginia Code § 46A-6-106(a) must be interpreted according to its plain terms.**

Although the courts must ascertain what a law is and determine its application to particular facts in the decision of cases, *see, e.g., State v. C.H. Musselman Co.*, 59 S.E.2d 472 (W. Va. 1950),

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<sup>2</sup>Nineteen states allow consumers to file a private cause of action without proof of reliance. CONSUMER PROTECTION IN THE STATES at pp. 8-10.

courts may not usurp the Legislature's power by rewriting a statute. Sowa v. Huffman, 443 S.E.2d 262 (W. Va. 1994); Soto v. Hope Natural Gas Co., 95 S.E.2d 769 (W. Va. 1956); State v. Epperly, 65 S.E.2d 488 (W. Va. 1951). *See generally*, 17 M.J. § 34, 378 (1994).

[I]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded. State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 107 S.E.2d 353, 358 (1959).

Sowa, 443 S.E.2d at 268. *See* Thomas v. Morris, Syl. pt. 4, \_\_\_\_ S.E.2d \_\_\_\_, 2009 WL 4059067 (W. Va.) (unambiguous, clear statute given full force and effect by courts); Rhodes v. Workers' Compensation Div., 543 S.E.2d 289 (W. Va. 2001) (unambiguous statute not open to interpretation).

Most often, the words of the statute are sufficient to determine the purpose of the legislation. In such cases, courts merely enforce the statute under its plain terms and do not resort to the rules of statutory construction.

Only where a statute is ambiguous or where its plain meaning would lead to an absurd or futile result, clearly at odds with the purpose of the enactment, should courts undertake an inquiry into intent beyond the mere text. State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (W. Va. 1983). "In the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary, and accepted meanings." Syl. pt. 1, Thomas v. Firestone Tire & Rubber Co., 226 S.E.2d 905 (W. Va. 1980), *quoting* Syl. pt. 1, Tug Valley Recovery Ctr. v. Mingo County Comm'n, 261 S.E.2d 165 (W. Va. 1979).

1. **Words in a statute will be given their common, ordinary, and accepted meanings.**

In Thomas v. Firestone, this Court was asked to consider whether a debt collector as defined by W. Va. Code § 46A-2-122 included a creditor attempting to collect his own debts. The respondent in Firestone argued that the statute only regulated the practice of professional debt collectors.

The Court began its analysis by looking to the words used in the definition of “debt collector,” which provides that the term means “any person or organization engaging directly or indirectly in debt collection.” W. Va. Code § 46A-2-122(d) (emphasis added).<sup>3</sup> This Court held that the statute applied to both the original creditor and professional debt collectors. In reaching this conclusion, the Court first determined the plain meaning of the word “any” in the context of the statute. After looking up the definition of “any” in THE OXFORD ENGLISH DICTIONARY, among others, this Court was “led to the unavoidable conclusion that the word ‘any,’ when used in a statute, should be construed to mean, in a word, any.” Id. at 909. This Court went on to explain:

The 1974 enactment of Chapter 46A of the West Virginia Code represents recognition by the legislature of abuses in consumer credit transaction practices. In the face of the use of the word “any,” it would be improper for this Court to limit the application of the statute to the activities of professional collection agencies. That would be a usurpation of the legislative function. The statute was designed to protect consumers against unscrupulous collection practices, by whomever perpetrated. In light of the broad remedial purposes of this legislative act, all who engage in debt collection are alike subject to

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<sup>3</sup>West Virginia Code § 46A-2-122(d) provides in its entirety:

“Debt collector” means any person or organization engaging directly or indirectly in debt collection. The term includes any person or organization who sells or offers to sell forms which are, or are represented to be, a collection system, device or scheme, and are intended or calculated to be used to collect claims.

its prohibitions. It would be incongruous to suggest that a creditor could evade the requirements of the statute by collecting his own debt in unconscionable fashion while another would be held to account if it enlisted the service of a professional collector to pursue the same course of action. Such a strained interpretation would conflict with common sense.

Id. at 909. *See also*, Fenton Art Glass Company v. W. Va. Office of the Ins. Comm'n, 664 S.E.2d 761 (W. Va. 2008); Zirkle v. Elkins Road Pub. Serv. Dist., 655 S.E.2d 155 (W. Va. 2007); Williams v. W. Va. Dep't. of Motor Vehicles, 419 S.E.2d 474 (W. Va. 1992).

2. **Under the plain meaning of W. Va. Code § 46A-6-106(a), a consumer may bring a private cause of action if he or she has suffered an ascertainable loss as a consequence of a business violating the WVCCPA.**

The same rule of statutory construction applies to W. Va. Code § 46A-6-106(a) because it is part of the WVCCPA. Clendenin Lumber & Supply Co., Inc. v. Carpenter, 305 S.E.2d 332, 337 (W. Va. 1983).

West Virginia Code § 46A-6-106(a) provides, in pertinent part:

Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provision of this article, may bring an action in the circuit court of the county in which the seller or lessor resides or has his principal place of business or is doing business . . . .

(Emphasis added.) Although the words “reliance” or “rely” are not used or implied in the statute, defendants ask this Court to interpret the statute to mean that a consumer bringing a private cause of action under the WVCCPA must prove that he or she purchased the product because they relied upon the business’s unlawful conduct. The plain meaning of the statute resists this interpretation.

As this Court did in Firestone, we looked first to the dictionary for the plain meaning of the

words “result” and “reliance.” The definition of “result” is “something that follows as a consequence of another action, condition or event.” WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 1594 (2d ed. 2004). See Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 624 (W.Va. 1961) (“Caused by” or “result of” means a cause in a natural sequence of events producing the result complained of.). Compare In Re Duncan, 182 Bankr. R. 156 (W.D. Va. 1995) (Court noted that the WEBSTER’S DICTIONARY definition of “following” included “to be a result of.”).

“Reliance” is defined to mean “somebody or something needed or depended on.” WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 1580 (2d ed. 2004). Even more instructive is the definition of reliance in BLACK’S LAW DICTIONARY. Specifically, it provides “[f]or fraud purposes ‘reliance’ might be defined as a belief which motivated the act.” BLACK’S LAW DICTIONARY 1291 (6<sup>th</sup> ed. 1990).

Considering the plain meaning of these terms, they clearly are not interchangeable. The statute explicitly states that consumers may bring a private cause of action if they have suffered an ascertainable loss as a result of, or as a consequence of, or following the business’s use of unfair or deceptive acts or practices. Had the Legislature intended to require consumers to prove they had relied upon a misrepresentation and suffered a loss as a result of their reliance thereon, it would have said so.

3. **West Virginia Code § 46A-6-106(a) requires a nexus between the defendants’ conduct and the plaintiffs’ loss; not a nexus between the defendants’ conduct and the plaintiffs’ purchase.**

This Court will not be the first one to analyze the phrase “as a result of.” In Smoot v. Physicians Life Ins. Co., 87 P.3d 545 (N.M. App. 2003), a policyholder brought a class action against her insurance company for failing to disclose fully the additional cost of her paying insurance

premiums monthly rather than annually. At issue on appeal, ~~was whether the New Mexico Unfair~~ Insurance Practices Act (UIPA) required the plaintiff to allege and prove detrimental reliance. As does West Virginia Code 46A-6-106(a), the statute being analyzed contained language that allowed recovery of actual damages to a person who “has suffered damages as a result of a violation” of the Act. Id. at 550 (emphasis added). The insurance company contended “that the statutory requirement for a causal connection between the deceptive practice and the claimant’s damages equates to a requirement that the claimant prove detrimental reliance.” Id.

In soundly rejecting this argument, the court explained:

[C]ausation and reliance are distinct concepts. “Causation requires a nexus between a defendant’s conduct and plaintiff’s loss; reliance concerns the nexus between a defendant’s conduct and a plaintiff’s purchase or sale.” Seth William 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, 11 (2002).

Id. “While it is true that . . . the UIPA require[s] proof of a causal link between conduct and loss . . . we find nothing in the language of [the UIPA] requiring proof of a link between conduct and purchase or sale.” Id. (internal citations omitted). See Pelman v. McDonald’s Corp., 396 F.3d 508 (2d Cir. 2005) (Consumer bringing private action under New York Consumer Protection Act deceptive trade practices provisions is not required to prove reliance.); Hinchliffe v. American Motors Corp., 440 A.2d 810 (Conn. 1981) (Plaintiff need not prove reliance when all statute requires is that he suffer an ascertainable loss “as a result of” a violation of the Act.); Iannacchino v. Ford Motor Co., 888 N.E.2d 879 (Mass. 2008) (Plaintiffs need not show proof of actual reliance on misrepresentation to recover damages.); Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co., 929 A.2d 1076 (N.J. 2007) (Consumer Fraud Act requires proof of ascertainable

loss, not reliance.); Mulford v. Altria Group, Inc., 242 F.R.D. 615 (D.N.M. 2007) (Detrimental reliance is not required to state a valid UDAP claim; causation and reliance are two distinct concepts.).

Likewise, the Supreme Court of Connecticut, considered the meaning of this language under the Connecticut Unfair Trade Practices Act (CUTPA) in Artie's Auto Body, Inc. v. The Hartford Fire Ins. Co., 947 A.2d 320 (Conn. 2008). In Artie's, the defendant, The Hartford Insurance Co. (The Hartford) appealed a ruling from the trial court granting the motion of the plaintiffs, three Connecticut auto body repair shops and a trade association of Connecticut auto body repair shops, for class certification. The plaintiffs were seeking money damages and injunctive relief and were alleging that The Hartford engaged in a pattern of unfair and deceptive acts and practices in violation of CUTPA. Specifically, the plaintiffs alleged that The Hartford engaged in conduct that constituted a violation of CUTPA and that "as a result" it was unjustly enriched.

In analyzing the statute, the court first noted that to "be entitled to relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation" and that "an ascertainable loss" is a loss that is "capable of being discovered, observed or established . . . ." Id. at 330. The court then found that "[w]hen plaintiffs seek money damages, the language 'as a result of' in § 42-110g(a) requires the showing that the prohibited act was the proximate cause of a harm to the plaintiff." Id. (emphasis added). When ascertaining if proximate cause exists, the court noted that it must first determine "whether the harm which occurred was the same general nature as the foreseeable risk created by the defendant's act." Id.

When plaintiffs seek only equitable relief, ascertainable loss and causation may be proven "by establishing, through a reasonable inference, or otherwise" that the defendant's unfair trade practice has caused the plaintiff's [injury] . . . ."

Id. (emphasis added). *See also*, The Kinetic Co. v. Medtronic, \_\_\_ F. Supp. 2d \_\_\_, 2009 WL 4547624 (D.Minn.) (Proof of reliance is unnecessary for claim under Minnesota consumer protection statutes.); Neighborhood's Builders, Inc. v. Town of Madison, 2010 WL 308786 (Conn.) (Plaintiff must show ascertainable loss due to defendant's violation of Connecticut Unfair Trade Practices Act.); Plubell v. Merck & Co., 289 S.W.3d 707 (Mo. 2009) (Missouri Merchandising Practices Act eliminates need to prove reliance.).

In the case at bar, the plaintiffs were merely following the advice of their trusted physician. Like most of us, they did not question that advice. Even though the plaintiffs were not aware that the drug they had been prescribed had been widely criticized within the medical community, they nonetheless received an inferior product, indeed a dangerous one, and as a result suffered an ascertainable loss. In re West Virginia Rezulin Litig., 585 S.E.2d 52 (W. Va. 2003) (If a consumer proves he has purchased an item different from what he bargained for, the ascertainable loss requirement of W. Va. Code § 46A-6-106(a) is satisfied.).

**B. If this Court finds W. Va. Code § 46A-6-106(a) ambiguous, the statute must be interpreted using the rules of statutory construction.**

If this Court finds W. Va. Code § 46A-6-106(a) to be ambiguous, the rules of statutory construction require that it look to the intent of the Legislature. *See*, Ewing v. Bd. of Educ., 503 S.E.2d 541 (W. Va. 1998); W. Va. Div. Env'tl. Protection v. Kingwood Coal Co., 490 S.E.2d 823 (W. Va. 1997); Anderson v. State Workers Compensation Comm'r, 327 S.E.2d 385 (W. Va. 1985). A statute is ambiguous if it is "susceptib[le to] . . . two or more meanings and uncertainty [exists] as to which was intended." HN Corp. v. Cypress Kanawha Corp., 465 S.E.2d 391, 396 (W. Va. 1995). Moreover, "a statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, Farley v. Buckalew, 414 S.E.2d 454 (W. Va. 1992). In

construing a statute, the court is presented with a purely legal question. Banker v. Banker, 474 S.E.2d 465, 473 (W. Va. 1996) *quoting* Syl. pt. 1, W. Va. Human Rights Comm'n v. Garretson, 468 S.E.2d 733 (W. Va. 1996).

In any event, a statute is a positive action of the Legislature, and it must have some meaning. The courts may not simply ignore a statute on account of imperfect draftsmanship.

**1. An ambiguous statute must be construed consistently with the intent of the Legislature.**

The legislative purposes of the WVCCPA are stated in W. Va. Code § 46A-6-101(1), which provides, in its entirety:

The legislature hereby declares that the purpose of this article is to complement the body of federal law governing 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 article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. *To this end, this article shall be liberally construed so that its beneficial purposes may be served.*

W. Va. Code § 46A-6-101(1) (emphasis added). The Legislature's intent to protect consumers from fraud and abuse is well-documented by the legislative history of the WVCCPA. Specifically, the WVCCPA has been amended on numerous occasions and with each amendment the Legislature provided consumers with additional protections.

For example, in 1998, the Circuit Court of Kanawha County ordered a defendant to pay a \$500,000 civil penalty. On appeal, the defendant argued that the maximum civil penalty that could be imposed under W. Va. Code § 46A-7-111 was \$5,000.00. This Court set aside the civil penalty, holding that the absence of any reasoning to support the amount of the civil penalty rendered it arbitrary. State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799, 810 (W. Va. 1998).

Although this Court agreed with the Attorney General's contention that a maximum civil penalty of \$5,000 served very little deterrent purpose and the Legislature's intent was that there be a \$5,000 civil penalty for each violation; the maximum amount of civil penalty was "more appropriately a matter to be addressed by the Legislature." Id. at 811.

Justice Starcher, in his concurrence, suggested that the Legislature clarify this issue by inserting the words "for each violation of this chapter" into the statute. Id. at 815. In 1999, the Legislature amended W. Va. Code § 46A-7-111 in accordance with Justice Starcher's suggestion.

Between 1984 and 2007, the Legislature amended the WVCCPA by adding twelve (12) new articles, Articles 6A through 6L, and with each amendment expanded consumers' rights.<sup>4</sup> Historically, this Court has recognized the remedial nature of the WVCCPA. Today, the Attorney General urges the Court to liberally construe W. Va. Code § 46A-6-106(a) to benefit and protect West Virginians who file a cause of action alleging violations of the WVCCPA.

2. **The legislative intent that a consumer can bring a private cause of action, whether or not he was deceived by a business's unlawful act, is apparent when W. Va. Code § 46A-6-106(a) is read *in pari materia* with the definition of an unfair or deceptive act or practice.**

In syllabus point 5 of Fruehauf Corp. v. Huntington Moving & Storage Co., 217 S.E.2d 907 (W.Va. 1975), this Court held:

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<sup>4</sup>The Legislature has enacted the following additional articles, each covering a separate area: Article 6A - Consumer Protection - New Motor Vehicle Warranties (1984); Article 6B - Consumer Protection - Automotive Crash Parts (1988); Article 6C - Credit Services Organizations (1991); Article 6D - Prizes and Gifts (1992); Article 6E - Consumer Protection - Assistive Devices (1998); Article 6F - Telemarketing (1998); Article 6G - Electronic Mail Protection Act (1999); Article 6H - Transfers of Rights to Receive Future Payments (1999); Article 6I - Consumer Protections in Electronic Transactions (2001); Article 6J - Protection of Consumers from Price Gouging and Unfair Pricing During and Shortly After a State Of Emergency (2002); Article 6K - Good Funds Settlement Act (2004); and Article 6L - Theft of Consumer Identity Protection (2007).

Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

*See e.g.*, Mitchell v. Cline, 412 S.E.2d 733 (W. Va. 1991); Huntington Human Relations Comm'n ex rel. James v. Realco, Inc., 330 S.E.2d 682 (W. Va. 1985); Manchin v. Dunfee, 327 S.E.2d 710 (W. Va. 1984); State ex rel. Miller v. Locke, 253 S.E.2d 540 (W. Va. 1979); Smith v. State Workmen's Compensation Comm'r, 219 S.E.2d 361 (W. Va. 1975). "The rule that statutes *in pari materia* should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the Legislature, especially if they were passed or approved or take effect on the same day . . . ." NORMAN B. SINGER, 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:3 (7<sup>th</sup> ed. 2009).

Unfair and deceptive acts or practices are specifically defined in the WVCCPA at W. Va. Code § 46A-6-102(7). This section provides, at subsection (M) that:

"Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:

\* \* \*

The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby[.]

W. Va. Code § 46A-6-102(7)(M) (emphasis added).

West Virginia Code § § 46A-6-106(a) and 46A-6-102(7)(M) relate to the same subject matter, consumer protection, and were both part of the WVCCPA when it was originally enacted. Accordingly, this Court should read them *in pari materia*. When reading W. Va. Code § 46A-6-106(a) *in pari materia* with the definition of an unfair or deceptive act or practice, there is no doubt that the Legislature intended for consumers to have a right to bring a private cause of action under the WVCCPA, whether or not they had, in fact, been misled or deceived.

**3. When it enacted the WVCCPA, the Legislature intended for it to complement the body of federal law governing UDAPS.**

The WVCCPA is part of a body of consumer protection law that began with passage of the FTC Act in the early part of the 20<sup>th</sup> Century and continued with passage of state consumer protection laws in the 1970's and 1980's. The Legislature explicitly recognized that its consumer protection statute was part of this body of law when it passed the Act in 1974:

*The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition.*

W. Va. Code § 46A-6-101(1) (emphasis added).

The Federal Trade Commission, in interpreting section 5(a)(1) of the FTC Act has held that reliance will be presumed as long as it is shown that the defendant's material misrepresentations were widely disseminated and that consumers purchased the defendant's product. FTC v. Freedom Communications, Inc., 401 F.3d 1192 (10<sup>th</sup> Cir. 2005) (The FTC is not required to show that any particular purchaser relied or was injured by the unlawful misrepresentations.); McGregor v. Cherico, 206 F.3d 1378 (11<sup>th</sup> Cir. 2000) (Fraudulent statements by telemarketers gave rise to presumption of reliance by consumers who purchased their product, thus the FTC was not required

to prove subjective reliance by each customer.); FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9<sup>th</sup> Cir. 1993) (Injury to consumers from misrepresentations by seller was established even absent proof of reliance by individual consumers.); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 312 (1991) (Actual reliance does not need to be proved in order to be entitled to a refund.); Thompson Med. Co v. FTC, 791 F.2d 189 (D.C. Cir.1986) (Advertising representations will be condemned if they are likely to deceive; actual deception need not be shown.).

Several state courts have recognized that their UDAP statutes were enacted to complement the body of federal law governing unfair, deceptive and fraudulent acts. Therefore, these courts have also held that their UDAP statutes do not require proof of actual reliance. Many of these courts point out that proof of causation is always necessary, but that reliance is not always an essential part of that proof. Odom v. Fairbanks Mem'l Hosp., 999 P.2d 123 (Alaska 2000) (Actual injury as a result of the deception is not required, rather all that is required is a showing that the acts and practices were capable of being interpreted in a misleading way.); Davis v. Powertel, 776 So. 2d 971 (Fla. 2001) (The standard under the Deceptive and Unfair Trade Practices Act does not require subjective evidence of reliance, as would be the case with a common law action for fraud.); Dix v. Am. Bankers Life Assurance Co. of Florida, 415 N.W.2d 206 (Mich. 1987) (Members of a class proceeding under the consumer protection act do not need to prove individual reliance on the misrepresentations.); State v. NCCS Loans, Inc., 624 S.E.2d 371 (N.C. 2005) (In order to establish a prima facie claim for unfair trade practices, a plaintiff must show that the act proximately caused the injury.).

The Attorney General urges this Court to “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.” W. Va. Code § 46A-6-101(1). Specifically, this Court should find that when private causes of action are filed

pursuant to W. Va. Code § 46A-6-106(a) reliance will be presumed as long as it is shown that the defendant's misrepresentations were widely disseminated and that consumers purchased the product.

**4. The Court has consistently construed the WVCCPA liberally and to benefit and protect consumers.**

This Court has consistently held that “the purpose of the [WV]CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers *who would otherwise have difficulty proving their case under a more traditional cause of action.*”

State ex rel. McGraw v. Telecheck Services, Inc., 582 S.E.2d 885, 895 (W. Va. 2003), *quoting State ex rel. McGraw v. Scott Runyon Pontiac-Buick*, 461 S.E.2d 516, 523 (W. Va. 1995) (emphasis added). *See also*, Clendenin Lumber & Supply Co. v. Carpenter, 305 S.E.2d 332, 337 (W. Va. 1983), *quoting Harless v. First Nat'l Bank of Fairmont*, 246 S.E.2d 270 (W. Va. 1978). Moreover, W. Va. Code § 46A-6-106(a) must be liberally construed to effect its purpose because it is a remedial statute. State Farm Mutual Auto Ins. Co. v. Norman, 446 S.E.2d 720 (W. Va. 1994); Martin v. Smith, 438 S.E.2d 318 (1993); Plymale v. Adkins, 429 S.E.2d 246 (W. Va. 1993); Fowler v. Lewis, Adm'r, 14 S.E. 447 (W. Va. 1892).

In Telecheck, the defendants argued that the State had alleged and failed to prove a “pattern or practice” of violations of the WVCCPA, and thus, could not obtain a temporary injunction. While the Circuit Court of Kanawha County was misled by the defendants' narrow and fictitious version of the standard for obtaining temporary injunctive relief under the WVCCPA, this Court was not.

Although the phrase “pattern or practice” permeates the circuit court's order, that phrase does *not* appear in the WVCCPA, nor does our research show that it is commonly used in the area of consumer protection or trade regulation law.

Telecheck, 582 S.E.2d at 895 (emphasis in original). This Court easily discerned that

[I]nsofar as we can determine from the voluminous record, the Attorney General did not use the phrase “pattern or practice” in his pleadings or arguments, and Telecheck has not cited us to any such instance. To the contrary, the record shows that it was Telecheck that asserted - as essentially the core of its defense to the Attorney General’s request for preliminary injunctive relief - the argument that the Attorney General had to prove a “pattern or practice.” *In ruling on the Attorney General’s request for a preliminary injunction, then, the circuit court used a standard that was introduced and advocated for by Telecheck.*

Id. at 896 (emphasis added.).

Based upon the legislative purpose of the WVCCPA and the remedial nature of the statute, this Court clarified that the standard for obtaining a temporary injunction under W. Va. Code § 46A-7-110 does not require a showing of a pattern or practice of violations. Id. at 897. Rather, proving a violation of W. Va. Code § 46A-6-104 may be done by proving a single illegal act, without necessarily proving an illegal practice. Id. at 896, n. 18. *See State ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799 (W. Va. 1996) (Standard for relief under W. Va. Code § 46A-7-110 substantially lower than ordinary standard of proof for preliminary injunction).

Similarly, in *State ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799 (W. Va. 1998), this Court broadly interpreted the remedies available to the Attorney General. In that case, the defendant argued that the Attorney General had no authority to obtain restitution for consumers because such relief did not constitute excess charges under W. Va. Code § 46A-7-111. This Court rejected that argument, holding that the Legislature’s use of the phrase “other appropriate relief” in W. Va. Code § 46A-7-108 indicated that the Legislature meant the full array of equitable relief to be available in suits brought by the Attorney General. Id. at 811-812. Thus, awarding a consumer restitution was not unfair, even if the consumer was not required to return the goods they purchased.

The same standard was used by this Court when it rejected the argument that only consumers can bring claims against an assignee of a consumer contract under W. Va. Code § 46A-2-102. State ex rel. McGraw v. Scott Runyon Pontiac-Buick, 462 S.E.2d 516 (W. Va. 1996). In Scott Runyon, this Court held that the Attorney General had authority to bring these claims on behalf of consumers because of his authority to seek refund of excess charges under W. Va. Code § 46A-7-111. The Court also interpreted the term “excess charges,” which is not defined in the WVCCPA, broadly to include the charges that were illegal, as well as those which exceeded lawful amounts.

Historically, this Court has construed the WVCCPA liberally and to benefit consumers. This Court should continue that tradition and hold that reliance is not a requirement before a consumer can assert a private cause of action under the WVCCPA.

**5. This Court must give the Attorney General’s interpretation of the statute that he enforces “great weight” unless clearly erroneous.**

In syllabus point 7 of Evans v. Hutchinson, 214 S.E.2d 453 (W. Va. 1975), this Court articulated yet another longstanding rule of statutory construction.

Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.

Thus, if this Court finds that W. Va. Code § 46A-6-106(a) is ambiguous, it should look to the interpretation given the statute by the Attorney General, the constitutional officer charged with enforcing it, and his interpretation should be given “great weight unless clearly erroneous.”

McJunkin Corp. v. W. Va. Dep’t of Tax & Revenue, 457 S.E.2d 123 (W. Va. 1995). *See generally*, W. Va. Dep’t of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993); Hardy County Bd. of Educ. v. W. Va. Div. of Labor, 445 S.E.2d 192 (W. Va. 1994); Smith v. Bd. of Educ., 452 S.E.2d 412

(W. Va. 1994).. Otherwise, “a staggering administrative burden would fall to the entire court system if administrative bodies operating as delegates of the Executive Department were forbidden to make interpretations of statutes which they are charged by law with administering.” Evans, 214 S.E.2d at 462. The Evans court also held an agency’s interpretation “ought not to be disregarded without cogent reason.” Id., quoting State ex rel. Daily Gazette Co. v. County Court, 70 S.E.2d 260 (W. Va. 1952) (emphasis added). Indeed, such interpretations “may even be determinative when questions are very close.” State ex rel. Thompson v. Morton, 84 S.E.2d 791, 800 (W. Va. 1954).

The Legislature authorized the Attorney General to bring legal actions in his own name to enforce the provisions of the WVCCPA. *See e.g.* W. Va. Code § 46A-7-108. Among other things, the Attorney General may seek relief regarding alleged “unfair methods of competition and unfair or deceptive acts or practice,” a term which is defined in W. Va. Code § 46A-6-102. The Attorney General, through his Consumer Protection Division, may also “counsel persons and groups of their rights and duties under this chapter,” W. Va. Code § 46A-7-102(b), including the rights of consumers to bring actions arising from alleged UDAPS, as provided for in W. Va. Code § 46A-6-106(a).

It is the position of the Attorney General that the statutory definitions in Article 2 of the WVCCPA apply to any action brought under the WVCCPA, including private causes of action brought by consumers. To find otherwise, would transform this remedial statutory right into a cause of action more akin to common law fraud – a result that is not consistent with the legislative intent and the spirit of the WVCCPA. It is the opinion of the Attorney General’s office that W. Va. Code § 46A-6-106(a) does not require that a consumer relied upon the unlawful conduct when making his purchase.

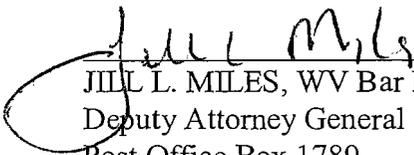
**IV  
CONCLUSION**

Consumers often lack two things: intimate knowledge of the products and services they are purchasing and the education to understand whether the language in the contract they are about to execute contains a legal loophole that does not actually protect them. The WVCCPA was not enacted to determine whether the parties got the benefits of a presumed arms' length bargain. Rather, state consumer protection statutes were enacted to outlaw unfair and deceptive conduct, even if the consumer was not actually deceived. The Attorney General respectfully and unequivocally joins in the plaintiffs' request that this Court answer the certified question with a resounding No!

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.  
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IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

WYETH and KETCHUM, INC.,

Defendants/Petitioners,

v.

SHIRLEY WHITE, CATHY DENNISON, and  
JENNY L. TYLER, on behalf of themselves  
and a class of others similarly situated,

Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

I, Jill L. Miles, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing **BRIEF OF THE WEST VIRGINIA ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/RESPONDENTS** was served upon all counsel of record by placing a copy thereof in the regular course of the United States mail, postage prepaid this 22<sup>nd</sup> day of February, 2010, addressed as follows:

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